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JULY 2019

SMALL TEAM, BIG POWERS

Inside the Office of the Independent Assessor

OPINION

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of the past

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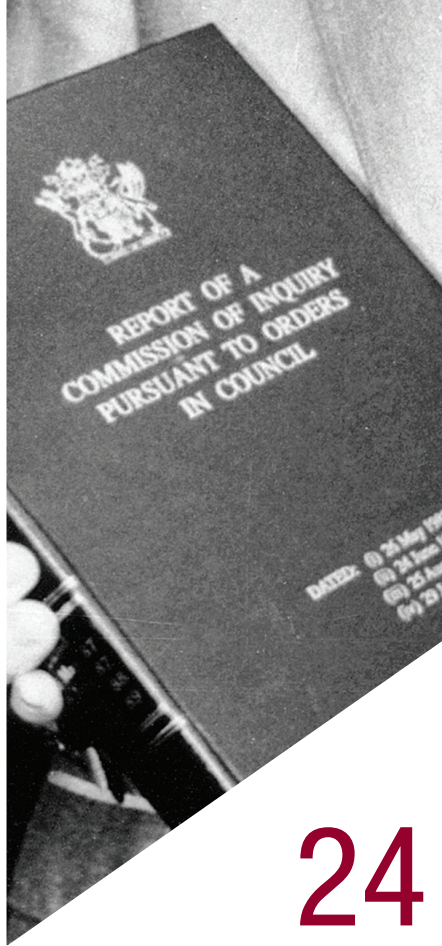
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34



24



26

FEATURES

- 24 **The shadow of the past**
Reflections on the Fitzgerald Inquiry
- 26 **Small team, big powers**
Inside the Office of the Independent Assessor
O.I.A. The three letters poorly behaved government officials need to fear
Flying high under the radar
- 30 **The state of youth justice**
Youth detention follow-up
- 34 **Changing the culture of civil litigation**
Views from the court

NEWS AND EDITORIAL

- 3 **President's report**
- 5 **CEO's report**
- 6 **News**
- 12 **On the interweb**
- 14 **Professional development**
- 16 **Career moves**
- 20 **In camera**

LAW

- 36 **Your Library**
Overtuning *terra nullius*: the story of native title
- 38 **Back to basics**
Subpoenas: Narrowing scope and setting aside
- 40 **Succession law**
Fake friends find a flaw
- 42 **Legal technology**
Spam to scam
- 43 **Practice and procedure**
Adieu, r2.11
- 44 **Ethics**
Successive representation
- 46 **Early career lawyers**
How to distribute trust property in corporate insolvency?
- 49 **Family law**
Court confirms 'interchangeable' supervisory terms
- 50 **High Court and Federal Court casenotes**
- 52 **On appeal**
Court of Appeal judgments

CAREER PATHWAYS

- 56 **Your legal workplace**

OUTSIDE THE LAW

- 57 **Classifieds**
- 61 **Wine**
- 62 **Crossword**
- 63 **Humour**
- 64 **Directory**



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Let the light shine on

Honouring the Fitzgerald legacy



"I herewith submit my report in respect of the matters set out in the Order in Council of 26 May 1987 as amended by the Orders in Council of 24 June 1987, 25 August 1988 and 29 June 1989."

With those simple and inauspicious words, above the signature of G.E. 'Tony' Fitzgerald QC, some rays of sunshine broke through the dark clouds that had hung over Queensland for many long years.

The corruption of the Queensland police force, which was so blatant and arrogant that it had acquired the nickname 'The Joke', was laid bare by the courageous and shrewd QC who headed the inquiry.

This was no mean feat, as many powerful people had no interest in the inquiry proceeding. Joh Bjelke-Petersen, Queensland's all-powerful Premier, tried to talk Police Minister Bill Gunn out of it, telling him: "If you lift up a piece of tin, you'll find one of two things under it, Bill, and that would be a snake or a dead cat."

Fitzgerald found much more than that, sticking doggedly to his task in the wake of death threats to him and his family to expose the rot that lay at the very heart of the system, and went all the way up to the top. At the very least, Bjelke-Petersen sanctioned the corrupt activities, and the strong suspicion is that he had a greater part in them than was ever revealed.

In any event, all Queenslanders owe Tony Fitzgerald a debt of gratitude for his inquiry, the findings of which were handed down 30 years ago this month. In 388 pages, a stunning degree of corruption was laid bare – and solutions to it proposed. Those solutions – including the establishment of the Criminal Justice Commission, electoral reform and creating governance and accountability in the police force – underpin democracy and the rule of law in our state.

Because of Fitzgerald's dedication and bravery, Queensland can now boast one of the world's most professional and ethical police forces, and a robust justice system.

Unfortunately we cannot rest easy. Successive governments have watered down the governance and oversight which came from the inquiry, and that leads to the potential for corruption to once again flourish. Queensland is repealing the police discipline system set up on Fitzgerald's recommendation, and police will again be able to investigate themselves. That lack of transparency can only undermine public confidence in our system.

Queensland Law Society will of course continue to speak out against legislative over-reach and a lack of transparency. For example, our long advocacy on the need for a judicial commission is founded in the need for people to be able to have faith in the process which appoints our judicial officers.

Our judiciary and magistracy are true meritocracies, where only the very good are considered for appointment – but if the public has no view of that process, it can seem a little shady. A judicial commission could also handle the rare occasions on which a judge or magistrate is underperforming or engaging in unsuitable behaviour. At the moment, there is no real process for dealing with such issues, and the heads of our various courts have no way to performance-manage their benches.

This system would benefit the judges and magistrates themselves, because it would clearly show to people the quality of candidates we have, and highlight the fact that misbehaviour and underperformance by the bench is exceedingly rare. The punitive arm of such a commission would be known more for the lack of any need to take action than the action it occasionally undertook.

On this anniversary of Fitzgerald shining a bright light on what was then the dark underbelly of our state, the thought of judicial officers being appointed behind closed doors

and operating without any accountability is an uncomfortable and indeed foreboding one.

If we are to stay true to the spirit of Fitzgerald and honour the legacy he gave us, we must commit to continuing to shine the light on every aspect of our justice system, because in the absence of light, the shadows return.

Follow the leadership

All of which is well and good, but how, other than eternal vigilance, can we achieve this?

The corruption of the pre-Fitzgerald era had many causes – greed, cowardice, a lack of governance – but at its heart it was a failure of leadership. Solicitors can help to prevent a recurrence of that era by strengthening our own leadership skills, and by being leaders in the community and not just the law.

This month will see the launch of our Aspire Leadership Lecture Series. The series will expose members to successful leaders (both in the profession and in other fields) to enhance their leadership instincts and to provide the skills to be effective and ethical leaders.

The first lecture in the series is on 24 July and features Isabelle Reinecke of the Grata Fund. Details are on our website and in my column in *QLS Update*. I hope to see you there.

Bill Potts

Queensland Law Society President

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Your growing profession

How Queensland stacks up



On four occasions since 2011 the Law Society of New South Wales has coordinated all Australia's law societies in submitting their practising certificate statistical data to Urbis, a consulting firm which analyses this de-identified information to provide a national portrait of the legal profession.

This analysis provides the societies with a clear indication of trends and changes across the profession, particularly relating to the gender, age, firm size, employment type and locations of all of our solicitors, nationally and by jurisdiction.

The latest Urbis report, finalised last month, provides a number of fascinating insights into the way our profession is changing. Next month in *Proctor* you will find commentary and an illustrated report on many of the findings.

For example, the analysis shows that the national growth of the profession has slowed, but it continues to grow more strongly in Queensland than the national average.

And of the 2833 private law firms in Queensland, some 88% are sole practitioners – the highest percentage of all states.

Looking at our 11,758 practising certificate holders in Queensland (as of October 2018), some 14% (1646) were practising in country or rural areas of the state, again one of the highest percentages in this category nationally.

The age and gender statistics for Queensland also provide interesting reading – 48% of all solicitors are in the 25-to-39 age group and, of this group, 63% are female.

Our growth rate in female practitioners is higher than the national average, and in particular we are seeing a significant increase in the number of female practising certificate holders in in-house and government roles.

Overall, this represents a significant shift in the gender balance of the profession, and as the predominantly male 45-to-60 sector moves closer to retirement, we can expect to see increases in the number of females in leadership roles.

However, in Queensland private practice firms, of which there are 2833, the gender balance has not yet reached parity, with females representing 48% of this group. However, with more women than men joining the profession in Queensland (at 10% above the national average), we can expect change in the not-that-distant future.

Of the 8800 Queensland solicitors in private practice, some 50% are either single principals or working for those principals, with 16.7% working in large law firms (more than 11 partners).

One concerning finding from the data analysis is that in Australia only 519 solicitors have identified as Aboriginal or Torres Strait Islander. Of these, 36 hold practising certificates in Queensland. I can see an urgent need for an increase in the number of cadetships and other incentives to encourage First Nations people to undertake legal studies and gain employment in the legal sector.

Can they find you?

In May and June we undertook a substantial public advertising campaign to promote one of our key QLS member benefits, the 'Find a solicitor' search tool.

You may have seen components of the campaign on TV or billboards, heard it mentioned on the radio, or come across it on social media.

Our TV ad reached hundreds of thousands of Queensland viewers during the State of Origin Game 1 pre-game show. The TV ads also reached cricket fans during the Channel 9 broadcast of the Cricket World Cup.

The campaign has generated excellent results to date, with over 5000 new visitors to the campaign page, and social media adverts seen more than 427,500 times. We have seen a 26% increase in the number of 'Find a solicitor' searches.

It's not too late to make the most out of the campaign. Register to be on the solicitor referral list at qls.com.au/referrals or contact the Records Team at records@qls.com.au.

Two top events

It was a pleasure to both participate and watch the proceedings at the recent QLS Early Career Lawyers Ball and Gold Coast Symposium. Both events were well attended and reflected the wonderful collegiality of the profession, as evidenced in the photos appearing in this month's In camera section.

Website searches

You may not have noticed – and it's not something we would normally mention – but qls.com.au has a new search engine that makes finding what you want on the website significantly easier.

The new search function has a range of features, such as suggesting related topics, 'best bets' and auto prompting for search terms. We will continue refining the search engine over the coming months as we continue to improve and update our website.

Rolf Moses

Queensland Law Society CEO

In memoriam

John Butler

22 October 1923 – 18 May 2019

John Anthony Fletcher Butler was one of the pioneers of the Sunshine Coast legal profession, and a stalwart of Queensland Law Society.

His passing on 18 May, aged 95, is a great loss to our profession.

John attended St Columban's College, finishing in 1941, and enlisted in the armed forces on 9 February 1943. He served in Papua New Guinea, with his active overseas service totalling 823 days.

On his return he set himself up for a career in law, with his articles of clerkship registered in the Supreme Court on 14 April 1947. Five years later he was admitted as a solicitor, on 19 December 1952.

It didn't take him long to find his way to the idyllic – and at the time, somewhat remote – Sunshine Coast. It was an auspicious time for lawyers in the area, as the burgeoning local legal scene, which had sprung up to serve the district's farmers and small businesses, adapted to the influx of developers and tourists discovering the beauty of the area.



John came to Nambour in 1953 and by 1954 had bought into partnership and become the Butler in Butler McDermott, an iconic firm of

the region which still trades to this day. John and his wife Georgie put down deep roots in the area and raised a family, which would eventually include five daughters (Robbie, Anne, Kathy, Bernadette and Michelle).

John's generosity of spirit and sense of fairness to all were ideal qualities for a legal career. He gathered a large and loyal client base, many of whom became friends as much as clients. To this day Butler McDermott retains many clients whose loyalty began with John, and whose families are now also clients – a fitting testament to his skills as a lawyer and his genuine concern for those he served. He was also made an honorary member of Queensland Law Society for his long and dedicated membership.

John retired from the law in 1988, enjoying spending more time with his family. His wife passed away last year, aged 93. He is survived by his five daughters.

John was a mentor to many over the years, and an example to all due to his commitment to community, clients and colleagues. He will be sadly missed by all who knew him, and our thoughts go out to his family, friends and all whose lives he touched.

QLS prize for ethics students

Two QUT students who led the way in legal ethics studies in the 2018 academic year have received the Queensland Law Society Prize – Ethics and the Legal Profession.

Bianca Stringer and Felicity Wood, *right*, were presented with the prize by QLS Ethics and Practice Centre Director Stafford Shepherd, *centre*, at the 2019 QUT Faculty of Law Prize Ceremony on 21 May.

More than 250 students, staff and guests attended the event. It also marked the final prize presentation for Law Faculty Executive Dean Professor John Humphrey, who stepped down as dean last month.



A portrait of Simon Della Marta, a middle-aged man with grey hair and glasses, wearing a dark suit, a blue and white striped shirt, and a blue patterned tie. He is sitting and looking directly at the camera with a slight smile. The background is a plain, light-colored wall.

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COUNCIL COMPLAINTS AT A GLANCE

Since opening for business in December last year the Office of the Independent Assessor has received nearly 600 complaints against Queensland councillors and mayors. The following figures give a snapshot into how the OIA assesses, handles, investigates and deals with matters.



667
TOTAL
COMPLAINTS
18/19 FINANCIAL YEAR



584
TOTAL
COMPLAINTS
TO OIA



201
ACTIVE
INVESTIGATIONS



8
UNDER
ASSESSMENT



18
REFERRED BACK
TO COUNCIL



77
REFERRED
TO CCC

*data from <https://oia.qld.gov.au/office-of-the-independent-assessor/about-us/insight/insight-april-2019.html>

THE TOP THREE TYPES OF COMPLAINTS FOR SOUTH-EAST COUNCILS WERE:

CONFLICT OF INTEREST
BREACH OF TRUST
BREACH OF POLICY

SEE PAGE **26** FOR MORE ON THE OFFICE
OF THE INDEPENDENT ASSESSOR.



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FCC releases new RAP

The Federal Circuit Court of Australia (FCC) has released its second reconciliation action plan (RAP).

FCC Chief Judge Will Alstergren said the 2019–2021 RAP provided practical measures to promote reconciliation and addressed some of the barriers faced by Aboriginal and Torres Strait Islander peoples in interacting with the court.

The FCC was the first court in Australia to enter into a RAP, which was originally released in 2014. See federalcircuitcourt.gov.au/rap.

Appointment of receiver for Harding Lawyers, Newmarket

On 16 May 2019, the Executive Committee of the Queensland Law Society Incorporated (the Society), as Council's delegate, passed a resolution to appoint officers of the Society, jointly and severally, as the receiver for the law practice, Harding Lawyers. The principal, Robert Blair Harding passed away on 17 April 2019.

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

Enquiries should be directed to the Society's Sherry Brown on 3842 5837 or Bill Hourigan on 3842 5845.

Sunshine Coast raises \$5000 at Justin Crosby Gala

The Sunshine Coast Law Association (SCLA) welcomed more than 180 legal eagles and friends to the Maroochy Events Centre on 17 May for the sixth annual Justin Crosby Memorial Gala Dinner.

Guests donned their black ties for a night of fine wine, gourmet food, entertainment by Tenori and The Vibe, and gave generously to raise more than \$5000 for the Justin Crosby Memorial Law Bursary.

The bursary was established in December 2013 by the SCLA to honour the memory of lawyer Justin Crosby for his outstanding legal service to the Sunshine Coast community.

Event MC Travis Schultz, QLS Councillor and Principal of Travis Schultz Law, opened the event with his personal story about Justin Crosby, a gentle, compassionate soul with a humorous and generous spirit. Travis had even managed to find and bring along a second-hand, dog-eared book called *Schultz* that Justin had found at a local flea market and gifted to Travis by post with a personal note back in about 1993. Not even Justin's wife Cate and daughter Emma, who were in the room, were able to easily decipher Justin's handwriting!

The bursary is open to students enrolled in the University of the Sunshine Coast Bachelor of Laws Program. This year's



winner was Lynda Langton, who shared her story about her dream to study law, despite the challenges of being a single mum with two children.

An annual life membership award was also presented to Magistrate Stephen Courtney, a former barrister who has made a significant impact on the Sunshine Coast legal community. He helped to start Sunshine Coast Barristers Chambers (with former Magistrate John Parker) and was instrumental in establishing the Justin Crosby Memorial Law Bursary.

This year's event was proudly sponsored by Herron Todd White, Pippa Colman & Associates, Finnigan Santoso, Sunshine Coast Barristers Chambers and Go To Court Lawyers.

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The Carter Newell team with the firm's Law Firm of the Year (1-100 lawyers) award.

Carter Newell takes two at law awards

Carter Newell Lawyers has won two major awards at the 2019 Australasian Law Awards – Law Firm of the Year (1-100 lawyers) and the AIG Insurance Specialist Firm of the Year.

It was the 11th year in which Carter Newell has been named as a finalist in the awards. Last year the firm won State/Regional Law Firm of the Year.

“As we celebrate our 30th year, it is tremendous that the culture and direction of the firm to continually strive to do better is paying off,” Managing Partner Paul Hopkins said.

“We never stop trying. We recognise the great privilege it is to act on behalf of our clients, and we value the trust they place in us. Working to uphold that trust is central to all that we do in acting on behalf of our clients.”

More than 600 legal professionals gathered at The Star Sydney on 23 May for the awards. Some 34 awards were presented to the top firms, in-house teams, leading individuals and landmark deals over the past year.

Brisbane-based mediator Tom Stodulka was named as the Resolution Institute Australian Mediator of the Year.

“This is a huge honour and recognition of almost 25 years of full-time mediation practice across Australia and overseas, both as a mediator



Mediator Tom Stodulka with Resolution Institute CEO Fiona Hollier.

and trainer, and mentor of new and experienced mediators,” he said. “It is an acknowledgement of the many ADR leaders, such as Sir Laurence Street, Professor Laurence Boule, Ms Mieke Brandon, Professor Dale Bagshaw and Professor Khory McCormick, who have played such an important role in my development over the years.”

Another award, that of Banking & Financial Services In-house Team of the Year, went to the Bank of Queensland, while the Lexon Insurance Risk and Claims Team was named as a finalist in the Sparke Helmore Insurance In-house Team of the Year category.

Images: © Australasian Law Awards 2019 (auslawawards.com.au, #AusLawAwards)

Judges honoured with portrait tradition

On 16 April, the Townsville District Law Association (TDLA), in accordance with time-honoured tradition, presented four framed judicial portraits for inclusion with the portraits of Townsville District Court judges on Level C of the Edmund Shepherd Court building, Townsville.

This tradition commenced when District Court Chief Judge Kerry O'Brien was the resident judge at Townsville, in collaboration with Raoul Giudes on behalf of the TDLA.

The subjects of the portraits were Judge Gregory Lynham and Judge John Coker, and retired judges the Honourable John Baulch QC and the Honourable Stuart Durward AM QC. The latter two portraits were reframed to include their dates of retirement from the bench.

TDLA President Mark Fenlon presented the portraits to Chief Judge O'Brien, who accepted them on behalf of the District Court. His Honour then gave an informative and entertaining speech regarding the tradition of the portraits, as well as a history of the District Court in Townsville.

Unfortunately Judge Coker was on circuit in Brisbane and not able to attend on the evening, but Chief Judge O'Brien stood in for him. The presentation took place at the North Queensland Club and was followed by an evening of collegiality between the profession and a number of justices, judges and magistrates both past and present.



From left, Townsville District Law Association President Mark Fenlon, Judge Gregory Lynham, Chief Judge Kerry O'Brien, and retired judges the Honourable Stuart Durward AM QC and the Honourable John Baulch QC.



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"It's that time of the year again. Today marks the first game for the State of Origin Series. Care to make this interesting @LawSocietyNSW? The Losing team at the end of the #SOO2019 series must wear the other teams colours" @QLSPresident – QLS President

"We have a deal! @LSNSW_President has a Blues jersey ready in your size. (We must admit, there was some concern among our contract lawyers that this deal could present an unfair set of terms – given the Maroons have very little chance of winning.) #UpTheBlues" @LawSocietyNSW – Law Society of NSW

Replying to @LawSocietyNSW @LSNSW_President
"How many NSW players does it take to win 8 series in a row? Nobody knows." @QLSPresident – QLS President

"We'd like to remind you that our great Law Society has beaten its maroon sibling in various fields over the years. We were first to incorporate our society in 1884, 44 years prior to @qldlawsociety Looking forward to seeing who is first to reach the try line tonight! #UpTheBlues" @LawSocietyNSW – Law Society of NSW

Replying to @LawSocietyNSW @LSNSW_President @qldlawsociety
"Pretty sure you used that comeback in 2018. Do you have anything else up your sleeve?" @QLSPresident – QLS President

"Game one done and dusted. A very comfortable win from Qld, just like we predicted. Care to comment @LSNSW_President @LawSocietyNSW?" @qldlawsociety – Qld Law Society

Replying to @qldlawsociety @LSNSW_President
"Congratulations @qldlawsociety on a thrilling win tonight. A massive effort for the Maroons to come from behind to take the 1st game in the series. Really looking forward to game 2 now!!!" @LawSocietyNSW – Law Society of NSW

Replying to @LawSocietyNSW @qldlawsociety @LSNSW_President
"This is either very classy or very sassy." @emelleiot – Ellen-Maree Elliot





Why you should develop a growth mindset

BY SHEILA KUSHE



What is a growth mindset?

According to Stanford University Professor of Psychology Dr Carol Dweck, possessing a growth mindset – a belief that intelligence can be developed – allows an individual to achieve a higher degree of success than if they possessed a fixed mindset and think that their intelligence is static: “I can either do it or I can’t.”

Dr Dweck suggests that a growth mindset is more of a determining factor to success than inherent intelligence, skill or ability.

What mindset do I have?

People typically exhibit both mindsets. The table, *at right*, shows a summary of the differences.

How do I develop a growth mindset?

In addition to the list above, here are some additional activities and behaviours you can adopt to develop a growth mindset:

Value learning – look at everything as a learning goal, put yourself outside your comfort zone, understanding that that is where personal growth occurs.

Realistic expectation – set high expectations, but also make them realistic.

Positive self-talk – learn how to have a better internal dialogue with yourself which is more helpful rather than critical.

Seek others’ advice and help – seek out constructive feedback to understand how you can do better, by asking for help from others.

Rational expectations

Of course, all the above is based on rational realistic expectations. As much as I apply a growth mindset to my singing abilities, I know I will never be able to sing like Beyonce or Adele!

Two simple, yet powerful, words

If there are two simple words that you can introduce to your daily vocabulary, they should be ‘not yet’. When you are not achieving as much as you wish, or appear to be failing, you can say: “I have *not* succeeded *yet*.” It allows you to have a solution-focused mindset to better manage setbacks, challenges, new situations and learning new things.

Fixed mindset, more likely to:	Growth mindset, more likely to:
<ul style="list-style-type: none">• avoid challenges because they can uncover weaknesses	<ul style="list-style-type: none">• embrace challenges because it’s an opportunity to learn and grow
<ul style="list-style-type: none">• believe you either have the skill or ability, or you don’t	<ul style="list-style-type: none">• believe their skills, abilities and talents can be developed using effort, deliberate practice and progress
<ul style="list-style-type: none">• ignore constructive criticism	<ul style="list-style-type: none">• use feedback to learn and course correct
<ul style="list-style-type: none">• give up easily in the face of setbacks	<ul style="list-style-type: none">• understand persistence and effort is the path to mastery
<ul style="list-style-type: none">• be threatened by the success of others	<ul style="list-style-type: none">• be inspired by the success of others and find lessons and inspiration

In July...

Practical Legal Ethics ✓

Practice Management & Business Skills ✓

Professional Skills ✓

Substantive Law ✓

11 Practice Management Course: Sole practitioner to small practice focus

PMC | 11–13 July, 9am–5.30pm, 8.30am–5pm, 9am–1.30pm | 10 CPD

Brisbane

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16 Drafting pleadings and particulars

Essentials | 8.30am–12pm | 3 CPD

Brisbane

Securing the best claim possible for your client starts with drafting accurate, clear and concise pleadings and particulars. Be guided by litigation experts and equip yourself with essential practical skills needed to prepare and draft pleadings and particulars.

