



AUGUST 2019

LIFE AFTER DEATH

Providing hope for shattered lives or creating a lifetime of unintended consequences?

PRIVACY COMPLIANCE LESSON

Why fingerprint scans proved unacceptable

YOUR GROWING PROFESSION

National study profiles lawyers across Australia

AN UPDATE

Sexual harassment in the legal profession

2019 COUNCIL ELECTION

Key Election dates

Roll of Electors close
9am AEST 9 September 2019

Nomination period
9 September to 4pm AEST
24 September 2019

Nominee campaigning period
From date nomination is approved to
4pm AEST 24 October 2019

Member voting period
9 October to 4pm AEST
24 October 2019

Announcement of results
From 25 October 2019

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Our young female profession

And the challenges of technology



Male, pale, frail and stale – that's us, right?

Solicitors are crusty old men sitting around boardrooms smoking cigars while articled clerks scuttle around topping up glasses of sherry.

Well, so sitcom stereotypes would tell us, but that (thankfully) is simply not the case. The Urbis 2018 National Profile of Solicitors was released recently, and it paints a much more diverse and shifting profession. "The times they are a-changin'"; the services we provide, and the way we provide them, are changing – and so are we.

The Urbis report confirms what anecdotal evidence has long suggested – solicitors are a majority female group, both nationally and in every state but Western Australia, where the gender balance is 50-50. That is good news, and the profession also continues to grow, with over 76,000 solicitors in the country. It shows that, despite the threats of automation and the commoditisation of aspects of the law, we continue to be valued and needed by clients.

It isn't all beer and skittles, though. Less than 1% of solicitors in Australia identify as Aboriginal or Torres Strait Islander, and that figure is actually down from 1.2% a few years ago. The growth in the profession seems not to include First Nations people. To be a truly diverse profession we need to look like the community we serve, so there is still work to do on that front.

The in-house and government sectors continue to grow at a rapid rate, both by 61% from 2011 to 2018. These sectors are also attracting more female lawyers, with females making up a massive 66% of government solicitors.

These statistics are a warning for our profession, and we need to take heed. Frustrated by the glass ceiling, many potential partners in the female half (sorry, *majority*) of our profession are looking elsewhere and finding things they like. We can't survive as a profession losing that much talent, so there's work to do there as well.

All in all though, our profession is looking pretty healthy, and in fact not so male, pale, frail or stale (indeed, while some of us including your good scribe are looking at 60 in the rear-view mirror, the young solicitors coming through have kept the mean age of the profession at 42). As I said, there is still work to do, but we remain in good shape!

As a sign of the sorts of changes happening and the new challenges coming up in the law, you will see a couple of articles in this edition dealing with the issues which arose from Ayla Cresswell's successful action to extract sperm from her deceased partner in order to have children. The issues cross many areas of practice and are things that we as a profession need to be talking about.

When we think about technology, it is usually in the context of what new piece of AI is coming to take our business, but the law and lawyers need to continually adapt to the implications of technological advances in many areas. Medical breakthroughs increase lifespans and come with issues around elder abuse, succession law and estate planning. Driverless cars come with implications for crash and bash. While virtual reality technology can be used to train construction workers without them ever being on a building site.

How do we get ready for this, for the new regulations that will come with these things, and the new challenges they involve? One way is to start the conversation right now, and begin working on solutions. Raising real world problems leads to practical solutions, such as the comprehensive cyber insurance the Society has arranged for 'Member Practices' (that is, practices in which all principals are full QLS members also insured by Lexon).

Law firms are a desirable target for cybercriminals, and despite the best practice and security measures, mistakes happen and firms can be compromised. Many discussions with small firms in exactly that position have shown the critical need for

expert help to support firms through some of the most challenging days they will face. Your Society – in partnership with Chubb Insurance Australia – has delivered it.

QLS Cyber Essentials Insurance will fund the first \$50,000 of your firm's investigation, response and compliance costs in the case of a cyber-incident (exclusions apply). Other benefits include business interruption cover and expert help to rebuild trust with your clients.

Keep in mind that Lexon PI insurance only covers compensable client losses, while QLS Cyber Essentials Insurance will look after the practice. The main types of cyberattacks directed at law firms are covered by this insurance. Members can call for expert help 24 hours a day, 365 days a year.

Extra cost to you? Zero. If your practice qualifies, it will be covered. (A deductible applies if there is a claim.) Just make sure you are a 'Member Practice', and confirm that \$50,000 is enough cover for your needs – top-up cover is available.

For more information, visit qls.com.au/cyberinsurance and make sure your practice is protected today.

As you can see, conversations about new technologies – and their consequences – are vital. They get us thinking about new realities and the brave new world of legislation that comes with them. If there are problems, they will be shaken out in these discussions. It is the way good lawyers ensure that good laws are made for the public good.

So enjoy! Get reading, get talking and get thinking – and then tell us what you think; we'll make sure the powers that be hear your collective wisdom!

Bill Potts

Queensland Law Society President

president@qls.com.au

Twitter: @QLSPresident

LinkedIn: [linkedin.com/in/bill-potts-qlspresident](https://www.linkedin.com/in/bill-potts-qlspresident)

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*Effective 1 July. Terms and exclusions apply. Refer to the Master Policy on the QLS website.

Court addresses noncompliance

Practice Directions 1 and 2 of 2019

BY MICHAEL CONNOR

Practice Direction 1 of 2019 (PD1) and Practice Direction 2 of 2019 (PD2) took effect in the Planning and Environment Court (PEC) on 10 May 2019.

While practice directions in the PEC are not new, the reasons for the adoption of PD1 and PD2 are both noteworthy and important to those who practise in the court and the profession more widely. Indeed, members of the PEC took the opportunity of addressing members of the profession about the genesis of the practice directions on 11 June 2019.

Having identified that the court's clearance rates – number of proceedings filed as compared to the number of proceedings finalised – was in decline, some troubling features emerged.

The areas of concern, revealed by the investigations, spanned essentially two areas.

- Parties use, or perhaps misuse, of the ADR Registrar's powers to make orders or adjourn proceedings on multiple occasions, vacate orders made by a judge and make orders by consent when the parties knew, or should have known, the agreed orders were not appropriate for the ADR Registrar (who is not legally qualified) to make.
- Increased evidence of parties' noncompliance with orders of the court, compounded by the fact that parties were not drawing that noncompliance to the court's attention, which had the effect that proceedings were not ready to proceed to hearing as schedule.

Those areas of concern produce a number of unsatisfactory outcomes:

- a. Parties' non-compliance with their implied undertaking to the court.
- b. Scarce court resources were wasted, because proceedings were not ready to be heard in the assigned months.
- c. Some parties seemed to approach orders and directions as aspirational rather than obligatory, and overlooked the fact that noncompliance could amount to contempt.

- d. Noncompliance was not isolated, occurring in some proceedings on multiple occasions, with the court being asked to remake orders only to see the new orders not complied with.

Those unsatisfactory outcomes seem to have a direct link to the court's experience that appeal hearings were not finishing in the time estimated by the parties and allocated by the court. Also, insufficient thought was being given to defining the real issues in dispute, with the court's time being diverted to deal with peripheral issues.

PD1 and PD2 are the court's response to those concerns and while many features of the practice directions are familiar, some new or recast features deserve special mention.

Practice Direction 1 of 2019

PD1 provides for case management procedures for all proceedings in the PEC, and repeals and replaces Practice Direction 1 of 2018.

Some features of PD1 (some old and some new) should be noted:

- a. Once filed, parties have no longer than six weeks to apply to the court for directions about the conduct of the proceedings.
- b. For appeals concerning development applications requiring impact assessment, evidence is no longer required about compliance with the notification stage.
- c. A typical directions order would include:
 - i. an estimate of the likely duration of the hearing and, if that estimate exceeds seven days, those proceedings will be case-managed by an assigned judge
 - ii. a requirement to prepare a hearing schedule.
- d. Establishing a process by which orders, other than final orders, agreed by the parties can be made without appearances, by a judge.
- e. At any review, the parties must inform the court about the extent of compliance with earlier orders and practice directions.

- f. If at the pre-callover review it is apparent that the parties have not complied with orders and directions, the proceedings will be removed from the callover, unless exceptional circumstances are demonstrated.
- g. A requirement for the parties to prepare and agree on (if possible) a concise list of issues in dispute and provide that list to the court at the start of the hearing.

Practice Direction 2 of 2019

PD2 provides for the power of the ADR Registrar to make orders or issue directions, and repeals and replaces Practice Direction 2 of 2018.

The powers of the ADR Registrar have been adjusted and reduced so that while the ADR Registrar can still make orders and directions, the opportunity for misuse by parties is minimised.

PD2 makes it clear that the powers of the ADR Registrar no longer extend to a range of matters identified in paragraphs 5 and 6.

Some comments

The efficient operation of courts in Queensland is a matter of considerable public interest. The adoption of PD1 and PD2 is a timely reminder to parties and those that represent them of the important role that parties play in an efficient outcome in the PEC.

QLS Ethics and Practice Centre Director Stafford Shepherd adds:

Some of the actions or omissions described in this article are disturbing in that they show a disregard for our paramount duty to the administration of justice. Our role as an advocate is to serve our client's best interest and to secure the most appropriate remedy. Dishonest representation does not advance our client's interests; indeed, it hinders and obstructs. We have an obligation to maintain our integrity and professional independence. Any member of a tribunal should expect the advocate to be well prepared and to set out the representation in a transparent and cogent way.

Michael Connor is a partner at Connor O'Meara Solicitors and Chair of the QLS Planning and Environmental Law Committee.

Bill seeks end to claim farming

On 14 June 2019 the Motor Accident Insurance and Other Legislation Amendment Bill 2019 was introduced into Queensland's Legislative Assembly.

The Bill will amend the *Motor Accident Insurance Act 1994* (the Act) to create two new offences prohibiting claim farming.

Claim farming involves anonymous persons contacting members of the public, from local or overseas call-centres or via email or social media and enquiring whether they or a family member have been involved in a motor vehicle accident.

In 2018 the Motor Accident Insurance Commission released a research survey report which indicated that 37% of Queenslanders had been contacted by a claim farmer in the past 12 months, mainly by telephone.¹

Queensland Law Society has long advocated for legislation to tackle claim farming. Over the last three years, the Society has worked with stakeholders such as the Queensland Government and the commission on legislative reform, sharing the views of legal practitioners and making submissions.

Under the proposed legislation, the first offence removes the financial incentive for persons to engage in claim farming by prohibiting a person giving or receiving consideration for a claim

referral or potential claim referral. Consideration includes a fee or other benefit, but does not include a gift or hospitality up to \$200.

The second offence will prohibit a person approaching or contacting another person to solicit or induce that person to make a claim. 'Approaches' or 'contacts' includes in person, by mail, telephone, email or another form of electronic communication.

The Bill also seeks to enhance the investigatory powers of the commission by replacing the existing investigative powers under part 5A with a 'modern suite of powers'. The Society is pleased to note that the new powers will be subject to internal review when requested by the person affected. The amendments also allow the person to appeal to the Magistrates Court if dissatisfied with the internal review decision.

In extending the powers of the commission, the Bill will partially abrogate the right to legal professional privilege for investigations of a law practice or lawyer and the right against self-incrimination for both licensed insurers and law practices or lawyers. The explanatory notes to the Bill seek to clarify the abrogation of these rights, detailing that if a person discloses privileged client communication the person is taken not to have breached legal professional privilege and limiting the

admissibility of information or documents to the extent it incriminates the individual or exposes the individual to a penalty, to those offences in the Bill.

The Bill reflects the Society's long-standing opposition to claim farming as well as any practice by solicitors and third parties which breaches the *Personal Injuries Proceedings Act 2002* (Qld) or the Australian Solicitors Conduct Rules 2012. The amendments may also assist in levelling the playing field with interstate practitioners by the proposed extra-territorial application of the '50/50 rule', which caps the amount a solicitor can charge under a no-win, no-fee agreement.

The Society has provided a submission on the key aspects of the Bill, particularly those outlined above, on behalf of its members. The parliamentary Economics and Governance Committee is due to provide its final report on 9 August 2019.

The annual QLS Personal Injuries Conference on 11 October will include more information on the Bill, along with updates on developments in personal injury law. See the events listing at qls.com.au/piconf.

Notes

¹ maic.qld.gov.au/wp-content/uploads/2018/10/2018-Claim-farming-research-summary.pdf.

Clean out your wardrobe for a cause

Women's Legal Service Queensland (WLSQ) is seeking fashionable donations for its Annual Designer Rummage Sale.

The sale, which will be held on Saturday 26 October from 2pm to 4pm, features pre-loved designer women's fashion and accessories which are sold for \$5. The funds raised help WLSQ to continue its services, which include the annual provision of free legal advice to 16,000 women and their children experiencing domestic violence.

Quality women's clothing, shoes, bags and jewellery are being sought and can be delivered to a number of locations, including the concierge desk at 111 Eagle Street, Brisbane.

For more details, including a full list of drop-off points, see facebook.com/events/330394044267738.

Goodbye to paper certificates of title

Paper certificates of title for the Queensland freehold land register are to be abolished from 1 October.

None will be issued from that date forward and paper certificates of title existing on 1 October 2019 will cease to have any legal effect or relevance. From that date they will not need to be produced to the Titles Registry for cancellation before a dealing is registered. This will apply whether a paper certificate of title was issued recently or any number of years ago.

The changes were announced by Registrar of Titles Elizabeth Dann following amendments to the *Land Title Act 1994* (Qld) in March.

Prior to 1 October, paper certificates of title will still need to be produced when required.

Call 1300 255 750 or alternatively, email titlesinfo@dnrme.qld.gov.au for more information.



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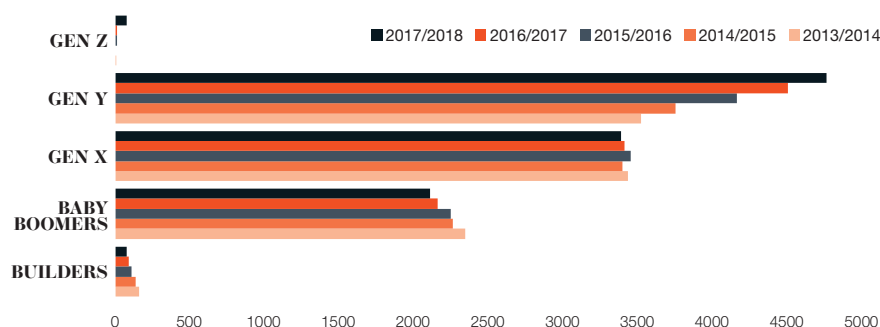
GENERATIONS OF CHANGE

The Queensland legal profession is gripped by swift generational change.

Membership figures from the past five QLS annual reports show that, as the Builders generation declines, Generation Z is poised to take off. And while the Baby Boomers are continuing their slow decrease, the figures show that Gen X has reached its turning point.

The strongest trend is the rapid and commanding growth of Gen Y in the ranks of solicitors. The significant presence now of digital natives in the cohort of solicitors is being explored by the QLS Innovation Committee in its work on disruption, innovation and change in the profession.

GENERATIONS IN PRACTICE



FEMALE SOLICITORS

As at October 2018, for the first time, the legal profession comprised of more female than male solicitors



Turn to page 30 to read more about the changing nature of your profession.

Queensland Law Society Inc.

179 Ann Street Brisbane 4000

GPO Box 1785 Brisbane 4001

Phone 1300 FOR QLS (1300 367 757)

Fax 07 3221 2279

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President: Bill Potts

Vice President: Christopher Coyne

Immediate Past President: Ken Taylor

Councillors: Michael Brennan, Chloe Kopilovic, Peter Lyons, Kirsty Mackie, Luke Murphy, Travis Schultz, Karen Simpson (Attorney-General's nominee), Kara Thomson, Paul Tully.

Chief Executive Officer: Rolf Moses

Editor: John Teerds

j.teerds@qls.com.au | 07 3842 5814

Design: Alisa Wortley, Courtney Wiemann

Art direction: Clint Slogrove

Advertising: 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.

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Update: Answers from the High Court

The High Court has delivered its judgment in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20, a case discussed in *Proctor* last month in the article, 'How to distribute trust property in corporate insolvency?' (page 46).

The High Court dismissed the appeal with costs.¹

As hoped, it resolved the judicial divergence previously commented on and stated clearly that the "intrinsic limit of the power of exoneration precludes it from being used to meet debts other than those incurred with authority for the conduct of the trust business".²

The court confirmed the correctness of the approach of the primary judge that "the proceeds from an exercise of a corporate trustee's right of exoneration in respect of trust liabilities may be applied only in satisfaction of the trust liabilities to which that right relates",³ and settled the question that continued to be asked in Victoria as to whether *Re Suco Gold*⁴ or *Re Enhill*⁵ should be followed. The court agreed with the criticism of the latter in *Jones* and rejected that decision of the Victorian Full Court of Appeal.⁶

The court did not approve of the primary judge's finding that the "statutory order of priority for the payment of debts was

inapplicable" and that the distribution could be made *pari passu*.⁷ The court stated clearly that s556 of the *Corporations Act 2001* (Cth) applies to corporations "and their property of all kinds".⁸

It should be noted that this may not be the end of what is commonly referred to as the Amerind Appeal. There are some interesting questions that were not a part of the appeal to the High Court and which were reserved for later hearing by the primary judge.⁹

Notes

¹ It should be noted that the High Court's decision has also provided much need guidance by stating that s433 of the *Corporations Act 2001* (Cth) does apply to the distribution of trust property upon the winding up of a corporate trustee, however this part of the appeal to the High Court was not the subject of the previous *Proctor* article and is not discussed in this brief update.

² *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20 [44].

³ *Ibid* at [92].

⁴ *Re Suco Gold* (1983) 33 SASR 99.

⁵ *Re Enhill Pty Ltd* [1983] 1 VR 561.

⁶ *ones (Liquidators) v Matrix Partners Pty Ltd, in the matter of Killamee Civil & Concrete Contractors Pty Ltd (in liq.)* (2018) 354 ALR 436; [2018] FCAFC 40.

⁷ Following *Re Independent Contractor Services (Aust) Pty Limited (in liq.) (No.2)* (2016) 305 FLR 222; [2016] NSWSC 106.

⁸ *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20 [96].

⁹ *Re Amerind Pty Ltd (in liq.)* (2017) 320 FLR 118, 215 [542].

QLS welcomes appointment of Chief Magistrate

Queensland Law Society has welcomed the appointment of Queensland Deputy Chief Magistrate Terry Gardner to the court's top job.

Society President Bill Potts said the elevation of Mr Gardner to Chief Magistrate would be a popular one in the legal profession, as would the announcement of Fraser Coast solicitor Trinity McGarvie as the new Mt Isa magistrate.

Mr Potts said Mr Gardner had served Queenslanders well since first being appointed as a magistrate in 2012.

He said the Society was also particularly delighted with the Government's appointment of solicitor Ms McGarvie to Mt Isa, one of the state's most remote regional centres.

"I am especially pleased to see yet another one of our very own stepping into such an honourable role in our justice system, as solicitors make fine and excellent members of our judiciary," he said.

Ms McGarvie has been a solicitor and member of the Society since 2001 and worked for a number of firms, including her own – McGarvie Family Lawyers – and a stint at Legal Aid Queensland early in her career.

Mr Potts said: "The Society will continue to advocate for better resourcing for our overworked courts, and I look forward to actively working with the Government on further appointments."



Caxton Legal Centre appoints new CEO

Caxton Legal Centre has announced the appointment of Cybele Koning (above) as its new Chief Executive Officer.

Cybele, who has been working with Caxton for seven years, was previously the director of the centre's family law, domestic violence and elder law practice. Prior to that, she was a senior lawyer in private practice and a mediator.

Caxton Legal Centre President Dan Rogers said: "Cybele is a highly respected and experienced lawyer whose passion, integrity and strategic thinking will bring a whole new level of innovation and influence to the way Caxton assists its clients and the way it partners with community, business and government to deliver its services."

Legal Profession Breakfast tickets on sale

Tickets are now available for the 2019 Legal Profession Breakfast, to be held at Brisbane City Hall on Thursday 14 November.

This year's event features keynote speaker Arman Abrahamzadeh OAM, the co-founder of the Zahra Foundation Australia, a White Ribbon ambassador and a passionate advocate against domestic violence.

To purchase tickets, see qls.com.au/legalbreakfast.

ON THE INTERWEB

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"Tonight is the deciding match for QLD and NSW. Who will take the crown and win the series? #SOO2019 @LawSocietyNSW"
 @qldlawsociety – Queensland Law Society

Replying to @qldlawsociety
 "We love a NSW win but we love seeing @QLSPresident in blue more!!
 Our @LSNSW_President made a bet with the northerners and she came out on top so - today @QLSPresident will wear the blue jersey to work! #UpTheBlues" @LawSocietyNSW – Law Society of NSW

Replying to @qldlawsociety @LawSocietyNSW @QLSPresident
 "What a game! Couldn't ask for a more exciting finish! It really went down the wire! Looking forward to seeing @QLSPresident in his favourite Blue Jersey! @LawSocietyPresident – Law Society of NSW President

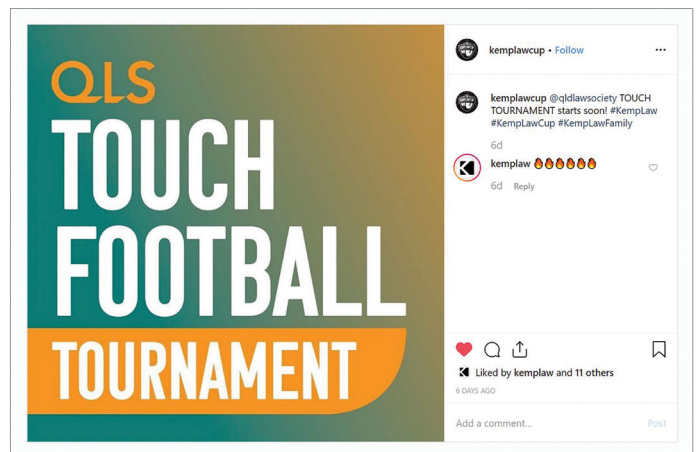


Congrats @LawSocietyNSW on winning the #SOO2019 series. Our President is wearing the blues jersey today – but he is Queensland to the core (or scarf, anyway!). Bring on 2020!



Replying to @qldlawsociety
 "Errmmm is this wasn't part of the bet...You need to be all in blue @QLSPresident! The QLD scarf wasn't an agreed term. In contract law terms, we demand specific performance!"
 @LSNWS_President – Law Society of NSW President


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Join me at the Aspire Leadership Lecture @qldlawsociety on 24 July. Turns out I'm a leader, despite all appearances (yes, I'm a millennial woman & yes, I love Real Housewives). I'll be talking about founding @GrataFund and the new leadership paradigm we're working in - come!

Grata Fund @GrataFund

Queensland friends! Grata ED and Founder @isreinecke will be delivering the @qldlawsociety's inaugural Aspire Leadership Lecture @qldlawsociety at Law Society House on 24 July at 6pm. Register to join us there: qls.com.au/Knowledge_cent...



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Celebration in the sunshine

Perfect weather drew the crowds to Brisbane's Musgrave Park on Friday 12 July for a family fun day as part of NAIDOC Week. QLS staff joined the celebration by operating a stall to engage with the public and to promote the QLS RAP and services offered by the Society. Children enjoyed a special lucky dip to win colouring pencils and books, frisbees and bouncing putty.



Breakfast with the best

More than 100 leading Queensland lawyers enjoyed the QLS Best Lawyers Breakfast on 17 July at Brisbane's Blackbird Private Dining and Event.

The annual breakfast, now in its fifth year, celebrates QLS members who have been acknowledged in Best Lawyers, Chambers, Asia-Pacific Legal 500 and Lawyers Weekly 30 under 30 lists.

