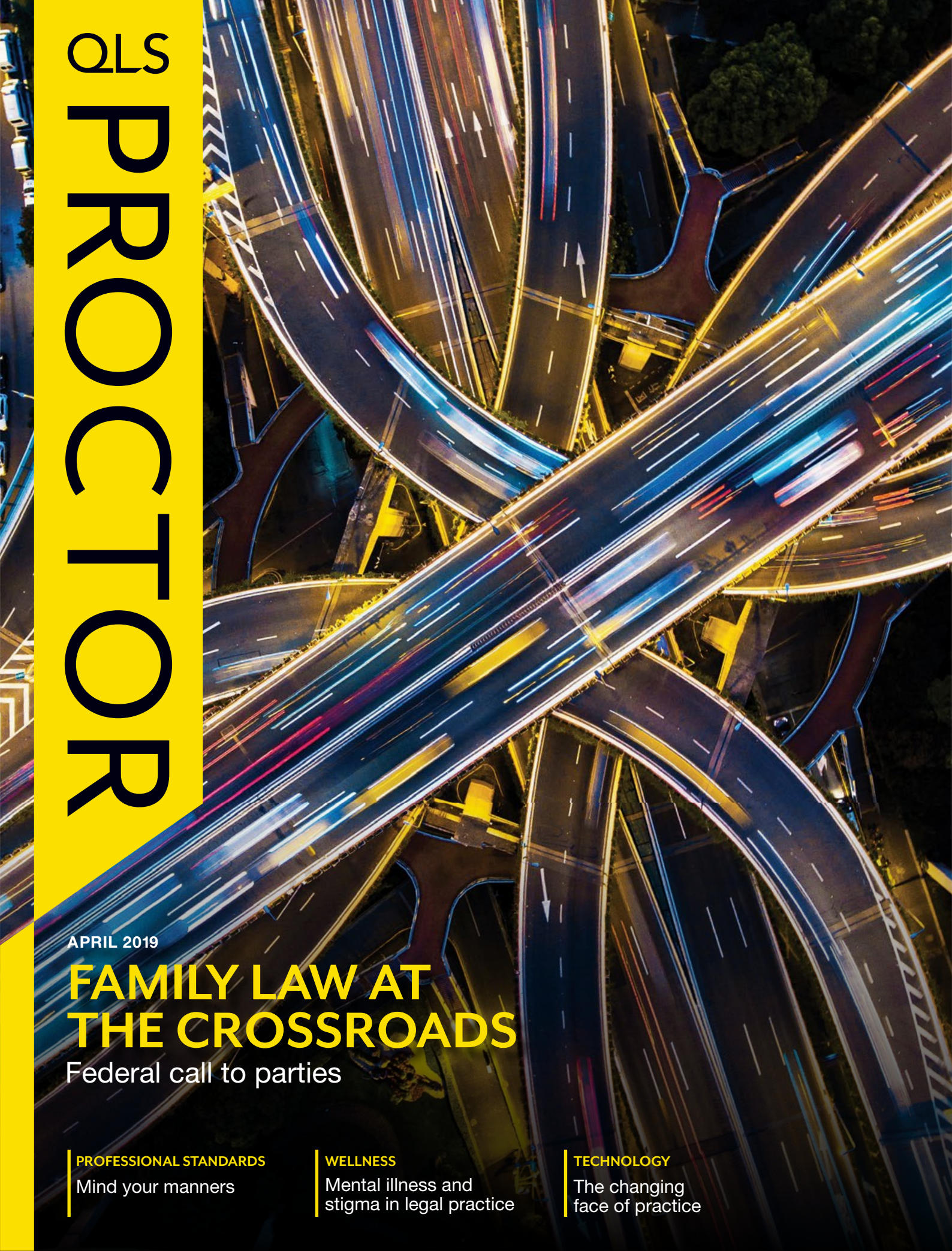
QLS PROCTOR



APRIL 2019

FAMILY LAW AT THE CROSSROADS

Federal call to parties

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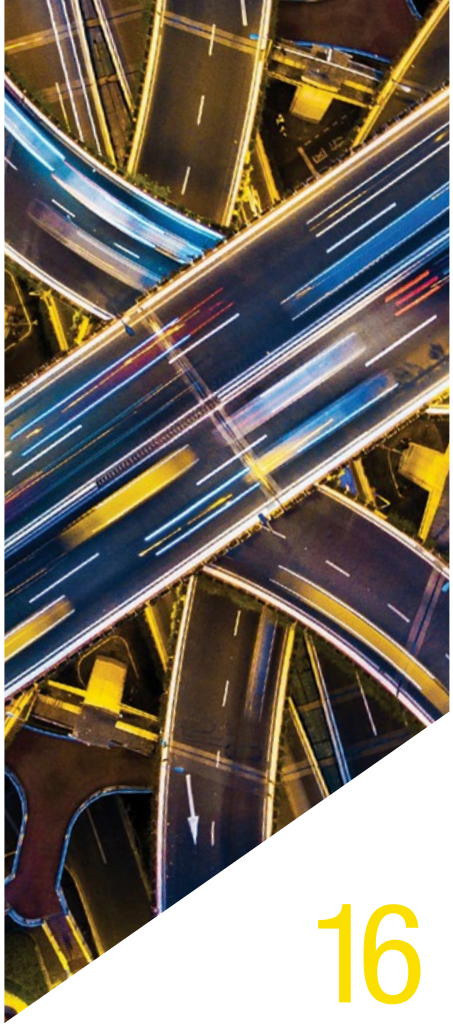

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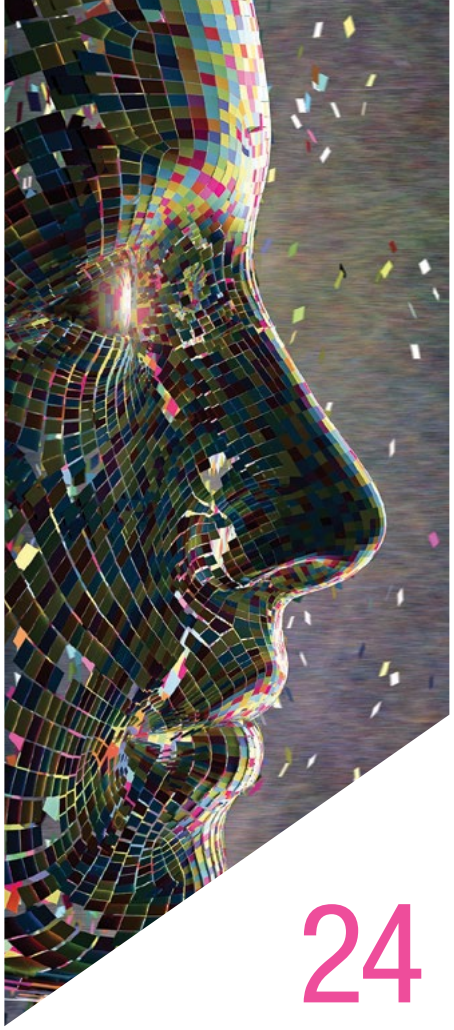

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Queensland **Law Society**

A voice for good law

And a ready-made path to sensible law reform

One of the vital tasks that occupies much of any QLS President's time is that of advocacy on behalf of the legal profession, often at parliamentary committee hearings and inquiries, or when the Society is specifically asked to comment on policy or proposed legislation.

In an election year, this task is greater, as governments become more responsive to the issues which might help shape an election outcome. At these times the need for a strong and clear voice on issues of importance to our members becomes acute.

One of the most powerful tools for ensuring the passage of good law is the Queensland Law Society's Call to Parties Statement. Via this document, put together through intensive consultation with our policy committees and a lot of elbow grease from our policy solicitors, the Society can do much good.

In it we ask the major parties to commit to a number of reforms which will improve our justice system and make our laws more efficient, fairer and easier to access for solicitors and their clients.

These statements can be great forces for positive change. In 2015, the incoming state Labor government committed to adopting almost all of the reforms called for by QLS, a signal achievement made on the back of great work from the policy team and QLS representatives. By relentlessly following up that work through 2016-2017, we were able to push through many changes that are delivering great results for members and their clients.

QLS will again call on our politicians to commit to sensible reforms in the upcoming federal election, with our Call to Parties Statement receiving its finishing touches at the time of writing. The Law Council of Australia will of course address many matters of national import in its own advocacy efforts while QLS, as one of the largest representative bodies for the legal profession in Australia, has an obligation to be vocal on behalf of our members.

Chief among our submissions will be a call for a commitment to an increase in federal funds for legal aid. Australians enjoy greater rights and freedom than any other nation, backed by largely effective legislation and an excellent and hard-working court system. Unfortunately, many cannot afford access to the justice that the legal profession strives so valiantly to provide; this cannot be allowed to continue.

Legal aid funding has sadly been a low priority for governments of all stripes and at all levels for many years. Whereas once legal aid was available for some civil claims, now the stretched resources can scarcely cover the most serious criminal matters. We need this funding to ensure society's least fortunate have the same access to justice as the 1%. We will be calling for this to be addressed before the current National Partnership Agreement expires in 2020; there is no time to waste as this needs to be in the 2019 budget.

We will also maintain our continuing call for more resources for the courts, in particular the Family Court and Federal Circuit Court. No area of the law creates more stress and trauma for parents and children than our family law jurisdiction, and much of that stress comes from exorbitant delays in our Federal Circuit Court and Family Court regimes.

Those delays relate directly to the fact that there simply aren't enough judges being appointed. As an example, the Gold Coast shares a Family Court judge with Ipswich and Lismore – no independent observer would consider that adequate. When we have young children who have been on interim custody orders more than half their lives, we know there is no argument against an increase in judicial numbers.

Speaking of judges, one way to ensure that lay people have confidence in their efforts would be to establish a judicial commission to formalise a transparent and merit-based appointment process. While we within the profession can vouch for the fairness, ability and work ethic of those on the bench, the public rarely sees that and usually base their opinions in this regard on the reporting of a sometimes mercurial and inexpert media.

Opening up the process and involving an independent commission would allow those outside the legal profession to appreciate the quality and commitment of our judges, and the depth of the talent pool from which they are selected. The resultant increase in confidence in the legal system would be a win for us all, and one would hope that no sane politician would be against that.

These are but a few of the matters we will be addressing in our Call to Parties Statement and the advocacy in support of it. I will speak more of these and others in the run up to the election. You will also find a summary of the key issues raised in the Call to Parties document in this edition of *Proctor*.

Regardless of who is victorious come election day, thanks to our Call to Parties Statement they will have a ready-made path to sensible law reform.

Bill Potts
Queensland Law Society President

president@qls.com.au
Twitter: @QLSpresident
LinkedIn: linkedin.com/in/bill-potts-qlspresident

Are your details up to date?

QLS will contact you in April to remind you to update your details ahead of practising certificate and QLS membership renewals for 2019/20. To ensure you don't miss any of these important messages, update your details today via **myQLS** or by contacting **QLS's Records & Member Services** team on1300 367 757 or records@qls.com.au.

CHECK YOUR DETAILS

qls.com.au/myQLS

Queensland Law Society®

Have your say

Maybe a letter is better

Twitter and other online forums often become cluttered with input to various discussions.

Comments come and move down your timeline, often before you've had a chance to absorb them or tweet a reply.

I know it's a bit 'old school', but there are many positives about a 'letters to the editor' column in magazines such as *Proctor*. You have time to reflect on your comments and revise until you're happy with them.

You're not competing with any number of others wishing to add their thoughts, and while your letter to the editor isn't engraved in stone, it is far less ephemeral than an online blog – making it a better choice when you want to make an important point.

Proctor, more so than many magazines, goes to a select audience, giving your message a better chance of being heard. Our audience includes you, your colleagues, many of Queensland's judges and magistrates (including the judges of the Supreme Court), and state and federal Queensland politicians.

So why not give it a go? Of course, letters should be about legal issues and the shorter, the better (300 words is a good length). Mark them clearly as a 'Letter to the editor' and send them to proctor@qls.com.au. If you are writing about an issue you think I should be aware of, please cc me: r.moses@qls.com.au.

And when you are tweeting, why not add a #qlsproctor tag? That way, your comments can also be considered for inclusion in *Proctor* as well!

Change is in the air

Speaking of *Proctor*, you may have noticed some changes in this month's issue, including a stronger, restyled cover format.

Because I know that you love to find out how your past colleagues or friends from law school are getting on, we have 'promoted' the Career Moves section to the front of the magazine, where you can get to it faster.

By the way, if you or your friends are earning promotions or changing jobs, make sure that you or your HR person take advantage of the complimentary listing in the Career Moves section. Just email the details, along with a high-quality head-and-shoulders image to proctor@qls.com.au (include 'Career Moves' in your email subject line).

You'll notice some more changes coming up in *Proctor*, and I invite you to submit any feedback you have on *Proctor* to either of the email addresses provided here so that we can take it into consideration.

Don't forget, *Proctor* is your magazine, and we want to provide you with the news and information that you need, so please let us know what you want. Also, contributions are always welcome.

Symposium thanks

Congratulations are in order to all those who made this year's Symposium such a successful event, including our keynote speakers – Attorney-General and Justice Minister Yvette D'Ath, Chief Justice Catherine Holmes and former Australia/New Zealand Facebook CEO Stephen Scheeler.

And of course there were the many presenters, exhibitors, attendees and QLS staff who each year make Symposium an occasion to remember.

My congratulations also go to the winners at this year's Legal Profession Dinner and Awards. It is a pleasure to see your contributions to this wonderful profession publicly acknowledged in the presence of your peers.

You will find some pictorial highlights from Symposium further on in this edition of *Proctor*, and on our Facebook page.

Renewals time

Finally, a reminder that practising certificate and QLS membership renewals kick off on 1 May, so don't forget to log on to **qls.com.au/myqls** and update your details before then.

You could also take the opportunity to register with the 'Find a solicitor' search tool, a membership benefit for those keen to attract new clients.

Renewals end on 31 May, so there is a full month to complete this task. If you experience a slow system response while engaged in the renewals process, it is most likely indicative of heavy traffic at that time. Simply log back in at any other time, 24/7, to complete this.

Rolf Moses
Queensland Law Society CEO

THE ROAD TO FAMILY LAW REFORM

ALRC = Australian Law Reform Commission

ALRC Review = Australian Law Reform Commission Review of the Family Law System

'Merger Bills' = Federal Circuit and Family Court of Australia Bill 2018 and Federal Circuit and Family Court of Australia (Consequential Amendment and Transitional Provisions) Bill 2018

QLS = Queensland Law Society

Senate Committee = Senate Legal and Constitutional Affairs Committee

18 MAY 2018

QLS submission to ALRC Issues Paper.

27 SEP 2017

ALRC Review and the Terms of Reference announced by former Attorney-General.

14 FEB 2018

The Senate Committee releases its report on the 'merger Bills'.

28 SEP 2018

QLS submission to the Senate Committee regarding the 'merger bills'.

13 DEC 2018

The Senate Committee's public hearing held in Brisbane, QLS in attendance.

31 MAR 2019

ALRC Final Report due to be delivered to the Attorney-General.

Our Call to Parties Statement for the 2019 federal election addresses the critical state of family law in Australia, along with 15 other key issues. See page 16.

2-3 APR 2019

Federal Senate sitting dates. Last chance to consider merging bills.

Queensland Law Society

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Published by Queensland Law Society
ISSN 1321-8794 | RRP $14.30 (includes GST)

Editor: John Teerds
j.teerds@qls.com.au | 07 3842 5814

Design: Courtney Wiemann

Art direction: Clint Slogrove

Advertising: Daniela Raos | advertising@qls.com.au

Subscriptions: 07 3842 5921 | proctor@qls.com.au

Proctor committee: Dr Jennifer Corrin, Kylie Downes QC, Steven Grant, Vanessa Leishman, Callan Lloyd, Bruce Patane, William Prizeman, Christine Smyth, Anne Wallace.

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

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

Advertising deadline: 1st of the month prior.

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

Circulation: CAB 30 September 2018 – 11,468 (10,535 print plus 933 digital)

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Request for feedback

Redraft of Independent Solicitor's Certificate

by Randal Dennings

The Queensland Law Society Banking and Financial Services Law Committee (BFSLC) created a standard certificate in the mid-1990s for use by solicitors when asked by lenders to provide a certificate of independent advice to guarantors.

Over the years this form and guidance have been 'tweaked' to more closely follow developments in current practice of the lenders, the profession and case law. (The current form and guidance is available under the practising resources section of the Knowledge Centre at qls.com.au).

The reason for promulgating a 'standard form' in the first instance was that many solicitors at that time had been asked by lenders to provide different forms of certification specific to each lender's requirements. Many contained onerous and invasive provisions which may have had the effect of significantly increasing the 'legal risk' of the practitioner providing the certificate as well as increasing the costs to be incurred by the guarantor in obtaining the necessary advice.

The standard form finally adopted had the benefit of input from lenders, Lexon Insurance, along with comments from other state and territory law societies and the Law Council of Australia (albeit that no one standard form or approach could ultimately be agreed between the various law societies).

In general terms, the 'standard form' was initially adopted by most (if not all) lenders as meeting their requirements. The then Chair of the BFSLC was also happy to engage with any lender or its lawyers who had any difficulties or concerns with the form, with a view to dealing with these and if necessary taking on board any constructive suggestions.

At a recent meeting of the BFSLC it was noted that the guidance notes for the certificate were now potentially somewhat dated and required amplification.

With this is mind, we have approached Lexon Insurance for its feedback, based on relevant claims history in these matters. Lexon is still receiving samples of third-party certificates from practitioners as examples of attempts to shift risk from a financier or other third party to the profession.

Many of these certificates differ from the standard form certificate and place further obligations on the practitioner. Often these requests come at the last minute and practitioners risk exposure if not allowing time and work to ensure they can provide the requisite certifications. The Lexon Third Party LastCheck can assist, however a good test is: "If the certification I give is later challenged, what paper trail will I have to prove I had a reasonable basis for so certifying?"

Accordingly, the BFSLC would welcome any feedback from the profession on:

1. The drafting of the current form and guidance – in particular, what (if any) improvements in drafting or approach should/could be made?
2. Whether there are any concerns currently coming from lender, borrower or guarantor perspectives on the current approach adopted or if they are drafting standard forms themselves?
3. Is there a current need for further like certificates and if so, in what contexts?
4. If amendments/further certificates are required, what process should be followed to seek input from all relevant stakeholders prior to promulgation?
5. Any other matters relevant to the use and drafting of the guidance information and the certificate.

Email any comments to policy@qls.com.au by 30 May 2019.

Lawyer CEOs lead the dance!

Next month some 16 corporate leaders will take to the stage of Brisbane City Hall for this year's Dancing CEOs competition to raise funds and awareness for Women's Legal Service Queensland.

Among them, three senior lawyers are returning to the competition – Genevieve Dee, Clarissa Rayward and Kelli Martin – in an Allstars Group, while this year Domino's Pizza Enterprises Limited Senior Legal Counsel Erin Walford will make her Dancing CEOs debut.

"The Women's Legal Service approached me in November 2018 about getting involved with their Dancing CEOs platform," Erin said.

"Of course I said yes! Dancing CEOs is an opportunity for me to give back to the community and to genuinely help women and kids experiencing family violence. A few dance steps at City Hall is nothing compared to the courage and bravery of the women reaching out for help.

"Having worked in community legal centres in my early years of practice, I have sat across the desk from women facing domestic violence and complex family law matters, and in some cases, they still had dried blood on their face and visible bruising.

"I have given advice and watched clients go from feeling helpless to feeling like there is a light at the end of the tunnel."

See **dancingceos.com.au** to support.

Erin Walford, *left*, with Domino's Team Legal raising funds and awareness at QUT for Women's Legal Service Queensland.

QLS welcomes passing of Human Rights Bill

Queensland Law Society has welcomed the historic passing of the *Human Rights Bill 2018* in State Parliament on 27 February.

"We applaud the Parliament on passing this Bill, and throughout the debate, our solicitors put forth both for and against views," QLS President Bill Potts said.

"QLS formed a working group twice with experts in the area, firstly to discuss the proposal and then a second time to review the Bill and make relevant submissions."

Mr Potts said the Bill would ensure respect for human rights across 23 areas, including freedom of expression, protection of families and children, recognition and equality before the law and the right to education and health services, to name a few.

"This Bill adds to already existing rights, and will lead to the creation of a Queensland Human Rights Commission which will enable Queenslanders to raise their concerns about human rights breaches from public entities," he said.

"QLS and the solicitors of Queensland will always support good law for the public good, and we thank our working group members and solicitors who provided their feedback on this important piece of legislation."

External examination reports now due

An external examination report covers the audit period 1 April each year to 31 March the following year, with the latest reporting period ending on 31 March 2019.

Lodgements are due with Queensland Law Society by 31 May 2019. Please note there is no provision under the legislation for extensions to be granted for late lodgements.

Statutory obligation

A law practice which held or received trust money during the 12-month period which ended 31 March is required to:

- complete the QLS Form 4 Part A and Part B: Law Practice Declaration and Trust Money Statement (Section 61 *Legal Profession Regulation 2017* (the Regulation)) including necessary schedules
- provide the completed QLS Form 4 to the external examiner
- have the trust records externally examined (Section 268 of the *Legal Profession Act 2007* (the Act)).

The external examiner must issue a report on QLS Form 5: External Examiner's Report, pursuant to Section 273 of the Act and Section 66 of the Regulation. The completed QLS Form 4 must be attached to the QLS Form 5.

The obligation to provide the Society with the QLS Form 4 and QLS Form 5 is imposed by Section 274 of the Act and Section 61 of the Regulation. If you are the principal of a law practice, the obligation on *you* to provide the forms to the Society is imposed by Section 244 of the Act.

Failure to lodge

Last year the Society commenced action against practitioners who had failed to comply with their obligation under the Act. It is the Society's view that failure to comply with the external examination report provision is a 'suitability matter' under Section 9(1)(k) of the Act and a matter which may be taken into account when assessing whether a practitioner is a fit and proper person to continue to hold a practising certificate (see Section 46(2)(c) of the Act).