PS ✓ SL ✓

18 The art of briefing counsel

Essentials | 12.30–1.30pm | 1 CPD

Livecast

This session considers the briefing process from start to finish. Topics include the decision to brief, the content and format of the brief, and communication with counsel throughout the matter.

PS ✓

23 Drafting statements and affidavits

Essentials | 8.30am–12pm | 3 CPD

Brisbane

Equip yourself with the essential skills to draft witness statements and affidavits. You will also learn how to differentiate between them and use each correctly. Take away practical tips and examples to draft documents clearly and concisely.

PS ✓ SL ✓

24 Aspire Leadership Lecture Series: Lecture one, 2019

Essentials | 6–7.30pm | 0.5 CPD

Brisbane

Delivered by leaders from within and outside the legal profession, people who have inspired, are confident, loyal and hardworking. They aim to take you on their leadership journey, to make you think about your own journey and provide you with practical tips to implement and improve your leadership skills.

PS ✓

25 Drafting enduring powers of attorney

Essentials | 12.30–1.30pm | 1 CPD

Livecast

This covers the basic legal concepts surrounding an enduring power of attorney (EPA). Learn the nature of an EPA and the legislative requirements of appointing an attorney, capacity issues and a step-by-step guide on how to draft and complete an EPA.

PS ✓ SL ✓

30 Rules of expert evidence

Essentials | 12.30–1.30pm | 1 CPD

Livecast

Cases often turn on the veracity and strength of an expert's evidence. Choosing and managing the right expert, gathering and presenting their evidence, and knowing how and when to challenge your opponent's expert evidence are all skills that can make or break your client's case.

SL ✓

QLS in the regions in August...

16 Hervey Bay Intensive

8.30am–5pm | 7 CPD

PLE ✓ PM&BS ✓ PS ✓ SL ✓

23 Kingaroy Intensive

8.15am–5pm | 7 CPD

PLE ✓ PM&BS ✓ PS ✓ SL ✓

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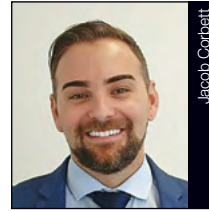
ESSENTIALS Gain the fundamentals of a new practice area or refresh your existing skillset



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



Craig van der Hoven



Jacob Corbett



Mark Bray



Juliet Spencer



Damien Quick



James Hunter

Career moves

Armstrong Legal

Armstrong Legal has announced the promotion of **Craig van der Hoven** to associate. Craig has been with the firm as a solicitor since October 2018, practising exclusively in criminal and traffic law.

Bradley & Bray Solicitors

Bradley & Bray Solicitors has announced an expansion, with **Jacob Corbett** joining **Mark Bray** as a director.

Jacob came to the practice, which is based in Nambour, in 2015 as a commercial paralegal. He was admitted in December 2016 and worked as a solicitor until May, focusing on property, commercial, business and development law. Mark had previously run the firm as a sole practitioner since 1986.

Creevey Russell Lawyers

Special Counsel **Helen Kay** has accepted a position as a partner with Creevey Russell Lawyers, making the firm's partnership ranks 50% female.

Helen, a senior commercial and property lawyer, joined the firm this year and has moved into the partnership with Tom Rynders, Dan Creevey and Clare Creevey.

Doyle Wilson

Doyle Wilson has appointed Senior Associate **Bronwen Curtis** to lead a dedicated family law team. Prior to her admission, Bronwen worked at the Law Council of Australia in the Family Law Section for seven years and practises exclusively in family law.

She has extensive experience in complex property and parenting matters, including property division, sensitive and high-conflict parenting matters, child support disputes and international family law issues.

Piper Alderman

Piper Alderman has announced four appointments to its Brisbane office.

Senior Associate **Lidia Vicca** focuses on commercial litigation and dispute resolution across a number of jurisdictions. Her experience includes working on matters such as contractual disputes, judicial review, energy and resource disputes, immigration review, disputes arising from tax audits and commissions of inquiry.

Associate **Alex Phillips** has joined the firm's dispute resolution and litigation team after a period living in the United Kingdom, where he gained experience in commercial litigation, contract and business disputes, insolvency and bankruptcy.

Juliet Spencer has joined the firm as a lawyer in the team led by Warren Denny (see last month's Career Moves). Juliet has more than 15 years' experience in insurance and commercial law, dealing with clients including insurers, corporations, professional bodies, directors and officers, accounting firms and individuals. She returns to private practice after a number of years dealing with property transactions for a rural business.

Damien Quick has relocated from Piper Alderman's Adelaide office to Brisbane and was admitted in December as a lawyer. Damien practises in commercial litigation, and has experience in corporate and personal insolvency matters.

Shand Taylor Lawyers

Shand Taylor Lawyers has welcomed the promotion of three of its lawyers to associate.

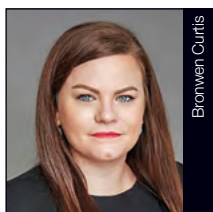
Patrick Sherlock, who joined the firm last year, has practised as a solicitor for more than seven years and is experienced in property development, business services, and banking and finance law.

Ruby Nielsen practises in a range of litigation and dispute resolution matters including employment, building and construction, and property disputes.

Andrew Pine practises in property and commercial matters including development, leasing, and acquisitions and disposals.



Helen Kay



Bronwen Curtis



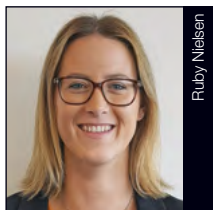
Lidia Vicca



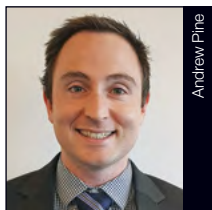
Alex Phillips



Patrick Sherlock



Ruby Nielsen



Andrew Pine



Peta Yujnovich



Bill King



Kiran Birkin



Nicola Thompson



Daniel Bellissimo

Slater & Gordon Lawyers

Slater & Gordon Lawyers has announced changes to its executive leadership team with the promotion of **Peta Yujnovich** to Queensland Practice Group Leader for WorkCover, motor vehicle accident and public liability claims. Peta is highly experienced, having practised in personal injury litigation for more than 15 years.

The firm has also welcomed Senior Associate **James Hunter**. James manages a superannuation and life insurance claims practice and has extensive experience in personal injuries and life insurance claims.

Bill King has joined the firm as a principal lawyer, managing the medical law practice in Queensland. Bill has 10 years' experience in medical negligence claims and 25 years' experience as a lawyer. He focuses on plaintiff compensation claims for brain and spinal cord injuries.

Kiran Birkin has been promoted to senior associate. Based in the Brisbane office, Kiran has worked in personal injury litigation for 10 years and has experience in motor vehicle, workers' compensation and public liability (inclusive of institutional abuse) claims.

Nicola Thompson now leads the Birtinya office, transitioning from senior associate to office leader for the firm's Sunshine Coast branch. Nicola has practised in personal injury law since 2009 and has extensive experience in motor vehicle accident, workers' compensation and public liability claims.

Wickham Lawyers

Wickham Lawyers has appointed new team member **Daniel Bellissimo**. Daniel has focused on migration law since 2015 and is a registered migration agent. He has recently branched out into family law.

Proctor career moves: For inclusion in this section, please email details and a photo to proctor@qls.com.au by the 1st of the month prior to the desired month of publication. This is a complimentary service for all firms, but inclusion is subject to available space.

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Queensland Budget a justice investment boon

BY TONY KEIM



For many, many years and during successive governments with diverse and differing political agendas, views and priorities – the needs and interests of the legal profession, judicial sector and the fundamental human right of access to justice has been almost forgotten, some say abandoned.

After concerted, consistent and relentless campaigns and lobbying by Queensland Law Society and other legal stakeholders and interest groups, that barren period fortunately ended on June 11 when the Queensland Government Budget revealed \$847.9m had been committed to a myriad justice investment initiatives over the next five years.

Queensland Law Society President Bill Potts welcomed the announcement – saying the government had delivered a veritable “funding bonanza” on numerous important issues such as an investment in court infrastructure (\$57.7m), Queensland Civil and Administrative Tribunal (\$13.1m) and Youth Justice (\$550m).

However, Mr Potts said it was extremely disappointing there was insufficient extra funding for the legal assistance sector and Legal Aid Queensland and the creation of yet another men’s correctional centre in the Lockyer Valley.

“This is certainly a justice investment Budget and QLS thinks the government should be praised for the much needed funding to crucial areas such as Youth Justice, child protection, the Queensland courts and QCAT,” Mr Potts said.

“This level of justice investment has been a very long time coming and been seriously overlooked by successive governments, both state and federal, for far too long.

“I am happy to say this Budget is something the criminal justice system and the legal profession needs and has been crying out for many, many years.

“This is the most significant investment in the justice system the Society has seen in recent years with \$847.9 million over 5 years.”

The myriad justice initiatives announced in the 2019-20 State Budget include:

- \$57.7m over 4 years to respond to increasing demand on state courts
- \$13.1m to respond to frontline demand pressures and increase sessional members remuneration in QCAT
- \$10.6m additional for Office of the Public Guardian and QCAT to address increased workloads from the rollout of the NDIS
- \$9.5m to commence implementation of the information, communication and technology strategy in the justice portfolio which the QLS hopes will include upgrades to court IT system
- \$3.9m for priority maintenance at Queensland courts – with an additional \$4.8 mil over 2 years for capital upgrades
- \$5m to establish a Murri Court at Ipswich
- \$517.5m over 4 years for family support and child protection, including \$27m for the Office of Public Guardian to continue to deliver protection to children in care and vulnerable adults and a \$13.5m increase for child protection litigation services by the Director of Child Protection Litigation
- \$5.8m for the Queensland Human Rights Commission to support the introduction of the *Human Rights Act 2019*
- \$42.8m increase for the Office of the Director of Public Prosecutions and \$12m a year to respond to increased workload
- \$17.3m for Crown Law to provide advice to the Attorney-General on the *Dangerous Prisoners Sexual Offences Act 2003* and representation before the Mental Health Review Tribunal
- \$19.1m increase to expand community justice groups
- \$15.3m increase to Victims Assist Queensland to provide support to victims of crime and to assist in the processing of claims and backlog
- \$18.5m increase to support the Townsville community youth response

- \$27.5m increase for restorative justice conferences in the youth justice system
- \$15m to establish three new community youth responses to address youth crime hotspots in Brisbane, Ipswich and Cairns
- \$1.7m to establish youth justice program management office to provide a whole of government response to youth justice issues
- \$2.3m for the Queensland youth partnerships initiative.

Mr Potts said the Attorney-General needed to be congratulated for convincing the Treasury to open its coffers for a much needed lifeline to the criminal justice system.

“We have campaigned long and hard for much of the funding announced in the Budget and will continue to do so for good law, good lawyers and the public good,” he said.

“It is pleasing the government is listening to the voice of lawyers in Queensland and we hope that fruitful relationship will continue to blossom overtime.”

He said QLS stood ready to assist the government to ensure all Queenslanders had proper legal representation and access to justice.



HAVE YOUR SAY

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Walking together for reconciliation



National Reconciliation Week is a time for First Nations and non-Indigenous peoples to come together.

In recognition of this year's theme, Grounded in Truth: Walk Together with Courage, on 3 June QLS staff traversed the riparian trails of Meanjin (Brisbane), walking to Geerbaugh's midden at Kangaroo Point, north of Riverlife.

This spot signifies the importance of history and storytelling. Special guests included Indigenous Lawyers Association of Queensland President Avelina Tarrago, RAP working group representatives Terry Stedman, Nick Frazer and Angela Shooter, together with QLS President Bill Potts, CEO Rolf Moses and QLS staff.

The walkers heard about sculptor and artist the late Ron Hurley and his six monuments, each of which represents a star in the Southern Cross.

The works celebrate the creations of the Kangaroo Point Cliffs area by the Rainbow Serpent and the stories told by Geerbaugh, the last traditional member of the Waka Waka Nation.

The initiative embodied this year's theme and provided an opportunity for yarning, storytelling and reflecting on First Nations history while enjoying First Nations tucker and bringing everyone together in the spirit of National Reconciliation Week.



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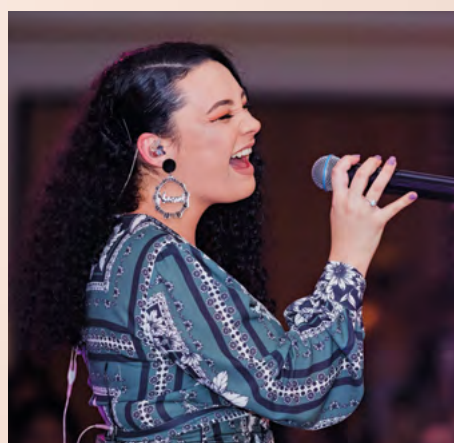
GLITZ AND GLAM ON JAMES STREET

Energetic early career lawyers and their partners made the most of a shiny new venue, innovative gourmet dining and a band that brought the funk at the 2019 QLS Early Career Lawyers' Ball. The ball was held on 31 May at the Calile Hotel in New Farm's James Street precinct.

Guests headed for the photo booth, filled the dance floor to the sound of Funk'n'Stuff and described the whole event as thoroughly enjoyable.

Several firms made the most of the night by filling complete tables with staff and partners. They included Allens, Corrs Chambers Westgarth, Herbert Smith Freehills, HopgoodGanim, HWL Ebsworth, Mullins Lawyers, Norton Rose Fullbright and Thynne + Macartney.







Gold Coast Symposium

Another successful Gold Coast Symposium wrapped up on Friday 7 June after a day of learning, collegiality...and happiness.

The opening plenary, 'The Business of Happiness', was presented by clinical psychologist Cliff Battley, who delivered fascinating insights into the nature of happiness and why it is a critical component of our personal and professional lives.

The well-received session was preceded by a 'Leading Wellness in the Profession Breakfast' delivered by QLS CEO Rolf Moses and followed by an exciting professional development program that culminated in a 'Celebrate, Recognise and Socialise' gathering at which QLS 25-year membership pins were presented to Darren Mahony and Pamela Roberts.

Gold Coast Symposium was held at the Star Gold Coast and drew 150 attendees.



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THE SHADOW OF THE PAST

DOES IT FALL ON THE PRESENT?



THIRTY YEARS AGO THIS MONTH, THE FITZGERALD INQUIRY REPORT INITIATED REMARKABLE AND WELCOME CHANGES IN QUEENSLAND. HOWEVER, **BILL POTTS AND SHANE BUDDEN** REMIND US THAT ONGOING VIGILANCE IS ESSENTIAL TO PRESERVING THE INQUIRY'S DEMOCRATIC LEGACY.

It is hard to believe, walking around present-day Queensland – with its thriving economy, admirable justice system and professional and ethical police force – that it wasn't always this way.

While we live now in a modern state run by transparent and effective governments, there was a time when Queensland was described as 'the moonlight state', and deservedly so. Three decades ago, corruption was king and neither the Government nor the police were minded to do anything about it, because they were the ones doing it.

It has been 30 years since Tony Fitzgerald QC, a man of deep integrity and boundless courage, completed an inquiry that many people assumed would be a whitewash,

having turned it into a process which returned true democracy to Queensland.

Initially slated for six weeks, the inquiry ran two years and ultimately delivered a damning revelation of corruption – bribery, standover tactics, misuse of public funds and more – that went all the way up to the Police Commissioner and even the then Premier, the infamous Joh Bjelke-Petersen.

Even before it got off the ground, there were attempts to subvert the inquiry. The Government initially proposed District Court

Judge Eric Pratt, a close personal friend of Police Commissioner Terry Lewis (whose activities the inquiry would investigate). After pushback from both journalists and lawyers, Pratt was rejected and after Ian Callinan recused himself for fear that he appeared too close to the Government, Tony Fitzgerald QC was appointed.

Cometh the hour, cometh the man. Fitzgerald, who had been a judge of the Federal Court and would go on to be a Supreme Court of Queensland judge and the first President of the Court of Appeals Division, had the rule of law in his blood.

He was born in Sandgate, where Robert Travers Atkin – a founding father of social justice in Queensland, and actual father of Lord Atkin, one of England's greatest judges – lived the final years of his life (and where he is buried). Fitzgerald took silk in 1975 and established a reputation for integrity and determination, both of which would be tested during the inquiry.

Fitzgerald broadened the ambit of the inquiry with the blessing of then-Premier Mike Ahern, who had to face down his own Cabinet in the process. Indeed, Ahern's support for the inquiry, and determination to implement its recommendations "lock, stock and barrel" deserve recognition.

Opposed by many in his own party (some of whom would end up serving time in prison) and cognisant of the fact that the inquiry's findings would almost certainly doom his government, Ahern nevertheless continued to give Fitzgerald his support.

The expansion of the inquiry was key, as the initial limitation meant only police officers could be subpoenaed and investigated – and Fitzgerald had discovered that things went much further than the cops on the beat. Armed with broader terms and new powers, including the ability to appoint assistant commissioners, Fitzgerald went to work.

The results of the inquiry were stunning, and almost incomprehensible in this day and age. Ultimately Police Commissioner Terry Lewis and three Government Ministers would do jail time. A fourth, Russ Hinze, would likely have been imprisoned but succumbed to bowel cancer before charges were laid. Former Premier Bjelke-Petersen was tried for perjury, which resulted in a hung jury. Consistent with the corruption of the day, it was later discovered one of the jurors was a friend of Bjelke-Petersen.

Fitzgerald's courage was not without consequence. He and his family received death threats which were regarded as credible, yet pulling back or shortening the inquiry never seemed to cross Fitzgerald's mind. Dedicated to the rule of law, he continued to pursue his quarry, despite the fact that in both resources and connections, he was disadvantaged.

On his side were two powerful allies, however: the fourth estate and the legal profession. Journalists had been hounding the Government about police corruption for years, often facing lawsuits – and worse – as a result.

In fact, the inquiry itself was largely the result of newspaper reporting, especially *The Courier-Mail's* Phil Dickie, whose relentless pursuit of corrupt politicians and police forced everyone to take notice. When the ABC's *Four Corners* picked up on Dickie's work and aired its compelling, disturbing 'Moonlight State' episode, the Government could no longer pretend there was "nothing to see here".

Then the watch upon the walls of Mordor slept, and dark things crept back into Gorgoroth.

The Fellowship of the Ring, JRR Tolkien

As for lawyers, for many years they had complained of clients being verballed and mysterious guilty pleas from clients in custody that were often accompanied by equally mysterious injuries.

Witnesses suddenly recanted testimony or simply disappeared, and clients arrested at street marches told of peaceful protests that descended into violence at the hands of unknown marchers who looked very similar to members of the police force's notorious Special Branch (which no doubt protected many criminals when it burnt its records rather than have them subpoenaed by Fitzgerald).

The legacy of the Fitzgerald Inquiry was nothing less than the return of democracy to Queensland, and the end of a de facto police state. The recommendations of the inquiry included the establishment of the Criminal Justice Commission (now the Crime and Corruption Commission) and the Electoral and Administrative Review Commission, now both cornerstones of Queensland's thriving democracy.

The Fitzgerald Inquiry was a great success, but it was not – indeed, cannot be allowed to be – the end of the story. Just as the banning of Lance Armstrong did not spell the end of drugs in sport, the findings and achievement of the Fitzgerald Inquiry do not mean that the job is done, nor that we can relax our

vigilance or allow our watch on the walls of justice to sleep.

Almost as soon as the initial recommendations were implemented, the forces of evil began to test them, and the appetite for ongoing reform began to fail. Fitzgerald himself left Queensland, later revealing that the election of the Beattie Government and its reluctance to commit to ongoing reform informed his decision to move.

Beattie's Government amalgamated the Criminal Justice Commission with the Crime Commission to form the Crime and Misconduct Commission, and took away its powers to investigate police, reversing one of Fitzgerald's key recommendations.

Subsequent governments have exhibited other concerning lapses. The Newman Government's so-called 'bikie' legislation made people guilty by association rather than their deeds, and stripped away rights Queenslanders had come to regard as inalienable, a concerning trend that has continued under the current Labor Government.

Several recent laws contain a reversal of onus – effectively, regarding people as guilty until proven innocent – and contain significant coercive powers. Legislation to sack the Ipswich City Council included provisions which denied the councillors involved the right to challenge the decision in court, a concept most Australians associate with despotic regimes. Dark things are indeed creeping back into Queensland.

Lawyers are officers of the court, and as such have a duty to the administration of justice and the courts. That duty encompasses the obligation to speak up when the rule of law is threatened. Tony Fitzgerald did it 30 years ago and freed a state from the tyranny of corruption. If the rule of law is again threatened, we must be ready to take up that cause.

That said, we stand in a better place than we did in 1987, when Tony Fitzgerald began his work.

As we recognise the 30th anniversary of the end of the systematic corruption of the police force and our governing institutions, the free citizens of Queensland should spare a thought for Tony Fitzgerald and raise a glass to him. The best way to honour him, however, is to hold our politicians accountable to the highest standards, and never let the rule of law be usurped again.

Bill Potts is the President of Queensland Law Society and Principal of Potts Lawyers. Shane Budden is a QLS ethics solicitor.

Image above left: Tony Fitzgerald QC hands the bound copy of the Fitzgerald Report to Premier Mike Ahern on July 7, 1989. *Image courtesy of State Library of Queensland, image no. 78930.*

O.I.A.

**THE THREE LETTERS POORLY BEHAVED.
GOVERNMENT OFFICIALS NEED TO FEAR**



BY TONY KEIM

Throughout time governments have been prone to give departments and legalisation innocuous and vague names that pretty much confuse everyone about their implied purpose or meaning.

One particular piece of legislation which caused many judges and magistrates to make disparaging and quizzical comments about its title was the now renamed *Classification and Computer Games and Images Act 1995*.

No one could ever quite work out at the time what hunting down child sex offenders possessing or obtaining child pornography via the internet had to do with playing computer games—but that was its essential purpose.

The most recent confusing name to be bestowed on a government department is Queensland's *Office of the Independent Assessor (OIA)*.

While name sounds innocuous, the OIA is home to an elite team of investigators and professionals who wield significant clout to receive, assess, investigate and prosecute complaints about elected local government officials, such as councillors and mayors, throughout Queensland.

One of the OIA team recently told Proctor: "When I heard the name I thought I should come to work with a white glove ready to assess [rare gems]."

Another said he looked forward to the day he could answer the phone with the simple opening: "Good morning, OIA," a nod to the widespread community acceptance of its older cousin the Crime and Misconduct Commission, or 'Triple C'.

While some legal types have referred to the OIA as the 'Baby Triple C', the team would rather be known as the leaner, meaner, and smarter younger sibling of the CCC.

The OIA is headed by former Crime and Corruption Commission assistant commissioner and Australian Crime Commission Queensland manager Kathleen Florian. She is supported by an experienced, diverse team made up of former CCC, police and other specialist investigators from throughout Queensland, New Zealand, the United Kingdom and the Northern Territory.

Queensland Local Government Minister Stirling Hinchliffe, when launching the office in December, said the OIA kicked off a new era of accountability, integrity and transparency as the government attempted to rebuild community faith and trust in local government authorities.

The lack of faith stemmed from the significant public outcry that flowed from CCC investigations and subsequent charging of Ipswich City Council mayors Paul Pisasale and Andrew Antonioli, and two chief executive officers—followed by the eventual sacking of all councillors.



HAVE YOUR SAY

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What lawyers need to know

ABOUT AN OIA ASSESSMENT AND REFERRAL OF A COMPLAINT TO THE COUNCILLOR CONDUCT TRIBUNAL

Councillor receives an OIA letter outlining complaint allegation

- The letter will explain how the matter would, or could, proceed from this point.
- This communication does not raise any requirement to engage in a natural justice process. A brief of evidence has not yet been compiled; it is an information gathering stage.

