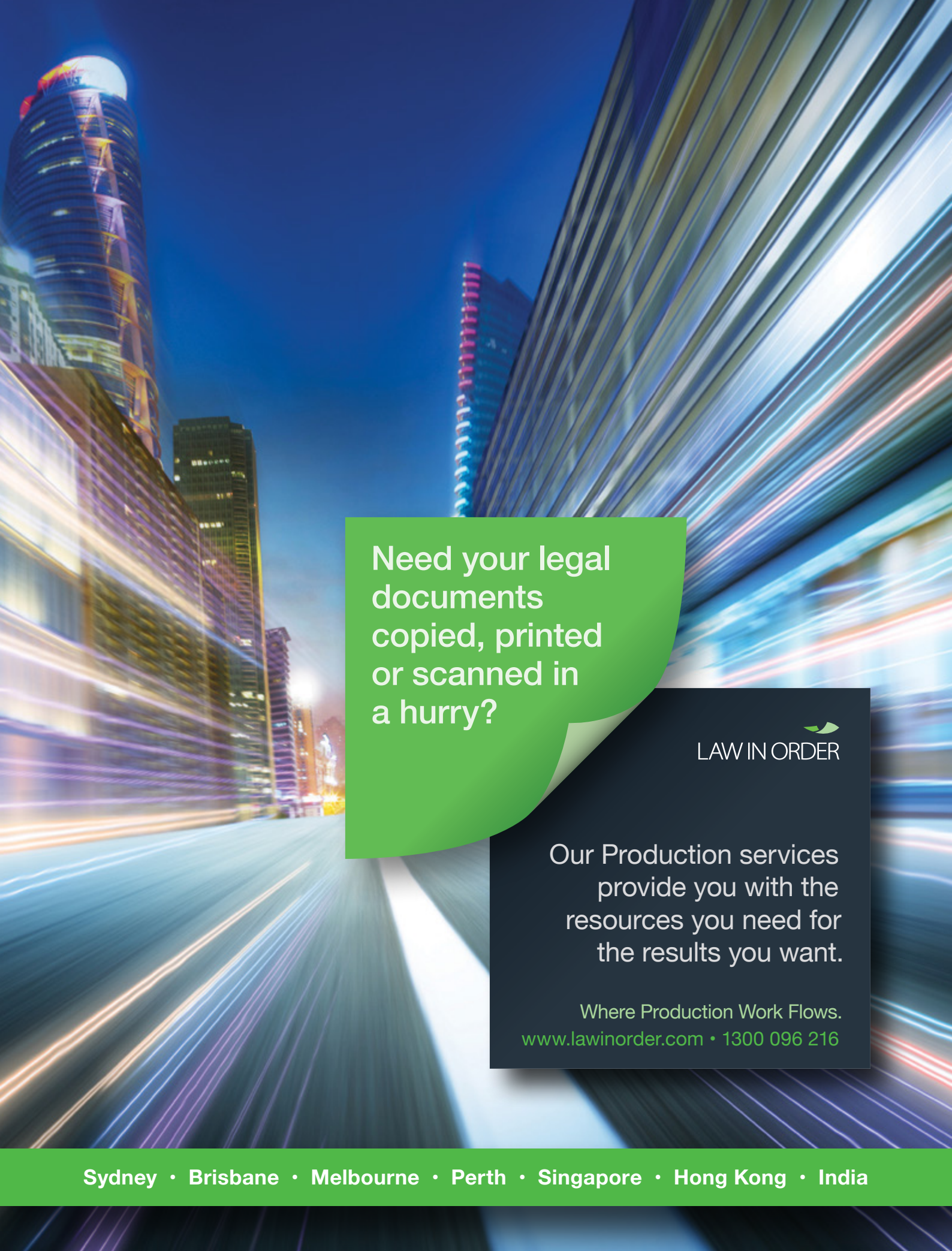
PROCTOR

Queensland Law Society

September 2018 – Vol.38 No.8

Our magistracy in profile

Apply to set aside, or appeal against an award?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Queensland Law Society

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2018 Legal Profession Breakfast

Supporting Women's Legal Service

Thursday 15 November

7-9am | Brisbane City Hall

Tickets are on sale for this anticipated annual event. Keynote addresses will be provided by Danny Blay, violence prevention trainer and policy advisor, and Rebecca Poulson, award winning author and domestic violence prevention campaigner.

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Excellence in law

What makes a good lawyer?

Excellence – that is what all legal practitioners should aspire to throughout their careers.

We are the guardians of the justice system and the protectors of the public good. Our solicitors carry out a valuable role each and every day by assisting members of their community with a multitude of legal matters.

We are often the last line of defence in serious circumstances, and the advisor that our clients rely on in their most challenging times. We contribute greatly to our profession and our community. Harnessing the excellence within our profession and promoting that throughout our communities is key in sharing the value of solicitors to society.

Recently, we recognised those listed on best lawyers' lists including Chambers, Legal 500 Asia Pacific, Best Lawyers and Lawyers Weekly 30 under 30. At this event, we were fortunate to have Phil Ware as our keynote speaker. Phil is a lawyer of nearly 30 years' experience across private first-tier and in-house practice. He is also the inaugural Chair of the Society's In-House Counsel Committee, a QLS Senior Counsellor and Chair of our Wellbeing Working Group.

Phil spoke about what makes an excellent lawyer, sharing some valuable insights into the benchmark for the modern lawyer. He shared that one must possess conjoining, ancillary and soft skills which move a practitioner from 'fair average quality' towards excellence and a 'trusted client adviser' along with a 'respected professional peer'. I would like to share the list of ingredients that were said to make up a good lawyer and support good law with you:

"For Good Lawyers

- Trite I know, but professionalism and civility
- Specialist accreditation where appropriate
- Client centricity in every facet
- Understanding and empathy
- Responsivity
- Solutions orientation
- Commerciality and practicality
- Process efficiency, including project management skills
- Client-recognised delivery of value and value for money
- Leadership
- Mentoring and pastoral care of professional and support staff
- Unquestioned ethics and integrity

"For Good Law

- Membership of the QLS
- Active support of the QLS and its initiatives including:
  - Participation in law reform via the QLS policy committees
  - Professional leadership via other QLS committees
- Community engagement including via District Law Associations and pro bono work.

"QLS promotes Good Lawyers and Good Law. That's a great precis of our deeper aspirations to professional excellence."[1]

I thank Phil for his insights and his support of not only the work that Queensland Law Society does, but also of the profession in general, and his trust in the high ethical standards of our practitioners.

I have discussed civility and collegiality in recent columns, and it is a subject I am passionate about. Our profession is steeped in tradition, and this includes our ethical standards. Who are our best lawyers? Those who balance ethics, professionalism, collegiality, upholding the rule of law and advancing their client's best interests embody the essence of a good lawyer. A good lawyer will also respect the courts, its officers, our justice system as a whole, their peers, staff and community. This excellence is what we must all strive for.

We must find what motivates us and hold onto that for the entirety of our careers, and beyond. The essence of a good lawyer carries over into life beyond law, within our families and communities. The passion that you find now will sustain you for life. Let us run the race together towards excellence in the law, for the good of the public.

Raising up the next generation

How do we instil the same robust and ethical values into the next generation of solicitors? By allowing students and emerging lawyers to learn in a real practice environment where mistakes can be made and corrected in a safe space is a start. Our young lawyers must be able to learn all of the facets of the job and become familiar with processes and key stakeholders to best understand the profession in its entirety.

If you can understand how a matter gets from a to z, then you have a better chance of being the most effective and efficient practitioner you can be. Not to mention, you can establish relationships with your peers, department and court staff by understanding their day-to-day tasks.

Having a proper opportunity to learn the ropes of being a solicitor on the job in the busy days of legal practice is so important. Having a proper mentor, guide or mater to help a young lawyer through is equally important. On-the-job training and the opportunity to learn and make mistakes safely should not be undervalued. When you think about it, that was the best of the old system of articles…

Ken Taylor
Queensland Law Society President

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Notes

[1] Phil Ware, keynote address, Queensland Law Society Best Lawyers Breakfast, Wednesday 18 July 2018.

SUCCESSION AND ELDER LAW CONFERENCE

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Queensland Law Society®

Service – our mark of distinction

Acknowledging those who give back

There are several identifying characteristics of a true legal practitioner.

In the July edition of *Proctor*, QLS President Ken Taylor spoke about one of them, civility. This month I would like to speak about another, 'service'.

This goes well beyond the service we provide to our individual clients. It extends to the community, through our pro bono work. It embraces the justice system itself through our belief in, and our efforts to uphold, the rule of law, along with our work to ensure 'good law'.

It is also integral to the legal profession itself, and the concept of 'giving something back'. This can take several forms, including mentoring and providing advice and guidance, and the contributions we make through working on policy committees and sharing our knowledge and experience – such as by writing articles for *Proctor*!

At Queensland Law Society, I believe it is important that we recognise those members for whom service is second nature.

With this in mind, I have recently reassessed and revised the process of presenting our members with the lapel pins that mark 25 or 50 years of QLS membership.

Townsville 25-year membership pin recipients Terry Browne and Jane Fittler with QLS President Ken Taylor.

I see it as critical that we specifically acknowledge the contributions of these long-serving members by using the opportunity to speak about the service they have given to not only their clients but to their community, the law and the profession.

In Townsville recently, we presented 25-year silver membership pins to Terry Browne and Jane Fittler and I believe that those present at the ceremony, including the recipients, appreciated the public acknowledgement of their contributions.

Both the 25-year pin and the 50-year gold pin bear the Society's coat of arms. This shield was designed in 1982 and modified in 2012 to the current form. It is composed of the central sceptre, which is a sign of royal authority in the area of justice; the Maltese Cross and Cooktown orchid, which represent Queensland, and the sunburst to symbolise Queensland as the sunshine state and enlightenment in justice and learning. Pegasus, the winged horse of Greek mythology, represents the Inner Temple Bar in London and the Southern Cross locates Queensland Law Society in Australia.

We also recognise the service of our members through other events. For example, on Friday 10 August, we held a breakfast at Law Society House to acknowledge the contributions of the chairs and deputy chairs of our policy committees. These willing volunteers put in an enormous amount of time and effort in working for 'good law', preparing submissions on proposed legislation and discussing the myriad issues that are brought to the attention of these committees.

We shared breakfast with more than 30 of our chairs and co-chairs, who appreciated the acknowledgement of their dedication and contributions, and enjoyed the opportunity to network and exchange ideas with colleagues.

Another group whose contributions to the profession have recently been gratefully acknowledged is our QLS Senior Counsellors, who provide fellow members with all manner of practical advice and guidance on career, professional and ethical problems.

These are highly experienced practitioners who are keen to give something back to the profession, and choose to do so by sharing their wisdom with those who need assistance.

We paid tribute to their commitment at last month's QLS Senior Counsellors conference. As well as a dinner event, it included an address from Queensland Civil and Administrative Tribunal President Justice Martin Daubney, a panel session on ethical issues featuring senior members of the judiciary, a session looking at mental health issues when dealing with practitioners, and an address from Acting Legal Services Commissioner Bob Brittan.

I acknowledge and thank all those members who serve our community and our profession through many and varied ways. And if you feel there are better ways this service can be acknowledged, please send me your suggestions.

Never a bystander

My interview subject this month is no stranger to service.

McCullough Robertson Chair of Partners Dominic McGann is – to use his own words – "never a bystander". I think these are words that all leaders within the profession, and those who aspire to leadership, should take to heart.

Dominic is a resources expert with more than 30 years' experience as a general commercial lawyer and particular experience in native title and cultural heritage matters, on which he is an acknowledged authority.

He joined McCullough Robertson in 1996 after holding key positions in the State Government, including Program Director of the Aboriginal & Torres Strait Islander Land Interests Program.

I believe you will find his thoughts on workplace culture and related issues quite enlightening, and I commend his comments to you. Please turn to the next page.

Rolf Moses
Queensland Law Society CEO

Never a bystander

Focusing on clients, colleagues and the community

For this month's interview, I spoke with McCullough Robertson Chairman of Partners Dominic McGann.

Dominic McGann with *Walking Tracks*, an artwork by Indigenous artist Thelma Hobson, who is well known in the Lockhart River area. McCullough Robertson commissioned the work, which is on display in the firm's reception area. The inspiration is Thelma's passion to produce works that speak of her individual identity, culture, land and community.

I have previously written and spoken to QLS members regarding workplace culture in our profession and the role of leaders to ensure we have equitable and healthy workplaces. Far too many practitioners leave the profession within five years of commencing and the research is clear that, in part, it is workplace culture – particularly relationships and workplaces not consistently living up to the ideals they promote – that is a causal factor in the high turnover rates.

You may have heard of the movement called Australian Male Champions of Change, a national organisation of cross-industry CEOs committed to gender equality and organisational cultural health. Queensland has its own branch and Dominic is the only solicitor member of the Queensland Male Champions of Change (QMCC), a group of a dozen male, cross-industry Queensland CEOs.

Dominic, please tell us more about the QMCC and its purpose?

The QMCC is a group based on the national Male Champions of Change, with the male champions being advocates for change for women, and equity and diversity.

The Queensland branch has a broad cross-section of members coming from senior government and commercial roles across a variety of industries. There are about 12 members who get together to share ideas and test them within their own firms. For each champion they have an internal agency lead to assist the implementation of change strategies in their own organisations. At McCullough Robertson that agency lead is HR Director Louise Ferris.

You are the only legal practitioner in the group; how did you get involved?

The group was keen to get a lawyer on board, given that they were aware of the challenges that existed in the legal sector. I had a clear interest in equity and equality, and thought this would be an area that I could contribute to, learn from, and to send a signal to my own firm, on our commitment to gender issues and diversity more broadly. I have been involved for four years and we meet three times a year. We have specific challenges in the legal sector, which we can learn to improve by engaging with leaders in other industries and how they look to deal with gender issues themselves. We have learned, in particular, that we need to manage the employment relationship carefully with people, particularly those going on parental leave, to ensure that we lean in without leaning on.

What does the group stand for?

The QMCC stands for leadership of female equality and has a strong focus on the alleviation of domestic and family violence – dealing both with victims and perpetrators and the interplay between domestic and family violence in the employment relationship.

The leaders are serious about cultural change and equity, and are committed to creating positive change within their own sphere of influence – normally meaning their own firm and their own industry sector. In law, 60% to 70% of staff are female. Issues for careers for women in law are quite different to many other industries. We have learned that in law the challenges are quite unique.

How do you approach these unique issues at your firm?

We started to address career issues for women by ensuring that we have four clear conversations about their careers.

The first is to ensure that women have had conversations with their life-partner or family and have clarified in their own mind what it is they want to do in their career. The next conversation to have with the firm is to be clear around what is available, what the possibilities are, and what their ambitions are. The third conversation is the collaboration, or what we call co-opetition (a combination of cooperation and competition), with the profession to work together to create change to advance the career prospects for women. The fourth conversation that we need to have is within the community more broadly, and

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by Queensland Law Society CEO Rolf Moses

part of that is to make our voice heard about what we are committed to and what the standards should be.

Where have you drawn your personal sense of purpose and commitment from to improve workplace culture?

I was one of eight children and grew up in various parts of Australia, including Port Hedland, Darwin and Townsville. My mother and father did a lot for us and we knew as children that our parents worked incredibly hard and gave up a lot for us. We learned early on that we should work hard as well – that we should take up every opportunity to try and improve ourselves.

We were also treated equally as siblings and all had to take self-responsibility. This sense of equity was role-modelled very much by my mother, and I remember growing up in Darwin in a very multicultural neighbourhood where kids were playing together from all different backgrounds and we would often share meals. I never saw anyone turned away from our table, and my mother was clear that no characteristic should ever be used to turn somebody away. In a way, my sense of equality and equity that we should strive for in a culture developed from early life experiences, in particular I describe my mother as having grace – she knew how to treat others.

This sense of egalitarianism is something that I've strived to develop in my own law firm by ensuring that all of our staff, particularly new staff, understand that everybody makes a contribution; sometimes that contribution is different depending on our role, but everyone is important. Collectively, we help our clients succeed and we help reach each other's and our own potential.

I ensure that people focus on clients, colleagues and the community. Again, I strongly believe that we have obligations as lawyers to contribute, and we must give back.

Our values here are not just about gender, that is one issue, but they are also about reconciliation, mental health, sexual orientation, ethnicity and the stigmas that make it difficult for people to feel included. We believe everybody has a role to play in this profession and that the more diversity we have, the more individuals we have. It enriches the firms they work in and it enriches the profession.

Many legal organisations are making great improvements in their workplace cultures. But this change is not easy. What concerns do you have about the industry – what are the challenges in this sphere?

I think we have a number of concerns about the profession moving forward, one in particular being the profession is disadvantaged by a sense of hierarchy, meaning we often look for what is different, rather than what we share; people can feel disempowered based on where they are in the hierarchy. Often people might not speak up if they feel that the system won't support them.

Our role in leadership is to get people to speak up and then be both proactive and reactive –meaning we must do proactive work against the negative influences and then be reactive so we follow through when there are issues to resolve. We must never be bystanders.

I was raised to believe that those who do not prevent the wrongs that they see happening are in fact helping wrongs to flourish. As leaders we must live up to our principles. It is vital that we understand that everybody's experience at work is important. It's important to remember that we are a member of the profession and that means we have obligations to each other, the law and the community.

THE MAGISTRACY

An estimated 95% of all of the court cases dealt with in Queensland each year are handled by the state's 100 magistrates.

Over

120

Magistrates Courts locations in Queensland

100

Magistrates roles in Queensland

7

Coroner's magistrates

Our magistracy in profile – page 18

All figures correct as at June 2018

Queensland Law Society

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UQ team launches first deaths in custody database

A team of University of Queensland law students and staff has developed Australia's first comprehensive deaths in custody website.

The website brings together details of more than 530 reported deaths in custody cases to provide the community, legal professionals, journalists, students, academics and researchers with an easy-to-use, searchable database. See **deaths-in-custody.project.uq.edu.au**

Project coordinator Professor Tamara Walsh said research into deaths in custody was lacking and existing court databases were inaccessible or out-of-date.

"The Royal Commission into Aboriginal Deaths in Custody recommended that a database be maintained to record the details of deaths that occur," she said. "It is important that this information be made available to researchers and members of the public in the interests of transparency.

"People in our prisons are among the most disadvantaged members of our community. If coroners' recommendations regarding deaths in custody are not being implemented, the community should be made aware of that."

More than 20 students have worked on the project on a voluntary basis. They have been involved in reviewing coroners' findings, as well as collecting information from reports, including demographic information and the circumstances surrounding the deaths.

Deaths in custody database team members Angelene Counter, *left*, Professor Tamara Walsh and Ella Rooney

Appointment of receiver for Smith Legal Solutions, Broadbeach Waters

On 6 August 2018, the Executive Committee of the Council of the Queensland Law Society Incorporated (the Society) passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, Smith Legal Solutions.