Submissions were made to the Council Executive Committee in respect of practitioners who had not lodged a report for determination of whether it believed grounds existed to suspend, amend or cancel practising certificates (see Section 60(a) and Section 61 of the Act).

So far, 10 practitioners have been issued with show cause notices in regard to the "proposed suspension, amendment or cancellation of the practitioner's practising certificate".

Appointment of receivers for AMH Lawyers and KB Law

On 26 February 2019, the Executive Committee of the Council of the Queensland Law Society Incorporated (the Society), as Council's delegate, passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, AMH Lawyers, Brisbane.

On 27 February 2019, it passed further resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, KB Law, Widgee. 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 regarding should be directed to Sherry Brown or Bill Hourigan, at the Society on 07 3842 5888.

Bond to offer masters in enterprise governance

Bond University will offer Australia's first Master of Laws in Enterprise Governance.

The university's Faculty of Law Executive Dean, Professor Nick James, announced the new degree at the recent Committee for Economic Development of Australia (CEDA) 2019 Economic and Political Overview in Brisbane.

Professor James said that the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services had confirmed the findings in the interim report from last year, highlighting significant gaps in governance within Australian financial institutions, including risk management and compliance problems, and evidence of unethical decision making.

He said similar problems with enterprise governance had been revealed in the final report of the Royal Commission into Institutional Responses to Child Sexual Abuse tabled in December 2017 and were likely to be found by the upcoming Royal Commission into Aged Care Quality and Safety established in October 2018 and due to finally report in April 2020.

"Every enterprise must be led by people with a thorough understanding of the principles of good governance, and it is for this reason that Bond University has created the Master of Laws in Enterprise Governance," Professor James said.

He said the foundation of good enterprise governance was an understanding of, and compliance with, the enterprise's legal and ethical obligations, and that the expertise of lawyers and legal scholars was invaluable in teaching others about best practice in governance.

The program will commence in May 2019 and can be completed on a part-time basis in 16 months. It will be delivered as a combination of online modules and intensive workshops at Bond University's Gold Coast campus, and will be available to both law graduates and other graduates with relevant enterprise experience.


Allison Haworth


Sarah Tuhtan


Joelene Seaton


Brooke Mallard

Career moves

Carter Newell

Carter Newell has announced the elevation of seven solicitors, including four in Brisbane.

Allison Haworth, a member of the Property & Injury Liability team in Brisbane, has been promoted to Special Counsel. Allison has extensive experience acting for major insurers and corporate clients in complex insurance and commercial litigation matters. She focuses on defending public, products and property liability insurance claims, and is routinely instructed in complex coverage disputes, multi-party large loss, dust disease and catastrophic injury claims.

Sarah Tuhtan, also a member of the Property & Injury Liability team, and Jasmine Wood, a member of the Energy & Resources team, were promoted to Senior Associate.

Sarah focuses on public liability claims (both in personal injuries and property damage), product liability and worker's compensation claims. Her experience as a defendant insurance lawyer includes advising Australian and international insurers, claims agents, corporate clients, educational institutions and local authorities.

Jasmine has experience in resources transactions including the sale and acquisition of mining and petroleum projects, undertaking land access negotiations and drafting compensation agreements, legal due diligence, advising on contractual risk and the impact of various state-based petroleum, mining and environmental regulatory regimes.

Tamara Baldwin, another member of the Property & Injury Liability team in Brisbane, has been promoted to Associate. Tamara's experience extends to personal injury and property damage claims, including multi-party disputes involving complex liability and indemnity issues.

In Sydney, Rochelle Rieck (Financial Lines) and Ryan Stehlik (Property & Injury Liability) were promoted to Special Counsel, while in Melbourne, Michelle Christmas (Financial Lines) was promoted to Senior Associate.

Collas Moro Ross

Collas Moro Ross has announced the appointment of Chris Barron as an Associate. Chris practises predominantly in litigation and commercial law, and appears regularly in court. He also enjoys acting in pro bono matters that the firm undertakes.

Evans & Company Lawyers

Gold Coast family law firm Evans & Company Lawyers has advised that it has changed its name to Evans Brandon Family Lawyers, with effect from 8 March. Principal Dean Evans said that the change reflected the progression of Luke Brandon to full partnership. Luke began with the firm as an articled clerk in 2004, was admitted in 2006, and became a partner in 2011, the same year he gained QLS Specialist Accreditation in family law.

McCullough Robertson Lawyers

McCullough Robertson Lawyers has announced changes to its Executive Leadership team, including the appointment of Corporate and Commercial business unit senior partner Reece Walker as Chair of Partners.

He succeeds Dominic McGann, who has held the position since 2014. Also joining the Executive Leadership team is Sydney-based partner Jason Munstermann, who leads the firm's Sydney commercial litigation practice. Existing members of the team include Michael (Mick) Moy, Matt Bradbury, and Managing Partner Kristen Podagiel.

MBA Lawyers

MBA Lawyers has announced the appointment of Joelene Seaton as a Senior Associate. Joelene has practised in family law for more than 15 years and is experienced in all matrimonial and de-facto relationship matters.

Brooke Mallard has been promoted to Lawyer in the firm's family law department and supports clients in all family law matters, including parenting disputes, property settlements, de-facto relationships and domestic violence matters.

Michael Lynch Family Lawyers

Michael Lynch Family Lawyers has welcomed back Amy Ryan to the team as a Senior Associate.

Amy, a QLS Accredited Specialist in family law, has experience in the full range of family law matters, including property and parenting. Amy returns to the firm after working in child protection in the United States.

Susan Moriarty & Associates

Susan Moriarty & Associates has welcomed Benedict Coyne to the firm as Special Counsel. Benedict manages a busy litigation practice in employment law, anti-discrimination law, administrative law, education law, and human rights law. Benedict is a former national President of Australian Lawyers for Human Rights and is currently a candidate for the 2019 Federal election in the Division of Dickson.


Jasmine Wood


Tamara Baldwin


Chris Barron


Luke Brandon


Reece Walker


Jason Munstermann


Amy Ryan


Benedict Coyne


Tamlyn Leahy


Jessika Reghenzani


Rhys Larsen


Joshua McDiarmid

WGC Lawyers

WGC Lawyers has announced the promotion of four staff to Associate.

Tamlyn Leahy, who works with Managing Director Eddy Lago in the Family Law Team, has gained wide experience in litigation and family law in both the Northern Territory and Queensland.

Jessika Reghenzani practises predominantly in employment law, assisting both employers and employees, and is active also in dispute resolution, corporate governance and debt recovery.

Rhys Larsen joined the firm as a graduate in 2014 and works in the Commercial and Property Team with Director Graham Dutton. He also manages the Conveyancing Team.

Joshua McDiarmid works closely with Director Doug McKinstry in the Construction Law Team. He gained valuable experience as an Associate in the District Court of Queensland during 2015.

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.


...breaking the mould...
leadership in the digital...


BRISBANE
convention
& exhibition
CENTRE
QLS
Symposium
2019


BRISBANE
convention
& exhibition
CENTRE


Queensland
Law Society
Symposium


ADOPT
ME!


Queensland
Law Society
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For learning and collegiality...

From an engaging Welcome to Country right through to the closing remarks of Queensland Law Society CEO Rolf Moses, QLS Symposium 2019 presented the attendees with two amazing days of learning and collegiality.

The opening address by Chief Justice Catherine Holmes brought delegates up to date with trends in the Supreme Court, including the rapid growth of class actions, before former Australia and New Zealand Facebook CEO Stephen Scheeler provided an eye-opening account of what 'breaking the mould' really means in running a 21st Century business.

From there the serious business of learning began, with more than 40 professional development sessions across Symposium's seven streams. The two-day event featured built-in opportunities to catch up with friends and share the collegiality for which the profession is noted.

Some 670 delegates, sponsors and presenters ensured it was another sensational Symposium.

Awards centre stage on the profession's *Night of nights*

A glittering celebration in the midst of Symposium recognised the remarkable achievements of leading legal profession members.

At the QLS Legal Profession Dinner and Awards, top criminal lawyer Glen Cranny was presented with the President's Medal, while children's representative and advocate against domestic violence Edwina Rowan won the annual QLS Agnes McWhinney Award.

President Bill Potts said that Mr Cranny had dedicated his career to advancing Queensland's legal profession and working for good law in the state.

"Glen is a true advocate for good policy in Queensland," he said. "It's a pleasure to present him with this award, as he has worked tirelessly as part of our policy committees and working groups over the years to see good law for the public good."

Mr Potts said that Ms Rowan's work to better the lives of women and children fleeing domestic violence was to be commended, and showed her commitment to bettering her local community.

"Not only does Edwina represent children in court, she also plays a leadership role on the ground in domestic violence through the EDON Place Domestic and Family Violence Centre and her work finalising a text on the topic; she is also a strong advocate for the Men's Behavioural Change Program," he said.

The winners of other awards on the night were:

Community Legal Centre Member of the Year – William Mitchell

Innovation in Law Award – Andrea Perry-Petersen

Queensland First Nations Lawyer of the Year – William Munro

Queensland First Nations Student of the Year – Giselle Kilner-Parmenter

Equity Advocate Award – Ian Hazzard and Michael Bidwell

Equity and Inclusion: Large and Medium Legal Practice – McCullough Robertson

Equity and Inclusion: Small Legal Practice – BTLawyers.

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THE 16 MUST-FIX PRIORITIES FOR THE NEXT GOVERNMENT

FEDERAL CALL TO PARTIES 2019

by Pip Harvey Ross

IT'S UNUSUAL FOR A FEDERAL ELECTION TO PLAY SUCH A LARGE ROLE IN ISSUES OF IMPORTANCE TO THE QUEENSLAND LEGAL PROFESSION. HOWEVER, THIS YEAR'S ELECTION IS SET TO HAVE MORE THAN ITS USUAL SHARE OF LEGAL PROFESSION INTEREST. ON THE POLICY RUNWAY FOR DECISION ARE THINGS LIKE:

- The ALRC Review of the family law system and the future role of lawyers and the court in resolving family disputes, particularly highlighted should the court merger Bills pass in early April. There will be more in May *Proctor* to keep you on track with developments.
- The expiring National Partnership Agreement on Legal Assistance Services which sets Commonwealth funding for Legal Aid Commissions and community legal centres.
- Reform of the banking and financial services sector following the Hayne Royal Commission and his recommendations.
- The shape of a Federal Integrity Commission to police corruption and misconduct at the Commonwealth level.
- Shaping an effective and funded national plan to combat elder abuse.
- Whether anti-money laundering compliance regime should be extended to lawyers, as it was in New Zealand last year.

The QLS 2019 Election Call to Parties Statement brings together a number of these threads and stakes Queensland solicitors' interest in this process. The April 2019 Federal Budget will also be a key part of progressing these issues and the pre-election theatre. We live in interesting times.

IN THE LEAD-UP TO THE 2019 FEDERAL ELECTION, QUEENSLAND LAW SOCIETY HAS LOBBIED THE FEDERAL POLITICAL PARTIES TO CONSIDER AND RESPOND TO PRIORITY ISSUES HIGHLIGHTED IN OUR 2019 CALL TO PARTIES STATEMENT.

Each election, QLS releases a Call to Parties Statement following extensive consultation with members, including the experts in our 26 policy committees. In the past, we have received commitments from the major parties to consider and reform key legal and social justice issues in response to the statement.

We have advocated on 16 legal issues in our 2019 statement, including:

Access to justice

To make the federal justice system more accessible, the community must receive appropriate advice and assistance, regardless of how they enter the justice system. The statement calls for a commitment to increase the per capita level of Federal Government Legal Aid and legal assistance sector funding to restore equality between the state and Commonwealth shares of funding by the 2020-2021 financial year, in addition to the assurance that the funding will be certain and sustainable long-term. QLS also calls for a commitment to remove existing clauses in community legal centre contracts that restrict engagement in advocacy activities and to refrain from imposing such restrictions in future contracts.

Court, tribunal and commission funding

In order to promote access to, and the administration of justice, federal courts, commissions and tribunals must be appropriately funded. Appropriately resourcing the Federal Court of Australia, the Federal Circuit Court, the Family Court of Australia and the Administrative Appeals Tribunal involves appointing a sufficient number of judges and members, promptly filling judicial vacancies and providing adequate infrastructure and resourcing. The statement calls on the Government to allow legal representation as of right in federal commissions and tribunals to benefit each party that is appearing and to help matters proceed as expeditiously as possible.

First Nations People advancement

Through the QLS Reconciliation Action Plan, QLS has committed to setting out practical plans of action to assist in creating social change and building relationships and respect for Aboriginal and Torres Strait Islander Australians. This includes promoting the advancement of First Nations People through advocacy. The statement calls for real and tangible progress to close the gap in all areas of inequality and to remove the entrenched levels of disadvantage for First Nations People and communities within the context of legal and justice outcomes. In particular, the statement calls for meaningful and evidence-based strategies to address the disparate imprisonment rates and the rates of violence against First Nations People.

THE 16 AREAS OF REFORM FLAGGED IN THE CALL TO PARTIES STATEMENT ARE:

1. Access to Justice
2. Court, tribunal and commission funding
3. First Nations People advancement
4. Family law dispute resolution
5. Consumer protection and protection for employees
6. Strong and sustainable compensation schemes
7. Assistance for businesses, including law firms
8. Regional and professional development
9. Engagement with the not-for-profit sector
10. Royal commissions of inquiry
11. National plan to combat elder abuse
12. Independence of the Australian Law Reform Commission
13. Commonwealth law reform processes
14. Review of the *Corporations Act 2001*
15. Preserving the integrity of our justice system
16. Preserving privacy.

These items form part of the Society's advocacy platforms for 2019. The complete statement is available at **qls.com.au/fedelection**

QLS members interested in these or other issues are encouraged to contact their local member. We welcome comments and feedback to policy@qls.com.au.

Family law dispute resolution

The statement calls for the simplification of the family law system by creating a single specialist court, with a single set of rules and single set of forms, and with a particular focus on the appointment of judicial officers with specialised family law experience. QLS calls on the Federal Government to assist the chronically overburdened court by increasing legal assistance sector funding to streamline family law matters. The statement also highlights the importance of improving children's experience in court proceedings by ensuring their views are heard and understood. This will require additional funding for experts, including independent children's lawyers and family consultants, and further training of family law professionals and judicial officers on relevant matters such as domestic violence and child development.

National plan to combat elder abuse

Attention is urgently required to respond to elder abuse and its direct impacts in the community. The prevalence of elder abuse is increasingly recognised in the community and in various institutional settings such as hospitals, retirement villages and aged care facilities. The Call to Parties Statement calls on the Federal Government to implement the National Plan to Combat Elder Abuse, as recommended in the Australian Law Reform Commission (ALRC) report, 'Elder Abuse – A National Legal Response'. This would include the implementation of priority recommendations as determined in the report, as well as the provision of adequate funding for community legal centres to assist people suffering elder abuse, and implementing policies which support the autonomy and agency of older people, irrespective of their decision-making ability.

Preserving privacy

QLS considers that the preservation of privacy and personal information is essential to civil society. It is necessary that the law be developed to keep pace with technological advancements, and we call for a commitment to investigate the creation of a statutory framework providing greater protection of the privacy of Australians and prohibiting the invasion of privacy and misuse of private information. Harmonisation of federal and state/territory privacy laws is also needed.

Pip Harvey Ross is a QLS legal policy clerk. This article was prepared under the supervision of solicitors on the QLS Legal Policy Team.

FAMILY LAW AT THE CROSSROADS

New Bills and ALRC review on collision course

by Matthew Dunn and Deborah Kim

2019 may well be seen in coming years as the time it all started to change for family law in Australia.

On foot currently in Federal Parliament is the Bill to merge the Federal Circuit Court and Family Court, and this sits alongside the Australian Law Reform Commission (ALRC) review of the family law system. Both of these have timeframes that converge in the early part of this month.

The ALRC is scheduled to hand its final report to the Federal Attorney-General on 31 March (a Sunday) and the Senate has only two sitting days left (2 and 3 April) to pass the Federal Circuit and Family Court of Australia Bill 2018 and Family Court of Australia (Consequential Amendment and Transitional Provisions) Bill 2018 (the Bills) before the likely federal election next month.

As the legal profession's representatives have consistently called for the court merger proposal to be dealt with after the receipt of the ALRC report, the opportunities for the Government to achieve this reform will come down to who has the numbers in the Senate on those two April days.

Whether the ALRC report will recommend, oppose, or be silent on the merger is not yet known – but it may play a large role in whether the merger reform gets over the line if the Senate cross-bench is looking for guidance. What is certain, however, is that 2019 will see the commencement of some sizable shifts in our family law system that will likely affect all those who participate in this jurisdiction.

In its submission to the Senate Committee in September 2018, Queensland Law Society expressed its concerns regarding the court merger. The proposed model is significantly flawed. The proposed 'Federal Circuit and Family Court of Australia' (FCFC) would be made up of two divisions – Division 1 being a continuation of the Family Court and Division 2 the Federal Circuit Court. In effect, the amalgamation will leave unresolved the existing issues regarding complexity, lengthy delays and cost-effectiveness.

The Bills' proposed shift *away* from family law specialisation in favour of a multi-purpose court is an alarming one. Loss of knowledge and expertise in determination of family law matters risks erroneous decision-making and poorer outcomes, leading to an overflow in appeals and imposing additional burdens on an already overworked system.

The proposed merger does not address the issue of chronic underfunding. Insufficient resources mean reduced capacity to hear matters in a timely manner. Current wait times are already delivering detrimental outcomes for families and children, and exposing victims of family violence to greater risk.

The Senate Legal and Constitutional Affairs Legislation Committee released its report on the Bills earlier than expected, on 14 February 2019. Despite exposing deep flaws with the merger, the committee recommended that the Bills be passed. Uncertainty remains as to whether the split report, will be considered by the Government or its recommendations adopted.

What is also perplexing is the limited and rushed nature of consultation around the proposed restructuring. The Bills were introduced with no regard to the abovementioned ALRC review, despite the issues at hand clearly falling within that review's terms of reference.

The ALRC review is a comprehensive analysis of the entire family court system. It examines the existing deficiencies holistically.

In its submission to the ALRC in May 2018, QLS commented on issues often experienced by family law practitioners. Lack of resources and lack of funding were identified as common causes of many deficiencies.

In particular, cuts to the legal assistance sector – including Legal Aid, community legal centres, and Australian and Torres Strait Islander legal services – have created a critical need for extra resources.

Increased funding will significantly improve many of the issues, including judicial resourcing and delays, experienced in family law system. It will reduce escalation of legal problems and reduce overall cost to the justice system; it will help clients meet basic litigation costs; it will increase timely assistance to victims of family violence; it will help families access multiple courts; and it will help the adequate representation of children's best interests in the courtroom.

QLS also made comments on ways to improve accessibility for various sectors of the Queensland community, such as Aboriginal and Torres Strait Islander people, culturally and linguistically diverse communities, people with disabilities, LGBTIQ people, and people in regional and remote areas of Australia. We recognised, and emphasised, that ongoing education and training of legal practitioners, amendment of legislation and court forms as required, and direct consultations with affected groups and individuals is necessary to facilitate improved accessibility across all of these communities.

While QLS supports the creation of a single specialist court, the Bills and their proposed structural reform to the federal courts system should not be implemented at this point in time. The Government should defer the passing of the Bills until the final ALRC report has been given proper consideration.

However, the single point of entry into the family law jurisdiction, the harmonisation of rules and forms, and the unification of procedures in the family law system can be implemented without legislative amendment, by reference to the rules of court. QLS has recommended that this move be implemented without further delay as there is little controversy and near universal acceptance as to its merit.

Upon receipt of the ALRC report and its proposals, recommendations and critiques, consideration should be given to whether the stated aims of the Bills can be better and more effectively achieved, and further comprehensive consultation undertaken where necessary.

Matthew Dunn is Queensland Law Society General Manager, Policy, Public Affairs and Governance, and Deborah Kim is a QLS Policy Solicitor.

HOW TO FIX A FAMILY (LAW SYSTEM)

Queensland Law Society supports family law reforms which promote better outcomes for families. Family law is a complex and emotional area of law. The family law courts are chronically overburdened, which creates delays and exacerbates frustration and conflict.

Queensland Law Society calls for a commitment to:

a. simplification of the family law system including the creation of a single specialist family court, with a single set of rules and single set of forms
b. appointment of judicial officers with specialist family law experience, noting that family law is a highly specialised jurisdiction and the proper determination of family law disputes requires considerable expertise
c. additional funding to the legal assistance sector to improve accessibility to the family law system. Access to legal advice and representation is key to the resolution of matters and helps to ensure litigants are properly informed and understand legal matters
d. amendments to the *Family Law Act 1975* which reflect the diversity of family structures and backgrounds of Australians and promotes the welfare of all children, without reference to their family structure
e. simplification of Part VII of the *Family Law Act 1975*, including the 'legislative pathway' currently provided
f. amendments to family law which improve the accessibility of the system for vulnerable and disadvantaged groups including Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds and people with disability
g. national status of children legislation which creates a consistent approach to parentage
h. maintaining the principle that the child's best interest is the paramount consideration. Importantly, provisions around parenting should not prioritise or favour any particular parenting arrangement as this gives artificial weight to a particular outcome in contraction to the paramountcy principle
i. measures which protect vulnerable litigants from systems abuse
j. improved collaboration and information sharing between the family courts and state and territory child protection and family violence systems
k. improving children's experience of court proceedings and ensuring children's views are heard and understood through the provision of additional funding for appropriate experts including Independent Children's Lawyers and family consultants
l. ongoing training of family law professionals, including judicial officers, on relevant matters including family violence, child development, post-separation family dynamics, diverse family structures and cultural awareness.

Extracted from the QLS *Federal Election – 2019 Call to Parties Statement*
Read the full version online at **qls.com.au**


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Courtesy, civility, collegiality: Constant companions for the ethical practitioner

by Shane Budden

> “A person who is nice to you, but rude to the waiter, is not a nice person.”
>
> – Humorist Dave Barry

It may be hard to fathom for millennial and younger practitioners, but once upon a time it wasn’t possible to serve, file or complete anything online.

