

REMARKS OF THE HON. MARILYN WARREN AC  
CHIEF JUSTICE OF THE SUPREME COURT OF VICTORIA  
ON THE OCCASION OF

VICTORIAN BAR INAUGURAL CPD CONFERENCE  
PEPPERS THE SANDS, TORQUAY  
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## **PLAYING AT FUTUROLOGY**

Next Tuesday the new Bar readers will start their careers as Victorian barristers. They will include great talent. People who have topped their law courses, elected to leave the major firms for life at the Bar and some who worked for the highest courts.

I expect like we all were when we started, they will be filled with passion, determination and ambition. Those readers will include individuals with excellent IT skills – they will understand how to use technology at all levels. Hence, their capacity to manage litigation – civil and criminal – through technology will be an excellent resource and attribute for the Victorian Bar. The readers' capacity to find answers will be devastatingly fast. But it is not only about skills at the keyboard. They have been educated to a very high standard. They have been drilled

in ethics, have excelled in studying fundamental legal principles<sup>1</sup> and will be barristers of extraordinary intellectual acumen<sup>2</sup>. Importantly, they will be well educated in ADR.<sup>3</sup>

Culturally, they are on the move and will shake the tree. They are not people intimidated by workload demands, seniority or tradition. They are quietly confident in their intellectual capacity and skills. These readers will include the silks of the 2020's and maybe even the judicial appointees of that time. The new readers will represent generational change.

But it is not just the next intake of readers to be watched. In the last four years, the Supreme Court has admitted 4435 lawyers to practice in Victoria. Many of them will be marching their way to the Bar to replenish its advocacy stocks and compete for work.

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<sup>1</sup> The author is Chair of the Council of Legal Education of Victoria and draws on her knowledge and experience through the oversight of the tertiary course for the teaching of law in Victoria.

<sup>2</sup> The author together with her colleagues of the Supreme Court of Victoria has engaged many legally qualified associates and draws upon her experience through working with those individuals.

<sup>3</sup> The author draws upon her knowledge of tertiary courses through her awareness of the various law school curriculum in Victoria.

So, what world of practice will the Victorian Bar offer in the next ten, twenty, even thirty years?

Today I will postulate some questions about the future of the Victorian Bar. Some questions you are already grappling with. So let us play at futurology.

Should the Bar continue its traditional evolutionary even organic approach to its services and operations? Why not become a proactive Bar and forge the future for the benefit of the collective institution rather than support and supplement the organic, evolutionary way for a group of individuals? What is paramount, the individual or the institution?

To answer some of these questions the Bar will need to examine how it has reached its present form and status and assess what will be confronted in the decades ahead.

There is no doubt the Victorian Bar has suffered from attrition of work for obvious reasons in the last twenty years: accident compensation law reform, torts law reform, reduced legal aid, the devolution of legal process to tribunals and expanded ADR. It is odd if we pause to

think, the Victorian and federal courts and tribunals have never had more judges and magistrates or more cases to hear. For example, VCAT handles 90,000 cases per year. The federal jurisdictions have expanded to include areas such as native title, immigration and extensive administrative review. Yet the Victorian Bar is reputed to have suffered work shrinkage. It has even been suggested that the reputation and status of the Victorian Bar has dropped. It is said only a very small number fall into the top national rank of first choice counsel<sup>4</sup>.

These might be relevant factors but I suggest the real reason for the shift in work lies in the transformation of the profession. In the 1980s and especially the 1990s the nationalisation of law firms had a dramatic impact. National conglomerates formed, mostly with head offices and national managing partners based in Sydney. Understandably, litigation partners brief barristers they know and have seen and thus more likely their local person. Understandably, if they can, they prefer to litigate in a forum they know. Thus it is pretty easy to see that a shift in the litigation axis occurred at this time

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<sup>4</sup> The full Chambers And Partners Rankings for Australian Barristers may be found at [www.chambersandpartners.com/Asia/Editorial/44542](http://www.chambersandpartners.com/Asia/Editorial/44542)>. These rankings were recently cited in the 25 February 2011 edition *The Australian*.

