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March 2017 – Vol.37 No.2

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Games on! 14

Queensland's gold medal legal team

The psychology of pricing 20

A practice idea that might make a big difference

Down to business with legal privilege 24

Practical considerations for in-house counsel

Dual distribution sales strike turbulence 26

ACCC v Flight Centre Travel Group Limited [2016] HCA 49

Law

In memoriam – Lloyd Sidney Nash	29
Early career lawyers – Networking 101	30
Back to basics – Compliance with a search order	32
Workplace law – App-based companies in the gig economy	34
QLS Senior Counsellors – Practical, personal guidance for members	36
Succession law – Missing deadlines	38
Your library – Your experts for legal information services	39
High Court and Federal Court casenotes	40
Family law – No property order – after 27 years	43
On appeal – Court of Appeal judgments	44

News and editorial

President's report	3
News	5-10
Technology – HTML contract drafting	6
Advocacy	11
In camera	12

Career pathways

New members	50
Career moves	51
Organisation spotlight – Indigenous legal futures	52
Diary dates	54
Career spotlight – Now and then	56

Outside the law

Classifieds	57
Wine – Time to board the Sunshine Special?	61
Crossword – Mould's maze	62
Humour – Mornings on the run	63
Contact directory, interest rates	64





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A question of value

Why they'll have to kill all the lawyers

The famous Shakespearian quotation, "The first thing we do, let's kill all the lawyers" (*Henry VI*), is often mistakenly applied.

In context, Shakespeare is saying that it is lawyers who stand between order and chaos, and that in order for chaos to prevail, the first step is to "kill all the lawyers".

I am proud to be part of a just and equitable society and proud to be one of those standing against the forces of disorder and disharmony. A part of my commitment to this role as Queensland Law Society president is to ensure that the true value of lawyers (and judges) to our society is recognised, both within the profession and beyond in the wider community.

To do this, I believe we must celebrate the value that solicitors bring to our community, articulate this value and champion it across all levels of our society.

We must focus on the positive and celebrate the contributions of our members, and our passion for this should be reflected in the way our law society performs its functions.

At last month's QLS Legal Profession Dinner and Awards, I spoke about this 'value':

"When we are admitted, we take an oath that we will, first and foremost, discharge our duty to the court and the administration of justice. We do what is right – not what is popular. Our commitment to this duty underpins society, and does no less than make Queensland workable, and the envy of other states.

"At every turn, when rights are threatened or abused, you will find a lawyer standing between abusers and their victims. Whether it is a large movement, for human rights, or acting for a confused homeless person stuck in a watch-house, for a crime he or she barely comprehends, a lawyer will stand up and speak for those who cannot speak for themselves. Lawyers, and the legal profession, are at the very heart of society and are essential to its healthy function."

In line with these sentiments, this event was important because it both celebrated the role of solicitors and recognised those among us who have given much to our profession.

I again congratulate our award winners. You have all contributed greatly, and our united thanks go to you. I also take the opportunity to thank all those who attended (more than 240 guests), those who presented, including Attorney-General Yvette D'Ath and guest speaker Tara Moss, and the many QLS staff and others who made it such a wonderful and successful night.

Another major event from last month also makes a statement on the value of our members, the QLS Bundaberg Roadshow.

I believe it is important to provide our members with professional development opportunities on their home turf. At a time when we are all 'busy', the convenience and accessibility of this makes an important difference, especially for non-metropolitan practitioners.

As a membership organisation, it was significant that we were able to put key staff members on the ground at the event, ready to speak with our local members and answer their questions on ethics, advocacy and other topics related to the Society's activities.

The feedback was that this, and simply the fact we were there, was certainly appreciated. And there was an intrinsic value in members seeing their Society prepared to make an investment in their community – in terms of venue hire, catering, accommodation and so on.

Finally, it was valuable for us to be out meeting our members, getting to know their issues and interests, so that our provision of services can be further refined and targeted at meeting their needs. You can look forward to more regional roadshows later this year.

Court of Appeal 25-year celebration, Justice Brown

Supporting and being seen to support our judiciary is another important part of the 'value' equation, and this was one of the

reasons I felt privileged to be able to speak at the 25-year celebration of the Court of Appeal and at the swearing-in ceremony for Supreme Court Justice Susan Brown QC.

In respect of her Honour Justice Brown, I celebrated the Bar's loss of their fine vice president as a gain for all Queenslanders and congratulated her on her appointment, which was met with universal acclaim.

Such events also serve as a reminder of the noble nature of our calling, as no matter what our particular function, we are all united in the service of justice. To this end, the Court of Appeal's milestone is one which represents the success of the whole profession, a fact which did not escape the court's president, who commented that "the Court of Appeal has been well-served by both branches of the legal profession".

In respect of gender parity, it was heartening to hear the president comment that "the percentage of women barristers appearing in the Court of Appeal has steadily increased since 1992. During the last financial year it was 19.7% of appearances, approaching parity with the 22% of women practising at the Queensland Bar."

I congratulated the Court of Appeal on its "fine 25 years, during which it has displayed courage, grace and unshakeable commitment to justice". Elaborating on my opening Shakespearean quote, I observed:

"Lawyers, and the legal profession, are the guardians against chaos underpinning society, government, business and community. Our collective duty is to the law and the administration of justice is discharged, ultimately, for the good of society, and discharged without fear or favour."

Christine Smyth
Queensland Law Society president

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Resignation of CEO

Queensland Law Society president Christine Smyth has announced that Amelia Hodge has resigned from her role as the Society's chief executive officer, citing family reasons for her departure.

Ms Smyth said Ms Hodge had been a valued member of the QLS family for the past 18-months and that during her time as CEO had made a positive contribution to the organisation.

"I personally want to acknowledge the hard work and commitment Amelia has brought to QLS," Ms Smyth said. "Amelia was employed as a change agent and has achieved remarkable things in her time here.

"But, at the request of Amelia, her resignation will take effect immediately.

"I look forward to continuing the momentum of change at QLS towards a very bright future – with a continued focus on our members and all of the legal profession across the state."

QLS government relations principal advisor Matt Dunn has been appointed to the role of acting CEO until a permanent replacement can take over this very important role.

Appointment of receiver for MRB Law Pty Ltd, Mooloolaba

On 6 February 2017, the Executive Committee of the Queensland Law Society Incorporated (the Society) passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, MRB Law Pty Ltd.

The role of the receiver is to arrange for the orderly disposition of client files and safe custody documents to clients and to organise the payment of trust money to clients or entitled beneficiaries.

Enquiries should be directed to Sherry Brown or Glenn Forster, at the Society on 07 3842 5888.

New lawyers gain a trusty companion

Queensland's newly-admitted lawyers will now begin their careers with a helpful 'companion'.

The *Queensland Lawyers' Companion*, a guide to their professional life, has been prepared by the Legal Practitioners Admissions Board (LPAB) and is being presented at Queensland admission ceremonies from this year.

It was launched at a function in Brisbane's Supreme Court Library on 31 January and at the Supreme Court in Cairns on 10 February.

Guests at the Brisbane launch included Attorney-General Yvette D'Ath, Chief Justice Catherine Holmes, Shadow Attorney-General Ian Walker, QLS president Christine Smyth, members of the judiciary, lawyers, barristers and other invited guests. In Cairns, the *Queensland Lawyers' Companion* was launched by Justice James D Henry, Judge Dean Morzone QC and LPAB deputy chair Liam Kelly QC with guests that included two newly admitted lawyers and their families.

LPAB chair Greg Moroney said the release of the *Companion*, which coincides with the 10th anniversary of the LPAB (established under the *Legal Profession Act 2007*), addressed an essential longstanding need for a practical guide for newly admitted lawyers as they transition from law graduates to admitted lawyers.

In the foreword, Mr Moroney says that the *Companion* "represents the collective knowledge, experience and vision of the members of the legal profession".

"Receiving a copy of the *Queensland Lawyers' Companion* marks a milestone in a newly admitted lawyer's career; it is but the start of a journey where with diligence and hard work you will contribute to the profession and its standing in society."

It represents the collegiality of the profession, and the initiative for its preparation was supported by both branches of the legal profession, the Queensland Law Society and the Bar Association of Queensland (BAQ). It includes welcome messages from the Chief Justice and the presidents of QLS and BAQ. Some of the diverse topics covered in the *Companion* include lawyers' ethical responsibilities, work practices and court etiquette, and tips on exploring career options.

The LPAB also intends the *Companion* as a memento for newly admitted lawyers on their admission day.

Justice Martin Daubney chaired the *Companion's* editorial board, and wrote the concluding words: "[i]t will be a journey in which you will never stop learning. And by engaging in this journey, you are actively contributing to the fundamental fabric of our civilised society by protecting and maintaining the rule of law."

Top right: From left, Greg Moroney, Melissa Timmins, Justice Martin Daubney, Anne Pickering, Stafford Shepherd and Nola Pearce.

Right: From left, Liam Kelly QC, Justice James D Henry and Judge Dean Morzone QC.

Bottom right: From left, Jennifer Rosengren, Liam Kelly QC, Attorney-General Yvette D'Ath and Philippa Mott.



HTML contract drafting

by James Semit,
The Legal Forecast

Smart contracts, self-executing agreements, blockchain and distributed ledgers were the innovation legal buzzwords of 2016.

They served us well, giving the legal industry an introduction to the disruptive world of automation and serving as a stark reminder that the future of legal practice will involve programming and coding at its heart.

However, to live by the mantra 'innovate or die' requires action, and it is crucial that the conversation of innovation in legal practice in 2017 shifts from concepts to models of implementation. Practitioners will need to understand the increasing importance of computing backgrounds and also potential models for implementation of smart contracts.

This article provides a high-level overview of some practical elements of smart contracts and sets out two legal forecasts. First, it outlines how the language of programming and coding is closely related to legal practice, and second, it shows the potential of 'hypertext mark-up language' (HTML) combined with JavaScript as a language for universal implementation of smart contracts.

Lawyers bridging the gap to software programmers

Software programmers and lawyers share many similarities. At the heart of both professions lies the skill of drafting a series of rules that dictate how certain actions are to be performed for different decisions and events. If certain specified events in a contract occur (that is, they are 'true'), then the contract sets out the next steps to complete the purpose of the contract. If certain events do not occur (that is, they are 'false'), then the contract may contemplate the rights of the parties in a termination or default.

Fundamentally, contracts are drafted to convey a series of 'if', 'then' and 'else' statements. A simple example at the heart of any agreement is as follows (*emphasis added*): 'If X gives consideration to Y, *then* Y must exchange the goods to X or *else* Y commits a default and *then* X may terminate the agreement.'

The logic of 'if', 'then' and 'else' statements is also the foundation of computer programming and the skills behind drafting in this language are common to both lawyers and software programmers. Both contracts and computer programs set out a series of rules to reach an output once performed.

Ubiquity is key

The current state of legal practice is hamstrung by the 'native format' of the A4 page. To create a truly smart contract, it is essential that lawyers communicate in a ubiquitous language that is native to both other lawyers and computer programs at the same time. Just as websites were the death knell for printed news, the technology behind web pages has the potential to supervene the ubiquity of the A4 page.

The key advantage of HTML and JavaScript implementation in front-end contract drafting is that every modern computer has the ability to view and run these contracts natively. Compatibility issues fall away, and expensive and complicated programs do not need to be developed, installed and subject to troubleshooting by a firm's IT department. Clients and counterparties can simply open the contract as if they were opening a web page.

On another front, the use of HTML and JavaScript enables easy conversion to more advanced technologies such as blockchains and self-executing agreements on platforms such as 'Ethereum' (a custom-built smart contract program that has advanced functionality for complex agreements). The possibilities are endless once lawyers are able to speak to *both* other lawyers and computers at the same time.

HTML and JavaScript – mark-up is more than just track changes

HTML is a form of mark-up language and JavaScript is a programming language. A mark-up language and programming language provide the functionality of annotating a document in a way that provides a set of instructions distinct from the text of the document itself.

To a rudimentary degree, the widely accepted drafting practice of using capitalised words to indicate a defined meaning uses the same principle and indicates that practitioners have a need for a mark-up style drafting language.

HTML and JavaScript, however, provide the added functionality and features that are often contemplated when the term 'smart contract' is used. HTML allows authors to 'wrap' text with tags and functions, and JavaScript ensures that operative clauses contain all necessary definitions and do not have any logical errors. Lawyers are then able to test and run contracts through all possible permutations of events and see where errors may arise, all within their web-browsers.

A Legal Forecast

The future of front-end contract is a client's dream – one where there is absolute certainty and clarity in how contracts are interpreted and applied. While some considerations, such as whether a certain even is 'reasonable' in all circumstances, or whether a state of affairs may be anticipated or foreseen, is ultimately a decision that must be made by a person, the outcome can be distilled into the same 'true'/'false' logic of a computer program.

James Semit is an executive member of The Legal Forecast and a solicitor at King & Wood Mallesons. The Legal Forecast (thelegalforecast.com) aims to advance legal practice through technology and innovation. It is a not-for-profit run by early-career professionals who are passionate about disruptive thinking and access to justice.

A warm welcome to 2017

The New Year Profession Drinks on 2 February was a fitting launch for the 2017 QLS events program, with a record crowd of more than 200 attending the function in the Gallery at the QEII Courts of Law. An address by QLS president Christine Smyth explaining her plans for raising the profile of the profession and its value to society was warmly received by attendees.

1. Rodney Hodgson, Christine Smyth, Peter Carne
2. Franka Cheung, Yu-Chin Cheng, Kenneth Yam Weng Pang
3. Amy Sanders-Robbins, Dominique Harvey
4. Hannah Daley, Sophie Goossens, Bruce Dodd



Sunshine jazz and shiraz

Members of the Sunshine Coast legal fraternity came together on 3 February for the Sunshine Coast Barristers Chambers Jazz and Shiraz evening.



Above: The 2017 chambers group photo: Stephen Courtney, Alex McKean, Toby Nielsen, Cathryn McGonaghy, Geoffrey Barr, Melissa Cullen, Taylor Wilson, Michael White and Clem Van der Weegen.

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Letter to the editor

Litigation guardians and a need for reform

I have recently become aware of a situation similar to the one stated in *Energex Ltd v Sablatura* [2009] QSC 356 and in which her Honour Atkinson J indicated the need for law reform. Unfortunately, since that case, there appears to have been none.

The situation involves a consumer who has a claim under the Australian Consumer Law against a supplier of goods. The claim involves a breach of a consumer guarantee regarding the quality of the goods. The supplier is a sole trader, however since the supply of the goods has lost legal capacity.

The consumer retains a good action against the supplier, and the supplier has assets over which a potential judgment could be enforced.

In this case no person related to the supplier has indicated their willingness to act as litigation guardian. In fact, all such persons have expressly disclaimed willingness to act as litigation guardian. Further, there is no enduring power of attorney and no administrator has been appointed.

Rule 93(1) of the *Uniform Civil Procedure Rules* 1999 (UCPR) provides that a person under a legal incapacity may start or defend a proceeding *only* by the person's litigation guardian.

Further, Rule 96 provides that if a defendant who is a person under a legal incapacity does not file a notice of intention to defend within the time limit, the plaintiff *may not continue the proceeding* unless a person is made litigation guardian of the defendant.

Although Rule 109 provides for service on a person with legal incapacity, nothing in the UCPR compels any person to become a litigation guardian.

As pointed out by Atkinson J, even the existence of an administrator duly appointed under the *Guardianship and Administration Act 2000* for financial matters, which includes legal matters, does not assist as section 239 of the Act provides that the Act does not affect the rules about a litigation guardian for a person under a legal incapacity.

Rule 95 of the UCPR contemplates that a court may appoint a person to become a litigation guardian without their consent, however I am personally not aware of any instance where a litigation guardian was appointed under this rule without their consent.

It is possible a court may appoint a person who is an administrator to become a litigation guardian without their consent, however it is also difficult to imagine a situation in which a court would order a stranger to the litigation to conduct the litigation for the person with legal incapacity, especially when a litigation guardian could become liable for costs.

The obvious candidate in these matters to act on behalf of persons with legal incapacity is the Public Trustee. However s.27(3) of the *Public Trustee Act 1978* provides that the Public Trustee cannot be appointed without their consent.

In the event that there is no person willing to act as litigation guardian, and the Public Trustee does not provide consent to be so appointed, then the consumer will be left without an effective remedy until the person with legal incapacity regains that capacity, or unfortunately dies.

As stated by Atkinson J: "It is, of course, a matter of some concern to the Court that, where the defendant is or becomes under a legal disability, an applicant or plaintiff may not be able to vindicate its rights if there is no-one who is able to act as litigation guardian, apart from the Public Trustee; the Court is of the view that the Public Trustee is the appropriate person to be appointed; the Public Trustee nevertheless has the statutory power to refuse appointment; and exercises that power to refuse appointment."

Atkinson J indicated that it may be necessary, as a last resort, to look to the Attorney-General in the court's exercise of its *parens patriae* jurisdiction.

It is not difficult to imagine scenarios where defendants who incur personal liability lose legal capacity with significant assets. Even where those assets are administered, an administrator, a friend or relative of the person with legal incapacity could refuse to become a litigation guardian, which could have the effect of denying vindication of a plaintiff's rights for the duration of the legal incapacity, and which could, in some cases, result in their effective indefinite postponement.

The need for law reform as indicated by Atkinson J remains.

*Julian Brown,
MacDonnells Law*

Legal network based on Christian values

Brisbane law firm Corney & Lind Lawyers has joined with Fijian firm Shekinah Law to develop the multi-denominational Kingdom International Legal Network (KILN), with the aim of inspiring Christians in the legal community.

The network has been developed under the guidance of Corney & Lind's Andrew Lind, Alistair Macpherson and Heilala Tabete, and Shekinah Law's Laurel Vaurasi and Romulo Nayacalevu.

"The purpose of KILN is to inspire Christians in the legal community to see and conduct their work as a calling to Kingdom Ministry," Heilala said. "This can be done through spiritual friendships where there is a desire for deep and abiding friendships to form beyond each of our borders and that those relationships will form the basis for mutual encouragement in the journey of Christian faith as legal professionals."

"These relationships may result in mentoring, resource sharing and lawyer exchange programs."

Under KILN's Lawyer Exchange and Development (LEAD) program, Corney & Lind associate James Tan recently joined Shekinah Law to practise in Fiji for a month, while Shekinah Law associate Seruwaia Masi joined the Brisbane firm.

James gained temporary admission to practice and appeared in local courts across Suva. He was also given the opportunity to present to the Fiji Christian Legal Fellowship.

Seruwaia, who has a family law background, noted many similarities in the two nations' Family Law Acts and was exposed to new practice areas including school law, leasing and employment.

KILN membership is free and the network has grown to include lawyers and legal staff across Australia, Fiji, Kenya, Solomon Islands and the United States.

An inaugural KILN conference is being planned for 26-27 January 2018 in Denarau, Fiji.

Christian lawyers or firms upholding Christian values are invited to visit the website at kiln.online

Above right: KILN developers, from left, Romulo Nayacalevu, Andrew Lind, Alistair Macpherson and Laurel Vaurasi.

Right: Exchange lawyers James Tan and Seruwaia Masi.



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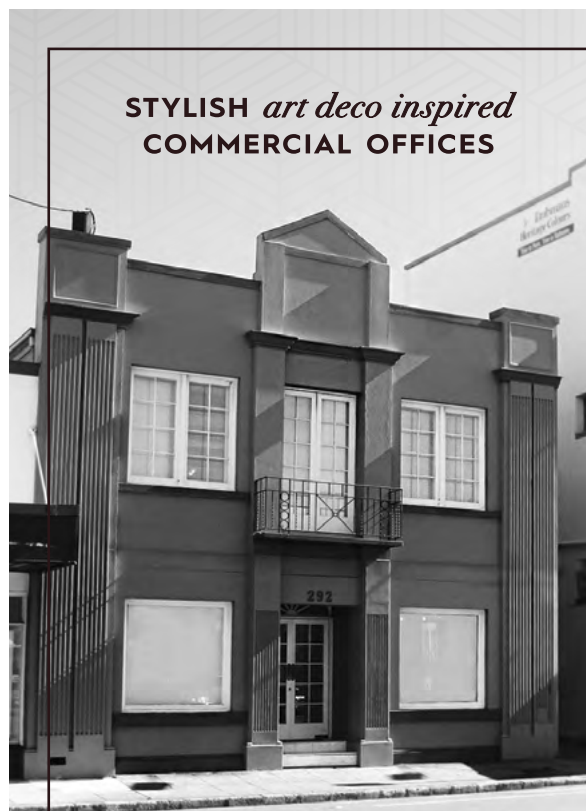
Tackling mental health in law

On Tuesday 7 February, QLS president Christine Smyth and the Love Law Live Life Working Group hosted the Resilience and Strength breakfast for early career lawyers.

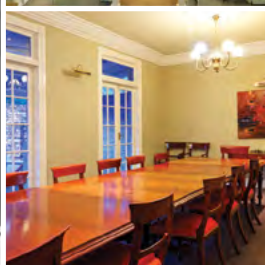
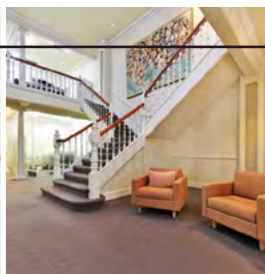
Coping mechanisms for managing stress in the workplace were discussed and top tips such as the importance of getting enough exercise and sleep were shared.

The Love Law Live Life Working Group is continuing to progress with strategies to improve the awareness of mental health challenges in the legal profession and work closely with LawCare, the free, confidential counselling service for members, their immediate family and legal support staff.

Visit qls.com.au/lovelawlivelife for more information and other fantastic resources including the new Being Well in the Law toolkit, developed by NSW Young Lawyers, the Australian National University and the Law Society of New South Wales. The toolkit draws on expert and multidisciplinary knowledge to help support those dealing with depression, anxiety and stress.



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Promoting equity and diversity – the QLS EOL Committee

The Queensland Law Society advocacy team works closely with the QLS policy committees to advocate for good law, respond to law reform proposals and identify issues of concern for the profession.

One of our policy committees, the Equalising Opportunities in the Law Committee (EOL committee), has a particular and distinctive focus. Its primary purpose is to promote the goals of equity, diversity and equal opportunity within the legal profession, given the research which suggests diversity adds positively both to an organisation's workplace culture and its 'bottom line'. The EOL committee promotes initiatives which support diversity and equality in all its forms and produces programs to highlight and work against discrimination.

It deals with issues associated with gender diversity, supporting LGBTI practitioners, work-life balance and flexibility within the profession, disability in the workplace and cultural diversity, including the recruitment and retention of Aboriginal and Torres Strait Islander legal practitioners. The committee is comprised of volunteers from private practice, tertiary education institutions and academia.

As part of its education and policy development program, the EOL committee has two key initiatives each year – the Equity and Diversity Awards and the Lawlink Program.

The Equity and Diversity Awards recognise law firms which have taken positive and innovative steps in promoting equity and diversity within the firm and to encourage all lawyers, of all backgrounds, to participate fully in the profession.

Judging criteria include equity initiatives in the practice; the education of legal practitioners in relation to anti-discrimination legislation, harassment and bullying; policies supporting equal opportunities; and flexible work practices. The 2016 winners were Harrington Family Lawyers (Small Legal Practice Initiative Award), Miller Harris (Small Legal Practice Award) and Clayton Utz (Large Legal Practice Award).

The Equity and Diversity Awards will be presented again in 2017 and law firms are invited to participate and apply. Details of the awards will be published in *QLS Update* and at qls.com.au.

The Lawlink program provides an opportunity for Indigenous law students to gain a better understanding of the practice of law, meet and network with members of the judiciary and the legal profession, and other law students. A Lawlink event is held twice a year and QLS is grateful for the generosity of our past hosts for taking the time to share their workplaces and experiences with the students. In 2016, Crown Law and Legal Aid Queensland hosted the event. The EOL committee will be coordinating Lawlink events again in 2017.

Recent advocacy – January and February 2017

The advocacy team has started the year with a busy program:

QLS provided comments to the Law Council of Australia for inclusion in its submission to the inquiry into the Marriage Amendment (Same-Sex Marriage) Bill. QLS was supportive of the Bill to the extent that it amends the definition of marriage from being between a 'man and woman' to 'two people'. However, QLS raised concerns about a number of aspects of the draft Bill in relation to the introduction of additional exemptions that introduce unnecessary complexity or create a new basis for discrimination inconsistent with the development of anti-discrimination law in Australia.

The QLS Competition and Consumer Law Committee made a submission in respect of the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016. QLS had previously considered the issue in our response to the exposure draft of the Competition and Consumer (Competition Policy Review) Bill 2016. We were pleased to see that part of our earlier submission had been adopted, so that the Bill now clarified that a corporation, with a substantial degree of power in one market, can engage in an unrelated market. The Bill also adopted our comments about clarifying "related entity" and "in that or any other market". Our recent submission advocated that the Bill required further amendment so that the term, "substantially lessening competition in the market" could be interpreted uniformly throughout the Act.

QLS also responded to an invitation to comment on an inquiry into access to retained telecommunications data in civil proceedings. In keeping with the spirit of the original legislation, QLS submitted that civil litigants, in some cases (excluding family law and civil domestic violence matters), should

be able to access this data if there is proper judicial oversight.

The QLS Property and Development Law Committee responded to the Land and Other Legislation Amendment Bill 2016, raising concerns regarding the scope of the new provisions which will introduce the concept of a 'priority notice' in Queensland. The priority notice mechanism is being introduced as part of the national eConveyancing system and will largely replace the existing 'settlement notice' mechanism in the conveyancing process, although priority notices will have wider operation. The committee suggested amendments which would clarify that a party must have an existing legal or equitable interest in a lot to support the lodgement of a priority notice. We also submitted that the existing section 146(2) of the *Land Title Act 1994* be retained, which prevents lodgement of multiple settlement notices in regards to the same transaction without the leave of the court. The committee considered that this approach would reduce the risk of misuse of the priority notice mechanism. QLS has also been invited to appear at the public hearing on the Bill before the parliamentary Agriculture and Environment Committee.