Advocacy in the north

North Queensland practitioners made the most of the Solicitor Advocate Course: Foundations, held in the Cairns Supreme Court in late June. The two-day course, developed by the QLS Ethics and Practice Centre in partnership with the Australian Advocacy Institute, enabled delegates to increase their skill base for advocacy work in courts and tribunals, and enhance their ability to deliver personalised and effective advocacy.



An EPIC success

Some 43 attendees enjoyed the first of the Society's EPIC sessions in June. Standing for Entrepreneurship, Productivity & Innovation Convention, the event was an initiative of the QLS Innovation Committee. The half-day program was developed to inspire and support practitioners in embracing innovation and technology.

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Law Society®**

It takes a village...

to raise a career

BY SARAH-ELKE KRAAL



When you look at the top echelon of lawyers in Queensland – and indeed, Australia – they may at first glance appear remarkably different.

After years of focusing their practice on a particular area of law (and in some cases, an even-more specific niche within that area), they seem to rise above the crowd in vastly different directions, embodying the legal contrasts between them, and becoming distinctly different practitioners as a result.

Though our profession's experts may ultimately differ, their recipes for success are all the same. They know that, to be successful in legal practice, you need to practise the business of law too.

The business of law

Practising the business of law is much bigger than simply knowing the law. It is recognising that each and every lawyer is ultimately running a business – and that business, is *you*. It is your personal brand, your value proposition, the way you operate in law and business, and your appreciation of commerciality.

All this takes business nous and legal technical excellence, but it also takes talking to the right people, and asking a lot of questions. It takes timely inspiration, market data, competitor analysis, mentorship and effective technology. It takes putting aside some time to consider how you can tap into every aspect of your potential – in and out of law.

In other words, it takes more than knowing the law to be successful. It takes a village.

Building your village

You can build a village any way you like, and with whomever you like. All successful lawyers usually have a core group of trusted and respected allies at the centre of their empire. These people (or businesses) may or may not be directly in the legal profession, but they will all undoubtedly support the key foundations of that practitioner's success.

Some may be mentors, others may be key innovators, others will be adept at data analysis and competitor monitoring, some will strengthen

your wellbeing and (of course) a key few will assist you with your continuing legal education.

You can gather your allies in lots of different ways. You might connect to practitioners you respect and admire on social media platforms such as LinkedIn, or perhaps by engaging with reverse mentor programs at your local university or alma mater (sometimes the best way to get a jump on the competition is to think like the next generation).

But the easiest way to build your village is by attending – and engaging with – professional development (PD) conferences. Here's how.

How to win allies and influence people (in two days or less)

Conferences and in-person seminars are untapped goldmines of opportunity to build your village.

While it's easy to hear 'PD', and automatically think of coffee carts, free pens, legislation updates and eating too much at lunch (not that I'm admitting anything), if you actually look a little deeper, you will find an entire ecosystem of allies and collaborators waiting to raise your career.

Here's how to take advantage of your next PD event so that you are truly developing *professionally*:

1. **Speak to people:** Yes, it can be the last thing you want to do as an introvert practitioner who really just wants to get in, get your CPD, and get out, but you are really missing out on valuable inside market information if you that's all you do.

Speak to trade exhibitors and make them your allies – find out what frictions they are noticing in the market, and what challenges your direct competitors are facing. Gather information on any unmet demands you might be able to meet, and mine for opportunities for innovation and growth. Speak to fellow attendees and remember to be open and honest about your practice and goals; while a very few will be potential competitors, most will be referral opportunities, and all will be potential support allies.

2. **Engage with any presenters you admire:** Most presenters will make themselves available during the conference to answer

questions or to otherwise chat generally. Take the opportunity to connect with them during these times, and ask lots of questions. If you aspire to have a career similar to theirs, ask them questions about how they got to where they are. Facilitate a speed-mentoring session; they will undoubtedly be flattered!

3. **Be seen:** It is as easy as attending a practice-specific professional development conference in your area of law to start positioning yourself as an expert in that field. Genuinely engaging with fellow attendees and trade exhibitors at these conferences will start an automatic association between your name and that particular area of law.

4. **Learn:** No matter how experienced you are, or how long you've been in the business of law, you can always learn something new. Fight the urge to check emails or take calls during seminars, and immerse yourself in the session; give yourself permission to just listen and absorb, without any external distractions or pressure to multitask. Be mindful that your next big idea could come from it – and that could pay real dividends like solving a longstanding problem in your practice, or boosting your billables.

5. **Have fun:** It's not all black letter law and buffet lunches, you know. Use networking drinks and dinners during the conference as an opportunity to relax and actually enjoy yourself. Some of our best and most valuable allies are met informally, when we are most ourselves, and have let go of the preconceived notion of 'networking'. Don't worry about talking too much business, just talk.

So, like anything in life, PD events are what you make of them. You can make a meal of it by sticking close to the dessert table (again, not admitting anything) and bustling from seminar room to seminar room, or you can start to build your village.

To seize these opportunities and more, register for an upcoming conference today at qls.com.au.

Sarah-Elke Kraal is a Queensland Law Society legal professional development executive and solicitor.

In August...

Practical Legal Ethics ✓

Practice Management & Business Skills ✓

Professional Skills ✓

Substantive Law ✓

13 Creating and sustaining mind fitness

Essentials | 12.30–1.35pm | 1 CPD

Brisbane

Join Paul Pitsaras of The Open Mind Institute as he explores how we can create 'mind fitness'. Explore the tools and exercises you need in order to sustain a happier, more productive and successful life.



16 Hervey Bay Intensive

 Essentials Masterclass Hot topic
8.15am–5pm | 7 CPD

Scarness

This year's program, designed in consultation with your district law association, includes some of the top-rated QLS presenters, as voted by you. Ensure you are up to date with employment and workplace relations, criminal and family law. Learn the key issues affecting the region and network with your peers and expert presenters.



20 Insolvency law masterclass

Masterclass | 8.30am–12pm | 3 CPD

Brisbane

This masterclass is designed for commercial and insolvency law practitioners with five or more years' post-admission experience who want to extend their skills and knowledge. It will use complex legal scenarios and questions to discuss key considerations for insolvency matters, with reference to recent decisions. Questions will be taken on notice and attendees will have the opportunity to ask a panel of experts.



22 Trust accounting essentials

Essentials | 9am–12.30pm | 3 CPD

Brisbane

Ensure you meet your regulatory obligations. This workshop provides interactive and practical training in the fundamental requirements for your trust records. It is designed for practitioners and accounting support staff.



23 Kingaroy Intensive

 Essentials Masterclass Hot topic
8.15am–5pm | 7 CPD

Kingaroy

Designed in consultation with your district law association, this year's program will cover substantive law sessions from the family, succession and criminal law sectors as well as core CPD topics including cybersecurity and ethics. Complete the day with networking drinks with peers and presenters.



27 Electronic signatures

Essentials | 12.30–1.30pm | 1 CPD

Livecast

Business transactions are increasingly taking place electronically. Ensure any transaction you are advising on is executed correctly.



28 Establishing and maintaining positive client relationships

Essentials | 8.30am–12pm | 3 CPD

Brisbane

Receive practical guidance to identify client expectations, define the scope of your retainer and assist you in estimating costs and setting the budget. Review practical scenarios and examples, and be provided with tools and checklists you can implement in your practice.



29 Practice Management Course: Medium to large practice focus

 PMC | 29–31 August, 9am–5.30pm,
8.30am–5pm, 9am–1.30pm | 10 CPD

Brisbane

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.



30 Solicitor Advocate Course: Building on foundations

 Solicitor Advocate Course | 30–31 August,
5–7pm, 8.30am–4.30pm | 9 CPD

Brisbane

The QLS Ethics and Practice Centre has partnered with the Australian Advocacy Institute to offer an outstanding course that combines theory and practical sessions. Participants will perform set advocacy tasks in a group before an instructor.



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



MASTERCLASS Advance your skills and knowledge in an area of practice



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



SOLICITOR ADVOCATE COURSE Increase your skill base for advocacy work in courts and tribunals of practice



PMC Advance your career by building the skills and knowledge to manage a legal practice



Lynn Armstrong



Alecia Connor



Sarah Ewing



Eleanor Yeomans



Kim Waygood

Career moves

Best Wilson Buckley Family Law

Best Wilson Buckley Family Law has announced the promotion of four staff from 1 July and welcomed two new solicitors.

Lynn Armstrong, a QLS accredited specialist in family law, has been promoted to special counsel. Lynn has practised exclusively in family law for more than 12 years and has previously been recognised as a leading family lawyer in Toowoomba by Doyle's Guide.

Alecia Connor has been promoted to senior associate and is the founding member and leader of the firm's North Lakes office. Alecia has practised exclusively in family law for more than seven years and has a particular interest in surrogacy matters and complex parenting cases.

Carla Franchina has been promoted to associate. Carla has practised exclusively in family law since her admission in 2013 and was named as a finalist in the Lawyers Weekly 30 Under 30 Awards in 2018 and 2019.

Kiara Greenway has been promoted to solicitor. Kiara joined the firm in 2016 and has worked closely with Legal Partner Amity Anderson in the firm's Ipswich office since her admission in 2017.

Sarah Donnelly has been appointed as solicitor and joined the firm's Toowoomba office earlier this year, bringing with her experience practising in family law in Brisbane and on the Sunshine Coast.

Cassie Boland has been appointed Senior Solicitor in the firm's North Lakes office. Cassie joined the firm in May, having previously practised in Rockhampton and Brisbane. She has focused exclusively on family law since her admission in 2014.

Brennans Solicitors

Brennans Solicitors has announced that **Bruce McDiarmid** has joined the firm as a consultant to practise in construction and property development matters.

Bruce was previously the principal of the law firm which became Brennans Solicitors, but left the law to focus on property development. After involvement in over 40 projects, including industrial buildings, offices including government centres, three hotels and numerous joint ventures, he is excited to return to the practice of law at the Sunshine Coast firm.

Carter Newell Lawyers

Carter Newell Lawyers has announced four staff elevations effective from 1 July.

Joining the partnership is **Johanna Kennerley** (energy and resources, planning and environment), who began with the firm in 2006. Johanna focuses on project development and environmental law, and has worked extensively with the energy and resources sector.

Sarah Ewing (litigation and dispute resolution) has been elevated to senior associate, while insurance team members **Eleanor Yeomans** and **Madelyne Inch** are new associates.

Sarah acts for corporate clients in major commercial litigation and insolvency litigation disputes. She has extensive experience advising on complex, high-value and multi-party disputes involving allegations of negligence, breach of contract, and contraventions of the *Competition and Consumer Act 2011* (Cth) and *Corporations Act 2001* (Cth).

Eleanor has extensive experience in public liability and property damage claims. She manages complex claims for major insurers, with a particular interest in claims within the hospitality and construction industries.

Madelyne's experience extends to professional indemnity, solicitors' negligence claims, disciplinary proceedings and management liability insurance. Madelyne also has a focus on employment practices liability.

Creevey Russell Lawyers

Creevey Russell Lawyers has appointed lawyer **Dannielle Glaister**.

Dannielle, who previously worked with a boutique firm in Adelaide, practises primarily in family law, including property settlement litigation, as well as complex child custody and parenting matters, divorce applications and child support matters.

She also has experience assisting in criminal, commercial, estate planning and conveyancing matters.



Carla Franchina



Kiara Greenway



Sarah Donnelly



Cassie Boland



Bruce McDiarmid



Johanna Kennerley



Madelyne Inch



Danielle Glaister



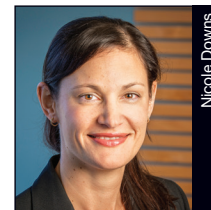
Emma Middleton



Stuart Efstathis



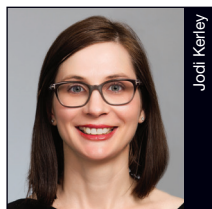
Madeline Klein



Nicole Downs



Phillip Smith



Jodi Kerley



Nicole Conlon



Melinda Foley



Melissa Sinopoli



Patrick Day

Catton & Tondelstrand Lawyers

Catton & Tondelstrand Lawyers has welcomed **Emma Middleton** as a lawyer to the firm working exclusively in family law. Emma has previously worked as a secretary and paralegal in family law since 2014.

EAGLEGATE Lawyers

Stuart Efstathis has joined EAGLEGATE as an intellectual property lawyer. Stuart has background in applied science, majoring in biotechnology, and works on copyright, trade mark strategy and infringement, and patent interpretation and infringement matters.

Garland Waddington

Maroochydore-based Garland Waddington has announced the appointment of **Madeline Klein** and **Nicole Downs** as associates.

Madeline, who joined the firm in 2017, was admitted in 2014 and has developed expertise in litigious matters including building and construction, commercial law, and wills and estate litigation.

Nicole, who joined the firm in 2016, was admitted in 2002 and focuses on wills, estates, business and property law.

HBA Legal

Defendant litigator **Kim Waygood** has joined HBA Legal in Brisbane, bringing with her more than a decade of experience in personal injury, insurance and dispute resolution matters.

Kim has joined the firm as a senior associate and will focus on professional indemnity and insurance disputes, as well as workers' compensation and public liability litigation.

Herbert Smith Freehills

Herbert Smith Freehills has announced the promotion of 29 Australian lawyers to senior associate, including two members of the firm's Brisbane team.

Phillip Smith, who works in corporate law, focuses on mergers and acquisitions with an interest in resources, battery metals and renewables. Phillip worked for several years in Latin America.

Jodi Kerley, who works in disputes, focuses on general commercial litigation and has experience advising clients on large commercial disputes, including energy and construction matters. Jodi practised for several years in Canada before returning to Australia in 2017.

Howden Sagers Lawyers

Howden Sagers Lawyers has announced the promotion of law clerk **Nicole Conlon** to solicitor. Nicole will work in criminal and traffic law, and also undertake youth justice and child protection matters.

MacDonnells Law

MacDonnells Law has two new owners and one new practice leader.

The firm, which is the second oldest business in Cairns, has announced that **Melinda Foley** and **Melissa Sinopoli** have become owners and directors of the firm and **Patrick Day** has been promoted to practice leader of the firm's local government and planning practice.

Melinda joined MacDonnells Law in 2002 and has been a partner for the past 12 years. She has led the litigation and dispute resolution team since 2014.

Melissa has moved through the ranks at the firm over the last 10 years, and most recently was leader of the commercial practice group.

Patrick, who began his career at MacDonnells Law and returned to the firm in 2018, has been appointed practice leader in the local government and planning space.



Annabelle Efstathis



David Isaac



Scott Vanderwolf



Daniel Hourigan



Natalie Woodward



Lachlan Lamont



Kelly Fraser



Lauren Abbott



Denise Burloff



Ciaran Ehrich



Matthew O'Keefe



Tamaryn Caldwell



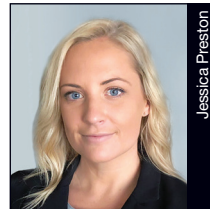
Jenna Hutchinson



Darren Whitelegg



Emma Davidson



Jessica Preston

Mullins

Mullins has announced five career moves, including three promotions to associate for lawyers **Annabelle Efstathis**, **David Isaac** and **Scott Vanderwolf**, the appointment of **Daniel Hourigan** as a property partner, and the appointment of associate **Natalie Woodward**.

Annabelle and Scott are part of the Mullins hospitality team and advise on liquor and gaming, licensing, leasing and property matters, while David is a member of the insurance team. He has four years' experience in insurance law, having represented a variety of insurers in workers' compensation, compulsory third party and public liability.

Daniel has extensive experience in commercial property matters, having worked on matters including acquisitions and disposals, mixed-use developments and commercial and retail leasing.

Natalie joins the firm with 10 years of experience in workers' compensation, public liability and compulsory third party.

Piper Alderman

Piper Alderman has announced 27 promotions, including four in Brisbane.

Lachlan Lamont, who has been promoted to special counsel, works closely with the litigation funding industry, regularly acting for clients in large-scale funded litigation and shareholder class actions.

Kelly Fraser, a litigation and dispute resolution lawyer, has been promoted to senior associate. Kelly has a primary focus on corporate and commercial disputes,

and is experienced in conducting funded litigation and representative actions.

Lauren Abbott, who has extensive experience in the sale, acquisition and leasing of commercial, industrial, retail and residential properties, has been promoted to associate. Lauren advises on due diligence, acquisitions, sales, and leasing in a number of prime, high-profile industrial and commercial facilities.

Denise Burloff, who has also been promoted to associate, advises participants at all levels in the construction and mining industries. She combines front-end advice in the preparation and negotiation of complex construction, mining and infrastructure contracts with back-end resolution of disputes, in particular involving security of payment.

Turner Freeman Lawyers

Turner Freeman Lawyers has announced several promotions, including four elevations to partner, across its Queensland offices.

New partner **Ciaran Ehrich** joined the firm's Brisbane office in 2012 as a graduate lawyer and has worked exclusively in compensation and injury law. Since July 2017, he has managed the firm's Gold Coast office at Varsity Lakes and handles a variety of claims under Queensland, New South Wales, Commonwealth and New Zealand law.

Matthew O'Keefe has also been promoted to partner. Matthew joined the firm in 2012 and has been based in the Ipswich office, which he has managed since early 2017. He has extensive experience in all areas of personal compensation and injury law, and has a strong litigation background.

New partner **Tamaryn Caldwell** has worked in personal injury and compensation law since she joined the firm in 2007, focusing on dust diseases claims in various jurisdictions. Tamaryn has a strong litigation background, and manages the North Lakes office.

Jenna Hutchinson, also promoted to partner, joined Turner Freeman in 2013 and heads the Queensland wills and estates department, practising exclusively in succession law. Based in the Brisbane office, Jenna services clients state-wide and manages a large department of both professional and support staff. Jenna also practises in New South Wales.

Darren Whitelegg, who has been promoted to senior associate, was initially based in the Ipswich office, but has worked in the Toowoomba office since it opened. Darren works in personal injury law and has extensive experience in motor vehicle accident, workers' compensation and dust diseases litigation.

Emma Davidson, promoted to senior associate, came to the firm in 2009 as a law clerk in the Brisbane office, later assisting in the establishment of the Gold Coast offices at Southport and Varsity Lakes. Emma has worked in personal injury law under Queensland, New South Wales and Commonwealth legislation, and has a strong background in TPD claims.

Jessica Preston, who has been promoted to associate, joined the firm in 2017 and has worked in the Gold Coast office. She has previously worked for a number of firms with a background in plaintiff and defendant injury and compensation law, both in Queensland and New South Wales, focusing on TPD and life insurance claims.

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COURT OUT: The decline of accurate news reporting

BY TONY KEIM



It is no secret – the fourth estate is now a frail, pale, pitifully understaffed and soulless ghost of yesteryear where once-great news tycoons wielded enormous power and were crucial in informing the wider populace via explicit capacity for advocacy and implicit ability to frame political issues.

As US founding father Thomas Jefferson once said: “The only security of all is in a free press.”

Traditional news media has undergone a painfully slow but steady free fall from its position of great authority and leadership thanks to plummeting financial returns from the ruthless and decimating disruption that commenced two decades ago with the dawning of the digital age. The result has seen the loss of thousands of years of journalism experience and hundreds of senior, accomplished, professional and dedicated reporters dispatched and replaced in favour of younger, inexperienced and far cheaper journalists to keep the businesses operating and returning ever-decreasing profits.

What has been sacrificed as part of the new news model is what once made journalism essential, necessary and great – its ability to expose and reveal truth via stories that were informative, fair, balanced and supported with verifiable facts and named (not secret or highly placed) authoritative sources. This latter type of reporting which relies on unnamed sources has even garnered nicknames by some veteran reporters as a ‘Ronald McDonald’ or a ‘Colonel’, in honour KFC’s creator Colonel Sanders, because these fast food chains rely on their “secret sauces” or “secret ingredients” that are hard to verify.

It is inevitable the public will continue to lose its already dwindling faith and trust in mainstream/traditional media as they continue to vote with their feet – or, more aptly, their fingers as they swipe, type or ‘like’ – opting for alternate and non-traditional news sites which have no real rigour around the way that they obtain, authenticate or

editorially consider the ethics, news value or appropriateness of the content they publish.

The crisis of declining news reportage standards has been highlighted in recent paper *Coverage and Criticism of Courts*, penned by Queensland Supreme Court judge Peter Applegarth.

The courts have long been the target of negative court reports and editorials about how out of touch the judiciary is with the ‘court of public opinion’, and how unlikely judges are to know or empathise with the thoughts, hopes and expectations of everyday Queenslanders because they live in ‘ivory towers’. But Justice Applegarth is very much plugged into community expectations or, as they say in newspapers, ‘what readers want’, and has long been an advocate for a fair and free press.

During his many years as a barrister, Justice Applegarth regularly represented media outlets and journalists in court, and advocated for their rights to publish and obtain material essential to full and fair reporting of matters.

Justice Applegarth’s paper is a lamentably accurate and brutally fair account of traditional news media (that is, newspapers, television and radio) as it exists today, and how unlikely it is to return to its glory days as a trusted source of news.

“Many of us fondly recall the days when trial courts were covered by dedicated court reporters,” Justice Applegarth says in his 28-page paper.

“In those days, the typical court reporter on a metropolitan or regional daily newspaper usually had enough time to get things right, file several hundred words about a case and still get to the pub by 6pm.

“Things have changed in recent decades, and we cannot expect media coverage of the courts to return to what it once was. The face of journalism has changed due to new technology and new media.”

He attributes this decline to the demise of dedicated and experienced court reporters, who have been replaced by young, inexperienced junior journalists and interns, as well as a lack of the depth and detail in

reporting and the blurring between actual reporting versus news commentary.

“We live increasingly in a journalist free zone,” Justice Applegarth said.

“Beginners or interns try to report cases, and in haste and ignorance do things like report what is said in the absence of the jury. We have ‘commentators’ instantly expressing opinions based on short and inaccurate reports, having not read the decision they are critiquing.

“Courts try to assist reporters and the public to understand our decisions with judgment summaries, and by having court information officers.

“Some courts even have guidelines and instructional manuals to teach reporters the basics of court reporting: something we used to assume was the subject of training in media organisations.

“We would be deluded to think that our modest attempts to train journalists, along with the provision of judgment summaries and the like, will do much to arrest the trend towards shorter, simpler and inevitably misleading reports of cases by both new and legacy media, which scramble to be first with the on-line news, written by time-poor journalists or interns.”

And he’s right. Much changed between my commencing my career as a newspaper court reporter in Central Queensland, covering a summary trial for two rugby league players accused of bashing a referee during a match in the early 1990s, and when I left the industry as chief court reporter at *The Courier-Mail* several years ago. And as QLS’s media manager, I continue to have a front row seat to the ongoing changes that see a revolving door line up of young and inexperienced, but fiercely energetic and eager, reporters turning up to do the best job they can, albeit with limited skills or contacts, every day.

Gone are days of newsrooms, top-heavy with career journalists with decades of experience covering complex and sometimes difficult rounds such as the courts, police, finance, councils, state and federal politics, business, etc. These veteran reporters’ notebooks of contacts contained the who’s who of

their particular speciality, and rarely would a decent story on their patch go uncovered without a strictly professional, thorough, authoritative and accurate account of the events or subject matter.

These senior reporters were supported by younger, up-and-coming journalists, usually with more than a few years under their belt to learn the ropes and fill in or cover other matters as stories rolled in, while working towards becoming the senior in their preferred round. Then you had the new, younger reporters, cadets and interns who spent stints covering myriad rounds, learning the craft and gaining experience via their senior colleagues.