A solid part of any graduate’s first foray into employment in the legal profession involved darting through Brisbane’s CBD, from registry to department, settlement to service address, attending to filing, serving, stamping and delivering the innumerable documents that were the lifeblood of the legal system.

These tasks used to be the province of the now-extinct articled clerks, who won this duty on the back of being paid far less than anyone else in the firm, even including people specifically paid to be filing clerks. A high TE score (now OP) and a law degree meant nothing once the sheer economics were factored in; only articled clerks were paid so little that they could be spared to stand in line or pick numbers off the wall and wait for their number to be called – and wait, and wait, and wait…

It wasn’t exactly what we had in mind when we rolled up to law school, but an important part of our development nonetheless. In addition to the technical grounding of our degrees, we articled clerks developed other skills doing this, including everything from good preparation – meticulously checking that the documents to be filed had the paper clip on the correct side and were in the right order (there was one clerk in the Magistrates Court who would send you to the back of the line if the documents were out of order) to working out how to get from the District Court registry to the QLS Library during a Brisbane thunderstorm without getting soaked when you had forgotten your umbrella (yes, it could be done).

Most importantly, we learnt the three Cs – Courtesy, Civility and Collegiality. They were vital then, and remain vital now, even if the office of articled clerk has long since been mothballed (and there no longer being a need to find a dry route to the library). We learned early that these three things were essential to continuing to be an asset to our employer, and so continuing to have an employer, if you get my drift; sometimes the value of these qualities were highlighted by their absence.

The old Family Court registry on Tank Street worked on a ‘take a number’ basis, and articled clerks whiled away many hours waiting for that number to be called. Unfortunately, some solicitors had a reputation with the registry staff, such that some of those staff would point-blank refuse to file material from certain solicitors. They sympathised with our plight, but had been abused and yelled at by those solicitors too often. Any clerk who struck one of these staff had no choice but to trudge back to the number-dispenser and hope luck would serve them up to a different registry clerk next time around.

By being discourteous and uncivil, these solicitors had failed their clients, and also put their clerks through hell. We worked out quickly that being pleasant to the registry staff made our jobs easier, and also more fun. Swapping a few jokes as documents were stamped was much better than the stony silence that greeted rudeness.

It also paid great dividends with fellow articled clerks if a civil and collegial camaraderie could be achieved. In fact, this was essential, because often timings meant that one person simply couldn’t get it all done. Having a mate to get your documents stamped while you shot over to a settlement often saved the day, and an articled clerk who could not, through rudeness or other uncivility, rely on their cohort for a favour or two was in serious strife.

On admission, of course, the three Cs moved from highly desirable to ethically mandated. Officers of the court are duty bound to be courteous, and that duty goes beyond their professional lives. The wisdom in the quote at the start of this article applies here – officers of the court should not go abusing serving staff or treating others rudely, and must remember that how they behave affects the way in which our profession, and the legal system itself, is seen.

That isn’t to say that the Legal Services Commission will come calling if a lawyer yells at the chemist for giving them the wrong prescription, but better is expected of us – and lapses can still do damage. You never know when a potential client, employer, or indeed judge is watching on as someone berates a waiter. Your personal brand is on show 24/7, just as you are an officer of the court 24/7. Rudeness is not a luxury many lawyers can afford.

Articles went the way of the dodo many moons ago, but courtesy in the law will never go out of style, and will always mark the leading lights of the profession.

Shane Budden is a Queensland Law Society ethics solicitor.

MENTAL ILLNESS AND STIGMA IN LEGAL PRACTICE

by Bridget Burton

A well lawyer is an ethical lawyer. Really?

On the Queensland Legal Services Commission website, we are told that:

"[L]awyers who are psychologically distressed will one way or another reveal their distress in conduct that falls short of the standard of competence and diligence and the ethical standards that members of the public and their professional peers are entitled to expect of them.

"We are unaware of any research which bears out an assumption to this effect but it seems likely to be true. Certainly psychological distress is the elephant in the room in a large proportion of the matters we deal with at the Commission. It's explicitly a factor in many of the matters that find their way to the disciplinary bodies. Our best guess is that it features in 1 in 3 of all the matters we deal with and the professional indemnity insurers tell us they reckon it features in about 1 in 3 of all professional negligence matters also."[1]

Last year, at the National Wellness for Law Forum, one presentation referred to the above when displaying a slide with the phrase 'a well lawyer is an ethical lawyer'. This is all very alarming, but is it true?

One in three! That's a lot, right?

Reading just the above, it would seem that indeed if one in three matters coming to the attention of the Legal Services Commission feature some aspect of mental distress then there must be some correlation (even causative) to diminished performance – as is assumed by the commission.

However, studies into the prevalence of mental illness and mental distress within the legal profession put the figures at between 30% and 50%[2] of the profession *as a whole*. The prevalence of mental distress noticed (anecdotally) by the Legal Services Commission is no higher than the prevalence in the profession more broadly and may even be less.

Anxiety and depression specifically are real and awful features of the legal profession. There is, of course, a need to identify and address the structural problems underlying the terrible statistics and to alleviate distress and manage illnesses, but not because individuals who are struggling are somehow failing or likely to let down clients or employers.

Personalising the epidemic of distress places added stress and responsibility onto vulnerable colleagues for no good reason, cultivates the very secrecy and stigma that makes illness hard to handle in legal workplaces, and obscures the solutions to the hazards of legal practice.

Stigma

We routinely encourage lawyers experiencing mental distress to talk and seek help. When individuals do not, we talk about perceptions of possible stigma, negative self-talk and lawyers' scepticism about treatment[3] (that is, personal internal factors rather than external environmental ones).

But the real barrier is not a *perception* of stigma. It is actual stigma, of a deep-seated structural variety. The sort of stigma that accepts (with no evidence) an unwell lawyer is *likely* to fall short professionally based on assumptions about the relationship between competence and mental health.

Reducing stigma around mental health, mental illness and psychological distress is urgent. Challenging it involves addressing unconscious bias and examining our own responses to distress in others. It includes rethinking the still prominent view that mental illness is a fragility or weakness that renders a lawyer unsuitable for certain work types or promotions.

We need to agree, as a professional community, that having a mental illness is not a professional failing and there is no reason to think it will lead to any sort of professional downfall. At between a third and half of our colleagues, lawyers with mental illness or distress (or a history of) are already shining among our best and brightest at all levels, though many have had to hide their internal struggles at great (and sometimes insurmountable) personal cost.

A healthy workplace is an ethical workplace

As well as attacking the barriers (bias, discrimination, stigma, harassment, bullying, workplace culture, etc.), there are positive steps legal workplaces can take to become healthier places to work. While we all wish therapy puppies and lunchtime yoga were the answer, they are not. Healthy legal workplaces address the root causes of the high rates of distress among lawyers rather than focusing on employees' responsibilities to be unrealistically resilient.

Happy, productive employees (and, for that matter, students and volunteers) feel autonomously, intrinsically motivated; they do good quality work because it is important to them. High performers feel as though they belong and have meaningful relationships with colleagues. They are encouraged to feel competent and are given control of their day-to-day workflow and decisions. The best workplaces give employees opportunities to develop and show character, values and strengths through their work.

Bridget Burton is the Acting Director of the UQ Pro Bono Centre. She has been seconded to the law school from Caxton Legal Centre where she holds the position of Director, Human Rights and Civil Law Practice. Bridget has worked in community legal centres and at Legal Aid for 13 years as a solicitor and practises mainly in human rights and anti-discrimination law. Bridget gratefully acknowledges the assistance of Associate Professor Francesca Bartlett and Dr Jason Chin at UQ Law and Andrea Perry-Petersen of LawRight.

Resources

There is a substantial amount of guidance out there to improve workplace health. Start with mindscount.org/the-guidelines/the-13-workplace-factors and go from there.

mindscount.org/

qls.com.au/wellbeing

cald.asn.au/wp-content/uploads/2017/11/BMRI-Report-Courting-the-BluesLaw-Report-Website-version-4-May-091.pdf

headsup.org.au/training-and-resources/educational-and-training/national-workplace-program

melbourne-cshe.unimelb.edu.au/__data/assets/pdf_file/0006/2408604/MCSHE-Student-Wellbeing-Handbook-FINAL.pdf

qls.com.au/LawCare.

Notes

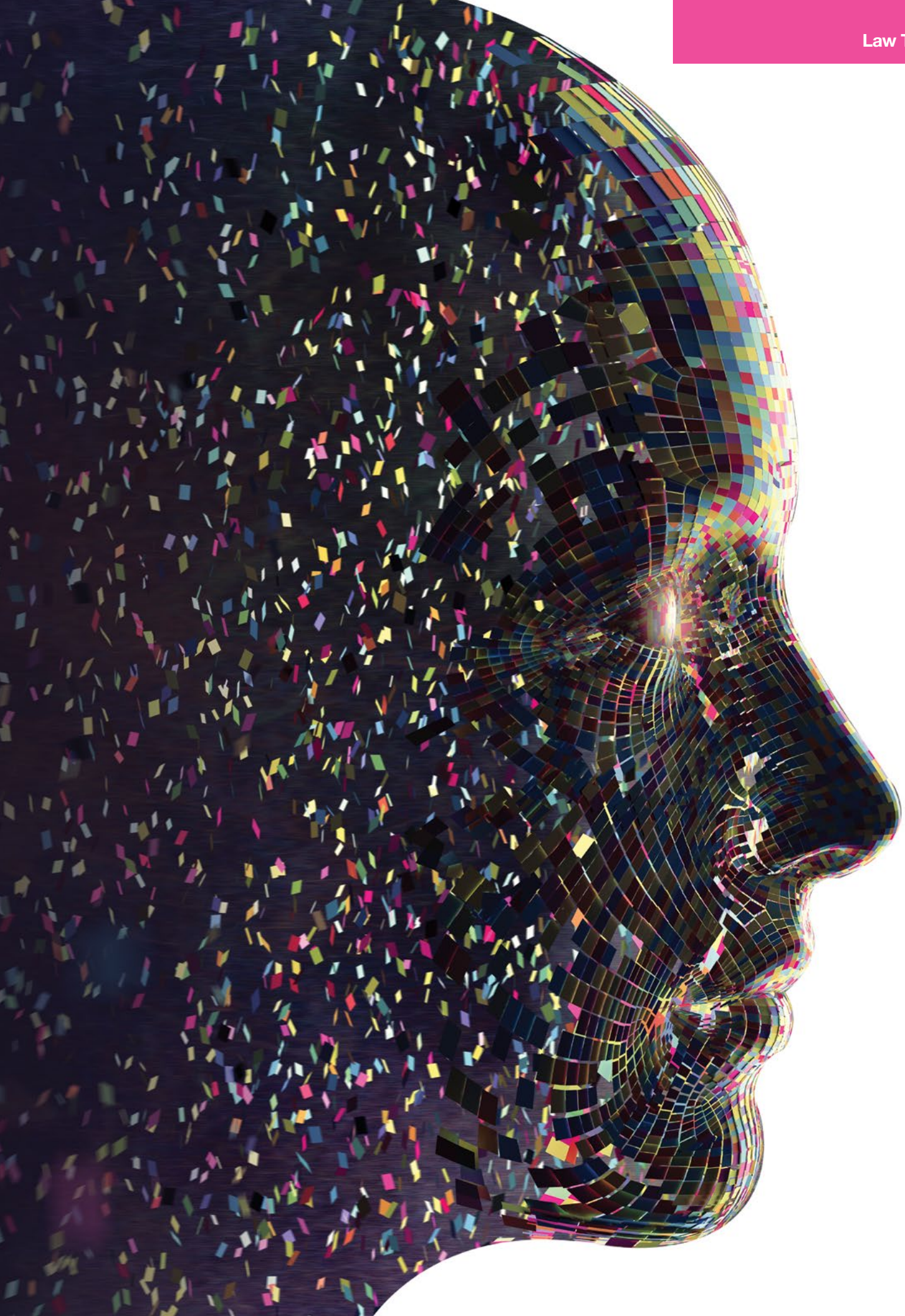
1 lsc.qld.gov.au/headline-issues/lawyers,-law-students-and-depression.

2 trove.nla.gov.au/work/31619934?q&versionId=38333598; mindscount.org/about-mental-health.

3 youtube.com/watch?v=ghzVoyzefvw&index=8&list=PLFGNuyxG6vjlMB-rTEW4qpKEL2Akx5M-8.

THE CHANGING FACE OF PRACTICE

The technologies shaping a brave new legal world



Regular *Proctor* readers will already be aware of several of the major innovations that have been identified as major 'disruptors' for the legal profession. In this article **Matthew Shearing** provides an updated summary of the key technologies that are changing the face of practice.

Emergent technologies are changing the practice of law in unique ways. This article is by no means exhaustive, but demonstrates some of the major changes about to wash over the profession.

It's worth stating at the outset that technological disruption isn't to be feared, but embraced – and will provide astute lawyers, firms and entrepreneurs with unprecedented opportunities to separate themselves and build truly innovative practices in the coming years.

Blockchain and smart contract technology

Distributed ledger technology, colloquially referred to as 'blockchain', allows the transfer of money and information on an open, shared, transparent, auditable and decentralised platform, free of third-party intermediaries. Using a blockchain like Bitcoin, capital exchange can occur near-instantly without the need for banks, agents, payment processors or settlement services.

On newer platforms like Ethereum and Cardano, complex code can be written to interact directly with blockchain transactions. Referred to as 'smart contracts', they make it possible to automate business logic and the transfer of money and information in a manner that is transparent, consistent and auditable. This will have applications in almost every industry as the technology matures, but the innovation is particularly relevant to the practice of law.

Take, for example, the simple trust. Currently, trust deeds require extensive documentation to establish the trustee's obligations and set out exactly how the trustee will benefit the beneficiaries. However, the documents (and common law) don't intrinsically prevent the trustee from taking harmful or fraudulent actions. Rather, they merely allow the beneficiaries to seek relief against the trustee *if* they discover it did the wrong thing. I call instruments like a trust deed and our laws *reactive*, as they're only enforceable if the wronged party takes action after the fact.

A trust which utilises a smart contract in conjunction with a traditional written agreement circumvents much of this ambiguity. Most importantly, rules can be coded (not just written down) at the establishment of the trust. If there are five beneficiaries to be paid in equal, 20% portions every six months from the trust account, that non-discretionary distribution can be built directly into the smart contract, as the smart contract is attached to the trust account and deals directly with any currency which comes in.

Any trustee looking to discretely favour one trustee over another would find that the contract prohibits it, because the code doesn't allow an action inconsistent with its terms. I call these *proactive* agreements because (try as they might) a trustee can't do something which isn't permitted by the smart contract.

Currently, almost all of our legal framework and technology can be characterised as *reactionary*. We draft contracts, make agreements and conduct transactional relationships without any true form of active contract enforcement. Instead, these instruments rely on the threat of consequences, implied trust and good faith in establishing legal relations.

Blockchain technology provides an avenue for lawyers to increasingly develop *proactive* solutions for clients. It promotes trust, allows condition-based transactional execution and prevents many of the simpler, but expensive, litigation issues that are prevalent in our legal framework. Forward-thinking firms may begin offering 'blended' solutions which use smart contracts and develop tools which blur the lines between a law firm and a software development company.

While the technology is still on the fringe, the advantages it provides will only increase as the technology matures and more users participate on the networks. This will be particularly true once clients become more comfortable with digital currency as a genuine unit of exchange.

It will be necessary for firms to educate their staff about blockchain technology and equip them to build *proactive* legal solutions in concert with software developers and engineers. Firms which commit to becoming increasingly 'blockchain native' will, provided the networks continue to grow, separate themselves from their competition.

Machine learning and AI

It's become popular for 'experts' to rattle off all the professions that will be 'replaced' by machines, and lawyers are often included in these lists. This usually shows that the experts don't really understand the role of the lawyer.

Machine-learning software and 'AI' (artificial intelligence) programs excel in repetitive task management, binary or gated decision-making and the interpretation of data. They are constructs designed to do some very specific tasks and do them well, but they are only as powerful as the human engineers who build them.

Developed properly, the algorithms can do many tasks to a higher standard than that of humans. Take the recent machine-learning algorithm developed by IBM for identification and diagnosis of skin cancer. In a scan of 3000 images, the technology was able to correctly identify a melanoma with an accuracy of 95%, as opposed to the 75-85% of most general practitioners. Similar results are being seen in areas from automated vehicle piloting to predictive speech.

It's important to understand, however, that AI and machine-learning technology still depends on human input. The melanoma algorithm first needed to be engineered and then 'trained' by feeding it data – photos which represented positive and negative melanomas. Only after being coached on the meaning of the data could the program begin to analyse new images.

The same is true for the capabilities of programs. You couldn't, for example, feed the program new images of brain scans and ask it to identify tumours. Fresh 'training' would be required, which could only be undertaken with considerable time and effort by qualified professionals. Nor does the algorithm have any ability to treat the cancer itself.

Indeed, given the higher success rate, the net effect of a program like IBM's would be to give medical professionals *more* substantial treatment work, as there'd be an increase in successful diagnoses. What would be reduced, or removed completely, is the tedium of scrutinising patients' bodies and the risk of medical negligence claims for incorrect diagnoses.

This perspective can be applied to almost any industry, including law. A well-built algorithm can be trained to analyse court databases and collate judicial rulings on a particular topic. An AI program could take limited data from an enquiry form and give a predicted success rate. Virtual dispute resolution 'assistants' could analyse small legal disagreements and provide basic guidance at a fraction of the cost of court proceedings.

However, these examples all occur on a *micro* level. They take place in controlled environments where parameters are well defined and don't stray from their chosen purpose. AI is still code, and code doesn't handle unknown quantities well. Any successful algorithm will, therefore, rely on strictly defined parameters and input control. Subjective judgments, nuanced drafting and the provision of holistic advice which contemplates the complexities of a client's unique circumstances cannot be performed by code.

The bottom line is that machine learning is only as good as those who build it, and building takes time. While firms and lawyers who begin developing machine-learning solutions now may initially find the process slow and cumbersome, they will steadily reap benefits as their understanding of what the technology can (and can't) do grows. It will become part of their toolkit, but it won't *replace* the lawyers themselves. At best it will augment them.

Given that legal technology isn't typically open-source, it's unlikely that proprietary technology developed by other firms will be available on the open market (especially given the potential for 'packaged' legal advice which could be offered as a product in its own right). It's therefore imperative that firms begin investigating and harnessing the technology now.

BLOCKCHAIN TECHNOLOGY PROVIDES LAWYERS PROACTIVE SOLUTIONS

Decentralised autonomous organisations

At its most basic level, a decentralised autonomous organisation (DAO) utilises blockchain and smart contract technology to create an organisation governed by code. Because the DAO (and the rules which govern it) exist on a distributed ledger, all DAO functions, rights and responsibilities are controlled by the programming, usually in concert with a detailed permissions system. A DAO can give members limited or full access to organisation financials, contracts, documents, business dealings and information at the software level. Because the smart contract code controlling the DAO is immutable and can be audited by all, it gives certainty that *no one can break the rules*.

DAOs are governed by consensus of members (often a defined sub-set of members) and are typically borderless. Because blockchain-based code *actively* governs typical corporate functions like the constitution, voting, shareholding, payroll and project management, they represent an entirely new way of building organisations. Mechanisms such as company shares, dividends and reporting could be handled far more effectively (and efficiently) by coding those mechanisms directly into the code of a DAO, provided that they're coupled with some robust APIs for reporting to external regulators.

Foundations, joint ventures and large projects are just some of the traditional corporate instruments that may perform better under a DAO model, but the applications are practically unlimited.

Online jurisdictions

In any agreement between parties, it's necessary to set the rules. When two parties are located in a particular state or country, it's relatively easy for the parties

to stipulate what authority they will appeal to if everything goes wrong. This is usually done by specifying an agreed jurisdiction towards the end of a contract.

As the world becomes increasingly connected, choosing a jurisdiction is more challenging when parties are based in different countries (or continents). Consideration is often given to the various restrictions, exemptions and protections afforded by the law of each jurisdiction, and where the relationship isn't based predominantly in one country, the parties usually favour the jurisdiction least restrictive to their shared goals.

There is, however, an increasing amount of business occurring online, without any easily-identifiable jurisdiction. From news aggregation websites to off-shore outsourcing, working out what the rules are and who to appeal to when things go wrong is becoming difficult. When you add decentralised organisations like DAOs and blockchain-based contracts into the mix, trying to assign a nation-based jurisdiction can become almost impossible.

The most promising approach to tackling the issue is the establishment of 'digital' jurisdictions, where parties can agree to be bound by mutually satisfactory rules not tied to any one land-based jurisdiction. Rulesets could feasibly be developed which are far less restrictive than legislative frameworks offered by traditional nation-states.

Digital jurisdictions are in many ways tailor-made for use with blockchain technology, and indeed, initiatives like Aragon's decentralised jurisdictions and EOS's blockchain constitutions are beginning to provide practical solutions to these problems. It will be important for legal practitioners to assess where they can provide value in this emerging sector.

Be it collaborating on an open-source digital jurisdictional framework, providing dispute resolution services or simply alerting clients that new models are available, the intersection between emergent technology and truly global business presents compelling opportunities.

Virtual reality

The inclusion of virtual reality in a primer on future legal changes may seem strange, but it's very relevant. With developments from virtual workspaces to immersive shopping experiences becoming a reality, the combination of high-fidelity experiences and developer-friendly software is fostering rapid growth in the sector.

