PROCTOR

Queensland Law Society

November 2018 – Vol.38 No.10

Sexual harassment in law | Trade marks and parallel importation | Member focus | The tip of a taxation iceberg?


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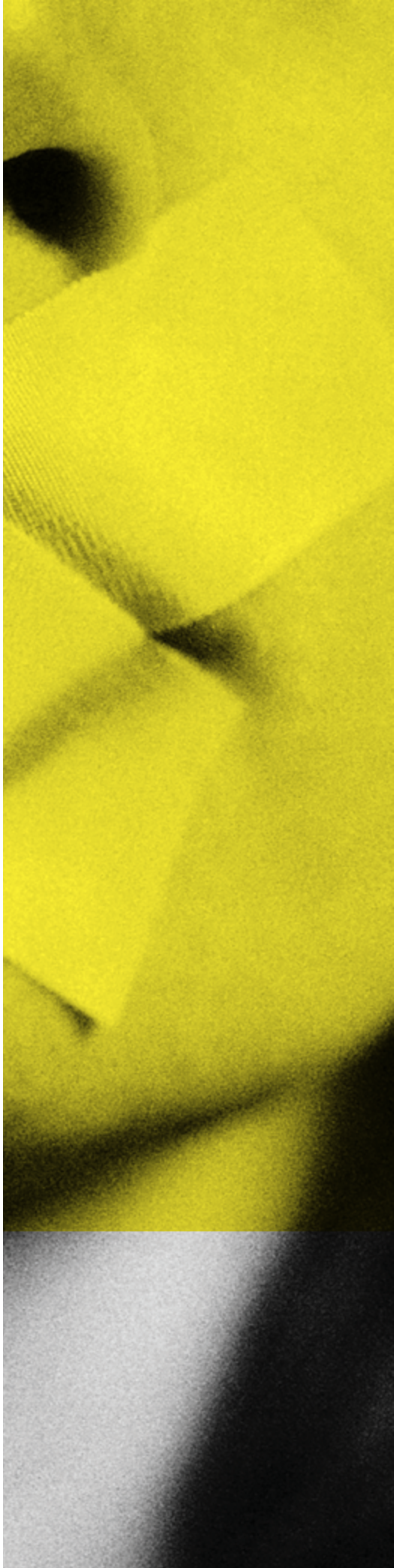

Published by Queensland Law Society | ISSN 1321-8794 | RRP $14.30 (includes GST) | **qls.com.au**

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.

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Bringing the balance

Public faith and the judiciary

We often say that solicitors are the guardians of the justice system.

What then, are our esteemed members of the judiciary? We could call them the frontline, or even the pillars of our justice system. The judiciary are those at the end of the legal process – those with the unfortunate role of balancing legislation with all the facts, as well as facing community expectation.

Over the years we have seen our judiciary criticised more than praised, questioned more than trusted. Many times, this criticism comes from a lack of understanding on the complete set of facts or the legal process in general. The effects of unfounded criticism against our judiciary are widespread. Not only do we see public faith in the judiciary decrease, but we also do our judges and magistrates no favours in the simple role of getting their job done.

Many do not understand exactly what our judiciary deal with day in, day out. They are often confronted with the worst of the worst of humanity. They are human beings just like we are. But they are bound by the law. They are also given all of the facts – facts that many members of the media or public may never be privy to. They make their decisions based on existing legislation and every fact before them. They do not act based on the court of public opinion – that would not be justice.

Being human, the judiciary is not going to be perfect. Criticism which is well informed, constructive and justified should not be stifled. A Judicial Commission would be an excellent vehicle to receive and appropriately act upon any input of that nature. Every person has the right to equal justice. That is what our judiciary aim to deal out in every case that comes before them. They are not prejudiced or influenced by opinion, they merely deal out justice for everyone. There should be no fear or favour in Queensland courts, just equal justice.

Magistrates and judges can only act upon evidence presented to them, with an independent judgment, and hand down individual sentences reflecting the seriousness of the offence, the need to protect the community and the personal circumstance of the defendant before them.

Our judiciary are here to protect us all – whether we be in the shoes of the defendant or as members of the local community. The rule of law must be respected, as well as those who have the difficult and complex role of upholding it. Without them, there would be chaos. We must always keep the rule of law in mind in everything that we do.

When there are questions on why a magistrate or judge has come to a certain decision, I would encourage both members of the legal profession and the public to read the sentencing remarks, which are often available online through the Supreme Court Library (**sclqld.org.au**) and the specific court. These documents will provide you with the facts that the judge took into account, and you are able to see why the judge came to that decision.

It is also worthwhile to take a look at Queensland Sentencing Advisory Council (QSAC) 'Judge for Yourself' online tool, which allows the viewer to step into the shoes of a judge or magistrate. Organisations such as QSAC bring balance to the sentencing process and assist in making the process palpable and accessible to the public.

We must always remember that we live in a very fortunate society, with a fair and just court system. There have been judges in other countries who have been arrested for their decisions or persecuted by dictators. In Queensland – and throughout Australia – our judiciary remain independent and impartial. They are not influenced by the public, nor the government. That is yet another reason why we should respect not only the role they play in our society, but also the decisions they make.

Before concluding this month's column, I would like to share with you my recent attendance at the Law Council of Australia's Legal Futures Summit. I, along with Deputy President Bill Potts and CEO Rolf Moses, attended this year's event, where leaders from around the country came together to consider the future of the legal profession. We looked at what really drives us as legal practitioners and the future roles we will play in this changing world.

The challenge is then for all in our profession to manage the way legal services are to be delivered to our clients, while continuing to maintain high ethical standards.

100 years – Soldiers of law

This month marks the 100th anniversary of Armistice Day. On the 11th day of the 11th month, 1918, Germany signed an armistice agreement with the Allies to end World War I.

We remember and acknowledge those in the legal profession who served, and also those who lost their lives in battle. Law students, articled clerks, solicitors, barristers and judges, all served their country. I encourage you to reflect on their sacrifice, and that of those who stayed behind. Some would assist with the drafting of soldiers' wills, and also the women who could not engage in battle but nursed the wounded, tended to the family farm back home and, more broadly, the families of those who were at war.

Lest we forget.

Ken Taylor
Queensland Law Society President

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Your QLS awards

Recognising excellence across the profession

Before you start looking forward to this year's Christmas parties and the holiday break, could I please ask you take a moment to reflect on the achievements of the past year?

While this reflection is worthwhile in terms of considering your career and its progression, along with evaluating your successes and reconsidering your goals, my ulterior motive relates to the recognition that Queensland Law Society offers to members and firms that are leading the way in the profession.

There are 11 QLS Legal Profession Awards, all of which will be awarded at the QLS Legal Profession Dinner and Awards in March. Nominations are now open and will close at 5pm on Friday 16 November. To nominate, see **qls.com.au/lpda** . The awards are:

QLS President's Medal – Open to individual solicitors, this award recognises and encourages commitment, contribution and outstanding performance within the Queensland legal profession. This year it was won by dedicated criminal defence lawyer Kurt Fowler.

QLS Agnes McWhinney Award – Named after Queensland's first admitted female solicitor, this award recognises outstanding professional or community contribution by a female lawyer. Our 2018 winner was Ann-Maree David who, among many other achievements, established the Queensland campus of the Australian College of Law.

QLS Innovation in Law Award – Open to all law firms and individual solicitors in Queensland, this award recognises excellence in the development and/or application of technology. This year it was won by Streten Masons Lawyers.

Community Legal Centre (CLC) Member of the Year – This award is open to all solicitors working or volunteering in a Queensland CLC who have made outstanding contributions to the community by influencing community justice programs or initiatives which benefit the local community. The 2018 winner was Terrence Stedman.

Committee of the year – This new award is open to all QLS committees and working groups, and recognises a QLS committee for outstanding achievements in the law and for pursuing justice outcomes in the Queensland legal profession.

Committee member of the year – This award has been introduced to recognise a QLS committee or working group member for their outstanding achievements in the law and for pursuing justice outcomes in the Queensland legal profession.

Another award series, with three awards, used to be called the QLS Equity and Diversity Awards, but has been renamed as the QLS Diversity and Inclusion Awards to better reflect contemporary terminology:

Equity Advocate Award – This award recognises individuals or a team from a legal practice who have successfully promoted equity and diversity innovative initiative(s) within the workplace to generate positive change or for their activities in the wider profession and/or the community. This year's winner was Terrence Stedman.

The **Large & Medium Legal Practice Award** and **Small Legal Practice Award**: These are awarded to legal practices of 20-plus or 19 or fewer practitioners that promote sustainable, healthy workplace cultures, engage in inclusive and equitable workplace practices and embrace workplace diversity in a meaningful way. This year's winners were Maurice Blackburn Lawyers and Miller Harris Lawyers, respectively.

See page 42 for comments from these winners on how diversity and inclusion feature in their practices.

The QLS Legal Profession Awards also include two First Nations Awards, reflecting our commitment to achieving real and positive change in the lives of Australia's First Nations people, in particular those who contribute to justice and the rule of law. The First Nations Awards aim to recognise the outstanding contributions of Aboriginal and Torres Strait Islander practitioners who are committed to promoting justice within their community and beyond.

Queensland First Nations Lawyer of the Year Award – This is presented to an Aboriginal or Torres Strait Islander individual for outstanding achievements in the law and for pursuing justice outcomes in the legal profession for First Nations people in Queensland. This year's winner was Marrawah Law principal Leah Cameron.

Queensland First Nations Legal Student of the Year – This award identifies an Aboriginal or Torres Strait Islander legal student who displays outstanding commitment to achieving a positive role in the legal community. The 2018 award winner was Nareeta Davis.

Our annual report

With the 2017-18 QLS Annual Report now tabled in Parliament, it is my pleasure to invite you to review our activities and accomplishments for the year.

We've included a short highlights summary in this edition of *Proctor* (see page 16), or browse the full report at **qls.com.au/annual-reports** .

One of the most interesting parts of the report each year is the statistics on our achievements, for example:

We offered more than 75 opportunities for professional development in 2017-18 – more than one a week – and a total of 4392 delegates took advantage of this to register for our professional development events.

Our QLS Ethics and Practice Centre took 4259 calls for ethical guidance in 2017-18, and provided 31 bespoke ethics training sessions for firms.

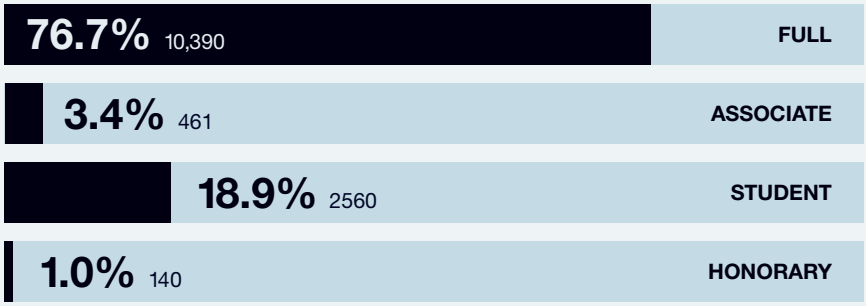
Please take a look at the full report. I think one of the things that some find quite surprising is that it reveals the full depth and variety of the many areas in which your Society is active.

Rolf Moses
Queensland Law Society CEO

OUR MEMBERSHIP SNAPSHOT

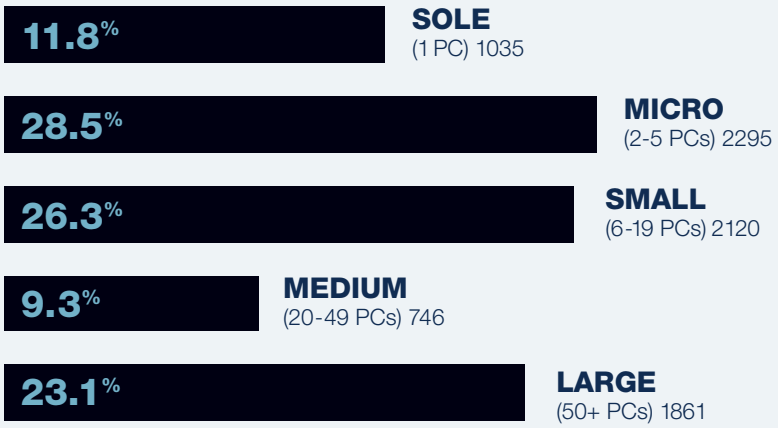
The statistics on this page are drawn from the Queensland Law Society Annual Report 2017-18. See page 16 of this edition of *Proctor* for more highlights, or view the full report at qls.com.au/annual-reports .

TOTAL MEMBERSHIP BY CATEGORY



FULL MEMBERS WORKING IN LAW FIRMS

Of all QLS full members, 77.5% work for law firms, marginally down on last year's percentage of 77.6%. The most notable change was the increase in full members working for micro firms (2-5 practising certificates) and the corresponding decrease in full members working for medium firms (20-49 practising certificates). Current numbers reflect proportions similar to those in the 2014-15 financial year.



SEE PAGE 16 FOR MORE HIGHLIGHTS FROM THE 2017-18 QLS ANNUAL REPORT.

Queensland Law Society

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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

Lexon announces new cyberfraud initiatives

Lexon has announced a significant new cyberfraud initiative with the appointment of a leading cybersecurity expert to provide on-the-ground assistance to insured practices.

Cyber risk consultant Cameron McCollum, a former Australian Army Intelligence Officer, joined Lexon on 2 October and brings extensive experience in threat evaluation and assessment.

In an expansion of the existing program, Cameron will undertake 'cyber risk visits' to individual practices without charge, as well as providing helpful insights on a broader level.

Lexon Chairman Glenn Ferguson AM and CEO Michael Young are also pleased to announce the development of a bespoke cyber education program as a part of the insurance company's ongoing commitment to helping practices limit their exposure to cyber risks.

The cyber education initiative, which will soon be available to all insured practices without charge, is an interactive program which addresses in a practical way the risks that practitioners face and provides workable solutions to minimise exposure.

More details on the two new initiatives will be available soon.

Groom & Lavers celebrates 125 years

Groom & Lavers staff members Alyssa Stevens, Courtney-Jane Klease, Krystle Lindsay, Shelby Battaglene, Amanda Boyce, Andrew Taylor, Nicola Geary, Kelly Hayes and Kristin Stower.

One of the Darling Downs' oldest legal firms, Groom & Lavers, has celebrated 125 years of service to the Downs and Toowoomba communities.

The firm started in 1893 when Charles Eden commenced practice in the Club Hotel chambers in Margaret Street, Toowoomba. Partners came and went, but in the early 1900s Leslie Walter Groom joined with Charles Eden to create the firm which traded as Eden and Groom. In 1909 Arnold Lavers became a partner and Charles Eden left to pursue his career in Brisbane, at which point the firm's name changed to Groom & Lavers.

One of the early partners was Sir Littleton Groom, the local federal MP and a Speaker of Parliament. The electorate of Groom was named after him. Arnold Lavers was one of the longest-serving partners, practising to the age of 92.

Today the firm is led by Andrew Taylor and Amanda Boyce, supported by a staff of 10, with primary practice areas that include real estate and business transactions, leasing, wills and estates, and family settlements.

The firm celebrated its anniversary with a function at Gabbinbar Homestead, Toowoomba, in September.

Koowarta scholarship now open

Applications for the 2019 John Koowarta Reconciliation Law Scholarship are now open.

The Koowarta scholarship is available to Aboriginal and Torres Strait Islander students enrolled in an Australian tertiary institution undertaking an approved course of study that may lead to admission as a legal practitioner in any Australian jurisdiction. The successful applicant will receive a scholarship to the value of $5500 for the 2019 academic year.

The scholarship was established in 1994 and commemorates John Koowarta, a member of the Winychanam community and a traditional owner of the Archer River region on the Cape York Peninsula. He is widely regarded as being at the forefront of Aboriginal land rights in Australia during the late 1970s and early 1980s.

Applications close on 30 November. See **lawcouncil.asn.au** > About Us > Scholarships.

Notice of Annual General Meeting of Queensland Law Society Inc.

(Pursuant to Rules 59 and 60 of the *Legal Profession (Society) Rules 2007*)

Notice is hereby given 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.

BUSINESS

- 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
- 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*
- Such further business as may lawfully be brought before the meeting.

18 October 2018

By Order

Louise Pennisi
Corporate Secretary

If you would like to attend in person, please RSVP by 5.30pm on Friday, 30 November 2018 to f.culnane@qls.com.au or phone 07 3842 5904.

Any full member whose subscription is not in arrears and who is present in person or by proxy is entitled to vote at the meeting.

PROXIES

A member who is entitled to vote may appoint one proxy who is another member who is entitled to vote. To be valid, the completed proxy form must be received by the Secretary by 5.30pm on Sunday, 2 December 2018. Completed proxy forms can be returned by:

a. Scanning and emailing – Attention: Corporate Secretary, f.culnane@qls.com.au
b. Post – Attention: Corporate Secretary, GPO Box 1785, Brisbane, Queensland, 4001
c. Hand delivery – Attention: Corporate Secretary, Level 2, Law Society House, 179 Ann Street, Brisbane.

A proxy form is available at **qls.com.au/agm** .

The Society's annual report, including financial statements, is published on the QLS website.

Carter Newell chefs shine

Leah Watt, Cameron Rodgers, Mark Kenney (construction and engineering team) and Kellie Fowler.

A lemon drizzle cake prepared by Senior Associate Leah Watt led the way to win overall at Carter Newell's 13th annual bake-off.

Following closely were Knowledge Manager Cameron Rodgers, who won best savoury dish with 'Nan's sausage rolls with cracked pepper and tomato relish', and Secretary Kellie Fowler with the best sweet dish, her 'lemon syrup tea cake'.

The firm's construction and engineering team took out the best team category.

The annual bake-off is a popular day in the firm's workplace giving calendar, this year raising $1000 for staff-nominated local charity Ronald McDonald House.

A taste of the notarial role

Queensland notaries are offering a seminar this month that may appeal to practitioners interested in becoming a notary public.

The one-day seminar, organised by the Society of Notaries of Queensland in association with the Australian & New Zealand College of Notaries, will be held at the Tattersall's Club, Brisbane, on 23 November. The seminar features session topics including 'All you wanted to know about notarial practice but were afraid to ask'.

The program will incorporate the Society's annual general meeting and luncheon.

More information is available at **societyofnotaries-qld.org** .

Popular PI

This year's QLS Personal Injuries Conference, held on Friday 12 October at the Brisbane Convention and Exhibition Centre, attracted 162 delegates and featured a strong two-stream program designed for both plaintiff and defendant solicitors.

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Government Lawyers Conference

On 14 September almost 90 delegates attended the QLS Government Lawyers Conference. This year's program featured practical and topical sessions, including presentations on the role of in-house counsel in addressing governance failures, and potential misconduct in government delivered by Crime and Corruption Commission Queensland Chair Alan MacSporran QC.

Exclusive sponsor

LAW IN ORDER

Committee works for better children's law

by Pip Harvey Ross

The Queensland Law Society Children's Law Committee is comprised of 14 members and guests who identify issues and advocate for good law in all aspects of the Queensland justice system that affect children and young people.

In particular, the committee focuses on legal and policy issues in the practice areas of youth justice and child protection.

The committee's advocacy is mainly through written submissions, stakeholder engagements and media campaigns. Recently the committee provided a significant contribution in relation to the 'Expert Assistance Program', participating in stakeholder group meetings and working on the expedient transition of 17-year-old young people out of adult prisons and back into the youth justice system.

Following the long and successful advocacy campaign to reinstate 17-year-old offenders back into youth justice, the committee has turned its attention to the 'Report on Youth Justice' by Bob Atkinson, a Special Advisor to the Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence, Di Farmer MP.

The report, released in June, addresses the progress of the Government's youth justice reforms, and other measures to reduce recidivism. Significantly, the report recommended implementation of a four-pillar model as the Government's youth justice policy. This focuses on early intervention, keeping children out of court and out of custody, and development of strategies to reduce reoffending.

Following the release of the report, the committee was invited to participate in the development of the youth justice strategy by providing advice on implementing the report's recommendations.

The committee recently attended the first stakeholder engagement meeting on the development of the strategy and is looking forward to playing a continuing role in this important work, and ensuring that the report's recommendations are implemented in an appropriate and timely manner, with continued stakeholder consultation.

QLS and the committee are pleased that several concerns identified by the report mirror some of the issues raised by the Society in the QLS Call to Parties document for the last state election, including the implementation of standalone children's courts and additional Childrens Court magistrates.

In June 2018, members of the committee met with representatives from the Department of Justice and Attorney-General to discuss the Childrens Court Expert Assistance Pilot program, which was introduced following a recommendation contained in the Child Protection Commission of Inquiry report.

The pilot is targeted at complex child protection matters for which the court considers that highly specific or specialised advice is required and allows the court to make an order appointing a person with relevant knowledge and skill to help the court.

The committee welcomed the introduction of the pilot program and agreed that, if successful, it would assist in the awareness of section 107 of the *Child Protection Act 1999*, uptake on the inclusion of expert assistance that this section permits, and help to secure long-term funding for the operation of this section.

The committee plays an important role in the education of practitioners during changes in the children's law sector. In February, committee Chair Damian Bartholomew updated QLS members on the changes to the youth criminal justice system via an online livecast.

Upcoming QLS professional development events will focus on the changes to child protection brought about by the *Child Protection Reform Amendment Act 2017*, which has commenced gradually throughout 2018, with the final provisions commencing last month. These provisions deal with self-care and connection, permanency, information sharing and transition to adulthood.

