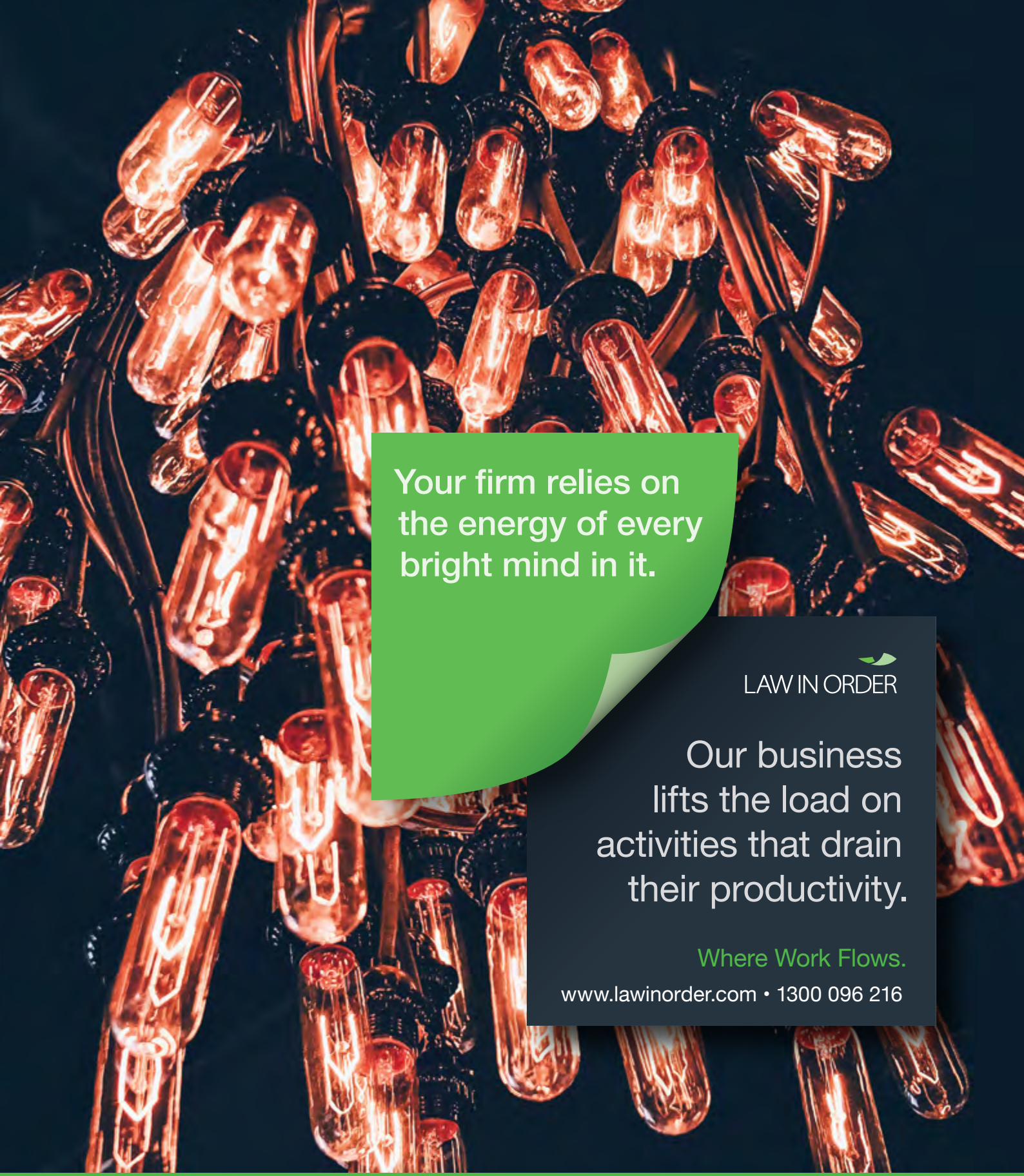
PROCTOR

Queensland Law Society

December 2018 – Vol.38 No.11

Reforms offer a new beginning for children

'Casual' by name, or nature?


Your firm relies on the energy of every bright mind in it.
LAW IN ORDER
Our business lifts the load on activities that drain their productivity.
Where Work Flows.
www.lawinorder.com • 1300 096 216
Sydney • Brisbane • Melbourne • Perth • Singapore • Hong Kong • India
Supporting you 24/7 365 days a year

Queensland Law Society

PROCTOR

Published by Queensland Law Society | ISSN 1321-8794 | RRP $14.30 (includes GST) | **qls.com.au**

QLS Symposium 2019

Stephen Scheeler

Former Facebook CEO for Australia and New Zealand; Founder, digitalceo.com.au; Senior Advisor, McKinsey & Company and Executive-in-Residence, Australian Graduate School of Management (AGSM), University of NSW, Sydney

Mr Stephen Scheeler appears by arrangement with Saxton Speakers Bureau

The Honourable Chief Justice

Catherine Holmes

Supreme Court of Queensland, Queensland's first female Chief Justice and head of the landmark Commission of Inquiry into the 2010-11 Queensland floods.

The Honourable

Yvette D'Ath MP

Elected on 22 February 2014 as the Member for Redcliffe and appointed Attorney-General and Minister for Justice on 16 February 2015. Ms D'Ath is also leader of the House in the Queensland Parliament.

Be challenged to break the mould. Symposium 2019 will bring the profession's leading experts together and provide thought-provoking sessions to ensure you stay proactive and competitive in the legal landscape.

15-16 March 2019 | Brisbane

View the full list of presenters and register online now
qls.com.au/symp19

Major sponsor

BOND UNIVERSITY
FACULTY OF LAW

10 CPD

Queensland Law Society®

The value of solicitors

Successes, plans and appreciation

The end of the year is now upon us, and I would like to thank you all for your support of the Society this year, and also update you on a couple of last things for 2018.

We have had many successes and set many plans in motion this year in support of good law and good lawyers and the public good.

In September I met with and wrote to Queensland's Attorney-General about increasing the current costs threshold for section 311(1)(a) and (2) of the *Legal Profession Act 2007*. Our proposal was also supported by the Acting Legal Services Commissioner in 2017.

We requested that the current prescribed amount of $1500 be increased to $5000. The original amount was introduced more than a decade ago, and has stood still despite inflation running to 21.9%. The original threshold remains misaligned to other industry thresholds and fee regulation, and would require frequent review to ensure it kept pace with inflation into the future.

Other Australian jurisdictions are also not consistent, but it is understood that, under the Legal Profession Uniform Law scheme, they are considering cost disclosure arrangements, potentially moving to a single threshold of $5000 and requiring the one-page form for all matters. We do not wish Queensland solicitors to be at a considerable disadvantage in the national marketplace for legal services should this go ahead.

We wish to reduce red tape for law firms and provide clients with a better understanding of costs by use of a more streamlined cost disclosure system. In addition to proposing the amended threshold, we also suggested that a simplified statement prepared by the Society's Ethics and Practice Centre be given to a client.

This would advise that the client and solicitor are forming a contract for the provision of legal services, that legal costs in the matter will be less than $5000, that if at any time it is expected costs will exceed that amount full cost disclosure will be provided as required by law, and that the client has rights if they are dissatisfied with the service provided.

Another positive piece of work on our agenda is a public campaign promoting the value of solicitors to the wider community. This would include an education campaign explaining what solicitors do, how they can help in numerous circumstances, and the value they will bring by providing skilled advice and guidance in difficult times and routine processes. We look forward to updating you as this progresses.

Having spoken to members across the state and throughout the Brisbane CBD and surrounds, the amount of pro bono and charitable work our solicitors do never ceases to amaze me. The significant and valuable impact lawyers have on their local communities by providing voluntary assistance to many and varied organisations is to be admired.

Add to this the passion for advocacy and the 200 submissions completed by our 26 policy committees this year, and you will see that our profession is all about the public good. Representatives of QLS appeared at 17 parliamentary committee public hearings this year, and I thank all of those who spoke on behalf of good law in Queensland. We are also grateful to all of our members who contributed this year in one way or another through presentations, feedback, attendance at events and myriad other engagements.

I would now like to take the time to share my appreciation of many people over this last year. Fortunately, I was able to express my thanks to some of our members at recent regional events and our annual appreciation evening. I have also attempted to visit as many of our committee and working group meetings as possible. Of course, there will always be someone missed in the clashing of schedules.

Firstly, thank you to the QLS Council, CEO Rolf Moses, executive leadership and the wonderful QLS staff for their support, our committee and working group members, our boards, advertisers and sponsors, and our wider membership. The successes we have had this year would not have been possible without your support, expertise and dedication.

Special thanks also to my family and work colleagues for 'holding down the fort' in my absence. A significant burden has been left to you all this year and your heavy lifting has been appreciated.

It has been a pleasure to provide leadership in such as well-respected and enduring organisation, and I look forward to continuing on the QLS Council as Immediate Past President. Prior to my presidency, I was on the QLS Council for four years, and I will continue to support the Society well into the future. I wish incoming president and current Deputy President Bill Potts all the best for 2019.

Ken Taylor
Queensland Law Society President

president@qls.com.au
Twitter: @QLSpresident
LinkedIn: linkedin.com/in/ken-taylor-qlspresident

2019 COURSES

Choose from two streams to suit your practice size.

SOLE PRACTITIONER TO SMALL PRACTICE

7-9 February

2-4 May

11-13 July

24-26 October

21-23 November

MEDIUM TO LARGE PRACTICE

21-23 March

29-31 August

INVEST IN YOUR FUTURE

Make 2019 the year you gain essential skills to manage a successful legal practice.

PMC offers you practical training and knowledge from uniquely qualified facilitators and exclusive access to ongoing post-course support, securing your investment after completion.

ENROL NOW

qls.com.au/pmc

QLS Practice Management Course™

Queensland **Law Society**

Positive action

Our initiatives to fight harassment, bullying and discrimination

As discussion on sexual harassment, bullying and discrimination continues across the legal profession, and the entire community, Queensland Law Society is taking positive action to counter the impact of these behaviours.

Any form of behaviour that creates a hostile working environment in the legal profession, or permits such an environment to continue, has negative consequences on the individuals, organisations, the profession and ultimately the community.

Behaviours such bullying, discrimination and sexual harassment of any kind are unacceptable, inexcusable and unethical.

I would like to acknowledge that majority of our profession who behave collegially, professionally and inclusively. We all must work together to eliminate harmful behaviour.

At QLS, we are communicating the growing concern about these harmful behaviours through a number of articles, including this column and other *Proctor* features, as well as via online blogs. Last month we consolidated these approaches through the release of a full position statement on workplace sexual harassment, bullying and discrimination.

In terms of providing education, we have launched a web page on **qls.com.au/diversityandinclusion** providing guidance on diversity and inclusion in the workplace. This page has useful links, as well as tools and resources that can help organisations to develop fair and inclusive workplaces.

Last month we conducted a complimentary livecast which discussed the prevalence of sexual harassment, bullying and discrimination in the legal profession and considered the forms that this behaviour takes. The event, an initiative of our Equity and Diversity Committee and our Wellbeing Working Group, looked at the available options for those experiencing sexual harassment, bullying or discrimination in their workplace, and explained our QLS initiatives in this space.

We have launched a mental health first aid (MHFA) course for the legal profession, with the first of these held on 28 November and conducted by Belinda Winter. Participants are educated on the nature of mental health issues and learn how to recognise and assist co-workers in need. Those who successfully complete the course can become accredited mental health first aiders with MHFA Australia. Relevant training is also being incorporated into the QLS 2019 Practice Management Course.

Our initiatives to provide ongoing support include training for our QLS Senior Counsellors to take calls on these issues and the launch of a support line to assist practitioners dealing with inappropriate workplace behaviours. This is currently available through the QLS Ethics and Practice Centre on 07 3842 5843.

Next year our continuing focus will include a QLS Symposium panel discussion on achieving respectful and inclusive workplaces, and the development of a comprehensive education syllabus on workplace behaviours for the legal profession.

We will appoint appropriate practitioners who have specific expertise in workplace and employment law to become QLS Senior Counsellors to assist in providing confidential guidance, as well as appointing a QLS organisational culture and support person.

Further training which will be available for practitioners will include sexual harassment, bullying and discrimination compliance training, along with unconscious bias training.

QLS AGM reminder

Don't forget that the QLS annual general meeting will be held at Law Society House on Tuesday 4 December from 6.30pm. I look forward to seeing as many members as possible at this meeting.

Toward year's end

I'm sure many practitioners will be looking to the end of the year and the opportunity to rest and recuperate. We have less than a handful of events remaining on this year's calendar. These include the early career lawyers Christmas party and the Brisbane Specialist Accreditation Christmas Breakfast with Chief Justice Catherine Holmes.

The latter event is an annual highlight which acknowledges and celebrates the achievements of the 2018 graduates. This event is complimentary for accredited specialists.

It is also the time of year when we look back and thank those whose efforts have enhanced your Society and its ethos of good law, good lawyers, for the public good.

I'd especially like to thank our outgoing President, Ken Taylor, who has really given 110% in meeting the duties of his office this year. I'd also like to thank our hardworking Council members, the practitioners who give selflessly of their time on our policy committees, our QLS staff and, most importantly, all of our members, who give our Society its *raison d'être*.

I wish you all the best for the festive season and hope you will return next year recharged and refreshed.

Rolf Moses
Queensland Law Society CEO

MERRY CHRISTMAS!

At last count, there were just over 526,000,000 children under the age of 14 in the world who celebrate Christmas on 25 December. In other words, Santa has to deliver presents to almost 22 million kids an hour, every hour, on the night before Christmas. That's about 365,000 kids a minute or around 6100 a second.

(*Source*: 'Santa's Christmas Eve Workload, Calculated', by Philip Bump, The Atlantic.)

STATE OF SPENDING ACROSS AUSTRALIA

On average, South Australians/NT residents spend the most on Christmas gifts, at $671, while Queenslanders spend the least, at $508.

(*Source*: 'Aussies splurge $11B on Christmas shopping', commbank.com.au .)

NSW/ACT	$608	AVERAGE SPEND
VIC/TAS	$621	AVERAGE SPEND
QLD	$508	AVERAGE SPEND
SA/NT	$671	AVERAGE SPEND
WA	$577	AVERAGE SPEND

SANTA'S REINDEER

Dasher, Dancer, Prancer, Vixen, Comet, Cupid, Donner, Blitzen and Rudolph

(*Source*: lovesanta.com.au)

Queensland Law Society

Queensland Law Society Inc.
179 Ann Street Brisbane 4000
GPO Box 1785 Brisbane 4001
Phone 1300 FOR QLS (1300 367 757)
Fax 07 3221 2279
qls.com.au

President: Ken Taylor
Deputy president: Bill Potts
Vice president: Christopher Coyne
Immediate past president: Christine Smyth
Councillors: Michael Brennan, Chloe Kopilovic, Peter Lyons, Kirsty Mackie, Luke Murphy, Travis Schultz, Karen Simpson (Attorney-General's nominee), Kara Thomson, Paul Tully.
Chief executive officer: Rolf Moses

Editor: John Teerds
j.teerds@qls.com.au | 07 3842 5814
Design: Alisa Wortley, Courtney Wiemann
Art direction: Clint Slogrove
Advertising: advertising@qls.com.au
Subscriptions: 07 3842 5921 | proctor@qls.com.au
Proctor committee: Dr Jennifer Corrin, Kylie Downes QC, Steven Grant, Vanessa Leishman, Callan Lloyd, Bruce Patane, William Prizeman, Christine Smyth, Frances Stewart, Anne Wallace.

Proctor is published monthly (except January) by Queensland Law Society.

Editorial submissions: All submissions must be received at least six weeks prior to the month of intended publication. Submissions with legal content are subject to approval by the Proctor editorial committee, and guidelines for contributors are available at **qls.com.au**

Advertising deadline: 1st of the month prior.

Subscriptions: $110 (inc. GST) a year (A$210 overseas)

Circulation: CAB, 31 March 2018 – 11,281 (10,345 print plus 936 digital)

cab CIRCULATIONS AUDIT BOARD

Art auction aids MND charity

An art exhibition and auction at the Toowoomba office of Creevey Russell Lawyers has raised more than $7000 to support Motor Neurone Disease (MND) Association Queensland.

"MND Queensland do a fantastic job helping clients and their loved ones navigate the challenges of this terrible disease and it was an honour for our firm to support and raise much needed funds for them," the firm's Principal, Dan Creevey, said.

"We were delighted to have MND Queensland CEO Lisa Rayner speak at the event and she outlined the invaluable services to MND sufferers that her organisation provides."

The exhibition featured works by leading Toowoomba-based artist Allan Cooney, including a portrait of Grammy Award-winning English singer/songwriter Amy Winehouse, who died in 2011.

MND is a progressive, terminal neurological disease which affects the nerve cells (neurones) controlling the muscles movement, speech, breathing and swallowing, causing them to degenerate and die.

Right: Auctioneer Cyril Close, left, with artist Allan Cooney and the Amy Winehouse portrait. *Photo:* Sophie Cahill.

13th annual *Queensland Legal Yearbook* available now

Have you ordered your free copy of the *Queensland Legal Yearbook 2017*?

Now in its 13th year, the yearbook is compiled by Supreme Court Library Queensland and edited by John McKenna QC. It provides an overview of noteworthy Queensland legal developments and events for 2017, including the Selden Society and Current Legal Issues lecture series, along with:

- the Queensland legal year in review
- Queensland legal statistics
- key speeches and papers
- records of ceremonial court sittings
- legal personalia.

The yearbook is available in print (while stocks last), PDF and EPUB formats. To order your complimentary copy, please complete the form at sclqld.org.au/yearbook-2017 .

Tired, but a winner

Brisbane family lawyer Anne-Marie Rice was named as the Leneen Forde AC Woman Lawyer of the Year at the Women Lawyers Association of Queensland (WLAQ) 40th Annual Awards Dinner on 27 October.

From left, Jamie Shine, Charlotte Campbell, Anne-Marie Rice, Christine Wilson and Thelma Schwartz.

Her acceptance speech, which has been edited for space reasons, appears below, along with a list of all award winners from the night:

"…ladies and gentlemen, I have a confession to make. I am tired.

I am tired because I am 44 years old, self-employed and the mother of two primary school-aged children. Tired goes with the territory.

I am tired because as well as being a mother I am a wife, a daughter, a sister, a friend, a colleague, a mentor, a teacher, a contributor to my personal and professional communities, and I take those opportunities seriously and I give them my all.

I am tired because I am a lawyer and the law is a jealous mistress.

But most of all I am tired from 20 years of doing a job through a prism that is inconsistent with who I am – a lens that I find fundamentally one-dimensional and inherently aggressive. It is inherently masculine. The way the law is, largely, practised invites lawyers to solve problems by first making them bigger and by then aggressively holding a position until a decision is imposed or a compromise based on brinkmanship is reached.

I don't naturally think like that, but I have been taught that that's how my job is done. And I have learned how to excel at it. But I am tired.

I am exhausted from walking that walk.

It affects who I am.

It dims my light.

And looking around this room I know I am not the only one who feels it.

But it also affects those who are NOT in this room tonight. The women who have left the profession. Not having retired after a full and fulfilling career but who have opted out. Early.

I get it: law was historically a man's domain and the pace of cultural change is indeed glacial. But ladies, at least as graduates and junior lawyers we have been here, en masse, for decades. But we are not here in numbers in the roles that require longer service. We know that. We drop out for many reasons – not least because we become tired. I think that has much to do with the fact that law, business, sport, family lives STILL operate so much through a lens that is not ours. It's not even equal, which would be better still.

I used to think, in my moments of tired, exhausted overwhelm, that my role in the profession didn't matter. That I am not a trailblazer like Leneen Ford, Agnes McWhinney or Margaret McMurdo. That the doors for women's entry to the law were now wide open and no one would care if I raised the white flag and opted out to run the school's second-hand clothing shop.

But I can see now that I (and the women of my generation) matter just as much as those upon whose shoulders we stand. The responsibility for the change to make professional life sustainable for women, is mine. It's ours. The responsibility to stop pretending that a flourishing legal career and committed parenting (or other) role is at all easy, realistic, healthy or sustainable, is mine. It's ours.

We lie loudest when we lie to ourselves.

But worse, I think, we lie to the generations to come. To the women AND men who will benefit from the opportunity to enjoy a deeply thoughtful, multidimensional professional life.

The time to think about, and then work out, how to practise as a problem solver, not a gladiator, is upon us. And it's so terribly exciting that it makes me forget about the tired.

We all know that Ginger Rogers did everything Fred Astaire did, but that she did it backwards and in high heels. But puzzle me this: what might have happened if Ginger Rogers had been invited to turn around?"

WLAQ winners and awards

Leneen Forde AC Woman Lawyer of the Year Award: Anne-Marie Rice of Rice Naughton McCarthy/Rice Mediations and Dispute Resolution.

Regional Woman Lawyer of the Year: Thelma Schwartz of Queensland Indigenous Family Violence Legal Service.

Emergent Woman Lawyer of the Year: Charlotte Campbell of Maurice Blackburn Lawyers.

2018 Woman In Excellence: Justice Roslyn Atkinson AO of the Supreme Court of Queensland.

Honorary membership of WLAQ: Justice Sarah Derrington of the Federal Court of Australia and President of the Australian Law Reform Commission.

Inaugural WLAQ Advocate Member: Former District Court of Queensland judge Marshall Irwin.

Inaugural Equitable Briefing Award: Fisher Dore Lawyers.

Trailblazer of the Year: Christine Wilson of the Commonwealth Department of Public Prosecutions.

The awards evening raised more than $15,000 in support of the Dancing CEOs All Star team (Genevieve Dee, Clarissa Rayward and Kelli Martin), with all funds donated to Women's Legal Service Queensland.

back to contents

Appointment of receiver for Gregor McCarthy and Company, Toowong

On 2 August 2018, the Executive Committee of the Council 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, Gregor McCarthy and Company.

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.

Reminder on PI claims

Queensland Law Society has issued a reminder to practitioners that, in regard to speculative personal injury claims, law practices may apply to the Society for approval to charge and recover an amount greater than that allowed under the 50-50 Rule (see ss347(2) – (5)) of the *Legal Profession Act 2007*.

The Society has guidelines to applications for such approval. The guidelines are available at **qls.com.au** > Knowledge centre > Areas of law > Personal injuries law.

AGM this month

Queensland Law Society members are reminded that the 90th annual general meeting (AGM) of members of Queensland Law Society Incorporated will be held in the Auditorium, Level 2, Law Society House, 179 Ann Street, Brisbane at 5.30pm on Tuesday 4 December 2018.

The agenda includes confirmation of minutes of the AGM held on 16 November 2017, reception of the annual report and financial statement of the Council for the year ended 30 June 2018, and consideration of any motion, notice of which has been given in accordance with the requirements of Rule 60(2) of the *Legal Profession (Society) Rules 2007*.

Enquiries may be directed to f.culnane@qls.com.au or phone 07 3842 5904.

Succession and elder law conference

Almost 200 delegates attended the Succession and elder law conference at the Surfers Paradise Marriott Resort and Spa on 2-3 November. The conference featured topical sessions and updates across ‘Life’ and ‘Death’ streams, and the colour-themed Gala Dinner following day one.

Bronze sponsor

LEAP

back to contents

QLS President Ken Taylor with 50-year pin recipient Tony Goodwin of Tony Goodwin & Company, QLS CEO Rolf Moses and 25-year pin recipient John Siganto of Grant & Simpson.

CQLA & QLS conference

Pin presentations were a highlight of the CQLA & QLS conference held in Rockhampton on 19-20 October. Other key features of the conference included the announcement of Stephanie Smith, of Swanwick Murray Roche, as the winner of the Justice Peter Dutney Memorial Prize, and a visit to the Caulfield Cup race day for delegates on day two of the conference.

Gold sponsor

WORRELLS

Milestones to celebrate

Congratulations to all members who received their 25 and 50-year membership pins at our celebrate, recognise and socialise event held at the Brisbane Convention & Exhibition Centre on 11 October. Reaching such a milestone in any profession is an achievement worth celebrating.

In appreciation

The QLS Appreciation Evening held on Wednesday 24 October celebrated and recognised the commitment of committee members, working group members, chairs and presenters for the year. It was held at the Boom Boom Room on George Street, Brisbane.

Sponsor

LAW IN ORDER

How we work for good law

Facing the onslaught of policy changes and proposed legislative amendments pumped out daily at federal and state levels can be a daunting task.

Queensland Law Society, through its Legal Policy team and assisted by members of our 26 policy law committees, constantly reviews the multitude of Bills and subordinate legislation, policy papers and stakeholder consultations. The Society prioritises those which necessitate our involvement, having regard to the interests of our members, the pursuit of good law and the need to uphold fundamental legislative principles.

Applying a collaborative approach of seeking feedback from the wider QLS membership and relying heavily on the expert practitioners who comprise our policy committees, QLS strives to conduct a comprehensive review of each item and provide a response which is grounded in the tenants of our well-established legal framework and evidence-based reasoning.