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

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

Thank-you to our policy leaders

At the heart of Queensland Law Society's efforts to achieve 'good law' for Queensland are its 26 policy committees, and each year the Society acknowledges the prodigious efforts of those committees with an event for their chairs and co-chairs. This year's breakfast, held on 10 August, saw more than 30 chairs and co-chairs attend, along with President Ken Taylor, CEO Rolf Moses and QLS policy solicitors. Read more on this month's legal policy page.

The mighty MALS

On 25 July Justice Andrew Greenwood of the Federal Court of Australia delivered lecture three in this year's Modern Advocate Lecture Series (MALS), speaking on 'Some practical considerations on advocacy'. This highly popular series wraps up for 2018 on 25 October with a lecture by former District Court Judge John Robertson.

Breakfast with the best

QLS acknowledged the success of its members who were named in the Best Lawyers, Chambers, APL 500 and 30 Under 30 lists with a breakfast at Brisbane's Blackbird on 17 July. Stanwell Corporation General Counsel and inaugural Chair of the QLS In-House Counsel Committee Phil Ware delivered the keynote address.

QLS criminal law conference

With 116 delegates, this year's QLS criminal law conference on 3 August was the biggest on record and was moved to a larger venue, the Pullman Brisbane King George Square. It was a conference with plenty of highlights, beginning with the opening plenary featuring journalist and author Madonna King, and closing with an engaging discussion of the implications of *Re: Pham* with input from the Immediate Past President of the Court of Appeal, the Honourable Margaret McMurdo.

QLS conveyancing conference

More than 60 delegates attended the QLS conveyancing conference at Law Society House on 2 August, taking a close look at recent developments and topical issues including the new GST withholding regime, cybercrime and E-Conveyancing.

Legal Aid keeps in touch

A fast and hotly contest final saw Legal Aid take out the champions title for the second year in a row at the QLS Touch Football Tournament at Finsbury Park, Newmarket, on 11 August. Food trucks and fun events made it a great day out for the hundreds who participated.

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BRISBANE MINI GARAGE

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Bill seeks to override legislated process

prepared by the QLS Legal Policy team

During July and August, Queensland Law Society was invited to attend and present at three public hearings on key state and federal issues.

The public hearing for the inquiry into the Draft Local Government (Dissolution of Ipswich City Council) Bill 2018 was held on 30 July 2018 by the parliamentary Economics and Governance Committee. The hearing was attended by QLS President Ken Taylor, General Manager of Policy, Public Affairs and Governance Matt Dunn, and Senior Policy Solicitor Kate Brodnik.

The purpose of the Bill is to dissolve the Ipswich City Council and provide for the appointment of an interim administrator to act in place of the councillors for an interim period. Reforms to local governments had already been considered in May 2018 when the Queensland Parliament passed the *Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Act 2018* following consultation with the same parliamentary committee.

This Act made some changes to the way local government could be dissolved under the *Local Government Act 2009*, that is, that a local council could be dissolved if the Minister reasonably believed it was in the public interest that every councillor be suspended or dismissed.

The Society made strong submissions that the draft Bill aims to override proper legislated process, while removing the ability for an aggrieved councillor to make submissions about a proposed dismissal, including that they had not been charged with an offence, and to have any determination judicially reviewed.

The public hearing allowed the Society to raise these significant concerns and breaches of fundamental legislative principles in a public forum. The position of the Society, that there is an existing process that needs to be followed, was clearly articulated. We do not support the draft Bill as an appropriate and fair means to an end.The parliamentary committee will now consider the submissions from stakeholders and produce a report on the draft Bill.

Police powers

On 19 July, QLS Deputy President Bill Potts and Legal Policy Manager Binny De Saram were invited to appear at the public hearing of the parliamentary inquiry into the Police Powers and Responsibilities and Other Legislation Amendment Bill. The Society was broadly supportive of the measures to preserve and enhance community safety provided in the Bill. However, we raised a number of concerns with the effect the draft legislation would have on the rights and liberties of individuals, including:

- the proposed amendment to allow police officers to demand access to passwords for applications and subscriptions for any electronic storage device
- the lack of a reasonable suspicion threshold test in the establishment of a high-risk missing person scene and the ability of commissioned police officers to authorise the establishment of a missing person scene before obtaining a missing person warrant
- the proposal to allow notices to appear regarding traffic offences to be served at an individual's most recent address may lead to a significant increase in people failing to appear and subsequently being convicted due to this absence, due to non-receipt of the notice.

Despite the QLS raising these concerns, the parliamentary committee tabled its report on 9 August 2018 and recommended that the Bill be passed.

Family violence

The Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (Cth) seeks to introduce appropriate protections for victims of family violence during cross-examination in family law proceedings. In particular, the proposed legislation would prohibit cross-examination in certain circumstances, and require that cross-examination be conducted by a legal representative.

The Society attended the public hearing on this Bill on 1 August 2018 and expressed general support for a Bill which prevents direct cross-examination of vulnerable witnesses in matters involving family violence.

The parliamentary committee sought clarification on the general rights of the court to intervene in proceedings involving family violence. The *Family Law Act 1974* provides judges with powers to tailor proceedings to protect victims of family violence, including, allowing a victim to have a support person nearby while providing evidence, closing the court to the public and disallowing certain questions on the basis that they are misleading, confusing or even offensive. The Society expressed the view that the current provisions are insufficient as each judge differs in their approach and these protections are inconsistently applied.

The Society also stressed the importance of retaining specialist, experienced and qualified judges to determine family law matters. This experience is critical for judicial officers to properly determine family law cases, particularly those involving family violence.

Annual policy chairs' breakfast

The annual policy committee chairs' breakfast was held on 10 August 2018.

The breakfast provides an opportunity to show the Society's appreciation for the significant work of the chairs and deputy chairs of each of the 26 policy committees, as well as a chance to look forward to the goals and events of the upcoming year.

This year, guests were asked to provide their insight on the greatest issues facing the legal profession today and what issues should be included in the Federal Call to Parties. The Federal Call to Parties is an opportunity for the Society and its members to call on Federal political parties to consider and respond to issues identified by the profession. The Society invites members to contribute issues affecting the profession by contacting policy@qls.com.au .

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Apply to set aside, or appeal against an award?

When to apply s34 or s34A of the *Commercial Arbitration Act 2013* (Qld)

When should you apply to set aside an arbitral award, or just appeal against it? **Russell Thirgood** and **Erika Williams** look at a recent Court of Appeal case which provides some guidance.

Mango Boulevard Pty Ltd v Mio Art Pty Ltd[1] (the original judgment) is an example of a case in which a party sought to set aside an arbitral award under section 34 of the *Commercial Arbitration Act 2013* (Qld) (the Act).

This decision was then appealed in *Mango Boulevard Pty Ltd v Mio Art Pty Ltd*[2] on the basis that the primary judge erred in not setting aside the award for the arbitrator's failure to afford procedural fairness.

Ultimately, the court found that the primary judge's findings were accurate, and that it was not possible to conclude any real unfair or practical prejudice because Mango Boulevard had been afforded a reasonable opportunity to present its case at arbitration.

Circumstances in which a court will set aside an arbitral award are extremely limited. Another avenue to challenge an arbitral award is by applying to appeal the award on a question of law. However, since the introduction of the Act in 2013, an application to appeal may only be made if the parties have agreed. In this article, we consider when and how this agreement should be reached.

Case background

The dispute between the parties originated from a joint venture for the development of land, specifically that the parties were unable to determine the share price pursuant to clause 4.1 in the share sale agreement (SSA).

At arbitration, it was stipulated that the arbitrator, in reaching his decision, "must adopt the same methodology as provided in clause 4.4".[3] This required the arbitrator to make assumptions agreed by the parties, particularly that the project would achieve a profit on cost percentage return of 25%.

In determining the subject property's market value under the SSA, the arbitrator was required to consider the "real life market considerations" and "commercial reality" of the project. In rejecting Mango Boulevard's expert evidence, the arbitrator concluded that a "competent", "prudent" or "rational" developer would not purchase the subject property unless they reasonably believed they could return a profit of 30% to 45%.[4]

Judgment and appeal

It is on this point that Mango Boulevard sought to set aside the arbitrator's decision on two grounds – firstly, that the methodology used by the arbitrator to determine the share price departed from the requirements of the SSA and was beyond the scope of the submission to the arbitration, and secondly, that the arbitrator failed to accord procedural fairness or acted in breach of the rules of natural justice by rejecting Mango Boulevards' expert witness, which meant it was unable to present its case and that the award was in conflict with the public policy.

Mango Boulevard first sought to set aside the arbitral award in the Supreme Court of Queensland under sections 34(2)(a)(ii) or 34(2)(b)(ii) of the Act, which provide that the court may only set aside an arbitral award under the Act in the circumstance whereby:

(a) the party making the application furnishes proof that it was otherwise unable to present the party's case, or

(b) the court finds that the award was in conflict with the public policy of the State.

The primary judge concluded that the arbitrator had appropriate reasons to reject the evidence of Mango Boulevard's expert witness, and that his error to not put this to the witness or counsel for Mango Boulevard did not amount to or cause a real practical injustice such as to set aside the award under section 34 of the Act.[5]

Mango Boulevard appealed the original judgment in the Queensland Court of Appeal, on the basis that:

(a) the primary judge erred in not finding that the arbitrator had conducted or resolved the arbitration in a manner that caused real unfairness or real practical injustice to the appellant, and

(b) on the basis of the error in paragraph (a), the primary judge erred in not finding that the arbitral awards delivered by the arbitrator should be set aside pursuant to sections 34(2)(a)(ii) or 34(2)(b)(ii) of the Act.[6]

Ultimately, the court held that, contrary to Mango Boulevard's contentions, it was not possible to conclude that there had been a real unfairness or real practical prejudice in this case. Mango Boulevard had been provided with ample opportunity to present its case. This was evidenced by the arbitrator's willingness for Mango Boulevard to recall its witness to give further evidence.

However, Mango Boulevard failed to do so on multiple occasions, choosing to present its case in the way it determined was appropriate. In conclusion, his Honour found that s34 of the Act was not intended to "protect a party from its own failure or poor strategic choices".[7] To set aside the award would effectively "bail out parties who have made choices that they might come to regret".[8]

Accordingly, the court dismissed the appeal.

Difference between s34 and s34A

In the original judgment, Justice Jackson referred to the judgment of *Cameron Australasia Pty Ltd v AED Oil Ltd*[9] (*Cameron*) to provide an explanation as to the difference when seeking to set aside under s34 or appealing against an award under s34A of the Act.

Cameron held that the provisions of s34A allow for "an appeal on a question of law arising out of an arbitral award, but only in limited circumstances, and only on an 'opt-in' basis."[10] In other words, a party can only appeal an arbitral award in circumstances whereby the parties to the arbitration agree that an appeal may be made on a question of law.

It is understandable that reaching an agreement once an award has been delivered is likely to be rather difficult, especially when agreement must be reached before the expiration of the appeal period (three months).[11] To counteract this potential stalemate, it is possible to agree to a right of appeal on a question of law in the arbitration agreement itself, or at the preliminary conference once an arbitration has been commenced.

If it is in your client's interest to maintain a right of appeal on a question of law, the best time to 'opt-in' to include this right is when drafting the arbitration agreement in the contract. An example arbitration clause from the Resolution Institute is:

"Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, Resolution Institute Arbitration Rules.

"Unless the parties agree upon an arbitrator, either party may request a nomination from the Chair of Resolution Institute."

If your client would like the right to appeal an arbitral award on a question of law, you should consider adding the following:

"The parties agree that an appeal lies to the Court in the relevant jurisdiction on a question of law arising out of an award, subject to the leave of the Court."

As is reflected in the above drafting, parties must also remember that, even if they have agreed on a right to appeal, they must also seek leave of the court.[12]

In contrast, a party can only seek to set aside an arbitral award under s34 of the Act in circumstances including (but not limited to) when:

(a) a party believes that the arbitrator has made an award outside the scope of the submissions to the arbitration
(b) the arbitrator has failed to accord procedural fairness or act in accordance with the rules of natural justice, or
(c) the award is in conflict with the public policy of the State.

Cameron identifies that section 34 of the Act provides for limited court intervention and nothing in the nature of an appeal on a question of law.

When should you apply under s34 or s34A

When making an application to either set aside or appeal an arbitral award, it is necessary to identify and apply the correct section of the Act. But which section best applies to your client's situation?

In the circumstance that you believe that an arbitrator has failed to accurately apply or interpret relevant legal principles to your client's matter, it would be necessary to appeal the award under s34A of the Act. However, as mentioned above, this would require not only the parties to agree to the appeal, but also leave from the court to do so.

Alternatively, in the circumstance you believe an arbitrator has:

(a) dealt with a dispute not contemplated by the submissions of the arbitration
(b) dealt with matters outside the scope of the submissions of the arbitration, or
(c) failed to provide your client with procedure fairness or accord with the laws of natural justice,

any of which results in the arbitral award being in conflict with the public policy of that state, then an application should be made under section 34 of the Act.

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Important notes

For anyone looking to challenge an arbitral award, it is important to note that there are strictly limited circumstances in which the court will set aside an arbitral award under s34 or allow an appeal of an award under s34A of the Act. Australian courts have demonstrated that they will use their best endeavours to uphold arbitral awards. Parties bringing set aside applications or appeals should also consider the manner in which they present their applications to the court, bearing in mind that bringing a frivolous application or presenting an application in an oppressive manner could result in an indemnity costs order.[13]

Finally, since s34A of the Act came into effect, due to the requirement for parties to agree to a right to appeal on a question of law, you should consider whether it is in your client's interest to agree to maintain this right.

For example, if your client would like the benefit of a quick, efficient and confidential arbitration but the dispute is in relation to a high-value claim or your client has a strong case in law, it may serve your client to maintain a right of appeal on a question of law. In this case, you should consider drafting such an agreement into the arbitration clause.

On the contrary, if your client would be best served by maintaining the final and binding nature of an arbitration award, you should be wary of any arbitration clause or agreement which includes an agreement to a right of appeal on a question of law.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee. Russell Thirgood is a partner and Head of Arbitration at McCullough Robertson Lawyers. Erika Williams is a senior associate at McCullough Robertson Lawyers and a member of the committee. The authors would like to thank Tom Hannah, a graduate at McCullough Robertson Lawyers, for his assistance in the preparation of this article.

Notes

1 [2017] QSC 87.
2 [2018] QCA 39.
3 *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [8].
4 Ibid, [10].
5 Ibid, [19].
6 Ibid, [5].
7 Ibid, [83].
8 Ibid, [85].
9 [2015] VSC 163.
10 [2015] VSC 163, 16.
11 *Commercial Arbitration Act 2013* (Qld) s34A(1)(a).
12 *Commercial Arbitration Act 2013* (Qld) s34A(1)(b).
13 *John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd (No.2)* [2018] QSC 48.

Chief Magistrate:

Judge Ray Rinaudo (since 2014)

Our magistracy in profile

The workings of Queensland's busiest courts

Queensland's Magistrates Courts are the engine room of the state's judiciary and in almost all cases the first touch-point for people who fall foul of the law for myriad offences.

It is traditionally and remains a very busy and vastly overworked court, with many call-over courts throughout Queensland – colloquially referred to as 'morning' or 'arrest' court – dealing with up to, and in many cases more than, 100 matters each and every day.

In the course of one day a magistrate can deal with everything from offences such as public urination, public nuisance, shoplifting, flashing, drink or drug-driving, drug possession, domestic and family violence, assaults, stealing, public exposure; to crimes such as rape, child sex offences, possessing or producing child pornography, major fraud, drug trafficking, attempted unlawful killing, manslaughter and the highest offence on the criminal books – murder.

Name any criminal offence and there is a chance that on any given day there is a magistrate somewhere in Queensland dealing with a person who has committed at least one of those crimes or more and that any decision made or penalty imposed could result in potentially significant lifelong changing impact on the people who appear before them.

In Queensland there are currently 100 magistrates (including the Chief Magistrate) charged with the responsibility of delivering fast and fair justice to a burgeoning population that breached the five-million mark on May 14 this year.

To explain the burdens, public scrutiny and high standards that are required to work in such a pressure-cooker environment, Queensland's Chief Magistrate Judge Ray Rinaudo and Deputy Chief Magistrate Leanne O'Shea give a unique insight into what can be a very stressful, lonely role, and ultimately the honour and privilege it can be to serve as a magistrate.

Judge Rinaudo – as chief magistrate (CM) – is the only member of the magistracy to hold the additional commission of a District Court judge. The commission for the higher court role was added to the role and introduced when Marshall Irwin was appointed as CM in September 2003.

Between them, Judge Rinaudo and Ms O'Shea have collectively racked up almost 80 years of legal experience – having been both admitted at solicitors in 1979 – and 30 years on the judiciary beginning their roles as magistrates via compulsory 'country service' in regional Queensland in Charleville (Judge Rinaudo) and Bundaberg (Ms O'Shea).

"(In Queensland) every (new magistrate) has to do at least two years in the country," Judge Rinaudo said.

"When I left for Charleville I always told the story that I thought western Queensland started on this (Brisbane) side of Ipswich. I didn't realise that there was another 750km just to get to Charleville, let alone the (more than 1500 kilometres) to get to Birdsville.

"(Country service) can be quite tough at first.

"You've got the added problem of uprooting your family and going to a remote place you don't know or understand and that can be quite disconcerting.

"I was in Charleville from 2007-08 and loved every minute of it, to be honest. Leanne (O'Shea) was up in Bundaberg. So as you can see everyone is expected to do it."

There has been considerable change in the legal profession over the past 50 years – one of the most positive being increased gender equity and diversity in the law. The legal profession had long been considered, and still is by many, one of the last bastions of the stoic male practitioner that in modern day parlance has garnered the not so flattering moniker of the 'pale, stale, male brigade'.

Judge Rinaudo says that outdated perception was vanishing fast and that he was honoured to be heading a lower court that was leading the way in evening out the battle of the sexes.

"I can tell you that there is a 45/55 (women to men) on the gender split (of the current 100 magistrates in Queensland). We are finally getting up there (to gender equity) and I've

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We profile Queensland's magistracy, its courts, responsibilities and concerns.

said to the Attorney-General that I hope we get up to 50/50 by the end of my term (as CM), but we are pretty close already," he said.

Another burgeoning topic that has for far too long been ignored as being too intrusive and a topic bordering on taboo has been the undeniable rise in the reports of mounting mental health issues. While it is widely accepted people like police, firefighters, ambulance paramedics and other frontline staff whose daily routine is subject to the horrors of life and man's inhumanity to man – the same is the case for magistrates and judges whose daily diet in the criminal courts is one of conflict, despair and a snapshot of society that on the surface appears fractured beyond repair.

Judge Rinaudo said an indicator of those extreme pressures of the role ended in the suicide of two Victorian magistrates. The full impact of the second death became even more personal as Judge Rinaudo recounted being at a conference with the Victorian CM when he received telephone notification of the magistrate's passing.