which probably the Victorian Bar did not appreciate until it was too late. Maybe with hindsight, BCL should have acquired sets of chambers in Sydney to encourage members of the Victorian Bar to work in Sydney. It is not too late. It would be an interesting step in the interests of the institution of the Victorian Bar. Why stop at Sydney? The Victorian Bar has released a discussion paper on the clerking system and these interstate issues are being looked at. It is heartening to see the provisional view is that barristers' clerks should consider opportunities to develop relationships with interstate sets of chambers or clerks<sup>5</sup>. The clerking discussion paper has also addressed the opportunity for the Bar to facilitate briefs from corporate lawyers.

In a way, the structure of the Victorian Bar is its strength and its weakness. The low barriers to entry through the provision of competitively priced chambers is laudable.<sup>6</sup> The democratic approach to large barristers' lists is laudable too. Both measures mostly ensure that a person of real talent, a future star advocate, is not precluded from coming to the Bar because of economic limitations

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<sup>5</sup> Victorian Bar, **Discussion Paper on the Clerking System**, 24 February 2011.

<sup>6</sup> See Chairman's report, *Annual Report of the Victorian Bar Inc for the year ended 30 June 2010*.

and lack of legal connections, or for that matter deterred from staying at the Bar because of child-bearing and rearing demands.

The weakness of the structure of the Victorian Bar lies in its lack of sharp market focus. Multiple sets of chambers have minimal impact. Essentially, it is the clerks that manage and promote the barristers. They in turn must spread the work for the greater good of the list.

So much could be done to demystify the Victorian Bar to make sure that the commercial and private consumers of legal services properly understand how the Bar may help and, potentially, save the consumer money. The Bar is not a conclave of artisans. Some still view the Victorian Bar as an elite secret society rather than a unique institution of highly specialised advocates. In fact the Victorian Bar does not sufficiently promote itself as a centre of dispute strategy specialists. I will return to this but some more history first.

All this change in the litigation landscape happened in conjunction with another significant change, the way in which litigation was conducted. Until about the late

1980s, solicitors rarely took a step when acting for a client where there was any prospect of litigation without taking two steps: issuing a brief to counsel to advise very early on prospects, strengths, tactics; later, delivering a brief to advise on evidence – the logic being that the person who would conduct the trial should determine the way to conduct the trial.

By the late 1980s and early 1990s, the firms saw the opportunity to minimise, even eradicate, the need for counsel by performing the two functions themselves, keeping the work in house, and especially, keeping the cost within the firm by briefing as late as possible. Additionally, the firms approached litigation on a risk aversion basis. They must cover and promote every point just in case. The Bar largely failed to respond to this development. In commercial litigation the consequences have been dramatic.

In my experience<sup>7</sup> time and again two consequences occur. By the time clients have incurred all the costs of the advice of their solicitors, the prospect of submitting to trial is prohibitive or, when a barrister runs the case and

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<sup>7</sup> The author was the judge in charge of the Corporations List and the Commercial List of the Supreme Court of Victoria between 1999 – 2002.

only uses a fraction of the material collected and advised upon by the solicitors, clients are staggered by the waste and the cost. One step the Bar could take is to make it known to clients that they should brief early and that it will be economical in the long run. Why not advertise in the commercial press: *'Have you met your barrister yet? How much is your lawyer charging you before you will see your barrister?'*

Now before war breaks out between the Bar and the firms, maybe the Bar should think strategically as to how the firms should work earlier and more collaboratively with the Bar. It should not be assumed that it is in the best interests of the client for the work to be kept, and thus the cost, within the firm. Rather the client should be given the best strategic advice as early as possible. The Bar collectively needs to develop a strategy so that the client wants their barrister present during most steps along the way.

Significantly for the administration of justice we have witnessed the demise of advocacy as a craft. I truly wonder whether most barristers would accept that

advocacy is a craft that can be learned. Many barristers do not understand the components of advocacy.