Alas, those younger reporters and interns are now expected to fill senior reporter roles as soon as they are handed their press credential laminate with limited training, contacts or understanding of their beat and with little or no support, guidance or training in specialist areas or mentors to advise them. This trend began in commercial metropolitan newspaper and television newsrooms towards the beginning of the 2000s – with profitable sales and advertiser revenue being lost to alternate media sources as a diverse range of so-called news providers exploded via the internet. While the ABC has been exempt from those pressures, it has suffered

Federal Government funding cuts, political pressures and accused of having a left wing, socialist editorial policy.

Queensland Law Society President Bill Potts, who has worked under the media glare during his 38-year career as a criminal lawyer, said the downsizing of newsrooms and pressure on young and inexperienced reporters to produce regular content for multiple platforms – such as print, online and various social media brands and services – has resulted in increased inaccuracies and superficial coverage of sometimes complex cases.

“This ultimately leads to a skewing of the court process – in particular, sentencing matters – to superficial coverage,” he said.

While it is abundantly clear all traditional media organisations and their editorial teams are working furiously and are dedicated to providing the best, accurate news coverage they possible can – it is equally clear they have nowhere near the resources required to do so and, as a result, the downward spiral is destined to continue.

What’s the solution? If you can solve that questions you may just be the next Rupert Murdoch or Kerry Packer.

Until then, Justice Applegarth suggests the judiciary continues to assist reporters and the

public to understand court decisions and not, as some courts outside of Queensland have tried, to attempt to provide guidelines and instructional manuals to teach court reporters the basics.

“We would be deluded to think that our modest attempt to train journalists...will do much to arrest the trend towards shorter, simpler and inevitably misleading reports of cases by both new and legacy media,” he said.

“Courts need to appreciate the time and other constraints under which most professional journalists work.

“We need to help journalists to fairly report, and then honestly comment upon the cases we decide and our performance as judges.”

To read Justice Applegarth’s paper in full visit:
archive.sclqld.org.au/judgepub/2019/applegarth20190608.pdf

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 **Queensland Law Society**

Life after death

Providing hope for shattered lives or
creating a lifetime of unintended consequences?



BY TONY KEIM

The crushing wave of despair that engulfs a person when they learn of the death of a loved one ordinarily has significant life-altering impact and can define and redirect the course of the rest of their lives – leaving them mentally and physically debilitated and shunning the outside world for months, even years.

The death of a spouse is understandably amplified exponentially – particularly when that death occurs suddenly and at a young age. All the shared hopes, dreams, future plans and desires surrounding the creation of a family and a life together lost in one

fell swoop. How is the spouse left behind expected to rebuild their life, remember and celebrate their dearly loved spouse and move on with their shattered existence?

Over the past 20 years, there have been a small handful of extraordinary Queensland cases in which grieving women have almost immediately set aside their overwhelming sorrow in a bid to salvage one last shared dream to honour their partner – to have and raise his child or children.

Despite the many issues to be considered before setting off to on the path to attempt to conceive a late partner's child – such as the practical, moral, social, parental custodial responsibilities, spiritual or religious guidance, financial plans and future security, education and care – that final decision to use a deceased partner's reproductive matter in the 21st Century has until a year ago fallen upon the shoulders of a small group of members of the state's judiciary.

Even today, the only way to do obtain a posthumous retrieval order in Queensland is by engaging a lawyer and making an urgent application to secure a judicial officer's (usually a coroner) permission to retrieve and store semen from the late male partner's reproductive organs.

Timeliness of this process is of the essence as posthumous sperm retrieval – according

to myriad international medical authorities – must be done within 36 hours of a man's death. However, the same authorities suggest viability of sperm capable of fertilising a female ovum or oocytes diminishes rather swiftly and extraction and storage is preferable within the first 24 hours after death.

Courts had traditionally rejected such applications to use a deceased person's reproductive material for procreation, with Brisbane Supreme Court judge Richard Chesterman in January 2001 ruling Simone Baker could not have permission to retrieve her just deceased de-facto husband Andrew Clarke's sperm – saying any change in law permitting the practice was “best left to the legislature” to decide, not the courts.

But just a year later, fellow Supreme Court judge Roslyn Atkinson created history when she reversed Justice Chesterman's view in an urgent out-of-sessions application by Elizabeth Denman on 12 February 2004.

Ms Denman, then aged 30, had applied to retrieve and store her 40-year-old husband Gary Denman's semen after he was killed accidentally a day earlier.

Justice Atkinson granted the application, saying: “A matter such as this...warrants the mature consideration that can be given to it once the status quo is maintained by the harvesting and storage of the sperm.”



"Whether or not it should be used, must await a decision (by another court) on another day."

That view and approach was adopted and followed by judicial officers over the ensuing years, but none of the parties (women) – as a result of a change of heart or difficult legal complexities, limited financial means or in one case because her application was dismissed by the courts – were able to successfully apply to use the stored seminal fluid for the purpose of in vitro fertilization (IVF).

However, that all changed in a landmark decision on 20 June 2018 when Supreme Court judge Susan 'Sue' Brown granted Toowoomba's Ayla Cresswell, 24, the go-ahead to use the spermatozoa of her partner of three years, bricklayer Joshua Davies, to commence IVF treatment in the wake of his unexpected death in August 2016.

Justice Brown, in her 51-page decision, said: "There has been no consideration in Queensland of the Court's jurisdiction to make orders as to whether a party (such as Ms Cresswell) is entitled to possess and use any sperm that has been removed (from a deceased person)."

"Such a determination depends on whether the sperm can be characterised as property, and if it is, who has the rights in relation to that property."

She said there were four issues to be determined in such cases:

1. the legal basis for the removal order and its present status
2. whether the removed sperm was property capable of being possessed
3. whether Ms Cresswell had an entitlement to the possession and use of the matter removed from Mr Davies, and
4. if Ms Cresswell did have such an entitlement, how it was affected by discretionary factors which must be considered in determining whether any declaration may be made in her favour.

In granting the application, Justice Brown also issued a plea to the government to get involved in structuring laws in such a fashion that the difficult task that had been foisted upon the judiciary to make their decision far easier.

"There are a number of matters which are unresolved in this area that do not arise for decision in the present case...(and) there are a number of issues which are likely to need to be resolved by Parliament."

Those changes are yet to eventuate, but precisely one year and one day later the same judge, Justice Brown, was asked and granted a second couple the same opportunity.

On 21 June, Dr Jennifer Gaffney, 36, an anaesthetist, was successful in an application

to use her husband's spermatozoa – dermatologist Dr Daniel Gaffney, 38 – after he died suddenly of natural causes on the Sunshine Coast in November 2018.

The Court was told the UK-born couple had been devoted to each other for 12 years and planned to have additional children after the birth of their toddler son.

Justice Brown, in handing down her decision, said: "The evidence does support the fact that Daniel did wish to have further children, and there is no evidence that he objected to the use of the sperm by Dr Gaffney."

"She is also conscious of the fact that she must be careful not to embark on this exercise as a result of wanting Daniel back."

Whilst it is clear the courts now support a woman who chooses to opt for continuing their deceased partner's lineage, despite their absence or ability to participate in the raising of their own child or children, some lawyers question whether Dr Gaffney, or other women in her situation, needed to seek or be granted the court's permission in the wake of the *Cresswell* decision.

Brisbane fertility law specialist Stephen Page told *Proctor* in the wake of Justice Brown's decision there is now a clear path established to allow people to bypass the courts provided they follow a now accepted "list of



From the Queensland Health website:

The previous guidelines were removed from the website following a decision of the Supreme Court of Queensland on 20 June 2018. For details see: sclqld.org.au/caselaw/QSC/2018/142

These interim guidelines are intended to help a person (the applicant) who wishes to arrange removal of sperm from a deceased family member for the purpose of in vitro fertilisation (IVF).

Part 3 of the *Transplantation and Anatomy Act 1979* (Qld) (the Act) deals with donations of tissue after death. The removal of sperm for IVF can be authorised, without court approval, in accordance with Part 3 of the Act.

If the death is or may be reportable under the *Coroners Act 2003*, the consent of the coroner is also needed before sperm can be removed.

The applicant should seek assistance from an IVF organisation with trained medical and/or technical staff available out of hours (if necessary), who are able to remove, process and store the sperm, testes or other tissue as necessary, on an authorisation given under the Act. The applicant should also ask the IVF organisation how long sperm remains viable after death without suitable storage – this period is likely to be no longer than 24 hours.

For advice on the application of the Act, including the relevant authorisation process, it is recommended that applicants obtain their own legal advice. Queensland Health does not provide applicants with legal advice.

Staff at the mortuary where the deceased is held should be informed about the possibility of sperm donation as soon as possible. Mortuaries would usually require a staff member to be present and to assist personnel from an IVF organisation attending to remove sperm.

requirements" from posthumous retrieval of for use in assisted reproductive treatment is for a 'medical purpose' under...the TAA."

"The TAA provides for a statutory regime for the removal of sperm which does not require parties to come before the Court for authorisation to permit removal of sperm, but rather requires the authorisation of the designated officer and in some cases, the Coroner to be obtained."

Mr Page said the court also ruled that whether any retrieved tissue could be utilised after posthumous retrieval had been successful was then a matter for the clinic in possession of the reproductive matter.

"It is a matter for the...clinic concerned to determine whether it is satisfied to proceed to facilitate the use posthumously of the sperm removed...having regards to its guidelines, including the NHMRC (National Health and Medical Research Council) guidelines," Justice Brown said.

"It is apparent from the reasons that this a complex and developing area of the law.

"It may be an area which it may be considered appropriate for consideration by a body such

Race against time to preserve *life's essence*



BY DAVID RIWOE

Darling Downs based firm Aden Lawyers paved the way for their client Ayla Cresswell to win the right to utilise the sperm removed from her partner of three years, bricklayer Joshua Davies, when he died unexpectedly in 2016. The following is an insightful and instructive 'how to' guide on the arduous task of acting swiftly for a client in grief.

Joshua Davies passed away at 6.30am on 23 August 2016.

His long-time partner (Ms Creswell) did not instruct the firm, Aden Lawyers, to act until 12.30am the following day. As a result, affidavits were drafted between 12.30am and 2.00am, following which the registry was contacted and the Supreme Court opened at 4.30am.

A copy of the eventual order to medically extract and store Mr Davies' spermatazoa was obtained at 6.30am, however, mere possession of a court order does not grant a person with an automatic right to remove the deceased sperm as there are other considerations to be addressed.

That includes advising the hospital where the deceased's body is located that a surgical procedure will need to be performed as a matter of urgency.

These procedures will not be allowed unless the supervising doctor authorises it. As a result, it is important to locate the supervising doctor and make sure they have received a copy of the court order and that they authorise the procedure.

After the hospital has been appraised on the upcoming surgical procedure, it is necessary to obtain the services of a suitably qualified person to perform the procedure (that is, to remove the specimen from the deceased).

Because the operation needs to be performed on a deceased person, it is highly likely that the body will be located in the morgue. The morgue will therefore need to be contacted so that access to the body can be arranged.

Consequently, the coroner's written consent should be obtained, as well as that of the next of kin.

It is highly likely that the supervising doctor will not authorise the procedure until they have received the coroner's consent. While it is

acknowledged that the Court Order authorises the removal of the sperm, the *Transplantation and Anatomy Act 1979* (Qld) also provides the statutory conditions for the removal of tissue where the body of a deceased person is in a hospital and as a result, those conditions should be complied with as well.

The conditions include:

- organising an IVF clinic to store the specimen after it has been removed (which is frozen with liquid nitrogen)
- organising transport for the removed specimen—importantly, the transport must be present at the hospital at the same time as the procedure is being performed as it is unlikely that the hospital will have the necessary facilities to store or freeze the specimen
- after the specimen has been removed and transported to the IVF clinic, obtaining a report on the sperm and its suitability for use in assisted reproductive procedures.

The second step

While the application to remove sperm from a deceased person must happen as soon as possible, there is virtually no time limit on the second application seeking orders to be able to use the sperm for IVF purposes. As a result, this gives one the time to properly grieve, discuss their desires or concerns with friends and family, obtain counselling and consult suitably qualified medical practitioners.

If, after a sufficient period of time has elapsed, and after they have received counselling and medical advice, the person may consider filing the second application for orders to be able to use the sperm for IVF purposes.

Conclusion

At this point in time, there is no statutory regime in Queensland which applies to the use of posthumous sperm.

While the court has clarified the legal position on the use of posthumous sperm, until the Queensland Parliament or the Australian medical profession establishes a standard procedure for the removal of sperm, it is important to be mindful that any application to the Supreme Court for orders authorising the removal of the sperm must be ideally filed within 12 to 24 hours after death, and one must also be prepared to undertake, or organise the numerous auxiliary steps required in actually obtaining the sperm specimen.

as the Law Reform Commission... (or) be resolved by Parliament.'"

Until then, Mr Page suggests the process from death to new life – advice he has given to a one of his own client's in a similar situation – is by following a list of requirements which include:

- obtaining counselling to ensure all aspects of the proposed course of action – use of posthumously retrieved reproduction tissue – have been considered
- a proper period of reflection, or time (for example, six months) is observed between the death of the spouse and the treatment to commence the fertilisation process and insemination, and
- a referral to an 'independent body' which could be a lawyer or a medical clinic's ethics committee.

While the path ahead for future parents wanting to maintain the family tree of loved ones after they pass is still anything but set in stone, it has become a lot clearer and achievable as a result of the few tenacious, courageous and loving partners who have taken up the cudgels to create life with their soul mates, long after they have left this world.

For the love of... gametes



BY STEPHEN PAGE

A single-judge Supreme Court decision last year in the case of young Darling Downs woman Ayla Cresswell (*Re Cresswell* [2018] QSC 142) has highlighted for many people the posthumous use of gametes and embryos by their grieving spouses to become parents.

Justice Anne Brown's decision was limited as to whether Ayla Cresswell could use the sperm of her former partner Joshua Davies to become a mother.

In approaching a posthumous case, it is always helpful if someone that is expecting to die (and their soon-to-be grieving widow or widower intends to become a parent) that the dying person leaves clear directions about the use of gametes and embryos to enable a child or children to be conceived.

When there aren't any clear directions, such as in *Re Cresswell* where Joshua Davies expressed a desire to have children with Ayla Cresswell, but then committed suicide – the three legal issues to be covered are:

1. retrieval of the gametes
2. storage of the gametes
3. use of the gametes.

Retrieval

Justice Brown's decision made plain that the appropriate course is *not* to make an application to the Supreme Court to retrieve the sperm within 24 or 48 hours of death, but instead to follow the procedures under the *Transplantation and Anatomy Act 1979* (Qld).

These procedures largely depend on whether the death falls within the jurisdiction of the coroner. A preliminary requirement is that if the death did fall within the jurisdiction of the coroner then the coroner must give consent. If the coroner does not give consent to retrieval, it is doubtful whether any further steps can be taken.

Whether or not the coroner has jurisdiction, the next issue is whether valid donor consent has been given by the deceased. If consent has been given, has it been revoked? Whether consent has been given or not, if the deceased objected to donation, then retrieval is not possible. If the body is in a hospital, there is a requirement of the senior available next of kin to consent and provide written authority and that another senior available next of kin of the same or higher order does not object.

Finally, in order to retrieve the gametes, the relevant designated officer of the hospital must authorise the removal by signed writing, and in a practical sense there must be a specialist fertility doctor on hand to ensure that the eggs or sperm are properly preserved – which requires them to be treated and then frozen in liquid nitrogen.

Gamete /'gami:t/: noun

plural noun: gametes – a mature haploid male or female germ cell which is able to unite with another of the opposite sex in sexual reproduction to form a zygote (the union of the sperm cell and the female egg cell also known as a fertilised ovum).

Storage

Half of Australian jurisdictions have an *Assisted Reproductive Treatment Act*. The other jurisdictions, including Queensland, do not. The conditions of use and retrieval are not contained under any statute but are contained under the National Health and Medical Research Council, 'Ethical Guidelines on the Use of Assisted Reproductive Technology and Clinical Practice and Research (2017)'.

In vitro fertilisation (IVF) clinics throughout Australia must comply with the Ethical Guidelines (subject to any contrary federal, state or territory statutes). Clinics must be registered under the *Research Involving Human Embryos Act 2002* (Cth) and the equivalent state law. IVF clinics are required to comply with the audit requirements of the Reproductive Technology Accreditation Committee (RTAC), a joint committee of the Fertility Society of Australia. The Ethical Guidelines and RTAC's Code of Practice work together hand in glove.

IVF doctors are naturally very cautious to comply with the Ethical Guidelines. If they breach their audit requirements then, aside from any adverse publicity which could be ruinous to their practice, a loss of licence prevents them being able to operate. Licences to operate can be extremely valuable – and are therefore treated with great care.

Even if a solicitor believes that there has been compliance with the law, if a fertility doctor is of the view that there is not compliance with the Ethical Guidelines, then there will not be retrieval, use or storage. The Ethical Guidelines being guidelines, are not binding law. The best example is in Guideline 8.21 which says in part: "Court authority is required before a clinician may facilitate the collection of gametes from a person who is deceased or is dying and lacks the capacity to provide valid consent."

The Ethical Guidelines were written on the assumption that a court order is required, whereas Justice Brown made plain in *Re Cresswell* that the court does not have jurisdiction.

I have found an effective way of dealing with this is to explain the *Re Cresswell* decision to the IVF clinic.

Who can seek the retrieval is limited:

- The request for collection has come from the spouse or partner of the deceased or dying person and not from any other relative.
- The gametes are intended for use by the surviving spouse or partner for the purposes of reproduction.
- There is some evidence that the dying or deceased person would have supported the posthumous use of the gametes by the surviving partner, or at the very least, there is no evidence that the deceased or dying

person had previously expressed that they do not wish for this to occur.

- The surviving spouse or partner provides valid consent for the collection and storage of the gametes, in accordance with the Ethical Guidelines.
- The proposed collection and storage has been approved by an appropriate court authority.

Again, the last requirement is not essential in Queensland because the court does not have jurisdiction about collection and is rarely needed for storage.

Posthumous use

If the deceased left clearly expressed directions that object to the posthumous use of their stored gametes or embryos, clinics must respect this objection and not facilitate the posthumous use of the stored gametes or embryos to achieve pregnancy.

Where the deceased has not left clearly expressed directions, where permitted by law, clinics may facilitate the posthumous use of stored gametes or embryos to achieve pregnancy, if:

- The request to do so has come from the spouse or partner of the deceased or dying person, and not from any other relative.
- The gametes are intended for use by the surviving spouse or partner for the purposes of reproduction.

- There is some evidence that the dying or deceased person would have supported the posthumous use of their gametes by the surviving partner, or at the very least, there is no evidence that the deceased or dying person had previously expressed that they do not wish this to occur.
- The surviving spouse or partner provides valid consent.
- There is sufficient time before attempting conception and/or pregnancy so that grief and related emotions do not interfere with decision making.
- The surviving prospective parent has undergone appropriate counselling.
- An independent body has reviewed the circumstances and supports the proposed use.

The principle to remember is that unless our law specifically prohibits an activity, it is permitted by law.

Furthermore, sometimes doctors collect gametes or gonadal tissue from a child or young person for the purposes of fertility preservation (for example, if they are treated for cancer). But these can only be used posthumously if the person for whom they were stored reached adulthood before their death and the other requirements are satisfied.

In practice, an IVF clinic will want:

- a detailed letter of advice from a barrister or solicitor that there is compliance with the law and the guidelines.
- a report from the treating counsellor (who is preferably a fertility counsellor) that the various relevant factors have been addressed and it is suitable to proceed.

No timeline is specified for sufficient time between death and attempts at conception. I am of the view that this should be a period of six months from death, being a rule of thumb covering adequate time between two enormous life events.





A LESSON IN PRIVACY COMPLIANCE

Fingerprint scans point to
unacceptable employer practices



BY GIRI SIVARAMAN AND PALOMA COLE

The Fair Work Commission Full Bench's recent decision in *Lee v Superior Wood Pty Ltd* [2019] FWCFB 2946 is a significant development in the interaction between technology and privacy and employment law.

BACKGROUND

In October 2017 Superior Wood, a sawmill operator, informed its employees that it was introducing fingerprint scanners to record employees' hours of work.

Mr Lee declined to use the scanners and repeatedly informed Superior Wood, both verbally and in writing, of his concerns regarding the control of his information and Superior Wood's inability to assure him that no third-party access to or use of his data would take place. Superior Wood's responses were limited to assuring Mr Lee that a fingerprint could not be reverse-engineered from the data taken by the scanner.

After issuing Mr Lee with two written warnings and a show cause notice, Superior Wood terminated his employment on 12 February 2018 for refusing to comply with a direction to use the scanners.

Mr Lee's unfair dismissal application was unsuccessful at first instance, despite the commissioner finding that there was a concerning lack of compliance with the *Privacy Act 1988* (Cth) (Privacy Act) by Superior Wood, its associated entities and service providers; and that Mr Lee had made a concerted effort to find a workable compromise which would not require the collection of his sensitive information.

APPEAL BEFORE THE FULL BENCH

While there were nine discernable appeal grounds raised by Mr Lee, the dominant issue for determination on appeal was whether the Privacy Act, and the Australian Privacy Principles contained within, operated to render the direction issued to Mr Lee unlawful and/or unreasonable.

Lawful

In determining whether the direction was lawful, of most significance was Australian Privacy Principle (APP) 3, which prohibits the collection of sensitive information unless the information is reasonably necessary for one or more of the collecting entity's functions or activities, and the individual consents to its collection.¹

Reasonably necessary

The Full Bench disagreed with Commissioner Hunt's view that the use of biometric scanners was "reasonably necessary".² Instead, the Full Bench held that the evidentiary basis for such a finding was "not compelling";³ the introduction of biometric scanners was mainly an administrative convenience, and there was no evidence that Superior Wood had investigated the cost and utility of other electronic means of recording start and finish times which did not require the collection of sensitive information.

Consent

Further, the direction issued to Mr Lee "in circumstances where he did not consent" to collection of his sensitive information was "directly inconsistent" with APP3.⁴ In response to a restrictive reading of APP3 by Superior Wood, the Full Bench held that APP3 applies to the solicitation of sensitive information, not just its collection.⁵

Other APP breaches

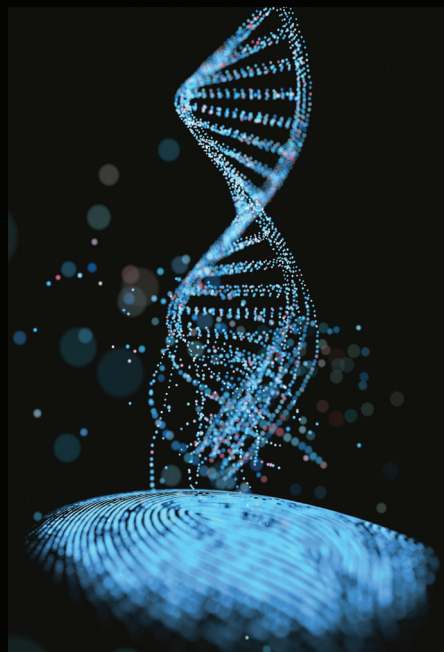
Superior Wood also breached APP1 by failing to have a clearly expressed and up-to-date policy regarding management of personal information;⁶ and APP5 by failing to issue a 'privacy collection notice' which set out a number of matters, including the consequences if the information wasn't collected, and the entities which would have access to the information.

As a result of the various contraventions of the Australian Privacy Principles, in breach of section 15 of the Privacy Act, the direction issued to Mr Lee to submit his biometric data when he did not consent to the collection of that data was not a lawful direction.

Reasonable

While not required to make a finding in this regard, the Full Bench noted that it would have held that the direction was also unreasonable, on the basis that "any 'consent' that [Mr Lee] might have given once told that he faced discipline or dismissal... would not have been genuine consent".⁷

It therefore followed that the direction issued to Mr Lee to consent to the collection of his sensitive information was not a lawful or reasonable direction, and as such, did not provide a valid reason for dismissal. As the refusal to comply with the direction formed the only reason for dismissal, the dismissal was unfair.



