Rights in university inventions: UWA v Gray

Professor Ann Monotti

INSIDE:
A Tribute to Professor Enid Campbell
Prato program receives national award
It was with great sadness that we learned of the death of one of the Monash Law Faculty’s greatest scholars, Professor Enid Campbell in January of this year. Enid was a towering figure in Australia’s academic landscape and for thirty years in the Law School provided intellectual leadership to generations of students and colleagues.

I was fortunate to be one of those colleagues for fifteen years between 1976 and 2000 and had the benefit of her wise counsel, penetrating intellect and research advice, even though we were not in the same academic field. However, for Enid, there was no field of which she had no understanding and no problem to which she could not contribute some valuable insight.

Enid was a teacher who taught and influenced thousands of students, directly through her teaching and indirectly through her writings. She was quintessentially the kind of academic upon whom the reputation of a great law school is founded: academically rigorous, publicly engaged, endlessly creative and infinitely supportive. In this issue, Professor HP Lee, also a long-time colleague, pays tribute to Enid and her stellar career. I am sure that there are many alumni who carry the memory of her work with them throughout their lives and careers.

Each new year brings its unique challenges. In 2010 we are undertaking a major review of the LLB and JD programs as part of the University’s regular five year rolling program of academic reviews. It will also form part of a new certification process instituted by the Council of Australian Law Deans and will be of value to the Council of Legal Education. Although our curriculum is kept under close review, it is useful, periodically, to take a longer view of the direction of legal education and to seek the views of those beyond the Faculty.

The review committee will be comprised of members of the practicing profession, local and international academics and students from both the LLB and the JD programs. Alumni who wish to make submissions to the review are invited to contact me before the end of July.

This year is also the year in which the Commonwealth government embarks on a major review of research in the tertiary sector through its Excellence in Research for Australia (ERA) initiative. This will involve an evaluation by the Australian Research Council of all disciplines and will produce a rating from 1 to 5 for each field of research in each institution and it is expected that there will be funding consequences in future years. The Faculty is well prepared for this exercise, having undergone a trial exercise in 2009. As is evident from the New Books section in this, and previous editions of Law Matters, the Faculty is very research active and producing numerous major works of national and international significance.

2010 also marks the launch of our new Malaysia program, modeled on the outstandingly successful Prato program which runs in the first half of each year. Seven subjects will be offered in the second half of this year with partner universities including the City University of Hong Kong, the University of Windsor, Canada and the University of Malaya. Together with the variety of internships and exchanges, we are working to provide our students with a truly international education for an increasingly globalised profession.

Professor Arie Freiberg, AM
Dean, Monash Law School
Judicial Appointments

Susan Armour (LLB 1982)
– Appointed to the Victorian Magistrates Court

Ms Julie O’Donnell (BA 1986, LLB 89)
– Appointed to the Victorian Magistrates Court

Mr Jack Vandersteen (BA 1992, LLB 1994)
– Appointed to the Victorian Magistrates Court

Mr Mordecai (Mordy) Bromberg SC (BCom 1980, LLB 1983)
– Appointed to the Federal Court of Australia

Mr Bromberg holds a Bachelor of Economics and a Bachelor of Laws from Monash University and was admitted as a solicitor of the Supreme Court of Victoria and the Supreme Court of New South Wales in 1984. Mr Bromberg was called to the Bar in 1988 and practised extensively in the field of industrial and employment law. Mr Bromberg also appeared in constitutional, trade practices, administrative law and discrimination law cases. He was appointed Senior Counsel in 2003 and has been President of the Australian Institute of Employment Rights since 2005.

Mr Bromberg’s appointment to the Melbourne registry commenced in December 2009.

Monash students lead local government

Monash students are providing a voice for youth affairs in local government, with two students elected to the role of mayor in metropolitan elections.

PhD student Charlotte Baines was last year elected as the youngest female Mayor of the City of Monash in south east Melbourne.

The 27-year-old Bachelor of Arts and Bachelor of Laws graduate is juggling her council commitments with completing a PhD in sociology in the School of Political and Social Inquiry.

Charlotte’s passion for youth affairs and finding solutions to community problems encouraged her to run for council. She has been elected to the role consecutively since first running for council in 2005.

Charlotte believes more young people need to be involved in civic life and in local decision-making processes.

“I think that life is really short and you don’t really know what’s around the corner so I’d rather do the things that I love to do as opposed to doing things that I’m only half-hearted about,” she said.

“I really like being a leader but also believe in being a team player. I like to be in positions where I challenge myself, where I can use it as a vehicle to influence and make change but at the same time I want to grow with other people.”

“I think the University has played a significant role in my thinking, challenging me to look at things from a variety of angles.”

“My study has really opened my mind to debate, to be open to various sides, know how to create reasoned argument, and also believe in the notion of collecting strong evidence to support your case.”

Double-degree student Stephen Tang was recently elected mayor of Glen Eira council for a second consecutive term.

Stephen, 26, has one year of study left to complete his double degree in law and commerce.

Young Victorian of the Year awards

Monash Commerce/Law student Andrew Asten was one of four finalists in the 2010 Young Victorian of the Year awards.

The 22-year-old was nominated for his volunteer work with the United Nations Youth Organisation and more recently, with the Oaktree Foundation, which he joined in 2007.