I have experienced it myself as a trial judge, and commercial judges tell me, time and again, that many commercial barristers do not know how to lead a witness, how to cross-examine or re-examine effectively or how to make persuasive, penetrating submissions other than in written form. One judge pointed out to me some commercial barristers seem content to hand up a long, heavily foot-noted written submission, a large folder of authorities and sit down. You would never have seen the great legends of the Bar do such a thing.

Returning to the loss of litigation, the shift of the litigation axis away from Melbourne may work to its advantage and soon. Things move in cycles. I believe a new era awaits the Victorian Bar.

First, a little economic history. In the 1980s there was a shift of significant corporate power to Sydney as many major corporations moved there. Coupled with the decision of Qantas to bring most international flights through Sydney and the decision of successive Prime

Ministers to use Sydney as the alternative base to Canberra, Melbourne fell behind and the Bar doubtlessly with it. At the same time the Victorian Supreme Court saw many of its great commercial trial judges retire or move to sit at appellate level. A malaise settled over Victorian litigation.

Yet, if the Victorian Bar tackles its future now it will be in a position to capitalise on the opportunities shortly unfolding.

A body of work carried out by the Victorian Bar in late 2007 looked at reform of the civil justice system in Victoria<sup>8</sup>. The report highlighted two sets of important facts. First, Australia's top one hundred companies have headquarters in approximately equal numbers between Victoria and New South Wales<sup>9</sup>. Also, an analysis of the Fortune Global 500 list of the world's largest companies shows Melbourne is actually increasing its share of Australian-companies with headquarters here. By 2007, there were more of those Global 500 companies based in Melbourne than Sydney. The second factor that the Bar

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<sup>8</sup> The Victorian Bar, **Reform of the Civil Justice System: A Major Opportunity to Improve Justice and Boost the Victorian Economy**, 30 November 2007.

<sup>9</sup> Ibid p.7.

identified is that civil litigation enabled total economic activity in Victoria in the order of \$900 million<sup>10</sup>.

Further, let us not forget the significance of the Collins Street spine. Melbourne has a unique financial and superannuation business spine running from the Spring Street end of Collins Street right through to the Docklands end. There are opportunities for the Victorian Bar to link into the financial precinct and increase awareness of the services it provides.

It was said in the Bar's report that there were four reasons for the shift of litigation from Victoria to New South Wales (remember it was written four years ago):

1. *Perceived superior performance of other courts.*

My response now: In a short space of time Melbourne has branded itself as a centre for civil and criminal litigation innovation and excellence. We need only think of the Commercial Court in the Supreme Court, the fast track list in the Federal Court, the Commercial List in the County Court, the post committal and pre-trial directions process in criminal trials in the Supreme Court, the intensive

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<sup>10</sup> Ibid p.12., precisely \$858M as set out in exhibit 6.

judge management and case conference approach in all jurisdictions including the common law areas of the Supreme Court.

2. *Differences in legislative schemes between Victoria and New South Wales.*

It was postulated that clients choose New South Wales law to govern their contracts in situations where it is perceived it has less burdensome legislation. My response is that position is changing particularly as COAG moves towards a nationalisation of systems and processes for business.

3. *Transfer of Tax Matters to the Federal Court.*

My response: The Corporation List in the Supreme Court continues to grow weekly notwithstanding the ATO transfer for reasons of national uniformity and consistency to the Federal Court. One need only look at the Supreme Court list to comprehend the point.

4. *Familiarity and Established Networks to Manage Litigation.*

It was postulated that clients 'feel more familiar' with the New South Wales courts and judiciary and have developed well established relationships with the Sydney litigation departments of major law firms. I

suggest that needs to be confronted by the Victorian Bar. The Victorian courts are doing their bit – through the Commercial Court and other means. Reputation has a high value. Articles in the national press based on questionable surveys and analysis of performance before the High Court of Australia verge on the ridiculous. The Bar should be quite aggressive in rebutting the sort of nonsense that is put about by a Sydney-centric media.

