

A CONVERSATION WITH THE HONOURABLE JUSTICE GREG GARDE AO RFD, PRESIDENT OF VCAT

VULJ Editors Robert Bujnowski, Hannah Cook-Tonkin, Niko Kordos, Kieran O'Brien and Simon Campbell interviewed the President of VCAT, The Honourable Justice Greg Garde AO RFD, on Thursday 1 September 2016 at the Victorian Civil & Administrative Tribunal.

VULJ: Justice Garde, how has your morning been so far?

President: Busy. I had a series of meetings. I've got a meeting day today. I have 10 meetings that I will conduct. Next Monday we get back to hearings, racing matters and cobalt and Mr Kavanagh and Mr O'Brien, who are facing charges as a consequence of alleged problems with cobalt. My days consist of cases, getting ready for cases and the work of the Tribunal and the court. It can be quite exciting. Things happen all the time.

Last week I was in the Practice Court of the Supreme Court. We had all sorts of exciting things going on there too, including the proceedings by the member of the Legislative Council against the State and the Premier. That member hasn't been sworn in yet and was concerned about that and had undertaken proceedings in the Court. The Collingwood squatter case was on in the Court, which you may be aware of. That was happening too. It is an interesting series of challenges we confront. All right – who's bouncing the ball first?

VULJ: Justice Garde, I'm going to start with some questions about your career, then Hannah will ask some questions about law graduates in VCAT, then Niko will finish with law reform – just some personal questions about your daily life. Why don't we get straight into it?

President: That's fantastic. Let's do that.

VULJ: Justice Garde, when did you first realise you might be interested in being a lawyer?

President: It was about Year 12. Although I loved sciences and I did a degree in pure and applied mathematics at the university, as well as law, I realised all the wonderful things that lawyers can do by way of service to other people and interaction with people. For me, the big challenge was would I do science or mathematics, or would I do law? Although I loved science, law was the way to go, because you interact more with people. I could see from the example of others that a good lawyer can very seriously help other people. You can tackle their debt problem with them. You can assist them if they're on the wrong side of the law in terms of their defence or the penalty that might get imposed. If there are family disputes, you can assist them. If it's a big corporate matter, you can provide assistance. It seemed that it was the career I wanted to do.

Looking back on it, I don't regret it because it's still the same. It's amazing what lawyers can do for other people. It's not about money. It's not about status. If you focus on people, you will never be dissatisfied. That's what led me down that path.

VULJ: What attracted you most about the legal profession?

President: It was people. It was the opportunity to interact with and the opportunity to help and assist other people. That's an enormous power to have. An experienced lawyer can help somebody else by reducing a problem, by resolving a threat. Even if there are negatives in a particular situation, almost always you can reduce the significance of those negatives to the person. If you're acting for a client

who's subjected to a criminal charge, if nothing else, you can address on penalty, and you can ensure that what the court does is appropriate for that person. That's a great power to have. Provided you focus on assisting people and not on other distractions that crop up like "How high do I go in the firm?" you will have a lifelong career of satisfaction as a lawyer.

VULJ: What events or instances in your life contributed to this attraction to help people?

President: I could see it happening through lawyers who were in practice when I was thinking about a career. As I went through secondary school, I had a father who was a suburban solicitor. I could see what he could do. I had an uncle who also came with a legal background. I could see the level of staff loyalty. I could see clients who would never leave the firm, who would recommend others. I could see that they would bring their families along when they had a problem. The answer is I could see it happening.

VULJ: Did your international experience inspire you to pursue the legal profession in a new light in Australia?

President: Yes. I've had a lot of international experience. You come back from countries that are ruled by dictators; you come back from countries where there is harsh oppression, where human rights are not respected, and you return to Australia, and you realise how different we are. Regrettably, there are only a few countries in the world that are really democratic. Regrettably, there are only a few countries in the world where human rights are seriously respected. We are one of those countries. International experience leads you to realise how important the rule of law is and how important democracy is. For all of the challenges that we confront, we have a wonderful country given to us by our predecessors.

Sometimes you think of all the migrants and refugees and people overseas who would come to Australia if they could, and you ask what motivates them. The predominant thing that motivates people is to be free of tyranny, to have the liberty that we enjoy, to have their human rights respected, to have a place to live and a place to work. That's what makes Australia so attractive. When you're overseas, you realise that that is really true.