Asten has since coordinated the foundation’s Face Up To Poverty campaign, which played a key role in getting the Federal Government to pledge an additional $4 million to the world’s poor.

Asten also founded the Schools 4 Schools program, which provides educational opportunities to students across the developing world. The program now involves more than 45 Australian schools and 21 South African schools. Andrew plans to expand the program into East Timor, Papua New Guinea and Indonesia.

The Young Victorian and Young Australian of the Year awards are held annually as part of the Australian of the Year awards to celebrate the achievements of people who contribute to creating a better Australia.

Australia Day Awards 2010

Dr Donald Argus (LLB 1995, MNHS 1995)
Companion of the Order of Australia (C)
For eminent service to business and commerce through leadership in the mining and finance industries, and to the community through the promotion of philanthropy, and executive roles in conservation, health, charitable and sporting organisations.

Mr Richard Gross (BA/LLB 1980)
Member of the Order of Australia (AM)
For service to local government, particularly through the Municipal Association of Victoria, as a contributor to environmental reform initiatives in the area of waste management, and to the community of Port Phillip.
James Rowland (LLB 2002)

I completed my law degree in June 2002 after spending my final semester in Prato studying International Commercial Arbitration, Comparative Civil Procedure and Trial Practice and Advocacy. After completing university I stayed in Italy to travel and learn Italian for several months. Later in the year, I found a job in the legal department of a company based in Florence where I worked as a trainee in-house counsel before returning to Melbourne at the end of 2003. I completed the College of Law Professional Program on-line in 2004 and based on my work experience in Italy (supervised by a lawyer from a common law jurisdiction), I gained admission to practice as a solicitor and barrister at the end of 2004. In 2005, I started practicing at Clayton Utz in Melbourne and moved to Deacons at the beginning of 2006 to work on a large cross-border litigation. I moved to China in July 2007 to begin work for King & Wood PRC Lawyers and am currently employed at King & Wood in Beijing as an advisor on international law. Since 2007 I have appeared as a barrister in commercial arbitrations in Stockholm and Hong Kong and have advised on the common law/international law aspects of several important cross-border cases involving China. Studying at the Monash Prato Centre taught me that there really are exciting opportunities all over the world for talented Monash law graduates. My advice to law students taking part in the Prato program: read all your materials before you leave Clayton and don’t be afraid to put all plans on hold while you are travelling; listen and study hard in Italy and be open-minded about what life has to offer when your classes in Prato are finally over.

Jeremy Szwider (LLB, BCom 1997, LLM (IP) 2001)

In 1997 I graduated from Monash with a LLB and BCom. In 2001 I completed a Master of Laws in Intellectual Property. My passion for the law started at a young age and I commenced working for Bazzani Scully Brand in 1994 whilst completing my undergraduate courses, where I worked until 2000 before my move to Phillips Fox. I then left Phillips Fox in 2004 to pursue an in-house career in the UK. After stints in some of the large UK law firms, I then worked for 5 years at the Carphone Warehouse as its General Counsel before making the bold decision to launch my business, Bespoke Law.

Bespoke Law is an exciting platform showcasing a new model of law firm. This virtual law firm revolutionises the traditional legal market by combining in-house and private practice principles to provide cost effective and high quality commercial legal solutions. With its flexible working practice and fee structures, Bespoke Law has quickly made a name for itself being recognised by the media as a pioneer for ‘the new third tier of the legal profession’. More information can be found at www.bespokelaw.com

William Lye MEI (Swinburne), LLM 1995, LLB 1986, BSc (Computers) 1985, MAICD

After completing my articles at Leo Cussen Institute, I worked for several months at the State Director of Public Prosecutions before embarking on a career at the Victorian Bar. I have been practising in commercial and corporate law, and intellectual property for 22 years. When I first went to the Bar, I was the only Barrister of Chinese Malaysian background.

The first Chinese Barrister in Victoria was William Ah Ket, who died in 1986. I have also held positions as Non Executive Director on a couple of public listed boards on the Australian Stock Exchange. Currently, I sit on several private and Not for Profit Boards such as the Chinese Professional and Business Association Ltd, and Norwood Association Inc (a government funded mental health organisation). I also hold a Master of Entrepreneurship and Innovation degree from the Australian Graduate School of Entrepreneurship. The breadth of my practice has taken me around the globe, including the Silicon Valley and the Malaysian Multi Super Corridor.

I currently tutor Contracts and Corporations Law at the Monash Law Faculty; teach commercial and corporate practice, and intellectual property at Leo Cussen Institute; are an accredited Advocacy Trainer for the Victorian Bar Readers’ course; and I convene and lecture the flagship subject, Opportunity Evaluation, at the Australian Graduate School of Entrepreneurship.

I have also presented talks at forums and conferences in the Asia Pacific region. The most recent was at the inaugural World Chinese Economic Forum held in Kuala Lumpur, Malaysia in 2009. I am a member of the Australian Institute of Company Directors, the Victorian Bar, an Executive Committee Member of the Commercial Bar Association of Victoria, the Chairman of the Asia Practice section of the Commercial Bar Association of Victoria, and a member of the Corporate Malaysia Round Table, Asian Strategy and Leadership Institute.