The child protection legislation update held by QLS on 16 October provided in-depth learnings and discussion on these key changes and the practical experience implementing the changes to date. The Society thanks presenters Tracey De Simone, Catherine Moynihan and Kate Grant for sharing their insights on this important topic.

QLS thanks the volunteer members of the Children's Law Committee for their continued advocacy and commitment to promoting good law and policy in the children's law arena in Queensland.

QLS will host a child protection masterclass on 6 December, which will provide detailed and practical information for members on case planning and permanency plans. The masterclass will be presented by Toby Davidson and Kate Grant, and chaired by Jennifer Glover. Registration for the masterclass is available at **qls.com.au** .

QLS launches pilot cybersecurity program

Queensland Law Society has launched a pilot version of an online cybersecurity improvement program.

The program aims to help members strengthen their cyber-defences, improving protection for their firm and clients. The pilot program offers streams for sole practitioners and for small firms of between two and 30 network users.

It began last month and will run for about 19 weeks, occupying about an hour a week. It aims to walk users through a sequence of tasks that will help them to develop tools to avoid potential cybersecurity issues.

The development of this QLS initiative follows a number of email-based cyberattacks on Queensland law firms, including the hacking of practitioners' email accounts in order to misdirect clients lodging monies into their trust accounts.

QLS resources for this topic are available at **qls.com.au/cybersecurity** .

Trade marks and parallel importation

Recent amendments to the *Trade Marks Act 1995* (Cth)

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Changes to the *Trade Marks Act 1995* aim to assist parallel importation into Australia by introducing greater flexibility in establishing trade mark permissions. Report by **Ben Thorn**.

On 16 August 2018, Federal Parliament passed the *Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Act 2018* (the Amendment Act),[1] which then received royal assent on 24 August.

Key amendments passed in the Amendment Act (which came into force on 25 August 2018) address the 'parallel importation' defence under the *Trade Marks Act 1995* (Cth) (TMA), specifically to clarify the circumstances in which use of a third party's registered trade mark by a parallel importer does not infringe the registered trade mark.

The regime before the Amendment Act

Trade mark infringement arises under s120 of the TMA when a person "uses as a trade mark" a registered mark without authorisation of the owner. The TMA provides a number of defences to infringement, including under s123, which provides a defence to infringement if a person uses a trade mark that was "applied by or with the consent of the registered owner":

s123 Goods etc. to which registered trade mark has been applied by or with consent of registered owner

(1) In spite of section 120, a person who uses a registered trade mark in relation to goods that are similar to goods in respect of which the trade mark is registered does not infringe the trade mark if the trade mark has been applied to, or in relation to, the goods by, or with the consent of, the registered owner of the trade mark.

(2) In spite of section 120, a person who uses a registered trade mark in relation to services that are similar to services in respect of which the trade mark is registered does not infringe the trade mark if the trade mark has been applied in relation to the services by, or with the consent of, the registered owner of the trade mark. [*Notes omitted*]

The s123 defence is frequently associated with cases of parallel importation of goods, when the importer acquires genuine goods overseas (other than through 'official' or 'authorised' distribution channels) and then imports the goods for resale in Australia. Other potential instances of the defence have arisen in circumstances in which a trader repairs or refurbishes trade-marked goods and resells the refurbished goods still bearing the original trade mark.[2]

In *Scandinavian*,[3] the respondent (Trojan) was alleged to have infringed Scandinavian's trade marks by importing Scandinavian's cigars and repackaging them for resale in the Australian market. Trojan was not an 'authorised' reseller of Scandinavian's products. It should be noted that the repackaging of the product was necessary to comply with Australian plain packaging tobacco laws. In doing so, Trojan discarded the original packaging and repackaged the goods with compliant packaging bearing Scandinavian's trade marks.[4]

At both the primary decision and on appeal, the court held that Trojan had used the marks for the purpose of s120, but was entitled to rely upon the defence under s123(1).[5] The defence applied even though Trojan had removed and replaced the original packaging, and it was enough that the goods were genuine goods to which the trade marks were applied with the consent of the trade mark owner.[6]

The availability of the s123 defence, and its interaction with the infringement provisions under s120, has been the subject of lengthy judicial discourse. The language of s123 also suggests that the question as to whether the mark was applied "by, or with the consent of, the registered owner of the trade mark" is a question of fact, and the outcome will therefore turn on the specific factual matrix of each case.[7] The Full Court in *Scandinavian* observed the question of fact as to whether the application of the mark was authorised (as required under s123(1)) might be beyond the knowledge of the respondent:

"…difficulty…may be faced by resellers who may have no sure way of knowing whether a mark applied to goods which they purchase was applied by or with the consent of the trade mark owner. This is, however, a difficulty that resellers have always faced when acquiring goods from anyone other than the registered owner of the mark. In the context of the 1995 Act, the reseller will either have the benefit of s123 or will be left to rely upon any contractual or other remedies it may have against the person from whom it acquired the goods in the event these are found to be infringing."[8]

The Amendment Act

The Amendment Act repeals s123(1) and introduces a new s122A, which applies to trade mark infringement proceedings commenced on or after 25 August 2018:[9]

122A Exhaustion of a registered trade mark in relation to goods

(1) In spite of section 120, a person who uses a registered trade mark in relation to goods does not infringe the trade mark if:

(a) the goods are similar to goods in respect of which the trade mark is registered; and

(b) before the time of use, the person had made reasonable inquiries in relation to the trade mark; and

(c) at the time of use, a reasonable person, after making those inquiries, would have concluded that the trade mark had been applied to, or in relation to, the goods by, or with the consent of, a person (a relevant person) who was, at the time of the application or consent (as the case may be):

(i) the registered owner of the trade mark; or

(ii) an authorised user of the trade mark; or

(iii) a person permitted to use the trade mark by the registered owner; or

(iv) a person permitted to use the trade mark by an authorised user who has power to give such permission under paragraph 26(1)(f); or

(v) a person with significant influence over the use of the trade mark by the registered owner or an authorised user; or

(vi) an associated entity (within the meaning of the *Corporations Act 2001*) of a relevant person mentioned in subparagraph (i), (ii), (iii), (iv) or (v).

(2) A reference in paragraph (1)(c) to consent to the application of a trade mark to, or in relation to, goods includes, without limitation, a reference to:
   (a) consent subject to a condition (for example, a condition that the goods are to be sold only in a foreign country); and
   (b) consent that can be reasonably inferred from the conduct of a relevant person.

(3) In determining whether a relevant person mentioned in subparagraph (1)(c)(iii) or (iv) was permitted to use the trade mark, disregard how that permission arose, for example:
   (a) whether it arose directly or indirectly; or
   (b) whether it arose by way of proprietary interest, contract, arrangement, understanding, a combination of those things, or otherwise.

(4) In determining whether a relevant person mentioned in subparagraph (1)(c)(v) had significance influence over the use of a trade mark, disregard how that influence arose, for example:
   (a) whether it arose directly or indirectly; or
   (b) whether it arose by way of proprietary interest, contract, arrangement, understanding, a combination of those things, or otherwise.

The Government's stated intentions behind the amendments were to clarify the law and facilitate parallel importation into Australia by "limiting the strategic use of restrictions by registered trade mark owners":[10]

"The overall principle is that the registered owner's rights are exhausted following the initial application of the trade mark to, or in relation to, goods. The subsequent use of the trade mark in relation to those goods by another person therefore does not infringe the trade mark rights of the registered owner in respect of those goods, as long as there is an appropriate relationship between the registered owner of the trade mark in Australia and the party who applied the mark. Where there is some commercial, corporate or contractual relationship of control or influence between the registered owner in Australia and the party that put the goods on the market, then the goods should be considered genuine parallel imports and should be able to benefit from the defence."[11]

A significant change in the defence is the new section's introduction of the element of reasonable inquiry on the part of the alleged infringer, as reflected in s122A(1)(b) and (c), in place of the arguably strict and potentially problematic question of fact required under s123(1).[12]

Under the new s122A, the importer is now in a position where a defence is available provided it has made reasonable inquiries to ascertain that the trade mark in question was applied to the goods with the authority of the trade mark owner or a relevant person. Of course, what is 'reasonable' must be determined with regard to the circumstances.

While the expanded defence will take some time to be judicially considered, and caution is still necessary, it appears the introduction of s122A provides greater certainty for traders who engage in parallel importation and resale of trade marked goods. Trade mark holders, on the other hand, face a decreased ability to control the resale of genuine goods by 'unauthorised' distributors and resellers through parallel importation.

Ben Thorn is the director of Xuveo Legal and has practised in intellectual property and commercial law for over 10 years. Ben is a member of the Intellectual Property Society of Australia and New Zealand (IPSANZ) and a member of the QLS Technology and Intellectual Property (TIPS) Committee. The author gratefully acknowledges Dr Dimitrios Eliades of the Queensland Bar for his assistance in reviewing this article.

Notes

1 Act No.77 of 2018.

2 See, for example, *Seiko Epson Corporation v Calidad Pty Ltd* [2017] FCA 1403 at [361] – although the defence under s123(1) is mentioned in the decision, reliance upon it was not considered necessary as the respondent was held not to have "used" the mark under s120; *Dunlop Aircraft Tyres Limited v The Goodyear Tire & Rubber Company* [2018] FCA 1014 at [340] – the s123(1) defence was raised in respect of the resale of refurbished imported aircraft tyres, but the defence was not considered as the court rejected registration of the relevant trade marks.

3 Primary decision: *Scandinavian Tobacco Group Eersel BV v Trojan Trading Company Pty Ltd* [2015] FCA 1086 (*Scandinavian* (Primary Decision)); Full Court: *Scandinavian Tobacco Group Eersel BV v Trojan Trading Company Pty Ltd* [2016] FCAFC 91 (*Scandinavian* (Full Court)).

4 *Scandinavian* (Primary Decision) at [3], [17]-[18].

5 *Scandinavian* (Primary Decision) at [7], [87]; *Scandinavian* (Full Court) at [77].

6 *Scandinavian* (Full Court) at [67].

7 *Scandinavian* (Full Court) at [53].

8 Ibid.

9 See s6 of the Amendment Act. It should be noted that s123(2) defence in relation to trade-marked services is not modified by the Amendment Act.

10 *Intellectual Property Laws Amendment (Productivity Commission Response Part 1 and Other Measures) Bill 2018,* Explanatory Memorandum (Explanatory Memorandum), Sch 1, Pt 1 at [7].

11 Explanatory Memorandum, Sch 1, Pt 1 at [11].

12 See *Scandinavian* (Full Court) at [53].

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Member focus

Summary of Queensland Law Society's 2017-18 annual report

The following highlight summary offers just a small sample of the annual report contents. Download and read the full report at qls.com.au/annual-reports .

CEO's review

There are many diverse and dedicated professionals who make up Queensland Law Society and its membership, and it is a privilege to acknowledge the great work carried out by them for the good of our profession over the last year.

…The breadth and depth of the work that has been accomplished over the financial year is noteworthy. The Society ran a total of 138 events including conferences, seminars, webinars and workshops, with over 4300 delegates in attendance – we are one of the key legal content educators and CPD providers in Queensland.

Over the last year we have changed the way we deliver professional development by linking face-to-face sessions with live online feeds. This has helped us connect with the regions and those unable to attend events in person. We have farewelled DVDs and moved completely into on-demand, downloadable clips that members can access immediately, from anywhere in the world, via the QLS shop. We also made renewals and QLS Council elections easier, by moving them online and using more effective technology.

During the past year, our QLS Ethics and Practice Centre received over 4300 phone calls from across the state, in which they supported individual practices and solicitors by guiding them in their professional decision making, day-to-day practice and individual workloads. Our ethics solicitors also visited over 60 practices to assist them to operate in successful and sustainable ways. Our Trust Account Investigations team engaged with many of our members, including visits to over 600 practices, and attended to over 5500 telephone and email enquiries from the profession.

…It has been my pleasure to assist in the acknowledgement of our long-term members and annual award winners. We have continued to present our 25- and 50-year pins to members at special events across the state. Over the past year 93 members were recognised with 25-year pins, and 10 members were recognised with 50-year pins.

Gender of full members

The proportion of female full members continues to climb, with females accounting for 49.6% of all full members, up from 49.1% last year.

This change is driven by newly admitted practitioners, of which approximately 60% are female.

Female full members account for more than 53% of full members in large law firms (50+ practising certificates) and, outside of law firms, in the Corporate or Government sectors.

Recognising and celebrating our members

QLS is proud to recognise the work and contributions of members across the state. Each year we take pride in honouring members who serve as role models to the profession.

The Legal Profession Dinner and Awards (LPDA) was held on Friday 9 March 2018, coinciding with the conclusion of day one of Symposium, allowing our regional members who attended Symposium to also attend this prestigious event.

Our annual President's Medal is awarded in the spirit of Queensland's rich legal tradition, recognising commitment, contribution and outstanding performance in the profession. The 2018 medal was awarded to Kurt Fowler, criminal deference lawyer and QLS-accredited specialist at Fowler Lawyers in Caboolture

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The Queensland Law Society Annual Report 2017-18 was tabled in the Queensland Parliament on 28 September 2018.

Our Agnes McWhinney Award, named after Queensland's first admitted female solicitor, recognises the contributions of outstanding women in the legal profession. In 2018 this award was presented to Ann-Maree David, who has devoted her career to professional development. Ann-Maree led the Society's own continuing legal education program for eight years until 2002 before going on to establish the Queensland campus of the Australian College of Law.

The Equity and Diversity Awards debuted at the LPDA in 2018, having previously been conferred separately. The 2018 award for the large legal practice category was presented to Maurice Blackburn Lawyers, and the small legal practice category was awarded to Cairns-based Miller Harris Lawyers for the third time.

Leading the profession

The Society advocates for good law, and good lawyers, for the public good.

The Society's 27 standing policy committees are comprised of over 350 volunteer committee members who contribute their expertise and knowledge to advocating for good law for the public good. Their dedication enables the Society to develop sound and balanced submissions to government when seeking legislative and policy reform which will have a positive impact for both the legal profession and the Queensland community. Our committee members come from a range of professional backgrounds, ensuring that our advocacy is representative on key issues affecting practitioners.

The Society values its relationship with the Queensland Government and the opposition, and is regularly consulted on the development of policy positions and proposed legislative amendments, leading to better outcomes and more responsive legislation. The Society also engages with the courts on procedural reform and practical issues affecting court users, including consultation on draft practice directions.

169 QLS policy committee meetings
149 Stakeholder engagements
212 Legal policy submissions
20 Parliamentary public hearings

Reconciliation Action Plan

On 5 July 2017 QLS launched its inaugural Reconciliation Action Plan 2017-19. Over the financial year, the Society strengthened its commitment to reconciliation by raising awareness of First Nations issues, increasing engagement with Elders, First Nations peoples, organisations and legal stakeholders, as well as exploring ways to increase opportunities for First Nations peoples. Our action items and important successes included:

- Successful endorsement by Reconciliation Australia of the Society's inaugural RAP in May 2017.
- Reconciliation Action Plan Working Group – 91% of members identify as First Nations peoples and 90% of members are also legal practitioners.
- Establishment of inaugural QLS Reconciliation and First Nations Advancement Committee (RFNAC) – Since October 2017 to June 2018, the RFNAC has submitted 12 positions to policy reform.
- Cultural awareness training – the Society has successfully introduced cultural awareness training to its staff, which was rolled out during the first half of 2018. The sessions engaged employees in cultural learning opportunities to increase awareness of First Nations cultures, histories, achievements and protocols.
- LawLink support – the LawLink program was established in 2004 to bridge the cultural divide between Indigenous law students and the legal profession. Students gain insight into the profession through formal and informal meetings and site visits to law firms, barristers' chambers, community legal centres and various courts.
- Yarning circles – Society staff engaged in a Yarning Circle during National Reconciliation Week 2018 to encourage staff to come together and share stories of their experiences and understanding of Aboriginal culture and traditional practices.
- Human resources – the Society has implemented RAP on-boarding for all new staff to raise awareness about reconciliation and the Society's commitments set out in the RAP.
- QLS First Nations Awards – in 2018, QLS inaugurated and conferred two awards: The QLS First Nations Student of the Year award (awarded to Nareeta Davis) and the QLS First Nations Lawyer of the Year award (awarded to Leah Cameron).

The legal landscape and plans for the future

The Society's strategic and operating plans form its short- and long-term roadmaps. We produced and approved the strategic plan prior to the 2017-18 financial year, after considering member feedback, previous corporate results, and other internal and external factors.

Our new operating plan, effective 1 July 2018, continues the strategic goals, objectives and key performance indicators of our strategic plan, with a focus on five priority areas:

1. Position QLS as a trusted advisor of law reform in Queensland by engaging with government in areas of legislative reform important to our members and the community.
2. Implement the information management and business processes systems upgrades and improvements.
3. Develop a member services capability expanding the QLS Ethics Centre offering into practice care, practice support and career advancement.
4. Develop a leading accessible technology-supported learning and development offering.
5. Strengthen our QLS culture. Our culture will be collaborative and collegial, there will be clear and strong inclusive leadership, operationally and strategically. We will develop our talent. We will focus on wellbeing, diversity and inclusion and on our staff's contribution to the community. Staff will be rewarded based on equity, merit and performance. We will focus our second year RAP on our staff and work towards a QLS solicitor graduate program and becoming a citation holder as an employer of choice for gender equity.

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THE TIP OF A TAXATION ICEBERG?

The potential liability of a legal personal representative

A person's appointment as a legal personal representative (LPR) is often perceived as a privileged role whereby a family friend or trusted adviser ensures that the deceased's wishes are given effect.

However, this fiduciary role also carries with it an array of responsibilities which should be considered before any appointment as an executor or administrator is accepted.

An LPR is personally liable for all liabilities incurred in the estate's administration. The LPR has a right of indemnity against the assets of the estate, but if they fail to pay a liability before distributing the estate, the LPR will be personally liable.

Further, an LPR inherits the liabilities which were owing by the deceased at the date of death. This liability is, however, limited to the value of the assets of the estate. This includes the deceased's outstanding tax liabilities and any tax payable following the issue of amended assessments that may be issued to the LPR in respect of the deceased's prior year assessments.

When probate or letters of administration are obtained, and the estate has been distributed prior to the payment of tax liabilities, the Commissioner of Taxation will pursue the LPR. Alternatively, when probate or letters of administration are not granted, the commissioner may determine the deceased's outstanding tax-related liabilities and authorise a member of the Australian Federal Police (or state police) to recover such an amount from the deceased's property.

Essentially, there are three time periods in which the Australian Taxation Office (ATO) may issue a notice of amended assessment in respect of a deceased individual.

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Ian Raspin and **Angela Cornford-Scott** discuss the potential taxation liabilities of a legal personal representative (LPR) and note the release of a practical compliance guideline which may reduce these.

Firstly, the commissioner may issue an amended assessment in respect of a deceased individual within two years of the date on which the commissioner gave notice of the assessment to the deceased, and that person was either not carrying on a business or was a sole trader that would otherwise qualify to be a small business entity, (or was a partner in a partnership or a beneficiary of a trust where the partnership or trust was itself a small business entity).

Broadly, a small business entity is an entity that carries on a business whose aggregated turnover is less than $10 million.

Given the breadth of persons covered by this amendment period, most deceased individuals have a prospective amendment period capped to two years.

Secondly, the commissioner may have up to four years after the date on which the commissioner gave a notice of assessment to the deceased if that individual carried on a business and was not a small business entity, (or was a partner in a partnership or a beneficiary of a trust which was not a small business entity). While less common, an individual (for example, a beneficiary of an investment trust) may be subject to an extended four-year amendment period.

Thirdly, an assessment may be amended at any time if the commissioner believes that there has been fraud or evasion. If an LPR believes such an amended assessment may issue, they should seek specialist advice.

Accordingly, a prudent LPR should make sure that all the deceased's outstanding income tax returns are lodged and that any related income tax liabilities have been met before the estate is distributed. An LPR should also request an amended assessment if they become aware of any prior year errors or omissions to ensure that outstanding tax liabilities are crystallised before the estate is wound up.

In Queensland, an LPR can advertise for creditors pursuant to the *Trusts Act 1973*, but the protection provided by this section is unlikely to protect against a liability arising under Commonwealth legislation, such as the Income Tax Assessment Acts.[1]

Further, it is doubtful that the defence of *plene administravit* would be available when a claim is made by the commissioner against an LPR after the estate has been distributed.[2]

Understandably there are examples where an LPR has elected to defer the distribution of an estate until the relevant amendment period has elapsed to quarantine themselves from any prospective tax liability.

To alleviate such concerns the ATO has issued Practical Compliance Guideline PCG2018/4, which proposes that an LPR of certain smaller and less complex deceased estates can distribute assets of the estate to beneficiaries within a shorter time frame, without exposing themselves to a personal liability.

Essentially, the LPR of such estates will not be liable for any taxation liability of the deceased if:

1. The LPR has no notice of any actual errors in the assessments or any fraud or evasion.
2. The LPR acted reasonably in lodging all of the deceased's outstanding returns (or advising the ATO that such returns were not necessary).
3. The ATO has not given the LPR notice that it intends to examine the deceased person's taxation affairs within six months from the lodgment (or advice of non-lodgment) of the last of the deceased's outstanding returns.

However, importantly from a Queensland perspective, reliance can only be placed on the above guideline if either probate or letters of administration have been granted.