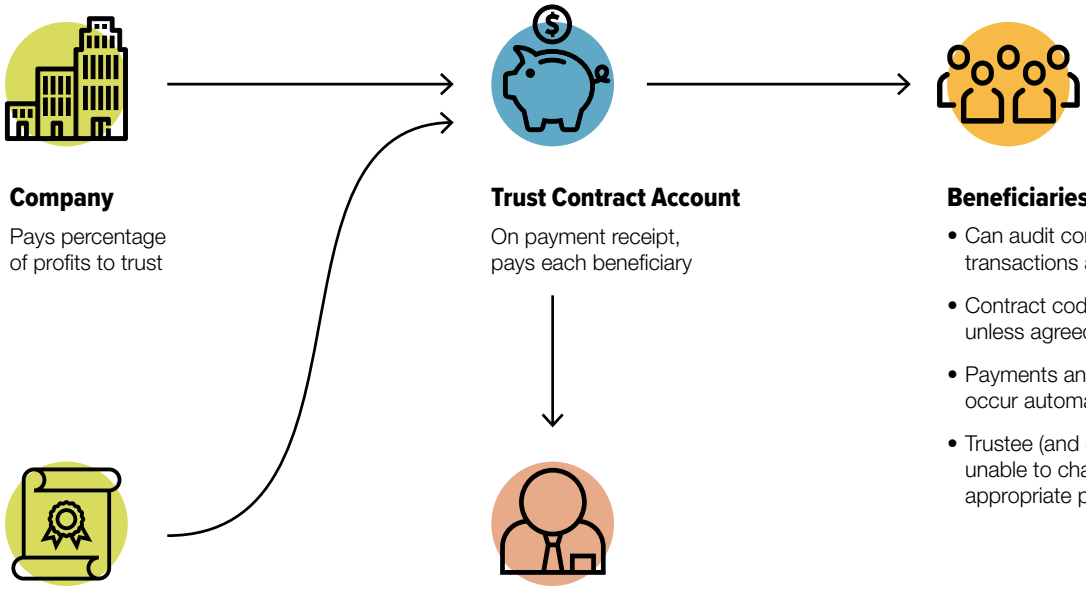
The most immediate benefit that early-adopters are seeing in a business sense is shifting from expensive physical offices to inexpensive virtual workplaces. eXp Realty, a publicly-traded United States real estate brokerage company, is run entirely in a virtual world. The company claims this has allowed it to almost double staff from 6500 to over 12,000 estate agents last year and reach over a $1 billion market capitalisation on the Nasdaq in the first day of public trading.

eXp's virtual world allows all company staff to attend team meetings, conferences, training and functions from anywhere in the world. The brokers still meet with clients and sell houses in the physical world, but their entire corporate office is housed in VR, meaning no expensive leases, cleaners, furniture and upkeep. Further, employees no longer need to commute to work, meaning less time spent in traffic and more time with their families.

Considering that many law firms spend up to 50% of the fee dollar on the expenses of running an office, the potential for drastic reductions in those fees can't be overlooked. While some would prefer the more traditional 'face-to-face' working environment, text-messaging, social media and video-conferencing has shown us that people are willing to embrace new technology for the sake of convenience and connectivity. When that technology could *also* significantly reduce fees, raise profits and give an advantage over the competition, it becomes incredibly compelling.

The 'Events Auditorium' in eXp Realty's virtual world.
Credit: eXp Realtyw

SMART CONTRACT TRUST



Company

Pays percentage of profits to trust

Trust Contract Account

On payment receipt, pays each beneficiary

Beneficiaries

- Can audit contract transactions any time
- Contract code is immutable unless agreed otherwise
- Payments and administration occur automatically
- Trustee (and other parties) unable to change code without appropriate permissions

Trust Deed

- References the smart contract
- Pulls terms in plain English
- Legal doccument

Trustee

Only has access allowed by contract

There's another, more indirect benefit to integrating virtual reality technology in legal practice. As the user base of VR experiences like Amazon's Sumerian, Linden Lab's Sansar and Philip Rosedale's High Fidelity increase, it will also mean access to a new type of customer with their own unique needs and novel legal issues. It's not so fantastic to imagine that many future clients may prefer to meet at a 'virtual' firm rather than travelling to inner-city offices, especially if they're travelling or based internationally. This may also be beneficial for face-to-face meetings such as mediations, settlement conferences and interviews, especially in today's crowded business environment.

Just like the other sectors we've covered, it's still early – and there's no telling what opportunities will present themselves as the technology matures. The only sure way to miss out is to not be involved.

Embrace the opportunities

Digital disruption is a real issue, but it's not a bogeyman out to make lawyers redundant. Technological developments like machine learning, blockchain and virtual reality are just new tools for the ever-expanding legal arsenal – tools which, when harnessed correctly, can be put to great use.

While lawyers will always be necessary, what may change is the expectations of clients, the skills required and the method of delivery. The key is to position yourself to capitalise on disruptive technologies and put them into the 'toolbox' in the same way that a carpenter upgrades their equipment to increase efficiency and reduce cost.

As the old adage goes, knowing is half the battle. If you're not familiar with the technologies mentioned, spend some time researching them. Get an expert with both a legal and technological background in to educate your firm and help you develop an innovation strategy. Having a legitimate plan to deal with technological disruption will put you ahead of 99% of the competition.

The bottom line? Technology is a tool. Automation and disruption are only a threat for those who aren't making use of it already. For those who are, it's an unprecedented opportunity – and one to be tackled head on.

Matthew Shearing is a technology lawyer, consultant and podcast host. He is the founder of BlockSense, co-hosts *The FOMO Show* (a fortnightly technology podcast) and runs Blockchain for Business Brisbane.

10 things you should know about affidavits

Key tips for Queensland's state courts

1. It is not necessary to serve a sealed copy of an affidavit.

Practitioners often delay serving affidavits until they have been filed and bear the court's stamp.

However, after an affidavit is sworn or affirmed, it can (and should) be served on the other parties without waiting for it to first be filed. This is especially so if there are circumstances of urgency or if there is a time limit within which an affidavit must be served.

2. Avoid duplication of exhibits.

As a general rule, if a document is exhibited to an affidavit, the same document should not be exhibited to any other affidavit.

If a witness wishes to refer to the document, then the witness can refer to the exhibit by reference to the affidavit to which it is exhibited, even if it is an exhibit to an affidavit which is relied upon by another party.

Such an approach prevents voluminous affidavits being filed which contain the same documents, which reduces costs.

It is also mandatory by reason of rule 435(12) *Uniform Civil Procedure Rules 1999* (UCPR).

If neither party intends to read and rely upon the affidavit which exhibits the document, it is permissible for a party to read and rely on the exhibit to the affidavit, rather than the entire affidavit.

3. The exhibits must be paginated.

It is critical that documentary exhibits be paginated, meaning that the first page of the first exhibited document is page 1 and then the pagination continues through to the last page of the last exhibit.

This does not mean starting the pagination again at page 1 for each exhibit.

When the case is being presented in court, the court can then be taken to a specific page of the exhibits to an affidavit, and there is no confusion or delay about which page is being discussed.

Pagination of exhibits when there is more than one documentary exhibit or the exhibits are a group of documents is mandated by rule 435(11)(a) UCPR.

4. There must be an index to the exhibits.

After paginating the documentary exhibits, prepare an index of the exhibits which describes each document and identifies the pages on which that exhibit appears.

Depending on the number of exhibits and whether the exhibits are contained in one or more paginated books, the index should appear at the front of each book addressing the exhibits in that book.[1]

5. The judge may like a working copy of the affidavits.

Depending on the number of affidavits and the type of hearing, you should consider preparing a working bundle of your client's affidavits, with tabs and an index, and contained in a ring binder (or more than one if needed).

This will enable the judge to highlight, annotate and tab parts of the affidavits, including exhibits, during the hearing. It also assists with locating the evidence quickly during oral submissions.

6. The affidavit should not contain submissions.

A common mistake is for witnesses, especially lay witnesses with an interest in the outcome of the litigation or a solicitor acting for a party, to provide their opinions in their affidavit about why one party is right or wrong or the merits of particular legal arguments.

In general terms, a lay witness can give evidence in an affidavit about what they saw or heard or thought at a particular time (if relevant) or physically experienced. In very rare instances, they can express an opinion such as their opinion about the speed at which a car was travelling. What they cannot do is express an opinion about whether a finding of fact should be made based upon other facts or an opinion about someone else's state of mind or motivation or give reasons why one party should succeed or fail. Such evidence is inadmissible and amounts to submissions. Even if admitted into evidence, the judge will be unlikely to pay any attention to it and will be likely to discount other evidence given by that witness.

7. The affidavit must contain evidence which the witness knows to be true.

Because a client is often keen to win the application or trial, they will be prepared to include statements of fact in their evidence which they do not in fact know to be true. Rather, they suspect them to be true or hope they are true or believe they are true.

When preparing an affidavit, ensure that it is confined to evidence which the witness knows to be true from their own observations. If the affidavit is to be used at a hearing at which final relief is not being sought, the witness can give evidence on information and belief, but it must then comply with rule 430(2) UCPR.

8. Rules of evidence apply unless the UCPR allows otherwise.

Subject to the UCPR, the evidence in an affidavit must be confined to the evidence which the person making it could give if giving evidence orally. It follows that the evidence in an affidavit must be relevant and otherwise admissible, having regard to the exclusionary rules of evidence such as the rule against hearsay.

Kylie Downes QC provides 10 essential tips for the preparation, filing and service of affidavits in Queensland's state courts.

Thinking in particular about relevance, it is a mistake to include evidence from a witness about aspects of the case which are not relevant to the issues which will be in play at the hearing in which the affidavit will be relied upon. For example, a deponent's evidence concerning the truth or otherwise of an alleged fact in the statement of claim would not usually be relevant to an application for further and better particulars.

9. Affidavit evidence is not always required.

Chapter 11 Part 8 of the UCPR permits a party to both file and rely upon correspondence exchanged in relation to applications which are described in rule 443 UCPR. These types of applications include an application for further and better particulars.

In relation to such applications, rule 447(2) UCPR identifies the documents (including correspondence) which must be filed with the application. Rule 448(2) UCPR provides that the court may decide an application based on the correspondence.

10. Cross-examination of deponents.

A deponent may be cross-examined in relation to their affidavit. If the affidavit is served more than one business day before the hearing, then the other party, if they wish to cross-examine the deponent, must serve a notice requiring that person for cross-examination at least one business day before the hearing.[2]

If the affidavit is served less than two business days before the hearing, then the person who made the affidavit must attend court to be available for cross-examination, subject to any different agreement reached with the other parties.

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

Notes

[1] Rule 435(11) UCPR.
[2] See rule 439(2) UCPR.

Make the most of mentoring

by Olivia Pine

The advantages of a successful mentor-mentee relationship cannot be overlooked.

Whether it is a formal mentoring relationship or simply the connection you have with your direct supervisor, it is important that early career lawyers put time and effort into building that relationship, which will provide lasting benefits.

For early career lawyers in particular, mentors can make or break how you feel about a firm or a particular area of the law. A good mentor relationship can also be the difference between a good junior lawyer and a great junior lawyer, so it's important for both parties to prioritise building the relationship.

With this in mind, we have compiled some helpful tips on how a junior lawyer can make the most out of their mentor relationship.

Tip 1: Build the rapport

It's important to try and build an open relationship with your mentor, so you can share ideas and communicate effectively.

Consider attending firm social events and don't be afraid to make general conversation with your mentor about life outside of work. Be upfront with your mentor about what you feel is out of your depth. Your mentor should be mindful of this and tailor your work and their advice to help you improve your skills in this area.

Tip 2: Set the ground rules

Everyone works differently, so start by asking your mentor how they prefer to work. In particular, some things to consider with your mentor are:

- What level of involvement will your mentor have? For example, will they settle everything you draft?
- What time of the day is best for them to discuss any questions or concerns you may have?
- Would they prefer to schedule regular catch ups or are you free to speak to them whenever you have a question?
- Would they like you to email questions to discuss in advance of any meeting?
- Scheduling a monthly coffee to 'check in' and discuss any general concerns.

It's important to remember that your mentor's time is likely to be limited, so use the time wisely and be upfront about what you feel has worked (and not worked) for you in the past, and what you think you need to focus on going forward.

Tip 3: Be prepared

Always carry a notepad with you – often a discussion about one file/issue will lead to discussions about other work. It's also a good idea to take notes on your mentor's advice.

If you're going to ask your mentor specific questions about a file or task you've been given, make sure you're familiar with the background first. They may need the general facts first before they can assist you. Try to anticipate what questions they may have or what information they need to help you (this might include bringing relevant sections of the file with you).

Always try your best to present a possible solution – don't just turn up with a problem. Your mentor is likely to be incredibly busy, if you can go to your mentor with a problem and possible solution it not only short-cuts the process, but shows that you respect their time.

Once you complete a task, think about what next steps are required and ask if you can assist in undertaking them.

Tip 4: Improve your skills

Working closely with a mentor is a great way to improve your skills. Some things to consider are:

- Make a list of goals with your mentor and check in regularly about your progress in achieving those goals.
- Whenever appropriate, ask questions. Ask about the challenges that your mentor has faced on files and in practice, and ask how they managed or overcame those issues. Your mentor has probably faced similar challenges to you, and can provide invaluable advice about the best way forward.
- Read their letters, advices and pleadings. This will help you understand their thought process.
- Sit in on their client phone calls and meetings. Listen to what questions they ask and what advice they give. This will improve your oral communication skills and your confidence.
- Ask to run a file/case together from start to finish. Be present at the initial client interview, discuss strategy with your mentor and ask to attend any mediation or court appearances. This is a great way to learn what is involved in running a file, while being supported by your mentor each step of the way.

The above advice is just a starting point. Each mentor/mentee relationship is different, so find what works for both of you.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Adam Moschella (Adam.Moschella@justice.qld.gov.au). Olivia Pine is a solicitor at Barry.Nilsson. Lawyers.

QLS uncovers solitary confinement data

by Vanessa Krulin and Madelaine van den Berg

In 2018, Queensland Law Society commenced a project liaising with Prisoners' Legal Service (PLS) and Queensland Corrective Services (QCS) following a Human Rights Watch report on the treatment of prisoners with disabilities in Australian prisons.

The content of this report was read with interest by the QLS Health and Disability Law Committee and the QLS Criminal Law Committee, and raised a number of concerns. As a result, QLS met with PLS and has corresponded with QCS to obtain data relating to the number and conditions of prisoners held in prolonged solitary confinement in Queensland.

6 February 2018

Human Rights Watch published a report, 'I Needed Help, Instead I Was Punished' Abuse and Neglect of Prisoners with Disabilities in Australia (the report). The report followed an investigation into the treatment of prisoners with disabilities in prisons in Australia. The inquiry looked at eight correctional facilities in Queensland.

The report claimed that, in 2017, the total population of prisoners in Australia reached its highest level of more than 41,000, with Queensland holding the second highest number of prisoners across all states and territories.[1]

15 March 2018

2018 QLS President Ken Taylor, PLS Director and Principal Solicitor Peter Lyons and QLS Legal Policy Manager Binny De Saram, Senior Policy Solicitor Vanessa Krulin and Legal Assistant Madelaine van den Berg first met to discuss the report. Since then, QLS and PLS have met regularly with PLS representatives including PLS Acting Director and Principal Casework Solicitor Helen Blaber as well as QLS General Manager, Policy, Public Affairs and Governance Matthew Dunn to discuss the report and consider options related to a joint campaign for better treatment of prisoners, in particular those with disabilities including cognitive impairment, and prisoners kept in solitary confinement for prolonged periods of time.

9 July 2018

QLS wrote to the Commissioner of QCS requesting a census snapshot of prisoners held in prolonged solitary confinement on Monday 2 July 2018.

The correspondence requested specificity in the numbers of male and female prisoners in solitary confinement on that day, as well as the average length of the collective time spent in prolonged solitary confinement in a continuous period, the name of each facility holding prisoners in prolonged solitary confinement, the number of prisoners in prolonged solitary confinement who are impacted by a physical and/or mental disability or cognitive impairment, and the number of those prisoners who received daily visits from health care professionals.

13 July 2018

QCS replied via email enquiring about the intended use of this information and explaining the expected timeframe to compile the data. QLS responded on 24 July advising that the QLS Criminal Law Committee and QLS Health and Disability Law Committee had expressed concerns regarding prisoners in prolonged solitary confinement and the information requested was to assist QLS in forming a position on the issue.

28 August 2018

QLS wrote a follow-up letter requesting an update regarding a response to our letter dated 9 July 2018.

2 October 2018

Prior to receiving a formal response from QCS, QLS received a letter from one of our members who became interested in the project after reading our letters on the QLS legal policy webpage.

11 October 2018

QLS submitted a Request for Information application to QCS. The application sought a response to the questions asked by QLS in the letter sent on 9 July 2018, including any Queensland Corrective Services internal documents, memos, emails and/or correspondence forming a draft response to QLS, and any associated briefing notes or reports which related to the questions asked in the QLS letter dated 9 July 2018.

15 November 2018

QLS received a response from Queensland Corrective Services and the release of our application. The release advised that on Monday, 2 July 2018:

- 130 prisoners were subject to separate confinement (15+ consecutive days) on Safety Orders, Consecutive Safety Orders or Maximum Security Orders
- 120 of those prisoners were male, 10 were female
- 30 of those prisoners were between 17 and 25 years of age
- 51 of the 130 prisoners were impacted by a physical and/or mental disability or cognitive impairment
- On 2 July 2018, over 75% of those prisoners recorded were accommodated for a continuous period of between 15 days and three months.

QLS is grateful for the ongoing correspondence with Queensland Corrective Services and will continue to liaise with Prisoners' Legal Service on these issues.

Vanessa Krulin is a QLS senior policy solicitor and Madelaine van den Berg is a QLS legal assistant with the QLS Legal Policy Team.

Notes

[1] *Daniel Soekov, D. (2017), 'I Needed Help, Instead I Was Punished' Abuse and Neglect of Prisoners with Disabilities in Australia, 2018 Human Rights Watch; available at* hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities*, accessed 7 February 2019.*

Representation roadblock

The decision of Holt AsJ in *Allison v Tuna Tasmania Pty Ltd* (*Allison*)[1] illustrates the need to keep in mind that we are not entitled to communicate with a litigant that we know is represented by a lawyer.

That is unless that person's lawyer has consented to the communication, or the communication would otherwise comply with Rule 33 Australian Solicitors Conduct Rules 2012 (ASCR).[2]

In general, there are three grounds for restraining a lawyer from continuing to represent a client. Firstly, where we hold a retainer from more than one party, where the interests of those parties are in conflict and they have not provided informed consent to the solicitor acting.

Secondly, where a solicitor has been retained by a new client to act against a former client and has in his or her possession confidential information that might reasonably be considered to be material to the matter of the prospective client and detrimental to the interests of the former client.[3]

Thirdly, where a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the solicitor be restrained from acting for a client, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.[4]

The first ground is based on the fiduciary duty we owe to clients to avoid conflict of duties[5] and the second on the protection of confidences. The third is based on the inherent jurisdiction of the court over its officers.

In *Allison*, the defendants brought an application to restrain a practitioner, M, from continuing to represent the plaintiff. The application sought the intervention of the court so as to protect the integrity of the judicial process.

M attended a meeting with F, one of the defendants. The plaintiff's claim was based on conversations the plaintiff had with F; F was therefore an important witness in the action.

The meeting between M and F was held without the consent of the defendant's solicitor and only they were present. M made a number of assertions with respect to the plaintiff's claim. which included that his client could recover $25 million in damages, that they had two reputable and independent witnesses and that the defendants were likely to lose the action.

M further said that he could persuade his clients to settle for $2 million inclusive of costs. F asked M to put his proposal in writing to his solicitor. Despite other things being alleged, the court concluded that it need not resolve those issues. The court noted that what was important was that the meeting occurred and that the detail of what was said at the meeting only had relevance as to whether the meeting had caused prejudice to the defendants.

During cross-examination of M it became apparent that M was in severe financial straits. M had also written to the solicitors for the defendant stating that "it was blindingly obvious that [F] would report our meeting to you, if he had not already alerted you in advance, which I thought he very likely had".[6]

Holt AsJ noted that M should have given more detailed consideration to the propriety of attending the meeting.

The court found that M's fees were only recoverable in the event that his client was successful. M was in personal financial difficulty. He had a social relationship with the client as well. M attended a meeting with F without the consent of F's solicitor to attempt to secure a settlement of his client's action. M acknowledged that his conduct was "egregious".[7] The court observed:

"The facts that a lawyer will not recover fees unless the client is successful, that the lawyer is in financial difficulty and that the lawyer has a social relationship with the client would not, in isolation or cumulatively, be sufficient to justify a conclusion that the lawyer might lack the necessary objectivity and independence to fulfil his or her obligations to the Court. However, here, these features are combined with actual misconduct. The misconduct was a result of [M] failing to give due attention to the ascertainment of appropriate professional standards. He gave no explanation for this lack of attention. The most likely reason lies in a lack of objectivity and independence and I so find."[8]

The court's finding was reinforced by M's statement that the reason he did not communicate the settlement offer through F's solicitor was that he did not trust him. M said that he had let his emotions get the better of him. The court accepted that a lack of objectivity of a lawyer will undermine the integrity of the judicial process.

If a solicitor or barrister is in default in this regard, the court not only may intervene but, in all probability, should intervene.[9] As officers of the court we must be mindful of the fact that the efficient administration of justice is dependent upon us adhering to high ethical standards. As Mason CJ noted:[10]

"…the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice…This is why our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court."

The ground of relief sought by the defendant was discretionary, which required the court to balance the entitlement of a litigant to the representation of choice and the consequences to such a litigant through consequential delay, inconvenience and expense. The court considered the following:[11]

- "Confidence that these standards and duties will be observed is dependent upon the lawyer not participating in proceedings where he or she lacks the necessary objectivity and independence and in some cases where that objectivity and independence, although in fact there, might be doubted.
- "[M], in the present proceedings, has demonstrated that he lacks the objectivity required for there to be confidence that standards and duties will be complied with in future.
- "Accordingly, allowing [M] to continue to act in the proceedings undermines the integrity of the judicial process and the due administration of justice, including the appearance of justice.
- "The application to have [M] restrained was made promptly following the breach coming to the attention of the defendants' lawyers.
- "The action is yet to be set down for hearing."

It was accepted that nothing was said by F at the meeting which would prejudice the defendants' interests. There was no suggestion that F was overborne or

Stafford Shepherd discusses the inherent jurisdiction to restrain a lawyer from continuing to act in a matter.

intimidated by M, nor was anything said that could provide M with a forensic advantage at trial. The plaintiff still desired M to continue to represent him (this was after the plaintiff obtained independent advice).