Lucinda Lecture 2010

The 17th Annual Lucinda Lecture was presented by The Honourable Justice Susan Keifel of the High Court of Australia with the topic ‘Section 92: markets, protectionism and proportionality – Australian and European perspectives’.

The topic was introduced by The Hon. Chief Justice Marilyn Warren who welcomed attendees who included the patron of the Lucinda Lecture, The Honourable Sir Zelman Cowen AK, GCMG, GCVO, KStJ, OC.

Held at Monash University Law Chambers in Bourke Street, the Lucinda Lecture was attended by 150 guests.
Monash Law graduate Nick Whitmore was awarded the Victorian ‘Young Construction Lawyer of the Year’ for 2009.

Nick is entering his third year of practice and has already gained skills in advising clients on a range of construction-related matters including the preparation and running of Supreme Court litigation for a national contractor regarding the construction of the Craigieburn By-Pass.

Nick has also advised local government on the procurement and resolution of disputes relating to significant public infrastructure and has acted for a major contractor on an interstate dispute (including claims against a foreign-based design firm) concerning the design and construction of a major arterial road/rail bridge. “Nick has developed an enthusiasm for extending his knowledge of construction and engineering law as well as the process for dispute resolution in the several forums in which he has practised,” according to Construction & Major Projects partner Paul Woods.

The Law Council of Australia’s Victorian sub-committee for Infrastructure and Construction sponsors this award named in the memory of the late Tom Yuncken, a renowned and highly regarded construction lawyer from Allens Arthur Robinson, every two years.

**Red Cross International Humanitarian Law Moot**

In March the 8th Red Cross International Humanitarian Law (IHL) Moot was held in Hong Kong. The Monash University Law Faculty and Monash ‘Law Students Society’ sponsored Kaja Strzalka and Hugh Bastiaan to represent the University and Australia at the competition.

IHL encompasses a body of statute and case law that is designed to protect fundamental human rights during times of conflict. The Moot problem saw the Monash team construct a case as the prosecution against a ‘General Sulphide’ who had committed various war crimes. Since February the team had been preparing with the help of Dr Gideon Boas who is a leading authority in the field of IHL.

The competition consisted of general rounds working their way down to a grand final. There were 20 teams representing over 13 nations with tough competition in all the rounds. The University of Hong Kong took out the competition narrowly defeating Universiti Utara Malaysia. This was the second time Monash has been represented at the prestigious competition.

The Monash team was chosen to represent Australia because of their success during the 2009 national rounds at ALSA in Brisbane. The competition encourages students to gain a greater appreciation for the principles and operation of international humanitarian law, and provides a unique opportunity to understand the implications of international armed conflict.
Celebration of the life and work of Professor Enid Campbell

To honour Professor Campbell Monash Law School held a ‘Celebration of the life and work of Professor Enid Campbell’ on Tuesday 23rd March. Guest speakers included Chief Justice Marilyn Warren, Bruce Dyer from Blake Dawson, Professor Arie Freiberg, Professor Richard Fox, Professor H P Lee and family members.

Mr Andrew Campbell handed the Dean of the Law School, Professor Arie Freiberg, the box of insignia for the Law School to keep and display in honour of Professor Campbell.

The night gave insight into what made Professor Campbell a brilliant scholar, valued teacher and colleague and reminded people of her amazing achievements, kindness and sense of humour.
Enid was born in Launceston, Tasmania, on the 30 October 1932. She was dux of Launceston’s Methodist Ladies’ College, she studied economics and law at the University of Tasmania graduating in 1955. She was awarded a scholarship to Duke University in North Carolina and was conferred a PhD in 1959. Upon her return to Australia she took up an appointment as a Lecturer in Political Science in the University of Tasmania. She joined the University of Sydney in 1960 and was Associate Professor of law from 1965–1967.

“IT can simply be said that she was widely acknowledged as the doyenne of Public Law”

On 1 August 1967, she was appointed to the Monash Law School’s Sir Isaac Isaacs Chair of Law, becoming the first woman to be appointed a Professor of Law in Australia. She held the position of Dean in the Law School in 1971. For 30 years until her retirement in 1997 she served the Monash Law School and University with dedication and distinction. For her brilliance and achievements she was showered with many accolades.

Professor Campbell was awarded an Order of the British Empire and made a Fellow of the Academy of Social Sciences. Her crowning glory was when in 2005 she was appointed a Companion of the Order of Australia ‘for service to legal scholarship and education’. She was conferred honorary doctorates by the University of Tasmania, the University of Sydney and Monash University.

Enid, in the world of legal academia, was a stellar performer, her legal scholarship was indubitably of the highest order, she wrote with remarkable lucidity and coherence and her writings were characterised by meticulous research and originality of ideas. Enid’s research interests straddled a broad spectrum of areas. It can simply be said that she was widely acknowledged as the doyenne of Public Law. She was highly respected for her contributions to the teaching of Australian Constitutional Law and Administrative Law at Monash.

Enid has left behind a vast body of works in the form of books (authored and co-authored), edited volumes, royal commission reports, journal articles and book reviews.

Enid made outstanding contributions to Australian society through her influential body of legal works, and particularly, through her work as a member of the Royal Commission on Australian Government Administration (1974–76) and the Constitutional Commission (1985–88).

