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FEATURES

NEWS AND EDITORIAL

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OUTSIDE THE LAW

Vol. 39 No. 10 | ISSN 1321-8794

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Brisbane
10 CPD

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Queensland Law Society®

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The Honourable Catherine Holmes
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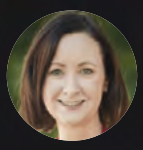

The Honourable Yvette D'Ath MP
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DAY 1–FRIDAY 13 MARCH

Keynote address from the Honourable Justice Walter Sofronoff

PERSONAL INJURIES	PROPERTY	FAMILY	CORE
Claim farming: In focus	Financial literacy in legal practice	Getting back on track: How to manage a serious complaint	Ethics in action: The foundation of a sustainable practice
Year in review: Case law update	Pick your battles: What really matters in a lease negotiation	Family law and faraway places	Low Bono—Making it work in a small firm
WorkCover update: What you need to know	Foreign direct investment: The changing regulatory framework and what this means for your overseas investors	Family advocacy basics	Managing cyber risk for busy professionals
Key issues in psychological injury	Year in review: Case law and legislation update	Child support arrangements	Becoming a leader worth following
Keeping up appearances: Perspectives from the Bar	Body Corporate and Community Management Regulations update	Year in review: Case law and legislation update	Managing psychological risks of vicarious trauma in the legal profession

First Nations in conversation: Voice, treaty, truth

DAY 2–SATURDAY 14 MARCH

Keynote address from the Honorable Yvette D'Ath MP

SUCCESSION	CRIMINAL	COMMERCIAL	CORE
Over my dead body	Year in review: Case law and legislation update	Gen Y to Gen Y: Franchising tips and traps	Creating and maintaining positive and profitable relationships
Estate administration workshop	Navigating Legal Aid	Wage theft: Advising on the proper payment of entitlements	Creating cultural change in the legal profession
What on earth does it mean? The construction of wills including self-made wills and informal wills	Cross-examination masterclass	Year in review: Case law update	The new business model for firms and legal departments
Year in review: Case law and legislation update	Written submissions: An underutilised tool in the criminal law toolkit	Current issues in corporate governance and legal risk	Lawyers as Legal Practice Directors: What you need to know for your Incorporated Legal Practice (ILP)
Protect and respect: Speaking out against elder abuse	Clients, cash and conflicts: In the trenches of criminal law practice	eTrials: Perspectives from the Bar and the Bench	How to create an innovative service culture that clients reward

Ethical Pursuit—The legal gen(i)us edition presented by Julian Morrow

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Heard about Brian Gitta?

Aspire series takes us outside the box

You probably haven't heard of Brian Gitta, but you may in future if his portable, non-invasive device for testing for malaria fulfils its promise.

Indeed, you might even see him picking up a Nobel Prize for medicine – which will be kind of weird since his qualifications are in computer science.

According to the World Health Organisation, 219 million people get malaria every year, and 435,000 of them will die; 90% of those people will be in Gitta's native Africa. To compound the tragedy, malaria is treatable, as long as it is properly diagnosed. This is essential as the drugs which cure it are harmful to people who do not have it.

Diagnoses usually require a blood test, for which people in Africa have to queue for hours – and the results can take up to an hour to analyse, time which those living on the breadline (or below it) cannot afford if they are to keep food on the table. The needles also terrify young kids, many of whom try to refuse the potentially life-saving test.

Brian Gitta thought there might be a better way, and by applying his computing skills to this medical problem, he developed a test which uses light scattering to detect crystalline structures in the blood cells which accompany malaria infection. A light is shone on the finger and the observations made; it takes two minutes and involves no needles. The device is now in clinical trials and has the potential to save millions of lives.

Why I am talking about this in a legal publication (apart from simply to recognise a moment of genius)? Because of the fact that Gitta's solution to a medical problem comes from outside the medical field; it is proof of the concept that cross-fertilisation of ideas from different disciplines can be of immense benefit.

It is that concept which is behind the Aspire Leadership Lecture Series, the second of which will be held on 6 November. By getting insights into leadership from successful leaders in a number of fields, we can look outside of our own box and see what solutions and innovations can be transferred into the legal profession.

That doesn't mean, of course, that there aren't great leaders in our profession, and in this issue you will note an interview with one of them, Federal Circuit Court Chief Judge (and Chief Justice of the Family Court) William Alstergren. QLS Media Manager Tony Keim secured an exclusive interview with his Honour.

In an illuminating and free-ranging discussion we get a great insight into the thoughts of the Chief Justice/Chief Judge, including what we can expect in the future. Very clearly a must-read for all of us, not just family lawyers.

One of the things the interview touches on – and to which his Honour gives some (qualified) support – is the concept of a judicial commission, for which QLS has long called. Chief Justice/Chief Judge Alstergren adds his name to a number of judges who have indicated that they are open to the idea, and it is clearly time for the legal profession as a whole to push for the establishment of such a commission.

The chief benefit of a judicial commission is that of transparency. Queensland's judges, magistrates and tribunal members are among the world's best, but the appointment process is shrouded in mystery. This invites speculation from the media and the public about what may be being hidden, and it undermines confidence in our justice system.

Having a commission which independently assesses candidates and creates a pool of appropriately qualified, learned and ethical potential appointees would give the public confidence that these appointments are made on merit. Pairing it with legislated procedures which mandate that any divergence from that pool be declared and explained in Parliament by the Attorney-General of the day would ensure transparency, as well as perhaps dampen any enthusiasm for those outside of the pool to seek appointment through political connections.

The commission could also be empowered to handle those rare occasions when a member of the Bench may require performance management. Given the incredible levels of stress experienced by those who sit in judgment in our courts and tribunals, I suspect heads of jurisdiction would appreciate a way of addressing such sensitive issues.

Simply put, the growing group of judges who support a commission tells us that now is the time. Queensland Law Society has shown consistent and long-term leadership on this vital issue. I think it is time the legal profession provided a united front on this and I sincerely hope our colleagues at the Bar will support us in calling for a judicial commission.

It is oft said that there is nothing so powerful as a good idea whose time has come; let's find out, shall we?

Bill Potts
Queensland Law Society President

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

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Queensland Law Society

Our cultural journey

Time to make a fresh start

On 25 September 2019, Deloitte Brisbane, supported by Queensland Law Society's Equity and Diversity Committee, hosted a breakfast seminar titled 'Inclusive Leadership – What will your impact be?'.

The key speaker was Lieutenant General (retired) David Morrison AO, former Chief of the Australian Army, Australian of the Year 2016 and Chair of the Diversity Council of Australia, who gave an inspiring, personal and challenging presentation on culture, inclusion, leading change and personal behaviour. David is well known for his video message to all army personnel in 2013, which has had millions of views YouTube. If you haven't seen this 3½-minute clip, I recommend you take the time to do so.

I was privileged to attend the event and hear David speak, and also to provide the closing remarks. In doing so, and having heard David share the culture change journey undertaken by the Australian Army, I was able to reflect on the work that QLS has been doing in the area of inclusion, diversity, workplace behaviour, culture and wellbeing.

Recently, I have been able to present on these topics to many members at CPD events on the Gold Coast, in Townsville, Rockhampton and Hervey Bay. At these events I have remarked that I am incredibly proud of the legal profession, but also that I have concerns that there are cultural aspects within the profession which lead to high survey responses of harassment and bullying, and high numbers of mental health presentations. At the same time, surveys show that the profession records low levels of formal reporting rates and high levels of bystanding to inappropriate behaviour in the workplace. This overall situation must change.