The court concluded that the interests of justice and the protection of the judicial process outweighed the factors against imposing a restraint. His Honour held that M's lack of objectivity and independence meant that his continued presence in the action meant that "the judicial process is genuinely, rather than merely possibly, under threat" and a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required that M be restrained from continuing to represent the plaintiff.

What are the lessons to be learned? Firstly, do not contact the client of another lawyer without first seeking the consent of that practitioner. Secondly, as officers of the court we have a paramount duty to retain independence and objectivity when representing our client's interest. Over familiarity with our clients may cloud judgment (this is so particularly when clients are good friends or relatives).

Thirdly, when personal interests intervene our judgment becomes impaired. We must be vigilant not to permit securing an early settlement to litigation to secure payment of professional fees to draw us in to inappropriate behaviour and breach our ethical duties. Fourthly, the rationale behind the no contact rule is to prevent potential undermining of the solicitor-client relationship and potential for the opponent's interest to be prejudiced.

Finally, the interest of justice ground is a demonstration that the court will in exceptional circumstances exercise its inherent jurisdiction to control the conduct of its officers.

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

Notes

1 [2011] TASSC 52.
2 In particular, see Rules 33.1.2 to 33.1.4 ASCR.
3 See Rule 10 ASCR.
4 *Kallinicos v Hunt* (2005) 64 NSWLR 561 per Brereton J at paragraph [76] and also the judgment of McMurdo J in *Pott v Jones Mitchell & Anor* [2004] QSC 48 at paragraphs [21] and [22]).
5 See also Rule 11 ASCR.
6 Above, n 1 [10].
7 Ibid [16].
8 Ibid [17].
9 *Kooky Garments Limited v Charlton* (1994) 1 NZLR 587 per Thomas J at 590.
10 *Giannarelli v Wraith* (1988) 165 CLR 543 at 556-557.
11 Above n 1 [24].
12 Ibid [35].

Social robotics

Should sex robots be criminalised?

Numerous developments in communicative technology have served to embody and express human sexuality.

Social robotics, while not yet a conventional contributor, is gaining considerable attention in discussions around the representation and enactment of societies' sexual practices. One such topic of discussion surrounds the development of sex robots.

Sex robots are already in existence, being both manufactured and marketed by various companies.[1] While the technology is relatively unheard of and certainly not widespread, it is probable that highly realistic sex robots will be created in the near future, thus eliciting unprecedented questions as to what their development could mean for the future of social behaviour and intimacy.

Assuming that robots do not have moral status and thus cannot be moral victims of sexual violence, what happens if this technology is designed specifically to allow users to engage in acts of robotic sexual violence? More seriously, should they be criminalised even if their use has no extrinsically harmful effects?

What constitutes robotic sexual violence?

It is quite obvious, by virtue of their name, that sex robots are not the same as industrial robots. Rather, a sex robot is categorised as artificial entity that is used for sexual purposes.[2]

The technology is intended to represent human-like appearance and movement, and possesses some degree of artificial intelligence in which it is capable of interpreting and responding to its environment.[3]

However, the question of what constitutes robotic sexual violence is a tricky issue. For instance, criminal law provides that rape is any non-consensual penetrative act,[4] but if the robot is not a moral agent, then it is incapable of granting consent.

So, why is the development of sex robots contentious?

Some proponents of sex robots argue that the technology has both the ability to protect women and children from sexual predators, while concurrently treating those who have illegal sexual desires.[5]

In contrast, opponents find sex robots problematic, arguing that the creation of this technology should be criminalised because it encourages the objectification and commodification of those in society who are already vulnerable (specifically women and children).[6]

There is no denying that there is something quite disturbing about the representational properties of sex robots. It is easy to argue, for example, that they recreate women as submissive and ever-consenting tools, which will contribute further to subordination, suppression and the normalisation of 'rape culture'.

However, there is no conclusive scientific evidence to suggest that this will actually be the case. Society should therefore be concerned about expanding the scope of criminal law too far. Without any empirical evidence for or against sex robots, their total criminalisation remains an uncomfortable concept.

Should sex robots be criminalised even if their use has no extrinsically harmful effects on others?

Regardless of the pro-sex robot/anti-sex robot debate, it could be prima facie argued that sex robots should be criminalised because they are 'morally wrong', meaning that they are both harmful to moral character and amount to public wrongdoings.

According to legal moralism, it is a proper object of the criminal law to regulate conduct that is morally wrong, even where such conduct has no extrinsically harmful effects on others.[7] It is likely that society will think about sex robots from a legal moralistic standpoint and within the context of current norms.

However, this prima facie argument could be defeated by obtaining scientific evidence suggesting that such usage will decrease the incidence of real-world sexual violence. There may be a link between the consumption of pornography and its harmful effects that could provide guidance on the sex robot debate. In fact, there are several studies that show no positive correlation between pornography and sexual crimes, and possibly even a negative correlation.[8]

Regardless, it is an issue that needs to be carefully researched and the possibility of using sex robots as remedial tools should not be dismissed without consideration. It is imperative that society does not get too far ahead of reality.

So, how should Australia react to the development of sex robot technology?

Few jurisdictions, including Australia, are yet to legislate on the creation, distribution and general use of sex robots. In June 2018, however, the United States House of Representatives unanimously passed the *Curbing Realistic Exploitative Electronic Pedophilic Robots (CREEPER) Act*, which bans the importation and distribution of childlike sex robots. The Congressional findings include the allegations that childlike sex robots both lead to rape and teach the user how to overcome resistance and subdue the victim.[9]

Childlike sex robots are just one niche of the nascent robotic sex industry that has generated serious debate and is met by most with outright revulsion. However, with no empirical evidence that childlike sex robots do actually lead to rape, it suggests that lawmakers in the US legislated using their feelings, rather than science or reason.

It is quite possible that sex with robots could create a dehumanisation of interpersonal relationships between humans, further isolating those who already struggle with human connection and therefore increasing their risk of offending.[10] However, society should be cautious of arguments that make robust claims about the effects of sex robots without any conclusive scientific evidence.

While opponents of sex robots raise significant arguments regarding how women and children are being represented, the response should not necessarily be to criminalise the creation of such technology. As a society, in order to truly do everything we can to decrease the occurrence of sexual violence in Australia, maybe we need to reimagine what it means to create a sex robot, and to think about how such technology could assist us to explore sexuality.

by Josephine Bird, The Legal Forecast

We should use technology to our advantage and consider how it could complement and enhance human relationships. Therefore, rather than denying or repressing inevitable technological advancements in social robotics, we could simply try to make it more positive.

If you've been sexually assaulted, you can get help and support. There are a number of services available nationally, such as 1800 RESPECT. In Queensland, you can contact the Sexual Assault Helpline on 1800 010 120.

Josephine Bird is a Queensland Executive Member of The Legal Forecast. Special thanks to Michael Bidwell of The Legal Forecast for technical advice and editing. The Legal Forecast (thelegalforecast.com) aims to advance legal practice through technology and innovation. TLF is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

Notes

1 For example, TrueCompanion's male and female sex robots, *Roxxy* and *Rocky*. See truecompanion.com.

2 John Danaher, 'Robotic Rape and Robotic Child Sex Abuse: Should they be criminalised?' (2017) 11(1) *Criminal Law and Philosophy* 71, 74.

3 Ibid.

4 *Criminal Code Act 1899* (Qld) s349.

5 Marc Behrendt, 'Reflections on Moral Challenges Posed by a Therapeutic Childlike Sexbot' in Adrian David Cheok and David Levy (eds), *International Conference on Love and Sex with Robots* (Springer, 2007) 96, 103.

6 Kathleen Richardson, 'The asymmetrical 'relationship': Parallels between prostitution and the development of sex robots' (2015) 45(3), Special issue of the ACM SIGCAS newsletter, *SIGCAS Computers & Society* 290, 293.

7 Danaher, above n2, 72.

8 Christopher Ferguson and Richard Hartley, 'The Pleasure is momentary...the expense damnable? The influence of pornography on rape and sexual assault' (2009) 14(5) *Aggression and Violent Behavior*, 323, 325-329; Milton Diamond, 'Pornography, Public Acceptance and Sex Related Crime: A Review' (2009) 32(5) *International Journal of Law and Psychiatry* 304, 309-314.

9 Curbing Realistic Exploitative Electronic Pedophilic Robots, HR 4655, 115th Congress (2017-2018).

10 Richardson, above n6, 290.

Passing and filing estate accounts

To many of us, estate administration disputes can seem Pythonesque – gravely serious, yet often comedic in their depth and nature.

The position of personal representative (PR)[1,2] is, at times, burdensome; for beneficiaries, at times bewildering. The mix frequently results in disputes over the manner in which the estate administration is conducted, with both often left floundering for a productive resolution.

Introduced in 2011, Chapter 15, Part 10 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR)[3] is an overlooked yet economic way to resolve these disputes. It starts as a quasi-judicial process and, if necessary, can proceed through to a full judicial determination.

This article provides a practical step-by-step guide to navigating Part 10.

Legislation

The current version of Part 10[4] was introduced through 2011 amending legislation under the *Uniform Civil Procedure Amendment* Rule *(No.1) 2011*.[5]

The explanatory memorandum to this amendment summarised its objectives as follows:

- clarifying the procedure for applying for the assessment and passing of an estate accounts
- prescribing the minimum standards for the procedure of the assessment
- clarifying the powers and functions of an estate account assessor
- clarifying and updating the procedure for applying for and awarding of a trustee's or executor's commission.[6]

Part 10 proscribes a formal process whereby the manner in which an estate trust is administered can be considered in a structured way through the oversight of an independent third party, an estate account assessor. The estate account assessor is both accredited and appointed by the court, and an accredited specialist in succession law. The estate account assessor has powers akin to a registrar, including the power to determine the process.[7]

Sadly, estate administration disputes often involve prolix and incendiary correspondence disputing the adequacy or otherwise of the estate accounting and administration, increasing the costs and acrimony between the parties without any real or satisfactory resolution.

An application to file and pass estate accounts therefore has the very real potential to save time and money by bypassing these exchanges, providing the parties with an independent assessment of the issues in contention which is proscriptive, and therefore economic and efficient.

Process – by person representative

As a shield, a PR concerned about potential or actual criticism of their conduct in administering the estate can simply apply to the court, ex parte,[8] seeking an order for the appointment of an estate account assessor to assess and pass the estate accounts. The process provides the PR with the imprimatur of the court for its conduct in the estate administration and, if necessary, guidance on any matters to be addressed.

Part 10 sets out the minimum requirements for what must be included in a set of estate accounts and the way in which they are presented – see rule 648. This proscription alone can remove a great deal of unnecessary disputation on what ought to be included in estate account reporting.

As with all things related to the law, language is key to understanding the process. Practitioners are directed to rule 644, which contains the definitions for Part 10. These clarify the expectations on what must be included in the material sought and presented.

Once the PR has filed an application for the filing and passing of estate accounts, they must follow the process as per steps five and six below.

Process – by beneficiary

A concerned beneficiary may utilise Part 10 as a sword by holding the trustee to account in a formal and relatively economic way.

Step 1: Eligibility

Is the beneficiary eligible to seek an assessment of the estate accounts?[9] See the definitions in rule 644.

Only a beneficiary entitled to an accounting may apply to the court under Part 10. Typically, the residuary beneficiary/ies are the only entitled beneficiaries. The case authority for this proposition is *Re Schilling* [1995] 1 Qd R 696. In that decision, the beneficiary's right to seek an account was generally limited to those in whom a beneficial interest, as opposed to a mere right to due administration, had vested on completion of the administration. It was further held that the beneficiary should ordinarily exercise the right to inspect the accounts before bringing an action.[10]

Step 2: Notice to the trustee of the estate – rule 646(1)

The beneficiary must write to the PR and request an estate account to be prepared and served within 30 days.[11]

Step 3: No response

If no estate account is provided after 30 days, the beneficiary is entitled to make an application to the court under rule 645 for the filing, assessing and passing of an estate account – see rule 646(7).

Step 4: Response provided – Objection

If the response is not satisfactory, then the beneficiary may serve a notice of objection on the PR – rule 646 (2).

The notice of objection must be in the approved form and must set out in a particular manner the objections – rules 646(3)-(6). The approved form is form 127 of the UCPR.

The notice must give the PR 21 days to address the objections – rules 646(7)(b)-(c).

Step 5: Estate account assessor appointment

If no response is given or is unsatisfactory, the beneficiary may then apply to the court for the appointment of an estate account assessor.[12] In preparation for that application, the beneficiary must write to the estate account assessor[13] seeking their written consent to act, confirmation of their fees, and to obtain clearance of conflict of interest – rule 645(3).

The beneficiary then files an application seeking orders that the PR file an estate account and that the estate accounts be assessed and passed – rule 645(1). The respondent to the application is the PR – rule 645. The application is supported by an affidavit.

The affidavit must depose to the reasons for the application – rule 645(2).

Christine Smyth offers a practical guide to resolving estate administration disputes.

Exhibited to the affidavit are the following:

1. Letter to the PR seeking account
2. Response from PR
3. Notice of objection
4. Response to notice of objection
5. Consent to act from nominated estate account assessor
6. Any other relevant material.

If the court orders the estate account be assessed, then it *must* appoint an estate account assessor and *may* give directions to the estate account assessor as to the assessment – rule 645(6).

Step 6: Process of assessment

The appointed estate account assessor may determine the process – rule 651(1). However, that power is tempered by the requirements of rules 651(2) and (3). The costs of the estate account assessor are ordinarily borne by the estate – rule 651(4).

The powers of the estate account assessor are quasi-judicial – rule 652.

Once the assessment of the estate accounts has been completed by the estate account assessor, they prepare, sign and file a certificate – rule 657(1), within 14 days after the end of the assessment, providing a copy to the parties – see rule 657(4). The certificate confirms the appropriateness of the manner in which the estate has been administered – rule 657(1)(a) or otherwise see rules 657(1)(b)-(d).

The estate account assessor isn't required to give reasons in the first instance, but must provide them if requested – rule 657A. The cost of preparing the reasons is borne by the person requesting – rule 657A(4).

Once the certificate has been filed, the matter may be relisted for the accounts to be passed – rule 657B. If a party is dissatisfied with the decision of the estate account assessor, they may seek the court's review – rule 657B(3). From there the court determines the matter on the material filed, at which point it becomes a wholly judicial process.

Conclusion

Grief, expectation and responsibility are a heady mix that can easily spill over into intractable, heated disputes. Often it is a lack of knowledge about what is expected of both the PR and the beneficiaries that results in an expensive escalation of tensions as to the rights and responsibilities of the parties.

The process of applying for the passing of estate accounts, while not a panacea, can go a long way to resolving those disputes in an efficient and final way through the supervision and imprimatur of the court.

Hopefully, with this step-by-step guide, practitioners can add another tool to their reservoir of options available to clients, which you can recommend, while demonstrating your value proposition as a trusted legal adviser.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, and Consultant at Robbins Watson Solicitors. She is an Executive Committee member of the Law Council Australia – Legal Practice Section, member of the QLS Specialist Accreditation Board, *Proctor* Editorial Committee and STEP and an Associate Member of the Tax Institute.

Notes

1. It is notable that the definitions simply refer to 'personal representative', without mention of 'legal'.
2. Note that the definition of 'trustee' in this part includes a personal representative of a deceased individual – see rule 644.
3. Referred to in this article as Part 10.
4. legislation.qld.gov.au/view/html/inforce/current/sl-1999-0111#ch.15-pt.10.
5. legislation.qld.gov.au/view/html/asmade/sl-2011-0296#sl-2011-0296. It amended the original UCPR as effective 1 July 1999 – legislation.qld.gov.au/view/html/inforce/1999-07-01/sl-1999-0111#SL-1999-0111.
6. Space doesn't permit an analysis of the process of executor's commission on this occasion.
7. In accordance with rule 651.
8. See rule 647, although the court can direct the application be served.
9. Note that this application is different to an application under s52(1)(b) *Succession Act 1981*, which provides for a legal personal representative to provide accounts to the court, and Section 8 *Trusts Act 1973*, which enables any person with an interest in any trust property to apply to court to review acts and give directions.
10. *Lee's Manual of Queensland Succession Law* (7th ed., 2013). Note that *Re Schilling* was decided pre-UCPR.
11. Note the *Acts Interpretation Act 1954* (Qld) s38 excludes the day the notice issues, but includes all ordinary calendar days, not just business days.
12. But note the court may dispense with compliance if it is considered urgent – rule 646(8).
13. Please note the author is a registered estate account assessor. For a list of all registered estate account assessors see courts.qld.gov.au/__data/assets/pdf_file/0020/173306/register-approved-account-assessors.pdf.

At last, a workplace investigations manual

by Sarah Ford

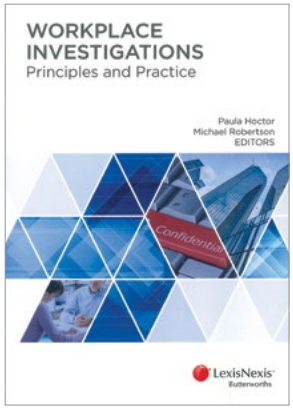
As this publication correctly identifies, the commissioning of workplace investigations is increasingly prevalent and complex.

Editors Paula Hoctor and Michael Robertson (both of national workplace investigations firm Q Workplace Solutions) have banded together to publish what could aptly be described as a workplace investigations manual.

Utilising the legal and investigative experiences and skills of 21 contributors, *Workplace Investigations Principles and Practice* is a well-written, comprehensive and practical resource.

In the first chapter, the editors articulate their hope that the book "…stands as a step along pathway towards building a professional framework for the workplace investigations market".The book manages to achieve precisely that. From the receipt of a workplace complaint/concern, up until the submission of an investigation report, each step of the process is carefully deconstructed and mapped out for the reader.

The requisite legal and ethical considerations applicable to each step are examined, and the 'how to' elements of the chapters are complemented by tools that the reader can utilise in practice. To that end, the book's checklists, example investigation plans, and example 'draft' letters are well-crafted and valuable resources.



Title: *Workplace Investigations Principles and Practice*
Author: Paula Hoctor and Dr Michael Robertson (editors)
Publisher: LexisNexis Butterworths
ISBN: 9780409347654
Format: Paperback/356pp
RRP: $139

Of particular interest to employers may be chapters 14 to 18. Those chapters address complaints of a specific nature, and allegations involving criminal and corrupt conduct. Topics such as sexual harassment, bullying, and disability discrimination are considered, and the contributors (all of legal backgrounds) provide useful commentary for employers about an employer's liability and duty of care in those contexts. Valuable tips on how to manage such investigations, as well as when to involve the police, are also proffered.

Interwoven throughout the book are also welcome reminders about fundamental concepts (such as investigator ethics, procedural fairness, and legal professional privilege) which are crucial to the success of the workplace investigations framework.

This book should be applauded for providing a much-needed best-practice guide for workplace investigations. Whilst the focus is undoubtedly on the obligations and duties of employers and investigators, the book's detailed analysis and discussion about the workplace investigations model generally should prove useful to anybody engaged in the process.

Sarah Ford is an associate at Gilshenan & Luton Legal Practice, and a member of the Queensland Law Society Occupational Discipline Law Committee.

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with Supreme Court Librarian David Bratchford

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Court rejects receiver for 'dysfunctional' business

with Robert Glade-Wright

Property – court's interim appointment of receiver to sell parties' business set aside

In *Scott* [2019] FamCAFC 9 (24 January 2019) the wife worked as practice manager in a professional practice in which the husband worked as a professional until 2016, a year after separation, when he set up his own practice. A month earlier the court appointed an independent interim manager to run the practice and directed the parties to remain involved in the business, subject to the manager's discretion.

In 2018 when the wife sought an order that the manager no longer be required to involve the husband in decisions, the husband sought the discharge of the manager and the appointment of a receiver. Cleary J removed the manager and appointed a receiver on the basis that the business was dysfunctional and each party would have the chance to buy the business from the receiver.

The Full Court (Ainslie-Wallace, Ryan and Watts JJ) said (from [22]):

"At its highest…the husband's complaints are that the manager acted inconsistently with his appointment in not providing the husband with financial information and the husband said that he would not sign the documents to roll over the financial facility…where he was unaware of the financial state of the business. (…)

[24] (…) [T]he husband's solution to his complaints about the manager and the suggestion that the business was insolvent was that a receiver be appointed to sell the business.

[25] Her Honour's reasons do not indicate the basis on which she concluded that the business was 'dysfunctional' and that management ha[d] been 'shredded' such that the manager's position was untenable…

[26] (…) Her Honour's order, if the receivers exercised their power of sale, would be incapable of being reversed at a final hearing and…the wife's hope of purchasing the business as a going concern would be lost. To sell the business would also bring the wife's employment to an end."

Property – 'equalisation' of parties' superannuation entitlements set aside

In *Bulow* [2019] FamCAFC 3 (18 January 2019) the Full Court (Strickland, Murphy & Kent JJ) considered a 20-year marriage between the wife (a registered nurse) and the husband, who had worked for the Australian Government as an engineer. The wife had superannuation worth $289,705 in two accumulation accounts in the growth phase and the husband a defined benefit interest in the Commonwealth Public Sector Superannuation Scheme (PSS) in the growth phase worth $636,013.

At first instance Judge Heffernan ordered that the parties' super entitlements be "equalised" by a splitting order under s90XT(1)(a) of the *Family Law Act*, which allocated a base amount of $173,154 to the wife. The husband appealed, arguing that the court erred in its approach, particularly given that throughout the four years since separation he had increased contributions from 2% to 10% of his salary.

The Full Court allowed the appeal, saying (from [17]):

"…[W]here the superannuation interests of both parties to family law proceedings are accumulation interests, few difficulties are usually encountered. However, an accumulation interest in the growth phase (as held by the wife in this case) and a defined benefit interest in the growth phase (as held by the husband in this case) differ in several important respects.