As of 31 October 2018, this approach has seen QLS make 190 reactive submissions and 18 proactive submissions, attend 18 parliamentary committee public hearings, and participate in 132 consultations as a key stakeholder since 1 January 2018.

This degree of effort and volunteer contribution from our policy committee members produces tangible results, and it has not gone unnoticed. QLS has steadily built a reputation for providing impartial and clear advice with respect to policy and legislative change, and our input is often sought by government and the judiciary at an early stage.

Consultation is one thing; evolving this into influence is another. We are pleased to report that, over 2018 (up to 31 October), the Legal Policy team recorded 103 quotes in Hansard. These provide the evidence that our input is being sought early in the legislative process, that our submissions are used to direct parliamentary debate, and that amendments are being made to legislation on the basis of our advice.

> “There are 250,000 Commonwealth public servants. There are 30,000 Queensland public servants. They are all making new policy and drafting legislation…”
>
> *– Matthew Dunn, Queensland Law Society General Manager, Policy, Public Affairs and Governance.*

Two recent examples of this influence are detailed below.

The Mineral, Water and Other Legislation Amendment Bill 2018 was passed on 18 October 2018. The Bill was originally introduced in 2017, prior to the dissolution of Parliament in November 2017. It was reintroduced by Dr Anthony Lynham MP on 15 February 2018. The Bill was then referred to the parliamentary State Development, Natural Resources and Agricultural Industry Development Committee for consideration.

In our submission, we highlighted the potential implications for stakeholders as a result of proposed changes to professional costs incurred in negotiation for a conduct and compensation agreement (CCA). We noted the policy intention to divorce professional costs associated with the provision of professional advices which are reasonably and necessarily incurred in the negotiation of a CCA.

The decoupling of costs from other compensatable effects was intended to ensure that a landholder would be recompensed for these costs in the event that an agreement between the parties was not reached.

QLS raised concerns about these proposed changes and the introduction of a new section 91 into the *Mineral and Energy Resources (Common Provisions) Act 2014* (MERCP), as potentially having the effect of changing the way a claimant’s costs are treated by parties.

On 9 March 2018, members of the QLS Mining and Resources Committee attended the public hearing on the Bill. The parliamentary committee sought further advice concerning the drafting of the changes to professional costs.

We referred to the explanatory notes and the policy intention to include agronomist costs as a professional fee that a landholder may be able to recover from a resource authority holder. QLS provided the parliamentary committee with alternative drafting, amending an existing clause in MERCP to achieve the policy objective, rather than including a new section.

The parliamentary committee report subsequently recommended that the Bill be amended to reflect the advice of QLS and adopt the alternative drafting.

Shortly after the public hearing, the Department of Natural Resources, Mines and Energy contacted QLS requesting further consultation and advice on the proposed new section, after further clarifying the policy intent of the proposed provisions. Having considered the department’s amended and more detailed description of the policy intent, QLS responded to set out a number of concerns regarding the original draft of the Bill, including:

- There was no clear trigger event or time from which the eligible claimant’s costs start to accrue, posing a risk that owners and occupiers of land could incur upon the grant of an exploration authority over their property.
- There was also no clear end point after which costs should cease to accrue, imposing the risk that owners and occupiers of land could continue to incur costs without realising that the resource authority holder was no longer required to reimburse for those costs.

We provided alternative drafting for the section to reflect the policy intention set out in the explanatory notes, to include an agronomist as a professional fee that a landholder may be able to recover from a resource authority holder, and to address the concerns about timing to provide clarity for both parties.

During the parliamentary debate on the Bill, Natural Resources, Mines and Energy Minister Dr Lynham noted the recommendation by the parliamentary committee to follow the advice of QLS.

back to contents

by Vanessa Krulin and Pip Harvey Ross

While the recommended amendments were not adopted at the time, the department has committed to continuing to consult with QLS on this issue as the changes come into effect to assess the impact on the relevant parties.

The other example relates to the Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016.

The Bill was introduced, according to its explanatory notes, with the intent of "reinstating compliance provisions for the reverse onus of proof and remove the 'mistake of fact' defence for vegetation clearing offences". It provided that the clearing of vegetation in contravention of vegetation clearance provisions was taken to be done by the occupier of the land, in the absence of evidence on the contrary, in effect reversing the onus of proof for determining responsibility for unauthorised clearing activity.

We raised particular concerns in 2016 about the reversal of this fundamental legislative principle and the insufficient justification for such a breach. In light of the concerns raised by QLS, the parliamentary Agriculture and Environment Committee recommended that the clause that would reverse the onus of proof in relation to vegetation clearing offences be omitted from the Bill.

Ultimately, the parliamentary committee was unable to reach a majority decision on the Bill and did not recommend that the Bill be passed. The Government response to the report defended its justification for the abrogation of fundamental principles, restating the position provided in the explanatory notes. The Bill failed during the second reading in the Legislative Assembly.

This year the Vegetation Management and Other Legislation Amendment Bill 2018 was introduced. The Bill was similar to the 2016 version, with one noticeable difference – the exclusion of the provisions reversing the onus of proof.

The Vegetation Management and Other Legislation Amendment Bill 2018 is an example of the long-term effect of QLS advocacy. The exclusion of the abrogation of fundamental legislative principles in 2018 is indicative of the influence QLS can have in the creation of good law in Queensland.

Vanessa Krulin is a Senior Policy Solicitor and Pip Harvey Ross is a Legal Policy Clerk with the Queensland Law Society Legal Policy team.

'CASUAL' BY NAME, OR NATURE?

Court reminder that designation and loading may not be enough

After four years of litigation, *WorkPac Pty Ltd v Skene* [2018] FCAFC 121 has provided employers with a significant reminder.

The decision by WorkPac Pty Ltd (Workpac) not to appeal the Full Court of the Federal Court of Australia decision in this case also brings to an end the long legal campaign by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) to have member Paul Skene recognised as a permanent WorkPac employee.

The Full Court's recent judgment has come under significant scrutiny and criticism from employer groups and the Federal Government, despite it being, in essence, a decision that largely restates existing common law principles.

At the centre of the controversy is the Full Court's finding that being designated as a casual employee, and paid a casual loading, is not determinative in and of itself of a person's employment being casual. Instead, courts will look for the "essence of casualness" – a lack of a firm advance commitment as to the provision (or acceptance) of work.

Relevant facts

Skene was employed by WorkPac for almost two years from 20 July 2010 to 17 April 2012. Throughout the entirety of that period, he was employed, ostensibly as a casual, on a flat rate which was said to include loading (though the rate was not provided), and placed to work as a dump truck driver in Rio Tinto Coal Australia Pty Ltd's Clermont mine.

Skene's employment contract with WorkPac provided that his employment was terminable by either party on an hour's notice, and stated that he was covered by the Workpac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007 (the agreement).

back to contents

The Federal Court of Australia decision in *WorkPac Pty Ltd v Skene* is a timely reminder that some 'casuals' may well be permanent employees and due the appropriate entitlements. Report by **Giri Sivaraman** and **Paloma Cole**.

For the entirety of his employment by WorkPac at the Clermont mine, Skene worked in the same crew, in accordance with a roster issued a year in advance that provided for seven 12.5 hour days on and seven days off. Flights and accommodation were provided to Skene at Rio Tinto's expense, and he was provided with the means to securely leave his belongings in his accommodation on his weeks off.

Skene's employment came to an end on 24 April 2012 after conduct allegations were made against him. Skene did not receive payment of annual leave at the time of his termination.

Skene's claim

Skene commenced proceedings in the Federal Circuit Court in May 2014 alleging that he had been a permanent WorkPac employee, and was therefore entitled to be paid annual leave pursuant to section 87 of the *Fair Work Act 2009* (Cth) (the FW Act) and clause 19.1.1 of the agreement, which provided for six weeks of annual leave a year, plus 20% leave loading.[1]

WorkPac's defence

In response, WorkPac argued that Skene was a casual employee pursuant to the agreement and the FW Act, arguing that the court should apply what it said was a commonly accepted definition in the industrial field for 'casual employee', being one designated as such by their employer.

Primary decision

Skene a permanent employee pursuant to the FW Act

Jarrett J noted that determination of whether a person is a casual for the purpose of s86 of the FW Act "is a question of fact to be determined having regard to the circumstances pertaining to the particular employee the subject of the Court's consideration".[2]

His Honour conducted a detailed review of existing case law,[3] ultimately finding that whether an employee is casual is not determined by the status allocated by the employer, or the payment of a casual loading, which are simply "matters to be taken into account in determining the true character of the employment".[4] Instead, the most significant and persuasive factor is whether the nature of the employment is unpredictable, with an "absence of a firm advance commitment" from either party as to the length of the employment and the days or hours to be worked.[5]

In determining whether Skene's employment contained this 'essence of casualness', his Honour held it was particularly relevant that Skene's employment was:

- regular and predictable, with a stable and organised roster issued 12 months in advance
- continuous, save for one unpaid absence of seven days arranged directly with Rio Tinto
- facilitated by a fly-in, fly-out (FIFO) arrangement and the provision of accommodation, all at Rio Tinto's expense
- not subject to significant fluctuation, with hours of work regular and certain.

His Honour found there "was plainly an expectation that Skene would be available, on an ongoing basis",[6] to perform his duties in accordance with his roster, with this expectation reflected in the FIFO arrangement and Skene's terms and conditions of employment. In his Honour's view, this was inconsistent with casual employment, which would allow Skene to elect which days he wished to work, if any.[7]

On this basis, his Honour held that Skene was "other than" a casual employee for the purposes of section 86 of the FW Act and therefore entitled to the leave provided for in Div.6.

Skene a casual employee pursuant to the agreement

In determining whether Skene was a permanent or casual employee for the purposes of the agreement, it was His Honour's view that he was not required to objectively determine the true nature of Skene's employment. Instead, he applied a subjective test, on the basis that he was only required to determine whether Skene was a casual for the purpose of the agreement.

In his Honour's view, clause 5.5.6 of the agreement – "[a]t the time of their engagement, [WorkPac] will inform each [employee] of the status and terms of their engagement" – provided that this was determinable by WorkPac at the time of Skene's engagement.

His Honour held WorkPac's titling of its employment offer to Skene – 'Notice of Offer of Casual Employment' – was sufficient to establish that WorkPac had informed Skene that he was engaged as a casual employee, and as a result, Skene was a casual for the purposes of the agreement and therefore unable to access the leave provisions contained in clause 19.1.1 of the agreement. The agreement leave provisions were more generous than those provided for in Div.6 of the FW Act.

Appeal decision

Skene a permanent employee pursuant to the FW Act

On appeal, WorkPac maintained its position that the term 'casual employee' in section 86 should be construed, not by reference to its legal definition, but instead with reference to a purportedly commonly accepted non-legal industrial meaning, being that: a casual employee is one who is designated as such by the industrial instrument that covers them.

This contention was again rejected, with the Full Court reiterating Jarrett J's interpretation of the phrase 'casual employee'.[8]

In its reasoning, the Full Court emphasised the long history of use of the phrase 'casual employment' for the same purpose in federal industrial legislation, with the ensuing extensive judicial consideration resulting in the phrase acquiring a legal meaning. Given the "abundance of authority for the proposition" that Parliament intended words to bear meanings judicially ascribed to them, it was, in the Full Court's view, difficult to accept that Parliament would have not provided a clear indication of a contrary intent if there was such an intent.[9] Their Honours considered the absence of such a clear indication to be "significant".[10]

It was also the Full Court's view that to define 'casual employee' by reference to meanings derived from awards and enterprise agreements would be to invert the hierarchy of terms and conditions of employment, of which the National Employment Standards (NES) form the pinnacle.

Given that the FW Act "expressly and in clear and unambiguous language" states when "criteria of eligibility to an entitlement has been given over to an applicable award or enterprise agreement to define or describe", it was the Full Court's view that such an intent could not be presumed of the legislature in s86 in the absence of clear language.[11]

In relation to WorkPac's argument that finding Skene to be a permanent employee would result in double-dipping (on the basis that he had already been paid his leave entitlements by way of a casual loading), the Full Court opined that it was not clear that Skene had been paid casual loading at all, given the lack of any breakdown in what made up his 'flat rate'. Furthermore, their Honours noted there was no requirement within the NES to pay a permanent employee a casual loading and therefore "as the hierarchy established by the FW Act must envisage, no 'double dipping' is possible."[12]

Regardless, even if Skene was paid a casual loading, the Full Court held this was not determinative of whether he was a casual employee for the purposes of s86. Instead, the Full Court emphasised "the importance of the 'essence of casualness' referred to in *Hamzy*",[13] with "the indicia of casual employment referred to in the authorities – irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability" – being "the usual manifestations of an absence of a firm advance commitment".[14]

To further explain this 'essence of casualness', their Honours provided the example of a relief teacher employed consistently over a period of a year as the result of a number of illnesses and departures within a school. While such employment was consistent, at no time was there an "advance mutual commitment to on-going employment on an agreed pattern of ordinary hours of work",[15] with work only offered on the basis of organisational needs as they arose. This could be contrasted with Skene's employment, in which the "pattern of work was 'regular and predictable', 'continuous' and 'not subject to significant fluctuation' in circumstances where 'there was plainly an expectation that Skene would be available, on an ongoing basis, to perform the duties required of him in accordance with his roster'".[16]

Skene a permanent employee pursuant to the agreement

Skene appealed Jarrett J's finding that he was not a casual employee for the purposes of the agreement. In considering the appeal, the Full Court noted that a broad purposive approach is to be taken in interpreting industrial agreements. However, when a term is undefined, unless there is a contrary indication, it ought to be presumed that the draftsperson intended that the term have its ordinary meaning – suggesting that 'casual' was intended to mean casual employee in its legal sense.

back to contents

The Full Court disagreed with Jarrett J's position that cl.5.5.6 of the agreement provided the machinery for an employment categorisation process determined by WorkPac, noting that granting employers the power to unilaterally catergorise employees could lead to arbitrary and capricious results.

Instead, in the Full Court's view, clause 5.5.6 merely imposed an obligation on WorkPac to inform their employees about the status and terms of their engagement; it did not empower WorkPac to specify and determine the terms upon which an employee was engaged.

In reaching this interpretation, their Honours noted that express words were used in other parts of the agreement to give WorkPac the power to unilaterally categorise an employee. In the absence of clear language in cl.5.5.6, their Honours held that an intent to provide such a significant power to WorkPac should not be presumed.

Does Skene reflect the reality of casual employment?

The circumstances of Skene's employment are common among labour-hire employees on long-term placement at specific worksites. It is these workers who are most obviously and directly impacted by the Skene decision.

However the premise upon which the Full Court's decision rests does not necessarily reflect the average casual employee's understanding of their own work arrangements. It is likely accurate to say the average Australian casual employee would be hesitant to pick and choose their shifts in a way suggested in this decision, for fear that their employer would brand them 'unreliable' and stop offering them shifts. Such an arrangement is one with a significant amount of power and control vested in the employer, and has little in common with the reciprocal flexibility described in *WorkPac v Skene* and its cited authorities.

Whether this inconsistency will impact the applicability of *WorkPac v Skene* to long-term casuals with standard and predictable hours remains to be seen, but the door for recognition of the permanent nature of many 'casual's' employment has been opened by the Full Court.

This article appears courtesy of the Queensland Law Society Industrial Law Committee. Giri Sivaraman is Principal Lawyer at Maurice Blackburn Lawyers and deputy chair of the committee. Paloma Cole is a lawyer at Maurice Blackburn Lawyers.

Notes

1 Div. 6 of the FW Act imposes a requirement that annual leave entitlements be provided to all workers who are "other than casual employees": s86 FW Act. 'Casual employee' is not defined in the FW Act, nor was it defined in the agreement.
2 *Skene v Workpac Pty Ltd* [2016] FCCA 3035, [69].
3 *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420, *Williams v MacMahon Mining Services Pty Ltd* [2009] FMCA 511, *Doyle v Sydney Steel Co Ltd* [1936] HCA 66, *Hamzy v Tricon International Restaurants trading as KFC* (2001) 115 FCR 78.
4 *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420, 424.
5 *Hamzy v Tricon International Restaurants trading as KFC* (2001) 115 FCR 78.
6 *Skene v Workpac Pty Ltd* [2016] FCCA 3035, [81(e)].
7 *Skene v Workpac Pty Ltd* [2016] FCCA 3035, [81(d)].
8 With reference and examination of further authorities *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456, *Ledger v Stay Upright Pty Ltd* [2016] FCA 659, *Bernardino v Abbott* [2004] NSWSC 430 and *Fair Work Ombudsman v Hu (No.2)* [2018] FCA 1034.
9 *WorkPac v Skene*, [107].
10 Ibid, [129].
11 Ibid, [122].
12 Ibid, [146].
13 Ibid, [169].
14 Ibid, [173].
15 Ibid, [174].
16 Ibid, [183].

Reforms offer a new beginning for children

Child Protection Reform Amendment Act 2017 (Qld)

The *Child Protection Reform Amendment Act 2017* (Qld) (CPRAA) has introduced significant changes to Queensland's child protection system.

These amendments will mean a paradigmatic shift in the way that the Department of Child Safety, Youth and Women (Child Safety) works with, and makes decisions about, Aboriginal and Torres Strait Islander children and families. There will also be a greater emphasis on creating permanency for children in out-of-home care.

Based on the recommendations of the Queensland Child Protection Commission of Inquiry (the Carmody Inquiry),[1] Child Safety undertook a comprehensive review of the *Child Protection Act 1999* (Qld) (the Act).

The CPRAA, which was passed by Parliament in October last year, makes a number of significant reforms to the Act, which have been implemented in three stages. This article outlines the final stage of the reforms that commenced on 29 October 2018.

Stock photo. Posed by model

back to contents

Keryn Ruska looks at the recent amendments to the *Child Protection Act 1999* (Qld) and their impact on Aboriginal and Torres Strait Islander children and families.

Intent

The intent of the third stage of the reforms is to promote the safe care and connection of Aboriginal and Torres Strait Islander children with their families, communities and cultures (Safe Care and Connection); promote positive long-term outcomes for children (Permanency), and provide a contemporary information-sharing regime for the child protection and family support system (information sharing).[2]

The key drivers for the Safe Care and Connection reforms are the significant overrepresentation of Aboriginal and Torres Strait Islander children in the child protection system and consistent feedback from Aboriginal and Torres Strait Islander people, communities and organisations that strong connection to family, community and culture results in better outcomes for Aboriginal and Torres Strait Islander children and young people.[3]

The Carmody inquiry highlighted the rapid and alarming increase in the number of Aboriginal and Torres Strait Islander children in the child protection system in Queensland, with an estimated 50% of Aboriginal and Torres Strait Islander children known to Child Safety at the time of the inquiry.[4] This overrepresentation was attributed to the intergenerational effects of past government policies and system factors in the current child protection system.[5]

A recent Australian Law Reform Commission report also identifies the numbers of First Nations women in prison as a contributing factor to the number of Aboriginal and Torres Strait Islander children in out-of-home care, and the consequent pathway for those children to youth detention and adult offending.[6]

Principles for administering the Act

Underpinning all the legislative amendments is an updated paramount principle for administering the Act that "the safety, wellbeing and best interests of a child, *both through childhood and for the rest of the child's life*, are paramount" (s5A of the Act). [*emphasis added*].

Section 5C of the Act contains additional principles for Aboriginal and Torres Strait Islander children – firstly, that Aboriginal and Torres Strait Islander people have the right to self-determination. Secondly, that the long-term effect of a decision on the child's identity and connection with their family and community *must* be taken into account. [*emphasis added*]

This amends the former wording that it *should* be taken into account. Thirdly, that the five core elements of the Child Placement Principles (referred to in the Act as 'the Child Placement Principles') apply in relation to Aboriginal and Torres Strait Islander children.

The five core elements of the Child Placement Principle articulated in section 5C(2) of the Act are:

1. *The prevention principle:* That the child has the right to be brought up within the child's own family and community.
2. *The partnership principle*: That Aboriginal or Torres Strait Islander persons have the right to participate in significant decisions under the Act about Aboriginal or Torres Strait Islander children.
3. *The placement principle*: That, if a child is to be placed in care, the child has a right to be placed with a member of the child's family group.
4. *The participation principle*: That a child and the child's parents and family members have a right to participate, and be enabled to participate, in an administrative or judicial process for making a significant decision about the child.
5. *The connection principle*: That a child has a right to be supported to develop and maintain a connection with the child's family, community, culture, traditions and language, particularly when the child is in the care of a person who is not an Aboriginal or Torres Strait Islander person.

Safe Care and Connection

Safe Care and Connection is an intentional practice approach to ensure the principles for administering the Act are applied to ensure the safe care and connection of Aboriginal and Torres Strait Islander children with their families, communities and culture.

The reforms support the broader Queensland Government 'Our Way' strategy, which "provides the framework for improving outcomes for Aboriginal and Torres Strait Islander children and families experiencing vulnerability".[7]

The child placement principles are embedded in the Act in both the principles for administering the Act and in the requirement that Child Safety, the Director of Child Protection Litigation and the Childrens Court must have regard to the placement principles when making decisions in relation to Aboriginal and Torres Strait Islander children.[8]

The amendments introduce the new concept of an 'Independent Aboriginal and Torres Strait Islander Entity'[9] (to be referred to by Child Safety as an 'independent person' when working with families), which aligns with the Child Placement Principles and responds to the concerns of the Aboriginal and Torres Strait Islander community about the lack of meaningful involvement of children and their families in child protection decision making.

The independent person is nominated by the child and their family. The independent person's role is to facilitate the participation of the child and their family in all significant decisions[10] about a child.[11] In practice, this may be by supporting the child and their family to say everything they wish to say and by providing contextual cultural information about things impacting on a parent, to ensure that Child Safety accurately understands the parent's motivations or actions when forming an assessment.

Section 6(a) provides that the independent person must be:

- an individual Aboriginal or Torres Strait Islander person, or
- a group whose members include Aboriginal or Torres Strait Islander persons.

In addition, section 6(b) provides that the independent person must:

- provide services to Aboriginal and Torres Strait Islander persons, or
- be representative of the child's community or language group, or
- be a person who:
  - is of significance to the child or child's family, and
  - is a suitable person for associating on a daily basis with the child, and
  - has appropriate authority to speak about Aboriginal or Torres Strait Islander culture in relation to the child or the child's family, and
  - is not an officer or employee of Child Safety.

back to contents

In addition, section 6(c) provides that the nominated entity must be a suitable person to be an independent person.

In practice, Child Safety will rely on the advice of the child and family to determine whether a nominated person is representative of the child's community or language group, is of significance to the child or the child's family, and has appropriate authority to speak about Aboriginal or Torres Strait Islander culture in relation to the child or their family. In determining suitability, Child Safety will have regard to information provided by the child and the child's family, information provided by the nominated person and information held by Child Safety.

Section 6AA(3) of the Act provides that Child Safety must arrange an independent person unless the child or the child's family does not consent; it is not practicable because the independent person is not available or urgent action is required; arranging it is likely to have a significant adverse effect on the safety or psychological or emotional wellbeing of the child or any other person, or it is otherwise not in the child's best interests.

At the time of commencement of the October reforms, Child Safety has rolled out funding for the Family Participation Program (FPP). The FPP enables the participation of families in child protection decision making and provides for independent facilitation of Aboriginal and Torres Strait Islander Family Led Decision Making (FLDM), which is a process whereby parents, children and families solve problems and lead decision making in a culturally safe space. It is intended that Aboriginal and Torres Strait Islander FLDM can occur at any point on the child protection continuum.

Practitioners should be aware that the reforms will remove all reference to recognised entities in the Act and they will no longer play a role in child protection matters. Instead, families themselves are recognised as the best source of cultural advice and information about their strengths and needs,[12] hence the focus on increasing the participation of children and their families in the child protection system.

Permanency

The Carmody Inquiry noted the importance of a permanent, stable home for the long-term wellbeing of children and young people.[13] Permanency outcomes were conceptualised as options along a continuum starting with children living with their own family, planning for reunification with family after protective removal, long-term guardianship to kin or foster carers, open adoption and guardianship to the Chief Executive as a last resort.[14]

A number of amendments have been made to the Act with the aim of promoting positive long-term outcomes for children and young people in the child protection system through timely decision-making and decisive action towards either reunification with family or alternative long-term care.

The paramount principle in section 5A of the Act has been amended to refer to the safety, wellbeing and best interests of a child both throughout childhood and for the rest of a child's life.

Section 5BA of the Act introduces new permanency principles that require consideration of the child's relational,[15] physical[16] and legal[17] permanency when making decisions about actions to be taken or orders to be made under the Act.

Concurrent planning has been embedded into the Act through case-planning processes[18]. Concurrent planning requires that when the case plan goal for best achieving permanency for a child is reunification with the parent/s, an alternative permanency goal must also be developed, in the event that the timely return of the child to the care of a parent is not possible.

