ISSUE 161 WINTER 2017

VICTORIAN BAR NEWS

A fiery start to the Bar

Cliff Pannam

Spies like us

Stephen Charles

Remembering Ronald Ryan

Masterpiece

Bill Henson work unveiled

161

At the Glasshouse: The Bar dinner photographs

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ISSUE 161 WINTER 2017

VICTORIAN BAR NEWS

20

8

46

58

Editorial

Not the 24 hour news cycle 3
THE EDITORS

Letters to the editors 5
President's report 6
JENNIFER BATROUNEY QC

Around town

2017 Victorian Bar Dinner 8

Indigenous Justice Committee RAP event 14
SALLY BODMAN

George Hampel AM QC 16
ELIZABETH BRIMER

Henson portrait of the Hon Ken Hayne AC QC 20
SIOBHAN RYAN

Supreme Court of Victoria v Australian Cricket Society 24
THE HON DAVID HARPER AM

Bar, Bench and Solicitors golf day 27
CAROLINE PATTERSON

News and Views

Volunteering at the Capital Post-Conviction Project of Louisiana 28
NATALIE HICKEY

The David Combe affair 31
THE HON STEPHEN CHARLES AO QC

The Judicial College of Victoria master of its fate 38
VBN

Direct questions and leading questions 40
ANDREW PALMER AND THE HON GEORGE HAMPEL AM QC

44 Milky Way Dreaming
KRISTINE HANSCOMBE QC

46 Innovate, regulate: Michael McGarvie, Victorian Legal Services Commissioner
GEORGINA COSTELLO AND JESSE RUDD

Bar Lore

52 A Fiery start at the Bar — some fifty years ago
DR CLIFF PANNAM QC

58 Remembering Ronald Ryan
KERRI RYAN

62 Where there's a will, we'll go a Waltzing Matilda: Serendipity in chambers
W. BENJAMIN LINDNER

Back of the Lift

66 Adjourned Sine Die

67 Silence all stand

68 Vale

76 Gonged

77 Victorian Bar Readers

Boilerplate

78 A bit about words JULIAN BURNSIDE QC

80 Off the Wall SIOBHÁN RYAN

82 Red Bag Blue Bag

83 The Australian Electoral Commission and the itchy pen philosophy
THE HON PETER HEEREY AM QC

84 Book Reviews

88 Verbatim

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VICTORIAN BAR NEWS

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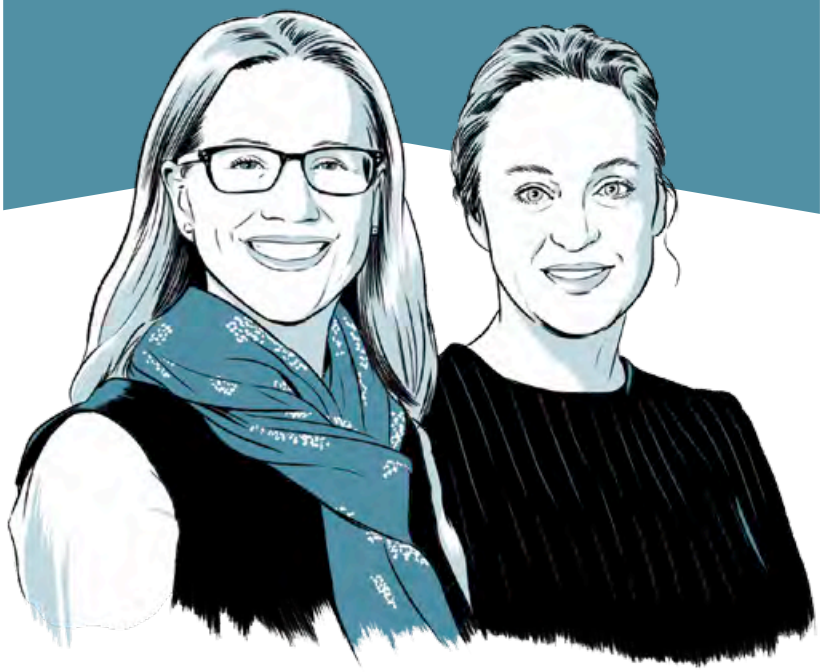
Editorial



Not the 24 hour news cycle

GEORGINA SCHOFF & GEORGINA COSTELLO, EDITORS

Victorian Bar News, unlike Twitter, Facebook status updates and the 24 hour news cycle, takes some time to arrive, hitting your chambers about each six months or so, on something like a 4,500 hour news cycle.

With varying distance between the news and events it covers, *Bar News* offers the benefit of hindsight as well as describing the march of progress. We thank you for your patience for this (err… overdue… sorry) issue, which will be the final one from us as editors.

Bar News relies entirely upon the participation of its members for content, with occasional contributions from those outside the Bar. For some of our authors writing is clearly a vocation (quite apart from the writing they do as barristers or judges) and the copy arrives in a steady stream. They include Julian Burnside, Stephen Charles, Peter Heerey, Cliff Pannam, the late James Merralls, Ed Heerey and Siobhan Ryan. In many respects their contributions have been the backbone of *Bar News* under our editorship and we thank them for that. Others write when they are inspired by a particular topic or event or because we have coerced them to do so. Writing for publication is never an easy task, and we hope that those who have provided contributions have found the process a rewarding one.

So much goes on in the life of the Bar and as we have said before, *Bar News* is an important record of our collective pursuits. We consider it particularly important to record the appointments, retirements and deaths of our members. As the Bar grows in size, this task has become increasingly challenging.

Long ago, Cicero said that eloquence is the lamp of reason. To write eloquently is one of the skills that we all hope to acquire as barristers.

Bar News offers each of you an opportunity to hone those skills and to focus them on something other than a legal argument. We encourage you to continue to support this wonderful publication by contributing your written words.

In addition to our contributors, we extend our thanks to the Bar News committee members, particularly our past and present Deputy Editors Anthony Strahan, Annette Charak, Justin Whelehan and Maree Norton, to Natalie Hickey who might be considered to be our "staff writer" and to our reliably excellent sub-editors: Jesse Rudd and Brad Barr. We thank the staff of the Bar Office, including Denise Bennett who now assists us remotely from Byron Bay and Sarah Fregon. We also thank past and present Presidents who have (for the most part) left us to our own devices.

We must also thank Guy Shield of the Slattery Media Group, who has been responsible for the design and layout of each of the issues that we have edited. His wonderful illustrations have lent the *Bar News* under our editorship a unique character.

One thing that we will particularly miss is choosing the pictures of our colleagues for Around Town. Barristers can be a glamorous lot (when we try) and we think that some of our spreads have rivalled those of *Vanity Fair*. In this issue, for instance, the photographs of the Bar Dinner fairly dazzle the eye, as do the photographs of the event at which Bill Henson's photographic portrait of the Hon Kenneth Hayne AC QC was unveiled. The portrait itself, which we have reproduced on the cover of this issue, is we think, a masterpiece.

We wish you all happy reading now and well into the future.

Kids IN Wigs

Clara Plunkett (James Plunkett's daughter)

Letters TO THE Editors

The dream of a life as a barrister

My mother asked me when I was 13 what I wanted to be when I grew up. I told her that I was going to be a barrister.

Unfortunately life got in the way and it wasn't until 2006, after a career in Government, that I took the plunge and started a law degree, intending to honour the intention that I had indicated to my mum many years before.

At that stage entry to the readers' course was through the waiting list that the overwhelming majority of readers of this publication will remember. Much to my dismay and disappointment shortly before the completion of my degree, the readers' course exam was introduced.

It is said that one should not have regrets, but here I was full of regret at not starting my degree a couple of years earlier, at not cramming a few extra subjects into a semester whilst working full-time as a judge's associate, and of course, at allowing the practicalities of mortgages, children and family to stand in the way of that long held dream.

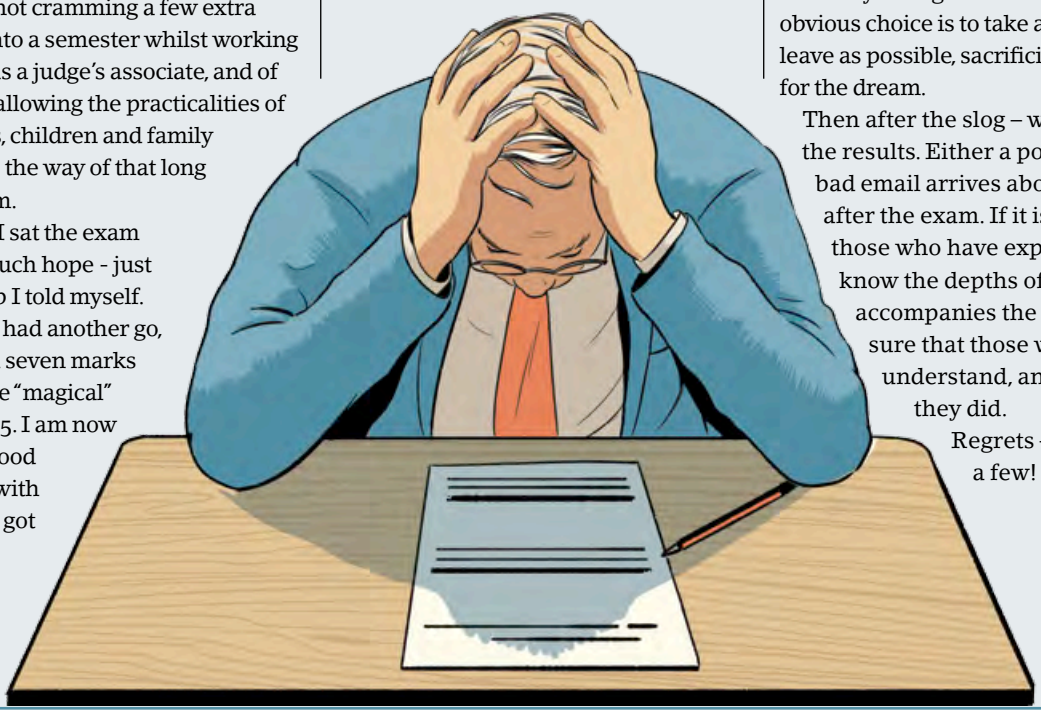
In 2014 I sat the exam without much hope - just a warm-up I told myself. Recently I had another go, only to fall seven marks short of the "magical" required 75. I am now in pretty good company with those who got close, but not close enough.

One colleague who has sat the exam a number of times recently remarked:

> *"Of all the adversities I have overcome, enrolling in and undertaking two degrees with two children under five and no partner, the exam and my inability to reach the 75 marks has been the most difficult adversity I have had to face. Each time as a single mother stumping up the $500 to sit the exam, to say nothing of the $6,000 payable a week after being offered a place on the readers' course. And this is in a climate of encouraging more women to come to the Bar".*

Another after the last exam results told me tearfully:

> *"I've wanted to be a barrister since I was ten years old and can't imagine doing anything else, but I'm now at a point where I feel so dejected and that something I want shouldn't be causing me so much heartache when I don't achieve it".*



Collectively it is accepted that the exam is here to stay, but the delicious irony of the whole process is that those who introduced the exam concept and are involved in setting, marking, discussing and analysing the exam, generally didn't have to achieve the magical 75.

Other than publication of sample answers seven weeks or so after a three hour exam, the transparency afforded to examinees in exchange for the $500 odd dollars is non-existent.

All those who sit the exam, essentially put their lives on hold. The need to study, memorise and understand each of the areas. Procedure, evidence and ethics becomes all consuming, to the point where nothing else matters. If we are lucky enough to have a job, the obvious choice is to take as much leave as possible, sacrificing all else for the dream.

Then after the slog – we wait for the results. Either a positive or a bad email arrives about four weeks after the exam. If it is the bad one, those who have experienced it know the depths of despair that accompanies the news. I'm not sure that those who haven't understand, and I wish that they did.

Regrets – we've had a few!

Craig Newton

Have your Say Write to the Editors at *Victorian Bar News*, Owen Dixon Chambers, 222 William Street, Melbourne, VIC 3000 or email *vbneditors@vicbar.com.au*

Bar President's report

JENNIFER BATROUNEY

The mid-point of a year in the life of a Victorian Bar President is an interesting time: a time to reflect on the outcomes we have achieved and to measure them against the vision outlined in my first report at the beginning of my term. It is also a time to plan for my remaining months in office and to ponder how this Bar Council can put in place a solid foundation for the next one.

So what was my vision for the Bar six months ago? I spoke of my commitment to ensure that the Bar and its members continue to thrive; that the Bar Council, working collaboratively, support members to foster professional excellence and continued high performance; and that we seek out opportunities to highlight the distinctive skills of our members. I looked to promote a collegiate Bar; a diverse Bar; a Bar supported by modern services, facilities and resources. Above all, I spoke of the need to maintain a strong independent Bar playing a vital role in the justice system of our State.

Halfway through the year, I think we're tracking pretty well.

Members of our Bar are leading the legal profession in Australia in 2017. Victorian Bar members currently hold three of the most significant legal positions in the country. Stephen Donaghue QC was appointed Commonwealth Solicitor-General in December, Fiona McLeod SC is the President of the Law Council of Australia (LCA), and Will Alstergren QC heads up the Australian Bar Association. It is through representation at the most senior level that our Bar continues to influence and drive legal policy reform. I also note that Julian McMahon from our Bar is the current holder of the LCA President's Medal in recognition of his outstanding pro bono work. I also congratulate Pat Zappia QC and his team on the pro bono and duty barrister committee for their ongoing work to promote access to justice for all Victorians.

As influencers in the legal profession, the Bar made a considered contribution to the recent Department of Justice and Regulation's Access to Justice Review. I thank Chris Winneke QC and his team, including the Bar policy staff, for their hard work in this important area. The government's response adopts almost all of the 60 recommendations made and awards $34.7 million in funding to support disadvantaged members of our community in the legal system.

Continuing the Bar's commitment to achieving gender equality, we are proud this year to support and facilitate the LCA national model gender equitable briefing policy. The policy is designed to level the playing field for all members of the Australian legal profession. Its ultimate aim is to see women briefed in at least 30% of all matters and accounting for 30% of the value of all brief fees by 2020. The Bar's Diversity and Equality Committee, led by Michelle Quigley QC, has established a working group to actively implement the policy at the Bar and promote its widespread adoption by members.

The Bar launched its new Reconciliation Action Plan in March and I am indebted to Tom Keely SC, Abigail Burchill, Richard Wilson and the Indigenous Justice Committee for their ongoing commitment to the promotion of Indigenous Australians at the Bar.

The diversity at the Bar is nowhere better demonstrated than in our latest crop of readers who signed the role in May 2017. The dates of their admission to practice range from one year ago to 28 years ago. They have come to the Bar with legal experience as barristers in other jurisdictions, as solicitors, as government lawyers and as 'public interest' lawyers. They have other professional backgrounds including as an army major, a managing director of a meal delivery start-up in South Africa, a real estate agent, a financial analyst and an IT professional. One was born in China, another in Germany. A number speak foreign languages including Indonesian, German, Japanese and French. Our Bar is the richer for the diversity of its members and our connection to the community is enhanced by the different paths our members have taken to get here.

The refurbishment of the first floor in Owen Dixon East was a key achievement in this term and my thanks go to the hard-working teams at both BCL and the Bar who brought this project to life. The new facilities bring members together in meeting areas designed to promote collegiality at the Bar, to allow us to engage with each other and to host members of the broader legal community. I am proud of our new modern space and am happy to see so many of our members making use of it. While BCL has had their fair share of challenges around the lift and communications services, Michael Wyles QC and his team are to be congratulated for continuing to enhance our built environment by sourcing many new sets of chambers. I look forward to continuing to work with BCL to ensure that the Victorian Bar facilities continue to be the best of all the independent Bars in Australia.

We launched the Peter O'Callaghan QC Gallery Foundation in June. The gallery has become an important focal point both for members of the Bar and for the public

> “In the second half of the year, we look to continuing our work in engaging with corporate clients and increasing direct touchpoints between the Bar and the community.”

who walk through the Owen Dixon West foyer. It provides a visual tribute to the enormous contributions of the Bar's champions and acts as a source of inspiration for future generations of barristers. The Foundation has been established to ensure that the Art and Collections Committee can continue to bring the stories of the Bar so beautifully and evocatively to life and will focus on funding the commission of future works to the gallery through donations and legacies from members and friends of the Bar. We are delighted and honoured that Justice Michelle Gordon has agreed to become the patron of the foundation.

The Bar's new website, launched in May, has been a major project for the Bar over the past twelve months and is the most significant upgrade of our digital platform in seven years. I am very grateful to Dr Matt Collins QC, our CEO, Sarah Fregon, and the Bar's project team for the extensive work they have put in to this project. The new website portrays a fresh, modern and approachable Bar and educates the community about the role and work of barristers. It delivers enhanced search and navigation functions to streamline the accessibility of the Bar for our external audience as well as providing a greater suite of on-line services for our members.

I would like to thank my hard working executive, Dr Matt Collins QC, Wendy Harris QC and Dan Crennan QC, together with all members of the Bar Council and the Bar office for their ongoing, unfailing support during the first half of my presidency and I look forward to continuing our collaboration over the coming months.

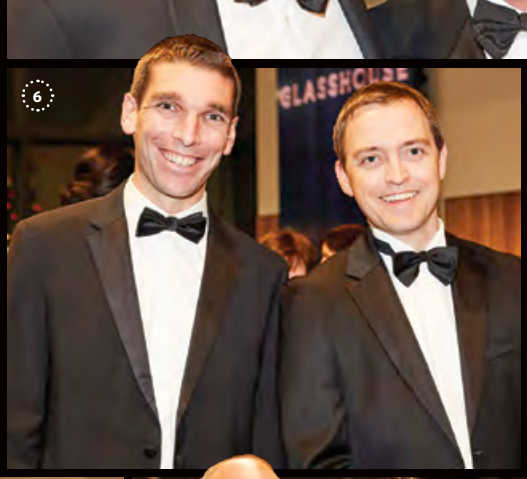
In the second half of the year, we look to continuing our work in engaging with corporate clients and increasing direct touchpoints between the Bar and the community. I will attend the ABA Conference in July and use the opportunity to further our connections with the UK and Irish Bars.

On 1 October, the Honourable Chief Justice Marilyn Warren AC will retire. As Australia's first female Supreme Court Chief Justice, her Honour's term has been one of innovation, leadership and achievement. Her contribution to the administration of justice in this State will be celebrated and recognised by the legal profession at a dinner on Saturday, 23 September and at a ceremonial sitting of the Supreme Court on 27 September.

We know that 2017 will continue to bring change and we welcome the challenges and new opportunities ahead of us. I will continue to work with Bar Council, Bar CEO Sarah Fregon and the Bar office staff to uphold the Bar as the fine institution to which we are all privileged to belong.














1. Kristen Walker QC, Susan Brennan SC, Jason Pizer QC 2. Peter Gray QC and the Hon Justice Bell AM 3. Peter Agardy, Alison Umbers and his Hon Judge Lyon 4. Associate Justice Simon Gardiner and Tim North QC 5. Erin Gardiner and the Hon Justice Redlich 6. Paul Glass and Ben Gibson 7. The Hon Justice Almond and Ross Macaw QC 8. Daniel Nguyen and Fiona Cameron 9. Emily Porter and Patrick Doyle 10. Dermot Connors, Shane Thomas, the Hon Justice Sloss and Michael Bearman 11. Tom Clarke, David Robertson QC and David Morgan 12. Melinda Richards SC, Julia Watson and the Hon Justice Tait 13. Dr Stephen Donoghue QC and Lisa Hannan 14. Brian Mason, Sergio Freire, Daniel Briggs and Nina Moncrief 15. Judge Samantha Marks and Aine Magee QC 16. Magistrate Donna Bakos and Kenneth Hayne AO QC 17. Melanie Szydzik, Claire Harris, Kathleen Foley and Fiona Forsyth 18. Simon Moglia, Trevor Wraight QC and Karen Argiropoulos 19. Sarala Fitzgerald, Sam Ure and Therese McCarthy 20. Paul Glass, Patrick O'Shannessy and Ben Gibson 21. Belinda Wilson and the Hon Justice Maxwell AC 22. Matthew Peckham, David Easteal, Daphne Foong and Stragen Foo

2017 Victorian Bar Dinner

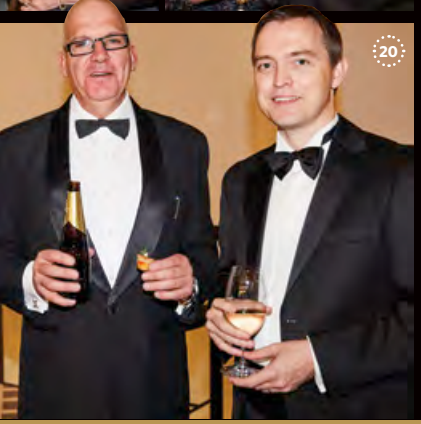
THE GLASSHOUSE, MAY 26 2017

On 26 May 2017, several hundred barristers and distinguished guests descended on The Glasshouse. Promoted as the perfect location for a 'sophisticated soiree', attendees were treated to one of the newest venues in Melbourne, located in the heart of Olympic Park.

To accompany the location, the wine, the fine dining and, of course, the band, there were the speakers. This year, the keynote speech was delivered by the Governor of Victoria, her Excellency the Hon Linda Dessau AC. Her Excellency spoke fondly of the Bar and reminisced about earlier such dinners, and the importance of the Bar Dinner in the social life of the Bar.

Kathleen Foley delivered the speech on behalf of the Victorian Bar with wit, flair and a healthy dose of self-deprecation. The refresh of the Vicbar Website (and everyone's new photos) offered fertile ground for humour, as did her 'research' of her predecessors' speeches in previous years. She ended with a stirring reminder of the work that is being done, and remains to be done, as we support the diversity of the Bar and the needs of many of those present.

The President of the Bar Council, Jennifer Batrouney QC, and its Deputy President, Dr Matthew Collins QC were a terrific support crew for the evening's honoured guests in their introductory comments.

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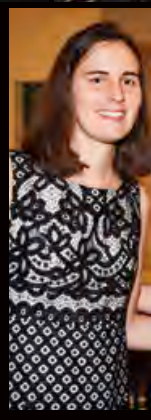


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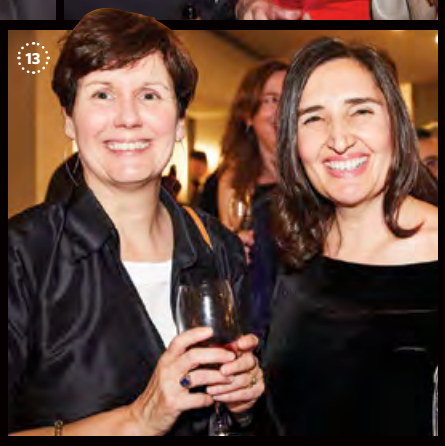
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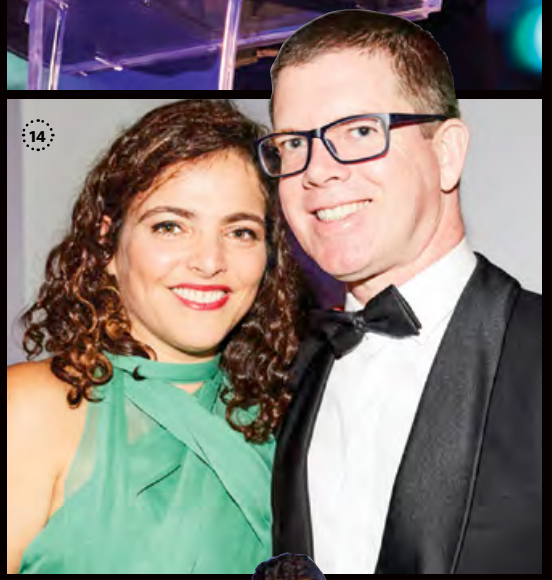
1. The Hon Martin Pakula AG, Jennifer Batrouney QC, her Excellency the Hon Linda Dessau AC and his Hon Judge Tony Howard 2. Anna Svenson and Kate Conners 3. The Hon Justice Chris Jessup, Amanda Upton, Bridget Slocum and Simon Pitt 4. Roshena Campbell, Jennika Anthony-Shaw, Sarah Zeleznikow, Emily Golshstein 5. Rachel Waters and Anna Lord 6. David Andrews, Sarah Fregon and Nicole Papaleo 7. Rebecca Howe and Andrew Clements QC 8. Adrian Anderson and Elle Nikou 9. Robert Heath and Kieren Hickie 10. Katherine Farrell, Briana Goding and Coral Alden 11. Paul Hayes QC, the Hon Justice O'Callaghan and Raini Zambelli 12. Kingsley Davis OAM, Marian Clarkin and Paul Panayi 13. Her Hon Judge Marks and the Hon Associate Justice Ierodiaconou 14. Fiona Batten and Leisa Glass 15. Johannes Angenent and Ahbi Mukherjee 16. Gavin Silbert QC, Caroline Kirton QC, Andrew Panna QC and David Brustman QC 17. Leo Faust 18 Tass Antos, Bridget Slocum and Andrew Burnett 19. Emma Heggie and Simon Tan 20. Tim Maxwell, Francis Gordon and Patrick Noonan 21. Peter Rozen and her Hon Judge Chambers 22. The Hon Martin Pakula AG, his Hon Judge Tony Howard, her Excellency the Hon Linda Dessau AC, Matthew Collins QC, the Hon George Brandis AG, Jennifer Batrouney QC 23. (back) Tom Barry, Calum Henderson, Matthew Peckham, Alice Muhlebach, Coral Alden, Fiona Hudgson, Daphne Foong (front) Scott Davison, James Humphris, Natalie Campbell, Stragen Foo 24. Simona Gory, Elizabeth Bennett and Kathleen Foley

1. Victoria Mcleod 3. Fiona Ryan, Emily Latif and Fiona Forsyth. 4. His Hon Judge Woodward, Penny Neskovcin QC 5. Wendy Harris QC 6. Natalie Hickey, Simon Marks QC, Matthew Collins QC and Rachel Chrapot. 7 Leisa Glass, Cathy Dowsett, and Stella Gold 8. Penny Marcou, Dermot Connors and Shane Thomas 9. Matthew Collins QC 10. Lisa Nichols and Rachel Doyle SC 11. Kathleen Foley, David Morgan, Emrys Nekvapil and Elizabeth Bennett. 12. Coral Alden 13. John Champion SC 14. Rebecca Preston and Patrick Whelahan 15. Noel Ackman QC and the Hon Justice McMillan 16. Ben Gauntlett and Daniel Crennan QC 17. Kathleen Foley 18. Her Excellency the Hon Linda Dessau AC 19. Jennifer Batrouney QC 20. Miles Tehan, Roshena Campbell, Tim Jeffrie and Justin Hooper 21. Alexander Solomon-Bridge, the Hon Justice Lee and Dion Fahey 22. William Alstergren QC 23. Justin Wheelahan.

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Indigenous Justice Committee RAP event

SALLY BODMAN

A two-fold celebration took place in the Peter O'Callaghan QC Gallery one Friday evening in late March 2017. Members of the Bar, the Bench and the Aboriginal community gathered to celebrate the tenth anniversary of the Bar's Indigenous Clerkship Program and to launch the Victorian Bar's new Reconciliation Action Plan (RAP) for 2017-2020.

Wurundjeri elder Aunty Joy Murphy-Wandin AO opened proceedings with a Welcome to Country.

Among those who spoke at the launch were the Hon Stephen Kaye AM, the Hon Mordy Bromberg and two of the clerks from this year's Indigenous Clerkship Program. The program is a prime focus of the Indigenous Justice Committee (IJC) and offers three indigenous students in each year a total of three weeks' paid work experience at the Bar, the Supreme Court of Victoria and the Federal Court of Australia. Both the judges and the clerks spoke of the program as having been a personally enriching experience and an example of reconciliation in a real and practical sense. Importantly, the program offers the opportunity for indigenous students to forge relationships with mentors who have the potential to have a positive influence on their careers in the law.

The RAP was launched by her Honour Magistrate Rose Falla, Victoria's only Aboriginal judicial officer, and her father, Uncle Kevin Coombs, an esteemed leader of the Victorian Aboriginal community. The Victorian Bar was the first Bar in Australia to adopt a RAP back in 2012. The Bar and the IJC have ensured that the RAP is more than a piece of paper filled with lofty objectives. It was drafted as an identifiable list of actions with clear targets and timelines to ensure that the process of reconciliation becomes entrenched in the mainstream culture and operation of the Bar; not merely a peripheral activity to be revisited from time to time.

Four years down the track our second RAP has given us the opportunity to measure progress and to improve and expand on the initiatives undertaken in the first RAP.

The message on the evening of the launch of our second RAP was a strong, positive and progressive one. The RAP has been well received at the Bar. Our clerkship program has continued to inspire young indigenous students to a career in the law, the number of indigenous barristers at the Bar has increased, and the Bar is tracking well against the objectives of the first RAP. Activities of the IJC in that time have included a number of CPDs on issues affecting the indigenous community within the legal system, the running of mentoring and work experience programs for secondary and tertiary indigenous students and the continued administration of the Indigenous Barristers' Development Fund and the Indigenous Barristers' Fund. In addition, the Bar offers subsidies for indigenous barristers in their early years at the Bar.

The Oxford dictionary defines reconciliation as 'the action of making one view or belief compatible with another'. That's a rather dry interpretation for the very real reconciliation evident at the launch. The RAP, by its very existence, proves that there are still serious issues affecting indigenous men and women in the justice system. Its keen adoption by the Bar and its realistic review and expansion goes a long way to addressing the issues and delivering a message of hope, optimism and possibility about a more equitable future.

ILLUSTRATION BY GUY SHIELD

George Hampel AM QC

ELIZABETH BRIMER

On 14 December 2016, a dinner was held in the Essoign Club to celebrate the extraordinary contribution made by Prof the Hon George Hampel AM QC to the readers' course and to the teaching of advocacy more generally.

George Hampel was called to the Bar in Victoria in 1958, appointed silk in 1976 and in 1983 was appointed to the Victorian Supreme Court. George Hampel pioneered advocacy skills training in Australia and began conducting workshops in advocacy skills in 1972 and continues teaching to this day.

At the dinner, a visual mark of the extent of George's contribution was unfurled by Dr Matt Collins QC, the Chair of the Readers Course : many, many, many pages which listed the names of all members of the Bar who have been taught by George since the readers' course started in 1980.

Rather than having one speaker mark the occasion, Dr Collins invited a number of people close to George to reflect on his extraordinary contribution to the teaching of advocacy. A number of wonderfully personal reflections were offered.[1]

The Hon Michael Black AC QC reflected that the old system of bar reading rested on the assumption that advocacy was not something that could be taught. It was a skill, or art, to be acquired by absorption and practice. Learning came by watching the leaders of the day in action, by doing and learning from one's mistakes, or not.

Although the Bar was collegiate and supportive, George was the visionary who challenged and changed the old ways and the assumptions underlying them. He believed that advocacy could be taught just as other aspects of the law and its practice could be taught. Beginning with the readers' course, with George at its heart, then the establishment of the Australian Advocacy Institute in 1991 with George as its founding Chairman, George and Felicity developed a national and international reputation for their insights and skills in the teaching of advocacy.

The Hon Nahum Mushin, having expressly disavowed any knowledge or involvement in that sport of hurtling down snow covered slopes wearing a couple of bits of board on your feet, recalled the early days of the readers' course; the terrible green armchairs and makeshift moot courts on the 13th floor. Although not fully realised at the time, George was the key influence on the structure and content of the course, which was truly innovative.

1. George Hampel AM QC 2. Sarah Porritt and Jim Shaw 3. The Hon Justice Marica Neave AO and the Hon Justice Dixon 4. Rachel Chrapot and his Hon Judge Gucciardo, Carolyn Starke QC 5. Mathew Collins QC 6. Simon Marks QC, Her Hon Judge Hampel and Deborah Mandie 7. Wendy Pollock, the Hon Justice Sloss, Miguel Belmar and Diana Price 8. George Hampel AM QC and Chris Winneke QC 9. Adrian Finanzio SC and Chris Canavan QC 10. The Hon Justice Chris Jessup, the Hon Justice Moshinsky and the Hon Justice Michael Black AC 11. Hampel family

Teaching with George at many weekend workshops all around the country, the feedback from students was always superlative. The highlight of the advocacy teaching with George was at Monash University's campus in Prato.

As Adjunct Professor at Monash, George brought his advocacy teaching to the position. Every student expressed glowing endorsements of his work.

His Hon Judge Frank Gucciardo considered that the best way to honour George and to describe the impact he has had on advocacy teaching over the last 30 years was to offer a reflection about George's character.

George, he said, worked tirelessly inspiring and guiding young and not so young advocates to broaden their horizons and find that spark for persuasion, for communication, for clarity, for primacy. He recalled travelling with George, drinking Slivovitz at dinner in Prague or 'Cossack' dancing in a frozen ice bar in Hong Kong while wearing bearskin coats, evenings spent on the terrazzo in Prato, deep in lengthy conversations about advocacy, philosophy and ethics. He observed George's full appreciation of beauty in art, food, people, talking, work, silence, music, cars, his curiosity about life and people generally.

George has achieved an extraordinary liberation of heart and mind. An undisturbed spaciousness and equanimity that is not cynical or detached. Capturing all those experiences and so many more, he has emerged awake to life in a total and compassionate engagement that is inspirational and which lies at the heart of what powerful advocacy can be.

His Hon Judge Greg Lyon first attended a workshop run by George in 1985 as a young solicitor. Having attended many more both as a student and teacher His Honour reflected on the influence George has had over so many. He said George has demonstrated that to communicate clearly, one must prepare. With preparation comes an understanding of the material, but understanding is not enough.