In addition, all the following conditions must be met:

- In the four years before their death, the deceased did not carry on a business and was not assessable on a share of the net income of a discretionary trust.
- The estate assets only comprise public company shares or interests in widely held entities, death benefit superannuation, Australian real property, cash and personal assets (for example, cars and jewellery).
- The total market value of the estate's assets at date of death is less than $5 million.
- The deceased was not a member of a self-managed superannuation fund.
- That no estate assets are intended to pass to a tax advantaged entity.

In any estates where these conditions cannot be met, then the LPR remains liable for a period of potentially up to four years.

Finally, when further assets come into the hands of the LPR after the administration of the estate, the ATO will treat the LPR as having notice of potential claim by the ATO, to the extent of those assets.

While the guideline is not a binding public ruling, it nonetheless has the capacity to significantly streamline the administration of smaller and less complex estates.

Accordingly, while it may appear counterintuitive, it may in fact be preferable for probate or letters of administration to be sought to accelerate the administration of the estate.

Angela Cornford-Scott is a principal of Cornford-Scott Lawyers, Chair of the Queensland Law Society Succession Law Specialist Accreditation Committee and a member of the Queensland Law Society Succession Law Committee. Ian Raspin is a Certified Practising Accountant and a Director of BNR Partners, where he heads the firm's specialist Estates and Trusts Division.

Notes

[1] S109 Commonwealth Constitution gives primacy to Commonwealth laws over inconsistent state laws.

[2] See *Taylor v Deputy Commissioner of Taxation* (1969) 23 CLR 206.

SEXUAL HARASSMENT IN LAW

WHAT ARE 'ALL REASONABLE STEPS' FOR PREVENTION?

There is no doubt that the Australian legal profession must act to curb sexual harassment in legal workplaces. **Bridget Burton** suggests that we start by taking note of lessons learnt in New Zealand and the results of a revealing Australian survey.

In Australia, we are yet to see any major public exposure of the problems of sexual harassment in the legal profession.

Despite this, it is likely that we do have a problem.

Some potential complainants may worry about how they will be perceived by the profession. Others are probably justifiably fearful that our industry will continue to punish, in some subtle way, those who make public claims against their employers.

On 12 September 2018 the Australian Human Rights Commission (AHRC) released 'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces'. One third of respondents reported having been sexually harassed at work, but very few had told their employer – mostly out of fear of adverse consequences.

The most alarming findings in the report come from its review of the three preceding surveys that identify trends over time. As might be expected, overall rates of sexual harassment have increased significantly (currently sitting at 33%). However, they also show that:

"Reporting of workplace sexual harassment has decreased over the years. In 2003, 32% of people who had experienced sexual harassment in the workplace formally reported the experience or made a complaint, compared with 16% of people in 2008, 20% of people in 2012 and 17% of people in 2018.

"A substantial proportion of people who made a formal report experienced negative consequences. This has steadily increased over the years of the survey, from 16% in 2003, to 22% in 2008, 29% in 2012, to 43% in 2018. Negative consequences included being labelled a troublemaker, being victimised or ignored by colleagues, being disciplined or resigning.

"The rise in negative consequences for workplace sexual harassment complainants over the years of the survey is an alarming finding of the 2018 National Survey." [p102]

Even if they did report and endure the consequences, around half the time respondents to the survey found that ultimately nothing changed in their workplace.

The fit with MeToo?

It is a feature of the MeToo movement that individuals and industries exposed by one or two complainants have subsequently been overwhelmed by an uncontrollable increase in the number of allegations as others 'come out of the woodwork' once the risk of complaint is assessable and seems reasonable.

It may only take one complainant to bravely step forward for the wave to break and the Australian legal profession to come under scrutiny.

Then again, Australia might mirror the New Zealand experience. The NZ legal profession had its MeToo moment in the public exposure of workplace culture at top law firm Russell McVeagh.

On 5 July 2018 that firm released 'An Independent Review of Russell McVeagh' by Dame Margaret Bazley. The particular crisis leading to her investigation was a number of disclosures by young women employees (summer clerks) about treatment they had received and witnessed, including a series of sexual harassment incidents which occurred during festivities over the 2015/2016 summer.

A month before the Bazley report was released, the New Zealand Law Society published the outcome of its own survey into sexual harassment in the legal profession, which found that 33% of female lawyer respondents reported being sexually harassed in the preceding five years. Some of the detail of this review was reported in the July 2018 *Proctor* column by Queensland Law Society CEO Rolf Moses.

A tide of complaints about the Australian legal profession is possible, even likely. And with a national inquiry into sexual harassment in the workplace being conducted by Sex Discrimination Commissioner Kate Jenkins, these are either exciting times, or terrifying ones, depending on your perspective.

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Now is the time for legal workplaces to ensure they have systems in place to encourage, handle and respond to complaints of sexual harassment. In addition to general responsibilities around safe workplaces that exist across many workplace instruments, s106(2) of the *Sex Discrimination Act 1984* specifically requires employers who do not wish to be held responsible for the unlawful behaviour of their employees to take "*all* reasonable steps" to prevent sexual harassment from occurring. (*emphasis added*)

'All reasonable steps' in 2018

The AHRC publication, 'Effectively preventing and responding to sexual harassment: A Code of Practice for Employers' (2008) is now 10 years old but is still useful. However, to respond to the 'all' in "all reasonable steps" legal workplaces need to be doing more.

The recommendations made by Dame Bazley for Russell McVeagh are a good place to start. Relevantly, she found legal workplaces should have:

- human resources staff that are properly trained and resourced, with the authority to engage external investigators where appropriate
- a standalone sexual harassment policy *and* a bullying policy, as well as other relevant policies to facilitate good behaviour and handle complaints about bad behavior
- a complaints process that is user focused (built with input from young and female lawyers) and confidential, with a range of pathways to complain and raise concerns
- a disciplinary process that offers an opportunity to improve behaviour as well as strong mechanisms to handle failures to improve or serious misconduct
- a promotions policy focused on management skill, particularly at partner level, and that assesses ongoing performance of partners and senior lawyers in relation to behaviour, adherence to desired firm culture, and management capabilities
- employees who are encouraged to leave work at a reasonable time and cultivate outside-of-work interests and relationships
- social events (especially recruitment related or targeted to young/early career lawyers) moved more to lunchtime than evening, with limited alcohol and plenty of food
- a standalone alcohol policy, especially for legal practices with a known problem
- unconscious bias training for all staff, and increased support for junior women lawyers in particular, to build a more woman-friendly culture (including not giving young women more administrative work because they seem 'better organised' than their male counterparts)
- visible top-down leadership on culture and behavior.

Broader organisational culture is also important and should not be forgotten in an overly targeted effort to stamp out sexual harassment. Much sexual harassment is a particularly nasty and effective form of bullying (for example, *Richardson v Oracle* [2014] FCAFC 82), and addressing it alone without looking at bullying more generally is a mistake.

It is important for legal employers to also understand that work history can reflect the bad behaviour of others in the form of mental illness, absenteeism or 'presenteeism', unusual career decisions such as leaving a great job for a lesser one, and less-than-glowing references. To ensure that the whipping tail of a past experience of sexual harassment (or bullying generally) does not continue to flay a legal career ad infinitum, care needs to be taken in hiring and promotion decisions so that such work history can be overcome.

A decision to not socialise out of hours, to stay away from Friday drinks, or to leave functions early should also be carefully interpreted – rather than indicating reclusive or disengaged tendencies, the person making those choices may be demonstrating appropriate boundaries and modelling a healthy professional culture.

The New Zealand experience also has lessons for the university sector, particularly clinical educators and staff involved in recruiting and promoting clerkships. Universities should:

1. Be careful about where they send students, and seek assurances around their treatment.
2. Train law students specifically about what is and is not appropriate workplace behaviour before they go into legal practices, and foster a culture of championing and modelling good behaviour.
3. Empower students to respond by speaking out and supporting each other if conduct falls short of expectations.
4. Support students who experience harassment or bullying by providing access to counselling and other services, including legal if necessary.

As part of its response, the New Zealand Law Society has developed and adopted a Gender Equality Charter that seeks to address other structural problems, including the gender pay gap. Perhaps it is time for one of those in Queensland, too.

Register for our livecast on 14 November covering sexual harassment, bullying and discrimination. Learn about the prevalence of these behaviours within the legal profession, available options if you need help, and QLS initiatives in this space. See **qls.com.au** for more details. Complimentary for QLS members.

Bridget Burton is the Acting Director of the UQ Pro Bono Centre. She has been seconded to the law school from Caxton Legal Centre where she holds the position of Coordinating Lawyer, Human Rights and Civil Law Practice. Bridget has worked in community legal centres and at Legal Aid for 13 years as a solicitor and practises mainly in human rights and anti-discrimination law.

Resources

New Zealand Law Society, 2018, Gender Equality Charter, **lawsociety.org.nz/law-society-services/women-in-the-legal-profession/gender-equality-charter** .

New Zealand Law Society, 2018, Workplace Environment Survey, **lawsociety.org.nz/practice-resources/bullying-and-harassment-in-the-legal-profession** .

Australian Human Rights Commission, 2018, 'Everyone's business: Fourth national survey on sexual harassment in Australian workplaces', **humanrights.gov.au/sites/default/files/document/publication/AHRC_WORKPLACE_SH_2018.pdf** .

Bazley, Dame Margaret for Russell McVeagh, 2018, 'Independent Review of Russell McVeagh', **russellmcveagh.com/getmedia/cc682d64-46a1-40e3-987b-cd82223bea24/Independent-Review-of-Russell-McVeagh-2018.pdf** .

Expert evidence

This article explores issues relating to expert evidence in civil proceedings.

1. Prove the facts on which the opinion is based

An expert is a witness who expresses an opinion about something. In other words, the expert takes into account certain information which is provided to them and then draws a conclusion based on that information.

An expert is not (usually) a witness who is able to give direct evidence in order to establish the truth of the information so provided. That direct evidence must be given in another way which is itself admissible.

For example, assume that you wish to have an expert provide a report as to the quantum of loss suffered by your client as a consequence of particular conduct of another party (which your client contends is unlawful).

You would brief the expert with documents relevant to that calculation and, in addition, your letter of instructions to the expert would set out facts which you ask the expert to assume are correct.

Subject to any agreement with the other parties to the contrary, you cannot then proceed on the basis that, because the documents are annexed to the expert report, they are admitted into evidence and do not need to be proven. Rather, because the expert's opinions in the report are based upon the documents (if that is the case), you will need to take steps to cause those documents to be admitted into evidence. Of course, the documents must be relevant and there must be a proper basis to seek to tender them.

Similarly, the facts provided to the expert (and on which the expert's opinion is based) must be established by other evidence at trial, unless a particular fact is not in dispute (such as, for example, it is a fact which is admitted on the pleadings). This means that the facts themselves must, as a starting point, be relevant.

This has the consequence that care must be taken when briefing an expert with facts and documents to ensure that there is an ability to prove those facts and documents at trial. If not, then the expert report may be inadmissible or, if it is admitted, the trial judge may decide not to accept the opinions expressed in it.

2. Preliminary brief

Depending on the nature of the matter, it may be prudent to brief the proposed expert with relevant documents and a basic statement of facts (both of which you know will be able to be admitted into evidence at trial) and, by way of oral instructions, ask the expert to meet in conference or confer by telephone to discuss the following:

a. whether the expert has appropriate expertise
b. the answers which the expert would give to particular questions if those questions were to be the subject of an expert report
c. the formulation of the questions which the expert should be asked to address, having regard to the issues in the case
d. any further information which the expert requires.

Such a discussion will assist you in forming a view as to whether to brief this particular expert at all and, if so, the content of any letter of instructions and brief given to the expert.

3. Letter of instructions to the expert

To brief an expert properly, a letter of instructions should be prepared and provided to the expert by you – not by your client.

As to the last point, the retention of the expert by you assists in maintaining the independence of the expert. An expert who is approached and retained by a client may start to feel sympathy for the client's cause and this may affect (or be perceived to affect) their impartiality.

As to providing a letter of instructions, rather than an oral brief, a letter enables the expert to be provided with a precise statement of any facts, and list of any documents, on which the report is to be based and what the expert is being asked to do. This avoids miscommunication or a misunderstanding between you and the expert as to these matters.

A letter also provides transparency to the trial judge and the other parties as to these matters.

Finally, a letter causes you to reflect on the facts and documents which your client will need to establish by admissible evidence at trial.

4. Content of letter of instructions

A letter of instructions to an expert should do the following (at least):

a. Identify the parties to the dispute to enable the expert to confirm their independence by reference to those parties.
b. Identify your client.
c. Identify the nature of the dispute in a neutral and summary way, without developing arguments as to why you client should succeed in the dispute.
d. Identify the question which the expert is being asked to answer. When framing the question, ensure that it is a question which is relevant to the facts in issue in the proceeding (for which you will need to have regard to the pleadings).
e. Ask the expert to confirm their expertise to answer that question and to exhibit a curriculum vitae to establish their expertise.
f. Identify the facts relevant to the opinion sought from the expert. These facts should be stated in a neutral manner and in the same terms as the pleading if possible. These facts must be facts which are common ground between the parties on the pleadings or which are capable of being proven by admissible evidence at trial.
g. Identify the documents provided with the letter in a list (and then provide those documents as annexures to the letter). These documents should be documents able to be tendered at trial. The list should not usually include the pleadings because that will encourage the expert to consider the dispute as a whole, including issues not relevant to their opinion.
h. Emphasise the need for the expert to explain the reasons for any conclusion reached. It is a common problem that experts fail to expose their reasoning in their reports.
i. Ask that the expert identify all facts and documents in the report on which the expert has relied to express any opinion. This may be a subset of what was provided to the expert by you or it may be all that was contained in or attached to the letter of instructions plus other information, such as journal articles or documents provided by you previously.
j. A copy of the relevant court rules with which the expert must comply.

A letter of instructions to an expert should not:

a. Identify the arguments which your client intends to advance at trial.
b. Contain any statements as to why you or your client contends that the other party is incorrect.
c. Identify the conclusion which your client contends is the correct one.

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Kylie Downes QC explains the key requirements in preparing your expert witness to develop a report and give evidence at trial.

d. Ask if the expert agrees with a particular stated outcome.
e. Make inflammatory or critical statements about the facts which appear designed to criticise the conduct of another party.

5. Avoid contact between the expert and your client

In order to maintain the independence of the expert, or to at least avoid the appearance that the expert is an advocate for your client, you should avoid allowing any contact to occur between your client and the expert. This is not an absolute proposition but, as the expert should not be relying upon any facts or documents other than those briefed to them in writing, and which letter and documents are to be tendered into evidence, the utility of any such contact is not apparent and can be detrimental.

This means that it is undesirable for your client to contact the expert directly by telephone or to prepare a memorandum to the expert (unless that document is admissible at trial), or to meet with the expert. All of these types of contact have a tendency to persuade the expert to form a view favourable to your client or at least give rise to a concern that there has been such persuasion.

An exception to this general rule may arise where your client needs to provide an explanation as to a factual matter to the expert. That explanation should be provided in your presence, reduced to writing in a formal letter of instruction and then be the subject of oral evidence by your client at trial.

6. Supplementary report

Further information, such as additional documents or an expert report delivered by another party, may become available after the expert has signed off on their report, and this could affect the expert's opinion. It is very important that the expert be briefed with that further information and asked to provide oral feedback as to whether that further information affects the opinions expressed in the report.

If the further information causes the expert to resile from the opinions expressed in the report, then you may consider not calling that expert as a witness at trial.

If the further information changes the expert's opinion (but in a manner which does not harm your client's case) or does not affect the expert's opinion, then you should seek a supplementary report from the expert which states this and provides an explanation.

If the further information is another expert report, the supplementary report could explain why the expert disagrees with any of the other expert's opinions (if applicable) with an explanation of the reasons for that disagreement.

7. Preparing an expert to give evidence

As part of preparing an expert to give evidence at trial, you should explain to the expert that:

a. The trial judge and counsel will not necessarily understand the acronyms, terminology and other language particular to the subject matter of the expert's expertise and so the expert may need to explain concepts and use language which facilitates understanding by others in the court.
b. If an acronym or special term is used by the expert in oral evidence, its spelling may need to be identified for the transcript.
c. The expert's duty is to assist the court and not to act as an advocate for a party. This means that an expert should agree with propositions put to them, even if that harms the case of the party who called them (for example). It also means that the expert should not be afraid to admit to error.

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

The prior convictions conundrum

Should you disclose them if the prosecution fails to?

Does Rule 30 of the Australian Solicitors Conduct Rules (ASCR) require a defence lawyer to disclose a client's prior convictions when the prosecution has failed to do so?

On occasions a prosecutor may not have a defendant's complete criminal history and you may be aware that your client does have priors. As a defence lawyer are you required to disclose to the court the information you have?

Let us assume that your client has pleaded guilty to driving a motor vehicle with a blood alcohol level of 0.11. On sentencing the police prosecutor informs the magistrate that your client has no previous convictions. You are aware that your client was convicted of a similar offence within the last three years. What is your ethical duty?

The general proposition is that as defence lawyers we are not required to disclose to the court our client's adverse criminal history. Our duty is to act in our client's best interests (Rule 4.1.1 Australian Solicitors Conduct Rules (ASCR)) and as a consequence we should not make such a disclosure to the prosecutor or the court unless our client specifically instructs us to do so and the client understands the consequences of doing so (refer to the obligation of confidentiality in Rule 9 ASCR, the obligation to provide clear and timely advice to permit a client to make informed choices in Rule 7.1 ASCR and the need to follow a client's lawful, proper and competent instructions in Rule 8.1 ASCR).

In *R v Bourchas* [2002] NSWCCA 373 (*Bourchas*), Giles JA (with whom Levine and Sperling JJ agreed) noted that in sentencing, the Crown and defence act within the adversary system. His Honour also said that "...it is not consistent with that system that the offender is under a duty to bring forward everything adverse to the offender's interests on sentencing" [at paragraph 92].

The rationale for this was best explained by Thomas J (with whom Connolly and Ambrose JJ agreed) in *Boyd v Sandercock, ex parte Sandercock* (1990) 2 QdR 26 at 28 (*Boyd*):

"A court is bound to decide a case on the evidence before it. The penalty that was imposed was entirely in conformity with both the facts and the law. All that happened was that the prosecutor failed to provide evidence to the court of a relevant fact. The consequence of this should be no different from that in any other case where a party fails to call relevant evidence. It makes no difference whether the proceedings follow a plea of guilty or not guilty. The court is to decide the case on the evidence before it. Of course where a party deliberately misleads the court, other remedies may exist… Nothing like that happened in the present case in which the prosecutor was simply not aware of the previous conviction and elected to proceed on the assumption that there were no previous convictions. The solicitor for the appellant was in the circumstances under no positive duty to bring it to the attention of the court."

We cannot knowingly or recklessly mislead a court (Rule 19.1 ASCR) by either the words we use or by omitting what may be necessary to be said. This is to avoid being either misleading or deceptive to the court (*R v Rumpf* [1988] VR 466 at 472 per McGarvie (*Rumpf*)).

As Lord Chelmsford once observed, "half a truth will sometimes amount to a real falsehood" (Peek v Gurney (1873) LR 6 HL 377 at 392). So as long as we do not put before the court misleading statements or half-truths, it is not our duty to disclose matters detrimental to our client, for example, prior convictions, or adverse aspects of his or her antecedents or character.

In these circumstances we walk a fine line in how we craft our submissions. We cannot put submissions that would suggest the client has not previously offended in the manner disclosed to us by the client but of which the court is unaware (Peter Hidden, 'Some ethical problems for the criminal advocate' (2003) 27 Crim LJ 191 at 194 (Hidden)).

The general duty to not mislead or deceive a court either knowingly or recklessly can be found in Rule 19.1 ASCR. This general duty is a specific application of the paramount duty in Rule 3 ASCR. Our ethical duty noted in *Bourchas, Boyd and Rumpf* is recognised in Rule 19.10 ASCR as follows:

"A solicitor who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer."

Rule 30 ASCR provides:

"A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact."

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by Stafford Shepherd

This rule is directed to sharp practices. If a prosecutor is either not aware of the prior convictions or fails to provide evidence to the court of a relevant fact, Rule 30 ASCR does not alter the general principle that we are not required to disclose to the court our client's adverse criminal history unless otherwise instructed by our client. A client should be provided with all relevant and material information so as to make an informed choice before consenting to disclose an adverse criminal history.

In the adversarial setting of the sentence hearing, it is for the prosecution to establish the relevant facts and not the client. This is not a situation where our client is taking unfair advantage of the 'obvious error' of the prosecutor to obtain a benefit which has no supportable foundation in law or fact.

As noted in *Boyd*, the court is bound to decide the case on the evidence before it. A penalty imposed by a court, where the prosecution has not provided evidence of prior convictions, is in conformity with both the facts and the law. Rule 19.10 ASCR reinforces our ethical duty and Rule 30 ASCR does not detract from it. There is no positive duty to bring prior convictions or adverse antecedents or character issues to the court's attention. The solicitor in those circumstances cannot be said to be taking unfair advantage of the obvious error of another person. On the facts described at the beginning, a defence lawyer would not be in breach of Rule 30 ASCR.

Remember there may be occasions, after the client has considered and understood the relevant legal issues, for them to make an informed choice about the disclosure of prior criminal history; but that is for the client to decide (see Hidden at page 194).

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

Loss of capacity – an issue for all lawyers

with Christine Smyth

"The husband in this case is not the first nor will he be the last litigant who thinks he is smarter than those advising him. Nor will the husband be the first or last litigant to make foolish decisions. That in my view does not make him a person with a disability."[1]

Many of us have irrational, demanding, clamorous clients, often when involved in complex legal matters. However, we also know that cognitive decline frequently involves this kind of conduct. So, at what point does the behavior of a client raise questions as to their capacity and invoke our duty to the court to bring it to the court's attention?