A significant amendment to the Act is the limitation on the duration of short-term child protection orders to a total of two years, after the first order is made, unless a court is satisfied that it is in the child's best interests and reunification of the child with their parents is reasonably achievable in the extended timeframe.[19]

In practice, the limited timeframe to achieve reunification will require case plan goals to be very clear about actions, expectations and timeframes as they apply to both Child Safety and parents.

Permanent care orders

A further amendment to the Act relating to permanency is the introduction of a new child protection order, a permanent care order (PCO),[20] which grants guardianship of a child to a suitable person[21] (other than a parent or the Chief Executive) nominated by the Chief Executive.

When considering an application for a PCO for an Aboriginal and Torres Strait Islander child, the court must have regard to Aboriginal tradition and Islander custom relating to the child and the child placement principles.[22] It may only make a PCO if it is satisfied that the case plan includes details about how the child's connection to culture, community or language group will be maintained, and the decision to apply for the PCO was made in consultation with the child, if the court considers consultation appropriate.[23]

There are a number of differences between a long-term guardianship order and a PCO, with two significant differences being that, once a PCO is made, Child Safety will not have any contact with a child or their permanent guardian unless they seek assistance from Child Safety and only the Director of Child Protection Litigation can apply to vary or revoke a PCO.[24] Another difference to note is that, while a child or a permanent guardian may seek a review of a PCO case plan, a parent cannot do so.[25]

The option available to a child (apart from seeking a review of the case plan) or a member of a child's family with a complaint about a PCO is the complaints process set out in sections 80B-80E of the Act. Note that any decision by Child Safety not to deal with a complaint must be in writing and is a reviewable decision.[26]

The Act imposes a number of obligations on a permanent guardian, including to keep Child Safety[27] and the child's parents[28] informed about where the child is living and to immediately notify Child Safety in writing if their care of the child is likely to end in the near future or if the child leaves their care.[29]

A permanent guardian is also obliged to: ensure that the charter of rights for a child is complied with; provide help in the child's transition to independence; ensure the child's identity and connection to their culture is maintained, and maintain the child's relationship with the child's parents, family members or other persons of significance to the child.[30]

Information sharing

The Carmody Inquiry recommended that Child Safety review the information exchange and confidentiality provisions in the Act with a view to amending the Act as necessary to support a number of the inquiry's recommendations.

New and expanded information sharing principles have been included in the Act that wherever safe, possible and practical, consent should be obtained;[31] a child or young person's protection and care needs take precedence over the protection of an individual's privacy,[32] and that before disclosing information about a person to someone else, an entity should consider whether disclosing the information is likely to adversely affect the safety, wellbeing and best interests of a child or the safety of another person.[33]

The information sharing reforms provide the legislative framework for agencies to coordinate services and share information, by defining the organisations that can share information[34] and identifying the particular purpose for sharing information.[35]

The reforms also enable the Chief Executive of Child Safety to share relevant information[36] with interstate and New Zealand child welfare authorities when Child Safety reasonably believes the information is required to perform a function under a child welfare law of the other state or New Zealand.[37] The Chief Executive is also enabled to provide information to people about their time in care,[38] to the parents of a child who died while in care,[39] and to the Police Commissioner when police are investigating the death of a child in care.[40]

back to contents

Child Safety is required to develop information sharing guidelines that are consistent with the Act[41]. Practitioners can access the information sharing guidelines on the Department of Child Safety, Youth and Women website, csyw.qld.gov.au .

Conclusion

The impact of overrepresentation in the child protection system on First Nations communities cannot be overstated. These reforms bring the promise of different ways of working with First Nations families in the child protection system in Queensland.

To be effective, the reforms will require greater cultural capability of all those involved in administering the Act. A serious commitment to the delivery of cultural capability is best facilitated by First Nations experts to ensure meaningful interpretation, application and development of the changes.

Keryn Ruska is a solicitor on secondment to the Office of the Child and Family Official Solicitor (OCFOS) (Department of Child Safety, Youth and Women). Keryn is from the Nunukul people of Minjerribah (North Stradbroke Island) and is a member of the QLS Reconciliation and First Nations Advancement Committee.

Image: davidf/E+/Getty Images

Notes

1 The full report of the Queensland Child Protection Commission of Inquiry, 'Taking Responsibility: A Roadmap for Queensland Child Protection, June 2013', is available at childprotectioninquiry.qld.gov.au/publications .
2 Child Protection Reform Amendment Bill 2017, Explanatory Notes, 9 August 2017.
3 The importance of connection to family, community and culture has been recognised in a number of state and national reports and inquiries, for example the Royal Commission into Aboriginal Deaths in Custody, the 'Bringing Them Home' report and the Carmody Inquiry.
4 Taking Responsibility', above n1 at 349.
5 Ibid, 351.
6 'Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples', Australian Law Reform Commission Report 133, December 2017 at 377- 378.
7 Explanatory Notes above n2. Note that the Our Way Strategy is available at communities.qld.gov.au/resources/campaign/supporting-families/our-way.pdf .
8 Sections 6AA and 6AB of the Act.
9 Section 6 of the Act.
10 'Significant decisions' are defined in Schedule 3 of the Act as decisions that are "likely to have a significant impact on a child's life".
11 Section 6AA of the Act.
12 Explanatory Notes, above n2 at 10.
13 'Taking Responsibility', above n1 at 221.
14 Ibid, 222.
15 Relational permanency for a child is the "ongoing positive, trusting and nurturing relationships with persons of significance to them, including their parents, siblings, extended family and carers": s5B(2)(a) of the Act.
16 Physical permanency for a child is "stable living arrangements, with connections to their community, that meets their developmental, educational, emotional, health, intellectual and physical needs": s5B(2)(b) of the Act.
17 Legal permanency for a child is "legal arrangements for their care that provide a sense of permanence and long-term stability": s5B(2)(c) of the Act.
18 Section 51B of the Act.
19 Section 62(2) of the Act.
20 Section 61 of the Act.
21 See section 59(7A) of the Act for the suitability requirements in relation to a permanent guardian.
22 Section 59A(2) of the Act.
23 Section 59A(3) of the Act.
24 Note that the grounds for revoking or varying a PCO are set out in s65AA of the Act.
25 Section 51VB of the Act.
26 Section 80D(2) and (3) of the Act.
27 Section 79 of the Act
28 Section 80A of the Act.
29 Ibid.
30 Section 79A of the Act. Note that the obligations in s79A also apply to long-term guardians.
31 Section 159B(g) of the Act.
32 Section 159B(h) of the Act.
33 Section 159B(i) of the Act.
34 Section 159M of the Act.
35 Section 159MA-ME of the Act.
36 Relevant information is defined in s189AB(4) as "information about a person or an unborn child acquired in the administration of" the Act.
37 Section 189AB(1) of the Act.
38 Section 188C of the Act.
39 Section 188D of the Act.
40 Section 188E of the Act.
41 Section 159C of the Act.

Keep it real: Ending entrenchment

Lawyers are experts at 'reality-testing'. We are trained to be rational, to look at things objectively and to see the weaknesses in a case.

Moreover, lawyers are duty-bound to warn their clients of the risks in their own case.

So how is it that many clients still go to a hearing despite the best reality-testing by their lawyers?

Entrenchment

A party sues for $200,000. They spend $50,000 on legal costs in the first six months and can no longer afford a lawyer. They go to a hearing 18 months later. They are awarded $80,000. The other party appeals. Several months later, the decision is overturned on appeal and the matter remitted for a rehearing.

After many interlocutory applications and cross-applications, the matter finally proceeds to a rehearing several years later. By this time, one party is broke and the other party has spent thousands of dollars engaging several law firms throughout the dispute. Despite the financial and emotional cost, the parties still have no outcome years after filing the original application.

The parties are 'entrenched' – with little prospects of resolution in the near future.

The alternative reality: The disconnect

Before the dispute, there was a time when things were good. Whether it is a commercial transaction when one party receives goods or services and the other is paid money, or neighbours who once got along (or at least 'live and let live'), it was a 'win-win'. Both parties stood to benefit.

Once someone sues, it becomes 'win-lose'. Once the parties are deep in litigation, like our hypothetical parties above, it can become 'lose-lose'. Each party will suffer a net loss, regardless of the outcome.

> "Say not, 'I have found the truth', but rather, 'I have found a truth'."
>
> – Kahlil Gibran, *The Prophet*

In our hypothetical example, lawyers have advised both parties. For us, it seems the parties' choice to keep fighting and reality are disconnected. Yet they continue to litigate. They are entrenched. The parties are locked into their own 'reality', albeit one not in their best interests.

We can help to prevent and overcome entrenchment by identifying this 'alternative reality' and testing it with strategies to help bring the parties back to the 'true' reality, helping them come to a solution to move forward with their lives.

Opening statement: The reconnect

Begin with an opening statement that plants 'reality seeds'. Experienced mediators will already have well-crafted opening statements. How to approach your opening statement is beyond the scope of this article, but suffice to say a good opening statement can set the right tone for the entire mediation.

With this is mind, taking some extra time at the start to incorporate some undeniable truisms for the parties can give them the first step up out of their quagmire. As self-evident as these might seem to us, entrenched parties often can no longer 'see the wood for the trees'. Remember, entrenched parties have already experienced some of these first-hand, so they are likely to resonate.

Some examples might include:

- reminding them that those who come to an agreement often walk away a lot more satisfied than those who go to a hearing
- explaining that the reasons for this include cost, uncertainty, risk and stress (which they are currently experiencing)
- contrasting what is important in a hearing (evidence and law) with what is important to them (usually time and money).

Taking some extra time with your opening statement also helps the parties ease into the process. With entrenchment usually comes tension and a reduced ability to think rationally (one of the reasons they are here). By slowing things down with a well-directed opening statement, you give the parties time to pause and reflect on some truisms they may have forgotten in the 'fog of war' – and potentially reframe their entire reality *at the very start*.

Done well – and with at least one party willing – it could lay the groundwork for an offer that might be completely different from what has been said up until now and is more conducive to settlement.

Remember, you need to connect with only *one* of the parties to help build a positive outcome *for everyone*.

Letting go

It may be that one or more of the parties are ready to settle, but neither is willing to make the first move – because they are entrenched and have been locked in battle for some time. You can test this by giving the parties permission to 'let go' – of the law, the past and what got them here:

- By this stage, they have engaged with the legal process at length with no solution or satisfaction.
- The past cannot be changed.
- What got them here is why they are still here.

by Bevan Hughes

Giving the parties permission to let go of all of this focuses them on the 'here and now' (which they do control) and creates opportunities to look at matters afresh.

One way of doing this is by suggesting to one of the parties (usually the plaintiff or applicant) at the start or end of their opening address to "Tell the defendant/respondent what you would consider to be a satisfactory resolution to end this dispute *today*". This has the following effects:

- It allows the party to make an offer without feeling that it is a sign of weakness (because they are responding to your suggestion).
- It frames negotiations as being 'solutions-focused' right at the start.
- It gives the other party an opportunity to make a counter-offer.
- It focuses the parties on what they are actually fighting over *now* (and whether it is still worth it).
- It gives the party the opportunity to make an offer *before reopening old wounds,* making it less likely to be anchored to the past (which no longer exists) and more likely to be conducive to settlement, surprising everyone (except you).
- Even if the offers are not accepted, it defines the boundaries of the dispute – *as it is right now*.
- It gives all the parties permission to let go of the past, the law and the side-battles.
- It helps move the parties' mindset from the everyday battle to the 'big picture'.

The true reality: The big picture

By this stage, when it is 'lose-lose', focusing on evidence and law is unlikely to help the parties come to an agreed solution. Regardless of who is right, they both lose. It is simply a question of *who will lose more*. That *is* their reality.

As a 'solution-provider', it is your job to help them see this so they can cut their losses and move on. This requires 'big picture' thinking – on your part and theirs.

Moving to 'big picture' thinking is where your reality-testing skills can come to the fore. Some well-known reality tests will be particularly poignant for entrenched parties, who will have already experienced these realities and know the truth of what you are saying (even if they don't admit it to you):

- If they know it is a 'lose-lose', why are they still here? What is it they are actually fighting for? If it is 'the principle', what is the principle and why is it important? Can or will a hearing uphold the principle? Is it really worth it?
- How will they define a 'win' from here?
- How will evidence and law help them achieve this? How has it helped them so far?
- How will a hearing 'fix' their problem?
- Even if they 'win', what will happen if the other side appeals?
- What will happen if the appeal is appealed?
- What if they are ordered to pay legal costs? What if the other side is not ordered to pay legal costs?
- How has this fight affected them? Who else is the fight affecting? How do they feel about it? (People have jobs to go to, businesses to run, families to love – how is this fight helping any of these?)
- Will a hearing bring finality or closure, as opposed to an agreed settlement? (And if possible, consent orders that cannot be appealed.)

Of course, this reality-testing is usually done in private session with each party. An alternative is to first put these rhetorically to both parties in open session, for them to consider and have in the back of their minds as they explore options and negotiate. You can then revisit them more fully in a private session, if needed.

Reality-testing in private helps the parties to be honest and open with you, allowing you to understand the real drivers of the dispute – their 'reality'. Once identified, you can help move them to the true 'reality' and come to a solution reflecting this reality, ending entrenchment.

Conclusion

As solution-providers, it is our duty to help the parties arrive at solutions based on reality. That reality may shift with time, leading to entrenchment. However, you can test that reality by shifting the parties' focus to 'the big picture': "How can we end this *today*?". And even if they don't, you will at least have planted the seeds for them to move forward with their lives by ending entrenchment.

Bevan Hughes is a full-time member of the Queensland Civil and Administrative Tribunal. He is a nationally accredited mediator and has mediated over 1000 matters with a 97% settlement rate. The views expressed are those of the author only and are not made on behalf of QCAT.

Applications for disclosure in the state courts

This article explores applications brought by parties for disclosure under rule 223 *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) in circumstances whereby one party contends that another party has failed to comply with their duty of disclosure.[1]

Basis for the application

Rule 223(1) UCPR provides that the court may order a party to a proceeding to disclose to another party a document or class of documents by delivery or production for inspection.

Rule 223(4)(b)(i) provides that such an order may be made if it appears that there is an objective likelihood that the duty to disclose has not been complied with.

Whether to bring the application

If you or your client consider that another party (the intended respondent) has failed to comply with its duty of disclosure, this usually means that your client is a party to an existing case which has been commenced by claim and in which pleadings have been filed and served.[2] This typical case will be the basis for identifying the following steps which you should take.

The starting point is to examine rule 211 UCPR which identifies the duty of disclosure in the typical case as being a duty to disclose a document:

a. in the possession or under the control of the party, and
b. directly relevant to an allegation in issue in the pleadings.

The first step is to ask: what is the evidence which your client will adduce at the hearing of the application that the identified document or class of documents is in the possession or control of the respondent?

As to possession, is there direct evidence that the respondent possesses the document or are there circumstances (such as legal obligations imposed on the respondent) from which the court can infer that the respondent has possession of the document?

As to the issue of control, is there evidence that the document is not in the possession of the respondent but that the respondent can obtain it, such as directing a non-party to provide it with the document?

The second step is to ask two questions: what is the allegation or fact in issue on the pleadings to which this document is said to be directly relevant? And will the document tend to prove or disprove the fact in issue?

An allegation or fact in issue is a fact which is in dispute between the parties on the pleadings. For example, a statement of claims alleges a fact, and the defence denies that fact. That fact is an allegation in issue. Importantly, if a fact is admitted on the pleadings, there is no fact in issue to which a document is capable of being relevant.

If the allegation in issue cannot be identified by you or if the document sought to be disclosed will not tend to prove or disprove the allegation in issue, then there appears to be no proper basis to bring an application.

The third question is to ask: has the document in fact been disclosed? This will require a close examination of the list of documents delivered by the respondent and an inspection of those documents which may be the document alleged not to have been disclosed. Sometimes, a party describes a document in an unexpected way in their list. You will need to be certain that the document or class of documents which is to be the subject of any application has not been disclosed.

The fourth question to ask is: is there any basis on which the respondent can argue that it has not breached its duty to disclose?

For example, rule 212(1)(b) UCPR provides that the duty of disclosure does not apply to a document relevant only to credit.

As another example, rule 221 UCPR provides that a party may disclose to another party a document relating only to damages only if the other party asks for its disclosure. If the document which you consider has not been disclosed relates only to damages, has your client asked for its disclosure?

The fifth question to ask is: can I obtain this document in any other way which avoids the need for an application, such as a request under rule 222 UCPR?

The final question to ask is: how important is this document to your client's case? Remembering that there are consequences for non-disclosure provided in rule 225 UCPR (including that the party will need leave of the court to tender the document at trial), is it important to your client's case that the other party be ordered to disclose the document? Why?

Like an application for further and better particulars, an application for disclosure can cause the respondent to spend time considering the issues in the case and perhaps even improve their case, as well as being given an insight into what your side considers to be of importance in the case. Is the application for further disclosure worth that? If it is, and your client can jump all of the hurdles set out above, then an application may be appropriate.

Letter to respondent

Although a rule 444 letter is not required to be issued prior to bringing an application under rule 223 UCPR,[3] the issue of a rule 444 letter or similar letter which identifies your client's complaint about the proposed respondent's non-compliance with its duty of disclosure may result in any number of events which mean that your client does not bring the proposed application.

back to contents

by Kylie Downes QC

For example, the other party may respond by making further disclosure or the other party may inform you that it does not have the document in its possession or control (and why that is the case). In the latter event, you may consider causing your client to issue a notice requiring non-party disclosure under rule 242 UCPR if it is able to identify a non-party which has possession of the document in question.

Sending a letter prior to bringing the proposed application will, in any event, improve your client's prospects of getting a costs order in its favour at the application. This is especially so if you identify the proposed evidence which your client will adduce at the hearing of the application to demonstrate that the duty of disclosure has not been met.

Application and supporting affidavit

The application should identify the rule under which the application is brought (being rule 223(4)(b)(i) UCPR in the typical case under consideration) and identify the document or class of documents in relation to which disclosure is sought.

The relevant test for the court to consider at the hearing of the application is whether there appears to be an objective likelihood that the duty to disclose has not been complied with by the respondent. This is the test which your submissions and affidavit evidence should address.

The supporting affidavit(s) should do the following (as a minimum):

a. Contain admissible evidence which demonstrates that the document or class of documents is in the possession or control of the respondent.

   This cannot be speculation or subjective opinion evidence by your client as to their beliefs as to what the respondent has in its possession or control.

   It can be direct evidence of facts that the document or class of documents is in the possession or control of the respondent, such as evidence of a former employee that he saw such documents kept as part of the records of the respondent.

   Alternatively, or in addition, it can be evidence of facts from which the court can be asked to infer that the respondent has such documents. For example, if the respondent has a statutory or other legal obligation to maintain certain records and to keep them for a certain period of time, the court may infer that the respondent has such documents in its possession or control.

b. Contain evidence which demonstrates that the document or class of documents has not been disclosed by the respondent (such as exhibiting the lists of documents provided by the respondent).

c. Exhibit correspondence between the parties about the alleged non-disclosure.

Basis for opposition to order

One basis upon which an application for disclosure may be opposed is that the document or class of documents is not in the possession or control of the respondent. As a general proposition, if that is the only basis on which the application is opposed and the respondent adduces cogent evidence at the hearing of the application to that effect, then the application is likely to be dismissed unless your side is able to demonstrate a basis upon which that evidence should not be accepted.

If such affidavit evidence is served by the respondent prior to the hearing of the application, then you might consider amending the application to seek an order under rule 223(2)(b) UCPR that the respondent file and serve an affidavit stating the circumstances in which a specified document or class of documents ceased to exist or passed out of the possession or control of the respondent. Such an affidavit may assist your client to identify a non-party for the purposes of obtaining non-party disclosure.

Another basis upon which an application for disclosure may be opposed is that the document or class of documents is not directly relevant to an allegation in issue in the pleadings. Usually, such a contest is a matter for submissions, not evidence. If that is the basis for the opposition, and you know this prior to the application being filed, you may consider applying in the alternative for disclosure on the basis that there are special circumstances and the interests of justice require the disclosure of the document pursuant to rule 223(4)(a) UCPR.

Such an application will turn on its own facts, which facts will need to be the subject of evidence contained in the supporting affidavits. However, if the document is of critical importance to your client such that you consider that the test in rule 223(4)(a) UCPR can be satisfied, then it may provide an appropriate alternative basis to bring the application.

A third basis upon which an application for disclosure may be opposed is that there is another rule which excludes the duty of disclosure in relation to particular documents, such as rule 212 UCPR. Again, as a general proposition, if that is the only basis on which the application is opposed and the respondent adduces cogent evidence at the hearing of the application to that effect, then the application is likely to be dismissed unless your side is able to demonstrate a basis upon which that evidence should not be accepted.

Kylie Downes QC is a Brisbane barrister and member of the *Proctor* Editorial Committee.

Notes

[1] In the usual case, a party makes disclosure by delivery of a list under rule 214 UCPR.

[2] See rule 209(1)(a) UCPR.

[3] *BTU Group v Noble Promotions Pty Ltd* [2002] QCA 505 at [4].

2018: Delivering a world-class digital experience

with Supreme Court Librarian David Bratchford

This year has been perhaps the busiest of my relatively short tenure to date, and another year of substantial progress for the library.

A strategic priority for the library over the year has been looking to the future. We deliver most of our services online, so the quality and capability of our websites is critical. Our vision is to provide a world-class digital experience, by optimising online services and improving access to legal information.

During 2018 we devoted significant time and resources to improving our online services. We comprehensively renewed our website and database infrastructure, adopted new technologies, established new processes, and developed capabilities which will continue to underpin and enable succeeding developments.

In October we sought your feedback about how you use the library websites, along with your suggestions for improvement. I am very grateful to those of you who responded – your feedback is helping shape the direction of our user experience design, which will in turn ensure we deliver online services that better meet your needs.

While website improvements are a big focus for us – and we appreciate your support and patience during this period – as your member library, our priority will always be to provide you with high-quality, responsive legal information services including:

- **Research assistance.** You can access up to 30 minutes of free research from our experienced legal researchers.
- **Copies of judgments and journal articles.** We can supply you with up to 10 documents a day free of charge.
- **For sole practitioners or firms with five or fewer practising certificates.** You are eligible for the Virtual Legal Library (VLL), which provides free online access to a large number of key legal publications from leading publishers.

Visit our website at **sclqld.org.au** to find out more about how we can help you.

I suspect 2019 will be even busier than 2018. We are very excited about finalising and deploying several website and database upgrades that have been in the works for a long time.

I wish you all the best for a safe and enjoyable festive season.

David

Christmas closure

The library will be closed for the duration of the Christmas court closure, from Monday 24 December 2018 to Friday 4 January 2019 inclusive.

Can I cross-examine a former client?

by Stafford Shepherd

Once our relationship with a client ends we have ongoing obligations to maintain the confidential information that the former client has entrusted to us.

With the ending of a retainer we will not normally have an ongoing duty of loyalty to the former client.

Can we cross-examine a former client?

The decision of *Fordham v Legal Practitioners Complaints Committee*[1] (*Fordham*) involved a barrister in just such a situation. The barrister was found guilty of unsatisfactory professional conduct for cross-examining a former client (where the cessation of the relationship was recent), even though the court noted that confidentiality had not been breached. Aggravating the issue, however, was the fact that the cross-examination involved facts common to her former retainer with that client. The court found that:

- Her actions amounted to a breach of loyalty to her former client irrespective of any breach of confidentiality (akin to a duty to protect the integrity of the judicial process).
- Her actions could have led a reasonable observer to conclude that she had indeed used confidential information to the detriment of her former client.
- She had breached a duty not to adopt a position hostile to a former client in the same or a related matter.

The case highlights our duty to the administration of justice.

Does this amount to a prohibition on acting? No, but we must be mindful of the following:

- **Confidentiality**: Clearly there is a prohibition on using confidential or privileged information gained during the retainer against our former client.
- **'Getting-to-know-you' factors**: Not all confidential information is technical. The court will consider the impressions we gained about the person – their character, habits, strengths, weaknesses, attitudes – the buttons we can push to gain information. This depends on the length of our prior relationship with the client.
- **Relevance to the current matter:** When we are representing a client in a matter arising from the same set of facts for which we represented the former client, then cross-examining the former client becomes problematic. The challenges of navigating a course through duties to our current client and our former client would likely place us in a position where we are professionally embarrassed.
- **Strength of the relationship with the former client**: If we were this person's solicitor over an extended period, our former client may well regard us as 'their solicitor' far more than someone we represented fleetingly.

We must make informed decisions based on the facts of each case to decide what is appropriate in the circumstances.

Stafford Shepherd is the Director of the Queensland Law Society Ethics and Practice Centre.

Notes

[1] (1997) WAR 467.

back to contents

You are not God

When instructions are clear, you must prepare the will

Earlier this year, Queensland Law Society invited me to co-present a webinar on the issue of testamentary capacity with ethics solicitor Shane Budden (with whom I also co-wrote this column).