As an advocate, one must appreciate what needs to be conveyed, but also how it is best conveyed. George's teaching has provided advocates with a means to communicate in court effectively. His Honour reflected that whether the principles were successfully applied and executed by His Honour as an advocate is no longer a matter for debate; at His Honour's own welcome, he was told he was an excellent advocate.

George has striven to improve the advocacy of so many, even by degrees. George's passion for advocacy and striving for excellence remains with his Honour today.

During my time as George's associate, I was persuaded that spending many weekends filming advocacy workshop performances was akin to winning the lottery. Many evenings and weekends later, I appreciate fully that, with George, I really did win the lottery.

That is perhaps not most importantly reflected in my ability to ski, appreciate great Burgundy and the 7th arrondissement of Paris, but rather because I have watched and worked with one of the truly great original thinkers; about advocacy as the art of persuasion, about skills learning, about teaching, about life.

Everything that happens is, for George, an opportunity; an opportunity to develop, to work towards excellence. To be a co-author of the Advocacy Manual is a privilege. To have been part of the recording of George's commitment and passion for the benefit of others is priceless. It is George's total commitment to his passion that has been and still is so inspiring.

Her Hon Judge Felicity Hampel reflected on the impact George has had internationally. In 1984 George and Felicity went to NITA, the pioneers of the performance/review technique. George's transformative contribution at NITA was the emphasis on teaching within a theoretical framework whilst encouraging individuality within that framework. George and Felicity were invited back again and again.

George's work led to the development of the advocacy component of the readers' course, and invitations to share his insights with the profession interstate, overseas and the formation of the Australian Advocacy Institute. Word spread. By the early 1990s, George and Felicity were invited to teach at Greys Inn, to Hong Kong, Singapore, Malaysia and South Africa. Then to The Hague and the International Criminal Court.

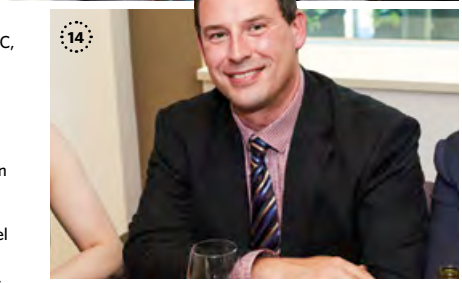
When George joined Monash University, the rigour of George's theoretical framework was recognised in the structure of the subjects taught, George's appointment as a Professor and the receipt of many teaching awards. George is a Bencher of Inner Temple, recognition of the extraordinary impact of "The Hampel Method" as his workshop skills training is called in the UK.

Always looking forward, George spoke about the critical need for advocates to continue to learn and to challenge themselves to ensure that their skills do not plateau and decline. To achieve and maintain excellence in any area where skills are involved, as in advocacy, further coaching and engagement in deliberate practice with objective input is essential. An important part of achieving this goal is the development of a culture which embraces continuing skills learning.

The President of the Victorian Bar, Jennifer Batrouney QC announced the dedication of the new space in Level 1 of Owen Dixon Chambers East, "The George Hampel Gallery". There is a panel of screens that displays the photographs of all of the Readers since the course began in 1980; (almost) all of whom were taught by George.

1 Thank you to all who spoke kindly for providing their speaking notes which I have used to summarise their reflections. Necessarily, I have had to be selective.

1. His Hon Judge Michael Rozenes AO, Fiona McLeod SC, Barbara Rozenes, Con Heliotis QC and His Hon Judge Gucciardo 2. Ray Finkelstein AO QC, His Hon Judge Lyon and Chris Canavan QC 3. The Hampels 4. Caroline Kirton QC 5. Bianca Stajic and Rob Taylor 6. Elizabeth Brimer 7. Elizabeth Brimer 8. Her Hon Judge Marks, Matthew Collins QC 9. Professor The Hon Nahum Mushin AM, Simon Marks QC 10. Deborah Mandie and Miguel Belmar 11. Adrian Finanzio SC, His Hon Judge Michael Rozenes AO, her Hon Judge Hampel 12. Ben Lindner 13. The Hon Justice Dixon, his Hon Judge Taft 14. Randall Kune 15. Jennifer Batrouney QC, the Hon Justice Michael Black AC 16. Sarah Porritt, Wendy Pollock and Pierre Testart 17. Her Hon Judge Hampel 18. Sue McNicol QC, Peter Heerey AM QC 19. Chris Canavan QC and Con Heliotis QC 20. Jennifer Batrouney QC



Henson portrait of the Hon Ken Hayne AC QC

SIOBHAN RYAN, ARTS AND COLLECTIONS COMMITTEE

It took a long time - over 12 months between commissioning and unveiling - but on 27 April 2017, Bill Henson's much anticipated portrait of the former High Court Judge, the Hon Kenneth Hayne AC QC was revealed to members of the Bar, the judiciary and guests, including Ken Hayne's family. Peter Jopling AM QC, the Chairman of the Art & Collections Committee and a driving force behind the commission, opened the evening by introducing the artist:

> *"Artists like Bill Henson are a rare breed indeed. Over his forty-year career, Bill in a sensitive and engaged way, has focused on the human condition and photographed in a manner which has always been powerful and evocative."*

Although the human figure has been his constant subject, Henson rarely does portraits. In 2002, he photographed the conductor Simone Young for the National Portrait Gallery. A decade later, in 2013, he captured the actress, Cate Blanchett for *Time* Magazine. The Bar's portrait of Ken Hayne is only his third public portrait commission.

The task of unveiling fell to the Commonwealth Solicitor-General Dr Stephen Donaghue QC, who was an associate of Hayne's at the High Court and is now his colleague in chambers. Dr Donaghue spoke of Ken Hayne's many accolades and achievements: a graduate of Melbourne University with First Class Honours in Arts and Law and the Supreme Court Prize for 1967; a Rhodes Scholar and Oxford graduate; reading with JD Phillips and signing the Bar Roll in 1971 (Bar No. 969); taking silk in 1984 and judicial appointment in 1992. In 1995, he was appointed as one of the foundation members of the Victorian Supreme Court, Court of Appeal, with his mentor J D Phillips JA. Two years later he was appointed to the High Court, on which he served for almost 18 years. Dr Donoghue spoke warmly of his time as Hayne's associate and it was clear from his anecdotes that Hayne's other associates also have fond memories. In fact, 27 former associates contributed to the funding of the commission.

Ken Hayne replied with modesty, telling Bill Henson, *"In the best traditions of this Bar you have taken a pig's ear of a case and turned it into a silk purse, in this case a wonderful piece of art"*.

And the portrait is indeed wonderful.

It is a three-quarter length image of Ken Hayne seated, dressed in a charcoal suit, his AC pin attached to the lapel. He wears a white shirt and a red tie. The background is dark and velvety. A swathe of golden light dissects the scene as if in a Johannes Vermeer interior. The frame


1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1. Ken Hayne AC QC with Bill Henson 2. Ken Hayne AC QC and the Hon Justice Gordon AM
3. Louise Hearman and Peter Joplin AM QC 4. Peter Hanks QC, Rowena Orr QC and Mark Costello

is classic black with a gilt edge. Its size is imposing. The work is charged with signs that this is one serious portrait.

But then there is the mischief. It starts with Hayne's raffish shirt-collar, which refuses to be contained. It plays on in the enigmatic smile, caught halfway between grimace and grin and finally settles in the eyes - there is no denying it, they twinkle.

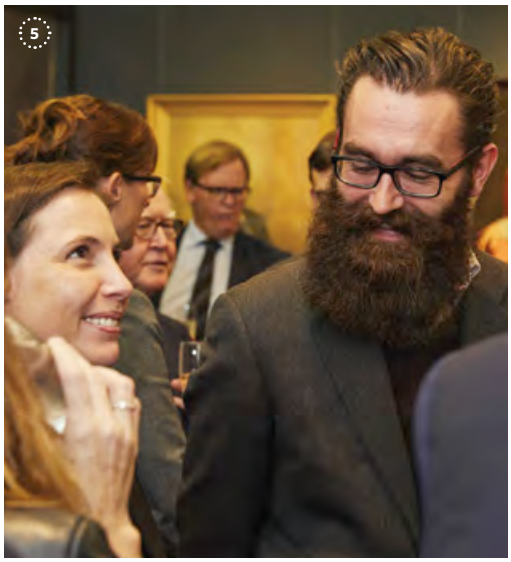
Bill Henson says that he was concerned to, "*capture the contradictions*". This meant portraying Ken Hayne's wit as well as the seriousness associated with his office. It required the artist to let the lightness shine through the gravitas. And so it does.

Behind this achievement is a complex process which began with several conversations between the artist and the sitter at Henson's home/studio. The actual shoot was completed in one sitting. Then came the painstaking creation of the material work. Nowadays, Henson shoots in analogue film, then digitalises the negatives. Narrowing 300 shots down to a single frame, meant ruminating over the proofs to find the one shot which "*has it all in there*". And because he shoots on film, the potential of the shot is not revealed until well after the sitter is gone.

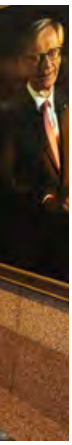
During the process, colour was pared back. The technique of 'dodging and burning' was then deployed to create contrasts by regulating the exposure in specific areas. It took time, with Henson making test print after test print to record his explorations with colour and light.

Although the term "painterly" is frequently used to describe Henson's photos the process seems more like sculpture. Henson acknowledges this when he says, "*I make objects that just happen to be photographs*".

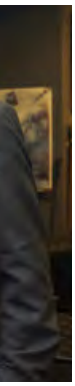
This object is a superb addition to the Peter O'Callaghan QC Collection, made possible by the generosity of Hayne's former 27 associates, an anonymous donor and the Bar.

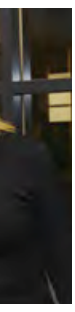


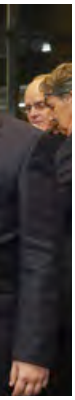








1. Bill Henson, Ken Hayne AC QC and Dr Stephen Donaghue 2.Lisa Fitzgerald and Jacqui Fumberger 3 Clive Tadgell, Sir Daryl Dawson AC KBE CB QC and Ken Hayne AC QC 4. Dr Samuel Mandeng, Jan Minchin (Tolarno Galleries), Martin Allen 5. Jim Hartley 6. Dr Ian Hardingham QC, Peter Joplin AM QC, Bill Henson, Jennifer Batrouney QC, Ken Hayne AC QC, Dr Stephen Donaghue 7. Ron Merkel QC, Sir Daryl Dawson 8. Ken Hayne AC QC's brother and sister-in-law 9. Michael Wheelan QC, Simon Steward QC, Eugene Wheelahan 10. Siobhan Ryan, Dr Samuel Mandeng and Ken Hayne AC QC 11. Siobhan Ryan, Kirstin Green, His Hon Judge McNab 12. Ken Hayne AC QC, the Hon Justice Gordon AM and family 13. Stephen Donaghue QC and Sir Daryl Dawson 14. Natalie Hickey, Matt Connick QC and Sarah Fregon 15. Kate Clark, David Bennett, Adam Kirk and Alistair Pound 16. Registrar Daniel Caporale, Kate Clark, James Hayne, Ken Hayne AC QC and Christopher Weymouth 17. Adam Bushby (Honorary Curator of Peter O'Callaghan QC Gallery), Susie Chadbourne, Daniel Kinsey 18. Rosemary Musolino, David Bennett and Richard Niall QC SG 19. The Hon Justice Gordon AM, Jan Minchin, Louise Hearman 20. Ben Gauntlett, Claire Harris, Jesse Rudd 21. Ken Hayne AC QC and the Hon Justice Gordon AM 22. The Hon Justice Nettle and David Curtain QC



Supreme Court of Victoria v Australian Cricket Society

SUNDAY 26 FEBRUARY 2017

BY DAVID HARPER

What follows is history as it should be written. Evidence based. Dispassionate. Comprehensive. But I want to begin with some general observations.

A fine book was published in April 2016, on the occasion of the 175th anniversary of the first sitting of the Supreme Court in March 1841. *Judging for the People – A Social History of the Supreme Court of Victoria* records in often striking prose the story of an institution with intricate and intimate links to its community. Since the arrival in Melbourne of John Walpole Willis as the first Supreme Court judge, the Supreme Court has been an integral part of the social fabric of, first, the Port Phillip district and, thereafter, the colony and State of Victoria.

But there is a gap in the account which *Judging for the People* gives. Sport is not mentioned. Yet sport, and cricket not least, has been an important element in the history of that social fabric; and sport has frequently breathed both within and outside the corridors and chambers of the Court's buildings. Even as this is written, the external passageway on the eastern side of the Old High Court is the practice nursery in which some of the cricketing legends of the Supreme Court cricket team were (in cricketing terms) born, and in which all have honed their skills.

In these circumstances, the fact that, in the modern era, the Judicial Cricketers' Trophy has been won and lost over 17 successive years should be recorded when the second edition of *Judging for the People* is published**.** For 17 unbroken years, the Supreme Court XI has brought together in close collegiality a complete cross-section of Court personnel, male and female, from general hands to administrative staff, from tipstaves to judges' associates, from trial judges to the President of the Court of Appeal. It is and always has been an exemplar of inclusivity without borders. In no other aspect of the Court's life has such a broad band of brotherhood and sisterhood flourished to such an extent.

The team is paramount; but many individuals with close connections to the community, to sport and to the Court could also be mentioned in this context. Three deserve attention here. Sir Leo Cussen, one of the Court's – and Australia's – most revered judges was awarded a full Blue for cricket when, in 1879, he was an engineering student at the University of Melbourne. He switched his allegiance to the law in 1885, when he commenced his law degree. But his allegiance to cricket never wavered, though he also played Australian Rules football for West Melbourne, and was a noted amateur athlete. *Judging for the People* does mention that he was president of the Melbourne Cricket Club for 26 years from 1907 until his sudden death in 1933. His tact and kindliness, coupled with his ability as an administrator, preserved harmony and goodwill where elsewhere, particularly during the "bodyline" controversy, each was in short supply.

The Hon Eugene William ("Bill") Gillard was for years a playing stalwart of the Brighton Sub-District First XI. He was also the inaugural, and legendary, captain, both ex officio and plenary officio, of the Supreme Court XI. No one else came near to qualifying, or would dare to admit to an ambition for the job, when Bill was available. He once bowled to the West Indies star opening batter Desmond Haynes, with the result that Haynes was dismissed for a duck, caught in slips off an unplayable reverse-swing Gillard special.

And so to the third of those who cannot be otherwise than the subject of attention bordering on awe. John Vardy. Indispensable tipstaff to successive judges of the Court. An ornament to the administration of justice. Organiser of some of the Court's most important collegial events, such as the commemoration of Armistice Day. And for 16 successive years not merely a member of, but a driving force behind, the Court's cricketing endeavours. Practice organiser, team selector, at various times acting captain, co-captain and vice-captain, and always opening bowler and stout-hearted middle-order batter. The heart and soul of the team.

These are the attributes John also brought to his day job. There is a photograph of the tipstaves, taken in 2014, in *Judging for the People.* It appears, as it should, under the heading "The Soul of the Court"**.** John is among them. But there is no photograph of the cricket team of that year, although had it appeared it would have included Peter Gregory.

For 18 years, Peter was *The Age's* Supreme Court reporter. He is also an opening batsman with a style which combines touches of David Warner with traces of Matt Renshaw; and a spin bowler who, while lacking something of Shane Warne's loop and turn, is equally effective as a brake upon over-ambitious batters. He is an automatic selection for the Supreme Court XI whenever he is available, which fortunately is most of the time.

Equally important in this context, Peter is one of the authors of *Judging for the People.* He is therefore a direct link between

ILLUSTRATION BY GUY SHIELD

the book and the cricketers of the Supreme Court. It is a link which is emblematic of the Court's ability to sideline hierarchical structures whenever (which is often) a concentration upon its overriding collegiality is appropriate. Peter contributed the book's penultimate chapter. It is entitled *Journalism and the Supreme Court.* The final chapter, *Conclusion,* includes a pertinent passage:

> *This remarkable book may be unique among official court histories, because it seeks both to demystify the Supreme Court and, maybe more importantly, to put a human face on all of its workings. Here is a place ... that depends as much on cleaners and messengers, typists and jurors, librarians and a host of officials with byzantine titles such as ushers, tipstaves and prothonotaries as it does on barristers, litigants, defendants and judges. Here is a place that depends not just on its own wisdom but on the expertise of others.*

For the last 17 years the Supreme Court cricketers have given substance to that passage. They will doubtless continue that tradition, as they did on Sunday 26 February 2017 in the annual match against the Australian Cricket Society.

So I now turn to that which, on that day, I saw with my own eyes, and about which I can speak the truth, the whole truth and nothing but the truth. I was present at 10.30 that beautiful Sunday morning, with the conflict shortly to begin. With my experience in cases of homicide, I could tell at once that it would be bloody. The pitch was grassy-green, dripping with barely suppressed hostility. But whether for ▸

> "With my experience in cases of homicide, I could tell at once that it would be bloody."

batter or bowler could not be ascertained with confidence. It might bounce. Or it might grub. Or it might, Janus-like, do both. Croucher J, captain of the Supreme Court XI, was accompanied by McDonald J, as the pitch was prodded and poked and generally examined with the experienced forensic eyes which each of those two judges brought to the task. I could almost hear their intellects whirring as they juggled with the prospect of the impending toss. If won, a momentous decision would be forced upon the team: to bat or … well, to bat. Yes, it might be hot in the afternoon, but by then the pitch would probably be terminally ill, taking to the grave any chance for the batters to judge pace or bounce.

While this was being done, Ken Penaluna, the captain of the Australian Cricket Society Veterans XI ("ACS"), looked on with growing disquiet. He knew instinctively that the confidence of the Supreme Court, which never wilted from an insufficiency of bravado, was growing with every prod. True, he could call upon a strong bowling attack, headed by the eternally ageless Bob Hopkins. In the Court's (now) 176 years Hopkins, who has been bowling for at least that long, has upended almost as many Supreme Court judges as have courts of appeal. And the ACS could also deploy the spin of its President, Ken Piesse. His deliveries are so well flighted that they get lost in the sun. It is often minutes before the defeated batter, stumped with humiliating ease, can recover the gift of sight sufficiently to depart the crease.

But the ACS batting was, on paper at least, brittle. All Penaluna's increasingly crafty batting skill would be needed if victory was to be won: with him, as with Hopkins and Ashley JA – another champion of the SCV XI, and its former captain - the passage of the years seems somehow to have encouraged a renewed blooming of inherent talent. Even so, the loss of the toss, and the consequential prospect of having to bat in the afternoon sun on a gravestone of a pitch against the bowling of Christopher Beach and two young associates – Jonathan McCoy and Will Davidson - daunted he who was otherwise beyond fear. His only comfort came with the news that he would not have to confront John Vardy. John was to miss this match for the first time in 17 years. An unmissable family commitment had precluded his appearance.

When, however, one lifted one's eyes from the turf to the surrounds, and considered the huddle gathered for the toss of the coin, the scene was pitch-perfect. The D W Lucas Oval sits like a village green in the leafy valley of Gardiner's Creek. Twenty-two fit, bouncy, nervy cricketers, dressed as for an Ashes Test, watched as the umpires, similarly accoutred, declared that the chosen coin did not have two tails. Penaluna tossed, Croucher called, and heads it was. The SCV XI turned to the pavilion to prepare for its innings.

They were not playing for peanuts. This is not a cricket match for the faint-hearted. The Judicious Cricketers' Trophy is something for which a tough contest – fought, nevertheless, with strict adherence to the principles of International Humanitarian Law - is fully justified. Indeed, that is part of its charm as the centrepiece of a fine and gracious tradition. When lost, the trophy sits proudly in the prize cabinet of the winning ACS captain. When won, it sits with equal pride on a Supreme Court mantelpiece. Seen with the afternoon sun behind it, it is often mistaken for the Melbourne Cup. It arrived, superbly polished for the occasion, resplendent in the custody of Penaluna. He had held it in trust for the last 12 months. He claimed that, if equity were to prevail, the Supreme Court would uphold his trusteeship. These were submissions which the Bench received with incredulity.

In accordance with laws of universal validity, Bob Hopkins opened the bowling. In accordance with those same laws, he bowled Patrick Hansen with the first ball of his second over. Hopkins does not operate under the rule of law as mortals know it. Patrick, the son of doughty tipstaff Frank, had done well to last that long. At the other end, Jonathan McCoy, Associate to McMillan J, was joined on Patrick's departure by Will Davidson, Associate to McDonald J. A flurry of runs followed – miracle of miracles, Hopkins was hit for 3, 2, 2 and 2 in successive balls – but the partnership succeeded only to a point. When McCoy was stumped for 12 – odd, this, since judges' associates are never stumped for anything - the ACS team, being the sportsmen that they are, resisted the temptation to point the way to the pavilion. They simply breathed a huge sigh of relief.

Their sighing continued thereafter. Geoff Fraser and Will Davidson (29) added 44, while Fraser (36) and McDonald J contributed another 40. The partnership between Fraser and McDonald was the highlight of the match. This was batting of real quality, a delight to watch even if you were a bowler. It ended with Fraser being run out (not his Honour's best call) when Fraser was only 4 shy of compulsory retirement. The judge more than compensated by deservedly reaching that landmark after an additional 40 runs had been added in partnership with Rod Ratcliffe (16). By then the SCV had reached 5 for 145. The remaining batters increased that to 171 before the allocated 40 overs were completed with 9 wickets down. Hopkins had, for him, an ordinary day: 3 for 21 from 8 overs. His performance nevertheless could stand proudly alongside those of McDonald, Fraser and Davidson.

Penaluna's prescience of the morning proved to be the reality of the afternoon. The pitch, however, was only partly to blame. When by bowling of real skill Davidson takes 3 wickets for 10 runs, McCoy 3 for 12 and Beach 2 for 19, 171 is an unreachable destination. Each bowler was assisted by the superb wicket-keeping of Patrick Hansen. The result was an ACS score of a mere 74, giving the Supreme Court its most decisive victory in 17 years. How could this be, when Vardy was not there? This is a mystery which no jury could solve. But, at least until summer once again calls the SCV XI into action, the Judicious Cricketers' Trophy will sit on a Supreme Court mantelpiece.

Bar, Bench and Solicitors golf day

CAROLINE PATTERSON

Twenty four golfers representing the Bar, Bench and Solicitors competed in a four ball event, with the result declared a draw. The Sir Edmund Herring Trophy has been retained by a representative of the Bar as we were, coming into the day, the reigning title holders.

The conditions at the Kingswood course were ideal, as was the weather. A beautifully prepared lunch was enjoyed after the round in the clubhouse, in a jovial and relaxed atmosphere amongst the group, despite the frustrations of the barristers, who were in the majority, about the overall result!

The next scheduled event at this stage will be the Victorian Lawyers versus NSW Lawyers Golf Day on 20 October 2017.

All golfers, regardless of ability, are invited and encouraged to participate and put in a good show against our rivals up north. Stay tuned for further notices and developments.

From left to right: James Syme, Ian Dunn, Michael Proud, Rex Wild, Tony Kenna, Declan Hyde, Bob Miller, Norman O'Bryan SC, Jeff Sher QC, Philip Jewell, Judge David Parsons, Peter Rashleigh, Caroline Paterson, Myles Tehan, Fran O'Brien QC, Alan Middleton, John Dunne, Huan Walker, Ron Tait, Tim Tobin SC, Gavan Rice, Adrian Anderson and David Curtain QC

ILLUSTRATION BY GUY SHIELD

News AND Views

Now I know what I want to do when I grow up:

Volunteering at the Capital Post-Conviction Project of Louisiana

BY NATALIE HICKEY

His arm (metaphorically) twisted high up his back, Ken Howden is somewhat reluctantly sharing his story of volunteering at the Capital Post-Conviction Project of Louisiana for 10 months in 2015-2016.

Ken is not a 'look at me' person, but in the spirit of paying it forward, he is prepared to offer some insights, to help others who might wonder whether the experience is for them.

He is a commercial barrister, whose practice more typically involves assessing the strength of insurance claims and the applicability of exclusion clauses, than searching through transcript in capital cases for appellable error.

Ken's interest in the activities of Reprieve (a not for profit organisation in the United Kingdom and Australia opposed to the death penalty) was sparked some years ago by barrister Ashley Halphen, who spoke about his own experience as a volunteer. Ken was also influenced by Justice Lex Lasry, with whom he shares a love of music, and who has experienced first-hand the tremendous challenge of representing people on death row in countries (at last count there were 25) still implementing the death penalty.

And so, with his wife Emma and two school-aged children (then aged 16 and 13), Ken packed his bags and relocated to New Orleans in the United States for almost a year. He and Emma, who is also a lawyer, had initially intended to do consecutive three-month internships, but they ended up doing it together.

He appreciates this was a little left field for a commercial barrister but, when queried on his motivation, says, "In my case, perhaps it's a small case of giving something back."

Ken is cautious about sharing too much about his experience because interns are subject to strict confidentiality requirements. The work is sensitive and the stakes are high.

What he does share is that the internship program usually goes for three months. Interns are placed in an office where they might do photocopying, carry the bags, undertake research and are otherwise general dogsbodies around the office. Most interns are students starting their legal career. Ken was a 'little' older than the typical demographic, but he says he fitted in fine. His experience meant that he undertook more legal research and writing than is probably typical.

He says, "Louisiana has about five million people and 42 judicial districts. This means there are 42 panels of judges, 42 sheriffs, and 42 district attorneys—every last one of them elected. Democratically. You get arrested, charged, then tried, at this District Court level. Some DAs go for the death penalty, others don't." Whilst Ken is circumspect, one can readily infer that we are in the Deep South and that the United States legal system is more overtly political than the Australian system.

He then explains that "matters come to the Capital Post-Convictions Office of Louisiana after normal appeals are exhausted, in which case the prisoner has become 'death eligible'. So one immediately files a habeas corpus petition in the federal courts whilst the Louisiana state court post-conviction review process continues."

The trial record is readily available for inspection and analysis, Ken says. He explains the task, in that "you are picking over transcript, motions, orders, investigators', district attorneys' and previous defence lawyers' files, looking for errors." He observes that practising in this

jurisdiction involves a lot of attention to issues of 'due process'.

Navigating this legal maze means that one has to develop a swift understanding of precedent in circumstances where there are 50 states in the United States of America, as well as a myriad of state courts and a seemingly infinite number of different circuits. Ken notes that one needs to look further if you can't find the precedent you're looking for in your own State.

Some of Ken's descriptions sound like a cross between the Netflix documentary *Making a Murderer* and HBO's *True Detective*. He admits that, once you get to the Bible Belt, things can look a little weird.

He also becomes a bit fierce when describing the life of a person who has been convicted of a federal felony, on the basis that, "your time is never done" and "you're a criminal forever". "Former prisoners are subject to all sorts of disqualification of civil entitlements that to us appear, ah, surprising."

Ken is a devotee of New Orleans piano and a blues fan. He is a blues pianist who has played in bands most of his adult life. He'd been warned

"Some of Ken's descriptions sound like a cross between the Netflix documentary Making a Murderer and HBO's True Detective."

New Orleans had become a museum and that Austin, Texas was where the action was at. He disagrees with this assessment.

"The music remains vital," he says, "it costs next to nothing. I saw Ellis, the father of all the Marsalis boys, for nothing up at Tulane University, saw Jon Cleary and his band for 10 bucks. You can find stuff all over the place. There is a wonderful little bar on Washington Avenue called Verret's. Calvin Johnson, who I would now count as a friend, played sax there with his band. He had a different drummer every week, red hot each time. I was sadly out of practice, but I've warned Calvin that when I go back, I'm going to sit in with them. Miss Kashonda will have to take a little rest."

Ken's use of 'when' he goes back does not go unnoticed and he admits the place has got under his skin. New Orleans is a very special place to him even though he notes it will probably be under water by 2060, that many areas affected by Hurricane Katrina have never been rebuilt, and that there are certain places you just don't go to after 9 pm. He adds to the list, "the climate is awful, but the culture ...!"

In short, as Ken puts it, he loved the joint and he loved the people. He thinks race relations in New Orleans are perhaps better than in other parts of the South because there is high internal migration to the city and a vibrant African-American culture. "White folks have to respect that. And mostly they do." There are parades, Mardi Gras Indians, available street culture and, "they know how to deep fry".

Asked about some of the prisoners he met, Ken won't say very much. The only thing he will say on the record is to observe generally about the criminal justice system that "slavery casts a long shadow there".

Plainly, something has ignited in Ken from his experience. He refers to it as a 'fire in the belly thing' and concludes, "Well, I'm 60 years old and now I know what I want to do when I grow up."

Commerce and the Lower Mississippi, by Ken Howden

We're sitting on the porch in the Louisiana sun, the man who came to fix our pipes and I. Would he care for a soda? "Why thank you, sir: it sho' is mighty warm."

Pretty soon the talk drifts to matters religious. He has been redeemed. The Lord turned his life around that day when he lay in the crack house, shot twice and bleeding out bad.

"He tell me I gotta look after my son. I heered His call. I give it up – the crack. Now we get mebbe forty at our meetin's all hear the word of the Lord."

The Timothy Trumpet of Truth Ministry proselytises where no Presbyterian dares tread. Sometimes the seed is sown in fertile ground. Other times not.

"So. We was this one time out N'Awlins East. We talking to a brother, he 15 years old. He in the retail business. He buy, he sell. Tough business. Stock on hand less cost of purchases 'n' all, they margins pretty thin, he not accumulating no capital.

"He do got security though. I seen his cousin there, behind him in the hall: he got a AK-47. A feckin' mo-sheen gun! And the brother, he got a .45 between his legs, just sittin' on the porch there. Right on the step. He know how to use it? Maybe. I's not askin'.

"He say, 'I got two dime rocks under my tongue. I sell these 'n' I get me some fie chicken an' diapers fo' the baby.' His priorities is his necessities, and his necessities is clear. He heard 'bout the Lord? Lass he heard Jesus don't give out no chicken. No diapers neither."

No soul, it seems, was saved that day. As we both know, by the time that boy is 23 he'll be up at the Farm: picturesque Louisiana State Penitentiary, in West Feliciana parish. It's a consolidation of several former slave plantations, one of which, Angola, lends its name to the facility. There, on the fertile banks of the Mississippi, traditional Southern ways are preserved, and un-mechanised primary production affords gainful occupation for upwards of 5,000 guests of the State.

"Yeh, he be in Angola. Or he be dead."

ILLUSTRATION BY GUY SHIELD

Spies like us?

The David Combe Affair

STEPHEN CHARLES

In 1973, David Combe became General Secretary of the Australian Labor Party, while Gough Whitlam was Prime Minister. Combe had worked very closely with Whitlam and later became a very close friend and associate of Bob Hawke while Hawke was President of the ALP. In late 1982, Malcolm Fraser was still Prime Minister, having ousted Whitlam in 1975. Sensing a Labor victory, Combe resigned as General Secretary to go into business as a Canberra lobbyist. In essence, lobbyists hold themselves out as having access to government, senior politicians and bureaucrats, and offer that access to interested parties for a considerable price. Combe was known to have such access

> “Petrov made startling allegations of a spy ring operating in Australia, including in the office of the Opposition Leader, Dr H V Evatt.”

to a high degree, and his business began very promisingly. He was immediately retained by a number of big corporates.

In 1983, the Cold War was still very much in earnest. Ronald Reagan was President of the United States, and calling the Soviet Union the “evil empire”. Mikhail Gorbachev did not become General Secretary of the Communist Party until 1985 and did not introduce the policies of glasnost (openness) and perestroika (progress) until 1986. The Soviet Union had invaded Afghanistan in 1979, and in 1982 remained in occupation there, bitterly resented and fought by the Mujahedeen. Most of the Western world had imposed sanctions on Russia, and in 1980 the Moscow Olympics had been wrecked by the refusal of many countries to attend.

Since 1974, David Combe had visited Moscow on several occasions. He was well known to be interested in improving relations between Australia and Russia. When he began his lobbying business in 1982, one of his first clients was a company called Commercial Bureau, run by Laurie Matheson. Matheson had been a navy diver, one of those involved in the search for Harold Holt at Cheviot Beach, and while in the navy had taken a course in Russian. Matheson was particularly interested in Russian trade and the potentially enormous commissions and profits involved. Combe already had good contacts in Moscow, and left for a visit to Moscow with his wife in November 1982, in part to assist Commercial Bureau. Combe had been helped in getting visas by one Valeri Ivanov, a First Secretary at the Russian Embassy. Ivanov and Combe had met early in 1982 and Ivanov had been friendly and attentive. Their social contact continued during 1982, with some long lunches at Canberra restaurants.

Ivanov had, however, been identified by ASIO, in some clever detective work, as an officer of the KGB. There is no question that this identification was correct, it was confirmed in various ways and it has never been seriously challenged. Ivanov returned to Russia on leave in June and July 1982 and, while away, ASIO planted a well-concealed bug in his Canberra house. The result of ASIO’s identification of Ivanov was, however, that those who dealt with him also came inevitably to ASIO’s notice. What seemed clear to ASIO was that Ivanov was cultivating Combe.

Combe went to Moscow. He had told Ivanov that he had been asked by Matheson to see Nicolai Smelyakov, the Deputy Minister for Foreign Trade, and Vladimir Suslov, the head of the division of the Soviet Foreign Ministry concerned with Australia. In Moscow, he met Smelyakov and a number of other high level contacts, and it seemed that he had had some success in smoothing out relations for Commercial Bureau. He returned to Australia to report.