As CEO, I have spoken and written about these issues over the last 18 months and now, with the support of QLS Council, we are mobilising more resources to deliver change programs to build healthy and sustainable workplace cultures in our profession.

This month, we are convening a broad representative focus group to workshop the extent of cultural change we think is required in the legal profession to ensure a safer and healthy profession, including what sort of education and awareness raising is required, and what regulatory framework is necessary to ensure that appropriate behaviours and cultures are underpinned. This will mark the start of our strategic culture change journey. Many initiatives will flow from this over the next year.

We also work with the Law Council of Australia and other state and territory law societies to share information and discuss initiatives and approaches in these areas, so that as a national profession we develop and implement effective responses and changes.

I look forward to sharing the outcomes of the focus group and engaging with more members of the profession on this topic. If there are any members particularly interested in contributing to this work, they would be welcome to contact me at ceo@qls.com.au.

Election update

I congratulate Luke Murphy on his election as President of Queensland Law Society and Elizabeth Shearer as Deputy President. Only one nomination had been received for President by the close of nominations.

One candidate exercised their right to withdraw their nomination for the role of Deputy President following the close of nominations. In accordance with rules 33(1) and (2) of the *Legal Profession (Society) Rules 2007*, the Returning Officer therefore declared Elizabeth Shearer duly elected as Deputy President.

Voting for the remaining positions of Vice President and members of Council was still in progress at the time of writing, due to *Proctor*'s print deadline, but I congratulate the successful candidates and thank all candidates for their participation.

It remains critical that members take an interest and, whenever possible, become involved in their Society and its work on behalf of members and the community.

The successful candidates in this year's election will commence their roles from 1 January 2020.

AGM reminder

There's plenty happening in the lead-up to the end of the year, including the QLS annual general meeting on 11 December, which I would like to invite you to attend.

This month begins with our popular Succession and Elder Law Conference, being held at Surfers Paradise Marriott Resort and Spa, and there's a Mental Health First Aid (MHFA) officer course on 11 November, as well as the Toowoomba Intensive on 12 November.

Following that is the 2019 Legal Profession Breakfast on 14 November, while in December there's the QLS Early Career Lawyers Christmas party (5 December) and Brisbane Specialist Accreditation Christmas Breakfast (12 December), along with plenty more events.

I hope you can be a part of this busy program as we wrap up 2019.

Rolf Moses
Queensland Law Society CEO

YOUR GROWING LIBRARY

Your library, the Supreme Court Library Queensland, continues to grow, with more titles regularly added to its print and online collections. Here's the top 10 most used print titles in the library, based on re-shelving statistics:

1. ***QUEENSLAND GOVERNMENT GAZETTE***
2. ***COMMONWEALTH LAW REPORTS***
3. ***QUEENSLAND REPORTS***
4. **JUDGMENTS (SUPREME COURT OF QUEENSLAND)**
5. ***ENCYCLOPAEDIA OF FORMS AND PRECEDENTS***
6. ***THE AUSTRALIAN ENCYCLOPAEDIA OF FORMS AND PRECEDENTS***
7. ***WILLS, PROBATE AND ADMINISTRATION PRACTICE* (QUEENSLAND)**
8. ***THE ALL ENGLAND LAW REPORTS***
9. ***THE AUSTRALIAN LAW JOURNAL***
10. ***STATE REPORTS, QUEENSLAND***

More facts and figures for your library, page 45

Queensland Law Society

Queensland Law Society Inc.
179 Ann Street Brisbane 4000
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Common law 'not so common'

Dr Danielle Ireland-Piper, Dr Michael Albrecht, Chief Justice Susan Kiefel AC, Executive Dean of the Faculty of Law Professor Nick James, Professor William Van Caenegem and Professor Brenda Marshall. *Photo courtesy of Bond University.*

High Court of Australia Chief Justice Susan Kiefel AC presented the 2019 Gerard Brennan Lecture at Bond University last month.

Her Honour's address, 'Just how common is the common law? A historical and comparative perspective', included a discussion of the divergence of the common law in former British Empire colonies away from that of England.

"In the early 20th Century the Privy Council was the highest appellate court for a quarter of the world's population but now it fulfils that role for just 0.1% of that population," her Honour said.

In Australia, the move towards judicial independence had occurred in the early 1960s and was emboldened by the Privy Council itself in the 1966 case of *Uren v John Fairfax and Sons*.

"The Privy Council's judgment made it clear that it would not now overrule High Court (of Australia) decisions merely because they differed from English decisions," the Chief Justice said. "It would do so only if it considered them to be wrong. Divergence was for the first time expressly sanctioned."

Appeals to the Privy Council from the High Court were abolished in 1975, and from any Australian court in 1986.

Bond University's Faculty of Law inaugurated the annual lecture in 1998 in honour of Sir Gerard Brennan AC KBE QC, the 10th Chief Justice of Australia.

Chief Justice Kiefel said it was an honour to present the lecture as she had known Sir Gerard since her days as a law student and had been a beneficiary of his kindness.

"He has made a very significant contribution to the law as a judge and to its understanding in his extensive public speaking over the years."

Election results now available

The full results of the Queensland Law Society 2019 election are now available at qls.com.au/election.

At the close of nominations, only one nomination was received for President. Following the close of nominations, one candidate exercised their right to withdraw their nomination for the role of Deputy President. Therefore the returning officer declared, in accordance with rules 33(1) and (2) of the *Legal Profession (Society) Rules 2007*, that Luke Murphy was duly elected as President of Queensland Law Society, commencing 1 January 2020, and that Elizabeth Shearer was duly elected as Deputy President, commencing 1 January 2020.

The counting of votes for the positions of Vice President and ordinary member of Council is now complete, and Queensland Law Society congratulates the successful candidates.

QLS welcomes new magistrates

Queensland Law Society last month applauded the State Government's appointment of four new magistrates, including well-known Brisbane solicitor Cameron McKenzie and Legal Aid Queensland's Rosemary Gilbert.

QLS President Bill Potts also praised the Government for elevating two acting magistrates to permanent roles – long-serving Acting Magistrate Robert Walker at the Emerald Magistrates Court in Central Queensland, and former solicitor Richard Lehmann to a permanent role in Townsville.

Mr Potts said he was delighted that Cameron McKenzie – the current Deputy Chair of QLS Domestic and Family Violence Law Committee – had been appointed as a magistrate to his home court at Southport for the next two years, while Ms Gilbert would sit in Brisbane for a minimum of two years.

"QLS has consistently supported the need for more magistracy appointments in regional Queensland and we applaud the Government for recognising that in filling roles in Central Queensland and the Gold Coast," Mr Potts said. "I congratulate all three appointees on their achievements to date and for their appointments as magistrates for Queensland."

Exploring and building cultural comprehension

Queensland Law Society recently joined with the Townsville District Law Association (TDLA) in a cultural partnership event focusing on the legal experience of Aboriginal and Torres Strait Islander clients and witnesses in the criminal justice system.

Lincoln Crowley QC – Queensland's first Indigenous Queen's Counsel – delivered a technical and culturally sound presentation, highlighting the issues and challenges faced by Aboriginal and Torres Strait Islander people in relation to key cultural concepts, including communication barriers, social customs and behaviours, and interpreting Indigenous nomenclature.

He was supported by QLS First Nations Legal Executive Anita Goon, who lifted the audience's understanding of the reconciliation landscape and how they too could be a part of this increasing movement. Anita delivered statistical data abstracted from the Australian Reconciliation Barometer and the Impact Measurement Report conducted on an annual basis by Reconciliation Australia, which shows the areas in which we are doing well and where there is room for improvement.