While the Full Bench's ruling is no doubt a significant step for those concerned about arbitrary collection of workers' personal data, it is likely to be of concern to those same individuals that an employer's obligations under the Privacy Act end at the time of collection. Potentially this allows employers to unilaterally change their privacy policies, disclose information to parties not detailed in a privacy collection notice, at any time after collection.

Consent under duress

Many employers rely on a variety of means to document and monitor their employees. This decision prima facie suggests that when the Australian Privacy Principles explicitly require an individual's consent before their employer collects their information, disciplinary action, including dismissal, cannot be taken if that employee declines to consent, because threats of such action would render any 'consent' given afterwards "vitiated by the threat".

Employers will need to seriously consider whether there are other means available to them to achieve their goals which do not require the collection of sensitive information, as were available to Superior Wood in this case.

However, it remains to be seen whether an employee, employed by an entity which is compliant with the Australian Privacy Principles, that has good reason to collect an employee's sensitive information, and which could not achieve its goals without such collection, would achieve the same outcome before the Fair Work Commission if he or she was terminated for refusing to consent to the collection.

OTHER POINTS OF INTEREST

Effect of 'employment records' exemption

Superior Wood sought to assert that the Australian Privacy Principles had no application on the basis of s7B(3) of the Privacy Act, which provides that an entity is exempt from its obligations under the Act when its conduct in collecting sensitive information is directly related to an employment relationship between the employer and an individual and an employee record held by the entity, relating to the individual.

The Full Bench held that the employee records exemption only applies to information already held by an employer. As a result, the Australian Privacy Principles apply to employers soliciting and collecting sensitive information "up to the point of collection". Once collected, the employee records exemption is enlivened and the Privacy Act no longer regulates the sensitive information's use or disclosure.⁸

This article appears courtesy of the Queensland Law Society Industrial Law Committee. Giri Sivaraman is a principal lawyer at Maurice Blackburn Lawyers and Deputy Chair of the committee. Paloma Cole is a lawyer at Maurice Blackburn Lawyers.

Notes

¹ It was not in dispute that the biometric data sought by Superior Wood was sensitive information.

² *Lee v Superior Wood Pty Ltd t/a Superior Wood* [2018] FWC 4762, at [203].

³ *Lee v Superior Wood Pty Ltd t/a Superior Wood* [2019] FWC 2946, at [85].

⁴ *Ibid*, at [48].

⁵ *Ibid*, at [47].

⁶ A number of the entities which had access to, or stored, the biometric information collected by Superior Wood were also non-compliant with APP1.

⁷ *Lee v Superior Wood Pty Ltd t/a Superior Wood* [2019] FWC 2946, at [58].

⁸ *Ibid*, at [57].

YOUR GROWING PROFESSION

National study profiles lawyers across Australia



The latest national solicitor profile paints a picture of a strong, growing profession with, for the first time, more females than males.

The '2018 National Profile of Solicitors' was prepared by Urbis for the Conference of Law Societies, based on data from the state law societies, the Victorian Legal Services Board and Commissioner, and the Legal Practice Board of Western Australia, as at October 2018 and released recently. It is the fourth national profile, with previous reports published in 2011, 2014 and 2016.

The following information, much of which has been reproduced from the report's executive summary, provides some fascinating insights into the size, shape and nature of your profession.

A key finding is that, since 2011, the Australian legal profession has grown by almost a third (33%), with 76,303 members—an increase of 18,726.

Most were practising in New South Wales (43%), then Victoria (26%) and Queensland (15%).

The increase in the number of practising solicitors was seen in all states and territories, but most strongly observed in the Australian Capital Territory (up 67%) and Tasmania (up 62%). In Queensland, the number grew by 39% – from 8474 to 11,758.

However, growth rates were generally the greatest early in this period (that is, 2011 to 2014), and have now slowed considerably.

Gender

For the first time last year, nationally, there were more female solicitors (52%) than male (48%), a trend evidenced by the larger numbers of female solicitors entering the profession compared with male solicitors (an increase of 49% compared with an increase of 16% in males) since 2011.

The highest levels of female representation were in the Northern Territory and the Australian Capital Territory. Western Australia was the only jurisdiction with an even representation of male and female solicitors. In Queensland, there were 5981 female practitioners (51%) and 5777 males (49%).

Aboriginal and/or Torres Strait Islander status

Since 2014, data has been provided on Aboriginal and/or Torres Strait Islander status in the profession.

In 2018, 519 solicitors (0.7%) identified as Aboriginal and/or Torres Strait Islander, a decrease from 1.2% in 2016.

The highest proportions of Aboriginal and/or Torres Strait Islander solicitors were in New South Wales (1.2%) and Tasmania (1.1%). In Queensland, only 0.3% (36 solicitors)

identified as Aboriginal and/or Torres Strait Islander, the lowest percentage in Australia. No data from Victoria was available.

Age

In 2018, the mean age of Australian solicitors was 42. Solicitors aged from 25 to 39 made up almost half of all solicitors (48%). Solicitors in the Northern Territory, the Australian Capital Territory, Western Australia and Queensland were slightly younger than those in other jurisdictions, with an average age of 41. Solicitors in South Australia and Tasmania were slightly older, with an average age of 43.

While the mean age of Australian solicitors has remained relatively consistent since 2011, there has been a large increase in the proportion of solicitors aged under 25, with a growth of rate of 33% since 2011. Queensland had the second highest proportion of solicitors aged 29 years and younger at 23%. At the same time, the proportion of solicitors aged 65 and over has also increased by 35%.

Overall, female solicitors were younger on average, with a mean age of 38, compared to 46 for male solicitors. Four in 10 female solicitors were aged under 34 (43%), compared with only a quarter of males (27%). Conversely, 12% of all male solicitors were aged 65 or older compared with only 2% of females.

Years since admission

In 2018, two-fifths of all solicitors had been admitted for 15 years or more (39%), while one in 10 had been admitted for less than a year (9%). Nearly one fifth of all solicitors had been admitted for either two to five years or six to 10 years (19% and 18% respectively).

When comparing across jurisdictions, Western Australia and the Australian Capital Territory had the largest proportions of solicitors admitted for one year or less (12% each), while South Australia and New South Wales had the largest proportions of solicitors admitted for 15 years or more (45% and 42% respectively).

In 2018, more than half of all female solicitors had been admitted for 10 years or less (53%), compared to only a third of all male solicitors (37%). This is consistent with the observed greater representation of female solicitors in the younger age brackets compared to males.

There was a lower proportion of solicitors admitted for 15 years or more working in government legal (33%), compared to private practice (41%) and corporate legal (40%). Within private practice, larger firms tended to have a greater proportion of solicitors admitted for five years or less compared to smaller firms.

The profile of years since admission remained relatively stable between 2016 and 2018. However, since 2011 the proportion of solicitors admitted for 10 years or less has steadily declined, while the proportion of solicitors admitted for 11 years or more has steadily increased.

Employment sector

In 2018, the majority of solicitors in Australia were working in private practice (69%), followed by corporate legal (15%) and government legal (12%). This pattern was consistent across most jurisdictions, with the exception of the Australian Capital Territory (where government legal was the dominant sector) and the Northern Territory (where most solicitors worked in 'other' sectors, including community legal).

Government legal was the most female-dominant sector, with two thirds of all solicitors being female (66%).

Conversely, females were outnumbered in private practice, representing only 47% of all solicitors.

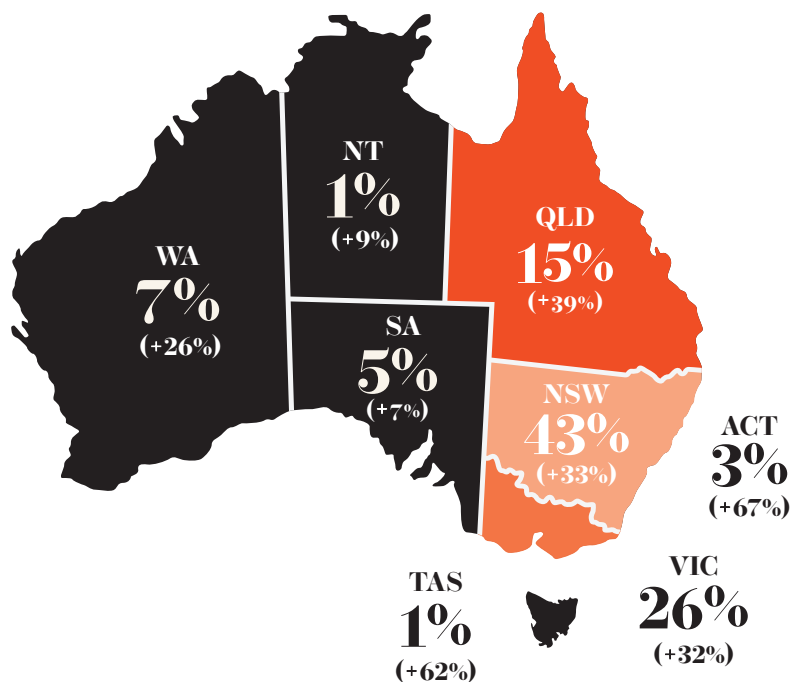
All main employment sectors have experienced growth since 2011, including +61% both in the corporate legal sector and in the government legal sector. Private practice grew by 23%.

Private law firms

In 2018, a majority of private practice firms were sole practitioners or firms with one principal (79%), followed by firms with two to four partners (7%). Higher proportions

DISTRIBUTION OF THE PROFESSION

Figures indicate the percentage of the national total; figures in brackets show change since 2011.



Graphical illustrations are based on data in the 2018 National Profile of Solicitors prepared by Urbis.

of single principal firms were observed in Queensland (88%), South Australia (84%) and New South Wales (82%).

Of all private practice solicitors in 2018, more than one third were employed in single principal firms (38%), followed by those working in firms of two to four partners (14%). One in 10 private practice solicitors were working in firms with 40 or more partners (10%). In Queensland, 50% of private practice solicitors were employed in firms with a single principal, 20% in firms of two to four partners, 8% in firms of five to ten partners and 22% in firms of more than ten partners.

Employment location

In 2018, more than half of all solicitors were practising in a city-based location (54%), a third were practising in a suburban location (32%), and 10% were practising in a country/rural location. Only 4% were practising interstate or overseas.

When looking across jurisdictions, Tasmania had the highest proportion of solicitors working in cities (83%), and the Northern Territory had the highest proportion of solicitors working in country/rural areas (19%).

In addition, more than half of all solicitors working in the Australian Capital Territory were working in suburban locations (53%), a higher proportion than in other jurisdictions.

Consistent with the national gender profile, there were more females than males working across most employment location types. The exceptions were 'country/rural' and 'overseas', where the gender split was more even.

Young lawyers (solicitors admitted for five years or less) were slightly more concentrated in city-based locations compared to all lawyers in the profession (58% compared to 54%). Conversely, a smaller proportion of young lawyers were working in suburban areas (29%), compared to all solicitors (32%). It is worth noting that young female lawyers were most strongly represented in country/rural areas, making up 65% of all young lawyers working in these areas.

The employment location type with the strongest growth in solicitor numbers between 2011 and 2018 was 'suburban' (up 61%) followed by 'city' (up 36%). The number of solicitors working interstate areas and overseas remained relatively stable between 2016 and 2018 after strong growth since 2011.

EMPLOYMENT SECTOR

In 2018, most solicitors
worked in private sector

69%

Government legal

12%

Corporate legal

15%

Other

4%



Is BigLaw failing our professional colleagues?

BY TRAVIS
SCHULTZ



**The numbers in the 2018
National Profile of Solicitors
are surprising, to say the least.**

We had all predicted that the profession would be dominated numerically by females, given that over recent years there have been significantly more female graduates than males from Australian universities. But who would have anticipated the wholesale fracturing of medium and large law firms and the proliferation of micro-firms and sole practitioners?

In 2018 there were 18,748 legal firms in Australia and, of these, 2833 were based in Queensland.

Nationally, only 1% of firms had either five to 10 partners or 11-plus partners, and a whopping 79% of firms were sole practitioners.

But in Queensland, the numbers were even more polarised, as 88% of legal firms are now sole practitioners and 10% of firms have two to four partners.

Across the country, 53% of solicitors work in firms with one to four equity holders, but in Queensland 50% of our colleagues work in private practices owned by sole practitioners – compared with a national average of 38%!

We've also seen the proliferation of small firms starting up as micro-firms and sole practices.

**In Queensland...
88% of legal firms
are now sole
practitioners
and 10% of firms
have two to four
partners**

So, it begs the question – what's wrong with BigLaw?

Why is it that so many solicitors are fracturing away from the larger firms to hang out a shingle?

Is it because the barriers to entry have lowered with the advent of serviced offices, digital dictation, practice management software and digital marketing platforms? Or is it just that there are many early career lawyers who are finding it difficult to establish their career in the larger firms and set up their own shop in the hope they can grow their firm into something more substantial?

Or is there something more sinister at play – such as a philosophical rejection by generation X and Y of BigLaw's insatiable desire to capture billable time and ever-increasing targets for time-costing performance?

Does this data flag the advent of a new style of practice for the 21st Century? Or is it just that BigLaw doesn't have enough room at the inn for all of the graduates our universities are pumping out?

The findings in the report raise a lot of serious questions that we need to find the answers to. As a profession we have a responsibility to guide, teach and mentor our graduates. If BigLaw is not working for them then perhaps things need to change to encourage them back into the fold?

The rise of small and micro firms – are lean times ahead?

If you're a legal practitioner about to start your own small firm, it might pay dividends to have a quick look at the data contained in the 2018 National Profile of Solicitors, and perhaps compare the report to the 2016 edition – the findings are truly disturbing!

In October 2016 there were 15,539 private law firms operating in Australia. Of these, about 73% were practices with only one principal. In Queensland, there were then 853 sole practitioners that between them only employed 148 lawyers.

Two years on and the 2018 report shows an alarming rate on growth in the micro and small practice space as the number of Queensland based soloists more than doubled. By the time the report was compiled in October 2018 across Queensland there were 1777 sole practitioners.

What we are seeing in Queensland defies the national average.

In Australia there are 50,772 solicitors in private practices, while nationally, 38% are employed in sole practitioner firms.

However, in Queensland, a staggering 50% (the largest number in the country) are now employed in one-principal firms!

The barriers to entry into private legal practice are now very low, and some would suggest, far too low.

With so many entrants into an already competitive space can all these new players survive and thrive?

What we do know is that the legal services market is relatively inelastic – consumers will generally only use a lawyer when they need one, so increasing demand is difficult.

Yet what we are seeing is hundreds of micro-firms largely competing in the same space because they generally acknowledge they can't compete with the big players who have the advantage of scale, large marketing budgets and the profile that corporate clients are generally attracted to.

Anecdotal evidence suggests that most of these new small firms are competing in consumer law spaces – areas such as wills and estates, personal injuries, family law, conveyancing and business law.

It seems that most of these firms rely on the same business development strategies of networks, relationships and a bit of low cost social media or advertising to generate new business.

The question remains – is there enough work for all? What happens if the number of sole practitioner firms doubles again over the next two years? Will Darwinism triumph over energy and enthusiasm? Or will we see a new phase of consolidation in an attempt to find efficiencies and economies of scale?

One thing is certain – the next report will be very interesting reading indeed!

Travis Schultz is the principal of Travis Schultz Law and a member of the QLS Council.

In 2018,
there were
18,748
private law firms
across Australia

PRIVATE LAW FIRMS

Most private firms where sole practitioners



AN UPDATE:

SEXUAL HARASSMENT IN THE LEGAL PROFESSION



**BY BRIDGET
BURTON**

In the November 2018 edition of *Proctor* the author considered lessons from New Zealand in responding to sexual harassment in legal workplaces.¹ This update is closer to home.

The recent case of *Hill v Hughes* [2019] FCCA 1267 has again drawn attention to the issue of sexual harassment in the legal profession.

Judge Vasta began his decision with [at 3]:

“At its core, sexual harassment is a social practice of enforced inequality that demeans individuals on the basis of sex. This is especially so in the workplace...[S]exual harassment law seeks to address those workplace power imbalances that result from fear, silencing and the harms that flow from sexual hierarchy.”

In 2015 Ms Hill was a newly admitted solicitor working for Mr Hughes when he sexually harassed her. The style of his communication set out in the decision will feel unfamiliar to many lawyers and it will be tempting to dismiss him as unrepresentative.

However, underlying his unusual manner are themes common in our profession – of entitlement that comes with seniority, treating aggrieved employees as ‘other parties’ in their own workplace, and gendered power imbalance where almost all support staff are women, 62% of junior solicitors (less than five years) are women, and 76% of senior solicitors (21 or more years) are men.²

The sexual harassment commenced barely two months into her employment when Mr Hughes offered to assist Ms Hill with her personal family mediation, a circumstance which Judge Vasta found “formed a sense of intimacy and trust in him which fuelled his attraction and blurred his objectivity” [at 147]. The night prior to the mediation, when he “had her in a position from which she could not easily withdraw” [at 150] Mr Hughes said “I am very happy to be able to represent you. My feelings towards you have grown” [at 19]. Three days later, in an email he repeated: “It was an

He then engaged in protracted unwelcome pursuit of Ms Hill and when, after a “bombardment of emails” over several months [161] she remained only professional towards him, Mr Hughes’ tone changed.

For example, he emailed Ms Hill “...To be honest I can see you would get there like in a timeframe I can live with if I was at full speed and we were lovers but your work output is not there otherwise. Just look at what you achieve and it will not pay the bills and make me a profit on any view I am afraid. That is the harsh reality of business. I need a lover and well if it is not you well...see my other emails...” [at 93]. And later the same day: “... I have tried my best with training and will continue to do so as long as you assure me you will not make a complaint or sue me. Up to you. I always fight the good fight btw...” [at 95].

Mr Hughes did indeed fight. In the proceedings he attempted to blame Ms Hill for his behaviour, describing her clothing, perfume and manner [266–267]. He raised irrelevant private matters, gleaned while acting for her, to “silence or bully” her [261–263]. Judge Vasta found the claims “outrageous” and, along with other aspects of Mr Hughes’ conduct, relevant to awarding aggravated damages.

The decision in *Hill v Hughes* came shortly after the International Bar Association (IBA) report, ‘Us Too: Bullying and Sexual Harassment in the Legal Profession’ (2019).³ The IBA report finds, unsurprisingly, that sexual harassment and bullying are prominent and tend to be directed mostly at younger and junior female lawyers. Consistent with other similar examinations,⁴ reporting of both was found to be rare, with the status of the perpetrator and the legitimate fear of repercussions having the most chilling effect.

Interestingly, very recent research coming out of the United States examining the impact of the #MeToo movement has found that bias against women who report sexual harassment has measurably reduced in that jurisdiction since October 2017 as more women

disclose.⁵ We should expect the same will happen here; times are changing, albeit slowly.

As Judge Vasta noted in conclusion: “It is the mark of a bygone era where women, by their mere presence, were responsible for the reprehensible behaviour of men”[at 270].

Bridget Burton is the Director of the Human Rights and Civil Law Practice at Caxton Legal Centre. Bridget has worked in several community legal centres, Legal Aid Queensland and the University of Queensland, and practises mainly human rights and anti-discrimination law. She acknowledges the kind assistance of Associate Professor Francesca Bartlett in the preparation of this article.

It is important to note that this is a decision at first instance and it appears that it may be appealed. I have focused on the elements of the reported decision that are learning opportunities for us as a profession rather than the factual detail reported in the media or any precedent value for practitioners of sexual harassment law.

Notes

¹ At the same time Kate Allman was writing a powerful article on a similar topic for the *Law Society of NSW Journal* (#TimesUp for the Legal Profession, Dec 2018)

² Based on QLS membership 2018 figures (qls.com.au/About_QLS/Queensland_Law_Society/Resources_publications/Corporate_documents/Annual_Reports/Annual_Report_2017-18) and also broadly reflective of the national profile (lawsociety.com.au/sites/default/files/2018-04/NATIONAL%20PROFILE%20OF%20SOLICITORS%202016.compressed.pdf).

³ ibanet.org/bullying-and-sexual-harassment.aspx.

⁴ See the Law Council of Australia’s submission to the AHRC Inquiry into Sexual Harassment in Australian Workplaces for a good summary as relevant to the legal profession, lawcouncil.asn.au/resources/submissions/national-inquiry-into-sexual-harassment-in-australian-workplaces.

⁵ Hart, Chloe Grace, 2019, ‘The penalties for self-reporting sexual harassment’. see also theconversation.com/women-take-a-hit-for-reporting-sexual-harassment-but-metoo-may-be-changing-that-116794.

⁶ David Bowles, ‘Bullying and sexual harassment are ethical issues. Was there ever any doubt?’, march 2018, qls.com.au/knowledge_centre/ethics/resources/anti-discrimination_and_harassment/bullying_and_sexual_harassment_are_ethical_issues_was_there_ever_any_doubt.

⁷ [2011] NSWSC 1452, [143].

⁸ qls.com.au/for_the_profession/practice_support/resources/diversity_and_inclusion_in_the_workplace/harassment_bullying_and_discrimination_in_the_workplace.

honour representing you in your own matter. I am sorry it coincided with me expressing to you a need in me for intimacy” [at 35].

RULE 42 ASCR

Queensland practitioners will be aware of rule 42 of the Australian Solicitor Conduct Rules 2012 (ASCR):

42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:

42.1.1 discrimination;

42.1.2 sexual harassment; or

42.1.3 workplace bullying.

As a result of this rule 42, an alleged breach of federal or state anti-discrimination law may also be the possible subject of a complaint to the Legal Services Commissioner. Practitioners will be acutely aware of what took place in New Zealand⁶ last year and it is difficult to imagine that the language and attitude noted in *Styles v Clayton Utz (No.3)*⁷ would be tolerated in today’s environment.

Queensland Law Society has recently created a position statement and has several resources supporting practitioners on this issue.⁸

Solicitors need to be mindful that behaviour that can be caught by this rule can include language which could intimidate, offend, degrade or humiliate a person (whether that person is a fellow solicitor, client, member of the public or witness).

What you need to plead

Allegations require a reasonable basis

BY KYLIE DOWNES QC AND MAXWELL WALKER



Solicitors and barristers are frequently faced with situations in which the material available to them to formulate a statement of claim, defence or other pleading is incomplete or inconsistent.

This article deals with the duties of pleaders to satisfy themselves in relation to the underlying material when making allegations in a pleading. It discusses that duty in the context of some of the repercussions of its breach, namely:

- a. consequences for the client such as summary judgment or strike out applications, and indemnity costs orders
- b. consequences for practitioners such as personal costs orders.

The professional rules

Solicitors are bound by the Australian Solicitors Conduct Rules (ACSR).¹ Rule 21.3 states that: “A solicitor must not allege any matter of fact in: ...any court document settled by the solicitor...unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.”

Rule 21.4 relates to allegations of any matter of fact amounting to criminality, fraud or other serious misconduct against any person. A solicitor must not settle a pleading containing that type of allegation “unless the solicitor believes on reasonable grounds that available material by which the allegation could be supported provides a proper basis for it”² and “the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out”.³

Barristers are under the same obligations.⁴

However, there is an important additional rule in respect of barristers. Barristers are allowed to “regard the opinion of the instructing solicitor that material which is available to the solicitor is credible, being material which appears to the barrister from its nature to

support an allegation to which Rules 63 and 64 apply, as a reasonable ground for holding the belief required by those Rules (except in the case of a closing address or submission on the evidence)”.⁵

Therefore, barristers can rely on solicitors to inform them about the case and the factual material available, and to rely on that opinion to satisfy the rules. A similar rule applies when a solicitor engages a different solicitor to settle pleadings.⁶

The need for the belief that material provides a proper basis

The rules require the pleader to form a belief on reasonable grounds that the factual material already available provides a proper basis to make an allegation.