The Labor Party under Hawke was elected to Government on 5 March 1983. The election had been called on 3 February. On the same day, Hawke challenged Bill Hayden for the leadership of the ALP and won. Hayden was very upset and annoyed, and later referred to the election as one a “drover’s dog” could have won. The day before the election, 4 March, Combe had dined with the Ivanovs at their house, the whole conversation being picked up by ASIO’s bug. It left ASIO in no doubt that Ivanov, a KGB officer, was engaged in the vigorous cultivation of Combe, and that it was time to report to the new Government that Ivanov was a KGB officer and should be expelled. Combe had given Ivanov a frank exposé of his hopes, casting himself as a person with high access within the Australian Government, and out for a large financial gain. Ivanov, for his part, said he had a written brief to talk to Combe about trading possibilities, originating from Boris Ponomarev (who was the head of the powerful International Department of the CPSU),[1] and signed by the Foreign Minister. But Ivanov’s position in the Soviet Embassy was wholly unrelated to trade. Furthermore, Ponomarev himself was certainly not a trade official. He had masterminded the suppression of the Hungarian rebellion in 1956 and his duties included issuing instructions to the KGB and GRU[2] for any clandestine operations.

In 1954, Robert Menzies, Australia’s longest serving Prime Minister, was facing an election and on the brink of defeat. ASIO then secured the defection of Vladimir Petrov, an official in the Russian Embassy, and his wife. Petrov made startling allegations of a spy ring operating in Australia, including in the office of the Opposition Leader, Dr H V Evatt. The furore which followed resulted in a narrow Liberal victory in the election. The Labor Party was enraged and highly suspicious that ASIO had engineered the whole event to keep Labor out of office. In 1983, many in the ALP still retained the darkest suspicions about ASIO and wanted to see the Organisation abolished. The Director General of ASIO, Harvey Barnett, although aware of Ivanov’s cultivation of Combe well before the March 1983 election, had not passed on ASIO’s concerns about Ivanov’s activities to Government until after the election had taken place, to ensure that there could be no repetition of the Petrov intervention.

It is important to remember that it was never suggested by anyone that David Combe himself ever committed any wrongdoing. ASIO’s concern was that Ivanov was cultivating Combe because Combe was a man of influence in

the new Government. Combe knew every member of the Party well. He had access to all Ministers, and it was for that access that his clients would pay. One example will suffice. The Chief Minister of the Northern Territory, Paul Everingham, was one of Combe's clients. On 5 April, Combe took Everingham on a round of visits to six Ministers in their offices, including Hawke himself. Combe had a number of substantial clients, some of them paying retainers of $50,000, and his business was plainly going to be a very successful one. ASIO was suggesting only that Ivanov and the Russians wanted to convert Combe into an "agent of influence". The agent of influence, in espionage terms, is someone who seeks to change people's minds, leading them to adopt attitudes and policies, in this case supposedly favourable to the Russians, and usually with the source of direction being fully concealed. The agent of influence is also likely to have access to highly confidential documents and governmental information.

ASIO was concerned that Combe was being cultivated for the purpose of making him into an agent of influence for the Russians, and in ASIO's view Ivanov had already injected an element of clandestinity into the relationship. In one conversation on 3 April, Ivanov had told Combe that he (Ivanov) might be expelled from Australia and that he had information which suggested that Combe's phone had been tapped by ASIO after he had returned from Moscow in December. They should not phone each other. Combe said that Ivanov told him that they should make contact only by private visits, i.e. to Combe's office or Ivanov's home. Matheson's evidence was that Combe told him on 6 April that Ivanov had said Combe should keep a low profile and wait for Ivanov to contact him, although Combe denied Ivanov used these words. ASIO had *not* tapped Combe's telephone after he returned from Moscow. It did so only after Ivanov's expulsion

> "With attacks being mounted in every direction, Hawke decided on a Royal Commission."

was announced on about 21 April. Combe did not demur to Ivanov's suggestions. What Ivanov said to Combe on 3 April was completely untrue.

The Director-General of ASIO, Harvey Barnett, saw Hawke on 20 April and told him of ASIO's concerns. ASIO wanted Ivanov expelled. Hawke then called in the Cabinet National and International Security Committee (NIS) consisting of Lionel Bowen, the Deputy Prime Minister; Gordon Scholes, the Minister for Defence; Senator Gareth Evans, the Attorney-General; Bill Hayden, the Foreign Minister; and Mick Young, the Special Minister of State. After meeting again with Barnett, the NIS decided that Ivanov should be expelled, but also that Combe's access to Government, to Ministers and to senior bureaucrats, should be cut off. The decision to blacklist Combe was made by the NIS without any ASIO recommendation to that effect.

In his book about these events, *The Ivanov Trail*,[3] David Marr put it that what happened to Combe was:

> *... a trial, held entirely in secret. The charge, very loosely formulated, was of conspiracy to betray Australia to a hostile power. The accused was absent, had no notice of the charge or the proceedings and was not represented. The judges did not see the primary evidence ... or examine the witnesses.*

Later, Marr (who is not known for understatement) said that "Combe's fate was decided by the Government for its own protection. Combe was a political problem not a security problem." Each Minister saw the danger which lay in "an overt association of someone within the bosom of the Labor movement with someone who has been expelled for espionage activities".[4]

But all Combe had done was pursue contacts in Moscow, offering to assist the Soviet government in perfectly understandable and legitimate ways and then in Australia had met on a number of occasions with a KGB officer — he admitted under cross-examination that he thought Ivanov might be KGB. ASIO thought that Combe may well have been more interested in Ivanov because he believed him likely to be KGB, and would therefore have more influence.

The effect of cutting off Combe's access to Ministers and senior bureaucrats in Government was inevitably and immediately to destroy his lobbying business, already a very lucrative one. Ivanov's expulsion was duly announced. Shortly afterwards the connection with a senior Labor official became public knowledge. The headlines were strident and enormous. The destruction of Combe's business rapidly became public knowledge and a furious storm broke over the new Government's head. With attacks being mounted in every direction, Hawke decided on a Royal Commission, to take place in Canberra, and appointed Justice Robert Hope of the New South Wales Court of Appeal to conduct it. Ian Barker QC and Rod Madgwick QC represented Combe, Michael McHugh QC and Neil Young (of our Bar) the Government, and I was briefed with Alan Archibald to represent ASIO. Barker had previously prosecuted Lindy Chamberlain to conviction[5] and McHugh had appeared for her on her appeals. Barker and his junior and client were very hostile to ASIO, and the atmosphere at the Bar table was most unpleasant. In my role, I spent much time over five months with Harvey Barnett. I found him to be a fine man, a very competent and fair-minded intelligence officer, determined that ASIO should be apolitical, and who should, with ASIO, have been applauded for the organisation's excellent work. Instead, he was subjected to a campaign of hostility and derision by

the press of the time. The very notion of an agent of influence was ridiculed by the press.

Appearing in a highly political Royal Commission can be very stressful. There were 20 to 30 reporters led by David Marr present every day covering the Commission, most of them hoping that ASIO and/or the Government would make mistakes. Much very secret material was involved, and all counsel had to be cleared for security. The difficulty of handling the secret material was considerable because it had to be carried in and out of the Commission (which took place in the Hinkler Building) every day in sealed yellow bags surrounded by hovering reporters. The reporting of the Commission's proceedings was consistently appalling. Combe was conducting a continuous and very noisy campaign against the Government and ASIO, with repeated demands that ASIO should be abolished. This was particularly unfair given that ASIO, by first-class intelligence work, had identified a KGB officer and planted a bug in his house undetected and deserved credit rather than abuse for it. The press treatment of the Commission, and ASIO, was very well analysed in a lengthy piece by Robert Manne in the October 1984 issue of *Quadrant*.[6]

The first problem was preparation. Any advocate getting up a case wants to be in the position of knowing more about the facts than anybody else in the courtroom. A Royal Commission is no exception. I, the last briefed, had only some three weeks in all to get ready. A number of the ASIO witnesses came out to our house in East Malvern in the evening, wanting absolute confidentiality. One night I said to my wife, Jenny, at dinner that I had some people coming to the house who insisted on complete secrecy and that I wanted her to keep our four children away from my study at the front. Jenny told the children they were to keep away from my study, and that I did not want to be disturbed. The elder three, showing all the benefits of a good upbringing, readily agreed. Our fourth child, not yet 10, was later heard by Jenny, calling out from the first floor, "Right, troops, upstairs, front room, quick, secret agent approaching at a fast walk".

The Commission started. The first weeks—indeed two months—were spent *in camera*, questioning ASIO witnesses. ASIO had to establish that Ivanov was a KGB officer, that the organisation was justified in its concern that his activities had gone beyond what was diplomatically acceptable, that the organisation was justified in its surveillance of Ivanov, Combe and others, including the bugging operation, and that they were justified in reporting their concerns to Government. There was a great deal of very hostile questioning, particularly from Combe's counsel, much of it informed by deep-rooted hostility to ASIO and its methods, and scepticism as to its competence. The evidence given *in camera* was mostly published later, after the portions regarded as secret had been redacted.

The remainder of the evidence was given mostly in open hearings. We heard from all the NIS cabinet members involved and the longest witness was David Combe himself who spent over a fortnight in the witness box. The Commission's hearings lasted 4½ months over a cold Canberra winter.

The purpose of cross-examination is to extract information helpful or favourable to your case from witnesses who are frequently hostile, a process which often involves trying to make an unwilling witness give evidence damaging, hurtful or embarrassing to the witness or those who called him. One of the rules of cross-examination is usually not to ask a question unless you have a very good idea what the answer will be. In court, counsel can control the witness, and if the witness strays from the question, one can stop the answer. When trying to get a particular answer from a difficult witness, one method is to attempt to build walls around the witness so that when one reaches the critical question, there is only one exit the witness can take. But cross-examining politicians is a very different matter. They are well-used to questions from the press and in parliament, and in such situations easily avoid difficult questions. I was attempting to get from each of the NIS ministers agreement that ASIO had a legitimate concern about Ivanov's activities, that they had acted properly in reporting what they had learnt to the Prime Minister, and that what was reported was correct.

Each of the six NIS ministers gave evidence and was cross-examined. The two most important from ASIO's viewpoint were the Prime Minister and the Attorney-General (Senator Gareth Evans), the latter being the minister responsible for ASIO. Hawke gave evidence over three days, Friday to Sunday, the Commission taking evidence the whole weekend to enable him to leave on Monday for an overseas trip. It is very rare for a Prime Minister to spend time in a witness box, still less to be subjected to cross-examination.[7] Hawke had at least three areas of real danger to cover in his evidence, the most difficult being the decision which had been made by cabinet to cut off Combe's access, even after Ivanov had been expelled. Hawke had completely mastered the facts beforehand and was a brilliant witness; he had had much courtroom experience, having been the ACTU advocate in many national wage case hearings. Hawke had raised to a high art the ability to avoid answering a difficult question, frequently by answering a different question of his own choosing; and he repeatedly employed these tactics to prevent Barker, his principal opponent, from pursuing him on areas of difficulty. Senator Evans was also a difficult witness, in his case more because of the length of his answers. Bill Hayden's evidence was interesting because his understandable resentment at his treatment by the

ALP was still simmering, which made him potentially explosive, and his answers unpredictable.

In summary, the NIS ministers all accepted that Ivanov was a KGB officer attempting the cultivation of Combe, and that ASIO was acting properly in reporting what the organisation had learnt to the Prime Minister and the NIS committee. As David Marr put it in his book:[8]

> *The government's difficulty was that the action it took against Combe was not recommended by security, security was not consulted on it, and it cut across ASIO's need for unobtrusive surveillance of the lobbyist. ASIO had come to the prime minster and the NIS ministers with no proposition for the punishment of Combe.*

Marr, a strong opponent of the Government and ASIO, and Combe's chief supporter in the press gallery, said of the Prime Minister's evidence that:[9]

> *Hawke's performance was the turning point of the Commission. He gave the government's case precisely the boost intended. The papers were still asking "What has Combe done?" but they carried also accounts of a supremely self-confident prime minister, and the courage he displayed in feeling compelled to cut off his old friend.*

The next witness was Combe himself, who was cross-examined for a fortnight. Combe had not been very forthcoming in putting his position to the Government about what he had discussed with his Russian contacts, or the help he had offered – for example to overturn the sanctions that Australia then supported. Combe agreed in the witness box that he was trying to overturn sanctions (it was indeed ALP policy) and that in conversations with Soviet officials he had been highly critical of the then Liberal Government and its Prime Minister, Malcolm Fraser.

In his statement to the Government, explaining his position, Combe had said of his trip to Moscow that:[10]

> *There is nothing that wittingly I did or said within the Soviet Union which could be viewed as an impropriety or which could be seen by any reasonable person to reflect any discredit or embarrassment upon ... my country.*

But Combe admitted in cross-examination that both in Moscow and with Ivanov he had been doing his best to discredit the then Government of Australia and he made no apology about his attitudes to non-Labor Governments in Australia.

He might have avoided a great deal of trouble if he had said frankly that he proposed to make a great deal of money out of Russian trade through his contact with Ivanov, leading to work possibly as a consultant with or on commission for the Russian Trade Ministry, all of which would have been entirely legitimate.

A point of particular significance in Combe's evidence was Ivanov's proposal for clandestinity. It was put to Combe that if Ivanov's warning was genuine, it must have led him to the view that ASIO had been penetrated by the KGB, that there was a mole inside ASIO. I asked Combe what he thought of this and he said that he regarded the possibility with amusement. He said that he felt no patriotic obligation at all even to report to anyone that ASIO had, in his view, been penetrated by the KGB. The implications were, as one of his callers said on the telephone, "enormous", to which Combe's response was, "So, it is a great story." The difficulty for Combe was, of course, that Ivanov's warning was either genuine and truthful, with very serious implications, or a false and cunning attempt to shift their relationship into clandestinity. Either way, Combe's case was in difficulty. Many in the press gallery found it genuinely amusing that I had suggested Combe had a patriotic duty to report that he thought ASIO had been penetrated by the KGB.

The judge's report, after the evidence was finished, cleared all parties. He found Combe was not a spy, not guilty of any crime nor any breach of national security. He found that Ivanov was an active KGB agent, cultivating Combe for illicit purposes: to have him act wittingly or

ILLUSTRATION BY GUY SHIELD

unwittingly as an agent of influence.[11] He found that Ivanov had in Combe as promising a target "as he was ever likely to get". The judge cleared ASIO, saying it had adopted a cautious and objective attitude, and that the Director-General's presentation to the Prime Minister had been adequate, objective and fair. He also cleared the Government, concluding that the Government was justified in deciding that the relationship had serious implications for national security.

Combe has done very well since. Shortly after the Commission ended, he was given a position as Australian Trade Commissioner to Western Canada based in Vancouver. He is now a successful businessman, having been for some time a director of Southcorp Wines, and Evans & Tate Limited. He has an unblemished reputation.

Those who doubt whether ASIO was entitled to have concerns about Ivanov's interest in David Combe should consider the eerily similar case of Arne Treholt. Treholt was a member of the Norwegian Labour Party and worked as a journalist for the national daily *Arbeiderbladet*. His father had been Minister for Agriculture in the Labour Government and Treholt read political science at university. He had made a name for himself in the anti-Vietnam war movement in Norway, his ideological leanings were known to be strongly anti-American and, in the early 1970s, he produced several articles attacking the CIA. He became Political Secretary to the Commerce Minister, Jens Evensen, before Evensen became Deputy Foreign Minister in the Bureau of Maritime Affairs from 1976 to 1978.

From 1979 to 1982 Treholt was connected to the Norwegian UN delegation in New York as an Embassy Councillor. During the years 1982 to 1983 he studied at the Norwegian Joint Staff College. He was also a department head of division in the Norwegian Ministry of Foreign Affairs from 1983. In 1983 Treholt was being spoken of as a future Foreign Minister of Norway. In January 1984 he was arrested, charged with espionage on behalf of the KGB, and described as the greatest traitor to Norway since Vidkun Quisling. In 1985 he was sentenced to 20 years in prison for high treason and espionage and served a prison sentence until being pardoned by a Labour Government in 1992. After his release from prison, he settled in Russia, later in Cyprus.

Treholt's articles against the CIA had attracted the attention of the KGB residency in Oslo, and he was invited to an embassy cocktail party, followed by a long series of contacts with Russians over long lunches. The Russians flattered the young Norwegian into believing he could serve Norwegian interests by bridge-building between the East and West. The KGB then offered him over-generous payment for performing a pedestrian task, a well-worn intelligence tactic and recognised as a standard procedure used in recruitment operations by the KGB. His principal contact for the previous three years had been one Yefgeniy Belyayev. Belyayev introduced Treholt to a new contact, General Gennadiy Titov, the KGB resident in Oslo. Titov proposed to Treholt that in future their relationship should be much more low profile, and that he should never write Titov's name in his diary, nor phone him at the Soviet Embassy, the excuse for these measures being Titov's allegedly busy program.

The KGB then began to develop Treholt's access and talents to their own ends. Treholt had considerable access to intelligence and people, being a consultant to the Foreign Policy Institute of Norway. In 1977 the USSR and Norway negotiated a sensitive treaty covering disputed coastal waters, which had been the cause of considerable ill-feeling between the two countries. Evensen was the Minister responsible for the Norwegian side of the negotiations, and his principal advisor was Treholt. Treholt showed Titov in Moscow his notes on the negotiations as well as secret Norwegian State papers, and the talks ended in what many believed to be major concessions being made by the Norwegians in favour of the Soviets. Treholt's next step up the ladder came when he was appointed to the UN as a member of the Norwegian delegation. Before setting out he was called to Helsinki to meet Titov and received contacting and other instructions from New York. He was told to leave notes in newspapers for his new KGB contact or even in automobile exhausts. His later explanation for doing this was simply that he had only been trying "to improve Norwegian-Soviet relations". Treholt was arrested in 1984 before boarding a plane to Vienna, and his briefcase was then found to contain a large number of classified documents from the Foreign Affairs Ministry. Over the period 1974 to 1983 Treholt had in fact provided thousands of documents to his KGB controllers and the damage in terms of Western security in Europe had been incalculable.[12]

All of this underlines the extent to which an agent of influence with good access may be useful to and used by a foreign power.

The question remains whether the Government was entitled to cut off Combe's access without warning him, and after Ivanov had been expelled. Justice Hope found that the Government had acted properly. Combe himself said that even after the Director-General explained ASIO's case to him, he still did not accept that Ivanov had been cultivating him with any sinister motive.

Notwithstanding Justice Hope's full endorsement of ASIO and its actions, the press remained militantly antagonistic. Journalists such as Paul Malone of *The Australian Financial Review*, and David Marr and Paul Kelly of *The Sydney Morning Herald*, took the view that Combe had done nothing wrong and had been condemned for what he might

have done. Paul Kelly wrote of the Government's ruthless cynicism and brutality. Michelle Grattan wrote of the seven-month destruction of Combe. Geoffrey Barker in *The Age* wrote of ASIO's talent for investing seemingly fatuous remarks with conspiratorial significance and of ASIO's paranoiac world view. Laurie Oakes was throughout a very close friend of Combe.

These journalists presumably saw nothing illegitimate or sinister in a KGB officer suggesting to an influential Australian citizen with unrivalled access to Government, that he attend meetings designed to erode ASIO surveillance, and nothing wrong in that citizen apparently acceding to—certainly not rejecting—such a suggestion. Nor did most of them see anything wrong—or other than amusing—in the KGB having a mole inside ASIO, nor, it would appear, would they feel any obligation to report the fact to anyone in authority.

Many might think that after Mikhail Gorbachev's reforms, everything has changed. But President Putin was a senior officer in the KGB before he retired to enter politics, and he appears determinedly on the path to restoring Russia to the position of strength and East European hegemony it enjoyed in the mid-20th century. Many believe that Russia remains ruled by former KGB officers, or the Siloviki, as they are called.[13] Arne Treholt's story suggests that the notion of the "agent of influence" still has a general relevance today (not least to American and Australian politicians) and that those who deal with foreign powers should bear firmly in mind what happened to both Treholt and David Combe.

1. Communist Party of the Soviet Union.
2. The military intelligence arm of the Russian Federation.
3. David Marr, *The Ivanov Trail*, Thomas Nelson Australia, 1984, 209-210.
4. Ibid, pp 230–231.
5. Lindy Chamberlain was three years later found innocent and acquitted, after her appeal to the High Court had been rejected and after a Royal Commission had been conducted by the Hon Trevor Morling QC.
6. Robert Manne, "David and Goliath, the Media and Mr Combe", *Quadrant*, October 1984, 22–39.
7. When John Howard gave evidence to the Australian Wheat Board Commission, no counsel were permitted to cross-examine.
8. Marr, op cit, p 257.
9. Ibid, p 303.
10. Ibid, p 319.
11. *The Official History of ASIO, 1975-89*, by John Blaxland and Rhys Crawley, Vol 111, 2016, makes detailed reference to the Combe affair and the Commission at 245ff. At 259, it reports that at Ivanov's farewell party at the Soviet Embassy, the KGB station chief, Lev Koshlyakov, was furious with Ivanov for having gone too far too soon.
12. Much of the information here regarding Treholt is taken from the excellent book by Harvey Barnett, *Tale of the Scorpion*, Allen & Unwin, 1988, pp 62–69. The details of this KGB operation can be found in an article by William Shawcross in *The Spectator* of 7 June 1986, later reprinted in *Quadrant* in September 1986.
13. The KGB was disbanded in 1995, and President Yeltsin substituted the FSB (Federal Security Service of the Russian Federation).

The Judicial College of Victoria Master of its fate

VBN

Do you ever wonder how a fellow lawyer transforms one day into a judicial officer? Sometime, shortly after the ceremonial sitting, judges attend their first judicial education program on one of the upper levels of the William Cooper Justice Centre. Here there is a red brick classroom with inspiring justice themed quotes blazoned on the walls from the likes of Nelson Mandela and Milan Kundera.

In *The Republic* Glaucon said "it would be absurd that a guardian should need a guard." When the Judicial College of Victoria was established in 2002 the prevailing attitude of the judiciary was much like Glaucon's. The oath of judicial office requires judges to discharge their duties according to law, to the best of their knowledge and ability, without fear, favour or affection. Why should the judiciary need a College?

Much has changed since then. One notable exception to that attitude was the Chair of the College for the last 13 years, the Honourable Chief Justice Marilyn Warren AC. Given the motto of her Honour's almer mater was *ancora imparo*, it is unsurprising that the Chief Justice has been a genuine enthusiast for judicial education, and recognises that implicit in the oath is a commitment to the acquisition of and continual improvement of the competencies required for judicial work.

The Judicial College is an important part of the Chief Justice's legacy, a legacy that will be the subject of much comment given her retirement in October this year. Without wishing to embark on premature hagiography, her Honour has done so much for the College since its inception that she has almost become the patron of judicial education. As CEO Samantha Burchell observes, her Honour's authentic, passionate advocacy for learning and leadership will be missed.

The College was established as a means of supporting members of the Judiciary with peer education. It came into being in 2002 with bi-partisan support under the Judicial College of Victoria Act 2001 as an initiative of the then Attorney-General, the Honourable Rob Hulls.

The College Board comprises the heads of the six Victorian jurisdictions, and two Governor in Council appointments. The purpose of the College is to ensure judicial officers in all Victorian jurisdictions are up-to- date with the latest developments in the law and to assist them to refine their skills as judges. It also supports new judicial officers in their transition from practice to the bench.

In its first 15 years the College has flourished and branched out to provide support and learning to the wider legal profession. The flagship for this outreach are the bench books, including the Criminal Charge Book, and the sentencing, criminal procedure, evidence, and human rights manuals — all of which have become indispensable to judges and practitioners alike.

The bench books are compiled by a small team of four researchers, and supervised by judicial editorial committees. Perhaps the most significant of these is the Criminal Charge Book. Prior to its development and introduction, judges were reliant on Judge Kelly's charge book to cobble together jury directions. Given the legislature's proclivity for amending and changing the elements of sexual offences, and the occasional High Court decision like *Getachew*, parts of the Charge Book are a palimpsest. Its contribution to the administration of justice cannot be underestimated.

Then there is the Sentencing Manual. With the 900 sentences in the higher courts (not to mention the tens of thousands of sentences in the Magistrates' Court) handed down every year in this State, and the dramatic changes to the sentencing landscape effected by Court of Appeal's explanation of CCOs in *Boulton*, keeping the Sentencing Manual up to date must look like a scene out of the sorcerer's apprentice. Edited by Patrick Tehan QC, the Sentencing Manual's summaries of recent cases have become even more important in the prosecutor's tool kit since the High Court handed down its decision in *Barbaro* — which prevents prosecutors making a submission on sentencing range.

The Children's Court Bench book supplements retired Magistrate Peter Power's important work in this area. For the novice Charter barrister, the Charter of Human Rights Bench Book, edited by Justice McLeish, no less, is much easier to understand than *Momcilovic*.

But apart from what would appear to the barrister to be the College's core business of ensuring that judges have a hymn sheet to sing from that makes jury directions appeal proof — the College does much more for the well being of the judiciary that is invisible to the public.

The College has taken an interdisciplinary approach. It provides judicial education in a range of diverse areas including judgment writing and learning how to be culturally sensitive in the court room. At one end of the spectrum, the likes of Helen Garner, Chris Wallace-Crabbe AM, Gideon Haigh, and Jamie Button have taught

> "The ambition of the College is nothing less than to be akin to a judicial university"

judges how to write judicial prose. At the other end of the spectrum, in 2015, the College teamed up with Carly Schrever, a PhD candidate from the University of Melbourne School in Psychological Sciences, to investigate what promotes well-being in the judicial environment.

Judges are subject to stress, oppressive caseloads, intense scrutiny, professional isolation, and traumatic material like child murder and exploitation imagery. Increasingly it is acknowledged that judges, just like the rest of us, can be subject to stress, depression, and vicarious trauma.

The education the College provides is for the most part judge led. However, the College works with other parts of the profession, such as Victorian Police, Legal Aid, case workers and court staff, and with the Academy. It also teaches judges oral decision skills, how to manage their court rooms, and how to use and understand new technologies effectively. The "Court Craft 360 Degree Feedback" program provides for constructive feedback from counsel and peers.

The work of the College is concerned not just with the law, but with the other significant roles that judges must play: for instance as leaders and managers. Increasingly, judges today have roles in the administration of courts and must understand how to lead and how to strategize. They need to be familiar with concepts of governance, finance and organisational risk, which might not be part of their core skill set. The College offers programs to assist judges to develop such skills.

The College teaches not just the law, but skills-based courses in lecture-style seminars, workshops and day long programs. Flicking through the College 'Prospectus' one can find courses on 'Latin: the Language of the Law'; 'Views from the Jury Box'; 'Cultural Sensitivity in the Court Room'; 'A Visit to Wathaurong country'; an interactive solution-focused program on judicial well-being; a number of programs dealing with decision making and court craft, and a six day orientation program for newly appointed Supreme and County Court judges. Its schedule of programs to be delivered in 2017 is full.

2017 sees the Judicial College launch its Strategic Statement for the next decade. The theme for the plan is "Masters of our Fate." The Shakespearean reference wasn't chosen to incite murderous rage in puisne judges because the Court of Appeal bestrides the narrow world like a colossus, whilst they walk under their huge legs like underlings, and peep about to find themselves in dishonorable graves — but because it invokes the universal theme of

destiny: "Men at some time are masters of their fates; The fault, dear Brutus, is not in our stars, but in ourselves, that we are underlings". As an organization, the College must be decisive about its purpose as it steps into the future.

The ambition of the College is nothing less than to be akin to a judicial university: expanding its scope to deliver bespoke education for other legal organisations in Australia and abroad; seeking appropriate value from its its intellectual property; acting on high priority education needs like family violence, youth justice and bail; exploring empirical research into issues such as judicial well-being; and deepening partnerships with the judiciary, academia, and policy makers.

If the last 15 years are anything to go by, the College is destined to become an institution to be cherished for supporting the ongoing education and good health of the independent judiciary, who in turn guarantee the rule of law itself.

Direct questions and leading questions

ANDREW PALMER AND GEORGE HAMPEL*

Few rules are as likely to cause the inexperienced barrister more anxiety than the rule against leading questions. If an opponent persistently objects that counsel is leading, counsel may become so unsettled as to abandon any attempt to elicit the evidence. To avoid this happening, counsel may reduce his or her examination in chief to an endless repetition of the one question to which they are sure their opponent will never object: "What happened next?"

While this question may be safe, it has the very serious defect of shifting responsibility for the examination in chief from counsel (to whom it belongs) to the witness (to whom it does not). In any given moment, myriad things occur: how is the witness to know which of these counsel is asking about? Of course, what counsel usually means when he or she asks a witness such a question is "Could you please tell the court about the next thing that is mentioned in your statement?"

Experienced witnesses, such as police officers, will usually understand that this is what counsel wants, and will be able to give their evidence without the need for any real guidance. But inexperienced witnesses are unlikely to know which details are important and which should be left out. They need counsel's help to tell their story. Questions like "What happened next" give them no help at all.

Examination of the "What happened next" type usually indicates one or other of two things. Either counsel is under prepared, and therefore unable to guide the witness through his or her story because counsel does not know what that story is or how to tell it. Or counsel does not appreciate the distinction between a leading question – which is prohibited – and a direct question – which is not.

"Direct questions" are, in Glissan's words, questions that "draw the witness' attention to the precise matter about which you wish him or her to give evidence, but fall short of suggesting the answer". There is no rule against direct questions: indeed, it is impossible to conduct an effective examination in chief without them. By contrast, using leading questions to elicit evidence about contested facts should be avoided even if one's opponent doesn't object: this is because evidence elicited in that way has very little probative value. What then is the difference between direct and leading questions?

When is a question leading?

The rule against leading questions prohibits suggestion. So much is confirmed by the definition in the Dictionary at the end of the Evidence Act 2008. This definition of "leading question" informs both s 37, which prohibits the use of leading questions in examination in chief or in re-examination (subject to a handful of exceptions including questions that relate to introductory matters or matters that are not in dispute); and s 42, which permits the use of leading questions in cross-examination (unless the court disallows it).

The definition in the Dictionary recognises two types of leading question:

> *Those that directly or indirectly suggest a particular answer to the question; and*
>
> *Those that assume a fact which is in dispute in the proceeding and about which the witness has not yet given evidence.*

Whether a question is leading will depend on the issues, the context and the wording of the question. For example, it would not ordinarily be considered a leading question to ask a witness testifying about an event that occurred on a weekday in William Street "What were you wearing", without first establishing that the witness was wearing something. But if the witness was testifying about events that occurred in a nudist colony, it might well be. On the other hand, it would usually be leading for counsel to ask "What were you wearing on your head" unless counsel had first asked "Were you wearing anything on your head?"

Of the two types of question described in the Evidence Act definition, it is the first with which we are primarily concerned. The test, then, is whether the question suggests a particular answer. Importantly, it is not determined by whether or not the question is capable of a "yes/no" answer. Of course, most leading questions can be answered in that way; but not every question that can be so answered is a leading question.

For example, in a case where a witness has testified that the accused punched him in the face, it is not leading to ask the witness "Did that hurt" (followed, if the answer is "Yes", with "How much [or where] did it hurt"). However, it would be leading to instead ask the witness "Did that hurt a lot". And in a case where a witness has testified about words that someone said to them, it is not leading to ask "How did those words make you feel?" However, it would be leading to ask "Did that make you feel alarmed [or threatened, or upset]?"

Similarly, in a case where a witness has testified that she saw a vehicle entering an intersection that was controlled by traffic lights just before the vehicle collided

ILLUSTRATION BY GUY SHIELD

> “Flustered and floundering, counsel may retreat into questions so convoluted or oblique that they leave the witness clueless as to what information is being sought.”

with another, it is not leading to ask “Did you see what colour the traffic light was at the time that the vehicle entered the intersection” (followed, if the answer is “Yes”, with “What colour was it?”). However, it would be leading to ask “Was the traffic light red?”

And again, in a case where a witness has identified the accused as the person he saw in a particular location, it is not leading to ask “Had you ever met the accused before” (followed by questions that elicit the details and circumstances of previous meetings). However, it would be leading to ask “Had you previously met the accused on a number of occasions?”, or “Did you know the accused very well?”, or “Had you previously met the accused while you were both students at Melbourne University?”

The non-leading questions in these examples direct the witness’ attention to the matter of interest, but do so without suggesting a particular answer. The leading questions, by contrast, contain details that go beyond what is needed to direct the witness to the matter of interest, and so put words in the witness’ mouth. This diminishes the value of the witness’ testimony. It is also unnecessary: once the witness’ attention has been directed to the matter of interest, it should be relatively easy to elicit the desired detail through the use of non-leading questions.

A failure to appreciate the distinction between direct and leading questions can expose counsel to objections that have the effect – often no doubt intended – of undermining counsel’s confidence in his or her capacity to elicit the necessary evidence. Flustered and floundering, counsel may retreat into questions so convoluted or oblique that they leave the witness clueless as to what information is being sought. Unable to elicit the evidence, counsel may simply give up and “move on” to the next topic.

Anatomy of an examination

We can see these dynamics being played out in the transcript of an occupational health and safety prosecution. We have taken some small liberties with the transcript for the sake of succinctness. There is nothing particularly remarkable about what occurred in this case: we have both seen scenes such as these replicated on numerous occasions.

The prosecution related to an incident in which an employee fell from a roof and suffered serious injuries. During the prosecutor’s examination in chief of the employee, defence counsel repeatedly objected on the grounds that the prosecutor was leading. Some objections were soundly based, such as the objection to the following question:

> *And you’ve earlier given evidence about seeing the safe work method statement [SWMS]?*
>
> *Yes.*
>
> *Is that the time that you say you saw the SWMS?*

This is a leading question, because it suggests to the witness that he saw the SWMS at a specific time. Instead, having confirmed that the witness had previously seen the SWMS, counsel should have asked the witness a question along the lines of “When did you [first] see the SWMS?”