Anita also highlighted the significance of implementing cultural initiatives within workplaces by offering tips and insights on how leaders in the profession can become change agents.

The event was enriched by a Welcome to Country delivered by Uncle Michael Illin, Traditional Owner of the Bindal people.

In October last year, QLS also partnered with the TDLA to support the legal and First Nations community for an exclusive screening of *Prison Songs*, a documentary on the effects of institutionalisation on Indigenous Australians.

If you or your firm are interested in reconciliation presentations, please email rap@qls.com.au.

ON THE INTERWEB

Join the conversation. Follow and tag **#qlsproctor** to feature in *Proctor*.

HAVE YOUR SAY
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FACEBOOK

LH Law
7 October at 19:45 ·

Like as your Page

I had a great couple of days attending the Queensland Law Society property law conference recently. It is the premier conference for property lawyers in Queensland each year.

At LH Law we value the importance of personal development and this excellent property law conference provided the perfect platform to continue to enhance our knowledge of property law, together with improvements in software to streamline processes for our clients.

There was a lot of great content over the 2-day conference and I left feeling inspired and ready to further assist clients with their property transactions.

Queensland Law Society, Sally Stride, Shell Hardman and 12 others — 1 Comment 3 shares

Townsville District Law Association
9 October at 23:13 ·

Like as your Page

Wow! This month's Queensland Law Society Proctor magazine is full of TDLA activities, seminars and events. Massive thanks to our partners, lecturers, guests and particularly our members who show up and makes these events successful... and newsworthy!

Marrawah Law
Yesterday at 14:38 ·

| Nareeta Davis – Paralegal |

We are incredibly proud to announce that Nareeta has joined the Marrawah Law team on a part-time basis. She has hit the ground running. We have seconded her to Holding Redlich to provide her with further training and experience on large scale projects. We sincerely thank Holding Redlich for their continued and meaningful support in providing additional opportunities to our staff and firm.

Nareeta was recently featured in the Queensland L... See more

PROFILE

Nareeta's shining progress

BY JOHN TEERDS

In 2018, the inaugural Queensland Law Society award for the Queensland First Nations Legal Student of the Year was won by Nareeta Davis of Cairns.

"I felt incredibly shocked to receive this accolade, as I was just one of many other individuals who were deserving and most inspirational," she said. "Personally, it was most rewarding, as I had worked so immensely hard to juggle working, motherhood, studying via correspondence and being actively involved with many volunteering activities."

Since receiving the award early last year, Nareeta has completed her law degree and been admitted. She is employed at BDO in Cairns, in the Advisory Division.

"I am passionate in assisting local communities and working towards positive and holistic change," Nareeta said. "I am involved in Indigenous and non-Indigenous boards, assisting with policies, procedures and responsibilities for the successful operation of the organisations."

InfoTrack
9 October at 12:22 ·

The insights of Tracey Whyte (Piper Alderman), Marie Sheehy (Calvados + Woolf Lawyers), David Bowles (Queensland Law Society) and Jason Jones (Corrs Chambers Westgarth) have been incredibly insightful. Strategies on innovation, cultivating business growth, ethics and using technology to support the growth of your firm.

#Cultivate2019

Queensland Law Society, Brent Cooper, Thiago Boche and Lee Baillie — 41 views

TWITTER

INSTAGRAM

25-year members honoured

Fourteen 25-year membership pin recipients led the guest list at the Brisbane Celebrate, Recognise and Socialise function held at Blackbird Private Dining and Events on 19 September.

Ears listen at Minds Count

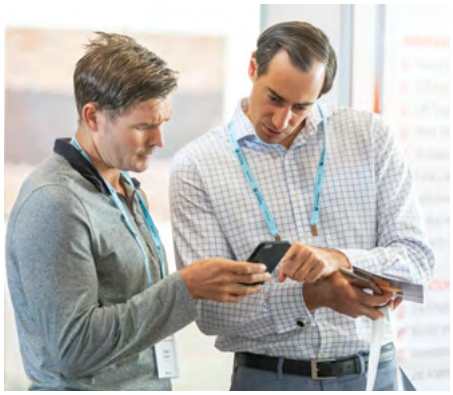
Queensland Law Society teamed up with the Bar Association of Queensland to present the Minds Count Lecture at Law Society House on 10 October. The presenter was King & Wood Mallesons partner John Canning, with all proceeds from registration going to the Minds Count Foundation.

Being a better advocate

The final Modern Advocate Lecture for 2019 on 10 October drew a substantial crowd to hear Supreme Court of Queensland Justice Soraya Ryan discuss the attributes and qualities of an advocate. Her Honour referenced the work of David Ross QC and, in particular, brought attention to the need for advocates to engage with the Bench with clarity and precision. This very popular series will return in 2020.

PERSONAL INJURIES – HOLD OR FOLD?

The Honourable Duncan McMeekin QC closed this year's Personal Injuries Conference with a well-received address, 'When to hold and when to fold', which offered his insights on reaching settlement, based on his experience practising as an independent arbitrator and mediator in PI matters. More than 130 people attended the 11 October conference at the Brisbane Convention & Exhibition Centre.



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The cost of bearing witness

Vicarious trauma in the legal profession

BY REBECCA NIEBLER

Being in a position to provide meaningful advice and support to vulnerable people is probably one of the most rewarding features of being a lawyer.

For many solicitors, the ability to guide their clients through some of the most difficult challenges of their lives is part of what once pulled them towards a career in law.

However, bearing witness to the pain of others comes at a price, and solicitors who spend a lot of time hearing about their clients' distressing circumstances and the horrifying events that may have eventually led them into your office rarely remain unaffected.

Maybe some of the following sound familiar to you.

There are the crime scene photographs that keep flashing up in your mind, for example. Or the case of organised child sexual abuse that you cannot forget, and the detailed allegations which make you worry about the safety of your own children much more than you used to. The pained look in the eyes of a client telling you about the acts of domestic violence they had to endure, and the permanent disfigurement it left them with.

They all make you feel emotionally drained, maybe angry and tense, strangely detached from others, or impatient with colleagues and family members. Maybe the experience of a whole night of deep, restful and nightmare-free sleep has become a sorely missed thing of the past. Or you have noticed that one or two glasses of wine in the evening don't do the job of relaxing you anymore – the bottles seem to empty themselves lately.

Maybe you cannot get rid of the dreadful, heavy feeling of being in the wrong job, the unshakable suspicion of being useless to your clients, unable to make any positive difference to them at all. Or maybe you just feel a bit numb these days.

If any of this resonates, you may be asking yourself where to put all these distressing thoughts, memories, internal pictures and sounds. How do you stop them from invading not only your time at work, but increasingly flooding your personal life too? How long can you shut them off, or try to compartmentalise them, before the walls collapse and allow the toxic content to contaminate your life?

What is vicarious trauma?

The scenarios described above are examples of vicarious trauma experienced by solicitors. Sometimes also referred to as secondary traumatic stress, vicarious trauma refers to the painful and negative inner transformation caused by ongoing, empathic engagement with trauma victims or traumatic material, combined with a commitment or responsibility to help them – which makes it a real occupational hazard for lawyers.

Of course, many other professional groups – such as mental health professionals, emergency staff, social workers and counsellors – are also at risk of vicarious trauma. What differentiates most solicitors from these groups, however, is the fact that legal professionals usually do not have the advantage of in-depth trauma-specific training and access to ongoing peer and professional support. This increases their susceptibility to negative effects and psychological impairment brought on by cumulative exposure to traumatic material.