VULJ: What aspects of your role as President of VCAT do you find most interesting?

President: You won't be surprised to know that I find VCAT to be a people place. We do 2,000 cases a week. We do 85,000 cases a year. I have 420 members and members of staff who work all over Victoria every day in all of our lists, dispensing justice. Very importantly, we are accessible. Our website is brand new. It will step you through all the things you need to do to bring a proceeding to VCAT. It's expressed in plain English. There are eight different languages. It has a text-to-voice. It will read a page to you if that is of assistance. VCAT is a Victorian asset. We're an institution that's about the resolution of disputes. In our community we dispense justice. We're accessible. We see a large number of litigants in person. That's what attracts me to VCAT. In those circumstances, as the President, encouraging all these activities, I see the role that the Tribunal plays for the people of Victoria.

VULJ: What are your least favourite aspects of the role?

President: Okay. What I know is we can always do more. We can provide more dispute resolution services. We can support people better. We can be more accessible. We can reach out better to disadvantaged communities. Like all services, it costs money, and I am perpetually encouraging the state

government, with all the challenges that it has and all the different priorities it happens to have, to provide more resources to the Tribunal so that we can do more in different fields. The state government is very supportive. Both sides of Parliament are first-class when it comes to supporting this Tribunal, but I'm always conscious that there are additional things that we can do.

We have an aging population. Elder abuse is increasingly common. We have a guardianship list that hears 12,000 matters a year. I can see the need to expand the services we have there. We have new power of attorney legislation in Victoria. That brings new jurisdictions. The Parliament is always giving the Tribunal new jurisdictions to administer. Here in the Tribunal, it's our responsibility to exercise those jurisdictions and decide cases that are brought to us. I'm continually conscious of the resource challenge. The more we do, the more it costs. That has to be supported by government, and government has very many competing priorities within the resources that it can achieve through our taxation system. That, to me, is the number one challenge, and sometimes I do weary at the prospect of winning more resources for the institution.

VULJ: Is there anything you miss about your private practice as a QC?

President: There is. I had a very long innings as a practising lawyer, as a barrister and as a Queen's Counsel. When you're a legal practitioner, you develop relationships with people, and there are people and organisations that I represented for 20 or 30 years, so I know them well. It's been a great pleasure and honour to look after them. When, of course, you become a judge, you've got to remove yourself from that field. You have to become independent, impartial, and you don't have the same close experience over a long time with parties to legal proceedings or institutions. It's critical that you are impartial, you are independent and you don't maintain close associations with parties to proceedings, or experts, or practitioners who are appearing before you. To do anything else would provide problems with procedural fairness. What I miss most is that ongoing friendship and experience.

As a judge, it's more like a passing parade of parties and witnesses. You can't ever develop those sorts of close relationships, but I've got all of my colleagues and the wonderful people who work here and in the Supreme Court. I'm not without friends and associates, but professionally, you don't have the same associations.

VULJ: What differentiates a good lawyer from a great lawyer?

President: As much as black-letter law can be important and governs many disputes, ultimately it's your capacity to listen to clients and witnesses and to support people. That, to me, is greatness in a lawyer. It's more important than being able to recite verbatim a passage in an equity textbook. I don't decry the law in any way because it's the law that may determine a dispute between parties. A great lawyer is someone who's really focused on providing services for people who need those services and goes beyond the call of duty to do so.

VULJ: What advice would you give to someone who is thinking about studying law?

President: The most important thing is to see if you can get a work placement to get into a place, or with a practitioner, where you can have an association with legal practice. It's important to see what really happens. In my days in practice, I used to take five students a year for work experience. In most cases they said, "This is great – something we would like to do". In other cases, they said, "This is not what I want to do. This is too demanding, the hours are too long, it's too stressful". In each case, that was a great outcome, either to know you wanted to do it, or to know you didn't want to do it.

Now, years later, I still have my work experience students who call in. Sometimes they ask me what subjects they should do at Uni. Sometimes they tell me how they're getting on in practice. We have an association that's enduring. The most important thing is to observe and get some experience with the law. That's what happened to me, so I'm no different. It was my capacity to observe legal practice in action that made all the difference for me.