"We do an enormous amount of work on what we call wellness (initiatives for magistrates)," Judge Rinaudo said.

He said Queensland Magistrates were the only court outside of Victoria that were a member of the Minds Count Foundation (formerly known as the Tristan Jepson Memorial Foundation) – which was established in 2008 after the death of a solicitor to improve work-related psychological ill-health in the legal community and to promote workplace psychological health and safety.

"We aspire to the (foundation's) principles and policies to promote those as good healthy work practices and what should happen if you're feeling down or you see it in a colleague. We have counselling resources that are available.

"With the domestic violence courts we have very specific counselling that is built in to the funding. We insisted on that as being part of the court when we first set up (the network of Domestic and Family Violence Specialist Courts) because if anything is going to go wrong it's going to go badly wrong there."

Deputy CM O'Shea, who also sits as Brisbane's Children's Magistrate, said one other aspect of the alarming mental health trends was in the number of children who appeared before courts across the state and who demonstrated signs of mental illness.

"I do the Childrens Court work here in Brisbane and I sort of keep an eye on cases across the state and there are a lot of mental health issues with kids," she said.

"There are so many we are now needing for kids to be screened (or assessed) because we can't be sure what the kids understand (about what's going on)."

Ms O'Shea said the whole issue of Youth Justice was in need of reform, with the courts already doing the best they can with the resources they have. She said a lot of work was being done in conjunction with Queensland Education to ensure children have positive outlets.

"With kids, we need to spend a lot more money (on programs) for kids who can't cope with things as simple as going to school. Schools aren't following up non-attendance anymore.

"So we've got a committee run by the Childrens Court judge and we are trying to raise the awareness…and for the first time ever we've got (Queensland) Education who should be able to tell who the (children) are that have left.

"I have kids coming into the Childrens Court who are 12 and haven't gone to school in two years. That's not unusual in the kids' court. I mean 14 or 15-year olds just give up, they don't go. There is not a lot for kids in school if they've got problems at home.

"And they are all the things that take it out of you (as a magistrate). (For example) to see another child who will come in…who has committed 48 offences and is then locked up in detention for a long time. And then every time you let him out he does more. What happens? He ends up back in custody."

However, Ms O'Shea said government departments were now working very closely with the courts in a bid to deal effectively on a host of issues – including Youth Justice.

"Youth Justice are working hard. I have to say all of the government departments are really including us (the courts) on a lot of decisions now, which is so valuable because we are all talking (to bring about positive change)."

Deputy Chief Magistrate:

Leanne O'Shea

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Magistrates as coroners

One of the most challenging roles of being magistrate is when they are required to act as a coroner.

Queensland has seven full-time coroners – however, every Queensland magistrate can be called on to act as a coroner and investigate the circumstances and causes of 'reportable' deaths.

'Reportable deaths' are any cases where a person's identity is unknown, the death was violent or unnatural, the death happened in suspicious circumstances, the 'cause of death' certificate hasn't been issued and isn't likely to be, the death was related to health care, occurred in care, custody or as the result of police operations.

Once a death is reported, the coroner begins the process of investigating the circumstances of the death. That may involve an autopsy and/or an inquest, resulting in the coroner making findings and, potentially, recommendations for how to prevent the type of death occurring again.

While the job can be very mentally and emotionally taxing – coroner's investigations and inquests can often attract intense media scrutiny and public interest.

High-profile past inquests includes hearings into the deaths of Sunshine Coast schoolboy Daniel Morcombe, the likely murder of 16-year-old Rachel Antonio in Bowen more than 20 years ago, the 2004 Indigenous death in custody of Cameron 'Mulrunji' Doomadgee in a police watchhouse cell on Palm Island and the jailhouse deaths of Queensland's first serial killer Leonard Fraser (a career criminal and multiple rapist convicted and jailed indefinitely for the slaying of three Rockhampton women and 11-year-old schoolgirl Keyra Steinhardt) and notorious child-killer Valmae Beck.

Like all other Queensland lower courts, the Coroner's Court labours away under an extremely heavy and burdensome workload and between 2011-17 it received almost 30,000 notifications of 'reportable deaths' – 353 of which were the subject of coronial inquest hearings.

Figures obtained from the 2016-17 Coroners of Court of Queensland Annual Report show among those that were subject to inquest – 25 of the reportable deaths were victims of the 2011 floods, 18 were deaths in custody, nine from quad bike incidents and five from single Pacific Motorway traffic crashes.

Despite the demanding amount of cases, the court finalised 29,644 of the cases reported.

Queensland's current State Coroner, Terry Ryan, oversees and coordinates the Queensland coronial system to ensure it is administered efficiently and appropriately.

Mr Ryan is based in Brisbane and is supported by Deputy State Coroner John Lock and fellow coroners Christine Clements and John Hutton.

Northern Coroner Nerida Wilson, who is based in Cairns, is responsible for covering the regions south to Bowen, west to Mt Isa and north to the border of Papua New Guinea. Central Coroner David O'Connell, based in Mackay, covers all Central Queensland deaths extending from Proserpine and the Whitsundays in the north to Gayndah in the south. South-Eastern Coroner James McDougall, located at Southport, investigate deaths in the Gold Coast region as well as Beenleigh and Logan.

In Queensland, the role of a coroner carries many powers and responsibilities, including whether an inquest should be held if they consider it is in the public interest to do so.

They may decide in some cases that an inquest should be held because there is significant doubt about the cause and circumstances of death, or believe an inquest may prevent future deaths or uncover systemic issues that affect public health and safety.

A coroner also holds the unique power of making a finding that there is a prima facie case – sufficient evidence – to recommend or commit one or more people be ordered to stand trial before a jury of their peers over a person's suspicious or unexpected death.

Courts presided over by magistrates include:

Criminal, Civil, Domestic and Family Violence Court, Murri Court, Coroners Court, Children's Court, Drug and Alcohol Court, Mental Health Court and Queensland Civil and Administrative Tribunal.

Role of the court and its magistrates

An estimated 95% of all of court cases dealt with in Queensland each year are handled by the state's 100 magistrates.

Queensland's Magistrates Court is the first point of call for almost all cases and almost exclusively the venue where anyone accused of a criminal offence will appear.

Although it is considered the lowest court in the state – as opposed to the District or Supreme Courts and the highest in the state, the Court of Appeal – the Magistrates Court hears a myriad of matters.

Unlike the Supreme and District Courts, a Magistrates Court has no jury. Therefore, the magistrate makes all decisions in criminal matters, including any penalty.

On any given day, a magistrate sitting in one of the more than 130 Magistrates Courts dotted across Queensland's 1.853 million square kilometres can be responsible for dealing with accused murders, unlawful killers (manslaughter), rapists, child molesters, arsonists, fraudsters, thieves, armed-bandits, and minor offenders, involving domestic and family violence matters, civil cases up to $150,000, the Murri Court, drug and alcohol diversion, Childrens Court, or even acting as a coroner.

Queensland does have specialist magistrates such Childrens Court Magistrate Leanne O'Shea (who is also Deputy Chief Magistrate) and a number of coroners covering different regions, but all magistrates' commissions empower them to also rule in Childrens Court matters, coronial inquests, as members of the Queensland Civil Administrative Tribunal, in minor family court hearings, and in arrest and bail hearings, as well as issuing warrants requested by police or government agencies.

In essence a magistrate's brief is wide and requires them to be jacks and jills of all trades in the legal profession.

Queensland's Indigenous magistrates

More than 150 years after Queensland's District Court was established, the state announced the appointment of the state's first Indigenous judge – barrister Nathan Jarro – in March this year.

Fortunately, Queensland has a much better record in appointing First Nations people to serve in the lower courts – with the appointment of the state's first two Indigenous magistrates sent to the bench almost 20 years ago.

Queensland currently has five Indigenous magistrates who identify as Aboriginal (Jacqueline 'Jacqui' Payne, Zachary 'Zac' Sarra and Bevan Manthey) and Torres Strait Islander (Catherine Pirie and James Morton).

Queensland's first Indigenous magistrate, Jacqui Payne, was appointed to the bench on 12 April 1999 and is currently based in Brisbane. Ms Payne was also the first Indigenous woman to be admitted as a solicitor in Queensland and before her appointment had worked in criminal defence for 14 years for the ATSI Corporation Legal Service and later in her own successful private practice.

Magistrate Zac Sarra was appointed seven months after Ms Payne on 22 November 1999. Mr Sara's journey to the courts took an unusual path which saw him start working picking tobacco and chipping cane as a young man in his hometown of Bundaberg, to becoming a social worker with psychiatric services, to professional rugby league player, to federal prosecutor, to becoming a magistrate. Mr Sarra currently presides at the Wynnum Magistrates Court.

Magistrate Catherine Pirie, based in Toowoomba, was appointed on 29 September 2000. Ms Pirie became the first woman of Torres Strait Islander descent to be admitted as a solicitor in 1989 and the first Torres Strait Islander to become a magistrate.

Magistrate Bevan Manthey, now residing in Warwick, was appointed on 12 April 2002 and has worked closely with the Indigenous communities and incorporated cultural meaning into the Murri Court since his first posting to Mt Isa.

Magistrate James Morton took up his appointment to sit in Mt Isa Magistrates Court on 8 May 2017 – just six-months after he was handpicked by the State Government to be chair of the newly reconvened Queensland Sentencing Advisory Council. During his legal career Mr Morton spent nearly two decades practising as a barrister representing Indigenous clients in regional and rural areas of Queensland and the Northern Territory.

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Aboriginal and Torres Strait Islander magistrates

All figures on pages 18-21 correct as at June 2018

Lexon INSURANCE

End of financial year review

Claims were up this year, but the impact was mitigated by the profession's commitment to good risk management practices.

A challenging start to 2017/18 saw greater claims activity reflected by a higher number of insurance files being opened, with 2017/18 recording 362 new matters as at 30 June, somewhat above the five-year average of 308. We also saw several larger claims in the identity fraud and cyber areas which impacted overall performance. These outcomes were within modelled parameters and, combined with good investment returns, mean that the scheme position remains strong.

Claims profile

Conveyancing continues to be the most frequent type of matter (27.3% of all files) and contributed 23.9% to overall portfolio cost. Whilst this was an increase on what we saw in 2016/17, it is only slightly above the five-year claims value average as at 30 June. We are mindful that cyberfraud is a growing area of concern in conveyancing and we will continue to work closely with the profession to assist in the management of that risk (see the September hot topics section, opposite page, for more on cyberfraud).

Commercial claims increased in both number and size, with 90 files opened in 2017/18 – the highest number since the 2008/09 year – and the overall claims value at 30 June represented 41.9% of the portfolio. The result was exacerbated by a greater number of high value claims (three contributing over $2m).

A small offset to the above was a very positive performance in the personal injuries area with claim values falling below $1m for only the second time since 2002/03. Personal injuries file numbers as at 30 June were down to just 8% of the portfolio.

The graph below compares the portfolio breakdown by area of law for 2017/18 with 'all years'. Overall claims values have generally reduced in more recent years and claims containment remains our primary goal.

Policy enhancements in 2018/19

- **LSC COVERAGE EXPANDED**

In recognition of the geographic growth of Lexon's insured practices, the innovative coverage provided in Queensland for Legal Service Commission (LSC) complaints was extended to comparable complaints brought against insureds in other Australian jurisdictions.

- **INNOCENT PARTY COVERAGE FOR ILPs INCLUDED**

The wording was refined to reflect the intent that cover is not only provided to 'innocent' associates in a law practice but also to an incorporated legal practice (ILP) itself, provided there was at least one 'innocent' legal practitioner director of the ILP.

- **TRUST ACCOUNT DEFICIENCY CLAIMS CLARIFIED**

The definition of 'claim' in the policy was refined to clarify that trust account deficiencies may be considered a claim event, even where the deficiency has been restored by the insured (subject always to the terms and conditions of the policy – for example, matters where there is an entitlement to claim on the Fidelity Fund are excluded).

- **CONVEYANCING PROTOCOL DETERRENT EXCESS CLARIFIED**

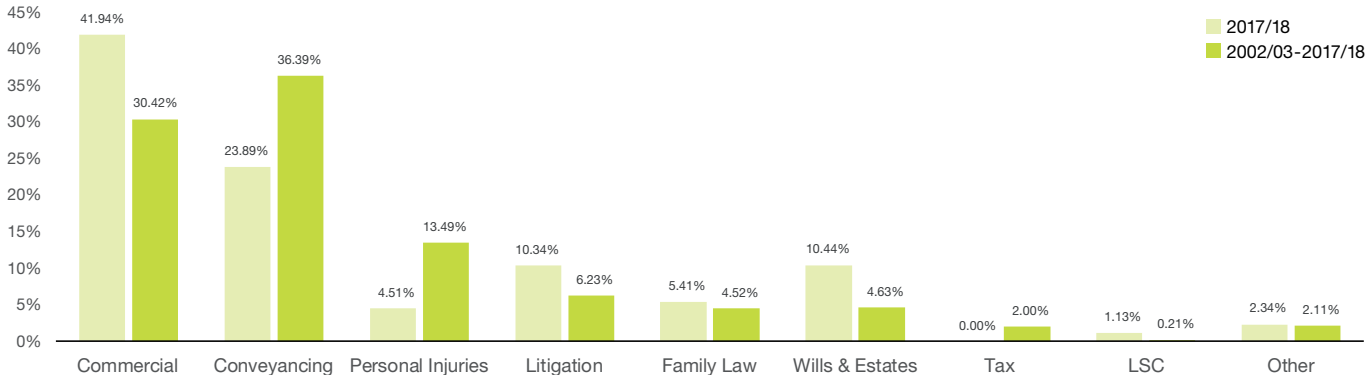
The wording was refined to reflect the focus on insureds being able to evidence some system in place to address the requirements of the Conveyancing Protocol.

The changes to the insurance coverage are further explained in the document entitled 'Outline of Changes to Master Policy No. QLS 2018 and the 2018-2019 Certificate of Insurance', which can be found on our website.

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

Michael Young
CEO

Claims cost by area of law



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Cyberfraud risks

Whilst Lexon's policy may respond to third-party losses resulting from cyberfraud, prevention is certainly better than a cure which involves Excess, potential Deterrent Excess and potential levy consequences together with the stress and time of managing a claim. Some of the practical steps you can take are outlined below:

Use Lexon's conveyancing protocol letters, tools and checklists
Use the suite of tools developed by Lexon for use in conveyancing matters to reduce the risk of loss of funds through cyberattacks. These same measures can be adapted for use in other transactions.

Email footers
Note our risk alert advice to not put electronic instruction warnings only in your email footer – fraudsters have intercepted these communications and have deleted the footer before sending the fake email – make the warning a part of your standard first retainer letter. Our letter packs across all areas of practice contain these warnings.

Use 'two factor authentication' before any funds are transferred
Immediately prior to funds being transferred utilise 'two factor authentication' (such as contact via a separately verified telephone number) to ensure that funds are sent to the right account. If a fraudster is monitoring your emails, this step will make their job that much harder. Failure to follow these steps can result in a Deterrent Excess being applied.

Have all your staff complete our complimentary online cybersecurity training course
Lexon has released an online learning module, Cyber Security Training. This module has been designed to assist practices in identifying situations where cyber and related fraud risks exist which might expose the law practice to financial losses. The module can be found at lexoninsurance.com.au .

PEXA platform users
If your practice uses PEXA, undertake a *regular* review of all registered users to check they are your staff. PEXA is aware of instances of compromised practitioners' email accounts, allowing an unknown person to intercept a change-in-password email and enter the PEXA system.

Maintain good cybersecurity and be vigilant!

Ensure that:

- Your virus protection, firewall and operating systems are patched and up to date (note earlier comments on specific PEXA obligations if using this platform).
- You *never* click on a link included within an email without first hovering to check the link address. Many of the recent cyberattacks originated from clicking on a link in an email, where there appeared to be no immediate effect. When in doubt, call the apparent sender of the email to query the legitimacy of the email.
- You *never* reveal user credentials and passwords (fraudsters may try and get these by masquerading as potential clients or using other targeted communications – this is covered in our complimentary cybersecurity training course).
- You adopt a less trusting mindset to email communications – healthy scepticism is required.
- If you think you may have been compromised, you immediately:
  - change your passwords (for example, personal, server, domain hosting, PEXA)
  - have your IT support provider review the matter including IP addresses accessing your server, monitoring for any new Outlook 'rules' and analysing suspicious 'clicked on' links
  - contact our Risk team who can discuss other time-critical steps to take to minimise exposure.
- You avoid password reuse across different services – make sure that the password that you are using for your work email service is not used for other services like Dropbox, Hotmail, Facebook, etc.
- You make sure email auditing is enabled. You can check this with your IT support provider.
- If you aren't using it, you disable it. For example, if you only access Outlook on your workstation, consider whether your IT support provider should disable Outlook Web Access.
- You visit the Australian Government cyber security sitestaysmartonline.gov.au .

Did you know?

- The foreign law exclusion in the policy has a carve-out for 'pre-approved' foreign law work. As business becomes more international, Lexon recognises that retainers from time to time will touch upon matters involving foreign law. The policy response seeks to strike a balance by providing coverage to practices that can demonstrate sufficient experience and skill in these specialised areas, whilst at the same time protecting the insured cohort as a whole from the cost of claims that arise where practices become involved in foreign law matters outside of their competence. If you would like to seek pre-approval, please complete the application form available on our website.
- For the 2018/19 insurance year, QLS Council arranged with Lexon to again make top-up insurance available to QLS members who sought the additional comfort of professional indemnity cover beyond the existing $2 million per claim provided to all insured practitioners. An application form can be found on our website.
- We remind practitioners acting as directors or officers of 'outside' companies (or any other body corporate) that the Lexon policy only responds to claims arising from the provision of legal services. Practitioners who assume those roles may wish to seek appropriate advice as to whether they have, or require, directors' and officers' insurance.

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Pleading denials in the state courts

In pleadings in the state courts, a party's denial of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue.[1]

This article explores how an explanation for a denial should be pleaded.

What is a direct explanation?

A direct explanation is a statement of the party's reasons for its belief that the allegation is untrue.

For this reason, it is not sufficient to plead a denial on the grounds that the allegation is 'untrue' without identifying why that belief is held.[2] Such a plea is devoid of the reasons for the party's belief as to why the allegation is untrue and leaves the other party at a loss to know the case which it has to meet at trial.

If your instructions are that an alleged event did not occur, the pleaded direct explanation could be that the "event alleged by the plaintiff did not occur at all".[3] Another acceptable plea may be that the allegation is denied because the [identified event] did not occur as a matter of fact.

If your instructions are that an alleged event occurred but not in the manner alleged, the direct explanation could be "[the identified event] did not occur in the manner alleged by the plaintiff"[4] but instead occurred [with a plea of the material facts concerning the event which are different to that alleged].[5]

Another explanation for a denial is that the allegation is inconsistent with other facts known to the defendant, in which case the direct explanation could be that "the alleged fact is so inconsistent with other [identified facts, which must themselves be pleaded][6] that the defendant believes it to be untrue".[7]

By pleading in this way, the facts in issue can be identified with clarity by the parties as well as the trial judge.