Other objections were less well-founded. For example, the employee gave evidence that due to there being bracing on the building under construction, he was unable to reach from inside the house to install flashing; nor could he set up his ladder. After a brief digression into other matters, the prosecutor asked:

> *As I understood your evidence, that made your task difficult, you said?*
>
> *Yes.*
>
> *DEFENCE COUNSEL: No, that’s not what he said, Your Honour, and perhaps if my friend doesn’t lead.*
>
> *PROSECUTOR: All right. There was some difficulty because of bracing?*
>
> *Yep.*
>
> *DEFENCE COUNSEL: Again, please don’t lead, objection, Your Honour.*

The first question was vulnerable to objection because it involved a characterisation or conclusion about what the witness had previously said. No doubt this was for the purpose of directing the witness’ attention back to his previous evidence in order to then elicit further detail. As it happened, the court agreed that counsel’s characterisation of what the witness had said was accurate: the witness had been saying that there was some difficulty in carrying out his work because of the bracing. Nevertheless, it probably would have been better for counsel to have first reminded the witness of the effect of the bracing (using the words the witness had previously used), and then asked the witness what impact the bracing had on his ability to carry out his work, or even whether the bracing made it difficult for him to carry out his work.

The objections continued. Shortly after the passage above, the prosecutor attempted to elicit evidence from the employee about discussions between him and his supervisor on the day of the incident:

> *Did you have any discussion with [the supervisor] upon arrival on [the day of the incident] at the site?*
>
> *DEFENCE COUNSEL: Leading.*
>
> *PROSECUTOR: How did you know what you needed to do?*

Because we were there from [four days prior to the incident].

And how - did you see [the supervisor] - - -

DEFENCE COUNSEL: Objection, this is leading as well, Your Honour.

PROSECUTOR: You've attended there with [the supervisor]?

Yes.

Did you see him when you - did you see him prior to the incident?

DEFENCE COUNSEL: Your Honour, objection, same objection, it's a leading question.

Actually, it was not leading to ask the witness whether he had seen the supervisor at the site on the day of the incident but prior to its occurrence (although to be completely safe, counsel might have taken a slightly longer path, first asking "Was anyone else at the site when you arrived", followed, if the answer was "Yes", with "Who was at the site when you arrived?")

Given that the witness had not yet given evidence that the supervisor was there when he arrived, it may have been a leading question (of the second, not the first, type) to ask the witness whether he had any discussions with the supervisor on arrival. However, this problem could easily have been rectified by reversing the order of the questions:

First ask the witness whether he saw the supervisor at the site on the day of the incident before the incident happened;

Follow up with a question about when or where he saw the supervisor;

If the answer was "on arrival", then follow up with a question about whether he had any discussions with the supervisor; and

Finally elicit what was presumably the crucial piece of evidence: what was said during those discussions.

Instead, as can often happen, counsel feeling that the path to this topic was blocked by objections, shifted to a new topic, no doubt trying to come back at the issue from a different direction. Counsel asked "What was your understanding as to safety measures as to any of the sites that you attended?" But defence counsel objected to this question too, on the grounds that it had not been covered in the witness' statements. The court later ruled that in examining a witness, counsel is not prohibited from eliciting details and explanations that flesh out the bare bones of a witness' statement; and if that leads to the disclosure of matters that require opposing counsel to seek instructions, then opposing counsel can be given time to do so.

But at this point, with the path to the second topic also seemingly blocked by objection, counsel tried a third path, asking the employee about scaffolding. With the prosecutor's confidence no doubt affected by the frequent (and frequently ill-founded) objections, counsel moved hesitantly towards the topic:

Did you make any observations as to the site?

Did I make any observations?

Observations of the actual site?

Well, I was there, so of course I saw the site.

Did you make any observations as to any scaffolding?

The question could have been better worded: no-one, apart from police officers, "makes observations". They see or hear things. So we would have recommended a more direct question: "Did you see any scaffolding at the site?" But unobjectionable as counsel's question was, the same objection was taken: "Objection, leading". So counsel retreated further, asking a question so vague that it left the witness clueless as to what he was being asked about:

Did you observe the site?

Yeah, I was there, I saw the site.

And did you notice anything at the site?

I don't understand the question at all.

The witness would have to have been a mind reader to understand that counsel was asking him about scaffolding. Not surprisingly, therefore, no evidence about scaffolding was adduced. It is worth noting by the way, that counsel abandoned this line of questioning purely on the basis of the objection, without requiring the court to rule whether or not the objection should be upheld. It needs hardly to be said that it is for the court to determine whether one's questions involve impermissible leading, not one's opponent!

In teaching advocacy, when we find students asking questions such as these, we ask counsel "*What do you want to know?*" In a case such as this, counsel will invariably reply "*Whether the witness saw any scaffolding*". "*So ask that*", we will say. "*Did you see any scaffolding at the site*" is not a leading question!

Conclusion

There is an important distinction between a direct question and a leading question. Direct questions are not only permitted, but are one of the cornerstones of effective examination in chief. Like all advocacy skills, eliciting and controlling evidence in chief by directed non-leading questions is a skill that must be understood and then practised.

1. * Andrew Palmer is a member of the Victorian Bar, a Principal Fellow of Melbourne Law School, and the Director of Trial Advocacy in the Victorian Bar Readers' Course. The Hon George Hampel AM QC is a former Supreme Court Judge, founding Chairman of the Australian Advocacy Institute, and Professor of Trial Practice and Advocacy at Monash University.
2. J L Glissan, Advocacy in Practice (4th ed, Butterworths, 2005), [4.7.1], page 61.
3. Ibid
4. See G Hampel, A Ainslie-Wallace, E Brimer and R Kune, Advocacy Manual (2nd ed, Australian Advocacy Institute, 2016), Chapter 5.

Milky Way Dreaming

KRISTINE HANSCOMBE

In May 2017, I was briefed in the Royal Commission into the Detention of Children in the Northern Territory. The brief involved two trips to Darwin, each of some days' duration. I had never been to Darwin before, so in particular had never seen the Supreme Court building. Those familiar with the building will know that it contains beautiful and evocative pieces of art, many by Aboriginal artists.

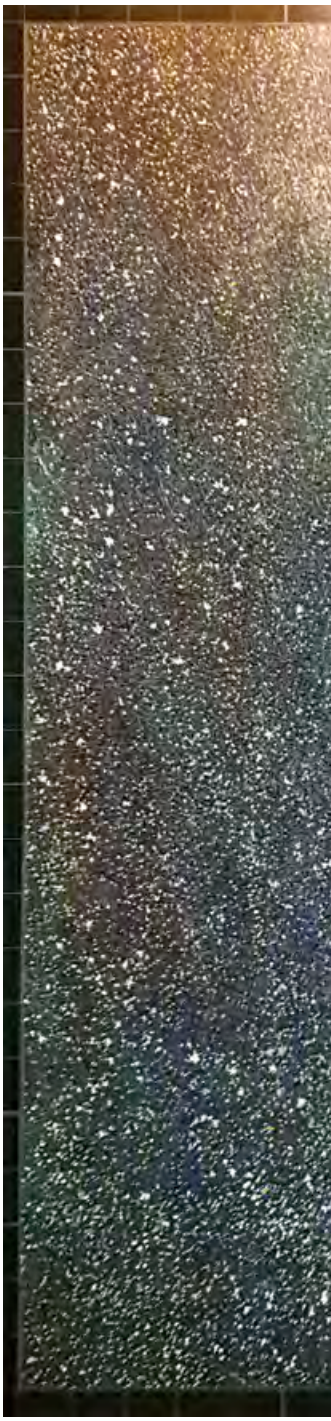
One work in particular was so astonishing that I thought others might like to see it, though some at our Bar are probably already familiar with it, and I have learned that it has been the subject of scholarly writing. But for those who don't know it, the work is a mosaic on the ground floor of the building, which can be viewed from a gallery on the fourth floor above. It is square, each side measuring about eight metres. The mosaic shows the Milky Way and the constellation that Western astronomy knows as the Pleiades. There is also a display showing the construction of the piece, together with information about its meaning and the artist, Norah Napaljarri. That information reads as follows:

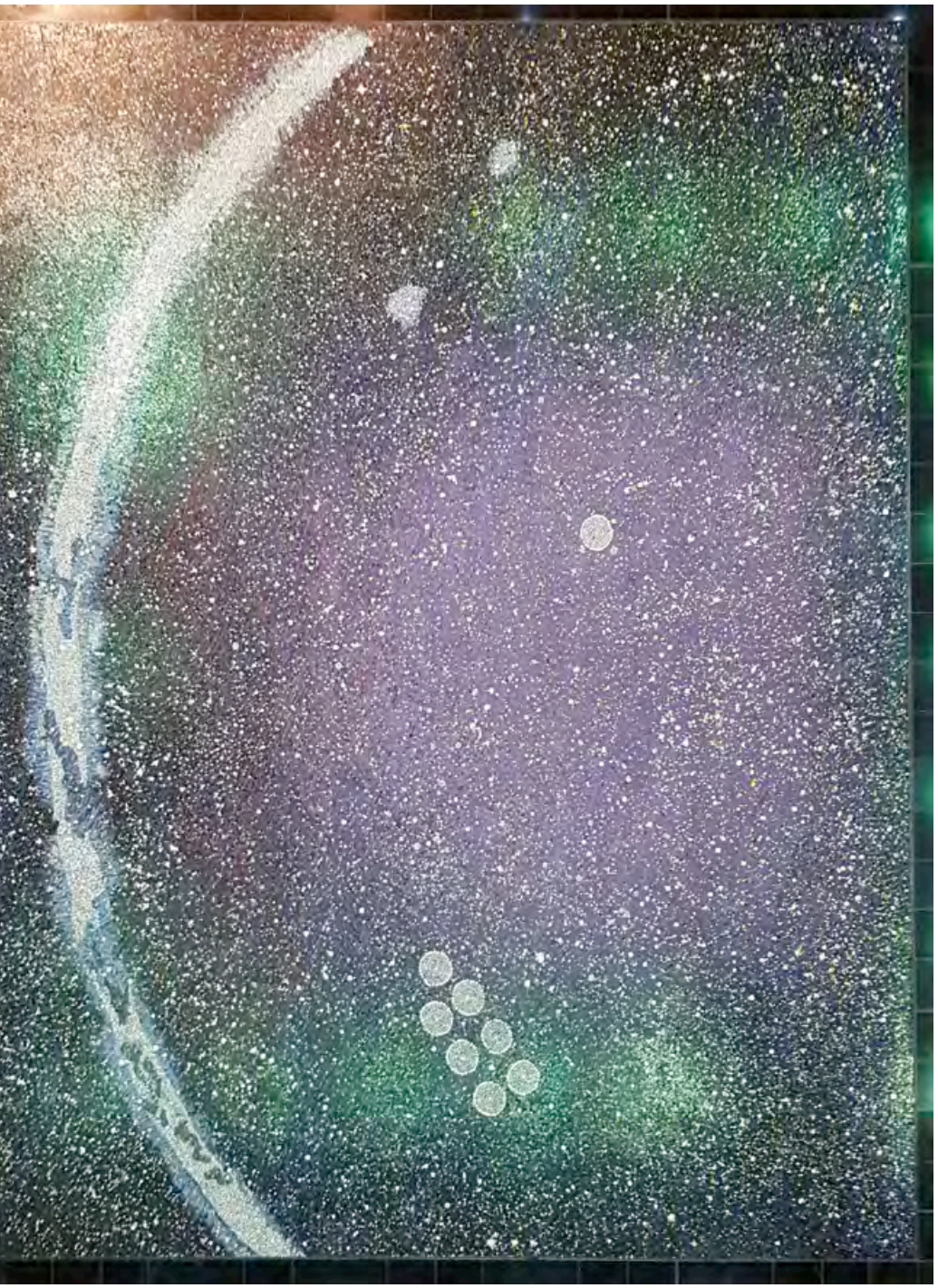
> ***YIWARRA JUKURRPA - THE MILKY WAY DREAMING***
>
> *This design depicts the dreamtime legend of the seven Napaljarri sisters who travelled through Walpiri country pursued by a lusty Jakamarra man. Much of the story is restricted by tribal law but the sisters, having come to the very end of their country and in order to escape, turned into fire and put themselves in the heavens as stars.*
>
> *The Jakamarra man found out what they had done and he too turned himself into a star to continue his pursuit. He is however the morning star, unable to pursue the seven sisters in the night sky.*
>
> *The artist, Norah Napaljarri Nelson of Yuendumu, NT, created uproar among the many artists of the region when she broke away from the meticulous dot art tradition to express the dreaming in a free form bordering on the abstract. The 'dispute' was resolved when the human manifestation of the dreaming and the keeper of the law declared the work to be both right and strong, thus recognising and accommodating new and old influences. This history of dispute resolution by the law makes the work especially suited to this building.*
>
> *The strength of the work has been translated into this mosaic of Venetian glass executed by Joe Attard and David Jack of Melbourne Mural Studios. Venetian glass was chosen for its unique qualities of colour, depth and durability. A display in the coffee lounge [on the ground floor of the court building] explains the processes involved. The mosaic is best viewed from the level above.*

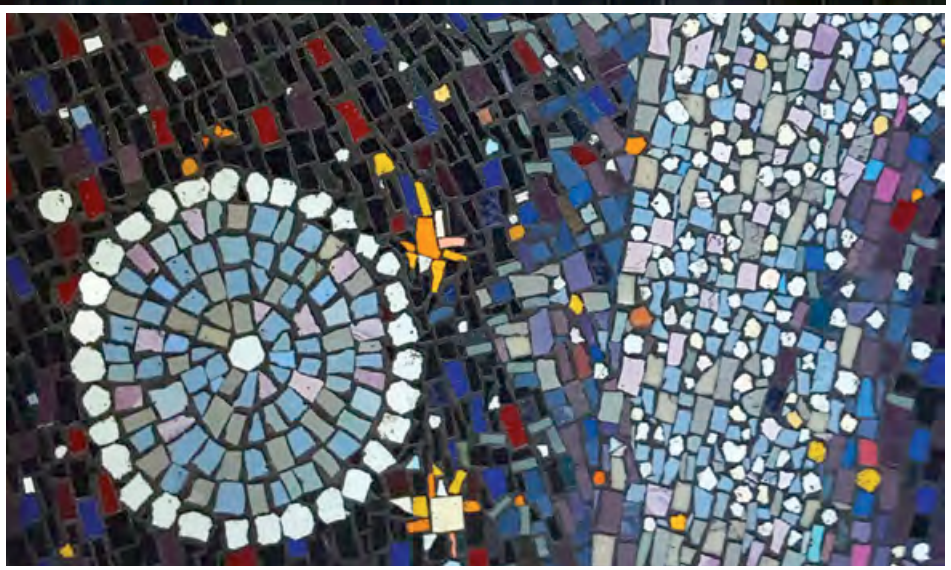
The mosaic glitters and somehow gives a real illusion of looking up into the night sky. I think the effect is the result of the many different colours used. Each day I found it hard to come away from it to attend the hearing, and whenever we were stood down, I spent what time I could steal from my work gazing down from the fourth floor.

I tried to find a print or other reproduction of it. To my surprise there seemed not to be one anywhere in the city. I ended up asking at the desk of the Northern Territory Library, which is housed in the Parliament building, in the same precinct as the court. The person on duty at the desk also did not know of any such material, but in a stroke of luck for me, volunteered that he is a keen amateur photographer and said that he would send some photos. And he did, as you can see, including two images from the construction display, one of which is of a small sample panel. The close up images and the sample panel show the range of colours used. The photos are a poor substitute for seeing the work itself, but I hope that they will give some impression of the sheer beauty and indeed majesty of the piece.

I reproduce the images by permission of the Supreme Court of the Northern Territory, which holds the copyright in the work, and of Michael Barritt, the kind volunteer. But of course, the moral right of attribution remains with the artist, Ms Norah Nelson, who has given a gift of great beauty to all who come into the court building.







Innovate, Regulate: Michael McGarvie, Victorian Legal Services Commissioner

BY GEORGINA COSTELLO AND JESSE RUDD

As barristers, we would prefer not to receive a call from the office of the Legal Services Commissioner regarding a complaint about our services. Bar News recently interviewed the man behind such calls - Victoria's Legal Services Commissioner, Michael McGarvie.

It may surprise readers to learn that the Legal Services Commissioner's office, on the south west corner of Bourke and William Streets, is a welcoming place. It has an attractive new fit out, a few floors up in a new building. The facilities are open-plan, light-filled and mindfully designed. Since McGarvie arrived on the scene, iPads have been distributed to staff, and practising certificate registration has gone on line. In the conference room where we met, McGarvie deftly slid a wall panel to one side to reveal coffee and tea facilities. He then put on the kettle and made us a cup of tea, without having to burden a staff member to bring us one. His friendly, transparent and unaffected manner matched the feel of his office, and

> "A major achievement under McGarvie's leadership has been a decrease in the number of outstanding complaints."

the tone of its functioning under his leadership.

The role of the Legal Services Commissioner includes receiving and managing complaints against legal practitioners; working with the legal profession to ensure that legal services in Victoria meet the highest standards of excellence; and assisting practitioners in understanding, managing and meeting consumer expectations. The Commissioner also educates the community about legal issues and the rights and obligations that flow from the client-lawyer relationship. As CEO of the Legal Services Board, the Commissioner is also involved in funds management and distribution. The Legal Services Board oversees the management and distribution of significant public purpose funds including revenue from interest on lawyers' trust account deposits, investments and practising certificate fees, and it also manages the Fidelity Fund.

At the time McGarvie took over as Commissioner in 2009, the atmosphere at the office was strained. A scathing Ombudsman report from 2008-2009 had stunned the organisation and exposed the need for changes to be made. An Acting Commissioner was needed to steer the ship until a new Commissioner could be found. McGarvie took the initial position out of a sense of duty rather than desire. He had been CEO of the Supreme Court of Victoria for some years at the time. However, within just a few weeks of being appointed to the temporary role, he decided to apply for the job permanently. To his surprise, the job was interesting, and he came to appreciate the importance of the role in sorting out conflicts between lawyers and clients. He also glimpsed the different dimensions of the role, including the capacity to manage and distribute monetary grants to promote justice in Victoria.

Since 2004, the Legal Services Board has given over $32 million in grants to important causes that address unmet needs for legal services. Under McGarvie's leadership, the Board implemented strategies to grow the Public Purpose Fund to around $180 million, including by switching banks to earn more interest. The Board has funded the costs of putting the Fitzroy Legal Service Handbook online, funded a Skype service for women in prison to get legal advice, and provided funding of around $25-30 million a year to Victoria Legal Aid. The Board has also provided significant funding to the Victorian Law Foundation, the Victorian Law Reform Commission, VCAT's Legal Practice List, and the costs of the Bar's and the Law Institute's regulatory and non-regulatory functions, such as the Bar's management of legal practising certificates for barristers, education and pro-bono services. The Legal Services Board is one of few public service functions which is a net funder to government.

A major achievement under McGarvie's leadership has been a decrease in the number of outstanding complaints - down from around 2,000 in 2009 to 517 in 2013. When McGarvie was appointed Legal Services Commissioner and CEO of the Legal Services Board in 2009, each of the organisation's 25 investigators had around 110 open cases of complaints against Victorian lawyers. Now, some eight years later, there are around 12 open cases per investigator, for the same number of investigators. As explained below, this success is the result of a number of important initiatives introduced under McGarvie's watch which, in practical terms, have meant that matters that may cause considerable anxiety to practitioners and distress to clients are brought to an end much more efficiently.

In response to the overwhelming number of open files that greeted him on appointment, one of the first things McGarvie did as Commissioner was to call clerks at the Victorian Bar and ask them to send over junior barristers. These barristers were briefed to sit in the offices of the Commissioner and wade through boxes and boxes of open files in order to help triage them. By asking the junior barristers to come to the Legal Services Commissioner's office, McGarvie avoided the cost of photocopying files and preparing briefs. For several junior barristers at our Bar, the work presented an opportunity for steady and interesting work.

Once this initial work of triaging cases had occurred, McGarvie implemented a brilliant idea: the Commissioner hired a number of 30 and 40-year veteran lawyers to be first-line responders to complaints against lawyers in non-serious cases. McGarvie had observed that most complaints were not about serious matters - such as fraud, money laundering, dishonest conduct or misconduct. Rather, 95 percent of complaints were about poor bedside manner, servicing issues, delay, poor communication and confusion over costs.

Before McGarvie took over, the previous system treated all complaints in a flat manner. For example, complaints about rudeness were investigated in the same manner as much more serious allegations. The result was both that insufficient resources were available for serious cases and, as McGarvie says, they were using "a hammer to crack a nut in relation to non-serious matters". Today, under his leadership, the Legal Services Commission applies a mediation/conciliation approach to the majority of cases. One of McGarvie's experienced conciliators rings up the complainant to see what the complaint is all about. Then the conciliator puts in "a friendly phone call" to the solicitor to discuss the complaint. Usually the next step is that the complainant and solicitor participates in mediation by phone or sometimes attends a conciliation at the Legal Services Commissioner's office.

Drawing on his previous experience as a solicitor in private practice, McGarvie implemented this complaints process to emulate the approach that a managing partner of an established law firm would take. He knew from his own experience as a longstanding personal injuries litigation partner at Holding Redlich that a pragmatic managing partner listens to unhappy clients

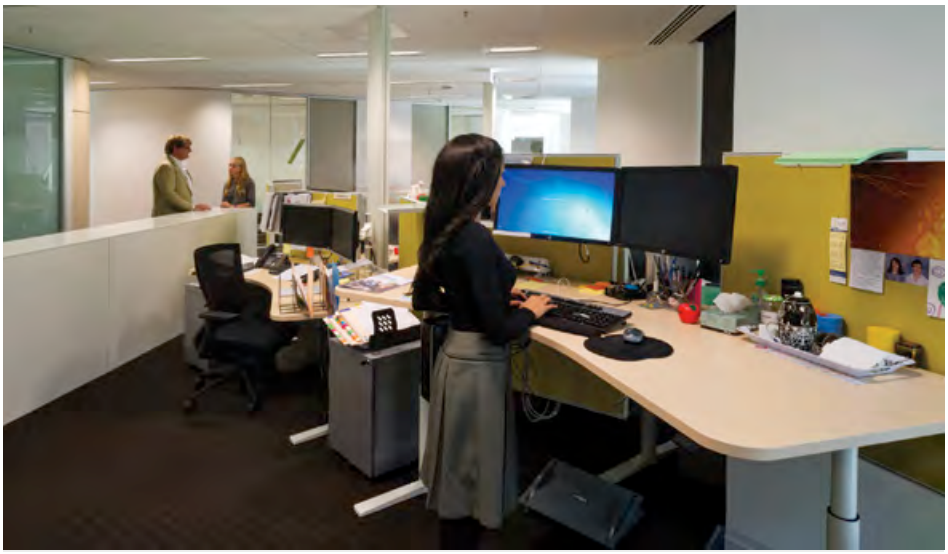
to understand what the problem is and find a solution. In that manner, law firms with such an approach often avoid less serious complaints being made to the Legal Services Commissioner in the first place. In endeavouring to emulate this approach, the conciliators hired by McGarvie are experienced legal professionals who are credible and good at dealing with people. The solutions negotiated through the conciliation process may include an apology, a promise of better service, and a refund or reduction of fees.

Within the Commissioner's office, there is a separate group of staff to deal specifically with costs disputes. As a result of legislative amendments enacted during his tenure, the Commissioner now has power to determine the outcome of a costs dispute if the amount of the disputed costs is less than $10,000. The Commissioner also now has jurisdiction to mediate costs disputes up to $100,000, whereas in the past the cap was $25,000.

McGarvie's approach to conciliation in non-serious matters has not seen him shy away from visiting serious consequences upon lawyers who have done the wrong thing. He has acted to vary, suspend or cancel practising certificates, and, in several cases, to apply for practitioners to be struck-off. During McGarvie's time as Commissioner, several solicitors have been struck-off. The organisation has also worked closely with agencies such as the Office of Public Prosecutions and the Independent Broad-based Anti-corruption Commission to coordinate in areas where their workloads overlap.

McGarvie stresses that investigating and prosecuting legal practitioners for disciplinary matters is but one aspect of the Board's and the Commissioner's role. He has found his work immensely satisfying because it "involves not just solving intractable problems between clients and lawyers and removing people from practice who should not be doing so but also managing and paying out funds to people who lose money through solicitors' fraud and providing grants to fund important justice projects". Throughout his time, McGarvie has had "freedom and help from an understanding and supportive Board to join forces with a determined reforming Commissioner to apply new ways of doing things to advantage the needs of legal consumers and leave good hardworking practitioners alone". The Legal Services Board is a non-executive one. Four members are appointed by Cabinet and three are elected by the profession.

According to McGarvie, while barristers represent ten percent of the legal profession, only five percent of complaints concern barristers. Areas where a higher number of complaints are made are family law, wills and probate, small commercial matters, personal injuries and conveyancing matters. In McGarvie's view, "most complaints arise out of a breakdown of a lawyer/client relationship in areas of high contact with clients". He adds that "where barristers fall down is in a lack of courteous



communication, bedside manner, representing a client's case without instructions, and occasionally, getting tripped up on friction with a client especially where acting in a direct brief". From time to time the Legal Services Commissioner receives complaints from judicial officers about barristers' conduct, for example, where barristers are late in meeting undertakings to the court. The Bar has a delegated function from the Commissioner to deal with complaints between barristers.

McGarvie has at times been saddened to observe cases of disappointing and bad behaviour by otherwise bright and privileged professionals. In his observation, anxiety, depression and poor mental health can lead to bad decisions from otherwise honest lawyers. In 2009, legal practitioners were required to disclose in the application for a practising certificate anything that bore on their capacity to practice, including any mental impairment. To encourage open dialogue and a culture of treatment, the Board under McGarvie changed the policy so that practitioners are no longer obliged to disclose mental health issues if their illness is being treated and managed in a manner that does not interfere with their practice. In McGarvie's view, this has enabled more confident discussion of the fact of mental illness by professionals, including within their law firms, and greater transparency about mental health issues.

McGarvie's performance as Commissioner has challenged the stereotypical view of regulators as being overly conservative and resistant to change. In Mr McGarvie's view, "experimentation and risk is how to bring about change. The formula here is that the organisation is entitled to get some things wrong but must try to do things differently in order to keep improving."

For the future, McGarvie sees a greater emphasis on "more sophisticated risk based regulating, including by surveying high risk people before they do wrong rather than cleaning it up afterwards and by sharing information with other agencies". He says that "regulators such as the Legal Services Commissioner need to try to stay one step ahead of acts of misconduct". McGarvie's ambition for the Legal Services Commissioner and Legal Services Board is for the organisations to be "very effective at identifying the risk of harm before harm is caused". Such an approach requires interventions, auditing, identifying real risk without actual harm, sharing information with other integrity related agencies and trying out new ways of doing things.

Throughout his time as Legal Services Commissioner, McGarvie has relied heavily on the Victorian Bar which he describes as providing expert advocacy as well as technical and analytical advice about statutory interpretation, law reform and litigation. The Board and Commissioner has briefed evenly between men and women and has provided work to barristers at all levels of experience including Queens Counsel in the High Court.

McGarvie leaves his role as Commissioner and CEO in late 2017. Victoria's lawyers – and their clients - have been well served by McGarvie in his role as the highest integrity regulator for our profession. Bar News wishes him well in his next endeavour, and thanks him for his service and for the enduring changes he has made to legal regulation in Victoria.

CHAMPAGNE POMMERY
REIMS - FRANCE

THE ART OF CHAMPAGNE SINCE 1836

BAR Lore

A Fiery start at the Bar — some fifty years ago

CLIFF PANNAM

Fifty years at the Bar is a long time. I have treasured every moment of it. Some more than others. Anyway it is the privilege of age to be able to look back and reflect.

After a few years of overseas post-graduate study followed by some time teaching in the University of Melbourne Law School, I decided that the groves of academe, although alluring, were not for me.

I signed the Bar Roll on 9 August 1967. A few months later I was invited to and delivered a paper at the first Australian Loss Assessors' Convention. The title was: "Of Law, Loss Assessors And Sealing Wax". I had sought the permission of the Bar Council to deliver the paper. Permission was granted. I was not required to submit a copy of the paper.

Back then the role of fault in the determination of motor accident claims was being questioned; especially those being heard by civil juries. Loss assessors played an important part in the process because they advised insurance companies in relation to these claims. A section of the Bar, the so-called "running down" Bar, had an obvious vested interest in the continuation of the fault-based system.

The subject matter of my paper suggested itself to me as a result of drafting and settling the answers to many sets of pre-trial interrogatories in which the parties were asked to answer on oath such questions as:

> *"What speed was your car travelling prior to the collision:*
> *A) 200 yards before?*
> *B) 150 yards before?*
> *C) 100 yards before?*
> *D) 50 yards before?*
> *E) At the time of the collision."*

This was just one of many standard form interrogatories dealing with various aspects of what was alleged to have happened.[1] It seemed to me to be a farcical and unreal process. The accidents had often occurred years before. How on earth could such questions be answered honestly?

In the paper I advocated the substitution of no-fault automatic compensation for victims of motor accidents. In presenting the paper and in

> “I was charged by the Bar Council of conduct, by delivering a paper, “which would tend to bring into disrepute the general body of Counsel on the Roll”.”

answering questions that followed I commented both upon what I saw as the defects in the fault liability system and the many difficulties associated with the substitution of a no-fault system.

I wrote and said nothing at all that had not been said many times before by great leaders of the profession and eminent judges. For example, Sir John Barry had said in an address entitled “Compensation Without Litigation” published in the *Australian Law Journal* in 1964:

> *“... it can be asserted without fear of rational contradiction that the common law has failed; that the conceptions which the law invokes are inadequate and outdated, and that the methods it uses to determine the questions that arise do no credit to judges and the legal profession .... This mode of trial is wasteful and cumbersome: its hollow pretences and intricate but often meaningless dogmas make it a scandalous travesty of what the law and the courts are supposed to stand for. Its persistence is largely due to political timidity and lethargy; fostered perhaps by those who have vested interests in the continuance of the system.”*[2]

Sir Victor Windeyer had expressed the view that these actions were “utterly unreal” and a “pretence”.[3] Mr Justice Wallace of the Supreme Court of New South Wales had described such trials as “artificial” and “fictitious”.[4] Indeed back in 1936 the then Commonwealth Attorney General, Mr RG Menzies QC, had said:

> *“I want to say as one who has practised a good deal before civil juries that the civil jury system ought to be abolished. I make no qualifications on that either. I regard the system as incompetent, unessential and corrupt.”*[5]

These are but examples of a host of other such comments that had been made by eminent jurists in Australia, Canada and in England.

At all events in February 1968 I was charged by the Bar Council of conduct, by delivering a paper, “which would tend to bring into disrepute the general body of Counsel on the Roll”. The particulars were that I had made public statements that had been published in the press to the effect of the following:

> *“(a) the present methods of dealing with motor accident claims are farcical*
>
> *(b) such cases are the unreal inventions of lawyers*
>
> *(c) any change in the present system of dealing with motor accident claims would be strenuously opposed by lawyers who make their living out of the present system*
>
> *(d) any change in the present system of dealing with motor accident claims would be strenuously opposed by politicians who are cautious men working in a conservative State*
>
> *(e) it is a remarkable psychological phenomenon that memories become clearer and clearer even though the accident may have occurred a year or more before the trial.”*

There were in fact *Herald* and *Sun* newspaper reporters present. Their reporting of some aspects of what I was alleged to have said was both exaggerated and ripped out of context. However, the substance was accurate enough, even though much of the language was not mine.

I had previously received a letter from the Chairman of the Ethics Committee dated 10 November which referred in detail to these newspaper reports and required me to comment on them. I wrote a lengthy letter in reply in which I said, inter alia:

> *“I am asked by the Committee to comment on the accuracy of certain reports of my address which appeared in the Herald and The Age newspapers. In my view ... they convey a completely misleading impression of the substance of my address. Isolated remarks are wrenched out of context ... my address was intended as a reflective piece which questioned the significance that is given to the notion of fault in the apportionment of responsibility in accident situations in both industry and arising out of the use of the motor car. I would ask the members of the Committee to read it and form their own opinion. In my oral presentation I adopted this same approach. There is certainly nothing new in the ideas put forward in the paper or in the comments I in fact made as the members of the Committee will appreciate. ...*
>
> *... it should be borne in mind that I was speaking about the social and economic impact of our present system of allocating responsibility for accident losses. I suggested that the trial of liability in motor car accidents was frequently a farcical exercise that only lawyers could imagine had any real relationship to the matters before the court or to the social problems generated by motor car accidents. I said that if an observer were only to look at the proceedings that took place before a Judge and jury a whole dimension of social reality would be missed.*
>
> *I also went into a detailed analysis of the social costs of motor car injuries. I said the cost was the same whether the accident was caused by negligence or not. The law of tort merely shifts losses but if it does not shift them they still exist. They do not disappear ...”*

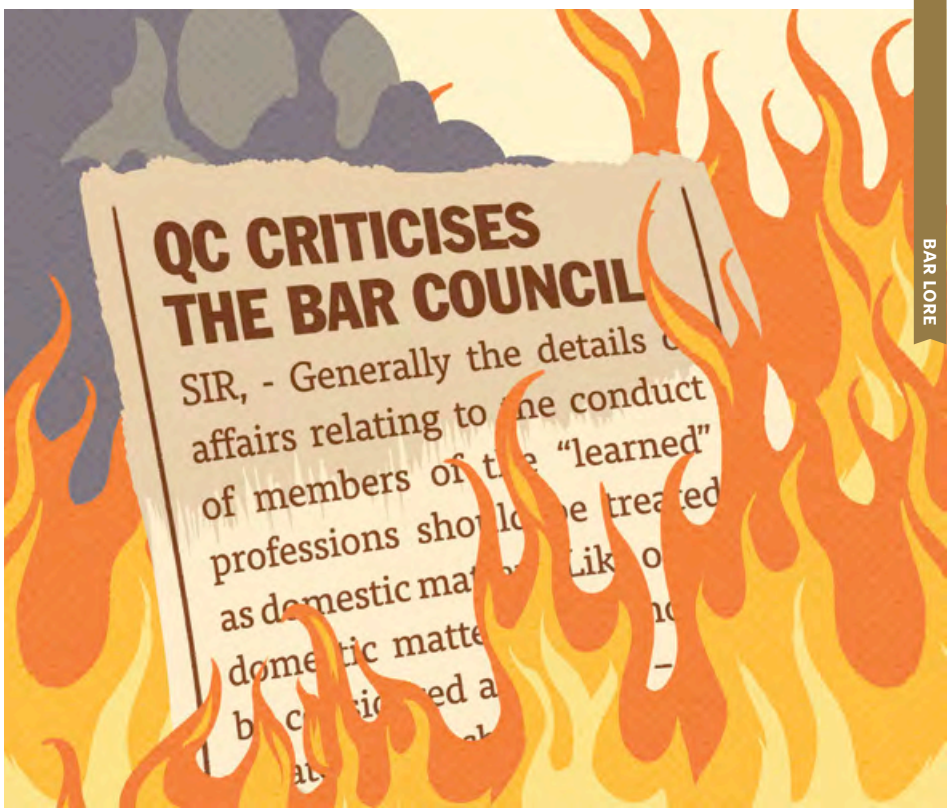
I was represented at the Bar Council hearing of the charges against me by Richard McGarvie QC and Michael Dowling. The charges were presented by Richard Fullagar QC and George Hampel. Despite what I thought were Dick and Michael’s unanswerable arguments, I was convicted by the Bar Council.