Enid was so consumed by her passion for legal research that even in retirement she was unceasing in her output of legal publications. Unfortunately, her health failed her. We in the Monash Law School share pride in her many achievements. We bid final farewell to our illustrious colleague. Vale, Enid.
Rights in university inventions: UWA v Gray

Abstract

In February 1985, Dr Bruce Gray commenced his appointment at UWA as Professor of Surgery and brought with him a considerable body of ongoing research which he continued to develop during his employment at UWA. The essence of the complex facts in University of Western Australia v Gray was that Dr Gray both applied for patents in his own name for various inventions arising from this research and pursued their commercial exploitation outside the university without its permission. In substance UWA's claim against Dr Gray was that UWA had proprietary rights in respect of the inventions, and of associated applications and patents, arising from Dr Gray's employment obligations. It claimed to be entitled to certain remedies because Dr Gray had dealt with the inventions as his own.

UWA was unsuccessful on all grounds at trial and on appeal. On 12th February 2010, the High Court rejected an application by the UWA for special leave to appeal from the Full Federal Court decision. The grounds for refusal were that UWA's challenge as to questions of law could only arise if the High Court re-examined the facts as found by the primary judge and by the Full Court. As ‘fact finding does not give rise to any special leave ground’, the Court concluded that this was not an appropriate occasion to consider those questions of law. This brought to an end the lengthy dispute regarding ownership of Dr Gray's inventions. It also clarified that Australian universities cannot assume they have rights in those inventions but must protect their claims with express contractual arrangements.

The legal issues

A fundamental principle of patent law is that rights in patentable inventions stem from the inventor. The Patents Act 1990 (Cth) contains no express provision that entitles an employer to its employees' inventions. Instead, an employer's rights are established under an express contractual term or pursuant to the implication of a term under the common law. In order to avoid the uncertainties associated with implied terms, it is the usual practice for employers to include express covenants in employment contracts that require employees to assign to their employer any inventions that they create in the performance of their employment duties.

In the case of Dr Gray, his employment contract contained no separate express covenant to assign inventions to UWA. Although the UWA senate had passed intellectual property regulations on 22 July 1996, UWA faced two insurmountable problems in enforcing against Dr Gray the obligations to assign to UWA all rights in any inventions created during the course of his employment. First, the regulations were not properly promulgated and hence unenforceable. Secondly, even if the regulations were validly promulgated, the University of Western Australia Act 1911 (WA) (as amended) gave UWA no power to make regulations which alienate or interfere with property rights not vested in UWA. Hence, UWA could not by regulation acquire property that vested in its staff.

Hence, as the litigation unfolded, it became evident that for UWA to have a valid claim to Dr Gray's inventions on its pleadings, it had to show that:

(a) He had an implied contractual obligation to assign to UWA all rights in those inventions; and
(b) Dr Gray had come up with the relevant inventions during the course of his employment at UWA; this involved an evaluation of the concept of inventorship as well as factual matters.

Space constraints must limit this article to a discussion of (a) – the implied contractual obligations of academic employees. As far as the legal principles are concerned, the employer's entitlement to own employee inventions pursuant to an implied term in law (as distinct from an implied term in fact) turns upon ‘[w]hat is it that he is employed to do?’ An implied term to assign inventions is presumed when an employee has a general duty to carry out research in a commercial environment in which inventions are the likely and desired outcome of the employee's duties. The operation of this implied term in private sector commercial entities is underpinned by a duty – either express or implied – not to make unauthorised use or disclosure of confidential information generated in the course or conduct of research. Although Universities and their advisers assumed that the implied term to assign inventions applied to academic employee inventions, no-one would have contended – and UWA did not argue – that a duty to keep information secret accompanied that term as of course. Hence, the UWA arguments for an implied term in law would require some form of ‘free standing’ implied term that was unsupported by an obligation of confidence.
The decision of the primary judge in the Federal Court (which was later upheld in the Full Federal Court) torpedoed the validity of these assumptions and propositions. Although Dr Gray’s appointment required him, inter alia ‘to undertake research, to organise research and generally to stimulate research among the staff and students’, all judges negated any implied term that would require him to assign to UWA any inventions resulting from that research. The Full Court regarded ‘the circumstances of his employment as a long way removed’ from the master/servant relationships discussed in the English cases which gave rise to the common law implied term. It recognised the distinctiveness of universities and academic employment within them as the ‘central pillar’ in their reasoning and that of the primary judge. Thus, academic employment was a subclass of employment contracts which could receive de novo consideration for the existence of the implied term. Their regard to the following ‘considerations of policy and consequentialist considerations’ influenced their negation of that usual implied term:

(i) An academic employee’s general duty to carry out research does not necessarily incorporate a ‘duty to invent’.

(ii) Universities are created to serve public purposes and there was no evidence to suggest that commercial activities replace the traditional public function as an institution of higher education in favour of the pursuit of commercial purposes.

(iii) There is a two faceted character of an academic staff member’s relationship with a university – ie as member and employee.

(iv) The implication of an obligation of secrecy as of course would be an inevitable consequence of the implied term and would have ‘quite significant collateral impact’ upon the practices of academics. This was impossible to reconcile with the academic freedoms to publish (there were no constraints to keep anything secret), to choose the subject and manner of research without being subject to the duty to invent and to collaborate with external organisations.