Plead material facts separately

In circumstances in which an alternative statement of facts is pleaded by the party denying an allegation, the alternative case should be pleaded in a manner that differentiates allegations of material fact from the explanation for the denial. This has an important advantage in that the opposing party is required to plead to the alternative case in any responsive pleading which it files.

One way to make clear that an allegation is a separate allegation of fact, and not part of the explanation for the denial, is to use the phrase "the defendant/s say/s" before pleading in enumerated subparagraphs each of the new allegations of fact.

The explanation for the denial, which will rely on the alternative pleaded material facts, can then be pleaded separately "by reason " of" the alternative material facts.

To identify the explanation for the denial, avoid using the phrase "on the grounds that"[8] or a heading such as "particulars" within an explanation for a denial.[9] Rather, the use of the phrase "denies the allegation because" is an adequate prelude to an explanation for a denial, and will satisfy the requirement that the explanation accompany the denial and be a direct explanation for it.

These principles can be incorporated into the process of drafting a responsive pleading, such as a defence, reply or answer, in the following way.

Step 1 – Identify each of the allegations

Despite the requirements of rule 146(1)(f) of the Uniform Civil Procedure Rules (UCPR) which requires, as far as practicable, a separate allegation to be contained in each paragraph, paragraphs in pleadings will often contain more than one allegation of fact.

For example, a statement of claim may plead:

3. In a conversation between the plaintiff and defendant on 26 May 2015 at Ipswich, the defendant said to the plaintiff that she would buy his car for $5000 and the plaintiff said he accepted that offer.

The first step for the pleader of the defence is to break that paragraph down into its component allegations, namely: (1) Did a conversation occur between the plaintiff and the defendant about buying the plaintiff's car? (2) Did it occur in Ipswich? (3) Was it on 26 May 2015? (4) Were statements made in that conversation as alleged?

The pleader would also ascertain related information (which may or may not be pleaded) such as: (5) If the conversation occurred, was anyone else present? (6) What other statements were made during the conversation? (7) Was there any other communication between the parties about the topic of buying the plaintiff's car, including any written communication? (8) Did the defendant communicate with anyone else about the topic of buying the plaintiff's car, such as a bank manager?

Assume that the defendant's instructions are that she accepts (1) and (2) above, cannot remember the date of the conversation, but says that she (the defendant) offered to purchase the car for $4000 subject to a roadworthy certificate and the plaintiff said that he agreed to that.

Step 2 – Admit where applicable

The defence should contain a statement of those facts which are admitted, as set out in the example below. This will assist in reducing the issues for trial.

Step 3 – Plead non-admissions where applicable

The defence should contain a statement of those facts which are not admitted, as set out in the example below. Rule 166 identifies the circumstances in which a non-admission may be pleaded and, as with a denial, a direct explanation for the non-admission must be pleaded.[10]

Step 3 – Plead alternative material facts

Assuming that the direct explanation for the denial is that the event occurred but not in the manner alleged, or the occurrence of the event is inconsistent with other facts which render it unlikely that the event occurred at all, it will be necessary to plead material facts which identify the alternative scenario or inconsistent facts.

Taking the example above, the material facts which would be pleaded are that, in the conversation, the defendant offered to purchase the car for $4000 subject to a roadworthy certificate and the plaintiff said that he agreed to that.

Step 4 – Statement of denial

Having set out the contrary facts on which the defendant will rely, the defendant must now specifically deny each allegation of fact that has not been the subject of an admission or non-admission, and provide an explanation

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Kylie Downes QC and **Maxwell Walker** explain how you should plead the explanation for a denial in Queensland courts

for the belief that those allegations are untrue. This can be done by linking the denial back to each material fact in the defence which is relied upon as the direct explanation for the denial of the relevant allegation of fact.

Taking the example, the defence could read as follows:

2. As to paragraph 3 of the Statement of Claim, the defendant:
   (a) admits the allegation that, in a conversation between the plaintiff and defendant at Ipswich, the defendant said to the plaintiff that she would buy his car
   (b) does not admit that the conversation occurred on 26 May 2015 because the defendant cannot recall the date of the conversation and, despite making reasonable inquiries having regard to the time limited for filing this defence, remains uncertain of the truth or otherwise of the allegation
   (c) says that, in the conversation, the defendant said words to the effect that she would purchase the car for $4000 subject to a roadworthy certificate and the plaintiff said words to the effect that he agreed to that
   (d) subject to (a) and (b) above, denies not make the statements as alleged but instead made the statements as pleaded in paragraph (c) above.

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

Notes

1 Rule 166(4) Uniform Civil Procedure Rules (UCPR). Pursuant to rule 166(5) and subject to rule 168, if a party's denial does not comply with rule 166(4), the party is taken to have admitted the allegation.
2 *ASIC v Managed Investments Ltd and Ors No.3* (2012) 88 ACSR 139; [2012] QSC 74 at [46] – [47].
3 *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd* [2009] 1 Qd R 116; [2008] QSC 302 at [29].
4 Ibid.
5 Ibid at [30].
6 Ibid.
7 Ibid at [29].
8 Ibid at [34].
9 *QBE Insurance (Australia) Ltd v Cape York Airlines Pty Ltd* [2008] QCA 400 at [13].
10 Rule 166(4) UCPR.

Accepting instructions from joint clients

by Stafford Shepherd

The intention of this note is to flag some points for consideration when accepting instructions from joint clients.

At the outset it is important to identify who is the client. The glossary of terms in the Australian Solicitors Conduct Rules 2012 (ASCR) defines client in these terms: "[W]ith respect to the solicitor or the solicitor's law practice…a person (not an instructing solicitor) for whom the solicitor is engaged to provide legal services for a matter."

It is to this client that we owe a number of ethical obligations, including but not limited to:

- serving the best interests of a client in any matter in which we represent the client[1]
- delivery of legal services competently, diligently, and as promptly as reasonably possible[2]
- providing clear and timely advice to assist a client to understand relevant legal issues and to make informed choices[3]
- following a client's lawful, proper, and competent instructions[4]
- maintaining a client's confidences[5]
- avoiding conflicts between duties owed to current and former clients, and[6]
- avoiding conflicts between duties owed to two or more current clients.[7]

Identifying where our duties are owed and to whom may not always be straightforward. In accepting instructions from an 'agent', we need to satisfy ourselves that we have been instructed to act as we must be certain that we have the necessary authority.[8]

If instructions come to us from a third party who purports to represent the interests of a 'client', we need to satisfy ourselves that the 'client' indeed wishes us to act.

To be satisfied we hold instructions, we need to either see the 'client' personally or obtain written confirmation from the 'client' (including, if the 'client' is a corporate entity, any resolutions appointing us to act) or taking such steps that the circumstances may require to be satisfied that we can act for the 'client'.[9]

On many occasions we are called upon to represent two or more persons whose interests appear the same in a 'joint engagement'. Although interests of the joint client appear the same, the ethical obligations are owed to each client separately. For example, when we act for a married couple or domestic partners in a transaction, we must be certain to obtain the authority of each partner to undertake the engagement.

Even if satisfied that there is authority to create a solicitor-client relationship we need to remember that such authority "is not the same as authority thereafter to give instructions in the performance of the relationship".[10]

The risks that arise are well illustrated by *Legal Services Commissioner v Mines*,[11] in which the practitioner acted on the sale of property for domestic partners and, acting on the instructions of the female partner, drew from the settlement monies a sum of money and released those funds to her without instructions of both sellers. As the Legal Practice Committee noted: "[A] solicitor in the circumstances of Mr Mines facing two clients who were themselves personally at odds and with a known obligation jointly and severally…was to treat each with equal care and not as a single unit."[12]

It has been said: "a solicitor's contract of retainer is with each and every client; the duties of the solicitor are owed and must be discharged to each of them. *It must follow that a solicitor is entitled to communicate with and take instruction from only one of several clients if he has the authority of the other clients to do so*…from the point of view of [the solicitor] the authority must be actual, whether express or implied, or apparent; but in each case the authority must emanate from the alleged principals, not the alleged agent."[13]

It has also been held that when we accept joint instructions we have a duty of disclosure to all.[14]

In summary:

1. Identify the client.
2. Joint clients should not be treated as a single unit.
3. Make certain you have authority to act.
4. Clearly stipulate your authority to receive instructions.
5. Make certain joint clients are aware of all information.

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

Notes

1 Rule 4.1.1 ASCR.
2 Rule 4.1.3 ASCR.
3 Rule 7.1 ASCR.
4 Rule 8.1 ASCR.
5 Rule 9 ASCR.
6 Rule 10 ASCR.
7 Rule 11 ASCR.
8 Rule 8.1 ASCR requires us to act on the client's lawful, proper, and competent instructions.
9 *Sheikh Amed Jaber Al-Sabah v Ali & Ors* [1999] EWHC 840 (Ch) at [48] Ferris J.
10 *Vukminca v Betyounan* [2008] NSWCA at [48].
11 LPC 002/10.
12 Ibid at page 5.
13 *Farrer v Messrs Copley Singletons (A Firm)* [1997] EWCA CW 2127 at pp 20-21, *emphasis added*.
14 *Perry v Eduoin WE*, Independent 1 April 1994 cited by Charles Hollander QC and Simon Salzedo QC in *Conflicts of Interest* (4th edition).

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An exercise in futility – summary dismissal applications

with Christine Smyth

Charlesworth v Griffiths & Anor [2018] QDC 115 is a well-crafted judgement by Porter DCJ in which he takes the legal traveler on a journey through the landscape of summary dismissal applications.

On this interlocutory sojourn his Honour draws upon the wisdom of several superior court decisions, taking us on a guided tour of the jurisprudence as to the correct approach. In doing so he hones in, with precision, on the applicable test in *General Steel*,[2] elucidating the remarks of Applegarth J in *Atthow v McElhone*[3] (*Atthow*), whilst reminding us that the history in the land of further provision applications (FPA) *does not* include a rule that a spouse has primacy.[4] All the while his Honour reaffirms that the two-stage test is the correct approach, regardless of the size of the estate.[5]

The executors of the estate of the late Kenneth Tandy brought an application for summary dismissal of an application by their sister, Mrs Charlesworth, who sought further provision from the estate of their late father. The estate was small, consisting primarily of a beneficiary loan account owed to the deceased by Manborough Pty Ltd as the trustee for the Tandy Family Trust, for $218,901.[6]

The deceased gifted the residue of his estate to his wife of 50 years and "Forgave any debts 'which may be owing', by Mrs Charlesworth".[7] Through the operation of the will, the executor sisters controlled the Tandy Family Trust.[8] The major asset of that trust was an historic building in which the wife resided, in the top half, rent free[9]. The bottom half was leased to a long-term reliable commercial tenant.

Mrs Tandy had superannuation of $755,000, of which she had received $588,000 from her husband's fund.[10] Her income was $40,000 a year. The applicant and her husband owned properties valued at $1.4 million, but had mortgages of $1 million, a business of negligible value, with the family expenses exceeding family income by $30,000 a year.[11]

In analysing the matters to which the court must have regard in summary dismissal applications generally but with focus on FPAs, Porter

> "O what made
> fatuous sunbeams toil
> To break earth's sleep at all?"[1]

DCJ identified that the power of the court to consider these applications arises through the "inherent jurisdiction of the court to prevent abuse of its processes by the prosecution of untenable claims", with the District Court having "equivalent jurisdiction, at the least arising under s69 *District Court Act 1967* (Qld)".[12]

Porter DCJ did not accept the respondent's submission that the statement of Applegarth J in *Atthow* that that applicant's case was "practically hopeless" had "the effect…that even if a claim for provision is practically hopeless, it cannot be summarily dismissed on a *General Steel* basis".[13]

Instead, Porter DCJ clarified Applegarth J's comment as meaning that "the threshold for determination is that a proceeding is so untenable as to comprise an abuse of process".[14] How that is articulated varies. So, in *Atthow*, Applegarth J's statement was the manner in which he articulated the application of the *General Steel* test, and by making that statement he did not "set down a binding legal test for summary dismissal".[15]

In applying the *General Steel* test, Porter DCJ observed "the power to dismiss as an abuse of process is not confined to an assessment of whether there is prima facie case advanced by the application on the first stage of the *Singer v Berghouse* test. The power recognised in *General Steel* depends on all the circumstances of the particular case. Accordingly in my view, if it were demonstrated that the proceedings were 'useless and futile' because by the time a trial was completed, the estate would be so diminished as to make it plain that the applicant's claim was in all the circumstances doomed to fail, it would be open to the Court to dismiss the proceedings on a summary basis."[16]

In turning his attention to these aspects, his Honour postulated that there were a number of possible ways the "matters might play out both before and at the trial. Costs might be less than anticipated…The value of the estate might be increased during the litigation phase and so on. It might be that in most cases, the position as at completion of the trial is so speculative as to make any certain conclusion that a claim is untenable impossible practically to establish."[17]

In dismissing the application and awarding indemnity costs to Mrs Charlesworth, Porter DCJ rejected the executors' contention that Mrs Charlesworth could not satisfy the first-stage test, relying on cases which they asserted gave a long-term widow primacy.[18] In rejecting that contention, his Honour takes us through a number of decisions, ultimately relying on *Bladwell v Davis* [2004] NSWCA.[19]

In finalising the application, Porter DCJ opted for a novel solution. Truncating the directions orders, he vacated the order for mediation and set the matter down for a one-day trial. By doing this he opened a new pathway for a cost-efficient alternative in small-estate FPA disputes.

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 *Futility* by Wilfred Owen.
2 *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125.
3 At [11].
4 At [54]-[59].
5 At [5]-[6].
6 At [21].
7 At[4].
8 At [4].
9 At [32].
10 At [31].
11 At [27].
12 At[10-[11].
13 At [12].
14 At [11].
15 At [12].
16 At [16].
17 At [17].
18 At [54].
19 The writer acted for Mrs Charlesworth and thanks her solicitor, Ms Vy Tran, and counsel, Mr David Topp, for their assistance and representation in the matter.

AI: The homophobic hurdle

by Michael Bidwell, The Legal Forecast

September marks the Brisbane Pride Festival, now celebrating its 27th year in support of the LGBTI+ community.

As an openly gay lawyer, Editor in Chief for The Legal Forecast and Events Coordinator for Pride in Law, I wanted to write this article as a reminder of how far we must go to reach true equality, given that artificial intelligence has learned and expressed homophobia.

As artificial intelligence (AI) may be incorporated into human resources (HR) practices for organisations, we must do better as employers and human beings to ensure everyone can have a fair go.

AI and HR

In short, AI is intelligence demonstrated by machines. According to IBM's 2017 survey of 6000 executives, 66% of chief executive officers believe AI can drive significant value in HR with some 54% of HR executives in agreement, noting that AI will affect key roles in their departments.[1]

Kate Guarino, Director of HR operations for Pegasystems, says that AI presents an opportunity for HR to automate "repetitive, low-value add tasks" and increase the focus on more strategic work.

She cites the example of HR spending time processing the steps of onboarding a new employee (allocating space, provisioning a laptop, etc.). Saving time in those arenas can help HR teams pivot to making sure they focus on "value-add work like mentoring and continuous feedback".

She says that companies have implemented 'AI recruiters' to automate scheduling interviews, provide ongoing feedback to candidates and answer their questions in real time.[2]

This all sounds exciting, right? However, we should consider where AI can go wrong if implemented in HR practices without appropriate supervision.

AI learning and homophobia

In 2016, Microsoft released an AI chat bot, Tay, which was learning to talk like millennials by analysing conversations on Twitter, Facebook and the internet. Tay was originally having polite conversations, but I won't share here the posts that followed. Microsoft had to apologise for the racist, sexist and homophobic content that Tay learned to create.[3]

In 2017, Google revealed a new software called a Cloud Natural Language API, which was built to help businesses test their messages and rate them on a scale from negative to positive. It ended up having a considerably negative reaction to words and phrases that are about homosexuality. For example, the AI rated the phrase 'I'm straight' at 0.1 and the phrase 'I'm homosexual' at -0.4.[4]

Working with Jigsaw, a division of Google that creates tools to deal with abusive comments, Google plans to train future AI to recognise the difference between slurs against LGBTI+ people and legitimate terms. The plan was announced at the South by Southwest Conference, where Jigsaw product manager C.J. Adams explained that its "mission is help communities have great conversations at scale. We can't be content to let computers adopt negative biases from the abuse and harassment targeted groups face online."[5]

Who should learn from whom?

AI is learning these behaviours from humans, which shows we need to do better in treating one another with respect. On one hand, you may feel we must do better as a society to ensure our AI also learns to be better. On the other hand, you may feel AI can show us how to be better and we learn from it as a society.

Either way, this article is not able to explore the workplace legal liability for humans or AI treating prospective or current employees differently for being LGBTI+, but all solicitors should be aware of rule 42 in the Australian Solicitors Conduct Rules: "A solicitor must not in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying."[6]

Conclusion

If your organisation is considering implementing AI in any practices, I suggest you consider all the risks and include appropriate management practices. I ask each of you to learn, engage and try to be better, so our AI can learn from us to be more inclusive. While our diversity in the profession provides great potential, it is only realised once we come together.

Michael Bidwell is an executive member of The Legal Forecast (TLF). Special thanks to Benjamin Teng of TLF for technical advice and editing. TLF (thelegalforecast.com) aims to advance legal practice through technology and innovation. It is a not-for-profit organisation run by early career professionals passionate about disruptive thinking and access to justice.

Notes

1. IBM, 'Extending Expertise: How cognitive computing is transforming HR and the employee experience', available at www-01.ibm.com/common/ssi/cgi-bin/ssialias?htmlfid=GBE03789USEN .
2. Dom Nicastro, '7 Ways Artificial Intelligence is Reinventing Human Resources', 12 March 2018, CMS Wire, cmswire.com/digital-workplace/7-ways-artificial-intelligence-is-reinventing-human" .
3. Nick Duffy, 'Microsoft created artificial intelligence but she's a racist homophobic Trump supporter', 24 March 2016, PinkNews, pinknews.co.uk/2016/03/24/microsoft-created-artificial-intelligence-but-shes-a-racist-homophobic-trump-supporter .
4. *IN*, 'GLAAAD Is Training Google's AI To Be Less Homophobic', 20 March 2018, *IN*: Celebrating Canada's LGBT Lifestyle, inmagazine.ca/2018/03/glaad-training-google-ai-less-homophobic .
5. Ibid.
6. Rule 42, *Australian Solicitors Conduct Rules* (at 1 June 2012).

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Find yourself a mentor

Just don't call them that!

Jaclyn Webb offers some key tips to help you build a rewarding and worthwhile relationship with a 'mentor'.

We all know how important it is to have mentors. How could we not?

Law firms often pair junior lawyers with a more senior lawyer the moment they commence work. Naturally, when junior lawyers are praised for their success, they often attribute it to a solid mentor relationship that makes them feel empowered and supported in their endeavours.