Options: Fast track or OIA investigation

- The councillor may agree with the allegation as alleged and elect to fast track the matter. Refer to uncontested process on OIA website.
- If the councillor disputes the allegation, OIA will continue investigating.

Investigation

- At the conclusion of the investigation, if the OIA has reasonable satisfaction that the councillor has engaged in misconduct, the OIA sends notice to the councillor that it intends to refer the matter to the Councillor Conduct Tribunal (CCT).

Section 150AA Notice to councillor

- The councillor will receive a section 150AA Notice together with a draft Statement of Facts which sets out in detail the allegation against the councillor and the evidence supporting it.
- This is the statutory natural justice process that precedes a decision by the Independent Assessor to refer the matter to the CCT.

Councillor responds

- The section 150AA Notice provides an opportunity for the councillor to respond. The councillor may provide a statement or information about the conduct and why the Independent Assessor should not make the decision to refer the matter to the CCT to be dealt with.
- If the councillor agrees with the allegation/s, the councillor may also amend, as appropriate, the draft statement of facts with a view to an agreed statement of facts being submitted to the Tribunal.
- The OIA will then consider the response (if any) before making a determination to refer the conduct to the CCT.

Application to Councillor Conduct Tribunal

- Upon considering the councillor's response, if any, the IA may refer the application to the CCT. The CCT will respond with a date for the hearing. Upon receipt of these details, the OIA will provide a copy of the Application including the date and time of the hearing. At this time, the councillor (or their legal representative) will be provided with a full brief of evidence.

"The independent assessor has the power to investigate and determine genuine complaints more effectively and efficiently while being able to quickly dismiss vexatious complaints," Mr Hinchliffe said.

Ms Florian said the OIA's job is to hold councillors who would commit misconduct to account, for the benefit of the community and the benefit of all councillors who are trying to do the right thing.

"It will be my priority to resolve the transition matters and ensure that the councillor conduct system is effective, timely and balanced," Ms Florian said.

"With new powers to address early complaints that are vexatious, frivolous or not in good faith, the focus of the OIA will be on complaints of more serious allegations of misconduct."

The OIA works closely with the Councillor Complaints Tribunal and the Department of Local Government, Racing and Multicultural Affairs to provide councillors with advice, training and information.

Flying high under the radar

BY TONY KEIM

Kathleen Florian is not a person immediately recognised as a high-flyer on the Queensland legal landscape, but she is highly regarded in elite professional circles and has had a front-row seat and wielded great powers for many years as the tip of the spear in cracking some of state's biggest and most difficult criminal investigations.

Ms Florian is one of the nation's best investigators. She has worked almost exclusively in the shadows of public scrutiny, often facing off against dangerous, violent and extremely abusive criminals, such as outlaw bikies, when they've been hauled before secretive star-chamber hearings and compelled to speak under threat of immediate jail about serious indictable offences when all other avenues of conventional police investigation had failed.

A veteran barrister and former Crime and Corruption Commission (CCC) assistant commissioner, Australian Crime Commission Queensland manager, and investigator in the high-profile tax evasion investigation Operation Wickenby, Ms Florian has now been thrust into the prominent public role of Queensland's independent assessor. The office was set up by the Queensland Government as a response to recommendations of the Operation Belcarra Report to hold local government authorities accountable. Ms Florian and her team are responsible for receiving, assessing, investigating and prosecuting complaints about councillor and mayoral conduct in Queensland.

The CCC's investigations and findings were triggered by numerous complaints made against mayors and councillors—from Ipswich, Moreton Bay, Logan and the Gold Coast—during the March 2016 local government elections.

The OIC is responsible for receiving, assessing and investigating any complaints levelled at the state's current 550-plus mayors and councillors—which does not include the sacked 22 councillors and two mayors from Ipswich and Logan City councils.



In an exclusive interview with Proctor, Ms Florian said her goal was to be “open and transparent” in all matters investigated by the Office of the Independent Assessor (OIA), and to “restore public faith” in government agencies.

“[The OIA team] sat down at the beginning and we had a conversation about what it was we wanted to be known for. We decided it was important we be known for being decent and approachable to everyone,” Ms Florian said.

“It's important to us culturally that we are decent and we always take the time and explain things to [complainants and councillors alike].”

When taking on the role, Ms Florian made it crystal clear another priority was to ensure the OIA be totally transparent and take steps to restore public faith in government institutions and their ability to ensure all matters are dealt with fairly and effectively.

“It will be my priority to resolve the transition of matters and ensure that the councillor conduct system is effective, timely and balanced,” Ms Florian said at the time.

“With new powers to address early complaints that are vexatious, frivolous

or not in good faith, the focus of the OIA will be on complaints of more serious allegations of misconduct.”

Since the OIA opened in December, the number of complaints received has skyrocketed from 573 over the seven years between 2011-12 and 2017-18, to a staggering 800-plus reported grievances within the past six months.

“We've seen a fairly significant increase in volume of matters,” she said.

“A consequence of that is there has been a fairly big increase in the number of matters under investigation and an increase in the flow of matters to the (Council Conduct) Tribunal.

“With many matters we have an option to either deal with (proven breaches) on a misconduct basis before the Council Conduct Tribunal, or there are matters where we can commence a statutory prosecution and prosecute them before the magistrates' court.

“Essentially, if it's a very serious matter we will prosecute (a councillor) up front or if the councillor has a significant disciplinary history, including similar conduct, then that says to us that the disciplinary process is not achieving the outcome required and we will prosecute them in the Magistrates' Court.

“If we prosecute (through the courts) upon charge, that is an integrity offence, and they are suspended (from serving) as councillors. If they are convicted, then the implication is that of (proven) integrity offences and they will be (banned) ... for a period of four years from running for local government.” Ms Florian said the OIC would prefer to resolve any valid complaints against councillors by way of disciplinary action, rather than criminal, so matters could be resolved swiftly and allow councillors to return to their roles better educated on their official obligations and without serious sanction.

“The disciplinary approach is that we very much try to encourage councillors who have done something wrong, particularly if it was a mistake, to come on board quickly (and admit the error),” she said.

“We send a letter to all the councillors when we commence an investigation ... and set out the allegations and facts as we know it at that time and in as much detail as possible. At that time we invite them to have a say in how the matter proceeds from that point.

What's there to complain about?

OIA—WHAT CONSTITUTES A COUNCILLOR CONDUCT COMPLAINT?

“The (councillor) may look at the allegation and decide that it is correct and they want it dealt with quickly. For councillors in that ballpark we want to get them straight through the tribunal as soon as possible to have them dealt with ... and have them see it as a learning opportunity and we can all move on.”

However, Ms Florian said some lawyers engaged by councillors, and who haven't had experience in disciplinary matters, often take great exception to the letters sent to clients and demand a full brief of evidence before responding to the OIA.

“Our focus is on prevention and deterrence and we would very much encourage lawyers who may be experiencing this jurisdiction for the first time to make contact with us ... [so we can assure them] that it is important to us that we are approachable and balanced because the nature of the misconduct side is that it is disciplinary only.

“Of course we won't hesitate to go to the criminal side, but only if we have no other option and we are forced to do that to change (a councillor's) behaviour.

“A message I would really like to get across is at the misconduct stage we definitely do not deal with it like it is a criminal matter,” she said.

Having spent most of her career working in the shadows and being protected from the spotlight of public office, Ms Florian said decades of experience have prepared her to take centre stage as head of the OIA.

“I think my time at the Australian Crime Commission, and the CCC particularly, has prepared me a lot for this public role,” she said. “At the CCC there has been a lot of media engagement [in recent years] and a lot of very public accountability through the CCC hearing process.

“[In that role] I've been through some pretty difficult times, dealing with difficult issues and I do feel like I am well and truly prepared.”

1. Unsuitable meeting conduct

Unsuitable meeting conduct is handled by a council in the council meeting. It is unsuitable meeting conduct when a councillor, in a council meeting, contravenes the code of conduct or a council policy.

2. Inappropriate conduct

Inappropriate conduct must be referred by councils to the independent assessor. It is inappropriate conduct when a councillor contravenes a behavioural standard (a breach of the councillor code of conduct), or a policy, procedure or resolution of council, an order of the chairperson of a council meeting to leave and stay away, or when a councillor receives orders for unsuitable meeting conduct three times in one year.

3. Misconduct

Misconduct is handled by the independent assessor, with the complaint heard by the Councillor Conduct Tribunal. It is misconduct when a councillor is dishonest or biased in the exercise of their powers.

Behaviours categorised as misconduct include:

- breaches of trust
- misuse of information or material acquired in, or in connection with, the performance of the councillor's function for the benefit or detriment of the councillor or another person
- giving directions to local government employees

- releasing information confidential to council
- failing to report suspected conflicts of interest of other councillors
- failing to comply with an order of the council or the Councillor Conduct Tribunal
- failing to comply with acceptable request guidelines of the council
- failing to comply with a council policy about the reimbursement of expenses or being disciplined for inappropriate conduct three times in one year.

4. Corrupt conduct

Corrupt conduct is handled by the Crime and Corruption Commission. Corrupt conduct is behaviour that:

- adversely affects, or could adversely affect, the performance of functions or the exercise of powers of the councillor
- is not honest or impartial
- results, or could result directly or indirectly, in the performance of functions or the exercise of a councillor's powers in a way that is not honest or impartial; or a breach of trust placed in the councillor; or a misuse of information acquired by the councillor
- is engaged in to the benefit or detriment of a person
- if proven, would be a criminal offence.



HAVE YOUR SAY

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SAVING A GENERATION LOST IN THE YOUTH JUSTICE CRISIS

BY TONY KEIM



There has been a boisterous war of words, rampant blame gaming, fatiguing finger-pointing and knee-jerk quick-fixes to Queensland's Youth Justice Crisis since revelations in mid-May about the dozens of children being held in dangerous adult police watch houses.

But, has anything really been realistically achieved since then to rectify the problem in the short term or consider enacting long-term measures or strategies?

Queensland's Premier Anna Palaszczuk, assorted government ministers, departmental heads, opposition party chiefs, various interest groups and the mainstream media have all taken a position and offered myriad solutions to a very complex issue that is often metaphorically drowned out by so-called 'community expectations' to be protected from 'rampant juvenile crime.'

In the seven weeks since the ABC's Four Corners program "*Inside the Watch House*" exposed details of up to 70 children being held at Brisbane's Roma Street watch house alongside serious criminals, there has been much debate and public funding committed to provide solutions.

The Queensland Labor Government responded by committing \$550 million – notably before the program aired, but a day before Child Safety and Youth Minister Di Farmer was interviewed for the show – to building a new youth detention centre and expanding an existing facility (\$320 million) and programs and resources to provide better support services and access to justice initiatives (\$230 million).

It also established a new 'department' with the appointment of Queensland's Deputy Police Commissioner Bob Gee as its Youth Justice Director-General. While the position created was new, no additional staff were allocated to Mr Gee, other than the staff already employed by the existing Department

of Justice. In effect, Mr Gee was the head of a department in name only.

The LNP's response to the crisis was to pepper the government with relentless criticism for failing to act before the ABC program aired.

On May 16, State Opposition leader Deb Frecklington proposed her LNP Party's solution to the dilemma – the holding of yet another Royal Commission.

QLS responded on 13 May, the morning after the program aired, by saying it was simply appalling that so many young children were being warehoused in adult watch house cells alongside seriously dangerous adult criminals, including sex offenders.

QLS President Bill Potts at the time said there was no need for a Royal Commission, saying the Atkinson Report on Youth Justice released in July last year had already identified and recommended 77 areas for reform – the majority of which proposed strategies and programs for the diversion of children away from the courts and custody.

After considerable consultation with members, in particular the QLS's Children's Law Committee, the Society wrote to the Premier Palaszczuk and Ms Farmer on 31 May, calling on the government to implement easy and practical measures to ensure the safety and future welfare of youth offenders.

"The Society...express great concern that the detention and treatment of children and young people runs contrary to the charter of youth justice principles in the *Youth Justice Act 1992* and the Queensland Police Service Operational Procedures Manual and Australia's obligations under international law and custom," Mr Potts' letter read.

"We also note that the Queensland Parliament has recently passed the *Human Rights Act 2019*. Although this legislation is not yet in force, there is obviously an intention by the Queensland government to protect the rights of children in the criminal process."

To that end, Mr Potts said QLS strongly recommended the implementation of an eight-point plan of short term measures to alleviate the crisis and detention overcrowding:

- an increase of the age of criminal responsibility to 12 years for all offences, or at least summary offences
- an assurance that no children under 14 years of age will be housed in watch houses
- strict adherence to the Queensland Family & Child Commission Joint agency protocol to reduce preventable police call-outs to residential care services
- that the security upgrade at the YDCs be completed as a matter of absolute urgency and that the 36 beds become available as a matter of priority
- the provision of more funding to the Office of the Public Guardian to allow community visitors to work with youth detention facility staff to identify rooms that are fit for sharing and habitation within the particular youth detention facility
- a commitment to review bail for children and young people, especially for those children and young people who are denied bail on welfare grounds
- an assurance from child safety that accommodation placement will be made available for all children and young people in care within 48 hours of arrest
- children who are appearing by videolink from the watch house continue to have access to all of the supports offered through the pilot programs offered at Brisbane Children's Court (education and mental health) as would be available as if they were present at court.

Mr Potts said QLS stood ready to assist all agencies or political parties in resolving the current crisis to ensure the current generation of troubled youth were afforded every opportunity for build a bright, positive and hopeful future after having had a brush with the Queensland Youth Justice system.

The times change, the *SUFFERING* remains

BY JOHN ROBERTSON



Tony Keim's article in the June 2019 *Proctor*, 'Suffer the Children', evoked strong emotions in me. Not only as a human being, but because it reminded me of so many of the sad cases that I had encountered as a judge of the Children's Court of Queensland (CCQ) from 1994 until my retirement last year.

His title, which evokes a passage from the Bible that has come into sharp focus in recent years, was also the title of a paper I delivered to the Medico-Legal Society of Queensland in May 2001, when I was president of the CCQ. My paper tracked the true story of a talented but troubled young Aboriginal woman, whom I had first met in court when she was 16. She was sentenced in the Supreme Court on her 19th birthday to 16 years in prison for the attempted murder of her courageous and committed long-term case worker. The paper follows the awful consequences for her following that sentence, which were carefully documented in the Forde Commission of Inquiry into Abuse of Children in Queensland Institutions (1998–1999).

I described her story as one of a child with great potential, who had complex needs, and who had fallen through the cracks in our criminal justice, corrections and health systems. Her case is one of many that haunt me to this day.

Tony's article reminded me that, as a society, and a compassionate and caring one at that, we still have a long way to go in responding justly to the complex needs of children who enter our youth justice system and end up before a court. In my paper, I refer to the extensive research which establishes that if we can get in early with children like this one, and respond in a focused and individualised evidence-based way, we have a better chance of preventing the conduct escalating into violent offending. The Forde Inquiry, and others that have followed, also refers to the research that establishes that in every one of these cases, when a child commits a violent crime, he or she has come from a background of severe family dysfunctionality, including sexual and/or physical and psychological abuse, and consequential drug and alcohol abuse and, fundamentally, a lack of love and nurturing in their very early childhood.

When I was president, I somehow convinced the minister of the day and most members of the parliamentary committee charged with youth justice issues, to spend a morning in the court listening to the cases that I had to deal with. I know it affected them all. If we are honest with ourselves, we would admit, as I do, that if such had been my childhood then there is a fair chance that I too might be antisocial and angry with society. Instead, I just happened by chance to be born into a humble middle-class family in north Queensland where I was surrounded by adults who loved me and supported me.

We have to do better as a society. When we quietly cheer at some "tough on youth crime" measure, or don't care that so many of the people who appear before our courts—child and adult—are homeless, a major predictor of criminal behavior, then we are complicit in what is happening now in our watch houses and prisons.

There are solutions, and some are much less expensive than building more prisons. As a judge, I always regarded New Zealand as the gold standard when it comes to dealing with youth crime. It is a country like ours with the same significant social problems particularly arising from lack of equality of opportunity. Restorative justice principles have been at the heart of that country's approach to youth crime for a long time, and the evidence is that it works, both to reduce crime and recidivism but also as a deterrent. From my own experience, I can recall many cases where the young offender was much more concerned about the restorative justice approach than anything I could do as a judge. Restorative justice was introduced into New Zealand's adult sentencing laws in 2014.



HAVE YOUR SAY

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John Robertson is a former solicitor, District Court and Children's Court Judge and now Queensland Sentencing Advisory Council Chair.

THE STATE OF YOUTH JUSTICE

BY DAMIEN ATKINSON



Happy children don't do crime. They aren't out late, rolling people for their Nikes or defacing the wall at the local train station. That's because they've been busy with sport, music, homework, dating or social media.

Those happy kids reckon they're blessed and they're right—but for the wrong reasons. They reckon they're privileged because their mums and dads buy them stuff. In fact, they're lucky because they have parents who are constantly nurturing their strengths, blunting their weaknesses, and giving them a stable platform for learning. They have families who walk with them.

The young people who reach the youth justice system hardly ever come from those backgrounds. We see over 500 clients each year at the Youth Advocacy Centre and we calculate that about 70% have been affected by one or more of a cluster of factors: mental illness, homelessness, domestic violence, learning disorders or substance abuse¹. They are not being offered an easy place to do homework or a yard to play sport. They have had disadvantage piled upon disadvantage so that, for instance, they've dropped out of dysfunctional homes and challenging school experiences, and now they don't have the support or the literacy to see a doctor, buy clothes or look for a job. They lack social networks but, more than that, they may lack the machinery to make their way in relationships with family, let alone with strangers.

All of this, of course, leads to the gloriously obvious conclusion that, if we are relying on our criminal justice system to address youth crime, we're crazy. The underlying premise of that system is that we create penalties so that the cost of committing anti-social behaviour is greater than holding back. But the kids who hit the youth justice system were, for the most part, badly damaged way before they came to make choices, and the drivers are usually still in place. The knot of unhappiness, confusion and powerlessness that presents as offending is not going to be unravelled by the binary levers of a penal system. If all we do as grown-ups is to tell these children that some things are forbidden—and we never give them the equipment to find a healthy path—that is a lame exercise in merely

delaying harm for tiny periods. Worse, we have squandered the opportunity to spare ourselves all the loss that damaged youth can bring later in life to themselves and to others.

I'm expressing with my full capabilities, and now I'm living in correctional facilities.

Express Yourself, NWA, 1988

In my view, it comes to this: the best improvement you can make to the youth justice system is to make sure we rarely use it. Happily, the current government has developed policies that are entirely consistent with the views set out above. The Minister for Child Safety, Women and Youth, Di Farmer, engaged the former Commissioner of Police, Bob Atkinson AO, to head a team that would assess the state of youth justice and the report was published in June 2018. There were four underlying 'pillars' in the recommendations, namely:

- early intervention (that starts with ensuring that children are born healthy)
- deflecting kids from courts
- deflecting kids from custody
- assessing policy by whether or not it reduces re-offending.

Beneath that high-level response, there were specific recommendations. They included focusing on towns or postcodes with high level offending and looking at 'place-based' approaches; looking to schools as a means of identifying children in need of support; establishing alternative facilities to address offending behaviour where children have problems related to disability, substance abuse or mental illness; working across agencies to share information; supporting transition back to normal life after custody; and setting high targets for reducing the number of children entering detention for the first time. There are many more recommendations, but one can see the theme: if the need occurs in isolated

pockets, identify it early and support families and children, rather than keeping with a reactive approach.

I have walked through the Brisbane watch house and seen the children, and it is a harrowing experience. The place is a cramped high-security stopgap for dangerous prisoners, and it was certainly not built for children. There is no natural light. There is no exercise yard (just a little tiled courtyard that's at most 8 metres x 8 metres). There is no privacy because there are 160 cameras through that place. Police officers will tell you that the nights on the weekends are the worst. It's a dark, scary place with adult prisoners wailing and bleeding or yelling obscenities, and I can only imagine what they are whispering to the children in nearby cells. It is the department that has made the decision to put these children in the watch house but it is the police that are left to make it happen. The department has attempted to improve the conditions at the watch houses but, frankly, they are polishing something that will never come up shiny. So the children stay. Decomensating. Bored. Powerless. Isolated from their parents. Surrounded by adult prisoners.

The department has been asked to provide a plan, or at least a deadline, for removing the children, but neither has been forthcoming. I suspect that it is resigned to allowing the problem to continue until at least late 2020, when the new facilities may be built. But that's outrageous. Even if there are only 50 kids in the watch house each week until that time, that's roughly 3000 Queensland children who will have been harmed, perhaps irreparably, and pressed down a path of miserable, criminal behaviour when they could have been diverted to much happier pursuits.

That is a very long way from a gold-star performance.

Damien Atkinson, OAM, QC is a barrister and Queensland's Youth Advocacy Centre Chair

Notes

¹ The State has disclosed broadly consistent statistics in *Working Together, Changing the Story* so that it found 58% of children in the youth justice system have a mental health or behavioural disorder, diagnosed or suspected.

Read the full version of this article online at medium.com/qlclawociety

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Changing the culture of civil litigation

VIEWS FROM THE COURT



BY JUSTICE PETER APPLGARTH AND
RESOLUTION REGISTRAR JULIE RUFFIN

FROM THE BENCH

When you thought, possibly at the age of 16, about being a lawyer, you probably imagined running high-profile trials like Atticus Finch, not sorting through mounds of paperwork.

Civil litigation is about “the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense”.¹ But how and when are “the real issues” defined and resolved?

Rules are important. But equally important is culture. Supreme Court of Queensland Practice Direction Number 18 of 2018, ‘Efficient Conduct of Civil Litigation’ (PD 18/2018), seeks to change the culture of civil litigation. It aims to achieve the objective of rule 5 of the *Uniform Civil Procedure Rules*

1999 and thereby improve access to justice. If we can change the culture, then the practice of law will be more satisfying for litigators.

Thinking in compartments

When we think about civil litigation, it is natural to think in compartments: pleadings, disclosure, witnesses and so on. That is how we are taught civil procedure and how the rules are structured.

For too long the culture has been to spend months or years fighting about pleadings, then eventually think about disclosure. At some later stage we saddle up duelling experts who address different issues based on different assumptions and instructions. Eventually, when the case does not settle at mediation,

lay witnesses are located and witness statements prepared for them. Closer to trial, the mysterious creature known as the ‘agreed trial bundle’ emerges. Eventually, when the matter comes on for trial, after a day or two, with everyone in the same room, the issues are distilled and narrowed. All this comes at a great cost, both financial and personal.

Pleadings and defining the real issues

Contemporary pleadings cases are complex. Multiple causes of action, with different causal chains depending on the cause of action, are often inadequately pleaded.

The pleadings will always remain the place in which issues are formally defined. However,

if we collectively want to identify and narrow the real issues in a case, then we need something simpler to manage the process: *a short summary of the issues to be tried.*

Documents

In most substantial civil cases, too many documents are put into a 'trial bundle'. This comes at a great cost. PD 18/2018 directs parties and practitioners to adopt "a proportionate and efficient approach to the management of both paper and electronic documents at all stages of the litigation".² I emphasise "*at all stages of the litigation*", because this is not just a problem about discovery.

It is a problem about how parties and courts deal with documents from the time the statement of claim is served through to the last day of trial. PD 18/2018 requires you to confer and agree about a document plan as soon as reasonably possible after a claim is filed.

Witnesses and trial plans

Ascertaining what potential witnesses will say at trial is less of a priority than it used to be. Because more than 90% of cases settle, many experienced litigators have never seen

a trial, or only seen a few, and do not give much thought to who the witnesses will be and how they will perform.