The outcome of this litigation was that Dr Gray would own his inventions, whether he made them before or during his employment at UWA. As it happened, all judges accepted that Dr Gray had conceived the inventions of which he was an inventor prior to his arrival at UWA so the implication of the common law term would have had no inventions upon which to operate. In general, the research he pursued at UWA was related to reduction to practice of the inventions already conceived.

Some observations

The case is too complex for a thorough analysis of the implications of this decision in this brief article. However some observations as to ownership of university inventions can be made.

The first relates to its application to future cases. The rejection of the special leave application leaves the Full Court decision as establishing that there is no general proposition that Australian universities own the inventions developed by academic staff in the course of their research. Nevertheless, as the primary judge noted: ‘Each case involving a university and its academic staff must be assessed by reference to its particular circumstances and the terms and conditions of employment of its staff.’ It is also relevant here to highlight the narrow grounds on which this particular case was fought. Both the primary judge and the Full Court expressly drew attention to the narrow and in a sense contrived nature of the argument but made no comment as to whether this might affect their decision.

The second relates to the implications for universities. We have a clear message for universities (which they understood and acted upon following the decision of the primary judge French J (as he then was) in 2008): the need for express arrangements that are enforceable. As a practical matter, the approaches for existing and new employees will be different. It may be a simple matter to alter new employment contracts, but not so simple to patch up any gaps with existing arrangements with employees and third parties with whom they have dealt as owner of those inventions.

Finally, the judgments confine their analysis of implied terms in law to the context of universities and their academic employees and it is sensible to view them in that context alone. The practical answer for any other organisation that might be anxious as to the decision having any wider scope beyond universities is clear: issues relating to ownership of intellectual property created in performance of the duties of employment should be governed with express contractual arrangements.

Professor Ann Monotti
Associate Dean (Postgraduate)
7 April 2010

1 University of Western Australia v Gray (No 20) (2008) 246 ALR 603 (French J); (2009) 259 ALR 224 (Lindgren, Finn & Bennett JJ).
3 Patents Act 1990 (Cth), s 15.
4 University of Western Australia v Gray (2009) 259 ALR 224, [148] – [158].
5 Ibid, [173].
7 University of Western Australia v Gray (2008) 259 ALR 224, [193].
8 Ibid, [164].
9 Ibid, [88] – [94].
Prato program receives award

The Faculty of Law’s Prato program was awarded the Australian Learning and Teaching Council 2009 award for Educational Partnerships and collaborations with other organisations.

The award celebrates the exceptional effort made by university teachers and general staff to improve the student experience of Australian higher education.

The Prato program was recognised for its collaboration with international organisations and universities.

The program, established in 2001, brings together staff and students from universities around the world to the Monash Prato Centre in Tuscany. This offers students the chance to acquire and develop skills and perspectives they will need as lawyers operating in a modern legal environment over one full semester of study.

Dr Jonathan Clough said it was a great achievement for the faculty and everyone who had been involved in the program.

“The award demonstrates the quality of our programs and the broad opportunities we give our students. It also demonstrates great teamwork in putting together a quality nomination that was supported by many testimonials from teachers and students.”

Clean sweep for Monash Law students

Monash University Law students won every category of the recent Victorian Council of Law Student Societies (VCLSS) Inter-university Championships – the most prestigious law students’ competition in Victoria.

Each of Victoria’s five law schools sends its best students to participate in the Championships, with teams competing in Mooting, Client Interview, Negotiation and Witness Examination. The competitions simulate various aspects of everyday legal practice, requiring exceptional written and oral advocacy, and often extensive legal research. Students are judged by senior members of the Victorian legal profession, including judges from the County and Supreme Courts, as well as partners from the competition’s sponsor, commercial law firm Blake Dawson.

For Mooting winners Alex Fawke and Michael Beaconsfield, this was the second consecutive year of taking out the top prize. The pair, whose team also included Matthew Eglezos, said that the Championships were a fantastic opportunity to improve their skills in advocacy and legal analysis. “To appear in front of some of the state’s top legal minds has been an invaluable experience, and to win was a great bonus,” said Alex, a fourth year Arts/Law student.

Other winners were first year students Vivien Tabe and Matthew Persico, who took out the Client Interview competition. Negotiation winners Sofia Hopper and Hugh Bastiaan, and Drossos Stamboulakis, who won the Witness Examination.
Constitution Education Fund Australia National Awards Ceremony

Ms Humaira (Mira) Lufti and Mr Andrew Vincent, undergraduate students from the Monash Law Faculty, were awarded Second Prize and Third Prize respectively at the 2009 Constitution Education Fund Australia (CEFA) National Awards Ceremony.

The ceremony was held at the Ian Potter Centre, National Gallery of Victoria on Monday, 28 September 2009. The awards were presented by Her Excellency Ms Quentin Bryce AC. The 2009 Chairman of the Final Judging Panel for the Governor-General’s Essay Competition was the Honourable Justice Dyson Heydon AC of the High Court of Australia. Acting Dean of Law, Professor H P Lee, and Lecturer in Law, Dr Colin Campbell were in attendance to witness the awarding of the prizes.