The penalty imposed was a reprimand.

I was aghast at the result as were my counsel. This was especially so because the Bar Council was at that time largely made up by members of the "running down" Bar; or, at least was considerably influenced by them. I prefer, even at this distance in time, not to identify all of them. It is enough to say that the Chairman of the Bar Council and the Chairman of the Ethics Committee were at the head of them.

I decided to appeal the decision to a General Meeting of Counsel which was permitted by the Rules but which had never been done before; or, for that matter, ever since. There was a good deal of publicity following my conviction.

My then retired dear friend and mentor at the Melbourne Law School when I was teaching there, Sir Philip Phillips QC, was livid.[6] He wrote a letter to the Editor of *The Age* newspaper that was published on 9th April 1968.



> "I decided to appeal the decision to a General Meeting of Counsel which was permitted by the Rules but which had never been done before."

"QC criticises the Bar Council

SIR, - *Generally the details of affairs relating to the conduct of members of the "learned" professions should be treated as domestic matters. Like other domestic matters they should be considered as private – and treated as such. From time to time the issues involved are too important to be concealed in coy secrecy. This appears to me to be the case today.*

Recently a junior member of the Victorian Bar gave, with the consent of the council of the Bar, a public address, on the subject of damage claims arising out of road accidents. He outlined, amongst other matters, the proposals for substituting in the place of legal actions claiming damages for faulty driving, certain alternative methods. These alternatives have been previously elaborated by highly competent authorities like Sir Charles Lowe, Sir John Barry, Lord Chief Justice Parker and others.

The junior barrister expressed the view that difficulties might arise in establishing any such reform. When he was asked why and from where opposition would come, he expressed the view that either the Bar, or those members who conducted many "running down cases" would or might oppose the suggested reforms. The implication of his remark may have been that some barristers, or the spokesmen for all of them, might be influenced consciously or unconsciously by their consideration of private gain rather than by contemplation of the public good. This implication may have been concealed from, and may have been not disclosed emphatically to, this young barrister's audience.

May I say as one who has studied to some extent the history of the Bar in Victoria and also the English Bar that, whilst one cannot prove by evidence or abstract reasoning that such opposition is certain to emerge, nevertheless, the probability of this result is extremely high, that it would be consistent with much past history of barristers and in accordance with a reasonable judgment upon human beings, of whom barristers are a species.

One advantage of making this assertion, clearly and without qualification, is that it will guard against the public being misled by statements by barristers on the issue of reform of the running down law, when that subject arises for debate.

But there is a matter of much greater importance to which I desire to attract attention. Because this junior barrister had made this statement, he was charged before the council of the Bar with having acted improperly in his profession. (The precise form of the charge was, as might have been expected, couched in more elaborate terms.) He was convicted, and an adverse "sentence" imposed. It is the significance of these proceedings to which I wish to draw attention. An adverse decision of this kind is likely to have a damaging effect upon a young man at the Bar. In short, the Bar Council can, by threat of such a decision, go far to shut the mouth of any barrister who legitimately desires

to assist the community by expressing an honest and reasonable opinion. The council can in short say: "Your obligation to avoid any criticism of your fellow barristers exceeds any obligation to the community. If you do not agree we will take steps which may ruin you in your livelihood."

There is some ground for thinking this attitude of the council is actually in conflict with the law as it has been enunciated in England in recent years. Putting that aside it is, in my opinion, entirely contrary to moral principles and in conflict with a proud tradition defending freedom of speech and opinion of which the Bar in its more euphonic moods is wont to boast.

regarding the action of the Victorian Bar council in taking disciplinary measures against a barrister for certain comments made by him during the course of a public address.

I do not presume the right to comment on the entitlement of the Bar council to take this action because, after all, it is a domestic matter for the council to enforce its code of ethics. Nevertheless, it would appear, to those who are not conversant with the precise details, that the barrister was disciplined because he maligned the learned members of his profession.

The public address referred to was delivered to a convention organised

> "What followed was quite a storm of public and private comment."

The foregoing amounts to a serious and carefully considered criticism of a fundamental kind touching the moral and professional values entertained by a majority of the controlling authority of the Bar of which I am a member. As such, it may render me liable to disciplinary action by some authority. Clearly, that authority cannot be the council of the Bar – since no man may be a judge in his own cause.

I believe what I have expressed to be right. I believe that making it is in the interest of the profession of which I am both fond and proud. I believe the public ventilation to be in the interest of the community. I am ready to the best of my ability to justify what I have written if it needs further justification."

What followed was quite a storm of public and private comment. The President of the Loss Assessors' Association forwarded a Letter to the Editor which was published in *The Age* the next day supporting my right to say what I did. It carried a heading in bold print –

"Barristers And Courage

SIR, - *Sir Philip Phillips, QC, has raised a matter of considerable public interest by The Loss Assessors' Council of Australia, the constituent bodies of which represent loss assessors in all States of Australia. The barrister accepted an invitation to deliver a paper to the convention on a subject of great interest to the community and which posed the question of whether or not the present system of victims of road or industrial accidents having to establish "fault" on the part of another person should be replaced by a system where "fault" would not have to be established.*

This highly contentious subject is exercising the minds of many learned people in a number of countries because modern society appears to be reaching the stage whereby it cannot afford to support the fault principle which is not only imposing formidable economic burdens on the community at large but is also creating much individual hardship on many victims who, for reasons outside their control, are often unable to establish "fault".

Inevitably, abolition of the fault principle would result in the limiting of a field of income at present open to a large number of people, especially legal practitioners and loss assessors. Nevertheless, these persons have a duty to the community and it should be incumbent on them to give the community the benefit of their specialised knowledge of the problem and to discuss the implications within their own sphere at every opportunity. It was with these responsibilities in mind that this subject was chosen for consideration at the convention.

It is, indeed, most unfortunate that a side issue has resulted in the form of disciplinary action by the Bar council against the barrister concerned, especially when it is remembered that the council gave the necessary authority for him to deliver a paper to the convention. No doubt unexpected domestic matters resulted and, not being aware of the nature of such issues, I cannot comment further on the actions of the council.

Nevertheless, the barrister put forward many proposals in an excellent paper which could not help but bring a good deal of intelligent thinking to bear on a matter of great interest to the community.

It would be a great pity if the experience of this barrister has the effect of stifling further comments by other members of his profession on such an important matter. However, this seems unlikely, because the profession clearly includes men of courage as is revealed, firstly by the barrister concerned in submitting his proposals, and now by the intervention of Sir Philip."

The Age published an Editorial on the same page in the following terms:

"Before the Bar

Sir Philip Phillips, QC, in a letter to the Editor yesterday, has raised a case which interests many people outside the legal profession. He has revealed how a junior member of the Bar, with the consent of the Bar Council, gave a public address on the subject of damages claims arising out of road accidents. The junior barrister suggested difficulties that might

arise in establishing any reform in the present procedures. Pressed by his audience as to why and from where such opposition would come, the barrister said that either the Bar, or those members who conducted many "running-down cases", would, or might, oppose the suggested reforms. In other words, said Sir Philip, the implication was that some members of the Bar might be influenced by private gain rather than public good in considering any suggested reforms.

The junior barrister who made the statement was later charged before the council of the Bar with having acted improperly in his profession. He was convicted and an "adverse" sentence was imposed. The professional ignominy of such a sentence could jeopardise the future career and livelihood of the junior barrister, who has now appealed to the full Bar.

Sir Philip Phillips' observations on these circumstances have some social significance. We agree with him that the Bar Council has in this case failed to distinguish between a barrister's responsibility to his profession and his rather more important responsibility to his community. In law, as in medicine, qualified professionals have joined together to establish and protect ethical standards, to solve professional problems within the profession and to deal with the community in a considered and united way. There is some feeling amongst laymen that the walls the professions have built are sometimes too high: in general, however, the system has operated honestly and to the public benefit.

It would be idle for the Bar Council to pretend that barristers have no interest in the public debate about damages actions resulting from road accidents. It would be even more idle for the council to believe that the extent of that interest, and its possible basis, had not occurred to members of the public. But interest is not self-interest. The Bar's reputation in Victoria is sound enough to suffer a realistic inference. It might not be if the public is allowed to feel that barristers regard professional discipline as more important than their social responsibility.

In view of the Bar Council's action against the junior barrister, we are entitled to speculate on Sir Philip Phillips' fate: he has presumably committed the same offence as his junior colleague and in a more deliberate way. We would feel that this eminent Queen's Counsel has performed a service to the public and, perhaps, to the Bar itself."

To the same effect was an Editorial in the *Herald* the same day and in *The Australian* the next.

Before the appeal was heard counsel for both parties circulated their respective arguments and supporting materials to every member of the Bar. It was a very very uncomfortable time for me.

The appeal was called on for hearing at a General Meeting of the Bar on the evening of 17 May 1968. In fact no substantive hearing took place. The appeal was thankfully upheld without debate on the motion of Peter Brusey seconded by Lou Voumard QC. Peter simply said that the Bar as a whole should take the view that the charges should never have been made. Peter and Lou could not have been more distant from the 'running down' Bar.

It was however something of a Pyrrhic victory. I was to suffer many adverse consequences of it for a very long time. Many senior members of the Bar Council barely acknowledged my existence when they were at the Bar, and, later treated me with cold detachment, even hostility, from the Bench. Other members of the Bar Council at that time never forgave me for the widespread public criticism of the Bar associated with my appeal which in their view should never have been taken. Some even stooped to criticising me for using the title "Dr." upon the basis that it was only an American degree; notwithstanding it was from one of the most distinguished Law Schools in the world! The fact is that when I joined the Bar I had written to the Chief Justice, Sir John Young, asking whether or not it was appropriate for me to use this academic title. He replied that it was entirely appropriate and conformed with the traditions of the Victorian Bar.

Not a good start. I cannot resist a jumps racing phrase – I almost fell at the first! But I can even after all these years still feel the sting of it all. A young academic lawyer decides to join the Bar and almost at once found myself in the centre of such such a very public and professional debate. And, more importantly, in relation to a subject about which far more extreme views had already been expressed. Just go back to the beginning of this piece. Would Sir John Barry, Sir Victor Windeyer or Robert Menzies QC have been criticized, let alone prosecuted, for expressing their far more extreme views? It is also of interest to note that no action was taken against Sir Philip for his letter to the Editor of *The Age*.

I cannot but think that I was regarded as a very soft target by the 'running down' Bar of the day in their attempt to deflect the inevitable.

1 I note from my first fee book that back in 1967 the fees for such work by a junior barrister varied between $11 and $20! It was so mechanistic.

2 (1964) 37 ALJ 339 at pp. 342-3.

3 (1961) 35 ALJ at p. 149.

4 (1961) 34 ALJ at p. 152.

5 See: (1936) 10 ALJ at p. 74. Sir Robert specifically referred to motor car accident cases in his book "Afternoon Light" (1967). At pp 326-9 – "The jury knows full well that some insurance company will pay. And insurance companies are fair game."

6 PD advised me to go to the Bar, at least for a time, because he said how on earth could one hope to successfully teach a subject area in which they had never practised. His advice for a young academic was this – during your first year at the Bar only appear in Magistrates' courts; in your second year only appear in the County Court; and, after that never again appear in either of them! I treasured, and still treasure, my association with him.

Remembering Ronald Ryan

KERRI RYAN

Memories from suburbia

The radio was on in the kitchen. We were boisterous. We were waiting to hear a news report, but in our raucous chatter we momentarily forgot. Then suddenly the news came on – maybe it was 9am – or a newsbreak, but we missed the headline. We missed it! What was happening? But then Craig, the eldest boy amongst us, said he heard the newsreader say 'Ronald Ryan is dead'.

I had hoped it wouldn't happen. I had wondered how Ronald had been feeling. How was his family coping? I tried to imagine the scene at Pentridge Prison. This was unimaginable. Ronald Ryan was hanged by the neck until he was dead.

That is my memory of 3 February 1967. I had just turned eight and was about to start Grade Three. This is on the edge of my memory and like a dream, is hard to describe. It is the first major news event that I recall. If you were around then and old enough, you too will likely remember where you were the day that Ronald Ryan was hanged.

Perhaps I remember, despite my age. because I share his surname. He could have been family and I identified with him. Annoying schoolmates would cry, 'your dad is a murderer!' even though it was not true, cementing this memory.

I also remember the public outrage and the demonstrations prior to the execution from watching television news reports. It was a volatile, highly charged period of time. For a youngster like me to remember this event is a testament to the size and intensity of the story. It overwhelmed and deeply affected our community. This helps explain why the execution has become an important part of Australian history.

The story of the dramatic escape by Ronald Ryan and Peter Walker from Pentridge Prison, and the fatal shooting of prison warder George Hodson by Ryan on 19 December 1965, is part of our folklore. The community of Victoria was terrified whilst the pair was on the run for 17 days. They loitered in Melbourne, moving around various locations. Walker killed a man on Christmas Day. They robbed a bank. They were recaptured in Sydney on 5 January 1966 and returned to Melbourne where they jointly faced charges of murder, of which Ryan was found guilty.

In 2007 I listened to a commemorative story on ABC Radio marking 40 years since the execution. Witnesses to the hanging told their stories and talked about the profound effect the event had had on them. It must have been truly shocking. Reading the biography of Ronald Ryan by Mike Richards transported me to the time of my childhood and provided so much more detail. It gave me an insight into the whole journey of Ronald Ryan, which has profoundly affected our society.

Supreme Court, 3 February 2017

The '50th Anniversary of the Last Judicial Execution in Australia – The Hanging of Ronald Ryan on 3 February 1967' was held at the Supreme Court of Victoria on 3 February 2017. It comprised two parts. The first was 'A Re-enactment of the Verdict and Sentence in The Queen v Ryan and Walker, 30 March 1966, Court Four, Supreme Court of Victoria'. This was followed by 'Observances' in The Supreme Court Library.

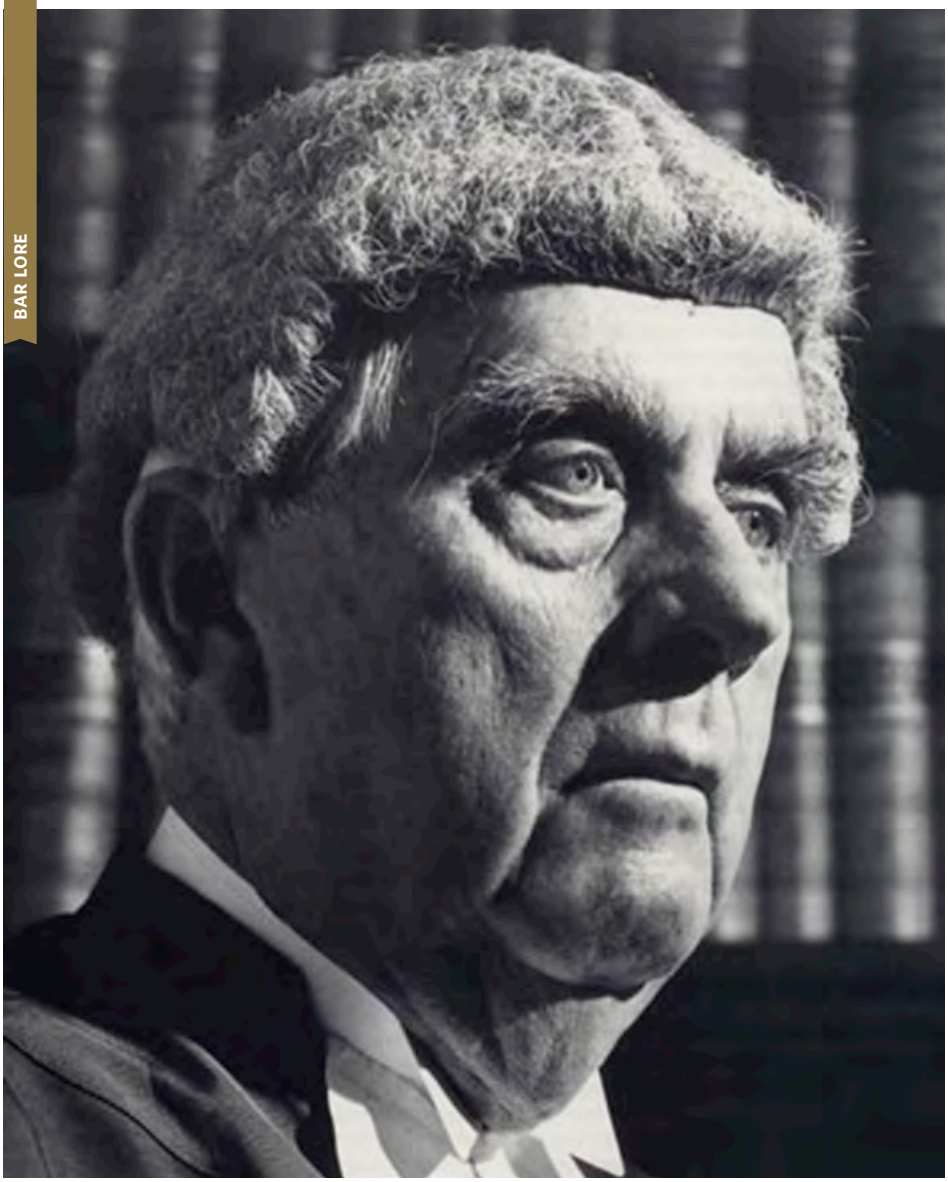
The re-enactment was held in the court where the trial had been held 49 years earlier. A large crowd assembled. As we filed into the public gallery, along with the creaking and squeezing to get into position, an eerie feeling loomed. Looking down into the body of the court I found myself in a time warp. The court was set up as if a court case was in progress, with official looking (mainly) men dressed in 1960's style - court staff, legal and press representatives were all in position. The clock was set to 10 o'clock, the time of night at which the jury returned to the court after deliberating for several hours.

The re-enactment began. Suddenly the 'prisoners' were brought in – pathetically I recognised one of them as Ronald Ryan. His stand-in looked a bit like I imagined that Ryan would. Briefly I believed it was the man himself. Loud knocks echoed and 'Justice Starke' appeared, played by actor John Stanton. He talked in the way that important men did then, providing a sense of time and place.

> "Looking down into the body of the court I found myself in a time warp."

The all male jury was brought in. The foreman sought clarification from the judge about the legal concept 'acting in concert'. This related to the scope and extent of the agreement made between Ryan and Walker when deciding to escape. Did they agree to commit violence if needed? The judge explained this term and how it related to the case. It clearly showed that the question on the minds of the jurors was whether Walker may be guilty of murder or the lesser charge of manslaughter. Ryan's destiny was already set.

In Act II the jury returned with a verdict. Walker was found 'not guilty' of murder and 'guilty' of manslaughter. Ryan was found 'guilty' of murder. Ryan seemed to take it without much reaction, but he did give Walker a congratulatory pat



Truth

SPECIAL!

HOW RYAN DIED

★RONALD RYAN said he would die like a man. He did. He stepped calmly on to the trapdoor a few seconds after 8 am at Pentridge Prison on Friday morning. It was over very quickly. Ryan was hanged in fulfilment of his sentence for murder. The hanging had been postponed three times and efforts to stop it reached a climax on Thursday night with a hastily called meeting at Government House.

Only a few minutes before Ryan was led from the condemned cell to the trapdoor gallows he still insisted he was not guilty of murdering Warder George Hodson.

The warder was shot as Ryan and fellow convict Peter Walker broke out of Pentridge on December 19, 1965.

He did not flinch on the gallows

You'll get top price for your Trade-In

on the back. Walker was taken away. Justice Starke, as his duty obliged him, then sentenced Ryan to death. At that time in Victoria, a conviction for murder carried a mandatory death sentence. Justice Starke did not don the black cap as was usual practice for a judge bringing a death sentence. It was known that he did not support capital punishment.

Being in Court Four added to the sense of realism. With the exception of Justice Starke, all roles were played by law-related professionals. The audience enthusiastically thanked them.

The gathering was then directed to the magnificent Supreme Court Library to hear 'Observances' from speakers including the Hon Chief Justice Marilyn Warren AC QC, Mr Brian Bourke, Dr Mike Richards, and the Hon Dr Barry Jones AC. Once settled, the Hon Justice Lex Lasry AM welcomed the audience and expressed pleasure in seeing a large turnout. He provided some insight into the story of Ronald Ryan and how the idea for the event came about: 'it was an important milestone and needed to be acknowledged.'

Chief Justice Marilyn Warren welcomed the audience. She expressed sympathy to the Hodson and Ryan families and friends for their enduring grief. She acknowledged it was 50 years to the day that Ronald Ryan had been hanged.

She spoke about the genuine fear experienced by Victorians when Ryan and Walker escaped from Pentridge Prison and their dramatic time on the run. She reflected on how the community was relieved when the pair was captured and how following their arrest 'an extraordinary thing happened': the community accepted the conviction of Ryan, yet there was a turnaround as to him being sentenced to death. It resulted in a movement – a dramatic shift in public opinion.

She wondered what it may have been like for Justice Starke in delivering the death sentence, and described how he may have felt on the journey between his chambers and the court: 'the contemplation of the experience is really hard to imagine'.

Chief Justice Warren indicated 'it was a significant time in this Court's history and in Victoria's history and development as a humane democratic society based on the rule of law.' She introduced the three speakers, and thanked and paid tribute to Justice Lex Lasry for his role in this event and his work in death penalty cases.

The first speaker Brian Bourke, was Junior Counsel for Ronald Ryan. He spoke about his role and being 'lucky enough' to get the brief to defend 'Ronnie Ryan'. After Ryan and Walker were re-captured, he met Ryan at Pentridge Prison.

He said that things moved quickly from there. The Coronial Inquest for Hodson was 4 March 1966 at which

time Ryan was committed for trial. The trial started mid-March, with a verdict on 30 March 1966. The Premier Mr Bolte made it apparent that the pair would hang. The Liberal Party in general were opposed to the death penalty but could not get enough support to stop the execution.

Throughout this ordeal Bourke got to know Ryan well and developed a friendship with him. The governor of Pentridge Prison, Mr Grindlay, permitted unlimited visitation, and Bourke made 50-60 visits. Ryan was respected by those around him. He wasn't a big time criminal and prior to the escape he had not been well known.

Bourke's voice wavered as he said that he had 'never met a tougher bloke' and that 'Ronnie' never complained about the situation he had found himself in. It was Ryan who consoled Bourke prior to the execution. Bourke said he was 'more than upset to have him executed'. He was deeply affected by what happened to Ronald Ryan.

The government appointed a hangman who remained anonymous. He was paid by Victorians to kill a man and Bourke believed this to be hypocritical. Apparently Bolte once said 'You weren't a Premier unless you hang somebody.' Once Ryan had died Bolte denied an application by the family to remove the body. Bourke concluded 'This shows how callous he was.'

Bourke said it has 'given me a thrill' to have witnessed a re-enactment 50 years on from an event to which he was a key player.

Mike Richards spoke next in his role as Ryan's biographer. Richards suggested the hanging is remembered as a turbulent moment in Australia's history – 'one that led to a decisive break with a relic of our colonial past.' He said that not only did the event stop the nation, 'but more than that changed the nation.'

Richards observed that the personal repercussions of the execution reached very much further than was appreciated at the time. For

> "Those questions I had asked myself that morning on 3 February, 1967 - How was Ronald feeling? What was the scene like? – have been answered."

the families and friends of Hodson and Ryan, he noted that their grief was naturally profound and enduring. He acknowledged those involved in the execution: Ryan's legal team, prison officials, anti-hanging activists, journalists who witnessed the execution and others. 'The emotional scars ran deep…those with us say they'll never get over it.'

He focused on Justice John Starke and said he was a 'life-long opponent of the death penalty.' Whilst researching his book Richards had refrained from approaching Justice Starke. In 1990, he unexpectantly met the retired judge socially, and decided to ask if they could meet and talk about Ryan. The answer was 'Sure, when do you want to come?'.

When they did meet, the first question Starke asked Richards was 'Do you think I did the right thing on Ryan?' Starke was clearly distressed and 'poured out the anguish he felt at having to sentence Ryan to death'. Starke told his story, and it involved a plan to save Ryan. As the trial judge in a capital case, and as was protocol at the time, Cabinet had invited him to a meeting to help it to decide whether to commute the sentence or to let the hanging proceed. Starke had contemplated telling Cabinet a lie - 'that he considered the jury verdict was unsound.' He had hoped that this would result in Ryan's death sentence being commuted. But when he fronted Cabinet and was asked if he agreed with the verdict, his innate honesty and integrity won out and he could not go through with his lie. Later Starke worried that he could have done more to save Ryan from the gallows. This was confirmed by his associate who revealed that 'Starke was inconsolable' on the morning of the hanging.

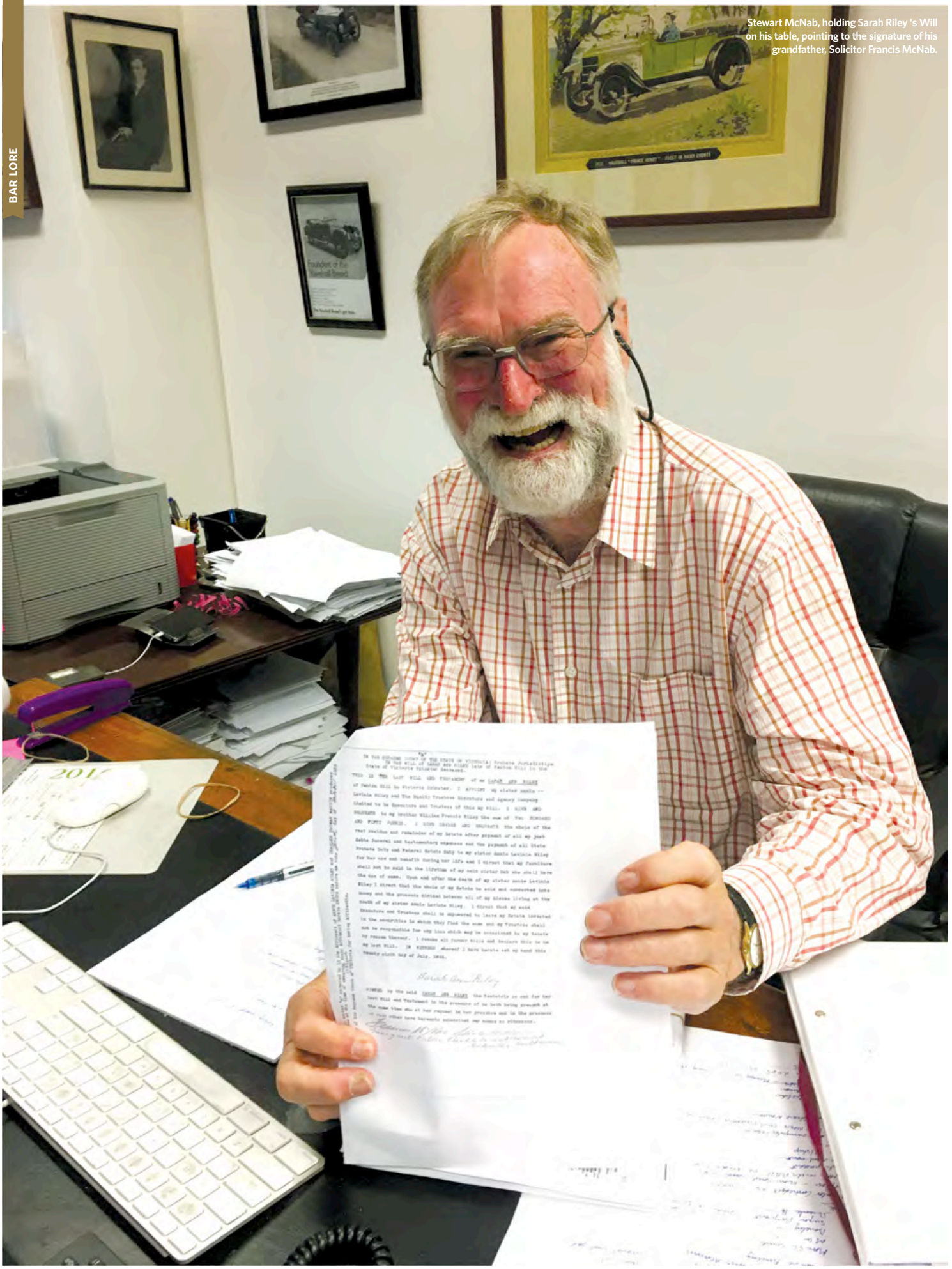
Richards finished by acknowledging that 'Jack Starke' holds a special place in his thoughts today and described him as 'a peerless advocate, a fine judge and a great humanitarian – who bore a very heavy burden of public duty and private conscience in having to pronounce a brutal sentence according to law.'

Barry Jones was the final speaker. Long before he entered parliament he campaigned against the death penalty from 1962-67. He provided a walk-through examination of executions through Australian and world history, and the current state around the world. He punctuated this with a few insightful quotes on the topic from various leaders and intellects through the ages.

Jones finished by asking, 'Can man, that imperfect being, be expected to render perfect justice? In that respect, could capital punishment give a notion of perfection to the justice of human beings?'

It was a solemn occasion performed with respect and grace. To have eminent figures speak provided a sense of living history. The common thread running through each presentation was that there is no place for capital punishment in our society, and that the emotional wounds are widespread and enduring.

Those questions I had asked myself that morning on 3 February, 1967 - How was Ronald feeling? What was the scene like? – have been answered. The fate of Ronald Ryan has affected us all in some way – from those closely and profoundly affected, to ordinary folk like me who just remember. Capital punishment was abolished in Australia decades ago, thanks largely to the amalgamation and uproar of the community. It is the enduring gift that Ronald Ryan has given us. Hopefully, in a global sense we can strive for a future without it.



Stewart McNab, holding Sarah Riley 's Will on his table, pointing to the signature of his grandfather, Solicitor Francis McNab.

Where there's a will, we'll go a Waltzing Matilda: serendipity in chambers

W. BENJAMIN LINDNER

A last will and testament usually reveals a person's last known residential address. But occasionally it reveals much more, serendipitously.

In October, 1888, a Sydney solicitor, A.B. 'Banjo' Paterson entered into partnership with one John William Street.[1] At about the same time, Paterson fell in love, penned a serenade to his betrothed, and later published his feelings for Sarah Ann Riley in *The Bulletin*.[2] Sarah's mother's brother's wife's brother's son was John William Street, senior partner in 'Street and Paterson'. Banjo was well connected.

'Street & Paterson' lasted 11 years. The partnership/engagement with Sarah persisted for seven years, ending in unfortunate circumstances. It is said that she left our shores for London wearing her sackcloth and ashes.[3] A copy of her will revealed that, many years later, she returned to Australia. However, the location of her last known residential address remained clouded in mystery, the will only naming a small town in country Victoria.

Why had Sarah left our shores so precipitously in the late 1890's? Sarah Riley disengaged Paterson when he took a shine to her girlfriend, Christina Macpherson, an old friend from their school days at an exclusive private girls' school, 'Oberwyl' (located on the corner of Barkly Street, Alma Road and Burnett Streets St. Kilda). In 1895, Sarah had invited Paterson to her brother's sheep station (Vindex) at the same time that Christina was visiting her own brother on his sheep station (Dagworth). Both stations were in central Queensland, the outback, or as Banjo called it, the "never never".

The two women, now 31 years old, met in Winton, Queensland, and to Sarah's eternal chagrin, she introduced Banjo to Christina. Christina's older brother, Bob Macpherson, squatter, of Dagworth Station only 80 miles north of Winton, immediately invited the couple to stay over and party. Banjo and Sarah accepted, with glee.

One evening, during dinner, mention was made of a swaggie passing by, 'waltzing matilda'. Banjo looked mystified. He was told that that referred to the itinerant workers who walked the tracks carrying their swag, or blanket, which kept them warm at night.[4] Banjo pondered the phrase. After dinner, as they sat on the veranda in the welcome cool of the Queensland night, Banjo was entranced by an old Scottish tune being strummed on an autoharp by Christina.