Comparisons were made late last year<sup>11</sup>, before the State election and the Victorian floods of some Australian states' economic position. It was noted that Victoria outstripped New South Wales on every key economic indicator, from business to new housing and jobs and growth, since 1995<sup>12</sup>. Data showed a decline in NSW's GDP and population from 1990 and the forecast until 2014<sup>13</sup>.

On the figures, for 1995 – 2010, Victoria outmatched New South Wales:

Housing consumption – 82% to 43%.

Housing investment – 97% to -3.1%.

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<sup>11</sup> Uren, D. Salusinszky, I., 'Premier state left in shade', *The Australian, Inquirer*, 25-26 September, 2010 pp 1-2.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

Commercial constructions – 249% to 64%.

Business Investment – 252% to 158%.

Public sector investment roughly on a par.

Total State demand – 95% to 53%.<sup>14</sup>

I am not aware of the figures being challenged.

Victoria suffered badly in the 1990s due to the economic downturn, it is said largely due to its manufacturing base. As a result the government of the day introduced economic reforms continued by subsequent governments. So, Victoria is said to be well recognized as a place for investment - one business leader describing Victoria as a place where people 'like to lead in innovation in the design of public services'.<sup>15</sup> Victorians are also described as having 'energy and curiosity'.<sup>16</sup>

Yet this economic dynamism has not occurred within a vacuum.

We have an Asian context.

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid, quoting Ms. H. Ridout.

<sup>16</sup> Ibid.

First, India. It has been described as being on a 'high growth trajectory'<sup>17</sup>. It is said 'with a growing 400 million strong middle class driving strong demand, competition and productivity and a decade of reforms, India is Australia's fastest growing major two-way partner'<sup>18</sup>. The advice seems to be that when in India, one should link up with local associations. So the question might be asked: When is the Victorian Bar inviting a serious Indian delegation to Australia? When is a Vic Bar delegation embarking on a serious dialogue with the Indian Bar? The connections with India cannot be understated. Why not do as the English did and have a senior politician lead a delegation to India? When Prime Minister Cameron of Britain went to India he took a delegation of English lawyers with him. The connections are significant: A British based common law system and a shared English language. The Vic Bar has advanced skills to offer the Indian Bar – ADR is an obvious one. But the Bar would learn too. My observations of an applications day before the Supreme Court of India is that advocates get to their point rapidly and directly. Furthermore, it is obvious that if Australian businesses are trading with India then legal

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<sup>17</sup> Kappadath, R., of Pitcher Partners, '*Gaining Ground in India*', *The Age Business*, 8 November 2010, pp. 8-9.

<sup>18</sup> Kappadath, R., *ibid.*

services will be needed. What has the Vic Bar done in marketing and directing itself to this major trading partner?

It is recognized that the nature of globalisation has shifted. It has moved to an Asian axis<sup>19</sup>. We are told it is clear that globalisation is now being powered by the emerging economies of China and India followed by other parts of Asia. At the same time, there are limited opportunities for domestic growth in Australia and Victoria.<sup>20</sup>

Again I ask, what has the Vic Bar done to link into opportunities in China - Shanghai and Hong Kong in particular. There may be ways this can be done through the Bars directly in Hong Kong and through linkages with the firms. How many members of the Victorian Bar speak Mandarin or Cantonese? Have lawyers of Asian background been encouraged to join the Victorian Bar?

Still on Asia we must consider Singapore. It is Australia's largest trade and investment partner in ASEAN and

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<sup>19</sup> Stutchbury, M., *'Welcome to the new world order'*, The Australian Focus, 29-30 January 2011, p.1 quoting New York based political science and risk consultant Mr. I. Bremmer.

<sup>20</sup> Boxsell, A., *'Asian Focus Transforms Legal Firms'*, Australian Financial Review, 25 February 2011, p. 26.

Australia's sixth largest trading partner overall. In 2008 Australia invested \$22 billion dollars in Singapore<sup>21</sup>.