M s H umair a (M ira) L ufti and M r A ndrew  V incent, undergraduate students from the Monash Law Faculty, were awarded Second Prize and Third Prize respectively at the 2009 C onstitution E ducation F und A ustralia (C EFA ) N ational A w ards C eremony. T he c eremony w as held at the Ian P otter C entre, N ational G allery of V ictoria on M onday, 28 Septem ber 2009. T he aw ards w ere presented by H er E xcellency M s Q uentin Bryce A C . T he 2009 C hairm an of the F inal J udging P anel for the G overnor-Ge neral’s E ssay C om petition w as the H onourable J ustice D yson H eydon AC of the H igh C ourt of A ustralia. A cting D ean of L aw , P rofessor H  P  L ee, and L ecturer in L aw , D r C olin C am pbell w ere in a ttendance to w itness the aw arding of the prizes.

O’Week Cocktail Party

To mark the start of the academic year, 300 first year students and their families joined Monash Law School staff for the annual ‘Welcome Cocktail Evening’.

Held in the Law School Library the evening provides the opportunity for new students to meet staff outside of the lecture theatre, as well as show their parents the place that they will be spending so much of their university life over the coming years. The evening was hosted by the Dean, Professor Arie Freiberg, AM and included speakers from the Law Students’ Society and the International Law Association.

Moving from North-Eastern Victoria to Melbourne to study a Bachelor of Arts and Bachelor of Laws at Monash. Bronwyn Wrigley was one of eight recipients of a Monash Law School Equity Bursary in 2010.

Bronwyn said the bursary will “assist me greatly throughout the year. It will help with the expenses of living on-campus and with other costs, such as buying textbooks. It will also reduce the demand on me to find a part-time job, allowing me to fully enjoy the opportunities available at Monash”.

Receiving the bursary allows Bronwyn to worry less about financial issues, and focus on her studies as she considers a future career in human rights law in Australia and overseas.

Associate Professor leads review of property laws

Victorian Deputy Premier and Attorney-General Rob Hulls has nominated Monash Law School Associate Professor Pam O’Connor to lead the State Government’s review of property law.

Mr Hulls said Dr O’Connor would oversee the first stage of the Property Law Review to update the state’s archaic property laws: “The Property Law Act is one of the most complicated, outdated and archaic pieces of legislation in Victoria and it is crying out for review.”

Mr Hulls said.

“The first stage of the review will also look at easements and covenants, which involve issues such as; rights of way, sewerage and drainage, and affects most homeowners. Dr O’Connor has demonstrated she has a strong conceptual grasp of the tasks required to fulfil this position, the strategic vision required to perform the review and combined with her broad knowledge of property law she is a very capable inaugural Commissioner of this review.”
New Publications by Monash Law School Staff


International Economic Actors and Human Rights
Adam McBeth

The actions of entities other than states in the economic arena can and often do have a profound effect on human rights. This book takes three very different categories of international actor – the World Trade Organization, the international financial institutions (World Bank and IMF) and multinational enterprises – and poses the question as to how international human rights law can and should address their operations. Adam McBeth concludes that international economic actors can and should be considered to operate within a holistic system of international law, including human rights obligations, but that changes in the operations and the accountability mechanisms for each actor are necessary. While written from a human rights perspective, the underlying theme of the book is one of engagement and harmonisation rather than condemnation. It provides valuable insight for those who approach this topic from a background of international trade law, commercial law or general international law, just as much as those who have a human rights background.

Sex Offenders and Preventive Detention: Politics, Policy and Practice
Bernadette McSherry and Patrick Keyzer

This book examines how governments should manage serious sex offenders in a way that prevents reoffending while respecting civil liberties. It focuses on three key modern policy responses to managing serious sex offenders, and the cases that propelled their development: • Earl Shriner in Washington State, and the United States approach of detaining ‘sexually violent predators’ in special institutions; • Dennis Ferguson in Queensland, and the Australian post-sentence detention and supervision schemes; • John Cronin in Scotland, and the Scottish approach of making orders for lifelong restriction at the time of sentence.

Michael S King

With the growing commitment by government and the judiciary to the use of problem-solving approaches and therapeutic jurisprudence in the resolution of legal problems has come the need for judges and magistrates to be trained in the knowledge and application of new judging techniques. This bench book is a resource for judicial officers using these techniques in problem-solving courts such as drug courts, family violence and mental health courts and those applying them in mainstream courts. The book has chapters on judging in problem-solving courts; judicial listening and communication skills; processes and strategies to support positive behavioural change in parties and their greater respect for the legal system; applying the strategies in mainstream lists; and challenges in taking this approach. It also has chapters on substance abuse, family violence and mental health. French CJ has described the bench book as “considerable and practical contribution in this important and developing area in the administration of justice”. It is being used by judicial officers around Australia and by a growing number of judicial officers overseas.

Students’ Guide to Legal Writing, Law Exams and Self Assessment
Enid Campbell, Richard Fox and Melissa de Zwart

This 3rd edition offers law students practical advice on preparing well researched and written essays and sound strategies for law exams. It has been updated to reflect the increasing reliance of students upon electronic modes of communication for learning, research, interaction with others and planning. The need for a critical approach when using internet sources is stressed. The benefits and pitfalls of using resources such as recorded lectures online is discussed as are the dangers and consequences of plagiarism. A new section on Self Assessment helps students test whether they have adopted successful study practices and have attitudes conducive to success in law.
Review of Children’s Court

Dr Becky Batagol is working for the Victorian Law Reform Commission for six months on a reference to review the processes in Victoria’s Children’s Court.