[18] Those differences include the method by which the ultimate benefit is calculated; the risk to the member inherent in each and, very importantly, the effect of a s90XT(1)(a) order (an order which allocates a base amount to the non-member spouse). Each and all of those differences can, and very often do, have a dramatic impact upon the justice and equity of a proposed splitting order and, in turn, its place within just and equitable orders for settlement of property. (…)

[20] Crucially…defined benefit funds…are not regulated by Part 7A of the SIS Regulations… It is therefore fundamental to a consideration of any proposed splitting order that the Court consider the governing rules of such funds contained within their specific trust deeds. It is those rules which will determine the effect of any splitting order on the underlying interest within that particular fund. As an example, within a defined benefit fund the fund's rules can dictate that a splitting order has significant effects on the formula by which a member's ultimate entitlement is calculated."

Children – child smacked by mother – no unacceptable risk of harm – lawful chastisement

In *Cao* [2018] FamCAFC 252 (19 December 2018) the father of eight and four-year-old children filed an urgent interim application for a change of residence to him, his case being that the eldest child told him that the mother had struck her. The father kept the children in his care after the disclosure notwithstanding an interim order made in 2016 that the children live with the mother. The independent children's lawyer (ICL) supported the father's case, submitting that the mother's new partner (Mr C) also posed a welfare risk to the child, who witnessed a prior assault of the mother by Mr C. Judge Obradovic dismissed the application and the father appealed.

In dismissing the appeal with costs, Austin J ([24]) said that the child's exposure to a prior assault occurred 15 months before the father filed his urgent application and ([26]) that "[i]n reality it was the first asserted risk [alleged physical abuse by the mother] which motivated the father to act". Austin J continued (from [37]):

"In summary, the primary judge found the risk of harm to the children in the mother's household was not unacceptably high because she lived alone with the children and Mr C was not a member of her household…, [and] she agreed to…an injunction restraining the children's interaction with Mr C (…)

[42]…[E]ven if the eldest child was struck by the mother…it did not necessarily mean she was physically assaulted. For example, she may only have been physically chastised. Even though corporal punishment is falling out of favour under contemporary moral standards, it is still not yet unlawful to use modest physical force to chastise a child (s61AA of the *Crimes Act 1900* (NSW)). Corporal punishment does not amount to physical 'abuse' under the Act unless it constitutes an assault (s4(1)). (…)

[43] It would…seem [from their records that] the police contemplated [that] the mother may have smacked the…child and they remained unconvinced [that] the incident amounted to an assault (…)."

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

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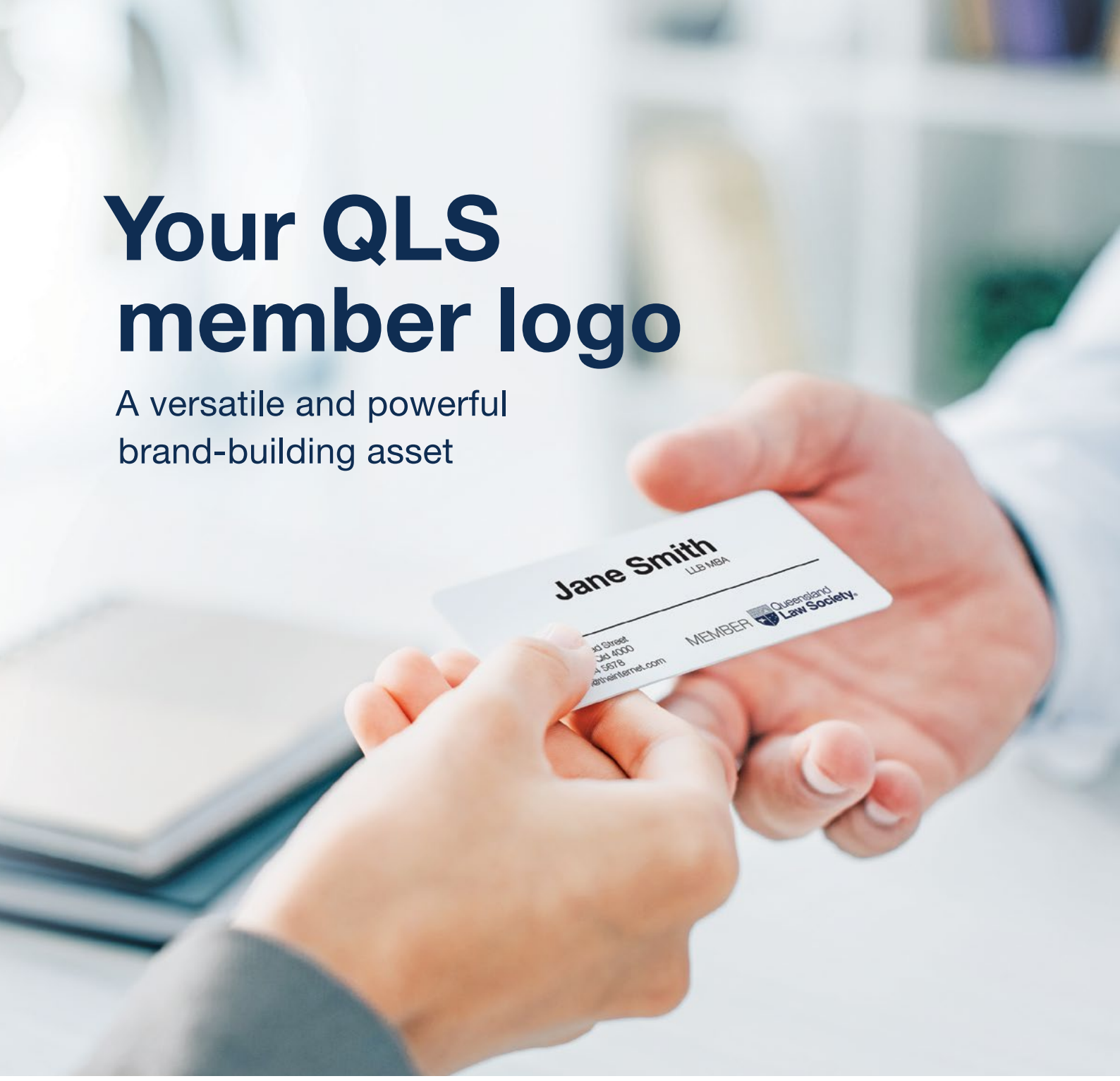

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with Bruce Godfrey

Civil appeals

Swan v Santos GLNG Pty Ltd & Ors [2019] QCA 6, 1 February 2019

Miscellaneous Applications – Civil – where the applicant seeks leave to appeal from two decisions of the Planning and Environment Court – where the grounds of the proposed appeals to this court are confined to error in law – where Santos built a 420-kilometre gas pipeline between the Surat and Bowen Basins and Curtis Island near Gladstone – where part of the respondent's [Santos'] gas pipeline was built on the applicant's properties – where Environmental Authorities were granted to Santos – where the applicant filed an originating application applying for declarations under s505 of the *Environmental Protection Act 1994* (Qld) that Santos was in breach of various conditions of the Environmental Authorities – where the applicant sought the appointment of an independent expert to report to the court on the extent of the breaches and the rehabilitations required – where the primary judge found that the orders sought at trial were beyond power – where Santos' argument is accepted that leave to appeal should be refused on the ground that the only substantive relief sought at trial was that a technical expert be appointed both to identify, or at least define the extent of, what contraventions had occurred and what should be done to remedy any such contraventions so identified or defined, and the trial judge correctly held that such relief should not be granted – where Santos' expert believed that all recommended rehabilitation had been undertaken except those obligations that required ongoing maintenance – where Santos undertook to continue that ongoing maintenance – where the trial judge considered that specific events gave considerable insight into the difficulty Santos had in dealing with the applicant and that the dispute about the soil was unnecessary and resulted only from the applicant's "stubbornness and inability to work through matters constructively and simply" – where the applicant's attitude to that issue was found to be consistent with his approach generally to issues including access for rehabilitation purposes, particularly after the commencement of the proceedings; that attitude was perhaps understandable but the trial judge concluded that it was unhelpful to the reasonable resolution of the problem – where those findings also supplied support for the trial judge's conclusion that the applicant would only ever be satisfied if an independent expert were controlled by him, which would inevitably lead to further difficulties about access and returns to the court to resolve disputed questions about implementation of any orders – where accordingly they were relevant to the exercise of the discretion whether to grant relief of the kind claimed by the applicant – where the applicant has not demonstrated that there is any error of law in either of the first and second main grounds for the trial judge's decision, each of which is of itself a sufficient reason for refusing leave to appeal – where for that reason, and because the proposed appeal involves a substantial departure from the way in which the applicant litigated the case in the Planning and Environment Court, it is unnecessary to consider the merits of the third main ground for the trial judge's decision – where the relief the applicant sought throughout, including in final submissions, was based upon the trial judge accepting Dudgeon's evidence (the expert for the applicant) about the appropriate remediation, which substantially differed from the remediation recommended by Sutherland (the expert for the respondent); and the applicant sought only the appointment of an expert to define contraventions, or their extent, and to determine the appropriate remedy – where having lost his challenge to Sutherland's evidence about how the land should be remediated and the argument about whether the orders he claimed could or should be granted (which formed a central plank of the applicant's case at trial) the applicant now seeks leave to appeal from the decision that Santos did not commit the alleged offences merely so that he can construct a very different form of relief on appeal – where the applicant was wholly unsuccessful in the proceeding below – where the primary judge ordered the applicant to pay the respondents' costs of the proceedings on the standard basis or as agreed – where s457(1) of the *Sustainable Planning Act 2009* (Qld) (SPA) provides that the costs of the proceeding are in the discretion of the Planning and Environment Court – where it was accepted that the general rule that costs follow the event did not apply and instead the non-exhaustive list of considerations in s457(2) SPA should be considered – where the primary judge observed that the court never ruled against the no-case submission – where the court did in fact rule against the no-case submission – where the trial judge's rejection of the no-case submission is not readily reconcilable with a conclusion that the claimed relief was so obviously unavailable as to justify a finding that the proceeding lacked reasonable prospects of success – where the primary judge considered the factor in s457(2)(d) SPA of whether a party commenced or participated in the proceeding without reasonable prospects of success in light of this error – whether the primary judge erred in ordering the applicant to pay the respondents' costs of the proceeding on the standard basis. In CA 2779/17, refuse the application for leave to appeal, with costs. In CA 4367/17, grant the application for leave to appeal and allow the appeal with costs, set aside the costs order made in the Planning and Environment Court on 24 March 2017, and instead order that the applicant pay the costs incurred by the respondents after 16 June 2016.

Jawhite Pty Ltd & Anor v Trabme Pty Ltd & Ors [2019] QCA 7, 1 February 2019

General Civil Appeal – where the second appellant (Mr Ryan) is the controller of the first appellant (Jawhite) and is a real estate agent – where the primary judge found the second appellant director misappropriated funds from the second respondent company – where the second appellant was ordered to repay the second respondent the misappropriated funds, including interest, by a specified date and time – where the second appellant failed to repay the misappropriated funds by the specified date and time – whether failure to pay money in accordance with the order amounted to contempt of court – where Chapter 19 of the *Uniform Civil Procedure Rules 1999* (Qld) makes express provision for enforcement of such orders and enforcement does not involve proceedings for contempt – where contempt proceedings are the subject of Chapter 20, a part of the rules that applies to non-money orders, that is to say, orders that require "a person to perform an act… within a time specified in the order" – where it follows that the requirement that payment be made by a particular time could not be enforced and was otiose – where this is simply a case in which a claimant was entitled to judgment for a sum of money – where notwithstanding Mr Ryan's exclusion from a management position and his resignation as director of the companies, Messrs Boland (the fourth respondent) and Edwards (the fifth respondent) caused Boedry (the second respondent) to send Mr Ryan a notice pursuant to the unit holders' agreement requiring him to lend the company $102,000 by way of "capital contribution" – where Mr Ryan was a "Covenantor" in relation to the unit holder Jawhite and was, therefore, liable to be bound to perform the obligations in clause 8 of the Unit Holders' Agreement – where on 4 December 2014 solicitors acting for Boedry, as trustee of the unit trust, made demand upon Jawhite and Mr Ryan for payment of $102,000 pursuant to clause 8 – where Boddice J found that the notice demanding that sum had been properly given and that it contractually obliged Jawhite and Mr Ryan to pay the money – where that finding is not challenged – where Boddice J did not find that the failure to pay the money had caused the company any loss – where a contract to lend money will not be specifically enforced – where that is because such an order would create a position of inequality – where the remedy for a breach of a contract to lend money is damages – where no loss was proved to have been caused by the breach and, consequently, no damages could be awarded other than nominal damages – where the respondents had also claimed damages for Mr Ryan's and Jawhite's breach of their obligation to furnish security to Westpac – where an agreement to give security may be specifically enforceable if damages would not be an adequate remedy – where in this case, the lender made no demand on Mr Ryan or Jawhite – where rather, it was their quasi-partners who wanted to compel Mr Ryan and Jawhite to perform their contractual obligation to give security – where the breach may have caused loss and, if it did, there was a right to claim damages and, indeed, damages were claimed – where however, the innocent parties have not proved that they have suffered any loss by reason

of the breach and so, there being no loss, no damages could be awarded – where a breach of the general obligation owed to the respondents to give some kind of security to Westpac cannot justify the court in making an equally general order to give security for a loan. Appeal allowed. The court will hear the parties as to the appropriate orders, and costs.

Santos Limited v BNP Paribas [2019] QCA 11, 5 February 2019

General Civil Appeal – where the appellant appeals against the primary judge's dismissal of its application for summary judgment on its claim for payment of a sum said to be due and owing under a performance security given by the respondent – where the primary judge refused summary judgment for the appellant because he found that the appellant had no real prospect of succeeding on its claim and there was no need for a trial – where the respondent issued to the appellant a "bank guarantee" in the nature of an unconditional bond to pay money on demand up to a stated maximum amount – where the bond requires the demand to be "purporting to be signed by an authorised representative" of plaintiff – where the bond requires demand to be in form of letter annexed to demand which states under signature line "authorised signatory of Santos Limited" – where the letter of demand stated above the signature "Santos Limited – GLNG Upstream Project" and under the signature a name and the title "General Manager Development" – where the principle of strict compliance is to be applied intelligently, not mechanically – where the strict compliance principle, which relieves the issuer of the necessity to look beyond whether the party making the demand has met the stipulations of the performance security – where in this case, those stipulations being entirely concerned with the form and content of the demand, Santos Limited was required to deliver a letter of demand on the face of which all essential matters appeared, without any obligation, or indeed entitlement, in BNP Paribas to supplement any deficiency with conjecture or investigation – where the demand must contain the essential features of the draft letter – where the draft letter, by containing the words "Authorised signatory of Santos Limited", makes it clear that an express statement of authority is required – where compliance with the requirement that the letter of demand be in the form of the draft letter would not necessitate strict adherence to the language of the latter; that would be inconsistent with an intelligent application of the strict compliance principle – where an intelligent application of the strict compliance principle did require BNP Paribas to look for a statement of the signatory's authority – where, as his Honour observed, Mr Simpson's signature coupled with his position description did not amount to a representation that he was an authorised representative or authorised signatory – where the words "General Manager Development" merely indicated that he held a particular position in the company and said nothing as to his authority in that role – where the letter of demand contained no statement of his authority to sign on Santos Limited's behalf – where for BNP Paribas in the absence of such a statement to resort to inference would have been to disregard the requirement for strict compliance – where Santos Limited's notice of demand did not comply with the requirements of the performance security – where the primary judge correctly gave summary judgment in BNP Paribas' favour. Appeal dismissed with costs.

Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Limited; Wiggins Island Coal Export Terminal Pty Limited v Civil Mining & Construction Pty Ltd [2019] QCA 12, 6 February 2019

General Civil Appeals – where Wiggins Island Coal Export Terminal Pty Ltd (WICET) is the corporate vehicle for a joint venture to develop and operate a coal export terminal – where Civil Mining & Construction Pty Ltd (CMC) was contracted by WICET to complete some of the earthworks and civil works required for the construction of the terminal – where WICET caused CMC to be delayed by 208 days in completing the work under the contract, for which CMC was entitled to an extension of time to the date for practical completion – where in a section of the contract dealing with variations the contract contained a table headed "Schedule of Daywork Indirect Personnel and Facilities Rates" (DIPFR) – where the central question on CMC's appeal is whether the DIPFR schedule contains rates such that it can be said to be one where the contract "prescribes specific rates…to be applied in determining the value" of the CMC's on-site overhead costs for the 208 days of delay caused by WICET – whether on a proper construction of the contract the DIPFR schedule is not one that is prescribed under the relevant clause of the contract – where Clause 35.5 and 36 of the contract provided that if CMC was granted an extension of time for delay, then WICET would have to pay for "on-Site overheads" attributable to the delay, valued under Clause 40.5 – where in turn, Clause 40.5(a) provided that "if the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used" – where Clause 40.5(a) of the contract provides that what the principal is to pay is an amount "ascertained by the Principal's Representative", and then sub-paragraphs (a)-(h) provide various alternative methods of valuation, and some components that have to be applied in reaching the valuation – where sub-clause (a) provides that the principal's representative shall use particular rates, but only "if the Contract prescribes specific rates…to be applied in determining the value" – where use of the phrase "if the Contract prescribes" means there must be something to which one can point, on the face of the contract or schedules, that links the rate to be used to the valuation to be carried out – where it is unable to be concluded that there is such a link in relation to the use of anything in section C-4, and in particular the DIPFR schedule, that would suggest that the contract was prescribing any of those rates to be used in determining the value of the on-site overheads under Clause 36 – where the contract simply does not prescribe the DIPFR schedule for the purpose of Clause 40.5(a) – where WICET's appeal concerned the admission into evidence of Exhibit 31, also referred to as the Vance Measurement – where in general terms WICET complained that Exhibit 31 was admitted into evidence over its objection, and that the document represented a radical departure from CMC's pleaded case – where the issue between the parties was whether CMC had been delayed overall in completing the earthworks – where WICET, who engaged their expert, Mr Abbott, to produce a productivity analysis to show that CMC was not so delayed – where Exhibit 31, the Vance Measurement, responded to the pleaded case and to Mr Abbott's report – where Mr Vance simply sought to demonstrate that there were antecedent delays in the period 23 November 2011 to 19 February 2012, by reference to the extra time the works took to complete – where Mr Vance's calculations were consistent with the pleaded case and relevant to the issues alive on the pleadings – whether the trial judge was correct to admit Exhibit 31, the Vance Measurement. In CA 4068 of 2018, the appeal is dismissed, with costs. In CA 4286 of 2018, the appeal is dismissed, with costs.

Palmer v Parbery & Ors; QNI Metals Pty Ltd & Ors v Parbery & Anor [2019] QCA 27, 22 February 2019

General Civil Appeals – where these appeals seek to overturn freezing orders made against the appellants who are some of the defendants in a proceeding brought by the respondents in the Trial Division (the judgment) – where their claims arise from the liquidation of the respondent company (Queensland Nickel) – where liquidators commenced proceedings against former directors and certain companies within the corporate group – where the liquidators were successful in an application for freezing orders and ancillary orders – where the respondents' case is that, as a director of Queensland Nickel, Mr Palmer owed to the company statutory and general law duties to ensure that the property of Queensland Nickel was used only for the purposes of the joint venture and not for the benefit of Mr Palmer or other entities which he controlled – where the payments totalling more than $200 million are alleged in each case to be the result of a breach by Mr Palmer of these duties and to have resulted in a loss to Queensland Nickel because the amount has not been repaid – where the primary judge found that there was a good arguable case that Mr Palmer was a shadow director – where the primary judge found that there was a good arguable case that Mr Palmer breached company statutory and general law duties – whether the primary judge erred in finding that there was a good arguable case – whether a good arguable case requires a finding of fact on the balance of probabilities – where no error is demonstrated in the conclusion of the primary judge that there was a good arguable case that Mr Palmer was a shadow director (when not an appointed director) at all relevant times – where his Honour did not need to find that, more probably than not, Mr Palmer was a shadow director – where the evidence of Mr Mensink (another director of Queensland Nickel) and Mr Wolfe (Queensland Nickel's chief financial officer) considered with the background of Mr Palmer's ownership of Queensland Nickel and the facts and circumstances of the impugned payments from its funds amply supported the finding that there was a good arguable case in this respect – where the primary judge was correct to find that what was paid was an asset of Queensland Nickel, albeit an asset which was subject to a trust, and there was a good arguable case that the payments were made in breach of the trust – where overall, Mr Palmer's submissions demonstrate no error by the primary judge in the consideration of whether there was a good arguable case against him to the extent of the amount of the restraint imposed in his case – whether the primary judge erred in finding that there was the requisite danger that a judgment would be unsatisfied because assets would be dissipated – whether an applicant seeking a freezing order must prove that the purpose of a likely disposition is to put the other party's assets beyond the applicant's reach – whether an inference of a risk of dissipation should be determined by the standard of a prudent, sensible commercial person – whether the evaluation of the existence of the risk of

dissipation should be conducted in a manner analogous to the approach taken in applications for interlocutory injunctions – where for the most part, the primary judge had to assess the risk of dissipation by a defendant without the benefit of evidence of that defendant's financial position – where what mattered, in his Honour's view, was Mr Palmer's ownership and control of the companies and Mr Palmer's propensity to use that control in order to cause assets to be dissipated – where there was no error – whether the primary judge properly considered the appellants' evidence of reputational damage that would be caused by the making of a freezing order – where this evidence was not overlooked by the primary judge, and the submission goes no further than a complaint that it was given insufficient weight – where the judge considered the effect upon the defendants' commercial reputations, but was unpersuaded that "further reputational damage would be caused by the making of the orders sought [which was] additional to the reputational damage which must already have been caused by the insolvency of Queensland Nickel and associated termination of employees" – whether a freezing order should not have been made because the assets frozen were more than twice the value of impugned payments and outstanding liabilities – where in rejecting that argument, the judge accepted the argument in response for the plaintiffs, namely that orders in the terms which were made were justified to ensure that an eventual judgment would not be frustrated, bearing in mind that ultimately the assets of a defendant could not be ordered to be available to satisfy a judgment against another defendant in recognition of "the separate cases against the defendants" – where there was no error in that reasoning – whether the primary judge failed to give adequate reasons – whether the primary judge's amendment to a freezing order and accompanying reasons for that amendment cured the failure to provide reasons for certain orders in the original freezing order – whether the primary judge failed to provide adequate reasons by not stating whether the freezing order was made pursuant to the court's inherent jurisdiction or the powers conferred by the *Uniform Civil Procedure Rules 1999* (Qld) – where his Honour did explain his reasoning as to the basis for these orders – where all that matters for this ground of appeal is that his Honour did reveal his reasoning and Mr Palmer's argument to the contrary must be rejected – where Mr Palmer filed an application to adduce further evidence as to his financial position – where Mr Palmer was self-represented – where Mr Palmer's companies were represented and shared his personal interest on most issues – where the evidence was extensive and no reason was provided as to why it was not tendered in the primary proceeding – whether the court should receive the further evidence – where Mr Palmer's submissions do not explain why this more detailed evidence as to his financial position was not tendered during the hearing of these applications – where although Mr Palmer was without legal representation, he is not the usual litigant in that position: not only has he the means to afford his own lawyers but his companies are very ably represented, and on this and most issues, they have the same interest – where by this application, he seeks to have this court consider extensive further evidence, in the form of an affidavit by him, without his presence at the hearing – where this is after some nine days of hearing before the primary judge, during which Mr Palmer should have adduced this evidence – where the application is refused to have it received in this court – where the primary judge raised a matter of concern about Mr Palmer's testimony in the absence of Mr Palmer – where the primary judge provided Mr Palmer an opportunity to, in effect, re-examine himself – where the primary judge refused an application to adduce further evidence – where the primary judge disclosed a conversation that concerned a communication between another judge of the Supreme Court and a judge of the Federal Court – where the primary judge granted an adjournment – where the primary judge made unqualified findings of fact – whether the circumstances indicated actual or apparent bias affecting the disposition of the applications for freezing orders – whether the primary judge ought to have recused himself for denying a party procedural fairness – where Mr Palmer did not appear at the hearing in this court, but the court agreed to receive yet further submissions from him, described as "speaking notes" and running to 33 pages, and it is within that document that his argument based upon the 2016 judgment is developed – where it may be noted that there was no argument by the joint venturers and Queensland Nickel Sales, either prior to the 2016 judgment or in their appeal against it, that there was any actual or apprehended bias on the part of the judge – where there is no basis for concluding that there was actual or apprehended bias by the judge in his consideration of the matter which was the subject of the 2016 judgment – where the correctness of his opinion on the critical issue in that judgment was unanimously upheld by this court – where in the (present) judgment, his Honour set out the critical passages from the 2016 judgment, explaining their relevance in terms which made it clear that his mind was not closed on the question of whether Queensland Nickel had a right of indemnity or reimbursement, and that what had to be decided was whether, on the evidence before him in 2018, Queensland Nickel had a good arguable case and an existence of such rights in relation to expenses and liabilities properly incurred by it on behalf of the joint venturers – where there was no apparent bias from the reasoning in the 2016 judgment, in his Honour's consideration of the question of whether, on the evidence led in the present matter, Queensland Nickel had a good arguable case for the existence of such rights over the joint venture property. In CA 6561/18, the appeal be dismissed with costs. In CA 6047/18, the application filed on 24 July 2018 be dismissed with costs and the appeal be dismissed with costs.