QLS made submissions and appeared before the parliamentary Legal Affairs and Community Safety Committee on the Criminal Law Amendment Bill 2016. We supported the policy rationale for amending the Criminal Code to exclude an unwanted sexual advance as a basis for the defence of killing on provocation, as the amendment is specifically intended to remove the 'non-violent homosexual advance' provocation defence in common law. We agreed that the partial defence of provocation should not be used in this manner due to the prejudicial and discriminatory effect on members of our community. However, we raised concerns that the current drafting could have unintended consequences. We recommended that the concept of "circumstances of an exceptional character", which appears in the draft legislation, be specifically defined to ensure that the non-violent homosexual advance defence could not be raised in the future. Further clarity was also required to ensure that an appropriate defence was available to, for example, victims of child sexual abuse or prior sexual assault who were provoked and responded lethally to the provocative act. We provided a supplementary submission in response to the committee's questions during the hearing.

Our night of nights

This year's Queensland Legal Professional Dinner and Awards on 17 February was certainly a night to remember.

With a new venue – the Royal International Convention Centre – a new format and three new awards, more than 240 guests dined and danced, also enjoying presentations by Attorney-General Yvette D'Ath, guest speaker Tara Moss and QLS president Christine Smyth.

The award of the night – the QLS President's Medal – went to Megan Mahon, of Mahon Legal, who took office as our youngest QLS president in 2007.

Maurice Blackburn Lawyers' managing principal Rod Hodgson received the Outstanding Achievement Award after more than 27 years of service to the profession,

while Honorary Life Member awards went to Peter Eardley, Peter Carne and Gary Hutchinson

Peter Eardley, a QLS past president, is a consultant at Kerin Lawyers and a director of the War Widow's Guild of Australia.

Peter Carne is also a QLS past president, as well as a former CEO of the Society, and is currently on his second term as the Public Trustee for Queensland.

Gary Hutchinson is a past QLS committee member and a QLS Senior Counsellor.

The president of the Robina Community Legal Centre, Ross Lee, was presented with the Community Legal Centre Member of the Year Award, while Sarah Roach from Helix Legal won the Innovation in Law award.

Thanks go to all involved including sponsor Brisbane BMW.



1. Terence Stedman, Carolyn Buchan, William Mitchell, Michael Murray
2. Jessica Carroll, Jarrad Petterwood, Margaret McNamara, Bill Loughnan, Marageth Jolly, Peter Jolly, Karen Gaston, Sue Maxwell
3. QLS president Christine Smyth
4. Attorney-General Yvette D'Ath
5. Megan Mahon – President's Medal award recipient
6. Bruce Doyle, Rob Hill
7. Elissa Pearse, Greg Chapman, Lesleigh Birrer
8. Guest speaker Tara Moss
9. Alison Swift, Miriam Barber, Glenda Vuillermin, Louise Skidmore
10. Catherine Burchill, Katherine Johnson

11. Michael Fitzgerald, Judith West, Jonathan Smithers
12. Ross Lee – Community Legal Centre Member of the Year award recipient
13. Sarah Roach – Innovation in Law award recipient
14. Rod Hodgson – Outstanding Achievement, President's Medal award recipient
15. Gary Hutchinson – Honorary Life Member award recipient
16. Peter Eardley – Honorary Life Member award recipient
17. Peter Carne – Honorary Life Member award recipient

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Games on!

Queensland's gold medal legal team

The Gold Coast 2018 Commonwealth Games (GC2018) is a \$2 billion project that will see the Gold Coast host the largest sporting event in Australia this decade.

About 6600 athletes and team officials from 70 nations and territories within the Commonwealth will descend on

Queensland to take part in 18 sports, including beach volleyball, which will make its Commonwealth Games debut, plus seven integrated para-sports.

In this article we take you behind the scenes to meet the GC2018 legal team as they limber up for all the pre-Games work that is coming their way. Read on to find out where their careers started and how they ended up working on the best sports law gig in Australia for many years!

The challenge...

GC2018 will be staged across 18 international standard venues in four different event cities and those venues must be readied to host 1.5 million spectators, 1500 employees, up to 15,000 volunteers, 25,000 contractors, 3500 broadcasters, photographers and journalists, and 1500 non-accredited media personnel.

On a day-to-day basis, the team provides legal services to 42 different functional areas within the Gold Coast 2018 Commonwealth



It's just over a year away, but just who are the lawyers making sure Australia's biggest sporting event of the decade goes off without a legal hitch? Introducing the Gold Coast 2018 Commonwealth Games legal team...

Games Corporation (GOLDOC) including accommodation, accreditation, broadcasting, catering, finance, marketing, security, sponsorship, sport, technology, ticketing, transport, venues and workforce.

The team also carries out distinct legal projects, such as working with the Office of Commonwealth Games to develop the regulation that will declare GC2018 a major event under the *Major Events Act 2014* (Qld) (the Act).

The Act was introduced for the main purpose of supporting GC2018. While other events have been prescribed as major events under the Act, GC2018 will be the first to have access to the full range of rights and protections afforded by the Act.

Other key aspects of the legal and brand protection function for GC2018 include managing requests under the *Right to Information Act 2009* (Qld), obtaining approvals from Treasury under the *Statutory Bodies Financial Arrangements Act 1982* (Qld),

Games lawyers, *from left*, Louise Young, Paula Robinson, Guy Cosgrove, Jessica Norris and April Rich

submitting exclusive dealing notifications to the Australian Competition and Consumer Commission under the *Competition and Consumer Act 2010* (Cth), obtaining trade promotion permits from various state gaming authorities and engaging with the Queensland Office of Liquor and Gaming to ensure all liquor licensing requirements for GC2018 are met.

Meet Paula...

What you need to know: Paula has vowed to come back in her next life as a professional tennis player, but until then has accepted that Wednesday night social tennis is about as good as its going to get. She's happy to report that she's a much better lawyer than she is tennis player, an important distinction given her current role as the head of legal and brand protection for GOLDOC.

Where she started: Paula started out by putting a commerce degree to use in building a career in marketing and business development. After 12 years, and despite getting to work in glamorous locations like Broome and Mt Buller, she realised the law was her true calling. Once the small matter of completing her Juris Doctor degree was taken care of, she entered the legal profession and never looked back.

What she's working on now: Paula is now the head of legal and brand protection for GOLDOC and leads the embedded MinterEllison team. She also coordinates the efforts of about 30 other lawyers who are working on the project from across MinterEllison's national network. Paula is spearheading GOLDOC's involvement in the development of the *Major Events Act* regulation and is responsible for coordinating input from the 42 functional areas within GOLDOC which will be impacted by the regulation. On a day-to-day basis, Paula supervises all the work produced by her team and is kept busy ensuring that GOLDOC's legal and brand protection needs are met in a timely and professional manner.

Meet Jess...

What you need to know: Hailing from Newcastle, Jess spent her formative years studying at Newcastle University, now she is manager of legal for GOLDOC and is responsible for the delivery of the entire legal function. Jess is also known for her expertise in organising workplace flash mobs, having successfully orchestrated a flash mob at a recent all-staff BBQ held at Games HQ!

Where she started: Not wanting to move to Sydney, because that's what everyone in Newcastle does, Jess ventured to Brisbane and started her career as a family lawyer. While some may think family law is a strange place for a sports lawyer to start out, look closely and you will see the comparisons – opposing sides and a referee feature in both.

What she's working on now: In 2016 she assisted with the drafting and negotiation of the host broadcaster agreement to secure host broadcasting services that will capture 1100 hours of live GC2018 footage (opening and closing ceremonies and 18 sports and para-sport competitions held across 18 venues)

to be broadcast to a cumulative global audience of 1.5 billion people.

Jess was also the lead lawyer on the drafting and negotiation of the production agreement for the GC2018 opening and closing ceremonies, which will ensure the creative design, production and delivery of two of the biggest ceremonial events staged in Australia this decade.

Meet April...

What you need to know: April is the manager of brand protection for GC2018 and is responsible for the delivery of the brand protection function. April joined the team at the beginning of 2016, just in time to help with the launch of the official GC2018 mascot, Borobi.

Where she started: April started her legal career with an entertainment law firm in Sydney, which soon led to a role in-house at an ASX-listed entertainment group, before joining one of the Big Four accounting firms to advise on all things intellectual property and technology. Somewhere along the way she also managed to live, work or study in seven cities across the world, and get admitted as an attorney in California.

What she's working on now: April's role involves protecting the entire suite of GC2018 brands, including 28 registered marks and 77 other images and references protected by state and federal legislation.

In addition to protecting the GC2018 brands, April is also responsible for advising on all IP rights, music licensing, ambush marketing, ticket touting, counterfeit merchandising and unauthorised broadcasting which may occur in relation to GC2018. April's role is integral in protecting the investments made by the GC2018 sponsor family and the official ticketing agent, merchandising agent and broadcasters.

Meet Louise...

What you need to know: Louise is a keen cyclist and while she may not have the talent to compete at GC2018 herself, she has found her niche at GOLDOC as the legal manager for the venue development and overlay program.

Where she started: Louise's career in the law began by not wanting to practise law at all. With her dad and an uncle as longstanding members of the profession, Louise wanted to do something 'different' and first headed down the social sciences pathway, studying psychology. Realising the error of her ways, she switched to a law degree after her first year in humanities. After five years at a top-tier firm in Brisbane, Louise made a sea change to join the GOLDOC legal team.

What she's working on now: Louise is now responsible for all the legal work behind the

\$275 million temporary construction program that will bring all of the GC2018 competition and non-competition venues to life. Louise suggests you take a look at the seat you sit on at Games time, as there is a very good chance it is one of the more than 60,000 temporary seats she was an integral part of procuring.

When Louise isn't tackling difficult construction law issues, she can be found negotiating sponsorship agreements, procuring field-of-play essentials like squash courts and the athletics track, or assisting with the administration of a raft of construction contracts.

Meet Guy...

What you need to know: What's a team of all female lawyers without a token guy? At Games HQ Guy is known as the celebrity lawyer as a result of his work drafting and negotiating agreements for five (soon to be six) GC2018 ambassadors – Sally Pearson OAM, Cameron McEvoy, Anna Meares OAM, Kurt Fearnley OAM and Laura Geitz.

Where he started: Born and raised in Toowoomba, Guy was among the last of a generation of practitioners to have completed a five-year articulated clerkship. From humble beginnings in a local Toowoomba law firm, Guy progressed to private practice roles and in-house roles in Brisbane and on the Gold Coast before landing his dream job with the GOLDOC legal team.

What he's working on now: Guy is the lead lawyer on the Queen's Baton Relay project, which will see the Queen's Baton (carrying a personal message from Her Majesty Queen Elizabeth II) go on a 288-day, 230,000km journey from Buckingham Palace to the opening ceremony via all six Commonwealth regions of Africa, the Americas, the Caribbean, Europe, Asia and Oceania.

In 2016 Guy played a key role in the procurement of services of four primary security providers to source, train and deploy more than 4000 guards (being the largest security workforce Australia has seen in a decade, and more than double the size of the recent G20 summit held in Brisbane).

A world-first partnership

Australian law firm MinterEllison is the Official Lawyers to the Gold Coast 2018 Commonwealth Games. The three-year partnership between the firm and GOLDOC commenced on 1 January 2016 and will continue until the end of 2018.

The partnership is a world-first in that it is the first time a sporting event of this calibre has implemented a fully outsourced legal function. The unique delivery model has MinterEllison embedding a team of experienced lawyers within GOLDOC, drawing in national specialist advisers as required.



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KEY DATES

Friday 31 March – 4pm
Discretionary applications close

Thursday 13 April – 4pm
All other applications close

Applications open now

 **Queensland
Law Society**



Lexon – It's not just about insurance

Insurance is often seen as a necessary evil – pay your premium and hopefully, if something goes wrong, it is there to get you back on track.

Lexon has worked hard to expand its relationship with the profession beyond that simple equation by providing substantial support over and above the payment of claims.

Our risk education program is an ongoing partnership with you to raise awareness of how to avoid common pitfalls that can lead to a claim event. Three program 'value adds' are discussed below.

Workshop 5

We are excited that our latest workshop program, to be launched shortly, will focus on how good risk management can be used to deliver great client outcomes. As a precursor to the launch, delegates to Symposium this month will have the opportunity to hear from Lexon's David Durham and Dr Sanjay Nandam of Monash University about the cutting-edge neuroscience research which underpins this workshop and can mean the difference between good and bad outcomes for your clients.

Help Now engagement

We have also developed a unique 'Help Now' program which is designed to provide support to practices which find themselves at substantial risk of claims events due to unexpected factors (such as illness or other incapacity). Christmas 2016 and the New Year saw an unprecedented call on this service, with four assistance programs being run simultaneously by Lexon.

While this support ties directly into risk management, it has the collateral benefit of providing some comfort for practitioners during difficult times. If you would like this service to assist you, then make sure you have an attorney who can authorise us to enter your practice in the event you have lost capacity.

Each year we have a number of these cases – and there really is no mechanism, short of a receiver appointment, to provide this assistance absent an attorney. It is also critical that a suitably trusted person be able to identify any necessary passwords to access your system in your absence.

This offering is intended to work hand in hand with the suite of assistance services provided via Queensland Law Society and the Queensland Law Foundation.

Estate stress tests

In late 2016 Lexon commenced the latest of our innovative 'stress-testing' programs which focuses on wills and estates. The idea behind this program is to provide practices with the opportunity to see how their current systems stand up to a critical challenge. If you would like to book a stress test, please contact Robert Mackay at robert.mackay@lexoninsurance.com.au.

Over the last decade we have seen our investment in risk management help practices drive a strong and successful legal business model. We are committed to continuing this assistance into the future.

2017/18 renewals and rates

Thank you to all practices that completed their QLS Insurance Renewal Questionnaire. The online process has been very successful and provided useful insights into the current state of the profession which I will report on in a later edition of *Proctor*.

Last year saw a 20% reduction in base levy rates. With the continuing improved claims performance of the scheme, QLS and Lexon are working hard to deliver the best rates possible for 2017/18 consistent with the long-term requirements of the scheme. These rates will be announced by QLS president Christine Smyth shortly.

Top-up insurance

QLS Council has again arranged with Lexon to make top-up insurance available to QLS members who would like the additional comfort of professional indemnity cover beyond the existing \$2 million per claim provided to all insured practitioners.

This option is available at very competitive rates and practitioners have the choice of increasing cover under the Lexon policy to either \$5 million or \$10 million per claim.

This offering comes with the full backing of Lexon and ensures access to its class-leading claims and risk teams in the event that you require their assistance. Further details will be provided during the renewals process.

I am always interested in receiving feedback, so if you have any issues or concerns, please feel free to drop me a line at michael.young@lexoninsurance.com.au.

Michael Young
CEO

Getting ready for the end of year

Practice changes (mergers, acquisitions, splits and dissolutions)

We find that the end of the financial year is the most active time for practice changes including purchases, mergers, amalgamations, takeovers, transfers, splits of partnership, entity transitions (for example, firm to ILP), principals (or former principals) leaving or joining, dissolutions or the recommencement of a former practice.

Given this, it is an opportune time to remind practitioners that, as part of their due diligence prior to undertaking such changes, they should consider the potential impact of the prior law practice (PLP) rule which seeks to maintain equity in the insurance scheme by ensuring a practice (and its relevant successor) retains responsibility for the insurance consequences of a claim made against it.

There are potentially significant financial consequences (in terms of future insurance levies and payment of excesses) which should be borne in mind when considering such changes. Because of these consequences, law practices are strongly encouraged to:

- Be familiar with the policy wording and Indemnity Rule (including Rule 10(6)) and the implications they may have.
- Contact Lexon to discuss your particular circumstances.
- Take independent legal advice where required.
- Consider contractual terms for adjustments/indemnities to provide some recourse in the future.
- Obtain a written authority and direction for Lexon to disclose the claims history and insurance history of any practice which you may be acquiring, etc. Note – this will only reveal existing matters.

Lexon offers law practices what is known as an Acquisition Endorsement which enables a practice acquiring another practice to limit the impact of new claims that arise out of *closed* matters previously handled by the acquired practice. The Acquisition Endorsement provides the following benefits:

- Such claims are excluded from any future claims loading calculations.
- The applicable excess for such claims will be that of the acquired practice (which will often be lower than would otherwise be the case).
- No deterrent excess will apply irrespective of the circumstances.

Further information on the PLP concept and the Acquisition Endorsement can be found in detailed information sheets available on the Lexon website.



Did you know?

- Lexon is always 'looking over the horizon' for the next possible source of claims so that we can take steps to educate the profession and, hopefully, avoid the stress and cost of claims events. As part of that process we regularly meet with the profession to canvass emerging risk areas. We often do this via a 'think-tank' round table with key players; a recent example is the extensive engagement process in the lead-up to the Foreign Residents Capital Gains Withholding regime which went live on 1 July 2016. As a result of these discussions, a new LastCheck has been produced and risk alerts released. The LastCheck can be found on our website. If you are not receiving our risk alerts and would like to, please drop us a line.
- Lexon prides itself on the extensive coverage it provides to the profession. This includes when a practice is undertaking 'foreign law' work provided that either:
 - a lawyer suitably qualified in the relevant jurisdiction is retained to assist in the matter, or
 - the law practice can establish 'special reasons' – for example, it can demonstrate sufficient local expertise in advising on such matters.

If you are intending to undertake foreign law work, you should contact Lexon to discuss coverage.



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The psychology of pricing

A practice idea that might make a big difference



We often view pricing through too narrow a lens... a purely rational approach founded more in accounting than in client behaviour. A better understanding of client emotions and preferences can increase client satisfaction and profits, says **Dr Peter Lynch**.



I love pricing – it's so multi-faceted.

And there's always that fabulous moment of truth in quoting/estimating work when, based on your price, you can potentially miss the boat, sink the boat, or get it just right.

'That sounds extremely reasonable' can be just as unnerving as 'that's way more than I expected'. The problem is that what is 'extremely reasonable' for one person is 'completely unsatisfactory' for another. So a good starting point is understanding how clients experience price.

How clients experience price

This is always moderated by market power and market knowledge. Powerful organisations like banks, insurance companies and large listed businesses tend to set prices themselves (within reason). Their dual goals are to push down total operating costs through set rates for set processes, and to reduce the risks of cost escalation through a rigorous set of rules on allowable billing practices.

They usually define price in fine detail – base rates, total price per class of matter, allowed extras, billing cycle, payment terms, and so on. So interestingly, it is the law firms working in these areas that do most of the *experiencing* of price. And often, because they have so little power, their enduring parallel questions are 'can we afford to keep doing this business?' versus 'can we afford not to do this business?'.

For less sophisticated clients, price is experienced as both a reality and a perception. Even without any actual idea of dollars, clients extract signals from other elements of our marketing mixes and form views about our pricing.

Are we in Eagle Street, a suburban shopping strip, or purely online? Are our offices on the 40th floor and are they all marble and fresh flowers? Is the feeling very corporate or very personal? What 'trust us' signals are on our website or in our TV advertising? Was the lawyer we spoke to on the phone personable and helpful so that we want to believe he will be fair with price? What pricing experiences

have our friends told us about and how do they influence our expectations?

Having a pricing strategy

To get on top of all this, firms need to develop a deep understanding of the things that matter to their target markets. Some legal start-ups I deal with initially say they are going to discount their price (rate) by around \$150 an hour vs their current big firm employer. I tell them they are nuts.

No client will reject a lower rate, but the better approach is: What do they typically like? What do they hate? What will get them over the line? What will drive them away? Remember, if you are pitching to a business client, chances are they already have lawyer/s and they already have firm views about specific aspects of pricing and billing.

So considering this, you could build a pricing strategy which may involve:

- a relatively high base rate, but with
- no charges for petties
- no charges for nominal attendances, and
- structured payment terms.

You positively sell them a price they can live with while removing the irritations you know they hate. This kind of approach can be helpful where your goal is long-term repeat business at a reasonable profit. You can say 'this is how we are different from other firms' and an experienced buyer will see that it is true.

Remember though, if giving anything away, make sure the client can see that's what you are doing (for example, in no-charge attendances) or they won't place any value on it. So the driver in this approach to pricing is the relationship rather than just the current transaction.

But this is just one example. There are hundreds of them. It may not suit your business.

The psychology of *too expensive*

Compared with what?

A rookie error dealing with reasonably unsophisticated clients is quoting fees or rates in abstract. For inexperienced clients, \$350 an hour will seem like a lot. For others

it will be a bargain. People will judge legal pricing harshly if they haven't anything to compare it with.

Sure they can search online sources (and you need to be on top of these). But in (say) commercial drafting/transactional work, you can reduce the perception of high price by taking the high ground and introducing a comparison yourself, for example, by saying '*The pricing is the good news*'. Because we have low overheads and the way we are structured, we can do this work every bit as well as you would find in a Street X law firm where partners charge \$600 an hour, but we can do it for a partner rate of \$465 an hour and an average rate of probably around \$400'.

This is a simple way of providing positive context for your rate/price, rather than letting the client form a negative view that isn't anchored to anything.

Can't afford or can't afford not to?

A price by itself means little without proper context of total costs and benefits. Nobody likes paying legal fees. (Trust me, it's true.) So your job is to ask questions so as to provide *future profit/loss* context for the spending decision on legal advice.

In family law matters, you can appeal to the emotional side of the brain, and balance that with the rational side (financial difficulty, relocation, practicalities of residency) to assist the client with a decision that gives your potential legal fees proper value.

In commercial matters, when providing front-end assistance on structuring, commercial agreements, etc. – you can provide practical examples of what can go wrong and in the context of those potential losses, how the drafting of the recommended agreements isn't very expensive at all. If you have the capability to provide high-quality tax advice as well, then usually it is much easier to present the total fees in a better light. Everyone loves beating the ATO.

Can't afford or can't afford today?

Lawyers and their clients regularly confound these two differing positions. A client may well have crossed the *can't afford not to* bridge, but will still be very anxious about proceeding because of perceived capacity to pay. Good law firms – particularly those working in personal law and small business law – understand that *method of payment* is just as important a part of pricing as *rate* and *estimate* per se.

Payment can be made easier through an understanding of the client's weekly and monthly cash needs, their creditworthiness, and where applicable, location of other family members with an interest in the outcome who may be prepared to help. Not unlike car dealerships, some firms now have a payment/finance process for all clients which establishes payment commitments prior to any substantive legal work being done.

The challenge in this area is that clients will too quickly interpret a total job estimate as being payable immediately, and therefore unaffordable. In litigation particularly, this is rarely the case. Of course, if you are an online provider, payment can be built in to the matter setup process.

Can't afford or can't afford all at once?

This is a particular case of the principle of *providing choice* (see below). It particularly applies in commercial matters. In the setting up of a new enterprise (sometimes in conjunction with the purchase of an existing business), the client typically faces several choices on the amount of legal work – depending on their perception of risk and their appetite for that versus their appetite for legal fees.

In these circumstances, the best approach is to divide the services up into 'must do', 'strongly recommended' and 'possibly optional' classes so that the client doesn't feel unduly boxed in by a very large total price – which may lead to a total rejection of the work.

All clients crave choice. By doing this, you provide an element of choice *from within* your fees proposal, as a partial foil to the client's seeking external alternatives. It can also be helpful to particularise in the proposal where there are substantial government fees and charges, so as to lessen the perceived weight of legal fees in the total cost.

Choice/What I want to believe

I have written at length on the subject of fixed-fee quotes versus variable estimates. There is no question about a progressive shift to fixed pricing and fixed stages – pretty much built around the capacity of clients to freely research their options on the web.

Not only that, but there is now a generation of buyers (of all services) who not only want both choice and certainty, but also would prefer not to have to deal with (as in, talk/meet) an actual person. So as all lawyers would have already discovered, some of the challenge is in actually getting the opportunity to personally engage... full stop.

However, when some form of engagement is still an option, it can be a folly to presume that clients will always go for a fixed fee versus an estimated range. If you quote a fixed fee for an initial stage in a family matter of \$5000, but your client gets an alternative estimate of \$3000 to \$5000 from a lawyer they like and regard as reputable, most of the time they will want to believe the low figure and will do business with the second provider.

This is the psychology of wanting to believe in the most favourable outcome. I call it the BBQ effect. At the Sunday BBQ, your brother says 'How much is the divorce costing you?' You answer 'About \$3 grand for the first part – not sure after that...' because that's what you want to believe. I encourage my clients to give their clients choice between fixed prices and estimates. Again, this provides internal choice and makes a buying decision easier.

Reassurance

Where big dollars are potentially involved, fear and distrust are big factors. In PI and family provision matters (respectively), the fear is dealt with by 'no win, no fee' and 'the costs come out of the estate'.

Even with that reassurance though, clients still may be reluctant to proceed because of fees stories they have heard from friends, or through simple distrust. In these circumstances (as I have written about previously in *Proctor*) the building of solicitor and own client costs assessing into the agreement as the method of pricing is a proven strategy to reduce disputes and increase trust.

You can't promise what the fees will be, but you can promise that an independent professional will certify that the fees are appropriate based on the costs agreement and the law. This is an example of the long-standing principle that people are more inclined to believe what others say about you rather than what you say yourself. And it really works.

Mode of communication and positiveness generally

As a professional service provider, your pricing is only one of seven elements of the marketing mix which determines whether clients will be attracted to your firm. As we have said before, there is now a generation that prefers to principally deal with systems rather than people.

There are some terrific online and quasi-online legal businesses that have carved out a presence. These variously wear the NewLaw hat. As technology advances exponentially, these will create further fragmentation of the market and an awesome array of choices for legal clients.

There remains though, and will continue to remain to some extent, a case for high-quality, face-to-face communication for matters in which the outcome doesn't follow a codifiable formula, where there are nuance, variability, and layers of risk, and where the client actually needs help in knowing the right questions to ask. These tend to be the higher risk, higher complexity matters.

Online and email pricing tend to be one-way communications (acknowledging the existence of online/helpline assistance). No matter how elegant and comfortable the site, the service provider's armoury is limited to only some of the experiential levers that can be engaged, including positive personality, hospitality and courtesy, closely interactive clarifications, and reassuring visual experiences (although online providers will argue that all of these are provided to a degree – but just in a different environment).