Vicarious trauma is an insidious force that can build up over time with cumulative exposure to sources of secondary traumatisation – in other words, taking on many highly distressing cases over the years, and dealing with a large amount of traumatic material and disturbing client stories.

Over time, in small steps, it can change the way you think and feel about yourself and the world, your place in it, your personal safety and that of your family, the quality of your relationships with clients, colleagues and loved ones, and the level of trust and intimacy you are able to allow in your life.

Jean Koh Peters, a clinical teacher at Yale Law School and a leading expert for trauma in the legal profession, poignantly describes vicarious trauma as "more than just the stress of overwork; it is a disintegrating ray gun aimed at your sense of who you are, what you think the world is like, and where you find meaning in the world".[1]

A number of studies showing the alarmingly elevated levels of depression and anxiety among Australian solicitors are a disturbing reality. For example, the Brain and Mind Research Institute of the University of Sydney found that around 31% of solicitors in its study suffered from high-to-moderate depression levels.[2] These figures were confirmed in another study by Chan, Poynton and Chan who also found that about 28% of the surveyed legal professionals suffered from moderate-to-extremely-severe levels of anxiety.[3]

The missing connection here may be the link to vicarious trauma, and how much of the reported psychological distress can be attributed to, or affected by, secondary traumatic stress. While research in this field is still new and only thinly spread, it is reasonable to assume that vicarious trauma is likely to play a role in the elevated levels of lawyers' vulnerability to mental health issues.

Who is at risk?

Vicarious trauma can affect any solicitor who empathically interacts with traumatised clients and/or is repeatedly exposed to distressing material (for example, photos, video footage, and graphic verbal or written testimonials of violent, distressing and emotionally painful events).

However, particular groups within the legal profession may have a higher risk because they are more frequently confronted with traumatised clients and distressing materials and documents; for example, legal professionals working in criminal law or family law.

Vrklevski and Franklin conducted a study to find out if levels of vicarious trauma among criminal lawyers were higher than for non-criminal solicitors.[4]

The results showed significant differences between the two groups in the effects of vicarious trauma, as measured in higher subjective levels of distress, depression, anxiety, stress and negative cognitive changes in relation to safety and intimacy for the criminal lawyers.

A second study by Maguire and Bryne looked into the extent to which exposure to traumatic

information affects legal practitioners as compared to mental health professionals.[5] The researchers found that lawyers reported significantly higher levels of thoughts and perceptions indicative of vicarious trauma (for example, "I find it difficult to deal with the content of my work", and "It is hard to stay positive and optimistic given some of the things I encounter in my work"), and experienced more negative psychological symptoms, including depression, anxiety and stress, compared with mental health professionals.

How can you protect yourself?

It is important to understand that vicarious trauma is an expected reaction to witnessing someone else's trauma – it is a perfectly human response and not a sign of weakness, lack of adequate professional detachment or any other kind of inadequacy within the helping person. In other words, if you do not have an emotional response to the graphic description of the suffering of others, this does not make you a better lawyer but rather questions your humanity – only automatons and sociopaths are devoid of empathy.

Having said that, it is possible to strengthen your protective psychological resources to make it less likely to be affected by the negative, destructive consequences of bearing witness to your clients' traumatic experiences.

The well-established mitigating mechanisms used by many helping professions (for example, psychologists, counsellors and social workers) include comprehensive training on emotional self-care strategies, as well as ongoing (and usually compulsory!) professional support and supervision sessions.

This includes ongoing reflection – supported and facilitated by a trained supervisor – on one's professional practice as well as critical analysis of the impact of associated experiences on thoughts, emotions and behaviour.

This type of supervision is different from technical coaching or management in that the focus is on working through the personal impact of the emotionally challenging and complex situations that arise as part of working with traumatised clients. The aim is to ensure the practitioner's ongoing effectiveness in their role, enable professional and personal growth, and remain accountable to professional ethical standards.

Unfortunately, not many solicitors will have this type of regular psychological support available to them. This makes it even more critical to connect and debrief experiences with colleagues and peers on an ongoing basis and in a safe, judgment-free setting. Bottling things up or engaging in maladaptive coping strategies (for example, self-medicating with alcohol and drugs, or isolating oneself) will make things worse and allow the symptoms of vicarious trauma to flourish.

Employers also have a responsibility to mitigate psychological risks for their staff, such as by monitoring and limiting exposure to highly distressing cases and materials, regularly checking in with employees, and enabling and encouraging ongoing support mechanisms such as peer networks, access to coaches or mentors, and appropriate training (for example, on vicarious trauma, psychological resilience and mental health).

For the individual, well-developed positive self-care strategies are of key importance. While the fundamentals – including regular physical exercise; nourishing your body with healthy, nutritious food; and getting sufficient sleep (seven to eight hours a night for most adults) – create a good starting point, strategies need to go beyond this and also include a focus on maintaining strong social connections with family and friends, pursuing hobbies and interests outside work, taking regular breaks, strengthening self-awareness skills to recognise the onset of signs and symptoms of stress as well as their triggers, learning personal relaxation techniques, and establishing a mindfulness or self-reflection practice.

Self-care, in this regard, is not a luxury or a nice-to-have. It is an absolute necessity, an ethical responsibility and a hallmark of professional competence. It's a fundamental skillset that will enable you to remain effective in your role to serve and support your clients to the best of your abilities.

See qls.com.au > For the profession > Resilience and wellbeing > Resources for more help and information.

Rebecca Niebler is a Queensland Law Society Organisational Culture and Support Officer.

Notes

1 Peters JK, Silver MA and Portnoy S, 2004, 'Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion'. *Touro Law Review* 19. 847-873.

2 Kelk NJ, Luscombe GM, Medlow S and Hickie IB, 2009, 'Courting the blues: Attitudes towards depression in Australian law students and lawyers', Sydney, Brain & Mind Research Institute.

3 Chan J, Poynton S, and Bruce J, 2013, 'Lawyering stress and work culture: An Australian study', *UNSW Law Journal*, 37:3. 1062-1102.

4 Vrklevski L and Franklin J, 2008, 'Vicarious Trauma: The Impact on Solicitors of Exposure to Traumatic Material', *Traumatology*. 14. 106-118.

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In November...

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

07 Verification of identity

Essentials | 12.30–1.30pm | 1 CPD

Online

Verification of identity (VOI) has fast become a topic of contention and confusion among practitioners. Join Peter Unkles, the individual responsible for implementing VOI education and training across Australia Post nationally, and QLS Ethics and Practice Centre Director Stafford Shepherd as they discuss the practical and ethical considerations in VOI.

PS

11 Mental Health First Aid (MHFA) Officer Course

Essentials | 8.30am–1pm | 4 CPD

Brisbane

Increase your understanding of mental health issues and learn how to recognise and assist your co-workers in need through the application of evidence-based treatments and support. This course, presented by Cooper Grace Ward Partner Belinda Winter, is purpose built for the legal profession and consists of eLearning and a face-to-face session. Places are strictly limited.

PS

12 Toowoomba Intensive

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

Toowoomba

Stay ahead of the curve and adapt to change with confidence. This year's innovative program is designed to transform the way you practice, keep you informed, and connect you with your profession. It features topical sessions presented by revered experts in their fields, including members of the judiciary.

PLE PM&BS PS SL

12 Toowoomba Celebrate, Recognise & Socialise

5–7pm

Toowoomba

Catch up with colleagues and connect with your local profession in a relaxed setting. This event will also be celebrating membership milestones for a group of local members. Join us in celebrating their achievements as they receive their pins.