There are few decisions dealing with this requirement in detail.

The case of *Allstate Life Insurance Co v Australian and New Zealand Banking Group Ltd* (1995) 57 FCR 360 dealt with the former New South Wales rules, in the context of a fraud allegation, but the relevant rule required “that a barrister must not draw or settle any court document...unless the barrister believes on reasonable grounds that...the factual material already available to the barrister provides a proper basis for the allegation”.⁷ That is relevantly the same wording presently found in Rule 21.3.

In that case the court⁸ said that:

- a. The material that can found the relevant belief can include “written material, instructions and matters of inference, as well as oral statements”.⁹ Therefore, the range of things that can found a reasonable belief extend beyond strictly admissible evidence.
- b. The pleader can draw inferences and “[t]he fact that later at a hearing those inferences may be shown to have been wrongly based would not affect the fact that at the time of pleading those inferences could be drawn”.¹⁰

c. The belief can be formed despite the presence of evidence pointing in different directions.¹¹ It was held that “[a]t the initial stages of pleading a claim there will always be evidence which points in one way and the other...the pleader is not obliged to conduct in his or her mind a mini-trial to reach a conclusion that the allegation must, or indeed would on the balance of probabilities, succeed”.¹²

d. The pleader might identify defences to the allegations and this “does not make it improper to make the allegation unless, on all the materials available, that defence must necessarily succeed”.¹³ This last statement is best considered an articulation of the rule (discussed below) that legal practitioners should not become party to an abuse of process and so should not settle a pleading with the “certain and absolute opinion that the case was hopeless”.¹⁴

Allegations amounting to criminality, fraud or other serious misconduct

The reasonable belief that pleaders must hold in respect of an allegation of fraud or other serious misconduct is that, on reasonable grounds, available material by which the allegation could be supported provides a proper basis for it (Rule 21.4). That phrase is similar to the one found in 21.3, however a future article will deal with how that rule is applied in practice.

Allegations of fraud differ in that, before that type of allegation is made, the pleader must believe on reasonable grounds that “the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out”.¹⁵

The proper content of that warning will be dealt with in a subsequent article, but if solicitors are uncertain they should consider briefing counsel both to settle the pleadings, and to provide the necessary advice about the consequences of making an allegation of fraud.

Consequences for pleading allegations without a material basis

A breach of the ACSR can amount to unsatisfactory professional conduct or professional misconduct.¹⁶

Further, practitioners who facilitate abuses of the court's processes by promoting hopeless cases can be visited with personal costs orders. However, there is a relatively high threshold for such an order.

The District Court¹⁷ has recently considered the principles surrounding personal costs orders against practitioners, stating that:

- a. There must be something more than "merely initiating or continuing an action which has no or substantially no prospects of success", and there must be a "serious dereliction of duty or misconduct, though that may be simply a failure to give proper attention to the relevant law and facts in making an assessment of whether there were any worthwhile prospects of success".¹⁸
- b. It was "rarely, if ever, safe for a court to assume that a hopeless case was being litigated on the advice of the lawyers involved".¹⁹
- c. Adopting an earlier statement from the Court of Appeal, "it is one thing to present a case which is barely arguable (but arguable nevertheless) but most likely to fail; it is quite another to present a case which is plainly unarguable and ought to be so to the lawyer who presents it".²⁰

Judge McGill SC found that the counterclaim in that case was "essentially hopeless", but not because of any legal bar, but rather because "to succeed it was necessary for the court to accept oral evidence which

was inconsistent with contemporaneous documentation and prior sworn evidence from those witnesses".²¹

His Honour said that this was theoretically possible, and that even though in a practical sense the case was accordingly hopeless, and advice to that effect should have been given to the client, if the matter proceeded on instructions having given the relevant advice, there was no warrant for a personal costs order against the solicitor.²²

Solicitors who breach their ethical duties by pleading an allegation without a belief that the material discloses a proper basis may also attract liability for breach of the duty of care that they owe the client.

Given the matters outlined above, it is important to remind clients that, just because a pleading is settled by counsel or a solicitor, it does not mean that it has good prospects of success. Clients should be told that an advice on prospects can, and should, be obtained, separately to any pleading exercise. However, if the solicitor perceives the relevant claim or defence to be weak, they should proactively alert the client to that circumstance promptly once they become aware of it.

Further, just because a pleading has been settled by counsel does not mean it is impervious to a summary judgment or strike out application.²³ The client needs to be aware that pleading a weak case, even if it can be done ethically, can expose them to summary dismissal and costs consequences.

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

Notes

- ¹ Legal Profession (Australian Solicitors Conduct Rules) Notice 2012.
- ² Rule 21.4.1 ASCR.
- ³ Rule 21.4.2 ASCR.
- ⁴ Bar Association of Queensland Barristers' Conduct Rules, 23 February 2018, rules 63 and 64.
- ⁵ Bar Association of Queensland Barristers' Conduct Rules, rule 65.
- ⁶ Rule 21.6 ACSR.
- ⁷ See Rule 36(a) of the New South Wales Barristers' Rules 1994, which were referred to in *Allstate Life Insurance Co v Australian and New Zealand Banking Group Ltd* (1995) 57 FCR 360 at 369.
- ⁸ At 369. Adopted in *Re Mustang Marine Australia Services Pty Ltd* (2014) 104 ACSR 461 at 466.
- ⁹ At 369.
- ¹⁰ At 371.
- ¹¹ At 372.
- ¹² *Ibid.*
- ¹³ *Ibid.*
- ¹⁴ *In re Cooke* (1889) 5 TLR 407 at 408, quoted by Callinan J (in dissent) in *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27 at [210].
- ¹⁵ Rule 21.4 ASCR.
- ¹⁶ *Legal Profession Act 2007*, s227(2).
- ¹⁷ *Rivergate Marina & Shipyard Pty Ltd v Morphet* (No.2) [2017] QDC 180.
- ¹⁸ *Ibid.*, at [40].
- ¹⁹ *Ibid.*, at [41].
- ²⁰ *Ibid.*, at [41] quoting *Steindl Nominees Pty Ltd v Laghaifar* [2003] QCA 157 at [24].
- ²¹ *Ibid.*, at [52].
- ²² *Ibid.*
- ²³ *Uniform Civil Procedure Rules 1999*, rules 171, 292 and 293.

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Would you trust AI with a scalpel?

And how should it be regulated?

BY IVY SHI, THE LEGAL FORECAST

Robotic surgery originated in a National Aeronautics and Space Administration (NASA) research centre in the '80s.¹

The earliest purpose of a surgical robot was to perform minimally invasive surgery (MIS) using a 'master and slave approach' – surgical robots were created as an extension of the human surgeon's arm, a tool for precision during robot-assisted surgeries.

By creating medical tools that could perform what mundane hands could not, robotic surgery was developed to improve the performance of and results from surgical practice, including optimised emergency responses, imaging technology, accuracy, and telesurgery.

In 2007, the SAGES-MIRA Robotic Surgery Consensus Group, defined robotic surgery as:

"A surgical procedure or technology that adds a computer technology enhanced device to the interaction between a surgeon and a patient during a surgical operation and assumes some degree of control heretofore completely reserved for the surgeon."²

Current robotic surgeons

Rapid developments in medical robotics have seen the creation of numerous robots in healthcare, including the MAKO system, which is an orthopaedic robotic arm currently residing at Queensland's St Vincent's Private Hospital,³ and the CyberKnife, a radiosurgery robot located at Sir Charles Gairdner Hospital in Western Australia.⁴

Both of these devices have a relatively high level of autonomy, operating either with close monitoring or minimal execution from the human surgeon.⁵

The two medical robots show not only the invincible power of technology, but also the slow transitioning from the traditional 'master and slave approach' into individually capable devices. In the future, it is expected that the inevitable development and enhancement of medical robots will lead to greater autonomy and decision-making through the power of machine learning and artificial intelligence.⁶

Legal implications

While hospitals may see the benefit in medical efficiency in respect of costs, timing and access to healthcare, there may be issues with identifying medical liability. Currently, if medical fatalities related to device malfunctions were to occur, surgical robots would be governed and regulated under the *Therapeutic Goods Act 1989*⁷ as medical device malfunction. This may not be applicable when robotic surgeons join the ranks of the medical profession, as their high level of autonomy will not only classify them as medical devices, but also capable of practising medicine.⁸

So, how should we regulate robotic surgeons?

When fully autonomous robotic surgeons arrive in our hospitals, regulations surrounding medical malpractice will need to change. As human surgeons will not be directly operating on patients in these situations, it will become much more difficult to determine if medical responsibility lies with manufacturers (product liability)⁹ or with human surgeons (medical negligence).¹⁰

The future will inevitably see robotic malpractice in the operating room, when device malfunctions create calculation and decision-making errors. These situations will require the courts to decide the level of responsibility of the involved parties, determined by the level of involvement each had in the surgical procedure.¹¹

The current regulation of surgical robots is not substantial enough for the future scenarios of malpractice outlined above. Manufacturers cannot take over the human surgeon's role of medical responsibility alone, as there are multiple parties to bear a shared sense of responsibility, including:

- robot designers
- engineers
- programmers
- manufacturers
- investors
- sellers
- users.

These parties are involved with the design, creation and execution of the surgical robot. However none can be chosen as the ultimate source of responsibility, because each plays a role unique to their expertise.¹²

If an autonomous robot fails to perform the procedure correctly, would it be solely the manufacturer's fault for the device error, or would the supervising surgeon be responsible for not preventing the incident? Perhaps the patient's situation was unexpected, and the robotic surgeon was not programmed to correctly act upon the scenario?

In these situations, where full responsibility is not delegated to a sole party, robotics ethics are challenged, and court cases would be difficult and tedious to solve.

Where to from here?

Fortunately for robotic surgeons, we have already seen satisfactory regulation for autonomous devices. The self-driving vehicle has gone through legislation amendments in some jurisdictions, including the appointment of an automatic driving system entity¹³ as the legal entity who determines the vehicle's safety on the road, and is held responsible for potential vehicle malfunction and error. This methodology could potentially be applied to future autonomous robotic surgeons.

Further, the ideology of legal personhood could be explored with robotic surgeons. In situations in which damage liability cannot be proven, a legal status for the electronic, self-learning person could be granted for the courts to determine who is responsible¹⁴ and potentially hold the manufacturer vicariously liable.

Regardless of how our legislation will develop, one thing is certain. Technology will continue to grow, and the autonomous robotic surgeons we saw in science fiction will become fact.

Notes

- ¹ Jay Shah, Arpita Vyas and Dinesh Vyas, 'The History of Robotics in Surgical Specialties' (2014) 1(1) *American Journal of Robotic Surgery* 12, 12-13.
- ² Arnold Advincula et al, *A Consensus Document on Robotic Surgery* (report, November 2007) 3.
- ³ 'Orthopaedic surgery is now ROBOTIC!', *St Vincent's Health Australia* (Web page, June 2015) svha.org.au/newsroom/announcements/orthopaedic-surgery-is-now-robotic.
- ⁴ Radiation Oncology, 'CyberKnife Robotic Radiosurgery System: Patient Information Sheet', *North Metropolitan Health Service* 2017, (patient information sheet, May 2018), scgh.health.wa.gov.au/OurServices/CancerCentre/RadiationOncology/Patient/pdf/CyberKnifePatientInformationSheet.pdf.
- ⁵ Guang-Zhong Yang et al, 'Medical Robotics – Regulatory, ethical and legal considerations for increasing levels of autonomy' (2017) 2(4) *Science Robotics* 1.
- ⁶ Roger Smith 'How Robots and AI are Creating the 21st-Century Surgeon', *Robotic Business Review* (Web page, 07 February 2019) roboticsbusinessreview.com/health-medical/how-robots-and-ai-are-creating-the-21st-century-surgeon

- ⁷ *Therapeutic Goods Act 1989* (Cth).
- ⁸ Guang-Zhong et al (n5).
- ⁹ *Trade Practices Act 1974* (Cth) pt VA.
- ¹⁰ *Civil Liability Act 2002* (Qld) ch 2.
- ¹¹ Alessia Ferrarese et al, 'Malfunctions of robotic system in surgery: role and responsibility of surgeon in legal point of view' (2016) 11(1) *Open Medicine* 286, 287.
- ¹² 'Report of COMEST on robotics ethics', UNESCO, 10th sess., UN Doc SHS/YES/COMEST-10/17/2 REV (14 September 2017, adopted 14 September 2017) para 228.
- ¹³ 'Changing driving laws to support automated vehicles', National Transport Commission policy paper, May 2018, 17.
- ¹⁴ 'Open Letter to the European Commission Artificial Intelligence and Robotics', Open letter, 5 April 2018, robotics-openletter.eu.

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



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**TRAVIS
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Herding cats

Dealing with recalcitrant executors and double probate¹

WITH CHRISTINE SMYTH



11,167 probate lodgments were filed in Queensland in 2017-18.²

This was a 4.5% increase on the prior financial year, and a 21% increase over the last five years.³

Along with this there is an inevitable increase in matters being referred to the court involving disputes as to whom a grant might issue. While no data is available, one area in which I have anecdotally noticed an increase is applications for a grant with the power reserved – double probate.⁴

This occurs when there are multiple executors and one or more neither seek to apply for a grant nor renounce their role, and your executor client/s are wrangling with the recalcitrant co-executor/s on making the application. An executor might take this course as a means of minimising the estate's exposure to delays caused by obstinate and uncooperative executor/s who cause the estate administration to languish in a state of suspended aggravation.

Recalcitrant executors who refuse to engage in or seek to unilaterally direct matters without regard to the view of the remaining executors can significantly impact the costs and time in administering a deceased estate. Typically, they cavil over if or when probate should be sought, who may represent the executor/s in seeking probate, and/or there may be issues of conflict of interest unable to be resolved by mutual agreement.

While co-executors must act jointly,⁵ there is an anomaly in the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) enabling one of multiple executors to apply for a grant in their sole name. There is no step by way of 'clearing off' in relation to the non-proving executor/s, which has to be evidenced. As a consequence an initial grant (reserving power) may issue, and if the other executor/s subsequently proves, two grants may be in circulation concurrently – double probate.

A grant of double probate was explained in *Tsaknis as Executor and Trustee of the Estate of Geoffrey Douglas Roland Lilburne (Dec) v Lilburne* [2010] WASC 152 by EM Heenan J as follows:

[44] "Where several executors are named in a will, if a grant of probate is made only to one or to some of them it is the practice of the court to reserve the power to make a like

grant to those others who are competent to act and who have not renounced — Martyn JR and Caddick N, Williams, Mortimer and Sunnucks on *Executors, Administrators and Probate* (19th ed., 2008) [25–14]. So, in this case where the late Geoffrey Lilburne made a will appointing both his son, Mr David Lilburne, and his son-in-law, Mr Tsaknis, as his named executors and trustees, and when the original application for the grant of probate was made only by Mr Tsaknis, the grant was made to him with, as already noted, leave being reserved for Mr David Lilburne to apply for probate, as he had not renounced his right to do so. When, as now, an executor who has not joined in applying or obtaining an original grant of probate but has been granted leave to apply, subsequently makes an application for probate, the ensuing grant, if it occurs, is known as a double probate. It is made in general terms and relates to the remaining unadministered estate at the date of the second or subsequent grant — *Halsbury's Laws of England* (4th ed., 2005) Vol. 17(2) [152]. It runs concurrently with the first grant if any of the first grantees are still living and it confers the same rights as an original grant. It follows that there may be several current grants of double probate — D'Costa R and Winegarten J, Tristram and Cootes: *Probate Practice* (29th ed., 2002) [13.122]."

Where your executor client/s determine to proceed with an application for a grant with the power reserved, there is a caution that solicitors might follow to ensure compliance with their duties under the Australian Solicitors Conduct Rules 2012 (Qld) (ASCR). It is recommended that, if a solicitor acts for a party who is proposing to obtain a grant reserving power, the solicitor might take reasonable steps to inform the executor/s for whom the power is reserved, of the proposed application, typically in writing and outside of the usual advertising process. This recommendation arises out of consideration of ASCRs r3.1 and 4.1.2.

Otherwise, the process of applying for the grant is substantially the same as an ordinary grant with a minor difference. Form 101 – Application for probate must contain a clause that probate be issued to the applicant/s “with power being reserved to make the same grant to [the non-proving executor/s] when s/he shall apply for a grant personally”.

Aside from the duties under the ASCR, there is no requirement in the UCPR to prove anything further in respect of communications or service upon the non-proving executor. The matter does not need to be heard by a judge and can be determined by the Probate Registrar on the papers. Without anything

more, the Probate Registrar will issue the grant, however the wording on the grant is as follows: “As one of the executors, power being reserved to make the same grant to [non-proving executor/s name] the other executor when s/he shall apply for a grant personally.”

On the grant issuing, pursuant to s49(2) *Succession Act 1981* (Qld) the named executor/s is/are solely authorised under that Act to administer the estate pursuant to the grant's authority. Importantly, no other person, including the non-proving executor, can intermeddle in the estate administration. The grant is their unassailable authority to administer the estate. Only upon the non-proving executor/s obtaining their own grant (a double grant) can that executor/s assert their executorial authority. And should that occur...

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, Court Appointed Estate Account Assessor, member of the QLS Specialist Accreditation Board, Proctor Editorial Committee, QLS Succession Law Committee and STEP, and an Associate Member of the Tax Institute.

Notes

- ¹ See also ‘What’s new in Succession Law’, *Proctor* December 2013 where I first commented on double probates. My thanks to Robbins Watson Law Clerk Rachel Mallard and Associate Solicitor Thomas Ashton for their assistance with updated research on this topic.
- ² pc.gov.au/research/ongoing/report-on-government-services/2019/justice/courts/rogs-2019-part-chapter7.pdf Table 7A.2.
- ³ courts.qld.gov.au/_data/assets/pdf_file/0020/606611/sc-ar-2017-18.pdf.
- ⁴ The Supreme Court records do not differentiate as to these grants.
- ⁵ *Loughnan v McConnell* [2006] QSC 359 at [49]: “The powers given by s49 of the *Succession Act 1981* to an executor are now co-extensive with those given to a trustee. ...they are now obliged, as are trustees, to act jointly...”

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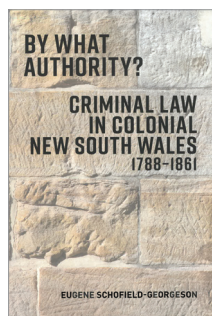


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New acquisitions



By what authority?
Criminal law in colonial New South Wales 1788-1861

Eugene Schofield-Georgeson
Australian Scholarly Publishing

By what authority? makes a ground-

breaking new case for a history of Australian criminal law from the 'bottom-up'. It does so by weaving together fascinating episodes of violence, protest, courtroom drama and colonial governance. For most people in the penal colony of New South Wales, criminal law was a brutal instrument of political coercion. It was also a part of daily life. In this sense, the law and its procedure were sometimes wielded by unlikely advocates in ways that not only reformed the law but transformed the social and political life of the colony. Eugene Schofield-Georgeson argues that the reform of criminal law in the colony owed as much to the agitation and resistance of working-class radicals, an early labour movement, and in some cases Aboriginal people, as it did to the judges, barristers and politicians who officiated over legal change.



Ctrl + Z: The right to be forgotten

Meg Leta Jones
New York University Press

Meg Leta Jones offers us a gripping insight into the digital debate over data ownership, permanence and policy.

'This is going on your permanent record!' is a threat that has never held more weight than it does in the Internet Age, when information lasts indefinitely. The ability to make good on that threat is as democratised as posting a tweet or writing a blog. Data about us is created, shared, collected, analysed, and processed at an overwhelming scale. The damage caused can be severe, affecting relationships, employment, academic success and any number of other opportunities – and it can also be long lasting.

One possible solution to this threat? A digital right to be forgotten, which would in turn create a legal duty to delete, hide, or anonymise information at the request of another user. The highly controversial right has been criticised as a repugnant affront to principles of expression and access, as unworkable as a technical measure, and as effective as trying to put the cat back in the bag.

Ctrl + Z breaks down the debate and provides guidance for a way forward. It argues that the existing perspectives are too limited, offering easy forgetting or none at all. By looking at new theories of privacy and organising the many potential applications of the right, law and technology, scholar Meg Leta Jones offers a set of nuanced choices. To help us choose, she provides a digital information lifecycle, reflects on particular legal cultures, and analyses international interoperability. In the end, the right to be forgotten can be innovative, liberating, and globally viable.

Upcoming events:

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High Court confirms sperm donor as parent

WITH ROBERT GLADE-WRIGHT



Children – artificial conception – sperm donor wins bid in High Court for fatherhood

In *Masson v Parsons* [2019] HCA 21 (19 June 2019) the High Court allowed Mr Masson's appeal against a declaration by the Full Court of the Family Court of Australia that he, as a sperm donor, was not a parent of the child. The appellant had provided sperm to the mother in the belief that he would father the child, would be named on the birth certificate and enjoy an ongoing role in the child's life.

The Full Court of the Family Court found that, because the birth mother and her wife were not de facto partners at conception, s60H of the *Family Law Act 1975* (Cth) (FLA) did not apply. It was held that s79 of the *Judiciary Act 1903* (Cth) applied such that the *Status of Children Act 1996* (NSW) applied, which presumed that the donor father was not a parent. In making that decision, the Full Court held that s60H "leaves room" for the operation of state laws as to parentage, there being nothing in the FLA that "otherwise provides".

Rejecting that decision, the High Court held that Part VII of the FLA "leaves no room for the operation of contrary State or Territory provisions" ([45]); that the Full Court was wrong to invoke s79 of the *Judiciary Act* to 'pick up' the NSW *Status of Children Act*; and that whether or not a person was a 'parent' under the FLA is a question of fact and degree, determined according to the "ordinary, contemporary understanding of a 'parent' and the relevant circumstances of the case at hand" ([29]).

Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ said ([3]) that the appellant "had an ongoing role in [the child's] financial support, health, education and general welfare and... enjoys what the primary judge [Cleary J] described as an extremely close and secure attachment relationship with the child", agreeing with Cleary J who said, relying on Cronin J's reasoning in *Groth & Banks* [2013] FamCA 430, that while the appellant did not qualify as a parent under s60H, he qualified as a parent otherwise than under that provision ([24]).

Property – long marriage – husband's initial contribution of land soared in value due to rezoning

In *Jabour* [2019] FamCAFC 78 (10 May 2019) the Full Court (Alstergren CJ, Ryan & Aldridge

JJ) allowed the wife's appeal against Judge Mercuri's contributions-based assessment of two-thirds: one third in favour of the husband after a 25-year marriage that produced three adult children.

The husband owned a half interest in three parcels of land (30, 30 and 44 acres) at cohabitation, having bought them from his father in 1975 for \$26,000. After 11 years of marriage, he sold his interest in the 30-acre lots to acquire all of the 44-acre lot. Originally used for a farm, the property was rezoned for residential use in 2010 and was sold in October 2017 for \$10,350,000. The net pool was \$9,033,913 plus superannuation of \$371,686.

At first instance, the court found ([125] of its reasons) that the parties' contributions during cohabitation were equal; observed that the value of the property represented almost 90% of the non-super pool; cited *Williams* [2007] FamCA 313 and *Zappacosta* [1976] FamCA 56; and concluded that the husband "bringing...Property A...into the relationship has made a significant contribution which needs to be appropriately recognised in the division of property between the parties".

The Full Court ([31]) accepted the wife's submission that "the primary judge erred in seeking a nexus between contributions and a particular item of property when assessing contributions holistically over a long marriage and when considering the assets of the parties on a global basis...quarantining from the assessment of contributions, all of the other contributions made by the parties...".