On an almost identical matter, I have seen a fees proposal of \$100,000 totally rejected when communicating online, only to be fully accepted in the intimacy and intensity of a face-to-face meeting run by a knowledgeable and positive principal. But watch this space. It's all developing very quickly.

The total experience

I have tried to argue that pricing is about much more than abstract hourly rates and fixed prices. For many people, it isn't about the price per se but about the payment conditions. For others, it is about the simple reassurance that they are being treated fairly. And for others still, it is about a state of mind that may want to see either the best or the worst in any situation.

In summary, price as a concept has a huge range of psychological constructs. If you can analyse your target market and understand the things that persistently draw them to your business as well as the things that you typically have arguments about, then you can generate a 'how we do business' pricing strategy that will win you more business, retain better relationships, and almost certainly make more profit as well.

See what you can do to improve your pricing strategy in 2017.

Dr Peter Lynch is the principal of dci lyncon, a boutique provider of professional practice management consultancy services. Contact p.lynych@dcllyncon.com.au.
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Down to business with legal privilege

Practical considerations for in-house counsel

The protection and maintenance of legal professional privilege presents an ongoing challenge for in-house lawyers.

Clients often don't sufficiently understand the concept, or its importance, which can result in inadvertent loss or waiver of privilege.

Most organisations will be involved in litigation in some capacity at some point, whether as an active party or a third party from whom documents are subpoenaed. They may also find themselves the subject of a regulatory investigation. Being forced to disclose, for example, advice to the effect that your client has breached a contractual obligation or highlighting the deficiencies in a case could be extremely damaging to a business both in financial and reputational terms.

This article aims to provide practical guidance on how to protect privilege in an in-house context.

A quick refresher

Legal professional privilege is a fundamental concept in Australian law and a creature of both common law and statute. It protects communications to which it attaches from disclosure to courts, third parties and regulators. It can apply to communications between lawyer and client,¹ as well as other communications made in connection with giving or receiving legal advice.²

In order for a communication to be the subject of legal professional privilege, it must be:

- confidential, and
- made for the dominant purpose of either seeking legal advice or for use in legal proceedings, whether existing or anticipated (the 'dominant purpose test').³

What's different about in-house lawyers?

There has been much judicial discussion about the differences between in-house lawyers and those engaged on a more traditional retainer basis in the context of privilege.⁴ It is established law in Australia that communications between an in-house lawyer and their employer or client may be the subject of legal professional privilege, provided the lawyer is giving advice in his or her professional capacity as a lawyer, that is, legal and not commercial advice, and in so doing exercising their own independent judgement.

In-house lawyers are commonly called on to give advice of a commercial nature, in addition to legal advice. Tamberlin J recognised the difficulties this can present in determining the purpose of a communication in *Seven Network Limited v News Limited* at [38]:⁵

"[T]here is no bright line separating the role of an employed legal counsel as a lawyer advising in-house and his participation in commercial decisions. In other words, it is often practically impossible to segregate commercial activities from purely 'legal' functions. The two will often be intertwined and privilege should not be denied simply on the basis of some commercial involvement."

Whether or not an in-house lawyer is performing a legal function will depend on the context and, most importantly, the purpose of the communication in question.

Practical tips

Although the functions of an in-house lawyer may not be entirely legal in nature, when giving advice in your capacity as a legal advisor, it will assist in establishing that the advice given is legal advice, where it is given separately from commercial advice. When dealing with a mix of legal and commercial issues, it is important to consider the purpose of the communication, since this is fundamental to the existence of privilege.

Consider whether the legal and commercial advice should be separated into two emails or letters to protect the privilege attached to the legal component, and ensure the document containing legal advice is more formal and confined to the relevant issues.

Legal professional privilege will only attach to advice provided by an in-house lawyer if they have the requisite degree of independence. Independence requires in-house counsel to act, "independently of undue pressure from their employer",⁶ and in-house lawyers should ensure that their employment conditions (including lines of reporting and delegation) are not inconsistent with the *Australian Solicitors Conduct Rules 2012* or the holding of a current practising certificate (**NB:** By law, in-house lawyers must hold current practising certificates.⁷)

Many legal departments use independence statements or policies to assist in demonstrating their independence. This informs the business about the functions of the legal department and highlights lawyers' ultimate duty as officers of the court. It is also highly advisable for in-house legal teams to enshrine this independence in employment contracts, including specifying that an in-house lawyer cannot be directed to change legal advice or act in a manner inconsistent with their fundamental duties.

It is important that the head of the legal department has direct access to the CEO, the board, and other executives when appropriate, to ensure advice is able to be given freely and without the possibility of being tainted by influence from superiors. It is critical that the legal department is able to demonstrate an absence of interference by management.

Legal privilege presents particular concerns for in-house counsel, as **Jemima Harris** explains.



Appropriate maintenance and security of legal files, both physical and electronic, against access by non-legal personnel is another way independence of the legal function of an organisation can be maintained. Implement and enforce a policy of locking legal files away when not in use and ensure appropriate security exists for electronic files and email.

On a practical level, in-house counsel can assist in protecting the privilege attached to communications they make by employing practices such as prominently marking emails and other documents containing legal advice as 'Confidential and Privileged', either in the subject line and/or at the top of the document. Care should be taken to apply such designations to genuinely privileged communications; claiming privilege when it isn't warranted is inconsistent with a lawyers' fundamental duties, and may invalidate genuine claims of privilege with disastrous results.

Including a notice will not be determinative of the existence of privilege, but it will certainly assist in making the argument if the need arises. A court will look at the substance of the communication and the context in making its determination. Conversely, the absence of such a notice will not of itself defeat a claim of privilege; waiving privilege requires the doing of an intentional act done with knowledge of the consequences.⁸

A common sense approach to the use of such notices when dealing with a sensitive issue is to consider the dominant purpose test, and mark your advice accordingly. Email is often treated as an informal method of communication, yet email is no less discoverable than any other form of communication. So, if in doubt... don't hit send.

When using email, only send advice to individuals within the business who have a real need to know, and mark the email with a notice such as 'Not to be distributed to anyone other than the named addressees', to remind the recipients not to forward it on. When responding to emails, consider altering the subject line to highlight the confidentiality of your response and don't necessarily 'reply all'.

Education is key

It is crucial to educate your internal clients about the importance and value of privilege and the potential ramifications of loss or waiver. The exponential increase in data created by organisations in recent years makes management of information, and maintaining the confidentiality of that information, all the more challenging.

Fundamental to ensuring privilege is maintained is ensuring that your client understands what privilege is and isn't. A seasoned senior executive from a former corporate client of mine had trained their team to copy a member of the legal team on certain emails in the mistaken belief that doing so would somehow magically make privilege attach to an already non-confidential document attached to that email.

Non-lawyers often assume that only communications between senior members of staff will be discoverable. It is important that all staff understand the role they play in maintaining privileged communications. Similarly, staff should be cautioned about creating potentially discoverable 'post mortem' documents setting out details of a deal gone awry or paraphrasing legal advice in communications with third parties as these may be extremely damaging or embarrassing to the organisation if they are required to be produced.

Providing appropriate training to relevant internal clients on the subject will not only assist in ensuring privilege is maintained but also provide an opportunity to build rapport between the business and the legal department. This training should be documented, including confirming who has attended, and refreshed at regular intervals.

Keeping the purpose of communications made in your capacity as an in-house lawyer front of mind will assist you to take the appropriate steps to assert and protect privilege. Educating your non-legal colleagues will bolster this protection and hopefully minimise inadvertent waiver of privilege.

Jemima Harris is managing counsel at lexvoco.

Notes

- ¹ In the case of legal advice privilege.
- ² In the case of litigation privilege, such as communications with expert witnesses.
- ³ See *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at [61].
- ⁴ See, for example, *Ritz Hotel Ltd v Charles of the Ritz Ltd (No.4)* (1987) 14 NSWLR 100 and more recently *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311.
- ⁵ *Seven Network Limited v News Limited* [2005] FCA 142.
- ⁶ *Australian Hospital Care (Pindara) Pty Ltd & Anor v Duggan & Ors* [1999] VSC 131.
- ⁷ See s24 of the *Legal Profession Act 2007*.
- ⁸ *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305; see also rule 34, *Australian Solicitors Conduct Rules 2012*.

Dual distribution sales strike turbulence

*Australian Competition and Consumer Commission
v Flight Centre Travel Group Limited [2016] HCA 49*



Competition law – agency agreements – price fixing – attempt to induce – contracts, arrangements or understandings – substantial lessening of competition

On 14 December 2016, the High Court handed down its decision in *ACCC v Flight Centre Travel Group Limited*.¹

By majority,² the court held that Flight Centre was in competition with certain airlines in a market for the supply of international airline tickets to consumers. This competition existed notwithstanding that Flight Centre supplied international airline tickets as agent for each airline.³

This article explains the decision and highlights key issues that practitioners should be aware of when advising clients whose businesses

involve selling products to customers both directly and via agency arrangements (known as ‘dual distribution’ models).

Background

Flight Centre carries on business as a travel agent, selling domestic and international airline tickets to customers. In parallel, airlines sell domestic and international airline tickets directly to customers through their websites.

As part of its marketing strategy, Flight Centre promised that it would beat any price for an airline ticket quoted by any other Australian travel agent or website, including a website operated by an airline (Price Beat Guarantee). The Price Beat Guarantee made Flight Centre commercially vulnerable to any airline which chose to offer tickets directly to customers at a discount to the fare which the airline published to its travel agents.

In a series of emails sent to Singapore Airlines, Malaysia Airlines and Emirates between 2005 and 2009, Flight Centre threatened to stop selling the tickets of each airline if that airline did not agree to stop offering international airline tickets directly to customers at prices lower than the fares published to travel agents.

The critical question for the courts to determine was whether Flight Centre was in competition with Singapore Airlines, Malaysia Airlines and Emirates when Flight Centre sent these emails attempting to induce each of those airlines to agree not to discount the price at which that airline offered international airline tickets directly to customers.

At first instance, the ACCC was successful in civil penalty proceedings against Flight Centre in the Federal Court⁴ on the basis that Flight Centre’s conduct constituted an attempt to induce Singapore Airlines, Malaysia Airlines and Emirates to make a contract or

A recent High Court decision reminds practitioners to ensure that clients with dual distribution sales models avoid contravening Commonwealth cartel laws. Report by **Joanne Jary** and **Tristan Smith**.



arrangement or arrive at an understanding in contravention of price-fixing prohibitions contained in s45(2)(a)(ii) and s45A of the former *Trade Practices Act 1974* (Cth) (TPA).⁵ The primary judge held that Flight Centre and the airlines were in competition in a market for booking and distribution services.⁶

On appeal, the Full Court of the Federal Court overturned the primary judge's decision.⁷ The Full Court held that the arrangements proposed in Flight Centre's emails to the airlines did not occur in a market in which Flight Centre and the airlines supplied booking and distribution services in competition with each other.⁸ Instead, the Full Court held that Flight Centre's conduct occurred in the market for the supply of international passenger air travel services in which Flight Centre was agent for, and did not relevantly compete with, the airlines.⁹

A majority of the High Court

On appeal to the High Court, Kiefel and Gageler JJ (with whom Nettle and Gordon JJ agreed) held that Flight Centre was in competition with each airline in a market for the supply of contractual rights to international air carriage, notwithstanding that Flight Centre supplied in that market as agent for each airline.¹⁰

Their Honours dismissed the ACCC's primary case, which contended that the relevant market was a market for distribution services to international airlines and booking services to customers (as held at first instance).¹¹ Kiefel and Gageler JJ (consistent with the Full Court's decision) considered it "artificial" to characterise the arrangement in this way, instead preferring to say that "booking the flight, issuing the ticket and collecting the fare were... inseparable concomitants of that sale".¹² To contend otherwise would amount to "economic theory doing violence to commercial reality".¹³

Notwithstanding these criticisms, Kiefel and Gageler JJ accepted the ACCC's secondary case that Flight Centre supplied international airline tickets in competition with each airline.¹⁴ In coming to this conclusion, their Honours did not accept Flight Centre's argument that it acted as agent for the airlines.

Relevantly, Kiefel and Gageler JJ noted that "the fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them".¹⁵ Their Honours noted that Flight Centre's authority under the agency agreement with each airline extended not only to deciding whether or not to sell an airline's tickets, but also to setting its own price for those tickets.¹⁶

Kiefel and Gageler JJ held that Flight Centre was "free in law to act in its own interests in the sale of an airline's tickets to customers and that is what it did: it set and pursued its own marketing strategy, which involved undercutting the prices not only of other travel agents but of the airlines whose tickets it sold".¹⁷

Accordingly, their Honours allowed the appeal with consequential orders varying the primary judge's declarations and remitting the matter to the Full Court for a determination on penalty.¹⁸

In a separate but concurring judgment, Nettle J agreed with Kiefel and Gageler JJ that the ACCC's primary case resulted in an "artificial construct that does not truly engage the commercial reality of the relevant commercial relationship and dealings".¹⁹

On the question of agency, Nettle J held that while "generally speaking, it may be correct that, where an agent has authority to sell for and on behalf of the agent's principal, it is less likely than in other circumstances that the agent and the principal compete with each other for the sale of the goods or services in question... but... the question of whether an agent, as opposed to an agent's principal, should be regarded as supplying the principal's goods or services depends as much as anything on the nature, history and state of relations between the principal and the agent so far as they relate to the supply of the goods or services".²⁰

In the result, his Honour agreed with the majority and held that Flight Centre's conduct in attempting to persuade the airlines to increase the prices at which they sold airline tickets directly to customers was an attempt to enter into a contract, arrangement or understanding which had or was likely to have the effect of fixing, controlling or

maintaining the price for airline tickets in the market for the sale of airline tickets in which both Flight Centre and the airlines competed.

In a further separate judgment, Gordon J agreed with the orders proposed by Kiefel and Gageler JJ, but did so for different reasons. In contrast to the majority, Gordon J held that the description of Flight Centre as 'agent' was factually wrong in circumstances where Flight Centre was dealing with its own customers in its own right without reference to any interests of any airline.²¹ Gordon J also held that the description of Flight Centre as an 'agent' was legally irrelevant for the purposes of the applicable provisions of the TPA.²² In this respect, her Honour noted that the statutory language of section 45A said nothing about agency, but was directed at whether or not the parties were in competition.²³

French CJ in dissent

In one of his final judgments as Chief Justice, French CJ dissented from the majority. His Honour considered that the case turned "critically upon whether or not the agent was, in any relevant sense, in competition with the three airlines, which were its principals at the time it made the proposals".²⁴

On this issue, French CJ held that the passenger sales agency agreement which appointed Flight Centre as agent with the authority to sell air tickets for the airlines²⁵ entitled Flight Centre to create, with each sale, a contractual relationship between the airline and the customer.²⁶ Accordingly, French CJ held that Flight Centre's conduct should be properly regarded as that of the airline.²⁷

His Honour considered that Flight Centre's concerns about pricing were not amenable to characterisation as competitive for the purposes of the TPA, would create tension between the concept of competition and legal agency, and would "open the door to an operation of the Act which would seem to have little to do with the protection of competition".²⁸ French CJ held that Flight Centre was not in competition, in any relevant market, with the airlines for which it sold tickets and the pricing proposals offered to its principals "were not proposals offered by it as their competitor, but as their agent".²⁹

Key issues

While it is recognised that the High Court's decision largely turned on the unique factual arrangement that existed between Flight Centre and the airlines in the sale of international airline tickets, the High Court's decision is likely to have significant implications for businesses that sell products to consumers both directly and by way of agency arrangements, particularly in the context of online sales.

These types of 'dual distribution' sales models are used widely by businesses in the insurance, health, travel, telecommunications, electricity and retail sectors and are becoming increasingly relevant for practitioners with clients operating in these sectors.

In light of the decision in *ACCC v Flight Centre*, practitioners should be aware of the following key issues when advising clients looking to implement or review dual distribution sales models:

Avoid drafting clauses in agency agreements which prevent a principal from selling products directly to consumers at a price lower than that of the agent. Following the High Court's decision, these types of 'price parity' clauses are likely to amount to price fixing.

Appreciate that the existence of a fiduciary relationship will not act as a shield against the application of cartel conduct laws in circumstances in which principals and agents offer the same products for sale to customers in the same market.

Carefully consider the amount of discretion given to agents, particularly with respect to the terms of any sale. The broader the discretion given to the agent, the greater the risk that any contract, arrangement or understanding entered into between principal and agent will contravene Commonwealth cartel laws.

The ACCC has given a strong indication that it will be looking to crack down on agency arrangements which contravene competition laws this year. In this respect, ACCC chair Rod Sims has recently noted that "this decision will provide important guidance for the future application of competition laws in Australia to other situations where competing offers are made directly to consumers by both agents and their principals. It is likely to be

particularly relevant when businesses make online sales in competition with their agents."³⁰

Practitioners should therefore ensure that clients with dual distribution arrangements take appropriate steps to ensure they are not subject to enforcement action by the ACCC.

This article appears courtesy of the Queensland Law Society Competition and Consumer Law Committee. Joanne Jary is a senior associate at Herbert Smith Freehills and a member of the committee. Tristan Smith is a solicitor at Herbert Smith Freehills. Image credit: ©iStock.com/dogbitedog69

Notes

¹ [2016] HCA 49.

² French CJ (dissenting); Kiefel and Gageler JJ (agreeing); Nettle J (agreeing); Gordon J (agreeing as to orders, but not as to reasons).

³ *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49, [26] (Kiefel and Gageler JJ).

⁴ *ACCC v Flight Centre Ltd (No.2)* (2013) 307 ALR 209.

⁵ Reflected in s45(2)(a)(ii) and s44ZZRD of the *Competition and Consumer Act 2010* (Cth).

⁶ *ACCC v Flight Centre Ltd (No.2)* (2013) 307 ALR 209, 244 [135].

⁷ *Flight Centre Ltd v ACCC* (2015) 234 FCR 367.

⁸ *Flight Centre Ltd v ACCC* (2015) 234 FCR 367, 404 [182].

⁹ *Ibid.*

¹⁰ *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49, [26] (Kiefel and Gageler JJ).

¹¹ *Ibid.*, at [72].

¹² *Ibid.*, at [73].

¹³ *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49, [71] (Kiefel and Gageler JJ). See further at [75] where Kiefel and Gageler JJ noted that "the ACCC's primary case... was unsustainable because it rested on attributing to Flight Centre and to the airlines the making of supplies of services of a description which did not accord with commercial reality".

¹⁴ *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49, [61] (Kiefel and Gageler JJ).

¹⁵ *Ibid.*, at [78].

¹⁶ *Ibid.*, at [89].

¹⁷ *Ibid.*, at [90].

¹⁸ *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49, [94] (Kiefel and Gageler JJ). On the question of cost, in recognition of the ACCC's failure to pursue its secondary case before the Full Court of the Federal Court, the ACCC was not awarded costs of its appeal to the High Court and was not awarded its costs to date of the appeal to the Full Court (see Kiefel and Gageler JJ at [93]).

¹⁹ *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49, [123] (Nettle J).

²⁰ *Ibid.* at [147].

²¹ *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49, [152], [177] (Gordon J).

²² *Ibid.*, at [153].

²³ *Ibid.* at [153], [185].

²⁴ *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49, [2] (French CJ).

²⁵ For background on the nature of the agency agreement, see *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49 at [9] – [14].

²⁶ *ACCC v Flight Centre Travel Group Limited* [2016] HCA 49, [22] (French CJ).

²⁷ *Ibid.*, at [23].

²⁸ *Ibid.*

²⁹ *Ibid.*, at [24].

³⁰ ACCC Media Release, 'High Court allows ACCC appeal in Flight Centre attempted price-fixing case' (14 December 2016).

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Lloyd Sidney Nash

19 October 1957 – 12 December 2016

Lloyd Sidney Nash passed away on 12 December 2016, survived by his two sons, Robert and James, brother Ralph, and sisters Lydian and Alice.

He was born in Dunedoo, New South Wales in 1957, the son of a retired Uniting Church minister, Roy Edward Nash, and Gladys Thelma Nash, a triple-certificate nursing sister. Both parents passed away in 2013.

Lloyd studied law at the University of Queensland and served his articles with Trout Bernays & Tingle before being admitted in 1984.

He became a partner of Clayton Utz in 1989 and headed up the firm's finance recovery and insolvency group until 2007.

Lloyd then travelled overseas for 12 months or so before coming back to the workforce towards the end of 2008. He set up his own legal practice and worked for various clients in Queensland, New South Wales and Papua New Guinea, in particular, Queensland and PNG construction firm Northbuild and The George Group.

Lloyd held a Master of Laws and was a longstanding member of the Queensland Law Society Insolvency Law Committee. He was chair of the committee for a number of years and made a substantial contribution to its development in its formative years.

Lloyd was also an editor of, and regular contributor to, the CCH Banking and Finance Law News publications and to Clayton Utz newsletters.

He was always willing to help others who were less fortunate than him and he worked hard to achieve the best results for them while not always being paid for his services. He loved to read, travel overseas and was an accomplished sportsman; having excelled in cricket, golf and tennis (in fact he was still bowling cricket balls in senior matches and/or down at the local nets in Brisbane and Sydney just prior to his passing).

Lloyd loved a good story and would enthusiastically entertain staff, clients, accountants and other groups in various sporting competitions and events, and on



some occasions took them to concerts given by AC/DC, the Rolling Stones, Robbie Williams, etc.

He enjoyed sweets with his coffee; he loved having desserts more than entrees and kept an extensive supply of Crunchie bars and chocolates for his staff in the bottom drawer of his desk.

He was a larger-than-life person who was highly regarded by his peers, clients and friends.

Lloyd will be sadly missed. A memorial service for Lloyd was held on 16 February at the Albert Street Uniting Church in Brisbane.

– Michael Reynolds, MGR Lawyers

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Networking 101

Build your knowledge, relationships and personal brand

Networking is one of the most important skills for a lawyer to develop.

Many young lawyers find it daunting or uncomfortable, but by knowing why, when and how to network, even an introvert can master the skill of (and even perhaps enjoy) networking.

Why do we network?

To build your knowledge and relationships

In an age where we can do everything from our computers and smart phones, stepping out of the office and connecting with people face-to-face still holds significant value. Ultimately most people prefer doing business with friends and likeminded people. An excellent lawyer will be a trusted adviser and confidant to their clients, and that relationship cannot be built and fostered from behind a screen.

Among other things, networking creates relationships and opportunities, facilitates communication, enhances your industry knowledge, and allows you to establish a career support structure.

To build your personal brand

A term that is used often in networking circles is 'personal brand'. Essentially your personal brand is your reputation – it's what other people say about you when you're not in the room. Your personal brand isn't all about your technical skills and the quality of work you produce; it's about who you are, what you do, and how you do it.

It is important to identify strengths and weaknesses in your personal brand, and to work to continually improve yourself. By improving your networking skills, you are strengthening your personal brand.

Networking opportunities

There is no shortage of networking opportunities for young lawyers.

Networking isn't all about connecting with clients and potential clients. It encompasses building relationships in a far broader network, including colleagues and members of the wider legal profession.

Firms and other organisations will often host networking events for their young lawyers to attend. This may include information presentations, informal drinks, formal cocktail parties, lunches, dinners and entertaining clients at sporting and cultural events. These events are great opportunities to network and build relationships with people within different sectors of your firm as well as your peers.

Network outside your organisation. External seminars, conferences, social events and alumni events are great opportunities to meet new people. Joining societies and industry associations will allow you to connect with like-minded people and keep up to date with industry developments.

Networking opportunities are not limited to pre-arranged events. Informal networking can take place online through social media platforms such as LinkedIn or simply in elevators, coffee shops, airports and public transport.

Networking tips and tricks

Some important tips and tricks to improve your networking skills are as follows:

Research and prepare: Research the attendees (including their jobs, employers, industries) before attending networking events, set some goals (such as a number of people you'd like to meet), think about some current affairs or current industry trends to discuss, bring business cards and turn up with a good attitude and looking well-presented.

Know how to join a conversation: Joining a conversation 'cold' can be difficult and sometimes awkward. Look for others who appear to be stranded, smile as you approach people, make eye contact with members of the conversation, use others as an introduction and start conversations while queuing for food or drinks.

Prepare to talk about yourself but ditch the sales pitch: First impressions are incredibly powerful. Have a 30-second description of yourself, and what you do, ready to use when necessary. However, keep this introduction casual and appropriate to the forum – remember you're not at an interview.

Have meaningful conversations: It's okay to start with small talk, but always be curious, authentic and sincere when conversing with others. Aim to ask both open and closed questions and actively listen to what others are saying.

Be polite and confident: Shake hands, remember and use people's names, maintain eye contact and acknowledge others.

Have an exit strategy: Think of some ways to politely exit a conversation – for example introduce someone new to the conversation and politely move on, or use a spontaneous interruption to ask for a business card and politely bring the conversation to an end.

Follow up: To build relationships is important to follow up with people you have just met after a networking event. Ask for business cards, connect with people on LinkedIn or send them articles about topics you may have discussed or you think would be of interest. After the initial follow-up, continue to stay in touch by catching up informally or inviting them to other events.

Successful networking requires an investment of your time, but it's an effort that every early career lawyer should be making, as **Amy Dunphy** and **Tom Ward** explain.



What not to do

Some common networking mistakes young lawyers should avoid are as follows:

Don't appear desperate: Networking isn't about schmoozing people. Be yourself and focus on simply building friendly, long-term relationships.

Have a conversation not a debate: Know the difference between a debate and conversation. While it is appropriate to discuss current affairs and trends, engaging in a debate about politics and religion should be avoided. It is fine to have different opinions. However, best practice is to politely steer the subject in a different direction rather than aggressively challenging other people's views (particularly on controversial topics).

Don't monopolise people's time: Try not to spend too much time with one person and take the opportunity to meet a number of people. Remember to use your exit strategy if needed.

Don't huddle with colleagues: It is easy to just huddle with other colleagues at networking events. Taking a colleague with you can provide a good confidence boost, but be mindful to meet other people (whether separately or together).

If necessary, limit your drinking: You might think that a few stiff drinks will help you relax and mingle. There's nothing wrong with a drink or two, but know your limit. When networking, you want to be sharp, clear and on top of your game. Remember to portray yourself as someone others want to work with, not necessarily drink with.