This year, the QLS Ethics and Practice Centre noted a marked increase in enquiries around the theme of what is the role of a solicitor in taking will instructions?

This column extracts the key elements from our webinar and is designed to assist practitioners by providing a succinct guide to our role and responsibilities.[1]

Solicitors have a duty to follow their client's lawful, proper and competent instructions,[2] and all adults are presumed to have capacity unless otherwise proven.[3] Generally speaking, a client who lacks capacity cannot provide instructions and a solicitor has a duty of care not to follow instructions when the client lacks the capacity to give them.[4]

However, will instructions occupy a more complicated space, in that they can often be given in circumstances in which capacity is in question (and not definitively established or ruled out). A solicitor's duty is to take will instructions;[5] if the instructions are not coherent, the solicitor is considered on notice that capacity may be impaired, and they must take steps to assess the client's capacity.[6]

Capacity is a legal test, not a medical one.

The courts have provided guidance for solicitors faced with will instructions from clients whose capacity is not definitively established, and that guidance consistently favours the taking of the instructions and the drafting of the will if this is possible. In the Canadian decision of *Scott v Cousins*[7] Collity J said:

"[C]areful solicitors…will not play God – or even judge – and will supervise the execution of the will while taking, and retaining, comprehensive notes of their observations on the question [of capacity]."

Similarly, in *Petrovski v Nasev; The Estate of Janakievska,*[8] the New South Wales Court of Appeal cited with approval the advice concerning the taking of instructions contained in Mason & Handler's *Wills, Probate and Administration Service NSW* (Butterworths):

"(i) The solicitor who is to draw the will should attend on the testator personally and fully question the testator to determine capacity – the questions should be directed to ascertain whether the testator understands that he is making a will and its effects, the extent of the property of which he is disposing and the claims to which he ought to give effect;

"(ii) One or more persons should be present, selected by the solicitor having regard to their calibre as witnesses if required to testify whether the issue of capacity is raised. Where possible, one of the witnesses should be a medical practitioner, preferably the doctor who has been treating the testator and is familiar with him, who should in making a thorough examination of the testator's condition, question him in detail and advise the solicitor as to the capacity and understanding of the testator. The presence of other persons at this time would require the testator's consent;

"(iii) A detailed written record should be made by the solicitor, the results of the examination recorded by the medical practitioner and notes made by those present.

"If after careful consideration of all the circumstances the solicitor is not satisfied that the testator does not have testamentary capacity he should proceed and prepare the will. It is a good general practice for the solicitor who took instructions to draw the will and be present on execution and this practice should not be departed from in these circumstances. On execution, the attesting witnesses should, where possible, come from those persons (including the solicitor) referred to above who were present at the time of instructions and, again, as at every stage, detailed notes of the events and discussions taken.

"If those questions and the answers to them, leave the solicitor in real doubt as to what should be done, other steps may be desirable. This may include obtaining a more thorough medical appraisal or, if the testator declines, considering whether the will can be properly drawn, should assurance on testamentary capacity fail to satisfy the test just quoted."

Given that wills can be taken when the end of life is near, urgency is required and the opportunity for extensive testing of capacity is limited, it is imperative that solicitors draft a will if clear instructions can be obtained. However, as taking instructions from an enfeebled testator whose capacity may be questioned comes with significant risk, steps must be taken to protect the interests of all concerned.[9] At the very least practitioners faced with this scenario would be assisted by the following:

- take such steps as are possible to assess capacity in the circumstances
- take instructions from the testator in person
- have witnesses present who are not beneficiaries and who also make notes of the attendance
- have the testator sign the notes of the attendance if possible.

back to contents

with Christine Smyth and Shane Budden

It is a strange anomaly that we are in an era in which practitioners are burdened with downward pressure on costs and upward pressure on practice and process. There is no doubt that complying with these steps is time-consuming and increases the risk a solicitor will be called upon to give evidence on a will dispute.

Conversely, many clients are price, simplicity and time sensitive. Their expectations and demands do no often align. However, there remains scope for practitioners to educate clients on the cost/benefit value of having a solicitor involved in the process, most importantly for when the testator passes and the will comes into effect.

To assist practitioners, the QLS Ethics and Practice Centre is developing an Ethics Note on the role of a solicitor in regard to the question of testamentary capacity. Any feedback from practitioners is welcome – please email ethics@qls.com.au .

Christine Smyth is Immediate Past 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. Shane Budden is a QLS ethics solicitor.

Notes

1. A more extensive analysis of a practitioner's role and duties is available through the *Queensland Handbook for Practitioners on Legal Capacity*.
2. Rule 8, Australian Solicitors Conduct Rules 2012.
3. *Murphy v Doman* (2003) 58 NSWLR 51.
4. *Goddard Elliott v Fritsch* [2012] VSC 87 at paragraph 418.
5. *Ryan v Public Trustee* [2000] 1 NZLR 700; see also WA Lee and AA Preece, *Lee's Manual of Succession Law*, fifth edition, LBC, page [307].
6. GE Dal Pont, KF Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) 750.
7. (2001) 37 ETR (2d) 113 at [70].
8. [2011] NSWSC 1275 (17 November 2011) at 89.
9. *Pates v Craig and Public Trustee, Estate of Cole* [1995] NSWSC 87 [142]-[148].

Token offers: a career opportunity?

by Daniel Owen,
The Legal Forecast

The explosive growth of blockchain during the past two years has coincided with a parallel growth in the use of cryptographic tokens in fundraising beyond the traditional methods contemplated by Chapters 5C and 6D of the *Corporations Act 2001 (Cth)* (the Act).

Consequently, new opportunities are now emerging for early-career lawyers to focus on this growing and complex practice area, while assisting in shaping blockchain regulation.

Token offers

Blockchain is a coded platform that verifies transactions through records held by a community of participants (that is, through a 'distributed ledger') rather than through a centralised authority.

According to Michael Bacina, a Partner in the Blockchain Group at national law firm Piper Alderman, "The blockchain industry offers early career lawyers the opportunity to specialise in a growth area of the law that is both challenging and rewarding and to add a unique offering to their professional expertise."

Token offers are related to cryptocurrencies (such as Bitcoin and Ethereum) however, unlike cryptocurrencies, they are not limited to fiat currency replacements. Token offers involve the issuer making an offer to investors which incorporates cryptographic tokens in order to raise funding for the issuer's blockchain-based business.

Token offers can broadly be separated into the increasingly prevalent 'security token offer', which combines an offer of cryptographic tokens with equity in the issuer (or some other valuable asset) and the more controversial 'initial coin offering' of utility tokens (where the tokens are the only assets offered).

Token regulation

During 2017, initial coin offerings rose significantly in popularity, likely due to a perception among issuers that utility tokens were not regulated as financial products by the Act. In response, the Australian Securities and Investments Commission (ASIC) published ASIC Information Sheet 225 (INFO 225), which provides that a utility token may in fact constitute a share, a managed investment scheme, a derivative or a non-cash payment facility. Each of these constitute a financial product and are therefore captured by the various disclosure and regulatory requirements of the Act.

Even where a utility token does not constitute a financial product, ASIC has received delegated authority from the Australian Competition and Consumer Commission (ACCC) to prosecute token issuers for misleading or deceptive conduct pursuant to section 18 of the Australian Consumer Law (ACL).[1] This allows ASIC to 'leapfrog' the historically limiting requirement that ASIC prove a financial product exists before it has jurisdiction to prosecute for misleading or deceptive conduct.[2]

The role of lawyers

Blockchain lends itself to lawyers who are digital natives with a fundamental understanding of the fluid legal status of cryptographic tokens. For example, tokens may not legally be a financial product upon issue, but may later evolve to include characteristics which cause them to constitute a financial product.

Given the complexity of token regulation, ASIC publically states in Part E of INFO 225 that, "ASIC strongly encourages entities to carefully consider their proposal and seek professional advice (including legal advice)".

ASIC's increased activity in the blockchain space follows the Australian Federal Parliament passing the *Treasury Laws Amendment (2018 Measures No.3) Act 2018*, which received royal assent on 1 September 2018. These amendments substantially increase the maximum penalties for companies ($10 million plus) and individuals for misleading or deceptive conduct pursuant to the ACL.

The increased ACL penalties are a welcome adjustment that bring Australia's consumer penalties regime into line with international standards,[3] however simultaneously indicate the increasing risk of participating in the blockchain industry.

Future of blockchain

With respect to potential future reforms, uncertainty remains regarding the treatment of non-financial product tokens. Specifically, it is unclear whether holders of such tokens have available to them a remedy against the issuer akin to a breach of directors' duties, despite the relationship of issuer to holder being broadly comparable.

It is also worth noting that the dollar thresholds prescribed by the Act which regulate the availability of fundraising pursuant to the small-scale offerings exemption[4] and the crowd-sourced equity funding regime are calculated based on past *security* issues. These provisions may require amendment to ensure that they cannot be undermined by issuers attributing (or potentially, apportioning) past funding to a utility token offer.

Conclusion

According to Mr Bacina, "lawyers have now become a critical adviser to any token issuer to manage the regulatory and reputational risk inherent to conducting a token offering".

Experience in blockchain may prove relevant to any number of potential career paths, both in the public and private sectors.

For early career lawyers, establishing a career in blockchain, particularly with ASIC publically recognising the value of legal advice, is a unique opportunity to contribute both to an evolving practice area and the public discourse regarding how it is regulated.

Daniel Owen is a Queensland Executive Member of The Legal Forecast. Special thanks to Michael Bidwell and Benjamin Teng of The Legal Forecast for technical advice and editing. We also thank Michael Bacina, Louisa Xu and Alejandro Vasquez Betancourt from Piper Alderman for their assistance. The Legal Forecast (thelegalforecast.com) aims to advance legal practice through technology and innovation. TLF is a not-for-profit run by early-career professionals passionate about disruptive thinking and access to justice.

Notes

1 Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

2 See ASIC RG234: Advertising financial products and services (including credit): Good practice guidance at RG 234.156 for a list of ASIC's relevant regulatory powers.

3 Following recommendations from Consumer Affairs Australia and New Zealand in its April 2017 final report, *Australian Consumer Law Review*, cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf.

4 The current threshold is a total of $2 million raised in a rolling 12-month period by issuing securities in the company. See section 708 of the Act.

back to contents

'No jurisdiction' to vary date of application

with Robert Glade-Wright

Property – decision that an application filed at 7.40pm be treated as filed that day contrary to FLR 24.05(2) set aside

In *Frost (Deceased) & Whooten* [2018] FamCAFC 177 (17 September 2018) the late husband's legal personal representatives appealed against Cronin J's decision to treat the wife's property application filed electronically at 7.40pm (where at 11pm the husband died in hospital from injuries sustained the previous day) as filed on that day, not after his death pursuant to FLR 24.05(2) which provides that an electronic filing after 4.30pm ACT time is taken to have been filed the next day.

The Full Court (Alstergren DCJ, Aldridge & Kent JJ) said (at [8]):

"His Honour considered that this order should be made because otherwise the strict application of the Rules would deny the respondent the right to litigate, which would be an injustice…However, this appeal is primarily concerned with whether or not the Court had jurisdiction to make any order at all and not whether the circumstances worked an injustice upon her."

Having agreed that the application properly invoked a matrimonial cause for property orders, the Full Court allowed the appeal, saying (at [55]):

"…[B]y the operation of r24.05(2) the Initiating Application was taken to be filed on the day after the deceased died (notwithstanding the automatically issued note placed on it to the effect it was filed the day before). Thus… the Court had no jurisdiction to proceed as there were then no proceedings between the parties to the marriage as one had died the day before. (…)"

The court added ([73]) that it could not "use the Rules to extend or vary time so as to acquire that jurisdiction" as "[t]o do so would be to alter the parties' substantive rights…, create a cause of action where none then existed [and] subject the deceased's estate to proceedings under s79 notwithstanding that the period in which those proceedings could be commenced…had expired".

Children – after a final parenting order an issue not previously dealt with does not involve the rule in *Rice & Asplund*

In *Cameron & Brook* [2018] FamCAFC 175 (13 September 2018) the parties had equal shared parental responsibility for their child K under a final parenting order made by consent when K was 11. When asked to sign an application for K's selection in an overseas student exchange program in which her school participated, the father refused. He also failed to attend family dispute resolution which the mother arranged as required by the order.

The mother's application for an urgent interim order that the father sign the form, failing which she be granted sole parental responsibility for doing so (filed as part of an initiating application for a final order in the same terms) came before Judge Coates on the eve of selection interviews. The court agreed with the father's case that the court lacked jurisdiction and dismissed the application, whereupon the mother appealed (the appeal hearing coming on before the extended deadline for interviews).

The Full Court (Strickland, Murphy & Kent JJ) said (from [33]):

"(…) The mother seeks to vary an aspect of the…order. The Court has…jurisdiction and power to determine that question if the parties cannot agree (…)

[35] (…) [W]hen parents cannot or will not do that which they should…the Court's powers are not excluded but, rather, enlivened, if its jurisdiction is properly invoked.

[36] (…) [A]lthough finality of litigation is desirable…final orders made in relation to… children are not final in the same sense as orders made, for example, relating to property settlement…

[37] We are not persuaded that the situation here is analogous to a case invoking the application of the 'rule in *Rice & Asplund*'. … There is here no attempt to reagitate issues previously agitated or issues addressed and settled by the consent orders…The… application involves a new question relating to an aspect of parental responsibility…that was not…in the contemplation of the parties at the time of the original consent orders."

The appeal was allowed with costs fixed at $11,192 and an order made that the mother have sole parental responsibility for the enrolment.

Divorce – *forum non conveniens* – complete relief was available in India (where wife lived) but not in Australia

In *Talwar & Sarai* [2018] FamCAFC 152 (10 August 2018) the Full Court (Ainslie-Wallace, Ryan & Aldridge JJ) allowed the wife's appeal from a divorce order made by Judge Tonkin.

Both Indian by birth, the parties met in India in February 2013 when the husband (an Australian citizen) visited there and they arranged to be married. He returned to India in August 2013 for the wedding; returned to Australia in September 2013, applying for a wife's partner visa but withdrawing his sponsorship for that visa in December 2013, alleging that the parties had separated. The wife brought proceedings in India under the *Indian Penal Code,* the *Protection of Women from Domestic Violence Act* and the *Dowry Prohibition Act*.

The husband applied for divorce in the Federal Circuit Court on 10 March 2017, the wife on 10 April 2017 applying in the Family Court of India for an injunction restraining the husband from continuing his divorce application. Absent a response by the wife, a divorce order was made by a registrar on 12 May 2017. On 27 May 2017 the Family Court of India made the injunction. Upon a review sought by the wife the divorce application was reheard by Judge Tonkin, who held that Australia was not a clearly inappropriate forum and granted the divorce order.

After citing High Court authority ([19]] holding that "[i]f the court is satisfied that Australia is a clearly inappropriate forum in which to determine the proceedings the court must stay them" the Full Court remitted the case, saying ([97]):

- "…[T]he exercise of the…judge's discretion miscarried in the following ways:
- on the face of s13 of the *Hindu Marriage Act* a divorce was available in India…;
- complete relief was therefore available to the parties in the Indian proceedings;
- undue emphasis was placed on the husband's '*prima facie* right' to proceed with his proceedings in Australia;
- the injunction against the husband continuing with his divorce application was ignored; and
- the…judge did not have proper regard to the effect of her orders upon the wife, who would not be divorced in India."

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

back to contents

High Court and Federal Court casenotes

High Court

Company law – voluntary administration – deed of company arrangement

In *Mighty River International Limited v Hughes; Mighty River International Limited v Mineral Resources Limited* [2018] HCA 38 (orders 19 June 2018; reasons 12 September 2018) the High Court upheld the validity of a deed of company arrangement implementing a moratorium on claims, requiring further investigations by the administrators and a report to creditors on possible amendments to the deed in six months' time, and preventing distribution of property of the company.

Mesa Minerals went into voluntary administration and administrators were appointed. At the second meeting of creditors, a majority of creditors voted to enter into a deed of company arrangement with the features above. Mighty River, a creditor, began proceedings claiming that the deed was void. It argued that the deed was inconsistent with the purpose of Part 5.3A of the *Corporations Act 2001* (Cth); that it invalidly sought to sidestep the requirements of s439A(6) of that Act, which allows for a court to extend the period within which to hold a second meeting of creditors; that it did not comply with an alleged requirement in s444A(4)(b) to distribute at least some company property; and that certain required opinions had not been formed under the Act.

At first instance, the Master upheld the deed. An appeal to the Court of Appeal was dismissed. A majority of the High Court held that the deed was valid. It had been executed in compliance with Part 5.3A and was consistent with and aimed to fulfil the purposes of that part, noting the intended flexibility of possible deeds of company arrangement. It was not simply an extension of time; rather, the deed was an otherwise valid instrument that incidentally extended time for investigations pending possible variations. The moratorium was valid and accorded with the purposes of Part 5.3A. The deed also did not need to specify property to be available for the purposes of s444A, and the administrators had formed and expressed the opinions required by ss438A(b) and 439A(4). Kiefel CJ and Edelman J jointly; Gageler J separately concurring; Nettle and Gordon JJ jointly dissenting. Appeal from the Court of Appeal (WA) dismissed.

Equity – doctrine of part performance

In *Pipikos v Trayans* [2018] HCA 39 (12 September 2018) the High Court considered the requirements of the equitable doctrine of part performance and whether those requirements should be relaxed.

The respondent and her then husband purchased a property (the Clark Road property) and made improvements. The respondent was the sole registered proprietor. The respondent and her husband later jointly purchased a second property with the appellant (also the respondent's brother) and his wife, financed by both couples and a bank loan. The appellant and his wife jointly held a half-share in the property, with the other half in the name alone of the respondent's husband. The couples then bought a third property (the Penfield Road property), financed in part by bank loan. The appellant and his wife paid the deposit and the balance. Each couple held a half share in the property.

In these proceedings, the appellant alleged that he and the respondent's husband had agreed that the appellant would acquire half of the Clark Road property (not including the improvements), to be paid largely by the appellant funding the share of the respondent and her husband in the Penfield Road property. The only evidence of the agreement was a handwritten note signed by the respondent. That note did not meet the requirements for contracts of sale for land in the *Law of Property Act 1936* (SA). The appellant argued that he was entitled to specific performance through the doctrine of part performance. Under existing authority, where a person has partly performed a bargain made and the acts relied upon to show part performance are unequivocally and by their own nature referable to the alleged agreement, the other party may be prevented from resiling from the bargain. The appellant argued for a relaxation of the requirement for acts to be unequivocally referable to the agreement asserted by the applicant. He urged an approach akin to equitable estoppel, focussed on "whether a contracting party has knowingly been induced or allowed by the counterparty to alter his or her position on the faith of the contract".

After review of the authorities, the court unanimously rejected the argument, affirming the requirement of unequivocal referability. In this case, the bargain did not meet that requirement (which the appellant conceded in the High Court). Kiefel CJ, Bell, Gageler and Keane JJ jointly; Nettle and Gordon JJ jointly concurring; Edelman J separately concurring. Appeal from the Full Court of the Supreme Court (SA) dismissed.

Equity – breach of fiduciary duty – account of profits

In *Ancient Order of Foresters in Victoria Friendly Society Limited v Lifeplan Australia Friendly Society Limited* [2018] HCA 43 (10 October 2018) the High Court considered the necessary causal nexus for an account of profits following a breach of fiduciary duties. Lifeplan operated a funeral products business through a subsidiary Funeral Plan Management (FPM). Foresters ran a similar business, though with a smaller market share. Mr Woff and Mr Corby were employed by Lifeplan in management positions. While still employed at Lifeplan, Woff and Corby approached Foresters with a plan to divert business from FPM to Foresters. They created a five-year business concept plan to carry this through, based on the "wholesale plundering of the confidential information and business records of Lifeplan". Lifeplan and FPM brought proceedings for breach of fiduciary duty and contravention of the *Corporations Act 2001* (Cth). They sought an account of profits. The primary judge found against Woff and Corby on the breaches and found that Foresters had knowingly assisted in some, but not all actions. The judge also found that Foresters would not have proceeded absent the business plan. When considering account of profits, the primary judge held that the confidential information had not itself been used to generate profit for Foresters and did not order an account of profits against it. On appeal, the Full Court held that was too narrow a view of the causation required and ordered Foresters also to account for profits. Foresters appealed to the High Court; Lifeplan cross-appealed against the finding of quantum. Foresters argued that the account of profits should be limited to the profits from the direct results of the acts amounting to knowing assistance. The High Court held that the profits of those acts could not be separated from the general scheme. The liability to account extended to "any benefit" arising "as a result of" the knowing participation. On the cross-appeal, once causation was found, it was for the appellants to show why amounts should not be included in the account of profits. In this case, there was no reason to restrict Foresters' obligation to disgorge less than the entire capital value of the business it acquired. Kiefel CJ, Keane and Edelman JJ; Gageler J separately concurring; Nettle J concurring separately on the appeal but dissenting on the cross-appeal. Appeal from the Full Federal Court dismissed; cross-appeal 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 .

back to contents

with Andrew Yuile
and Dan Star QC

Federal Court

Administrative law – migration law – procedural fairness – whether practical, direct and non-misleading advice as to how material disclosed might be used by the decision-maker

In *Stowers v Minister for Immigration and Border Protection* [2018] FCAFC 174 (12 October 2018) the Full Court allowed the appeal and set aside the primary judge's decision. The appellant is a citizen of New Zealand. His visa was mandatorily cancelled under s501(3A) of the *Migration Act 1958* (Cth) because he had a "substantial criminal record" under s501(7)(c) and consequently did not pass the "character test" in s501(6)(a). The Assistant Minister decided not to revoke the visa cancellation decision. The primary judge dismissed a challenge to the Assistant Minister's decision on the ground of procedural fairness. The sole ground of appeal to the Full Court was that the primary judge erred in failing to find that the Assistant Minister made a jurisdictional error by denying the appellant procedural fairness (at [34]).

Flick, Griffiths and Derrington JJ stated at [52]: "...Mr Stowers was put on notice by the relevant terms in Part C of Direction 65 that any 'serious conduct' on his part as defined in the Direction, as well as any criminal conduct, was potentially relevant to the primary consideration of protecting the Australian community. Five months after Mr Stowers' attention was drawn to the potential relevance of Part C, he was provided with additional documentary material and was told that it might be taken into account. The central issue in this appeal is whether it was procedurally unfair not to give Mr Stowers greater specification of that additional material...which put him on notice as to which parts of that material might be relied upon in finding that he had engaged in 'serious conduct' and that this might be relied upon in refusing his revocation request."

The Full Court held that Mr Stowers was not given practical, direct and non-misleading advice about the "factors critical" to the Assistant Minister's revocation decision (at [53]-[59]). Their Honours explained at [49]: "The learned authors of Australia's leading text, *Judicial Review of Administrative Action and Government Liability*, 6th ed., state at p545 that the approach of 'practical, direct and honest' advice of the 'factors critical' to a decision provides 'a useful general guide to disclosure'. We respectfully agree but believe that the word 'non-misleading' is more appropriate than the word 'honest', noting that there was no evidence of dishonesty in *NBNB* or here. 'Honesty' on the part of those administering legislation should be assumed."

Costs – application for order for costs against non-parties to a proceeding

In *Popeye Bido Pty Limited (Receivers and Managers Appointed) v Intermediate Capital Asia Pacific 2008 GP Limited (No.3)* [2018] FCA 1597 (24 October 2018) the court dismissed the respondents' application under s43 of the *Federal Court of Australia Act 1976* (Cth) for costs against non-parties. The respondents' application was for a considerable sum of costs for an interim injunction obtained by the applicants ex parte, and the unsuccessful attempt by the applicants to have the injunction continued as an interlocutory injunction. The non-parties against whom the costs orders were sought were directors of the four companies of the applicants. Besanko J considered the relevant principles at [13]-[18] and, in particular, the principles stated in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 192-193 per Mason CJ and Deane J (with whom Gaudron J agreed).

Industrial law – orders accompanying pecuniary penalties – whether power to order advertising of the fact that the contraventions have been found and the penalties imposed

In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The BKH Contractors Case) (No.2)* [2018] FCA 1563 (18 October 2018) the court imposed pecuniary penalties on the union (CFMEU) and individuals in relation to contraventions of ss340, 343, 494 and 500 of the *Fair Work Act 2009* (Cth) (FW Act). Flick J also held that the court had power under s545 of the FW Act, and it was appropriate in the exercise of discretion, to make an order for advertising of the fact that contraventions have been found to have been made out and the penalties imposed (at [146]-[157]).