19 Debt recovery essentials

Essentials | 8.30am–12.30pm | 3.5 CPD

Brisbane

This practical workshop will give you the essential skills and knowledge for debt recovery matters. Topics covered include debt collection, bankruptcy and winding up processes.

PS SL

21 Practice Management Course: Sole practitioner to small practice focus

21–23 | PMC | 9am–5.30pm, 8.30am–5pm, 9am–1.30pm | 10 CPD

Brisbane

Develop the essential managerial skills and expert knowledge required to manage a legal practice. Learn the art of attracting and retaining clients, managing business risk, trust accounting, and ethics in the new law environment.

PLE PM&BS PS SL

29 Solicitor Advocate Course: Advanced – cross-examination and argument

29–30 | Solicitor Advocate Course
5–7pm, 8.30am–4.30pm | 9 CPD

Brisbane

This practical and interactive workshop is an extension of the Solicitor Advocate Course: Building on foundations workshop. It concentrates on skills in questioning witnesses, primarily in cross-examination, based on final argument in support of case theory.

PLE PS SL

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

MASTERCLASS Advance your skills and knowledge in an area of practice

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

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

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

INTRODUCTORY Understand key concepts and important aspects of a topic to better support your team


Derek Pocock


Jim Peterson


Tanya Denning


Carly Brailak


Rachel Hamada


Johan Engelbrecht


Kate Archer


Matthew Jones


Chloe Houghton

Career moves

Baker McKenzie

Baker McKenzie has recruited two partners and two associates for its corporate group, and another partner from Melbourne.

Derek Pocock and **Jim Peterson** have joined the corporate group in Brisbane and will focus primarily on capital markets and mergers and acquisitions (M&A).

Derek's key area of interest is capital markets, working regularly with clients in the energy and resources sectors, particularly those in the oil and gas, and electricity sectors.

Jim focuses on M&A, regulatory matters, ASX compliance and corporate compliance, and capital raisings. He has extensive experience in the resources, mining and automotive sectors, and is a leader in corporate governance.

The firm has also welcomed associates **Adrienne De Bruyn** and **Lisa Houston**, who join Derek and Jim as part of a team move to its Brisbane office. Both are also focused primarily on the capital markets and M&A space.

Baker McKenzie has also announced the appointment of **Tanya Denning** as a partner.

Tanya joins the firm from Melbourne, where she has focused on energy, renewables, energy storage, utilities and mining, and acted on leading LNG, oil and gas, mining and energy projects and transactions. She is the President of AMPLA, the association of energy and resources lawyers.

Clifford Gouldson Lawyers

Clifford Gouldson Lawyers has welcomed **Carly Brailak** to the team as special counsel in Toowoomba.

Carly has more than 17 years' experience in property and commercial law with large legal practices, and most recently was running her own practice in Brisbane's west.

Carly has particular expertise in assisting clients achieve successful outcomes with property development projects including the BTP Westlink Green Precinct at Darra, the Quest Hotel at Eight Mile Plains, the Brothers Sports Club at Bundaberg, and the residential community titles development M25 Sherwood.

Cronin Miller Litigation

Rachel Hamada has been appointed as a solicitor at Cronin Miller Litigation.

Since her admission in 2014, Rachel has practised across Australia in commercial litigation, debt recovery, corporate insolvency, and internal and external dispute resolution. Rachel's experience extends from working with large publicly listed companies and government organisations to small businesses, liquidators, trustees and individuals.

Garland Waddington

Experienced South African commercial law solicitor **Johan Engelbrecht** has joined Maroochydore-based law firm Garland Waddington.

Johan has almost 30 years' experience, focusing on commercial and business law, including retail and commercial leasing and sales, purchases of businesses, and residential conveyancing. Johan was admitted as a lawyer in the High Court of South Africa, Gauteng North Division Pretoria in 1991, and went on to open his own practice, which is still being run by his son and daughter. He was admitted in Australia in 2011.

Macpherson Kelley

Macpherson Kelley has welcomed **Kate Archer** to the firm's commercial team as a senior associate.

Kate has worked for more than 17 years in boutique and mid-tier commercial law firms, and has extensive transactional and advisory experience across a variety of disciplines, with particular emphasis in commercial, banking and finance, and property areas.

Her experience includes drafting and advising on complex hybrid debt/equity arrangements, corporate and trust structuring, and all aspects of high-value corporate, commercial and property acquisitions and sales.

Steindls Lawyers & Notary

Steindls Lawyers & Notary has announced the promotion of **Matthew Jones** to partner. Matthew commenced his career at the firm in 2014 and has been made a partner within the firm's litigation department, where he practises primarily in property, body corporate, commercial and estate disputes.

The firm has also announced the promotion of **Chloe Houghton** to senior associate. Chloe has experience in a broad range of commercial matters, including property law, wills and estate planning and commercial 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.

Our 2018-19 annual report

Highlights show a member-focused QLS

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

2018-19 has been a year of significant achievement for Queensland Law Society.

Across our organisation, we have delivered on some of our long-held goals, implemented significant projects, and realised bold plans as an effective and cohesive team. We are excited to share our progress towards becoming a truly member-focused organisation in our latest annual report covering the 2018-19 financial year.

It is particularly exciting to note that the Society's membership mirrors the demographic breakdown of the profession as a whole. With 52% female and 48% male members, and more members at early stages of their careers than ever before, we are excited for a future that is representative of gender balance and full of promise.

Our challenge will be to keep practitioners engaged in the law throughout their careers; a goal we are approaching with zeal as we look towards 2019-20 with a number of key projects, including realigning our member value proposition around key member segments.

Advocating for good law

Engaging members of the profession via our policy and membership committees and working groups remains one of the Society's strengths and is of the utmost importance to us. There are more than 350 volunteer members who make up our 26 standing policy and membership committees and working groups. They assist us in our vision for good law, good lawyers and the public good.

The commitment of members who sit on these committees (on a voluntary basis) is vital to our success. Our legal policy committee members held 128 committee meetings during the 2018-19 financial year. The Society received 244 requests for comment, attended 175 stakeholder consultations, made a total of 226 legal policy submissions, attended and provided evidence at 17 parliamentary committee public hearings and received 286 mentions in *Hansard* as a result of this legal policy work.

Promoting the value of solicitors in the community

In 2018-19, we also embarked on a substantial investment in communicating the many reasons to engage a solicitor to members of the public via our 'Seek legal advice' advertising campaign.

The campaign used creative assets produced by the New South Wales Law Society that had already proven successful in that market. This saved significant member funds and enabled us to responsibly deploy our resources to secure premium advertising placements.

In Queensland, we secured heavily discounted placements on commercial television, radio, outdoor and social media. In total, the media investment for this campaign was $306,022. The value delivered (excluding digital placements) significantly exceeded this spend, totalling $1,330,654. During the campaign, we achieved an increase of more than 3524% in the number of searches each week on the QLS 'Find A Solicitor' web search tool.

Educating good lawyers

Every CPD event offered by the Society in 2018-19 was carefully developed with our members' everyday practice, compliance, and wellbeing needs in mind.

During the year we welcomed 5500 members of the Queensland legal profession as delegates to our 96 CPD events. We worked to provide this education flexibly with face-to-face, livecast and on-demand recordings available for many CPD events. In total, 385 CPD hours were delivered, helping practitioners in Queensland meet their CPD requirements with high-quality, up-to-date education in their specialist area or on core legal practice topics. Additionally, 146 practitioners graduated from the QLS practice management course and 18 solicitors joined the Society's community of 994 accredited specialists in 2018-19.