VULJ: Has access to VCAT by self-represented applicants with a disadvantage, be it linguistic or cultural, improved? What further is planned to enhance access?

President: I think it has improved. At the Tribunal we have a Diversity Committee headed by one of our Deputy Presidents, who is also the Deputy President who is the head of the Human Rights List. There is much more to be done to provide access to legal services for disadvantaged people or people with cultural or linguistic issues of one sort or another. Quite recently, we completely revisited our website. If you look at our website now, you will see that it's expressed in plain English – no legalism. We've chopped out legal expressions to the maximum extent possible. It provides a simple series of steps to bring a proceeding to the Tribunal. It has an introductory section in eight languages. It has a text-to-voice capability. It's mobile friendly. Over 28 percent of people access our website on their mobiles.

In addition, we are undertaking a study of the access to justice of Aboriginal and Torres Strait Islander people in Victoria. It's a real concern, when we think about Koori people in Victoria, of whom there are a significant number, as to whether they can access the services that we provide. We have one Koori member of the Tribunal as a decision maker, who sits often in the Western District and in Geelong. We need to do more. We need to think about should we be conducting hearings in, for example, Koori areas. Should we be using Koori facilities for our proceedings? How do we make access to the Tribunal less threatening? How do we better use community elders to provide access? There is no doubt, in terms of Koori people, that we have a very serious problem in Australia. We have a very high proportion, by comparison with the rest of the population, who are in jail. We have real concerns about drugs, about alcohol, about domestic violence. As a community, with all the benefits that we have, there is no doubt we need to do more to tackle these issues.

The final measure I'll mention is our self-help centre. We have a project on foot that was tested recently with Monash University to bring into existence a self-help centre where you can seek assistance and use resources without cost. We're about to set it up in the not-too-distant future. We've undertaken a pilot program that continued for a 12-month period. We have obtained some funding to assist us from the state government, so that's another facility that is very much needed.

When you think about access to the legal system in Victoria, most people think about the higher courts, the Supreme Court, the County Court, the Magistrate's Court. What we forget is that in the area of civil litigation and, for that matter, in the area of summary offences in the Magistrate's Court, the vast, vast majority of parties are self-represented. The parties who can afford legal representation, or for whom Legal Aid can provide representation are only a small proportion – well under half of the parties appearing in our court or Tribunal system. We need to ensure that as we move more in the area of information technology, we don't leave people behind.

If you look at our last census statistics, you will see that around 25 percent of Victorians don't have access to a computer. This may be because of eyesight issues. There may be physical issues. There may be language issues. There may be issues of mental health. But we cannot forget that a

significant part of our community cannot access things online, and we need to think about how we support their access to services. There's a danger that if we forget about them, we will effectively exclude them from access to the justice system because we're conducting it in a way that they can't access it. Hopefully, over time, the proportion will go down, but at this stage we need to be very serious about alternative ways to access the system that don't involve information technology and computers, which we are increasingly relying on.

VULJ: What plans are there to make VCAT more accessible through technology? Do you envisage hearings taking place with participants located at home or other remote locations?

President: The first thing is that we're moving well away from paper forms. We now have nine online forms available on our website, so you can sit at your computer, at your desktop and make your application to the Tribunal. It can all be done online. You don't have to physically come and do anything, and you don't have to post anything. We're expanding that service across all lists in the Tribunal. That is a systematic process. When we've got our online forms ready, we'll move to respondent's forms, so we see proceedings more and more intensively conducted using online resources. For those people who can't, we will provide a staff member to act as an intermediary to put their application online. We need more wireless services.

The other big step going on through Court Services Victoria (of which we are a member) is the development of videoconferencing. If you're making a bail application and you're in custody, it's highly probable that the application will be made by videoconferencing technology. I also see videoconferencing technology as a way to give greater support in regional areas. If we move on from the situation where in remote areas of Victoria the Court or the Tribunal might come once a month, if you have videoconferencing access to that location, you can be there every day. Access to justice around regional Victoria can be significantly enhanced through videoconferencing technology.

VULJ: Is it the vision for videoconferencing that people in regional places would go to a Tribunal location, or they would be able to do it from their home?