In December 2009, the Attorney-General asked the Victorian Law Reform Commission to review those aspects of Victoria’s child protection system that concern Children’s Court processes and provide the Government with a range of reform options that may minimise disputation and maintain a focus on the best interests of children.

Amongst other issues, Dr Batagol is examining whether there ought to be a greater focus in the child protection justice system on Appropriate Dispute Resolution and other procedural measures to reduce the adversarial nature of the justice system.

Dr Batagol’s work for the commission fits well with the faculty’s interest in researching and teaching the many aspects of Non-Adversarial Justice and follows the publication in 2009 of Non-Adversarial Justice by Michael King, Arie Freiberg, Becky Batagol and Ross Hyams.

Non-adversarial justice: implications for the legal system and society conference

The Faculty of Law in conjunction with The Australasian Institute of Judicial Administration recently hosted a conference on ‘Non-adversarial justice implications for the legal system and society’. Chief Magistrate Ian Gray welcomed attendees and Chief Justice Marilyn Warren AC, Supreme Court of Victoria introduced the topic.

The conference which was held from Tuesday 4th to Friday 7th May 2010 attracted a number of high profile speakers including Professor David Waxler, University of Arizona who spoke on ‘Therapeutic jurisprudence: from theory to practice and back again’, Her Honour Judge Jennifer Coate, State Coroner, Victoria who presented on ‘Non-Adversarial Justice and Coroner’s Courts’, The Honourable Peggy Hora, Former Judge, California Superior Court who spoke about ‘Problem-solving courts’ and The Honourable Justice Ray Finkelstein, Federal Court of Australia who discussed ‘The Adversarial System and the Search for Truth’.

Non-adversarial justice aims to address offenders underlying issues and prevent the cycle of offending. Currently the Faculty of Law offers ‘Non-Adversarial Justice’ as an undergraduate elective.

Federal and Constitutional Law
A Contemporary View
Sarah Joseph and Melissa Castan

Now in its third edition, this book elucidates the difficult discipline of constitutional law in a clear, accessible, and engaging way. This new edition includes material on recent developments on the corporations power, separations of power, external affairs, executive power, spending and appropriations, freedom of interstate trade, express rights and the implied right to vote.

The World Trade Organization and Human Rights: Interdisciplinary Perspectives
(Edward Elgar, 2009)
Sarah Joseph, David Kinley and Jeff Waincymer (eds)

This collection of essays from leading human rights and trade scholars examines the connection between the World Trade Organization (WTO) and human rights issues. It represents a key outcome from an Australian Research Council funded grant. The editors argue that a true appreciation of the salient issues requires consideration of disciplines beyond law, such as economics, political science, and philosophy. This book builds on previous trade/human rights projects by adding that interdisciplinary dimension.
Impact upon Business Law and Regulatory Policy
– Trade Practices Act and Franchising Code of Conduct

The Federal Government has accepted the recommendations of a three-member expert panel that included Professor Bryan Horrigan from the Faculty of Law at Monash University, to reform the law of statutory unconscionable conduct and the Franchising Code of Conduct. The February 2010 report by Professor Horrigan, Mr David Lieberman, and Mr Ray Steinwall is entitled *Strengthening Statutory Unconscionable Conduct* and the Franchising Code of Conduct. It appears on the websites for the Department of Treasury and the Department of Innovation, Industry, Science, and Research, both of which assisted the panel with the two distinct but related parts of this public inquiry.

The first part of the inquiry concentrated upon the best regulatory means for clarifying the operation of statutory unconscionable conduct under the Trade Practices Act. The second part of the inquiry examined the prevalence and best regulatory treatment of five identified behaviours in the franchising industry.

In publicly releasing the panel’s report and the Government’s response to the report at a major BRW conference in Sydney in March 2010, Dr Craig Emerson, the Minister for Small Business, Independent Contractors and the Service Economy and also the Minister for Competition Policy and Consumer Affairs, publicly released and endorsed the panel’s report in these terms:

“I am pleased to be able to release that report publicly here today and to announce that the Government supports and will adopt the findings of the expert panel.

I would like to publicly thank the members of the expert panel – Professor Bryan Horrigan, Mr David Lieberman and Mr Ray Steinwall – for their thoughtful and well-considered work.”

The panel’s recommendations as adopted by the Government will build upon other reforms of trade practices, consumer, and franchising regulation in the current parliamentary cycle. These reforms affect business generally and the franchising industry (including commercial tenancies) in particular, and hence have an impact upon major aspects of Australian business regulation. Professor Horrigan’s appointment to this expert panel follows his academic publications, professional consultancy work, and public submissions in this area of business regulation, including his public submission and evidence before the Senate Economics Committee in late 2008.

Meet our new HDR international candidates

As at April 2010, the number of HDR candidates at the Faculty of Law has increased to a total of 81. Out of this number, 19 are new candidates commencing in 2010. Of the 19 new candidates, two are from overseas Dennis Ndonga from Kenya and Sina Etezazian from Iran and we have one current international candidate who has been enrolled in the LLM (Research), Noel Villarom an from the Philippines’ who will commence his PhD in July 2010.