Wembley & Wooten (*Wembley*),[2] a recent decision of the Family Court, examines the capacity of a client to conduct litigation and the duty of the acting solicitor to bring their concerns before the court. It draws on the decisions of *Goddard Elliot (a Firm) v Fritsch* [2012] VSC 87 (*Goddard*) and *Pistorino v Connell* [2012] VSC 438 (*Pistorino*),[3] distinguishing the facts of *Pistorino*, while affirming the applicable legal principles enunciated in both decisions.

All adults are presumed to have capacity, unless the contrary is established on the balance of probabilities.[4] Rule 8 of the Australian Solicitors Conduct Rules 2012 requires a solicitor to follow a client's lawful, proper and competent instructions.

Here we are concerned with "competent". Capacity is to be determined according to the context.[5] When certain factors are present, solicitors have a duty to ensure the client has the requisite legal capacity before either taking instructions or assisting them to make a legal decision which will affect their interests.[6]

In *Wembley*, the husband's solicitor became increasingly concerned as to his client's ability to properly give instructions. In August, 2017 (five months prior to the application) he wrote to the husband's treating psychiatrist querying his client's capacity. In September, 2017 the psychiatrist reported that their mutual client did "not presently present with prominent cognitive impairment".

Notwithstanding, the solicitor maintained his concerns, bringing an application before the court. The solicitor's evidence included

> "Talk sense to a fool and he calls you foolish."
>
> – Euripides, *The Bacchae*

the husband being affected by alcohol consumption, his heavy chain-smoking, reluctance to attend the solicitor's office, believing his solicitor was wrong, the husband's behaviour at the conciliation conference, and inappropriate email communications.[7]

Having regard to those factors and his duties to the court under the provisions of *the Legal Profession Uniform Law Application Act 2014* (Vic.),[8] and *Goddard*, the husband's solicitor brought an application for a case guardian to be appointed on behalf of his client.[9] The husband did not oppose the application, counterintuitively, he "indicated to the Court that he proposes to continue instructing the applicant in this case",[10] regardless of the outcome.

In Goddard, Bell J articulated the solicitor's duty as follows:

"…the primary responsibility of a lawyer is to be satisfied the client has the mental capacity to instruct. Doubts about this issue in the mind of the lawyer can also have important consequences for the conduct of legal proceedings. If the issue cannot be resolved to the reasonable satisfaction of the lawyer, as occurred in the present case, the lawyer must raise the issue with the court. It is the court which has the final responsibility to determine the issue."[11]

There was supporting evidence from the wife's affidavit material exhibiting the husband's medical history,[12] which included "Chronic Post Traumatic Stress Disorder (PTSD), Major Depressive Disorder-Recurrent and Alcohol Use Disorder and a history of prominent longstanding intermittent depressive symptoms, low moods associated with despondency (not suicidal), disturbed sleep, social avoidance and symptoms of anhedonia and amotivation".[13]

Upon the application being made, the court ordered that the husband attend further medical examination. The medical evidence was that the husband could "adequately conduct and give adequate instructions for the conduct of the case"[14] with the caveat that the doctor was not privy to the privileged sealed evidence of the husband's solicitor.[15]

Ultimately, the court found that the husband had the requisite capacity.

The difficulty with these matters is not that the client must have completely lost capacity, to the extent of invoking an enduring power of attorney, but rather "[T]he standard of capacity which is required for a person to participate in legal proceedings is the same standard of capacity which is required for a person to enter into legal transactions."[16]

One in five people between the ages of 16 and 85 suffer a mental illness in any year,[17] which, while not impacting their overall capacity, may impact their capacity to engage in legal matters. Practitioners may now, more than ever before, need to be live to their duties in this context. It is an onerous duty and one that may call for the practitioner contemplating such applications within the client retainer.

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.

Notes

1 *Wembley & Wooten* [2018] FamCA 334 at [31].
2 [2018] FamCA 334.
3 See page 40 of the October 2013 edition of *Proctor* for a previous article by this writer on these cases.
4 *Hawkes v Wilkie* [2012] NSWSC 1039 – the question was whether the elderly person had the capacity to create a trust by which she gave $300,000. Upon the death of the elderly person, the question of her capacity to make the gifts and to create the trust was litigated and very much turned on the evidence. See also: *Eg, Re Bridges* [2001] 1 Qd R 574; *Re T* [1992] 4 All ER 649, 664 (Lord Donaldson MR).
5 *Gibbons v Wright* (1954) 91 CLR 423.
6 *Legal Services Commissioner v Ford* [2008] LPT 12; *Legal Services Commissioner v Comino* [2011] QCAT 387; *Legal Services Commissioner v de Brenni* [2011] QCAT 340.
7 At [22] much of the evidence was sealed due to client confidentiality.
8 Equivalent Queensland provisions are found in the Australian Solicitor Conduct Rules.
9 At [1].
10 At [32].
11 At [6].
12 At[11].
13 At [13].
14 At [17].
15 At [17].
16 At[23] citing the passage from *Goddard* at 554-555.
17 blackdoginstitute.org.au/docs/default-source/factsheets/facts_figures.pdf?sfvrsn=8 .

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Final 2018 Selden Society lecture

Law and politics in McCawley's case
Presented by Professor Nicholas Aroney

Thursday 22 November
5.15 for 5.30pm
Banco Court
Queen Elizabeth II Courts of Law
Level 3, 415 George Street, Brisbane

The appointment of Thomas William McCawley to the Supreme Court of Queensland in 1917 was a decision destined to provoke controversy. The challenge to his appointment was based on what were called 'purely legal and constitutional grounds', but personal motives, partisan manoeuvring and ideological goals were never far from the surface. The case was heard by the Supreme Court, the High Court of Australia and ultimately the Privy Council of the United Kingdom, and involved several layers of constitutional controversy. McCawley ultimately won the case and was soon after appointed Chief Justice. Sadly he did not live long to enjoy it. He died three years later while rushing to catch a train at Roma Street Station.

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Econveyancing: from growing pains to one giant leap?

by Molly Thomas, the Legal Forecast

The face of conveyancing in Australia is changing, but is the industry moving fast enough?

It has been 10 years since the Council of Australian Governments committed to creating a single, national econveyancing mechanism for the Australian property industry. This push was as a result of two previous attempts; Victoria's Electronic Conveyancing Victoria (ECV) and New South Wales' National Electronic Conveyancing Office (NECO). These would become Property Exchange Australia (PEXA), which has proved to be a popular marker of innovation in the property industry.

A report by PricewaterhouseCoopers (PwC) in 2015 stated that a national econveyancing system could result in an increase of the total annual national household income of $314 million and boost economic activity by $259 million in real GDP. More recently, a Deloitte report, published in May this year, found that the net benefit of 2% of electronic lodgements to practitioners of the econveyancing system in 2016-17 stood at $0.2 million.[1]

Since then, that number has been on an upward trend, as more transactions become mandated across the country. The report goes on to forecast that the net benefits to the conveyancing industry will balloon out to $89 million a year when a 100% digital lodgement and settlement process is reached by 2021-22. But how will we get there? And what is standing in our way?

New challenges

It is clear that legal practitioners accept the reality of electronic conveyancing. Research by GlobalX last year found that more than 91% of respondents viewed electronic conveyancing as inevitable, with 72% of respondents saying it would positively impact the industry.[2] This is especially important given the growing rate of transactions and the ever-slimming profit margins on conveyancing services.[3]

Deloitte's research found that traditional conveyancing involves a large amount of time-intensive tasks, with anecdotal evidence from practitioners noting that they spend up to 45 minutes on the phone with financial institutions and up to two hours travelling to settlement.[4]

In an industry in which it is increasingly less profitable for law firms to act, this may cause clients to go to non-lawyers for conveyancing, which carries with it certain risks.

This should be reason enough for the whole industry to embrace digitisation, but this has yet to happen.

Obstacles to implementation

The Deloitte report provides a few reasons for this. Transitioning a 160-year old paper process to a digital one takes time, and as the report points out, involves a steep learning curve. Moreover, while the industry transitions to 100% digital, two processes need to coexist, and although close to 7000 practitioner firms are already on the platform, some have yet to come on board. As a result, if one party in a multiple party transaction has not adopted the electronic option, then the whole transaction reverts to paper.

However, it has also been noted that the uptake in Queensland has been especially slow,[5] which might suggest that the reluctance to embrace electronic conveyancing goes beyond growing pains. Part of this may be from early concerns about security.[6] However, cybersecurity risks existed long before the emergence of econveyancing and have been an industry-wide concern.

In December 2017, at least two Queensland law firms lost several millions to hackers in what was reported as a "highly sophisticated" email scam that happened in the paper world.[7] That is why industry players such as the Queensland Law Society have routinely highlighted to members the need to be cyber-aware.[8] Email fraud is a systematic issue in the legal profession, which goes beyond the conveyancing process.[9] This should not – and indeed cannot – impede the embrace of electronic conveyancing if lawyers still want to have a role in this process. It should also be noted that, with more practitioner uptake, electronic conveyancing will be easier to regulate, and bad actors easier to detect.

The desirability of overcoming this reluctance is evidenced by the potential benefits to the industry. In New Zealand, an econveyancing system was introduced in 2002 with it becoming the standard process from 2009 onwards. This led to a dramatic uptick in satisfaction: increasing from 48% in 2005 to 80% in June 2009. By 2012-13, only 2% of transactions were conducted through the paper process.[10] New Zealand is now considered to be the most efficient global economy for registering property.[11]

The forecasted figures for 2021-22 are possible and the industry is well ahead of schedule. The quicker we get there; the faster practitioners will be able to realise the benefits.

Molly Thomas is an Executive Member of The Legal Forecast (TLF). Special thanks to Michael Bidwell and Benjamin Teng of The Legal Forecast for technical advice and editing. We also thank Julie Khoo and Jessica Caire from PEXA 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 Deloitte Access Economics, 'Impacts of e-Conveyancing on the Conveyancing Industry' (Deloitte Access Economics, May 2018), deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-impact-e-conveyance-pexa-220518.pdf 1-2.

2 Sol Dolor, 'Most Qld Property Lawyers Still Waiting on Clear Rollout of Electronic Conveyancing' *Australasian Lawyer*, 9 September 2017, australasianlawyer.com.au/news/most-qld-property-lawyers-still-waiting-on-clear-rollout-of-electronic-conveyancing-241416.aspx .

3 Neil Rose, 'Pity The Poor Conveyancer' *The Guardian*, 20 January 2012, theguardian.com/law/2012/jan/19/conveyancers-struggle-to-survive .

4 Deloitte, above n1, 11, 21.

5 Dolor, above n2.

6 See examples of concerns about security in the United Kingdom: Land Registry, Report on responses to e-conveyancing secondary legislation part 3, 2011.

7 Toby Crockford, 'Queensland Law firms Lose Millions to Hackers in 'Highly Sophisticated' Email Scam' *Brisbane Times*, 17 December 2017, brisbanetimes.com.au/national/queensland/queensland-law-firms-lose-millions-to-hackers-in-highly-sophisticated-email-scam-20171217-p4yxsb.html .

8 Queensland Law Society, 'Cyber Security', qls.com.au/Knowledge_centre/Ethics/Resources/Cyber_security .

9 Crockford, above n8.

10 Deloitte, above n1, 17.

11 World Bank, *Doing Business*, doingbusiness.org/data/exploreeconomies/new-zealand#registering-property .

High Court and Federal Court casenotes

High Court

Administrative law – migration – jurisdictional error – multiple bases for decision – materiality

In *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 (15 August 2018) the High Court held that there was no jurisdictional error in a decision of the Administrative Appeals Tribunal (AAT) notwithstanding that the AAT had erred considering one visa criterion, because the AAT had correctly found that the appellant did not meet another, independent visa criterion. The appellant applied for a partner visa. To be granted the visa, the appellant had to show, relevantly, that the application had been made within 28 days of his ceasing to hold another visa "unless the Minister was satisfied exceptional circumstances existed". He also had to show that he did not have a debt to the Commonwealth. The AAT was not satisfied either criterion had been met. In the Federal Circuit Court, the Minister conceded that the AAT had erred by considering the exceptional circumstances criterion as at the date of the visa application, not the date of the AAT decision. However, the Minister contended that the decision should not be set aside because the finding as to the debt to the Commonwealth was correct. The court rejected that argument, finding that the error in respect of exceptional circumstances was jurisdictional and the AAT's decision was therefore invalid. The Full Federal Court on appeal held that the error was jurisdictional, but that the AAT still retained authority to make the decision on the other criterion. The High Court held that to describe an error as jurisdictional refers not only to the existence of error, but also to the gravity of that error. The extent of non-compliance required to make out jurisdictional error will turn on the construction of the statute. The question is whether, on the proper construction, the error is of a magnitude that takes the decision outside the jurisdiction conferred. Statutes are "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance". That threshold "would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made". In this case, the AAT's error could have made no difference, because the AAT was correctly satisfied that the second, independent criterion, about the debt to the Commonwealth, was not met. The error was therefore not material and not jurisdictional. Kiefel CJ, Gageler and Keane JJ jointly; Nettle J and Edelman J separately concurring. Appeal from the Full Federal Court dismissed.

Administrative law – migration – jurisdictional error – multiple bases for decision – materiality

Shrestha v Minister for Immigration and Border Protection; Ghimire v Minister for Immigration and Border Protection; Acharya v Minister for Immigration and Border Protection [2018] HCA 35 (15 August 2018) was heard concurrently with *Hossain* (above) and concerned similar legal principles about jurisdictional error and materiality. In these cases, the appellants had been granted student visas. A requirement of the visa grant was that the students were "eligible higher degree students", which in turn required that the visa applicants be enrolled in a relevant preliminary course of study. The appellants' visas were cancelled because a circumstance necessary to the grant of the visa was no longer met. Although the appellants had been enrolled in the required preliminary courses of study when granted the visas, they were no longer so enrolled. The AAT affirmed the decisions to cancel the visas in each case. The Full Federal Court held that the word "circumstance" referred to a factual state of affairs, rather than a legal characterisation of a state of affairs. The AAT had erred by focusing on whether the appellants satisfied the definition of "eligible higher degree students", rather than on whether the prerequisite of enrolment in the relevant course was satisfied. However, the Full Court refused to set aside the AAT's decision because the error could have made no difference. The High Court dismissed the appeal because, following the principles from *Hossain*, even if the AAT had made the error alleged, that error could have no impact on the decisions. At most, the error meant that the AAT asked a superfluous question. The AAT's factual findings, reasoning and exercise of discretion were not impacted. Any error was not material and not jurisdictional. Kiefel CJ, Gageler and Keane JJ jointly; Nettle and Edelman JJ separately concurring and holding that there was no error in the AAT's approach. Appeal from the Full Federal Court dismissed.

Probate – interest in a will – procedural fairness – new trial

In *Nobarani v Mariconte* [2018] HCA 36 (15 August 2018) the High Court held that the appellant had an interest in a will under contest and had been denied procedural fairness because of the circumstances surrounding the hearing of a claim for probate. The appellant, who was unrepresented, claimed an interest in challenging a handwritten will. He filed two caveats against a grant of probate without notice to him. The respondent brought proceedings for the caveats to cease. The respondent also sought probate of the will and filed a statement of claim. The appellant was not named as a party in the probate proceedings. The probate claim was listed for hearing on 20 and 21 May 2015. At a directions hearing on 23 April 2015, the appellant was told by a judge that the trial would be limited to the caveat issue. Until that point, he had not been the subject of any orders to file evidence or take steps towards a trial of the probate claim. On 14 May 2015, the trial judge held a directions hearing at which he told the appellant that the trial would be of the claim for probate, and also instructed the appellant to file a defence and any evidence on which he wished to rely for the probate claim by 18 May 2015. The trial judge was not told, at that time, that the appellant was not a party to the proceedings or that his evidence to that point was limited to the caveat issue. On 20 May 2015, the appellant was joined. His applications for adjournments were refused. On 22 May 2015 the trial judge gave judgment orally, granting probate and ordering the appellant to pay the respondent's costs. A majority of the Court of Appeal dismissed an appeal. Ward JA held that, although there had been a denial of procedural fairness, there was no possibility that the outcome would have been any different. Emmett AJA held that the appellant did not have an interest in challenging the 2013 will. The appellant sought to have the Court of Appeal's decision overturned and a new trial ordered. A new trial could only be ordered if there had been a denial of procedural fairness and "some substantial wrong or miscarriage" had resulted. The High Court held that a denial of procedural fairness would cause a substantial wrong if it "deprived the affected person of the possibility of a successful outcome". The High Court held that the appellant had an interest in challenging the will, and that he had been denied the possibility of a successful outcome by a denial of procedural fairness. That followed from the consequences, and effect on the appellant, of altering the hearing, at short notice, from a hearing of the caveat motion to a trial of the claim for probate. The High Court ordered a new trial. Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (NSW) allowed.

Criminal law – evidence – admissibility – tendency – prior recording – hearsay – separate trial

In *The Queen v Dennis Bauer (a pseudonym)* [2018] HCA 40 (12 September 2018) the High Court upheld an appeal and clarified several aspects of the law concerning the admissibility of evidence on different grounds.

The respondent was charged with 18 sexual offences, alleged to have taken place over around 11 years. At trial, the respondent sought to exclude the following evidence relied on by the Crown: a recording of evidence from the complainant from an earlier trial; tendency evidence from the complainant relating to Charges 1 and 3-18; tendency evidence from the complainant's half-sister relating to Charge 2 and an uncharged act involving the complainant, and tendency evidence from the complainant about other uncharged sexual acts (the "tendency evidence"); and evidence from a second witness (a school friend) of things said by the complainant (the "complaint evidence"). The respondent also sought to sever the trial in respect of Charge 2. The trial judge admitted all of the evidence and refused to sever the trial, including after separately

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with Andrew Yuile
and Dan Star QC

considering the High Court's decision in *IMM v The Queen* (2016) 257 CLR 300 (*IMM*). The respondent was convicted on all charges.

On appeal, the Court of Appeal held that none of the evidence should have been admitted and held that the trial on Charge 2 should have been severed. The High Court upheld the Crown's appeal in respect of all the evidence and the severance issue. In respect of the recording, there was no error given the complainant's strong preference to avoid giving evidence again if possible and in the absence of competing considerations or outweighing disadvantage to the respondent. In respect of the complainant's tendency evidence, the court set out a unanimous view on admissibility of tendency evidence in single complainant sexual offence cases. Here, there was no need for a "special feature" as referred to in *IMM* to make the evidence admissible. All the relevant acts were committed against one complainant and none was far separated in time or much different in nature or gravity. The probative value of the complainant's evidence was high and not productive of unfair prejudice.

The court also made some observations about tendency evidence in multiple complainant sexual offence cases, and about risks of contamination, concoction or collusion. The tendency evidence of the half-sister had high probative value and no real risk of misuse by the jury. It was admissible. The complaint evidence was admissible, as an inference was available that the evidence was fresh in the complainant's memory when the conversation took place and the probative value of the evidence outweighed any prejudicial effect. Finally, there was no basis for Charge 2 to be severed. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Vic.) allowed.

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Federal Court

Administrative law – judical review – whether inflexible application of government policy – whether aspects of the policy unlawful

In *G v Minister for Immigration and Border Protection* [2018] FCA 1229 (17 August 2018) the court held that the decision of the Administrative Appeals Tribunal (AAT) to refuse the applicant's application for Australian citizenship should be set aside and remitted for determination according to law.

The applicant (who has a severe language disability, borderline low IQ and austism spectrum disorder) was a child born in Australia to Albanian parents. His parents unsuccessfully applied for protection visas, however, the applicant himself was granted a protection visa many years later. The applicant became a permanent resident even though the migration status of his parents was uncertain and his father was being held in immigration detention. The permanent residence status of the applicant meant he was eligible to apply for Australian citizenship, which he did. His application for citizenship was refused by a delegate of the Minister and, on review, the AAT affirmed the delegate's decision.

The challenge to the AAT's decision in the Federal Court focussed on the AAT's use and application of a government policy set out in a lengthy document entitled 'Australian Citizenship Instructions' (Citizenship Instructions) which was made in an exercise of executive power (at [34]). A central question was whether the AAT simply followed the Citizenship Instructions as if they formed a framework constraining its discretionary decision-making function under s24(2) of the *Australian Citizenship Act 2007* (Cth) (the Act). Upon a close analysis of it, Mortimer J characterised the policy as overly prescriptive, stating at [49]: "decision-makers are in reality directed that they are required to make their decision in the framework set by the policy guidelines". For example, on a comparison of the detail of the policy compared to the broad discretion under the Act, her Honour was of the view that "the Citizenship Instructions, by their structure, content and language, effectively reverse the operation of the statutory scheme established by the Parliament" (at [68]).

On an examination of the AAT's reasons, the court held that its task had miscarried in various respects because of the structure and content of the Citizenship Instructions, together with the AAT's strict adherence to them (at [71]-[122]). The applicant succeeded on all of his grounds (at [125]-[135]), which included that aspects of the policy contained in the Citizenship Instructions were unlawful (at [244]-[262]) and that the AAT inflexibly applied the policy in the Citizenship Instructions (at [263]-[272]).