New and interesting ways to keep up to date

Proctor has long been QLS's flagship publication, and in 2018-19 it received a facelift. Members asked for a more dynamic presentation of the unique mix of legal news, opinions, and legislation updates and we delivered in April 2019 with the first edition of our new-look publication.

We also welcomed a new title to the QLS stable this year in First Reading. In this new legal policy blog, members of the legal profession can access up-to-date information on the progress of Queensland Law Society's legal policy and advocacy work. Our bite-sized updates succinctly summarise the changes proposed to Bills and Acts and outline the Society's position on behalf of Queensland's legal profession.

With 52% female and 48% male members, and more members at early stages of their careers than ever before, we are excited for a future that is representative of gender balance and full of promise.

Connecting throughout the state

Throughout 2018-19, we continued to grow our engagement with regional practitioners by facilitating events where they could come together to learn and engage with peers, leaders in the profession and the Society.

With 14% of our membership residing outside the south-east corner of Queensland, it's clear that we need to continue to find more ways to connect with practitioners in regional areas. Many of the events that formed part of our engagement during the year recognised the significant contribution of QLS members who have been long-serving members of their communities with the presentation of 25-year and 50-year membership pins, and we further acknowledge their contribution in this report.

The future of our profession

Our annual report also discusses our focus on the next generation of legal practitioners. We are encouraging student members and young lawyers to access more from the Society.

Our Legal Careers Expo grew to showcase 40 employers of legal graduates, up from 38 in 2018, and welcomed 585 students (2017-18: 497).

2019-20 will see the Society increasing our focus on lawyers at early stages of their careers as we refine ways to engage and support these members throughout their career in the law.

Mitigating cybersecurity risk for Queensland law firms

A recent sharp increase in cyber fraud and data loss has led to significant losses to firms and clients. QLS and Lexon have both issued warnings about the risk of cyber attacks. These have helped to reduce the incidence of successful diversion of trust funds to some extent, but loss of confidential data continues. In 2018-19 QLS provided significant education and tools to enable firms to build a security culture among leaders and staff, and to close the most commonly exploited security gaps.

Queensland Law Society's strategic and operating plans form its short- and long-term roadmaps and the end of the 2019 financial year marks the halfway point in our 2017-21 strategic plan. We commend the annual report to you and invite you to read the full document (qls.com.au > About QLS > Annual Reports).

We look forward to continuing to report on our progress towards 2021 in our next annual report for the current financial year (2019-20).

HUNG OUT TO DRY?

Our colleagues in New Zealand have come under the growing dominance of an AML/CTF compliance regime. When will it come for us and will solicitors be hung out to dry?

BY PIP HARVEY ROSS

This year's re-election of the federal Coalition Government brought with it the likelihood of continued expansion of the anti-money laundering/counter terrorism financing (AML/CTF) regime.

The Government reaffirmed its commitment to the regime following the release of the Financial Action Task Force (FATF) report in 2015 which criticised Australia for failing to regulate non-financial services, such as lawyers, and raised a number of other issues.

TRANCHE 2 – WHAT IT WILL MEAN FOR PRACTITIONERS

Tranche 2 of the reforms has been touted as covering designated non-financial businesses and professionals with similar vulnerabilities to the financial sector, including real estate agents, accountants and legal practitioners. Tranche 2 should also include an extensive simplification, streamlining and enhancement of the AML/CTF regime.

The introduction of the regime means that practitioners could be at risk of criminal proceedings, disciplinary action by relevant bodies, and potential civil proceedings brought by clients or others. This has been the experience in the United Kingdom, where a regime has been in place for many years. The New Zealand profession became AML/CTF-regulated from July last year (*see panel over page*).

The inherent conflict between obligations under the regime to report on client transactions and client legal privilege is of particular concern. Queensland Law Society and the Law Council of Australia have made a number of submissions highlighting this point and raising concerns about the effect of an erosion of the client-lawyer relationship and the independence of the legal profession.

If Tranche 2 goes ahead as planned, it will be a balancing act for practitioners to comply with the new obligations while still protecting a client's right to confidential advice and respecting private information that the lawyer believes to be privileged.

QLS survey figures from 2017 indicate that the cost of annual compliance for law firms is likely to be significant. For larger firms, the cost is likely to be around $748,000 a year; for medium firms, around $523,000; and $119,000 for small firms.

The explanatory notes to the *Anti-Money Laundering/Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) indicated that a Tranche 2 of the legislation, to regulate a range of non-financial transactions provided by accountants, lawyers and real estate agents would be introduced once the implantation of Tranche 1 had concluded. Over a decade has passed and we are yet to see a Bill for Tranche 2.

TRANCHE 1.5

The Government has instead committed to introducing Tranche 1.5 of the legislation to implement recommendations from the 2016 statutory review of the regime. This 'transitional' legislation will include measures to simplify the secrecy and access provisions in the AML/CTF Act to provide greater flexibility for the use and disclosure of financial intelligence to a range of government, foreign and industry stakeholders; consolidate and simplify existing reporting requirements; clarify aspects of Australia's money-laundering offences; and expand the ability of reporting entities to rely on customer identification procedures by a third party in certain circumstances.

The Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill is due to be introduced but is not listed to receive parliamentary passage before the end of 2019. The Bill does not include any form of regulation of the legal profession.

TRANCHE 1

The AML/CTF regime was introduced to bring Australia into compliance with international standards published by FATF, reduce the risk of Australian businesses being misused for money laundering, and assisting law enforcement agencies to collate information which may be linked to money laundering, terrorism financing and other serious crimes. The regime aims to deter, detect and respond to financial criminality and terrorism-financing activities by imposing due diligence and reporting obligations on certain industries.

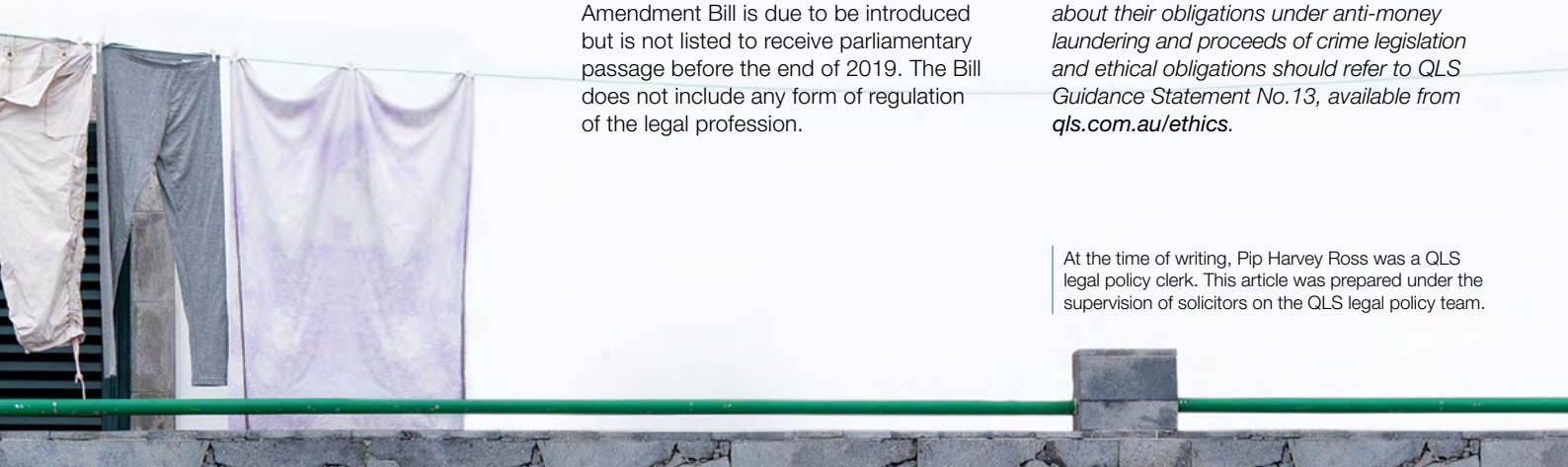
The AML/CTF Act was passed in 2006 and was phased in over two years. Known as Tranche 1, the reforms commenced in 2008 and regulate the bullion, gambling, financial and remittance service industries in which the conversion and transfer of physical and electronic forms of money are vulnerable to money laundering and terrorism financing.