Before reassessing contributions at 53:47 in favour of the husband, the Full Court said (at [43]):

"...[T]he Court in *Williams* somewhat overstated the importance of the increase in value of a piece of property at the expense of 'the myriad of other contributions that each of the parties has made during the course of the relationship' (*Williams* at [26])."

Children – final order made after discrete trial as to unacceptable risk at which father found to pose such a risk

In *Rodelgo & Blaine* [2019] FamCAFC 73 (26 April 2019) the Full Court (Strickland, Kent & Hogan JJ) dismissed the father's appeal against a parenting order made by Judge Jarrett after

a discrete hearing as to whether the children were at risk of harm from either parent. After finding that the father did pose such a risk, Judge Jarrett directed each party to file written submissions as to whether a further hearing was necessary or final orders should be made based on the finding of risk ([34]).

The mother and independent children's lawyer (ICL) supported final orders. The father objected. Judge Jarrett made a final order that the mother have sole parental responsibility, that the children live with her and spend supervised time with the father of not less than two hours each fortnight. The father appealed, arguing that he had been denied procedural fairness.

The Full Court said that the trial judge's approach "was permissible pursuant to Division 12A of Part VII of the Act" ([6]) and cited s69ZN as to the principles for conducting child-related proceedings, s69ZQ(1) by which a court "must decide which of the issues... require full investigation and hearing and which may be disposed of summarily ([7]) and s69ZR as to the court's power to make findings and orders at any stage" ([8]).

The court continued at [35]-[36]:

"...[T]he trial of the discrete issue involved each of the parents and the [ir] witnesses... giving oral evidence and being cross-examined. ...[T]he family report writer and... the expert psychiatrist were the only... witnesses who did not give oral evidence... but...[they did provide] written reports...[the facts contained in which] were not in contest.

[36] ...[B]oth the mother and the ICL provided written submissions...that it was in the children's best interests for the Court to proceed to make final orders. Whilst...the father sought to have a further hearing...there was no agitation by [him] to the effect that he wanted the opportunity to cross-examine either of the expert witnesses before the Court proceeded to make final...orders. His written submissions...[were] largely a re-agitation of complaints about the mother..."

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

High Court and Federal Court casenotes

WITH ANDREW YUILE AND DAN STAR QC



High Court

Contract law – arbitration clause – construction of contract

Rinehart v Hancock Prospecting Pty Ltd; Rinehart v Rinehart [2019] HCA 13 (8 May 2019) concerned the scope of arbitration clauses in certain deeds and whether the validity of the deeds could also be subject to arbitration under the deed. The appellants (Bianca Rinehart and John Hancock, children of Gina Rinehart) brought proceedings in the Federal Court concerning the conduct of Gina Rinehart, Hancock Prospecting Pty Ltd and others. It was alleged that Ms Rinehart dealt with companies in the Hancock Group to her benefit and to the detriment of assets (shares in Hancock Group companies) of trusts of which Ms Rinehart is the trustee and of which the appellants are beneficiaries. Prior to lodging a defence, the respondents sought an order pursuant to s8(1) of the *Commercial Arbitration Act 2010* (NSW). That section requires a court to refer parties to a proceeding before the court to arbitration in certain circumstances. The respondents' applications relied on several deeds. Three of those deeds, the subject of this litigation, were said by the appellants to be void because of misconduct on the part of one or more of the respondents. Each of those deeds contained a clause providing that in the event of a dispute "under this deed" there was to be a confidential arbitration. The question was whether a dispute about the validity of the deeds could be referred to arbitration under the clause in the deed. The trial judge held that it could not. The Full Court disagreed, holding that the clauses should be given a liberal interpretation by which the arbitrator could deal with all issues including in respect of validity. The High Court unanimously dismissed the appeal, holding that, understood in context, the arbitration clauses extended to claims about validity. This was not a case that had to be decided on the language alone – the background and purpose of the deeds pointed to wide coverage of the confidential arbitration processes. The High Court also considered a cross-appeal from an aspect of the Full Court's decision which held that three companies not parties to the deeds could not be referred to the arbitration because they were not persons claiming "through or under" the deed. By majority, the High Court held that, having regard to the subject matter in controversy, the third-party companies were claiming through or under the deed and therefore were "parties" that could be referred to arbitration under s8 of the Act. Kiefel CJ, Gageler, Nettle and Gordon JJ jointly; Edelman J separately

concurring on the appeal and dissenting on the cross-appeal. Appeal from the Full Federal Court dismissed; cross-appeal allowed.

Aviation law – tort – carriage of passengers by air – carrier's liability – statutory construction

In *Parkes Shire Council v South West Helicopters Pty Limited* [2019] HCA 14 (8 May 2019) the High Court considered whether claims in tort were precluded by the terms of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth). The appellant hired the respondent to provide assistance with a low-level noxious weed survey to be conducted by helicopter. In carrying out that activity, the helicopter crashed and two officers of the appellant were killed. The widow and children of one of the officers brought a claim in tort for damages from negligently inflicted psychiatric harm resulting from the death of the officers. Part IV of the Act applies to create liability in the carrier for damages sustained by death of a passenger resulting from an accident that took place on board (s28). That liability is "in substitution for any civil liability of the carrier under any other law" in respect of death or injury of a passenger (s35(2)). Section 34 imposes a time limit on rights of action under Pt IV. In this case, the claims brought were outside the time allowed by s34. The question was whether the claim came within Pt IV of the Act, thus precluding the claim. The judge at first instance held the claim did not come within s35(2). The Court of Appeal by majority allowed an appeal. The High Court dismissed the appeal. The High Court held that the family was entitled to bring an action under s28 of the Act. This was an action in respect of the death of a passenger. Section 35(2) then substituted that s28 entitlement for any claim that could be brought at common law. In his case, that meant that s34 extinguished the entitlement to claim, and the claim should have been dismissed. Kiefel CJ, Bell, Keane and Edelman JJ jointly; Gordon J separately concurring. Appeal from the Court of Appeal (NSW) dismissed.

Constitutional law – implied freedom of political communication – laws restricting gifts and donations

In *Spence v State of Queensland* [2019] HCA 15 (15 May 2019) the High Court considered the validity of Queensland and Commonwealth laws purporting to regulate the making of gifts to political parties. The relevant Queensland laws purported to prohibit property developers from making gifts to political parties endorsing and promoting candidates for the Queensland Legislative Assembly and local government councils. The relevant Commonwealth law

permits a person to make a gift to a political party registered under the *Commonwealth Electoral Act 1918* (Cth) and permits the party to receive and retain the gift, despite any state or territory electoral law, if the gift or part of the gift is required to be used or might be used to incur expenditure for the dominant purpose of influencing voting in the House of Representatives or the Senate. The plaintiff commenced proceedings in the High Court's original jurisdiction arguing that the Queensland laws were invalid because they infringed the implied freedom of political communication. The plaintiff also argued that the Queensland laws were exercises of legislative power vested exclusively in the Commonwealth Parliament, and that the Queensland laws were invalid by operations of s109 of the Constitution as they were inconsistent with the Commonwealth law. The defendant, in turn, challenged the validity of the Commonwealth law. A majority of the High Court held that the Commonwealth law was invalid because it went beyond the reach of Commonwealth legislative power to the extent that it purported to immunise from state law the making of a gift that merely *might* be used to incur expenditure for the dominant purpose of influencing voters in a federal election. That holding meant that there could be no s109 inconsistency between the Commonwealth and Queensland laws. A minority of the court would have held the Commonwealth law valid and that the Queensland laws were to some extent invalid for inconsistency with the Commonwealth laws. The court unanimously held that the Queensland laws were not invalid on any of the other grounds raised by the plaintiff. Kiefel CJ, Bell, Gageler and Keane JJ jointly; Nettle J, Gordon J and Edelman J each separately dissenting in respect of the validity of the Commonwealth law, holding that the Queensland laws would in that case have been invalid in part under s109, and concurring that the Queensland laws were not otherwise invalid. Answers to Special Case given.

Administrative law – Administrative Appeals Tribunal review – spent convictions – scope of review

In *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16 (15 May 2019) the High Court considered whether the Administrative Appeals Tribunal (AAT) was prohibited from taking into account spent convictions in conducting merits review of a banning order imposed by Australian Securities and Investments Commission (ASIC), where ASIC was prohibited from taking those spent

convictions into account. The appellant was convicted of offences in 1978 and 1997. At all relevant times in this litigation, those convictions were “spent” within the meaning of Pt VIIC of the *Crimes Act 1914* (Cth). In 2014, a delegate of ASIC made a banning order in respect of the appellant because he was not a fit and proper person to engage in credit activities. On review, the AAT took into account the spent convictions. Division 3 of Pt VIIC had the effect, relevantly, that a “Commonwealth authority” is prohibited from taking into account a spent conviction (including findings of guilt without conviction). “Commonwealth authority” includes ASIC and the AAT. That plainly precluded the delegate from taking the spent convictions into account. However, s85ZZH(c) of the Act provides that Div.3 of Pt VIIC does not apply in relation to the disclosure of information to, or the taking into account of information of, a tribunal established under Commonwealth law. Both the judge at first instance and the Full Court held that s85ZZH(c) allowed the AAT to take the spent convictions into account on review. The High Court held unanimously that the jurisdiction of the AAT on review of the ASIC decision under the *National Consumer Credit Protection Act 2009* (Cth) is not affected by s85ZZH(c). The jurisdiction of the AAT is to stand in the shoes of the decision maker, subject to the same constraints, except where altered by clearly expressed statutory indication. In this case, s85ZZH(c) did not alter the statutory jurisdiction of the AAT to allow it to take account of a spent conviction. The statutory language was held ultimately to be insufficient to have that effect. Bell, Gageler, Gordon and Edelman JJ jointly; Kiefel CJ, Keane and Nettle JJ jointly concurring. Appeal from the Full Federal Court allowed.

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

Federal Court

Administrative law – whether an executive policy is inconsistent with a statute and unlawful

In *Minister for Home Affairs v G* [2019] FCAFC 79 (21 May 2019) the Full Court allowed the Minister’s appeal and set aside a declaration by the trial judge that part of the Australian Citizenship Instructions, a policy document, was inconsistent with the *Australian Citizenship Act 2007* (Cth) and unlawful. The trial judge had also held that the decision of the AAT to refuse the applicant’s application for Australian citizenship should be set aside and remitted for determination according to law. There was no appeal from those orders. Note: A summary of the trial judge’s decision in *G v Minister for Immigration and Border Protection* [2018] FCA 1229 was published in this column in the November 2018 *Proctor*.

The Full Court addressed the key principles and cases applicable to whether an executive policy is inconsistent with a statute and unlawful at [58]-[62]. The Full Court rejected G’s submission that it is not open to the Minister to challenge the declaration because he has not sought to appeal from the orders of the primary judge setting aside the decision of the AAT and remitting the matter for determination according to law. Murphy, Moshinsky and O’Callaghan

stated at [76]: “The declaration is a discrete matter and there is no inconsistency between the Minister accepting the correctness of the orders setting aside the decision of the Tribunal and remitting the matter, and challenging the correctness of the declaration.”

Practice and procedure – witnesses – whether court should make order overriding express confidentiality obligation of potential witnesses

Zantran Pty Limited v Crown Resorts Limited [2019] FCA 641 (8 May 2019) is a securities class action. The essence of the alleged case of Zantran Pty Limited (Zantran) is that the promotional activities of Crown Resorts Limited (Crown) in mainland China directed to recruiting Chinese ‘high-roller’ gamblers to gamble in its casinos in Melbourne, Perth and Macau were illegal under Chinese criminal law. It is uncontested that on 6 February 2015 the Chinese Government announced a crackdown on the promotion of overseas gambling to Chinese nationals. Nineteen Crown employees were ultimately charged with criminal offences related to the promotion of gambling; they pleaded guilty and were convicted in China. Based on these and other matters, Zantran alleges in its class action in the Federal Court that Crown breached its continuous disclosure regime under ASX listing rules and s674 of the *Corporations Act 2001* (Cth), and engaged in misleading or deceptive conduct.

The interlocutory issue before the court was to whether Zantran’s legal representatives should be permitted to confer with 19 named former Crown employees to obtain witness statements or outlines of evidence and/or to obtain copies of documents connected with their criminal prosecution and conviction. The former Crown employees had entered into an agreement with a Crown subsidiary with express confidentiality obligations. Crown accepted that its former employees could give evidence at the trial but argued that they could not confer with Zantran’s legal representatives prior to trial, and that if Zantran wished to call them to give evidence they had to be called ‘cold’.

Murphy J held it was appropriate to make orders to relieve the former Crown employees of their contractual confidentiality obligations for the limited purpose of allowing them to provide witness statements prior to trial and to provide copies of documents produced by the prosecution or the court in China in connection with their criminal prosecutions and convictions (at [110]). The court’s decision was particularly based on the obligation of the court under s37M of the *Federal Court of Australia Act 1976* (Cth) (FCA) to exercise its powers in a way that best promotes the overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible (at [7] and [116]-[123]). The court also relied on its power to make such orders under ss21, 23, 37P and 33ZF of the FCA. The class action nature of the proceedings had relevance given the court’s supervisory and protective role in relation to class members’ interests (at [145]) and the obligations of Zantran and its legal representatives to class members (at [146]-[148]).

Murphy J said at [154]: “In terms of the competing public interest, I accept that there is a public

interest in upholding contractual bargains, including as to confidence. But in my view, in the circumstances I have described, that interest is outweighed by the public interest in the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. In this regard it is relevant that Crown does not argue that it will suffer any commercial disadvantage in the sense of disclosure of trade secrets or confidential information that could be used by a competitor if the proposed orders are made, and relevant that Crown no longer engages in the same promotional activities in China. Relieving the employees of their confidentiality obligations for the limited purpose of providing a witness statement and/or documents regarding their criminal prosecution and conviction will involve the minimum necessary interference with the employees’ obligations of confidence.”

The court discussed the principal authorities relevant to whether witnesses should be relieved of contractual obligations of confidence at [70]-[100]. Murphy J explained why he reached different conclusions to those reached in some of those cases or why certain of the cases were distinguishable or similar (at [159]-[161]).

Practice and procedure – litigation guardian – whether the advice of the applicants’ legal representative constitutes advice of an ‘independent lawyer’

Brindle v The Corporation of the Trustee of the Roman Catholic Archdiocese of Brisbane operating as Brisbane Catholic Education [2019] FCA 609 (2 May 2019) and *Lewis v The State of Victoria (Department of Education and Training)* [2019] FCA 714 (21 May 2019) are two recent examples of applications by a litigation representative for approval of a settlement under r9.70 of the *Federal Court Rules 2011* (Cth). In both cases the settlements were approved.

Rule 9.71(2)(c) provides that the interlocutory application for approval must be accompanied by “an opinion of an independent lawyer that the agreement is in the best interests of the person under a legal incapacity”. On this requirement, Kenny J explained in *Lewis* at [13] (omitting case citations): “In previous decisions, it has been held that the requirement in r9.71(2)(c) for the opinion of an ‘independent lawyer’ did not necessitate the provision of an opinion from a lawyer who had no previous association with the proceeding. Rather, this required that the lawyer providing the opinion did so ‘in furtherance of the lawyer’s duty to assist the Court and not in furtherance of any duty the lawyer may have to a party in the proceeding’... Other judges have followed the same approach... This does not exclude the possibility that, in the appropriate case, the Court may form the view that the opinion of a lawyer with no previous association with the proceeding is needed, as, for example, happened in *Gray v State of Victoria (Department of Education and Early Childhood Development)* [2017] FCA 353 (Murphy J).”

Reeves J had undertaken a similar approach on the ‘independent lawyer’ issue in *Brindle* at [12].

Dan Star QC is a Senior Counsel at the Victorian Bar, ph 03 9225 8757 or email danstar@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au.

Court of Appeal judgments

1–30 June 2019



WITH BRUCE GODFREY

Civil appeals

Gold Coast City Council v Sunland Group Limited & Anor [2019] QCA 118, 14 June 2019

Application for Leave *Sustainable Planning Act 2009* (Qld) (SPA) – where the applicant issued five infrastructure charge notices (ICN) to the respondent each under s635 SPA in order to levy charges on the respondent for trunk infrastructure – where the respondent filed an appeal against the appellant’s decision to issue the notices – where the primary judge held that the notices were not in accordance with s637(2) of the SPA and were not infrastructure charge notices under the SPA – where the applicant has sought leave to appeal against the declarations of the primary judge – where at the heart of the issues before the primary judge, and this court, is the question of what s637(2) of SPA requires when an ICN is issued – where more specifically, whether s27B of the *Acts Interpretation Act 1954* (Qld) (AIA) applies or whether there is a contrary intention evident in SPA – where the primary judge concluded that s27B AIA applied, and that the “reasons” were inadequate – where this court has adopted the principle in *Kelly v The Queen* (2004) 218 CLR 216 that the proper course of statutory construction is to read the words of a definition into the substantive enactment and then construe the substantive enactment – where, however, definitions are not substantive and therefore the definition itself is not expanded in the same way – where SPA is a statutory instrument that regulates all aspects of development applications, assessment, decision-making and appeals in a detailed and prescriptive fashion – where an applicant’s rights to develop land, and for that purpose to make and pursue a development application, are completely governed by SPA’s provisions – where so too are the rights and obligations on the assessment manager to decide the application and notify the result to the applicant – where similarly, the applicant’s rights to challenge the decision are fully governed by SPA – where the applicability of s27B AIA is governed by s4, which provides that the application of the AIA “may be displaced, wholly or partly, by a contrary intention appearing in [the] Act” – where there is nothing in SPA’s provisions which would suggest a contrary intention so that s27B AIA was inapplicable – where to the contrary the formulations used for the various requirements for giving reasons supports the conclusion that s27B AIA applies and the reasons in the information notice are to explain how it is that the council decided to give the ICN – where

the application of s27B AIA does not alter the character of SPA at all – where under s635(2) SPA the council was obliged to give an ICN – where that obligation is triggered when a development approval has been given and an adopted charge applies for providing the trunk infrastructure for the development; s635(2) SPA – where the requirement that the information notice state “the reasons for it”, refers to the reasons for the decision to issue or the notice – where in this case that was done by the words which followed in that section of the ICN, stating that the decision had been made “as a result of the additional demand placed upon trunk infrastructure that will be generated by the development” – where in other words, the reason why the council issued the notice was because of the additional demand that the development would place upon trunk infrastructure – where there is no basis to adopt the view that the sort of reasons required of a local government under s637 SPA are akin to those that might be expected of a judge, tribunal or arbitrator, where a path of reasoning should be exposed – where given the scope of what these reasons were for, that is, about the decision to give the ICN and not about the matters that were to be stated otherwise in the ICN, the reasons could be short and terse, as long as they were “proper, adequate and intelligible” – where both s637 SPA and s27B AIA were satisfied by the statement of the reasons – where true it is that to say that the decision was made because there will be additional demand says very little beyond that, but the requirement was to state the reasons for the decision to give the notice, and those words say that – where contrary to the finding by the primary judge, the information notice does identify findings on material questions of fact – where the primary judge fell into error in concluding, with respect to the information notice and in particular as to the statement that the ICN was issued because of the additional demand on the trunk infrastructure, that the information notice had to disclose a path of reasoning by which council reached its conclusion – where the basis for the finding of additional demand that underpins the ICN is something that must be set out in the ICN itself – where the final obligation imposed by s27B of the AIA is that the information notice must “refer to the evidence” upon which the factual finding was based – where it is only in that respect that the information notices were deficient – where the importance which attaches to the statement of the reasons for the decision to give the ICN is that it informs the right of appeal given by s478 SPA – where under that section the recipient of an ICN “may appeal...about the

decision to give the notice” – where the right to appeal under s478(1) SPA is “about the decision to give the notice” – where s637 does not contain a power to issue an ICN, nor does it relate to the conditions upon which an ICN might be triggered – where if an error is made in the content of an ICN, as in having a deficient information notice, there is no obvious ground of appeal in respect of that under s478 – where the absence of a right of appeal does not say anything about whether the ICN complies with s637 – where the legislation does not reveal an intention that invalidity would follow a failure to comply with the requirement to refer to the evidence, when the other requirements had been met – where s440 of SPA contains a provision permitting the court, in appropriate circumstances, to either excuse non-compliance or to punish it – where in the present case the failure of the information notices to refer to the evidence upon which the material finding of fact, that there would be additional demand from the development, does not have the consequence that the ICNs were invalid. Leave to appeal granted. Appeal allowed. Orders made by the Planning and Environment Court are set aside and in lieu thereof the respondents’ application for declarations is dismissed. Costs. (Brief)

King v Australian Securities and Investments Commission [2019] QCA 121, 18 June 2019

General Civil Appeals – Further Orders – where the Australian Securities and Investments Commission commenced a civil penalty case against a company (MFS Investment Management Pty Ltd (MFSIM)) and various directors and officers of that company and a broader group of companies for breaches of the *Corporations Act 2001* (Cth) – where the primary judge found that the company had contravened s601FC(1) of the *Corporations Act* by misusing funds that belonged to an investment fund, of which the company was a custodian, for the purpose of paying debts of other companies in the group, where the fund was not actually or contingently liable for those debts – where Mr King was the CEO of the group of companies but was not a director of the company at any relevant time – where the primary judge found that the appellant contravened the *Corporations Act* by being knowingly concerned in the company’s contraventions of the *Corporations Act*, and by being an officer of the company as a person who had the capacity to significantly affect the financial standing of the company – where the primary judge consequently disqualified the appellant from managing any corporation for 20 years and ordered him to

pay a pecuniary penalty of \$300,000 – where the Court of Appeal did not disturb the finding as to being knowingly concerned, but found that the appellant was not an officer of the company – where the appellant submits that a lesser penalty ought to be imposed when regard is had to authorities in non-officer cases, the parity principle in respect of the penalty imposed by the primary judge on another non-director, and the totality principle in respect of a compensation order – where the critical finding concerning Mr King's conduct, unaffected by whether or not he was an "officer" of MFSIM, was his knowing involvement in serious and deliberate contraventions by MFSIM, which involved dishonesty and misuse of a large amount of money held on trust for investors – where Mr King used his position in the MFS Group to encourage MFSIM to misuse a very substantial amount of money held on trust – where his conduct resulted in huge losses to investors – where general deterrence requires a substantial pecuniary penalty to be imposed upon Mr King to deter others in a position of power and influence from engaging in similar conduct – where the fact that he did not owe duties as an "officer" of MFSIM does not alter the need for a large pecuniary penalty to punish Mr King for the course of contravening conduct in which he was involved, and to deter others from engaging in similar conduct – where account must be taken of the fact that he did not make use of his position as an "officer" of MFSIM and thereby breach duties which he owed as an officer of it – where regard should be had to the fact that he used his influence as CEO of the MFS Group and encouraged officers of MFSIM to obtain and use the RBS funds for the purpose of keeping the MFS Group afloat, rather than use the funds for PIF's purposes – where Mr King's conduct and its consequences justified a very lengthy period of disqualification, by way of deterrence as well as protection – where having regard to the dishonesty involved in the contraventions in which Mr King was knowingly concerned, the use of his position as the CEO of the MFS Group to encourage the misuse of funds held on trust and the size of the loss suffered by beneficiaries who were entitled to have the funds used for the purposes of PIF, the primary judge was correct to characterise the pecuniary penalty sought by ASIC as "moderate" – where the penalty should reflect the seriousness and number of Mr King's contraventions as well as the large loss sustained by investors – where Mr King has expressed no contrition for his conduct or acceptance of responsibility for his conduct – where the general approach taken by the primary judge to costs following the trial is appropriate – where the primary judge concluded that an order that Mr King pay 60% of ASIC's standard costs of and incidental to the proceeding was appropriate – where this order should be reconsidered and varied because it reflected, in part, ASIC's success at trial on the "officer issue" – where the costs order should take account of Mr King's success on the officer issue – where the parties were directed to file and serve written submissions as to costs of the appeal and cross-appeal – where the "officer" points upon which Mr King succeeded occupied a significant part of his

appeal, as reflected in his grounds of appeal, the proportion of his written and oral submissions devoted to these points and in ASIC's response to them – where however, as noted, there were many other issues raised by his appeal and his unsuccessful challenges occupied more time than his successful "officer" points – where these included consideration of a significant body of evidence in relation to the November payment, MFSIM's contraventions, pleading points, the role which Mr King occupied and evidence bearing upon what he knew – where overall ASIC enjoyed a substantial measure of success – while Mr King succeeded on the issue of whether he was an "officer" of MFSIM, that success has not been reflected in a reduction in the period of his disqualification – where it has, however, resulted in some reduction of the pecuniary penalty and an adjustment to the costs order made against him in respect of the trial. The order made in paragraph 30 of the orders made on 26 May 2017 be varied, by substituting a pecuniary penalty of \$270,000 for the sum of \$300,000. The order made in paragraph 32 of those orders be varied, by ordering that the appellant pay 50% of the respondent's costs of and incidental to the proceeding in the trial division on the standard basis. The appellant pay 75% of the respondent's costs of the appeal and there be no order for costs on the respondent's cross-appeal.