Mortimer J undertook a close analysis of the seminal authorities on the role of executive policy, especially in the AAT (at [139]-[199]). After doing so, her Honour explained at [200]: "The structure, nature and content of a particular executive policy may increase the risk that in applying it, a decision-maker may cross the boundary between lawful and unlawful use of executive policy in exercising a statutory power. The more general a policy, the more likely it is to invite consideration of the "fullness...of relevant circumstances" and leave an "unaffected range of discretion" for exercise, to use the words of Brennan J in *Drake (No.2)*. The more prescriptive and rule-like the policy, the more likely it is to encourage decision-makers to feel compelled to adhere to each part of it, follow its structure with strictness and approach the policy as if it formed part of the statute. Further, the more likely the policy is to stray into directing decision-makers as to the outcome, or 'usual' outcome, of an exercise of power".

Bankruptcy – validity of bankruptcy notice – whether a bankruptcy notice is a nullity where it uses pseudonyms instead of the debtor's and creditor's names

In *LFDB v MS S M* [2018] FCA 1397 (13 September 2018) Markovic J dismissed an application to have a bankruptcy notice set aside.

The bankruptcy notice used the pseudonyms of Ms SM for the creditor's name and LFDB for the debtor's name. These pseudonyms had been used to describe the parties in a number of proceedings before the courts in New Zealand, in the Federal Circuit Court of Australia and in the Federal Court of Australia (at [7]).

Based on the use of the pseudonyms instead of their names, LFDB argued that the bankruptcy notice was a nullity for two reasons (at [25]). The first basis was that the way in which the addressee and creditor were named in the bankruptcy notice rendered it a nullity because of the public interest policy which underpins bankruptcy; namely, to inform other creditors and the public of the debtor's status and to prevent a multiplicity of proceedings. The second basis was that the addressee, LFDB, was likely to be misled as to the identity of the creditor named in the bankruptcy notice.

The court rejected both arguments. On the first issue, Markovic J held that the concerns raised by LFDB did not arise at the stage of service of a bankruptcy notice (at [30]). Her Honour explained "at the point of its issue, a bankruptcy notice operates only as between the addressee and the creditor...The creditor makes the application and the bankruptcy notice is issued to it. The creditor will then serve it on the debtor. At that stage it is not a public document and no other creditor of the same debtor can rely on that bankruptcy notice". The court went on to note that it will be different once a creditor's petition is filed, where the need to be able to identify the parties and, in particular, the debtor is brought into sharp focus. Markovic J stated at [31]: "Although not in issue on this application, at that stage the issues raised by LFDB take on a different complexion and would lead one to conclude that the use of acronyms or pseudonyms in a creditor's petition would not be appropriate given the policy behind, and scheme of, the Act".

On the second issue, the court rejected that LFDB could be misled about the identity of the creditor described as 'MS SM' (at [35]-[42]).

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Court of Appeal judgments

1 to 30 September 2018

with Bruce Godfrey

Civil appeals

Amos v Wiltshire [2018] QCA 208, 4 September 2018

Application for Leave s118 *District Court of Queensland Act 1967* (Qld) (DCQA) (Civil) – where Mr Amos and Mr Wiltshire have been involved in litigation against each other for a number of years – where on 28 August 2015, the Court of Appeal made a number of orders, which included an order that Mr Amos pay Mr Wiltshire the sum of $200,288.90 together with interest on the sum of $133,390.28 – where Mr Amos did not pay the judgment sum at the time – where the applicant submits that leave to appeal is not required, in reliance on amendments made to the DCQA, s118 – where s118 DCQA was amended in 2010 – where the respondent contends that leave to appeal is required – whether leave to appeal is required – where on the correct construction of the amending Act, the principal proceedings in respect of which the 2015 orders were made by the Court of Appeal and the warrant was obtained commenced in 2009 – where the amending Act therefore does not apply in respect of this appeal – where as the preconditions in s118(2) have not been satisfied in the present case, leave to appeal is required by Mr Amos – where the respondent took out an enforcement warrant in respect of an order of the Court of Appeal that the applicant pay the respondent a judgment sum including interest on an amount – where the enforcement warrant miscalculated the rate of daily interest – where the respondent applied to have the warrant amended – where the applicant cross-applied to have the warrant stayed or set aside – where the applicant submits that the primary judge had no power under the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) rr371 and 375 to amend the warrant – where the applicant submits that the primary judge erred in refusing to set aside or stay the warrant – where the respondent resists the appeal, including on the basis that the appeal is now moot as the result of payment by the applicant to the respondent of a sum "in full and final settlement of payment of interest" – while the reasons of the primary judge referred to the error with respect to "interest" as a "minor departure from the judgment", the proper characterisation of the error as to the overstatement of interest was not a failure to comply with or follow the judgment but rather a failure to comply with the rules – where the order of the court provided for interest to be paid in accordance with s59(3) of the *Civil Proceedings Act 2011* (Qld) – where r817 of the UCPR provides for the amount of interest to be calculated and stated as a daily rate – where there is no error identified in terms of the exercise of his Honour's discretion to permit the amendment – where the amendment favoured Mr Amos insofar as it reduced the amount of the daily interest and no prejudice was suffered by him by allowing the amendment – where the irregularity in the warrant was a defect to which r371 UCPR applied and that rule empowered the primary judge to make the order amending the enforcement warrant. Leave refused. Costs.

Geoscience Resource Recovery LLC v Central Petroleum Limited [2018] QCA 216, 14 September 2018

General Civil Appeal – where the respondent commenced a proceeding in the Supreme Court of Queensland against the appellant – where the respondent served a claim on the appellant in the United States of America without leave of the Supreme Court of Queensland – where r124(1)(g) of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) permits service on a person outside Australia if the originating process is for "a proceeding relating to a contract…made by 1 or more parties carrying on business or residing in Queensland" – where the respondent carried on business in Queensland – where the appellant filed an application for the claim to be dismissed – where the primary judge dismissed the application – whether the proceeding is one "relating to a contract made" by the respondent – where it is observed that there is a genuine dispute between the parties as to whether they entered into a legally binding agreement in February 2012 in terms of the disputed agreement – where the question for resolution here is whether the Central Petroleum Limited (CTP) proceeding, centred as it is on that dispute, is one "relating to a contract made by" CTP, being a party carrying on business in Queensland – where resolving that question requires consideration of the meaning of the expression "proceeding relating to a contract made by" an eligible party carrying on business or residing in Queensland – where it is accepted that the qualifying phrase "relating to" is, on its face, of general and far-reaching application – where the issue is whether or not a proceeding may relate to a contract made by a party so as to engage the rule, when the proceeding itself requires resolution of a dispute between the parties over whether there is, or was, a contract between them – where there is no apparent logical reason why a service rule of this kind would discriminate between proceedings where there is no dispute as to whether an enforceable contract had been made, on the one hand; and one in which one party to a proceeding asserts that such a contract had been made and the other party denies that it had, on the other – where other categories in r124(1) UCPR do not have a like requirement and to infer an exceptional requirement in the case of category (g) would disrupt a consistent interpretation and application of the rule – where having regard to the first two considerations, word "made" is attributed in r124(1)(g)(ii), a limited role intended to require that the contract to which the proceeding relates must be one which at least one of the parties to the proceeding alleges was made. Appeal dismissed. Costs.

Mount Isa City Council v The Mount Isa Irish Association Friendly Society Ltd [2018] QCA 222, 18 September 2018

General Civil Appeal – where the appellant resolved to levy utility charges for water – where the appellant issued rates notices to the respondent, which charged the respondent for utility charges for water in respect of rateable land owned by the respondent – where the utility charges were made pursuant to s94 of the *Local Government Act 2009* (Qld) and s101 of the *Local Government Regulation 2012* (Qld) (LGR) – where the utility charges for the water were not charged using a "2-part charge" – where the utility charges were worked out on the basis of a fixed amount plus an amount for each unit, or part of a unit, of water that is used over a stated quantity – whether the appellant's utility charges for water were charged "wholly according to the water used" under s101(1)(a) of the LGR – where it was common ground at first instance that the Friendly Society's properties used a water meter – where it was also common ground that the council's method of levying utility charges did not constitute a 2-part charge as defined in s41(4) of the LGR – where s101(1) LGR requires that the utility charges for a water service be charged by either of two methods – where the first is expressed to be "wholly according to the water used"; the second is "partly according to the water used, using a 2-part charge" – where the expression "partly according to the water used" accurately reflects a 2-part charge in which there is a fixed element or charge for using water supply infrastructure and a variable element or charge based on the amount of water actually used by the consumer – where this case is, however, concerned with the meaning of the expression "wholly according to the water used" in the first alternative – where unlike the term "2-part charge", that expression is not defined for the purposes of the LGR – where the words "according to the water used" are apt to require a relationship between the quantum of the charge and the volume of the water used – where, however, a requirement expressed in such general terms does not prescribe the permissible way or ways in which charges for the water used may be worked out – where it is the role of s101(2) to do that – where s101(2) is intended to complement s101(1) by specifying how utility charges are to be levied according to the water used for both alternatives in s101(1) – where it is inferred from the structure of s101 in its entirety, that the role intended for the word "wholly" in s101(1)(a) is

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to make it clear that, other than in the case of a 2-part charge, utility charges for a water service are to be charged wholly according to the water used as worked out by one of the methods for which s101(2) provides – where so construed, there is no conflict between s101(1) and s101(2), particularly s101(2)(b)(ii) – where s101(2)(b)(ii) sets out one of two methods by which utility charges for water may be worked out when water usage is measured by a water meter – where it is apparent that the fixed amount to which this provision refers is a fixed monetary amount which entitles the consumer to use up to a fixed volume of water – where the method described in the language of s101(2)(b)(ii) does not reflect a 2-part charge as defined – where under the latter, the fixed charge is an infrastructure usage charge; whereas under the provision, it is for water usage – where further, under the latter, the variable charge is on the amount of all water that it is actually used by the consumer; whereas, under the provision, it is applicable only to water used over a stated quantity – where the example given in s101(2)(b)(ii) does not replicate a 2-part charge as defined – where the fixed charge ($100 for a domestic consumer and $600 for a commercial consumer) is described as an "access charge", rather than as an infrastructure usage charge – where, in any event, the example should be ignored for construction purposes consistently with s14D(c) of the *Acts Interpretation Act 1954* (Qld) – where that is because it is incompatible with the method of working out a charge as described in s101(2)(b)(ii) – where in the example, no quantity is stated – where the finding made by the primary judge was that the council had failed to exercise its power under s94 consistently with s4 as it had failed a duty implied by s4(1) to at least turn its mind to the local government principles – where his Honour inferred that the council had not done so – where the inference appears to have been based upon an absence from the revenue statement of "an explanation as to why the [council] chose to adopt a method for determining the utility charges for water which did not give any consideration to charging for (at least partly) the water used by the ratepayer in a case where it is conceded a water meter existed" – where the criticism is misplaced – where it assumes that the per unit charge of $202.00 was not in respect of water usage as s101(2) permits water usage charges to be worked out – where that assumption is incorrect – where, moreover, it implies that compliance with local government principle (a) required the council in its revenue statement to articulate a range of available charging options for water, to choose one of them, and then to present reasons for its choice – where such a requirement is neither expressed nor implied in the principle as stated – where a requirement of that kind would necessitate the inclusion in a revenue statement of matters that are beyond those listed in s172(1) of the LGA as the matters that must be stated or included in a revenue statement – where it is considered that the required transparency was demonstrated in the preparation of the revenue statement, the setting out in it of the land-use based units to be applied in calculating the water charges; the statement that to the council's satisfaction the units generally reflected "the relative costs of service"; and the adoption of the charges at a special budget meeting. Appeal allowed. The orders made in proceeding No.13137 of 2016 and proceeding No.253 of 2017 respectively on 1 February 2018 are set aside. The relief sought by way of originating application in each of those proceedings is refused. Costs. (Brief)

Day v Lerch & Ors [2018] QCA 224, 18 September 2018

General Civil Appeals – where the appellant appealed against the decision of the primary judge to dismiss an application that his Honour recuse himself in the course of a protracted hearing of an application to strike out a claim and statement of claim on the basis of apprehended bias – where the appellant was self-represented – where there is no contention that the primary judge applied the wrong legal principles – where there were a number of complaints by the appellant about the conduct of the proceeding – where it is plain that the primary judge's patience was sorely tested on a number of occasions leading to responses which, if taken out of context, might be seen by a fair-minded lay observer as displaying a degree of exasperation, and in other cases forcing the appellant to the point in issue – where, however, the fair-minded lay observer would also be aware of the conduct of the appellant as the counterpoint to what was driving the primary judge's responses – where

further, some of the matters which the appellant asserted during the course of the hearings were plainly wrong and, not surprisingly, resulted in a stern response from the primary judge – where the fair-minded lay observer would conclude that his Honour was trying, albeit with differing and even increasing levels of frustration, to identify precisely what the issues were, so as to be able to consider their merit – where there was undoubtedly a degree of intervention by the primary judge and, where appropriate, Ms Day was confronted with the consequences of her submissions – where a fair-minded lay observer would not consider that the judicial intervention was intimidatory, undue, too enthusiastic such as to deprive Ms Day of an opportunity to make her submissions, lacking impartiality, or otherwise going beyond the bounds of propriety in terms of testing the arguments presented with a view to elucidating that which was genuinely in issue – where relevant to that assessment is that the fair-minded lay observer would have been aware of the conduct of Ms Day in advancing her points and resisting arguments put against her – where the respondents were successful in receiving summary judgment in their favour in relation to an employment dispute with the appellant – where his Honour identified the basis for the application for summary judgment, namely that, apart from the claim for fraudulent misrepresentation, the claim against the respondents sought to recover damages for personal injuries which arose out of the appellant's employment with Queensland Compensation Lawyers (QCL), and that she was precluded from bringing such a proceeding because of her failure to comply with the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (WCRA) prior to instituting the proceeding – where at the hearing below, and before this court, the appellant contended that there were factual disputes as to when her employment terminated and she contended that those disputes should be resolved at a trial – where given that the application was focused on the fact that the appellant's case was restricted to being an employed worker as at 4 November 2013, the factual dispute affects the question whether it was appropriate to grant summary judgment – where there was no way that dispute could be resolved short of a trial, where the evidence could be tested, particularly as to the QCL parties' documents that stipulated that her employment ceased before 4 November 2013 – where here there is a self-represented litigant who had expressed the desire to run the case on a different or alternate basis, namely that she was not employed as at 4 November 2013, and therefore not a "worker" within the meaning of the WCRA – where true it is that such a case was somewhat inarticulately expressed, and inconsistent with the case as it stood pleaded at the time of the hearing – where, however, it is a case which Ms Day had expressed during the various hearings prior to that in August – where on 10 February 2017, in a disordered response, she said that her case as to when the employments ceased was in August 2013, or that the court should rule on the date – where further, that case is in conformity with the facts pleaded by the QCL parties – where their defence expressly pleads that Ms Day's employment terminated on 23 August 2013 when she resigned – where on that basis Ms Day could not have been employed or a "worker" as at 4 November 2013 – where before this court counsel for the QCL parties conceded that if Ms Day was not an employee as at 4 November 2013 then the WCRA did not apply – where the primary judge took the view that it was not to the point that the QCL parties contended that her employment had ceased in August 2013 – where that is true in terms of the case as pleaded, but that does not detract from the fact that the pleadings raised a disputed fact, namely at what date was the employment terminated – where only by resolving that factual dispute one way could the claim be dismissed for non-compliance with the WCRA – where because the QCL parties elected to pursue summary judgment and not the previous strike-out application, the result was that two questions not explored before the primary judge, nor before this court, were: (i) whether Ms Day wished to amend the pleading so as to reflect the case that her employment was terminated prior to 4 November 2013; and (ii) whether such a claim had prospects of success in the *Palermo v National Bank Ltd* [2017] QCA 321 sense – where there are factual disputes that preclude a finding that there is no need for a trial, or, put another way, there is no real question to be tried. In Appeal No.3799 of 2017: The appeal is dismissed. Costs. In Appeal No.12360 of 2017: The appeal is allowed. Orders 3 and 4 made on 26 October 2017 are set aside. Submissions on costs. (Brief)

Butler v Attorney General (Qld) [2018] QCA 243, 28 September 2018

General Civil Appeal – where the appellant was convicted of sexual offences involving children between 1962 and 1970 – where he has been indefinitely detained since 1982 under s18 of the *Criminal Law Amendment Act 1945* (Qld) – where he applied for release under s18(5)(b) and the Governor in Council determined he should not be released – where a statutory order of review of that decision was dismissed – where on appeal it was contended that as a matter of statutory construction, the question to be answered under s18(5)(b) was whether, on the evidence before the decision-maker, the appellant was capable of controlling his sexual instincts in a proper manner – whether the Governor in Council erred by not addressing the relevant question – where in the present case, the question for the examining medical practitioners to consider and report upon, and the ultimate question of which the Governor in Council had to be satisfied was not whether there "was a risk" or whether a perceived risk was "unacceptable" – where it was whether the detainee lacked the statutory capacity – where both Dr Stedman and Dr Aboud addressed the question whether the appellant represents an unacceptable risk to others – where the reasons of the Governor in Council discloses that the decision maker was concerned that the materials implied the existence of some level of risk and that, although that risk might be reduced by the provision of "support measures", there was no certainty that such measures would be utilised by the appellant – where this appeal is not concerned with whether there have been errors of fact in arriving at the decision – where the significance of the reports of the medical practitioners is that neither of them expressed the opinion that the appellant satisfied the statutory criterion that, alone, could justify his continued incarceration – where nor do the reasons of the Governor in Council show an appreciation of the task to be undertaken – where the reasons explain why the decision maker apprehends that the appellant's release would be attended by risk – where the reasons demonstrate a lack of satisfaction that the prospective "support measures" would necessarily be afforded to the appellant, but that is not the test – where the reasons never address the only relevant question: Upon the basis of the expert opinions that have been offered, am I satisfied affirmatively that the appellant is presently incapable of properly controlling his sexual instincts? Appeal allowed. Orders made on 9 May 2018 be set aside. The order of the Governor in Council dated 1 February 2018 be set aside. The matter be remitted to the Governor in Council to be determined according to law. Costs.

Qld Law Group – A New Direction Pty Ltd v Crisp [2018] QCA 245, 28 September 2018

Application for Leave s118 DCQA (Civil) – where the case involves a question of the true construction of s335(5)(a) *Legal Profession Act 2007* (Qld) (LPA) – where the question is one of importance to the legal profession in Queensland and in Australia generally – whether leave to appeal should be granted – where the applicant is a law firm that represented the respondent in a personal injuries proceeding – where the applicant sent the respondent a letter on 28 April 2015 enclosing a tax invoice that set out a lump sum for the applicant's professional fees including GST – where the respondent requested an itemised bill on 21 March 2016 – where the respondent received an itemised bill from the applicant on 19 May 2016 – where the respondent filed an application for a costs assessment pursuant to s335 LPA almost one year after receiving the itemised bill from the applicant – where s335(5) LPA provides that a costs application must be made within 12 months after the bill was given, or the request for payment was made – where the applicant contended that this 12-month limitation period commenced with the provision of the bill on 28 April 2015 – where the respondent contended that the 12-month time period began running again when the later itemised bill was provided – where the magistrate found that the respondent's costs application had been brought out of time – whether there is a distinction between different kinds of bills in s335(5), such that the subsequent provision of an itemised bill after the provision of a lump sum bill causes a new 12-month period to commence in which a costs application can be brought – where the statute does not make the delivery of an itemised bill, or indeed the delivery of any kind of bill, a condition precedent to the right to make a costs application – where it is not only the delivery of a bill that triggers the beginning of the limitation period; it is triggered by a solicitor's request for payment or by a client's payment of costs – where it can therefore be concluded that there is nothing in s335 that, for the purposes of an application for an assessment of legal costs,

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promotes the importance of an itemised bill over a lump sum bill or even that distinguishes between them – where in other places the statute expressly distinguishes between the effects of the delivery of particular kinds of bill – where s333 makes an express exception about the limitation period in the case of an interim bill being delivered – where s332 also distinguishes between the effect of the delivery of a lump sum bill and the delivery of an itemised bill – where these express provisions that distinguish between the legal effects of the delivery of one kind of bill from the legal effects of the delivery of another kind of bill suggest strongly that the absence of any similar distinction in s335 means that, for the purposes of s335(5), there is no distinction – where there are considerations that militate against the conclusion that the delivery of an itemised bill after a lump sum bill has already been delivered triggers a fresh limitation period – where if that were the case, then the client who has received a lump sum bill would be in a position to extend the limitation period to one of two years merely by making a request for an itemised bill – where nothing in the statute suggests that such a form of self-help was intended. Leave granted. Appeal allowed. Orders (a), (b) and (c) of Kent QC DCJ made on 23 March 2018 and order 1 made on 1 May 2018 are set aside. The respondent's appeal to the District Court is dismissed. The matter is remitted to the District Court in order that the respondent's appeal against the magistrate's refusal to extend time can be dealt with. Costs. (Brief)

Weatherup v Krayem [2018] QCA 247, 28 September 2018

Application for Leave s118 DCQA (Civil) – where the applicant sought summary judgment against the respondent in the proceedings below – where the respondent, as the plaintiff in those proceedings, brought a claim for defamation against the applicant – where the respondent claimed the applicant was liable for defamatory material published on a website of which she was the "registrant" – where the applicant sought, as respondent in those proceedings, summary judgment, or in the alternative, that the defamation claim be struck out – where the applicant submitted below that her position as a "registrant" did not of itself constitute a "publisher" for the purposes of the *Defamation Act* 2005 (Qld) – where the primary judge dismissed the application for summary judgment, and the alternative application to strike out the claim – where the primary judge correctly identified, insofar as the application for summary judgment was concerned, that the issue for determination was whether the respondent had no real prospect of succeeding in the claim and there was no need for a trial – where further, the primary judge correctly identified that a determination of that issue required a consideration whether the respondent had established some real prospects of succeeding at trial – where the primary judge expressly acknowledged there was presently no pleading of actual or constructive knowledge of the contents of the website on the part of the applicant – where the affidavit material gave rise to inferences which might support a finding of involvement in the publication, sufficient to found the applicant's liability – where these inferences prevented a conclusion that there was no need for a trial of the proceeding and on that basis, the application for summary judgment was properly dismissed – whilst reliance on that material supported the primary judge's conclusion that it was arguable on the available evidence that the applicant could be liable as a publisher of the allegedly defamatory statements, that reliance also highlighted a glaring insufficiency in the respondent's pleaded case – where the primary judge failed to properly consider the applicant's alternate claim for relief, namely a striking out of the statement of claim – where a consideration of the statement of claim supported a conclusion that it did not plead sufficient facts to found a reasonable cause of action – where the pleaded basis for the applicant's liability as a publisher amounted to no more than a bald assertion of liability with no supporting factual basis – where the additional facts set out in the affidavit material highlighted the deficiencies in the pleaded factual basis – where the statement of claim ought properly to have been struck out, with leave to replead – where in failing to properly consider the applicant's alternate claim for relief, the primary judge erred in law – where it is in the interests of justice for the respondent's claim to only proceed on the basis of pleadings sufficient to found the claimed cause of action. Leave granted. Appeal allowed. Orders made on 19 February 2018 be

set aside. The statement of claim be struck out. The respondent have liberty to replead within 21 days of these orders. Costs of application and appeal be reserved to the trial judge.