Flick J explained at [152]: "The purpose achieved by making such an order is to inform (inter alia) those members of the building industry engaged in construction work of a like kind to that in the present proceeding of the outcome of the proceeding and to inform them of the kind of conduct which constitutes a contravention of the *Fair Work Act*. It also achieves the purpose of informing members of the Respondent Union of the kind of conduct that has been held to constitute a contravention. The making of such an order, it is considered, falls naturally within the ambit of the power conferred by s545 to 'make any order the court considers appropriate' in respect to the contraventions. If necessary, it is further considered that such an order can accurately be characterised as 'preventative' *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3 at [104], (2018) 273 IR 211 at 237 per Keane, Nettle and Gordon JJ. Advertisements of the kind presently envisaged will hopefully go some way to 'preventing' further like contraventions of the *Fair Work Act*. At the very least, advertisements may cause individual union members to pause before pursuing unlawful conduct..."

His Honour noted that the Full Federal Court is reserved in an appeal from another judgment (which was by his Honour) concerning orders for advertising of contraventions (at [156]).

Whether personal payment order should be made

In *Australian Building and Construction Commissioner v Gava* [2018] FCA 1480 (2 October 2018) the court imposed pecuniary penalties on Mr Gava and the CFMEU for contraventions of s503 of the *Fair Work Act 2009* (Cth). White J was not persuaded by the regulator to make an order for the union official to personally pay a pecuniary penalty imposed on him without the union doing so (that is, a personal payment order) (at [79]-[93]).

White J observed at [90]: "The existence or absence of a history of contraventions by an official is very relevant to the discretion concerning the making of a personal payment order but, in my opinion, it would be inappropriate for the Court to proceed on the basis that such an order should be made only when an official has such a history. The overriding consideration is whether the making of the order is appropriate so that the contravener will feel the burden or sting of the penalty. Such an order may be appropriate in a case of a first time contravener. Equally, the Court may be satisfied in the circumstances of a particular case that it is not appropriate even though the official has a history of contraventions."

Practice and procedure – preliminary discovery

In *Aristocrat Technologies Australia Pty Limited v Ainsworth Game Technology Limited* [2018] FCA 1511 (11 October 2018) the court held that it would make orders for preliminary discovery under r7.23 of the *Federal Court Rules 2011* (Cth). The application arose in the context of a prospective claim for misuse of confidential information and infringement of copyright. The court summarised the principles to be applied in an application for preliminary discovery (which were not in dispute) at [41]-[47].

Dan Star QC is a senior counsel 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 .

Court of Appeal judgments

1 to 31 October 2018

with Bruce Godfrey

Civil appeals

Attorney-General (Qld) v Fardon [2018] QCA 251, 3 October 2018

General Civil Appeal – where the respondent had been convicted and imprisoned for numerous sexual offences – where on 6 June 2003, 24 days before the expiration of the respondent's term of imprisonment, the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (the Act) came into force – where the Act introduced a regime by which prisoners serving a term of imprisonment for a serious sexual offence, who are a serious danger to the community, may be subjected to a continuing detention order or a supervision order of the Supreme Court beyond the expiration of their term of imprisonment – where the supervision order to which he is presently subject, imposed in 2013 and not contravened since, will expire at midnight on 3 October 2018, three days before he turns 70 and 30 years after he committed his last offence – where the applicant applied for a further supervision order – where that application was dismissed at the preliminary hearing – where the Act imposes a threshold test at the preliminary hearing – where the Act requires satisfaction at the preliminary hearing that there are reasonable grounds for believing a prisoner is a serious danger to the community – where the test at final hearing is whether a court is satisfied the prisoner is a serious danger to the community – whether the satisfaction of the preliminary hearing test was conflated with the final hearing test at first instance – where the practical effect of s8 of the Act is to provide a threshold to be met by applicants for Division 3 orders, as a prerequisite for being able to seek those orders at a final hearing – where if the threshold is passed, it allows the application to proceed to a final hearing and, in the meantime, s8 allows the court to make orders, including that the prisoner undergo a psychiatric examination – where there is limited occasion for any exercise of discretion under s8 – where if the court is satisfied that reasonable grounds for the prescribed belief are shown, a hearing date must be set; the discretion is confined to deciding whether orders for psychiatric examination and further supervision or custody pending the final hearing should be made – where the test for a preliminary hearing is not as demanding as the test for a final hearing – whereas the final hearing test requires satisfaction the prisoner is a serious danger to the community in the absence of a further order, the preliminary hearing test requires satisfaction there are reasonable grounds for believing that to be so – where the distinction between the tests is an important one, all the more so by reason of the likely alteration of the evidentiary picture between the stages at which the tests are to be applied – where the Act contemplates that by the time of the final hearing there will likely be evidentiary material before the court additional to that before the court at the time of the preliminary hearing – where this may include the written submission of a victim and the independent reports of two psychiatrists named by the court to examine the prisoner and report on their assessment of the prisoner's level of risk of committing another serious sexual offence – where thus the evidence before the court by the time of the final hearing might be more compelling, one way or the other, than the evidence before the court at the time of the preliminary hearing – where his Honour alluded to the standard of satisfaction, including evidentiary satisfaction, required by s13(3) – where that standard is not the standard to be met under the s8 test – where the concern arising is that his Honour's observations about statutory context erroneously gave rise to an interpretation of the s 8 test which requires reference to the evidentiary demands of the s 13 test – where as much is confirmed by his Honour's observation that "what must be proved to satisfy" the s8 question "is informed by what will be required before the court is able to make the ultimate critical finding under s13(1)" – where s13's relevance to interpreting or informing the s8 test is confined to its definition of what is meant by the phrase "serious danger to the community", a phrase which is common to both tests – where there the overlap ends – where the evidentiary demands specified at s13(3) relate solely to s13 – where they are irrelevant to the interpretation of s8 and do not inform what must be proved to satisfy the s8 test – where his Honour erred in considering that they did – where it is common ground that this court is in as good a position as the primary judge was to consider the application at a preliminary hearing and should determine the preliminary hearing forthwith – where it would be fallacious to reason that the respondent's past offending and prolonged period of past dangerousness should forever be regarded as reasonable grounds for believing the respondent is a serious danger to the community in the absence of a further supervision order – where however, they are powerful considerations – where although their force has been diminished by the passage of five years of compliant conduct under supervision and the recent assessment of low risk, they remain reasonable grounds for believing the respondent is a serious danger to the community in the absence of a further supervision order.

Appeal allowed. The court being satisfied pursuant to s8 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* that there are reasonable grounds for believing the respondent is a serious danger to the community in the absence of a further supervision order, a judge of the Trial Division will conduct a s13 hearing of the application for a further supervision order. The respondent undergo examination by two psychiatrists who are to prepare independent reports. (Brief)

JM Family Holdings Pty Ltd & Anor v Owltown Pty Ltd & Anor [2018] QCA 260, 9 October 2018

Application for Extension of Time/General Civil Appeal – where a dispute arose as to the validity of motions passed at an annual general meeting of the body corporate – where an adjudicator was appointed under the *Body Corporate and Community Management Act 1997* (Qld) (BCCM) to resolve the dispute – where the adjudicator's decision was appealed to the Queensland Civil and Administrative Tribunal pursuant to s289 of the BCCM – where a single non-judicial tribunal member constituted the appeal tribunal – where the appeal tribunal allowed the appeal – where the applicants seek leave to appeal the appeal tribunal's decision to the Court of Appeal – where the respondents submit the Court of Appeal does not have jurisdiction to hear the appeal as it is not an "appeal under division 1" as referred to in s150(2) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCATA) – where that argument must be rejected – where Part 8 division 2 regulates appeals to the Court of Appeal from decisions of the tribunal, including appeals from decisions of the tribunal under division 1 and appeals from decisions of the tribunal which do not involve the exercise of its appeal jurisdiction – where the ordinary and natural meaning of the phrase "appeal under division 1" is that the phrase is intended as a reference to a decision of the tribunal exercising the appeal jurisdiction referred to in ss25 to 27, and regulated by division 1 – where it is regarded that the intended operation of s149(2) of the QCATA as being to permit a party seeking to appeal a decision of the tribunal constituted by a judicial member to bypass the internal appeal to the appeal tribunal and to appeal directly to the Court of Appeal – where that view is also consistent with the terms of s142 which do not permit an appeal to the appeal tribunal when a judicial member constitutes the tribunal – where s151(2)(b) of the QCATA requires an application for leave to appeal to be filed within 28 days after the "relevant day" – where in this case that would have required the application seeking an extension of time and attaching the notice of appeal to be filed by 8 February 2018 – where it was not filed until 21 March 2018, 41 days after the expiry of the 28-day deadline – where the applicants have not demonstrated a good reason for the delay – where on the other hand, the respondents have not suffered any prejudice in consequence of the delay, and the issues on the appeal involve a question of construction of s115(3) of the Commercial Module, which is an issue of wider import than merely providing a resolution to the dispute between the present litigants and in which, as will appear, the decision below contains a determinative error of law – where moreover, the resolution of the question, although involving comparatively modest amounts of money, affects the liability of the lot

back to contents

owners for the costs of their ownership of real property for the life of the building – where it is in the interests of justice to grant the extension – where s115(3) of the Commercial Module requires an individual lot owner to be responsible for maintenance costs of "utility infrastructure" to the extent that the utility infrastructure "relates only to supplying utility services to the owner's lot" – where it is evident then, that the critical aspect of s115(3) is the introduction of "only" as an adverb modifying the nature of the verb "relates" – where the evident function of the lift was to provide one of two alternative means of access between the common property foyers on the lower and upper levels of Building B between lot 7 and lot 8, the second means being the common property stairs – where an alternative, the lift would be relevant and available to any person wishing to access or depart from the upper level of lot 8 – where critically, it would also be a relevant and available alternative to any person who wished to access or depart from the common property toilet facilities on the upper level or the roof itself – where it would be impossible to reach a conclusion that there was a sole or exclusive relationship between the lift and the supply of utility services to lot 8 – where one could not conclude it was the only function because it would also be true to say that the lift enhanced access in relation to common property (namely by easing the path to and from the common property toilet facilities and the roof) such that it could be regarded as relating to the supply of access to common property – where it was suggested by the appeal tribunal that no regard should be had to evidence of how and for what purposes the lift is used in fact – where the evidence of actual usage tended to shed light on (so as to confirm) an objective understanding of how building users might be expected to use the lift – where the contrary conclusion reached by the appeal tribunal was reached because the member misconstrued s115(3) of the Commercial Module as authorising the application of a 'but for' test – where the analysis called for by the proper construction of s115(3) was not one to which the application of a 'but for' test was apposite – where the application of a 'but for' test would, wrongly, operate to treat as irrelevant relationships between infrastructure and the supply of utility services to other lots or common property if those relationships existed, but could not be regarded as so significant that they explained the existence of lot 8 – where s115(3) does not contemplate that course – where the conclusion reached by the adjudicator was correct and the decision of the appeal tribunal to reverse it should be set aside.

Applicants granted an extension of time in which to seek leave to appeal. Leave granted to appeal. The appeal is allowed and the orders made by the appeal tribunal (including the costs order are set aside) and in lieu thereof it is ordered that the first respondent's appeal to the appeal tribunal be dismissed. First respondent must pay the appellant's costs of the application for leave to appeal and of the appeal to this court. Question of the order which should be made in relation to the costs of the proceeding before the appeal tribunal is remitted back to the appeal tribunal for determination.

Attorney-General of the State of Queensland v Legal Services Commissioner & Anor [2018] QCA 267, 12 October 2018

General Civil Appeal – Further Orders – where the court allowed the appellant's appeal – where by an oversight the appellant sought no order for costs in her notice of appeal or outline of submissions – where consequently, when the judgment was delivered, there was an order for costs in favour of the Legal Services Commissioner but no order for the costs of the Attorney-General's appeal – where the appellant sought leave to make an application for the costs of the appeal when the judgment was delivered – where paragraph 52 of Practice Direction 3 of 2013 provides that parties wishing to make submissions on costs must do so in their written outlines of argument and/or orally at the hearing – where the appellant was granted leave to apply for costs – where the *Legal Profession Act 2007* (Qld) provides a distinct role for the appellant Attorney-General to challenge a decision of the Queensland Civil and Administrative Tribunal in the public interest – where there was no evident tension between the respective arguments for the appellants, the distinct role of the Attorney-General takes the case out of the more usual kind.

The second respondent pay to the appellant the costs of the appeal, not including the costs of the Attorney-General in seeking leave to apply for that order. There should be no order for the costs of that application for leave.

SS Family Pty Ltd v WorkCover Queensland [2018] QCA 296, 30 October 2018

Application for Leave s118 *District Court of Queensland Act 1967* (Qld) (Civil) – where the second respondent applied for compensation but did not tick the box which would have identified him as a trustee at the time of the injury – where the first respondent, WorkCover, allowed his application for lump sum compensation under chapter 3 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (the Act) – where the second respondent elected to seek damages under chapter 5 of the Act – where WorkCover now denies that it is obliged to indemnify the applicant employer on the ground that the second respondent was not a 'worker' at the material time as he performed his work under a contract of service with a trust of which he was a trustee – where the applicant applied for orders striking out the allegations in WorkCover's amended defence denying its obligation to indemnify the applicant – where the primary judge rejected this application – whether an insurer's decision to allow an application for compensation by a person claiming to have been a worker who sustained an injury in the course of working for an employer precludes the insurer from subsequently contending that the person was not a worker as a ground for denying that the alleged employer is entitled to an indemnity against legal liability for damages for the injury – where s8 of the Act relevantly confines the indemnity under that insurance to a case in which an employer may become legally liable for compensation or damages in respect of injury sustained by a 'worker' employed by the employer – where the effect of s32A of the *Acts Interpretation Act 1954* (Qld) is that the definition of 'worker' must be applied except so far as the context or subject matter otherwise indicates or requires – where accordingly the task for the applicant is to identify an indication or requirement in some relevant context or subject matter that the definition of 'worker' does not apply to that word in s8 – where in deciding whether or not there is some such indication or requirement in the Act, it is necessary to bear in mind the differences between the insurer's obligation to pay compensation to a worker and its obligation to indemnify an employer against legal liability for damages claimed by a worker – where s8 describes the statutory accident insurance both in relation to compensation and in relation to legal liability for damages claims, but they are quite different heads of liability – where the applicant's case relies in part upon a decision by an insurer to accept an application for compensation under s134 – where that section contains no indication that any determination implicit in such a decision that a person was a 'worker' employed by an employer might exclude the application to s8 of the definition of 'worker' for the different purpose of deciding whether the statutory accident insurance indemnifies the alleged employer against a subsequent claim for damages by the person – where furthermore, s168 provides that an insurer is entitled from time to time to "review a person's entitlement to compensation" and upon such a review, to "terminate, suspend, decrease or increase an entitlement", and s170 entitles an insurer to recover from a worker or other person the difference between the amount of a payment of compensation and the amount to which the worker or other person is entitled – where those provisions seem difficult to reconcile with the proposition that an insurer's decision to accept an application for compensation in any way alters the scope of the statutory accident insurance for compensation, much less for an alleged employer's liability for damages – where there are very close connections between decisions by an insurer and the regulation of common law claims for damages by persons claiming to be workers who were injured in the course of their employment – where it does not follow that an insurer's decision under s134(1) to accept a claim for compensation (which is relevant under s237(1)(a)(i) or s237(1)(b)), or an insurer's decision that a person is a 'worker' which is made for the purposes of any of ss237(1)(a)(ii), (c), (d) or (e), justifies not applying in s8 the definition of 'worker' to determine the scope of the indemnity available to the alleged employer under the statutory accident insurance against the claim for damages – where as the applicant argued, 'worker' in the introductory text of s237(1) means "the worker in relation to whose injury the claim is made" as defined in s233, but the definition of 'worker' is applicable in s233 as well as in s237, and the word 'damages' also limits the regulated claims to ones referable to injury sustained by a 'worker' – where s233 does not assist the applicant's argument – where the effect of the applicant's construction is that an insurer is not permitted to deny indemnity against the liability of an employer to pay damages which is outside the scope of the statutory accident insurance on the ground that the claimant is not a 'worker' as defined in the Act merely because the insurer earlier allowed a claim for compensation upon the basis of a mistaken determination that the applicant was a 'worker' as defined in the Act – where that construction of the Act is not reconcilable with the definition of "accident insurance" in s8 read with the definitions of key terms, it does not find

support in other provisions, none of which is directed to the scope of the accident insurance, and it is incompatible with the statutory purposes expressed in the Act – where the question framed by the applicant assumes in the applicant's favour that a proceeding for damages by a person whose application for compensation was accepted despite not being a 'worker' as defined in the Act, is regulated by chapter 5 – where for reasons given the assumption is not justified.

Application for leave to appeal is granted. Appeal is dismissed with costs.

Hansen & Anor v Patrick & Ors [2018] QCA 298, 30 October 2018

General Civil Appeal – where the appellants' claim for damages for fraud, negligent misstatement, breach of fiduciary duty and contraventions of the *Trade Practices Act 1974* (Cth) was dismissed – where the first appellant alleged that he sold his interests in the fourth respondent and a related unit trust in reliance upon representations made by the first respondent as to the value of certain pieces of land owned by their jointly owned company – where the primary judge rejected the entirety of the first appellant's evidence given at trial – where his Honour found that the first appellant had attempted to deliberately deceive the court – where no submission was made by counsel for the respondents at first instance that the first appellant had given his evidence dishonestly or had committed perjury – where the accuracy, correctness and reliability of Mr Hansen's evidence was certainly in issue in the trial; but the proposition that he had set out to fabricate a false case, to deceive the court and to perjure himself were not in issue before his Honour – where the rules of procedural fairness confer a right upon a party to a proceeding to be given fair notice of any finding that might be made that might affect the outcome of the case – where this does not depend upon whether or not the finding might impeach that party's integrity; but a finding that will have such an effect is, *a fortiori*, one that should only be made after giving a fair opportunity to respond – where to this may be added the further reason that judges, better than most, appreciate that findings made with the authority of a judge can have very grave personal consequences beyond the case at hand – where they may have lasting professional, business or personal consequences for the person directly affected and for unknown others – where no question was put to Mr Hansen that expressed or implied that he was a perjurer and no circumstances said to support any such imputation were put to him – where consistently with the conduct of the defence, the defendants did not invite the trial judge to find that he was a perjurer – where Mr Hansen had no reason to think that he had to defend himself against the possibility that the judge might make such a finding, yet his Honour made such findings – where the findings of dishonesty on the part of the first appellant were erroneous – whether the erroneous findings as to the first appellant's dishonesty were essential links in the learned trial judge's reasoning, such that his Honour's orders ought to be set aside – where these findings constituted essential links in his Honour's chain of factual reasoning to judgment, his Honour's orders dismissing the appellants' claims must be set aside – where the respondent also cross-appealed against the order giving the first plaintiff judgment for $749,145.04 – where it common ground between the parties that part of the purchase price was retained by the purchasers of the shares and units in order to ensure that tax liabilities for which the vendors might be liable could be met – where the right to recover the money, whether it inhered in the first plaintiff or the second plaintiff, was assigned by deed by Mr Hansen and Banchick Pty Ltd, the only possible creditors, to Mr Hansen, the first plaintiff – where in order to give effect to this deed, which was executed after evidence had finished, it was necessary for the plaintiffs to seek to reopen the case in order to tender the deed – where the trial judge granted leave over the defendants' objection – where that was an exercise of discretion in a matter of procedure – where by cross-appeal the defendants challenge the correctness of that exercise of discretion – where no error of fact or law has been identified in his Honour's reasons – where rather, the respondents simply assert that the decision was wrong – where consequently, no error has been shown in the exercise of discretion by his Honour.

Appeal allowed. Retrial is ordered. The cross-appeal is dismissed. Written submissions on costs.

Criminal appeals

R v Liddy; Ex parte Attorney-General (Qld) [2018] QCA 254, 8 October 2018

Sentence Appeal by Attorney-General (Qld) – where the respondent was convicted of manslaughter (having been acquitted of the charge of murder) – where the respondent was sentenced to 9½ years' imprisonment, with a declaration as to 756 days of presentence custody being time already served under the sentence – where no order was made as to parole eligibility so that the respondent was required to serve 50% of the sentence before eligibility for parole – where the respondent was engaged in a fistfight which he left to get a knife – where three stab wounds were inflicted – where the fatal blow was inflicted with force – where there was no intention to kill or cause grievous bodily harm – where the respondent was 26 years of age at the date of offending, had surrendered to police one day after the incident, and had a minor criminal history of no relevance – where the Attorney-General (Qld) appeals against the sentence imposed and submitted that the sentence should be increased to 10 years or more and a Serious Violent Offence (SVO) declaration should be made – whether the sentencing judge erred in failing to declare the offence to be a Serious Violent Offence – whether the sentence imposed was manifestly inadequate and whether there was any misapplication of principle or fact to warrant this court re-exercising the sentencing task – where clearly, the weight to be afforded to an offer to plead where it is not acted upon at trial will vary according to the circumstances of the case – where given the sentencing remarks it is apparent that his Honour did not consider the offer to plead warranted significant moderation and proceeded on the basis that the respondent's remorse was limited – where even so, *R v DeSalvo* (2002) 127 A Crim R 228 does not compel the conclusion that the sentence imposed was manifestly inadequate bearing in mind the range of 10 to 12 years referred to in that case and that some moderation was required, as the appellant accepted, to reflect matters of mitigation including that an offer to plead to manslaughter was made although not maintained at trial, the admissions made and that the respondent voluntarily surrendered to the authorities – where the authorities relied on by the appellant do not support the submission that a sentence of 11 or 12 years' imprisonment was required to be imposed in the present matter – where importantly, the prosecution submissions urging a sentence of 10 to 12 years were premised on a factual basis that was not accepted by the sentencing judge, in particular, that the respondent engaged in a sustained, frenzied attack with a knife – while the sentencing judge did not expressly state that he declined to exercise the discretion to make an SVO declaration, his Honour was clearly appraised of the relevance of the issue – where given the specific rejection by the sentencing judge of the sole basis put forward for the making of a declaration and that his Honour gave express consideration to the issue of parole eligibility, by setting the parole eligibility date as 50% of the sentence, which was the approach put forward by the respondent's counsel, it is tolerably clear that his Honour had regard to the issue of the making of a SVO declaration in respect of the 9½-year sentence imposed – where the sentencing judge was alive to the principles and the relevant factual considerations and it is apparent from his sentencing remarks that he did not fail to take them into account.

Appellant's appeal against sentence dismissed.

R v Chmieluk; Ex parte Attorney-General (Qld) [2018] QCA 271, Date of Order: 1 August 2018; Date of Publication of Reasons: 16 October 2018

Sentence Appeal by Attorney-General (Qld) – where the respondent pleaded guilty to one count of dangerous operation of a vehicle causing death while adversely affected by an intoxicating substance – where the respondent was sentenced to five years' imprisonment to be suspended after three months with an operational period of five years – where the respondent caused the death of her sister after crashing a vehicle, whilst under the influence of alcohol, in which her sister was an occupant – where the respondent had a lengthy history of traffic infringements – where the respondent demonstrated genuine insight into her offending and had made substantial efforts at rehabilitation between the time of offending and sentence – where the killing of her sister had a significant effect on the respondent – where the appellant submits that the sentence imposed on the respondent is manifestly inadequate – where the appellant's submission is primarily directed toward considerations of general deterrence, denunciation and comparison with previous sentences in cases of this kind – whether the lenience afforded to the respondent by the sentencing judge was not in the public interest, such that the sentence is manifestly inadequate and a more severe penalty ought to have been imposed – where it has been said by this court repeatedly, and the appellant accepts, that whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a pre-determined range derived from previous sentences but by reference to all the factors relevant to sentence – where the cases referred to by the appellant demonstrate that, unlike so many other offences in the *Criminal Code*, the offence of dangerous operation of a motor vehicle is one that anybody,

back to contents

of any age and in any walk of life, of previous good or bad character, and with or without any previous criminal history, might commit – where there is no conventional or archetypal offender – where there is another special feature about this offence, which it shares with manslaughter – where the difference between cases in which the offender's deliberately dangerous or criminally negligent acts can constitute a serious offence involving a killing rather than a less serious offence because no death ensues is often a matter of chance – where for these reasons, in cases of dangerous driving causing death there can be no standard range of penalty – where the range of behaviour itself that can constitute the offence, the range of circumstances in which the offence has been committed and the range of personal circumstances of the offender are multifarious and without parallel in most other indictable offences and, together, they affect culpability and, therefore, penalty – where it is not enough to catalogue several cases involving the same offence with some similar aggravating factors and to point to the maximum penalty that has been imposed and the minimum penalty that has been imposed and then to advocate for a similar sentence in the instant case – where there is much that such offenders may have in common but there is much that they do not have in common – where the task is to identify the principle as applied to facts that guided a particular decision in order to determine its application to the case at hand – where in this case Kent QC DCJ was evidently moved by the implications of two things – where first, the respondent had used the period of two years between the offence and sentencing to sublimate and to convert her guilt, shame and remorse into genuine steps towards rebuilding her character and to create a moral and healthy foundation for her life, and it seems, a basis upon which to counsel and help others – where second, his Honour regarded it as a highly material fact that the victim of the respondent's offence was her sister – where victims are sometimes heard to contend rightly that an offender will serve a few years of a sentence, but they will serve a life sentence of grief and loss – where in this case the undisputed evidence is that, after serving her term of imprisonment, the respondent too will serve such a life sentence and one that carries inescapable guilt as well – where the factors relevant to any particular sentence will almost always conflict with each other in their tendencies – where it is for the judge sentencing the offender to perform the difficult task of synthesis in order to arrive at a coherent penalty that accommodates all such opposing factors – where that is why a sentence that is arithmetically out of line with earlier, somewhat similar, cases may still be the result of a proper exercise of discretion – where there will be no error if leniency in sentencing is based upon a rational view that, in the particular offender's case, leniency would serve the public interest and a more severe penalty would not.