We were very fortunate last year in Melbourne to receive an address from Chief Justice Chan Sek Keong of the Supreme Court of Singapore<sup>22</sup>. The address of the Chief Justice is on the CommBar website<sup>23</sup>. With respect, I will try to pick up the key points made by the Chief Justice:

- few Australian law firms have offices in Singapore.
- India is an opportunity awaiting.
- Melbourne firms are welcome in Singapore.
- Asia is where the future is in terms of economic power.
- Australia's trade with China will generate a lot of work for Australian lawyers.
- Victorian barristers are welcome in Singapore.
- The Singapore International Arbitration Centre (SIAC) is the flagship of Singapore's ambition to grow the city as a major arbitration centre in Singapore.

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<sup>21</sup> The Rt. Hon. Chief Justice Chan Sek Keong, remarks to the Asian Practice Section of the Commercial Bar Association of Victoria, 15 September 2010, citing the Australian Department of Foreign Affairs and Trade Brief on Singapore, paras. 9-10.

<sup>22</sup> Ibid.

<sup>23</sup> A copy of his Honour's address may be found at <[http://www.commbar.com.au/uploads//Areas%20of%20Practise/Asia%20Practice/Address\\_by\\_CJ\\_Chan\\_15\\_Sep\\_2010.pdf](http://www.commbar.com.au/uploads//Areas%20of%20Practise/Asia%20Practice/Address_by_CJ_Chan_15_Sep_2010.pdf)>.

So, members of the Victorian Bar, why not set up chambers in Singapore? To what extent are members of the Bar aware of the arbitration services offered by Maxwell Chambers in Singapore? Should the Victorian Bar be pressing the new Victorian government to enact the *Commercial Arbitration Act* quickly (I think so)? Should you press the new government to insist the Commonwealth government continue to roll out the national grid for Australian commercial arbitration by supporting a centre in Melbourne now that one in Sydney is established (I think so too)?

Australian law firms now have a very strong Asian focus. Legal practice is transforming into a global phenomenon<sup>24</sup>. The market is now international<sup>25</sup>. At all levels there is pressure on state governments and their economies to achieve greater efficiencies and national consistency through the Council of Australian Governments reforms. The national legal professions reforms are an example. The firms are repositioning. One partner said recently: 'You've got to look at every aspect of your business, not just your strategic settings but your operational and

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<sup>24</sup> Boxsell, A., *Ibid*, quoting Mr D. Boyd, Deputy Chief Executive, Norton Rose.

<sup>25</sup> *Ibid*.

cultural arrangements and bringing all your people together<sup>26</sup>.

The rise of the role of in house or general counsel in the major corporations cannot be under estimated. They wield strong power and influence. Simultaneously they are under intense pressure to reduce the cost for their corporation. English research revealed that 90% of general counsel said they were under internal pressure from their finance directors to provide better value, efficiency and cost reductions. Sixty per cent of the general counsel surveyed said they had already reduced their overall external legal spend<sup>27</sup>. This English research also reveals that one of the biggest casualties of the global financial crisis has been the hourly rate charged by law firms. A new phenomenon of 'value billing' has arisen. Value billing is billing based on the value of the work for the client rather than the amount of hours spent on it by outside counsel<sup>28</sup>.

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<sup>26</sup> Boxsell, A., Ibid, quoting Mr. R. Milliner, Chief Executive Partner, Mallesons Stephen Jaques.

<sup>27</sup> Eversheds, **Law Firm of the 21<sup>st</sup> Century – The Clients' Revolution**, [www.eversheds.com](http://www.eversheds.com) p.4.

<sup>28</sup> Ibid, p.7.; also, Fennell, E., "Eversheds Report looks at how 'Perfect Storm' will affect the legal profession", **The Sunday Times**, 18 March 2010.

So where will these changes and developments leave the Victorian Bar? How will the Bar take advantage of a well-placed Victorian economy, the fresh perspective of Victoria as an innovative and aspirational place to do business, the Asian opportunities and the new globalised profession? The Bar cannot continue to do things in the same traditional way. To sustain its future, the Victorian Bar must remain relevant and needed.

Much of what I have said, the Criminal Bar will see as not relating to them. The pressures are certainly different but the demands for shorter trials and reduced delays are constant themes.