Criminal appeals

R v DBQ [2018] QCA 210, 11 September 2018

Sentence Application – where in Victoria the applicant had sexual intercourse with the complainant when she was 13 years old and he was 33 years old – where shortly afterwards the applicant and complainant moved to Queensland – where the applicant maintained a relationship with her until after she turned 16 – where during the period of maintaining the applicant had regular sexual interactions with the complainant – where the applicant was prosecuted in Victoria for sexual penetration of a child – where the applicant was sentenced to two years' imprisonment, wholly suspended for a period of three years and the applicant was declared a registered sex offender for a period of 15 years – where the applicant was then extradited to Queensland and convicted on his plea of one count of maintaining a sexual relationship with a child under 16, with a circumstance of aggravation that he had unlawful carnal knowledge of a child under 16 – where the applicant was sentenced to seven years' imprisonment with a parole eligibility date fixed after serving two years and three months – where the sentencing judge observed that the sentence in Victoria was a factor to be taken into account, however noted that if the offending in Victoria had been included it would have extended the period of offending – where despite the apparent acceptance by the sentencing judge that totality considerations were relevant, the sentence imposed was not in fact appropriately moderated to reflect that matter – where the term of seven years' imprisonment thus failed to have proper regard to the totality of the sentences imposed for the Victorian offending which continued to require compliance with reporting conditions – where a consideration of the authorities also supports the contention that when totality considerations were taken into account, a combined head sentence of nine years was manifestly excessive had the applicant been dealt with for all the offending including the Victorian offending – where the applicant was not being dealt with for offences against more than one child victim – where having regard to other authorities put forward at sentence and before this court, as a yardstick, a combined head sentence of nine years would not have fallen within the sentencing discretion had the applicant been dealt with on the one occasion for all the offending including the Victorian offending. Application granted. Appeal allowed. The sentence is varied to the extent that the head sentence of seven years' imprisonment is set aside and, in lieu thereof, a head sentence of six years is imposed.

R v KAR & Ors [2018] QCA 211, 11 September 2018

Applications for Extension (Conviction); Sentence Application; Applications for Extension (Conviction & Sentence); Applications for Extension (Sentence) – where each of the seven applicants was convicted on his plea to one count of riot pursuant to s61 of the *Criminal Code* (Qld) with two circumstances of aggravation, causing grievous bodily harm and property damage – where the applicants were part of a group of more than 12 assembled persons involved in a riot at a youth detention centre – where during the course of the riot the group damaged air-conditioning units, used metal poles as weapons and retrieved other objects which were used to attack staff members – where various staff members suffered injuries – where one staff member was struck in the head with a rock which resulted in the loss of sight in an eye, which constituted the grievous bodily harm – where each applicant seeks an extension of time to lodge an appeal against conviction for the circumstance of aggravation of causing grievous bodily harm – whether the applicants could be convicted of the circumstance of aggravation as a secondary party by virtue of either s7 or s8 of the *Criminal Code* (Qld) – whether a person can only be convicted of a circumstance of aggravation where the person did the act constituting the relevant circumstance of aggravation – whether the term "offence" in s7(1)(c) and s8 of the code contemplates only a non-aggravated form of the offence or whether "the offence" includes a circumstance of aggravation where that circumstance of aggravation had been proven to arise – whether the decision in *R v Barlow* (1997) 188 CLR 1 precludes an interpretation of "offence" in s7(1)(c) and s8 of the Code to include a circumstance of aggravation – whether the dicta in *R v Phillips and Lawrence* [1967] Qd R 237 as to the application of s7(1)(c) and s8 to a circumstance of aggravation are reconcilable with *Barlow* – where, as stated in *Barlow*, the definition of "offence" in s2 of the Code, makes it clear that the term is not used to describe the concatenation of elements which constitute a particular offence or facts that create a liability to punishment by the actual perpetrator – where, rather, it denotes the element of conduct which, with other facts of the case, renders the person engaging in it liable to punishment – where as explained in *Barlow*, s7(1)(a) confirms that "offence" is used to denote the element of "conduct" in that sense, and not the constituent elements that constitute a particular offence – where it follows that there is nothing in the definition of "offence" in s2, as interpreted in *Barlow*, which precludes s8 from operating to extend liability to encompass the relevant act or omission together with any circumstance of aggravation found to have been done by the principal offender, where the resulting aggravated offence was a probable consequence of the common unlawful purpose and done in prosecution of it – where likewise, there is no basis to confine the concept of "offence" in s7(1)(c) to only the simpliciter offence where, for example the assistance is given to a principal to commit an aggravated form of the offence – where in the circumstances of the present case, there is no basis to conclude that for the context of s8 the "unlawful purpose" cannot be the offence of riot simpliciter and that the "offence" (to which liability is extended to the co accused) cannot be that of riot with a circumstance of aggravation of causing grievous bodily harm – where nor in the circumstances of the present case, is it to the point to consider whether the circumstance of aggravation relevant to the principal's conduct, in respect of which assistance is given for the purpose of s7(1)(c), can be characterised as an "element of the offence" – where the relevant point of focus is whether the assistance is rendered in relation to the conduct of the principal offender (which includes that the fact that the conduct is accompanied by an act which amounts to a circumstance of aggravation of causing grievous bodily harm) which rendered the principal liable to punishment under s7(1)(a) of the code – where for the present purposes, it is important to note that the relevant "offence" for the purposes of s7(1)(a) and s8 is the conduct of the unnamed principal which, with other facts of the case (as admitted on sentence), rendered that person liable to punishment for the offence of riot with the circumstance of aggravation of causing grievous bodily harm – where that conduct comprised being present as one of at least 12 assembled persons using or threatening to use unlawful violence as prescribed in s61(1)(a) and in the circumstance prescribed in s61(1)(b) with the result prescribed in s61(a) – where the applicants pleaded guilty to riot with two circumstances of aggravation and were each sentenced to 2½ years' detention, to be released after serving 50%, and convictions were recorded – where two of the seven applicants were also given concurrent sentences for other offences – where each applicant seeks leave to appeal against sentence – whether the sentence imposed on each of the applicants was manifestly excessive in all of the circumstances – whether the sentencing judge failed to give consideration to parity for some of the applicants who argued they had a lesser role in the offending – whether the sentencing judge erred in declaring time in custody – where the applicants were all sentenced under the *Youth Justice Act 1992* (Qld) (the Act) – where it is a circumstance of particular seriousness here that the riot was directed against staff of a youth detention centre, that is, the very people responsible for maintaining order and safety in the centre – where moreover, quite apart from whether staff are targeted, the mere act of participation in a riot by persons who are serving custodial sentences or are remanded in custody represents such a challenge to the state's lawful power of behavioural control over them as to inevitably require starkly deterrent punishment – where none of the cases referred to suggest the sentences imposed upon the applicants here were manifestly excessive – where substantial sentences were called for – where the applicants were all sentenced to 2½ years' detention, except for Master MCV, who received two years' detention – where they are clearly substantial sentences for juvenile offenders – where however, they are not so significant as to exceed an appropriate range of penalty for such serious offending by juveniles in custody. In relation to the applications concerning the convictions in each file: Grant leave to extend time in which to appeal against conviction. Dismiss the appeals against conviction. In relation to the applications for leave to appeal against sentence should in each application be: Application for leave to appeal sentence refused.

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R v MCW [2018] QCA 241, 30 September 2018

Sentence Application – where the applicant pleaded guilty to two counts of assault occasioning bodily harm, one count of choking, suffocation or strangulation in a domestic setting and one summary charge of contravention of domestic violence order – where the applicant was sentenced to imprisonment of two years and six months in respect of each of the assault occasioning bodily harm counts, three years and six months for the choking, suffocation or strangulation in a domestic setting count and three months for the summary charge – where the sentencing judge did not forewarn the parties of his intention to reduce the head sentence slightly to reflect the guilty plea and not give the applicant an opportunity for a parole date at earlier than half the sentence – whether the applicant was afforded procedural fairness – where it is not "unusual" in the sense that expression was used in *R v Kitson* [2008] QCA 86 for a head sentence to be imposed that was selected after allowing for the guilty plea, leaving the eligibility for parole date as determined by s184(2) of the *Corrective Services Act 2006* after 50% of the sentence had been served in custody – where it does not follow from the fact that the sentencing judge did not foreshadow to the prosecutor and counsel for the applicant on the sentence that he was considering reflecting the guilty plea in a reduction of the head sentence without any further mitigation that he failed to afford procedural fairness to the applicant – where the structure of the sentence that the sentencing judge imposed was within the alternative sentences that may have applied in the circumstances and must be taken as being within the contemplation of the prosecutor and the applicant's counsel – where the applicant persistently inflicted domestic violence against the complainant – where the applicant contends that the sentence imposed was manifestly excessive – whether the sentence imposed by the sentencing judge was manifestly excessive – where in each of these three authorities relied on as comparable before the sentencing judge and on this application, the maximum penalty for the offence of assault occasioning bodily harm was seven years' imprisonment, but the elements of the offence of assault occasioning bodily harm can be contrasted with the offence against s315A of the *Criminal Code* (Qld) – where the gravamen of this offence committed by the applicant was the choking of the complainant in the domestic setting – where the offence under s315A was introduced as a result of the Legislature accepting the recommendation made about the creation of a specific offence of strangulation in the report 'Not Now, Not Ever: Putting an End to Domestic Violence in Queensland' by the Special Taskforce on Domestic and Family Violence in Queensland – where it is therefore not useful to consider sentences for an assault occasioning bodily harm, even where the assault was committed in the domestic context, as comparable authorities for an offence committed against s315A – where a mark of the seriousness of the offence committed by the applicant was that the complainant lost consciousness – where the applicant's criminality was also increased by the fact that the choking incident was preceded, and then followed, by an assault occasioning bodily harm – where the sentencing of the applicant was distinguished by his criminal history of contraventions of domestic violence orders against the same complainant on three prior occasions, two of which involved putting the complainant in a chokehold – where the test of whether the sentence imposed on the applicant was manifestly excessive is not determined by comparing the sentence selected by the sentencing judge with the submissions made by the parties before the sentencing judge as to the appropriate sentence – where the test of manifest excessiveness depends on whether the sentence is unreasonable or unjust, having regard to all the factors relevant to the sentence: *Hili v The Queen* (2010) 242 CLR 520 – where on the basis of the applicant's persistence in inflicting violence on the complainant, including of the nature that is specifically targeted by the offence against s315A, it was not unreasonable for the sentencing judge to conclude that the appropriate sentence for the choking, suffocation or strangulation in a domestic setting (even after an early guilty plea) was imprisonment for three years and six months without any further mitigation. Application refused.

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.

Husband $175K better off after wife's costs added back

with Robert Glade-Wright

Property – notional add-backs – court's approach to paid legal fees

In *Trevi* [2018] FamCAFC 173 (6 September 2018) the husband added $175,000 to his property settlement by winning his appeal to the Full Court (Alstergren DCJ, Murphy & Kent JJ) against Thornton J's refusal to add back to the $9.5m pool the wife's legal fees of $437,000. The appellant was a partner in a law firm who earned $30,000 weekly and the wife the primary homemaker and parent to their children.

Those fees were paid from the proceeds of sale of the home. Thornton J also declined to add back the husband's fees as they had been met from his income or "absorbed in-house", his liability being limited to counsel's fees and other outlays ([26] and [67]).

Murphy J (with whom Alstergren DCJ and Kent J agreed) said (from [37]):

"An order failing to add back legal costs is a pre-emptive decision about one party paying [or contributing to] the other's legal costs [whereas] [t]he statutorily prescribed default position is that neither party pays all or some of the other party's costs. (…)

"[41] [*Chorn & Hopkins (NHC & RCH)* [2004] FamCA 633 (FC)] …draw[s] a distinction between legal costs met from property that would otherwise be available at trial and legal costs met from funds 'generated by a party post-separation from his or her own endeavours or received in his or her own right (for example, by way of gift or inheritance)'. The proposition there advanced, that such expenditure 'would generally not be added back', also needs to be seen as a guideline informing the relevant discretion rather than determining it. A further distinction is suggested in *Chorn* between funds generated in that manner and '[f]unds generated from assets or businesses to which the other party had made a significant contribution or has an actual legal entitlement'."

Upon the husband's appeal being allowed it was ordered that the sum payable to the wife be reduced as the result of the notional adding back of her legal fees.

Children – trial judge misapplied High Court's test of 'unacceptable risk' in *M v M* [1988] HCA 68

In *Sahrawi & Hadrami* [2018] FamCAFC 170 (4 September 2018) the Full Court (Ryan, Aldridge & Watts JJ) allowed the father's appeal of Gill J's parenting order. The parties married and lived in 'Country E' before coming to Australia via the mother's student visa in 2015. Upon separation the mother sought a protection visa, alleging assault and sexual harassment by a neighbour in Country E. She also alleged family violence by the father (allegations he said were fabricated by the mother).

Gill J was not satisfied that such an assault had occurred ([48]) but held ([49]) that the court could "assign it significance as an uncertain fact" as was "recognised in the seminal High Court case of *M v M* [[1988] HCA 68]", Gill J saying ([146]) that *M v M* (where the High Court held that "the resolution of an allegation of sexual abuse against a parent is subservient…to the court's determination of what is in the best interests of the child", informed by whether an unacceptable risk of such abuse is found to exist) had a "more general application to the facts and considerations underlying a conclusion of what is in the best interests of a child".

Ryan & Aldridge JJ said (at [39]-[40]):

"It is a fundamental principle that a party who asserts facts bears the evidentiary onus or burden of proving them to the requisite standard. It is apparent that the mother failed to do so to the satisfaction of the primary judge. As the evidence adduced in support of the allegations was not accepted, it could not therefore continue to have a role to play in the fact-finding process.

…[T]he question of whether there is an unacceptable risk to a child still requires that there be actual evidence which at least gives rise to the conclusion that behaviour may have occurred or may occur. (…)

Children – expert's recommendation for no time was first made from the witness box – procedural fairness

In *Sagilde & Magee* [2018] FamCAFC 143 (6 August 2018) the Full Court (Strickland, Murphy & Kent JJ) heard the mother's appeal against a parenting order made by O'Brien J of the Family Court of Western Australia that the parties' 12-year-old child live with the father and spend no time with the mother. The order followed testimony from clinical psychologist, Dr B, who had provided two family reports. At the trial both parents were self-litigants. The independent children's lawyer (ICL) was represented by counsel.

The Full Court said (at [23]):

"In neither of her two reports did Dr B express any opinion to the effect that the child is potentially at risk of physical harm in the care of the mother if final orders are made which result in the child living primarily with the father. In neither of those reports did Dr B advance any opinion about the…potential effect upon the child…of an order for no time with his mother… In the second of her reports…[Dr B said] 'there appears to be no compelling reason for a change in living arrangements'."

After noting that Dr B was interposed during cross-examination of the mother and that "at no point did counsel for the ICL open any evidence of Dr B that was not contained in her reports", the Full Court said (from [59]):

"The questioning of Dr B…by counsel for the ICL…led to Dr B giving evidence, again a departure from anything in her written reports, that consideration ought be given to the mother's time being supervised. (…)

[65] There is no suggestion that this expert… ever…canvassed with the child his views about the prospect of orders…[that he have] no time with his mother.

[66] When the mother's cross-examination was resumed…nothing was put to [her]…about her presenting a…risk of…harm…; nor was the proposition of no time…put to the mother.

[67] …[W]e conclude that this self-represented mother had no reasonable opportunity to meet a case that her mental health was such that she posed a risk of physical harm to the child. (…)"

The appeal was allowed to the extent of the case being remitted for O'Brien J to reconsider ordering that the child spend time with the mother.

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).

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In November...

Brisbane Livecast Regional

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

8 Practice Management Course: Sole and small practice focus

8-10 | 9am-5.30pm, 8.30-5pm, 9am-1.30pm | 10 CPD

Law Society House, Brisbane

Our Practice Management Course advanced the careers of 144 solicitors in the last financial year. They are now eligible for a principal practising certificate and on a pathway for career advancement.

Thinking of advancing your career? Enrol now in our upcoming course. To find out more or register visit qls.com.au/pmc .

PLE PM&BS PS SL

13 Current governance and transparency issues for NFPs

12.30-1.30pm | 1 CPD

Livecast

Do you advise or serve on a board for a not-for-profit (NFP) or charity? Join our two expert presenters as they review the NSW RSL Inquiry and highlight key lessons learnt.

SL

14 Workplace sexual harassment, bullying and discrimination

12.30-1.30pm | 1 CPD

Livecast

Queensland Law Society is committed to leading the profession towards healthy, safe, inclusive and respectful workplaces. This complimentary member event aims to raise awareness of and better understand unethical and inexcusable behaviours in our profession.

PS SL

16 Rural property law update

12.30-1.30pm | 1 CPD

Livecast

Are you up to date with property law issues specific to regional and rural communities? Join us for this livecast to gain valuable information on water allocations, mining laws, rural land transactions and much more.

SL

20 Introduction to conveyancing

20-21 | 8.30am-5pm, 8.30am-3.10pm | 10 CPD

Law Society House, Brisbane

This interactive and engaging introductory course provides hands-on training from the experts. Delegates will build their practical skills and gain fundamental knowledge.

PLE PS SL

Earlybird prices and registration available at
qls.com.au/events

20 Toowoomba workshop

8.15am-5pm | 7 CPD

Picnic Point, Toowoomba

This innovative full-day workshop has been built in consultation with Downs and South West Queensland Law Association. Sessions address the unique needs of Toowoomba practitioners.

PLE PM&BS PS SL

20 Celebrate, recognise and socialise

5-7pm

Picnic Point, Toowoomba

Catch up with colleagues and connect with your local profession in a relaxed setting over drinks and canapés. Join us in celebrating the special milestone of 25 years of membership for a group of members.

22 Legal matter management course

9.30am-1pm | 3 CPD

Hilton Cairns

This practical workshop will give you an overview of strategies to manage client expectations, define the scope of your retainer and estimate costs. A number of checklists and tools will be provided for you to utilise in your practice.

PM&BS PS

23 Legal matter management course

9.30am-1pm | 3 CPD

The Ville Resort Casino, Townsville

This practical workshop will give you an overview of strategies to manage client expectations, define the scope of your retainer and estimate costs. A number of checklists and tools will be provided for you to utilise in your practice.

PM&BS PS

28 Mental health first aid course for the legal profession

8.30am-12.30pm | 4 CPD

Law Society House, Brisbane

Become an accredited Mental Health First Aider with QLS. This blended course is purpose built for the legal profession to develop skills in recognising and assisting co-workers with mental health concerns.

PS

30 Solicitor advocate course – advanced trial skills SOLD OUT

30 Nov-1 Dec | 5-7pm, 8.30am-4.30pm | 9 CPD

Brisbane Magistrates Court

Extend your advocacy skills with this course presented jointly by the QLS Ethics and Practice Centre and the Australian Advocacy Institute. Lawyers will have the opportunity to focus on case theory as it relates to evidence in chief, cross examination and preparing and presenting final submissions.

PLE PS SL

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Nikolina Palasrinne


Nicole Murdoch


Trung Vu

Career moves

Aitken Legal

Aitken Legal has announced that **Nikolina Palasrinne** has joined its growing team as a senior associate in the Gold Coast office. Nikolina has a wealth of experience from seven years of practice in employment law.

EAGLEGATE

Nicole Murdoch, previously the head of the intellectual property (IP) practice group at Bennett & Philp Lawyers, has launched her own firm, EAGLEGATE, a boutique IP, information and communications technology (ICT) and information security law. Nicole has more than 10 years' experience in IP law, ICT and cyberlaw, as well as practical experience in IT, forensics and encryption.

MinterEllison Gold Coast

MinterEllison Gold Coast has appointed a partner and senior associate to head up a new construction, infrastructure and procurement division.