Appeal dismissed.

R v MDB [2018] QCA 283, 19 October 2018

Sentence Application – where the applicant pleaded guilty to domestic violence offences against his partner including common assault, threatening violence, assault occasioning bodily harm, choking in a domestic setting and wilful damage – where the applicant contends the sentencing judge erred by relying upon the existence of an earlier domestic violence order as evidence that the offending was not isolated and exceptional – whether the existence and contravention of a previous domestic violence order is a relevant and aggravating feature – where the existence, and indeed contravention, of a domestic violence order which was in force at the time, was plainly a relevant consideration for the sentencing judge to take into account, and an aggravating feature – where it is relevant as part of the past record of the offender, under s9(3)(g) of the *Penalties and Sentences Act 1992* (Qld) (the Act) – where in addition, s9(10A) of the Act requires a sentencing court to treat the fact that the conviction is of a "domestic violence offence" as an aggravating feature – where the applicant contends the sentencing judge's finding that the applicant had, by his actions, threatened to kill the complainant represents an erroneous interpretation and impression of the agreed facts –where the applicant contends the judge erred by questioning the applicant's credibility and reliability, as a result of him telling police he did not believe it was illegal to possess a flick knife in a private place, when he had previously been convicted of possessing a knife in a public place – where the sentencing judge questioned the applicant's reliability, in the context of submissions made about the effects of medication combined with alcohol as causes of his offending, in the absence of supporting evidence – whether the sentencing judge erred in any of these respects – where the sentencing judge's comment, that the

applicant was, by his actions, threatening to kill the complainant, reflects no error at all – where in the course of what plainly must have been a terrifying incident for the complainant, the applicant has grabbed her and pushed her, causing her to fall; threatens to bite her face off, and then proceeds to try to bite her face and cheeks; pulls out a flick knife and holds it against her throat; throws her to the floor when someone intervenes, then picks her up with both his hands around her ribs and slams her, on her back, on a massage table; puts his hands around her throat and squeezes, causing her to be unable to breathe or speak; throws her onto the floor and then, on the floor, pins her arms down with his knees, and again squeezes her throat such that she is unable to breathe or swallow; and punches the floor next to her head three or four times with significant force – where the sentencing judge's remarks about being sceptical about placing reliance on things the applicant had said – relevantly, about the role of medication in combination with alcohol in causing his offending on 17 February 2017 – were not merely on the basis of the view his Honour formed about the applicant's comment about flick knives; but more generally on the basis that, having regard to the agreed statement of facts, the applicant was not frank or candid with police when he was interviewed the day after the offending – where he denied the offending, and suggested the complainant had been injured when she tripped on something and fell over, and that the only time he touched her was when he went to help her up – where the caution adopted by his Honour was appropriate, on the basis of the agreed facts, and in the absence of any evidence to support the submission in relation to medication – where the applicant was sentenced to four years' imprisonment for choking in a domestic setting under s315A of the *Criminal Code* – where this court has recently considered, for the first time, an appeal against a sentence imposed for the offence of choking or strangulation in a domestic setting, in *R v MCW* [2018] QCA 241 – where in the context of this particular type of domestic violence offending, choking or strangling, the serious and dangerous nature of such an act, the fact that it has been shown to be a predictive indicator of escalation in domestic violence offences, and the concerning prevalence of this act in domestic violence offending all support the need for stern punishment in cases of this kind – where the applicant is a mature man, with a serious and relevant criminal history, including for offences of violence – where the offending was protracted and violent, including a threat with a flick knife, threatening to bite the complainant's face off, and attempting to bite her face and cheeks, squeezing the complainant's throat, twice, to the point she could not breathe, and wilful damage of substantial value – where general deterrence, personal deterrence and denunciation, as well as community protection, are important factors in sentencing an offender under s315A – whether the sentence imposed by the sentencing judge was manifestly excessive.

Application refused.

R v CCF [2018] QCA 285, Date of Orders: 18 October 2018; Date of Publication of Reasons: 23 October 2018

Sentence Application – where the applicant was convicted of two offences of indecently dealing with a child under 16 years – where the applicant was aged 16 at the time of the first offence and was 17 or 18 at the time of the second offence – where the complainant was the same person for both offences and was about five years younger than the applicant – where the applicant was convicted and sentenced about 20 years after the offending occurred – where the sentencing judge ordered that no conviction be recorded in relation to the first offence, but that a conviction be recorded in relation to the second offence – where the applicant sought leave to appeal only in relation to the sentence imposed for the second offence – where the sentencing judge was obliged to consider the matters prescribed by s12(2) *Penalties and Sentences Act 1992* (Qld) (PSA) in deciding whether or not to record a conviction, and those matters include the impact that recording a conviction would have on the offender's economic or social wellbeing or chances of finding employment – where the judge was addressed by defence counsel on the potential consequences for the applicant's employment from the recording of a conviction – where the submission was that a conviction would "obviously have a significant impact on his ability to continue that profession insofar as it involves children", referring to his profession as a nursing assistant for which he would require a Blue Card for work involving children – where it was apparent that the judge did not consider the matters prescribed by s12(2) PSA – where the judge referred to what he saw as the material considerations, but made no mention of the effect on the applicant's employability – where s12(2) required that matter to be considered and the necessity for a court to give reasons for its decision required the consideration of that matter to be demonstrated in the sentencing remarks, if not clearly demonstrated during the argument – where it must be inferred that the matter was not considered – where the nature of the offence, as the judge said, fell "towards the lower end of the scale of seriousness" – where it involved a momentary touching – where as the judge also said, his offending had "some degree of immature sexual experimentation about it" – where the conviction will have an impact on his prospects of finding employment, because it will limit the work which he is able to do – where it cannot be supposed that he is a danger to children: the judge said that he had "rehabilitated from this type of conduct".

Leave to appeal granted. Allow the appeal. Vary the order made on count 2 of the indictment by ordering that a conviction not be recorded.

Wassmuth v Commissioner of Police [2018] QCA 290, 26 October 2018

Application for Leave s118 *District Court of Queensland Act 1967* (Qld) (Criminal) – where a magistrate at Townsville issued a search warrant under the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) authorising the search of premises at Cranbrook in Townsville – where a search warrant was executed at the applicant's residence – where during the search, officers located a mobile telephone – where the officers asked the applicant for the access code – where the applicant did not provide the access code to police, and was charged with and convicted of an offence under s205 of the *Criminal Code* (Code) for disobeying a lawful order – where the warrant contained an order pursuant to s154(1)(a) of the PPRA requiring the applicant, in effect, to provide the PIN code to her mobile telephone – where without suggesting or implying anything concerning the character of the applicant, it is a commonplace investigative avenue of gathering evidence by police officers concerned with offending with respect to dangerous drugs to search and obtain details of the records held in mobile phones relating to phone calls, and more importantly text messages – where frequently it is these text messages that lay the foundation for the proof of offending, be it the possession of dangerous drugs (s9 *Drugs Misuse Act 1986* (Qld)) (DMA), the supply of dangerous drugs (s6 DMA) or trafficking in dangerous drugs (s5 DMA) – where in seeking and obtaining an order from the magistrate directing the applicant to supply the information necessary to access the stored data on the phone plainly the police officer was searching for evidence of drug offending going beyond the instances alleged in the warrant – where the potential for self-incrimination by a suspect should that person answer questions acknowledging ownership or possession of the phone, or knowledge of the access information or familiarity with how to use the phone, is obvious – where the cases relied upon by the applicant shows that the privilege against self-incrimination is a right closely protected by the courts – where the consequence is that for a statute to abrogate the privilege clear and unambiguous intent must be shown usually demonstrated by words expressing a clear, unambiguous and irresistible intention that the privilege is abrogated – where significantly in the context of this case it was s205 that created the offence of which the applicant was convicted – where that section had nothing in express terms to say about the privilege of self-incrimination but importantly it expressly contemplated a "lawful excuse" – where s154 of the PPRA to like effect has no express statement touching upon the privilege – where the applicant had a lawful excuse for failing to provide to the police officer the access information to the phone – where that lawful excuse was her right to insist upon her privilege not to incriminate herself by demonstrating the extent of her knowledge of the information necessary to access the phone and its data, and thus to demonstrate she knew how to use the phone and that she had used it and its PIN code – where this conclusion is fortified by the amendments made by the Parliament subsequent to the events with which this court is concerned to insert provisions into the PPRA and the Code of which the former expressly refer to and in terms remove a person's privilege against self-incrimination in this context – where it follows that the applicant, having a lawful excuse not to comply with the order contained in the search warrant was not guilty of the offence with which she was convicted.

Leave to appeal granted. Appeal allowed and the order of the District Court made on 22 September 2017 be set aside. The conviction entered in the Magistrates Court at Townsville on 16 November 2016 be quashed and a verdict of not guilty be entered. Written submissions directed on costs.

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.

back to contents


David Grant


Dean Alexander


Martin Mallon


David Hughes


Melinda Peters


Gemma Twemlow


Eloise Pawley


Anthony Cocolas


Callan Peach


Sarah Stoddart


Wesley Hill


Patrick Stanhope

Career moves

Boss Lawyers

Boss Lawyers has announced the promotion of **David Grant** to Senior Associate in the commercial litigation and insolvency team. David joined the firm in 2016 as a lawyer and has the ability to resolve complicated commercial disputes through mediation, and if necessary, litigation. His background in intelligence and investigation provides a unique forensic skillset to critically analyse and evaluate factual disputes.

Enyo Lawyers

Enyo Lawyers has announced the formal appointment of **Dean Alexander** as Director and Partner in the firm. Dean began with the firm's Managing Director, Liam McMahon, 12 months ago. He heads up the insolvency team, as well as holding a senior role in the litigation team.

Finnigan Santoso Law

Finnigan Santoso Law commenced practice on 11 July.

Kristy Crabb, who has been at the private Bar for 10 years, has taken the post of Legal Practitioner Director, while **Kristen Boyce** is a company director and lawyer. The firm focuses on family and criminal law, plus domestic violence matters and general practice.

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.

Maurice Blackburn Lawyers

Maurice Blackburn Lawyers has announced the appointment of **Martin Mallon** as a lawyer in its Queensland wills and estate team in the Brisbane office. Martin is an experienced litigator who focuses on wills and estate disputes.

McCullough Robertson Lawyers

McCullough Robertson Lawyers has announced two partner appointments to the firm's growing tax practice, **David Hughes** and **Melinda Peters**.

David is a QLS Accredited Specialist in Tax Law, one of only five in Queensland. His primary focus is on private clients and small-to-medium enterprises.

Melinda, who was a special counsel at McCullough Robertson, is an experienced tax and duty lawyer, with a focus on corporate taxation, transaction structuring and tax controversy.

Piper Alderman

Piper Alderman has announced the appointment of two senior associates in its Brisbane office.

Gemma Twemlow, who has joined the firm's infrastructure and projects team, has worked across commercial, residential, oil, gas and energy projects, increasing her knowledge and experience in jurisdictions including Australia, the United States, Vanuatu and New Zealand.

Eloise Pawley, who has joined the dispute resolution and litigation team, acts in a range of commercial disputes, advising Queensland-based, national and international companies.

SLF Lawyers

SLF Lawyers has welcomed **Anthony Cocolas** and **Callan Peach**.

Anthony focuses on insolvency and commercial litigation. Since being admitted in 2007, he has worked predominantly in these areas, and has appeared in both state and federal jurisdictions.

Callan started as a conveying law clerk in Townsville, moving to Brisbane in 2016 where he was admitted. He is passionate about commercial litigation and dispute resolution.

Stoddart Legal

Stoddart Legal has announced the promotion of **Sarah Stoddart** to director. Sarah has extensive experience in healthcare and commercial matters, while also being responsible for the firms' employment law and workplace law practice.

Tucker & Cowen

Tucker & Cowen has announced the appointment of **Wesley Hill** as an associate and **Patrick Stanhope** as a solicitor.

Wesley has extensive experience in trusts, superannuation, corporations law, corporate governance, commercial contracts, corporate business structuring and acquisitions.

Patrick has practised predominantly in commercial litigation, insolvency, bankruptcy and prosecution matters.

back to contents

In 2019...

Practical Legal Ethics | Practice Management & Business Skills | Professional Skills | Substantive Law

Lock in your professional development for the new year and secure your CPD requirements by 31 March 2019. qls.com.au/events

February

12 Cost agreements – clarity for clients

Essentials | 12.30-1.30pm | 1 CPD

Livecast

Getting your retainer right is the key to a positive and mutually beneficial client relationship. This livecast covers the fundamental requirements for disclosure, ongoing disclosure and costs agreements. It will also show you how to ensure your retainer is more than just a billing tool.

PM&BS

13 Drafting pleadings and particulars

Essentials | 8.30am-12pm | 3 CPD

Brisbane

Equip yourself with the skills for drafting pleadings and particulars in civil litigation matters. Be guided by litigation experts on the fundamentals of drafting succinct pleadings and particulars.

PS SL

19 PI retainers: Charging models and cost agreements

Masterclass | 12.30-1.30pm | 1 CPD

Livecast

Avoid costs complaints from unhappy clients. Join our expert presenters as they discuss key considerations when drafting cost agreements for personal injury matters.

PM&BS

20 Drafting statements and affidavits

Essentials | 8.30am-12pm | 3 CPD

Brisbane

Equip yourself with the essential skills in drafting witness statements and affidavits and learn how to differentiate between using the two. Throughout the sessions you will be provided with practical tips and examples to draft documents clearly and concisely.

PS SL

26 Early career lawyers strategies for success

Essentials | 7.30-8.40am | 1 CPD

Brisbane

We all make a few big mistakes in those first few years of practise. But wouldn't it be great if you could skip that often embarrassing rite of passage and get the tips you need straight away? Our expert presenters will share a few war stories and the important things they wish they'd known when they first started practise.

PS

27 Drafting contract terms and better business writing

Essentials | 8.30am-12pm | 3 CPD

Brisbane

If you are required to regularly draft and negotiate contracts, join leading expert Sue Tomat for this hands-on workshop. Using a case study to work through the contract drafting process, you'll learn how to take instruction, draft clauses from scratch, negotiate effectively and peform a final review. Sue will also provide tips on better business writing techniques.

PS

March

07 International Women's Day: Panel discussion

Essentials | 5.15-7.30pm | 1 CPD

Brisbane

Join us to celebrate International Women's Day 2019. This stimulating panel discussion comprises esteemed panelists who will reflect on the many contributions made by women to encourage a new generation of female leaders. Secure your ticket early. Spaces are limited.

PS

ESSENTIALS Gain the fundamentals of a new practice area or refresh your existing skillset

MASTERCLASS Develop your intermediate skills and knowledge in an area of practice

On-demand resources

Access our popular events online, anywhere, anytime and on any device.

qls.com.au/on-demand

back to contents

A closer look at profitability

by Graeme McFadyen

The Macquarie Bank 2017 Legal Benchmarking Survey[1] provides some really useful information about the performance of the legal sector.

In particular it demonstrates that while some small practices are performing really well, the majority are struggling. This data is summarised in the table below. The number of firms simply indicates those that responded to the survey – 27 large firms, 70 mid-sized firms and 156 small firms, so it is a good sample across all states and territories.

We can make three key observations:

1. In each category of firm size, the lower-profit firms are larger than the more profitable firms both in terms of their staff numbers and fees, demonstrating that mere size per se is no indicator of profitability. The larger non-performers would be well advised to critically assess their strategic plans.
2. The spread in average profitability between the high and low performers is surprising. As you can see, the low-profit firms – which make up the majority of those with turnover below $20M – are making a profit of just 12-13% of turnover. At this rate the principals are only earning a basic wage.
3. The largest number of non-performers, not surprisingly, is in the small firm (fees < $4M) category.

From this, it appears that the larger, less profitable firms in each category may need to critically assess their respective areas of practice and their existing clients. The data below proves that not all clients contribute equally to the bottom line. Any assessment needs to look beyond gross fees. In particular you need to be alert to three traps for the unwary.

1. Busy does not mean profitable

Too often law firms are seduced by gross fees and the presumption of profitability rather than actual net return to the practice. It is important to remember that the profitability of a practice is the aggregate of the profitability of all matters. If some areas of practice consistently generate low rates of return, then unless other areas of the practice generate higher-than-average returns, the practice overall risks becoming a low-profit practice with a preoccupation on survival rather than growth.

2. Beware of the 'contribution to overheads' argument

A regular argument in favour of low profitability work is that any contribution to overheads is better than none. If this argument is accepted, you risk taking on larger volumes of lower-profit work which in turn could lead to the further expansion of overheads. If certain staff (and principals) have insufficient work, then focusing on low-hanging fruit of limited value is not the solution.

3. Beware of the 'sausage machine' strategy

Taking on large volumes of low-value work in anticipation of economies of scale, thereby enabling a higher level of profit, may be a legitimate strategy *provided that* you manage the implementation properly. If you accept a low fee per item, such as might occur in some conveyancing or mortgage processing work, then you must ensure that the client delivers on the volumes promised and you must carefully monitor the costs to ensure that the economies you anticipate are actually achieved.

Financial analysis of client contributions

Having identified the more profitable areas of law, the next step is to identify the key clients in these areas. These are likely to be the clients responsible for a major part of the firm's profitability. One critical way to assess the value of clients is to determine the preferred net profit of the firm and then work backwards to calculate the necessary gross profit which will deliver the desired return.

A number of surveys over the past few years have demonstrated that overheads excluding legal team salaries represent around 40% of revenues. If you desire a 25% profit margin, then your necessary gross profit rate needs to be 65% (25% + 40%). In calculating gross profits you need to allow an imputed salary of say $200,000 for partners. Clearly practitioners need to make a decision about their priorities: profitability or practise in a particular, less profitable area, or continue to service a client regardless of returns.

Conclusion

The point here is that the financial return of a legal practice is likely to be significantly higher if the principals engage in careful strategic planning to ensure that they are practising in those areas of practice which are likely to realise a reasonable profit.

Participation in benchmarking surveys such as the Macquarie Bank study[2] highlighted here is one way of keeping a close eye on performance. The survival of your practice may well depend on it.

	Large firms (> $20M)		Mid firms ($4-20M)		Small firms (<$4M)	
	High profit	Low profit	High profit	Low profit	High profit	Low profit
No. of firms	11	16	35	35	66	88
Av. fees	$45M	$69M	$10M	$10M	$1.0M	$1.6M
No. of staff	214	342	44	50	8	11
Av. profit margin as % of fees	24%	11%	37%	13%	46%	12%

Graeme McFadyen has been a law firm GM/COO/CEO for more than 20 years. He currently provides consulting services to law firms.

Note

[1] See macquarie.com/au/business-banking/campaigns/legal-benchmarking-2017 .

[2] FMRC and ALPMA Crowe Horwath also conduct comprehensive annual benchmark surveys.

back to contents

Litigation for laughs

by Peter Heazlewood

Lawyer or not, being involved in a legal dispute is no laughing matter.

It is crucial to understand what's what when you are confronting litigation, but until now such enlightenment has not been within easy reach. Too many lawyers take themselves too seriously, while some are clueless and most legal books are written seemingly to put you to sleep.

Paul Brennan's new masterpiece, *The Art of War, Peace & Palaver*: *The Contentious Guide to Legal Disputes*, provides the cut-through you need.

As we all know, the purpose of a review is to boost book sales. As a former lawyer of 25 years and now a guy who provides marketing services for lawyers, I can say, no guarantee, that if you buy this book you will be more informed and win your case (that is unless the other side buys it too, or if your case is rubbish).

Paul is a legal incubator, making the complex simple, and in so doing he educates, stimulates discussion and entertains.

He has written this mighty tome in the backdrop of his substantial legal experience. Paul is a lawyer and has been a partner or principal of law firms in London, Sydney and now practises on the Sunshine Coast with his wife Diane, who is also a lawyer.

At one point in his career he worked as Counsel and Investigative Manager with the American multinational technology corporation, Intel, in Hong Kong. Paul holds an honours degree in law and a post-graduate degree in international intellectual property law, both from the University of London. He is admitted in several jurisdictions and is the author of six other books (all unputdownable).

As you will soon learn, legal disputes are all about strategy. Paul has channelled no less than the great Chinese general, military strategist, writer and philosopher, Sun Tzu. *The Art of War, Peace & Palaver* weaves Sun Tzu's timeless wisdom into the world of legal disputes with humour and flair.

This book is for those who have (or seek) a sense of humour. Written in an accessible, conversational style, it rollicks along at an entertaining pace, but remains informative and valuable. You'd be forgiven for thinking that Paul Brennan is anti-lawyer, but that would be wrong.

Title: *The Art of War, Peace & Palaver: The Contentious Guide to Legal Disputes*
Author: Paul Brennan
Publisher: Brief Books
ISBN: 13: 978-0-9874894-4-9
Format: Paperback/166 pp
RRP: $19.99

"When a thing is sacred to me it is impossible for me to be irreverent toward it. I cannot call to mind a single instance where I have ever been irreverent, except toward the things which were sacred to other people."

Is Shakespeare Dead? – Mark Twain.

I challenge you to name another book that contains vital information about a Brazilian wax business, debtor prisons; one that unmasks liquidators, explains why the mafia is not big on defamation, defines a trustee in bankruptcy as "a life coach with a sombre bent" and "why the court system can be like two pandas mating: expectations are high and the results sometimes disappointing".

Paul's brilliant cartoon illustrations also provide a rich tapestry for *the Art of War, Peace & Palaver*, contributing a visual element to its unmistakably comic overtones. That said I was left disappointed there was no illustration after the line, "Issuing a writ feels better than sex".

The book is lovingly dedicated to Paul's parents, Edward and Eileen…they have a lot to answer for.

Peter Heazlewood is a director at Lift Legal Pty Ltd and Smart Law Marketing Pty Ltd, Sydney.

back to contents

Basic entitlements – annual leave

by Robert Stevenson

Full-time and part-time employees are entitled to four weeks' paid annual leave for each year of service under the National Employment Standards (NES).

The entitlement accrues progressively during each year, is cumulative and is paid out on termination. 'Service' does not include periods of unpaid leave (for example, unpaid personal leave, unpaid parental leave). Public holidays are not counted in any annual leave period, nor is any period of personal leave. There is no requirement to work for a year before being able to take annual leave.

For both award employees (this will usually be the *Legal Services Award* for private legal practices) and non-award employees, annual leave may be taken as agreed with the employer and the employer must not unreasonably refuse a request for annual leave. Relevant considerations can include the respective needs of the employer and employee, industry custom and practice, and the amount of notice given in refusing the request.

For award employees covered by the *Legal Services Award*:

- A loading of 17.5% is payable on annual leave (which is also payable on any annual leave payment on termination).
- Annual leave may be taken in advance subject to written agreement and any overpayment can be deducted on termination of employment.
- An employer can require annual leave to be taken as part of a close-down (for example, Christmas-New Year) if at least four weeks' notice is given;
- An employer can direct an employee to take annual leave where they have an accrual of more than eight weeks, subject to certain requirements.
- There is no general ability to direct an employee to take annual leave.

Both award-free and award employees can make an agreement to "cash out" annual leave if the agreement is in writing, the employee receives the same amount as if they had taken the leave and the employee keeps at least a four-week annual leave balance.

For award-free employees (usually this will be admitted solicitors for private legal practices):

- There is no statutory requirement for leave loading.
- An employer can impose a reasonable requirement on an employee to take annual leave (which would cover the Christmas close-down situation).
- There is no ability for employers to make a deduction on termination for annual leave taken in advance.

What happens if the employer directs a Christmas close-down but an employee does not have a sufficient annual leave accrual to cover the absence? In this situation, there is no general stand-down power. An employer cannot direct an employee to take unpaid leave and will be required to pay the employee as if they were at work, even if the business is shut down.

What happens if there is a dispute about taking annual leave? Award-based employees may have an entitlement to raise a dispute in the Fair Work Commission under the terms of their award. This entitlement does not exist for award-free employees and any legal avenue to challenge an employer's decision will largely depend on evidence of an unlawful motive on the employer's part. The parties should consider taking part in voluntary mediation.

Employers should actively monitor annual leave accruals and encourage employees to take annual leave to rest and refresh, rather than accruing large amounts of annual leave which may cause practical issues when the employee wishes to take a large chunk of annual leave and/or be a financial burden for the employer on termination.