President: The immediate goal is to go to a location that is local, whether that is a school, a hospital, a council facility, or the local police station, and use the facility provided there. That would be free and they would be supported by a local staff person who could help them. I say that because they might be asked about documents. Documents might have to be provided. People need assistance in accessing the network they may be unfamiliar with. We haven't gone yet, although this may come in the future, to a Skype or equivalent-based technology. At the moment, videoconferencing is preferred simply because people can be supported as they access the system. You can be at a disadvantage if you can't see the documents the other person has, or you don't know what you're meant to say or how you're meant to access the system. Moving to Skype-based technology directly from people's homes is probably a step further down the track, although we may well see the day when that takes place as a routine matter.

VULJ: What is the biggest strategic challenge for VCAT in the next three to five years?

President: I probably highlighted the two big areas. Technology is one, and providing better access to people is the other. If we could progress with better access to the system for the community, that would be a very important thing to do; and, of course, using technology to contribute to dispute resolution is of critical importance. We are progressing on both of those areas, but I see those challenges as the most important for at least the next decade.

VULJ: Justice Garde, what in your view is the biggest law reform issue today, and how would you like to see it approached?

President: I'm still on my two themes of people and human rights, and the media and technology. Providing protection for people, defending human rights, is an ongoing law reform challenge. I mentioned earlier elder abuse. I mentioned earlier the challenges faced by disadvantaged people in many ways. I think law reform directed at overcoming those issues is important.

The other area where the law is behind and we need to catch up relates to media and technology. The law is not usually the technological or social leader in the community. It normally follows some distance behind the developments in science or technology, and probably that's the place it should be; but if we think about social media for a moment, every day we hear stories of people's rights being invaded. Every day we hear of the damage that social media can inflict, as well as some of the very positive benefits of social media, and the same with technology. It brings great advantages, but it also brings some disadvantages. I think the law has to be, and will be, by community demand, better structured, more focused, better developed in that area in years to come.

VULJ: Are any reforms required to ensure that unrepresented litigants and accused defendants are treated equitably?

President: We have unrepresented litigants in large numbers every day, but I still think we can support them better. I've mentioned a self-help centre. I think that would be a great plus. I'm a strong supporter of Legal Aid in appropriate cases. Legal Aid is an area that could do with more resources. The profession has been very good at *pro bono* representation. I can see that strengthening in years to come – both for unrepresented litigants and accused defendants.

VULJ: Has the use of alternate dispute resolution grown as expected?

President: Yes. ADR has been progressively growing all over the Tribunal and in courts from when it started in the early 1990s – ADR is now used in planning and environment cases. It's moved into the review and regulation area. It's moved into areas where it was never thought to be likely. We have an exciting new development in the area of ADR called "Online Dispute Resolution". We're looking at the introduction of software systems that might facilitate resolution of disputes online. This is a new concept starting to develop across the world. We're looking at it from the Tribunal's point of view. The Department of Justice is looking at it more widely. Courts are looking at it.

In years to come, we can think of a legal proceeding as having two sides. One is the formal side where the interlocutory steps are being carried out, and the other is the ODR/ADR side, where continuously options for Online Dispute Resolution are being pursued. So two things will be happening simultaneously, not one. You'll have the interlocutory steps, preparing a matter for hearing, and simultaneously you'll have an ongoing review of the dispute resolution prospects for that particular dispute. That's in everyone's interest, because the longer a case takes, the more it costs. The more it costs the parties, the more time it demands, the more resources it consumes, both private and public. If we can see disputes resolved more efficiently by ADR, that's a benefit to all concerned.

VULJ: When you find yourself with spare time, do you have any particular personal interests or activities that you enjoy?

President: Yeah, absolutely. I like catching up with my family. I have a 2-year-old grandson who's a great delight. We have a mutual admiration society, so we get on very well. He loves to look at excavation equipment, and when it's working he tells me it's far too noisy. You can understand that's a delight. Chris and I also love travelling to other cultures. That probably won't surprise you after our conversation. If you look around this room, here you've got the top of The Andes portrayed. You've got Tasmania portrayed. You've got Lake Eyre portrayed. She's a much better photographer than I am, but we do love visiting other places, talking to other people, visiting other countries, travel. That's a great delight. She always tries to ensure that I travel to a telecommunications black spot.