Partner **Paul Muscat** has more than 25 years of legal experience, including six years with his own firm on the Gold Coast, and significant expertise in advising government departments, developers, principals and contractors on major infrastructure, construction and engineering projects across a broad range of sectors and contracting models.

Craig Tanzer, who brings 10 years of experience in construction law to the new senior associate position, will provide strategic advice and legal representation to key stakeholders in relation to contracting models, risk management and procurement for major projects and infrastructure.

Also joining the new team are **Aaron Williams**, **Stephen Lewis** and **Steven Uniacke**, with recruitment under way for another associate.

NB Lawyers

NB Lawyers has appointed two new staff.

Sarah Lock, who has joined the employment law team as a special counsel, has almost 20 years of experience in industrial relations and will focus on matters such as defending general protections claims, discrimination and sham contracting claims for employers and business owners.

Dan Chen has been welcomed as a lawyer on the employment law and workplace relations team, where he will provide advice to clients to assist with decision making in areas such as performance management, award analysis and development of enterprise bargaining agreements.

Redchip

Redchip has announced four promotions, including that of **Robert Champney** as a director heading the firm's litigation department. Robert has a strong track record in dispute resolution, building and construction disputes, insolvency and debt collection.

The litigation team has been further bolstered by the promotion of **Rebecca Forsyth** to associate. Rebecca acts across property and commercial disputes, intellectual property and employee theft and debt recovery.

Trung Vu has been appointed an associate director. Trung leads Redchip's tax practice, analysing the tax considerations for his clients' business structures and transactions.

Rhennen Ford has been promoted to associate in the firm's property and commercial teams. Rhennen focuses on property and business sale transactions, and leasing matters.

Small Myers Hughes

SMH Lawyers has announced three promotions.

Asha Egan has been promoted to associate in the family law department. Asha joined the firm in 2017 and has experience that includes complex property settlements, parenting matters, child support issues and binding financial agreements.

Sian Ogge has been promoted to associate in the estate planning department. Sian joined the firm at the start of 2017 and practises in asset structuring and planning, trusts, estate planning, probate and estate administration, and estate litigation.

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.

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Paul Muscat


Craig Tanzer


Sarah Lock


Dan Chen


Robert Champney


Rebecca Forsyth


Rhennen Ford


Asha Egan


Sian Ogge


Matt Krog


Thomas McKeown


Clancy Robba

Matt Krog has been promoted to associate in the property and commercial and strata law and business and estate planning departments. Matt joined the firm in 2017 and regularly advises clients in relation to shared equity documentation as well as loans and security, intellectual property transactions and general business transactions.

Thynne + Macartney

Thynne + Macartney, has announced the appointment of **Thomas McKeown** as a senior associate in the planning and environment group.

Thomas' experience involves acting for a variety of local government authorities and private sector clients with respect to all forms of development, from residential to larger commercial and industrial development.

Wiseman Lawyers

Wiseman Lawyers has announced the appointment of traffic lawyer **Clancy Robba**, who has extensive automotive and transport industry experience. Clancy focuses on Queensland traffic law, representing clients seeking work and special hardship licences, those seeking to minimise drink and drug driving penalties, and clients facing high jail-risk charges such as dangerous driving.

Meeting the challenges of equity and diversity

The QLS Legal Profession Awards provide an opportunity for outstanding solicitors, legal teams and organisations to showcase their ingenuity to the profession.

In 2019, 11 winners across three categories will be announced at the Legal Profession Dinner and Awards in March.

If you or someone you know is making an outstanding contribution to Queensland's legal profession then QLS encourages your nomination. Nominations for the 2019 awards are now open and will close at 5pm on Friday 16 November 2018. For more information or to nominate, visit **qls.com.au/lpda** .

The Diversity and Inclusion category (previously known as the Equity and Diversity Awards) recognises initiatives to create diverse, positive and equitable workplaces. For this article we invited the 2018 winners of the Equity and Diversity Awards to talk about how equity and diversity is integrated into their organisations.

Miller Harris Lawyers

Partner Melissa Nielsen explains the approach that has won the firm the Equity and Diversity Award for the last three years in the small legal practice category.

Miller Harris Lawyers prides itself on its dynamic team. The diversity of thought and opinion that comes from employing people from a range of different backgrounds is a key strength of our business which has leveraged countless benefits for our clients.

Our commitment to gender equity, flexible work arrangements, recruitment, career development, well-built policy structures and human resources management proves our ongoing dedication to equity and diversity in the workplace. Our senior practitioners have embraced their position as role models and we strongly believe that the way in which individual team members act in their day-to-day roles has advanced our position as an industry leader.

Miller Harris Lawyers is proud of its sensitive approach to our team members' needs by adopting flexible work arrangements, particularly for those with parental commitments. We have formal processes in place to facilitate parental leave and return-to-work programs, based on the appropriate needs of the individual and their commitment to raising a family. Our arrangements provide flexibility to accommodate changes in personal commitments that arise from time to time and our culture provides a child-friendly environment.

Flexible work arrangements have been implemented for staff, enabling a staged reduction/increase in working hours to meet the specific needs of the individual. The firm recognises the importance of job-sharing with some positions occupied on a share basis, allowing full-time positions to be taken by staff who prefer to work part-time.

We have entered into arrangements with a team member who lives in a rural township, enabling her to work from home to avoid burdensome travel. Staff working from home, either through formal arrangements or due to specific circumstances that may arise, are able to access our firm's modern software using our remote access technology, which ensures such work is able to be undertaken efficiently and effectively.

Our firm has implemented a range of initiatives to ensure the principles of fairness and equity are adopted in recruitment, progression and career development. These initiatives differentiate equity from equality by ensuring that an individual's personal circumstances and background are taken into account and considered objectively as part of our recruitment and career progression processes.

Implementation of our initiatives across all aspects of our firm's operations is realised through our policies and processes and our staff view Miller Harris Lawyers as an employer of choice, which offers a positive and supportive work environment. Our approach has had an enormous impact on staff morale and has encouraged staff loyalty spanning many decades.

Maurice Blackburn

2018 Equity and Diversity Award winner in the large legal practice category.

Maurice Blackburn's vision is to have a diverse and inclusive workforce representative of, and engaged with, the community we serve.

This means that every employee feels comfortable to bring their whole self to work and thrive in an accepting and supportive environment. It also means that our clients and other visitors to the firm are treated with dignity and respect by every member of the Maurice Blackburn team.

Another key aim for the firm is to provide access to justice to Australians of all backgrounds, cultures and beliefs. These values exist within the firm's DNA, with Maurice Blackburn Lawyers having worked as social justice campaigners for nearly 100 years, working with underprivileged groups and protecting the less fortunate.

Maurice Blackburn CEO Jacob Varghese says "It is important that everyone can be who they are without fear of bias, prejudice or mistreatment. In the workplace this means embracing our differences as well as our similarities and ensuring that everyone is included.

"The firm has long had established policies covering a number of facets of employment that provide clear structure and guidance to ensure equity and fairness in our processes.

"I am pleased to advise that an 'All In' section has been added into all of our HR policies. This section explicitly states that 'MB is focused on actively fostering diversity and promoting inclusion through our internal policies and procedures'.

"The statement goes on to say that 'the firm provides equal access to opportunities and outcomes to all employees with a specific focus on gender, LGBTIQ, Indigenous, caring responsibilities and diverse cultural background.'"

Diversity and Inclusion Steering Committee (DISC) chair Liberty Sanger, said: "Diversity and inclusion is never something we can just tick-off as an organisation; it's an ever-evolving element of our firm that we need to constantly review and focus on to ensure we are leading the way."

Initiatives

The DISC has created a framework around ensuring our accountability and representation of the following groups, together with a focus on eliminating entrenched discrimination and creating opportunities:

- Our Cultural Diversity Group
- Aboriginal and Torres Strait Islander Rights Committee representing Indigenous Australians
- The PRIDE Network for LGBTIQ rights
- Women's Network for women's rights
- WeCare for the wide range of carers at the firm, from parents to people with a disability and those caring for the elderly
- Accessibility and Inclusion Disability rights.

The DISC committee launched the All In strategy, a firm-wide approach to advancing diversity. The strategy strives to ensure that every employee will foster and promote a work environment that is safe, inclusive, free from discrimination and reflective of the diverse community we service; and every client of, and visitor to our firm will treat our team, clients and visitors with respect and courtesy to create an inclusive environment free of discrimination.

We conducted our first All In staff census to get a snapshot of the diversity of our current workforce. Targets were then set to ensure our workforce is reflective of the makeup of the wider community, and that we have measures in place to address structural inequality. This has included action in areas including, but not limited to, employment, pay and benefits and career development; health and safety, work-life balance and freedom from violence; and leadership transparency and governance.

Maurice Blackburn created and implemented 'Positive Choices' training that focuses on equality, diversity and respect. This is an online interactive program with a series of videos, case studies and information specifically designed for the firm. All staff were required to complete this training.

We've engaged all staff via our CLE programs, through leadership meetings and specific groups in the firm to bring inclusion actively into the mindset of our staff. This includes unconscious bias, LGBTI awareness and cultural competence training. Unconscious bias has been a major focus of both DISC and our HR team, with training run for interview panels and introducing the concept of a 'black hat' role in performance rating calibration meetings.

Engagement

Staff have been very engaged and positively embraced the policies. The fact that these policies have largely formalised the culture and values that the firm has embodied throughout our history has meant that this has not been a significant change in how we go about our business.

Terrence Stedman

2018 Equity Advocate Award winner.

I see equity as a means to have a greater equality of opportunity; equity also provides a solid foundation for respect for diversity.

Over the years I have been involved in many projects in the community legal centre (CLC) sector that have focused on improving access to justice. A main focus of those programs has been to address inequity and the lack of understanding or opportunity of those from a diverse background.

I have many fond memories of outcomes which came with the development of the first Child Protection Duty Lawyer service in Queensland at the Beenleigh Childrens Court. For many years many persons who were socially and financially disadvantaged found it difficult to deal with the complex nature of child protection proceedings.

Any accomplishments in my work would not have been possible but for the fact that I was employed in the CLC sector. I have found that staff working within this environment are focused on addressing the social inequalities that many face.

Dealing with so many matters day after day at CLCs does tend to cause an emotional drain – in some cases a feeling of dismay and disappointment at how the justice system deals with those who are seen to be different, or less fortunate, or poor, or just not the norm.

I believe that addressing why there is exclusion and inequity rather than being defensive of past societal ideologies is a way to move forward to improve our social framework and reflect the makeup of the society we live in.

I can only impress upon legal practitioners the need to spend some time volunteering at a CLC or looking at a career with one. There is much to be gained from looking at the legal plight someone is faced with and the central cause of their plight is that they are socio-economically disadvantaged, and then finding a solution. The clients are the most grateful and in some cases the work you do with those clients brings about a change to your own perspective and more importantly a social acceptance of the client by being acknowledged for who they are.

I am currently working at Caxton Legal Centre, which actively promotes an environment of cooperation and respect and in so doing strives to eliminate barriers to inclusion.

It would be nice to see all workplaces in the legal sector strive for responsible workplace conduct supported by socially aware employment principles and a code of conduct which reflects an awareness on respect, inclusiveness, equity and diversity.

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Thriving in the legal profession

by Noela L'Estrange

Earlier this year, Queensland Law Society held a Mental Health Breakfast at which a panel of experts discussed early career lawyer (ECL) challenges and provided practical tips to help ECLs thrive in the legal profession.

The panel received an overwhelming response, so this article aims to address a number of the questions which went unanswered on the day:

What if joining a particular law firm as a graduate/junior lawyer was a 'mistake'?

Firstly – why do you view this as a mistake?

Are you simply unhappy with the work that you are getting? Then you may need to discuss with your supervisor whether you can change to another department, or area of law. If there is no other area to which you can move, then you need to discuss how you might be able to get broader practical legal experience in your early career years.

Do you perceive that there is not capacity for your professional development? Perhaps you could consider accessing QLS professional development courses to 'top-up' your practical experience. Talk to your supervisor about the areas in which you think you are lacking, and how this might be cooperatively addressed.

Have you decided that you do not like the culture of the firm? Or for a range of reasons, you don't want to stay? Then you probably need to consider the options of moving. Prepare your CV and keep an eye on the market. Talk to your colleagues about opportunities that might be coming up.

How would you advise an ECL who is concerned they are being pigeon-holed into a particular area of law, particularly where that area is niche?

Talk to your supervisor about the time that you have spent in one area, and your concerns that you have not been exposed to a broader range of legal work. Are you really being pigeon-holed, or are you working on one large matter that is all-consuming? If so, then you need to talk with your supervisor about "life after this matter" – not pulling out, but getting some assurance that you will be rotated, or given work from other areas to give you wider experience.

Consider whether you are interested in the niche area. If so, then you should raise this as an issue with your supervisor – you need to get other experience, but indicate that you would be interested in returning to this area.

Remember that there are quite a few lawyers who developed expertise in an area serendipitously – that is, they had a matter, got interested, and stayed in the area, gradually becoming skilled practitioners.

What are the safe ways to explore other options?

Talk to your trusted colleagues about their experiences in other areas of law or law firms. Consider what the options might be – government, corporate/in-house (though usually for more experienced lawyers), academia, different-size firm.

Take a look online at the firms/lawyers who practise in the area to get a feel for what the work is like. Attend a CLE or PD session in the area to get an idea of how it works.

Unfortunately, there's really no 'try before you buy', so you need to do your research, talk to people, and then make a decision.

How do you know when you should take the next step in your career and move onto another role/firm?

When you see an opportunity and consider that it fits with where you want to go – either in a chosen area, or in another area of law. Be brave, make the application. There are no guarantees in life or in law, so you will always be taking a calculated risk. But be prepared, do your homework, and make the decision!

Keep an open mind on your career. It is less likely to be linear than a zig-zag through which you gain experience and knowledge.

Identify your legal and personal strengths – and look for work that fits with these. You are more likely to be happy and productive if they align.

Make sure that your CV is kept up to date – and remember that your CV should highlight your portable skills and your ability to move to the next step in your chosen career.

If you have access to a mentor program, then this is the sort of discussion you should have with a more experienced person.

Talk with your colleagues about where they are in their careers, and how their planning is progressing. Everyone's different, but you'll get a feel for where you fit in the group.

Noela L'Estrange is a member of the QLS Wellbeing Working Group and Non-Executive Director of National Seniors Australia and TAFE Queensland. She is also a former Queensland Law Society CEO and has previously held positions with the Queensland University of Technology Law School and Norton Rose Fulbright.

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What do your clients really value?

by Graeme McFadyen

The Macquarie Bank 2017 Legal Benchmarking Survey is a well-written analysis, and one of its most interesting observations concerns the different perspectives of firms on the subject of what their clients are looking for.

The smaller firms (turnover of less than $5m) nominated reliability, knowledge, professionalism, friendliness and approachability as the key elements of their relationships. Mid-sized firms ($5m to $20m) emphasised professionalism, expertise, knowledge and speed. Larger firms (more than $20m) identified innovation, flexibility and forward-thinking as the characteristics their clients most value.

This value assessment was in the context that firms of all sizes identified retention of clients and attraction of new clients as the principal source of new business. However, this raises the question of how many firms actually have a deliberate strategy of regularly asking their clients what they value. It is more than likely that many practitioners make assumptions about what their clients enjoy about the relationship to the detriment of their practice.

In one of the general commercial firms where I was employed, we had a partner who had a sizeable practice producing bank loan documentation and the firm's bank was his largest client. He insisted on a 24-hour document turnaround, which occasionally required support staff to work crazy hours, but he insisted that this turnaround was the reason the bank gave him the work.

Sceptical that this level of turnaround was a key driver, I eventually asked one of the bank's managers whether this was indeed the case. After some hesitation the manager admitted that the bank was surprised that the partner was able to produce the documents so quickly and so they did not give him the more complex work, fearing that he might overlook some issues. So the partner was doing himself and the firm an injustice by insisting on the quick turnaround.

Someone at the bank should have had that conversation with the partner, but that is what happens isn't it? Disappointed clients generally do not disclose their disappointment; they simply wander off and engage another solicitor to handle their next matter.

All firms should seek feedback at the end of each matter from the client as to what the experience was like and, in particular, what the firm could have done to improve the experience. However, it is preferable if this conversation involves an independent person either in the firm, or even external, rather than involving the clients' regular partners or lawyers.

The introduction of this initiative is likely to require some leadership by the senior practice principals, as you can be sure that some partners will argue that, since these clients are *their* clients, it rests with them to obtain this feedback. Partners need to be reminded regularly that all clients are clients of the firm and the relationship is not exclusive to any individual partner.

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

Security of fees – thinking differently about money in trust

A practice idea that might make a big difference

Over the years, we have banged on quite a bit about getting paid.

This 'Keep it simple' is a small but effective tweak that can remove some of your client payment risk.

We secure payment in various ways – director guarantees, money in trust, caveats and so on.

Clients often wonder about this. They think (and you can see their point), 'why can't you just invoice me like all other suppliers?' Unfortunately, history shows that, particularly in litigation, clients can lose confidence in their prospects and their lawyer – and concurrently lose their enthusiasm for paying.

Not many firms are good at any of this. Typically, their client agreement entitles them to request initial payments in advance of work done, and then further top-up payments. Occasionally firms are good at the initial request (*don't* start the work until you have the money), but usually terrible at top-up requests.

So, when the first invoice is produced, whatever money is held in trust is applied against it. After that, we are back to billing invoice by invoice.

The initial payment into trust does work to some extent. Any behavioural training where a client learns that things don't happen without payment is helpful. And frankly, the quantum isn't all that important.

The difficulty is that client problems tend to occur towards the end of a matter, rather than at the beginning. And because trust top-up requests are hard work (lawyers get gun-shy and clients either don't understand them or don't want to understand them) you end up totally exposed to non-payment when the risks are highest.

A solution

My advice is – yes – ask for a sensible payment into trust – but explain that it will be held as a security payment and applied against the FINAL invoice in the matter – with a shortfall/refund as the case may be. Get on with issuing invoices in the normal way and require their payment under the normal terms of your progress invoice.

By doing this, if you do have issues towards the matter end, at least your interests will be partially protected by the amount you have held in trust.

The *perfect* situation would be to request trust top-ups all the way through the matter. But clients and lawyers are terrible at this, so why bother pretending that they're not?

Also, firms often can't wait to get money into the general account – as a kind of cultural thing. That's all fine, but you are left with no security when you need it most. AND with a competent initial conversation, your clients will pay your early invoices, so the cash will flow anyway.

So that's the tip. If you're no good at asking for top-ups repeatedly, just ask for the initial payment into trust, but then hold it aside for offsetting against the final account. It means that you will have some security when you potentially need it most.

Hope that assists.

Dr Peter Lynch
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Secrets of sleep

by Laura Gercken

Why We Sleep is a captivating and informative text that offers readers insight into something that we all crave, yet which all too often escapes us – sleep.

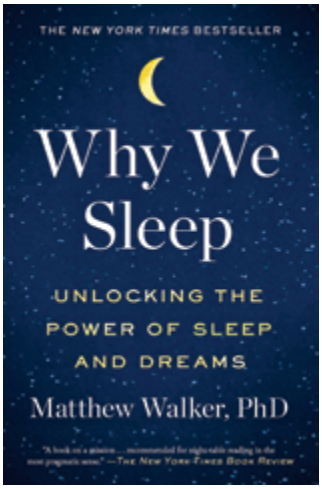
After only a few pages, it is apparent that Matthew Walker, a professor of neuroscience and psychology at the University of California, Berkeley, has an unbridled passion and curiosity for everything about sleep. In this, his first book, Professor Walker shares what he has learnt and observed about sleep over his 20-year career. Spoiler alert: sleep is *very* important.

The book starts by exploring exactly what sleep is, and how humans came to sleep in the way that we do. From an evolutionary point of view, sleep doesn't make any sense; we're vulnerable to predators when we're unconscious, and can't perform other essential tasks, such as gathering food. And yet, despite those evolutionary risks, sleep has persisted. Walker suggests that the persistence of sleep throughout the evolution of all species demonstrates precisely how vital sleep is.

Despite the overwhelming benefits that accompany sleep, humans are the only species that will deliberately deprive itself of sleep without legitimate gain (I expect that, although not expressly stated, watching 'just one more' episode of whatever you're binge-watching is not what Walker considers 'legitimate gain'). Walker explains that his book intends to serve as an intervention of the unmet need of sleep, with a view to reversing the chronic neglect of sleep that is endemic in our society.

After looking at what sleep is, the book canvasses the countless, and often terrifying, consequences of sleep deprivation, both long and short term. A short-term lack of sleep is linked to memory loss, aggression, lapses in concentration and overeating. Although lapses in concentration may seem like a rather pedestrian side-effect, the potential consequences are immense. Take, for example, driving while tired. In Walker's view, driving while tired is more dangerous than driving under the influence of alcohol. The reaction times of a person driving under the influence of alcohol are impeded, but a person asleep behind the wheel doesn't react at all.

A chronic lack of sleep is linked to an increased risk of almost every disease imaginable, including Alzheimer's disease, cancer, cardiovascular disease and stroke.



Title: *Why We Sleep*
Author: Matthew Walker
Publisher: Allen Lane, 2017
ISBN: 9780241269060
Format: Hardback/360pp
RRP: $22.99

Walker relies on various studies to support the link between shorter sleep and cardiovascular disease. Of note is a Japanese study spanning 14 years that found those participants who were sleeping six hours or less per night were 400 to 500 times more likely to suffer one or more cardiac arrests. This finding remained so, even after other risk factors such as smoking and weight were taken into account.