Rob Stevenson is the Principal of Australian Workplace Lawyers, rob.stevenson@workplace-lawyers.com.au .

back to contents

Accountancy

Fixed Fee Remote
Legal Trust & Office Bookkeeping
Trust Account Auditors
From $95/wk ex GST
www.legal-bookkeeping.com.au
Ph: 1300 226657
Email:tim@booksonsite.com.au

WE SOLVE YOUR TRUST ACCOUNTING PROBLEMS

In your office or Remote Service
Trust Accounting
Office Accounting
Assistance with Compliance
Reg'd Tax Agent & Accountants
07 3422 1333
bk@thelegalbookkeeper.com.au
www.thelegalbookkeeper.com.au

Accountants and Tax Advisors specialising in legal firms.

Practice management software implementations and training.

www.verlata.com

Ph: 1300 215 108

Email: enquiries@verlata.com

Offices in Brisbane, Sunshine Coast and Singapore

Agency work

ATHERTON TABLELANDS LAW
of 13A Herberton Rd, Atherton,
Tel 07 4091 5388 Fax 07 4091 5205.
We accept all types of agency work in the Tablelands district.

CAIRNS - BOTTOMS ENGLISH LAWYERS
of 63 Mulgrave Road, Cairns, PO Box 5196 CMC Cairns, Tel 07 4051 5388 Fax 07 4051 5206. We accept all types of agency work in the Cairns district.

Agency work continued

BROADLEY REES HOGAN
Incorporating Xavier Kelly & Co
Intellectual Property Lawyers
Tel: 07 3223 9100
Email: xavier.kelly@brhlawyers.com.au

For referral of:
Specialist services and advice in **Intellectual Property and Information Technology Law**:

- patent, copyright, trade mark, design and confidential information;
- technology contracts: license, transfer, franchise, shareholder & joint venture;
- infringement procedure and practice;
- related rights under Competition and Consumer Act; Passing Off and Unfair Competition;
- IPAUSTRALIA searches, notices, applications & registrations.

Level 24, 111 Eagle Street
Brisbane, Qld 4000
GPO Box 635 Brisbane 4001
www.brhlawyers.com.au

SYDNEY – AGENCY WORK
Webster O'Halloran & Associates
Solicitors, Attorneys & Notaries
Telephone 02 9233 2688
Facsimile 02 9233 3828
DX 504 SYDNEY

NOOSA – AGENCY WORK
SIEMONS LAWYERS,
Noosa Professional Centre,
1 Lanyana Way, Noosa Heads or
PO Box 870, Noosa Heads
phone 07 5474 5777, fax 07 5447 3408,
email info@siemonslawyers.com.au - Agency work in the Noosa area including conveyancing, settlements, body corporate searches.

BRISBANE FAMILY LAW – ROBYN McKENZIE
Appearances in Family Court and Federal Circuit Court including Legal Aid matters. Referrals welcome. Contact Robyn.
GPO Box 472, BRISBANE 4001
Telephone: 3221 5533 Fax: 3839 4649
email: robynmck@powerup.com.au

SUNSHINE COAST SETTLEMENT AGENTS
From Caloundra to Gympie.
Price $220 (plus GST) plus disbursements
P: (07) 5455 6870
E: reception@swlaw.com.au

NOTE: CLASSIFIED ADVERTISEMENTS

Unless specifically stated, products and services advertised or otherwise appearing in Proctor are not endorsed by Queensland Law Society.

SYDNEY AGENTS
MCDERMOTT & ASSOCIATES
135 Macquarie Street, Sydney, 2000

- Queensland agents for over 25 years
- We will quote where possible
- Accredited Business Specialists (NSW)
- Accredited Property Specialists (NSW)
- Estates, Elder Law, Reverse Mortgages
- Litigation, mentions and hearings
- Senior Arbitrator and Mediator (Law Society Panels)
- Commercial and Retail Leases
- Franchises, Commercial and Business Law
- Debt Recovery, Notary Public
- Conference Room & Facilities available

Phone John McDermott or Amber Hopkins
On (02) 9247 0800 Fax: (02) 9247 0947
Email: info@mcdermottandassociates.com.au

BRISBANE – AGENCY WORK

BRUCE DULLEY FAMILY LAWYERS

Est. 1973 – Over 40 years' experience in Family Law

Brisbane Town Agency Appearances in Family Court & Federal Circuit Court

Level 11, 231 North Quay, Brisbane Q 4003
P.O. Box 13062, Brisbane Q 4003
Ph: (07) 3236 1612 Fax: (07) 3236 2152
Email: bruce@dulleylawyers.com.au

SYDNEY & GOLD COAST AGENCY WORK

Sydney Office:
Level 14, 100 William St, Sydney
Ph: 02 9358 5822
Fax: 02 9358 5866

Gold Coast Office:
Level 4, 58 Riverwalk Ave, Robina
Ph: 07 5593 0277
Fax: 07 5580 9446

All types of agency work accepted

- CBD Court appearances
- Mentions
- Filing

Quotes provided. Referrals welcome.

Email: info@adamswilson.com.au

07 3842 5921
advertising@qls.com.au

back to contents

Agency work continued

RIGBY COOKE LAWYERS

Victorian agency referrals

We are a full service commercial law firm based in the heart of Melbourne's CBD.

Our state-of-the-art offices and meeting room facilities are available for use by visiting interstate firms.

We can help you with:

> Construction & Projects
> Corporate & Commercial
> Customs & Trade
> Insolvency & Reconstruction
> Intellectual Property
> Litigation & Dispute Resolution
> Mergers & Acquisitions
> Migration
> Planning & Environment
> Property
> Tax & Wealth
> Wills & Estates
> Workplace Relations

Contact: **Elizabeth Guerra-Stolfa**
T: 03 9321 7864
EGuerra@rigbycooke.com.au

www.rigbycooke.com.au
T: 03 9321 7888

BRISBANE, GOLD COAST, NORTHERN NSW & TOOWOOMBA AGENCY WORK

All types of agency work accepted (incl. Family Law)
2003 – Admitted NSW
2006 – 2015 Barrister - Brisbane & Sydney
2015 – Present Commercial Solicitor
E: guy@guysara.com.au
M: 0415-260-521
P: 07 5669-9752

GUY SARA & ASSOCIATES
GUY-THEODORE SARA – Principal
CPA, B.Bus LLB LLM

FAMILY LAW - SYDNEY & NSW
IVY LAW GROUP

AGENCY AND REFERRAL WORK
Prompt and Efficient Service
Please contact Shane Neagle of Ivy Law Group

Suite 401, 127 York St., Sydney, NSW, 2000
Tel (02) 9262 4003 | (M) 0408 168 281
Email: info@ivylawgroup.com.au

SLF LAWYERS

SYDNEY, MELBOURNE, PERTH AGENCY WORK

Sydney Office – Angela Smith
Level 9/210 George Street
Sydney NSW 2000
P: (02) 9264 4833
F: (02) 9264 4611
asmith@slflawyers.com.au

Melbourne Office – Rebecca Fahey
Level 2/395 Collins Street
Melbourne VIC 3000
P: (03) 9600 2450
F: (03) 9600 2431
rfahey@slflawyers.com.au

Perth Office – Natalie Markovski
Level 1/99-101 Francis Street
Perth WA 6003
P: (08) 6444 1960
F: (08) 6444 1969
nmarkovski@slflawyers.com.au

Quotes provided

- CBD Appearances
- Mentions
- Filing
- Civil
- Family
- Conveyancing/Property

EMERSON FAMILY LAW

Need a Brisbane Family Law Town Agent urgently?

We are a boutique family law firm based in North Quay, Brisbane CBD.

We provide fixed fees for Town Agency Appearances in the Brisbane Family Law Courts as follows:

1) $850 (+GST) for a court appearance less than 4 hours; or
2) $1750 (+GST) for a court appearance more than 4 hours.

Contact us on (07) 3211 4920 to discuss how we can assist you today.

www.emfl.com.au

NOTE: CLASSIFIED ADVERTISEMENTS

Unless specifically stated, products and services advertised or otherwise appearing in Proctor are not endorsed by Queensland Law Society.

Buchanan Legal Group

Melbourne - Agency work

Buchanan Legal Group - For all Family, Criminal and Commercial Law Matters.

Appearances in all Melbourne CBD and suburban Courts including Federal Courts. Referrals welcomed.

Contact Stephen Buchanan – Principal.
Level 40, 140 William Street, Melbourne.
Phone 03 9098 8681, mobile 0423 893 093
stephen@buchananlegalgroup.com.au

BRISBANE TOWN AGENT

BARTON FAMILY LAWYERS

Courtney Barton offers fixed fees for all town agency appearances in the Family & Federal Circuit Court:

Half Day (<4 hrs) - $900+GST
Full Day (>4 hrs) - $1600+GST

Ph: 3465 9332; Mob: 0490 747 929
courtney@bartonfamilylaw.com.au
PO Box 3270 WARNER QLD 4500

FINLAYSONS LAWYERS

Do you need a Darwin Agent?

Martin Kelly – Partner
Ph: 08 8235 7495
Martin.kelly@finlaysons.com.au
Assistance with all commercial arrangements and expertise in:

- Pastoral / rural land transactions
- Renewal energy projects
- Commercial and residential real estate
- Business disposals and acquisitions
- Land Title Office dealings

Ralph Bönig – Special Counsel
Ph: 08 8235 7684
Ralph.bonig@finlaysons.com.au

- Appearances in all relevant Courts and Tribunals

Agency work continued

AGENCY WORK
BRISBANE & SUNSHINE COAST
Family Law & Criminal

Over 30 years combined practice experience. Includes appearances in Interim Hearings (without counsel). Mentions and Mediations in all family law matters including Legal Aid appearances.

Short Adjournments/Mentions $440; Interim Hearings $550 for half day, $880 for full day (for non-complex matters). Some Civil agency services available.

Email: adrian@hawkeslawyers.com.au

Call Adrian Hawkes 0418 130027 or Kelvin Pearson 0455 234 501.

NOTE: CLASSIFIED ADVERTISEMENTS

Unless specifically stated, products and services advertised or otherwise appearing in Proctor are not endorsed by Queensland Law Society.

EAGLEGATE LAWYERS

+61 7 3862 2271
eaglegate.com.au

Intellectual Property, ICT and Privacy

- Doyles Guide Recommended IP Lawyer
- Infringement proceedings, protection advice, commercialisation and clearance to use searches;
- Patents, Trade Marks, Designs, Copyright;
- Australian Consumer Law and passing off;
- Technology contracts;
- Information Security advice including Privacy Impact Assessments, Privacy Act/GDPR compliance advice, breach preparation including crisis management planning;
- Mandatory Data Breach advice.

Nicole Murdoch
nmurdoch@eaglegate.com.au

Barristers

MICHAEL WILSON
BARRISTER

Advice Advocacy Mediation.

BUILDING & CONSTRUCTION/BCIPA

Admitted to Bar in 2003. Previously 15 yrs Structural/ Civil Engineer & RPEQ.

Also Commercial Litigation, Wills & Estates, P&E & Family Law.

Inns of Court, Level 15, Brisbane.
(07) 3229 6444 / 0409 122 474
www.15inns.com.au

Business opportunities

McCarthy Durie Lawyers is interested in talking to any individuals or practices that might be interested in joining MDL.

MDL has a growth strategy, which involves increasing our level of specialisation in specific service areas our clients require.

We are specifically interested in practices, which offer complimentary services to our existing offerings.

We employ management and practice management systems, which enable our lawyers to focus on delivering legal solutions and great customer service to clients.

If you are contemplating the next step for your career or your Law Firm, please contact

Shane McCarthy (CEO & Director) for a confidential discussion regarding opportunities at MDL. Contact is welcome by email shanem@mdl.com.au or phone 07 3370 5100.

For rent or lease

POINT LOOKOUT BEACH RESORT:
Very comfortable fully furnished one bedroom apartment with a children's Loft and 2 daybeds. Ocean views and pool. Linen provided. Whale watch from balcony June to October. Weekend or holiday bookings.
Ph: (07) 3415 3949

www.discoverstradbroke.com.au

POINT LOOKOUT – NTH STRADBROKE

4 bedroom family holiday house. Great ocean views and easy walking distance to beaches.

Ph: 07- 3870 9694 or 0409 709 694

Casuarina Beach - Modern Beach House

New architect designed holiday beach house available for rent. 4 bedrooms + 3 bathrooms right on the beach and within walking distance of Salt at Kingscliff and Cabarita Beach. Huge private deck facing the ocean with BBQ.

Phone: 0419 707 327

COMMERCIAL OFFICE SPACE

46m² to 536m² – including car spaces for lease
Available at Northpoint, North Quay.
Close proximity to new Law Courts.
Also, for sale a 46m² Commercial Office Unit.
Please direct enquiries to Don on 3008 4434.

OFFICE TO RENT

Join a network of 486 Solicitors and Barristers.
Virtual and permanent office solutions
for 1-15 people at 239 George Street.
Call 1800 300 898 or email
enquiries@cpogroup.com.au

CLARENCE
WORKPLACES FOR PROFESSIONALS

For rent or lease continued

Spring Hill – For Rent

Commercial office including fit out.
Suit professional practice, 150m², 2 car parks.
Enquiries to Michael Byrom on 0409 156 258.

For sale

GOLD COAST LAW PRACTICE FOR SALE

Established Family Law Practice.

Experienced support staff. Low rent in good location. Covered staff car parking.

Opportunity to expand into Wills/Estates.

Price on Application. Reply to: Principal, PO Box 320, Chirn Park, QLD, 4215.

Cairns Practice for sale

Practice has roots to 1991. The work is mainly conveyancing, wills and estates. Some commercial and family. Well over 1,500 safe custody packets. Excellent solicitor in place. Ample parking. Office on busy arterial road. Reasonable rent. Freehold available. Gross Fee Income for 16/17 and 17/18 was $285k - $330k. Approximately $76k PEBIT. Asking $55k as Principal relocating for family reasons. Vendor financing available. Contact Les Preston on LP@pmlaw.com.au

NOTE TO PERSONAL INJURY ADVERTISERS

The Queensland Law Society advises that it can not accept any advertisements which appear to be prohibited by the *Personal Injuries Proceedings Act 2002*. All advertisements in Proctor relating to personal injury practices must not include any statements that may reasonably be thought to be intended or likely to encourage or induce a person to make a personal injuries claim, or use the services of a particular practitioner or a named law practice in making a personal injuries claim.

For sale continued

LAW PRACTICES FOR SALE

Country Practice S.E. Qld $185k
Well established practice in Family, Conv, W/Estates. Owner now retiring. Gross fees $580k Nett $178k (PEBIT)

Sunshine Coast $495k + WIP
Conv, Family, Wills/Estates, Comm' Lit. Gross $870k Nett $449k (PEBIT). Main Rd position. Freehold or Lease avail'.

Tropical North Qld $288k +WIP
Commercial, Conveyancing, Wills and Estates Family, Lit' etc. Two locations. Gross 2018 $768k Nett $288k (PEBIT)

CBD & Southside $440k + WIP
Family 98% No Legal Aid. Est 19 years, Now retiring. New lease or can move it. Gross fees 2018 $1,049,986 Nett $420k

Northern Suburbs General Practice
Resi' & Commercial Conveyancing, Wills & Estates Family etc. Gross over $1mill. Nett $218k (PEBIT) **Price $245k + WIP**

Western Qld $170k WIP +F/Hold
Conveyancing, Estates and Family. Gross in 2017 of $670k Nett $148k. Exp staff in place. **Freehold option available $150k**

Toowoomba $230k + WIP

S O L D

Western Suburbs $70k +F/Hold

S O L D

Gold Coast $60k + WIP

S O L D

100 % Conveyancing Gold Coast

S O L D

Details available at:
www.lawbrokers.com.au
peter@lawbrokers.com.au
Call Peter Davison
07 3398 8140 or 0405 018 480

For sale continued

SOUTH BURNETT PRACTICE FOR SALE

Well established two Solicitor practice with three offices in the South Burnett, practising mainly in conveyancing, estates, wills and family law. Experienced support staff.

Gross revenue for 2016/2017 - $803,000. Approximately 5500 safe custody packets.

Price on application (not including work in hand). Opportunity to purchase freehold land in principal location.

Apply to: Principal, PO Box 235, Kingaroy, Qld, 4610 or kingaroy@sblawyers.com.au.

Townsville Boutique Practice for Sale

Established 1983, this well-known firm is focused on family law, criminal law, estates and wills. Centrally located in the Townsville CBD. Can be incorporated if required. Operates under LawMaster Practice Management System. Seller prepared to stay on for a period of time if requried. Preferred Supplier for Legal Aid Queensland and Legal Aid NSW (when required). Seller is ICL and Separate Representative. $150,000.00 plus WIP. Room to expand. Phone 07 4721 1581 or 0412 504 307, 8.30am to 5.30pm Mon-Fri.

PRACTICE FOR SALE

Brisbane North Solo Practice with its origins in the 1930's, current Principal for 35 years. Wills, Estate Administration, Estate Litigation, Elder Law and related matters form the bulk of the work, with cottage conveyancing accounting for roughly 20% of the fee base. Stable long term experienced staff in place. 15K + Safe Custody documents. Three years average Proprietor's Earnings before Interest and Tax (PEBIT) 2015-2017 was $363,186.00.

Average gross earnings for the same period $1,244,218.00. Scope for expansion. Attractive freehold premises available for rent or purchase. Principal prepared to remain as a consultant for up to 12 months if required. $450,000.00 plus WIP.

Enquiries to: g247365@hotmail.com

Toowoomba Law Practice for Sale

Commenced over 30 years ago. A fantastic opportunity to purchase an established business based on conveyancing and wills & estates. Strong ongoing clientele.

Huge price reduction to $70,000.

Great position. Plenty of parking. The premises can be purchased – great investment in itself!

Phone Terry Finn on 0407 078 388 for details.

terry@regattasales.com.au
Regatta Sales Pty Ltd

Legal services

PORTA LAWYERS
Introduces our
Australian Registered Italian Lawyer
Full services in ALL areas of Italian Law

Fabrizio Fiorino
fabrizio@portalawyers.com.au
Phone: (07) 3265 3888

Associate Services
Legal Costing – Queensland

Providing legal cost solutions - the competitive alternative

Short form assessments | Objections
Cost Statements | Itemised Bills
Court Appointed Assessments

Luke Randell LLB, BSc | Solicitor & Court Appointed Cost Assessor
Admitted 2001

(07) 3256 9270 | 0411 468 523
www.associateservices.com.au
associateservices1@gmail.com

Legal software

Wise Owl Legal Software

Practice Management Software

TRUST | Time | Fixed Fees | INVOICING | Matter & Contact Management | Outlays | PRODUCTIVITY | Documents | QuickBooks Online Integration | Integration with SAI Global

Think Smarter, Think Wiser…
www.WiseOwlLegal.com.au
07 3106 6022
thewiseowl@wiseowllegal.com.au

07 3842 5921
advertising@qls.com.au

NOTE: CLASSIFIED ADVERTISEMENTS

Unless specifically stated, products and services advertised or otherwise appearing in Proctor are not endorsed by Queensland Law Society.

Locum tenens

ROSS McLEOD

Willing to travel anywhere in Qld.

Admitted 30 years with many years as Principal

Ph 0409 772 314

ross@locumlawyerqld.com.au

www.locumlawyerqld.com.au

JIM RYAN LL.B (hons.) Dip L.P.

Experienced solicitor in general practice as Principal for over 30 years - available for locum services/ad hoc consultant in the South East Queensland area.

Phone: 0407 588 027

Email: james.ryan54@hotmail.com

Mediation

KARL MANNING

LL.B Nationally Accredited Mediator.

Mediation and facilitation services across all areas of law.

Excellent mediation venue and facilities available.

Prepared to travel.

Contact: Karl Manning 07 3181 5745

Email: info@manningconsultants.com.au

Missing wills

MISSING WILLS

Queensland Law Society holds wills and other documents for clients of former law practices placed in receivership. Enquiries about missing wills and other documents should be directed to Sherry Brown or Glenn Forster at the Society on (07) 3842 5888.

CHILDREN'S CANCER FOUNDATION

A gift in your Will can change children's lives. For information and appropriate wording, please contact 03 7001 1450 or email hello@childrenscancerfoundation.com.au

www.childrenscancerfoundation.com.au

Would any person or firm holding or knowing the whereabouts of a Will or other document purporting to embody the testamentary intentions of **MARK PETER MITCHELL** late of 57 George Street, Bundaberg, Queensland, who died on 11 January 2017, please contact Anthony Malouf of MALOUF SOLICITORS, PO Box 945, Parramatta NSW 2124, Tel: 02 8833 2000, Fax: 02 9687 3697.

Missing wills continued

Would any person with knowledge of **LESLIE WOOD** who died on 9 November 2012 at Mackay Base Hospital, Mackay, Queensland or **REGINALD AUSTIN HARWARD** who was born on 23 August 1938 at Milton Road, Auchenflower, Queensland, the son of Reginald Charles Harward and Vere Geddis May Austin or any person or firm holding or knowing the whereabouts of any Will those persons may have, please contact Kate Do of the Office of the Official Solicitor to The Public Trustee of Queensland, GPO Box 1449, BRISBANE QLD 4001, Tel: (07) 3213 9350, Fax: (07) 3213 9486 or Kate.Do@pt.qld.gov.au within 14 days of this notice.

Would any person or firm holding or knowing the whereabouts of any original Will of **JOY LINDA NESTER** late of 242 Toohey Rd, Tarragindi, Queensland, who died on or about 1 October 2018 please contact CLIFF KROESEN, KROESEN & CO LAWYERS, 21 Railway Street, Southport, telephone (07) 5571 1982, or email cliff@kclaw.com.au within 14 days of this notice.

Would any person or firm holding or knowing the whereabouts of a will or other document purporting to embody the testamentary intentions of **Wendy Jane Smith** late of 155 Chadwick Drive, South Maclean in the State of Queensland 4280 who died on 28 July 2018 please contact Ainsley O'Keefe of Parsons Law, Suite 3, 1 Bell Place, Mudgeeraba QLD 4213 Ph: 07 5522 9272 Email: info@parsonslaw.com.au

Office supplies

inkdepot Lower Prices Higher Standards

SAVE on your ink and toner budget! BUY now and Save up to 70% with our Low prices. Use coupon 'smartlaw' to save 5% on your first order. Call 1300 246 116 for a quote or visit www.inkdepot.com.au

Technical services

Audio advantage Professional Audio Services

Audio restoration & clean-up for poor quality recordings. Do you have an audio witness or statement that sounds unclear? For a confidential consultation - John 0411 481 735. **www.audioadvantage.com.au**

Wanted to buy

Purchasing Personal Injuries files

Jonathan C. Whiting and Associates are prepared to purchase your files in the areas of:

- Motor Vehicle Accidents
- WorkCover claims
- Public Liability claims

Contact Jonathan Whiting on 07-3210 0373 or 0411-856798

JONATHAN C WHITING & ASSOCIATES LAWYERS

NOTE TO PERSONAL INJURY ADVERTISERS

The Queensland Law Society advises that it can not accept any advertisements which appear to be prohibited by the *Personal Injuries Proceedings Act 2002*. All advertisements in Proctor relating to personal injury practices must not include any statements that may reasonably be thought to be intended or likely to encourage or induce a person to make a personal injuries claim, or use the services of a particular practitioner or a named law practice in making a personal injuries claim.

back to contents

Christmas wine, day by day

with Matthew Dunn

The countdown to Christmas was formerly the domain of those brightly decorated advent calendars in which a daily treat awaited behind each little door.

Now, they're a little more grown up. Wine, cheese, craft beer, gin, rum and scotch whiskey are included in the new breed of countdown calendar available online and at various retail outlets.

Like many of our Christmas traditions, the advent calendar was originally German and served to mark the days of the period which started on the Sunday nearest Andreasnacht (30 November) and ended three Sundays later. Over time the calendars narrowed to the certainty of the days of December and the original daily candle or religious picture evolved into sweets,[1] chocolates,[2] Lego,[3] or animated sequences.[4]

Of greater interest to adult consumers may be the wine editions of the new Christmas countdown calendars, providing daily wine for the festive season with a growing number of options.[5] Marketing for the De Bortoli offering[6] inquires: "Dreaming of a wine Christmas?"

At present, the wine calendars seem to come in one of two forms – 12 full-size bottles or 24 daily piccolos/mini-bottles.

The full-size bottle editions tend to feature a mixed mystery dozen, numbered and wrapped in protective tissue paper to prevent peeking. The 12 bottles are presumably to be enjoyed by opening one bottle every two days leading up to the big day. Some come with tasting notes and food matching guides, but I think one has to ask whether these advent calendars are actually ordinary mixed dozen cases repackaged for the festive season?