Obligations under Tranche 1 include:

- Identification and verification: Reporting entities must identify and verify the identity of customers before providing the customer with any service.
- AUSTRAC reporting: Reporting entities must report all suspicious matters, certain transactions above a threshold amount, and international funds transfer instructions to AUSTRAC. AUSTRAC is entitled to share information with domestic security and law enforcement agencies, and some international counterparts.
- AML/CTF program: Reporting entities must develop and implement AML/CTF programs that are designed to identify, mitigate and manage money laundering and terrorism financing.
- Record keeping: Reporting entities must make and retain records, and certain client documents, for seven years.

As we wait for the introduction of the Phase 1.5 'transitional' reforms, the profession should fortify itself against unwitting involvement in money laundering and continue to prepare for potential inclusion under the AML/CTF regime.

Members who would like to know more about their obligations under anti-money laundering and proceeds of crime legislation and ethical obligations should refer to QLS Guidance Statement No.13, available from qls.com.au/ethics.



At the time of writing, Pip Harvey Ross was a QLS legal policy clerk. This article was prepared under the supervision of solicitors on the QLS legal policy team.

BIG NUMBERS

Financial intelligence data from the AUSTRAC Annual Report 2017-18 reveals some big numbers when it comes to activities related to money laundering in Australia:

$2.8 BILLION
over 10 years in extra tax assessments

$700 MILLION
record AML penalty ordered against Commonwealth Bank

125,900
suspicious transaction reports made to AUSTRAC

1596
reviews of welfare payments

$207.4 MILLION
in extra tax assessments by Serious Financial Crime Taskforce in a year

See austrac.gov.au/sites/default/files/2019-05/AUSTRAC_annual_report_2017-18.pdf.

RISKY BUSINESS

AML regulation and legal ethics

BY NATHAN CONDOLEON

The extension of anti-money laundering (AML) regulation of lawyers is not a new or recent concept in Australia.

Following the 2016 statutory review of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth), the Commonwealth Government considered extending the regulation to lawyers, only again to postpone Tranche 2 reforms and propose the implementation of 'Phase 1.5' reforms.[1]

Recommendation 4.2 of the review provided that the Attorney General's Department and the Australian Transaction Reports and Analysis Centre (AUSTRAC) include the legal profession as a designated non-financial business/profession.[2] As other common law jurisdictions such as the United Kingdom and, more recently, New Zealand have extended AML regulation, Australian lawyers and law firms have been preparing for the inevitable AML 'Sword of Damocles' to fall in 2019-20.

FRAMING AML OBLIGATIONS

New York University law professor David Garland has observed a trend of the 'responsibilitisation' of civil society and private sector institutions in assisting crime prevention and control.[3] Justice Perram highlighted this notion in *Chief Executive Officer of Australian Transaction Reports and Analysis Centre v TAB Limited (No.3),* regarding the Australian Parliament's approach to "identify areas of risk within the economy and seeking to manage that risk".[4]

Although lawyers are recognised as a self-regulating profession, the proposed extension of regulation in this area has prompted concerns from Australian legal professionals and their associations, in terms of the erosion of fundamental ethical obligations to clients and the associated compliance costs.[5] It is important, however, to appreciate that failures to implement AML responses can significantly delegitimise otherwise legitimate organisations and individuals.[6]

Aside from the rare and isolated instances of practitioners knowingly and intentionally laundering the proceeds of crime, risk arises when lawyers are recklessly or negligently providing a service that allows the criminal to convert, disguise or conceal illegitimate wealth and assets.[7] The representation of a client is based on the practitioner's ethical responsibility to advance their client's lawful interests, uninfluenced by any personal view of the activities of that client.[8]

The reluctance to implement this type of regulation must also recognise that a lack thereof would lead to Australia's continuing status as a safe haven for criminals to launder money and assets.[9] The effect to Australia's real property market, which became a brief but noteworthy issue for the 2019 federal election, is a good example of these associated risks.[10]

In a constantly emerging globalised market, law firms provide a range of legal and business services. Practical issues noted by the Financial Action Task Force (FATF) highlight the difficulties for effective AML investigation when professional privilege or secrecy affects the evidence-gathering process.[11]

The inevitability of regulation, however, forces lawyers to reconcile their role, and their ability to retain core legal ethical practices in the delivery of legal services, with an environment in which the flow of illicit proceeds is exponential, and regulators and law enforcement seek intelligence to combat the underlying predicate crimes.

THE RISK-BASED APPROACH AND LEGAL ETHICS

FATF's recent guidance on the risk-based approach for legal professionals is one of the various resources available when weighing up the associated risks of money

laundering against the proper practice of law. Applying a risk-based approach is a process of identification and assessing whether a particular transaction or service provided by a lawyer is likely to assist or facilitate money laundering and/or terrorism financing.[12] A report by AUSTRAC considered some of the various methods by which lawyers and law firms are used to facilitate money laundering:[13]

- to conduct transactions, which assist with the concealment of illicit funds
- the use of trust accounts to facilitate layering and reinvestment of funds which originate from an illegal source
- engaging a solicitor in the recovery of a fictitious debt in an effort to disguise the origin of the asset
- the purchase and sale of real estate
- the creation of business structures such as shell companies, trusts, etc.

The risk-based approach is not a 'zero failure approach', but it is worth noting the methodology's comparison to several existing legal management practices and ethical duties. Firstly, it stands to reason that as officers of the court we are required to comply with the law and not to engage in any conduct that brings the profession into disrepute or undermines confidence in the administration of justice.[14]

Lawyers are now essentially project managers, requiring great attention to detail and monitoring the life cycle of a matter. Knowing when something doesn't 'add up' or otherwise make commercial sense can be the difference between either assisting a criminal enterprise or failing to understand the client's transaction (or reason for seeking legal advice in the first place).

Secondly, identifying a client is to identify precisely who it is you are advising, and to whom you owe legal and ethical duties and responsibilities. Verification can be achieved by placing on file a copy of the client's passport or driver's licence at client inception, for example. In the case of companies and corporations, calls for beneficial ownership registries in various jurisdictions including Australia are a likely possibility.[15] Such registries exist in various jurisdictions and these have proved to serve as valuable tools in addressing a legal practitioner's concern or uncertainty as to the beneficial ownership or control of a corporate structure.[16]

Thirdly, and as alluded to above, the practice of law is increasingly globalised. From divorces to property disputes and taxation, cross-border transactions are a growing reality for all firms, regardless of their size. Checking for information that relates to your client's matter, such as the jurisdiction where an asset is located or whether or not your client has any prior criminal allegations or dealings, are appropriate measures to shield lawyers from unnecessary regulatory investigation or other attention.