State of Queensland v Maryrorough Solar Pty Ltd [2019] QCA 129, 25 June 2019

General Civil Appeal – where the *Electrical Safety (Solar Farms) Amendment Regulation 2019* (Qld) amended the *Electrical Safety Regulation 2013* (Qld) by inserting s73A – where s73A of the *Electrical Safety Regulation* necessitated that the locating, mounting, fixing in or removing from a place of a photovoltaic module at a solar farm could only be performed by a person who held an "electrical work licence" pursuant to the *Electrical Safety Act 2002* (Qld) – where the primary judge concluded that s73A *Electrical Safety Regulation* was inconsistent with the *Electrical Safety Act* and void as a result of being beyond the regulation-making power conferred by the Act – whether the primary judge erred in construing s73A *Electrical Safety Regulation* as being beyond the regulation-making power conferred by the *Electrical Safety Act* – where the validity of s73A depends upon whether it is within the power to make regulations conferred upon the Governor in Council – where the statutory context must be taken into account in the construction of the regulation-making power conferred by s210(2) (b) – where that context includes the description in s5(c) of a way of achieving the Act's purpose, the extensive and detailed provisions about electrical licences and discipline of electrical licence holders to which that paragraph adverts, and the express grant in s210(2)(m) of broad and detailed regulation-making power about electrical licences – where in terms of s5(c), the extent to which the expressed purpose of the Act is to be achieved by licensing and discipline of persons is relevantly confined by the Act to the licensing and discipline of persons who perform "electrical work" – where to the extent that the general words of s210(2)(b) are capable

of being construed as authorising regulations that are inconsistent with the detailed provisions in the Act defining the scope of the licensing scheme, the former provision must be regarded as subordinate to the latter provisions – where s73A would involve "a new step in policy" which cuts across that aspect of the Act by requiring a licence for work that is not "electrical work" – where, indeed, in so far as the effect of s73A is that a person is not authorised to perform the work described in paragraphs (i) and (ii) of s73A(1)(b) without holding an "electrical work licence", that regulation is practically irreconcilable with the effect of s 20(1) that such a licence authorises only the performance of "electrical work" – where s73A(1)(a) and (b) and s73A(2) depart from the licensing scheme the Act enacted in pursuit of the statutory purpose – where it follows that s73A(1)(a) and (b) and s73A(2) are not authorised by s22 of the *Statutory Instruments Act 1992* (Qld) or by the general power in s210(1) of the Act – where the state contends for the first time in this appeal that s73A falls within the delegated legislative power in s210(2)(f) as a prescription of safety and technical requirements for electricity supply – where s73A concerns electricity generation rather than electricity supply – where the operative parts of s73A and the definitions of 'PV module' and 'work' in s73A(3) make it clear both that the topic of regulation is "work on a PV module at a solar farm" and that a PV module generates electricity – where the state did not argue that a PV module also supplies electricity – where for this reason, and for the reasons already given, s210(2)(f) is not a source of power for s73A. Appeal dismissed with costs.

Gold Coast City Council v K & K (GC) Pty Ltd [2019] QCA 132, 28 June 2019

Application for Leave *Sustainable Planning Act 2009* (Qld) (SPA) – where the respondent applied to the applicant for a material change of use permit to develop land within the Detached Dwelling Domain of the 2003 planning scheme to build a service station, convenience store, take-away food premises and a fast-food drive through premises – where the proposed uses of a cafe and fast-food premises conflict with the planning scheme and "should be considered as undesirable or inappropriate" – where, under s326(1)(b) of SPA, the applicant may approve uses that conflict with the planning scheme provided there are sufficient matters of public interest to justify the approval – where the applicant refused the respondent's application – where the respondent appealed that decision to the Planning and Environment Court on the basis that, inter alia, there was a 'need' for the proposed development – where the judge allowed the appeal having been satisfied that the extent of the need for the proposed development was sufficient to justify approval despite its conflict with the planning scheme – whether it is in the public interest to maintain the terms of the planning scheme unless the contrary is demonstrated – whether the respondent identified how the asserted 'need', or satisfaction of such a need, constituted a matter of public interest – whether the Planning and Environment Court applied the statutory

requirements under s326(1)(b) of SPA – where having acknowledged that its proposal conflicted with the 2003 planning scheme, K & K pointed to nine factors that, it submitted, warranted approval notwithstanding that conflict – where these matters, it was submitted, were “matters of public interest” that overcame the conflict – where this was particularly so, it was said, in respect of “need” – where, however, neither in any pleading document nor in written submissions did explain how the asserted need, or the satisfaction of such a need, constituted a matter of public interest, or how, if the need did constitute a matter of public interest, it was “sufficient”, on its own or in combination with other “matters”, to justify the decision that sought – where on this appeal the council submitted that her Honour should have assumed that it was in the public interest to maintain the terms of the planning scheme unless the contrary was demonstrated – where it made no such submission below – where, nevertheless, that submission of law must be accepted – where, however, need as a factor in town planning decision-making has been held, under various statutes, to constitute a matter of public interest that can override the opposing public interest in seeing the enforcement of a planning scheme – where there has been a failure by the parties in this case to apprehend and apply the applicable statutory requirements – where it has been established beyond argument that a decision maker must take a planning scheme to be an expression of the public interest in terms of land use – where the proposition can be put the other way around – where it is, in general, against the public interest to approve a development that conflicts with the planning scheme – where to justify such a development it must be demonstrated that the desired deviation from the planning scheme serves the public interest to an extent greater than the maintenance of the status quo – where the public interest that is to be satisfied by the proposed development must be greater than the public interest in certainty that the terms of a planning scheme will be faithfully applied – where although the words “matters of public interest” appear in various places in the record, the case actually proceeded upon the basis of assumptions that considerations that were once relevant under repealed legislation were those that still applied under this legislation – where the proposed development is a service station including ancillary businesses – where it is not, in any sense of the expression where it appears in the 2016 city plan, a neighbourhood centre – where this error in construction affected the exercise of discretion because her Honour concluded that her consideration of provisions in the 2016 city plan concerning neighbourhood centres showed that neighbourhood centres may be located in medium-density residential zones and low-density residential zones in certain circumstances, and they may be located in urban and suburban neighbourhoods within walking distance of residences. Leave to appeal granted. Appeal allowed. Orders made on 29 June 2018 are set aside. The matter is remitted to the Planning and Environment Court to be determined according to law. Costs.

Criminal appeals

R v Sprott; Ex parte Attorney-General (Qld) [2019] QCA 116, 14 June 2019

Sentence Appeal by Attorney-General (Qld) – where the respondent pleaded guilty to two counts of attempted murder – where the respondent was sentenced to two concurrent sentences of 9½ years’ imprisonment – where the complainants were the respondent’s mother and her partner – where the sentencing judge considered aggravating circumstances of the offence, including that the respondent was subject to a domestic violence order concerning the complainants and that the attack was premeditated – where the sentencing judge considered the “most relevant circumstance” of the offence to be that the respondent’s son was killed by a dog kept by the complainants whilst in their care – where the appropriate range for the offence of attempted murder is generally from 10 to 17 years’ imprisonment – where the sentencing judge considered the respondent’s case was not a “general case” – whether the sentencing judge gave appropriate weight to the mitigating and aggravating factors of the offence and respondent’s personal circumstances – whether a sentence below 10 years’ imprisonment for two counts of attempted murder is manifestly inadequate – where s669A of the *Criminal Code* (Qld) confers jurisdiction upon the Court of Appeal to decide an appeal by the Attorney-General against any sentence imposed by the court of trial – where the section also confers the powers to be used by the Court of Appeal in the exercise of that jurisdiction – where the jurisdiction so conferred requires that error on the part of the sentencing judge be demonstrated before the court’s discretion to vary the sentence is enlivened – where in order to ensure that the jurisdiction is exercised only in appropriate cases, it is useful to remember that the question for the Court of Appeal in such cases is not whether a sentencing judge had a sufficient reason for the sentence – where it is whether the sentence involved error of a kind warranting interference with a discretionary judgment – where the finding of error is a necessary condition for the exercising of the discretion – where unless some material error of fact or law can be seen in the sentencing judge’s reasoning, then the question is whether, by reason of the extreme leniency of the sentence, an error of principle can be inferred – where this court has said a number of times that the appropriate range for the offence of attempted murder is generally from 10 to 17 years’ imprisonment – where in this case the sole ground of appeal is that the sentences were manifestly inadequate – where regarded in isolation from any other matters, the objective circumstances of the offences are on an equal footing with numerous other cases involving horrific attempts to murder and which have drawn sentences within the sentence range – where in this case there were substantial mitigating factors that were personal to the respondent and it was these that, according to the sentencing remarks, moved Crow J to impose a lenient sentence – where in 2013, when the respondent’s son was three years old, Ms Strachan’s (his mother’s) dog seized him by the neck and dragged him away – where the

injured child entered a coma from which he never emerged and he died three days later – where at the time nobody informed the respondent of the killing of his son – where he learned of it some time later in a phone call from an auntie living in the United Kingdom – where, incredibly, neither his mother nor her partner apologised to the respondent for the death of his son or even acknowledged any responsibility for it – where at the child’s funeral, which they attended, they sat behind the respondent and taunted him – where his mother said, “I’m going to sit here, you cunts” – where she called him a “dog and a useless cunt” – where of course, the dog was destroyed – where the respondent’s mother and her partner soon acquired a replacement, another German Shepherd, whom they named ‘Hunter’ – where this was the name of the respondent’s dead son’s half-brother – where Crow J found that the “most relevant circumstance” was the killing of the respondent’s son – where this was a death that occurred after an earlier attack had been ignored by his mother – where the respondent could not live with these facts – where this was a case in which it was open for his Honour to give substantial weight to the factors in mitigation if he thought that that was right – where in particular, the respondent’s state of health was caused in part by his mother’s lifelong neglect of him, and was greatly contributed to by both of his victims’ irresponsibility that had led to the little boy’s death, and by their almost incredible callousness afterwards – where his Honour was aware of, and took account of, the objective seriousness of the offending – where his Honour determined upon a course that would give effect to principles of general deterrence and denunciation but which would also give appropriate weight to the mitigating factors which, in this case, his Honour considered to lay at the heart of the matter – where it is not for the Court of Appeal to substitute its own views about such matters and, by that pathway, to substitute a sentence of its own – where, rather, it is for the Attorney-General to demonstrate actual error in the sentencing judge’s reasoning and, in my respectful opinion, and despite the helpful and illuminating arguments of Mr Rees, no error has been shown – where this is simply a case in which the judge accorded the weight he thought appropriate to the various matters put in front of him – where it is a case in which he judged that the mitigating facts were, in the unusual circumstances of this case, very weighty – where for that reason he imposed a lenient sentence – while the sentences are outside the general range, so too are the facts of this case outside the usual run of cases. Appeal dismissed.

R v Davidson [2019] QCA 120, 18 June 2019

Appeal against Conviction – where the appellant was convicted at trial of 18 counts of sexual assault and one count of rape against nine separate female complainants – where the jury was unable to reach a verdict on two other counts of rape against one female complainant – where each complainant attended on the appellant in his professional capacity as a masseur – where each complainant alleged the appellant applied his fingers to a private part of their body during their massage – where the pre-trial hearing judge refused a defence

application for severing the counts – whether the counts involving the various complainants formed part of a series of offences of the same or similar character – whether there was a sufficient link between the rape offences and the sexual assault offences as to make them admissible in the proof of the other – where in this case, those two grounds involve essentially the one question, which is whether the evidence of each complainant on a charge of sexual assault was admissible for each of the charges of rape, and vice versa, because the rules for the reception of ‘similar fact’ evidence were satisfied – where it must be acknowledged that the offences of rape were more serious than the other offences – where, however, there was a sufficient link between the rape offences and the other offences as to make the evidence of one offence strongly probative in the proof of another – where the common features, as argued by the prosecution, demonstrated a sufficient link between the offences – where all were committed in relevantly identical circumstances, against an unsuspecting and vulnerable complainant, and with the apparent belief by the appellant that the victim would find the experience to be agreeable, or at least would not complain – where the summing up well explained to the jury what had to be established by the prosecution for the evidence on one count to be used by them when considering another count – where there was no miscarriage of justice from the joinder of all charges and the jury being allowed to use the evidence of conduct the subject of one charge as being probative of whether the conduct on another charge occurred. Appeal dismissed.

Attorney-General for the State of Queensland & Anor v Wands [2019] QCA 125, 25 June 2019

Appeal from Interlocutory Decision – where the primary judge at first instance stayed further prosecution on indictments presented against the respondent until the Crown paid the respondent \$2400 for costs thrown away – where the primary judge was concerned

that, due to a fault in the way the prosecution authorities progressed the matter, it had resulted in lost costs for the respondent – where the primary judge was of the opinion that the lost costs would impact on the respondent's ability to properly fund his trial – where the primary judge was of the view there had been a fundamental unfairness in the trial proceeding – where the indictments which were stayed involved alleged offences under both Commonwealth and state statutory provisions – where the Attorney-General of Queensland and the Director of Public Prosecutions (Cth) have lodged appeals pursuant to s669A(1A) of the *Criminal Code* (Qld) – where it is contended that the primary judge erred in the exercise of his discretion to order that the indictments be stayed – where it was submitted that the primary judge erred in not considering whether the circumstances justified the conclusion that the matter was such as to justify the granting of a conditional stay – whether the primary judge erred in his discretion to stay the indictments – where there is no statutory power to order the Crown to pay the costs of an accused who has been charged on indictment – where it is not for the court to determine whether an indictment will be presented, who is to be charged and who is not to be charged or, generally, how an indictment will be prosecuted by the Crown – where for such reasons, decisions about prosecutorial matters are generally not subject to judicial review – where, however, the court is concerned with prosecution decisions at least in so far as they may affect the fairness of the trial of the charges in the indictment – where the court holds an ultimate power to stay a prosecution to ensure fairness as between prosecution and defence – where, however, few such instances would justify a *Mosely* (*R v Mosely* (1992) 28 NSWLR 735) order – where this is because such an order constitutes an interference with the right of the Crown to prosecute its indictment – where an

order cannot be justified merely because, in the civil jurisdiction, costs, or even indemnity costs, would have been ordered against the Crown in similar circumstances – where the only justification can be that, in the absence of a stay, the continuation of the prosecution would be unfair to the accused to a degree that justifies stopping the prosecution until the party that has caused it has alleviated the unfairness – whether or not the asserted unfairness reaches that level is the judgment that lies at the heart of the exercise of the discretion – where the unfairness may mean that the prosecution must be stayed permanently or it may mean that the prosecution must be stayed until the circumstances giving rise to unfairness have been eliminated – where in cases in which a *Mosely* order is sought, the unfairness is one that can be alleviated by the payment of money – where his Honour found that the relevant loss was the costs thrown away by the adjournment of the pre-recorded evidence of the child and the trial in the sum of \$2400 – where the respondent, in his affidavit swore that he had spent \$6600 on legal fees and the final estimate of fees for the entire proceeding was up to \$30,000 – where, however, his affidavit shows that he does not have the means to raise such a sum – where the \$6600 was incurred in bringing the application before his Honour which, in the main, failed – where there is no basis upon which his Honour could have found that the loss of \$2400 in the context of the present litigation led to any significant effect upon the respondent's ability to fund his trial or to any unfairness in the prosecution continuing. The appeal be allowed and the order be set aside.

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.

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SHINE LAWYERS

Can our office go paperless?

BY MAGISTRATE TERENCE BROWNE, TONY DEANE,
STEVEN TYNDALL AND CAROLINE HART

A popular session at QLS Symposium 2019 asked whether a paperless office is truly possible. Attendees were provided with some very practical answers.

If you're reading *Proctor* online or have downloaded it as a PDF, then you're already working in a digital environment and minimising reliance on paper.

This article shares insights about what's fact and what's fiction in 'the paperless office' so that the rewards and value can begin to be enjoyed by lawyers, especially those in small-to-medium practices.

It's not about 'paperless' – it's about 'paperlite'

The idea of 'paperless' can be overwhelming for most firms. 'Paperlite' is more realistic than 'paperless'.

Most lawyers have already moved into 'paperlite' mode. Think about the following:

- If you're using emails to communicate rather than posted letters.
- If your staff have access to smart phones that make them contactable and productive outside of the office.
- If you access online subscription/non-subscription databases and website resources rather than books and journals.

If you answered 'yes' to any of these, then you're already withdrawing from 100% reliance on paper. And you're going to be able to take the next steps too.

Bring everyone with you and give support

Technology changes quickly but people tend to change more slowly. When you make the transition to paperlite, bring everyone with you and build in support for this period, which can be anything from a few weeks to about six months.

How you can do this:

- Identify good change agents in the office. For example, use 'reverse mentoring' so that staff who register highly for IT-comfort can provide guidance and support for those who are less comfortable.
- Invest in software and hardware that is a good fit to transition to paperlite. This is not about the biggest, most expensive, most sophisticated technologies; it's about what's going to be the most strategic use of technology for you, your staff and your clients. It's also about risk management and not contracting with an expensive external system that may tie you down or reduce your ability to access your own documents. Instead, a small/medium law firm may find the use of a simple scanner to create PDF documents is all they need.
- Be conscious that there will be pain, resistance, bugs and unforeseen issues. The paperlite plan will change as you move forward, and that's OK. Be prepared for the 'hybrid' in-between state being the most difficult. It's more about 'practising' paperlite than fully attaining it.

Invest strategically in what's going to work for you – it's less than you think...

Lawyers express concerns about the capital cost of equipment and software, but monetary costs are not the biggest investment or resource needed to become paperlite. Below is a technology shopping list of less than \$2000 spent over a year to get you started:

- Use an 'off the shelf' document management system. The cost can vary from about \$50 to \$250/month. Whatever system you sign up for, make sure you get access to help.

- Use an iPad to take notes. The benefits include creating a permanent record. The notes travel with you and can be readily and appropriately shared. Your notes will be safer than paper notes that can be either lost or destroyed. Costs of an iPad can vary from \$450 to \$1000+.
- Office 365 is a subscription product that offers access to Word, Excel, PowerPoint, Outlook, SharePoint and Exchange. It costs around \$20/month and includes support.
- An electronic signature has the same status as a legal signature. The cost of an electronic signature is \$250/year.
- Invest in at least two free-standing computer monitors so that you can work efficiently across the material without the need to print out multiple documents. This is one of the key tips from practitioners that is relatively inexpensive and vastly improves the shift from paper to digital. Monitors cost anything from about \$130 to \$450.
- Make sure documents are saved systematically and that everyone uses the same method. If you make documents searchable on content, not just on their saved name, for example the party's' names, then it's much easier to retrieve them.
- Stop generating paper by not printing documents. Instead, store and archive them electronically.

The reality of the digital age is that we are in a constant state of transition, and it's not always within the control of the lawyer to be part of that. For example, consider the impact of Practice Direction 18 of 2018, 'Efficient conduct of civil litigation'. This PD requires litigants to use technology where possible, including preferences for searchable PDF files, and to avoid excessive printing. This direction impacts on the management of documents at all stages of litigation to reduce reliance on paper.

It's not just the courts that are increasingly using technologies and minimising the use of paper. It's also clients, other professions – especially accountants, new law graduates and government – that are moving away from paper. As trusted legal advisors, there is an imperative for lawyers to match the environment in which their clients, staff and the institutions of law and justice operate.

The biggest concern for lawyers – ‘how can I keep my practice cybersafe?’

Cybersecurity is the biggest concern for lawyers, significantly higher than concerns about ethical issues.

Information technology security is not perfectly safe, but threats tend to originate not from the use of technology but because of the weakness and failures of the human side. Law firms become vulnerable to cyberattack because of the following human involvement:

- failing to update or change passwords
- lack of training and education on how to be vigilant and what to look for when assessing threats
- lack of judgment on recognising threats and being tricked into releasing information
- insufficient risk management practices and systems.

The paperlite office, if managed properly, can be more secure than the paper office.

Cybersecurity is a risk that requires appropriate management and access to expertise to provide staff with training, education and system configuration. This is an area that is well-supported by Queensland Law Society.

The second biggest concern for lawyers: ‘What about the ethics implications around records management?’

Lawyers have a duty to maintain records. Documents coming into existence during the retainer and for the purpose of the business transacted during that retainer should be dealt with as follows:

- Documents prepared by the lawyer for the benefit of the client belong to the client.
- Documents prepared by the lawyer for the lawyer's benefit and for which no charge is made, belong to the lawyer.
- Documents sent by the client to the lawyer, the property in which is intended to pass from the client to the lawyer, belong to the lawyer. However, the copyright may remain with the client unless expressly released.

Record-keeping is a key concern for lawyers. Digital storage of the range of documents, including diary notes and diary entries, emails, attachments, safe custody, letters, court documents, consultant's reports and expert workings, briefs to counsel, documents obtained on disclosure and discovery, non-party documents, client documents, linked files or parts of files, non-trust and account records and trust records (local and interstate) and digital data transfers can all be stored electronically.

A small-to-medium law firm can store documents using its own storage, rather than accessing external storage systems such as the cloud, where ongoing costs, access and retrieval may present as hurdles.

Not all records should be made digital-only; for example, if legal documents have been initiated through paper, then keep the documents as paper, but also scan and create a PDF copy.

What if I don't go paperlite?

It's worthwhile thinking about ‘What if I just want to stay paper-based? What does it mean?’

- The physical environment is more expensive to operate and maintain than the digital environment. Think of the costs of printers, photocopiers, physical storage, paper, toner and servicing of equipment. And what about the time spent physically searching documents manually? It's also likely that external interactions will increasingly rely on paperlite, which will push back on to you printing costs.
- There are now new graduates who have only; experienced the digital environment. Law practices that are proactively adapting to that environment are attractive to valuable legal staff. Such staff are also valuable to the practice; they offer potential for reverse-mentoring opportunities and offer some expertise in contributing to the evolution of the practice into the digital environment. What this means is potentially lost succession-planning opportunities.
- Potential clients who themselves are operating within the digital environment want their trusted legal advisor to match their use and experiences of this environment. The paperlite office offers clients a more interactive experience of their matter and creates opportunities for communication channels other than phone calls and letters.
- Operating a paper-based practice that also has to respond and interact with a digital world means that your office will bear the costs associated with both environments.