I use the word 'mentor' because it generally describes the nature of professional relationships we should all be seeking, and not because any of us actually has to use that word when seeking a mentor. The mentor/mentee relationship is informal, and varies from person to person. If you reflect on your current mentors, you will probably realise that you have never used that word with them.

As junior lawyers, we must not get complacent about mentorship (although, I admit, it is easy to do). More specifically, we should not lose sight of what is required to be a good mentee – something rarely given adequate focus in literature and within many firms. We could all benefit from taking a moment to consider whether or not we have the attributes of a good mentee. It takes a lot of time and effort, and comes more naturally to some than others. Figure out where you are on the scale, and use it to work on being a good mentee!

So, how do we form meaningful mentor/mentee relationships, and ensure we are giving as much as we are taking from our mentors?

Hopefully, you'll find the nine points below a helpful starting point in answering that question.

Don't ask someone to be your mentor; tell them why they should be.

Directly asking someone to be your mentor is awkward. It puts that person in a very uncomfortable position. Instead, find a way to let your mentor know they have values you find inspiring. Tell them why you think they could give you the tools for success in your own life and career.

What are you bringing to the table?

At the risk of sounding cynical, very rarely do busy professionals do something for purely selfless reasons. We must ensure that we are constantly offering something to our mentors. It might be diligence and hard work, but it can also be something simpler, like our energy, a different take on things, or genuine gratitude. Essentially, as with any relationship, the relationship between a mentor and mentee flows both ways.

Keep it authentic.

Sometimes mentor/mentee relationships don't work. Maybe your schedules are incompatible, your values conflict, or you simply don't *click*. The important thing to remember is that it's no one's fault and it's probably for the best. The common thread running through the most valuable mentor/mentee relationships is a natural and genuine connection.

Have deeper conversations.

This can be difficult in a corporate setting, but it is important that we engage with our mentors on a personal level. Superficial conversations will not take us far. Although it can be scary, opening up and sharing our personal interests and hobbies with our mentors will encourage them to do the same. When we are invested in each other's lives, our mentors will be more motivated to mentor us and we will be more motivated to learn from them.

Acknowledge that these relationships take time.

Mentor/mentee relationships may take time to bear fruit for the mentee. It is important to accept this, and not get put off. If your mentor moves cities – keep in touch! Distance can easily erode effective communication, so take the time to stay on their radar.

What do you want?

All right, so we are putting in all this effort over a long time, forming relationships, offering something, etc. – it's best to have a clear idea of exactly what you're seeking from your mentor. Is it just legal skills development? Are you looking for a mentor who can assist with networking possibilities? Are you interested in learning how to create work/life balance? Whatever it is, make sure it is clear to you and your mentor, so you can both reap the benefits of your relationship.

Seek feedback.

In order to achieve personal and professional growth from this relationship, you should be constantly seeking feedback. This is easier once the relationship has matured, and should become second nature. A good mentor will provide carefully considered and practical feedback.

Pay it back.

The way we pay back our mentor is by working hard, and demonstrating that we are implementing, and responding appropriately to, any feedback our mentor may have given us.

Pay it forward.

Find a mentee of your own. Like having a mentor, being a mentor yourself is hugely fulfilling, and will ultimately better your relationship with your mentor.

The benefits of an authentic and reciprocal mentor/mentee relationship are countless. Using these nine tips will, hopefully, help you build a rewarding and worthwhile relationship with a mentor. But remember – you don't need to call them that!

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). Jaclyn Webb is an associate at Allens.

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What's in a courthouse?

with Supreme Court Librarian David Bratchford

This October we are excited to open the doors of the Queen Elizabeth II (QEII) Courts of Law to the public for behind-the-scenes tours of the Brisbane Supreme and District Courts, and the Supreme Court Library.

We have partnered with Queensland Courts to participate in Brisbane Open House (**brisbaneopenhouse.com.au**), an annual festival that provides residents and visitors with the rare opportunity to discover the hidden wealth of architecture, engineering and history in buildings and places around Brisbane.

Visitors can join a guided tour through the entrance foyer, the library, Banco Court, a criminal or civil courtroom, and the jury assembly area.

Saturday 13 October, 10am to 3pm

- Tours running every half hour – bookings essential
- Free entry

Visit **sclqld.org.au/bne-open-house** for details.

QEII Courts of Law: a unique legal precinct

The QEII Courts of Law creates a unique legal precinct, linking the building with a public square and the Brisbane Magistrates Court. It is the symbolic centre of the judicial branch of government in Queensland.

The building is a radical departure from traditional court design, providing a light, open, accessible and transparent layout in sharp contrast to the 1970s precast concrete courthouse it replaced in 2012.

Housed over 19 floors, the building includes:

- a large ceremonial court – the Banco Court
- the Queensland Court of Appeal
- 23 criminal and 13 civil courtrooms with digital evidence display technology
- judges' chambers
- separate access for judges, jurors, prisoners, vulnerable witnesses and the public
- a basement cell block for people in custody
- secure facilities for children, vulnerable witnesses and victims to give evidence
- a jurors assembly area and lounge
- the Supreme Court Library Queensland and the Sir Harry Gibbs Legal Heritage Centre.

The building design is suggestive of a traditional Queensland house in its use of wooden floors and extensive sun-shading.

Double-skin glass with anti-glare fritting (a form of glass tinting and colouring) and integrated sun-blinds controlled by a computerised solar clock system allow natural light into the building while controlling heat and glare. Courtrooms and jury rooms have external and internal glass walls to allow the flow of natural light throughout the building.

Internal and external gardens and courtyards throughout the building respond to our subtropical environment and promote a healthy workplace.

The building uses low energy lighting with time and movement sensors to reduce its environmental impact. Solar panels on the roof are used for night and emergency lighting.

The QEII Courts of Law building also houses a significant collection of contemporary and historical artwork, including public artworks commissioned especially for the building.

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Gay couple win appeal on sperm donor 'parent'

with Robert Glade-Wright

Children – birth mother and partner win appeal against declaration that sperm donor was a parent of their eldest child

In *Parsons and Anor & Masson* [2018] FamCAFC 115 (28 June 2018) a birth mother (Susan), while living with her partner (Margaret), had two children ('B', 10, and 'C', 9) conceived by artificial insemination, for which sperm had been donated by the respondent (Robert) for B and by an unknown donor for C. Robert sees the children (they call him 'Daddy') and was registered as a parent on B's birth certificate while Margaret is on C's birth certificate. Section 60H of the *Family Law Act* deems Margaret to be C's parent ([3]).

At first instance the court declared Robert to be a parent of B, as it was not satisfied that Susan and Margaret were in a de facto relationship when B was conceived. It was held that Robert was a legal parent of B as he had "provided his genetic material for the express purpose of fathering a child he expected to be parent" ([17]). The mother's application to relocate to New Zealand was dismissed. Susan and Margaret appealed.

Thackray J (with whom Murphy and Aldridge JJ agreed) did not need to decide whether the finding that the appellants were not in a de facto relationship was in error. As to the finding that Robert was a 'parent' of B within the meaning of the *Family Law Act 1975* (FLA), the Full Court (at [6]) agreed with the appellant's submission that "her Honour, who was sitting in New South Wales, erred in failing to recognise that s79 of the *Judiciary Act 1903* (Cth) required her to apply not the FLA but the *Status of Children Act 1996* (NSW)", the effect of which is that "the respondent is conclusively presumed not to be B's father".

Thackray J cited s14 of the state Act which contains four presumptions of parentage arising out of the use of artificial conception procedures, including:

"(2) If a woman…becomes pregnant by means of a fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy."

The appeal was allowed, the parenting order set aside and the case remitted for re-hearing.

Property – judge who declined to make 'manifestly inadequate' consent order disqualified for apprehended bias

In *Silva & Phoenix* [2018] FamCAFC 41 (7 March 2018) Strickland J allowed the appeal of the husband [H] against Judge Kelly's order dismissing [H's] application that he disqualify himself, having refused to make a consent order minuted by the parties. The terms provided for [H] to pay [W] $30,000, 9% of the asset pool. A statement of agreed facts was filed and the matter listed for submissions. Judge Kelly was not prepared to make the orders (for being "manifestly inadequate"), at [19] saying (inter alia) that he was "concerned that an award of nine per cent for even a relatively brief marriage is not just or equitable and [he] cannot approve it". The matter was listed for trial. [H] then filed an application for an order disqualifying the judge on the ground of actual or apprehended bias. It was dismissed, whereupon [H] appealed.

Strickland J concluded (at [22]-[24]):

"…[T]he question is…can it be said that his Honour has pre-judged the issue in dispute. That depends on whether his Honour's comments can be confined to the application… before him, or whether it demonstrates a closed mind that will not be changed when the subsequent hearing takes place.

[23] Although an argument could be mounted that it is the former, on the basis that a judicial officer is able to put aside his views in rejecting the consent orders, and bring an open mind to the subsequent hearing when there will be far more evidence put before him, the test is still whether 'a fair-minded lay observer might reasonably apprehend that the judge may not bring an impartial and unprejudiced mind to the resolution of the question that he or she is required to decide'.

[24] In my view, it is undeniable that that test is satisfied here. (…)"

The appeal was allowed and an order made that Judge Kelly be disqualified from further hearing the property applications between the parties.

Maintenance – court erred in considering appellant's property but not his liabilities and in disregarding his support of new partner and her children

In *Elei & Dodt* [2018] FamCAFC 92 (17 May 2018) Ryan J heard Mr Elei's appeal against Judge Boyle's interim order that he pay Ms Dodt maintenance of $1450 a week; her health insurance premiums and $2000 for medical treatment. Ms Dodt, a real estate agent, had been out of the workforce for five years since undertaking IVF.

Ryan J said (from [17]):

"…[Since] separation [Ms Dodt] had not sought employment in the real estate industry…According to [Mr Elei], pursuant to s90SF(1)(b)(ii) [FLA], this ought to have resulted in the application for maintenance being dismissed.

[18] This submission ignores that s90SF(1)(b)…enabled the…judge to be satisfied that [Ms Dodt] was unable to support herself adequately 'for any other reason' (s90SF(1)(b)(iii)). …[T]he…judge determined the question of whether [Ms Dodt]…was unable to support herself adequately by reference to the totality of [her] circumstances and not the narrower ground upon which [Mr Elei] sought to rely. These 'other reasons' included [Ms Dodt's] absence from the paid workforce for five years, that she had been attending a psychologist… had…personal difficulties…and…surgery to her hand…[that she] was impecunious, wished to return to work but required funds…to renew her real estate licence…"

Ryan J concluded from [33]):

"…[T]o determine capacity to pay by reference to property it was incumbent upon the…judge to consider [Mr Elei's] liabilities and not just his assets. This was not done…" (…)

[36] Furthermore…the…judge's approach to [Mr Elei's] support of his [former] partner and her children was erroneous. This expense was disregarded on the basis that the appellant provides support 'to people he has no obligation to support'. The primary judge's expression suggests that she may have mistakenly blurred s90SF(3)(d) and (e). (…)"

The appeal was allowed in part, the order being set aside except as to the lump sum payable.

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Federal Court casenotes

Federal Court

Bankruptcy – procedural fairness – right to fair hearing

Hayes v Pioneer Credit Acquisition Services Pty Ltd [2018] FCA 1113 (30 July 2018) concerned an appeal from the Federal Circuit Court in which a sequestration order was made against the estate of the appellant pursuant to s52 of the *Bankruptcy Act 1966* (Cth). The appellant (a litigant in person) succeeded on the ground that he was denied procedural fairness at the hearing of the creditor's petition in circumstances where he was removed from the courtroom and therefore not able to give evidence or make submissions.

At the hearing of the creditor's petition, the appellant (who was also self-represented at this hearing) refused to identify himself as the respondent, despite being asked 13 times in total to do so, and an unproductive and frustrating exchange ensued between the primary judge and the appellant (at [7]). In the appeal in the Federal Court, Rangiah J compared the lenghty, circular discourse between the primary judge and the appellant to that of Monty Python's 'Dead Parrot' (at [15]). Ultimately court security was called to remove the appellant and the court adjourned. The hearing then proceeded in the appellant's absence, concluding with the primary judge making a sequestration order and an order for costs.

The appellant, while being difficult, did still repeatedly acknowledge that he was Brett John Hayes and that he was there to respond to the claim against him. This led Rangiah J to hold that the primary judge's statement – "I don't know who that was." – was not correct and his conclusion that he was not satisfied that the appellant was the respondent to the proceeding was unreasonable (at [18]).

Rangiah J explained at [20]: "The primary judge was presumably faced with a busy bankruptcy list. The appellant was wasting the Court's time with nonsensical recitations and his refusal to directly acknowledge that he was the respondent to the proceeding. His Honour's frustration was palpable, and understandable. I am conscious of the reputation of appellate judges as 'the ones who lurk in the hills while the battle rages; then, when the battle is over, they descend from the hills and shoot all the wounded': see Ruth Bader Ginsburg, *Remarks on Writing Separately* (1990) 65 Washington L Rev 133 at 143. However, the 'battle' is not supposed to be between the trial judge and a self-represented litigant. His Honour was not entitled to insist that the appellant describe himself by the title 'respondent' as a condition of being permitted to appear. The exchanges did not justify the exclusion of the appellant from the courtroom. The appellant was denied the opportunity to call evidence and to make submissions. That was a denial of procedural fairness."

As Rangiah J was not satisfied that a properly conducted hearing could not possibly have produced a different result (see *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-147), the appeal was allowed and the matter remitted to the Federal Circuit Court to re-hear and determine.

Practice and procedure – legal representation – no right to legal assistance

In *ADF15 v Minister for Immigration and Border Protection* [2018] FCA 1099 (25 July 2018) Flick J dismissed the appeal from the decision of the primary judge in the Federal Circuit Court which dismissed an application for judicial review of a decision of the then Refugee Review Tribunal which affirmed the delegate's decision to refuse to grant a protection visa to the appellant.

The notice of appeal included, in the words of the appellant, "I have no lawyer to represent me in this court as I am unemployed and I have no money to pay for legal representation". Flick J held that appellant's lack of legal representation did not provide any reason to set aside the decision of the primary judge (at [27]).

The court recognised that legal representation confers an unquestionable advantage (at [23]). Referring to the authorities, Flick J was cognisant of the court's responsibility "...to ensure that a trial is fair" and that the unrepresented party "suffers no meaningful disadvantage..." (at [24]). His Honour (at [25]) cited with apparent approval the following statement by Katzmann J in in *SZVLE v Minister for Immigration and Border Protection* [2017] FCA 90 at [40]: "...there is no statutory right to legal representation. Nor is there any absolute right to legal representation at common law. In civil proceedings procedural fairness does not require that a party be provided with legal representation, no matter how serious the consequences of the proceedings might be."

Practice and procedure – access to documents on court file by non-party – whether plaintiff has a right to legal assistance

In *Castle v United States* [2018] FCA 1079 (19 July 2018) the court (Mortimer J) made orders granting leave to a journalist from *The Age* newspaper to inspect and photocopy a number of documents on the court file. The proceeding concerned an application by Mr Castle for review of a determination that he is eligible for surrender for extradition. The documents requested were (a) a reply; (b) an affidavit; (c) an outline of submissions; (d) an address for service; and (e) the originating application. The United States had no objection to access to material being granted to the non-party media organisation, save some diplomatic correspondence, known as "notes verbale", annexed to an affidavit filed on its behalf. Mr Castle on the other hand, submitted that the request for access to documents should be denied to "any/all media".

Mortimer J held that access should be granted to all of the documents sought (at [13]). The documents fell into two categories. Documents (d) and (e) are commonly referred to "unrestricted documents" within r2.32(2) of the *Federal Court Rules 2011* (Cth) (the rules). In the absence of orders providing for their confidentiality, such documents can be inspected by a non-party, such as *The Age* journalist, without leave of the court. The remaining documents (documents (a) to (c)) are commonly known as "restricted documents" and are outside r2.32(2) of the rules. Leave of the court is required before they can be inspected or copied by non-parties.

Mortimer J referred to the principle of 'open justice' expressed in s17(1) of the *Federal Court of Australia Act 1976* (Cth) and further reflected in the terms of Part VAA of that Act, in particular in ss37AE and 37AG (at [16]-[17]).

At [18], her Honour explained in relation to affidavits and written submissions: "Thus, where an affidavit has been 'read' in open court, there is a strong presumption that any member of the public should be given leave to inspect it: see *Baptist Union of Queensland – Carnity v Roberts* [2015] FCA 1068; 241 FCR 135 at [28]-[29], [33]-[40] (Rangiah J) and the authorities there cited. The same can be said for written outlines of submissions filed by parties and relied on in court. Where court proceedings are entirely oral, as occurred in superior courts more

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with Dan Star QC

frequently in the past, then the evidence would have been spoken in open court, and the submissions would have been made orally in open court. All present could hear them, repeat them and report on them, so long as the reporting was fair and accurate. The move to giving evidence, and making submissions, in writing should not obscure the fact that evidence and submissions are still presumptively treated as being given in open court."

There was no basis for refusing access to the documents sought. Indeed, there was a public interest in allowing information concerning extradition processes, and the competing claims made during proceedings under the *Extradition Act 1988* (Cth), to be publicly available (at [26]).

Statutory interpretation – judicial comity – whether single judge should follow the interpretation of another judge

In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] FCA 83 (13 February 2018) the court considered the proper interpretation of industrial activity under s347 of the *Fair Work Act 1999* (Cth). Bromberg J's preferred construction was at least impliedly rejected by Jessup J in both *Esso Australia Pty Ltd v The Australian Workers' Union* [2015] FCA 758 and *Australian Building and Construction Commissioner v Australian Manufacturing Workers' Union (The Australian Paper Case)* [2017] FCA 167.

Bromberg J therefore considered the principles and authorities about when it is appropriate for a single judge to depart from earlier authority (at [83]-[85]). While his Honour thought that the interpretation of Jessup J was wrong, he was not persuaded it was plainly wrong and therefore did not depart from it (at [85]).

In giving his preferred construction of the relevant provision of the *Fair Work Act 1999*, Bromberg J summarised the principles regarding the circumstances in which reference may be made to extrinsic materials including an explanatory memorandum (at [50]-[52]).

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There are no High Court of Australia casenotes this month, as the court did not sit in July.