The real take-home message from this part of the book is quite simple – by not prioritising sleep, we shorten our life, and, at the same time, decrease the quality of that shorter life.

Walker then explores the fascinating world of dreams in a scientific context. Although there are still many mysteries about dreams, Walker explains how dreams are a form of overnight therapy. REM-sleep dreaming enables our brains to separate information from emotion. As a result, we can recall painful memories without feeling the same emotion that we felt at the time of the event.

The sleep, including REM sleep, of those who suffer from post-traumatic stress disorder (PTSD) is disrupted. Walker's theory was that, as a result of that disrupted REM sleep, PTSD sufferers are less able to divorce information from emotion, and during a flashback the person is experiencing the same visceral emotion that accompanied the actual event. Walker's theory was supported by studies, and led to physicians finding more effective means of treating PTSD.

The final part of the book looks at sleep disorders, and how they impact on society, including in education, health care and businesses. This part resonates powerfully.

In many professions, it is not uncommon for people to be so focused on what they're doing, and how busy they are, that they succumb to the mindset that they must be working late and then starting again early, with sleep the first thing to be sacrificed. Often, these people are lauded and encouraged for their dedication. Walker gives an example of young doctors in the United States working 30-hour shifts as a rite of passage into the medical profession. Many wear these long hours as a badge of honour when, in fact, they're putting themselves at risk of the side effects of a lack of sleep, and their patients at risk of medical errors, such as prescribing the wrong dose or drug.

Walker's book attempts to shift this mindset that is so often ingrained, by reference to the bottom line. It quotes some staggering figures, suggesting that inadequate sleep costs the US economy US$411 billion a year. This cost is made up of a number of components but, in short, sleepy employees are unproductive employees who have difficulty solving any challenges they might face in their workday.

At the book's conclusion, Walker offers some tips for healthy sleep. Unsurprisingly, keeping gadgets such as phones out of your bedroom is one suggestion. He also suggests sticking to a sleep schedule – going to sleep and waking up at the same time every day, even on weekends.

Does the book achieve its purpose of serving as an intervention? In my view, it does. Walker comprehensively explains all aspects of sleep, and does so in a way that lay people can understand. Although the book canvasses some scientific matters, the message behind the science is not lost. Walker's message is expressed in no uncertain terms: reclaim your right to a full night of sleep.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and Adam Moschella (Adam.Moschella@justice.qld.gov.au). Laura Gercken is an associate at GRT Lawyers.

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Cool is hot for sparkling wine

with Matthew Dunn

The warmer weather heralds the November party season, which is usually characterised by a selection of sparkling wines.

The good news this year is that we can expect more and more Australian sparkling wines to find their way onto the guest list, as our continuing experiments with bottled bubbles begin to bear fruit. The most notable trend here is the way our quality sparkling is moving south. But first, a little history

Australian sparkling wine started in the 19th Century as a fair copy of the French fizz, but essentially it was killed off by our thirst for port and beer. We then moved through the bad years of over-cooked and overly sweet bubbly business from the hot places of South Australia, New South Wales and Victoria, before our modern renaissance – sparked by the realisation that Australia's cooler regions could actually do it well.

A sense of this change is evident in the *Halliday Wine Companion 2019*. The venerable vinous veteran has noted that the seven highest rating sparkling wines (all 97 points), were Tasmanian (five from the House of Arras alone).

To explain this 'southification', Halliday referenced the potential of pinot noir (the tricky major note in good sparkling), saying "Tasmania is the El Dorado for the variety, and the best is still to come with better clones, older vines and greater exploration of the multitude of mesoclimates…". He went on to describe Tasmania as the current and future "keeper of the Holy Grail".

The sparkling story in Tasmania started with the Prospect Farm vineyard, just out of Hobart, planted by Bartholomew Broughton in 1823 and producing the first commercial wine in 1827. He found success at exhibitions in England, but the vineyard was lost a mere 30 years later.

Skipping forward to the 1970s and the rebirth of sparkling, this came about when enterprising botanist Andrew Pirie decided to do his doctoral thesis on cool climate viticulture and purchased a property on Pipers Brook in northern Tasmania. At that time very little wine was made in Australia's cool climate regions, but Pirie was certain the conditions suitable for Champagne were replicated somewhere in the New World, and Tasmania appeared the most likely place.

After completing his doctorate at the University of Sydney in 1977 on this subject, the Pipers Brook Vineyard[1] got into full swing and released its first full-scale sparkling wine in 1995.[2] This fulfilled his long-held ambition to best Champagne, and in doing so he also started Tasmania's sparkling revolution.

At about the same time as the first Pipers Brook sparkling was starting to sell, Hardys' sparkling wine wunderkind Ed Carr began experimenting with Tasmanian grapes. South Australia-based Hardys had no Tasmanian winery, shipping its cold-pressed juice to South Australia for winemaking.

In 1999, Carr released the first House of Arras[3] wine, starting a new dynasty with the unashamed intention of beating Champagne at its own game. While they are made at the Hardys Tintara cellar in McLaren Vale, the Arras wines are 100% Tasmanian fruit. Hardys is taking Pirie's original vision to the next level. The Arras story is just beginning, how it plays out will be interesting to watch.

As Halliday pointed out, Tasmanian sparkling is only just getting (re)started.

Notes

1 Now owned by Kreglinger Wine Estates, kreglingerwineestates.com .

2 Prior to Domaine Chandon opening in the Yarra Valley in 1986, the only facilities for making sparkling wine were in South Australia. The cost of trucking grapes there to make sparkling and returning the product to Tasmania made it prohibitive.

3 houseofarras.com.au .

The tasting

Three sparkly examples of Tasmanian fizz withstood some close scrutiny.

The first was the **Pirie Tasmania NV Traditional Method** which was pale with a light green tinge. The nose was toast lime and yeasty bread. The palate was rich and dry, with soft fruit flavours and well integrated lees characters lingering into the long palate.

The second was the **A by Arras Premium Cuvee Tasmania NV** which was a pale straw colour but a little diminutive on the nose outside of some lime. The palate was dry but had some weightier fruit sweetness balanced out by higher acidity and less obvious exposure to lees. Also a hint of green apple in the entry level House of Arras wine.

The last was the **Stefano Lubiana Tasmania Brut reserve Method Traditionelle** which took the prize for best label – emblazoned with a crown, a scarab beetle and the words 'Est 1990 Granton Tasmania'. The bead exploded like a firecracker and burned down quickly on crystal clear nectar. The nose was stonefruit and grapefruit on the palate with a background of yeasty toast building into the mid palate. Serious fizz built for smoked salmon.

Verdict: The three wines were all very different and the Lubiana was preferred for the mix and honest attack on the tastebuds.

Matthew Dunn is Queensland Law Society policy, public affairs and governance general manager.

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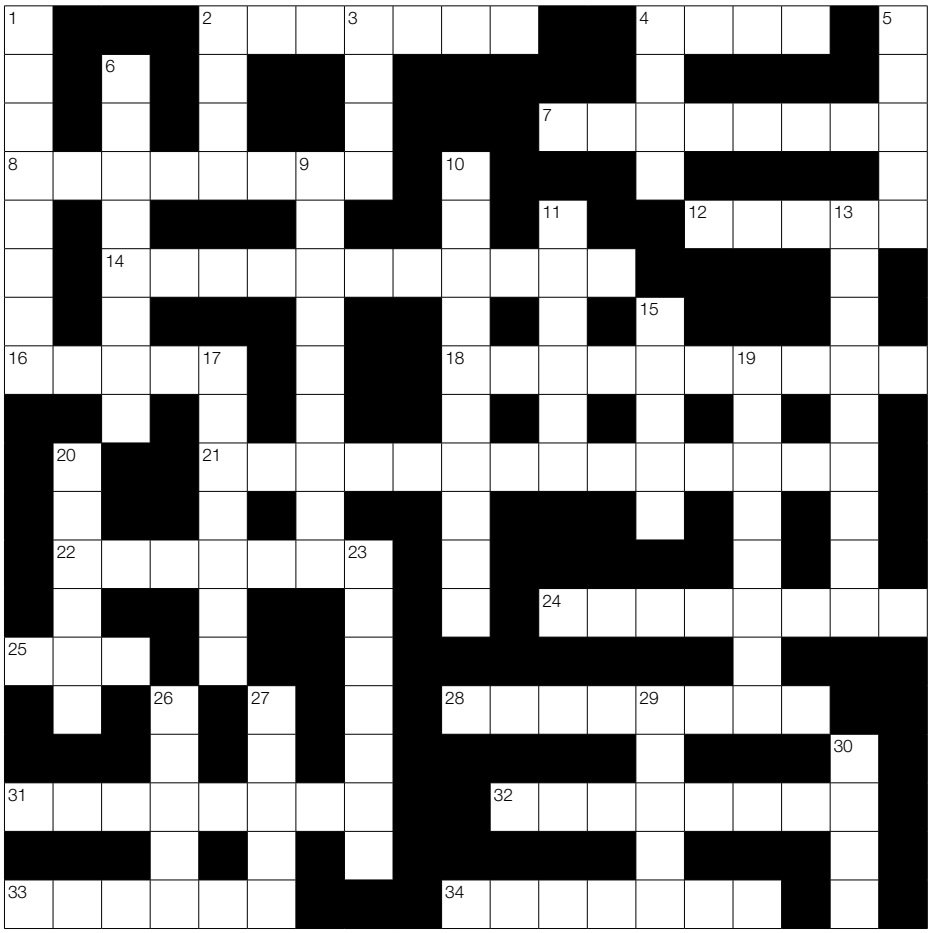
Mould's maze

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



Across

2 Admiralty equivalent of a bailiff. (7)

4 Criminal conduct by a plaintiff in Queensland reduces damages by at least twenty-…. percent. (4)

7 Silver-Logie winning actor and comedian who spent 10 years as an insurance solicitor, Shaun …… (8)

8 Disobedience of court orders. (8)

12 A person is taken to be cruel to an animal if they abuse, terrify, torment or ….. it. (5)

14 A ……. Notice of Intention to Defend is filed when territorial jurisdiction is in issue. (11)

16 A plaintiff requires the court's leave to ….. a claim not served within five years. (5)

18 Third party litigant. (10)

21 The jurisprudential basis of ostensible authority, estoppel by …… (14)

22 ……. judgment is awarded when a defence has not been filed. (7)

24 Standard for liability in defamation, "……, reasonable person". (8)

25 Statute. (3)

28 A reply must be served ..... days after service of a defence or answer to counterclaim. (8)

31 Person authorised to conduct litigation for someone under a legal incapacity, case …… (8)

32 The court may impose a …… order over shares, stocks and bonds. (8)

33 Defamation defence, …… opinion. (6)

34 Notice that a suit has been filed in relation to real estate, *lis* …… . (Latin) (7)

Down

1 Making expiation or atonement. (8)

2 The right of a deserted spouse to remain in occupation of the matrimonial home has been held to be a …. equity. (4)

3 Stay judicial proceedings. (4)

4 A jury is a tribunal of ….. (4)

5 In Magistrates Court proceedings, a person may be served by post if they reside or carry on business more than ….. km from the nearest court. (5)

6 Defence in defamation, …… dissemination. (8)

9 Owner of a law firm. (9)

10 Estoppel resurrected by Denning J in the 'High Trees' case. (10)

11 Surname of a Queensland District Court judge and a Queensland Supreme Court justice. (6)

13 Response to a reply. (9)

15 Deduce logically. (5)

17 A bailiff may seize property under an enforcement …… (7)

19 Proof of astronomical phenomena is assisted by s66 of the …… Act (Qld). (8)

20 Cite as evidence. (6)

23 A lessee's right of entry on land, *interesse* …… . (Latin) (7)

26 Deliver initiating process. (5)

27 A ….. tenancy comes with a right of survivorship. (5)

29 Damages for loss of consortium and servitium in Queensland are limited to ….. times the average weekly earnings. (5)

30 Elder abuse may be referred to the …. Care Complaints Commissioner. (4)

Solution on page 56

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My life as a monkey slave

Or why we haven't met any aliens, yet

by Shane Budden

I grew up in the '70s (the *nineteen*-70s, just in case my photo gives you the wrong idea) and like most kids of that era I fully expected that by now we would be zipping around the galaxy, meeting aliens and hanging out with the cast of *Star Wars*.

It seemed like every other day the United States put someone on the Moon (and fortunately, that someone was never Donald Trump) so a space-age future seemed assured.

Even if we didn't have that confidence in our technology, we were pretty certain that, if we didn't find the aliens, they would find us. After all, we knew from shows like *Star Trek*, *Space: 1999* and *Battlestar Galactica* that aliens always had much more advanced technology than ours, albeit coupled with a dim view of our warlike nature (an attitude they managed to hold even when trying to destroy us; evidently many politicians in charge of developing foreign policy also watched these shows). In fact, *Battlestar Galactica* dangled the tantalising idea that, as Lorne Greene[1] used to solemnly intone, "life here…began out there".

The fact that aliens have not yet contacted us is a source of great confusion to my generation, similar to Instagram, except that we are far closer to contacting aliens than we are to being able to use Instagram. Indeed, some misguided people think the fact that we have not yet heard from aliens means that there aren't any, which is impossible given the vastness of the universe, plus it would really suck. So I think we can happily discount these people.

There are of course many good reasons that aliens have not yet contacted us, reasons that are logical, scientifically valid and no less persuasive by virtue of the fact that I can't think of a single one right now (except for Donald Trump, and he hasn't been around long enough, although I am happy to have him sent away – just in case – to somewhere nobody ever goes and unjustifiably arrogant and intellectually unremarkable people don't stand out, such as Collingwood).

One possibility which now occurs to me, and is not the result of consuming wine while I write this column, whatever you may have heard, is television. You see – and fair warning, I am about to throw around some heavy scientific concepts here – space is really, really big, and it happens to be where our universe, give or take, is. This means that almost everything in it is inconveniently far away from us; some things, of course, are inconveniently too close to us, and here I am thinking of the Kardashians.

The only thing that can really get anywhere in such a big place is light which – now here's a coincidence – travels at the speed of light. Television shows are basically made of light, as you can see if you conduct the same experiment Einstein conducted back in 1915, that is turning off the light in your lounge room while leaving the TV on.

Do this, and you will be impressed to find that lots of light comes from the TV, thus proving our conjecture (literally, 'spit') that TV shows are made of light; you will be even more impressed that Einstein conducted this experiment several decades before the invention of television (he was *that* clever).

This means that aliens have been watching our TV shows for years,[2] and given the quality of our early shows this may not have encouraged contact with us. For example, one of the earliest shows was *I Love Lucy*, which we all understood was a comedy because it said so in the TV guide, but which the aliens – due to the fact that nothing funny happened on the *I Love Lucy* show, ever – might have thought it was a documentary.

Another early show was *The Honeymooners*, which relied on the 'hilarity' generated by the main character threatening to punch his wife. If aliens aren't trying to contact us, you can see their point.

Another explanation could simply be that the aliens have been trying to contact us, but have mistaken the dominant life form on the planet, which is of course smartphones, but before that it was us (by which I mean humans. If you are reading this and you are not sure if you are a human, go look in the mirror; if you are wearing a Brisbane Broncos jersey, the answer is no). From afar, however, it may appear that we are not in charge.

For example, when I walk my dog (for those who have read footnote two already, here comes the true bit) he generally dictates where we go, based on where the most disgusting-smelling thing he can find happens to be lying. I walk along behind, saying things like "get out of that" which the dog ignores. Then, when he decides to go to the toilet, I pick up the result and put it in a bag, while the dog looks at me with an expression that basically says, "Dude! Do you know what that is?"

When we get home, I give the dog food and water, and then go off to work while the dog sleeps and scratches himself. Based on his 9-to-5 schedule, the only real difference between my dog and Clive Mensnik is that my dog comes back when you call him.

In any event, any alien of more than single-figure IQ watching this scene – which every dog owner acts out on a daily basis – will clearly conclude that the dog is the one calling the shots. My hypothesis is that aliens have made regular attempts to contact Earth, but they have mostly been walking up to dogs (after we are all asleep) and saying something like, "Hey, what's with these talking monkey slaves? Are they hard to train?" Since the aliens have not said anything that sounds like "have some food" the dogs ignore them and go back to sleep.

In closing, I know that there are plenty of people out there who are certain that aliens are indeed in regular contact, at least with them. I want to be clear that I fully respect your views, as well as – and I cannot stress how key this is – holding no desire whatsoever to discuss them with you.

If you are speaking to the aliens, though, my dog says that the talking monkey slaves are relatively easy to train but given to unnecessarily snide commentary.

Notes

[1] If you don't know who Lorne Greene was, he was Ben Cartwright on *Bonanza.* If you never watched *Bonanza*, shame on you.

[2] NB: Yes, I know that they actually couldn't be doing that, because of the diffusion of signal and the fact that their NBN, like everyone else's, isn't working, but if this column was limited to things that were true every instalment would be a paragraph long treatise on the stupidity of my dog, so live with it.

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Crossword solution

From page 54

Across: 2 Marshal, **4** Five, **7** Micallef, **8** Contempt, **12** Worry, **14** Conditional, **16** Renew, **18** Intervenor, **21** Representation, **22** Default, **24** Ordinary, **25** Act, **28** Fourteen, **31** Guardian, **32** Charging, **33** Honest, **34** Pendens.

Down: 1 Piacular, **2** Mere, **3** Sist, **4** Fact, **5** Fifty, **6** Innocent, **9** Principal, **10** Promissory, **11** Martin, **13** Rejoinder, **15** Ergat, **17** Warrant, **19** Evidence, **20** Adduce, **23** Termini, **26** Serve, **27** Joint, **29** Three, **30** Aged.

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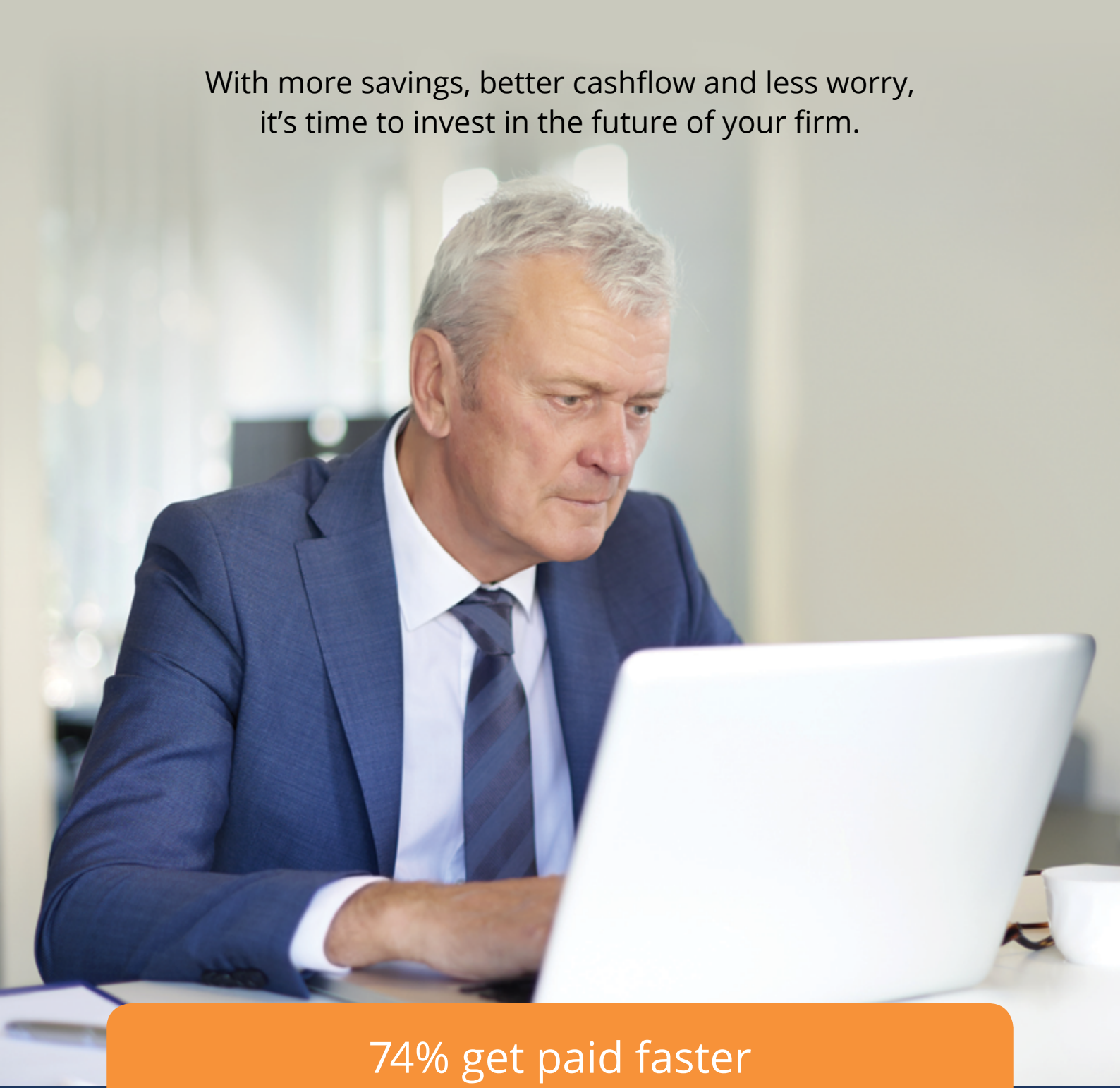

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