"Why don't you sing the words to that?" inquired Banjo. Christina replied, "It hasn't any words that I know of, but it must have had at one time; I believe it to be an old Scottish tune."[5] Banjo, with a glint in his eye, then penned a verse or two….and the choruses. His original[6] first verse and choruses (including amendments to first thoughts) were-

[Verse 1]

Oh, there once was a swagman
camped in the billabong,
Under the shade of a Coolibah tree,
And he sang as he looked at the old billy boiling,
Who'll come a [~~rovin' Australia~~] Waltzing Matilda with me?

Then, in the first chorus, Banjo posed this question of Christina, his inadvertent, musical collaborator:

[Chorus 1]

Who'll come a [~~rovin~~'] waltzin' Matilda my darling,
Who'll come a waltzin' Matilda with me ?
Waltzing Matilda and leading a [~~tucker~~] water bag
Who'll come a waltzing Matilda with me?

Banjo answers his question in the next two choruses, unambiguously:

[Chorus 2 & 3]

You'll come a waltzing Matilda my darling,
You'll come a waltzing Matilda with me ,
Waltzing Matilda and leading a water bag,
You'll come a waltzing Matilda with me.

Banjo's invitation to 'his darling', initially, to go 'roving Australia' with him, was not accepted by Christina.

After waiting seven years for a marriage date to be fixed, that flirtation was the last straw for


Banjo Patterson

Sarah. She gave Banjo, 'the cad', the sack. To this day, her descendants maintain that at least she kept the engagement ring. Meanwhile, it is said, Banjo was unceremoniously kicked off Dagworth station by Christina's brother, the squatter, Bob Macpherson.

I located Sarah's will and grant of Probate at the Public Record Office, North Melbourne, online. They cost $32.80. The e-mail arrived soon enough with the valuable attachment. I noticed the solicitors for the will were McNab & McNab 454 Collins Street, Melbourne. I read it. It commenced in the usual way:

> *'THIS IS THE LAST WILL AND TESTAMENT of me SARAH ANN RILEY of Panton Hill in Victoria, Spinster."*

Sarah Riley's address, 'Panton Hill', was inadequate. She hailed from Geelong and had spent many years in Scotland and England. She returned to Australia in her 60's having been born in 1863, the year before Banjo. What was she doing in Panton Hill? And, problematically, both the street number and street name of her last abode were missing from her will.

If the residence was still there, it would be likely to present as a substantial, impressive homestead. The Rileys had been rather well off ever since her father, James, selected some prime real estate for sheep farming north of Hamilton, in 1841.[7] Sarah's last address would be in the solicitor's file for the making of this will. He would need it to post her his account. The law requires that such files be retained by solicitors for 7 years. What are the chances, in 2017, of finding the file of a will made in July 1933? "Zip", thought I!

But as McNab & McNab still exists, although somewhat expanded in name and membership, I might have some luck. It would be only a phone call away. Better still, Stewart McNab is a barrister in practice on my floor. In June 2002, he resigned as a partner of McNab McNab & Starke to join the Victorian Bar. Stewart signed the Bar Roll in November 2002. During his time as a solicitor, Stewart practised extensively in the wills and probate jurisdictions. He was perfectly placed to advise me as to the provenance of Sarah Ann Riley's last will and testament.

The Victorian Bar has always had an open door policy, of which I would now take advantage. I walked to Room 902 of Isaacs Chambers. It was not far away as I was sitting in my own chambers at Room 910, eight rooms along the corridor!

Noticing that his door was ajar, I knocked on it to attract his attention while he was sitting at his table in chambers.

[An aside: On the first day reading with my Master, the late David Ross QC, he informed me of a few fundamentals, as I embarked on my Readers' Course - that Solicitors work *from* 'offices',[8] barristers work *from* 'chambers'; solicitors work *on* a 'desk'; barristers work *on* a 'table'; solicitors work *as* professionals, barristers *follow* a calling[9]; solicitors *don't* wear wigs in the course of their daily work; barristers did, until that portion of the traditional garb was dispensed with in 2017. Before the change, a judge could neither see nor hear a barrister who was improperly attired (i.e. wigless). Now that the wig has gone, do Barristers still work in chambers, off a table, as they undo

their pink or white ribbons to read their briefs, in order to follow their calling…or do they now work in offices, off desks, indistinguishable from their professional counterparts of the Law Institute of Victoria, I wonder?]

Stewart invited me in, no doubt perplexed as to the nature of an inquiry a criminal barrister would have of the resident expert in Wills and Probate. Our conversation went a bit like this:

Benjamin: "Stewart, I have a will here, which may be of interest to you, and I also have a question for you."

Stewart (peering over spectacles, quizzical expression): "Yeeahhs… go on."

Benjamin: "I have a will here by Banjo Paterson's fiancée of seven years standing. She broke it off shortly after he wrote 'Waltzing Matilda' and, 38 years later, gave her instructions as to her estate to a solicitor's firm you'd know, then in Collins Street, Melbourne. Your old firm, then called McNab & McNab, wrote up the will, in July, 1933. My question for you is after all these years, in order to locate Sarah Riley's last place of residence, which is not included in the will, would her will file still exist, archived somewhere?"

Stewart (now frowning): "I can inform you that, in 1958, I was personally given the task of emptying out the "no longer required files" cabinets at McNab and McNab then stored in Essendon and I burnt the lot. Sorry about that. Anything else I can help you with?"

Benjamin (handing over the 2 page will): "Not really, Stewart. But I notice the will was signed by someone you may know, so I thought I'd leave you with a copy."

Stewart (now with wry smile): "Ah, yes. That witness to the Will is my grandfather, Francis McNab. I'd know his signature anywhere. And I see it was also signed by Margaret Paton, his loyal clerk of many years. I knew her, too."

Benjamin: "I wonder whether your grandfather realised he was witnessing the will of a person intimately connected with 'Waltzing Matilda', Sarah having introduced the musician to the wordsmith."

Stewart: "Well, I can't tell you that, but I can tell you something else that might pique your interest. "

Benjamin: (peering over spectacles, quizzical expression): "Yeeahhs?"

Stewart: "When I retired from the partnership at McNab & McNab, I only brought one thing with me to the Bar. This desk. And I think it is highly *probable (as a civil barrister, I was not surprised to hear Stewart speak in probabilities), that* this *will was signed on* this *very desk, as it was previously owned by Francis McNab, my grandfather.*

The ink on Sarah Ann Riley's signature suddenly seemed fresh to me, as it had now returned to the place it originally marked the page, on 26 July 1933. That was two years and five days before she passed away; one day later, Sarah was interred alongside her parents at Geelong Western Public Cemetery.

As I left Stewart's chambers, and returned to mine, eight doors down the corridor, I wondered whether Stewart's grandfather's desk, had become, since November, 2002, a table.

Then, as I entered my own chambers, I looked over at my wig, perched on a bust of Beethoven as it has for many years, and I contemplated my impending trial in Morwell, before His Honour Judge Smallwood who would neither see nor hear me without that portion of the proper courtroom attire.

1 John William Street, produced sons who foreshadowed an historic legal dynasty, namely three Chief Justices of the Supreme Court of N.S.W. i.e. Sir Phillip Street KCMG, 1925 – 1934, Sir Kenneth Street KCMG, KStJ. 1950 – 1960 and Sir Laurence Street AC, KCMG, QC, 1974 – 1988.

2 'As Long As Your Eyes are Blue', *The Bulletin*, 7 November, 1891

3 Roderick, Colin, *Banjo Paterson, Poet by Accident*, Allen & Unwin, 1993, p.88: "After Sarah had broken off her engagement with Bartie in the winter of 1895 and left for London to wear her sackcloth and ashes, his family was all agog to see where Bartie would look next."

4 The phrase is derived from two German words. '*Waltzing*' derives from *auf der walz* referring in turn to the custom of apprenticeship whereby the apprentice would travel around the country for the allotted time (eg. 3 years) before returning to their village, fully qualified in their trade. '*Matilda*' was the name given to females in the 16th Century 30 Year European War who followed the soldiers in battle, 'keeping them warm' at night. Transferred to the outback, 'waltzing matilda' meant to walkabout looking for a job of work, carrying that which keeps you warm at night.

5 Sydney May, *The Story of Waltzing Matilda,* W.R. Smith & Paterson Pty Ltd.,Brisbane, 1944, p.18. The old Scottish tune she spoke of was *Thou Bonnie Wood of Craigielea*.

6 Original manuscript, Paterson Estate reproduced in Campbell R. and Harvie P., "*Singer of the Bush, A.B. Banjo Paterson, Volume 1, 1885- 1900*, Ure Smith Press, 1983, pp. 518 (complete), and 251 (partial).

7 In 1840, James Riley had accompanied Count Pawel Strzelecki, James Macarthur, three convicts and aboriginal, Charlie Tara, on an exploratory trip around Gippsland. Strzelecki had climbed and named Mt. Kosciusko, then named the Strzelecki Ranges and also Gipp's Land (after the Governor of N.S.W.) while Macarthur and Riley looked out for sheep grazing country. They found it and settled in the Western District of Victoria, with Riley later moving to Geelong. There, he conducted prosecutions as Sheep Inspector, appointed under the *Scab* Act, 1870.

8 Between 1888 and 1899, Street & Paterson initially operated from 85 Pitt Street, Sydney, then from 24 Bond Street, Sydney – where, presumably, Mr. Paterson sat in his dingy little office where a stingy ray of sunshine struggled feebly down between the houses tall; And the foetid air and gritty of the dusty, dirty city through the open window floating, spread its foulness over all. (adapted excerpt from 'Clancy of the Overflow', The Bulletin, 21 December, 1889)

9. a vestige of that occurs when, after fulfilling the prerequisites of admission to the Bar, the Honorary Secretary calls out your name and invites you to sign the Bar Roll in the Supreme Court Library.

Back of the lift

Adjourned Sine Die

Federal Court of Australia

The Hon. Justice Christopher Neil Jessup

Bar Roll No. 1137

A ceremonial sitting of the Federal Court of Australia was held on 13 April 2017 to farewell Justice Christopher Jessup. The farewell was attended by a great number of distinguished guests, including current and former members of the High Court of Australia, Supreme Court of Victoria and Court of Appeal, as well as many members of the Victorian Bar. The attendance of so many was testament to his Honour's breadth of practice and pre-eminence both as counsel and as a judge.

His Honour attended Malvern Grammar and Scotch College and then Monash University, where he graduated with honours degrees in Law and Economics and shared the Supreme Court Prize with Justice Mark Weinberg. He then completed a doctorate of philosophy at the London School of Economics in industrial relations law.

As a junior barrister, his Honour was widely published and was editor of

Back of the lift

In this Back of the lift section of the Victorian Bar News, *the Bar acknowledges the appointments, retirements, deaths and other honours of past and present members of our Bar.*

Adjourned Sine Die 66
The Hon. Justice Christopher Neil Jessup
BY TIM DOWLING 66

Silence All Stand 67
The Honourable Justice David O'Callaghan
BY JENNIFER BATROUNEY 67
The Honourable Judge Anthony Kelly
BY MARK COSTELLO 68

Vale 68
Christopher Gilligan
BY GREG AND SOPHIE MCNAMARA 68
John Edward Barnard QC
BY THE HON MURRAY KELLAM AO 69
Hartog Carel Berkeley
BY THE HON SUSAN CRENNAN AC QC AND THE HON JUSTICE JOHN DIGBY 71
John Arthur Riordan
BY MARK CAMPBELL 75

Gonged 77

Victorian Bar Readers Course 77

the second edition of the seminal text *Alley's Industrial Law in Victoria*. He had three readers (the Hon Geoffrey Giudice AO, Simon Marks QC and Bryan Mueller), all of whom went on to have successful careers in the law.

His Honour took silk in 1987 and soon became established as one of the leading industrial law counsel nationally. He was known as a masterful advocate.

He was Chairman of the Victorian Bar in 1992-1993 and speakers at the farewell made reference to his Honour's outstanding leadership throughout that time – which was one of the most perilous periods of the Bar's existence.

In addition to legal scholarship, his Honour's keen interest in wine led him to undertake a Bachelor of Applied Science (Wine Science) from Charles Sturt University and he has been devoted to his vineyard in the Victorian Pyrenees for many years. Some were fortunate enough during his time in practice to witness his command of a wine list.

As a judge, his Honour heard and determined many complex cases throughout the federal jurisdiction and he did so with distinction. Although he came to the bench as a leader of the industrial law Bar, it was to the Court's great benefit that his Honour relished the task of hearing cases in various fields, particularly taxation and intellectual property. He had an especially keen interest in matters involving biochemistry and molecular patents. His work ethic as a judge was well known and respected.

He made a major contribution to the Federal Court in overseeing the introduction and development of electronic court files and electronic trials. The Court now has close to 40,000 digital court files, owing in large part to his efforts.

His Honour's dry wit and unflappable manner in court were admired by all, and will be missed. We wish him well in his retirement and thank him for his considerable contribution.

TIM DOWLING

Silence all stand

Federal Court

The Honourable Justice David O'Callaghan

Bar Roll No. 2048

On 8 December 2016, the Governor in Council appointed David O'Callaghan QC as a Judge of the Federal Court of Australia. At his Honour's welcome on 10 February 2017, the Attorney-General Senator the Honourable George Brandis QC said the moniker by which he is universally known "DO'C" is both an acronym and a mark of affection. That affection was duly demonstrated by the large gathering of friends, colleagues and distinguished guests. It was strictly standing room only as the crowd spilled outside the courtroom. As noted by Fiona Macleod, as a judge of the Federal Court, he is expected to make the easy transition from "DO'C" to "JO'C".

His Honour studied law at the University of Melbourne and tutored in law at Trinity College. He was an articled clerk at the former firm Madden Butler Elder & Graham under the supervision of Alan Fenton.

He became an associate with Justice Keely of the Federal Court.

His Honour continued his academic pursuits and attained a Masters of Law at Yale Law School. He then became a foreign associate with the New York firm Sullivan & Cromwell.

He signed the Bar Roll in 1986 and quickly became a favoured junior of many of the leading silks at the Bar, including Kenneth Hayne QC, Stephen Charles QC, David Habersberger QC, Alex Chernov QC and Ray Finkelstein QC.

His Honour returned to Yale as a visiting lecturer in 1996. Between 1998 and 2000, he worked at New Haven firm Wiggin and Dana. He worked closely with the firm's then head of its appellate practice, who later became Judge Mark R. Kravitz.

In 2003, his Honour took silk. As silk, he enjoyed a busy and successful practice, appearing in matters involving corporations law, trade practices law, revenue law, equity, mining and energy law and constitutional law among many other areas in a broad senior practice.

His Honour made a significant and sustained contribution to the Bar. His distinguished service to the Bar included being a member of the Bar Council for four years. His talent for, and a commitment to, teaching was reflected in his chairmanship of the Readers' Course Committee for more than four years between 2012 and 2016.

Outside of the law, his Honour enjoys running, cycling and American football. His Honour became a Green Bay Packers fan in the American National Football League after the demise of his beloved Fitzroy Football Club. His Honour also has a strong affection for American classic cars (including his 1965 Wimbledon white convertible Mustang with red interior) and fast horses (including his horse Cisco of more than 14 hands).

In his response, His Honour spoke with pride and affection about his wife Wendy and his three sons Alexander, Samuel and Benjamin.

We wish His Honour long and distinguished service on the court.

JENNIFER BATROUNEY

Federal Circuit Court

The Honourable Judge Anthony Kelly

Bar Roll No. 2146

After nearly 30 years at the Bar, his Honour Anthony Kelly has accepted appointment as a Judge of the Federal Circuit Court.

His Honour had a remarkable practice at the Bar. For 16 years he was substantially occupied with three controversies. His entrée to mega-litigation came with the *Bank of Melbourne* case, which ran from 1990 to 1993. His Honour – about three years post-call when he received the brief – appeared unled at a Bar table crowded with stars, both risen and rising.

His Honour then accepted a brief as Peter Murdoch QC's junior in the *Estate Mortgage Trusts* litigation. They appeared for Lloyds of London. The litigation ran from 1993 to 1997.

Then, in 1998, he was briefed to act for Exxon-Mobil in the litigation emerging from the Longford explosions. He could not have predicted the hydra-like quality of the dispute. The various actions and enquiries, continued until 2008.

Aside from those very large cases, he managed a diverse practice on the commercial and common law side.

As a Silk his Honour was noted for his impeccable preparation. He worked feverishly in the lead-up to trial. He had no truck for hierarchy within the legal teams he led; each contribution was considered on its merits. One of his mantras was "there's no pride in authorship". Juniors were encouraged to amend his drafts.

Another mantra – which may prove telling in his new role – was "Momentum!". On the theory that prospects improve with momentum and dim with stagnation, he eschewed side-issues and strived to prevent litigation becoming bogged-down. Counsel appearing before his Honour can expect credit for advancing the progress of a case. The alternative is best not contemplated in a happy note such as this.

His Honour was blessed by mentors of diverse abilities. In particular, Murdoch QC and Derham QC took the time to inculcate him in the ways of the Bar. No doubt influenced by their generosity, he took much time mentoring the junior bar, including his four readers.

His Honour is innately interested in the law. That he had not practised in the Federal Circuit Court when he was approached to take appointment would only have piqued his interest. His love of the law, and his wide professional and human experience, will serve him and the Court well as he delves into the weighty Federal legislation that forms the bulk of the work of the Court.

MARK COSTELLO

Vale

Christopher Gilligan

Bar Roll No. 1514

Chris will be remembered not just for what he did but the way he did it. He saw the world with generosity, warmth, optimism and humour.

Born on 2 October 1952, Chris was by nine years the youngest of four brothers. Mainly due to his parents' frequent travel overseas, he attended boarding school from the age of six and with the exception of one year boarded for the rest of his school life. He attended St Bede's College, Mentone for his last nine years of school. It was a happy time for him and he excelled in all areas of school life.

Chris was a gifted sportsman; a champion high-jumper and captain of the school football team. He was scouted by three VFL clubs (something he never mentioned) before suffering a football-ending knee injury. He was school captain. His final year school valediction notes in part, "Possessed of an easy going personality, he has influenced his fellow students by the unassuming and dedicated manner in which he has approached all things asked of him as school leader."

In 1971, Chris commenced economics and law degrees at Monash University, in residence for a time at Mannix College. He enjoyed university life to the full and, although unable to play, was an active member of the Monash Football Club. He graduated, completed the Leo Cussen Practical Training Course and was admitted to practice in 1977. Chris spent 1978 travelling overseas and signed the Bar Roll in September 1979.

He read with Ray Lopez on the 5th floor of Owen Dixon East. The 5th floor was a lively place in those days. His near neighbours included John Barnett, Bob Kent, Geoff Flatman and Otto Strauss. It was a wonderful environment for a young barrister. Chris always had a strong practice, mainly in the common law courts and VCAT. He was held in the highest regard by all who had dealings with him.

Chris's greatest love was family. Mary and Chris married in 1981 and had four wonderful children: Lucy, Abbey, Darcy and Cormac. Chris always had time for his children, spending countless weekends on sporting fields and long summers on their annual beach holidays in Fairhaven. Despite the terrible illness, his courage and sense of humour did not waver, and Mary and the children were with him when he passed away at home on 14 April. Chris made great friendships in every phase of his life and will always be missed.

GREG AND SOPHIE McNAMARA

John Edward Barnard QC

Bar Roll No. 540

John Barnard was a man of many fine attributes. He was a proud father and grandfather. He was devoted to his wife, Margaret, as she was to him. He was a first-class lawyer and a superb jury and appellate advocate. He was a mentor to many. His interests were wide and eclectic. They ranged from conservation of the Western Port seagrass, to ornithology, to the detailed history of exploration in early Victoria and in particular Westernport. He had of course numerous friends and admirers in the legal profession, but he also had many friends outside the law, particularly down at the Island.

Sir Daryl Dawson described John "as a man of the land – a man of the earth". John's parents had a property near Corowa in NSW. Once when we were on circuit we drove to Corowa and he showed me the tiny primary school that he had attended. He pointed out where the butcher's shop and the bakery had been and of course he had an entertaining story about each. Subsequently his family moved to Mount Eliza. It is said that John rode his horse down from the property.

John came to Haileybury as a boarder in 1945 for the last four years of high school – in what was then called Form 3, now Year 9. He was a gifted student, placing first in Forms 4 and 5, and second in matriculation. School records, however, show that there were only four students in Year 12 so he came second out of four. Another boarder at Haileybury at that time was Jeff Sher, who was later a leading silk and a regular opponent of John's at the Bar, and possibly another of the four.

John began law at Melbourne in 1950. He came into residence at Ormond College in 1951 and, in his years at Ormond, shared a study with Daryl Dawson.

John graduated Bachelor of Laws and served articles at the firm of Mullet Langford in Collins Street. He was admitted to practice on 1 April 1955 and signed the Bar Roll in February 1956. He read with the late Tony Murray, who was later Solicitor-General for Victoria and then a Supreme Court judge.

John began in the Courts of Petty Sessions as they were then known. He was, from the outset a determined opponent. Glenn Waldron reports that he never gave up and would make submission after submission, always having a comeback to anything his opponent might say, until the magistrate's patience was exhausted and he put a stop to things. Glenn Waldron's report of John's early days in those courts will be readily believed by those who were involved with John in later years. As a senior silk, he represented The Alfred Hospital in the case of *PQ v Australian Red Cross and others*, the HIV AIDS blood transfusion case, still the longest-running civil jury trial in Victoria, probably Australia. Unfortunately after all that time, to use the words of Jeremy Ruskin, his junior, "We came second".

John became known in that case as 'the great objector' having made over 100 objections before the case commenced and losing every one of them. Jeremy Ruskin tells me that after losing the first few objections, rather than politely saying to the judge, "If your Honour pleases", he would mutter as he sat down, "law of the jungle". John did not mind a sotto voce mutter from the Bar table. I recall being opposed to him and I made some application that he opposed strenuously, but was overruled by the judge. As I sat down I could hear the gruff voice that I knew so well mutter, "Gone wrong, gone wrong". Peter O'Callaghan told me that John and he were opponents in many cases and that John was, to say the least, a 'very tight settler'. His most prevalent offer when negotiations started was to say "as a matter of generosity, we will pay your costs". Well O'Callaghan did well. In the case I am talking about Barnard's opening offer was "as a matter of generosity, we will not require you to pay our costs."

But to return to earlier years; John had two readers: Ross Gillies now QC and Jonathan Ramsden, who later became judicial registrar at the Family Court. John developed a large common law practice as a junior and often appeared with eminent silks of the time, such as Bill Crockett and Barry Beach, both of whom were highly regarded and respected by John.

In 1970 John was briefed to appear in the West Gate Bridge Royal Commission. John was aged 39 and junior to his good friend Barry Beach QC. John was some three years away from taking silk but the company in which he was during the Royal Commission hearing says a great deal about the reputation that he had already established. It was a veritable Who's Who of the Victorian Bar. Assisting the Commissioner was John's old master, Tony Murray QC, leading Jim Gorman QC. Others included Keith Aiken QC leading Stephen Charles, William Kaye QC leading SEK Hulme QC and Richard Searby, John Young QC—later Chief Justice of Victoria—leading Clive Tadgell, and Peter Murphy QC leading Jim Gobbo and Alan Goldberg. Fullager QC, Brooking QC and Marks QC, also appeared. Finally, Peter Coldham QC led Daryl Dawson and John Winneke

I first met John in 1973 when I worked as a solicitor. The firm which employed me regularly briefed him as a junior and continued to do so after he took silk later that year. The large practice he had developed as a junior continued immediately after he took silk. I briefed John often over the next three years or so and watching him work was a major reason for my decision to go to the Bar after encouragement from him.

Over the following years, I worked from time to time with him as his junior, usually acting for seriously injured plaintiffs. Some of those cases were pretty desperate, such as

one involving a young man who had dived into Albert Lake, but John took them on irrespective of whether he might get paid in due course. Many of the cases I did with John were on circuit and I observed how much he enjoyed acting for country people. He was truly interested in their lives, and he enjoyed nothing more than discussing rainfall patterns, the price of sheep or cattle and the background of those people. There was not an ounce of pretension in John. He would be the same person, whether talking to a grizzled old shearer or the Governor. I recall Alex Chernov describing John as the Bar's answer to Henry Bolte.

One of those circuit cases involved a young man who suffered paraplegia as a result of a single motorcycle accident on what we claimed was an inadequately maintained and poorly repaired bridge near Hamilton. The case was against the president and councillors of the local shire. I recall well the mischievous look on John's face when we found out that the president of the Dunkeld Shire was none other than the father of Allan Myers.

Amongst John's many other attributes as a barrister, his unquestionable integrity, his resilience and tenacity, and the interest he had in encouraging other barristers stand out in my mind. John was a great mentor of so many people at the Bar, whether junior or senior. Alex Chernov spelt out how John's deep knowledge of the law and its common-sense application were a great help to him, and that John's friendship was important to him when he was under pressure during his time as chair of the Bar.

John's service to the Victorian Bar was prodigious. He served eight years on the Bar Council, six of those on the executive committee; and was vice-chairman in 1983-84. John served a remarkable eight years on the ethics committee, five of those as chairman. I was a member of the Bar Council for those years and saw first-hand how important his wise and principled advice was to the council. Integrity was always a first principle with John.

John was a learned, wise, compassionate and very practical ethics committee chairman—and such a master in managing meetings of the committee that, on the one hand, members of the committee felt that they'd been able to express their views but, on the other hand, the business of the committee was conducted expeditiously.

I mentioned John's resilience. The members of the Bar Council of 1986 will never forget a meeting in late September at which John, who was never late, was not present. Suddenly Alex Chernov came into the meeting with an anguished look on his face and informed us of the dreadful and tragic death of John's daughter, Beth. Few, if any, of us could imagine the depths of grief which John and Margaret and the children suffered nearly 31 years ago.

John came back to work very soon after. I suspect that his work was his antidote to grief. At the time, he and I were representing a number of plaintiffs who had suffered loss in the Ash Wednesday fires. On one occasion in late 1986, we were having a conference in John's chambers on the 17th floor with a young married couple who were farmers in the Hamilton area. During the conference, we learned that both of them had been at Longerong Agricultural College at the same time as Beth. This was the only time I ever saw a slight chink in the resilience of John. He stopped taking his notes, which, as always, he was doing with his Parker fountain pen on blue paper, and swivelled his chair around with his back to us looking out the window. I knew what had upset him and it seemed to me at the time he looked away for minutes, but it was probably a matter of seconds. When he turned around, I thought I saw a slight tear in his eye and then he resumed the conference. Of course, John cared for every client he acted for, but thereafter he acted for this young couple with a special tenacity.

It was not just members of the Bar that benefited from John's generosity. His clerk, John Dever, said "John Barnard was my mentor and trusted advisor after my father passed away in 1985. His superb counsel was reliable, trusted and given with kindness and understanding. A great person has left us."

Similar notices came from John's beloved Phillip Island. The Board of the Western Port Seagrass Partnership paid tribute to his many years of wise counsel and tenacious efforts to champion the cause of protecting Western Port. Those in the Phillip Island community who fought to keep the local hospital also benefited from John's generous advice. And of course, John was beloved by his friends on the 17th floor, such as Chernov, Costigan, and Hedigan, who Ruskin tells me would each afternoon during the six months of the PQ case stick his head around the door, and in language I shall not repeat, castigate them both for being on a 'gravy train'. Chernov recently said "thank heavens Barnard's room was between my room and Hedigan's". Of course, there were others on that floor who also worshipped John, such as a then very young Paul Santamaria who John enjoyed teasing. Michael Crennan said that "in the years we spent on the 17h floor we rarely had a day when John did not instruct or amuse us. We were so lucky to be on that floor with him". Alex Chernov noted that John had a great and wicked sense of humour that came out to level anyone getting ahead of themselves—often that included Chernov.

It may be that John's pupil, Gillies, learned something from John about causing mischief. Shortly before the PQ case, John had had his first hip replacement, and had spent much of his convalescence teaching himself how to use a computer. He became pretty proficient and as this was 1989, few barristers were using computers. Accordingly, when the PQ

trial started, John was regarded by everybody in the trial as the expert in checking transcript references and the trial judge would often ask John to check on his machine (as the judge called it) for a particular passage in the transcript. However, John had, in that trial, to contend not only with 'the law of the jungle' but with his former pupil Ross Gillies QC, who was leading Jack Forrest. Forrest had reasonable computer skills but was much slower than John. There were two bar tables, one behind the other in the 11th Court. Gillies and Forrest were at the second bar table, immediately adjacent to the power cord to John's computer. Gillies, tiring of his old master having become the computer king in the trial, would unplug the extension cord, thus enabling Jack Forrest to find the passage the judge was asking about first, leaving Barnard exasperated about his constantly failing computer.

John retired from practice in 2000 after more than 44 years at the Bar, more than 26 years as Queen's Counsel. After his retirement, John spent nearly all his time at the farm. He rarely came to Melbourne, although he maintained an interest in what was going on. He read the law list and would say things to me such as "What is Chernov up to? I haven't seen his name in the law list for a while." He played golf for a period, pretty badly really, but it was something he shared with Margaret until his hip gave him so much trouble that he had to give it up. He had a second hip replacement and, although he did not resume golf, it did not slow him down. Soon after that hip replacement, neighbours found him up to his waist in one of his dams, trying to rescue a cow that had somehow got stuck in there. He and Margaret enjoyed the years up until 2012, she playing quite a bit of bridge at the Phillip Island Bridge Club and he fully engaged in the farm, with the seagrass committee, and in providing free wise advice to Phillip Island locals involved in such issues as trying to retain the local hospital.

One sadness at the end of his life was the loss of Margaret. She had expected to be looking after him in his old age. Sadly, that was not to be, but John's children took over much of the responsibility for that. It seems resilience is also a genetic Barnard trait.

Another sadness two months before John's death was the untimely death of his close friend, John Clarke. In some ways, John's final dementia was a blessing, in that had he been able to fully comprehend it, he would have been devastated by the death of his much younger friend. John Clarke's wife, Helen, told of the friendship she and her husband shared with John and Margaret. She recounted an expedition to see two sea eagles that were nesting on John and Margaret's property: two adult birds, nesting with their chick. The drama and the humour of John's commentary and the adventure of driving in John's truck to a suitable viewing position were enjoyed almost as much as the spectacle of the nest.

Helen recalled the great friendship that the two Johns enjoyed, their common interest in birdlife, conservation, farming, and the world of politics and law. John Clarke was in awe of John's sharp mind and dogged pursuit of the rule of law. John Barnard was a mine of interesting stories, informed opinion, local history, and legal and political gossip. He was also enormously generous and kind to his friend. The two Johns were very amused by one another and laughed a lot, sharing one of those unique friendships between an older and a younger man, who in other ways were quite different.

John also advised and greatly assisted his friend with the still ongoing project of conserving and protecting the unique Rhyll Inlet and its wetland surroundings.

The Phillip Island wetlands has lost two of its greatest champions and the Victorian Bar has lost one of its greats.

THE HON MURRAY KELLAM AO

Hartog Carel Berkeley

Bar Roll No. 601
The following is a distilled version of the "Address to Celebrate the Life of Hartog Berkeley QC" delivered at the Essoign Club, Victorian Bar on Monday 6 March 2017

Hartog Carel Berkeley QC, a delightful, fun loving, generous, kind and colourful, and somewhat eccentric member of the Victorian Bar for 46 years, 10 of which he served as Solicitor–General for the State of Victoria, died on 17 February of this year at the age of 88.

Hartog personified the collegiality and generosity of the Inner Bar.

Hartog was also passionately committed to the independent Victorian Bar and to the community of the Bar. He was unerring in his personal support and generosity to his friends and close personal colleagues.

Now something of Hartog's colourful story.

Hartog's family, the Berkelouw family, were Eastern European Jews who fled to Holland. They became upper echelon, Antiquarian Booksellers from 1812, in Holland. Hartog's grandfather and namesake, Hartog, expanded the business and gained membership of the International Antiquarian Booksellers Association. Hartog's father, Leo, worked in the

Antiquarian Book business for a period, but left Holland for England; and worked in retail clothing in London.

Hartog, still Berkelouw, was born in London on the 14th of August 1928. He attended school at the Roan School for Boys in Greenwich then at Eltham College in Kent.

World War II was devastating for the family. Hartog's father and family were in England. Hartog lost two uncles in Europe; and in the siege of Rotterdam, *Berkelouw Books* was bombed and its entire stock destroyed.

It was at about the end of the War, upon completion of his secondary schooling, that Hartog began an Arts and Economics course at the University of London. But this was interrupted by the family move to Australia, more particularly to New South Wales. Hartog, however, had remained in England to finish the academic year and sit his exams, after which, unaccompanied, he travelled to Australia to join his family in 1947. It was indeed an arduous flight in stages by Seaplane. This would have been an epic trip for a lone 18 year old young man.

It was in Australia that Hartog's father Leo anglicised the family name to "Berkeley".

Hartog's love of his family was his life force and foundation. Beyond family, Hartog had at least four conspicuous passions:

» Books were in his blood – *Berkelouw Books* dating back to 1812. Hartog well remembered his Grandfather's Antiquarian book shop in Rotterdam.
» His second passion was the land – that emerged very strongly in Australia.
» His third passion was fitness, Hartog was a passionate runner.
» He participated in more than one Marathon, including the Big M Frankston to Melbourne Marathon in 1984. He trained with his beloved dog "*Phoebe*" while humming snatches of "Bye Bye Blackbird" because Hartog believed the song helped with his running rhythm. Hartog completed this marathon in 3 hours, 32 minutes and 32 seconds.
» His fourth passion was the Law.

On arrival in Australia, Hartog initially worked for a couple of years on the land as a sheep rouseabout and with shearers. He worked on a dairy farm in Bega, up every morning, at 4am to round up the cows. That only lasted a few months. Then there was a 5-acre market-garden on Forest Way, New South Wales. And, with his brother Klaas, there was a two-ton Austin truck, and a concreting job in East Linfield.