The increase in fees by Victoria Legal Aid are very welcome.<sup>29</sup> The more times new counsel are able to get into court and on their feet the better. The fee increases help that. The wise advice to new counsel is 'don't chase the money, chase the advocacy'. In terms of the future there was one especially wonderful proposal. VLA announced a new program to fund 'talented junior counsel' attached to experienced and capable mentors in

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<sup>29</sup> On 20 December 2010 VLA advised the Victorian Bar of an increase in VLA fees effective from 18 January 2011. The advice was contained in a letter dated 20 December 2010 which also proposed a raft of other reforms. A copy of the letter was provided by VLA to the author.

50 trials per annum (10 in the Supreme Court and 40 in the County Court). The identification of suitable trials, appropriate mentors and juniors will be done in conjunction with the Bar and the relevant court. The investment by VLA of approximately \$500,000 is commendable. The intention is to provide mentoring and development of the junior Criminal Bar with a view to changing culture and seeing newer, fresher people come through from the junior ranks. It is a beginning. It will not be a case of charitable works for the leaders. The nominated juniors are part of the new generation of the Bar. They will be fully on top of IT, the uniform evidence and criminal procedure legislation and, they will be sharp.

At the same time we have the new criminal appeal reforms just commenced in the Court of Appeal. They will lead to much greater involvement of trial counsel in appeals. It is anticipated that the involvement of trial counsel will have an impact long term on the criminal Bar right down through the ranks. Just as in other jurisdictions, competent counsel should be able to switch from trials to appeals. From the point of view of the overall criminal justice system it is expected there will be advantages. With the greater involvement of trial

counsel in appeals giving advice on prospects of success, drawing grounds of appeal and appearing on the appeal (if leave to appeal is granted) will help ensure the key issues are properly litigated at trial. There will be a greater level of accountability and responsibility. Appeals will be conducted by reference to what actually occurred at the trial.

There will be a significant benefit I expect to the Bar. The reforms will enrich and deepen the intellectual talent and experience of the ranks of the junior criminal bar.

Yet in terms of reform, whether the jurisdiction is criminal or civil it all comes down to cost. To focus for a moment on criminal costs, the length of criminal trials is worrying. It should trouble the Bar deeply. Anecdotally, on occasion, judges speak of witnessing brilliant advocacy in their court: focused, strategic and highly professional. Regrettably, they also speak, on occasion, of barristers who have not kept up to date with significant law changes, new authorities and who conduct trials on an open-ended basis. It is complained that these barristers conduct criminal trials exactly as they did years ago. No effort is made, it is said, to refine and improve the skill,

the art of the advocate, to have an eye and ear to participating in an effective and efficient process.

In England the view has been taken that as criminal fees are mostly funded by the public purse recognition of standards of advocacy are encouraged. Almost a year ago the English Bar began contemplating a scheme for criminal defence advocates, including accreditation<sup>30</sup>. Since then, a consultation process has been conducted, and it is expected that common advocacy standards will be in place for criminal law specialist barristers, solicitors and legal executives by July 2011. Indeed since the end of 2009, English barristers generally have been permitted to engage in mixed partnerships between solicitors and bars, to conduct litigation so that barristers may collect evidence directly and also to prepare evidence<sup>31</sup>. These reforms may be of particular interest to the Victorian criminal Bar.

In the criminal jurisdiction the vision in England is for prescribed standards for criminal defence work linked to

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<sup>30</sup> Green, N. QC, '*The Changing Face of the Bar of England and Wales*', World Bar Conference April 2010, Sydney, p.2.

<sup>31</sup> *Ibid* p.4.

high quality continuing education<sup>32</sup>. It is a laudable aspiration. It presents the opportunity to reduce the cost of criminal justice through effective advocacy of a recognised and renowned standard.

Technology is another opportunity for the criminal Bar.