Cases are more likely to settle on a fair basis if the parties know that, if it does not, there is a *realistic prospect of an early trial*. The court can only set down matters for trial if we know how long the trial is going to take. We only know that, if you turn your mind to the real issues that are to be tried, and reach agreement about facts and documents which should not be in contention.

The culture of speaking to each other

If there is one cultural change that I hope the practice direction achieves, it is to require litigators to *confer* (in person or by telephone), agree a document plan very early (even before the defence goes in), narrow issues and work out a trial plan.

The court expects you as practitioners to confer as early as reasonably possible so as to identify the real issues that remain in dispute. We need you to agree at an early stage that formal proof is not required of facts and documents that should not be in contention.

We want you to confer and work out two basic things:

1. What is this case really about?
2. How are we going to resolve it?

Those questions require you to address at an early stage:

- a. the documents that are likely to be critical to the resolution of the case, and a document plan that is practical and proportionate
- b. the real issues in dispute
- c. how to minimise the costs of proving facts and documents that should not be in contention
- d. the witnesses who will really be required if this matter goes to trial, and how long any trial will take.

If these matters are addressed, trials will be shorter and costs will be saved. Practitioners acting professionally should be able to agree efficiencies and narrow issues without court intervention. But if you cannot, the Resolution Registrar or a judge will help you to resolve matters, so the real issues can be resolved at a minimum of expense to your clients. That might also make the practice of the law closer to what you imagined it would be.

FROM THE RESOLUTION REGISTRAR'S PERSPECTIVE

Despite good intentions, it is not always possible for parties to resolve contentious matters quickly and efficiently.

PD 18/2018 provides a mechanism whereby parties can confer with a view to removing obstacles to the efficient progress of a matter to trial. To this end, the case conferencing regime has been introduced in the Supreme Court and the role of Resolution Registrar has been created and tasked to oversee the regime.

Case conference

Matters such as the contents of the trial bundle, or the timing of witnesses at trial, can and should be dealt with in correspondence in the first instance. However, agreeing on these matters can be a logistical nightmare. There are occasions when correspondence is ignored or only addressed shortly before the final hearing.

Although it is common to exchange a notice to admit documents and notice to admit facts in the lead-up to trial, it is equally common to respond to these in an automatic way, keeping all facts and documents in issue pending advice from counsel.

If the parties are unable to agree on a document management plan, the real issues in dispute, the readiness of a matter for trial

or the expected duration of the trial, they may request a case conference before the Resolution Registrar. Parties requesting a conference should contact the Resolution Registrar by email and the conference will be arranged for a mutually convenient time. For regional jurisdictions, the conference can be conducted by Skype or telephone.

Conferencing affords a valuable opportunity to sort out facts, issues and documents well before trial. In almost every case conference conducted to the present time, parties have made concessions about facts, issues and documents so that potential problems have been resolved at a much earlier stage. Further, these practical and focused discussions have highlighted those matters not in dispute and at times have led to agreement on major issues or the resolution of the entire claim.

Practical aspects

A case management conference is relatively informal and is held in a conference room rather than a courtroom. Conference notices are delivered to the parties by email. The duration of the conference varies depending on the complexity of claim, and the parties involved, and takes anywhere between half an hour and two hours.

Parties are required to prepare for the conference so that any issues are identified

and can be meaningfully discussed. The conference is on an 'open' basis but litigants have the opportunity to engage in 'without prejudice' discussion if so desired.

Directions are put in place at the conference, timetabling the outstanding steps to be completed in the period leading to trial. Such a timetable makes it infinitely easier to efficiently manage a proceeding.

Why require a conference?

Conferencing provides the opportunity to clear the lines of communication between the parties and discourages an approach that impedes the efficient conduct of litigation. The scale and complexity of the claim dictates the nature of the processes necessary for compliance with the practice direction. At first blush, PD 18/2018 may appear to impose additional procedural steps, but ultimately it does no more than require practitioners to embed good practices in the conduct of every claim.

Justice Peter Applegarth is a justice of the Supreme Court of Queensland in the Trial Division. Julie Ruffin is the Resolution Registrar at the Supreme Court of Queensland.

Notes

¹ Rule 5 of the *Uniform Civil Procedure Rules 1999*.

² Supreme Court of Queensland Practice Direction Number 18 of 2018, 'Efficient Conduct of Civil Litigation', 5.

New exhibition: Overturning *terra nullius*: the story of native title

WITH SUPREME COURT LIBRARY QUEENSLAND CURATOR CHARLA STRELAN



NAIDOC Week (7–14 July) is an annual celebration of the history, culture and achievements of Australia's First Nation peoples.

As curator of the library's exhibitions, I'd like to mark NAIDOC Week by introducing our free exhibition in Sir Harry Gibbs Legal Heritage Centre.

'Overturning *terra nullius*: the story of native title' explores two cases and some of the people that were particularly influential in shaping native title law reform in Australia:

- *Mabo v Queensland (No.2)* [1992] HCA 23 (*Mabo*), in which the High Court of Australia recognised the Meriam people's uninterrupted rights to land, and overturned the doctrine of *terra nullius*
- *Wik Peoples v Queensland* [1996] HCA 40 (*Wik*), in which the High Court ruled that native title and pastoral rights could coexist.

The exhibition charts the important events and milestones in the history of land rights in Australia. Beginning 60,000 years ago with the first identified Indigenous inhabitation of Australia, through Captain James Cook's declaration of sovereignty in 1770, to the *Native Title Act* 1993 (Cth) and its amendment in 1998.

The road to recognising native title was long and the two landmark cases of *Mabo* and *Wik* did not appear out of nowhere. The exhibition explores the changing social climate in Australia during the 20th Century, which manifested itself in campaigns for Aboriginal and Torres Strait Islander equality. Momentum increased as attitudes in Australia gradually changed, finding its first legal expression in the 1971 *Gove Land Rights Case*.

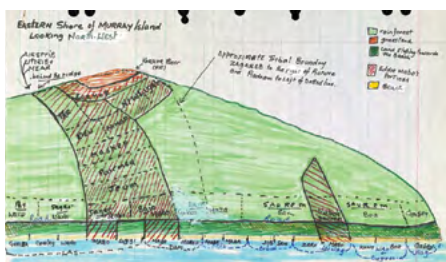
'Overturning *terra nullius*: the story of native title' also explores the political aftermath of the *Wik* decision, which drew heavy criticism from conservative politicians. Opponents of the decision warned that huge areas of Australia were at risk of native title claims—warnings that were countered as manufactured hysteria and fearmongering.

The exhibition emphasises that the *Native Title Act* does not give land ownership rights



Above: Demonstration march at the Aboriginal Tent Embassy, 1972.

Photograph by Ken Middleton, courtesy of the National Library of Australia.



Left: Evidence such as the structure of traditional property boundaries drawn on a map by Eddie Mabo played a key role in the case presented by the plaintiffs.

From the papers of Bryan Keon-Cohen, courtesy of the Mabo family and the National Library of Australia.

to traditional owners. Rather it provides legal recognition of rights that the High Court acknowledged were in existence long before European settlement. The *Native Title Act* protects the rights of traditional owners to use and access ancestral country and to enjoy some control over what happens to land in the future.

To bring the story of native title to life, we consulted with a group of three experts who brought their own special insights to the *Mabo* and *Wik* cases.

- The Honourable Margaret White AO acted as junior counsel for the Queensland Government for the 10 years of litigation in the *Mabo* case. Her unique perspective and wealth of knowledge of the events proved invaluable as we unpacked the complexities of this landmark constitutional case.
- Barrister Joshua Creamer is a proud Wanyji and Kalkadoon man whose practice areas include native title, commercial law, Indigenous law and human rights.

- Dr Heron Loban, a senior lecturer at Griffith Law School, is a Torres Strait Islander woman with a keen interest in Indigenous legal issues and many years' experience in teaching native title law.

We thank these experts for their valuable insights and contributions.

Overturning *terra nullius*: the story of native title

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Subpoenas: Narrowing scope and setting aside

BY KYLIE DOWNES QC AND WILL LeMASS



An overreaching or improper subpoena will often require urgent action from the recipient, who may be taken by surprise and unfamiliar with the case in which it has been issued. This article focuses on subpoenas from the perspective of a recipient and the steps that may be taken to set one aside.

A subpoena is an order requiring that a person attend court to give evidence or produce documents.

A subpoena is unique because it is usually issued by the court without any judicial supervision.

As a result, the task of setting aside an unreasonably broad or burdensome subpoena often falls to the recipient. Non-compliance otherwise carries serious consequences.¹

Procedure

At a high level, a subpoena involves three steps.

Request: The party seeking the subpoena firstly files a request for subpoena in the Registry.² The Registry will then issue the subpoena and it must then be served on the recipient.³ While the Registrar has a discretion to refuse to issue a subpoena,⁴ in practice that is rarely exercised.

Production: The party served with the subpoena must comply with it.⁵ How they do so will depend on whether it is a subpoena to give evidence or to produce documents. If it is for the production of documents, those documents may be produced to the Registry in advance of the hearing.⁶

Inspection: The parties to the proceedings must obtain permission from the court to inspect the documents produced.⁷

Challenging a subpoena

There are two ways in which a subpoena may be challenged:

1. by applying for it to be set aside⁸
2. by objecting to inspection of the documents produced.⁹

An objection to inspection may be made by any person having a sufficient interest in the documents.¹⁰

This article addresses applications for a subpoena to be set aside.

Grounds for setting aside

The court's power to set aside a subpoena is discretionary.¹¹ The key grounds on which such an application may be brought are, in part, listed in the *Uniform Civil Procedure Rules 1999* (the rules).¹² They are addressed below.

A subpoena must not be used to obtain disclosure. It is an abuse of process to use a subpoena to, in effect, obtain disclosure from a non-party to the proceedings.¹³

Traditionally, a subpoena is used only for the giving of evidence or the production of documents at trial or another hearing.¹⁴

This is in contrast to disclosure, where documents are exchanged well in advance of trial and may or may not eventually be tendered as evidence.

If disclosure is sought, then the non-party disclosure provisions of the rules¹⁵ should be used. Those provisions impose a greater burden on the party issuing the notice to identify why the requested documents are "directly relevant" to an allegation in issue.¹⁶

Lack of relevance

A subpoena may be set aside for lack of relevance.¹⁷

It is not necessary that the documents or evidence sought by the subpoena be "directly relevant" to a matter in issue (as is the case for disclosure).¹⁸

The test for relevance, in the context of a subpoena, is "apparent relevance".¹⁹ That may be satisfied where:

- the requested document "might give rise to a line of enquiry" relevant to the issues in dispute,²⁰ or
- it is "on the cards" that the requested documents will be of material assistance.²¹

Nonetheless, a mere "fishing expedition" is impermissible.²²

Apparent relevance is determined by the issues raised on the pleadings,²³ although relevance only to credit will suffice.²⁴

Privilege

A subpoena may be set aside on the ground of privilege,²⁵ including public interest immunity²⁶ or legal professional privilege.

The determination of a claim of privilege is a separate topic. We note that, on an application to set a subpoena aside, the court may, if necessary, inspect the relevant documents to determine any privilege claim.²⁷

Oppression (and confidentiality)

A subpoena may be set aside for "oppressiveness".²⁸

This ground encompasses three key concepts:

- confidentiality
- breadth
- cost.

Confidentiality: Confidentiality is not, of itself, a valid ground for the setting aside of a subpoena.²⁹ However, confidentiality is a relevant consideration which may tip the scales in favour of setting aside a subpoena; particularly when the documents sought are "at the very margin" of the subject matter of the dispute (even if they meet the "apparent relevance" threshold).³⁰

Confidentiality will also give rise to a legitimate basis for objection if it can be shown that the documents are sought for an improper or spurious purpose (for example, for the purpose of other proceedings or for some private purpose).³¹ These considerations may be overcome by an appropriate confidentiality order.³²

Breadth: A subpoena need not identify specific, individual documents for production. It is permissible for a subpoena to identify

documents by category or description (such as documents “relating to” a particular issue).³³ However, a subpoena will be oppressive where it is too vague, too wide or lacking in particularity.³⁴

In considering the breadth of a subpoena, the court will have regard to the relationship of the recipient to the parties and the recipient’s knowledge of the matter. Imprecision or breadth in the subpoena may be of less significance when the recipient is familiar with the subject matter and is likely to recognise the documents sought in any event.³⁵

Cost: The desire to achieve cost-effective litigation is relevant also to the setting aside of a subpoena.³⁶ The court will take into account the likely time and cost associated with complying with the subpoena, including

the amount of material that must be searched through to identify the documents sought.³⁷ However, vague or imprecise assertions of time and cost are unlikely to be sufficient.³⁸ Further, oppressiveness is relative. A task that is oppressive for an individual or a small business may reasonably be imposed on a large organisation such as a police force or the Commonwealth Government.³⁹

Noncompliance with the rules

A subpoena may be set aside for non-compliance with the rules⁴⁰ and it is worth noting the requirements as to form,⁴¹ service⁴² and the provision of conduct money in advance.⁴³

Curing a defect

If necessary, the party issuing a subpoena may seek that it be amended so as to appropriately narrow its scope.

However, it is not the task of the court to redraw the subpoena in order to make it unobjectionable.⁴⁴ The power to amend should only be exercised when the amendment is obvious, readily cures the ambiguity and the subpoena is not otherwise oppressive.⁴⁵

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

Notes

¹ *Civil Proceedings Act 2011* (Qld), ss55-57.

² Rule 414(2).

³ Rule 421.

⁴ Rule 414(6).

⁵ Rule 414(8).

⁶ Rule 420.

⁷ Rule 422A.

⁸ Rule 416.

⁹ Rule 422B.

¹⁰ Rule 422B(3).

¹¹ *AGL Wholesale Gas Ltd v Origin Energy Ltd* [2009] 1 Qd R 305 at [28].

¹² Rule 415(6).

¹³ *Re Leighton Contractors Pty Ltd v Western Metals Resources Ltd* [2001] 1 Qd R 261 at [17]-[22].

¹⁴ *Ibid.*

¹⁵ Chapter 7, Part 3.

¹⁶ *Deppro Pty Ltd v Hannah* [2009] 1 Qd R 1 at [33]-[34] and rules 242(1)(a) and 243(1)(b).

¹⁷ Rule 415(6)(a).

¹⁸ *AGL Wholesale Gas Ltd v Origin Energy Ltd* [2009] 1 Qd R 305 at [15] and *Xstrata Queensland Ltd v Santos Ltd*; *Santos Ltd v Xstrata Queensland Ltd* [2005] QSC 323, [47]-[48] (the Court of Appeal also applied the test of apparent relevance: [2005] QCA 477 at [25]-[27]).

¹⁹ *AGL Wholesale Gas Ltd v Origin Energy Ltd* [2009] 1 Qd R 305 at [15]-[17].

²⁰ *Queensland Power Trading Corp v Xstrata Queensland Ltd* [2005] QCA 477 at [27]; *Apache Northwest Pty Ltd v Western Power Corporation* (1998) 19 WAR 350 at 374.

²¹ *Alister v R* (1984) 154 CLR 404 at 414.

²² *Ibid.*

²³ *McIlwain v Ramsey Food Packaging Pty Ltd* (2005) 221 ALR 785 at [35(e)].

²⁴ *R v Spizzirri* [2001] 2 Qd R 686.

²⁵ Rule 415(6)(b).

²⁶ *R v Smith* [1991] 2 Qd R 467; *Alister v The Queen* (1984) 154 CLR 404.

²⁷ *Alister v The Queen* (1984) 154 CLR 404 at 415-416.

²⁸ Rule 415(6)(c).

²⁹ *Santos Ltd v Pipelines Authority (SA)* (1996) 66 SASR 38 at 56.

³⁰ *AGL Wholesale Gas Ltd v Origin Energy Ltd* [2009] 1 Qd R 305 at [28], [31] and [36].

³¹ *Santos Ltd v Pipelines Authority (SA)* (1996) 66 SASR 38 at 57.

³² *Ibid.*

³³ *Petoneport Pty Ltd v Barnes* [1999] 2 Qd R 267 at [34].

³⁴ *R v Spizzirri* [2001] 2 Qd R 686 at [23(1)]; *Petoneport Pty Ltd v Barnes* [1999] 2 Qd R 267 at [35]; *Southern Pacific Hotel Services Inc. v Southern Pacific Hotel Corporation Ltd* [1984] 1 NSWLR 710 at 719-720.

³⁵ *McColl v Lehmann* [1987] VR 503 at 513.

³⁶ *AGL Wholesale Gas Ltd v Origin Energy Ltd* [2009] 1 Qd R 305 at [31].

³⁷ *Braudmont Pty Ltd v Gold Coast City Council* [2012] QCA 140 at [23].

³⁸ *Lauschet v Malaysian Airline System Berhad (No.2)* [2018] NSWSC 821.

³⁹ *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 619 at [424].

⁴⁰ Rule 415(6)(d).

⁴¹ Rule 415.

⁴² Rule 421.

⁴³ Rule 419.

⁴⁴ *Santos Ltd v Pipelines Authority (SA)* (1996) 66 SASR 38 at 56.

⁴⁵ *Ibid.*

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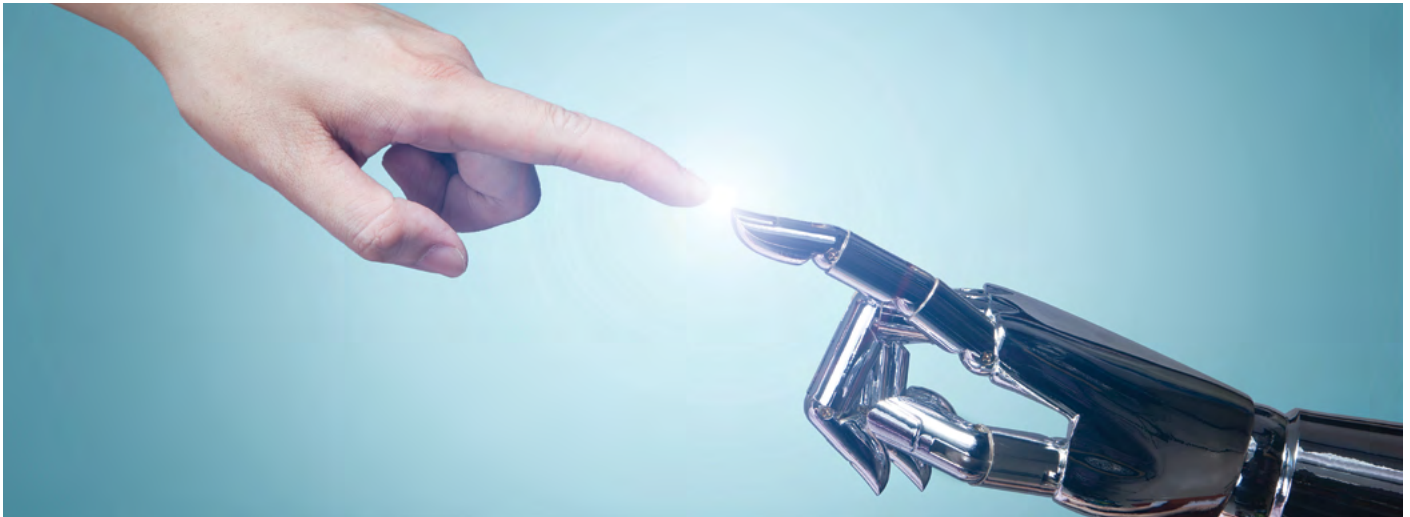


 SHINE LAWYERS

Fake friends find a flaw

New power of attorney laws may offer a loophole

WITH CHRISTINE SMYTH



What makes a ‘real friend’? The ordinary *Macquarie International English Dictionary*¹ defines friend as “...somebody emotionally close, somebody who trusts and is fond of another”.²

But we are in the new millennium, and the term ‘friend’ takes on many forms,³ to such an extent that being a ‘friend’ is now a popular paid service in certain cultures, for example Japan.⁴

Currently 27% of people aged over 65 live alone.⁵ With the rise of an ageing and frail population, friendship has never been more important and increasingly difficult to obtain. Recent statistics identify around one in seven people in Australia is aged over 65,⁶ with predictions that rate will rise to one in four by 2056.⁷

Without support structures close by, older people have a significant need to rely on paid services for all manner of day-to-day tasks, and now it seems paid friendship may be one of them. A recent news article⁸ reports on the arrival of a paid friendship service to the Gold Coast. It is not a unique service, as there are currently several services online providing access to paid friends throughout Australia.⁹

Australian households aged over 55 hold 53% of our nation’s wealth at an estimated worth of \$2.8 trillion.¹⁰ These demographic features drive the ever-growing need for members of our aged population to have an attorney to assist them to manage their affairs as their capacity to do so diminishes. While there is no registry or central data collection system¹¹ to know how many people have an enduring power of attorney, a recent report provides that around 30% of those surveyed had one in place.¹² It is not unreasonable to expect this figure to rise.

Current power of attorney law recognises the vulnerability of our elder population to exploitation. Noting that elder abuse is on the rise, our Government has seen a need to review and amend power of attorney laws through the passing of the *Guardianship and Administration and Other Legislation Amendment Act 2019* (Qld) (GOLA). The GOLA aims to increase protection from exploitation, with the new laws designed to “enhance safeguards for adults with impaired capacity in the guardianship system”.¹³

In line with this policy objective, certain people are prohibited from being appointed as an enduring attorney, nor can they be a statutory health attorney. Relevantly here, one of those exceptions is anyone who is a ‘paid carer’¹⁴ for the principal, either before or after the commencement of the appointment.¹⁵

Under the current legislation, there are no time limits to this exception. The new Act¹⁶ attempts to broaden this protection by including a timeframe prohibiting a ‘paid carer’ from being an attorney if they held the role of ‘paid carer’ within three years of being appointed, or subsequently become a ‘paid carer’ after the appointment.

The intent of this amendment is to “ensure unsuitable people cannot act as attorneys and to reduce the risk of abuse or exploitation to an adult by a person appointed under an enduring document”.¹⁷

The definition of ‘paid carer’ is, in effect, someone who performs services for the principal and gets paid for those services. The question that therefore arises is, what is the scope and extent of those services? The definition of ‘paid carer’ assists us by referring us to the *Griffiths v Kerkemeyer*¹⁸ principle.

In short, it includes anyone who provides paid domestic or nursing services to the principal. So that would obviously include cleaners, gardeners, drivers and nursing assistants. But under this definition, both under the old and new legislation, it does not include being a ‘paid friend’. Who hasn’t helped a friend take the laundry off the line, mowed their lawn, cooked them a meal, or driven them

to the doctor when they are unwell? These are all services that fit within the definition of 'paid carer'. Accordingly, there is scope within 'friendship services', for the objects of the legislation to be circumvented by individuals claiming to be a 'paid friend' not a 'paid carer' in an attempt to avoid application of the legislation.

In seeking to protect the vulnerable, our legal crystal balls can only forecast so much, because the commercial world tends to move at a far greater pace than legal developments. For the moment, at best, we can be aware of this issue and raise it with the client, should it be at all relevant to their instructions at the time of making the enduring attorney.

Sometimes friends in need can be targeted by 'friends' in finance, indeed.