Go on, get out there

As a young lawyer you have a long career ahead of you. Aim to create long-term, quality relationships that will stay with you throughout your career, and make work just that bit more fun.

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee's Proctor working group is chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and William Prizeman (william.prizeman@legalaid.qld.gov.au). Amy Dunphy is a senior associate and Tom Ward is a lawyer at MinterEllison.

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Compliance with a search order

The role of the independent solicitor

The harmonised rules regarding search orders require that the court appoint at least one independent solicitor to supervise the enforcement of a search order.¹

There may be the temptation for an applicant to view the independent solicitor as a means of pressuring the respondent to comply with a search order.

The supervisory role may involve providing explanations to a respondent as well as, within reason, mediating disputes, but does not go so far as to empower the independent solicitor to force compliance. Recalcitrant or delinquent respondents are more properly dealt with through other sanctions, such as contempt of court.

This article focuses on the scope of an independent solicitor's role in securing the respondent's compliance with a search order (rather than an analysis of the entirety of an independent solicitor's responsibilities).²

What the independent solicitor cannot do

Fundamentally, search orders operate against the respondent personally and amount to a command from the court that the respondent permit inspection (among other things, depending on the terms of the orders). Accordingly, permission of the respondent is necessary before the search order can be executed.

This basis for the operation of search orders was explained in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch. 55, which is the seminal case that approved the inherent jurisdiction to grant search orders.

In *Anton Piller*, Lord Denning MR stated:

"But the order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises

entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: It brings pressure on the defendants to give permission. It does more. It actually orders them to give permission – with, I suppose, the result that if they do not give permission, they are guilty of contempt of court."³

This is reflected in the wording of the example orders contained in court practice directions.⁴

For that reason, an independent solicitor does not have the power to compel the respondent to comply with the search orders or forcibly enter the subject premises, although the respondent's refusal to comply may amount to contempt of court. However, as discussed below, the independent solicitor may, acting reasonably, open discussions with the respondent with a view to securing permission to execute the search.

What the independent solicitor can and should do

In *Microsoft Corp v Goodview Electronics Pty Ltd* (1999) 46 IPR 159, Branson J set out a list of matters that the "supervising solicitor" would be in a position to do, namely:

- give immediate and independent advice to the occupier as to the significance of the order
- ensure the occupier has an appropriate opportunity to obtain legal advice (if desired)
- to mediate any dispute as to whether any particular member of the applicant's search team is an unsuitable member of the team on the basis, for example, that he or she might derive commercial advantage from an inspection of the premises
- to ensure the proper protection of privileged documents (if any)
- to assess whether items or documents come within the terms of the court order and, in the case of doubtful material, to ensure its safekeeping pending an order of the court
- to ensure that an appropriate list is prepared of all items or documents to be removed from the premises
- generally, to assist in the smooth execution of the order.⁵

The rules of court generally state that the responsibility of the independent solicitor is to supervise the enforcement of the order and do other things in relation to the order the court considers appropriate.⁶

Practice directions (with associated model orders and undertakings) provide further guidance as to the usual responsibilities of the independent solicitor.⁷ Of course, the responsibilities of an independent solicitor in any particular circumstance will depend on the terms of the order of the court.

Consideration of the practice directions

The model orders and undertakings in the practice directions contemplate the following:

- that the independent solicitor serve the order and supervise its execution⁸
- that the independent solicitor explain the terms of the search order to the respondent (if required) and inform the respondent of his/her right to take legal advice⁹
- that the respondent keep the independent solicitor informed of steps he/she is taking and permit the independent solicitor to enter the premises (but not to start the search) while the respondent is seeking legal advice and gathering potentially incriminating or privileged documents¹⁰
- that the independent solicitor hold a thing pending resolution of a dispute as to whether it is a listed thing (and thereby covered by the order).¹¹

Moderation of the parties and its boundaries

In practice, part of the role of the independent solicitor includes moderating and seeking to resolve issues that may arise between the respondent and applicant's representatives.

In this respect, the independent solicitor may, by opening discussions with the respondent, secure the respondent's cooperation and compliance with the search order. This would serve to assist the smooth execution of the order and may assist the respondent avoid an allegation of contempt

An independent solicitor's supervision of a search order may involve moderating the relationship between the respondent and the applicant's representatives to facilitate the smooth execution of the order. However, a critical feature of this role is to safeguard the respondent – and an independent solicitor is not empowered to compel the respondent to comply with the order. Report by **Kylie Downes QC** and **James Byrnes**.



of court. However, generally it is prudent for an independent solicitor to avoid giving legal advice over and above drawing issues to the respondent's attention.

In engaging with the respondent, an independent solicitor should be cognisant of the limitations of the role. In particular, an independent solicitor should take care to exercise common sense, maintain impartiality and avoid being seen to behave in an oppressive manner, particularly in what may be an emotionally charged atmosphere.

If, despite the efforts of the independent solicitor, the respondent continues to refuse to comply with the terms of the search order, an appropriate sanction may be for the applicant to pursue the respondent for contempt of court. It is not for the independent solicitor to interfere so as to compel compliance with the search order in the event of an impasse.

Kylie Downes QC is a Brisbane barrister and member of the Proctor editorial committee. James Byrnes is a Brisbane barrister.

Notes

- ¹ Refer to rule 261E of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) and rule 7.46 of the *Federal Court Rules 2011* (Cth) (FCR). The wording of the UCPR will be used in this article. For consistency, the term 'search order' is used throughout this article and it is noted that search orders are also referred to as 'Anton Piller orders', after the decision in *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch. 55.
- ² For such an analysis, albeit in the English context, refer to Willoughby T, 'The Role of the Supervising Solicitor' (1999) 18 CJQ 103.
- ³ *Anton Piller*, Lord Denning MR at 60.
- ⁴ For example, refer to Supreme Court of Queensland Practice Direction No.2 of 2007 (Appendix: Pro-forma Search Order at paragraph 7) and the Search Orders Practice Note (GPN-SRCH) in the Federal Court (and Annexure A at paragraphs 6, 8 and 9).
- ⁵ *Microsoft Corp v Goodview Electronics Pty Ltd* (1999) 46 IPR 159, Branson J at [30]. For a summary of the development of the role in the United Kingdom, refer to Willoughby T, 'The Role of the Supervising Solicitor' (1999) 18 CJQ 103 (which Branson J referred to in *Microsoft Corp* at [31]).
- ⁶ Rule 261E of the UCPR and rule 7.46 of the FCR.
- ⁷ For example, refer to Supreme Court of Queensland Practice Direction No.2 of 2007 and the Search Orders Practice Note (GPN-SRCH) in the Federal Court.

- ⁸ Supreme Court of Queensland Practice Direction No.2 of 2007 (Appendix: Pro-forma Search Order at paragraph 6) and the Search Orders Practice Note (GPN-SRCH) in the Federal Court at paragraph 2.11(a) and (d).
- ⁹ Supreme Court of Queensland Practice Direction No.2 of 2007 (Appendix: Pro-forma Search Order at paragraph 9(b) and Schedule B, Undertakings Given to the Court by the Independent Solicitor at paragraph 2) and the Search Orders Practice Note (GPN-SRCH) in the Federal Court at paragraph 2.11(b) and (c).
- ¹⁰ Supreme Court of Queensland Practice Direction No.2 of 2007 (Appendix: Pro-forma Search Order at paragraph 12) and the Search Orders Practice Note (GPN-SRCH) in the Federal Court (Annexure A at paragraph 14).
- ¹¹ Supreme Court of Queensland Practice Direction No.2 of 2007 (Appendix: Pro-forma Search Order at paragraph 13) and the Search Orders Practice Note (GPN-SRCH) in the Federal Court (Annexure A at paragraph 15).

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App-based companies in the gig economy

Are they your regular web-footed, quacking waddlers?

Companies based on digital applications (apps) operating in the gig economy¹ typically categorise themselves as ‘technology companies’, providing a platform to connect willing workers to paying customers.

In Australia and overseas, workers for app-based companies are engaged as self-employed independent contractors, as opposed to employees.

This classification was recently challenged in a decision in the United Kingdom, which involved two Uber drivers. It was determined that the Uber drivers in this case were not self-employed but workers entitled to minimum wages, paid breaks, and holiday and sick pay. Uber UK is appealing this decision.

With test cases being filed in the United States against food delivery companies DoorDash and GrubHub, and law firm Maurice Blackburn investigating the classification of Deliveroo and Foodora riders in Australia, it is only a matter of time before the status of workers engaged by app-based companies in Australia is also tested.

While the app-based company business model and technology may be new, the Fair Work Commission and courts are experienced at applying the ‘quacks like a duck’ test in circumstances in which what is documented in the contractual relationship bears little resemblance to the actual work relationship.

Independent contractor or employee?

As the frequently cited statement by Justice Gray goes, “the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck”.²

More recently, Fair Work Commission deputy president Gostencnik said: “That which has webbed feet, waddles and quacks is likely to be a duck. Putting a saddle on it and calling it Phar Lap will not change that fact.”³

The commission and courts look beyond the contractual description of the relationship and into the real substance of the parties’ roles, functions and work practices.

The judiciary looks at the totality of the relationship between the parties, and does so by considering the following factors:

- the level of control over when, where and how work is performed
- the worker’s ability to negotiate their own rates
- the worker’s ability to delegate the performance of part or all of the services
- the worker’s ability to generate goodwill and carry on the business as a going concern
- whether the worker is paid on a result or time basis
- whether the worker owns and uses their own tools, equipment or premises for the purpose of performing the service, and
- whether the worker is the emanation of the head company to the world at large – for instance, is the worker required to wear a uniform?⁴

Are Uber drivers employees or contractors?

The position in the UK

In the decision of *Aslam, Farrar & Others v Uber B.V., Uber London Ltd and Uber Britannia Ltd*,⁵ a UK tribunal found that Uber’s written contract with its drivers did not correspond with “practical reality”⁶ and accused Uber UK of “resorting in its documentation to fictions, twisted language and even brand new terminology”.⁷

Uber UK argued that it was not bound by employment obligations because, rather than drivers providing a service to Uber, Uber was providing a service to drivers by providing access to customers and a payment system via its app.⁸ Uber’s case was that it was not a business providing transportation services, rather a technology company providing a platform to connect willing workers to paying customers.

The UK tribunal found it was “unreal” to deny that Uber was in business as a supplier of transportation services.⁹ It said the “notion that Uber in London is a mosaic of 30,000 small businesses linked by a common platform is to our minds faintly ridiculous”.¹⁰

The tribunal also rejected Uber UK’s argument that it helped drivers grow their own businesses, saying this was not supported by the facts, such as rules that drivers could not solicit the custom of particular passengers or contract on any terms or conditions other than those set by Uber.

The position in the US

In 2015, the Labor Commissioner of the State of California reached a similar finding in *Barbara Ann Berwick v Uber Technologies, Inc., A Delaware corporation, and Rasier-CA LLC, a Delaware limited liability company*.¹¹

In this case, Uber ran a similar argument that it provided a technological platform that private vehicle drivers and passengers use to facilitate private transactions,¹² and that it exercised very little control over driver activities.¹³ Uber denied exerting control over the hours worked by its drivers and said it did not reimburse drivers for expenses relating to operating their personal vehicle.¹⁴

Similar to the finding in the Uber UK decision, the Labor Commissioner rejected Uber’s argument that it was nothing more than a neutral technological platform. It found that Uber was in the business of providing transportation services to passengers and that, without drivers, its business would not exist. The reality was that Uber was involved in every aspect of the operation, according to the Labor Commissioner.

Australia will soon see judicial scrutiny of the employer-employee relationship in the gig economy. **Sara McRostie** and **Laura Regan** report on the view now being taken by British and American authorities.



As a result, the Labor Commissioner found that the plaintiff driver in the matter was Uber's employee under the applicable US labor law. Uber is appealing the decision.¹⁵

If it quacks like a duck...

The lesson for Australian businesses that engage independent contractors, either under the gig economy business model or through traditional arrangements, is that the courts and commission will look beyond the contractual description of the relationship and into the real substance of the relationship. If the reality is that it has webbed feet and quacks like a duck, then, technology aside, it probably is just another duck.

Sara McRostie is a partner and Laura Regan is a senior associate at Sparke Helmore Lawyers.

Notes

- ¹ The gig economy encompasses people working independently (freelancing) – often utilising technology – rather than in traditional employment arrangements.
- ² *Re Porter; ex parte TWU* (1989) 34 IR 179 at 184.
- ³ *National Union of Workers v ePharmacy Pty Ltd* [2015] FWC 3819 at [26].
- ⁴ See generally *Stevens v Brodribb Sawmilling* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Abdalla v Viewdaze Pty Ltd* (AIRC FB, 14 May 2003, PR927871).
- ⁵ *Aslam, Farrar & Others v Uber B.V., Uber London Ltd and Uber Britannia Ltd*, 28 October 2016, United Kingdom Employment Tribunal, Case No.2202550/2015 & Others.
- ⁶ *Ibid* at [90].
- ⁷ *Ibid* at [87].
- ⁸ *Ibid* at [89].
- ⁹ *Ibid*.
- ¹⁰ *Ibid* at [90].

¹¹ Case No.11-46739 EK.

¹² *Barbara Ann Berwick v Uber Technologies, Inc., A Delaware corporation, and Raisier- CA LLC, a Delaware limited liability company* Case No.11-46739 EK at page 4, line 25.

¹³ *Ibid* at page 8, line 2.

¹⁴ *Ibid* at page 6, line 5.

¹⁵ Uber appealed the ruling on June 16, 2015 to the Superior Court of California, County of San Francisco, Case No. CGC-15-546378.

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This month, we profile three QLS Senior Counsellors who practise in the Toowoomba region – Stephen Rees, Tom Sullivan and Kathy Walker.

Stephen Rees

What motivated you to become a QLS Senior Counsellor?

It is essential that our profession maintains the highest ethical and professional standards and ensures continuity of standards for future generations of lawyers. Critical to that is the role of mentors for both new and experienced lawyers who may need to talk through a problem with an independent, objective and confidential advisor.

I wanted to contribute and believe my background of 34 years in legal practice and involvement in outside organisations equips me to understand and empathise with the travails of modern practice as well as provide guidance on practical and ethical issues.

What is the best part about being a QLS Senior Counsellor?

For the most part I am consulted by colleagues who need help, or a second opinion, about making ethical decisions rather than those who are in trouble for past wrongs. We often discuss matters involving value judgments about conflicts between running a business and meeting ethical obligations, including the sometimes conflicting obligations to clients, the profession and the administration of law. It is satisfying to help colleagues by providing advice and by being a sounding board. And it is heartening to sense the relief experienced by my callers. I also very much enjoy attending the annual QLS Senior Counsellors Conference. Great to catch up with and share ideas with a group of dedicated, experienced and wise practitioners.

What do you like to do during your time off?

I'm a great fan of having a balanced life. For me, this involves getting involved in community activities, spending time with my family and friends, working in my garden, keeping fit (age-related aches and pains notwithstanding) and overseas travel. I recently returned from my seventh trip to Nepal where I enjoy trekking and mountaineering.

What is your favourite area of practice?

It is not so much the area of law that I favour but the experience of creativity in addressing problems whether it be by helping parties negotiate agreements, mediate disputes, plan their business and estate affairs or decide upon case theory and tactics in court. I enjoy working collaboratively with lawyers and other professionals to achieve satisfactory outcomes for clients. My other favourite thing is the friendship of my staff, all of whom have been with me for many years.

Can you provide an overview on your general experience as being a QLS Senior Counsellor?

The role offers a great way to assist fellow practitioners and, by example and mentoring, provide a means of passing on and encouraging practitioners in the noblest traditions of our profession despite the distraction of marketing and pressure of competition. There's more QLS Senior Counsellors can do, if only colleagues would more readily pick up the phone.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

Make your own way, but if you want to know what, at the end of my career, I will most cherish about my practice in law, it is the time I have given freely to benefit others rather than making money.

What do you like about your region?

Toowoomba is a modern, vibrant regional centre... great shopping, terrific schools, parks and gardens and a cool evening breeze, delightful to step into after returning from a February day in the Brisbane Family Court, and an ideal place to raise a family.

Tom Sullivan

What motivated you to become a QLS Senior Counsellor?

I was the Queensland Law Society president in 2002/03 and having met so many solicitors throughout our state I realised that many solicitors, especially in country Queensland and small practices, were delighted to be able to speak to a solicitor who understood how the Queensland Law Society worked and who could provide sensible practical advice. For that reason, I accepted a role as Senior Counsellor at that time.

What is the best part about being a QLS Senior Counsellor?

As a young solicitor in the 1970s I found back then that many of the older, more experienced practitioners I dealt with were so very helpful with practical advice, which assisted me greatly as a young practitioner. As a result, I have always adopted the policy of trying to help other practitioners wherever I can.

What do you like to do during your time off?

I have a great love of travel and have travelled extensively all around the world with my wife and family. I enjoy the beach and have a unit at Broadbeach where I spend a lot of my leisure time. I also enjoy playing golf and love following football, cricket, tennis and the races.

What is your favourite area of practice?

I enjoy all facets of general practice and work in diverse areas of the law, but mainly in estates and property development.

Can you provide an overview on your general experience as being a QLS Senior Counsellor?

I find that most solicitors who seek my advice are simply looking for a sounding board to point them in the right direction. I think it always helps to have someone independent assess various situations practitioners find themselves in.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

I think the most important piece of advice I could give to a solicitor commencing a career in law would be to maintain a lifestyle balance with regular breaks from practice so as to enjoy their life and family. Ever since I commenced in practice with Lionel Davidson in 1979 I have always taken regular holidays. I opine that with the demands of practice these days all practitioners should try to have at least four weeks' leave each year. Many large employers currently insist on their employees taking their holidays every year.

What do you like about your region?

Toowoomba and the Darling Downs are very pleasant places to live and practise law in. I find all practitioners look to work harmoniously together. (I might add that I do not do family law work, which probably helps!)

Kathy Walker

What motivated you to become a QLS Senior Counsellor?

During my early years in practice, I experienced the challenges of working in a small and more remote firm that didn't have access to 'in-house think tanks', friendly counsel, an extensive library or precedent banks, or sometimes just someone to talk to about professional issues. There was no maternity leave. I felt it was my turn to share some of my experience and resources with newly admitted and senior practitioners alike. I have been a Senior Counsellor for over 20 years now.

What is your background?

I've spent time on the committees of local law associations and as a pro bono volunteer with community legal services.

I've been the 'rural rep' on the then Solicitors' Board for a number of years and provided legal services to three generations of many families and businesses.

What do you do in your time off?

I still play sport and enjoy reading biographies of the famous and not so famous.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

As soon as you realise you need help, go and get some. There are lots of confidential resources available.

What do you like about your region?

The clean country air and friendly community. Having a log fire in winter. Knowing wherever our kids travel in the world, 'Facebook' will find a friend from home with a spare couch.

To learn more about QLS Senior Counsellors, see qls.com.au > QLS Ethics Centre > QLS Senior Counsellors. Contact details for QLS Senior Counsellors are listed at the back of each edition of *Proctor*.

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Missing deadlines

The costly lesson learnt from *Mortimer v Lusink & Ors*

with Christine Smyth



How one reacts when they realise they have been excluded from a will is a personal matter.

Many people, acutely aware of the sensitivity usually associated with a loved one passing, will patiently remain in the background for fear of 'upsetting the applecart' or causing additional distress. This can, as was demonstrated in the recent Supreme Court case of *Mortimer v Lusink & Ors* [2017] QSC 119 (*Mortimer*), mean that important deadlines are missed if you are seeking further or better provision of an estate.

Time limits apply for commencing proceedings and limitation periods vary in each jurisdiction. In Queensland, section 41(8) of the *Succession Act 1981* (Qld) sets out that an application for proper maintenance and support must be brought within nine months of the will-maker's death. In *Mortimer*, the court considered the scenario in which the application was brought outside the limitation period – albeit by only nine days.

At first instance, the court refused to grant the applicant an extension. The decision reiterates that time is of the essence and persuading a court to grant an extension to a statutory time limit is a rare and difficult thing. (The case at first instance also demonstrated that a court's power under s41 is a discretionary one and that there is no automatic right for a party to be granted either an extension of time or successful order for further provision.)

The Court of Appeal, however, diverged from this decision as it found that the primary judge failed to inquire whether the appellant's claim was one that was clearly unlikely to succeed or would probably fail. In doing so, the Court of Appeal was of the view that the failure to consider the viability of the appellant's claim caused the primary judge to improperly dismiss the application.

As such, the Court of Appeal set aside the Supreme Court's orders and upheld the appellant's claim to make an application, despite exceeding the limitation period.

The Court of Appeal's reasoning in *Mortimer* demonstrates a pattern which requires that sufficient judicial analysis of whether

an application has a reasonable degree of success must occur, in the course of determining whether to uphold an appeal.

We see this also in the decision of *Frastika v Cosgrove as executor of the estate of Russell Walter O'Halloran (Deceased)* [2016] QSC 312, which considered an application to contest brought 63 days after the limitation period. In *Cosgrove*, Justice Boddice considered those factors which might impact on the success or failure of application, including the value of the estate, the relationship duration and relatively short marriage of only eight months and concluded that "the applicant would have difficulty in establishing that the limited provision made for her in the deceased's will was inadequate, having regard to the sizable provision made for her through the binding death benefit nomination".

A large number of estate matters filed in the court relate to applications seeking further and better provision of the estate. The Society's Succession Law Committee has undertaken recent advocacy in this area.

QLS Succession Law Committee advocacy

The Society's Succession Law Committee has a long history and is charged with reviewing, advocating and consulting with government and judiciary on areas impacting on succession law. In recent months, the committee has provided consultation and feedback in relation to:

- the District Court's draft practice directions in relation to family provision applications, which demonstrated the divergent views of the profession on certain issues. The Society, headed by president Smyth, later met with Chief Judge O'Brien and Judge Dorney alongside members of the Bar Association, to further discuss these issues.
- the current guardianship laws in Queensland, which have been an ongoing area of interest. The committee is now providing feedback in relation to the Guardianship and Administration and Other Legislation Amendment Bill 2016.
- proposed reform to enduring powers of attorney legislation, which reflected on interstate legal aspects, the onus that lies on the practitioner, and liability issues

- meetings with the Public Trustee, regarding the need for a dedicated enquiries officer to respond to practitioner enquiries
- proposed amendments regarding suggested improvements to the court-made wills protocol
- providing feedback in relation to a Queensland Law Reform Commission-led review of the *Trusts Act 1973*.

Additionally, members of the committee regularly meet with the Supreme Court Registry to discuss matters including the number of applications filed, processing times, common requisitions and other notable issues.

The committee welcomes feedback on any practice items or areas of succession law reform. Please contact QLS policy solicitor Vanessa Krulin on (07) 3842 5872 or v.krulin@qls.com.au.

The author expresses her gratitude for the assistance provided by QLS policy solicitor Vanessa Krulin in the preparation of this column. Christine Smyth is president of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, QLS Specialist Accreditation Board, the *Proctor* editorial committee, STEP, and an associate member of the Tax Institute.

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Supreme Court Oration 2017

The Supreme Court Oration 2017 on 'Judicial Method in the 21st Century' will be presented by new High Court Chief Justice Susan Kiefel AC on Thursday 16 March 2017.

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High Court and Federal Court casenotes

High Court

Contract – construction of terms – rectification

In *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47 (7 December 2016) the corporation required certain undertakings to be provided and Simic, as the director of a company named Nebax (the third respondent), provided necessary details for the documents to an employee of ANZ (the second respondent). The details given were wrong and referred to a non-existent entity, rather than the corporation, as was required. The corporation later sought to enforce the undertakings and ANZ refused on the basis that the corporation was not named in the documents. The corporation argued that the documents could be construed as referring to it, or, alternatively, that the documents should be rectified to refer to it. The High Court held that the documents were to be construed objectively by reference to their text, context and purpose in the usual way. On those principles, the undertakings could not be construed as referring to the corporation. However, it was appropriate to rectify the documents as there was an “agreement” between the parties in the sense of a “common intention” (ascertained by reference to the parties’ words or actions) that the undertakings should operate by reference to the corporation. The documents did not reflect that intention because of a common mistake. Gageler, Nettle and Gordon JJ jointly; French CJ and Kiefel J separately concurring. Appeal from the Supreme Court (NSW) allowed in part, cross-appeals allowed.

Criminal law – sentencing – ‘current sentencing practices’

In *The Queen v Kilic* [2016] HCA 48 (7 December 2016) the respondent pleaded guilty to intentionally causing serious injury after pouring petrol on his girlfriend, who was pregnant with his child, and igniting the petrol. The victim survived, but with serious and ongoing injuries. The pregnancy was terminated. The sentencing judge imposed a total effective sentence of 15 years’ imprisonment with a non-parole period of 11 years. The Court of Appeal held that to be manifestly excessive, stating that it was so disparate with current sentencing practices that there had been a breach of the principle of equal justice. The High Court set aside that judgment and reinstated the original sentence. The court held that the Court of Appeal erred by impermissibly treating the sentences in the few cases available as defining the sentencing range, and finding that the sentence in this case was excessive because it exceeded the sentences in most similar cases. Having observed correctly that the offence in this case was at the upper end of the range of seriousness, the question for the

court was why a sentence of 14 years, when the maximum was 20, for an offence at the upper end of seriousness, was manifestly excessive. The High Court held that, given the circumstances of the case, that sentence was not unreasonable or plainly unjust. Bell, Gageler, Keane Nettle and Gordon JJ jointly. Appeal from the Supreme Court (Vic) allowed.

Competition – anti-competitive conduct – markets – ‘in competition’

See competition law article, page 26.