Queensland Nickel Sales Pty Ltd & Ors v Mount Isa Mines Limited [2019] QCA 32, 29 August 2018; 30 August 2018

Application for Extension of Time/General Civil Appeal – where the notice of appeal was not filed in time – where the date by which a timely notice of appeal could have been filed was 18 December 2017 – where allowing for the intervening court holidays when the Registry was closed, the application and the proposed notice of appeal were filed some six working days after that date – where the solicitor's evidence provides an adequate account of why there was a delay in filing – where significantly, the period of the delay is very short – where MIM has not put on evidence deposing to any prejudice suffered by it in consequence of the delay – where the application for extension of time is dependent upon the prospects of success of the proposed grounds of appeal – whether the application for extension of time is granted – where the respondent brought an originating application seeking a declaration that the respondent could lawfully remove the appellants' equipment – where the appellants argued that the matter was not appropriate for determination by originating application and should proceed by way of pleadings – where the primary judge found the arguments advanced by the appellants were "clearly unarguable" – where the appellants appealed against the dismissal of their application to have the matter proceed by way of pleadings – whether the primary judge erred in determining that the appellants' arguments could be determined summarily – where the duty to give reasons required that a concise, reasoned explanation for the rejection of the "defences", or of a finding that the QN companies lacked standing to raise them, ought to have been given – where the reasons given on 20 November 2017 were deficient in that they did not contain such an explanation – where that is not to say that the deficiency necessarily has any practical consequences for the proposed appeal – where it is only if one, at least, of the "defences" is meritorious and one, at least, of the QN companies has standing to raise the defence or defences, that this ground would avail them – where a claim for damages for trespass was not before the court at either hearing in August 2017 – where perusal of the transcript of the hearing on 20 November 2017 and of their written outline of submissions reveals that the QN companies did not substantively put in dispute MIM's submissions concerning trespass and its entitlement to damages or challenge the relevance or accuracy of the evidence as to quantification of damages – where no adjudication of competing arguments on those issues was required – where there was, therefore, no obligation upon the primary judge to have given reasons for the award of damages for trespass – where the respondent granted a licence for non-exclusive access to a berth at the Port of Townsville (the premises) for the purposes of berthing vessels, unloading and loading nickel ore and refined products and for the construction, installation and maintenance of certain works – where the licence agreement contained an essential term to punctually pay all harbour dues – where the respondent alleges that harbour dues were not paid – where the respondent alleges that the licence agreement was terminated because of failure to pay the harbour dues – whether the licence agreement was terminated – whether the purported termination of the licence was void by reason of s440B(b) of the *Corporations Act 2001* (Cth) – whether the appellants can rely upon relief against forfeiture of the licence – whether the right of termination purportedly exercised by the respondent was void as a penalty – where the clauses permit MIM to terminate the licence agreement – where termination takes effect without prejudice to accrued rights or liabilities but without the imposition of any additional or different liability on those companies – where it follows that these clauses are not penalty provisions for the purpose of the penalties doctrine – where as a matter of legal principle, it is clear that the doctrine has no application to them – where the respondents were awarded damages for trespass to property because of equipment belonging to the appellants trespassing on the premises – whether the primary judge correctly calculated an award of damages for trespass – where from the perspective of principle, *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245 confirms that the cost of remedial action to prevent damage threatened by a continuing nuisance is

not recoverable at common law – where the harm for which the damages were awarded to MIM was not harm to be incurred prospectively by it – where the relevant harm is the imposition on MIM of the burden of having to incur expenditure in removing the equipment in the face of the refusal of its owners, QNR and QNM, to do so – where the burden was imposed on MIM at, or shortly after, the termination of the licence agreement and the imposition of it continued thereafter – where thus this harm has already been incurred; its occurrence is in no sense prospective – where the challenge to the award of damages at common law cannot succeed – where it is noted that it is questionable whether the award of damages against QNS was appropriate, given that it has never owned any of the equipment – where, however, in absence of any appeal by it on that ground, the award of damages against it must stand – where the QN companies seek to raise, for the first time, a number of arguments which are specific to three large items in the list of equipment in Schedule 1 to the originating application – where it is accepted that the arguments encapsulated under this ground were not developed at the hearing in August 2017; nor were they advanced at the November 2017 hearing – where there is no good reason why they could not have been raised at either hearing – where there is, therefore, validity in the proposition that, in the interests of finality in litigation, the directions sought under this ground ought not be made – where there is one countervailing consideration – where directions will be made for litigation of the relief against forfeiture "defence" – where there is a likelihood that that litigation will involve resolution of the question whether the installations are fixtures at law or not – where it is considered that the interests of justice are balanced in favour of permitting the appellants to advance the arguments in respect of the installations in the litigation that is to take place. Extend time to appeal until 1 March 2018 and allow the appeal to a limited extent in order to accommodate the appellants' success with respect to grounds e(ii) and l. Order that the relief against forfeiture "defence" and the arguments raised by ground k of the appellants' revised proposed notice of appeal be determined on pleadings in the Trial Division. It is appropriate that Orders 1, 4 and 5 made 20 November 2017 be set aside. Parties to provide brief submissions on costs. (Brief)

Criminal appeals

R v Edwards [2019] QCA 15, 12 February 2019

Sentence Application – where the applicant pleaded guilty to the offence of using a carriage service to access child pornography material – where he was sentenced to 15 months' imprisonment, to be released on a $500 recognisance after serving two months, on the condition that he be subject to probation for a period of two years – where defence counsel contended that the imposition of a period of actual custody is manifestly excessive – where the applicant was a serving federal police officer – where the majority of the child pornography material were graphic representations in the form of computer generated figures engaged in sexual activity or stories – where it was submitted the nature of the offending did not attract a period of actual custody – where it has long been accepted that the possession of child pornography material creates a market for the continued corruption and exploitation of children – where the courts have long accepted and stressed that possession of child pornography is not a victimless crime – where Category 6, whilst having the feature of not involving (at least directly) real persons in it, is not to be treated as substantially different from the other categories – where it is simply different from them, just as they are different from one another – where Category 6 material is not harmless just because it is anime, cartoons or stories – where it is not harmless just because it does not involve real children – where the content of the Category 6 material was abhorrent – where in particular the stories of raping babies, when seen in the context of an exploration of how to have sexual intercourse with a baby without damage, are of great concern – where that was the sort of conduct that cries out for general deterrence, and amply justifies the imposition of a period of actual custody – where once it is conceded that imprisonment was an appropriate sentence, it is in my view very difficult to demonstrate that a period of actual custody was beyond the sentencing discretion – where the sentencing judge was correct to consider the applicant's employment as an AFP officer as an aggravating factor – where firstly, as a policeman the applicant swore he would uphold laws, not break them – where the community, and the vulnerable in the community including children, had the right to expect he would do so – where secondly, shortly before the offending occurred the applicant recognised that accessing child exploitation material was wrong – where he put in his own integrity report disclosing that he had accidentally accessed some, and said he was no longer doing so – where thirdly, he evidently knew what he was doing was wrong as he took steps to anonymise his access to the websites, and to hide the history of internet searches – where fourthly, when discovered he lied to the police about having had access to such material, and about taking steps to hide it – where in doing all those things the applicant was in a different position from others because of his role as a federal policeman. Application refused.

R v HBV [2019] QCA 21, Date of Orders: 7 December 2018; Date of Publication of Reasons: 19 February 2019

Sentence Application – where the applicant is an Indigenous boy who has just turned 16 years of age – where the applicant was a juvenile – where the applicant was convicted of one count of armed robbery with actual violence committed in company and sentenced to nine months' detention – whether the trial judge erred by considering irrelevant matters – where the applicant has been diagnosed with intellectual impairment together with Attention Deficit and Hyperactivity Disorder Conduct Disorder – where it is clear that the applicant is intellectually capable of understanding the requirements of the orders made by the court, and is no doubt intellectually capable of complying with suitable programs designed for his rehabilitation – where 1 of the Charter of Youth Justice Principles which is Schedule 1 to the *Youth Justice Act 1992* (Qld) specifically makes protection of the community a relevant factor in sentencing a child – where counsel for the applicant though, submitted that

the subjective belief of a Child Safety officer as to the applicant's risk of reoffending is irrelevant and the sentencing judge ought not to have taken that belief into account – where as the argument developed, the real complaint emerged, namely that the sentencing judge equated "protection of the community" with preventative detention, and the latter is an irrelevant consideration – where in *Veen v The Queen [No.2]* (1988) 164 CLR 465, the High Court explained that protection of the community is a relevant consideration in sentencing but a sentence should not be increased beyond what is proportionate to the offence, in reliance upon considerations of preventative detention – where that statement of principle was repeated in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 – where protection of the community as a sentencing consideration under the *Youth Justice Act* should be understood in that way – where her Honour did not expressly say how she took into account the consideration of the protection of the community – where however, actual detention of a child is a last-resort measure – where there is clear evidence of the applicant demonstrating insight into his conduct and there is evidence of rehabilitation being under way – where the Crown prosecutor appearing in the Childrens Court recognised and acknowledged as much – where the inference is drawn that her Honour has been distracted, impermissibly, by considerations of preventive detention. Leave granted. Appeal allowed. Sentence of detention of nine months is confirmed. The detention order be immediately suspended and that the applicant be immediately released from detention upon a conditional release order for a period of three months. Requirements of conditional release order listed. A conviction is not recorded. (Brief)

R v Randall [2019] QCA 25, Date of Order: 15 February 2019; Date of Publication of Reasons: 22 February 2019

Sentence Application – where the applicant plead guilty to manslaughter – where the applicant killed his 10-week old son with a single punch to the stomach – where the applicant was sentenced to nine years' imprisonment with parole eligibility after five years – where s184(2) of the *Corrective Services Act 2006* (Qld) provides parole eligibility after serving half of the sentence – where the trial judge exercised the discretion under s160C(5) of the *Penalties and Sentences Act 1992* (Qld) to postpone the applicant's parole eligibility date by six months – whether the trial judge erred in postponing the statutorily mandated halfway parole eligibility date – where he told his wife that he had performed CPR incorrectly and that this was what caused Kai's injuries – where he told a social worker that he blamed the 000 operator for giving him wrong instructions – where from the day of the killing until the eve of his murder trial, the applicant consistently maintained these stories and maintained his innocence – where two days before the trial, the applicant said that he was willing to plead guilty to manslaughter – where the DPP accepted this plea and the applicant was re-arraigned on one count of manslaughter and pleaded guilty – where the Crown accepted that the killing was "spontaneous" – where more accurately, in our respectful opinion, the applicant's formation of his intention to deliver the punch to hurt Kai was spontaneous – where the execution of this plan required a few moments before it could be done, moments to move into position and moments in which there was just time to reflect, if the applicant was capable of reflection, about the thing he was about to do – where during submissions, Davis J expressed his doubt whether this was really an explanation at all – where in our respectful opinion, it does furnish an explanation – where it is consistent with his shirking of culpability, with his self-pity, and his proclivity to foist blame upon anyone or anything other than himself: the Queensland Police Service, the 000 operator's defective instructions and external circumstances – where the applicant submits that a reduction of penalty to take into account the plea "was to be reflected in the reduction of the head sentence" and that the significance of a guilty plea is not to be taken into account in the exercise of the discretion to postpone parole – where he cites two cases as authority for that proposition: *R v McDougall and Collas* [2007] 2 Qd R 87 and *R v Assurson* [2007] QCA 273 – where those cases do not support the existence of any such remarkable principle –where the exercise of the discretion under s160C(5) of the *Penalties and Sentences Act* to postpone a parole eligibility date must be supported by a "good reason" – where as Davis J observed, the purpose of the discretion to vary a parole date from the default halfway mark that the Act otherwise imposes, is to empower a sentencing judge to achieve a just sentence in all the circumstances – where that purpose is, in our view, the paramount objective of sentencing – where the discretion to fix a parole eligibility date is unfettered and the significance of a guilty plea for the exercise of that discretion will vary

from case to case – where consequently, there can be no mathematical approach to fixing such a date. Application refused.

R v PBC [2019] QCA 28, 26 February 2019

Appeal against Conviction – where the appellant was convicted of indecent treatment and rape – where the complainant had consensual sexual activity with a person other than the appellant – where the appellant at trial argued that the alleged conduct was fabricated because there were similarities between the complainant's description of the alleged conduct and the complainant's description of the consensual sexual activity – where the prosecutor in their closing address suggested that the similarities were the result of the sexualisation of the complainant by the appellant – where the prosecutor suggested that there was a "very plausible explanation" for the incident with E which was the conduct of the appellant of which she complained – where the prosecutor said that if there was such a similarity between the intercourse with E and the alleged intercourse with the appellant, the jury might infer that she had applied her experience of sex with the appellant in choosing "the same position" with E – where the effect of that argument was that the incident with E was something which was probative of the appellant's guilt – where that was not an argument which defence counsel should have anticipated – where the submission had the potential to make the jury think that the complainant had had no other experience, an inference that might have been fortified by the fact that she had been cross-examined only about the incident with E – where the appellant at trial was not permitted to ask the complainant about their sexual history other than the single instance of consensual sexual activity – where because the prosecutor's argument was at least potentially misleading, it warranted some intervention by the trial judge – where defence counsel at trial did not seek a direction about the prosecutor's argument – whether it was unfair that the appellant was not able to ask the complainant about any other previous sexual activity – whether defence counsel made a forensic decision not to seek a direction – whether there was an unfairness as there were distinct risks to the appellant's case at trial if defence counsel chose to seek a direction or chose not to seek a direction. Appeal allowed. Quash the appellant's conviction. The appellant be re-tried.

R v Thompson [2019] QCA 29, 26 February 2019

Appeal against Conviction – where the appellant was convicted of murder – where at the trial, it was uncontested that the appellant killed Mr Knyvett by striking him several times on the head with a bottle – where the appellant submitted at trial that the killing was the result of sudden provocation in the form of an unwanted sexual advance – where s304 *Criminal Code* (Qld) as amended by the *Criminal Law Amendment Act 2017* (Qld) did not apply – where the primary judge erred by misdirecting the jury to apply s304 *Criminal Code* (Qld) as amended by the *Criminal Law Amendment Act 2017* (Qld) – where a jury would have to consider whether all of the circumstances, including any relevant history between the accused person and the deceased, could have combined to cause that response on the part of an ordinary person – where the jury here was not instructed in those terms and the instructions which were given raise the possibility that the jury, or some of them, assessed the circumstances as unexceptional without considering the questions required to be answered under s304 as it was for the purposes of this case – where put another way, it is possible that the jury did not consider at all the defence of provocation which, the parties evidently agreed, they were to consider – whether "no substantial miscarriage of justice has actually occurred" – whether there was a substantial miscarriage of justice whether or not, in the court's view, the appellant was guilty of the offence of which he was convicted – whether operation of the proviso precluded – where in order to apply the proviso in the present case, this court is asked to exercise the function of the jury to determine whether the defence of provocation was established, when quite possibly that function was not exercised by the jury – where if provocation was not considered, the jury did not determine whether the appellant was guilty of murder, but instead considered only whether the prosecution had proved the facts which it had to prove – where it may be said that in this case, the application of the proviso would "substitute trial by an appeal court for trial by jury". Appeal allowed. Quash the appellant's conviction. The appellant be re-tried.

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.

In May...

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

April

30 Guide to trust accounting

Essentials | 12.30-1.30pm | 1 CPD

Livecast

Aimed at junior legal staff or those wanting to improve their fundamental knowledge of trust accounting regulation. This livecast provides access to the Society's in-house experts and is your essential guide to trust accounting compliance.

PM&BS

May

01 Effective time recording and billing narration

Essentials | 12.30-1.30pm | 1 CPD

Livecast

Hear practical tips to record time confidently, efficiently and ethically. Be guided on how to communicate the value of your time and be compensated accordingly.

PM&BS

02 Practice Management Course: Sole practitioner to small practice focus

PMC | 2-4 May | 9am-5.30pm, 8.30am-5pm, 9am-1.30pm | 10 CPD

Brisbane

The QLS Practice Management Course (PMC), allows you to develop the essential managerial skills and expert knowledge to manage a legal practice. Learn the art of attracting and retaining clients in the new law environment, managing business risk, trust accounting and ethics.

PLE PM&BS PS SL

02 Young Professionals Networking Evening

5.30-7.30pm

Brisbane

Build your network and potential business opportunities. Join fellow young legal and accounting professionals for an evening of drinks and canapés.

07 Introduction to family law

Introductory | 7-8 May | 8.30am-4.30pm, 8.30am-4.15pm | 10 CPD

Brisbane

Develop your knowledge and skills in family law. Receive practical guidance on the most common processes and tasks associated with handling family law matters.

PLE PS SL

08 Negotiations and settlements

Essentials | 12.30-1.30pm | 1 CPD

Livecast

Negotiation skills are essential for practitioners at all levels. Explore the fundamental skills and strategies needed to conduct legal negotiations more effectively in non-contentious matters.

PS

10 Solicitor Advocate Course: Foundations

Solicitor Advocate Course | 10-11 May 5-7pm, 8.30am-4.30pm | 9 CPD

Brisbane

Delegates will increase their skill base for advocacy work in courts and tribunals, and enhance their ability to deliver personalised and effective advocacy.

PLE PS SL

16 QLS Open Day

Essentials Masterclass Hot topic 1-5.30pm | 3 CPD

Brisbane

Law Society House opens its doors for an afternoon of complimentary professional development and showcasing of memeber benefits.

PS SL

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

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

HOT TOPIC Keep up to date with the latest developments in an area of practice

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What's your practice worth?

by Graeme McFadyen

The 2017 Macquarie Bank Legal Benchmarking Report included an interesting commentary about succession planning, noting that only 44% of the survey's 275 respondents nationwide had a succession plan.

My expectation is that the majority of medium and small-firm principals whose turnover is less than $5M will struggle to justify any goodwill payment on the sale of their practice.

Goodwill arises when the value of a business exceeds the value of its net assets. However, the concept of goodwill attaching to law firms is a vexed and much misunderstood issue. Usually goodwill is only payable if a practice enjoys a significant and, importantly, *sustainable* profit.

It is little comfort to practitioners, but the reality is that, as the market becomes more competitive, profitability becomes less predictable. Unless a practice enjoys a brand which has a demonstrated history of profitability and, importantly, a reasonable expectation of continued profitability, then there is unlikely to be a queue of ready buyers.

Demonstrated profitability

This is the single most important variable in the value chain. So what is the profitability required for a legal practice to notionally qualify for goodwill? Let's look at both the ALPMA/Crowe Horwath and the Macquarie Bank legal benchmarking surveys for 2017 in respect of mid-sized firms (turnover $5-20M) and small firms (turnover less than $5M). Both surveys provided extraordinarily similar outcomes.

Traditionally, 25% was the median profitability benchmark used for legal practices – that is, 25% was regarded as the targeted norm. And just to be clear, this is 25% *before tax.* This proposition proved to be true, as both surveys found that the average net profit of law firms in the $5-20M and <$5M cohorts was indeed 25%.