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 Second edition.
- ² There is no statutory definition of 'friend' of which I am aware, although there is a definition of friendly society in the *Acts Interpretation Act* (Qld).
- ³ See social networking services such as Facebook, MySpace, WhatsApp and so on. There are currently at least 60 different social networking sites that rely on the concept of friending to build networks see: makeawebsitehub.com/social-media-sites.
- ⁴ theatlantic.com/family/archive/2017/11/paying-for-fake-friends-and-family/545060.
- ⁵ aihw.gov.au/getmedia/d18a1d2b-692c-42bf-81e2-47cd54c51e8d/aihw-australias-welfare-2017-chapter5-1.pdf.aspx.
- ⁶ aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/social-and-economic-engagement/employment-and-economic-participation.
- ⁷ ABS Media Release of 4.9.2008 – one in four Australians will be 65 or older by 2056 – up from one in 10 in 2007.
- ⁸ goldcoastbulletin.com.au/subscribe/news/1/?sourceCode=GCWEB_WRE170_a&dest=https://www.goldcoastbulletin.com.au/lifestyle/a-gold-coast-woman-is-starting-a-business-charging-people-to-be-her-friend/news-story/a82b9347af1c5a94991c24f99614e358&memtype=anonymous&mcode=premium&is_silent_authentication=true&error=login_required
- ⁹ rentafriend.com.
- ¹⁰ mccrindle.com.au/insights/blog/australias-generations-wealth-income.
- ¹¹ Except in Tasmania, where registration of an EPOA is required for validity *Powers of Attorney Act 2000* (Tas.), s16; and see s7 *Powers of Attorney Act* (NT), s25 *Powers of Attorney Act* (Qld) et al – under which powers of attorney may be registered, and are required to be registered before dealing with land.

¹² *Having the Last Word: Will making and contestation in Australia*, Key Findings, ARC Linkage Project, March 2015; Cheryl Tilse, Jill Wilson, Ben White, Linda Rosenman and Rachel Feeney.

¹³ Explanatory notes, GOLA.

¹⁴ Sched 3, s3 – dictionary:

paid carer, for a principal, means someone who –

(a) performs services for the principal's care; and

(b) receives remuneration from any source for the services, other than –

(i) a carer payment or other benefit received from the Commonwealth or a State for providing home care for the principal; or

(ii) remuneration attributable to the principle that damages may be awarded by a court for voluntary services performed for the principal's care.

Note— This principle was established in *Griffiths v Kerkemeyer* (1977) 139 CLR 161 – see Queensland Law Reform Commission Report No. 45, 'The assessment of damages in personal injury and wrongful death litigation, *Griffiths v Kerkemeyer*, Section 15C *Common Law Practice Act* 1867, October 1993.

¹⁵ ss29, 59, 63 of the *Powers of Attorney Act* 1999, as amended by the GOLA.

¹⁶ Not commenced at the time of writing (20 May, 2019).

¹⁷ Explanatory notes, GOLA.

¹⁸ (1977) 139 CLR 161.

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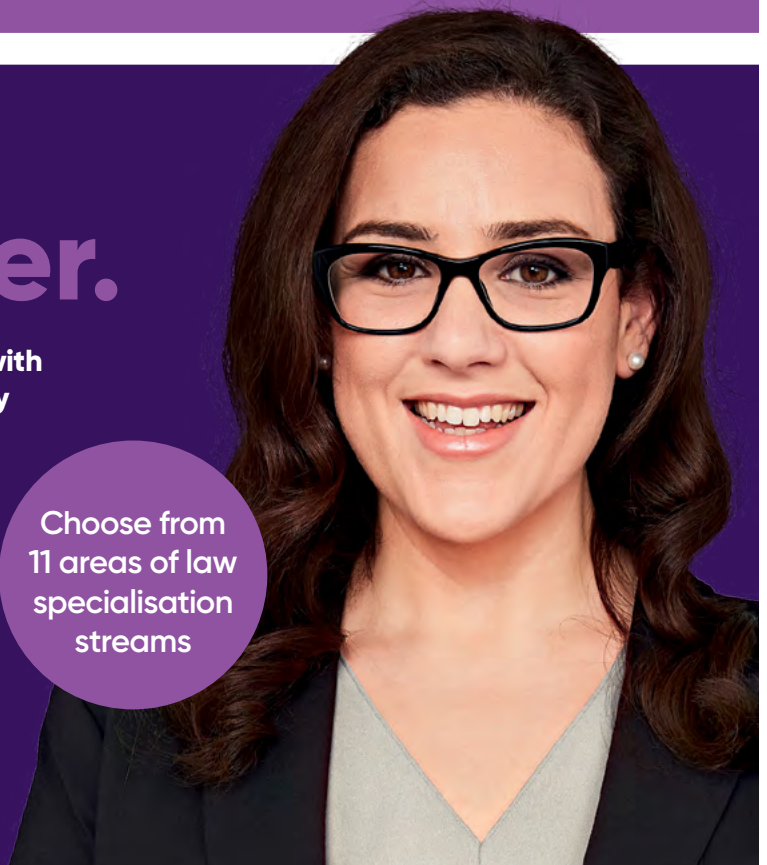
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Spam to scam

The growth of email fraud

BY JACOB STACEY, THE LEGAL FORECAST

We can all recall that moment – we receive an email stating that a relative we have no recollection of has serendipitously passed away, bestowing upon us untold riches in exchange for a fee to be sent to an unknown ‘good Samaritan’.

While we might roll our eyes and continue with our day, it is important to recognise when an innocent spam message turns into something more sinister.¹

Scamming techniques have been used since the inception of the digital age and are costing Australian businesses and consumers more than \$340 million a year.² Professional scammers continue to use intricate technological analytics to infiltrate online data systems.

Most concerning is the breadth of mediums: from payment transactions via trust account details and falsified bank cheques to large institutions such as banks, professional service firms and law firms.³ It is estimated that scam emails alone cost the global banking system more than \$31 billion annually.⁴

Due to the diversification of techniques, this area of the ‘dark web’ continues to grow in strength and sophistication. In 2017, Victorian home buyers were duped out of more than \$200,000 in unsolicited fees. They received an inconspicuous follow-up email from their alleged selling agent, advising that an error had been made when uploading their account details. The email accounts, personal contact details and financial information of both the sellers, estate agents and buyers were all infiltrated to coax the scheme.⁵

In 2017, the legal profession was also implicated when multiple Queensland law firms were deceived into revealing confidential material. The scam involved a two-step authorisation process, buying time to establish trust. The ‘client’ usually required “conveyancing services” before requesting details relevant to the transaction. However, such details were also what was needed to infiltrate the firm’s intranet system. This methodology paved the way for scammers to penetrate client information and

trust account details via a “highly sophisticated login regime”.⁶

While fraud is a criminal act, both at a state and federal level, the current definition fails to encapsulate all fraudulent behavior and deal with the nuisance of cybercrime-based offences. As such, a number of investigative bodies including Scamwatch and the Australian Cybercrime Online Reporting Network have been created to tackle these issues.

There is considerable consensus that action is needed to circumvent fraudulent behaviour and stay one step ahead, but there is little agreement on how to overcome the sheer scale, anonymity and skillful tactics employed by scammers. The challenge is that certain regulation creates restrictions on global technology companies and carriage service providers, preventing them from taking further pre-emptive action. In addition to continued debate about cross-jurisdictional authority, the importance of customer anonymity and right to privacy is at the forefront of many governmental and consumer agendas.

Further, most fraudulent actions are so small that they are likely to be conceived as nothing more than a petty irritation requiring little intervention, remuneration for finances lost, or time wasted.

However, it is inevitable that as more petty email fraud is committed, and the practices of scammers increase in sophistication, fraudulent conduct will become an accepted and entrenched part of our everyday lives – if it is not so already. When compared to a game of chess, our opponents are eyeing up our king and queen while we malingering over our pawns.

Methods for success

McKinsey analysts have reported that email fraud requires a shift in mindset from a focus on false positives and loss prevention, to an understanding that the same technology making our transactions more efficient and seamless is also being used against us.⁷

To better protect ourselves, Property Exchange Australia’s (PEXA) Security Operations Centre (SOC) continuously monitors the environment for behavioural anomalies. Combining technology and human intelligence, the SOC will respond to an alert, when it detects that the behavioural pattern of a user has changed.

PEXA has engaged technology companies in Australia to come together and use their skills and expertise to combat the problem of cybercrime. The company continues to help its members become more cyber aware through discussion, articles and conferences on trends and tips on cybersecurity. PEXA is also collaborating with different organisations to launch a security forum focusing on the property industry in Australia.

Conclusion

It remains imperative that those who use deceptive technologies are held to account. However, the current status quo can be best described as the ‘dog chasing its tail’ conundrum. The more advanced our security measures are, the easier it is for us to fall prey to the very thing we’re trying to protect ourselves from.

Jacob Stacey is a Queensland 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. TLF is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

Notes

¹ For example, Emmanuel Marshall, ‘\$10k lost in latest email fraud against Aussie business’, Mailguard Blog (web page, 17 August 2018), mailguard.com.au/blog/10k-lost-email-fraud-aussie-business.

² Australian Competition and Consumer Commission, ‘Australians lost \$340 million to scammers in 2017’, ScamWatch (website, 21 May 2018), scamwatch.gov.au/news/australians-lost-340-million-to-scammers-in-2017.

³ Salim Hasham, Rob Wavra and Rob Hayden, ‘Combating payments fraud and enhancing customer experience’, McKinsey & Company (online, September 2018), mckinsey.com/industries/financial-services/our-insights/combating-payments-fraud-and-enhancing-customer-experience.

⁴ Ibid.

⁵ Caleb Triscari, ‘An email scam has caused \$200,000 in losses to real estate agents and home buyers in Victoria’, Property, Technology (newspaper article, 15 February 2018), smartcompany.com.au/industries/property/consumer-affairs-victoria-warns-real-estate-agencies-and-buyers-over-new-email-scam.

⁶ Toby Crockford, ‘Queensland law firms lose millions to hackers in “highly sophisticated” email scam’, *Brisbane Times* (online, 17 December 2017), brisbanetimes.com.au/national/queensland/queensland-law-firms-lose-millions-to-hackers-in-highly-sophisticated-email-scam-20171217-p4yxsb.html.

⁷ Above, n3.

Adieu, r2.11

Publication of notices of winding up applications under the *Corporations Act*

BY JESSICA LAMBERT AND JOELLE LENZ



Following on from our article in the March edition of *Proctor*, which covered some of the changes to the Corporations Registrar's powers under Schedule 1A *Uniform Civil Procedure Rules 1999* (UCPR), this month we look at what is required for publishing notices and what dispensations are still required to be sought from the Registrar.

The wording of these provisions requires readers to follow a syntactically serpentine trail between multiple Acts and regulations from both federal and state jurisdictions. Read on now and you can thank us later.

The starting point for Queensland practitioners is r5.6 of schedule 1A UCPR, which prescribes two courses of action. The choices are dependent on whether parties are applying for a winding up under ss459P, 462 or 464, or not.

Given how frequently section 459P, 462 or 464 applications are made, it might be surprising to find the relevant information contained in the note to r5.6. Nevertheless, in this note, applicants are directed to *Corporations Regulations 2001* (Cth) (Corporations Regulations) regs 5.4.01A, 5.6.75 and *Corporations Act 2001* (Cth) (Corporations Act) ss1367A, 465A(1) and not in that order.

Our interpretation of this note is as follows:

1. Under s465A Corporations Act, applicants must cause a notice setting out the *prescribed information* about the application to be published in the *prescribed manner*.
2. The *prescribed information* is provided in reg 5.4.01A(2) Corporations Regulations and includes such material as the name, any trading name and ACN of the company to be wound up; the date the application was filed and court file number; name and address for service of the applicant; name and address of the court; as well as the time and date of the hearing.
3. The *prescribed manner* under reg 5.6.75 Corporations Regulations states that parties other than ASIC are taken to have complied with a requirement to publish a notice in the prescribed manner if the person electronically lodges the notice with ASIC for publication by ASIC.
4. And finally, s1367A Corporations Act confirms the usefulness of reg 5.6.75 Corporations Regulations, endorsing their application and the ability to rely on publications of notice on ASIC website.

Be aware that the above information only applies to those parties applying for a company to be wound up under ss459P, 462 or 464. A guide to winding-up applications pursuant to these provisions can be found at courts.qld.gov.au (search for 'winding up').

Ultimately, given the wording of reg 5.6.75 Corporations Regulations and the recent omission of r2.11 of sch 1A UCPR, it is our understanding that there is now no longer any requirement to seek from the Registrar dispensation from publishing a notice of the application in a daily newspaper.

A person applying for a company to be wound up in all other circumstances under the Corporations Act, is required as the alternative in r5.6(1) to cause a notice of the application to be published in the daily newspaper circulating generally in the state where the company has its principal place of business.

The notices must still be in form 9, which can be found at courts.qld.gov.au under the Court Users > Practitioners tab. Also, they must be published at least three days after the originating application is served on the company and at least seven days before the date fixed for hearing. Appropriate affidavit materials deposing to the publication of the notices on the ASIC website must also be filed by the applicant.

As is often the case when blending old and new methods, the road to a streamlined process is not straightforward.

Jessica Lambert is Senior Legal Officer at the Supreme, District and Land Courts Registry, Corporations Registrar, and Secretary of the Supreme Court Rules Committee and Joelle Lenz is now Principal Legal Officer National Redress Scheme at Strategic Policy and Legal Services.

Successive representation

The duty to protect confidences versus the duty to disclose

BY STAFFORD SHEPHERD



What if:

Blackstone Legal (Blackstone) was retained by Molloy Finance (Molloy) to provide advice in the areas of corporate and securities law.

Molloy is in the business of providing financing to certain types of business ventures. During the engagement, Blackstone learned from Molloy that it intentionally failed to disclose the existence of a certain debt on a prospectus filed with the Australian Securities and Exchange Commission. The prospectus had been prepared in the course of a public offering of Molloy's stock.

Blackstone had no involvement in preparing the prospectus. The omitted debt was material and the omission is fraudulent. Blackstone advised Molloy to rectify the concealment but Molloy refused to do so. Blackstone terminated its retainer with Molloy.

MacKintosh Property Projects Ltd (MacKintosh) has been a client of Blackstone for many years and has received various legal services. Some months after Blackstone withdraws from representing Molloy, MacKintosh informs Blackstone that it received from Molloy a proposal for the financing of one of MacKintosh's projects and wants Blackstone to advise as to the proposal.

Consider:

1. Can Blackstone represent MacKintosh in the proposed transaction with Molloy?
2. Can, or must, Blackstone disclose to MacKintosh the fact of Molloy's admitted fraud?
3. Can Blackstone represent MacKintosh in transactions that do not involve Molloy?

Rule 9 ASCR

Rule 9 of the Australian Solicitors Conduct Rules 2012 (ASCR) states that "a solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement", except to persons specified in rules 9.1.1 and 9.1.2, or falling within the permitted exceptions in rule 9.2.

The rule is quite broad. It does not permit disclosure of information which is confidential and acquired during the client's engagement. As Dal Pont notes, "[the] rule premise[s] the obligation of confidence not upon the source of the information but in its connection with the [engagement], effectively deeming that information confidential".¹

The information must have the character of being 'confidential' to a client. The rationale behind the rule is to encourage clients to be open and frank with us, so as Lee J said in *Fruehauf Finance Corporation Pty Ltd v Feez Ruthning*, a client need not fear being prejudiced by its subsequent disclosure.²

Millet LJ in *Mortgage Express Ltd v Bowerman Partners* has said that "all information supplied by a client to his solicitor is confidential".³ A contract of engagement between a client and a solicitor will usually include an implied term obliging the solicitor to keep his/her client's affairs secret and not to disclose them without just cause: *Parry-Jones v Law Society*.⁴ The duty of confidence does not end with the termination of the engagement. Blackstone, during its engagement with Molloy, became aware of Molloy's past fraudulent behaviour. This information is confidential.

In the United States, a client's prior commission of a crime is a confidence that an attorney may not disclose: *People v Singh*.⁵ In general, we will not be in a position to reveal Molloy's confidence, unless permitted by rule 9.2.

The exception provided by rules 9.2.4 and 9.2.5 are not mandatory but are discretionary. Rule 9.2.4 refers to disclosure for "the sole purpose of avoiding the probable commission of a serious criminal offence"; while rule 9.2.5 refers to "preventing imminent serious physical harm to the client or to another person".

Neither of these exceptions appears to be applicable. It does not appear that Molloy is about to commit a serious criminal offence (defined in the Glossary of Terms of the ASCR), nor could it be suggested that disclosure would prevent imminent serious physical harm.

Rule 10 ASCR

If Blackstone sought to represent MacKintosh in a transaction with Molloy, this raises a number of issues. Molloy is a former client

(it is an entity that has previously instructed the firm – see the definition of 'former client' in the Glossary of Terms of the ASCR). A solicitor or law practice must avoid conflicts between the duties owed to current and former clients (rule 10.1).

Rule 10.2 will permit successive representation, only if:

- the law practice does not have possession of confidential information of a former client
- that information is not reasonably concluded to be material to the matter of the prospective client, and
- would not be detrimental to the interests of the former client.

Here, if Blackstone was to represent MacKintosh in connection with Molloy's proposal to finance MacKintosh, then Blackstone's engagement could be said to be adverse to its former client, Molloy, because:

- the fraudulent deception is confidential information
- it would be material to the matter of MacKintosh's involvement in the transaction, and
- would be detrimental to Molloy if disclosed.

The law practice must be in possession of confidential information – that is, information that could be used against the former client in the later representation. The information could be said to be material if it is information that could have relevance to the proposal and would tempt us to reveal or use it in circumstances where we shouldn't. We should not accept an engagement with a prospective client where we cannot provide the fidelity and confidence such an engagement would require.

Thus, confidential information will be material for purposes of rule 10.2, if it is information that we would be obliged to impart to our client if we were not subject to our duty of confidentiality. In this case study, the information is material as it would impact upon whether the client would undertake the transaction.

It would also be 'material' if there is a likelihood that a client would think it is important with respect to activities connected to the representation and we would be obliged to disclose the information but for the duty of confidentiality.

If Blackstone could secure the written consent to act, could it do so without disclosing the prior act of fraud to MacKintosh?

If it is reasonable to conclude that the prior act of fraud is material to the prospective engagement, then Blackstone will not be in a position to serve the best interests of MacKintosh as required by rule 4.1.1 ASCR.

Without the prior client's written consent to reveal the information to the prospective client, the legal practice would be conflicted, between preserving a confidence and service of their client. Knowing of the prior fraud, the firm would be tempted to put in place special precautions which could indirectly reveal the confidence it is required to keep secret.

As the Californian Court of Appeal noted in *Goldstein v Lees*:⁶

"It is difficult to believe that a counsel who scrupulously attempts to avoid the revelation of former client confidences – i.e., who makes every effort to steer clear of the danger zone – can offer the kind of undivided loyalty that a client has every right to expect..."

If Blackstone was to act for MacKintosh without revealing Molloy's dishonesty, it would mean it was not serving the best interests of its client.

What if the proposed representation would not be such that the MacKintosh would be in direct relationship to Molloy (separate matter conflict)?

As Dr Paul Finn (later Justice Finn) has noted:⁷ "A simple, but often unacceptable, answer would be that as the fiduciary's possession of that information is in a sense fortuitous, and as he is duly bound not to reveal the information, he should advise his client on the basis of the information that he possesses other than which he has received in confidence. But this quite obviously can be objectionable..."

We have a duty to our client to provide all relevant information, including confidential information: *Spector v Ageda*.⁸ If we cannot do so because of a duty to retain the confidence, then we should refuse to act. Although *Hilton v Barker Booth & Eastwood* (a firm)⁹ is a case concerned with concurrent representation, it still offers guidance on the effect the possession of confidential information can have on us discharging our ethical and fiduciary duties to a prospective client.

We should not put ourselves in a position of having irreconcilable duties¹⁰ and nor should we prefer one client over another.¹¹ The acquiring of confidential information from one client engagement could be relevant and material to another client in a wholly unrelated transaction.

Our primary duty is to avoid conflict (see rules 10.1, 11.1 and 12.1 ASCR). An illustration of what can be described as a separate matter conflict is *Black v Shearson, Hammill & Co*¹² where a broker permitted clients to acquire shares in a company on the basis of published material when he was aware from previous dealings with that company that it was in financial difficulty (the confidential information acquired through other representation). The broker was held liable for his client's losses.

Blackstone should refuse to accept an engagement from MacKintosh, when the firm cannot disclose all relevant information to MacKintosh.

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

Notes

¹ Dal Pont, *Lawyers' Professional Responsibility*, 4th ed., 233.

² [1991] 1 Qd R 558 at 565.

³ [1996] 2 All ER 836 at 845.

⁴ [1969] 1 Ch 1.

⁵ (1932) 123 Cal. App. 365.

⁶ (1975) 46 Cal. App. 3d 614 at 620.

⁷ Finn, *Conflicts of Interest and Professionals in Professional Responsibility*, 29.

⁸ [1973] Ch 30 at 48.

⁹ [2005] 1 All ER 651.

¹⁰ Ibid, Lord Walker at [41].

¹¹ Ibid, Lord Walker at [44].

¹² 72 Cal. Rptr. 157 (1968).

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How to distribute trust property in corporate insolvency?

BY JOSHUA STOREY



It is uncontroversial that trusts form a critical part of the Australian economy.¹

It is common for trusts, especially when operating as trading trusts, to have a corporate trustee. It is also not uncommon for these corporate trustees to experience the same insolvency issues that any corporation may.

However, unlike other corporations, corporate trustees have the additional nuance of holding property on trust and incurring debts personally as trustee. For this reason, *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth & Ors* (M137 of 2018) (*Carter Holt*), which is before the High Court, is of immense practical importance as the position on how the law should deal with corporate trustees in insolvency is not as clear in Australia as many practitioners would like it to be.

Carter Holt is an appeal from the Victorian Court of Appeal decision last year in *Re Amerind Pty Ltd; Commonwealth of Australia v Byrnes and Hewitt & Ors* (2018) 54 VR 230; [2018] VSCA 41 (*Commonwealth of Australia v Byrnes*, commonly referred to as the *Amerind* appeal)² which was heard in February of this year.

The case provides an opportunity to consider two³ important questions on the insolvency of trustees: first, to what extent, if any, should the assets of a trust held by a corporate trustee be considered assets of the company and available to pay non-trust creditors (the first question); and second, does the statutory priority regime apply to the distribution of trust assets (the second question). In answering these questions, courts have had to reconcile a point of tension between statutory insolvency and trust law, with different approaches resulting.

The basics

A trust does not have legal personality distinct from that of the settlor, trustee or beneficiary. A trust is merely a relationship given unique treatment by equity. While trustees hold legal or equitable title to the assets on trust, they do not own them beneficially. Simply, the assets of the trust *are not* the assets of the trustee. When a trustee enters into a contract or incurs another liability as trustee it does so personally. General law, statute and usually the trust deed itself give a right for trustees to indemnify themselves out of those trust assets for expenses and liabilities properly incurred as trustee.⁴

These rights are often described as one right of indemnity, but it is more helpful to see them as two distinct rights: a reimbursement (or recoupment) right for expenses paid personally by a trustee and an exoneration right for the trustee to apply trust assets directly to discharge trust liabilities. This is a critical distinction for the purposes of understanding the issues before the High Court in *Carter Holt* and the necessary characterisation of what is the property of a corporate trustee.

The problem

A trustee's right of indemnity is proprietary in nature⁵ and can be exercised by a person appointed over the trustee company in insolvency proceedings (for example, a liquidator).⁶ Practically, the application of this right by insolvency practitioners has been met with some confusion.

The right of reimbursement

In relation to the right of reimbursement described above, the position is straightforward. The trustee company has used its own corporate funds to satisfy a liability it incurred as trustee and is out of pocket as a result of doing so. It is entitled to reimbursement in its own right. It can retain the funds received, and they are no longer trust funds – they are just assets of the company.

A liquidator of the trustee exercising that right and receiving funds will be able to distribute those funds received among all creditors of the company under the statutory priorities in s556 of the *Corporations Act 2001* (Cth), whether or not they are trust creditors.

The right of exoneration

The position with the right of exoneration is not so clear. The trustee company has a personal liability incurred as trustee to a creditor. It is entitled to use the trust assets to discharge that liability. In one sense it has a personal right to see its personal liability discharged. In another sense it has a power as trustee to use the assets to discharge the liability. The trust assets to be so applied remain trust assets until they are paid to the relevant trust creditor. They are not paid to the trustee company in its own right.