Land rights – claimable Crown lands, ‘lawful use or occupation’

In *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50 (14 December 2016) the High Court held that land in Berrima could not be claimed under the *Aboriginal Land Rights Act 1983* (NSW) because it was in lawful use or occupation. The Act allowed for the council to claim lands that were “claimable crown lands”. Excluded from that definition was land “lawfully used or occupied”. The land in question had in the past been used for jail and correctional facility purposes, but that had ceased and the proclamations for those uses had been revoked. The state of New South Wales remained the registered proprietor of the land. It was held at first instance that the land was in use given that it was guarded, buildings were locked, services continued to be supplied, lands and buildings were maintained, and gardens were visited by the public. The Court of Appeal upheld the finding. The High Court affirmed that the question was one of fact. The court held that the land was occupied because of the activities taking place on it. It did not need to be actively used for its dedicated jail purposes to be “lawfully occupied” as that would deny “occupied” a separate sphere of operation from “used”. The court also held that no further statutory authorisation was required – s2 of the NSW Constitution retained the executive’s power to appropriate waste lands subject to legislative control or restrictions. Further, as the owner of the land, the state was empowered to occupy the lands through its agents. French CJ, Kiefel, Bell, and Keane JJ jointly; Gageler J concurring separately; Nettle and Gordon JJ jointly dissenting. Appeal from the Supreme Court (NSW) dismissed.

Tax law – unit trusts – public trading trusts

In *ElecNet (Aust) Pty Ltd v Commissioner of Taxation* [2016] HCA 51 (21 December 2016) the High Court held that a trust known as the Electrical Industry Severance Scheme (scheme) was not a public trading trust within Division 6C of the *Income Tax Assessment Act 1936* (Cth) because it was not a “unit trust”. The scheme allowed for employers in the electrical contracting

industry to become members. Members were obliged to make payments to ElecNet as trustee of the scheme. If an employee of a member was made redundant, ElecNet made a payment to the employee. ElecNet sought a private ruling that it was a public trading trust, which would allow it to pay income tax at a lower rate. An essential criterion of a public trading trust was that it was a unit trust. The High Court applied the ordinary meaning of unit trust, being a trust under which the beneficial interests were divided into units, which when created or issued are held by the persons with interests in the trust, for whom the trustee maintains and administers the trust estate. This would ultimately turn on the construction of the trust deed. In this case, there were no such units. ElecNet simply made payments out of the estate to redundant workers. The worker’s entitlement was not “unitised” and it was not analogous to a share in a company or similar. No “right” was held by the worker that was cancelled, extinguished or redeemed when the worker was paid. Kiefel, Gageler, Keane and Gordon JJ jointly; Nettle J separately concurring. Appeal from the Full Federal Court dismissed.

Building and construction law – security of payment – statutory construction – progress payments

In *Southern Han Breakfast Point Pty Ltd (in liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52 (21 December 2016) the High Court held that a “reference date” under a construction contract is a necessary precondition to the making of a valid payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) and that there was no such date in the present case. Southern Han and Lewence were parties to a relevant contract. On 27 October 2014 Southern Han gave Lewence a notice purporting to exercise a right under the contract to take remaining work away from Southern Han for breach. Lewence treated the notice as a repudiation of the contract. It purported to accept the repudiation on 28 October 2014 and terminated the contract. Lewence then served on Southern Han a claim for payment. The issue for the High Court was whether it was necessary for a “reference date” to have arisen under the contract for the payment claim to be valid (and hence for an adjudicator under the Act to have jurisdiction). The High Court held that a claim could only be made by a person entitled to a “progress payment” as defined by the Act. A person was entitled to such a payment only on and from each reference date under the contract. A reference date was therefore a necessary precondition to a valid claim. In this case, the contract specified dates (the 8th of each month) upon which progress payment claims could be made. The remaining question was whether 8 November 2014 could be a reference

with Andrew Yuile and Dan Star



date, given the events of 27 and 28 October 2014. The court held that, however one construed those events, Lewence would have no right to make a claim for payment. Therefore, there was no reference date and the payment claim was not valid. Kiefel, Bell, Gageler, Keane and Gordon JJ jointly. Appeal from the Supreme Court (NSW) allowed.

Criminal law – child offending – presumption of incapacity between 10 and 14 – rebuttal of presumption

In *RP v The Queen* [2016] HCA 53 (21 December 2016), the High Court considered the evidence required to rebut a presumption of incapacity for criminal responsibility in a child aged between 10 and 14. The presumption can be rebutted if it is shown that the child knew the action was morally wrong. RP was relevantly charged with two counts of sexual intercourse with a child under 10, being his half-brother. The appellant was about 11 and the complainant about six at the time of the offending. The trial judge held the presumption to be rebutted from the circumstances of the offending, which included that the intercourse took place while the children's father was out of the house, RP forced the complainant into the act, RP stopped when the father returned home, and RP told the complainant not to say anything. The only other evidence available were two expert reports, which showed (among other things) that RP was borderline intellectually disabled and of very low intelligence. There was some suggestion of sexual abuse in the household. The High Court held it could not be assumed that the circumstances demonstrated understanding of moral wrongdoing. There was no relevant evidence from RP's parents or school, or evidence about the child's environment that shed light on his moral development. In the absence of evidence on these subjects, it was not open to conclude that it had been proved beyond reasonable doubt that the appellant, with his intellectual limitations, knew that his actions were seriously wrong in a moral sense. Kiefel, Bell, Keane and Gordon JJ jointly; Gageler J separately concurring. Appeal from the Supreme Court (NSW) allowed.

Andrew Yuile is a Victorian barrister, phone 03 9225 7222, email ayuile@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au.

Federal Court

Courts and appeals – when a significant delay between the trial and the delivery of judgment gives rise to appellable error

In *Auguste v Nikolyn Pty Ltd* [2016] FCA 1579 (23 December 2016) the Federal Court (McKerracher J) dismissed an appeal from the

Federal Circuit Court of Australia (FCCA). One of the grounds of appeal from the decision of the FCCA raised whether significant delay in the delivery of judgment following trial had an operative effect on the conclusion of that judgment.

The proceeding in the FCCA was a building dispute in the form of a misleading and deceptive conduct claim. Mr Auguste brought a claim against building company Nikolyn Pty Ltd and its director in relation to plumbing works for a subdivision development on his land. The claim was in essence for damages caused by delay in construction of compliant plumbing works. The claim was dismissed by the FCCA and a significant portion of the counterclaim was allowed.

The judgment of the FCCA was delivered almost 23 months after the trial and five months after the FCCA stated that the judgment was anticipated to be delivered (at [58]-[59]). One of the grounds of appeal was that the conclusion of the trial judge was flawed by reason of the delay in judgment delivery (at [56](1)).

McKerracher J analysed the legal principles and authorities on excessive judgment delay at [62]-[63], in particular the reasons of the Full Federal Court in *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 (Allsop CJ, Jessup J and White J). The critical question was "whether there is operative delay. That is, whether the delay can be seen as being problematic in the sense of confidence being placed in the judgment" (at [65]). Examples given of operative delay dealt with issues on only a cursory basis or overlooked clearly critical evidence. Bare credit findings based on impressions of a witness would be the findings most vulnerable to attack on the basis of excessive delay (such as in *Tattsbet*): see at [66]. However, McKerracher J held that none of the findings of the FCCA fell into that category (at [67]).

Further the court held at [78] that: "Notwithstanding the delay, the reasons demonstrate that his Honour considered all of the evidence, such that it is clear that no delay had an operative effect on the conclusion reached to dismiss Mr Auguste's claim and allow the cross-claim".

The remaining grounds of appeal in relation to misleading and deceptive conduct and other matters also failed.

Consumer law – unconscionable conduct under the Competition and Consumer Act 2010

In *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 1472 (8 December 2016), the Federal Court (Yates J) dismissed the ACCC's claim of unconscionable conduct against Woolworths.

The proceedings concerned whether Woolworths engaged in trade or commerce in conduct in connection with the acquisition or possible acquisition of goods from its suppliers that was, in all the circumstances, unconscionable and in breach of s21(1) of the *Australian Consumer Law* (ACL), which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

The ACCC alleged that the design and implementation of Woolworths' 'Mind the Gap' scheme was unconscionable. Under the scheme, Woolworths sought payments from certain suppliers who had underperformed for a certain period relative to the previous corresponding period according to certain metrics. The aim was to improve the gross profit position of Woolworths and bridge the gap between Woolworths' targeted and expected profits (at [90]). As things transpired, the scheme raised more than \$18m.

The ACCC's case was documentary and it called no witnesses. The ACCC did not call any evidence from any supplier affected by the scheme (at [8]-[9]). Woolworths called evidence from witnesses such as its relevant director and managers (at [11]-[17]). Woolworths (but not the ACCC) called evidence on the commercial dynamics of supermarket businesses (at [33]). Woolworths' evidence illustrated that while the scheme was a coordinated approach to seeking payments from suppliers in December 2014, the individual approaches made at that time were no different in character to the approaches typically made to individual suppliers at other times in the normal course of Woolworths' trading relationship with those suppliers (at [43]). Further, "the 'asks' made as part of the [scheme] were instances of the normal commercial negotiations that category managers and buyers routinely enter into with suppliers albeit that the [scheme] was a focused and coordinated approach to suppliers in a particular period... that was targeted to improving, by one means, Woolworths' financial performance..." (at [118]).

The ACCC's pleaded case was that Woolworths' systematic conduct in implementing the scheme was unconscionable (at [124]). The focus of the ACCC's case was the design and implementation of the scheme. Its case was not that Woolworths engaged in particular conduct with regard to one or more particular suppliers that was unconscionable in all the circumstances concerning those particular suppliers (at [126]). Justice Yates distinguished the conduct in issue in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (Gordon J) which concerned specific conduct directed to certain suppliers in the course of seeking payments that was alleged, admitted and found to be unconscionable (at [127]; see also [143]-[149] and [244]).

The court considered the meaning of 'unconscionable' in s21(1) of the ACL by reference to relevant cases (see from [129]). Having done so, Yates J said at [142]: "... the characterisation of conduct, in trade or commerce, as 'unconscionable' is not arrived at by a process of personal intuitive assertions or idiosyncratic notions of commercial morality. The characterisation of the conduct in issue is plainly informed by fact-finding concerning the nature of the relationships involved, by which the relevant norms are to be identified. Woolworths called evidence on this subject, and its witnesses were cross-examined. The ACCC called no such evidence."

Ultimately, in its consideration of the case against Woolworths, the court rejected the many propositions relied on by the ACCC to make its case of unconscionable conduct (at [191]-[262]). Justice Yates concluded at [263] that: "It may be that some would see Woolworths' conduct in making 'asks' and seeking 'payments' as unjustified, unfair or unjust according to their own standards of commercial propriety. This, however, is not the proscriptive standard that s21(1) of the ACL imposes. I hasten to add that I have made no such evaluation myself. I mention these matters only to distinguish the task of the Court from the casual and informal judgments made by others. My task has been to consider the nature of the case that has been pleaded, the evidence that has been adduced, and the legal requirements of s21 read in light of s22(2) of the ACL and the authorities describing the operation of these, and like, provisions."

Industrial law – penalty for breach of the Fair Work Act 2009 – whether court has power to order another person not to indemnify the contravenor against his or her liability to pay the penalty

In *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2016] FCAFC 184 (21 December 2016), the Full Court upheld the appeal in part.

At first instance the Construction, Forestry, Mining and Energy Union (CFMEU) and Joe Myles ultimately admitted liability for contravention of s348 [intent to coerce] of the *Fair Work Act 2009* (FW Act). Orders were made imposing penalties on both the CFMEU and Mr Myles. In addition, the primary judge (Mortimer J) made the following (Order 13):

"The [CFMEU] must not directly or indirectly indemnify [Mr Myles] against the penalties in paragraphs 9 and 10 above in whole or in part, whether by agreement, or by making a payment to the Commonwealth, or by making any other payment or reimbursement, or howsoever otherwise."

The Full Court set aside Order 13, holding that there was no statutory foundation for it (Allsop CJ and Jessup J in separate judgments, North J agreeing with both). The Full Court held that s545(1) of the FW Act, which was the only source of power relied on by the primary judge, did not authorise Order 13 (at [15], [26] and [66]). Among many other matters, the court observed that if

s545(1) provided power to authorise Order 13, it would also be a source to make orders preventing anyone from assisting contravenors to meet penalty payments. Such intrusion into personal freedoms required clear statutory power (at [13] and [61]).

The Full Court also upheld the ground of appeal that the primary judge denied natural justice to the CFMEU in relation to its use of a financial report which had been tendered for limited purposes but was used by the primary judge for another purpose not stated at trial without warning to the CFMEU (at [17], [28] and [75]-[85]).

Other grounds of appeal were dismissed. There was no breach of natural justice by the primary judge's finding that the union engaged in a deliberate strategy of defending knowingly unlawful action and eventually capitulating when the time was right (at [18], [29] and [92]-[97]). It was open to the primary judge to give minimal weight to the CFMEU's admissions (at [19], [29] and [104]-[105]). The primary judge's discretion did not miscarry in relation to the significant quantum of the penalty imposed on Mr Myles (at [20]-[21], [30] and [121]-[128]).

Dan Star is a barrister at the Victorian Bar and invites comments or enquiries on 03 9225 8757 or email danstar@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au.



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No property order – after 27 years

with Robert Glade-Wright



Property – 27-year same sex relationship – Full Court upholds decision not to make a property order

In *Chancellor & McCoy* [2016] FamCAFC 256 (2 December 2016) the Full Court (Bryant CJ, Thackray & Strickland JJ) dismissed with costs Ms Chancellor's appeal against Judge Turner's decision that it would not be just and equitable to grant her application for a property order. The trial judge found that there had been no intermingling of finances or joint bank account; each acquired property was in their own name; each was responsible for their own debts and could use their earnings as they chose without explanation ([27]).

The Full Court said (at [35]-[36]):

"It was ... submitted that the absence of 'future plans or goals' was not a relevant consideration ... Although her Honour did not say so ... we understand her reference to the absence of 'future plans or goals' to be part ... of her findings about how the parties kept their affairs separate and conducted their financial lives without being accountable ... to the other party. (...)

There was ... 'common use' of the homes owned by the respondent, but there was also a modest periodic payment by the appellant referable to her occupation of those homes. Furthermore, her Honour made no findings that would point to any 'express and implicit assumptions' [per *Stanford* [2012] HCA 52 at [42]] that the parties would ultimately share in the other's property. On the contrary, her Honour properly placed significance on the fact that neither had taken any steps to ensure that the other would receive their property or superannuation in the event of death, and indeed the respondent had executed a will giving her entire estate to her parents. In the absence of evidence of any assumption by the parties that one would benefit on the death of the other, it would not have been open to her Honour to conclude, without evidence, that there was any assumption that there would be some redistribution of wealth upon termination of the relationship by means other than death."

Children – mother loses appeal against order for hyphenation of child's surname

In *Reynolds & Sherman* [2016] FamCAFC 240 (29 November 2016) the Full Court (Ryan, Murphy & Aldridge JJ) dismissed with costs the mother's appeal of Judge Baumann's order that the parties' three-year-old child have the surname 'Reynolds-Sherman'. The parties had a relationship for one month and never lived together. The child lived with the mother. The Full Court said (from [71]):

"The mother submitted that it would be confusing if the child did not have the same surname as the parent with whom he lives ... [and] that ... the child will be attending the same school as the mother ... ([who] is training to be a teacher) and that it will be embarrassing for the child to constantly explain to people why they have different surnames. (...)

[73] ... [T]he primary judge ... rejected, the mother's submission ... [and] the experience of this Court demonstrates it is now common for children to have a different surname from at least one of their parents, even in intact relationships.

[74] We consider that the finding was one that could be made on the evidence and that no error has been shown."

The Full Court (at [92]) approved Judge Baumann's conclusion that he was "satisfied that it is in the best interests of [the child] that he have a surname which accurately reflects his heritage. To do so enhances his sense of identity with both his father and the mother and their extended families."

Children – interim relocation from southern NSW coast to Darwin allowed

In *Larsson & Casey* [2016] FamCA 971 (16 November 2016) Gill J allowed the mother's appeal against an interim order of a local court when transferring the case to the FCC at Canberra which restrained her from relocating a child in her care to Darwin. The parties who had two children, 'C' (born in 2002) and 'B' (born in 2006), separated in 2007. While both children initially lived with the mother, C began living with the father in 2012. From 2014 the parents lived 500km apart, B living with the mother and C living with the father. The mother remarried ('Mr Larsson') and had two children of her new

relationship. The mother sought permission to take B with her to live in Darwin, Mr Larsson having moved there for work (with the children of that relationship). The father opposed relocation of B, proposing that if the mother moved to Darwin B should live with him and C.

"[27] ... [I]n consideration of meaningful relationship[s] between each parent and each child, the settled arrangements engaged in are indicative that each parent treated the arrangements as sufficient for the maintenance of their relationship with the child that was not living with them. (...)

[30] Until the commencement of the proceedings B was living in a settled arrangement with his mother, Mr Larsson and his two younger siblings. He is described as having a close relationship with his younger siblings and to be functioning well under the primary care of his mother. The relationship with his brother and father was maintained primarily through 50 percent of the school holidays, although this year he has been able to spend seven other occasions with his father and brother. (...)

[33] If B relocates to Darwin there will be no change in the time he spends with his father and brother on school holidays. (...)

[42] ... the move to Darwin will involve some, but acceptable change to the time B spends with his father and C. It involves no change to the time C spends with his mother. This case, unlike many that involve a significant increase in distance, does not also involve a substantial change in the time spent with each parent."

The mother was granted permission to relocate with B to Darwin and the case was listed before the FCC at Canberra for further directions.

Robert Glade-Wright is the founder and senior editor of *The Family Law Book*, a one-volume looseleaf and online family law service (thefamilylawbook.com.au). He is assisted by Queensland lawyer Craig Nicol, who is a QLS accredited specialist (family law).

Court of Appeal judgments

1-31 December 2016

with Bruce Godfrey



Civil appeals

The Queensland Local Government Superannuation Board v Allen [2016] QCA 325, 6 December 2016

Application for Leave s118 DCA (Civil) – where the board/applicant is the trustee of the Queensland Local Government Superannuation Scheme – where the respondent was employed as an administration officer by the Gold Coast City Council between late 1995 and early 2002 – where the respondent ceased work in January 2002 and claimed that she had been subjected to “bullying and harassment” in the workplace and was permanently incapacitated for work by reason of a number of conditions affecting her health – where the applicant refused the respondent’s claim for payment of a total and permanent disability benefit – where the respondent commenced a proceeding in the District Court seeking to establish an entitlement to payment of that benefit – where the respondent brought an interlocutory application in that proceeding seeking disclosure of legal advice provided to the applicant – whether legal professional privilege in the legal advice had been impliedly waived by the applicant – where it was not disputed that, at the time when the advice was provided, it attracted legal professional privilege – where, however, as the party alleging that privilege had been impliedly waived, Ms Allen bore the onus of proof on that issue, and that was the real question for determination on the hearing of the application in the court below – where there can be no doubt that the question whether there was in this case an implied waiver of privilege in the advice provided by the board’s solicitors must be answered by reference to the principles stated in the joint reasons of four members of the High Court in *Mann v Carnell* (1999) 201 CLR 1, and the primary judge certainly recognised that to be so – where those principles were revisited and then affirmed in a subsequent decision of that court, *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 – whether the board paused to consider whether it was legally obliged to reconsider Ms Allen’s claim or even if its preference was not to do so, the fact is that the board did, consistent with its legal advice, reconsider her claim – where it is therefore difficult to accept that the advice had any relevance, let alone direct relevance, to any allegation in issue on the pleadings – where even if some relevance to what the board has advanced as grounds for its denial of paragraph 22 of the statement of claim could be made out, it cannot be concluded that the advice was capable of proving (or disproving) any of those matters or, more broadly, that it was capable of proving (or disproving) the board’s state of mind at the time when it decided Ms Allen’s claim – where the advice was not directly relevant to an allegation in issue on the pleadings – where it follows that, independently of any question of legal professional privilege, the advice was not a

document that the board was obliged to disclose to Ms Allen – where there is nothing in the conduct by the board of its case to give rise to an implied waiver of privilege – where it is necessary to add that, whatever view was taken on the question of waiver, it was not appropriate to order that the whole advice be disclosed – where the uncontested affidavit evidence was to the effect that the advice dealt with four discreet issues, only one of which concerned the “subject matter of the correspondence exchanged in this matter” – where therefore, if privilege was impliedly waived, it could have only been waived with respect to that one issue – whether the respondent was entitled to disclosure of the advice on the basis that the advice was the subject of joint privilege so that privilege in the advice was shared by the applicant with the respondent – where advice is sought by a trustee, not about the day-to-day affairs of the trust, but about the discharge of the trustee’s own obligations regarding a particular beneficiary, no duty or obligation on the part of the trustee to disclose the content of the resulting advice can be implied – where trustees must therefore be entitled to seek and obtain legal advice about claims made against the fund without the risk of subsequent disclosure of that advice to the claimant – where at the time the advice was provided, Ms Allen and the board were in a dispute which could well have escalated into a proceeding before the tribunal (if not other litigation); they could not have a joint or shared interest in the advice – where there is no joint privilege in the advice.

Leave to appeal granted. Appeal allowed. Orders of the District Court are set aside and, in lieu thereof, substitute the following orders: The application filed on 7 September 2015 is dismissed; the applicant is ordered to pay the respondent’s costs of and incidental to the application calculated on the standard basis. The respondent to pay the applicant’s costs of and incidental to the application for leave to appeal and the appeal on the standard basis.

Legal Practitioners Admissions Board v Doolan [2016] QCA 331, 9 December 2016

Appeal *Queensland Civil and Administrative Tribunal Act* – where the appellant has satisfied both academic and practical training requirements for admission as a legal practitioner in Queensland – where unfortunately he has a history of mental illness – where notwithstanding this, he desires to be admitted as a legal practitioner – where the appellant refused the respondent’s application for early consideration of suitability as a result of conflicting medical opinions as to his mental health, relevant to suitability matter under s9(1) (m) of the *Legal Profession Act 2007* (Qld) (LPA) – where the respondent’s appeal against the refusal was allowed and referred to QCAT to determine whether, in light of his mental health, he is currently able to satisfactorily carry out the inherent requirements of practice, and whether the declaratory relief sought by the application should

be given – where the tribunal made a factual finding that the respondent is not currently able to satisfactorily carry out the inherent requirements of practice – where, despite this finding, the tribunal made the declaration sought by the respondent – where it was submitted the tribunal erred in law by: (1) making orders inconsistent with its factual finding; (2) venturing beyond the matters for direction which the tribunal had been referred to; and (3) misapprehending that suitability matter (m) could and ought be dealt with at the stage of issue of a practising certificate – whether the Admissions Board ought properly refuse the declaration sought by the respondent – where it is clear that the critical finding that the respondent was “probably unable to satisfactorily carry out the inherent requirements of legal practice because the current state of his mental health makes direct client contact and communication too problematic” justified a direction in terms which conformed with this finding – where the judicial member erred in giving the direction that was given with respect to any conditions to be imposed on the respondent – where the error is reflected in the content of the direction given which is irreconcilable with the direction that clearly should have been given, but was not given – where it is for the Supreme Court as admitting authority to be satisfied that an applicant is a fit and proper person for admission – where in deciding whether the applicant is a fit and proper person, the Supreme Court is required by statute to consider each of the suitability matters in relation to the applicant – where the Supreme Court may not ignore, or diminish its consideration of, any of them by regarding it as more appropriate for consideration by the regulatory authority – where under s46(4) LPA, if a matter has been disclosed for admission purposes and has been decided by the Supreme Court or the board as not to be sufficient for refusing admission to legal practice, then the matter cannot be taken into account as a ground for refusing to grant or renew a practising certificate – where arguably, it may be taken into account when considering whether a condition to address it should be imposed on a practising certificate – where here, if the board were to make the declaration required by the tribunal’s order, it would be binding on the board in its consideration of whether Mr Doolan is a fit and proper person for admission – where the board could not qualify its recommendation to the Supreme Court on that account – where if the Supreme Court were then to admit Mr Doolan as a legal practitioner, s46(4) LPA would preclude the regulatory authority from refusing to issue a practising certificate to him on the basis that he is, by reason of his mental illness, unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner – where this would be regarded as an unsatisfactory outcome.

Appeal allowed. Set aside the decision of the tribunal made on 28 April 2016. Order, in lieu,

that the appellant, Legal Practitioners Admissions Board, ought properly refuse the declaration sought by the respondent. No order as to costs.