The criminal jurisdiction here in Victoria will be affected by technology in years to come. Time again for some statistics. By 2008, 67 per cent of Australians had access to a computer at home. Worldwide there are estimated to be more than 2 billion internet users and 4.5 million mobile phone users. The majority of people accessing the internet do so through mobile devices. 825 million, or almost half of all internet users, are in Asia, which is becoming the economic and technological hub of our globalised world<sup>33</sup>.

The opportunities for cyber crime are bewildering. The march of the social media revolution is daunting. It is said

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<sup>32</sup> Ibid p.5.

<sup>33</sup> The figures were those given by Clive Shepherd in an online seminar for ALT in early December 2010. That seminar may be accessed at <<https://sas.illuminate.com/site/external/jwsdetect/playback.jnlp?psid=2010-12-06.0325.M.339E81E6399E525735F4BC0BEFF8B6.vcr&sid=7565>>

to be the number one activity on the web<sup>34</sup>. There are an estimated 500 million Facebook users. Every minute there are 24 hours worth of video uploaded onto the internet. Up to 10,000 Twitter accounts are opened daily<sup>35</sup>.

Technology and social media have already started to impact on trials. Counsel will need to know how it all works to effectively examine and cross-examine witnesses on the use of technology. Critical statements in evidence may be made in all sorts of ways unimagined when the jurisprudence on evidence in the criminal trial was developed.

So why not practice the new IT ways now? Why not set up a Criminal Bar Twitter to publish research, papers, case summaries and the like? When waiting to get on at court skills can be developed and information shared. The use of iPads is blossoming – the VRs and the CLRAs and the VSCs and VSCAs are on hand now almost instantly.

The IT savvy future criminal advocate will be a daunting opponent.

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<sup>34</sup> Murdoch, S., 'Law Firms, Banks Join Social Media Bandwagon', *The Australian, Business*, 22-23 January 2011, p.33.

<sup>35</sup> Ibid.

Indeed the future is all about IT, IT and more IT. The courts are grappling with how to manage their institutions and their trials through effective IT. As generational change is occurring across the benches of the courts more IT savvy judges and magistrates are presiding. To be frank judges have had enough of the paper.

But IT is also about the projection and management of the Bar itself. There will be opportunities to centralize and facilitate access to contemporary technology to support barristers and enable them to be better at what they do. Again, this will be where the new readers and those who come after them will implement change to the Bar as we presently know it. The Bar might also ask itself: Are economies of scale being sufficiently exploited through IT?

At this stage the common law Bar may be feeling neglected. They are never forgotten. Equally with the commercial, criminal and appellate areas the common law is entering an exciting time. Anecdotally it is said that civil juries are back in vogue. The Victorian Court of Appeal recently supported that<sup>36</sup>, yet there are other

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<sup>36</sup> *Trevor Roller Shutter Pty Ltd v Crowe* [2011] VSCA 16.

opportunities. In the next five years Victoria will witness significant class actions arising from the bushfires. Those proceedings will challenge the common law Bar because the presiding judges will adopt very much an *AON* interventionist approach. They will also exploit the new civil procedure provisions. The focus of the judges will be to identify early the real issues at stake and bring all aspects of interlocutory proceedings back to those issues. It might even be said that the bushfires litigation will be an opportunity for the common law Bar to show the commercial Bar how it could be done.

### **Closing Remarks**

For the purposes of my discussion I have conducted empirical research by speaking to senior judges who were previous leaders of the Victorian Bar and some of the clerks. I have drawn on my own reflections as a trial judge and head of jurisdiction for now almost 13 years.

The system of justice in this State, indeed this nation, needs a vibrant, relevant and modern Victorian Bar. We must never forget that the Bar is the interface between the litigant and the courts.

If I may I will make three suggestions:

- first, the Bar must devise strategies to draw back and seize control of litigation in this State.
- second, the Bar must find a way to reconfirm and market its differentiating skill, namely, its advocacy.
- thirdly, the Bar must market what it has to offer: value for money, that it is not time based but value based – the new way of the modern post GFC corporation.

I would encourage a thorough, wide-ranging and deep discussion about the very nature of the Bar in the context of a changing community. The courts have an important part to play in a dialogue with the Bar. I look forward to that opportunity.