If they were treated as assets of the trustee company in insolvency, the effect would be that trust assets held by a corporate trustee would be available to non-trust creditors or trust creditors of another trust which the corporate trustee is also appointed to. That is, trust assets would be applied for non-trust purposes: to pay the personal non-trust creditors of the trustee company.

Further, as the trustee's right of exoneration is limited during the life of a corporate trustee to only being available to meet trust creditors, this would mean that this right changes upon the occurrence of an insolvency event to extend to non-trust creditors. It would mean that the use of a corporate trustee would result in a markedly different outcome than if a personal trustee was appointed, as trust property is not included in the property of a bankrupt and cannot be used to meet the claims of general creditors.⁷

Editor's note: The High Court handed down its decision in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20 as this edition of Proctor was going to press. An update will be included in the next edition.

On the other hand, if trust assets are not assets of the trustee company, then they would only be applied to pay trust creditors. But if they are not assets of the company, should the statutory order for application of company assets apply at all? To speak of the ramifications of such a position in other words, should trust trade creditors rank equally with trust employee entitlements, and not after them? Should employees lose out?

The history

To properly understand *Carter Holt*, it pays to understand two separate approaches: one adopted by the Full Supreme Court of Victoria in *Re Enhill Pty Ltd* [1983] 1 VR 561 (*Re Enhill*) and the other of the Full Supreme Court of South Australia in *Re Suco Gold* (1983) 33 SASR 99 (*Re Suco Gold*). The courts in both these decisions found that the statutory priority regime applied to trust assets when a trustee company was in liquidation but adopted different approaches on the question of whether the assets of the trust should be distributed to non-trust creditors as well as trust creditors.

The problematic *Re Enhill*

In *Re Enhill* the court was asked to consider the rights of a liquidator when winding up a corporate trustee of a single trust where the trustee did not operate a business or trade in its own right. The court cited *Octavo*⁹ as authority for the proposition that the trustee's right of exoneration was an asset of the company and that it was not attended by any equitable obligation that it be used only for the paying of trust creditors.

The court concluded that the amounts to be distributed following the exercise of right of exoneration against trust assets were available to pay the company's creditors generally and not restricted to merely trust creditors. For this reason, the second question did not arise.

The decision of *Re Enhill* is often criticised and has been described as "clearly wrong"⁹ and "distinctly fragile".¹⁰ If *Re Enhill* was correct, and I suggest that it is not, there would be a different result for the winding up of a corporate trustee than that of the bankruptcy of a personal trustee without any apparent reason for such a distinction.¹¹

The differing approach in *Re Suco Gold*

A similar question arose in South Australia, shortly after *Re Enhill*, in *Re Suco Gold*. There the court held that the trust assets could be realised to the extent of paying and discharging the liabilities of the company incurred as trustee. But the trust assets were not available to pay non-trust creditors.

Chief Justice King, delivering the leading judgment, could not agree with the approach of *Re Enhill* as his Honour could not ignore the fact that the use of trust property to discharge exclusively non-trust liabilities is the use of trust assets for an unauthorised purpose. The trust property would be being used for the benefit of the trustee personally¹² and not the beneficiaries or trust creditors.¹³ It is respectfully suggested that the approach of *Re Suco Gold* is the correct approach for answering the first question posed above.

Where *Re Suco Gold* is less convincing is its utility in answering the second question posed above: whether the distribution of trust assets is to be governed by the statutory priority regime. While *Re Suco Gold* gives the definitive answer that it should,¹⁴ this answer is problematic in large part because the language of the *Corporations Act* regulates the distribution of assets "beneficially owned" by a company. Assets held on trust by a company would not appear to be captured by this language.

The judicial divergence

The first question – trust assets only for trust creditors?

Some 35 years of history have followed the two primary inconsistent approaches in *Re Enhill* and *Re Suco Gold*.¹⁵ But the difference remains unresolved, and now there are two recent cases exemplifying this inconsistency.

In 2018, a five-member appeal bench of the Victorian Supreme Court of Appeal handed down its decision in *Commonwealth of Australia v Byrnes*, finding that the trustee's right of indemnity (both reimbursement and exoneration) was property of the company for the purpose of the statutory priority regime. In a unanimous judgment, the court said that it was not necessary to decide the question of whether trust assets should be distributed to non-trust creditors. But their Honours appeared to prefer the approach of *Re Enhill*, and in any event said that *Re Enhill* should stand in Victoria until an appellate authority provided otherwise. *Carter Holt* is now the appeal from this decision.

Shortly after, the Full Federal Court (sitting in its original jurisdiction) gave judgment in *Jones* (also referred to as *Re Killamee*)¹⁶. In this case, Allsop CJ and Farrell J endorsed *Re Suco Gold* as the correct approach for both the first and second question.

Given the desirability for uniformity of decisions in interpreting uniform national and federal legislation¹⁷ and the opportunity the Victorian Court of Appeal had, it is unfortunate that their Honours did not resolve what they described as the "doubt about which of *Re Enhill* or *Re Suco Gold* is correct".¹⁸ While the Full Federal Court in *Jones* has provided guidance on this point, it is unlikely that any court in Victoria will depart from the authority of *Re Enhill* until further appellate authority provides otherwise.

The second question – does statutory priority apply to trust assets?

As stated above, though they did not regard the trust assets as effectively being assets of the company and available for non-trust creditors, the court in *Jones* found that the statutory priority regime applied to the distribution of trust assets. It is worth noting that Allsop CJ and Farrell J gave differing reasons for why the statutory priority regime applied.

A third and distinct line of authority has also developed on the second question which does not follow *Re Enhill* and *Re Suco Gold* on the point from Brereton J's decision in *Re Independent Contractor*.¹⁹ His Honour found that the statutory priority regime in the *Corporations Act* did not apply in respect of the distribution of trust assets, instead finding that the distribution should be made *pari passu* among the trust creditors.²⁰

Such a distribution is consistent with how the law resolves competing claims by beneficiaries of different trusts when tracing into a mixed fund²¹ and the general principle in equity that requires a distribution of company property upon a winding-up to treat equally creditors of equal degree.²² The logic of *Re Independent Contractor* is very persuasive, however it does not achieve an important aim that the statutory priority regime does: protection of employee entitlements. While persuasive, it is important to note that Brereton J's logic is inconsistent with both an intermediate appellate court and the Full Federal Court sitting at first instance.

Conclusion

Given the differing landscape that each state has for this issue, guidance from the High Court is clearly desirable.²³ The case of *Carter Holt* provides the High Court with an excellent opportunity to reconcile the decisions of *Re Enhill* and *Re Suco Gold* and provide clarity for all courts regarding the effect of insolvency proceedings upon a corporate trustee's right

of indemnity. This would be valuable for not only providing a consistent approach for Victoria, Australia and New South Wales, but it would also provide guidance for jurisdictions such as Queensland,²⁴ where this controversy has not yet prominently arisen.

Many of the cases that have previously come before the courts have involved the less complex factual scenario where there is only a trustee of a single trust which does

not trade in its own right, and there are no non-trust creditors. It is hoped that the High Court will take the opportunity to sort out the long-standing controversy, as it applies in the broader sense, once and for all.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Adam Moschella (amoschella@pottslawyers.com.au). Joshua Storey is a lawyer at Allens.

Notes

¹ See the statistics offered in *Jones (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 [205] (Jones); see also Dr D'Angelo, 'Commercial trusts in practice: the trust as a surrogate company', paper presented at the annual Supreme Court Commercial and Corporate Law Conference, NSW, November 2016.

² See the primary decision of *Re Amerind Pty Ltd (receivers and managers appointed) (in liq)* (2017) 320 FLR 118; [2017] VSC 127.

³ While beyond the scope of this article, there is also an interesting question regarding the treatment of circulating security interests in insolvency situations before the court.

⁴ *Worrall v Harford* (1802) 8 Ves. 4, 8; 32 ER 250, 252 per Lord Eldon; *Trusts Act* 1973 (Qld) s72.

⁵ *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360, 369-370 (Octavo).

⁶ *Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477, 488; see also *Re Dalewon Pty Ltd (in liq)* [2010] QSC 311 [8].

⁷ *Bankruptcy Act* 1966 (Cth) s 116(2)(a); see also *Octavo and Re Johnson* (1888) 15 Ch D 548 (*Re Johnson*).

⁸ See n5.

⁹ *Lewin on Trusts* (19th ed.), Sweet & Maxwell, pg 888, fn 196.

¹⁰ P Finn (ed), *Essays in Equity*, 1985, pp 249-250 per Sir Anthony Mason.

¹¹ Compare *Re Enhill* with *Re Johnson*.

¹² In breach of the obligations imposed in *Keech v Sandford* (1726) 2 Eq. Cas. Abr. 741; 25 ER 223.

¹³ *Re Suco Gold* 105; see also *Jones* 454-455 [76].

¹⁴ In *Re Suco Gold* 109 where the court found that a liquidator is bound by the provisions of s292 of the *Companies Act* 1961 (Vic.) (dealing with priorities upon the winding up of a company) when paying trust debts.

¹⁵ I say two primary because of Brereton J's "third" approach in *Re Independent Contractor Services (Aust) Pty Limited (in liq) (No.2)* (2016) 305 FLR 222; [2016] NSWSC 106 (*Re Independent Contractor*).

¹⁶ See n1.

¹⁷ See *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492; see also *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-152 [135].

¹⁸ *Commonwealth of Australia v Byrnes* 291 [286].

¹⁹ See n15.


²⁰ This approach being favoured in JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia*, LexisNexis (8th edition) pg 523-524 [21-35], B McPherson, *The Insolvent Trading Trust* in P Finn (ed.), *Essays in Equity*, 1985 and consistent with the position in Singapore in *E C Investments Holdings Pte Ltd v Ridout Residence Pte Ltd* [2013] SGHC 139.

²¹ *Re Johnson; Re Standard Insurance Co* [1968] Qd R 118.

²² B McPherson, *The Insolvent Trading Trust* in P Finn (ed.), *Essays in Equity*, 1985.


²³ If not from the High Court, there is a desire for the legislature to amend the priority regime under the *Corporations Act* to be more explicit as to the extent it affects a trading trust: see *Jones* 477-478 [207]-[208] per Farrell J.

²⁴ Noting the current position as recently detailed by Crow J in *Re Humphreys & Anor* [2018] QSC 241 [20].



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Court confirms 'interchangeable' supervisory terms

WITH ROBERT GLADE-WRIGHT



Children – expressions 'supervised time' and time spent 'in the presence of' may be used interchangeably

In *Elias* [2019] FamCAFC 53 (28 March 2019) the Full Court (Ainslie-Wallace, Aldridge & Austin JJ) dismissed the father's appeal against a parenting order where it was found that he posed an unacceptable risk of harm for a child. It was ordered that the child live with the mother, that she have sole parental responsibility and that the father's time be supervised at a contact centre, or by the father's sister, or a combination of both. He appealed, arguing inconsistency between the court referring to 'supervised time' and time 'in the presence of' another person.

The Full Court said (from [30]):

"...[W]e...do not regard the word 'supervision' or the phrase 'in the presence of' as terms of art that have different meanings. The ordinary meaning of both suggests that constant presence is required of a person overseeing the child or children spending time with the parent subject to the supervision order. More particularly, it is our view that in the ordinary course the phrase 'in the presence of' does not entail a lesser form of supervision which would permit, in the context of this case for example, the child to be left alone with the father, especially for significant periods of time. (...)

[40]...[Johnston J's reasons] strongly suggest that his Honour was using the word 'supervisors' and the phrase 'in the presence of' interchangeably. As they are not terms of art – or, for that matter, defined by the Act – this does not, contrary to the father's submission, demonstrate loose thinking on the part of the primary judge or that his Honour conflated two distinct concepts. (...)

[43] We consider that the phrase 'in the company of' is no different to 'in the presence of' – both connote constant presence. The primary judge clearly understood this to be so and used the words interchangeably as meaning the same thing. It is an arid exercise in semantics to seek to find a difference of substance in the primary judge's choice of words, let alone one which demonstrates appealable error."

Property – court relies on family violence findings in earlier parenting case in support of a *Kennon* decision

In *Adair* [2019] FamCAFC 70 (29 April 2019) the Full Court (Strickland, Ryan & Austin JJ) dismissed the husband's appeal with costs of \$15,000. Before ordering that three properties be transferred to the wife, Rees J had found that the wife's contributions should be given greater weight, having been more arduous as a result of the husband's violence. In previous parenting proceedings, Hannam J had found that the husband had assaulted the wife and his three eldest daughters and posed an unacceptable risk of harm to those children such that he should spend no time with them. The court relied on those findings in the property case. The husband appealed.

The Full Court said (from [35]):

"The husband acknowledged [that] the law does enable findings of one spouse's violent conduct towards the other to reflect in that way in property settlement orders (*Kennon* [1997] FamCA 27...[but] contended it was impermissible for the primary judge to rely upon the prior findings...[in the parenting case].

[36]...[T]he husband...asserted that Hannam J's findings about his past violent conduct were not admissible in the property...proceedings (s 91 [EA])...[nor] by reliance upon...res judicata or issue estoppel (s93(c) [EA])...[H]is submissions must be rejected. (...)

[38] Section 91...only operates to prevent the use of prior...findings of fact to prove the existence of facts which are the subject of dispute in subsequent proceedings. Before the primary judge it was not controversial [that] the husband had behaved violently towards the wife and the children, so the existence of that basal fact was not genuinely in issue. ...

[39] Importantly, s190(1) [EA] enables a court, with the parties' consent, to dispense with...provisions of the *Evidence Act*, including Part 3.5, within which s91 is located. (...)

[41] The inference [to be drawn from the husband's failure to object to the admissibility of the prior reasons is that] the parties consented to the dispensation of Part 3.5...in respect of Hannam J's findings."

Property – affidavit of bookseller adduced by husband to value his book collection held inadmissible as expert evidence

In *Isaacson* [2019] FCCA 522 (6 March 2019) Judge Wilson considered a dispute in a property case as to the value of the husband's book collection, which the husband contended was worth \$183,905 while the wife said it was worth \$384,421. The husband's alleged expert (Mr C) filed a 97-page affidavit as to which the court said (from [26]):

"Mr C gave as his occupation the following which he said entitled him to express an expert opinion in the case – 'I am the owner/ proprietor of Company where I sell books and collectables. I specialise in old books. I opened my first book store in Suburb D in 1995 and have been selling and grading books for nearly 23 years. I currently hold a second-hand dealer's licence.' (...)

[28] That was the extent of Mr C's statement of his training, study or experience in the field of valuing second-hand books. (...)

[30] ...I do not accept Mr C as an expert (...)

[31] Mr C did not depose to any study of books especially second-hand books that would take him into the realm of a specialist. ...At all events Mr C did not depose to training or study that enabled him to express specialised knowledge in the value of books. ...

[32] (...) It is true that Mr C deposed to opening a book store...and that he owned a book store. He then said he had sold and graded books for 23 years. He gave no information as to what he did in the course of selling or grading books. He gave no experience as to the method, technique, skills, requisite criteria...by which he could assert that his 'experience'...enabled me to receive his evidence as that of an expert (...)"

Upon it being held that the affidavit of the wife's alleged expert was also inadmissible due to the failure of that witness to attend for cross-examination, an order was made that the book collection be sold.

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

Constitutional law – implied freedom of political communication

Kathleen Clubb v Alyce Edwards; John Graham Preston v Elizabeth Avery [2019] HCA 11 (10 April 2019) concerned the validity of Victorian and Tasmanian laws prohibiting communications and protests near abortion clinics. Kathleen Clubb was convicted of an offence under s185D of the *Public Health and Wellbeing Act 2008* (Vic.), which prohibits a person from communicating in relation to abortions to persons accessing or attempting to access premises where abortions are provided, if the communication is reasonably likely to cause distress or anxiety. John Preston was convicted of an offence under s9 of the *Reproductive Health (Access to Terminations) Act 2013* (Tas.), which prohibits protests in relation to terminations that are able to be seen or heard by a person accessing, or attempting to access, premises at which terminations are provided. Both appellants argued that the relevant sections impermissibly burdened the freedom of political communication about governmental matters implied into the Commonwealth Constitution. In relation to the Victorian Act, Gageler J, Gordon J and Edelman J held that the validity of the section should not be decided. Ms Clubb had not contended that her communication was political. Gageler J held that in the absence of appropriate facts, the validity of the section should not be decided. Gordon J held to the same effect and also held that s185D would be severable from a case with facts involving political communication. Edelman J also held that s185D was severable. Their Honours dismissed the Clubb appeal for those reasons. The rest of the court held that s185D of the Victorian Act burdened the implied freedom but was justified by the legitimate purposes of the provisions, being the protection of the safety, wellbeing, privacy and dignity of persons accessing the relevant premises. The whole court held that s9 of the Tasmanian Act burdened the implied freedom but was justified by the same legitimate purposes as the Victorian Act. Kiefel CJ, Bell and Keane JJ jointly; Gageler J separately dismissing the Clubb appeal because the appellant had not engaged in political communication, and concurring on the Preston appeal; Nettle J separately concurring with the plurality in both appeals; Gordon J separately dismissing the Clubb appeal because the appellant had not engaged in political communication and because s185D was severable, and concurring on the

Preston appeal; Edelman J separately dismissing the Clubb appeal because s185D was severable, and concurring on the Preston appeal. Appeals removed from the Magistrates Court (Vic.) and the Magistrates Court (Tas.) dismissed.

Native title – extinguishment of rights – definition of ‘leases’

In *Tjunggarrayi v Western Australia; KN (deceased) and Others (Tjiwarl and Tjiwarl #2) v Western Australia* [2019] HCA 12 (17 April 2019) the High Court considered whether petroleum exploration permits and mineral exploration licences came within the definition of ‘leases’ within s47B(1)(b)(i) of the *Native Title Act 1993* (Cth). In each appeal, the appellants made a native title claim, including over areas of vacant Crown land. In each claim, the traditional laws and customs acknowledged and observed by the claim group in relation to the claim area conferred rights of exclusive possession. However, those rights were extinguished by acts of partial extinguishment prior to the enactment of the *Native Title Act*. Generally, extinguishment of rights is permanent. However, s47B(1)(b)(i) relevantly provides that historical acts of extinguishment are to be disregarded for the purposes of a claim over vacant Crown land, unless the area is covered by a ‘lease’. The issue for the High Court was whether a petroleum exploration permit granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) and a mineral exploration licence granted under the *Mining Act 1978* (WA) were ‘leases’ within s47B. The trial judge held they were not. The Full Federal Court disagreed, relying on s242(2) of the *Native Title Act*. That section extends the meaning of ‘lease’ in certain circumstances, and relevantly provides that “[i]n the case only of references to a mining lease, the expression lease also includes a licence...or an authority”. A majority of the High Court held that s242(2) was engaged only where the operative provision of the *Native Title Act* contains an express textual reference to a ‘mining lease’. Section 47B(1)(b)(i) did not contain such a reference and so s242(2) could not apply. It followed that the petroleum exploration permit and mining exploration licence could not be ‘leases’. Kiefel CJ, Bell, Keane, and Edelman JJ jointly; Gageler J, Nettle J and Gordon J separately concurring. Appeal from the Full Federal Court allowed.

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Federal Court

Administrative and environment law – judicial review under the EPBC Act

In *Triabunna Investments Pty Ltd v Minister for Environment and Energy* [2019] FCAFC 60 (15 April 2019) the Full Court heard an appeal from the dismissal of a judicial review proceeding in relation to a decision by the delegate of the Minister under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The subject matter of the appeal was an exercise of power by the delegate under s75 of the EPBC Act, which allowed for the establishment and operation of a salmon farm at Okehampton Bay in Tasmania.

Central to the question before the primary judge, and on appeal, was whether the proposal was a “controlled action” for the purposes of the EPBC Act because the establishment and operation of the farm would, or was likely to, have a significant impact on one or more of the matters of national environmental significance set out in Pt 3 of Ch 2 of the EPBC Act (at [116]). The delegate decided, as set out in the notification of referral decision (notification), that the “proposed action is not a controlled action provided it is undertaken in the manner set out in this decision”. By doing so, the delegate decided that the proposed action was not a “controlled action” provided it was undertaken in a “particular manner” within the meaning of s77A of the EPBC Act.

The key issue in the appeal was whether the notification, given pursuant to s77 of the EPBC Act, complied with s77A of that Act. Mortimer J noted that there had been no other authority where the proper construction and operation of s77A had been determined (at [197]).

The Full Court, in separate reasons given by Besanko J, Flick J and Mortimer J, held that the delegate and primary judge had erred on this issue. The appeal was allowed in part. While relief was not finally decided, the court’s ‘present view’ was that the appropriate relief was to set aside the notice issued under s77 of the EPBC Act and to require a fresh notice to be issued (Mortimer J at [247], which whom Besanko J agreed at [15]).

Administrative and migration law – jurisdictional error – whether the discretion to exclude evidence under s138 of the *Evidence Act 1995* (Cth) applies to the Minister in making decisions under the *Migration Act 1958* (Cth)

In *Minister for Home Affairs v Hunt* [2019] FCAFC 58 (11 April 2019) the Full Court allowed the

Minister's appeal. In 2017, the Minister decided to exercise his discretion under s501(2) of the *Migration Act 1958* (Cth) to cancel Mr Hunt's visa on the basis that he reasonably suspected that Mr Hunt did not pass the character test and that Mr Hunt had not otherwise satisfied him that he did pass that character test. Mr Hunt challenged this in the Federal Court. The primary judge held that the Minister committed jurisdictional error by failing to have regard to the fact that Mr Hunt's sentence of imprisonment for certain sexual offences for nine months was suspended wholly for two years. The Full Court overturned the primary judge's decision on this point, noting that when regard was had to the totality of the material before the Minister it was not appropriate to draw the inference so as to find as a positive fact that the Minister overlooked the suspension (at [71]).

The Full Court also dismissed Mr Hunt's notice of contention. The notice of contention concerned two documents allegedly obtained by the Home Affairs Department in contravention of the *Information Privacy Act 2009* (Qld). Mr Hunt contended that information as to his prior convictions was obtained by reason of the non-compliance and as his data had been accessed unlawfully, the documents were inadmissible under s138 of the *Evidence Act 1995* (Cth) including in support of the decision to cancel his visa under s502 of the *Migration Act*. The primary judge and the Full Court rejected this ground for a variety of reasons. The Full Court held there was no requirement in Division 2 or elsewhere in the *Migration Act* imposed on the Minister to comply with state (or Commonwealth) privacy laws in the obtaining of information (at [90]). Further, McKerracher, Perry and Banks-Smith JJ said at [72]: "Finally, the discretion under s138 of the *Evidence Act 1995* (Cth) has no application to administrative decision-makers who are not bound to apply the rules of evidence or by the *Evidence Act*, albeit that the rules of evidence may afford guidance to administrative decision-makers: see s4, *Evidence Act*; and eg *Martin v*

Medical Complaints Tribunal (2006) 15 Tas R 413 per Evans J (at [15]) and the general discussion in the context of administrative tribunals in *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93 per Flick and Perry JJ (at [88]-[97]). As such, there was no requirement that the Minister undertake the balancing exercise required by s138 of the *Evidence Act* before having regard to the Criminal Record or Sentencing Transcript..."

Costs – consideration of barrister's costs agreement – indemnity principle – uplift fees

In *Mango Boulevard Pty Ltd v Whitton* [2019] FCA 490 (11 April 2019) Rangiah J determined a dispute about the costs previously ordered against the applicants. The applicants had sought judicial review of a decision of the second and third respondents' trustee in bankruptcy and of a resolution passed by their creditors (the review proceeding). In an earlier judgment Rangiah J dismissed the proceeding and ordered that the applicants pay the bulk of the respondents' costs. Relevantly, it was the costs of the second and third respondents' Senior Counsel that were now in issue.