On the flip side, there are unexpected and hidden consequences experienced by paperlite law firms including:

- increased collaboration among staff as a function of increased access to document management systems
- increased and more productive mobility – being ‘out of the office’ no longer means being unproductive
- a more attractive workplace with increased productivity and resilience. Staff respond positively to the opportunities of flexibility. They also respond to the systems that are more accessible as a result of the technology.
- increased loyalty – staff express responsiveness to the flexibility offered by a firm that effectively extends its reach through the digital environment
- improved client relations as a result of opportunities to create and increase client engagement with their own case management through controlled access to digital documents.

Paperlite is about using technology strategically to add both immediate and long-term value to the law practice. That value is gained through:

- savings on not having to maintain an expensive physical environment
- attracting and retaining valuable legal staff and administration staff
- attracting and building valuable client relationships
- creating and investing in systems to assist with ‘future proofing’ the practice.

Resources

Queensland Law Society offers a range of resources that include information on ethics implications, records management and cybersecurity. Visit the QLS Ethics and Practice Centre at qls.com.au/ethics for more information.

This article is based on a presentation given at QLS Symposium 2019 titled ‘I want to have a paperless office – can I? How do I?’, by Townsville Magistrate Terrence Browne, a lecturer at the James Cook University School of Law; Clayton Utz Special Counsel Tony Deane, a member of the QLS Practice and Rules Committee; NextLegal Managing Director Steven Tyndall, and Associate Professor Caroline Hart of the University of Southern Queensland School of Law and Justice and a member of the QLS Practice Management Committee. The authors would like to acknowledge the participants at the Symposium who very generously contributed their comments and questions that have assisted with this article.

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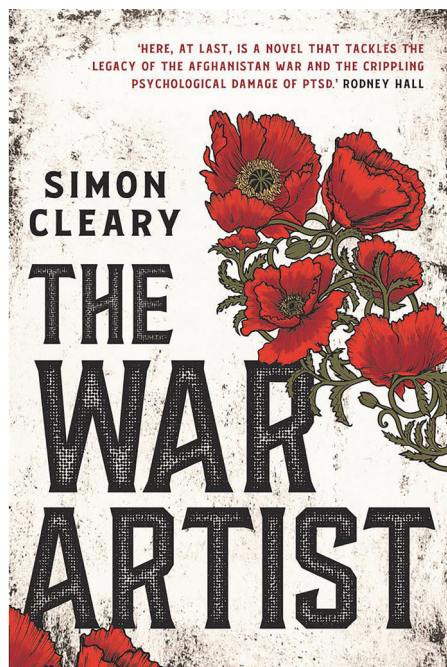
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Trauma depicted with artistry

BY SHEETAL DEO



Brisbane author Simon Cleary paints a hauntingly beautiful picture with his latest novel, aptly titled *The War Artist*.

Based on the life of Brigadier James Phelan, an Australian soldier left traumatised after the tragic death of a young soldier under his command, Cleary takes you on the tumultuous emotional journey of Phelan as he leaves the battlefield only to continue a combat with feelings of dislocation, guilt, anger, honour and love upon his return to Australia.

For someone with minimal exposure to the crippling psychological damage of post-traumatic stress disorder, this novel was incredibly intense and confronting in the most poetic of ways. You can't help but become emotionally invested (and challenged) as Phelan attempts to normalise into society but is flooded with flashbacks from his time in Afghanistan.

Phelan embarks a cathartic journey in *The War Artist* as he tries to navigate his relationships, his home and his true self after his experience in Afghanistan.

Truly, a remarkable journey and therein lays the most important takeaway for me from this novel – the realisation that Phelan's story is not singular. Phelan's story is a sombre and necessary reminder of the sacrifices made by soldiers – some of whom had no choice in being enlisted.

The War Artist is a beautiful read of a tragic story and one I would highly recommend.

Title: The War Artist

Author: Simon Cleary

Publisher: University of Queensland Press

ISBN: 9780702260346

Format: Paperback/320pp

RRP: \$29.95

Sheetal Deo is a legal professional development executive at Queensland Law Society.

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The story of Hunter wine begins with Scot James Busby, who at the age of 23 set about releasing colonial New South Wales from rum and its bastard economy. Busby thought wine a civiliser bringing "temperance and contentment" and promoting "the morality

of the lower classes of the Colony; and more especially the native-born youth".

Busby was granted 2000 acres in the Hunter Valley in May 1825. He called his property 'Kirkton' and set his brother-in-law, William Kelman, in charge. Busby dabbled in local winemaking and returned to Europe to collect cuttings of the major grape varieties from the great vineyards. In 1832 he returned and planted most at the Sydney Botanical Gardens and some, including his 'scyras', at Kirkton.

The 'scyras' were described as an excellent grape that promised "to be at least as valuable for red wine as Verdelho is for white. This is the sort said to be chiefly cultivated on the celebrated hill of the Hermitage."²

When the Hunter Valley Viticultural Association first met in 1847 for a wine tasting, William Kelman brought an 1845 Kirkton red hermitage. Since that time shiraz, or hermitage as it was known into the 1980s, became one of the mainstays of the Hunter with its own unique style.

James Halliday said of the promise of shiraz in the Hunter in 1980: "Hermitage

does produce wines of marvelous softness, warmth and subtlety in the Lower Hunter, which acquires great elegance with sufficient bottle age. Lindemans have finally released their superb 1959 vintage Bin 1590 from show duties (where it won many gold medals and trophies); at \$27.50 a bottle it is an outstanding example of Hunter Hermitage at its greatest, and is worth every cent."³

James Halliday also cautioned on the uniqueness of the flavours, and to this day Hunter shiraz is off-putting for the devotee of South Australian shiraz styles. "But most of these [great Hunter shiraz]...are wines which require special understanding of district function and flavour. Show them to the average Bordeaux or Burgundy winemaker and he will find them too brown, and with a curious aroma, known affectionately to locals as 'sweaty saddle'."⁴

Note: This article has been edited due to space limitations. A complete version with footnotes and extra tasting notes is available from qls.com.au/wineaugust2019.

The tasting Four wines were tasted to assess the spectrum of Hunter shiraz.



The first was the Mount Pleasant Philip Shiraz 2015, which was cranberry red with a tinge of brown. The nose was black pepper and red fruits. The palate had the earthy tones of granite with a leather savoury touch, blackcurrant fruit and white pepper undertones.



The second was the Glenguin Schoolhouse Block Shiraz 2013, which was blood plum in colour. The nose was earth, saddle and spicy red fruit. The savoury palate was chewy with tannin, leather and five spice, and a smooth blackcurrant finish.



The last was the Meerea Park Hell Hole Shiraz 2014, which was brick red with a browning tinge. The nose was black pepper, blackberry and a floral note. The palate was cherry red fruits with a growing sense of mid-palate savoury flavours, leather saddle notes and chewy tannin. It was taut and ready to launch its layers of red fruits and savoury spice.

Verdict: The preferred was the Meerea Park, with classic flavours and brooding intensity.

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

Mould's maze



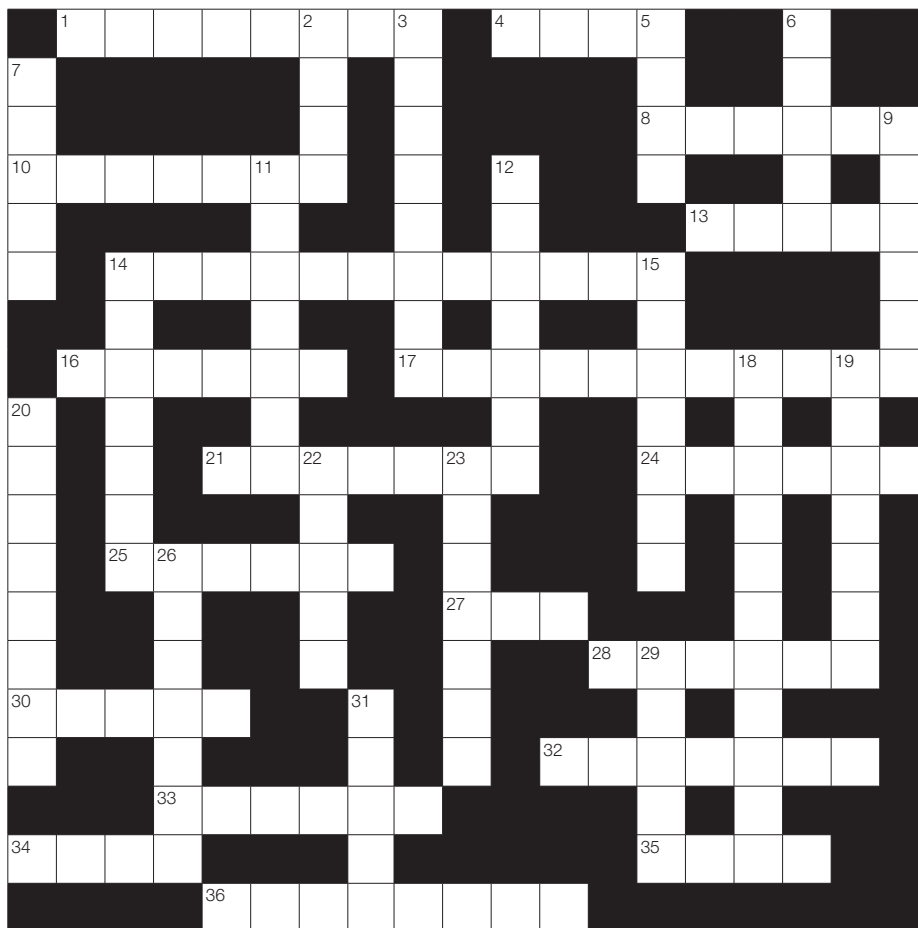
BY JOHN-PAUL MOULD, BARRISTER AND CIVIL MARRIAGE CELEBRANT | JPMOULD.COM.AU

Across

- 1 Agreements are to be observed, *pacta sunt (Latin) (8)*
- 4 An order made *pro tunc* will have a retroactive date attributed to it. (Latin) (4)
- 8 *Noscitur a is a rule of construction by which the meaning of a doubtful word may be gleaned by reference to the meaning of the words associated with it. (Latin) (6)*
- 10 The phrase *in flagrante refers to a criminal being caught red-handed. (Latin) (7)*
- 13 *Pari is used to describe equal distribution to competing claimants in, for example, a bankruptcy. (Latin) (5)*
- 14 Section 65 of the *Succession Act 1981* (Qld) presumes survivorship occurs in order of seniority in cases involving (Latin) (12)
- 16 Recent High Court case involving the parenting rights of a sperm donor, *v Parsons*. (6)
- 17 Describing an offence without aggravating features. (Latin) (11)
- 21 *Sui , or unique. (Latin) (7)*
- 24 *Nudum , or a bare agreement is one giving no contractual rights by reason of absence of consideration or otherwise. (Latin) (6)*
- 25 Interim injunction involving restraining dissipation of assets. (6)
- 27 *Non ... factum* is used as a defence to enforcement of a written contract by someone who is illiterate. (Latin) (3)
- 28 *judicium* refers to a trial by jury. (Latin) (6)
- 30 The phrase, *res alios acta*, relates to the privity of contract doctrine. (Latin) (5)
- 32 Full, as in a court. (7)
- 33 Of the same mind. (Latin, two words) (6)
- 34 Judicially presume or declare. (4)
- 35 *Actio personalis moritum cum persona* means a person's right of action with the person, relevant now mainly to defamation. (Latin) (4)
- 36 A *Legum is a Master of Laws degree. (Latin) (8)*

Down

- 2 Verb used when a prosecutor withdraws a charge at court. (Abbr.) (4)
- 3 *Expressio unius est exclusio , used in statutory interpretation, means the expression of the one is the exclusion of the other. (Latin) (8)*
- 5 The Statute of Westminster II (1285) enacted that the clerks in Chancery could agree to production of a new writ *in consimili , which gave rise to new forms known as 'actions on the case'. (Latin) (4)*



- 6 Prisons, especially on ships. (Jargon) (5)
- 7 *Ubertimae refers to fiduciary relationships. (Latin) (5)*
- 9 A worthless cheque, or a counterfeit coin or note. (6)
- 11 *Qui prior est potior est jure* is a maxim of equity referring to an earlier equitable interest prima facie prevailing over an equal older equitable interest. (Latin) (7)
- 12 *De no curat lex* means the law does not concern itself with trifles. (Latin) (7)
- 14 *Quare fregit*, meaning by which he/she broke the close (land), was an early form of trespass. (Latin) (7)
- 15 Where property is bequeathed to grandchildren *per , the children of one parent will not be entitled to more than a rateable proportion of their parent's share. (Latin) (7)*
- 18 The phrase, *accusare nemo se debet*, refers to the right not to oneself. (Latin) (11)
- 19 Applying the *generis* rule, where in a statute a general word immediately follows a group of specific words, the interpretation of the general word will be restricted to the bring it within that group. (Latin) (7)
- 20 From the start. (Latin, two words) (8)
- 22 *acus interveniens* refers to an act that breaks the chain of requisite causation. (Latin) (5)
- 23 *Ex turpi causa non oritur actio* refers to a court refusing to enforce an contract. (7)
- 26 *Audi partem*, or hearing the other side, is a canon of natural justice. (Latin) (7)
- 29 Formally alter a pleading. (5)
- 31 The writ of *fi fa*, or *facias*, is the archaic version of an enforcement warrant. (Latin) (5)

Solution on page 60

Our snazzy threads

And their important role in '70s law firm culture

BY SHANE BUDDEN



We hear a lot of talk these days about culture in workplaces, including law firms.

That represents a big change from my day, when no one would have referred to a law firm as a 'workplace'.

'Culture' had a different meaning back then, in that culture was basically something partners had and articled clerks did not.

That was unless you counted the bacterial colonies living on the one suit the articled clerk had purchased second-hand from a Lifeline shop. Some – and I refer here to the bacteria, not the articled clerks – had developed quite advanced societies with art, technology and digital watches, which were quite impressive back then. Had any articled clerk been able to afford dry-cleaning, it would have counted as genocide.

Fortunately no articled clerk would have expended capital on cleaning a suit, especially since nobody ever noticed articled clerks and many of us probably could have walked around naked without causing any comment from the partners.

However, you should not think that we were grubs (we were, but you should not think that), or that we made no effort in the suit-maintenance discipline. For example – and I am not making this up – one of my friends once ironed his suit, because it had been in storage and we had a formal event to attend on short notice. Another of my friends avoided the problem by purchasing a new (he worked at a big firm) suit that was trendy at the time, and which was coloured silver (yes, *silver*).

Neither bacteria nor dirt would cling to his suit, which he claimed was because it was made of revolutionary material, possibly from the Apollo space program. The rest of us believed his suit remained clean because bacteria had far too much taste to live on it. Also, it was hard to believe that NASA would have created anything that hideous and ever let it out; it would have been locked in the hangar in Area 51 with the dead aliens from Roswell, engines that run on water and Elvis.

The other disincentive to dry-cleaning our suits was that the cost of the dry-cleaning almost always outweighed the cost of a second-hand suit from Lifeline, Vinnies or those strange mutant things called 'op shops'. Op shops sold an eclectic range of products that were not found in other shops, largely because other shops would not sell items that were, technically, rubbish.

I don't mean rubbish in that the items were unappealing – for example, "Man, that new Adam Sandler film is rubbish." (You might want to write that comment down, it is extremely versatile and can be used on all Adam Sandler films, including future ones.) I mean the items were rubbish in the sense that they were the sorts of things not even accepted at the local dump.

This ought to give you some idea of just how snazzy our threads were ('threads' is a cool '70s word for clothes; if you don't believe me, check out any episode of *The Brady Bunch*, although I point out that I offer up *The Brady Bunch* as proof of being from the '70s, not proof of being cool).

Anyway, back to the point, which was culture (go back and check; I'll wait). These days, culture involves a whole bunch of nebulous things such as wellness, team-building exercises, peace, love and, one suspects, the occasional use of the sorts of controlled substances my clients were always claiming to have been put in their fridge by a mate.

Also, it has become OK to sit at your desk with your eyes closed, breathing deeply; these days this is called 'mindfulness', although back in my day it was called 'sleeping on the job'. Had we been aware of the very positive effects of sleeping in the office back then, much unpleasantness could have been avoided.

Workplace culture can be damaged by many things, and I do not speak here of Christmas parties, although they certainly carry their own risks. I speak of the dangers of not having a Workplace Card Protocol. This is something every workplace should have, to

ensure that the process of sneakily signing a welcome/happy birthday/sorry about your nasal polyp/farewell card can proceed smoothly, and without asking the person who is actually receiving the card to sign/donate money/"aren't you glad that lazy dweeb is going?"

Workplace Card Protocol

No backsies – once you have been given the card, it is your job to find someone who has not signed it and give it to them; you cannot give it back to the person who gave it to you.

Keep your message short – taking up a quarter of the card carefully describing the day you and the recipient turned up to work wearing identical felt jackets with leather elbow patches is inappropriate for all kinds of reasons.

In every workplace there is one hilarious person who writes their message upside down – don't be that person.

If you have an undeclared love for the person leaving, this is not the time to let them know, especially if they are (a) married to a UFC champion, and (b) just going on a two-week honeymoon.

Know why they are going – writing 'Congrats! You deserve this!' on the card of someone who is going to jail for seven years for fraud will only upset them, and they are about to meet a bunch of people who hurt other people for money.

Do not use the term 'Congrats!'.

If you cannot pick the card recipient out of a line-up in three guesses, do not sign the card.

Proposing this simple protocol will ensure that card-signing time will be free of chaos and disharmony, at least for you, because after that you will never be asked to sign a card again.

DLA presidents

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

Bundaberg Law Association **Edwina Rowan**
Charltons Lawyers
PO Box 518, Bundaberg QLD 4670
p 07 4152 2311 f 07 4152 0848 erowan@charltonslawyers.com.au

Central Queensland Law Association **Samantha Legrady**
RK Law
Suite 5, 25 East Street, Rockhampton Qld 4700
p 07 4922 0146 samantha@rkinglaw.com.au

Downs & South West Queensland District Law Association **Sarah-Jane MacDonald**
MacDonald Law
PO Box 1639, Toowoomba QLD 4350
p 07 4638 9433 f 07 4638 9488 sarahm@macdonaldlaw.com.au

Far North Queensland Law Association **Dylan Carey**
O'Connor Law
PO Box 5912, Cairns Qld 4870
p 07 4031 1211 f 07 4031 1255 dylan@oconnorlaw.com.au

Fraser Coast Law Association **John Willett**
John Willett Lawyers
PO Box 931, Maryborough Qld 4650
p 07 4191 6470 mail@johnwillettlawyers.com.au

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

Gold Coast District Law Association **Mia Behlau**
Stone Group Lawyers
PO Box 145, Southport Qld 4215
p 07 5635 0180 f 07 5532 4053 mbehlaui@stonegroup.com.au

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

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

Logan and Scenic Rim Law Association **Michele Davis**
Wilson Lawyers, PO Box 1757, Coorparoo Qld 4151
p 07 3392 0099 f 07 3217 4679 mdavis@wilsonlawyers.net.au

Mackay District Law Association **Catherine Luck**
Taylors Solicitors
PO Box 687, Mackay Qld 4740
p 07 4957 2944 f 07 4597 2016 luck@taylors-solicitors.com.au

Moreton Bay Law Association **Hayley Suthers-Crowhurst**
Maurice Blackburn
PO Box 179, Caboolture Qld 4510
p 07 3014 5044
f 07 3236 1966 hsutherscrowhurst@mauriceblackburn.com.au

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

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

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

South Burnett Law Association **Mark Werner**
J.A. Carroll & Son
Solicitors, PO Box 17, Kingaroy Qld 4610
p 07 4162 1533 f 07 4162 1787 mark@jacarroll.com.au

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

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

Townsville District Law Association **Mark Fenlon**
PO Box 1025 Townsville Qld 4810
p 07 4759 9686 f 07 4724 4363 fenlon.mark@police.qld.gov.au



QLS contacts

Queensland Law Society
1300 367 757

Ethics centre
07 3842 5843

LawCare
1800 177 743

Lexon
07 3007 1266

Room bookings
07 3842 5962



Interest rates

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



Crossword solution

From page 58

Across: 1 Servanda, 4 Nunc, 8 Sociis, 10 Delicto, 13 Passu, 14 Commorientes, 16 Masson, 17 Simpliciter, 21 Generis, 24 Pactum, 25 Mareva, 27 Est, 28 Parium, 30 Inter, 32 Plenary, 33 Adidem, 34 Deem, 35 Dies, 36 Magister.

Down: 2 Neto, 3 Alterius, 5 Casu, 6 Briggs, 7 Fidei, 9 Stumer, 11 Tempore, 12 Minimis, 14 Clausum, 15 Stirpes, 18 Incriminate, 19 Ejusdem, 20 Abinitio, 22 Novus, 23 Illegal, 26 Alteram, 29 Amend, 31 Fieri.

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Bank of Queensland integrates with PEXA

“The traditional days of having to wait until 4pm for your property to settle are gone”

In a forward leap into digital property transactions, Bank of Queensland (BOQ) announced its trust account integration with PEXA. Bill Hourigan, Queensland Law Society's Manager of Trust Account Investigations, said “BOQ's integrated trust account with PEXA enables law practices that maintain trust accounts with BOQ to now participate directly within PEXA.”

Natalie Scanlon, Principal at Countrywide Legal & Business Services, was the first legal practitioner in the country to use BOQ's integrated function. Excited about this new efficiency-gain for her firm Natalie said, “We couldn't wait for Bank of Queensland's trust account to be integrated with PEXA. We're delighted it has finally arrived. Our firm has been a fully digital conveyancing firm for two years and the **PEXA-BOQ integration saves us a minimum of 15 minutes per transaction** – a significant time saving in our conveyancing matters.”

David Thorley, Manager Partner Enablement at BOQ, thanked the bank's practitioner clients for their active collaboration and feedback during the integration process with PEXA.

“BOQ prides itself on providing an individual experience for our customers. We worked closely with our practitioner customers and their feedback was instrumental in this digital transition. **We believe by integrating with PEXA, our customers will benefit from cost efficiencies, less delays and a seamless online property settlement experience.**”

David also commented on the flow on benefits of digital settlements to the end consumer, saying, “The traditional days of having to wait until 4pm for your property to settle are gone and consumers are now able to be advised in real-time of successful settlements.”

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For more information about using trust accounts on PEXA, visit community.pexa.com.au/trustaccounts.

If you'd like to speak with PEXA regarding transacting online, please contact Rukshana.Sashankan@pexa.com.au.

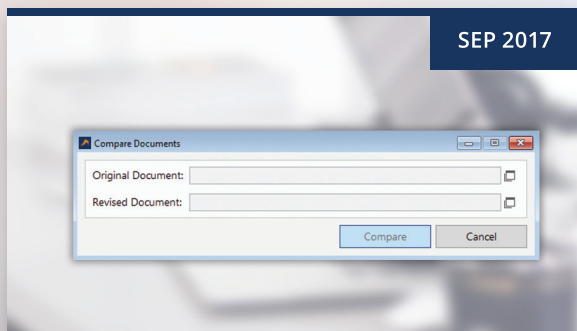
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NOV 2018

Desktop - Two-Factor Authentication



SEP 2017

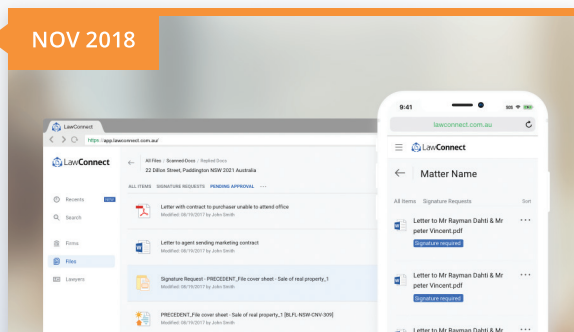
Desktop - Document Compare

JAN 2019



Mobile - Create a New Matter

NOV 2018



LawConnect - Comment & Reply on Shared Documents



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