Court of Appeal judgments

1-31 July 2018

with Bruce Godfrey

Civil appeals

Workers' Compensation Regulator v Pryszlak [2018] QCA 157, 6 July 2018

General Civil Appeal – where the respondent claimed to have injured his thumb at work – where the respondent's application for compensation under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (WCRA) was rejected – where an application for a review of such a rejection must be made within three months of receipt of notice of the rejection – where the respondent applied for review out of time – where an extension of time to file an application for review can be granted if "special circumstances" exist justifying the grant of an extension – where the respondent's application for an extension of time was refused – where the respondent successfully sought judicial review of the refusal of an extension of time – where the respondent was, inter alia, denied procedural fairness through the failure of the original decision-maker to show him a letter from his employer maligning his character and casting doubt on whether he had been injured at all – whether the respondent's application raised circumstances that were capable of being regarded as special, such as to warrant the granting of an extension of time under s542 of the WCRA – where s5 of the Act describes the scheme of the Act in terms which s4 states are the main objects of the Act – where s5(4) states that it is intended that the scheme should "ensure that injured workers are treated fairly by insurers" – where the term 'fairly' will mean different things in different contexts but, in the context of an administrative decision-maker who is obliged to perform a statutory duty to consider an application, s5(4) connotes that the decision will be made fairly according to law – where like any provision for an extension of time, the purpose of s542 is to strike a balance between an applicant's entitlement and the benefits of finality – where the power to extend time exists to prevent injustice in a particular case that might be caused by the enforcement of a general time limit – where it is an instance of the general policy of the law to ensure that mandatory statutory provisions are not applied blindly so as to cause injustice in an individual case – where consequently, the meaning of "special circumstances" will be informed by its purpose but also by other provisions that depend upon it – where in the case of s542 the large factor will always be the explanation for the failure to make the application within time – where, however, the merits of the claim for compensation are also obviously relevant for if a claim has little merit there can hardly be any likely injustice in refusing an extension of time – where on the other hand, while an application for an extension of time is not the occasion for a merits review, if an evidently meritorious claim exists, then that will bear upon the question of whether other relevant circumstances taken together with the merits would constitute special circumstances – where, in this case, the respondent's application did raise circumstances that were capable of being regarded as special – where prominent among these was that he was denied procedural fairness by not being shown his employer's letter, a letter which not only maligned his character but which also cast unjustified doubt about whether he had been injured at all – where the history given by the respondent, confirmed in all respects by the medical records, is consistent with his having suffered a real injury and that it was sustained at work on a date in early April – where the failure to give the respondent an opportunity to respond to Mr Nucifora's (the respondent's employer's representative) allegations worked a real injustice in this case because it resulted in the decision-maker failing to appreciate what she would have appreciated if she had given the respondent that opportunity – where a consideration of the evidence that he submitted showed that it is more probable than not that the respondent had suffered an injury, that he had sustained this injury at work, that Mr Nucifora's deductions to the contrary were misconceived, that the respondent had reported his injury to his superiors and that any assertion to the contrary was not correct – where the fact of the injury had actually been established beyond any doubt, to the point that the wire lodged in his hand, which Mr Nucifora told WorkCover he doubted was even there, could be inspected in a photograph – where none of this had been considered by the decision-maker because of WorkCover's failure to afford the respondent procedural fairness – where a failure to afford procedural fairness means that the decision sought to be reviewed is not a decision at all – where that the decision-maker, whose decision is the subject of the application for an extension of time, has not actually performed the statutory duty imposed upon her is, undoubtedly, a special circumstance within the meaning of s542 because one of the objects of the Act is that workers should be treated fairly – where the finding of the regulator's delegate that no special circumstances existed failed to take into account that some of the errors that led to the decision had been induced by the decision-maker's own failure to afford natural justice – where this failure conflicts with one of the primary objects of the Act, which is to treat workers who come within its terms fairly – where as McMeekin J said, the decision-maker failed to consider the merits of the claim – where the regulator correctly recognises the relevance of merit because a specific inquiry was made about that subject in this case and the regulator's published guidelines, given to Mr Smith, also say so – where that approach is correct and the submissions to the contrary made on the regulator's behalf in this appeal are incorrect – where there is also the fact that the delegate of the regulator found that the respondent had not demonstrated that he was suffering from a medical incapacity that prevented him from lodging his application for review on time – where no doubt such incapacity, if it existed, would have been a relevant consideration to consider – where in a case in which the applicant's case did not involve such a factor, its non-existence is an irrelevant consideration.

Appeal dismissed.

Legal Services Commissioner v Nichols [2018] QCA 158, 6 July 2018

General Civil Appeal – where the appellant exercised a discretionary power under s448 of the *Legal Profession Act 2007* (Qld) to dismiss a complaint against two legal practitioners – where the appellant had delegated investigation of the complaint to a senior investigator – where the appellant had accepted the senior investigator's recommendation that the complaint be dismissed – where information included in the senior investigator's report was incorrect – where the primary judge held that the appellant had committed jurisdictional error in exercising the s448 power – where by accepting the recommendations of the senior investigator in the internal memoranda the appellant, in effect, impermissibly imposed two pre-conditions or threshold requirements

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in exercising his statutory function – where the first pre-condition was the requirement for a determination (either by a court or by the appellant) as to whether the moneys paid to the daughter-in-law were impressed with a trust or formed part of the matrimonial property – where the second pre-condition was that the employed solicitor had to know that the $173,831.53 paid to the trust account of the firm had come from the bank account of Asden Developments Pty Ltd – where by limiting the exercise of his statutory function under s448(1)(a)(i) by reference to these two pre-conditions or threshold requirements, the appellant has not actually exercised his statutory function – where he has not formed the opinion required by s448(1)(a)(i), namely that there is no reasonable likelihood of a finding by a disciplinary body of either unsatisfactory professional conduct or professional misconduct – where as both 'unsatisfactory professional conduct' and 'professional misconduct' are given wide definitions by the Act and are matters which the Act contemplates will be determined by a disciplinary body (such as the Queensland Civil and Administrative Tribunal), by accepting the opinion and recommendation in the internal memoranda, the appellant has misapprehended the nature of his statutory function – where by limiting the exercise of his statutory function to considerations of whether it had been determined that the moneys were impressed with a trust or that the employed solicitor knew this, the appellant has not actually formed the opinion required by s448(1)(a)(i) – where the primary judge made an order in the nature of *mandamus* under part 5 of the *Judicial Review Act 1991* (Qld) – whether the primary judge made an express finding, requisite to *mandamus*, that the appellant had failed or refused to exercise jurisdiction – whether the primary judge should have refused to grant an order of *mandamus*, because any jurisdictional error was immaterial and would not affect any future outcome – where the discretionary power to dismiss the complaint could only be exercised if the appellant was of the opinion that there was no reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct – while the appellant's letter of 9 September 2016 uses the language of s448(1)(a)(i), the requisite opinion was never formed – where his Honour's order requires the appellant to reconsider the exercise of power under s448(1)(a)(i) by reference not only to his Honour's reasons but also to the respondent's submissions below – where the order therefore contemplates a comprehensive review by the appellant in forming the requisite opinion, untainted by jurisdictional error – where there is no present basis for asserting that upon such review the result will be the same – where in that sense it is not accepted that his Honour's order was either 'futile' or 'pointless'.

Appeal dismissed. Costs.

Bowyer Group Pty Ltd v Cook Shire Council & Anor [2018] QCA 159, 6 July 2018

Application for Leave *Sustainable Planning Act* – where the second respondent was granted development approval for a material change of use of land for an extractive industry – where the applicant, an owner of adjoining land, commenced an appeal against the decision to grant the approval in the Planning and Environment Court – where the applicant contended, as a preliminary issue, that the development application was not a properly made application as it was not accompanied by the consent of the holders of a Crown lease of the land – where the Planning and Environment Court found the application was properly made, being accompanied by the consent of the State as the owner of the land – consideration of the meaning of the word 'owner' in the phrase "owner of the land the subject of an application" in s263(1) of the *Sustainable Planning Act 2009* (Qld) (SPA) – whether the holders of a rolling term lease for pastoral purposes under the *Land Act 1994* (Qld) are 'owners' of the relevant land within the meaning of that provision – where a lease of Crown land is a creature of statute, and as such the rights and obligations that accompany such a lease derive from the statute – where the grant gives the lessee such possession as is required for the occupation of the land for the purposes of the grant – here, pastoral purposes, but it does not confer exclusive possession – where the natural and ordinary meaning of the language used in the definition of 'owner' is that the owner is the person (or persons or entity) who is (currently) entitled to receive the rent for the land, or (where the land is not, currently, let) who would be entitled to receive the rent for the land, if it were let to a tenant at a rent – where in the present case the State (the Crown) is entitled to receive the rent for the land, from the lessees under the rolling term lease – where, having separately considered the context in which that word is used in s263(1) SPA, the purpose of the provision, and the natural and ordinary meaning of the language used, it is considered that the analysis of Stephen J in *Spurling v Development Underwriting (Vic.) Pty Ltd* [1973] VR 1 is persuasive and it accords with the view as to the proper construction of the meaning of the phrase "owner of the land the subject of the application" – where the construction of 'owner' which is considered to apply does not result in prejudice to persons in the position of the Crown lessees, in terms of their right to object to a development application on the merits – where it simply means they do not have a right to veto the making of the development application.

Application for leave to appeal granted. Appeal dismissed.

State of Queensland v Baker Superannuation Fund Pty Ltd & Anor; Aurizon Operations Limited v Baker Superannuation Fund Pty Ltd & Anor [2018] QCA 168, 27 July 2018

General Civil Appeals – where the first respondent owned land bordering a railway – where the railway was over a hundred years old – where culverts were constructed underneath the rail line to allow for the natural flow of water – where over time, an increased flow of water through the culverts caused significant erosion on the first respondent's land – where in 1884, the land for the railway was bought off the previous titleholder to the first respondent's land – where it is necessary to assess the nature of the use of this section of the railway land during the period which is relevant, which commenced no earlier than when the respondent complained of the erosion and concluded no later than in June 2002, when the land was gazetted as "Non-Rail Corridor Land" under s215 of the *Transport Information Act 1994* (Qld) – where the claim against Aurizon was that it failed to remedy a nuisance of which it was or ought to have been aware – where s126B of the 1994 Act provided that within five years of its commencement, Queensland Rail and the chief executive were required to identify the land constituting existing rail corridor land as well as that which was not existing rail corridor land but which was of "strategic importance to the State as part of a transport corridor" – where it provided that the identification of a piece of land in that second category was to be notified in the Gazette, at which point the land would then become unallocated State land – where by s126B(7), it was provided that a regulation might extend the five-year period for this process of categorisation by not more than two years – where there was such an extension, with the result that at all material times for the case against Aurizon, the land was held by it (as Queensland Rail) under this "transitionary land rationalisation process" – where the state of affairs, upon which nuisance was founded had not been created by Queensland Rail – where its ongoing ownership of the land was in doubt whilst the process under s215 was being completed – where the process had to be completed by late 2002 – where in responding to Mr Baker's correspondence in early 2000, Queensland Rail wrote on 19 May 2000 informing him that it was then in negotiations with Queensland Transport about "the ownership and associated future maintenance responsibilities of the Brisbane

Valley decommissioned rail corridor". – where Queensland Rail was susceptible to being divested of the land, with no compensation at any time – where even the costs of investigating the cause of the erosion, and the means of remedying the situation, would themselves have been considerable, quite apart from the cost of undertaking the works – where in these circumstances, Queensland Rail (now Aurizon) could not have been expected to abate the nuisance – where at all relevant times from 2008, the State of Queensland was aware of the erosion and of the respondent's complaint – where there was no evidence that the works on the former railway corridor, which the respondent claimed were required to abate the nuisance, would have compromised the use of this land as the public recreational facility which it has become – where the embankment and the culverts were changes which had been made to the landscape so that the land could be used for a railway – where there was no justification for retaining them apart from saving costs to the State, once the nature of the ongoing use of the land had become clear, and where that use would not be compromised by their removal – where in short, the use of the culverts within this embankment no longer constituted a use of the State's land "in a reasonable and proper manner", having regard to the damage which they continued to cause to the respondent's land – whether there was an actionable nuisance committed by the State of Queensland.

In Appeal No.3654 of 2017: Appeal dismissed. Costs. In Appeal No.3650 of 2017: Appeal allowed. The order made for the payment by the appellant to the respondent of damages for nuisance be set aside. Costs.

Body Corporate for Mount Saint John Industrial Park Community Title Scheme 18632 v Superior Stairs & Joinery Pty Ltd [2018] QCA 173, 31 July 2018

General Civil Appeal – where the appellant is the body corporate of a community titles scheme and the respondent is the owner of one of the lots within the scheme – where the appellant claims that the respondent is obliged to pay outstanding contributions under the scheme and commenced proceedings to recover them, together with interest and costs, in the District Court – where the respondent successfully applied for the summary dismissal of part of the appellant's claim upon the ground that it was made outside a limitation period which, the primary judge held, was prescribed by s145(2) of the *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) – where s145(2) of the regulation provides that where the amount of a contribution or contribution instalment has been outstanding for two years, the body corporate must, within two months from the end of the two-year period, start proceedings to recover the amount – where the only question in this appeal is whether s145, upon its proper construction, does prescribe a limitation period, by requiring that if the amount of a contribution has been outstanding for two years, the body corporate must within the next two months start proceedings to recover the amount – where the issue is whether a failure by a body corporate to start proceedings in accordance with s145(2) within a period of "two months from the end of the two-year period", has the consequence of barring any proceeding commenced beyond that date – where clearly, the language of s145(2) requires a body corporate to start proceedings to recover the amount within that two months, but it does not expressly provide that a failure to do so will bar a subsequent proceeding – where s145(2) is in mandatory terms: it compels a body corporate to start proceedings if an amount has been outstanding for two years – where it is not in terms which require proceedings, if the body corporate decides to bring any, to be commenced within a certain time – where nor is it in terms that no proceedings are to be commenced after the expiration of that time – where the difference between the terms of s145(2) and provisions of those kinds is telling and reveals that the intended purpose of s145(2) is to impose a duty upon the body corporate, rather than to serve any of the purposes for which limitation periods are enacted – where the Explanatory Notes confirm what is already sufficiently clear from the text, namely that the purpose and effect of s145(2) is to compel the body corporate to bring a proceeding, rather than to impose a time limit, for the benefit of a defendant, upon any proceeding which a body corporate might see fit to commence – where the duty imposed by s145(2) serves several purposes, without it imposing a limitation period – where the duty is fortified by s152 of the Act, which provides by s152(1)(b), that a body corporate must comply with the obligations with regard to common property and body corporate assets imposed under the regulation module applying to the scheme – where there is an outstanding amount of a contribution, that debt is a body corporate asset – where in the event that the body corporate did not discharge the duty under s145(2) of the regulation (and s152 of the Act), the duty could be enforced by a lot owner through the dispute resolution provisions of the Act – where s145(2) does not impose a limitation period for a proceeding of the present kind – where the relevant parts of the appellant's pleading ought not to have been struck out.

Appeal allowed. Orders 1 and 2 made in the District Court on 29 September 2017 be set aside. Costs.

Criminal appeals

R v Hansen [2018] QCA 153, 6 July 2018

Sentence Application – where the applicant was sentenced for one count of unlawful carnal knowledge of a person with an impairment of the mind under care, one count of indecent dealing with a person with an impairment of the mind and five counts of indecent dealing with a person with an impairment of the mind under care – where the sentencing judge was wrongly informed by the prosecutor and defence counsel that there was no power to fix a parole eligibility date – where the respondent conceded error was made – where the applicant must be re-sentenced – where the applicant had an intellectual impairment and personality disorder – where the applicant had 1215 days spent in pre-sentence custody that was not declarable – where the offences were committed whilst the applicant was on a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) – where the applicant had a relevant criminal history – where the guilty pleas were late – where protection of the community is paramount – where the applicant should be given full credit for the period in which he was held in custody after he was arrested, but which cannot be declared, because he was also detained under an interim detention order – where because of the applicant's poor prospects of rehabilitation, the late guilty plea is better reflected in a slight reduction of the sentence, rather than setting a parole eligibility date at a point that is less than half the sentence – where therefore the sentence is reduced by four months to recognise the guilty plea – where that would result in a sentence of three years four months' imprisonment for count 13 – where the pre-sentence custody was in excess of any term of imprisonment that was appropriate for count 6 which was committed separately from the balance of the offending and without the circumstance of aggravation of Ms X being under the applicant's care – where that means that the sentence for count 6 should be varied by setting aside the sentence of imprisonment and not further punishing the applicant for that offence – where he will therefore remain convicted of that offence – where the effective sentence at first instance for each of counts 7 to 11 was six years four months' imprisonment – where in view of the particulars of each of counts 7 to 11, it is difficult to justify that sentence, before the reduction for the non-declarable custody – where without the complication of the non-declarable time in custody, a sentence of four years' imprisonment would have been appropriate.

1. Application for leave to appeal against sentence granted. 2. Appeal against sentence allowed. 3. The sentence for

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count 6 varied by setting aside the sentence of imprisonment and not further punishing the applicant. 4. The sentences for each of counts 7 to 11 varied by substituting six months' imprisonment for three years' imprisonment. The sentence for count 13 varied by substituting three years four months' imprisonment for four years' imprisonment.