The applicants argued that the Senior Counsel entered his costs agreement in contravention of s324(1) of the *Legal Profession Act 2004* (NSW) (repealed) (the LPA (NSW)), that the agreement was void, and that he was not entitled to recover his fees. In the alternative, the applicants argued that the Senior Counsel failed to comply with his obligation under s324(4) of the LPA (NSW) to provide an estimate of his uplift fee, with the consequence that he was only entitled to recover, and they were only required to pay, the fair and reasonable value of his services. The issues in dispute which the court addressed at [37] were:

- whether the Senior Counsel entered a costs agreement "in relation to a claim for damages"
- whether the Senior Counsel entered a single costs agreement for the whole of the various litigation, or a separate costs agreement for each proceeding, including for the review proceeding

- whether the phrase "in the matter to which the costs agreement related" in s327(4) extends to the review proceeding, which was not a claim for damages
- whether the Senior Counsel's costs agreement was void under s327(1) because it did not contain an estimate of his uplift fee in contravention of s324(4), and the consequences of such a contravention
- whether the LPA (NSW) applied to the Senior Counsel's costs agreement, or whether the *Legal Profession Act 2007* (Qld) applied instead.

In addressing these issues, Rangiah J considered the connection and distinction between a costs agreement and a retainer agreement (at [65]-[76]).

The costs agreement was held not to be void. However the Senior Counsel's costs agreement did not comply with s324(4) of the LPA (NSW) which required that the agreement contain an estimate of the uplift fee or, if that was not reasonably practicable, a range of estimates of the uplift fee. The effect of s319(1)(c) was that his legal costs were recoverable "according to the fair and reasonable value of the legal services provided" (at [101] and [134]-[135]).

Practice and procedure – application for temporary stay of proceedings

In *OPENetworks Pty Ltd v Myport Pty Ltd* [2019] FCA 486 (10 April 2019) O'Bryan J dismissed an application by a telecommunications carrier seeking a temporary stay of court proceedings for declaratory and injunctive relief pending the outcome of objections referred to Telecommunications Industry Ombudsman. The court summarised the principles applicable to a stay of proceedings (at [10]-[25]) pending the outcome of proceedings before an administrative body.

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Court of Appeal judgments

1–31 May 2019



WITH BRUCE GODFREY

Civil appeals

Deans v Maryborough Christian Education Foundation Ltd [2019] QCA 75, 3 May 2019

General Civil Appeal – where the appellant was employed by the respondent as a specialist schoolteacher – where the appellant fractured her left patella after she slipped on a grape while walking through a foyer outside classrooms where junior school students were having ‘fruit break’ – where the trial judge applied the liability provisions of the *Workers’ Compensation and Rehabilitation Act 2003* (Qld) (WCRA) in determining whether there was any breach of duty of care owed to the appellant – where the trial judge found that the risk of an employee sustaining an injury by slipping on a piece of fruit while walking through the foyer area of the classroom block when a fruit break was occurring was not foreseeable under s305B(1)(a) of the WCRA – where the trial judge found the risk of injury was insignificant – where the trial judge also found that a reasonable person in the position of the defendant would not have taken the precautions suggested by the appellant – where the determination of whether a risk is foreseeable for the purposes of s305B(1) of the WCRA must begin with the ascertainment of what the relevant risk is – where within the evidential framework in this case, it is a risk that at or about a fruit break, a child would drop fruit on the floor of the foyer; that the child (or someone else) would not pick it up; that a person familiar with fruit breaks (as, on the evidence those who accessed the foyer area were) who was traversing the foyer on foot would fail to see the grape; that the person would tread on it, slip and fall to the ground; and that the person would be injured as a result – where in circumstances where children from three classes would carry fruit, usually whole pieces not in containers but including grapes, through the foyer area on their way to and from the classroom, it was foreseeable that fruit might be dropped onto the floor – where it was also foreseeable that the child who dropped it (or someone else) would not notice and pick it up – where further, it was foreseeable that even a person who was familiar with the fruit break, who was crossing the foyer on foot and who failed to look at the floor in front of them, would tread on the fruit, slip, fall to the floor and injure themselves – where in these circumstances, it was reasonably foreseeable that injury would occur in that way – where the primary judge reasoned that the absence of evidence of injury during a fruit break including by slipping on the foyer floor justified a conclusion that the risk of injury here was ‘low’

– where the additional consideration that, on the evidence, a large number of persons would have traversed the foyer area over the five years at or about a fruit break time, led his Honour to an “almost inevitable conclusion” that the risk was properly categorised as ‘insignificant’ – where by that categorisation, his Honour foreclosed a finding that the risk was “not insignificant” – where on the evidence, the probability of occurrence of the relevant risk was very low – where it is unpersuasive that the primary judge erred in not categorising it as not insignificant – where on the basis of the categorisation he did make, there was no breach of duty. Appeal dismissed. Costs.

Mackellar Mining Equipment Pty Ltd & Ors v Thornton & Ors [2019] QCA 77, 7 May 2019

General Civil Appeal – where a plane crash in North Queensland killed two pilots and 13 passengers – where the respondents, relatives of the deceased pilots and passengers, commenced proceedings against the appellants in Missouri in May 2008 – where the appellants brought an application in March 2017 in the Queensland Supreme Court for, inter alia, a permanent anti-suit injunction in respect of the Missouri proceedings – where the primary judge found that the appellants had delayed in seeking injunctive relief, and that the Missouri proceedings would probably apply Australian law, would be a jury trial and was ready for trial – where the application for a permanent anti-suit injunction was refused because the primary judge found that the Missouri proceedings were not vexatious or oppressive – whether the primary judge erred in her findings in respect of both the Queensland and Missouri proceedings – whether the findings formed part of the reasoning to refuse the application – whether the Missouri proceedings are vexatious or oppressive – where the appellants had to establish that the prosecution of the Missouri proceedings was vexatious or oppressive – whether the Missouri proceedings could be characterised in that way depended in part upon the circumstances surrounding the commencement of the Queensland proceedings, when they were started, why they were started and what those proceedings comprehended – where it was for this reason that her Honour was obliged to consider the question of the purpose of the proceedings – where it was highly material that they were begun late in chronology and as a platform from which to seek injunctive relief – where her Honour rightly said that the proceedings here and in Missouri lack “parity” or are “not strictly parallel” – where one reason for this was that some of the parties

in the Missouri proceedings cannot make valid claims in Queensland – where other differences were contentious, such as the availability of remedies in each jurisdiction and upon choice of law – where all of the factors relied upon by the appellants to support the submission that the Missouri proceedings are vexatious and oppressive are factors that existed since those proceedings were commenced – where the continuation of these proceedings is not rendered vexatious and oppressive against the remaining defendants just because the sole US party has been removed – where the appeal had been heard and judgment reserved – where the appellant made an application to reopen the appeal and adduce further evidence – where the primary judge found, in refusing an application for a permanent anti-suit injunction, that the Missouri proceeding was “ready for trial” and would be heard at a time earlier than the Queensland proceeding – where the appellant submits that there is new evidence that would show that neither the appellants nor respondents are really ready for a trial in Missouri in July 2019, and that the Queensland proceedings will be ready for trial before the Missouri proceedings – whether the circumstances are exceptional to allow the appeal to be reopened – whether the evidence, if led, would probably have an important influence on the result of the appeal – where two courts in the United States, both of them in Missouri, one a federal court and the other a state court, have ruled that Missouri is not an inconvenient forum in which to litigate the dispute – where the grounds raised in each of those two applications were the same and they are the same as the grounds that were raised before Lyons SJA and that have been repeated on appeal – where, moreover, the Circuit Court has made orders for mediation and for trial – where no party applied to vacate those directions or to adjourn the trial – where leave to reopen the hearing is refused – where the facts that they would wish to prove if given an opportunity can make no difference to the case – where the appellants submit that the Queensland proceeding is in federal jurisdiction (as it is because of the relevance of certain Commonwealth laws) – where they submit that there is a constitutional guarantee of an appeal to the High Court in such a case (as there is) – where it follows, so the argument runs, that the election by the respondents to have a foreign court quell the controversy is incompatible with the “fundamental character of the federal jurisdiction enlivened by the application for negative injunctions” and “threatens the integrity of the local proceeding” and is, for that reason

on its own, vexatious or oppressive – where the two premises may be accepted – where the conclusion does not follow – where no authority has been cited for the novel principle that once a plaintiff has commenced a proceeding in federal jurisdiction in an Australian court, that plaintiff is entitled to an injunction to prevent a defendant litigating the dispute anywhere else and, it seems, whatever the circumstances – where the principle must also have escaped the attention of Gummow J when his Honour decided *National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 22 FCR 209 as a member of the Federal Court. Leave to reopen the hearing of the appeal refused. Appeal dismissed. Costs.

Masson v State of Queensland [2019] QCA 80, 10 May 2019

Miscellaneous Application – Civil – where the appellant suffered a severe asthma attack – where the appellant was unconscious, had a low respiratory rate but had high blood pressure and a high pulse rate – where an ambulance officer treated the appellant initially by the intravenous administration of the drug salbutamol and then 20 minutes later by the intravenous administration of the drug adrenaline – where the appellant suffered hypoxic brain damage and later died as a result of the asthma attack – where the ambulance officer's manual instructed the officer to “consider adrenaline”, not salbutamol – where the ambulance officer administered salbutamol in amounts in excess of the manual's guidance – whether the ambulance officer considered the administration of adrenaline – whether the ambulance officer departed from the manual – whether there is a responsible body of medical opinion in favour of the administration of salbutamol over adrenaline where a person in imminent arrest has high blood pressure and a high heart rate – whether it is consistent with the exercise of reasonable care and skill for an ambulance officer to depart from the guidance of their manual – where Ms Masson was not treated in accordance with the Clinical Practice Manual (CPM) – where the use of adrenaline was not considered as required by the flowchart – where if it was considered at all, it was inconsistent with the CPM to decide to administer twice the permitted dosage of salbutamol in the hope that this would be as effective as the administration of adrenaline – where the CPM was not relevantly ambiguous – where the understanding of the senior officer and determinative decision maker at the scene, Mr Peters, was that adrenaline was not even to be considered for a patient who was not bradycardic – where it would have been remarkable if the CPM precluded the use of adrenaline where the heart rate was normal – where Mr Peters' conduct cannot be excused on the basis of a reasonable but mistaken interpretation of the CPM – where an ambulance officer could not have been expected to know of the existence of competing bodies of medical opinion on that subject, and was not competent to make an assessment of the respective merits – where, instead, the exercise of reasonable care required the ambulance officer to be guided by the CPM – where his Honour's finding that there was a responsible body of opinion in the medical profession to support the administration

of salbutamol to a patient with Ms Masson's high heart rate and blood pressure was not supported by the evidence – where each of the three medical practitioners who gave evidence in the respondent's case subscribed to the view that salbutamol was an equally effective drug for bronchodilation – where none of them said that, *upon the premise that adrenaline was the superior drug for the treatment of an asthmatic at immediate risk of cardiac failure and death*, that the risk from using an inferior drug was outweighed by the risk of side effects from the adrenaline – where consequently, there was no basis, consistent with the exercise of reasonable care and skill by Mr Peters as an ambulance officer, for him to use what he ought to have understood was a less effective drug for a patient in this critical condition – where the existence of potential side effects, from the perspective of an ambulance officer instructed by the CPM, was not a justification for instead using salbutamol – where it follows that the trial judge ought to have held that Mr Peters was negligent in not administering adrenaline at the outset – where the respondent was vicariously liable for Mr Peters' negligence. Appeal allowed. Set aside the orders made on 23 July and 8 August 2018. Written submissions as to the amount for which the appellant should be given judgment and costs of the appeal and in the trial division.

Allen v Ruddy Tomlins & Baxter [2019] QCA 103, 28 May 2019

Application for Leave s118 DCA (Civil) – where the applicant client and the respondent, a firm of solicitors, entered into a costs agreement in August 2005, which was terminated in August 2007 – where the applicant objected to the respondent's bill of costs and applied for a costs assessment under the *Legal Profession Act 2007* (Qld) (LPA) s335(1) – where the costs assessor filed an ‘interim decision’ in the District Court in March 2009, and subsequently a costs assessor's certificate in July 2017 – where the registrar made orders pursuant to that certificate in 2017 – where the respondent submitted that the *Legal Profession Act 2007* (Qld) and the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) gave rise to an independent “codified regime for the quantification and recovery of legal costs between a law practice and client” that exists outside the ambit of the regime under the *Limitation of Actions Act 1974* (Qld) (LAA), such that it was not time barred from claiming its costs from the applicant – where in *Edwards v Bray* [2011] 2 Qd R 310 (*Edwards*), the court was required to consider whether, by virtue of the provisions of the *Queensland Law Society Act 1952* (Qld) (QLS Act), there was more than one source of a solicitor's entitlement to payment – where the court held that the relationship between solicitor and client was contractual, which upon termination of the retainer, gave rise to a cause of action for moneys owing pursuant to contract – while s10(1)(d) of the LAA applied where the claimant had a right of recovery sourced in a statute and a cause of action (that is, a factual situation which would support his or her right to judgment) had arisen, s6ZE(2) of the QLS Act was not a source of the applicant's right of recovery – where the relevant limitation period

that was held to apply was one of six years from the accrual of the cause of action pursuant to s10(1)(a) of the LAA – where the court noted that, where there was a concern that the limitation period was about to expire, a solicitor's position could be protected by obtaining the court's leave to start a proceeding pursuant to s48J(2) of the QLS Act – where the conclusion in *Edwards* remains relevant – while there are two avenues to judgment, one being by bringing a proceeding for moneys owing pursuant to the terminated retainer, and the other being by an assessment application, the underlying cause of action is contractual – where it follows that an application to the court for assessment under the LPA is not an ‘action’ for the purposes of the LAA – where as observed in *Edwards*, the respondent could have protected its position by seeking leave to commence proceedings prior to the limitation period expiring pursuant to s328 of the LPA – where a client brings a costs application under the UCPR, the client is using an administrative procedure for the determination of a dispute as to the quantum of a debt, and not seeking relief as to the vindication of the rights concerning the validity of the costs agreement or the contractual debt – where the application by the client does not therefore constitute an action founded on contract; nor can it constitute a proceeding by the solicitor, the ‘person’ referred to in s10 of the LAA, for the purpose of that Act – where the fact that, where appropriate, the administrative process can be made the vehicle for the determination of issues such as the contractual entitlement of the solicitor, or the validity of the contract founding a claim, does not lead to the client's application for assessment itself constituting an action for the purposes of the LAA – where, indeed, r743H(3) of the UCPR provides a practical opportunity to determine whether the underlying cause of action has been extinguished by the relisting procedure under r743H – where it is difficult to see why the time period for the recovery of costs (as a contractual debt) should differ depending on whether the client challenges the quantum of costs or whether the solicitor brings a recovery proceeding (or costs assessment application) – where if an application for a costs assessment brought by the client sufficed as an ‘action’ under the LAA, and one under which the solicitor could claim costs, the practical effect would be to remove a client's entitlement to raise a time limitation to the solicitor's claim once an application for costs assessment has been made by the client – where that consequence does not promote the purpose of s3 of the LPA to regulate legal practice in Queensland in the interests of the administration of justice and “for the protection of consumers” – where an application for costs assessment pursuant to s335(1) of the LPA is not an ‘action’ for the purposes of the LAA – where in the present case, the respondents brought no action within the period prescribed by the LAA, which remained applicable – where the applicant raised the issue of the respondent's entitlement to recover costs after the filing of the assessor's certificate in accordance with r743H of the UCPR. Application for leave to appeal granted. Appeal allowed. Order of 21 March 2018 be set aside. Written submissions on costs.

Criminal appeals

R v Wiedman [2019] QCA 71, 3 May 2019

Appeal against Conviction – where the appellant fired an arrow from a compound bow which ricocheted off a pole and struck the complainant on the chin, causing an injury that constituted grievous bodily harm – where the appellant was convicted of one count of unlawfully doing grievous bodily harm with an intent to maim, disable or disfigure, or to do some grievous bodily harm – where an issue at trial was whether the appellant held the requisite intention – where the complainant gave evidence to the effect that the appellant had aimed the arrow at him – where the appellant gave evidence that he aimed the arrow at the pole – where the appellant appeals against his conviction on the ground that the verdict is unreasonable or cannot be supported on the evidence – whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant held the requisite intention – where there was direct evidence from the complainant that the appellant had aimed the arrow at him – where in cross-examination he said that it was pointing at him “dead centre” – where the post stood between the appellant and the complainant – where it lay along the projected flight of the arrow – where there was direct evidence from the appellant the other way – while the jury might have accepted the appellant’s firm assertion about his actual intention, it was not obliged to do so – where if it rejected that evidence and put it to one side, the remaining evidence led by the Crown was capable of supporting a rational conclusion that the appellant had aimed his arrow directly at the complainant intending to hit him – where although the case now appears to be a simple and straightforward one, that was not how it was presented to the trial judge or to the jury – where the case became a very complicated one for the trial judge to sum up, let alone for the jury to comprehend – where this complexity had a number of consequences – where one of these was that, although the trial judge told the jury that he would direct them about “a possible alternative verdict” and later stated his intention to discuss on the following day “the alternative charge of grievous bodily harm without an intention” inadvertently he never did so – where the only reference in the summing up to a path of reasoning the jury might follow, if satisfied the injury to Mr Boyd did amount to grievous bodily harm, but not satisfied the appellant had the requisite intention, was wrapped up in the direction about the defence of accident – where this was confusing, and could have led the jury to conflate intention and foreseeability – where after giving directions about the many issues raised his Honour concluded by informing the jury, in the usual way, about what would happen after they had reached a verdict – where the problem is that the jury was never directed that if they were satisfied that the appellant had caused grievous bodily harm to Mr Boyd and that none of the defences raised had exculpated him, but if they were not satisfied that he had intended to cause grievous bodily harm, then they should find him guilty of the lesser offence – where the alternative offence was not even referred to in the final direction – where no objection was taken

to this problem in the summing up but, in the circumstances of this case, that does not matter – where the appellant has been deprived of a real chance of being acquitted on the charge of malicious act with intent – where this was not a case in which a conviction on that charge was inevitable. Appeal allowed. Conviction set aside. Order that there be a retrial.

R v Kane [2019] QCA 86, 17 May 2019

Sentence Application – where the applicant pleaded guilty to one count of burglary and one count of child stealing – where the applicant was sentenced to three years and six months’ imprisonment, and four years and six months’ imprisonment on each count respectively, with parole eligibility set four months after the date of sentence – where the applicant’s bipolar disorder was the underlying cause of the offending – where the applicant did not have a sexual or violent intention in abducting the child – where the child was unharmed and voluntarily returned after two days – where comparative cases show a wide range of sentences – whether the sentence was manifestly excessive in the circumstances – where here, there are a number of factors which point to the sentence being manifestly excessive – where the applicant’s conduct was to a substantial extent a product of his deteriorating mental health, a problem that began to appear as early as 2004 when the applicant lost his job – where the applicant’s mental health is an important factor that reduces his moral culpability – where it also renders the case an inappropriate one to express the importance of deterrence – where the applicant has done what he could to accept moral responsibility for his offending and to demonstrate that acceptance of responsibility in tangible ways – where the question remains whether any purpose to benefit the community would now be served by ordering the applicant to be imprisoned, after he has served a lengthy period on remand and a longer period at large while undergoing successful medical treatment – where that question is to be asked now in circumstances in which he would be eligible to apply for parole in a very short time – where punishment is needed but the applicant has served a substantial time in custody – where his condition is such that a further period of custody of a few months is not called for by any consideration of personal deterrence, nor would it serve the purposes of general deterrence – where the applicant has now served a period of about 15 months and the parole date ought to be set as today. Leave granted. Appeal allowed. Sentences imposed on each of counts 1 and 2 on the indictment are set aside. On each of counts 1 and 2 the applicant is sentenced to a term of imprisonment of three years’ imprisonment with those terms to run concurrently. The period of 417 days pre-sentence custody is declared as time already served under the sentences. The applicant be admitted on parole on 17 May 2019.

R v Baxter [2019] QCA 87, 17 May 2019

Appeal against Conviction – where the appellant was acquitted of murder but convicted of manslaughter of his six-week-old son, Matthew (the deceased), on 3 November 2011 – where the deceased sustained rib fractures prior to sustaining the brain injury the subject of the charges – where evidence of the rib fractures

was ruled admissible pursuant to s132B of the *Evidence Act 1977* (Qld) (EA) subject to the need to give appropriate directions and warnings to the jury – where the appellant challenges the admissibility of the rib fracture evidence on the ground that it did not constitute evidence of the “history of the domestic relationship” because it was disputed who caused the rib fractures – whether evidence of the rib fractures sustained by the deceased should have been admitted pursuant to s132B EA – where in the present case, to describe the rib fracture evidence as admissible so that the event or events of 3 November were not seen as isolated events out of context did not grapple with the clearly stated intention of the prosecution to use the rib fracture evidence as part of a course of conduct alleged against the appellant, described by the prosecution as a compelling graduation in the injuries sustained by the deceased at the hands of the appellant, with the end point of the death of the deceased from the event or events of 3 November 2011 – where that is to say, the prosecution intended to use the rib fracture evidence as propensity evidence of the appellant having inflicted injuries upon the deceased on 3 November – where once that point is reached, it is difficult to understand the basis of the trial judge’s ruling on the application of s130 EA – where in the present case, the trial judge reasoned that the evidence should not be admitted as propensity evidence at common law, in particular on the issue of intention to cause death or do grievous bodily harm for the offence of murder, because it was neither sufficiently probative on the issue of intent, and because he did not accept it was sufficiently probative to outweigh the possible prejudice to the appellant – where it cannot be said, therefore, that the trial judge ignored or misunderstood the prejudicial effect to the appellant of admitting the evidence – where, however, the reasons do not disclose any further analysis of why that effect was not considered to be unfair to the appellant under s130 EA – where the trial judge considered, however, that appropriate directions and warnings to the jury with respect to propensity evidence and appropriate instructions as to the basis of the tender under s132B EA supported admission of the rib fracture evidence as evidence of the history of the domestic relationship – where the rib fracture evidence was not admissible to prove the identity of the person who inflicted trauma upon the deceased on 3 November 2011, because there was no issue at the trial that if the deceased sustained trauma shortly before his cardio-respiratory arrest on that day, that trauma occurred when only the appellant was with him – where the identity of the person who caused any trauma before the cardio-respiratory arrest was not in issue – where, in this case, the appellant was not advantaged by the rib fracture evidence being admitted only as evidence of the history of the domestic relationship – where had the rib fracture evidence been excluded, the appellant would not have been subject to its use at all, and in particular would not have been subject to the non-expert propensity reasoning relied on by Dr Lamont, leaving aside whether that evidence or other evidence of Dr Lamont or any of the other expert witnesses should have been ruled inadmissible because of that process of reasoning – where, alternatively, had the rib fracture

evidence been admitted as propensity evidence, the appellant would have been entitled to a direction that the jury must be satisfied beyond reasonable doubt that the appellant caused the rib fractures before they used that evidence as probative in relation to whether the defendant caused the death of the deceased. Appeal allowed. Conviction quashed. Retrial ordered.