Apart from that, I still enjoy some sport. I used to play quite a bit of sport, but not so much now. I think it's important to cope with the physical side, particularly when you've got a sedentary occupation, as judges tend to have. I think you've got to always be focused on the physical activity you're engaged in.

VULJ: Are those the sorts of things you use also to relax at the end of a day if there's time for that as well?

President: Yes. They're very important. You have to be, as a lawyer, used to handling stress. You have to work out what is your individual solution. How do you reconcile yourself in relation to stress? Let's assume you've got a very stressful case that's taking place, and you're representing somebody and things are very difficult. How do you get yourself into a mental frame and a physical shape that you can carry on the next day and do the very best thing for that person? I think stress is a very important thing for lawyers and others in the community to consider. We all should maintain a focus in that area.

VULJ: That's a very pertinent area at the moment.

President: Students, particularly, suffer from stressful situations as assignments are due and examinations are approached. I guess that's where it starts. You have to think, "Well, how do I get myself in a good shape to do this well?" That doesn't mean that you spend the last night to all hours of the morning furiously pounding the textbooks. You might be better off seeking to get some rest and putting yourself into a frame of mind where you can tackle things in a better way the next day. Right from those days, that has to be considered. The legal profession has to be focused on your own physical and mental health, because without that you're not going to be helping anyone.

VULJ: Identify the one federal or state court judge, living or dead, whom you admire the most or consider a mentor and explain why.

President: Sir Ninian Stephen was, and is, not only a great lawyer, but if we think back to the decisions he made on the Supreme Court of Victoria or in the High Court of Australia back into the 80s and earlier, was a judge possessed of modern insights. He was a judge starting to tackle environmental and planning issues long before most others had even considered they existed. He was ahead of his time. When you read his judgments even now, you realise how his thinking had developed well in advance of the community as a whole. I very much admire his work in that area and later still he was a great Governor-General of Australia. He was a very special judge who contributed greatly to Australia.

VULJ: Did you interact with him personally?

President: Yes, I've met Sir Ninian on a number of occasions. I don't know him personally. I know some members of his family, but I don't have any particular personal relationship with him. He's an example of an Australian jurist who really made a difference.

VULJ: If you had to list three cases that have been significant to Australian society, what would they be and why?

President: There's a lot of choice. First of all, *Mabo v Queensland (No 2)*, in 1992. Native title had never been recognised in Australia before that case. It changed the law. It changed Australia. It provided us with native title. It led to a Native Titles Act federally. There's just no doubt of the impact of Mabo on Koori people, on recognition of land rights and on the Australian community as a whole.

The second is *Kioa v West* in 1985. It introduced and consolidated the concept of procedural fairness, that people when they access the justice system must be dealt with in a procedurally fair way by courts, the Tribunal, by decision makers. More generally, it introduced the notion of a flexible obligation to adopt fair procedures appropriate to the circumstances of the case. While that sounds like a mouthful, it is a pervasive doctrine. It's close to being recognised as a constitutional right under the Australian Constitution. It may be in a few years' time that that will be the case. Reading Justice Gageler in the High Court, he's not far off, if he's not there already, declaring procedural fairness to be a consequence of judicial power in the Australian constitution. *Kioa v West* goes everywhere in terms of later cases of decision making, so I highlight that as a landmark case.

My final one is *Walton Stores (Interstate) Ltd v Maher*, also in 1988. While that dealt with promissory estoppel unconscionable conduct, I really see it as the gateway case into consumer rights. We're starting to recognise that consumers have more rights than the law of contract traditionally recognised. I see that as the serious start of consumer rights both through courts and through the Parliament all over Australia. Now consumerism has gone everywhere. We're getting more of it in different fields: finance and insurance, to name some areas. I see *Walton Stores* as just a landmark case that pointed the way to the protection of consumer rights in Australia.

There's my big three. They're all powerful cases, and they're all signposts in terms of where the law has gone and where the justice system has gone.

VULJ: That brings us to the end of the questions, could we take a photo?

President: Sure, it'd be lovely. I wish you all well in your studies and work and future. If you can get as much satisfaction out of the practise of law as I have done, then you'll be very well placed. I think you're on the right pathway. Hopefully, there's a little bit of focus out of our conversation. I've enjoyed catching up with you, and I wish you well as you travel your own pathways of helping other people through the legal profession.

VULJ: Thank you very much.