Rogers v Roche & Ors [2016] QCA 340, 16 December 2016

General Civil Appeal – where the appellant was injured when he was riding as a pillion passenger on a jet ski – where the appellant brought proceedings in the Trial Division and was given judgment including an amount for economic loss – where the appellant considered that the award for economic loss did not fully compensate him for the economic loss he had sustained – where the appellant commenced proceedings in the Trial Division against the respondents to recover the balance of the loss he had sustained and for other relief – where the appellant’s “Fresh Statement of Claim” claimed damages for breach of retainer, negligence and breach of fiduciary duty, a declaration that the first and second respondents were not entitled to the payment of fees they had charged and consequential orders for repayment of those fees – where the primary judge held that the appellant’s claims for breach of retainer, negligence and breach of fiduciary duty, and the parts of the Fresh Statement of Claim relating to those claims, be struck out for a number of reasons including that the claims were not maintainable by reason of the advocate’s immunity – where the appellant argued that the first and second respondents breached fiduciary duties that they owed to the appellant by preferring their own interests over the appellant’s interests – where the allegations against the first and second respondents concerned solicitors’ out of court conduct in relation to the appellant’s personal injuries claim and as such did not attract advocate’s immunity – where the respondents argued that the appellant’s claim is necessarily within advocate’s immunity because each alleged act and omission of the respondents led to the continuation of the claim to a judgment – whether the first and second respondents’ conduct attracted advocate’s immunity – where the primary judge’s decision was given before the High Court gave judgment in *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 – where an issue in *Attwells* was whether advocate’s immunity extended to a solicitor’s negligent advice which led to settlement of litigation on terms disadvantageous to the client – where by majority the court held that it did not – where the majority rejected an argument that it would be anomalous to hold that the immunity did not extend to advice which led to a disadvantageous compromise but that it did extend to negligent advice not to compromise which led to a judicial decision which was less beneficial to the client than a rejected offer of compromise – where importantly for the present case, the majority rejected that argument upon the ground that the assumption that negligent advice not to settle was “intimately connected” with the ensuing judicial decision so as to attract the immunity was incorrect – where *Attwells* is authority for the propositions that the test for advocate’s immunity for out of court work by an advocate (which includes a solicitor retained to prosecute litigation) is whether that work was intimately connected with in court work, in the functional sense that the work affected both the conduct of the case in court and the resolution of the case by that court, with the result that advocate’s immunity is not attracted by out of court work which does not progress the

litigation towards a judicial determination – where *Attwells* is authority for the propositions that advocate’s immunity is attracted by the advocate’s participation as an officer of the court in the quelling of controversies by the exercise of judicial power and that the immunity is grounded in the high value which the law attributes to certainty and finality of judicial decisions and the consequential undesirability of allowing collateral attacks on those judicial decisions – where the allegations in the Fresh Statement of Claim concerned solicitors’ out of court conduct in relation to the appellant’s personal injuries claim, including allegations of alleged wrongful conduct in relation to the retainer and the preparation of the appellant’s claim before and during litigation which was a cause of the appellant not obtaining an amount for economic loss by settlement which was much greater than the amount obtained in the judgment – where all of the appellant’s claims are nevertheless collateral challenges to the judicial decision in the personal injuries litigation in the sense that the decision he seeks in this litigation about the economic loss he sustained as a result of his accident would conflict with a judicial decision upon the same issue in the personal injuries litigation – where it is an aspect of all parts of the appellant’s claim that he was deprived of a full opportunity of obtaining the entire amount of his economic loss by the wrongful conduct of the first and second respondents – where to shut out litigation of this part of the appellant’s claim would be more likely to bring the administration of justice into disrepute than would conflicting judicial decisions about the appellant’s economic loss reached upon different evidence – where the respondents argued that the provisions of the *Personal Injuries Proceedings Act 2002* (Qld) (PIPA) requiring pre-litigation settlement processes attract advocate’s immunity – where the provisions in PIPA require solicitors to carry out before the commencement of litigation much of the work which previously was done after the commencement of litigation as preparation for the trial of a personal injuries claim – where in this case the claim is for loss said to have been caused by the conduct of the solicitors in failing properly to prepare the claim, including by obtaining available supporting documents and evidence, and presenting it to the defendant as required by PIPA – where the conduct of the respondents alleged in this section of the claim had no more than an historical connection with the subsequent litigation – where there is not here that intimate and functional connection between the work of an advocate and the conduct of the case in court and its resolution by judicial decision which is required to attract advocate’s immunity – where all of the appellant’s allegations about the third respondent’s negligent preparation of the appellant’s claim in the course of the litigation involve acts or omissions which affected in-court conduct and express or imply the conclusion that the alleged negligence resulted in the economic loss component of the personal injuries judgment in his favour being less than it ought to have been – where it follows from what has already been written that, as the appellant acknowledged in the course of argument, his claim against the third respondent for negligent preparation of his claim during the litigation stage is precluded by advocate’s immunity – where the same is true of all of the appellant’s claims seeking to hold the respondents legally liable for loss said to result from the allegedly inadequate preparation of his claim

during the litigation – where the appellant is entitled to claim that the first and second respondents did not perform their retainer (except in so far as that allegation is referable to the alleged inadequacies in preparation of the claim during the litigation stage) – where the subparagraph struck out by the primary judge therefore did not necessarily attract advocate’s immunity and it was also not a re-litigation abuse of process.

Appeal allowed. Set aside the orders made in the Trial Division on 24 September 2015. Specified paragraphs of the Fresh Statement of Claim be struck out, otherwise the respondents’ application in the Trial Division be refused. The appellant have leave to file and serve an amended statement of claim which omits the specified paragraphs and which otherwise amends the Fresh Statement of Claim in ways which are not inconsistent with these reasons, such statement of claim to be filed and served within 21 days of judgment in this appeal. Parties have leave to make submissions about the costs of the appeal and the costs in the Trial Division.

Di Iorio v Wagoner [2016] QCA 346, Order delivered ex tempore 25 November 2016; Reasons delivered 20 December 2016

Application to Discharge or Vary – where the applicant was ordered by the Queensland Civil and Administrative Tribunal to pay a monetary sum – where the applicant is an undischarged bankrupt – where the applicant appealed the QCAT decision to the Appeal Tribunal of QCAT and the Court of Appeal out of time – where a single judge of appeal exercising the powers of the Court of Appeal heard and refused the application for an extension of time – where the sole avenue for review of a decision of a single judge of appeal established by legislation is to be found in s44(4) of the *Supreme Court of Queensland Act 1991* (Qld) – where the applicant applies to discharge or vary the decision of the single judge of appeal – where absent the court granting such relief, the decision of the single judge of appeal is deemed to be a decision of the court – where no decision of this court has previously considered the nature of the review provided for by s44(4) – where that is to say, questions as to whether the court constituted by three or more judges is to deal with the application by way of rehearing ab initio or de novo, by a more restricted form of rehearing, or by a review in the strict sense, have not previously been addressed – where the words of the section themselves do not shed light on how they are to be answered – where this court ought to take the same approach as is taken in New South Wales: *Wentworth v Wentworth* (1994) 35 NSWLR 726; *Patrick v Howorth* [2002] NSWCA 285 – where on this appeal, in order for this court to grant an application to discharge or vary under s44(4), the applicant must demonstrate, on the part of the judge of appeal, an error of law, a material error of fact, a failure to take into account a material consideration, the taking into account of an irrelevant consideration, or unreasonableness in *House v The King* (1936) 55 CLR 499 sense – where at the commencement of the hearing, the court invited the applicant to refer to Morrison JA’s reasons and to advance submissions based upon them – where the applicant made discursive oral submissions for almost an hour that were repetitive of the generalised allegations in his outline, spanned all proceedings in which he had been involved, and were replete with complaints of a denial of natural justice which, in substance,

were complaints of being refused relief which he thought he justly deserved – where despite many efforts by members of the court to encourage the applicant to address the reasons of Morrison JA, he failed to do so in any meaningful way – where he did not point to any error on his Honour's part, let alone an error sufficient for the court to exercise its discretion to grant his application to discharge or vary his Honour's orders.

Application refused.

Tighe & Anor v Pike & Ors [2016] QCA 353, 23 December 2016

Application for Leave *Sustainable Planning Act* – where the second respondent issued a decision notice under the *Integrated Planning Act 1997* (Qld) approving an application for reconfiguration of the original lot into two lots – where condition 2 of the approval conditions required creation of an easement for access, on-site manoeuvring and connection of services for the benefited lot, lot 2, over the burdened lot, lot 1 – where the registered proprietors of the original lot did not include grant of an easement for “on-site manoeuvring” or “connection of services and utilities” – where the second respondent nevertheless endorsed the survey plan – where the titles for lot 1 and lot 2 were created upon registration of the survey plan with this easement registered on the titles – where the applicants subsequently became the registered proprietors of lot 1 and the first respondents subsequently became the registered proprietors of lot 2 – where the first respondents applied in the Planning and Environment Court for a declaration that condition 2 of the development permit had been contravened and an enforcement order directing the applicants to comply with condition 2 – where the Planning and Environment Court granted the application – where it was submitted by the applicant that the primary judge erred in finding the court had jurisdiction to make the enforcement order by reason of the commission of a development offence where there was no such offence – whether s245, in combination with s580(1), of the *Sustainable Planning Act 2009* (Qld) operated to make condition 2 continue to have effect by attaching condition 2 to lot 1 after the reconfiguration of the lot had been completed and the approval had been spent – whether condition 2 imposed any obligation upon the applicants even though they were not parties to the reconfiguration of the original lot approved by the development approval – whether the applicants committed a development offence by failing to comply with condition 2 – whether a development offence existed that could support the making of an enforcement order – where any application of s245 of the *Sustainable Planning Act* to attach the development approval to lot 1 and make it, including its conditions, binding upon the applicants did not change that meaning of condition 2 – where since the applicants were not parties to the reconfiguration of the original lot approved by the development approval, condition 2 did not impose any obligation upon the applicants – where it follows that they could not have committed an offence against s580(1) of the *Sustainable Planning Act* by not providing the registered easement described in condition 2.

Application granted. Appeal allowed. Orders made in the Planning and Environment Court set aside. Originating application in that court is dismissed. First respondents are to pay the applicants' costs of the application for leave to appeal and the

appeal and the applicants' costs in the Planning and Environment Court.

Quinn v Legal Services Commissioner [2016] QCA 354, 23 December 2016

Application for Extension of Time; Appeal *Queensland Civil and Administrative Tribunal Act* – where the respondent filed a disciplinary application against the applicant, alleging guilt of 64 separate charges of professional misconduct and/or unsatisfactory professional conduct for trust accounting offences – where the applicant did not file any affidavit and indicated to the tribunal that he did not intend to make any submission in opposition to the application – where the tribunal decided to hear the application on the papers, pursuant to s32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) – where the applicant was found guilty of each charge of professional misconduct by the tribunal, his name removed from the Roll of Legal Practitioners and ordered to pay \$2500 in costs – where the applicant, over a year out of time, applied for an extension of time within which to appeal against the tribunal's orders, submitting that the tribunal failed to hear and decide the discipline application in accordance with the requirements of the *Legal Profession Act 2007* (Qld) (LPA) – where it is not in issue that there is a satisfactory explanation for the delay – where earlier this year the tribunal accepted that the applicant had shown sufficient reasons for his delay in applying for a reopening of the tribunal's original decision, but dismissed that application upon a ground that is not relevant in this application – where the respondent concedes that the explanation for the delay accepted by the tribunal adequately explains the applicant's delay in appealing to this court – where the tribunal proceeded on the basis that the assertions made in the disciplinary application were correct because they were not denied by the applicant – whether that mode of proceeding is reconcilable with the LPA – where s456(1) LPA makes it clear that the disciplinary body's power to make such orders, or any disciplinary order, arises only after it has completed a hearing of a discipline application and is satisfied that the practitioner has engaged in unsatisfactory professional or professional misconduct – where the nature of the required hearing is elucidated by s453 LPA, which obliges the disciplinary body to “hear and decide each allegation stated in the disciplinary application” – where in the context of this legislation, ss453 and 456(1) LPA required the tribunal to hear the evidence (which, in this case, the tribunal decided it could do by reading the affidavits) and decide whether that evidence proved the allegations made by the respondent against the applicant – where the tribunal's approach of proceeding upon the assumption that the allegations made in the disciplinary application were correct was a fundamental departure from the statutory obligation imposed upon the tribunal to hear and decide each allegation stated in the discipline application – where it follows that the jurisdiction of the tribunal to make orders against the applicant under s456(1) LPA did not arise.

Application for extension of time granted. Appeal allowed. Set aside the orders of the Queensland Civil and Administrative Tribunal. Direct that the registrar or other proper officer of the Supreme Court cause the name of the applicant to be restored to the Roll of Legal Practitioners from which that name was removed pursuant to the order made on 24 March 2015. Order the

respondent to pay the costs of the appeal (not the costs of the applicant's application to extend time for appealing). Grant the respondent an indemnity certificate in respect of the appeal.

JLF Corporation Pty Ltd v Matos [2016] QCA 355, 23 December 2016

General Civil Appeal – where the respondent purchased property from the appellant – where the respondent and the appellant entered into a put option agreement whereby the appellant agreed to purchase back the property if the respondent sent a contract contained in a schedule prior to a certain date – where the respondent sought to exercise the put option – where the respondent used the 10th edition of the REIQ/Queensland Law Society standard form contract in lieu of the eighth edition of the contract attached to the put option agreement – where the primary judge held that the respondent validly exercised the put option contained in a written put option agreement between the respondent and the appellant dated February 2012 – where the appellant argued that the exercise of the put option was invalidated by the delivery of the 10th edition of the standard form contract rather than the edition contained within the put option agreement – where the respondent submitted that the primary judge's conclusions were correct – whether upon the proper construction of the put option agreement, it required, for the valid exercise of the put option, that the respondent deliver a contract in the form of the eighth edition of the REIQ/Queensland Law Society standard form – where the resolution of the appeal turns upon the proper construction of the put option agreement – where an objective approach must be adopted in that exercise; the meaning of that agreement must be determined by what a reasonable business person would have understood it to mean, and that requires consideration of the language of the agreement, the surrounding circumstances known to the parties, and the commercial purpose or objects to be secured by the agreement: *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 – where there is no relevant ambiguity about the meaning of the relevant clause – where the only way in which the put option could be exercised, if the respondent chose to exercise it, was “by the Owner delivering to JFL two (2) copies of the Contract...”, and otherwise as prescribed in cl.2.4 – where the primary judge noted that cl.2.4 did not itself contain express terms requiring an executed contract in the form of the eighth edition of the standard form contract, but that was conveyed with at least equal clarity by the inclusion in Schedule 1 of a form of contract with several identifications in it that it was the eighth edition of the standard form contract – where the clear language of cl.2.4 of the put option agreement made the delivery to the appellant of two copies of the eighth edition of the REIQ/Queensland Law Society standard form of contract for houses and residential land, duly signed by the respondent, an essential requirement for the exercise of the put option – where the respondent's delivery of signed copies of the 10th edition of that standard form contract did not comply with that essential requirement, with the result that the put option was not exercised.

Appeal allowed. Set aside the declarations and orders made in the Trial Division. Dismiss the originating application. Costs.

Criminal appeals

R v Fall [2016] QCA 327, 9 December 2016

Sentence Application – where the applicant and his co-offenders were involved in a fight – where the applicant was 19 at the time of the incident, had no relevant criminal history, was unlikely to reoffend and was remorseful – where the applicant was sentenced for doing grievous bodily harm to a period of three years' imprisonment, suspended after 12 months, with an operational period of three years and six months – where the applicant was sentenced for assault occasioning bodily harm in company for a period of two years' imprisonment, suspended after 12 months, with an operational period of three years and six months, to be served concurrently – where the applicant would serve only two months less in custody prior to suspension or parole than one of his co-offenders (Riki) who was the principal offender and inflicted the grievous bodily harm, was 21 at the time of the incident and had previous convictions involving dishonesty and violence – whether the sentences were manifestly excessive – whether the sentences engaged the parity principle – where having regard to the circumstances of the offences and the applicant's age and antecedents, the sentence imposed of three years suspended after 12 months was a heavy one – where drawing the threads together there is substance in the applicant's submission that the two-month difference in the time actually to be served as between the applicant and Riki does not properly reflect the more serious offending and less favourable antecedents in Riki's case – where that is not really answered by the circumstance that for Riki's sentence on the conviction of assault occasioning bodily harm he will be supervised on parole months after his release at 14 months – where it is concluded that the applicant's sentences are erroneous on the ground of parity as between the applicant's sentences and those imposed on Riki, having regard to the applicant's lesser role in the offence of doing grievous bodily harm, his lack of any

relevant criminal history, his strong personal circumstances and low risk of reoffending.

Application for leave to appeal granted. Appeal allowed. For the sentence of grievous bodily harm (count 1) the applicant is sentenced to a period of two years six months suspended after eight months with an operational period of three years. For the offence of assault occasioning bodily harm in company (count 2) the applicant is sentenced to a period of imprisonment of two years, suspended after eight months, with an operational period of three years. The sentences on counts 1 and 2 are to be served concurrently.

R v Gathercole [2016] QCA 336, 14 December 2016

Appeal against Conviction – where the appellant was convicted of murder – where the appellant killed his best friend, to whom he had never before shown any hostility – where the appellant was intoxicated at the time of the murder – where the appellant contended his post-offence conduct and statements to police were capable of raising a doubt as to whether he had a murderous intent – where the statements could also have been construed by the jury as evidence of his remorse for the killing and concern for his own position – where the jury was entitled to be satisfied beyond reasonable doubt that at the time of the killing, the appellant had a murderous intent – whether the verdict was unreasonable – where the evidence supported a finding that the appellant fought with the deceased over what the appellant perceived to be the deceased's maltreatment of the dog; that he opened the kitchen drawer, removed a large and obviously dangerous knife, and in the heat of an argument over the dog stabbed the deceased with moderate force to the abdomen; that the deceased unsuccessfully tried to fend off the attack; and that, at that time, the appellant intended to do the deceased at least serious harm – where the jury could have construed the appellant's post-offence conduct as deep and genuine remorse for the killing and concern for the gravity of his own position, after realising the enormity and finality of his actions in killing his

best mate – where this ground of appeal is not made out – where the appellant told police that he had attempted suicide two months prior to the killing – where the prosecutor, in his closing address, suggested that because the appellant had tried to commit suicide he had no respect for human life and formed a murderous intent at the time of the killing – where the prosecutor relied on the appellant's history of depression, failure to take his medication and failure to seek treatment for his rages triggered by binge drinking – where the prosecutor's submissions were illogical, unfair and encouraged jurors to follow an impermissible path of reasoning – where the trial judge did not direct the jury to disregard the prosecutor's submissions – whether there was a miscarriage of justice – where the fact that this appellant may have attempted suicide two months earlier in an incident completely unrelated to the present charge, and the fact that he initially told the police he had not attempted suicide for a long time but then said he had made an attempt two months earlier, was irrelevant to the issue of whether, at the time he stabbed the deceased, he did so with a murderous intent – where this evidence was not only irrelevant; it was potentially highly prejudicial – where the prosecutor wrongly urged the jury to reason that, because the appellant had attempted suicide in the past, in circumstances completely removed from the charged killing, he had no respect for human life and formed a murderous intent when he killed the deceased – where unfortunately the judge did not correct the prosecutor's wrong submissions, no doubt because her Honour was not asked for such a correction – where in the absence of firm directions from the trial judge to disregard the prosecutor's submissions that the appellant had formed a murderous intent because he had not obtained treatment for his mental health issues; had stopped his medication; and had previously attempted suicide, the jury may have convicted him of murder by following this impermissible and illogical path of reasoning.

Appeal allowed. Verdict of guilty set aside. Retrial ordered.



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FWO
Chartered Accountants

Comptroller-General of Customs v Yip;
Comptroller-General of Customs v So;
Comptroller-General of Customs v Johal [2016]
QCA 339, 16 December 2016

Application for Leave s118 DCA (Criminal) – where the respondents each intentionally failed to declare jewellery and Rolex watches, attempting to evade payment of duty after arriving in Brisbane from Hong Kong – where the undeclared jewellery and watches were seized – where the magistrate ordered fines and, in addition, an order for condemnation under s205D(3) of the *Customs Act 1901* (Cth) – where, on appeal, the judge of the District Court concluded that the magistrate failed to give adequate reasons – where the District Court judge, in finding legal error, proceeded on the footing that s205D(3) (c) reposed in the court a discretion and that it fell to him to exercise the discretion afresh and concluded that a condemnation order ought to be made with respect to the undeclared jewellery but not the watches – where the applicant alleges that the judge of the District Court erred in law in his characterisation of s205D(3) – whether such a characterisation was infected by legal error – where insofar as the respondents’ submission contends that title to forfeited goods does not vest in the Crown until a condemnation order is made, it is without authority and unsustainable in light of the Australian authorities: *Burton v Honan* (1952) 86 CLR 169; *Frost v Collector of Customs* (1985) 9 FCR 174 – where paragraph (c) does not employ the language of discretion – where the court must make the condemnation order if it is satisfied as to the specified matter – where the specified matter is that, in all the circumstances of the case, it is appropriate for a condemnation order to be made in respect of the seized goods – where the word ‘appropriate’ is not a legal term with an ascertained meaning in a legal context – where paragraph (c) gives no guidance as to what would, or would not, render it fair, just or reasonable that, in effect, the Crown’s title to forfeited goods be affirmed or that the Crown be deprived of the title to them – where in the absence of guidance on such a significant topic, it is, unlikely that Parliament intended to confer a discretion of the kind suggested by the respondents – where neither the fact that a penalty is imposed for the offence proved nor the amount of such a penalty would be a circumstance relevant to the matter about which the court is to be satisfied.

In each Appeal: Leave to appeal granted. Appeal allowed. Set aside orders made in District Court. Dismiss the appeal to District Court. Costs.

R v HBN [2016] QCA 341, 19 December 2016

Appeal against Conviction – where the appellant was convicted of raping his seven-year-old great niece – where the complainant gave varying accounts of how many digits were used in the rape – where the appellant contends the complainant’s evidence was uncorroborated and unreliable – where the complainant maintained at all times that the appellant digitally raped her – where the jury were entitled to accept the complainant’s account as reliable beyond reasonable doubt – where after carefully reviewing the evidence at trial, despite the many issues raised by the appellant the jury were entitled, having scrutinised her evidence with great care, to accept it beyond reasonable doubt – where on that evidence, the appellant raped her by placing at least one finger in her vagina – where the judge directed the jury in the terms of s102 *Evidence Act 1977* (Qld) – where this direction

was unnecessary as there was no evidence of circumstances from which an inference could be drawn that the complainant had an incentive to conceal or misrepresent the facts – where this direction favoured the prosecution and may have caused the jury to reason impermissibly – whether there was a miscarriage of justice – where this case turned on the uncorroborated testimony of a young child, just seven and eight years old – where her evidence required careful scrutiny before being accepted – where despite the judge’s many directions that the jury must accept the complainant’s evidence beyond reasonable doubt before convicting, it is possible, relying on the judge’s unnecessary direction under s102(b) and without a warning of the kind discussed in the previous paragraph, the jury may have reasoned that, as she appeared to have no incentive to misrepresent the facts, she could be more easily believed – where there is a real possibility that the misdirection deprived the appellant of the chance of an acquittal – where the prosecutor drew attention to the complainant’s naivety and asked rhetorical questions in his closing address – where the complainant seemed unsophisticated and there was no evidence she had any prior sex education that would have enabled her to make a false complaint – where the prosecutor’s rhetorical questions did not amount to a reversal of the onus of proof – where it is true that a prosecutor should not ask questions of the jury in his or her closing address, even rhetorical questions, which invite the jury to consider whether the accused person has provided satisfactory answers to those questions where this amounts to a reversal of the onus of proof – where that was not the effect of the impugned aspects of the prosecutor’s address here – where the prosecutor was entitled to make firm and fair submissions consistent with the evidence – where the prosecutor was entitled to invite the jury to consider the matters raised in the questions posed in assessing the complainant’s credibility – where even so, prosecutors should be circumspect in the use of questions when addressing jurors in case they inadvertently overstep the mark and reverse the onus of proof – where that was not the case here.

Appeal allowed. Conviction set aside.
Retrial ordered.

R v Murray [2016] QCA 342, 19 December 2016

Appeal against Conviction – where the appellant was convicted by jury of murder – where at trial the appellant’s counsel applied to exclude proposed evidence from an accessory after the fact of conversations about text messages that the appellant received from the deceased – where the trial judge dismissed the application and ruled that the evidence was adverse to the appellant’s interest and shed light on the relationship between the parties – where during cross-examination of the appellant, a jury note inquired as to the content and meaning of particular text messages referred to in the accessory’s evidence – where the appellant contends the evidence should not have been admitted because the jury note suggests it caused the jury to impermissibly speculate as to what was said in the messages – whether the evidence was admissible – where after discussing the note with counsel, the trial judge told the jury, in effect, that there may not be any further questions asked of the appellant on that issue but that in his summing up, he would give them a particular direction as to the use which could be made of Ms Peckham’s (who had pleaded guilty to being an accessory after the fact to the murder and received a sentence

reduced for her undertaking to give evidence in the case against the appellant) evidence in that respect – where the cross-examination then resumed and no further question was asked on the subject – where the enquiry was made before the jury had the benefit of his Honour’s direction and there is no reason to suppose that the direction was not followed – where acting according to his Honour’s directions, they would not have treated the evidence of Ms Peckham of her conversations with the appellant about the text messages from the deceased as any evidence of motive – where after the events causing the deceased’s death, the appellant wrapped the deceased in a carpet or blanket and disposed of the body in mangroves off an isolated road – where the appellant also disposed of items containing the deceased’s blood and cleaned the scene of the crime – where in summing up the trial judge distinguished the disposal of the body and the cleaning of the scene as two distinct categories of post-offence conduct – where the trial judge directed that there are “innocent” explanations for post-offence conduct, including “panic, fear or other reasons having nothing to do with the offence charged” – where the trial judge directed that the disposal of the body may be used as consciousness of guilt of murder only if the jury excluded the “innocent” explanations – where the appellant contends a miscarriage of justice occurred because the trial judge failed to direct the jury that disposing of the body could also indicate consciousness of guilt of an unintentional killing and there is a real possibility that the jury did not consider that lesser offence – whether the non-direction amounted to a miscarriage of justice – where the conduct of the disposing of the body was capable of amounting to an acknowledgement of guilt of manslaughter – where in other words, it was open to the jury to find that the explanation for this conduct was that the appellant wanted to destroy evidence that he had unintentionally killed the deceased – where the question is whether the directions which were given sufficiently indicated that factual possibility and instructed the jury that unless they rejected it, the conduct could not be indicative of the appellant’s guilt of murder – where there was no specific direction that the jury should reason in that way – where there is a real risk that in considering the conduct of the disposal of the body, the jury treated that conduct as indicative of a consciousness of guilt of murder once they had rejected “innocent explanations”, that is to say explanations which were consistent with innocence of any offence – where the appellant was deprived of the possibility of an acquittal of murder and there was a miscarriage of justice which warrants the quashing of the conviction and a retrial.

Appeal allowed. The appellant’s conviction of murder be quashed. The appellant be retried upon the indictment.