R v Woods [2018] QCA 167, 27 July 2018

Appeal against Conviction & Sentence – where the appellant was convicted by a jury of one count of grievous bodily harm and one count of unlawful wounding – where he was sentenced to concurrent terms of imprisonment of 5½ years and two years respectively – where the prosecution case was that, in the course of an altercation between the appellant and Mitchell Robinson, the appellant armed himself with a knife and did grievous bodily harm with it to Mr Robinson, also wounding Tiffanie Hansen, who intervened in the altercation – where the appellant was charged in count 1 with malicious act with intent, referred to hereafter as grievous bodily harm with intent, and in count 2 with unlawful wounding – where the issue of the appellant's intention was a live one in count 1, however he was acquitted of doing grievous bodily harm with intent and only convicted of grievous bodily harm simpliciter – where insofar as the issues at trial are relevant in the conviction appeal, they arise out of the conflicting and limited versions of how the injuries were inflicted – where the appellant's counsel submits the direction on s23(1)(a) *Criminal Code* (Qld) did not include a direction that the prosecution must exclude beyond reasonable doubt the possibility the movement of the knife entering the body of Mr Robinson occurred independently of the will of the appellant or refer to the legal consequence of a failure to exclude that possibility, namely acquittal on counts 1 and 2 – where the jury were not expressly directed of the need for the prosecution to exclude the possibility of the appellant's account of the wounds having been inflicted inadvertently as he was being assaulted by Mr Robinson – where however, when the summing-up is considered in context, the jury could not have been left in any doubt that was what the prosecution had to do – where the assessment of the adequacy of directions in any case necessarily involves matters of degree and depends upon the particular circumstances of the case – where in light of the features of the directions highlighted above, the jury could not have been in any doubt that the prosecution had to exclude beyond reasonable doubt the possibility that the knife's infliction of injury upon Mr Robinson occurred independently of the will of the appellant – where the appellant's counsel submits the jury were erroneously directed to consider the elements of s289 in isolation from the relevant facts and subsequent to their consideration of the exculpatory provisions of s23 – where there is substance to the complaint of inadequacy in relating the directions on the law applicable to the facts of count 2 – where that complaint related particularly to the direction on criminal negligence although it applies in the same vein to the defence of accident in count 2 – where the jury's apparent satisfaction that the appellant's wielding of the knife was willed renders academic an argument of the appellant that the jury should have been but were not told the appellant could not be regarded as having the knife in his charge or under his control, as s289 requires, if his wielding of it occurred independently of the exercise of his will – where however, it does not follow from the jury's verdict on count 1 that the defence of accident was also excluded on count 2 – where there being no suggestion the appellant intentionally wounded Ms Hansen, the live issue in respect of the defence of accident in count 2 was whether an ordinary person would reasonably have foreseen Ms Hansen's wounding as a possible consequence of the appellant's wielding of the knife in his confrontation with Mr Robinson – where this was a different issue than had been in play for the defence of accident in count 1, which was, in this context, focussed on the foreseeability of Mr Robinson's, as distinct from Ms Hansen's, injuries – where the direction given by the trial judge of the potential application of the defence of accident in count 2 identified no such distinction – where it informed the jury the defence of accident, earlier discussed in respect of count 1, again needed to be excluded in respect of count 2, but it did not explain or analyse the different factual aspects which the jury needed to consider in the application of that defence to count 2 – where merely informing the jury the defence of accident, explained in respect of count 1, also needed to be excluded by the prosecution in respect of count 2, did not alert the jury to the fundamental difference on the issue of foreseeability as between the two counts – where the direction's silence about specific factual considerations and their relevance to the jury's properly informed consideration of both accident and criminal negligence in respect of count 2 ("the failure to adequately direct on the foreseeability issue") meant that critical aspects of how those legal provisions applied to the facts of this case went unexplained – while those provisions involve different tests, the real issue in respect of their application to count 2 was the foreseeability (whether from the perspective of the appellant or an ordinary person in his position) of Ms Hansen's movement into the fray and, in turn, of her wounding – where on this real issue the directions were silent – where in the case at hand there is a reasonable possibility that the failure to adequately direct the jury on the foreseeability issue pertaining to count 2 may have affected the verdict on count 2 – where by reason of that failure the jury may have erroneously considered the issues relating to count 2 were so similar to those relating to count 1 that guilt of count 2 flowed automatically in the wake of a conclusion of guilt on count 1 – where the obvious difference in the issue of foreseeability as between the injuries done to Mr Robinson and the injuries done to Ms Hansen being identified and without the significance of the facts to that issue in count 2 being explained, the jury were ill-equipped to correctly apply the law relating to accident and criminal negligence to the facts in respect of count 2, wrongly depriving the appellant of a chance of acquittal of count 2 – where the failure to adequately direct on the foreseeability issue in count 2 thus constituted a miscarriage of justice – where the proviso is inapplicable because the nature of the error means it cannot be said that no substantial miscarriage of justice has actually occurred by reason of the error.

Appeal dismissed in respect of count 1 but allowed in respect of count 2. The conviction on count 2 is quashed. The appellant is to be re-tried on count 2 (unless it is discontinued). The respondent will, within four weeks of these orders, inform the appellant's legal representatives of whether it intends to proceed with the retrial of the appellant in respect of count 2 on the indictment. Procedural orders in relation to the progression of this matter.

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.

Career moves


Angela Engel


Laura Gahan


Leanne O'Neill


Kara Thomson


Ryan Kennedy


Will Brock


Sam Marsh


John-Anthony Hodgens

Aitken Legal

Aitken Legal has announced the promotion of **Angela Engel** to special counsel in the firm's Gold Coast office. Angela joined the firm in 2011 and has more than 18 years' experience. She has expertise in all aspects of employment law and acts exclusively on behalf of employers.

Cooper Grace Ward

Cooper Grace Ward has announced seven promotions, including four senior associates who have been promoted to special counsel.

Special counsel **Laura Gahan** is a commercial and rural property lawyer with 15 years' experience across a range of real estate transactions, including advising on commercial and industrial property purchases and disposals, complex rural land and multi-tiered agribusiness transactions.

Leanne O'Neill, a special counsel in the property, planning and environment team, has more than 19 years' experience, including nine years as a solicitor representing the State of Queensland in negotiations and litigation. Leanne advises on land access and tenure management, planning and development approvals and appeals, compulsory acquisition and valuation law, environmental compliance, remediation and offsets, vegetation and water management, native title and cultural heritage, and petroleum and mineral resources compliance.

Kara Thomson, a special counsel in the insurance team, has more than 10 years' experience in both litigation and personal injuries. Kara is a QLS accredited specialist in personal injuries, with a special interest in workers' compensation claims, pure psychological injury claims, and claims involving multiple parties across various personal injuries regimes in Queensland.

Special counsel **Leanne Weekes** focuses on advising developers and government entities across the spectrum of property development-related matters. She has extensive experience in planning and environment legislation and compliance.

Vanessa Thompson, who was promoted to senior associate, has 11 years' experience in planning, environment and related land use matters. Vanessa's extensive experience includes advising developers, local authorities, banks and receivers on a broad range of town planning matters, compulsory acquisition, environmental licensing and offences, contamination, remediation and land valuation.

New associate **Kathryn O'Hare** has experience across planning, local government, infrastructure and environmental law.

Nicole Smith is now an associate in the firm's property, planning and environment team, with broad property law expertise.

Hickeys Lawyers

Hickeys Lawyers has announced the expansion of its planning and environment division with the appointment of **Antony Knox** as special counsel.

Antony, who has more than 28 years' experience, has expertise in a range of matters in the planning and environment arena, appeals, applications, planning scheme amendments, applications and appeals with the Queensland Court of Appeal and High Court of Australia, as well as numerous planning law advices.

Holman Webb Lawyers

Holman Webb Lawyers has announced four promotions.

New partner **Pat O'Shea**, who started with the firm as a clerk in November 2007, has more than a decade of experience in insurance litigation.

Ryan Kennedy, who has been promoted to senior associate, joined the firm in August 2017 and practises in general insurance litigation.

Will Brock, who has been promoted to associate, joined Holman Webb in 2013 and practises in dust diseases and insurance litigation, while **Sam Marsh**, also promoted to associate, joined the firm at the end of 2014 and practises in commercial litigation with an emphasis on body corporate law, directors' liabilities, and insolvency.

Macpherson Kelley

Macpherson Kelley is pleased to announce that employment and safety lawyer **John-Anthony Hodgens** has joined the firm as a workplace relations consultant in its Brisbane office.

John-Anthony, who was recognised by Doyles Guide 2018 as a recommended employment lawyer, has more than 20 years' experience.

MBA Lawyers

MBA Lawyers has announced the promotion of litigation lawyer **Duane Williams** to partner. Duane joined the firm in 2014 and is an experienced corporate and commercial litigator who practises across industries including banking and finance, real estate, insurance, building and construction, and intellectual property.

The firm has also announced the appointment of **Peter Waller** as special counsel. Peter, a QLS accredited specialist in commercial litigation, has more than 23 years' experience in advice and strategy, commercial litigation, building, construction and development, insurance claims and defence, and mediation and negotiation.

Brendan Pitman has been promoted to associate in the litigation department. Brendan focuses on corporate and commercial litigation, acting for secured

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Leanne Weekes


Vanessa Thompson


Kathryn O'Hare


Nicole Smith


Antony Knox


Pat O'Shea


Duane Williams


Peter Waller


Brendan Pitman


Tessa Calver-James


Sarah Boevink


Michele Davis

and unsecured creditors, insolvency practitioners, private companies and individuals.

Tessa Calver-James has been promoted to associate in the commercial department. Tessa supports clients in all aspects of corporate and commercial law, including body corporate and management rights, wills and estates, and property and real estate.

Sarah Boevink has been appointed as a solicitor in the commercial department. Sarah, who has worked at the firm for nearly two years, has experience in matters such as business sales and purchases, body corporate and management rights, and manufactured homes.

Wilson Lawyers

Wilson Lawyers has announced the appointment of Michele Davis as head of its succession and elder law practice group. Michele, who joined the firm in May, is an expert in succession and elder law, and is the founding President of the Logan & Scenic Rim Law Association.

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

12 Masterclass: Contract law

8.30am-12.40pm | 3.5 CPD

Law Society House, Brisbane

Join contract law expert Jeffrey Goldberger when he returns to present this in-depth, interactive and practical contract law masterclass.

SL

14 Government lawyers conference

8.20am-5.15pm | 7 CPD

Law Society House, Brisbane

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PLE PM&BS PS SL

18 Introduction to civil litigation

8.30am-4.20pm | 6.5 CPD

Law Society House, Brisbane

Aimed at junior practitioners and legal support staff with less than three years' experience, this introductory course will provide practical guidance in running a civil litigation file.

PLE PM&BS PS SL

19 Complex tax issues: Administering estates with SMSFs

12.30-1.30pm | 1 CPD

Livecast

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SL

21 Solicitor advocate course – general skills

21-22 | Day one: 5-7pm

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PLE PS SL

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In law, can we still live the flexible dream?

by Ruth Hatten

Though our legal industry may sometimes appear inflexible, occasionally we are blessed with a breath of fresh air, and I am lucky to be someone who has experienced that freshness.

I was admitted to practise law in 2003 and since then I have held positions with a variety of organisations including private firms, government and not for profits. While government and not-for-profit organisations do offer flexibility, private firms can be somewhat less inclined.

Flexibility can be important for so many reasons, including such things as family commitments, sporting commitments and health and wellbeing requirements. For me, flexibility is important because I have a passion that resides outside the law.

Since I was a little girl, I have held a deep regard and compassion for animals. This approach to animals has grown as I have grown. With that growth, I sought out opportunities where I could use my skillset to improve the lives of animals.

Once I became a lawyer, I dreamed of a way that I could help utilise my legal skills to help animals. I stumbled across animal law and thought I had found my dream profession. In 2010, I was very lucky to be offered an opportunity to work as an animal lawyer. I left my senior lawyer position in one of the country's top firms to work for a not-for-profit organisation, Voiceless, the animal protection institute.

I loved working for Voiceless. It was my dream job. But life took a turn and I returned to private practice.

The yearning to use my skillset to benefit animals persisted and it was while working back in private practice that I decided to pursue animal naturopathy (the use of natural remedies like nutrition, herbs and physical therapy to support the body to function optimally, achieve balance and heal itself).

In 2014, I commenced animal naturopathy studies. In 2015, once I had obtained my certificate in small animal nutrition, I commenced practice as a cat and dog nutritionist, seeing clients on weekends and evenings. I absolutely love helping our furry companions achieve better health through nutrition.

But as any small business owner will tell you, running a small business can be extremely challenging, especially when you're juggling your business with a full-time job. I wanted to run my business and complete my animal naturopathy studies, but I also wanted to continue my practice as a lawyer.

Late last year I started searching for a part-time lawyer role that would provide me with the flexibility to operate my business and complete my studies. Many firms I approached weren't interested in hiring a lawyer on a part-time basis. After three months of seeking a part-time role, I was very lucky to be presented with an opportunity that allowed me to pursue my passion for helping animals and practise as a lawyer.

Four days a week I am a senior associate for Aitchison Reid Building and Construction Lawyers, a small family firm in Cleveland. Two days a week, I am a businesswoman and student. Life is extremely busy (whose isn't!) but every day I am reminded of the special opportunity I have been given to follow my dream.

The owners of Aitchison Reid, Fionna and Riley, have proven time and time again to be supportive of my desire to improve the lives of animals. When I interviewed with the firm I felt comfortable being honest and upfront with them about my business. There was no need to hide away this important part of my life for fear that I may not get a job. As small business owners themselves, they truly understand my position, and that understanding translates to supporting me in not only my practice as a lawyer but also as a business woman.

That support was evident again when I was recently presented with an opportunity to work one day a week as an animal lawyer for another firm. When I approached them about the opportunity, they didn't bat an eyelid. They showed their support by allowing me to accept this meaningful opportunity.

So why am I writing this article for a legal industry publication?

Because I want to let others know that you can pursue your personal interests while continuing your profession as a lawyer. Amidst the plethora of inflexible law firms, there are law firms which will happily provide you with the flexibility and support to pursue your passions outside the law. I know, because I have been lucky to find one such law firm.

So go on, dream big and have faith, because you never know what opportunity is waiting for you around the corner.

Ruth Hatten is a senior associate at Aitchison Reid Building & Construction Lawyers, an animal naturopath and student – ruthhatten.com .

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OK – you're no longer an employee...

A practice idea that might make a big difference

You've taken the big step and set up in private practice. Your craving for independence has been satisfied (for now). Which is all great. Seriously – it really is. But the practical issues of feeding the family and paying the mortgage will never be far away.

I first became involved in the Queensland Law Society Practice Management Course in 1996.

It commenced as a compulsory program in 1989, and one of the underlying assumptions (and correctly so) behind its establishment was that new practitioners (generally) were naïve as to the business imperatives of legal practice. Don't forget, that was also a time when lots of rules got in the way of any serious competition between law firms.

Things have changed quite a bit. But then again, they haven't changed at all. Most employed lawyers now live with competition, production budgets and the relentless drive for new business and profitability as *normal*. They may or may not like it, but they sure know that it is what it is.

What hasn't changed is the craving for personal and professional independence – simply – to not have others tell you what to do. And to purloin the profits of your efforts for yourself. Together, these are the underlying drivers of new practice formation.

The best advice I have always given to people setting out on this course is to be married to a dermatologist or senior counsel. For these lucky souls, a fair number of your own practice misjudgments won't end in financial tragedy.

But for the rest, there are some time-honoured guidelines that will give your household a reasonable chance of eating three meals a day and paying the power bills.

1. Understand *fixed* and *variable*: When you set up, most of your costs are fixed… labour, rent, insurance, and so on. The rent (lease) you usually can't change quickly without financial pain. Staff aren't too far behind, what with recruiter commissions and loss of productivity. Your revenue is usually 100% variable. Your fees are usually as good as your next retainer and their willingness to pay. So you have fixed *money out* and highly unpredictable *money in*.
2. Excluding those firms which are starting up with a couple of great *repeat business* relationships in place, this tends to be quite a challenge. You can say – *I'll invest in a really innovative web business portal plus a bunch of other leading-edge technology* – but what if it's a fizzer? (that is, doesn't convert into business)
3. Every new business (not just law firms) faces these choices. As I have noted on these pages in the past – there are only two generic types of business risk – *missing the boat* and *sinking the boat.* There is no question that to succeed, you need a positive go-get-'em attitude. You want to be better. You want to be different. You have the technical skills and want the market to know about them. You are motivated. This is your big chance. You don't want to *miss the boat.* But if you borrow a bundle, go too hard and it doesn't come off – will you *sink the boat?* This is all perfectly normal. It's the judgment all businesses need to make.
4. The online/digital environment has enabled new firms to better manage these risks. You can significantly reduce your fixed costs (labour and rental) by opting for a virtual/micro firm model. As such, you can substantially reconfigure the risks as between *missing the boat* and *sinking the boat.*
5. Unfortunately, every solution comes at a cost. By reducing the *fixed cost risk*, you usually increase the *total time spent/burnout/being all things to all people risk*. But don't worry – so long as you have an understanding partner (life partner) – making this kind of early career sacrifice is perfectly normal and much of the time it pays off.
6. Also follow the financial basics…

   If your household persistently spends more money than your practice brings in, then you either have a spending problem, or a business model problem, or both. So you will need to recognise this and do something about it. Spending less isn't fun. But being bankrupted is even less fun.
7. Don't fall into the business overdraft trap. On the whole, banks love lending money to lawyers. The purpose of an overdraft is to compensate for the gaps/unpredictability in business cycles so that business can continue in the face of occasional slow payers, slow WIP conversion, and so on. But don't use your overdraft as a source of high-cost, long-term finance that supports your standard of living when it is patently obvious that the firm isn't keeping up with it. Your family can only afford a standard of living which equates to reliable after-tax collected fees less costs.
8. And finally, a tip for the long term. The sooner you start providing for your long-term retirement, the better. Sure, in the very early stages, you will need to invest in business growth – so go for it. But as soon as you can, you should invest in property, super, etc. *out of the law firm* investments. This (as in the point above) will typically involve substituting saving/investing for some (not all) current consumption (c'mon – do you really need the S500?). Call me a grinch if you like.

   I am constantly amazed by the number of practitioner clients who, after years of very high practice drawings, face retirement with an uncertain financial future. And if you are a sole practitioner, don't think for a minute that the sale of your firm = your superannuation fund. Agents will try to talk them up, but most of the time they aren't worth anything near what owners would like to think.

Hope that assists.

Dr Peter Lynch
p.lynch@dcilyncon.com.au

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Accountancy

Agency work

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Agency work continued

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

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

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- Standard Search $37.00 (incl. GST)
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Our application form has been amended to reflect the increase in price and is available for downloading via **powerlink.com.au** where you can also make your application direct online.

Please use the existing form ver08/16 until Friday 31 August 2018. From Saturday 01 September, all new applications must be on the new form ver07/18.

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C'est Bon? It's good!

by Amy Detheridge

Even though our love affair with burgers, poke bowls, tapas and all things fried is still in full swing, there's always a place in our hearts for good-quality French food.

And not the kind you can find on Uber Eats, the kind you can only experience by dining in a warm, cosy, candle-lit space filled with white tablecloths, gentle music and, of course, French wine.

This one isn't going to show up on a 'cheap eats' list anytime soon, but if that sounds right up your alley and the name C'est Bon doesn't automatically come to mind, then look no further. After 10 years of offering delicious, authentic French food in the heart of Woolloongabba, C'est Bon is well worth cancelling your Saturday evening dinner date with Netflix.

C'est Bon recently reopened its doors, expanding its space into a modern and chic wine bar, paired with the original intimate restaurant, the legacy of Michel Bonnet, who left France nearly 50 years ago with one dream – to become a chef.

Today, his dream has well and truly come to fruition, as the godfather of C'est Bon, now owned by his protégé, Celine Damour. Celine has her work cut out for her, with aspirations of adding a new cellar, urban garden and rooftop to the establishment.

The restaurant and wine bar are off Stanley Street amongst the Gabba's heritage-listed buildings. Echoing the traditional French bistro style, the restaurant greets you with an intimate dining room over two storeys. It's hidden behind an entrance, no wider than a doorway.

The décor is understated, and tall mirrors add depth to the otherwise narrow, yet warm and charming, space. Next door old Provence meets Paris, with C'est Bon's new wine bar (and soon-to-be café) with a chic fusion of arches, brass against brick, and wooden undertones, but most notably a full bar of French wine. Otherwise, if French-inspired cocktails and locally brewed beer or cider (brought to you by another Brisbane favourite – Aether Brewing) are more to your liking, you won't be disappointed.

Now, the stuff you've been waiting for. The restaurant offers the choice of à la carte or a create-your-own degustation. The menu is inspired by traditional French cuisine (incorporating food from different regions), and modern influences. A glance at the menu reveals this is not the place if you're looking for a low-calorie, gluten-free treat; C'est Bon is traditional French dishes in the most delightful way.