Sina Etezazian
Sina Etezazian is the Faculty’s first HDR candidate from Iran. He completed his LLM (International and Comparative) from University of Wollongong in 2009 and is currently undertaking LLM (Research) on the topic of the international law of self-defence under the supervision of Dr Gideon Boas at Monash Law School. Sina specially chose to come to Monash to be supervised by Dr Boas because of the Faculty’s strength and expertise of Dr Gideon in international law.

Dennis Ndonga
Dennis completed his LL.B (Hons) in Kenya and soon after joined Monash in 2009 where he completed his Master of Laws (Commercial law) in the same year. He was awarded the Faculty scholarship to pursue his PhD commencing in 2010. His PhD topic is on the impact of paperless trade in selected African states. It focuses on how the transmission of documents in electronic form has facilitated international trade in certain African countries. He enjoys studying at Monash and is hoping his research experience will be rewarding.

Noel Villarom an
Prior to commencing his LLM (Research) at Monash University, Noel worked as a criminal defense attorney in the Philippines. His LLM thesis is about the international law basis of the right to development and its possible application in the restructuring process of sovereign debts. Two of his articles, based on his LLM thesis chapters, have been published in international journals such as the Florida Journal of International Law (Florida, USA), Human Rights Brief (Washington, DC) and Journal of Politics and Law (Toronto, Canada). Noel is also scheduled to commence a PhD in Law at Monash in July 2010. He is a recipient of the Monash International Postgraduate Research Scholarship (MIPRS) and Monash Graduate Scholarship (MGS). For his PhD, Noel’s proposed research will explore the UN Security Council’s de facto and de jure roles in human rights enforcement. His supervisor is Dr Adam McBeth, senior lecturer in the law faculty and deputy director of the Castan Centre for Human Rights Law.

Top PhD student wins

Debra Wilson was recently awarded the Mollie Holman Medal for Excellence. The Mollie Holman Medal for Excellence is awarded to each faculty to the PhD candidate judged to have presented the best thesis for the year.

Debra Wilson’s thesis was on “The legality of human cloning: an analysis of the legal arguments for and against a ban on reproductive cloning from a eugenics/human rights viewpoint”. Debra’s research examined the legality of human cloning, in particular whether human rights laws, often referred to as justifying a prohibition on cloning, actually support this position, or in fact support cloning.

The award is named after Emeritus Professor Mollie Holman in honour of her significant contribution to science and education.
Federal Magistrate Phipps visits the Law School

Federal Magistrate Phipps (LLB 1969) is visiting the Law Faculty for April and May 2010, he currently hears family law cases in the Dandenong Court. While at Monash Law School he will be looking at the relationship between the Federal Magistrates Court and the many other agencies and bodies which deal with family law and family relationship problems.

The Family Law Assistance Program (FLAP) is one of these bodies. They offer family law advice and assistance to the public provided by current Monash Law students who are supervised by qualified lawyers. Federal Magistrate Phipps will also take part in FLAP’s project with Chadstone Family Relationships Centre.

The Family Law Act puts a particular emphasis on parties reaching agreement rather than using litigation, reaching agreement after legal proceedings have been commenced and following the agreement if one is made. Family Relationship Centres and other agencies have a role to play both before and after litigation is started and after the litigation is finished. Legal advice and assistance is needed at all stages. Federal Magistrate Phipps hopes to gain a better understanding of how it all fits together during his time with the Clinical Program at Monash Law School.

Commercial Court Seminars 2010

In conjunction with the Supreme Court of Victoria, the Victorian Bar and the Law Institute of Victoria, Monash Law School has held a number of Commercial Court Seminars to provide an opportunity for barristers and solicitors to develop a greater understanding of the Commercial Court.

Topics have included ‘Issues in Case Management’, ‘Early Neutral Evaluation’ and ‘ADR: Developments you need to know about’ with the seminars held at the Monash Law Chambers in Bourke Street.

The seminars have been developed through the support of Justice Tony Pagone and Justice Jennifer Davies with attendees finding them extremely beneficial while providing an opportunity for Monash Law School to showcase the Monash Law Chambers and our postgraduate courses to practitioners.

More seminars are planned to be held throughout the year. For our upcoming seminars visit www.law.monash.edu.au/news/events/

Alumni Mentors

Would you consider assisting a bright, aspiring law student to gain insight, information and advice concerning your professional experience?

Would you have valued an insider’s industry knowledge during your legal training?

Would you like to meet law graduates of the future?

If you can answer ‘yes’ to these questions, then perhaps volunteering to be an Alumni Mentor is for you!

Our program offers introductions between law students and law Alumni in all walks of life and is often a mutually beneficial relationship.

For more information about the Monash Law School Alumni Mentor Program please see www.law.monash.edu.au and click on ‘For Alumni’, or call Lloyd England on (03) 9905 3385.
Postgraduate Law Units: June – September 2010

Units are listed alphabetically.

For full timetable details visit: www.law.monash.edu.au/postgraduate/timetables/

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<td>Anti-money laundering</td>
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<td>LAW7071</td>
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Matters

Law Matters is published bi-annually and is the official newsletter for the Monash University Law School.

If you have an interesting story or something you wish to say, please contact Kate Daley on + 61 3 9905 2630 or email Kate.Daley@law.monash.edu.au

Every effort will be made to include contributions however space is limited. Please understand that items may be edited or not included.

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