R v Lyall [2016] QCA 350, 23 December 2016

Appeal against Conviction – where the appellant was convicted by jury of one count of sodomy – where the offence was said to have occurred on a property owned by the appellant in 1982 or 1983 – where the complainant’s evidence of the sodomy or other sexual misconduct was not supported by other evidence but there was substantial support for the surrounding circumstances, including the complainant’s presence at the appellant’s property – where the complainant had a history of drug abuse and mental illness – where the appellant contends the verdict was unsafe and unsatisfactory – whether on the whole of the evidence the verdict of guilty can be supported – where the

prosecution case depended upon the evidence of the complainant – where the complainant had told police officers that as he fled the property, he was drunk – where his evidence at the trial was that on that evening (the evening following that on which the offence was committed) he had had nothing to drink – where the trial judge directed the jury, there were therefore many reasons for the jury to approach the complainant's evidence with special care – where not only was there the long delay from the time of the alleged offence, the complainant's mental illnesses created a particular risk that his evidence "might be a result of delusions, rather than based on reality", as his Honour described it – where, however, the reliability of the complainant's evidence was enhanced by his ability to recall things about his visit to the property which appeared to be true according to other evidence – where this is a case where the long passage of time from the events in question and the complainant's history of mental illness provide a basis for doubting the appellant's guilt of this offence – where this is also a case where the jury's advantage in seeing and hearing the complainant's evidence is capable of resolving any doubt which this court might experience – where the appellant's argument that it was not open to the jury to find that the appellant was guilty of this offence is ultimately unpersuasive – where on the second day of deliberations the jury sent a note to the trial judge asking for a summary of the defence's closing address – where whilst discussing the request with counsel the trial judge received a second note asking to rehear the appellant's evidence in relation to the offence – where after discussing the second request with counsel the complainant's evidence was read back to the

jury – where the trial judge then instructed the jury to consider the complainant's evidence and reconsider if they still required the summary of the defence's closing – where after retiring for lunch the jury sent a third note saying they no longer required the summary of the defence's closing – where, after receiving a Black Direction, the jury returned a verdict of guilty – where the appellant contends a miscarriage of justice occurred because the jury were not permitted to hear the defence summary and the trial judge's statements suggested they may not need to hear the defence summary after rehearing the complainant's evidence – whether there was a miscarriage of justice – where in the present case, the request to hear part of the address by defence counsel evidenced at least the possibility of an imperfect understanding by the jury, or some of the jury, about the defence arguments – where the judge indicated to the jury that, in his view, they might not need to hear more than the complainant's evidence, however his Honour did not preclude the possibility of replaying that part of the address which the jury had requested – where what he said to the jury could well have been understood by them as indicating that it was the evidence of the complainant upon which they should focus and that they might be able to reach their verdicts without hearing again the defence argument – where there is a real possibility that the jury was influenced by this statement by the judge to send a further note, saying that they did not wish to hear the summary of the defence case – where the possibility remains that the jury reached its verdict with that imperfect understanding, by at least some of the jury, of the defence case – where there was a miscarriage of justice – where a co-accused, C, was discharged

on the first afternoon of the trial – where the appellant intended to call C as a witness in his defence – where on the second day of trial defence counsel was granted an adjournment to the following day before opening his case to determine if C would be in a position to give evidence – where on the third day of trial defence counsel informed the appellant that C was unwell and would not give evidence – where the appellant was not aware he could compel C's attendance to give evidence – where the appellant contends a miscarriage of justice occurred because he lost the potential benefit of C's evidence by his solicitor and counsel not advising as to the possibility of adjourning the trial and compelling C's attendance – where there was a miscarriage of justice – where in the absence of any evidence from the appellant's trial counsel, this court is left to speculate about C's ability and willingness to provide evidence helpful to the appellant's case, as of the third day of the trial – where the fact that an adjournment was not sought indicates that C was not a willing or helpful witness by that stage, rather than indicating any failure by the lawyers to consider a request for a further adjournment of the trial – where on the present evidence, the appellant's trial counsel made a forensic decision which is not proved to have lacked a rational basis – where no miscarriage of justice is established by this ground of appeal.

Allow the appeal. Set aside verdict of guilty. Order a retrial on count 2 of the indictment.

Prepared by Bruce Godfrey, research officer, Queensland Court of Appeal. These notes provide a brief overview of each case and extended summaries can be found at sclqld.org.au/caselaw/QCA. For detailed information, please consult the reasons for judgment.

SOLICITORSHOTLINE

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solicitor in Queensland and will give you
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Martin Conroy

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Litigation (including Personal Injury claims)

Mobile 0458 001 630

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Trusts, Office Management

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SOLICITORASSIST

*An initiative of, but wholly independent of, QLS.
Supported by Law Foundation-Queensland*

New QLS members

Queensland Law Society welcomes the following new members who joined between 10 January and 9 February 2017

Julie Ackerman, Cooke & Hutchinson
Roger Allingham, BHP Billiton Marketing Asia Pte Ltd
Lachlan Amerena, Broadley Rees Hogan
Ava Aram, non-practising firm
Jayne Attack, Carter Newell Lawyers
Sarah Bartrim, non-practising firm
Andrew Bautovich, non-practising firm
Katrina Bills, Children's Health Queensland
Vicky Biondo, National Australia Bank Limited
Lisa Bishop, Public Trustee of Queensland
Rina Biswas, Hillhouse Burrough McKeown Pty Ltd
Thomas Blackhurst, My Move Conveyancing
Joshua Blue, Gadens Lawyers – Brisbane
Julian Bodenmann, MacDonnells Law
Priscilla Bourne, Herbert Smith Freehills
Paul Brittain, Allens
Willow Buckley, O'Reilly Lillcrap
James Bunting, Mott and Associates
Mitchell Byram, Minter Ellison
Claudia Cameron, Health Support Queensland
Rebecca Cantwell, non-practising firm
Dawn Carey, Source Legal
Ballachanda Cariappa-Roy, UQ Union Legal Service
Joo Yee Chan, Ashurst Australia
Micaela Chomley, Chomley Family Law
Nicholas Congram, Corrs Chambers Westgarth
Courtney Cotter, QC Law
Ambyr Cousen, Aitken Whyte Lawyers
Luke Cudmore, Northside Family Law
Michele De Bonis, Cairns Community Legal Centre Inc.
Justine Dean, Samford Family Law
Alvina Delaney, ACLG Lawyers
Oszkar Denes, Denes Lawyers
Barton Donaldson, Holding Redlich
Thomas Eckersley, Richardson Eckersley Lawyers
Jasmine Evans, Merthyr Law
Laura Field, Range Lawyers
Kirsty Foulkes, non-practising firm
John Futer, Housing Industry Association
Jelena Grey, non-practising firm
Hayden Grimston, PD Law
Natasha Gromof, Ashurst Australia
Ian Haig, IE Haig
Rachel Hamada, CLH Lawyers
Jillian Hambleton, Barry.Nilsson. Lawyers
Dugald Hamilton, 23Legal
Emma Hanley, McCullough Robertson
Michael Hobson, Hobson Legal
Mark Hourigan, Transurban
Jason Hunt, Impact Homes
Kimberley Hutchinson, Ashurst Australia
Geoffrey Ingram, Pollock Ingram Pty Ltd

David Isaac, Mullins Lawyers
Natasha Jackson, Gayler Cleland
Morgan Jane, Gary S. Rolfe Solicitors
Sharan Kang, Gary S. Rolfe Solicitors
Sarah Kingston, South West Brisbane Community Legal Centre Inc.
Paayal Kishore, Minter Ellison
Suet Lai, Ebenezer Legal
Christine Lee, Spranklin McCartney Lawyers
Robert Legat, SB Partners Legal Pty Ltd
David Lewis, Holding Redlich
Mary-Jean Lewis, Hunter Compensation Lawyers
Naomi Lewis, DA Family Lawyers Pty Ltd
Zi Lim, Shimizu Kokusai Law Office
Vivien Little, Brisbane City Legal Practice
Candace Lombardi, McDonald Leong Lawyers
Jeffrey Lucas, Taylor David Lawyers
Tamara Lutvey, Ashurst Australia
Courtney Macdade, DSS Law
Geoffrey Maguire, non-practising firm
Rosemary Maitland, Dowd and Company
Kelly Marshall, Gadens Lawyers – Brisbane
Colin Martin, Bytherules Conveyancing Pty Ltd
Elizabeth McAulay, Neilson Stanton & Parkinson
Alice McCarthy, Batch Mewing Lawyers
Jason McCubbin, Thomson Geer
Jennifer McKain, HBM Lawyers
Patrese McVeigh, Ashurst Australia
Benjamin Meredith, MacDonnells Law
Phillip Mew, Virgin Australia Airlines Pty Limited
Kylee Miller, Cairns Regional Council
Jodie Mills, Small Myers Hughes
Anu Mohan, Cruise Lawyers
Ashleigh Montgomery, Kilmartin Knyvett Lawyers
Montana Morais, McInnes Wilson Lawyers
Katie Morrow, Terra Firma Law
Dileepa Munasinghe, Minter Ellison
Rebecca Mync, AJ & Co
Laura Neill, Ashurst Australia
Kylie Newman, non-practising firm
Craig Nicol, Small Myers Hughes
Celeste Norman, FIIG Securities
Michael O'Brien, Fisher Dore Lawyers
Jordan Palmer, Wiltshire Lawyers Pty Ltd
Damien Payard, Fair Work Ombudsman
Alexander Pugliese, HopgoodGanim
Roba Rayan, Knowmore Legal Service
Kathryn Rayner, Shine Lawyers
Esmeralda Reasbeck, Strutynski Law
Jennifer Rimmer, Jenny Rimmer Mediations
Heidi Rodriguez, Clyde & Co
Daniel Roe, Colin Biggers & Paisley Pty Ltd

Alicia Roncato, Groves and Clark
Ashley Rooney, Corrs Chambers Westgarth
James Ryan, James Ryan – Solicitor & Mediator
Rachael Ryan, de Groot's Wills & Estate Lawyers
James Saikovski, LawLab Pty Limited
Rose Sanderson, Ashurst Australia
Toni-Lee Saunders-Locke, Caldwell Solicitors Pty Ltd
Aidan Shanley, Holding Redlich
Christopher Shelley, Herbert Smith Freehills
Sarah Shipley, Holding Redlich
Cady Simpson, CRH Law
Tania Smith, Stone Group Lawyers
Emilie Soust, Herbert Smith Freehills
Laura Spalding, Piper Alderman
Nadette Stafford, Quinn & Scattini Lawyers
Karen Standish, New Hope Group
James Stedman, Hall Payne Lawyers
Rebecca Stoll, Fletcher Building (Australia) PTY LTD
Hayley Stubbings, Minter Ellison
Sean Sweeney, Shine Lawyers
Alison Swift, Pine Rivers Community Legal Service
Brooke Thomas, Ray White Group
Julia Thompson, Youi Pty Ltd
Clair Tighe, Gleeson Lawyers
Angela Todd, Barry.Nilsson. Lawyers
Stephanie Toplis, Moray & Agnew
Garreth Turner, Shine Lawyers
Martin van der Walt, Walt Allan
Deborah Vella, Support Legal
Leanne Weekes, Cooper Grace Ward
Rachel Weeks, John Bridgeman Limited
James Whitehouse, Whitehouse Builders Pty Ltd
Trina Williams, Knowmore Legal Service
Nadine Wismayer, The Real Estate Lawyer
Jasmine Wood, Carter Newell Lawyers
Amanda Wu, Ashurst Australia
Andrew Wydmanski, Clayton Utz
Kailey Zabloski, City of Gold Coast



Sophie Scott



Ben Hall



Katherine Bland



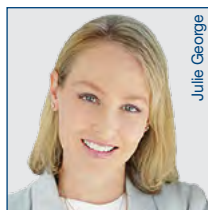
Rebecca Ebzery



William Keating



Warren Tripathi



Julie George



Leanne Francis



Laura Hanrahan



Stephen Hughes



Richard Suthers



Katie Jacklin



Lauren Gabriel

Career moves

Bartley Cohen

Bartley Cohen has announced the promotion of **Sophie Scott** to senior associate. Sophie has a strong commercial litigation background, with a particular emphasis on media law. She has acted in and assisted on substantial commercial litigation and professional indemnity claims since joining the firm in 2015.

Carter Newell Lawyers

Carter Newell Lawyers has announced the appointment of **Ben Hall** as special counsel to lead its Melbourne office. Ben is an insurance lawyer and accredited commercial litigation specialist with more than 18 years' experience, including day-to-day firm management.

The firm has also announced the promotion to senior associate of **Katherine Bland** (property and injury liability) and the promotion to associate of **Rebecca Ebzery** (construction and engineering) and **William Keating** (corporate), who has recently transferred to the Melbourne office.

CDI Lawyers

CDI Lawyers has announced the appointment of principal **Warren Tripathi**. Warren, a former property director of an international law firm, focuses on mixed use and strata title projects, advising on all aspects of development including site acquisition, joint venture and funding arrangements, titling and structuring, large-scale development conveyancing, and retail and commercial leasing.

COOKLEGAL

COOKLEGAL has announced the appointment of solicitor **Julie George**, who joins director Kara Cook and consultant solicitors Tamara de Kretser and Stephanie Ewart. She is an accredited family dispute resolution practitioner with experience in working with government services and in private practice, undertaking family law mediation and domestic violence responses.

DGT Costs Lawyers

DGT Costs Lawyers has announced that its Brisbane office managing solicitor, **Leanne Francis**, has become a court-appointed costs assessor, with her name added to the Registrar of Approved Costs Assessors. Leanne has practised as a lawyer for many years and now focuses on all areas of costs law.

HopgoodGanim Lawyers

HopgoodGanim Lawyers has announced the promotion of **Laura Hanrahan** to senior associate. Laura is a member of the estate planning and administration team, advising clients on wills, powers of attorney, superannuation death benefits, family discretionary trusts and deceased estates.

Macpherson Kelley

Industrial relations expert **Stephen Hughes** has joined Macpherson Kelley's Brisbane office to lead its regional workplace relations team.

Stephen provides strategic and operational workplace relations advice, with particular expertise in advising the aviation industry, construction, mining and professional services clients.

The firm has also announced the promotion of **Richard Suthers** to associate. Richard has extensive experience in providing advice on commercial matters, including acting for business sales and acquisitions, sale and purchase of shares, and commercial leasing.

Also promoted to associate was **Katie Jacklin**, an experienced workplace relations lawyer focused on general employment. Katie works predominantly with business owners, human resources managers and safety managers in diverse industries including manufacturing, real estate, construction, and professional services.

Rees R & Sydney Jones

Rees R & Sydney Jones has announced the promotion of **Lauren Gabriel** to associate. Lauren is a member of the family law division and has been with the firm since 2006.

Proctor career moves: For inclusion in this section, please email details and a photo to proctor@qls.com.au by the 1st of the month prior to the desired month of publication. This is a complimentary service for all firms, but inclusion is subject to available space.

Indigenous legal futures

The Indigenous Lawyers Association of Queensland Inc. (ILAQ) was established in 2007 with the aim of proactively advancing the participation and contribution of Aboriginal and Torres Strait Islander law students and legal professionals across the profession in Queensland and beyond.

Its recent activities have included:

- establishing and maintaining effective, respectful relationships across the Queensland legal profession
- partnering with the Queensland Law Society Equalising Opportunities in the Law (EOL) Committee for two significant student networking opportunities (Lawlink visits to Crown Law and Legal Aid Queensland)
- providing several professional development workshops (for students and professionals)
- co-hosting the second Indigenous Law Students Mooting Competition.

Last year it partnered with Soroptimists International to create the inaugural Sisters in Advocacy Bursary, recently awarded to a Queensland Indigenous female law student.

Individual ILAQ members have been supported by the association to travel and present papers on the international stage, and ILAQ has provided sponsorship to events serving to educate and inform (such as Caxton Legal Centre's 'Without Unnecessary Violence' symposium).

Its management committee has worked to educate the public, legal profession and government on matters in which an Indigenous perspective has been long silenced. These include the voice of Aboriginal and Torres Strait Islander (Ab & TSI) women in regard to domestic violence, the unique positions of Ab & TSI communities and families in consideration of recent legislation removing the civil statutory time limits for child sexual abuse, submissions on an equitable briefing policy, televising court proceedings, human rights legislation in Queensland and the transition of 17-year-old Queenslanders into the youth justice system, to name but a few.

Individual committee members make time to mentor, coach, tutor and otherwise support younger members of the community (and new members to the legal profession) in the hope of creating more positive opportunities for participation and contribution.

"The deficit dialogue and the appalling disadvantage continually experienced by Indigenous Queenslanders can be significantly altered if we take responsibility for ensuring that the opportunity for professional Indigenous knowledge, the amplification of Ab & TSI voices and the presence of First Nation Community perspectives is legitimately realised and duly regarded," Linda said.

"ILAQ works tirelessly to get Indigenous legal skin in the justice game and we are only too aware that the rules of this justice game will be changed (for the better) by our increased professional and cultural contributions.

"The opportunity for ILAQ to work more closely (as a reciprocal community partner) with QLS can only be of benefit to all Queenslanders, especially as we aim, together, to ensure Queensland's future legal professionals are well connected and all legal professionals are both academically and culturally intelligent."

She said there were several opportunities for members of the profession to assist ILAQ in its endeavours.

"Primarily you are all invited to join the membership (see indigenouslawyersqueensland.com.au)," she said. "Membership is open to individuals and corporates."

Individual members (and corporate representatives) could be interested in contributing to one of the ILAQ focus committees, covering events, nominations, policy and procedure, sales (including funding and merchandise), media and communications, partnerships and professional development, and position papers and submissions.

"Of course I would always encourage the profession generally to support the ILAQ events and offerings as often as possible," Linda said.

NOTE: Check indigenouslawyersqueensland.com.au for details of the ILAQ's forthcoming 10-year anniversary activities.



ILAQ president Linda Ryle claims to have an "unremarkable" background.

"I was born in Bowen on Birragubba country (country Queensland), the sixth generation of our family to be born there (at that time)," she said. "My family heritage is evidenced in 140 years of documented history, with our existence first recorded in Kamilaroi Country (NSW) and built upon further by six generations of cultural family connection to the Whitsunday Coast of northern Queensland – Birragubba Country.

"I grew up as a bush/farm kid with a lot of nothing but family and a seriously fierce independent streak. My early years were witness to my father's hard work and my mother's perseverance.

"Dad managed several different rural stock and agricultural operations in western Queensland – often in the middle of apparent nowhere. My younger brother and I also spent time on the family farm at Mookara on the banks of Duck Creek (south of Bowen). I recall collecting colourful and interesting pebbles and rocks (often finding the best specimens on the ground beneath any guttering downpipes or water tank overflows) – even now I can often be caught with interesting rocks in my handbag (seed pods and bark, too)."

When her parents separated, Linda relocated with her mother and younger brother to Auckland, New Zealand, eventually beginning full-time employment in Invercargill in the hospitality industry as a cashier/kitchen hand).

Returning to Australia, she worked in her home town in Indigenous affairs, including a key role with the Girudala Council of Elders and then with the Aboriginal Legal Service

Advancing the profile and interests of Indigenous peoples in the Queensland legal community takes a focused organisation with a determined leader. **John Teerds** talks to Indigenous Lawyers Association of Queensland president Linda Ryle.



(in the days when Queensland boasted 13 separate ATSILS corporations).

"I was encouraged to study law by a barrister colleague," she said. "He and I had spent many long hours working for the benefit of our Ab & TSI community clients. It is very important to note that Indigenous clientele had many of the same real-world legal issues as non-Indigenous citizens (emphatically noting that not all of our work was criminal representation). I thank (and blame) him for everything law-related since!

"Despite being quite a competent and able student, my family circumstances meant that I had not completed Year 12, and a university education was never an issue I considered relevant to people like me.

"No other person in my family at that time had been university educated. I was accepted through the alternative entry pathway for Indigenous students at QUT, and ticked all the boxes for bureaucratic disadvantage – a single mum, mature aged, Aboriginal woman and a university student studying externally – I *could* have been a poster girl for assimilation!

"At that time, I was receiving audio-cassette recordings of the law lectures and tutorials, and submitting assessment work for marking via a facsimile machine. I had to purchase my first computer and did so when I took on my first mortgage in my own name. It was around 2003/2004 before I realised the difficulties

with distance and effective study and career opportunities, so I relocated to Brisbane to complete the law degree at QUT."

Linda said she could be quoted as having studied "internal, external, part-time, full-time and all the damn time!" At the end of 2005 she began work with the Brisbane ATSILS office as a legal services field officer.

She worked with the legal service in Bowen, Brisbane and on the Sunshine Coast, but the experience clarified for her that all was indeed not equal in the 'real world'.

"The people who made the rules did not reside in any real world I was a participant of or contributor to," she said. "While I regard myself as very fortunate to have been trusted by the Indigenous community, and particularly the clients I served to support and assist, I felt I was not useful enough.

"I was consistently disappointed and frustrated by my individual lack of ability to do more to make lives easier and fairer – ignorance, few experienced professional Indigenous colleagues and foreign systems cobbled me as relentless restrictive masters.

"The cultural difference was often beyond my comprehension, and I struggled to grasp why our cultural priorities were so difficult a concept for some professional colleagues to understand (or at the very least acknowledge).

"Simply put, change required increased Indigenous contribution to the making of the rules. Those existing rules had consistently misunderstood and misrepresented the needs of Ab & TSI citizens – and none more so than Aboriginal women."

In 2006, the notion of a national Indigenous legal body, comprised of state branch members, was aired, with huge support during a national Indigenous legal conference (NILC) in Sydney.

The state delegates were determined and tasked with establishing their branch before the next conference, and the Queensland branch was incorporated in 2007 with Nathan Jarro as inaugural president and Linda as the inaugural student representative.

As deputy chair of the QLS Reconciliation Action Plan (RAP) Working Group, Linda and the group's members have been focused on delivering a RAP which is practical, sustainable, meaningful and respectful.

"QLS has consistently and graciously accepted the 'frank and fearless' advice of the group membership," she said. "This has been of immense assistance."

John Teerds is the editor of *Proctor*.

New Directions for DA Family Lawyers

It has been almost 12 years since Accredited Family Law Specialist, Deborah Awyzio established DA Family Lawyers and we would like to take this opportunity to share some exciting news. We are pleased to announce Lisa Foley has now been appointed Managing Director alongside Deborah who will continue in her role as Director. We wish Lisa Foley congratulations and are looking forward to what the future holds for DA Family Lawyers.

Deborah and Lisa have worked together since the inception of DA Family Lawyers; Lisa finishing her law degree at the Queensland University of Technology while taking on employment as a law clerk to Deborah. While Lisa travelled overseas for a brief period, working as a government child protection lawyer and following her return worked with the Department of Communities on cases falling within the Hague Convention on the Civil Aspects of International Child Abduction, she returned to DA Family Lawyers as a Partner in 2012.

Deborah and Lisa are proud of the direction the firm has taken. In recent times, the firm has broadened its social media presence. Solicitors within the firm including Deborah and Lisa present quarterly lunchbox seminars to other firms and lawyers and the firm is excited to be working on a new project, which it intends to pilot in 2017, that will offer family law advice to those members of the community who may not be in a position to pay for advice and are unable to access other forms of legal assistance.

Deborah and Lisa share the same philosophy when it comes to family law. They adopt an empathetic but no nonsense approach. From the first encounter, they seek to establish what the client wants to achieve and assist them to achieve that in the most cost effective and least litigious way possible.

www.dafamilylawyers.com.au



DEBORAH AWYZIO
MEDIATION

DA FAMILY
LAWYERS

This month ...

Modern Advocate Lecture Series, 2017, Lecture one

Law Society House, Brisbane | 6-7.30pm

To foster collegiality in the legal profession and promote engagement between solicitors and barristers, Queensland Law Society proudly presents the Modern Advocate Lecture Series, an initiative of QLS president Christine Smyth and QLS Ethics Centre. The series will feature lectures from senior practitioners within the legal profession or members of the judiciary dealing with practical advocacy relevant to early career practitioners.

Join Land Court of Queensland president Fleur Kingham as she delivers Lecture one for 2017.

Networking drinks will be held after the presentation.



0.5 CPD POINT

THU
2
MAR

Core Webinar: Profiting from PR & Media

Online | 12.30-1.30pm

Are you making the most of the multitude of opportunities out there to market your firm? If not, do you even know where to start? Join our expert presenters and get the tips and tricks you need to harness the power of PR and start boosting your business.



1 CPD POINT

TUE
7
MAR

Introduction to Conveyancing

Law Society House, Brisbane
Thu 8.30am-5pm, Fri 8.30am-4pm

Aimed at junior staff, this introductory course provides delegates with the key skills to:

- understand key concepts and important aspects of the conveyancing process, including ethical dilemmas
- develop an applied understanding of the sale and purchase of residential land and houses, and lots in a Community Titles Scheme
- get ahead of the game with insight into e-conveyancing in practice.

The course is based on the nationally accredited diploma-level unit 'BSBLEG512 Apply legal principles in property law matters', which is offered by Queensland Law Society as self-paced study.



10 CPD POINTS

THU-FRI
9
TO
10
MAR



Focus on the future of law



Queensland
Law Society

Symposium 2017

Framing the future

Brisbane Convention & Exhibition Centre
Fri 8.30am-5pm, Sat 8.30am-3pm

Don't miss your final chance to register for QLS Symposium 2017. This premier event for Queensland's legal profession offers the perfect opportunity to hear from future-thinkers, innovators and the profession's most respected experts on issues that are shaping the future of law in Queensland. Select stream-specific programs or the Core CPD program







10 CPD POINTS (full attendance)

FRI-SAT
**17
TO
18**
MAR

Live Webstream: Opening Plenary

Stream LIVE Online | 8.30-10am

Unable to attend QLS Symposium 2017? Register for the live webstream of the opening addresses, including a welcome from QLS president Christine Smyth, an address by Chief Justice Catherine Holmes, and our opening plenary by Holly Ransom, CEO of Emergent.





1 CPD POINT



Don't miss out.
Registrations close 14 March.

qls.com.au/symposium

Core: Better Law Through Movies, Music and My Quirky Family

Law Society House, Brisbane | 9am-12.30pm

Three, one-hour sessions that teach critical lessons in all three core CPD areas; all delivered by American educator and internationally renowned speaker Stuart Teicher. Join 'the CPD performer' as he provides important practice guidance and core lessons in a way you will never forget.



3 CPD POINTS

TUE
21
MAR

Practice Management Course – Medium and Large Practice Focus

Law Society House, Brisbane | from 8.30am

The three-day Practice Management Course (PMC) has been designed specifically for Queensland practitioners by a team of experts. The course offers practical guidance relating to IT, practice finance and business development and ongoing exclusive access to continued learning and networking opportunities post-graduation.

The Society's PMC features:

- practical learning with experts
- tailored workshops
- interaction, discussion and implementation
- leadership profiling
- ongoing bespoke support and commitment.