***R v Heke* [2019] QCA 93, 24 May 2019**

Sentence Application – where the applicant was convicted of unlawful striking causing death – where the applicant delivered a blow to the deceased who fell backwards onto a road and was hit by a truck – where the applicant was sentenced to 6½ years’ imprisonment – where it was ordered, pursuant to s314A(5) of the *Criminal Code* (Qld), that the applicant must not be released until he has served 80% of that term – where the respondent urges that as s314A of the code is a new and “distinct offence with its own sentencing requirements”, that “sentences imposed in broadly comparable circumstances for manslaughter...should be of no more than broad assistance”. – where this submission ought to be accepted – where if a sentence is to be lessened, taking into account and bearing in mind the 80% rule imposed by s314A(5) of the code (or s182 of the *Corrective Services Act 2006* (Qld)), then it can only be done on the proper basis and with reference to important facts relevant to the sentence under consideration – where the sentencing judge’s decision accords with the correct application of s314A of the code and s9 of the *Penalties and Sentences Act 1992* (Qld) to the facts and circumstances of the applicant’s offending. Application refused.

***R v Hyatt* [2019] QCA 106, Date of Orders: 13 May 2019; Date of Publication of Reasons: 31 May 2019**

Appeal against Conviction & Sentence – where the appellant was convicted by jury of one count of assault occasioning bodily harm with a circumstance of aggravation – where the alleged offence occurred in prison – where it was alleged in cross-examination that the complainant had fabricated the allegations against the accused with a view to obtaining compensation – where it was alleged that this amounted to an imputation as to the complainant’s character – where the trial judge intimated that cross-examination of the accused on his prior convictions would be allowed if he gave evidence – whether the trial judge erred in exercising the discretion to allow the accused to be cross-examined on his prior convictions if called and the extent to which the prior convictions could be put to the defendant if he gave evidence – where the appellant represented himself on appeal – where it is subsection 15(2) of the *Evidence Act 1977* (Qld) (EA) which is the relevant subsection – where that subsection contains a prohibition against cross-examination of an accused on his prior convictions – where prior convictions are of course generally irrelevant to prove a criminal charge – where an accused may be cross-examined on prior criminal history with the court’s leave, but only where one of the conditions in subsections 15(2)(a), (b) or (c) of the EA are established – where here the Crown relied on subsection 15(c) of the EA – where, therefore, before the Crown prosecutor could cross-examine the appellant on his prior criminal history, the

Crown was required to make out the condition in subsection 15(2)(c) and then obtain a favourable exercise of discretion under subsection 15(3) to permit the cross-examination – where the trial judge heard argument on whether subsection 15(2)(c) had been engaged and whether the discretion had arisen, but did not hear argument as to how the discretion ought to be exercised – where, however, his Honour seems to have ruled that the discretion should be exercised in favour of the Crown: “I’ll allow [the prosecutor] to take up with the witness his prior history if he chooses to do so.” – where it could hardly be thought necessary to cross-examine the appellant on his complete criminal history which includes some serious acts of violence – where cross-examination on those convictions would inevitably invite propensity reasoning by the jury and a danger that a direction as to the limited use to which the cross-examination could be put may not be fully appreciated and followed – where, undoubtedly, his Honour acceded to this course in the belief this his intimation would benefit the accused – where, unfortunately, the intimation made by his Honour that cross-examination would be allowed of the appellant on his criminal convictions, apparently without limit, rendered the trial unfair – where, however, a warning must be given to the jury against acting on evidence where a warning is necessary “to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case” – where if those circumstances arise it is not sufficient for the judge to simply remind the jury of counsel’s arguments – where the warning must be given by the judge with the authority of the court – where the warning must identify the features of the evidence which warrant the warning and must explain the reasons for it and why it is necessary to scrutinise the evidence of the particular witness with great care – where, here, a warning was clearly called for – where Mr Williams had a criminal past and as both he and the appellant were in prison together at the same time, fabrication implicating the appellant was difficult to disprove – where added to that were the circumstances of the delay in making the complaint, the fact that he intended to pursue compensation (that seemed to have triggered the complaint) and the prior inconsistent statement in relation to the weapon allegedly used – where here, the Crown case depended totally upon the evidence of Mr Williams – where the failure to give a warning in appropriate terms was a significant deficit in the trial process. Appeal allowed. Conviction quashed. Sentence set aside. Order that there be a retrial.

***R v Lavin* [2019] QCA 109, Date of Orders: 3 May 2019; Date of Publication of Reasons: 31 May 2019**

Appeal against Conviction & Sentence – where the appellant was convicted by a jury of one count against s31 of the *Work Health and Safety Act 2011* (WHSA) – where the conviction arose from a fatal incident which occurred at a work site – where Lavin Constructions subcontracted roofing work to Multi-Run Roofing Pty Ltd (Multi-Run), the sole director of which is the appellant, and employed the victim of the fatal accident – where in Multi-Run’s quote for the subcontracted work, the work was described as including “supplying and installing of safety rail” – where one way of ensuring the safety of

persons working on the roof of the building was to install a safety rail along the edge of the roof to prevent falls – where notwithstanding the terms of the quotation, no safety rail was installed – where instead an alternative plan was adopted, namely the use by workers of harnesses which were attached to ropes secured to the ground and then secured to fixing points on the roof, and the positioning of scissor lifts as a barrier at the edge of the roof – where at some stage the victim approached the edge, tripped in a gutter and fell off the roof – where tragically, he suffered fatal injuries and died shortly after the accident – where the evidence revealed that a scissor lift was not positioned where the victim fell as the ground was uneven and this made positioning the lift difficult – where the particulars assert that the appellant offended against s31 WHSA as he breached his duty under s27 WHSA by failing to ensure Multi-Run’s compliance with its duty under s19 WHSA – where s31 WHSA, like ss32 and 33 WHSA, imports a consideration of ‘reasonableness’ for a jury’s consideration but in a very different way to ss32 and 33 WHSA – where by s31 WHSA, the conduct is not criminal if there is ‘reasonable excuse’ for the act or omission – where the trial judge directed the jury that the criminal liability of the appellant turned on a consideration of “reasonable practicability” – where the issue under s31 WHSA was not whether the erection of the railing was “reasonably practicable” – where the issue was whether the failure to erect the railing “expose[d] [the victim] to a risk of death or serious injury...”, and if so whether there was ‘reasonable excuse’ in making that omission – where in determining whether there was ‘reasonable excuse’ the jury was obliged to consider the alternative measures which the appellant directed to be put in place (the harnesses and the use of the scissor lifts), not just whether it was reasonably practicable to install the railing – where ‘reasonable excuse’ also raises consideration not only of what measures were put in place but also what measures the appellant believed had been put in place – where his belief is relevant to the reasonableness of any excuse – where here the appellant may have been found by the jury to have failed to cause Multi-Run to erect the railing – where the jury may have been satisfied that the erection of the railing was a ‘reasonably practicable’ step to take – where however, the appellant had directed that workers on the roof were to use harnesses if working near the edge – where he also directed that the scissor lifts be positioned in such a way as to constitute a barrier – where the real question was, having given those directions and, in the context of any other relevant evidence in the case, whether he had a ‘reasonable excuse’ for not causing Multi-Run to erect the railing – where the summing-up was defective in that it did not properly identify the elements of the offence – where such a misdirection prevented the jury from performing its proper function and constitutes a miscarriage of justice. Appeal against conviction allowed. Conviction set aside and a retrial ordered.

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.

Basic entitlements – notice of termination and redundancy pay

BY ROB STEVENSON



The National Employment Standards (NES) set out minimum requirements for the giving of notice of termination of employment and redundancy pay.

All employees must be given notice of termination in writing. Civil penalties can be imposed under the *Fair Work Act 2009* (Cth) if this is not done. Ideally, notice should be handed to an employee personally as part of a termination meeting.

Apart from notice in writing, employees must be given the minimum notice required under the standard or paid in lieu for the period of notice. Exceptions mainly relate to casual employees and employees terminated for serious misconduct.

These are minimum requirements only and any greater contractual requirement should be met. However, the statutory requirement will override any lesser contractual notice provision. The requirement for notice is also separate to requirements to pay accrued entitlements such as annual leave and long service leave.

The minimum entitlements to termination notice under the *Fair Work Act* are:

Period of employee's service	Required notice
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	At least 2 weeks
More than 3 years but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

An employee who is over 45 years of age and has worked for the same employer for at least two years is entitled to an extra week's notice.

If an employee resigns their employment, the employer should check that they have provided the appropriate notice required under an award or contract. If award-based notice is not given, the employer *may* be within its rights to withhold an amount from any payment due to the employee, for example, from any annual leave, if this is allowed by the industrial award. Alternatively, they may be able to sue the employee for the amount of notice not given, whether under the award or contract.

If employment ends due to the redundancy of the employee's job, then redundancy pay is required in addition to the giving or payment of notice. Redundancy occurs when an employer decides they no longer need an employee's job to be done by anyone, including when the duties of the job are to be distributed amongst other existing employees.

The statutory scale of redundancy pay is:

Service period	Redundancy pay period
1–2 years	4 weeks
2–3 years	6 weeks
3–4 years	7 weeks
4–5 years	8 weeks
5–6 years	10 weeks
6–7 years	11 weeks
7–8 years	13 weeks
8–9 years	14 weeks
9–10 years	16 weeks
10 years+	12 weeks

The requirement to pay redundancy does not apply if the employee has less than 12 months' continuous service or if the employer is a 'small business employer' (an employer with less than 15 employees).

If the employer obtains other acceptable employment for the redundant employee or cannot pay the required redundancy pay, the employer can make application to the Fair Work Commission to vary the required amount. There is also an exemption in certain transfer of business situations.

The standard deals with minimum notice and payment requirements. However, please keep in mind that the standard does not deal with all the requirements of termination and redundancy.

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The treasures of Langhorne Creek

WITH MATTHEW DUNN



Tucked away on the wrong side of the Adelaide Hills from McLaren Vale lies the home of Australia's obscure red wine treasures – the powerhouse region of Langhorne Creek.

During the winter months, attention naturally turns to full-body red wines and the usual names, such as Barossa, McLaren Vale, Clare Valley, Coonawarra and Margaret River, dominate. Names less known, like Langhorne Creek, fly under the radar but consistently pump out fine red wines at comparatively accessible prices.

Located south-west of Adelaide on the cooling shores of Lake Alexandrina and bisected by the South Australian Bremer River, Langhorne Creek is ideally suited to raising both quantity and quality vines. At the intersection of warm air from Central Australia and air-conditioning southerlies, along with floodwaters from the Bremer River, it has every natural advantage.

The first estate in the district was forged by the irrepressible Frank Potts in 1850

and called Bleasdale. Potts was a jack of all trades, from joining the Royal Navy at nine and serving on HMS Victory, he was a carpenter and ship's chandler. He was one of the original settlers of the South Australian colony in 1836 and built houses, worked for the first harbor master in a pilot boat and then turned to boatbuilding himself.

Upon acquiring land at Langhorne Creek, he built a bullock-powered sawmill, planted a vineyard, devised a weir and river-flood irrigation system for the vineyard, a red gum wine press and red gum vat system. The Bleasdale estate is still in the hands of the Potts family five generations later. Its signature wine, the Frank Potts Cabernet blend, combines a united nations of varieties – cabernet sauvignon, malbec, petit verdot, cabernet franc and merlot.

Langhorne Creek has also given us the iconic Metala Shiraz Cabernet, now a brand of the megalith Treasury Wine Estates. The original Metala was a mixed farming estate acquired by the Formby family in 1882 and the vineyard was planted in 1891. It is claimed to be one of the world's oldest surviving cabernet sauvignon vineyards, coming on

three years after Penfolds Kalimna Vineyard in the Barossa Valley.

For some time, the Metala estate's fruit was made into wine in the neighbouring family-owned property, Stoneyfell. The original estate continued producing grapes for many years and was relaunched in 1998 as Brothers in Arms by the continuing family, now married into the Adams Family as a vineyard and winery in its own right. The brand label Metala was launched in 1961 and won the first Jimmy Watson Trophy in 1962. It has been a fixture on the Australian wine landscape ever since.

Another notable label is Lake Breeze, where the Follett family has been farming at Langhorne Creek since 1880, grape-growing since the 1930s and since 1987 producing its own wines. The Bernoota is named after the original homestead on the estate and is a shiraz/cabernet blend that has picked up a swag of medals and awards.

Langhorne Creek has a proud history of winemaking and presents a very credible alternative to the usual red wine suspects this winter.

The tasting Three big reds from Langhorne Creek were put to the test.



The first was the 2017 Metala Shiraz Cabernet, which was an impenetrable black purple colour and was chocolate, blackcurrant and spice on the nose. The palate was young and full with chocolate again and mulberry with black peppercorns. Very agreeable and approachable for its price point. A fine house wine.



The second was the Bleasdale Second Innings Malbec 2016, which was purple blood plum in colour and had a floral nose of roses, raisins and whip leather. The palate was ripe dark berry fruits with a hint of leather savoury tones and a firm backbone. Quite different to the violets and jam of Argentine malbec, but a fulsome and satisfying red wine.



The last was the mighty Bleasdale Frank Potts 2015, which is a classic Bordeaux blend and was inky black-hearted in the glass with ruby tinges. The nose was mulberry and mint, red forest fruits and black currant twang. The palate was set upon a firm tannin backbone made for the long haul; this tour de force was a balance of red sweet fruits with a blackcurrant acid cut supported by oak on the frame. Four years young and at least 10 ahead. A fine wine, like the 2010 vintage reviewed in 2014.

Verdict: The best in show was by far the Potts, with grace and style, yet with an iron fist underneath that velvet glove.

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

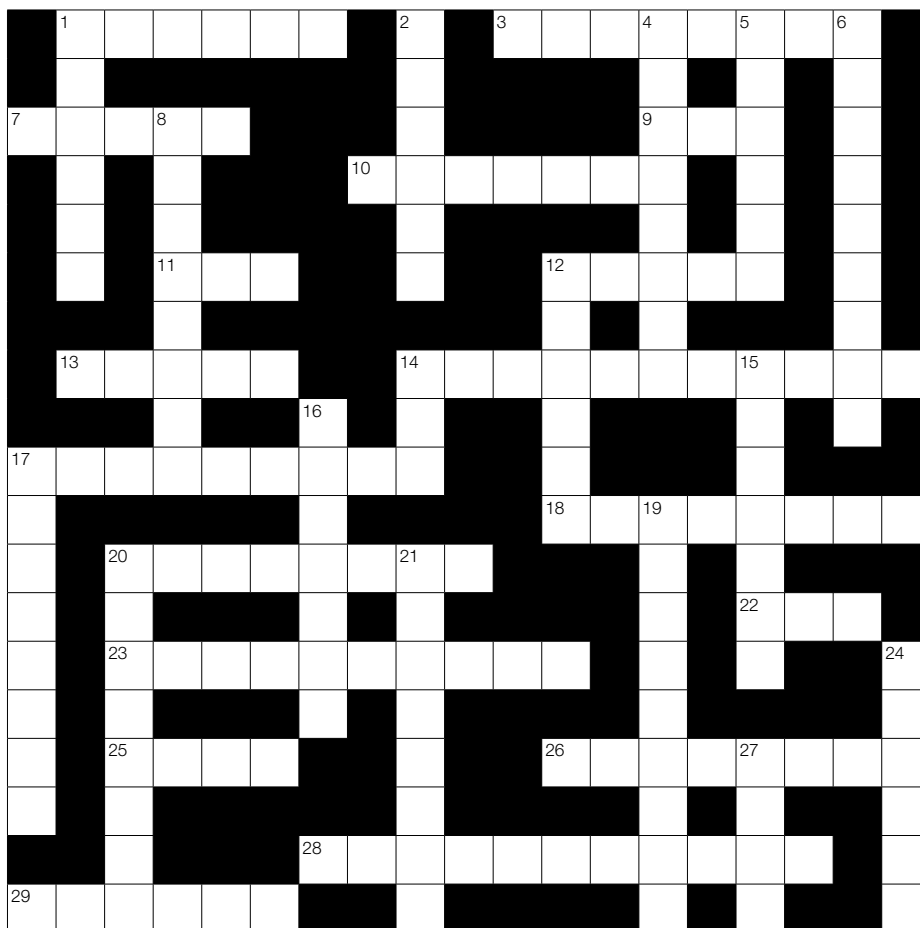
Mould's maze

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



Across

- 1 A person not recorded on the public register as a company director but who manages the company's affairs and is taken to be so under the *Corporations Act*, a director. (6)
- 3 A constructive trust evolves from the verb '.....', not the verb 'construct'. (8)
- 7 A Baumgartner constructive trust operates in a case where the substratum of a joint relationship or endeavour is removed without attributable (5)
- 9 Judicially presided, ... on. (3)
- 10 Disbursements. (7)
- 11 Mutually agreed medico-legal appointment. (Abbr.) (3)
- 12 A person appointed by another to represent them at a meeting. (5)
- 13 A ground by which a consent order may be set aside under Section 79A of the *Family Law Act*. (5)
- 14 A contract of is enforceable against a minor. (11)
- 17 A document acknowledging that a company undertakes to repay money lent to it by the holder of the document. (9)
- 18 The *Criminal Code (Qld)* was recently amended to define murder as including an act done or omission made with indifference to human life. (8)
- 20 Method used in criminal sentencing involving conveying moral instructions. (8)
- 22 A caveat of a person objecting to an adverse possession claim in Queensland lapses unless the caveator commences proceedings in the Supreme Court to recover the lot and gives written notice to the Registrar of Titles within ... months. (3)
- 23 A solicitor who provides services to a firm on a self-employed basis or as a contractor. (10)
- 25 Chancery case involving the two limbs by which third parties could be liable for a breach of trust, *Barnes v* (4)
- 26 Hand-cuffed. (8)
- 28 of a contract can occur when, as a result of a change in the law, performance is rendered illegal. (11)
- 29 First female Chief Justice of the High Court, who dropped out of school at age 15. (6)



Down

- 1 Lord drew an analogy between the length of the Chancellor's foot and the Chancellor's conscience. (6)
- 2 A mistake can derive from a situation in which the parties are at cross-purposes over the meaning of a contract. (6)
- 4 The Court of Petty tried cases pertaining to the recovery of small debts. (Arch.) (8)
- 5 Formally approve and sanction. (6)
- 6 Annexed to an affidavit. (9)
- 8 A claimant has a duty to take all reasonable steps to the loss claimed. (8)
- 12 In some circumstances the prosecution may choose not to charges. (6)
- 14 Indicating a maiden name. (3)
- 15 Convert assets into money. (7)
- 16 Once a court has passed a valid sentence after a lawful hearing, it is generally officio. (Latin) (7)
- 17 A share of the profit of a solvent company paid to shareholders. (8)
- 19 A Title Scheme supports a variation to freehold title by allowing for the inclusion of common areas and facilities within the scheme lot. (9)
- 20 Terminate. (8)
- 21 Rescission will only be granted when restitutio in is possible. (Latin) (8)
- 24 Cite as evidence. (6)
- 27 Provocation will only constitute a defence before there is time for the defendant's passion to (4)

Solution on page 64

Winter is come

Martyred by my entertainment choices

BY SHANE BUDDEN



I have a confession to make: I have neither read, nor watched, any of *Game of Thrones*.

All I know about it is that Boromir is in it and winter is a factor.

I realise this puts me out in the cold (see what I did there; winter really did come!) and completely on my own, but that is OK. I am happy to suffer for my entertainment choices, and indeed have done so before.

For example, I once went to see a movie called *Conquest of the Earth* which was so bad there is no way it could be made today without involving Adam Sandler, Owen Wilson, Ben Stiller and Jim Carrey. Fortunately that gathering would clearly constitute a crime against humanity and the United Nations would prohibit it.

Unfortunately the UN's only power is to issue strongly-worded statements against countries that don't technically exist, such as the Principality of Hutt River, Narnia and New Zealand; so it might be best if as a precaution we sent all four of them to Neptune. I know I would contribute to the Kickstarter page.

Anyway, the movie was so bad that I was the only one in the theatre, so cold and alone is not new to me. Actually, I appreciated it at the time, because being caught seeing that movie may well have made me so socially alienated that I would have had to move to an uncharted Island in the Pacific with Elvis, Harold Holt, the millionaire and his wife.

Conquest of the Earth was actually a semi-sequel to the late '70s TV show, *Battlestar Galactica*. That series had been made to cash in on the *Star Wars* phenomenon but without access to expensive things such as good special effects, competent actors and a plot – but compared to *Conquest of the Earth*, it was *Lord of the Rings*.

Conquest of the Earth was so bad that none of the original *Battlestar Galactica* actors (even those whose careers had been reduced to appearing at kids' parties, doing late-night infomercials and robbing convenience stores) agreed to appear in it. I suspect it was eventually cast by kidnapping people off the street and not letting them go until

they had filmed their scenes. Somewhere in an abandoned studio in Hollywood, locked away, are those who simply had too much integrity to do it.

The point is that I am not too concerned about not knowing anything about *Game of Thrones*. In fact, I felt kind of good about it when I saw ads on the TV for other shows discussing the episode that had just been broadcast. It was as if it were a previously undiscovered paper by Albert Einstein containing a theory of everything, and not just a way of watching porn without acquiring an incriminating browser history. I am glad I wasn't a part of that.

It did leave me out of a lot of conversations at work, however, but this actually proved good preparation for my hernia operation. As those of you who have way more time on your hands than is good for you will recall, I was going to tell you what happened at my hernia operation.

The reason being left out with no one to talk to was good preparation is that around 90% of the awake time I spent at the hospital was hanging out alone, waiting to be taken somewhere else. Again this proved to be a good thing, however, as before surgery doctors feel it is important to remove every scrap of dignity you have, and it starts with your attire.

You have to put on a comical gown that does up at the back, a shower cap and shoes made out of paper. When you see yourself in the mirror in this get-up, you laugh yourself sick – or at least you would if you had any blood supply, but you don't because you are also wearing compression socks.

These are socks of the same overall diameter as a drinking straw but which are made of stretchy material so that they can, with a little effort, be expanded to the diameter of a slightly larger straw. They do for blood flow what independents do for the Senate, although statistically the socks are more likely to pass legislation (or, for that matter, grade three maths).

Doctors will tell you that this attire is required due to sound medical reasons, but they never tell you what those reasons are. I suspect the truth is that they don't want you to sue them if something goes wrong, so they threaten to release pictures of you in surgical garb unless you sign a waiver. Trust me, that plan would work, unless you have a job in which comical attire is accepted, such as barrister or the Pope.

Eventually I was wheeled off to the operating theatre, where I became concerned as there were far more medical personnel and expensive-looking machinery than I would have deemed necessary for an allegedly simple operation. I was going to ask about this but then the anaesthetic hit and I woke up, as near as I can figure, yesterday.

OK, so it was only a couple of hours later, but man that is one good sleep! If you slept like that every night, I reckon you could be mellow and relaxed about any development, no matter how bad – war, global warming, your daughter's boyfriend announcing he has just been appointed Donald Trump's press secretary. I suspect Mike Brady had access to industrial quantities of this stuff, and so when Greg confessed that he had inadvertently started World War Three, Mike gave him a calm talking-to and had him whitewash the fence.

All in all, my operation was a success, and I am back to full speed, despite no longer having a belly button and not – as I had been led to believe by many comics in the '70s – having acquired super powers from radiation emitted by medical machines. I do applaud the fine men and women of our medical profession, and – quite seriously – give thanks to the fact that I live in a country with magnificent medical care. I would also urge you to donate to support their efforts every chance you get.

I know I will; they still have those pictures...

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Crossword solution

From page 62

Across: 1 Shadow, 3 Construe, 7 Blame, 9 Sat, 10 Outlays, 11 IME, 12 Proxy, 13 Fraud, 14 Necessaries, 17 Debenture, 18 Reckless, 20 Didactic, 22 Six, 23 Consultant, 25 Addy, 26 Manacled, 28 Frustration, 29 Kiefel.

Down: 1 Selden, 2 Mutual, 4 Sessions, 5 Ratify, 6 Exhibited, 8 Mitigate, 12 Prefer, 14 Nee, 15 Realise, 16 Functus, 17 Dividend, 19 Community, 20 Discharge, 21 Integrum, 24 Adduce, 27 Cool.

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