At the age of 25, Hartog was ready for marriage, membership of the New South Wales Scottish Regiment and, a year later, the study of Law.

At about this time Hartog met his first wife to be, Margaret Bingham. Margaret was the daughter of Colin Bingham – who was a leader-writer and foreign affairs correspondent for the *Sydney Morning Herald*.

In about 1954, and now married to Margaret, Hartog commenced his legal studies.

Hartog did not go to the University of Sydney Law School, then the only New South Wales Law School in existence. Rather, Hartog took the alternative course and sat the Barristers Admission Board examinations. Unlike the Victorian equivalent, which had the Council of Legal Education course at the Royal Melbourne Institute of Technology, the New South Wales Barristers Board was only an examining body, there were no lectures. Hartog had simply to buy the text books and casebooks, and some lecture notes, and learn it for himself.

High Court Justice Michael McHugh qualified for admission to practice in New South Wales in this same way, and was admitted in 1961, just a few years after Hartog in 1958.

After admission to the New South Wales Bar, Hartog began Reading with Tom Hughes. At this point Hartog was 30 years of age, had been married for 5 years, and his two children, Susan and Leo, were part of the Berkeley Family.

It was apparently very lean at the New South Wales Bar at this time. There was no "floating work" to speak of and, in his first six months, Hartog had, he said, only one brief.

Encouraged by one solicitor, who promised that his firm would support him, Hartog came to Victoria and was admitted to practice here on the 1st of June 1959. He was required to Read again at the Victorian Bar. This resulted in Hartog Reading for six months with Bill Harris, later Harris QC, Bar Chairman and Supreme Court Judge.

For most Mentors ("Masters" as they were then known), the instruction and mentoring of a Reader comes after they have been admitted to practice.

Not with Hartog. For Bill Harris, his work with this Reader began at his pupil's admission in Victoria. Harris had agreed to move Hartog's admission.

But things were to get off to a rocky start because, with typical Hartogian insouciance, Hartog failed to turn up on time for his admission, believing that the ceremony would start at 10.30 am.

On the 1st of June 1959, the Full Court, presided over by the Chief Justice Sir Edmund Herring, convened to hear three applications for admission at 10 o'clock in the Banco Court. Bill Harris was at the Bar Table, but alas, no Hartog.

Harris was, to say the least, understandably grumpy. However, with characteristic determination and generosity, Harris approached the Chief Justice and the Full Court re-convened at 2:15pm to hear the one remaining application for admission. At 2.15 pm Hartog had to give Sir Edmund an undertaking that he would, thereafter, read the Law List in *The Age* every day.

Another favourite story of Hartog's about his very early days at the Bar concerns his good fortune in landing two briefs on the one day. Hartog discovered how this occurred when

he overheard his then Clerk, Percy Dever say on the telephone: "Well there is always Berkeley" and after a prolonged silence (during which Percy listened to the Solicitor on the other end), Percy said "Yes, I know – but he's cheap".

Soon after his admission to the Victorian Bar on 1 June 1959, Hartog signed the Bar Roll on 25 June 1959 and took silk in 1972. Hartog served as Chairman of the Bar Council for two years from 1979 to 1981 and served at the same time as President of the Australian Bar Association. For 10 years between 1982–1992, Hartog served as Solicitor–General for the State of Victoria. Before then he was involved in numerous Bar Council Committees. He chaired the important Ethics Committee from 1976 to 1977 and was a director of Barristers Chambers Limited from 1974 to 1979. Hartog retired from full time practice at the end of June 2005. He was a special guest that year at the Bar Dinner, having signed the Bar Roll more than 45 years earlier. He was in good company with his original companion in chambers, Gerard Nash, the late James Merralls, Brian Bourke and David Kendall.

The milestones highlight that Hartog spent 46 years as a barrister, a profession he loved and in which he was both an outstanding leader and a generous mentor. More than that though Hartog was a person of ample mind, well read, fluent, quick witted and very, very funny. He was also courageous in the face of any judicial grumpiness a *modus operandi* which thankfully has gone.

Hartog described his early life at the Bar as one in which he had a habit of avoiding his bank manager. He once had a run of bankruptcy petitions for the Deputy Commissioner of Taxation who Hartog said 'never paid'. When the time came for Hartog to write the cheque to pay his provisional tax he set off against his own tax bill, the amount the Deputy Commissioner owed him for fees. This resulted in a cheque within a week from the Commonwealth Crown Solicitor.

When the centenary of the Victorian Bar rolled around in 1984, Bar thespians – Graeme Thomson, Simon Wilson and Paul Elliott — approached Hartog with the idea of doing a Bar Revue entitled 'The Life and Times of Judge John Doe'. Hartog wrote a personal cheque on the spot when he learnt how much they would need to get it going. A brilliant conceit in the revue was that the hero John Doe had once read for the Bar with Warthog Darkly – loosely based on 'you know who' — and played brilliantly as I mentioned by Doug Salek. At the time Hartog's brothers ran Berkeley Cleaning Company Pty Ltd. So, on stage Hartog's chambers were bedecked as a drycleaners complete with an ironing board as a desk and the hapless reader John Doe sitting quietly in the corner. Whilst spraying poor John Doe regularly, with his steam iron Hartog/Warthog ironed shirts and sang:

'I'm Melbourne's leading legal brain

I'm wise to all the loopholes

And very modestly, I maintain

I haven't any scrup-holes.

Let's not forget my father, a lawyer too was he

In fact he shouted 'I object!' the first time he saw me.

I'm the best by far of the Band of the Bar

A most obnoxious lawyer

I'll press your law suits whilst you wait

And scorch them to annoy you.

I'm a lawyer who knows how to sue

you slander me and that's my cue

I'll litigate all over you I'm Warthog the lawyer.'

– accompanied by more spraying of poor John Doe.

The writer of the song engaged in more than one bit of poetic licence because Hartog's father was not in fact a lawyer.

Hartog followed Sir Henry Winneke, Tony Murray and Sir Daryl Dawson in the role of Solicitor–General. The Premier with whom he worked most, the Honourable John Cain, recollects Hartog's painstaking determination to heed Sir Henry Winneke's thoughts on the shape of the role and to maintain the independence so essential to the proper discharge of duties.

One of Hartog's favourite stories about himself as Solicitor–General (when he was the most junior of them) concerned his theory of section 109 of the Constitution, a theory unmediated I have to say by Brian Shaw or me. Hartog addressed the High Court thus:

'I would like your Honours to imagine a diagram often found in my books of logic. It contains a big circle enclosing a smaller circle. The big circle represents insurance generally, that belongs to the Commonwealth. The smaller circle represents State insurance, the Commonwealth cannot have that. Your Honours, this is called the "doughnut theory" of Constitutional law.'

Hartog, a keen observer of the demeanour of judges, always said the Chief Justice of the day Sir Anthony Mason was the only judge who did not smile, but Hartog claimed that he distinctly saw a tear roll down Sir Anthony's cheek on this occasion. However, Hartog may have misunderstood that tear. Many Sydneysiders doubt that Sir Anthony ever fully recovered from his exposure to Hartog's ruminations on the Constitution.

By the time Hartog became Solicitor–General he had been indulging in whimsy and fun in all aspects of his practice for a very long time. In the days before instructing solicitors dwelt in marble halls, briefs were often papers (not in any particular order) tied up with a piece of pink ribbon. Hartog took it upon

himself to discipline that branch of the profession by marking a fee for "sorting papers in brief — $150". Hartog was also very good on the telephone. Once Howard Nathan rang up and said: "Little Jesus here", to which Hartog replied in his best baritone: "It's your father speaking". On another occasion when a solicitor telephoned to enquire about Hartog's fees, Hartog enquired "Are you sitting down?" After a conference during which robust advice was given and solicitors had retreated, Hartog's junior Chris Canavan, mildly enquired whether the advice was just a tad "too robust?" to which Hartog replied: "It was Lord Halsbury who said 'people pay us for our opinions, not our doubts'."

Hartog fostered many major Bar enterprises – the Centenary in 1984, the Bar Review I have mentioned, the Readers' Course, the tapestries adorning the foyer of Owen Dixon West, the sculpture in East, the Living Legends Dinner, and the Essoign Club, of which he was a life member. He named the Essoign Club probably as a result of idly leafing through a law dictionary on a slow day. "Essoign" is a law French term meaning "an excuse made for nonappearance" in court.[1] The original name of his farm "*Shifty Nooking*" came straight from a judgment of Lord Denning in the style of: "It was bluebell time in Kent …". Such things illustrate Hartog's tremendous capacity to find amusement, part of his biophilia, even when reading law dictionaries or judgments.

As to the tapestries, when Owen Dixon West was finished, Graeme Uren and David Byrne thought of having in it some work of art donated by the silks. Brian Shaw, Hartog and Stephen Charles put on their thinking caps and the tapestries are the result while David Byrne collected the donations, achieving a recovery rate many a liquidator might envy. The theme of the Western tapestry is "Barristers at work". The small owlish figure was a present from a grateful reader's group to the Executive Officer of the Bar, then Anna Whitney. Juniors are represented by Hartog's very good friend Michael Adams and silks are represented by none other than Hartog himself. It is fitting that the lineaments of such a titan at this Bar remain for all to see. Of course, managing to get donations of $1000 from each silk to pay for the tapestries was a challenge, unsurprisingly there was some grumbling. When the tapestries were hung, one of the grumblers was overheard saying to another: "I hear they cost a fortune. You could get an antique Persian rug for a lot less." His friend replied, "True, but with an antique Persian rug you wouldn't get Hartog Berkeley thrown in".

No epitome of Hartog could omit the importance to him of family, his farm and Anna Berkeley.

Hartog was very much a "present" father to Susan and Leo. Occasionally, he came home late; occasionally, he was interstate – but for the most part, Hartog was home and very devoted and very involved. Hartog and Margaret were likewise devoted to Suong.

Hartog harboured a deep appreciation and love of nature – of the Australian bush. Hiking, often alone, invigorated Hartog physically and mentally. He also took his children Susan and Leo hiking.

Margaret, who had also worked as a journalist, taught English as a Second Language at the Prahran Multicultural Society – and helped at the Prahran Op Shop. Hartog helped the Multicultural Society buy land at Inverloch for a camp site. Margaret and Hartog also helped run many of the annual holiday camps for new immigrants, at different places such as Phillip Island.

And there was Hartog's beloved farm at Thornton.

Hartog was determined that *Shifty Nooking*, as his farm was named, would not be just a city barrister's "hobby" farm. He was determined to make it a success. He learned about cattle breeding and artificial insemination; he went to New South Wales to undertake cattle breeding courses. It has been said that Hartog was more proud of the title "*Studmaster*" and of his licence as an "A Class" Artificial Inseminator, than of the title QC – and that Certificate hung in his Chambers for many, many years – some have quipped that Hartog's adeptness in this area had something to do with "the long arm of the law".

With Hartog's special capabilities, drive and enthusiasm *Nooken Stud* soon evolved into a serious Poll Hereford breeding operation, incorporating the best of Australian, American and Canadian blood lines. *Nooken* was a frequent "Best in shed" or "Best of breed" at the Royal Melbourne Show; and Hartog's cattle not infrequently also took prizes at the Sydney and Adelaide and Dubbo Royal Shows.

Margaret died in 2006. Later, Hartog and Anna Whitney were married and Lord Howe Island became another special place for them.

Like Hartog, Anna, during her long career of excellent service to the Victorian Bar for the best part of 25 years, initially assisting Miss Dorothy Brennan and then, for some 17 years, Executive Officer of the Bar Council, has made a most valuable contribution to the Victorian Bar. Amongst other things, Anna was, for many years, the Administrative Officer of the Bar Readers Course and the Administrative Support of the Bar Ethics Committee. In those days, those at the Bar all knew, respected and warmed to Anna.

Anna has brought so much joy and satisfaction to Hartog's life and Hartog likewise to Anna's life. This has always been plain for all to see. One example is a project of which Hartog was so proud and which gave him many years of great pleasure. That was the completion

of the *Nooken Park* homestead at Thornton.

Anna largely designed and managed the construction of the Berkeleys' truly stunning home at the farm. Every visit there involved Hartog taking one on a tour during which he, again and again, pointed to aspects of the building's beauty, clever design and functionality, saying: "Anna did this"… "Anna thought of that"… "isn't that clever or isn't that stunning"… "that was Anna's idea".

Anna was always 100 percent there in the hard times for Hartog; and likewise Hartog for Anna.

In 2008, Hartog suffered a serious stroke which initially compromised his quality of life quite significantly. Anna left absolutely no stone unturned in her campaign of love and support aimed at ensuring that Hartog would fully recover his health and vitality – after prolonged sustained efforts Anna was successful. Hartog was very often heard to express his profound gratitude and love for these and so many other devotions.

It is truly heart-warming that Anna and Hartog had such a very happy last year together, including an extensive time overseas. It should also be said that this last year's loving and happy finale of travel together was preceded by so many earlier happy and loving trips abroad and around Australia – Anna and Hartog were great travellers.

Bernard Shaw once said something apposite to the great man we have lost. Bernard Shaw said of a lion of culture and creativity, William Morris:

> *"You can lose a man by your own death, but not by his. And so until then, let us rejoice in him".*

Farewell Hartog

1 Jowitts, *Dictionary of English Law,* 2nd ed (1977) vol 1 at 722.

THE HON SUSAN CRENNAN AC QC AND THE HON JUSTICE JOHN DIGBY (2017)

John Arthur Riordan

Bar Roll No 1094

My last, and lasting, memory of John was a visit to him at the Epworth hospital with Matthew Harvey and Philip Barton a week or so after his bypass surgery. He was in fine spirits. The operation had been a success. Family photos surrounded him. He was disobeying orders and creating mayhem with nursing staff, completely normal. As we left I shook his hand whilst we made arrangements to see him at his home in a week or so. He was delighted. His smile, as always, revealing enormous kindness, generosity of spirit and his sheer delight in being with friends and family. News of his death only three days later was devastating. To his many friends at the Bar it was inconceivable that a life lived with such vibrancy could have been so suddenly ended.

John challenged conventions. He explained it as his "Irishness." He provoked debate and welcomed controversy. He reveled in pointing out absurdities behind commonly accepted views and attitudes. Over regular coffees with friends, debate and discussion freewheeled over all manner of topics. These were frequently raucous with John by turns provocative, amusing or infuriating. If consensus developed on any issue he would argue the contrary position. His theatrical talents saw him sometimes literally "acting on" a point he thought needed to be made. His response to what he regarded as the absurdity of the wig wearing debates was to turn up in chambers sporting the most enormous Afro wig. Playing on a friend's obsession with celebrities, he attended his place of work "disguised" as Kylie Minogue. In one controversy, he wore a full burqa to a lunch to clinch an argument in his favour, and in another, he attended a function at a conservative club in the guise of a destitute and homeless man to drive home a point about social justice. He once walked through a crowded Domino's wearing an enormous rabbit's head…..I think that one was just for the hell of it. I could go on. He was unique. He abhorred blandness.

His professional approach to his legal work was uncompromising. His preparation of cases, meticulous. His paper work honed to elegant expression. Not a word was wasted; opinions were clearly stated. He treated those he acted for with the utmost respect and concern. He fought hard for them. He was unstintingly generous with the time he gave to all colleagues that sought his advice; it was always astute.

Born in Shepparton on 6 May 1944, John was one of six children born to Clarisse and John Riordan senior, known as "JR", a lawyer of ability and renown. John revered JR and spoke of him often as a man of principle, dignity and humility. He was his father's son.

John's gregarious personality and his love of musicals and theatre came to the fore early. His performance of the lead role of the king in the local production of the musical "The King and I" was by all accounts, – principally his own, outstanding. He'd "out-kinged" even Yul Brynner. Members of the 15th floor of Owen Dixon Chambers West were frequently treated to his enthusiastic rendition of "Shall We Dance" as past theatrical glories were re-lived.

As a boarder at Xavier College John did well academically, and was

even Dux. Doubt was cast on this latter claim, it being pointed out that his name was conspicuously absent from the Honour Board hanging in Xavier's Great Hall. Without pause he explained that in truth he'd been denied recognition of his achievement as punishment for having sealed up the offices of the reviled head of cadets and filling the room with water from a hose left running throughout the night. Knowing John, that was accepted as an entirely plausible explanation.

John studied law at the University of Melbourne. He was a diligent student and excelled. He was a resident in Newman College where he made lifelong friendships including that of Bernard Bongiorno QC, later DPP and Justice of Appeal, who was best man at John and Angela's wedding.

On graduation he returned to Shepparton to work in the family firm, Riordan & Riordan. He was admitted to practice in March 1967 and found himself involved immediately in a wide variety of interesting legal work, none more so than as solicitor acting in the defence of Leith Ratten, who'd been charged with his wife's murder. The trial, conducted by Chief Justice Sir Henry Winneke, was a sensation at the time. Ratten was convicted but maintained his innocence. The matter ultimately went on appeal to the High Court and the question of his guilt or innocence divided opinion for years.

Never one to baulk at a challenge, in 1971, aged 27, John ran for a seat in Federal Parliament standing as Labor's endorsed candidate for the seat of Murray. Then, as now, the seat was staunchly conservative. John's political hero, Gough Whitlam, launched his campaign, which included cameo appearances by then ACTU president Bob Hawke. Whilst he didn't win, John had taken to the hustings with gusto, achieving a 17% swing to Labor. Sadly the loss put an end to John's modest ambition to become Prime Minister by his 30th birthday. He'd later concede to a touch of hubris, but just a touch.

Shepparton was always unlikely to contain such a spirited personality. He left for Melbourne, signing the Bar Roll in 1974. He read with Donnell Ryan QC, later a judge of the Federal Court. His intention to develop an industrial law practice was derailed by the demand for his talents as an advocate in the common-law personal injuries jurisdiction.

An early case of note was *Brisbane v Cross* [1978] VR 49 (Young CJ, McInerney and Dunn JJ) in which John appeared as counsel for the appellant before the Full Court. John sought to persuade their Honours that the common law rule in *Searle v Wallbank* (landowner immune if livestock stray onto the road) did not form part of the common law of Victoria. The respondent's counsel was the formidably clever Brian Shaw QC. John's submissions were able and thorough, prompting a compliment in the course of argument from McInerney J. John recalled that at a particular high point in his submissions he glanced across the bar table towards Shaw, expecting to observe some unease. On the contrary, Shaw had remained completely composed, calmly reading Newton's *Principia Mathematica* – till then not widely appreciated as a leading treatise on the law relating to straying cattle.

By the late-80s John's practice was large and, had he applied, would certainly have justified silk. Instead he decided to pursue further study at Oxford University where he ultimately obtained a diploma of law completing his thesis in an industrial law related topic.

On return to Australia he was determined to give expression to an idea that he'd conceived some time previously for a new encyclopaedia of Australian law. He persuaded the Law Book Company to back the concept, becoming the founding Editor-in–Chief of what was to be "*The Laws of Australia*". He gathered the best practitioners and academics to contribute to the work under a distinguished advisory board headed by Sir Zelman Cowen. At TLA's launch in 1993 Justice Kirby, then President of the NSW Court of Appeal, described it as "perhaps … the boldest [enterprise of legal publication] in our country's history". John's uncompromising commitment to the work's excellence, at any cost apparently, led to robust and, as John recounted, frequently fraught and hilarious exchanges with the LBC's uncomprehending and beady-eyed bean counters.

In the mid-90s John returned to full-time practice at the Bar, resuming work principally in common law personal injuries trials but also appearing in a wide variety of cases including commercial disputes, defamation and property law.

In 2007, John, for the first time, applied for silk. He had come to the view that despite his objections to silk generally, without it his ability to attract the better cases for plaintiffs in common law matters and so advance his career was limited: largely because defendants (invariably insured), briefed silk as a matter of course and, as a number of his instructing solicitors explained, it was difficult to convince an anxious plaintiff that there was no need for them too to retain silk when the cost of doing so would always be recoverable as reasonable. His application was not successful. Reasons were not given. There was no right of appeal. This was the way it had always been. In John's view the process was shrouded in unjustifiable secrecy, unburdened by considerations of natural justice, that lawyers would otherwise ordinarily regard as totally unacceptable. So began his highly public, fearless and, in the view of some, quixotic campaign fought over the next three to four years to force change. In the end his efforts did not go entirely unrewarded and quite apart from generating valuable discussion on the matter, they led to an inquiry by former Appeal Justice, Murray Kellam, which resulted in changes clarifying the process and ensuring that a disappointed applicant can now at least seek "feedback" from the President of the Bar.

The public campaign gave John his 15 minutes of fame. Attending a function with his brother-in-law, Alan

Archibald QC, a young lawyer on being introduced to both followed with, "Ah, the famous John Riordan, I know all about you…. what do you do Alan?"

More recently, John's restless intellect and creativity led to his writing a book on superannuation, *Total and Permanent Disablement in Superannuation and Insurance*. The second edition is soon to be published.

At the still centre of John's life was Angela, his life partner, their children, Andrew, Bridie and John, their partners and his adored grandchildren. To be in their company was to see a family that crackles with love and joy.

The Bar prides itself as home for the intellectually curious and those of fearless independence. John was a barrister's barrister.

MARK CAMPBELL

Gonged!

Australia Day Awards 2017

Her Excellency, the Hon Linda Dessau AC
The Hon Justice Mark Weinberg AO
The Hon Stephen Charles AO QC
The Hon Justice Kevin Bell AM
The Hon Elizabeth Curtain AM
The Hon Nahum Mushin AM
The Hon Kevin Mahony AM
Brian Walters AM QC
William Lye OAM
Gemma Varley PSM

Queen's Birthday Awards

Julian McMahon AC
The Hon Joseph Kay AM
Brian Bourke AM

Other Appointments

Allan Myers AM QC - Chancellor of the University of Melbourne
Dr Stephen Paul Donaghue QC - Solicitor-General of Australia
Simon Molesworth AO QC Judge of the Land and Environment Court of New South Wales
Julian McMahon - LCA 2016 President's Medal
Christopher Horan QC - Vic Bar Pro Bono Trophy

Victorian Bar Readers

March 2017

BACK ROW: Coral Alden, Thomas Barry, Amelia Hughes, Angus Christophersen, David Easteal, Calum Henderson, Fatmir Badali, Leo Faust, Jim Hartley, Matthew Peckham, David Carolan, Alice Muhlebach, James Davaris, Duncan Chisholm
MIDDLE ROW: Rachel Chrapot, Sarah Lenthall, Nancy Grunwald, Angela Sharpley, Jennifer McGarvie, Reegan Morison, Elizabeth Bateman, Stephanie Wallace, Katherine Farrell, Carina Moore, Jordan Schulz, Robert Paoletti, Stragen Foo, Briana Goding, Samantha Seoud, Estelle Frawley, Julia Kretzenbacher, Wendy Pollock
SEATED: Lachlan Carter, James Tierney, Daphne Foong, Scott Davison, Fiona Hudgson, Natalie Campbell, Christopher McDermott, James Humphris, Jonathan Barrington, Abbie Roodenburg, Andrew McRobert, James Plunkett, Johannes Schmidt

Boilerplate

A BIT ABOUT WORDS

Midwife

JULIAN BURNSIDE

Midwife is an odd word, but so common that we rarely pause to consider its origins, because its meaning is generally understood and not attended by the ambiguity which haunts so many English words.

According to the OED, the received meaning of *midwife* is "A woman who assists other women in childbirth, a female accoucheur." It has been used with that meaning since the early 14th century. But that's where the clarity ends. The first component of *midwife* is uncertain, and the second is surprising.

Mid- might be an adjective, denoting something "in the middle of" something else; or it might be a preposition, denoting "association, connexion, accompaniment, proximity…". In this meaning, it is readily linked to the German *mit*, meaning *with*.

So, the first element, *mid-*, is ambiguous. And the second element, *-wife*, is used with its very early meaning of *woman*. As the OED has it, *wife* once meant "A woman: formerly in general sense; in later use restricted to a woman of humble rank or 'of low employment', especially one engaged in the sale of some commodity…" So, there were constructions (like *midwife*) but no longer in general use, like *ale-wife* (a woman who kept an ale-house); *apple-wife* (a woman who sells apples). And (not yet forgotten, but not much used) *fish-wife*: a woman who sells fish, but this is often used disparagingly. As Brewer's *Dictionary of Phrase and Fable* says: "Fish-wives are renowned for their flow of invective, hence the term is sometimes applied to a vulgar, scolding female".

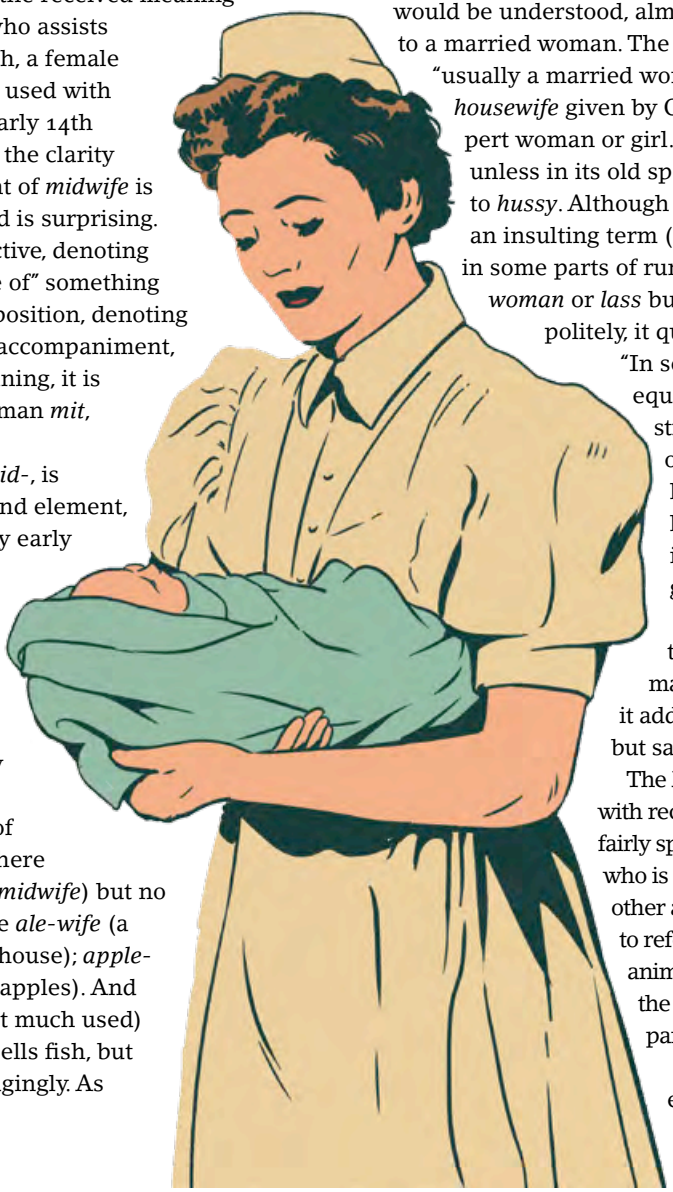


ILLUSTRATION BY GUY SHIELD

Johnson also recognised the several meanings of *wife*. In his first edition, he defines *wife* as "A woman who has a husband", and he says it is also "used for a woman of low employment". He illustrates this with a quote from Bacon "*Strawberry wives* lay two or three great strawberries at the mouth of their pot, and all the rest are little ones". This suggests a usage equivalent to *apple-wife* and *fish-wife,* although I confess to having never heard of a *strawberry wife*. Stumbling across this quote from Bacon led me to discover some of the more obvious limitations of Google. Searching for *strawberry wife* produced results ranging from the name of the wife of an American baseball player called Darryl Strawberry (her name is Tracey) to recommended dining and accommodation opportunities.

Be strawberry wives as they may, Brewer says that *housewife* is an expression equivalent to *ale-wife* and *fish-wife*, but this seems surprising: a reference to a *housewife* would be understood, almost universally, as a reference to a married woman. The OED says that *housewife* is "usually a married woman". Another meaning of *housewife* given by OED is "A light, worthless, or pert woman or girl…", but adds that it is obsolete, unless in its old spelling of *huswife*, now shortened to *hussy*. Although *hussy* is generally regarded as an insulting term (as the OED reference suggests) in some parts of rural England it simply means *woman* or *lass* but even if the definition starts politely, it quickly descends into insult: "In some rural districts a mere equivalent of Woman, lass; hence, a strong country woman, a female of the lower orders; a woman of low or improper behaviour, or of light or worthless character; an ill-behaved, pert, or mischievous girl; a jade, a minx. …".

The Macquarie Dictionary says that a *wife* is a "woman joined in marriage to a man as husband", but it adds that it can also mean *woman*, but says this is archaic.

The Macquarie definition accords well with received understanding: *wife* is now fairly specific in its meaning of a woman who is married, although it can be used in other applications. It is sometimes used to refer to the female partner in a pair of animals, and in slang use it can refer to the passive member of a homosexual partnership.

And all this brings us, naturally enough, to The Handmaid's Tale:

a book written in 1985 by Margaret Attwood and recently made into a 10-part series shown on SBS television. As well as its TV treatment, the book has been made into an opera (in 1990) and a film (in 2000). It is a dystopian look at a near future in which a strongly male-dominated religious sect takes control of the (imaginary) American State of Gilead. Apart from its lacerating critique of the subjugation of women, The Handmaid's Tale revives the word *handmaid*, a word largely out of use, almost forgotten, but still recognisable. It echoes Chaucer's Canterbury Tales, although Chaucer did not include a Handmaid's Tale. The Canterbury Tales include tales by several named people, and people of many well-recognised occupations (knight, miller, cook, man of law, wife of Bath, clerk, merchant, squire, physician, shipman, prioress, friar, monk, nun, priest, and parson).

But it also includes The Reeve's Tale, The Summoner's Tale, The Manciple's Tale, The Pardoner's Tale, The Canon's Yeoman's Tale, and The Franklin's Tale. But no Handmaid's Tale.

Most of these refer to familiar occupations, but with names we no longer recognise.

A *reeve* was an official holding office under the Crown, similar to a magistrate or, in some cases, a bailiff.

A *summoner* was a petty officer who warns people to appear in court.

A *manciple* was an officer who bought supplies for a college, an inn of court, or a monastery. It could also be a servant more generally.

A *pardoner* was, as its name suggests a person who was licensed to sell papal pardons or indulgences.

A *canon's yeoman* was a yeoman specifically under the control of a Canon. A *yeoman* was a servant or attendant in a royal (or noble) household or, it would seem, an ecclesiastical household. Sometimes a yeoman's services were quite specialised. So, there were yeomen of the bottles, yeomen of the buttery, yeomen of the cellar, yeomen of the chamber, yeomen of the crown, yeomen of the ewery, yeomen of the

> "The Macquarie Dictionary says that a *wife* is a "woman joined in marriage to a man as husband", but it adds that it can also mean *woman*, but says this is archaic."

horses, yeomen for the household, yeomen of the larder, yeomen for the mouth (specifically, the King's mouth), yeomen of the revels, yeomen of the robes, yeomen of the stable, yeomen of the stirrup, yeomen of the tents, and yeomen of the wardrobe. These are all self-explanatory, apart from *yeoman of the ewery*. This was a yeoman who was specifically in charge of *ewers*: jugs with wide spouts, especially useful for bathing, in days before the convenience of modern plumbing. Not many houses these days have a room specifically designed to hold a significant number of ewers.

A *franklin* was a freeman, but not a man of noble birth.

A *handmaid*, on the other hand, was not free. A *handmaid* was (is ?) a female servant. A handmaid is also a species of moth. So, also, is the Miller moth.

Until I started looking at the meaning of *handmaid*, I had not realised how many varieties of moths exist. About 160,000 according to the Smithsonian.

Moths are part of the insect family, in the order *Lepidoptera*. They are distinct from other insects because most of them have scales on their wings, and (crucially) they can coil up their proboscis. A handy trick no doubt, and useful for entomologists.

There are six families of moths: the Tiger Moths (Arctiidae); the Geometridae, the Sphingidae, the Saturniidae, the Microlepidoptera (very small) and the Noctuidae (very large).

Despite the predictable Latinisms of their zoological classifications, many moths have names much more evocative than the Miller moth. For example:

The American dagger moth; the Brick; the Brimstone; the Clouded border; the Clouded-bordered brindle; the Common footman; the Common Quaker; the Dot; the Elephant hawk; the Figure of eighty; the Snout; the Small dusty wave; the Turnip and the True lovers' knot moth.

And for reasons I have not yet worked out, pugs feature disproportionately in the names of moths. There's the Ash pug moth; the Bordered pug; the Currant pug; the Foxglove pug; the Golden-rod pug; the Green pug; the Grey pug; the Juniper pug; the Lime-speck pug; the Mottled pug; the Slender pug; the Tawny speckled pug and the Wormwood pug moth. Go figure.

Pug is a word with a surprising variety of meanings. As an abbreviation of *pugilist*, it is a fighter, which may account for the name of the variety of dogs which bears the name. A much rarer meaning is a mixture of loam or clay ready for making bricks. It also means the footprint of an animal, from the Hindi word *pag*, meaning *foot*. Another rare meaning of *pug* is given by OED as "The husks of any kind of small seed which are separated in cleaning it; the chaff of wheat or oats, the awns of barley, etc.; the refuse corn separated in winnowing." From this we have *pug-drink*, which is pressed apples before they ferment: non-alcoholic cider. Until the late 17th century *pug* also referred to a bargeman.

The other surviving meanings of *pug* include: a servant of superior rank, an imp or dwarf, and an ape or monkey.

But, closest to my starting point, there are several obsolete meanings of *pug*. From 1566 to 1611 it was used as a term of endearment for a person. But from 1600 to 1719 it meant a courtesan or mistress or harlot.

It is not the only instance of a word which starts life affectionately but ultimately becomes an insult to women.

OFF THE WALL...