10 CPD POINTS

THU-SAT
23
TO
25
MAR

Core Webinar: Standing Out from Our Colleagues

Online | 12.30-1.30pm

Relevant to all practitioners, this webinar will examine how legal ethics relates to personal brand. QLS Ethics Centre director Stafford Shepherd will talk about how our 'ethical personal brand' can help us to stand out from our colleagues in a competitive and demanding legal services market.



1 CPD POINT

FRI
24
MAR

Core Webinar: 5 Things I Wish I Knew When I Started Practice

Online | 12.30-1.30pm

We all make a few mistakes in those first few years of practice, not to mention those countless 'aha' moments where the day-to-day practice pieces all fall into place at once (usually a little too late). Wouldn't it be great if you could skip that (often embarrassing) rite of passage and get the tips you need straight up? Join our expert presenter to hear a few war stories and the five things they wish they'd known when they first started out.



1 CPD POINT

WED
29
MAR

Can't attend an event?

Purchase the DVD



Look for this icon. Earlybird prices apply.

Save the date

Masterclass: Family Law	5 April
Masterclass: Succession Law	6 April
Introduction Webinar: Property Contracts	11 April
Masterclass: Property Law	13 April
Lawyers as Employers	
Webinar Series: Pre-Employment	19 April
QLS ECL vs BAQ Debate	20 April
Introduction Webinar: Trust Accounting	26 April
Practice Management Course – Sole and Small Practice Focus	27-29 April

Earlybird prices and registration available at

 qls.com.au/events

Now and then

Articled clerks reunite after 40 years

After 40 years, six lawyers reunite to recall the legal profession as it was. Report by **John Byrne**.

On the evening of 30 August 2016, six senior lawyers came together in Brisbane for the 40th year reunion of their commencing articles of clerkship in Townsville.

Now spread as far afield as Townsville, Mackay, Sarina, Canberra and Scotland, the group were part of 11 clerks who started their five-year, full-time articles of clerkship and their Solicitors Board studies in 1975-76.

At that time, only the University of Queensland and James Cook University offered law courses and, in the case of James Cook, it was only first-year law. As no part-time courses were available to study law, one had to either live in Brisbane to study full-time at university or be enrolled in the Solicitors Board external course and at the same time complete a five-year full-time clerkship for your master solicitor.

At that time, it was common for the articles of clerkship document to be entered into by the clerk, the solicitor and a clerk's parent. It was a term of the document that, if the clerk absconded, the parent would have to resign their occupation and serve out the balance of the clerkship for the solicitor at less than the apprenticeship wages paid to the clerk.

At the time they commenced their clerkships, the six lawyers who came together for this reunion were employed in three Townsville law firms. Ken Seaniger, Peter McLachlan and Peter Morrison were all articled at Dean Gillman & Thompson. Trevor Cowling and John Byrne were articled at Nehmer Boulton & Cleary. Bruce Virgo was articled at Roberts Leu & North.

They also shared flats and houses in various combinations between themselves and other clerks during that period. In those years articled law clerks also ran annual sporting weekends in which they challenged the profession and an annual law ball which always generated a variety of hijinks and stories.

Articled law clerks could be expected to run errands for their master, including picking the master's children up from school, helping with sporting clubs or political campaigns to which the master was committed, maintaining office furniture and equipment, and many other non-legal tasks.



Standing, from left, Ken Seaniger, Peter McLachlan, Peter Morrison and John Byrne; seated, Bruce Virgo and Trevor Cowling.

Bruce Virgo was articled to Mr David Glasgow; Ken Seaniger was articled to Mr Jim Thomson; Trevor Cowling was articled to Mr Don Cleary; John Byrne was articled to Mr John Boulton, and Peter Morrison was articled to Mr Gordon Dean and then Mr Jim Thomson, and Peter McLachlan to Mr Gordon Dean and then Mr Bernie Messer (these changes happening when Mr Dean was elected to Federal Government).

They appeared in courts, briefed barristers and within their respective firms were often crowded several to a room and/or shared desks.

Following their admissions around 1981, Ken Seaniger went on to establish his own firm KJ Seaniger & Associates in Sarina; Peter McLachlan went into partnership at Beckey Knight & Elliott in Mackay; John Byrne spent several years as a locum while pursuing a professional sports career and then returned to establish his own practice in Townsville, and all are all still practising in those firms.

Peter Morrison, Trevor Cowling and Bruce Virgo spent a number of years in a few different combinations of partnership. Cowling and Virgo practised together in Airlie Beach for a number of years before, after a period of work with the Australian Government Solicitor, Cowling first became a partner at Suthers Taylor and then joined Roberts Nehmer McKee where Morrison was also a partner at the time. Cowling went on to become a notary public and remains a partner of that firm.

Bruce Virgo practised in the Whitsundays until 1994 and after re-qualifying first in England/

Wales and then in Scotland, worked at various times in both Edinburgh and Brisbane up to mid-2006, including a short time in the Brisbane office of Roberts Nehmer McKee (where Morrison and Cowling were still both partners), before returning to Scotland where he still lives. He is now a partner in the London office of the English firm, Gateley PLC as well as a Scottish notary.

Peter Morrison followed a long-held interest with the Army Reserve and, after leaving Roberts Nehmer McKee in Townsville, pursued a full time position reaching the rank of colonel. He is now a magistrate in Canberra.

Reflecting on their early years as articled clerks, these gentlemen agree that the five years' full-time work gave them a much broader and more practical experience than full-time study.

Asked what they would tell junior lawyers nowadays, the participants said:

Bruce Virgo: "The law is a vastly different arena to that we battled in and through. Keep your CVs fresh and apply often to X-Factor."

John Byrne: "Don't take risks for clients. Next month that client will not need a lawyer, but you will still need to be one."

Trevor Cowling: "Law is a demanding profession. Make sure you find (or make) some fun in every day."

Peter McLachlan: "Maintain your integrity. Be courteous – particularly when faced with discourtesy. Be firm, but do not personally invest in clients' matters."

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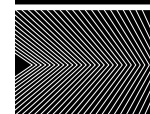
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Time to board the Sunshine Special?

with Matthew Dunn



As the quality of our Queensland wine industry thrives and the number of local producers drop, perhaps it's time to consider new ways to make it easier to buy local.

Our Queensland wines are at a bit of a crossroad. Quality has never been better and the cohort of exceptional Queensland wine and producers is growing strongly.

Venerated wine guru James Halliday now lists three Queensland wineries as magical five-star entries in his latest reference guide (Boireann, Golden Grove Estate and Witches Falls Winery). In that edition, Boireann had three 96 point wines, two 95 pointers and two 94s; Golden Grove had three 95 point wines and two 94s; and Witches Falls had two 95s and two 94s. These, along with a number of other very worthy local creations, are serious wines and well debunk the old stereotypes of ice cubes in glass.

But the good times for the best have been accompanied by a contraction in the overall number of producers in Queensland. Amongst others, Jimbour House ceased producing wine in 2010 and the historic

operation at Romavilla (Queensland's oldest, opening in 1863) closed in 2013. Figures from the *Australian and New Zealand Wine Industry Directory* show that in 2005 there were 100 Queensland wine producers compared to Tasmania's meagre 77. In 2016 the position was reversed, with 79 producers in Queensland and 115 in Tasmania.

Tasmania now has one of the most profitable wine industries in Australia and scores 29 entries in Mr Halliday's five-star wineries list.

The question is, what has brought about this change of fortunes?

There are climatic differences in Tasmania's favour, but Queensland producers have a ready local mass market eight times the size of the Taswegians. There may be a number of factors, but our local wine industry and regulators need to take a long-term view and look for ways to spruik the local drop in preference to back-of-the-truck specials from down south.

Speaking to one Brisbane specialist wine retailer recently with a good selection of Queensland wine, it was reported that finding the wines is a problem. It seems producers are sometimes shy and the local buyers need educating to know what to ask for.

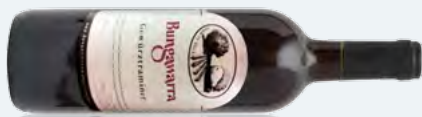
One thing the Tasmanians had in place from the early 2000s to 2013 was a special licence to sell Tasmanian wine. The licensing board had a Tasmanian and local wine licence, which could be granted when the liquor to be sold by the licensee was:

- Tasmanian and local wine only
- (except for tastings) sold only for consumption off the premises
- sold only as an adjunct to the primary purpose of the licensee to be carried on at the licensed premises which primary purpose related to the provision of hospitality and tourist services or the sale of hospitality or tourist goods on the licensed premises, and
- subject to conditions to ensure that such provision would not detrimentally impact on the operation of the premises for their primary purpose.

Recipients of this type of licence were mostly tourist shops, high-end delis and food stores, and even the occasional petrol station with the lot. One of the results of this approach was to make local wine more noticed, easier to source and over time, in greater demand.

Perhaps we could consider something similar to make it easier to find and buy local.

The tasting Three Queensland treats were subject to scrutiny.



The first was the **Bungawarra 2013 Granite Belt Gewürztraminer**, which had a golden robe and a nose of honeysuckle, lime and crushed jasmine flowers. The palate was smooth and stylish, viscous in the mouth with some sweetness to the fore cutting back almost to dryness. A quartz backbone layered with lime. A perfect wine for rich salmon or Queensland prawns.



The second was the **Golden Grove 2010 Granite Belt Semillon**, which was pale straw in colour. The nose was lemon citrus tang but with the beginnings of classic Hunter-style buttery complexity appearing. The palate was a pure and dry attack with lemon lanoline in support and a hint of creeping chablis in the background lurking waiting to emerge. Perfect for Queensland summer lunches.



The final wine was the **Boireann 2015 Granite Belt Shiraz S2**, which was the colour of ripe blood plums. The nose was full-bodied cracked black pepper and ripe red summer fruits. The palate had arms outstretched to embrace the drinker, wrapped in layers of spice, tanniny oak and red fruiti di bosco. While the layers are set apart for now, they will meld with time. A comforting red wine in search of Queensland beef.

Verdict: The panel of wines were great ambassadors for what Queensland wine is today and why it should be first choice for thinking locals. The Boireann was sublime.

Matthew Dunn is Queensland Law Society acting CEO and government relations principal advisor.

Mould's maze

By John-Paul Mould, barrister
jpmould.com.au

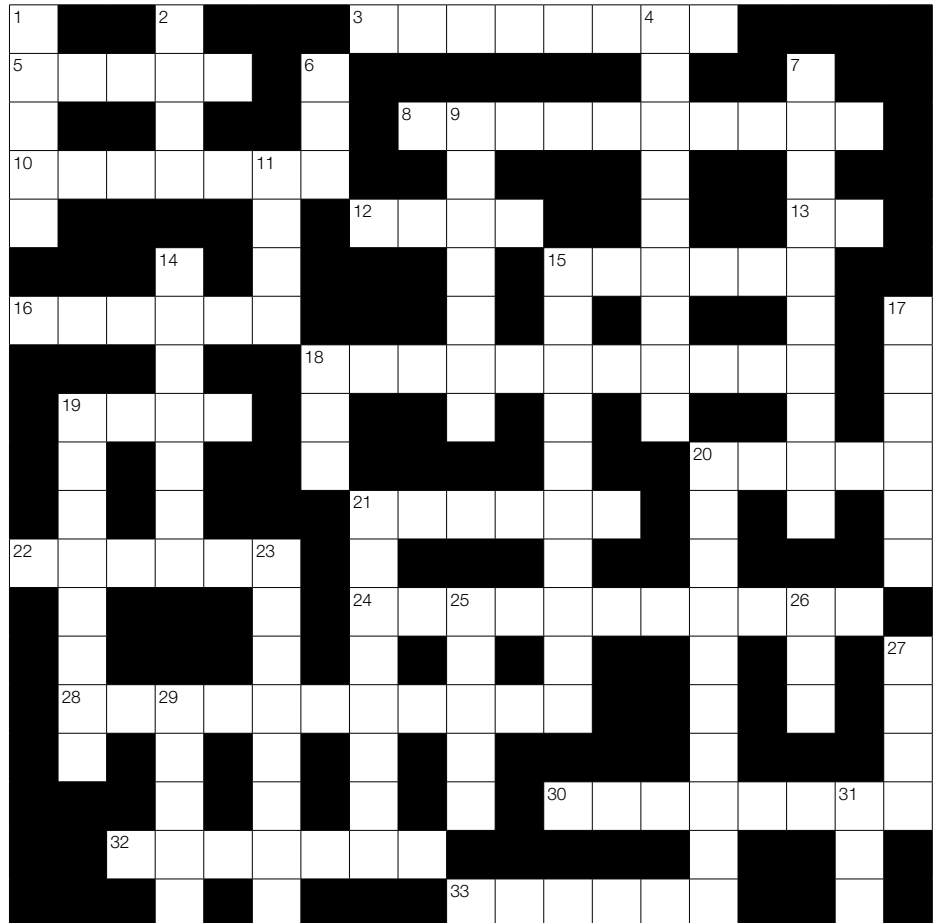


Across

- 3 An initial judicial determination is made 'at first'. (8)
- 5 A bankruptcy usually lasts years. (5)
- 8 Cancels. (10)
- 10 A judgment is liable to appeal if there are no adequate given. (7)
- 12 The law relating to anti-.... injunctions is mostly settled since the High Court decision of *CSR Ltd v Cigna Insurance Australia Ltd*. (4)
- 13 A pre-trial criminal application is made under Section 590.. of the Criminal Code. (2)
- 15 The common law rule in 's Case provides that once a landlord has consented to an assignment of a tenant's interest, the landlord implicitly consents to all future assignments by the tenant. (6)
- 16 An unmarried father of a child is liable to make a proper contribution towards the mother's reasonable medical expenses of pregnancy and birth if she commences proceedings within months of the birth. (6)
- 18 If the presumption of equal shared parental responsibility applies, and equal time is not reasonably practicable, the court must consider making an order for and substantial time. (11)
- 19 Traverse, in the context of a pleading. (4)
- 20 Recent High Court case concerning collateral contracts, *Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*. (5)
- 21 Arrest warrant, writ of (6)
- 22 *I the Law* was sung by The Clash, Bobby Fuller and Green Day. (6)
- 24 Punishment motivated by vengeance. (11)
- 28 Transfer of a criminal suspect to another country. (11)
- 30 Defence of the judicial and legislative arms of government, privilege. (8)
- 32 The rule in *Saunders v* provides that if all beneficiaries of a trust are adult and able, they may transfer the legal estate to themselves and terminate the trust. (7)
- 33 Equitable defence focusing on the opponent's tardiness in commencing proceedings. (6)

Down

- 1 The principle of following judicial precedent, decisis. (5)
- 2 Heritable estates in land; charges. (4)
- 4 Legal disobedience. (9)
- 6 No legal action can be instituted twice for the same cause, *ne ... in idem*. (Latin) (3)
- 7 A binding financial agreement that deals with how, in the event of the breakdown of a de facto relationship, property of the parties is to be divided, is of no force and effect until a declaration is made. (10)



- 9 The right of compulsory acquisition, domain. (US) (7)
- 11 Interest on a judgment is payable under Section 5.. of the *Civil Proceedings Act 2011* (Qld). (4)
- 14 A person who intentionally creates a chimeric embryo is liable for imprisonment for 15 years under the *Prohibition of Human for Reproduction Act 2002* (Cth). (7)
- 15 is both a crime and a tort. (10)
- 17 A presumption of paternity arises if an unmarried man cohabits with a woman during the period beginning not earlier than 44 weeks and ending not less than weeks before the birth. (6)
- 18 If a serious drug offender confiscation order is granted, the court can direct that the property of the offender, including property which was gifted in the ... years prior to conviction, is to be forfeited. (3)
- 19 The sword of is often used to describe the effect of a suspended sentence on an offender. (8)
- 20 In a zone, a country may exercise control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations. (10)
- 21 The Act regulating bills of lading, the of Goods Act 1991 (Cth). (8)
- 23 When a defendant is being sentenced for multiple offences, the court applies this principle to ensure the aggregate sentence is appropriate. (8)
- 25 A judge is a of law. (5)
- 26 Adding a day, the period between a decree nisi and a decree absolute is ... month(s). (3)
- 27 Christian name of solicitors Smith and Short, barrister Leotta and jury foreman Shaw appointed in the Bjelke-Petersen trial. (4)
- 29 Not quite a contractual offer, an invitation to (5)
- 31 Family provision. (abbr.) (3)

Solution on page 64

Mornings on the run

But afternoons are for training

by Shane Budden



As regular readers will know, presuming their medication is not one which affects memory, I run to work several days a week.

I do this in part because it is supposed to be good for the environment, although what help the environment gets from me sweating my body weight all over it every morning is not immediately clear.

There are obviously health benefits – for a start, laughing is apparently very good for you and few people can watch me run without becoming hysterical to the point of incontinence, especially as I suspect I am often trailed by an ambulance full of paramedics taking bets on when exactly I will collapse.

The fact that I run at the approximate speed of the plot of *The Bold and the Beautiful* doesn't help (this show moves so slowly I suspect that, even though I haven't seen it since 1989, it is 'the next day' and Ridge – whose face now looks a lot like a thong covered in Glad Wrap and stuck in the microwave for five minutes – is trying to decide whether it is wrong to re-marry Brooke because he is simultaneously her ex-husband, brother, stepson, cousin and father-in-law). If you have never watched this show, it is clear you didn't study law in the '80s, because it came on at lunchtime and was perfect study-avoidance fodder.

Actually, thinking on that, it is possible you did study law and just got good marks due to not avoiding study. For younger readers, 'study' is a thing you had to do back in the days before your iPhone could do your assignments for you, and we had 'exams' where we had to prove our legal competence by reproducing enough of the textbook in the exam to ensure that our answers were too long for the lecturer to read, at which point he or she would write '65%' on the exam and head for the Campus Club. Now, of course, you have take-home exams and I suspect there is one person doing everybody's exam – and in the process making more money than they ever will in law.

However, I digress; the point is that I do run to work some mornings, but due to the fact that my knees have all the flexibility and robust strength of the ones they occasionally pull out of Egyptian burial chambers, I can't do the run home.

This means I have to subject myself to public transport, and in the case of afternoon travel this means the train. I take the train in the afternoons based on an in-depth process whereby I have calculated the relative costs of the bus and the train, their overall carbon footprint and the fact that the train station is much closer to my office than the bus stop (NB: Not all of these factors were weighted equally in the calculation).

The problem is that I am unused to the train and train travel etiquette has changed since I was last a regular user, back in my student days. Trains were very quiet then, mostly because almost nobody ever managed to actually catch one.

This was because trains in those days had a quantum-inspired timetable, in which no train would ever arrive at the station at the same time from day to day. And just as you can't know a quantum particle's speed and position at the same time, you could not know the train's arrival time and the actual station at the same time; all you could be sure of was that it would most certainly not arrive at the time specified in the timetable.

This meant fairly empty and quiet carriages, especially if you were a student and had no need to be anywhere at any particular time (you may be picking up on why I did not exactly make the dean's honours list during my student days).

Anyway, it is different now – much noisier, because everyone has a phone and many people feel that the details of their conversations are of such compelling gravity that all other occupants of the train should be made aware of them, in real time and with colour commentary ("She didn't! In the theatre? Wearing the clown costume? And her mum was there? OMG! LOL!").

That isn't the worst bit, though – the worst bit is getting on the train, because that etiquette has changed as well. In the old days, you lined up about where you thought the doors would be when the train stopped, and if you were right you got on first and people followed in the order of how close they got to guessing the position of the doors; it was sort of a reward for being pedantic enough to get the position right.

Some of the older guys who used to catch my train regarded this as a serious sport, and would try to get to the station earlier than each other to get prime spot, glaring balefully at one another as if they were lining up for the 100-metre final at the Olympics, rather than attaching a deeply concerning level of significance to where they stood while waiting for the train.

At least those guys had some honour about them though – they would never push past someone who got closer than them, and would probably hold an inquiry if anyone else ever did.

These days, boarding a train is done with the same overall decorum as people display when attending the Boxing Day sales – people rush from all angles, as if Willy Wonka left a golden ticket under one of the seats. Anyone trying to get off the train needs to show the footwork of Johnathan Thurston if they don't want to be crushed in the rush; I wouldn't be surprised if JT catches trains in the summer just to practise his side-step.

Once on the train, of course, anyone who doesn't get a seat stays near the doors, knowing how little chance they would have to get off if they were standing in the aisle. This means that everyone is pressed up very close, and I can often end up standing cheek-to-cheek with someone who looks and smells like a Wookiee that has been for a dip in a sewerage tank.

It isn't as bad as it sounds though, because I can usually read the news from someone's iPhone, as well as see what their friends are doing on Facebook. That is pretty cool, as I am not one Facebook myself; now if I can just stand next to somebody who is friends with my friends...

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Crossword solution from page 62

Across: 3 Instance, 5 Three, 8 Terminates, 10 Reasons, 12 Suit, 13 AA, 15 Dumpor, 16 Twelve, 18 Significant, 19 Deny, 20 Crown, 21 Capias, 22 Fought, 24 Retribution, 28 Extradition, 30 Absolute, 32 Vautier, 33 Laches.

Down: 1 Stare, 2 Fees, 4 Contumacy, 6 Bis, 7 Separation, 9 Eminent, 11 Nine, 14 Cloning, 15 Defamation, 17 Twenty, 18 Six, 19 Damocles, 20 Contiguous, 21 Carriage, 23 Totality, 25 Trier, 26 One, 27 Luke, 29 Treat, 31 TFM.

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Rate	Effective	Rate %
Standard default contract rate	3 October 2016	9.25
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 January 2017 to 30 June 2017	7.50
Federal Court – Interest on judgment debt for half year	1 January 2017 to 30 June 2017	7.50
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 January 2017 to 30 June 2017	5.50
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 January 2017 to 30 June 2017	7.50
Court suitors rate for quarter year	1 January 2017 to 31 March 2017	0.815
Cash rate target	from 2 November 2016	1.50
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2016	8.00

Historical standard default contract rate %

Mar 2016	Apr 2016	May 2016	June 2016	July 2016	Aug 2016	Sep 2016	Oct 2016	Nov 2016	Dec 2016	Jan 2017	Feb 2017
9.45/9.55	9.55	9.55/9.60	9.60	9.35	9.35	9.35	9.25	9.25	9.25	9.25	9.25

NB: A law practice must ensure it is entitled to charge interest on outstanding legal costs and if such interest is to be calculated by reference to the Cash Rate Target, must ensure it ascertains the relevant Cash Rate Target applicable to the particular case in question. See qls.com.au > Knowledge centre > Practising resources > Interest rates any changes in rates since publication. See the Reserve Bank website – www.rba.gov.au – for historical rates.

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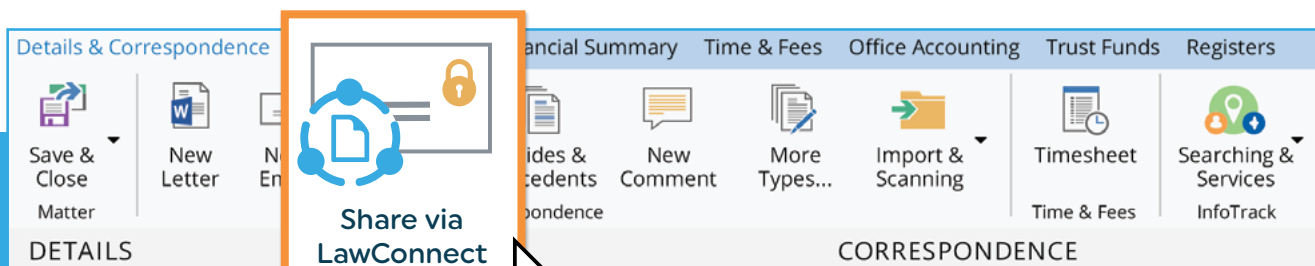
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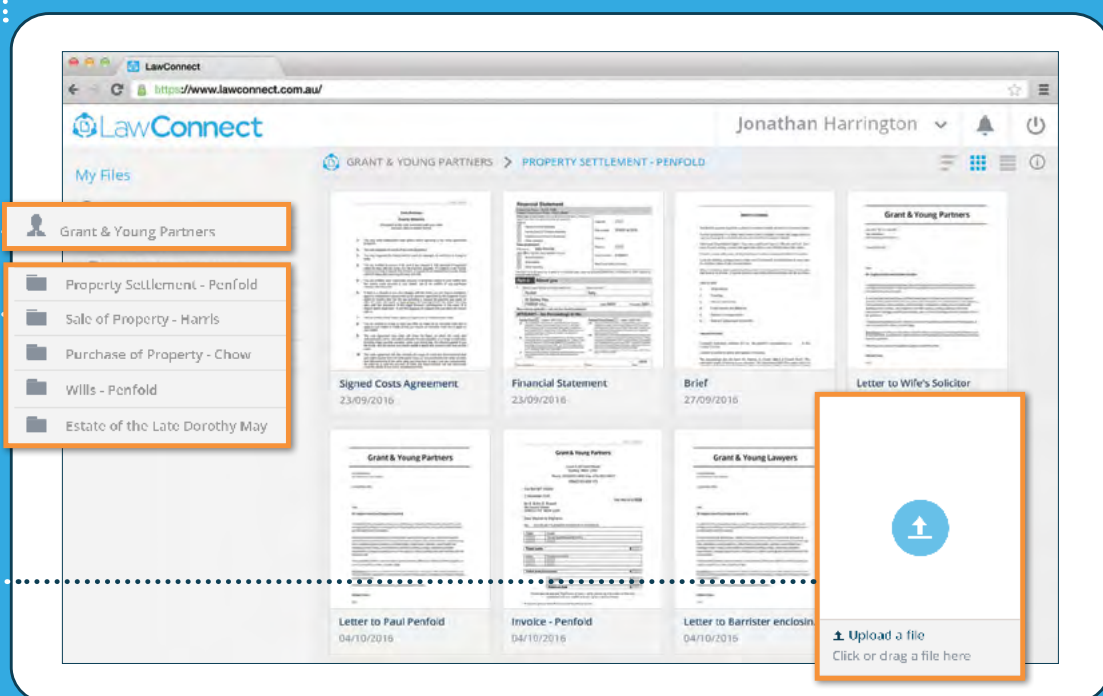
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