The daily editions, such as the De Bortoli one I purchased this year or the new-to-Australia Aldi 2018 calendar, have mystery offerings of a 187ml or 200ml mini-bottle across each of the 24 days. These little bottles represent one quarter of a standard bottle – about two standard drinks. With a new option each day, there is the opportunity to share with a friend, savour responsibly or re-gift as desired.

This year there was much controversy[7] when discount supermarket Aldi announced in August it would release a 24 mini-bottle advent wine calendar in the United Kingdom for the second year running (and an accompanying 24 mini-cheese calendar), but not in Australia.

Christmas enthusiasts in states where liquor licensing laws permit supermarkets to retail alcohol (New South Wales, the ACT, Western Australia and Victoria) excitedly petitioned the German behemoth to make the products available down under.

Until last month it seemed that the lobbying had fallen on deaf ears and the popular calendars would only be available in the United Kingdom and United States, leaving Australians to content themselves by watching YouTube bloggers smugly revealing their boxes' daily contents. Then the news came that the Aldi wine and beer (but not cheese) calendars would be available in Australia from mid-November.[8]

Sadly, these affordable wine and beer advent calendars are not directly available in Queensland due to our antiquated liquor licensing laws, but no doubt plenty will find their way over the border at Tweed Heads.

There are also 24-can craft beer calendars (fancy the spirit of Canvent?) or spirit calendars with gin, rum or whiskey to mark the Christmas countdown.[9] Gin is particularly popular this year and there are many options of a measure a day of different artisan gins to mark the season – Ginvent anyone?

To mark the season, enjoy your wine responsibly and remember that Queensland or Australian wine makes a great gift. Not only do these products bring pleasure in the receiving but they also support local industry and keep people in jobs. I can drink to that.

Matthew Dunn is Queensland Law Society Policy, Public Affairs and Governance General Manager.

Notes

1 amazon.co.uk/Haribo-Advent-Calendar-Christmas-sweets/dp/B0052VSMPC .

2 cadburygiftsdirect.co.uk/our-product-range/shop-by-product-type/advent-calendars/cadbury-heroes-advent-calendar.html .

3 shop.lego.com/en-AU/LEGO-Star-Wars-Advent-Calendar-75097 .

4 jacquielawson.com/advent .

5 copperandoak.com.au/products/red-wine/25-wine-advent-calendar.aspx , thewinegallery.com.au/special-packs/details/12-wines-of-christmas-advent-calendar/?gclid=EAIaIQobChMIhsvrva-63gIVywMqCh3p5gE6EAAYAiAAEgKsrPD_BwE .

6 debortoli.com.au/our-news/promotions/adventcalendar .

7 dailymail.co.uk/news/article-4939708/Aldi-won-t-stock-wine-advent-calendar-Australia.html .

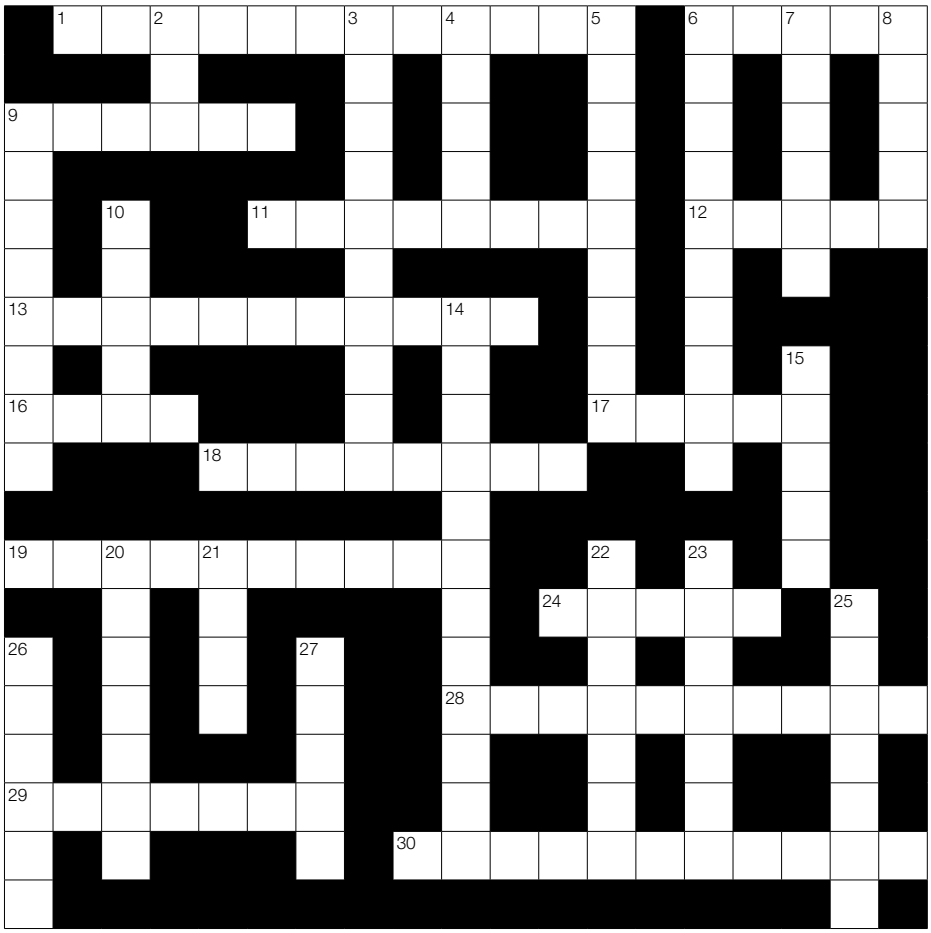
8 news.com.au/finance/business/retail/aldi-australia-launches-wine-and-beer-advent-calendars/news-story/b36a773ee6a674e5f8e231a077491707 .

9 buckscoop.com.au/guides/best-alcohol-advent-calendars-in-australia-for-2018-132567 .

back to contents

Mould's maze

By John-Paul Mould, barrister
and civil marriage celebrant
jpmould.com.au



Across

1 Fear of lawsuits. (12)

6 Lord Campbell's Act statutory dependency claims are preserved by s64 of the ..... *Proceedings Act* 2011 (Qld). (5)

9 The State Penalties Enforcement Registry (SPER) replaced the ..... Court in Queensland. (6)

11 A ..... injury is that which has the highest range of Injury Scale Values. (8)

12 A right to ..... is a defence to an action for trespass. (5)

13 A ..... order under the *Uniform Civil Procedure Rules 1999* can only be made by the Supreme Court of Queensland. (11)

16 Order made at a divorce hearing, decree ..... (Latin) (4)

17 Queen's Counsel or Senior Counsel. (5)

18 Each pleading must contain a statement of all ..... facts on which the party relies but not the evidence by which the facts are to be proved. (8)

19 Repeat offender. (10)

24 Staple attire of all Australian counsel and judges. (5)

28 One who commits a civil wrong. (10)

29 An affidavit accompanying an application for an enforcement hearing summons must contain an undertaking by the applicant to offer to pay ..... money. (7)

30 Unless there is good reason, a court must not grant an injunction without an ..... as to damages. (11)

Down

2 A Magistrates Court may be constituted by ... justices of the peace. (3)

3 A ..... right grants shareholders the first opportunity to buy a new issue of company stock. (10)

4 A government agency devoted to the performance of a specific function. (5)

5 High Court case concerning penalties for non-performance of contracts, *O'Dea v ..... Leasing System (WA) Pty Ltd.* (9)

6 A judge will only have regard to ..... cases in determining the appropriate sentencing range. (10)

7 Aurecon became the first Australian company to launch a ..... employment contract across its workforce. (6)

8 Ending of a time limit. (5)

9 A ..... order governs the procedures of a parliament. (8)

10 A subpoena ..... tecum is a court order requiring the production of documents to court. (Latin) (5)

14 Inclusion within an official list of names or items. (12)

15 Accepted or habitual practice. (5)

20 Rule preventing barristers selecting their cases. (Two words) (7)

21 American Psychiatric Association manual used in Queensland to assess mental disorders. (Abbr.) (4)

22 The Rule in *Saunders v .....* provides that if all beneficiaries of a trust are of capacity, they may require the trustee to transfer the legal estate to them. (7)

23 High Court case concerning implying terms into a contract, ... *Construction Pty Ltd v State Rail Authority of NSW.* (7)

25 Counsel's final trial remarks, ... address. (7)

26 Cause of death of Mark 'Chopper' Read. (6)

27 The first woman to be appointed a judge of the Supreme Court of Queensland, former Justice ..... AO. (5)

Solution on page 52

back to contents

A touch of nostalgia

Notes on a 30-year reunion

by Shane Budden

Since coming to Queensland Law Society, I have had the opportunity to witness a number of swearing-in ceremonies for new judges, magistrates and tribunal members.

The ceremonies are always impressive and often quite moving, with appointees thanking those – family, friends and mentors – who have helped them achieve high office. They sometimes even mention favourite lecturers, and the words of inspiration those lecturers gave to them as students.

"Yous'll all fail!"

If I am ever sworn in as a judge (pause for hysterical laughter from friends and former lecturers), those are the only actual words of inspiration that I will be able to recall from a lecturer at uni. One of our lecturers would thunder this on a reasonably regular basis, and with the sort of passion usually only seen when Bob Katter is providing dubious statistics on croc attacks in North Queensland.

Occasionally he (our lecturer that is, not Bob Katter) would provide some of the reasoning for this statement, almost always along the lines of unfavourable comparisons between our collective IQ and the intellectual capacity of the average pet rock.

To be fair, I remember more from that particular lecturer's orations than most others, but that was probably due to his anecdotes which largely involved using his superior knowledge of the *Sale of Goods Act 1896* to vanquish salesmen and retail staff.

I recall him telling us how he took some poor high-school kid working Saturday mornings at Kmart through the Act, all to ensure that he (again the lecturer, and not the kid) got a replacement for his defective toaster immediately, and not after the involvement of the manufacturer. I imagine the kid is still in therapy.

The sound of that lecturer assuring us that we'd all fail is as much a part of my uni career as scribbling indecipherable notes at 100 miles an hour in a lecture, falling asleep in Constitution lectures and the delicious thud of willow on leather as someone ran into the tree in the middle of the touch football field. I also recall the sound of the Wiggles playing the kidney lawn, though they were the Cockroaches back then – although the way they dealt with poor old Sam, they probably still are cockroaches (parents of young kids will understand that statement).

There actually was a tree in the middle of the touch football field at QUT, and my mate Phil was an expert at running opponents into it, either because of his dazzling skills or the fact that our opponents were not always the sharpest overall tools in the box (after all, there were some teams from the engineering school in the comp).

Touch football at QUT back then was actually a fairly dangerous undertaking, because in addition to having the tree, the field sloped down towards the Southeast Freeway, which in fact constituted the boundary on one side.

This wasn't great as the freeway is constructed of concrete which – as many qualified engineers have noticed – is much harder than trees. This could on occasion result in more broken bones than are usually associated with touch football; on the other hand, it was pretty easy to settle arguments over whether someone had stepped out or not.

Player 1: You stepped out!

Player 2: Did not!

Player 1: Then why is your leg bleeding?

Player 2: It was like that when we started!

Player 1: I can see the bone

Player 2: I'll have you know I was on my way to get a skin graft and thought I'd fit in a quick game of touch footy!

Player 1: You don't look so good

Player 2: (faints)

Why am I gibbering on about uni (I have a feeling I should add 'again' to that sentence)? Because back in October, there was a 30-year reunion of the most talented (as defined by how much they like my column) cohort of QUT Law students ever, the cohort that attended 1985-ish to 1988-ish.[1]

At the outset, I can assure you that if you want to feel old, having a 30-year reunion of pretty much anything you have ever done will do the trick. Another thing that will help is to flick through photos of how you used to look back then – so we wisely elected not to have any such photos about.

Going to reunions is always fun for me, because while on the one hand I have a terrible memory for names, on the other my recollection of faces is even worse. Thus, I simply smile at everyone and wait for someone to accidentally say the name of anyone I don't recognise. Unfortunately, my friends are all as old as me and are employing the same strategy, which can make for some awkward silences.

I suspect this problem was anticipated, because there were nametags; also, the reunion took place at Parliament House and security probably thought at least some of us were terrorists. Nametags, as you will have noticed, is the go-to response to terrorism for all Australian governments; I bet the rest of the world is just kicking themselves for not thinking of it.

Bellowing lecturers and tree-induced concussions were not the only things I remembered from uni, of course; I remembered fun, laughter (lots of laughter) and a great group of people. Fortunately, on this at least, my memory functioned perfectly, and my old uni mates proved to be exactly as I recalled: easygoing, fun-loving people that the world needs heaps more of (and – based on the number of conversations I had about the cost of childcare/school/uni – is going to get).

In short, it was a great night and I urge anyone to go to every reunion – school, uni, netball, whatever – you possibly can (NB: It is always better if it is your reunion, but it is up to you). To my cohort, thanks for an awesome night and for being such awesome people; roll on the 40th!

 Shane Budden is a Queensland Law Society ethics solicitor.

Note

[1] It is hard to be precise, as many of us were so talented that we had to spread a four-year course over five years; it is entirely possible that we have a different concept of talent from the one with which you may be familiar.

back to contents

DLA presidents

District Law Associations (DLAs) are essential to regional development of the legal profession. Please contact your relevant DLA President with any queries you have or for information on local activities and how you can help raise the profile of the profession and build your business.

Bundaberg Law Association — **Nicole McEldowney**
Payne Butler Lang Solicitors
2 Targo Street Bundaberg Qld 4670
p 07 4132 8900 f 07 4152 2383 nmceldowney@pbllaw.com

Central Queensland Law Association — **William Prizeman**
Legal Aid Queensland, Rockhampton
p 1300 651 188 william.prizeman@legalaid.qld.gov.au

Downs and South Western Queensland District Law Association — **Bill Munro**
Munro Legal, PO Box 419, Toowoomba, QLD 4350
p 07 4659 9958 f 07 4632 1486 bill@munrolegal.com

Far North Queensland Law Association — **Spencer Browne**
Wuchopperen Health
13 Moignard Street Manoora Qld 4870
p 07 4080 1155 sbrowne@wuchopperen.com

Fraser Coast Law Association — **Rebecca Pezzutti**
BDB Lawyers, PO Box 5014 Hervey Bay Qld 4655
p 07 4125 1611 f 07 4125 1238 rpezzutti@bdblawyers.com.au

Gladstone Law Association — **Kylie Devney**
V.A.J. Byrne & Co Lawyers
148 Auckland Street, Gladstone Qld 4680
p 07 4972 1144 f 07 4972 3205 kdevney@byrnelawyers.com.au

Gold Coast Law Association — **Mia Behlau**
MinterEllison – Gold Coast
PO Box 11, Varsity Lakes Qld 4227
p 07 5553 9400 f 07 5575 9911 Mia.Belau@minterellison.com

Gympie Law Association — **Kate Roberts**
CastleGate Law, 2-4 Nash Street, Gympie Qld 457
p 07 5480 6200 f 07 5480 6299 kate@castlegatelaw.com.au

Ipswich & District Law Association — **Peter Wilkinson**
McNamara & Associates,
PO Box 359, Ipswich Qld 4305
p 07 3816 9555 f 07 3816 9500 peterw@mcna.com.au

Logan and Scenic Rim Law Association — **Michele Davis**
Wilson Lawyers, PO Box 1757, Coorparoo Qld 4151
p 07 3217 4630 f 07 3217 4679 mdavis@wilsonlawyers.net.au

Mackay District Law Association — **Kate Bone**
Beckey, Knight & Elliot, PO Box 18 Mackay Qld 4740
p 07 4951 3922 f 07 4957 2071 kate@bke.net.au

Moreton Bay Law Association — **Hayley Cunningham**
Family Law Group Solicitors
PO Box 1124 Morayfield Qld 4506
p 07 5499 2900 f 07 5495 4483 hayley@familylawgroup.com.au

North Brisbane Lawyers' Association — **John (A.J.) Whitehouse**
Pender & Whitehouse Solicitors,
PO Box 138 Alderley Qld 4051
p 07 3356 6589 f 07 3356 7214 pwh@qld.chariot.net.au

North Queensland Law Association — **Michael Murray**
Townsville Community Legal Service Inc.
PO Box 807 Townsville Qld 4810
p 07 4721 5511 f 07 4721 5499 solicitor@tcls.org.au

North West Law Association — **Jennifer Jones**
LA Evans Solicitor, PO Box 311 Mount Isa Qld 4825
p 07 4743 2866 f 07 4743 2076 jjones@laevans.com.au

South Burnett Law Association — **Caroline Cavanagh**
Swift Legal Solutions
PO Box 1735 Hervey Bay Qld 4655
p 07 4122 2165 f 07 4121 7319 sbdistrictlaw@gmail.com

Sunshine Coast Law Association — **Samantha Bolton**
CNG Law, Kon-Tiki Business Centre, Tower 1,
Level 2, Tenancy T1.214, Maroochydore Qld 4558
p 07 5406 0545 f 07 5406 0548 sbolton@cnglaw.com.au

Southern District Law Association — **Bryan Mitchell**
Mitchells Solicitors & Business Advisors
PO Box 95 Moorooka Qld 4105
p 07 3373 3633 f 07 3426 5151 bmitchell@mitchellsol.com.au

Townsville District Law Association — **Mark Fenlon**
PO Box 1025 Townsville Qld 4810
p 07 4759 9814 f 07 4724 4363 fenlon.markg@police.qld.gov.au

QLS contacts

Queensland Law Society
1300 367 757

Ethics centre
07 3842 5843

LawCare
1800 177 743

Lexon
07 3007 1266

Room bookings
07 3842 5962

Interest rates

Interest rates will no longer be published in Proctor. Please visit the QLS website to view each month's updated rates **qls.com.au/interestrates**

Direct queries can also be sent to interestrates@qls.com.au.

Crossword solution

From page 50

Across: 1 Liticaphobia, **6** Civil, **9** Setons, **11** Dominant, **12** Abate, **13** Declaratory, **16** Nisi, **17** Silks, **18** Material, **19** Recidivist, **24** Jabot, **28** Tortfeasor, **29** Conduct, **30** Undertaking.

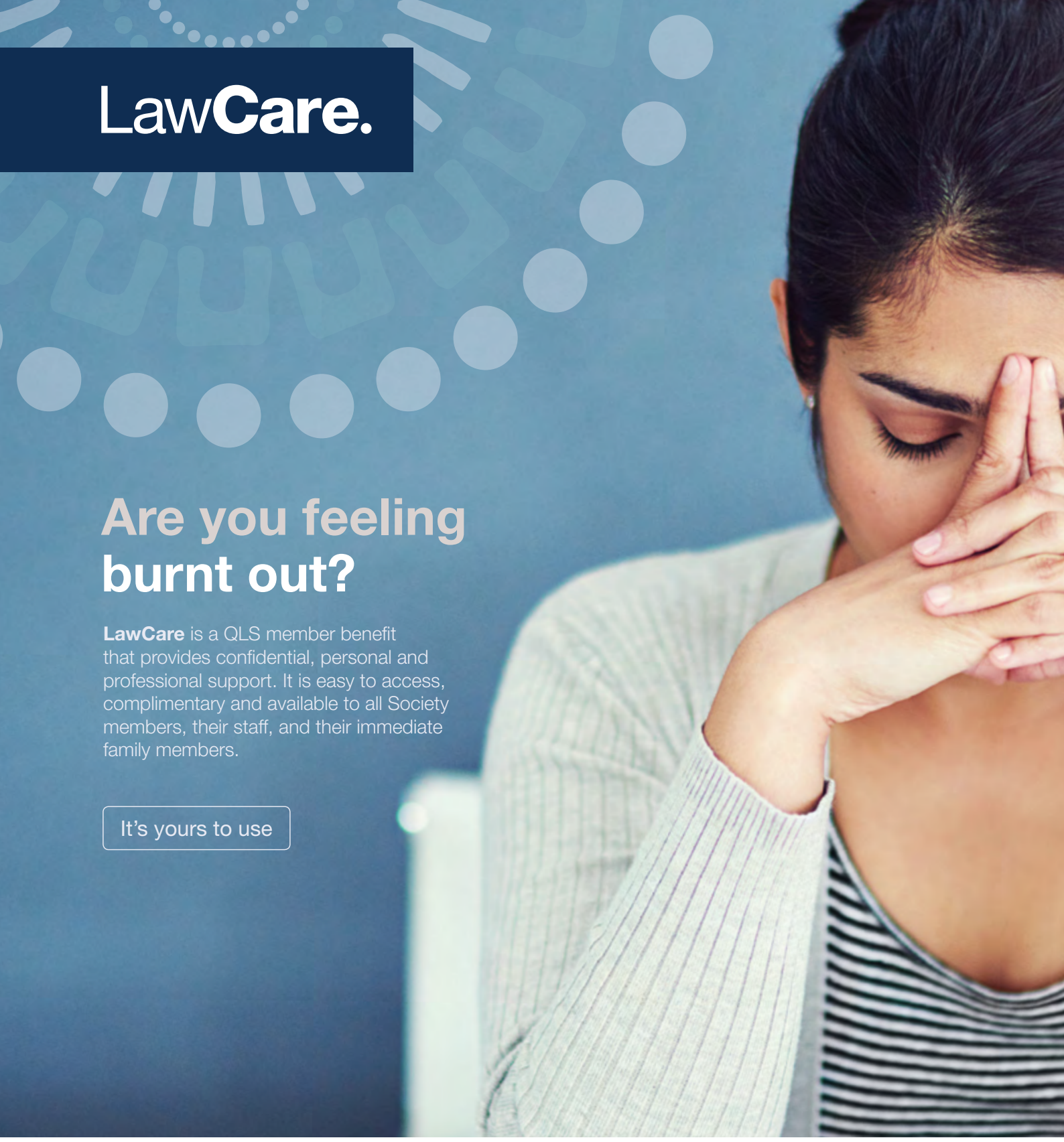
Down: 2 Two, **3** Preemptive, **4** Organ, **5** Allstates, **6** Comparable, **7** Visual, **8** Lapse, **9** Standing, **10** Duces, **14** Registration, **15** Usage, **20** Cabrank, **21** DSM4, **22** Vautier, **23** Codelfa, **25** Closing, **26** Cancer, **27** White.

QLS Senior Counsellors

Senior Counsellors are available to provide confidental advice to Queensland Law Society members on any professional or ethical problem. They may act for a solicitor in any subsequent proceedings and are available to give career advice to junior practitioners.

Brisbane	Suzanne Cleary	07 3259 7000
	Glen Cranny	07 3361 0222
	Peter Eardley	07 3238 8700
	Glenn Ferguson AM	07 3035 4000
	Peter Jolly	07 3231 8888
	Peter Kenny	07 3231 8888
	Dr Jeff Mann	0434 603 422
	Justin McDonnell	07 3244 8000
	Wendy Miller	07 3837 5500
	Terence O'Gorman AM	07 3034 0000
	Ross Perrett	07 3292 7000
	Bill Potts	07 3221 4999
	Bill Purcell	07 3001 2999
	Elizabeth Shearer	07 3236 3000
	Dr Matthew Turnour	07 3837 3600
	Phillip Ware	07 3228 4333
	Martin Conroy	0410 554 215
	George Fox	07 3160 7779
Redcliffe	Gary Hutchinson	07 3284 9433
Southport	Warwick Jones	07 5591 5333
	Ross Lee	07 5518 7777
Toowoomba	Stephen Rees	07 4632 8484
	Thomas Sullivan	07 4632 9822
	Kathryn Walker	07 4632 7555
Chinchilla	Michele Sheehan	07 4662 8066
Caboolture	Kurt Fowler	07 5499 3344
Sunshine Coast	Pippa Colman	07 5458 9000
	Michael Beirne	07 5479 1500
Nambour	Mark Bray	07 5441 1400
Bundaberg	Anthony Ryan	07 4132 8900
Gladstone	Bernadette Le Grand	0407 129 611
	Chris Trevor	07 4976 1800
Rockhampton	Vicki Jackson	07 4936 9100
	Paula Phelan	07 4921 0389
Mackay	Brad Shanahan	07 4963 2000
Cannonvale	John Ryan	07 4948 7000
Townsville	Chris Bowrey	07 4760 0100
	Peter Elliott	07 4772 3655
	Lucia Taylor	07 4721 3499
Cairns	Russell Beer	07 4030 0600
	Jim Reaston	07 4031 1044
	Garth Smith	07 4051 5611
Mareeba	Peter Apel	07 4092 2522

back to contents



Externally provided by Benestar
Be your best you

For 24hr confidential information and appointments

1800 177 743 qls.com.au/lawcare

Queensland Law Society®

eConveyancing Simplified

A must-have starter guide to eConveyancing for the small law sector

Included in the national LEAP pack:

- Timelines for mandatory compliance for each state and territory
- Practical tips for a smooth and successful transition process
- Commentary from legal practitioners
- A comprehensive glossary of legal terms

To download the pack visit:
info.leap.com.au/econpack

LEAP

Together we protect your firm.

1300 886 243 | leap.com.au