However, as they drilled deeper a different story emerges. Both surveys split their revenue groups into better-than-average and worse-than-average performers. This further analysis showed that the better-than-average performers in both groups achieved an impressive average net profit of around 40%. However, the under-performers in both groups, the majority, scored a dismal 13%. At 13%, you are making a bare wage at best.

Coincidentally, IBISWorld founder Phil Ruthven recently reviewed the profitability of international service industries.[1] His research shows that the international best practice benchmark for service industry profitability was 22% after tax. The 25% profit benchmark referred to above is pre-tax, so if we assume a tax rate of say 35%, then to meet the international benchmark of 22% after tax, law firms need to achieve 33% before tax.

This performance measure sits comfortably with the two surveys noted above. So for the purposes of this article, it is argued that to qualify for any goodwill consideration, a legal practice's profitability needs to be 33% or better. And it needs to be sustainable.

Predictability of profits

Predictability is a function of brand strength, areas of practice, quality and transferability of clients and degree of competition.

Brand strength

With more intense competition, the sustainability of profits has become more difficult, especially with new disruptive legal models and new technologies. Consequently, those practices which do not have a strong brand are having to compete on price in a number of areas of practice.

Areas of practice

George Beaton recently identified conveyancing, wills and family law as three areas of practice which are now largely commoditised and therefore largely compete on price[2]. Beaton concludes that "commoditization means competing on price…and competing your profits away".

Quality and transferability of client base

The quality and transferability of the client base in this context has enormous value. If the client is a large corporate which uses a particular legal brand as a matter of corporate choice, then that brand has significant value. Regrettably though, this is not the experience of the smaller law firms whose mainly consumer clients, believing that all lawyers have similar skill sets, tend to choose based largely on convenience and price.

Degree of competition

If the majority of client relationships are grounded in convenience and price, it is inevitable that the addition of more competition and disruption must erode the relationship over time as your clients encounter other lawyers in their social and commercial lives, both physically and via the now inevitable Google search.

Conclusion

What the above analysis demonstrates is that no principal can assume that there is a capital windfall at the end of the road. This realisation should alert practitioners to the need to optimise profits today rather than wait for some future windfall that is likely to become less achievable over time.

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

Notes

1 "It takes more than serendipity or good fortune to achieve strong profitability", Phil Ruthven in *The Australian*, p27, 12 September 2018.

2 "All would agree that conveyancing, wills and family law, to name some, are familiar, largely commoditized forms of legal services provided to consumers" in *Remaking News of the Week* posted by George Beaton on 13 September 2018, remakinglawfirms.com/remaking-news-of-the-week-law-firm-partnerships-are-losing-their-lustre.

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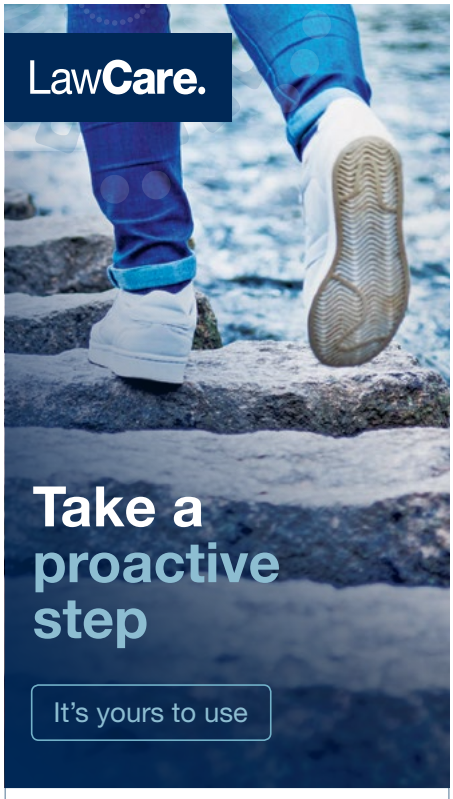


‘Mother’s ruin’ a Tassie treasure

with Matthew Dunn

Pepperberries, saffron, sheep whey and changing archaic legislation – Tasmania has led the rebirth of craft distilling in Australia and, more recently, brought an internationally acclaimed approach to the gin boom.

Yes, we are in a gin boom – it is hipster and fashionable, bespoke and craft. Sales are booming and small-scale distilleries are appearing everywhere.

The New York Times recently mused about the revolution in Tasmania, noting that at least 26 gin distilleries are now in operation with more on the way. “Most of the gins – distilled by young, small-batch entrepreneurs – have popped up in the last five years,” its report said.

The incredible rise of gin distilling is occurring across the country, but where the Tasmanian experience is different is in the unusual flavourings being used, the symbiosis with whisky production and the determination of a man named Bill Lark, whose efforts meant it could all happen.

Today Bill Lark is a doyen of the finest Tasmanian Lark whisky, but in the late 1980s he was just a man who wanted to give making his own whisky a go. Sadly, the Commonwealth *Distillation Act 1901* prevented small-scale distilling (to prevent moonshining and the generally corrupting influence of strong liquor) and largely embodied the strictures of the UK’s ‘Gin Act’ of 1751.

The UK restrictions were introduced in response to a ‘gin epidemic’ of average annual consumption of spirits of over two gallons per capita at its peak, leading to the infamous reputation of gin as ‘mother’s ruin’, causing laziness and social and moral decay. The Australian strictures reflected this policy and remained unchanged until 1989 due to the efforts of Bill Lark, his local MP Duncan Kerr and the accordance of then Small Business and Customs Minister Barry Jones. Without this key legislated change, gin production would still be the province of industrial-scale operators.

Competition in the market in Tasmania has driven producers to look for new and interesting ways to set their products apart:

- The Sullivans Cove Hobart No.4 Gin adds four unique native ingredients to the traditional juniper – native lemon myrtle, anise myrtle, wattleseed and pepperberry.
- The Grower’s Own Saffron Gin is flavoured with Tasmanian-grown Tas-Saff product.
- The Hartshorn Distillery has its much celebrated Sheep Whey Gin to complement its sheep milk cheeses.
- The Lawrenny Highlands Gin features the unique flavours of blue cypress from just outside the distillery shed door.

From prompting legislative change to riding the gin boom, Tasmania continues to set itself out as a destination for unique wine and spirits.

Note: This article has been shortened. A complete version with footnotes and extra tasting notes is available from qls.com.au/wineapril2019.

The tasting

The first was the **Hartshorn Distillery Sheep Whey Gin** which neat had a nose of citrus and juniper. The palate was a delicate mix of lime, pith, peppermint and floral warmth. The attack was relatively quiet and with the addition of tonic a slight creaminess appeared which would suit a rich cheese handsomely.

The second was the **Sullivans Cove Hobart No.4 Single Malt Gin** which was pepper and wild Australian bush mixed with an alcohol hit on the nose. Sullivans Cove recommend the gin not be mixed, save perhaps for an ice cube as if it were one of their whiskies. On the palate it rightly came alive and was magic with an attack of the pepperberries and a flash on anise liquorice, dimming on the long, long palate to the reprise of the wild Australian bush. This is truly gin made to be experienced like a fine whisky. Truly unique and compelling.

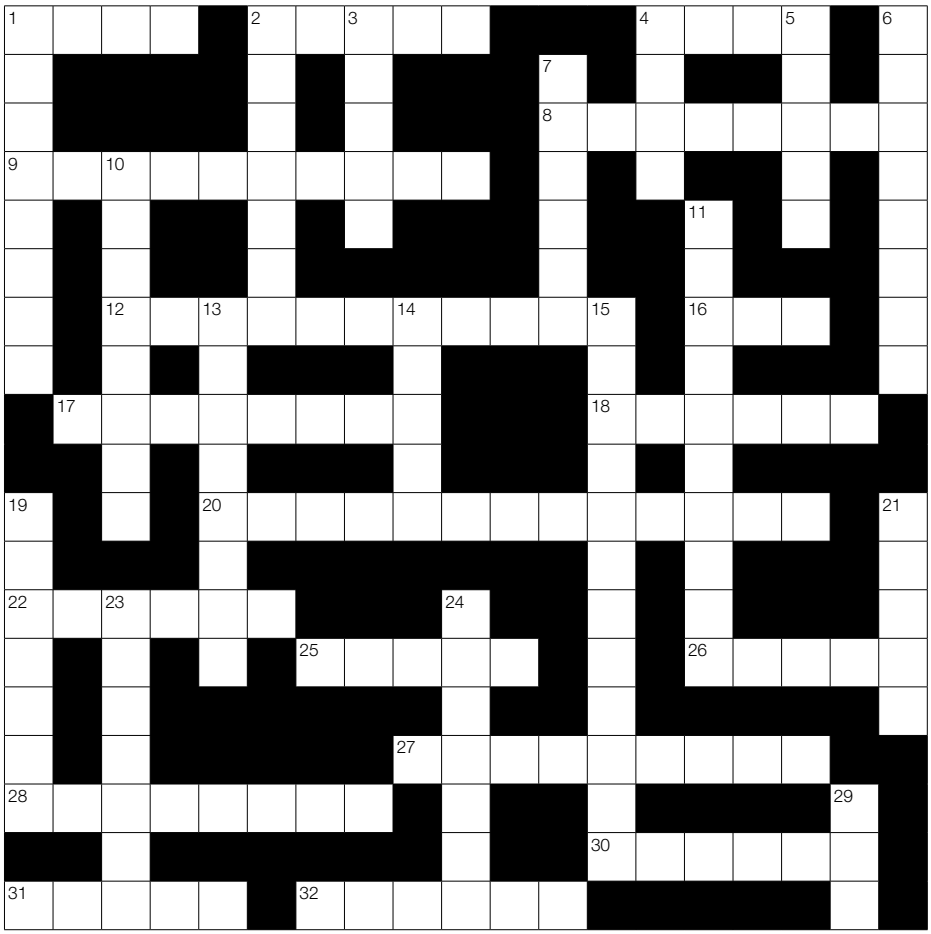
The last was the **Lawrenny Highlands Gin**, which was grapefruit and spruce on the nose. The neat palate had a profound attack of menthol moving quickly to blue cypress needles. With tonic the character changed completely, the citrus comes forward and the menthol calms revealing a drive of mouth-filling herb sweetness and some Scandi forest floor. Soda water might be a good alternative with a slice of pink grapefruit. A delightful transformation.

Verdict: The three gins were thoroughly distinct and enchanting each in its own way. It was intriguing that each would respond best to a very different accompaniment. The preferred by far was the Hobart No.4, as it took gin to a whole new level.

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

Mould's maze

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



Across

1 Act .... prohibita refers to acts that are wrong only because laws have been passed prohibiting them. (Latin) (4)

2 An ousted co-owner can bring proceedings for ..... profits. (5)

4 High Court of Australia (HCA) case concerning whether a quantum meruit claim could avoid a licensing statute, *Pavey & Matthews Pty Ltd v .....* (4)

8 There is a statutory presumption of equal shared ..... responsibility. (8)

9 The legal authority of a court. (10)

12 ASIC, the Australia Securities and ..... Commission. (11)

16 HCA case concerning the reasonable practicability of a parenting order, *... v GR*. (3)

17 HCA case holding that damages for negligence are incapable of application when the comparison is between life with disabilities and non-existence. (8)

18 HCA case holding that there is no implied term in contracts of employment imposing a mutual duty of trust and confidence. (6)

20 The quality of being accepted as evidence. (13)

22 HCA case holding that there was no separate action for a breach of any constitutional right, *..... v Commonwealth*. (6)

25 The Constitution requires that legislation receives ..... assent from the Governor-General. (5)

26 The *Fair Work Act* provides that an employee must not work more than thirty-..... hours a week unless reasonable to do so. (5)

27 Kelsen's theory of positive law provides that all laws emerge from a ..... (German) (9)

28 Term used when a court overrules a principle in a case without specifically stating so, sub ..... (Latin) (8)

30 HCA case overruling the decision in *Beaudesert Shire Council v Smith, N.T. v .....* (6)

31 Drug analysis. (5)

32 HCA case concerning the cruise ship *MS Mikhail Lermontov, Baltic Shipping Company v .....* (6)

Down

1 HCA case holding that a negligent doctor could be held responsible for the cost of raising a healthy child, *Cattanach v .....* (8)

2 Contractual defence, either unilateral, mutual or common. (7)

3 Instituting civil proceedings. (5)

4 HCA case which abolished the rule in *Rylands v Fletcher* and the ignis suus principle, *Burnie .... Authority v General Jones Pty Ltd.* (4)

5 HCA case that held child support was not a tax, *..... v Lessels.* (5)

6 The first case to be decided by the HCA, *..... v Hannah.* (8)

7 If a conditional costs agreement relates to a litigious matter, the ..... fee must not exceed 25% of the legal costs, excluding disbursements. (6)

10 Entity which now provides services previously performed by the Health Insurance Commission. (8)

11 An order for spousal maintenance ceases to have effect upon the death or ..... of the payor. (10)

13 *The Voyager case, Commonwealth v .....* (8)

14 HCA case concerning an accused sending abusive letters to relatives of Australian war veterans, *..... v The Queen.* (5)

15 A writ inquiring into the lawfulness of restraint of a prisoner, habeas corpus ad ..... (Latin) (12)

19 HCA case concerning a casino alleged to have taken unfair advantage of a patron's gambling problem, *..... v Crown Melbourne Ltd.* (7)

21 HCA decision relating to standing of third parties with no direct involvement, *..... About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*. (5)

23 Confirms or supports, judicially. (7)

24 HCA decision concerning double jeopardy, *R v ..... (7)*

29 National group previously known as the Australian Plaintiff Lawyers Association. (Abbr.) (3)

Solution on page 60

Teen birthdays no laughing matter

But I'll be left in stitches

by Shane Budden

By the time you read this, I will have been through two traumatic incidents.

These would be guaranteed to make even great heroes from Australian history, such as Captain Cook, Dally Messenger and Skippy, turn pale. I will have undergone surgery to repair a couple of hernias, and attended an 18-year-old's birthday party – and I am not sure which of these is worse.

Actually, I am – it is the birthday party. Not, I should add, due to the horrendous music teenagers must (apparently by law, as there is no other explanation for it) listen to, and at volumes which cause ripples in the rings of Saturn. I do not fear this, because the birthday boy is the child of our good friends, and his mother has both excellent taste in music and a sound system so powerful even teenagers cannot get near it.

Indeed, I fear the birthday party more than falling into the clutches of modern medicine, despite the fact that I am at the age where a skilled health care professional can take a minor bruise on my elbow and turn it into a three-week hospital stay dedicated to finding out which parts of my body react the worst to needles.

I mean, sure, I can present at a hospital with an in-grown toenail and end up forking over the cost of a six-pack of F-35 fighter planes for the privilege of having tissue samples taken from every internal organ I possess, but the birthday party can do something much worse – make me feel old.

This is because the fine young man who is turning 18 used to be – last month, if I recall correctly – a newborn who could fit on my forearm when I first met him, 12 hours after his birth, and incapable of communicating other than in grunts, burps and unintelligible mumbles. Next time I see him, he will be 18 years old and taller than me, although as a teenager his communication preferences will remain largely the same.

To make matters worse, another of my friends has a daughter who is even older, although she at least had the decency not to invite us fogies to her 18th and so rub in the obvious message – my friends and I are old and decrepit dorks. Our response to that would of course be to protest vehemently that we are neither old nor decrepit, before trailing off because we have forgotten what we were saying, and possibly what day it is.

In other words, despite the impression of youthful vigour, dynamic vibrancy and wolverine abs that one must gain from looking at my profile photo (and I assure you, my friends all look almost – although of course not quite – as amazingly youthful as me) I am getting older. Fortunately for fans of this column, the maturity that usually accompanies age has never once evidenced itself in my case, so we can safely assume that it has no intention of putting in an appearance.

I digress, however, and return to the point at hand, which is that I am getting older and that now that I am attending the birthday parties of my friends' adult children, this can no longer be denied. People of my vintage used to be able to avoid confronting our mortality because, when we were young, cameras were not ubiquitous (literally, 'affordable') so evidence of ageing was thin on the ground.

Indeed, another group of friends has a photo of most of our group, taken – as near as I can figure it – just after photography had been invented. It allegedly shows us at the dawn of either our legal careers or time itself, meaning we are supposedly in our early 20s. When I look at it now, however, it seems to show a group of 12-year-olds who have snuck into a restaurant after raiding their parents' wine cellars.

So once upon a time I could avoid the passing of years by not looking at that photo and any like it, of which there are few. The lack of a photographic record of our collective misspent youths is partly related to the expense of photos back then, partly to the difficulty in storing them and mostly to the fact that the responsibility for taking and storing photos back then fell to any girlfriends in the group.

Thus many good photos were taken, meticulously dated and described on the back, carefully stored, and then burnt as invocations to various goddesses to smite the male involved when the relationships ended; such were the primitive ways of my people (known to archaeologists as *Davidus Bowiesapiens,* or The Children of the '80s).

That is not an option for today's youth, who can take and post upwards of a dozen selfies in the time it takes to exit a cab (sorry, Uber; today's youth prefer a form of transport inspired by Nazi Germany, apparently). Also, should they consume one or two too many sherbets, and find themselves sitting naked atop the clock tower of City Hall and declaiming the virtues of going on the paleo diet,[1] their friends will thoughtfully record the event and upload to video-sharing sites. So young people will not lack for a record of their own ageing.

For my friends and me, however, even the absence of any real forensic record of the passage of the years can no longer protect us, due to the curse of all lawyers – mathematics. Simply put, Einstein's theory of relativity states (somewhere near the back, I think) that if your friend's kids are turning 18, and you are the same age as your friends, then you are relatively old.

Come to think of it, having to have a hernia repaired isn't exactly an indication of youthfulness either. I cannot recall my kids, even once, coming home from kindy and mentioning that little Alchemy Stevens (c'mon, you don't hear of anyone calling their kids Johnny or Mary any more, do you?) was off until Easter due to a hernia. Even at uni, if you had said the words 'inguinal hernia' to one of us, we would have assumed it was the name of Iggy Pop's new band.

Thankfully I'm not one of those really old guys, you know the ones, who just go on and on about what a drag it is getting ol-uh oh…

 Shane Budden is a Queensland Law Society ethics solicitor.

Notes

[1] Nil, unless you count the public benefit of notifying the rest of the world that you are a gullible prat.

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Crossword solution

From page 58

Across: 1 Mala, 2 Mesne, 4 Paul, 8 Parental, 9 Competency, 12 Investments, 16 MRR, 17 Harriton, 18 Barker, 20 Admissibility, 22 Kruger, 25 Royal, 26 Eight, 27 Grundnorm, 28 Silentio, 30 Mengel, 31 Assay, 32 Dillon.

Down: 1 Melchior, 2 Mistake, 3 Suing, 4 Port, 5 Luton, 6 Dalgarno, 7 Uplift, 10 Medicare, 11 Remarriage, 13 Verwayen, 14 Monis, 15 Subjiciendum, 19 Kakavas, 21 Truth, 23 Upholds, 24 Carroll, 29 Ala.

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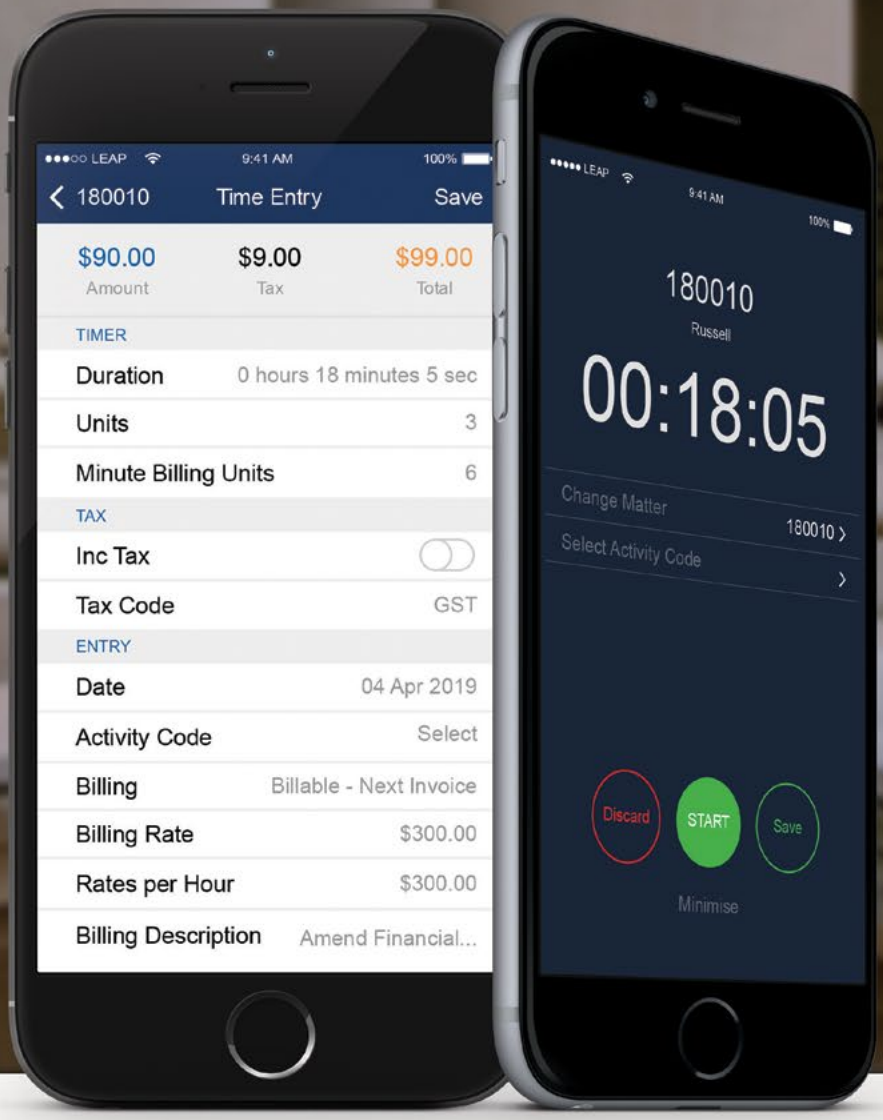

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