The Peter O'Callaghan QC Gallery Foundation Ltd launch: the stuff of legends

SIOBHÁN RYAN, ART & COLLECTIONS COMMITTEE

Since opening in October 2014, the Peter O'Callaghan QC Gallery has made its mark on the life of the Bar. The once disparate collection, now augmented by new commissions, loans and gifts - six new portraits in two years - seems to watch over the barristers as they sweep through the space.

The logical next step in the gallery's evolution was the establishment of the Peter O'Callaghan QC Gallery Foundation Ltd to ensure its viability and secure future acquisitions.

On 8 June 2017, the founding directors, Peter Jopling AM QC, Jennifer Batrouney QC, Matt Collins QC and Wendy Harris QC gathered members of the Bar and the

judiciary to launch the Foundation and spruik its deductable gift recipient status. In the best tradition of the Bar, the evening was characterised by talk of legends, rather than the fundraising one comes to expect at these events.

Peter Jopling opened by welcoming Justice Gordon of the High Court (and a member of our Bar) and confirmed, as we had hoped, that she has agreed to become the Foundation's patron. This role complements her Honour's well-known passion for the arts, already manifest in her joint patronage, with the Hon Ken Hayne AC QC, of the Melbourne Recital Centre's Legal Friends programme. Her Honour captured an important purpose of the gallery, noting that, "the Peter O'Callaghan QC Gallery pays tribute to the past and present champions of the Bar and, at the same time, is a daily visual reminder and inspiration for all who pass by the portraits, of the importance of contributing to the law, to the broader life of the Victorian Bar and to the wider community".

Next to be announced, was the temporary loan of a portrait of Brian Bourke AM by Karl Schott and the Bourke family's promise to bequeath it to the Foundation. Bar President, Jennifer Batrouney QC stepped up to speak of "*Brian Bourke — The Man and His Portrait*". We were reminded that Brian is a "Certified Legend of the Bar". Indeed, he is one of the inaugural "Legends" of 1998, a fact which can be confirmed by checking the Honour Board in the foyer of Owen Dixon Chambers East. Batrouney spoke of Brian Bourke's long and distinguished service to the Bar and the many people whose lives he has touched: coaching the Pentridge Prison debating team to the Victorian A Grade Championships in 1955; joining the Bar in 1960 (Bar Roll number 612); defending Ronald Ryan in 1966, led by Phil Opas QC; co-authoring *Bourke's Liquor Laws*; and his early ties with the Australian chapter of Amnesty International. Bourke's portrait has its own story involving the artist (a former client), the Werribee 7-Eleven, the South Melbourne Football Club, a confession, and a Bourkesian outcome at trial.

> "The portrait will be painted by the celebrated artist, Rick Amor, who also painted the Bar's portrait of Sir Ninian Stephen."

Another Legend (2012), Allan Myers AC QC was then called upon to announce the Foundation's first commission which is, appropriately, a portrait of Peter O'Callaghan QC. Peter (also a Legend of 2012) was present to hear Myers recall the early days in Horsham where O'Callaghan's first career was as a mechanic and where he starred in the local footy team as a "*showy full forward*". After Horsham and the machine shop came adult matriculation at Taylor's College and tertiary education in the venerable institutions of Melbourne University, Newman College and the Shakespeare Hotel. The Bar beckoned in 1961 (Bar Roll number 622) and with it, years as a circuiteer with the likes of Neil McPhee, Francis Villeneuve-Smith and Barry Dove, during which Peter became known around South-West Victoria as, "*O'Callaghan, the well-known steak and claret man….*".

O'Callaghan QC's more weighty achievements were also remembered: as a director of Barristers Chambers Limited responsible for building Owen Dixon West chambers in the 1980s; a long-standing member of the AFL Appeals Tribunal; an honorary doctorate from the Australian Catholic University; and 20 years as the independent commissioner for the Catholic Archdiocese, which Myers acknowledged was "*an astonishing burden*" and a "*job done with courage and honesty*". The portrait will be painted by the celebrated artist, Rick Amor, who also painted the Bar's portrait of Sir Ninian Stephen. The funds for this commission were generously donated by Allan Myers AC QC.

Finally, the Chief Justice Warren was called upon to announce the Foundation's second commission - a portrait of Ross Gillies QC. Gillies QC, yet another Legend of 2012, has made an immense contribution to the Victorian Bar and the Common Law Bar, in particular. He has been the chairman of the Common Law Bar Association since 2001 and has chaired Dever's List for decades. Fittingly, his clerk, John Dever and the List D members have contributed to this commission.

Ross' mentorship and support of barristers of all ages and callings is legendary, as is his wit. The Chief Justice mused on what it must have been like in Gillies' room back in the days when his reader was another incorrigible raconteur, Terry Forrest (now Forrest J). Her Honour reminded those present that Gillies QC signed the Bar Roll in October '67 (Bar Roll number 822). Another interesting, though perhaps unsurprising, statistic is that Ross Gillies has had more mentions in Bar Dinner speeches than any other barrister; apparently only Ruskin, Bongiorno and Beach come close.

The "Legend" status of Brian Bourke AM, Peter O'Callaghan QC and Ross Gillies QC has previously been recognised by their inclusion on the Legends Honour Board. These portraits will be their seals.

The last word went to Jopling QC who, ever on point, rallied the crowd to contribute to two further commissions. Portraits of Sir James Gobbo AC CVO QC and the Hon Alex Chernov AC QC are needed to complete the Vice - Regal portraits in the collection. Gobbo and Chernov's contributions to the Bar and the Victorian community in general need no elaboration here. $80,000 needs to be raised - now tax deductable, of course.

PHOTO COURTESY OF J BATROUNEY

RED BAG BLUE BAG

BLUE BAG – a view from junior counsel

Dear Red Bag,
Last Christmas, I sent out some Christmas hampers to my instructors packed with some of my home made chutney. My modern friend G thought this was a terrific idea, whereas my old fashioned friend G was mortified. She drew my attention to Bar Rule 46 that a "barrister must not make a payment or gift to any person by reason of or in connection with the introduction of professional work to the barrister", but she thought it was OK to take the team out to lunch after completing a case. Does Bar Rule 46 prevent me from sending out Christmas presents to my instructors? If so, how is taking your instructor out for lunch after finishing a case any different from singing heigh ho to the holly with a hamper?

Blue Bag

RED BAG – a view from senior counsel

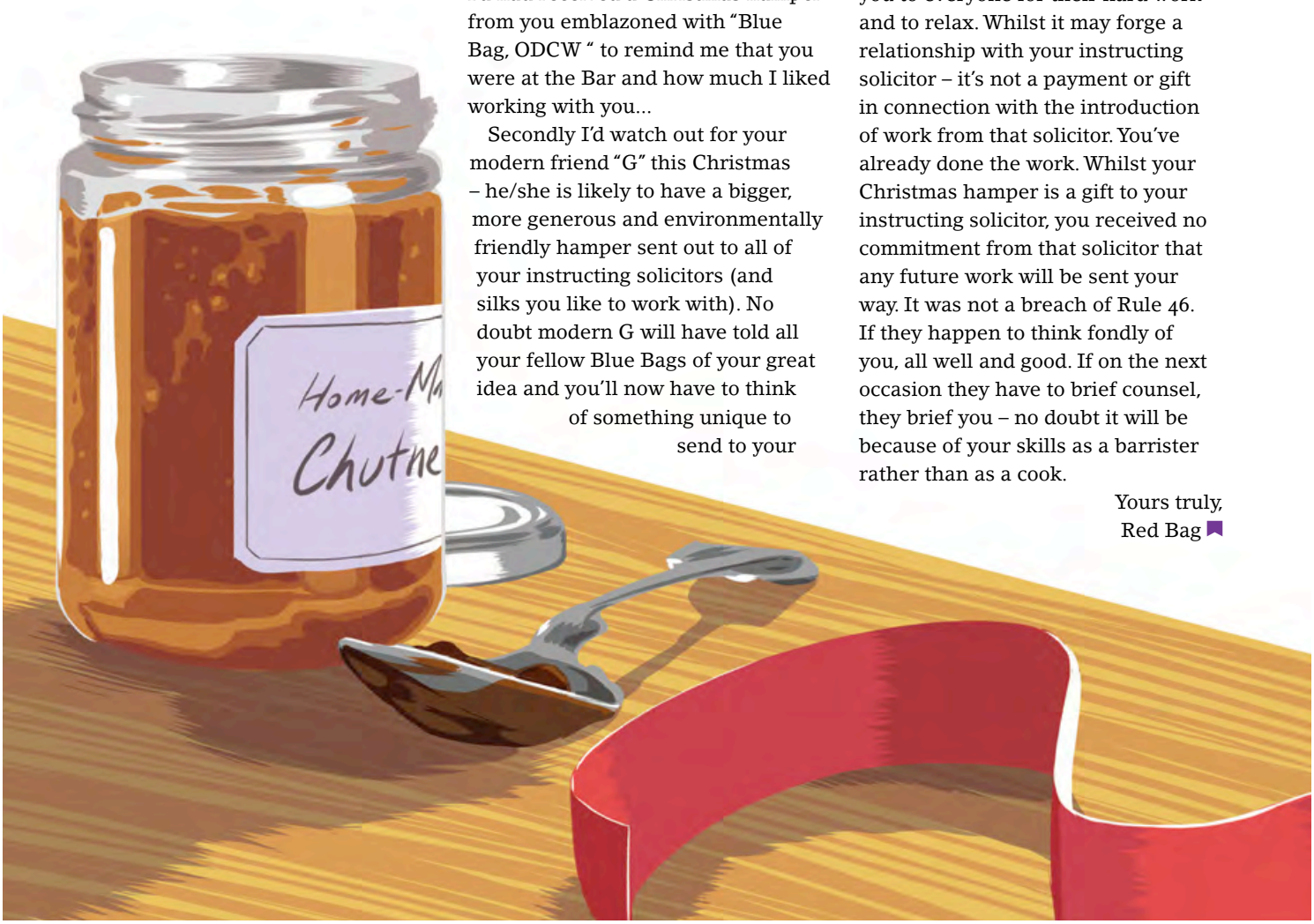
Dear Blue Bag,
First I regret to inform you that enquiries with my clerk reveal that no Christmas hamper from you was received last year. It must have gone astray. Which is a great pity because not only is homemade chutney one of my favourite Christmas treats, but at that time I was looking around for good juniors to recommend in a class action that has kept me and my troop of juniors busy with daily fees since Christmas and is likely to do so until next Christmas. If only I'd had received a Christmas hamper from you emblazoned with "Blue Bag, ODCW " to remind me that you were at the Bar and how much I liked working with you…

Secondly I'd watch out for your modern friend "G" this Christmas – he/she is likely to have a bigger, more generous and environmentally friendly hamper sent out to all of your instructing solicitors (and silks you like to work with). No doubt modern G will have told all your fellow Blue Bags of your great idea and you'll now have to think of something unique to send to your solicitors to stand out from the crowd of cane baskets cluttering up their work spaces.

When I was a young Blue Bag and keen to attract work from new solicitors, I was not permitted to advertise or tout, both of which were considered inconsistent with the ethos of professional life as a barrister, in which a barrister is bound by duties to the court, to other barristers as well as to the client. The cab-rank rule and the need to avoid any and/or any perception of conflicts of interest being at the forefront of every barrister's mind. Barristers of course remain bound by these duties.

Taking a solicitor to lunch after the completion of a case is not a breach of Rule 46. It's the natural conclusion of what is more often than not a challenging and arduous task – it matters little whether your team is on the winning side. It's an occasion to say well done and thank you to everyone for their hard work and to relax. Whilst it may forge a relationship with your instructing solicitor – it's not a payment or gift in connection with the introduction of work from that solicitor. You've already done the work. Whilst your Christmas hamper is a gift to your instructing solicitor, you received no commitment from that solicitor that any future work will be sent your way. It was not a breach of Rule 46. If they happen to think fondly of you, all well and good. If on the next occasion they have to brief counsel, they brief you – no doubt it will be because of your skills as a barrister rather than as a cook.

Yours truly,
Red Bag



The Australian Electoral Commission and the itchy pen philosophy

PETER HEEREY, CHAIRMAN, AUSTRALIAN ELECTORAL COMMISSION, 2009-2016

Working on the Australian Electoral Commission exposed me to a wonderful example of the Commonwealth "itchy pen philosophy" of legislative drafting – the need to dream up all conceivable eventualities and find words to deal with them. Fortunately, it was an affliction not suffered by the drafters of the Ten Commandments or the Gettysburg Address.

In Australia, voting is compulsory and preferential. The distribution of voters' preferences after their first preferred candidate is eliminated can often determine the result. Some uninterested voters may simply vote from the top to the bottom down the ballot paper, a phenomenon sometimes referred to as the "donkey vote".

So the order of names on a ballot paper is important. How is that order to be determined? Alphabetical order would give unwarranted advantage to the Aarons and the Abbotts and discriminate against the Youngs and the Zapruders. One would think that some form of random selection would be fair. The legislation might contain some provision such as:

> *The order of names on a ballot paper shall be determined by lot, to be conducted in public.*

That would be a self-enforcing law. Candidates or their agents would ensure the procedure was conducted fairly. Eighteen words would cover it.

But section 213 of the *Commonwealth Electoral Act 1918* goes into more detail—to put it mildly.

The section commences by providing that the person who is required to determine the order of names shall "prepare a list of the names … in such order as the person considers appropriate" and then "read out that list".

Then the person is to "place a number of balls equal to the number of candidates … being balls of equal size and weight and each of which is marked with a different number, in a spherical container large enough to allow all the balls in it to move about freely when it is rotated".

> "Alphabetical order would give unwarranted advantage to the Aarons and the Abbotts and discriminate against the Youngs and the Zapruders."

Now that you have the balls in the container, the person in charge must "rotate the container". Not only that, he or she must "permit any other person present who wishes to do so to rotate the container".

So how are the balls to be removed from the container after rotation? The section requires that the person in charge shall "cause a person who is blindfolded and has been blindfolded since before the rotation of the container … to take the balls, or cause the balls to come, out of the container one by one and, as each ball is taken or comes out, to pass it to another person who shall call out the number on the ball".

Then, "as each number is called out", the person in charge is to "write the number opposite to a name … in the list … so that the number called out first is opposite to the first name … in the list and the subsequent order of the numbers in the list is the order in which they are called out".

Phew! So at last it's all done?

Oh, no. What we have now is a list with numbers against the names, for example:

Sally Jones, Greens	2
Bill Smith, Labor	3
Tom Black, Liberal	1

The section now requires the person in charge to "place all the balls back in the container". Then once more there is to be rotation of the container, taking out the balls by a blindfolded person, reading out the number on the ball, and so on.

The new sequence of balls might be those numbered 3, 1 and 2, with the result that the order of names on the ballot paper will be Smith on top, then Black and then Jones.]

There are various other provisions, including dispensing with the need for a blindfolded person if an "approved container" is used; that is, "a container in respect of which the Electoral Commissioner has certified in writing that the container is so constructed that when it is rotated no control can be exercised over the order in which the balls come out of the container".

Total words in section 213: 710

One trembles to think of the number of cups of tea consumed in the Office of Parliamentary Counsel while this edifice was constructed.

BOOK REVIEWS

Criminal Appeals & Reviews in Victoria

O.P. HOLDENSON

Over the last 10 years, and particularly over the last five years, the work for those who practise in the criminal jurisdiction has become very arduous indeed. The major cause of this change in our work has been the many substantial and frequent amendments which have been made to the laws with which we criminal lawyers deal on a daily basis, and the consequences of those amendments.

The substantive criminal law, the rules of evidence, the procedural rules and the sentencing laws are no longer settled, having been transformed over that period by not a mere stream, but a flood, of legislative activity. Focussing upon the Victorian Parliament, there has not merely been the enactment of the *Evidence Act*, 2008, the *Criminal Procedure Act*, 2009 and the *Jury Directions Act*, 2015, but there have been numerous amendments made to other legislation, including the *Sentencing Act*, 1991, the *Crimes Act*, 1958 and the *Serious Sex Offenders (Detention and Supervision) Act*, 2009.

That legislative activity has led to much uncertainty in the law and the imposition of very heavy workloads upon both Magistrates and Judges at first instance and the Court of Appeal. The criminal courts are constantly required to construe and apply the many new statutory provisions. In that regard, the Court of Appeal has become most active, creating a sea of new jurisprudence which must be constantly "monitored" by each and every practitioner. And in a period which can only be described as one of limited judicial resources and oppressive judicial workloads, much more is expected by the courts of practitioners in their preparation and presentation of cases.

Criminal Appeals & Reviews In Victoria
Corns, C., Borġ, S. and Castle, A.,
Law Book Co., Thomson Reuters, 2017

Moreover, with respect to the presentation of cases, the appellate courts have introduced new (and onerous) practices and procedures (some of which are still evolving) such that appeals which were once conducted over two, or even three, hearing days, are now concluded by lunch-time on the first day when the court reserves its judgment. The manner in which the Court of Appeal exercises its criminal jurisdiction today is very different from what was done by its statutory predecessor, the Court of Criminal Appeal, in the 1980's through to 1995.

In short, the result of that which I have just described is that the appellate jurisdiction is now much more busy and it has been opened up to a much broader range of practitioners. Very junior practitioners, who once only ever read the judgments of the Court of Appeal, now find themselves drafting court documents which must comply with inflexible rules and conducting interlocutory appeals, applications for leave to appeal and appeals before that Court.

Very junior practitioners, having unsuccessfully run a contest in a Magistrates' Court, must now consider whether or not a challenge by way of an application for judicial review has prospects of success and, if so, on what basis. Again, precise court documents which comply with the Practice Notes must be prepared.

And so a need for a concise, but complete, clear and helpful guide through the maze of the prescriptions of both the many Practice Notes and Practice Statements and the statutory and general law for not only the most junior, but also the most senior, practitioner in the criminal jurisdiction was created.

And the need has been answered – this authoritative and comprehensive text has been provided.

Christopher Corns, a senior academic who has published widely in the criminal law, Susan Borġ, an experienced Crown Prosecutor in our County and Supreme Courts and a member of our Bar since 1991 and Adrian Castle, a particularly knowledgeable solicitor who has served with the Office of Public Prosecutions for well over 30 years including 27 years in the "appeals section", have come together and written a most helpful text.

Entire chapters have been devoted to appeals and other applications from the Children's Court, appeals and other applications from the Magistrates' Court, interlocutory criminal appeals, appeals against conviction and sentence and other applications (including cases stated) to the Court of Appeal from trials on indictment in the County and Supreme Courts, statutory appeals on questions of law, applications for judicial review to the Supreme Court, criminal appeals to the Federal Court and criminal appeals to the High Court.

Within each chapter, the authors have precisely identified the statutory source and scope of each appellate jurisdiction, the nature of the appeal(s) and the powers of the appellate court(s).

Each chapter also comprehensively details the relevant procedural steps and requirements. And so the most junior practitioner can use each chapter as a guide, while the most senior practitioner can use each chapter as a

> “Guidance is also given upon how best to prepare for an oral hearing, with pages devoted to the “wants and needs of the appellate court”.”

check, in order to ensure that the case will not be stalled or impeded by some non-compliance with a procedural requirement, or even fail because the practitioner did not know and understand the law concerning the incidents of that appeal.

But of particular importance, every proposition is supported by the citation of relevant current authority.

By way of example, the chapter devoted to “Appeals against Interlocutory Decisions” (Chapter 5) is 30 pages in length. Every step in the life of an interlocutory appeal is described and sourced to the relevant provisions in the *Criminal Procedure Act*, 2009 and the *Supreme Court (Criminal Procedure) Rules*, 2008. Each of the numerous decisions of the Court of Appeal concerning the scope and the subtleties in the exercise of this jurisdiction is, on my close reading, accurately cited and summarised. The chapter concludes by setting out the relevant prescribed forms and the Court of Appeal Practice Statement.

In short, no barrister appearing in a criminal trial now has any excuse for getting any aspect of his/her interlocutory appeal to the Court of Appeal wrong.

Turning to the chapter devoted to “Appeal and other Applications from Trials on Indictment” (Chapter 6), it comprises some 149 pages and over 700 footnotes. Every aspect of the jurisdiction of the Court of Appeal is detailed.

For example, in the section which deals with the case stated, the relevant provisions within the *Criminal Procedure Act*, 2009 which constitute the source of this jurisdiction are identified and explained by reference to the authorities. The procedural steps and the powers of the Court of Appeal are likewise explained, including costs. Several pages are then devoted to describing in helpful detail some recent examples of cases decided by the Court of Appeal.

Reference should also be made to Chapter 10, “Appellate Advocacy”. No matter how experienced an advocate may be, the conscientious advocate ought always be on the lookout to improve his/her ability to persuade. Focussing upon the particular characteristics and “challenges” of appellate courts and their judges, this chapter identifies the skills required to draft grounds of appeal and court documents which are both concise and persuasive.

Guidance is also given upon how best to prepare for an oral hearing, with pages devoted to the “wants and needs of the appellate court”. In this context, the leading authorities which must be understood by every appellate advocate are summarised.

Within this chapter, for example, some 6 pages (with 33 footnotes) are devoted to the first limb of s. 276(1) of the *Criminal Procedure Act*, 2009 which provides that an appeal against conviction must be allowed if the jury verdict is “unreasonable or cannot be supported having regard to the evidence”. Several pages are devoted to the effective presentation of submissions in support of this “unsafe and unsatisfactory” ground, the relevant principles from the many authorities then being explained.

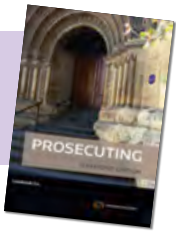
I could further describe the content of this text. To do so, however, would be simply to repeat the above. Put simply, this text is easy to search, easy to read and truly comprehensive.

There is, however, a challenge for the authors. As a consequence of the overly frequent legislative change within the criminal jurisdiction, and the proliferation of cases decided by the Court of Appeal, it seems to me that this text will need to be revised every couple of years.

Prosecuting

BY MARK GIBSON

Prosecuting
by Raymond Gibson
Thomson Reuters



The recently published book entitled “*Prosecuting*”, authored by Raymond Gibson, is a simple, easy-to-read, well-structured, comprehensive catalogue of just about every matter a prosecutor is likely to encounter in preparing and then running a criminal trial. Whilst the book gives useful tips on how to approach prosecuting a trial, it also offers defence counsel helpful insight into what they are likely to confront in the unfolding of the Crown case. For this reason, despite its title, in my view it is as useful to defence counsel as it is for a prosecutor. For the younger, less experienced criminal law practitioner, it is essential to have a written checklist of matters requiring consideration and analysis. Almost like a ready-reckoner. For the experienced, more seasoned advocate, it is helpful to have a text you can consult which will quickly and efficiently provide the answer you are searching for.

The book has 14 succinct chapters, all essential reading. Its contents include:

- the nature of the charges themselves and all matters arising from the charges such as severance and joinder;
- the differing types of evidence to be led by the prosecution including tendency, coincidence and relationship evidence;
- essential techniques for leading evidence in order to present the prosecution case;

- refreshing memory in the witness box;
- helpful tips on effective cross-examination of an accused person, which are equally applicable to any witness;
- a step-by-step guide to appropriately dealing with an unfavourable witness under section 38 of the Uniform Evidence Act, including the relationship between what an unfavourable witness has previously said and hearsay evidence under section 60 of that Act;
- suggested ways to deliver effective opening and closing addresses;
- ethical obligations; and
- the sentencing process and the many responsibilities confronting a prosecutor including referring to relevant sentencing principles and ensuring a sentencing judge does not fall into appellable error.

Whilst many authorities are variously cited throughout the book, propositions are supported by the most relevant authority only. This provides the reader with an ability to then quickly search for other authorities on point.

Raymond Gibson has spent many years prosecuting all manner of crimes committed in all manner of circumstances. This book taps into his vast experience. It allows the reader to gain not only an appreciation of the technical aspects of prosecuting, but also the pitfalls to be avoided. A thorough reading will ensure fewer mistakes. As Mark Tedeschi, AM, QC writes in the forward, "this book fills a gaping void, so that no prosecutor will have any excuse for saying that there was no guidance in the professional literature". I agree.

Justice Denied

HUGH SELBY

Justice Denied
by Bill Hosking QC and John Suter Linton
Harlequin Books

Writing it down will convert a fanciful speculation to 'it must be so'. In the days before the High Court said 'No' to unsigned written confessions in Driscoll there were NSW Police (including the now infamous, convicted murderer, Roger Rogerson) who knew the forensic strength of a well constructed, albeit entirely invented, unsigned written confession from the suspect.

Those skills are not forgotten. There are always 'True Crime' writers who are adept at turning rumours and gossip into the persuasive truth that sells their miserable books. Fortunately Bill Hosking QC, former NSW Public Defender, and District Court judge, is able to keep to the plain facts in his 'Justice Denied', written with the help of John Linton, and 'categorised' accurately by the publisher on the back cover as 'true crime'.

Here's a book that entertains as it instructs with the details of crimes, the background to those who may or may not have committed them, the personalities of Crowns, defence advocates and trial judges, and the tensions that arose within those 'atmospherics'. So human, always so human.

Hosking knows how to tell a story, a sine qua non of a successful jury trial advocate. He also knows how to understate it. Describing a relationship with a once fellow barrister then judge before whom he appeared he writes, 'Our professional relationship, for want of a better word, faded'. I've been told that they loathed each other, but the anecdote he relates is delicious whatever the background. Asked by that judge at a sentencing hearing, 'How does your client explain the events leading to this tragedy?' Hosking replied, ' I don't fucking know'. His Honour exploded. Hosking then added, 'Answer 46 in my client's record of interview, Your Honour'. What beaten up advocate has not yearned for an opportunity such as that.

That particular story has permutations, the stuff of legend. These keep the same persona but the variation – at 'some other sentencing' – that I like, has Hosking on his feet addressing while his dock bound client is trying to catch his attention with, 'Fuck this' and 'Fuck that'. Hosking ignores him. His Honour, anxious to score a point, innocently says, 'Mr Hosking, your client is trying to get your attention'. Equally innocently Hosking replies, ' My apologies Your Honour, I thought my client was addressing the Bench'.

Hosking offers more than clients' stories and amusing side anecdotes. He brings alive the dilemmas faced by criminal trial advocates, at both ends of the bar table, as they thoughtfully consider plea options. For example, how does one advise an accused charged with murder that a plea to manslaughter is the best option, better than testing the evidence at trial, losing and receiving a very long sentence for murder. How does an experienced prosecutor tell the deceased's

> “He combines astute observation with empathy.”

family that to accept a plea to manslaughter is a better outcome than going to a trial for murder and losing? Hosking says that it was the most difficult task he faced as a defence barrister, one that never got easier. For him that was more than 30 years ago. It's still an issue, the more so when the deceased is a police officer. Section 19B, NSW Crimes Act, prescribes imprisonment for life for the murder of a police officer while that officer was doing his duty. The gamble (because that is what it is) is to plead not guilty and face 'life' if one loses, or plead guilty to manslaughter and get a long, but 'manageable' term. This is so whether they did or did not do the deed.

As Hosking explains, 'To proceed to trial is not a question of counsel's courage…If … [a] mistake is made, counsel does not serve any time in gaol…that is the sad lot of the client'. This was a point made to a young Hosking by the then elderly, famous Tony Bellanto QC, 'Be very careful, son….remember, we lawyers never serve a day'.

These days it's an axiom of Australian criminal practice that, barring argued claims of public interest immunity and statutory 'confidential claims' (as in some sexual cases) the prosecution will disclose its hand, the entire hand it holds. How quickly do we forget even the recent past. *Maddison v Goldrick* (The NSW AG versus a competent Magistrate) is a seminal case on that road to openness, decided in the mid 1970's, when the police decided that the 'usual' call by a defence counsel – in this case Bill Hosking – to see and read the police brief at a committal hearing was to be thwarted. In round three, in the Court of Appeal, the police lost. The High Court saw no reason to hear an appeal from that decision. Though we now take such openness for granted it is still not the case in some places outside Australia with a 'common law' tradition: the State does not share its witness statements with the Defence pre-trial.

Alas there are always noisy, influential people who are selfishly motivated to press the 'fear and panic' button to, 'lock them up and throw away the key, or at least store it for a good many years'. Not for them any thought as to the realities of imprisonment such as loss of self respect, violence, wasted lives, destroyed families. Hosking describes prison conditions as they were and are. He combines astute observation with empathy. He doesn't talk though of today's remand prisons where numbers are high and services low, and where those awaiting trial can languish for a year and more. Bad luck if you're innocent or found 'not guilty'. Perhaps those politicians and shock jocks who advocate less bail, longer sentences, inadequate legal aid funding, too few judges to hear cases, and more powers to police might spend a night or two in one of our nastier, overcrowded prison establishments and like those CEO's who live 'rough for a night' gain some useful insights. What a silly thought: in these days of 'fake news' is 'good news' there is no incentive to change.

Hosking doesn't spell it out but it takes a special character to be able to run a trial well for people who, guilty or not, have the public strongly against them. All murders are horrible but some are more horrible than others. Hosking describes the fateful cases of Veen and Mallard (the latter is NOT the more recent West Australian case) in which these men murdered, served time, were released, and then murdered again. He also sets out, in a long and fascinating narrative, his role defending one of the accused in the Anita Cobby murder: remember it? Ms Cobby, a nurse, walked homewards. She never arrived because she was robbed, bashed, raped, tortured and had her throat cut. It was Hosking's last case before he became a judge.

He discusses some 'terrorism' offences, a discussion that usefully reminds everyone that there is nothing new, not in the deluded conduct of the actors, the panic alarmists (we'll all be murdered in our beds), the imperfections small and large in the police response, and the media opportunists. He sets out first, among several examples, the fateful history of Tim Anderson and his colleagues (all Sydney members of the Ananda Marga), who were falsely accused, convicted, served about seven years, and were released only after an inquiry found that Seary, the main witness for the Crown, 'had lied on at least fifty occasions'. For Anderson it was not over as four years later (1989) he was charged with the 1978 Hilton Bombing in which three people died. Those charges arose from information given by a prison snitch and another Ananda Marga member who was later labelled as 'unreliable'. Anderson was found guilty as an accessory before the fact. That verdict was overturned on appeal and a verdict of acquittal entered.

One can read this book looking for legal history, for insights into notorious criminals and police culture, for confirmation that judges are human, to err is human, and that therefore judges err. So do advocates. There, but for good luck, go any and all of us: the Crown case was that the accused had shot her husband, that he could not have shot himself in the back of the head. During his final address to the jury the experienced Crown Prosecutor decided to show the jury that the dead husband could not have killed himself. He picked up the gun. He positioned it. Everyone in the court room saw at the same moment that the deceased could have killed himself.

HIVE Park - launch of the debut album

VBN

St Kilda's Memo Musical Hall, a venue which has this year hosted Clare Bowditch and Tex Perkins, enjoyed what was said to be its biggest pre-sale of tickets in recent history for the launch on Sunday, 4 June, of the debut album of the band HIVE Park.

HIVE Park's lead vocalist and acoustic guitarist is Cassie Serpell, a member of the Bar. Jeremy Blackman plays the violin and sings backing vocals, while Illias Tsinanis plays the bass and electric guitar. Cassie, Jeremy and Illias formed HIVE Park in 2011 and its debut album '*things we should have said…*' was recorded two years later. As Cassie explained to those gathered at the album's launch, the launch would have happened much earlier had she not broken her right elbow in 2013, which ruled out guitar playing for the next couple of years.

In the beautiful Art Deco space of the Memo Music Hall, the band played songs from the album into early evening to a full house, which included friends and family and many of Cassie's colleagues from the Bar. The songs, like the catchy single "Save Me", describe clearly and lyrically the liberation and angst of all of our intimate relationships. Cassie wrote the words to the songs, and she and Jeremy wrote the music.

The layers of Cassie's acoustic guitar and Jeremy's violin in each song give HIVE Park's music a distinctive sound. Apple Music labels HIVE Park's musical style under the banner "alternative", while Triple J has used more varied hash tags to describe it: #rock # pop #folk #indie #guitar #violin. Cassie herself admits that a definition of the band's musical style may be hard to pin down, adding that the influences on HIVE Park's sound include jazz and classical music, and reflect the varied interests and backgrounds of each band member.

CD and vinyl copies of HIVE Park's debut album may be purchased directly from Cassie, and digital copies through iTunes, Spotify and iGoogle.

The Bar News congratulates HIVE Park on the brilliant launch and looks forward to covering the release of its next album.

VERBATIM

Have you heard something interesting or amusing in court? Send in the transcript extract to *vbneditors@vicbar.com.au*

County Court of Victoria

Kim Maree Johnston V Kbi No.5 Pty Ltd, before His Honour Judge Saccardo on 23 May 2017.
Appearing: J Brett QC with E. Makowski, for the Plaintiff; D. McWilliams with J. Zhu for the Defendant.

HIS HONOUR: Now the address of the place at which the plaintiff worked?

MR BRETT: Level 2, 8 Treadwell Street, Niddrie.

HIS HONOUR: Treadwell Street, really?

MR BRETT: It means nothing to me, Your Honour, but – oh, "tread well".

HIS HONOUR: Treadwell.

MR McWILLIAMS: The irony's palpable, Your Honour.

MR BRETT: Sorry, Your Honour.

MR McWILLIAMS: It's actually, Your Honour, in the defendant's list of witnesses, we provided the address there.

HIS HONOUR: I only smile because it's the street in which I was raised.

MR BRETT: Oh. Probably not in this particular block, Your Honour.

HIS HONOUR: Oh, no. It's been redeveloped but there we go.

MR BRETT: There we go.

HIS HONOUR: So I can give everyone directions as to how to get there today.

MR BRETT: Well, my learned friend has suggested we may need a view.

HIS HONOUR: It's the No.49 or 59 tram, if you're travelling by tram. Yes, all right?

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