C'est Bon doesn't try to reinvent French cuisine; its entrées include all of the luxurious French favourites – escargot swimming in garlic butter, melt-in-your-mouth foie gras, and freshly baked bread with whipped butter that will have you taking out a second mortgage (and signing up to F45) to eat like this every day.

The wine list is quite accessible, starting out with bottles from $45 that will afford you the opportunity to sample some of France's best wine regions, without leaving your wallet hungover. If there are too many choices for you to decide, the professional staff are well versed in recommending the perfect pairing with your food.

For your main course, choose from traditional French favourites, or from a selection of modern Australian and French fusion dishes. The Le Canard à l'orange (crispy free-range duck, twice cooked and accompanied by sweet potato puree, red cabbage, orange and Grand Marnier sauce) will never disappoint. Other dishes include chicken provençal, 'Normandie'-style pork tenderloin, lamb rump and even a kangaroo loin fillet. Of course, there is also a vegetarian option, which changes depending on the availability of fresh products.

Alternatively, build your own main from the char grill selection, with garnishes and sauce. Think duck fat-roasted potatoes, truffled forest mushroom sauce, burgundy jus, garlic and herb butter, all of the best steak imaginable, veal cutlets or a fish of the day.

Even if the entrées and mains have left you feeling completely satisfied, you might feel inclined to sample the dessert degustation. Or, choose from a mouth-watering selection of soufflé de la passion, crème brûlée, bombe Alaska, crêpe suzette, crème caramel or duo of chocolate mousse. Fair warning, the desserts are as visually stunning as they are scrumptious. In fact, as you see them wheeled out to the tables around you, you will find the need to try one irresistible!

If you're still not sold, head to C'est Bon's new bar, enjoy a glass of wine and sample some of the bar menu (with your favourite C'est Bon entrées, selection of French cheeses, duck pate and the popular charcuterie board).

Images courtesy of C'est Bon.

While (at the time of writing) you can pop into C'est Bon to enjoy a selection of traditional French dinner options, soon you will be able to head down for a bistro-style lunch, or even a French-inspired breakfast menu. Be sure to book in advance, because in true French style, the restaurant is cosy and chaotic in the best way.

Bon appetit!

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). Amy Detheridge is a lawyer at Allens Linklaters.

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Fakery by the bottle

with Matthew Dunn

Recent reports of 'copycat' wines offered for sale online in China may be a new headache for Australian wine exporter Treasury Wine Estates, but wine fraud is as old as the vines in the hills.

ABC News last month reported[1] that bottles of "Benfords Hyland" wine – looking distinctly like Penfolds wines – were all over China's third largest online sales platform, Pinduoduo, which has only recently listed on the NASDAQ with a value of US$24 billion and is regarded as a part of the Chinese online sales troika, along with Alibaba and JD.com.

The Benfords wines, with labels deceptively similar to Penfolds, were reported to be genuine Barossa Valley wine but sold for a fraction of the price the Penfolds brand sells for in the Middle Kingdom.

This development in the high frontier of online retail is a further problem for Treasury Wine Estates, which owns the Penfolds brand, among many other fine Australian wine labels. The popularity of the Penfolds product and the hype surrounding its Grange name here and overseas makes these wines easy targets for scammers and fraudsters.

As recently as March this year, Chinese police swooped on 50,000 bottles of fake Penfolds wines in Zhengzhou, the capital of China's Henan province.[2] Reports indicated the fake wines were copies of the renowned Bins 2, 8, 28, 128, 389, 409 and 707.

This seizure followed a similar raid in November 2017 by Shanghai police, who found 14,000 bottles of fake Penfolds which were being sold through a marketplace app related to Alibaba.[3] In this instance it was Treasury Wines Estates itself which complained to the ecommerce giant when its wines were being regularly sold for as little as 200 yuan ($39) when retail prices were actually between 600 to 3000 yuan ($119 to $594).

China has emerged as the new giant of wine consumption due to the growing wealth of its middle class. Wine Australia, our export marketing body, publishes statistics which put this into some context and also suggest why it's a big deal for Treasury and others when fakers bite into the market. To March 2018:

- Australian yearly wine exports were valued at $2.65 billion.
- Annual Australian wine exports to China have increased 51% (as a result of the Free Trade Agreement and other factors) to a staggering $1.04 billion.
- Australia's second largest wine export market, the United States, has shrunk 7% and is only valued at $439 million.

To get a sense of the scale of the wine market in China, in January to March this year China imported a massive 200.57 million litres of wine with a value of around $1.07 billion.[4] The largest exporter to China was France with stock worth $369 million and second place was Australia at $271 million.

This is undeniably big business. In 2017 *Forbes* magazine said:

"The Interprofessional Council of Bordeaux Wine boldly estimates that 30,000 bottles of fake imported wine are sold per hour in China. Jeremy Oliver, an Australian wine critic, was quoted by *The Weekly Times* saying he was told stories that the average bottle of Champagne in China is filled seven times. He estimates that 50% of wines retailing for $35 or more in China are bogus."[5]

Whether such alarmist estimations are true or not, it was reassuring to see *Forbes* also admit in the same article to being duped:

"In 1985, a single bottle of wine was sold for a record-breaking $157,000 at Christie's in London. The purchaser was Christopher Forbes, who was bidding on behalf of his father, Malcolm Forbes, the founder of this publication. The bottle was the so-called Thomas Jefferson bottle, a 1787 Lafite. It was thought to have the founding father's initials 'Th.J' carved on to the amber green glass. Other circumstantial evidence had also suggested the third president of the United States was once the owner.

"It was later proven to be a fake."

This vignette is a reminder that nothing presently occurring in China is new. Even Pliny the Elder complained about the plethora of fake wine available in ancient Rome.

The *Forbes* case was the handiwork of one of the two biggest names in label fraud, Hardy Rodenstock, a German pop music manager and collector of rare wines. The story goes he hosted decadent wine tastings of unique vintages and invited all the great wine writers and experts to sample. The most famous of these was the 1998 tasting of 125 vintages of uber-Sauterne Château d'Yquem dating back to 1784.

The Jefferson bottle was said to have come from a chance discovery of a walled-up cellar in Paris in 1985. Curiously, Rodenstock never said who he bought it from or where the cellar was.

More recently, another great name in label fraud was Rudy Kurniawan, who was arrested in 2012. He had a similar scam to Rodenstock, except his focus was old Burgundy. From the early 2000s the previously unknown Kurniawan made a name for himself buying and selling rare wines at auction.

Kurniawan only came undone when it was realised that bottles he had put up for auction were found to be 'non-existent' vintages. For example, in 2008 he consigned several bottles of Domaine Ponsot Clos St Denis Grand Cru from between 1945 and 1971. The estate itself advised the auction house that it had only started making that wine in 1982.

Kurniawan's simple technique was to buy old burgundy from lesser producers, relabel with a grand name and old vintage, and resell. Arrested and convicted, he was sentenced to 10 years' jail and is scheduled for release on 9 January 2021.[6]

Wine, especially fine wine, is big business, and it is all too easy to misrepresent provenance. When a new label increases the price handsomely, no wonder scammers flock in. Be careful out there!

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

Notes

1 abc.net.au/news/2018-08-04/australian-lookalike-wines-big-sellers-on-chinese-online-giant/10064836 .

2 afr.com/news/world/asia/chinese-police-seize-50000-bottles-of-fake-penfolds-20180327-h0y19c .

3 smh.com.au/world/chinese-police-find-14000-bottles-of-fake-penfolds-wine-in-counterfeiting-scam-20171116-gzmnh3.html .

4 thedrinksbusiness.com/2018/05/chinas-wine-imports-soar-in-q1 .

5 forbes.com/sites/pamelaambler/2017/07/27/china-is-facing-an-epidemic-of-counterfeit-and-contraband-wine/#2c69ad8f5843 .

6 Look up Rudy Kurniawan at bop.gov/inmateloc .

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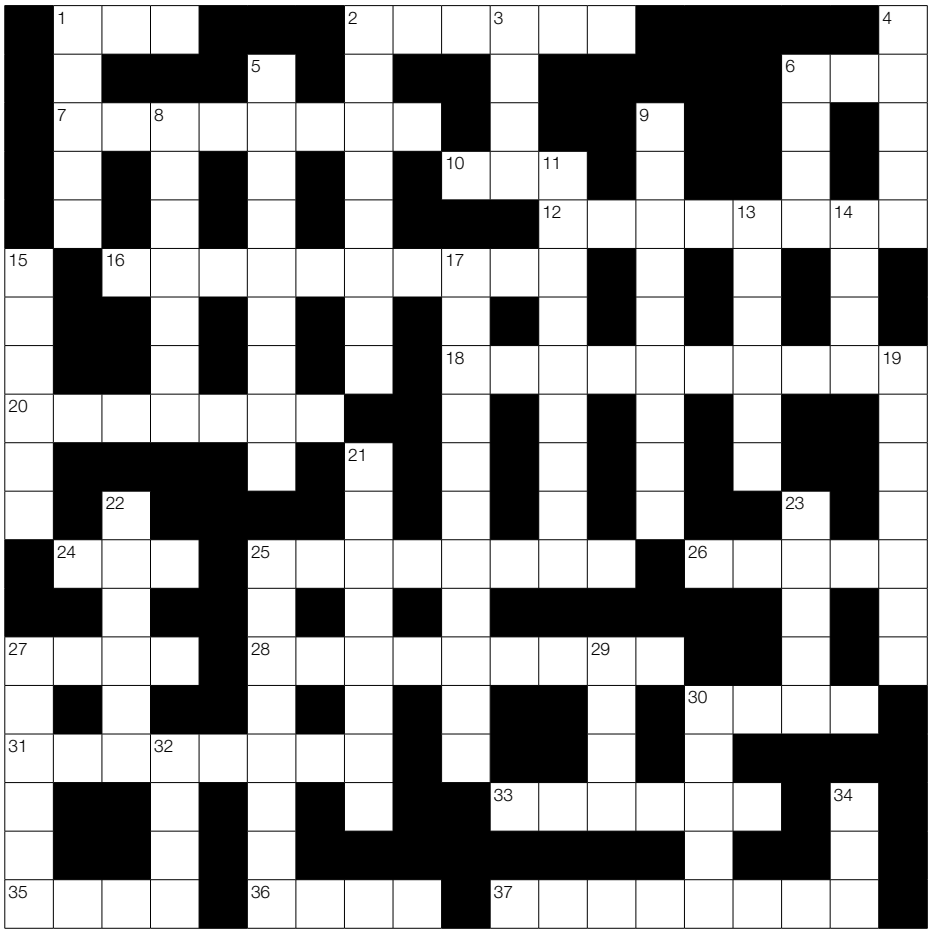
Mould's maze

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



Across

1 High Court of Australia (HCA) decision on whether the issue of pastoral leases extinguished native title. (3)

2 HCA decision involving unconscionable dealing, *Commercial Bank of Australia v* ..... (6)

6 Family Court decision concerning liability of a parent to contribute to private school fees, ... *v Ferguson.* (3)

7 In Don McLean's song, *American Pie*, "no verdict was .....". (8)

10 Application for family provision from a deceased estate. (Abbr.) (3)

12 Original court exercising equitable jurisdiction in England and Wales. (8)

16 A network of computers that must all approve an exchange before it can be verified and recorded. (10)

18 Presumption which provides that public officers have been properly appointed. (10)

20 Justice of the Federal Court in Brisbane. (7)

24 Prisoner (jargon); deceive. (3)

25 A ..... notice given under the *Defamation Act (Qld)* prior to proceedings. (8)

26 Commencing civil proceedings. (5)

27 Dispense punishment. (4)

28 'Marriage' is now the union of ... . to the exclusion of all others. (3,6)

30 A venire is a group from which a .... is drawn. (4)

31 The HCA sitting as the Court of ..... Returns hears challenges on the validity of federal elections. (8)

33 TV star sued by ASIC for using confidential information obtained during his directorship for personal benefit, Steve ..... (6)

35 Litigation guardian, ... friend. (4)

36 .... *Aboriginal Corporation v Minister for ATSIP*, found that a native title holder extended to a person who held native title at common law. (4)

37 *Malec v JC Hutton Pty Ltd* concerned the degree of probability of when a court awards future ..... loss in PI claims. (8)

Down

1 "Don't you ..... about that" was a famous phrase used by Sir Joh Bjelke-Petersen. (5)

2 Permanent impairment in Queensland is evaluated using the ..... Medical Association Guides. (8)

3 Kathryn O'Brien is Queensland's only .... solicitor. (4)

4 HCA case concerning the overturning findings of credit made by a trial judge, *Fox v* ..... (5)

5 A person for whom another acts as agent. (9)

6 The use of this word by security staff was banned in the Federal Parliament in 2005. (4)

8 Principle whereby a limitations period shall not bar a claim where the plaintiff could not discover the injury until after its expiration, equitable ..... (7)

9 Referring to the 2015 Federal Budget, Senator David Leyonhjelm said "I have a feeling it'll be like giving a gorilla a .....". (9)

11 Test of criminal insanity, ... Rule. (9)

13 South Australian statute enabling a person to obtain their partner's criminal history if they fear domestic violence, ...'s Law. (6)

14 Hire or lease (4)

15 Flamboyant Queen's Counsel, Tony ..... (6)

17 An agreement between a company and its creditors, deed of company ..... (11)

19 Irving ..... is wrote the '10 commandments of cross-examination'. (7)

21 HCA case concerning conversion, and trespass, ... *Wines Pty Ltd v Elliott.* (8)

22 A gift in anticipation of death, *donatio* ..... *causa*. (Latin) (6)

23 Laser speed detector. (5)

25 A law report's reference. (8)

27 The ..... *Slavery Bill 2018* imposed supply chain reporting provisions of human trafficking and child labour. (6)

29 In *Amaca Pty Ltd v* ...., the HCA held that a dying plaintiff could recover for future superannuation over "lost years". (4)

30 First Qld Indigenous judge, Nathan ..... (5)

32 A written agreement between two states or sovereigns. (4)

34 Methylenedioxymethamphetamine. (Jarg.) (3)

Solution on page 52

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Reflections on a rite of passage

– just down the road

by Shane Budden

In a former life I ran the legal section of the building regulator in Queensland, which eventually became a lot of fun but was a little scary at the start.

Partly this was because at the time I possessed the overall management skills of a golden retriever, but mostly because a mass exodus of staff had preceded my promotion (I would like to believe the two events were unrelated).

Thankfully I soon got new staff and was able to build an awesome team, at least as measured by success in the courtroom, quality of advice and – above all – fantastic Christmas lunches, some of which may still be going on. Until the new staff came on board, however, I was somewhat busy in the same sense that Donald Trump is somewhat enamoured of himself.

This meant that I spent a lot of time at work, including late at night and on the weekends, so that I was able, with hard work and determination, to produce some of the least comprehensible documents in history. This is because, although it may seem like working longer hours helps you, eventually you get tired, rundown and start to hallucinate.

As a result, some of my statements of reasons back then occasionally made reference to people who might – if you get all technical about it – not actually have been involved in the building disputes in question, such as Spiderman and Wolverine.

It did mean that I got to be on a first-name basis with many of the cleaning staff, including a young fellow from Thailand, who had not at that time grasped the role that 'scale' plays in maps and once confidently announced to me that he was planning to drive down to Adelaide and back on Saturday. Indeed it is always fun when people from other countries realise just how big Australia is, because it allows you to tell war stories of massive, Leyland Brothers-style trips that you have never, technically, driven yourself.

We can get away with it because tourists tend to think that all Australians are basically Crocodile Dundee without the hat, whereas most of us can get lost walking home from the bus stop, especially if there happens to be a pub along the way. Millennials glued to smartphones are especially vulnerable, and even when attempting relatively simple trips such as going from the kitchen to the bedroom are statistically more likely to end up in Adelaide than my friend the cleaner.

Still, it is part of our national heritage, this view that anywhere is within driving distance, including the Oort Cloud. It is that delusion which once prompted two friends and me to drive to Sydney to visit some other friends. This was in the days before the internet or affordable air travel, and so a trip to Sydney was a serious undertaking which required planning and preparation, and we planned each step meticulously as long as 'meticulously' means 'by adopting a vague set of assumptions'.

That is to say, we applied the same amount of planning that young men in their early 20s apply to everything, in that we made sure we were wearing pants when we left the house. Like all savvy and experienced travellers, we developed a detailed travel plan to ensure that we had no problems, which – in order to assist any readers who would like to visit Sydney – I reproduce here in full:

1. Get in car.
2. Drive to Sydney.

We were confident we could get there because we had been to Stanthorpe before and had seen signs for Sydney, most of which pointed vaguely south, and we knew from extensive study of scholarly works, such as every State of Origin game ever played, that Sydney was in the south, and also that it was evil.

In any event we headed off to Stanthorpe and turned vaguely south, safe in the knowledge that if we missed the turn for Sydney, Melbourne was also a lovely place to visit. It was a particularly pleasant trip for me because my friends and I had differing views on the purpose of the speed limit. I held the view that it was there to indicate the maximum speed you could travel, and they held the view that it was merely a suggestion which nobody followed, similar to the way politicians view expense accounts.

This meant that they would not allow me to take a turn at driving, so I was able to relax in the back seat. I would also have admired the scenery, but I couldn't see it because light only travels so fast.

(Note to the people who wrote in to tell me that parsecs were a unit of distance not time, and who even now have stopped reading to bash out a furious email to tell me that it is not possible to travel faster than light: I *know*. I knew that parsecs were units of distance as well, probably long before you were born and certainly before the word was misused in *Star Wars*, where you first heard about it. It is just that sometimes, for humorous effect or out of sheer laziness, I say things which are not completely true, which some people call lies. Besides, I *invented* parsecs.)

In any event, we made it to Sydney and had a great time with our friends, and returned safely via the Hunter Valley, where not driving turned out to be a real bonus as far as I was concerned. In doing so, we completed something of a rite of passage for Brisbane youths – a road trip to Sydney, the city that once – sometimes even *twice* – per century gets to borrow the State of Origin shield, and where units almost big enough for two people to lie down in (as long as they lie on their sides) can be had for as little as the price of the NBN.

Also, I don't mean to brag, but we did the trip in *way* less than 12 parsecs…

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Crossword solution

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Across: 1 Wik, 2 Amadio, 6 Mee, 7 Returned, 10 TFM, 12 Chancery, 16 Blockchain, 18 Regularity, 20 Rangiah, 24 Con, 25 Concerns, 26 Suing, 27 Mete, 28 Two people, 30 Jury, 31 Disputed, 33 Vizard, 35 Next, 36 Nuga, 37 Economic.

Down: 1 Worry, 2 American, 3 Deaf, 4 Percy, 5 Principal, 6 Mate, 8 Tolling, 9 Brazilian, 11 Mcnaghten, 13 Clares, 14 Rent, 15 Morris, 17 Arrangement, 19 Younger, 21 Penfolds, 22 Mortis, 23 Lidar, 25 Citation, 27 Modern, 29 Latz, 30 Jarro, 32 Pact, 34 Xtc.

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