As Cicero noted, "Dionysius seems to have made it sufficiently clear that there can be nothing happy for the person for whom some fear always looms".[17] Australian lawyers should not fear impending AML regulation; rather, we should take this as an opportunity to demonstrate to law enforcement and regulators our commitment to the longstanding ethical duties and principles of our profession.

Nathan Condoleon is a lawyer with a focus on anti-money laundering, sanctions, data protection and other in-house risk and compliance areas. The views expressed in this article are his own.

Notes

1 Patrick Durkin, 'Real Estate Agents, Lawyers and Accountants to Avoid Money Laundering Laws', *Australian Financial Review* (2018), afr.com/business/banking-and-finance/real-estate-agents-lawyers-and-accountants-to-avoid-money-laundering-laws-20181008-h16dcd.

2 Attorney-General's Department, 'Report On The Statutory Review Of The Anti-Money Laundering And Counter-Terrorism Financing Act 2006 And Associated Rules And Regulations' (Director, Governance Office, Attorney-General's Department, 2016) 151.

3 David Garland, *The Culture Of Control*, Oxford University Press, 2001.

4 *CEO AUSTRAC v TAB Limited (No.3)* [2017] FCA 1296 (10 November 2017) [3].

5 Law Council of Australia, 'Response To Consultation Paper: Legal Practitioners And Conveyancers: A Model For Regulation Under Australia's Anti-Money Laundering And Counter-Terrorism Financing Regime', Law Council of Australia, 2017, 45.

6 Michael Newbury, 'Designated Non-Financial Businesses And Professions' (2017), 20(3) *Journal of Money Laundering Control* 247, 254.

7 Attorney-General's Department, 'Report On The Statutory Review Of The Anti-Money Laundering And Counter-Terrorism Financing Act 2006 And Associated Rules And Regulations' (Director, Governance Office, Attorney-General's Department, 2016) 151, 4-5.

8 *Giannarelli v Wraith* (1988) 165 CLR 543, 579 (Brennan J).

9 Sue Lannin, 'Australia A "Place Of Choice" For Money Laundering Due To Lack Of Regulation: ANZ',*Australian Broadcasting Corporation*, 2017.

10 Patrick Durkin, 'Labor To Target Lawyers, Accountants, Real Estate Agents', *Australian Financial Review* (2019), afr.com/business/labor-to-target-lawyers-accountants-real-estate-agents-20190224-h1bnd3.

11 Financial Action Task Force, 'Money Laundering And Terrorist Financing Vulnerabilities Of Legal Professionals', (Financial Action Task Force, 2013) 3, 31.

12 Financial Action Task Force, 'Guidance for A Risk Based Approach – Legal Professionals' (Financial Action Task Force, 2019) 3, 19.

13 Australian Transaction Reports and Analysis Centre, 'Money Laundering Through Legal Practitioners; (Australian Transaction Reports and Analysis Centre, 2015), 9.

14 Queensland Law Society, Australian Solicitors Conduct Rules (at 1 June 2012) r5.1.2.

15 Commonwealth of Australia, 'Increasing Transparency Of The Beneficial Ownership Of Companies', (Australian Government, 2017).

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17 Marcus Tullius Cicero, *Tusculanae Disputationes* (Book 5, 45BCE).

THE NEW ZEALAND REGIME

The legal profession in New Zealand became AML-regulated from 1 July 2018.

The scheme, which may be very similar to any possible Australian scheme, is comprised of a number of elements which require a firm to:[1]

- have a designated AML compliance officer who is vetted alongside senior management
- establish and maintain an assessment of its AML risks
- establish and maintain policies, processes, controls and procedures to be codified into an AML program. This includes maintenance of AML records.
- conduct verification due diligence on customers and their source of funds. This includes realising when enhanced due diligence must occur, and identifying and conducting due diligence on politically exposed people.
- conduct ongoing monitoring of customer accounts; for example, identifying changes or establishing patterns that prompt red flags
- ensure all staff are AML aware and trained
- undergo an independent audit of their risk assessment and AML/CFT program
- conduct prescribed transaction reporting and escalate potential concerns of money laundering to financial crime intelligence authorities
- submit annual reporting to the supervisor of AML and undergo supervisor queries/reviews.

Notes

1 The content of this article has been sourced from the New Zealand Law Society. See lawsociety.org.nz/practice-resources/practice-areas/aml-cft/aml-related-articles/get-ready-for-the-change.

A family (court) affair

QLS SENIOR JOURNALIST TONY KEIM SPEAKS WITH FAMILY COURT AND FEDERAL CIRCUIT COURT CHIEF JUSTICE WILL ALSTERGREN QC

Family Court.

Two words that conjure a myriad of strong and vexed emotions, firm views and a sense of fear and loathing. It is where complete strangers take control and make permanent, life-impacting changes that result in the dismantling, restructure – and in some cases – the complete destruction of one of life's most prized and valued institutions: our very own family.

On any given day, Family Courts (FC) and Federal Circuit Courts (FCC) around Australia – both of which handle family law matters – are very grim and humbling places to visit. The despair, sadness, acrimony and resignation of the parties involved in the adversarial nature of pending proceedings are etched on the faces of the participants: regular mums and dads, former couples and life partners who are almost invariably visiting a court for the first time, and are trying to negotiate and navigate an outcome contrary to their intended plans of a blissful life together. The pain and emotional stress of being at the court is almost palpable, with the only other equivalent in the court process being a trip to Domestic and Family Violence Court.

In recent years, the FC and FCC – and the family law system itself – have been the subject of much public criticism and debate as backlogs of cases going back many, many years became public knowledge and families and the legal profession started to expose the failures causing additional anguish and heartbreak to an already stressful and debilitating process.

In early 2016, to mark the 40th anniversary of the Australia's *Family Law Act 1975*, the Queensland Law Society acknowledged the Family Law Courts in Queensland were in a state of crisis and desperately in need of funding and more judges.

"They are under-resourced and this restricts timely access to those courts by those in need," the then newly-appointed QLS President Bill Potts said.

The FCC deals with most family law matters. The most complex and difficult financial and parenting matters are heard by the trial division of the FC.

While many people could be forgiven for thinking the FC and its judges had sole responsibility for settling family disputes, the truth is almost 90 percent of the family law case workload is ordinarily handled by FCC judges – leaving 10 percent of the more complex matters and trials to their FC colleagues.

Edvard William 'Will' Alstergren, QC

The Honourable Chief Justice William Alstergren was appointed as Chief Justice of the Family Court of Australia on 10 December 2018.

His Honour holds a dual commission as Chief Judge of the Federal Circuit Court of Australia, to which he was appointed on 13 October 2017. His Honour is also the administrative head of the Appeal Division of the Family Court of Australia.

After graduating from Melbourne University in Law (and completing an LLM), Chief Justice Alstergren undertook articles in family law with Kenna Croxford & Co.

From 1991 he practised as a barrister in Melbourne and took silk in 2012. His Honour was regularly briefed in large and complex commercial, family, industrial and tax trials and appeals in the Federal Court and state superior courts.

He was a member of the Bar Ethics Committee, the founder of the Bar's Pro Bono Duty Barristers Committee and received the Distinguished Pro Bono Service award by the Victorian Chief Justice in 2008.

His Honour is a former Chairman of the Victorian Bar. Immediately prior to coming to the Bench, His Honour was the President of the Australian Bar Association.

In his spare time, Chief Justice Alstergren enjoys spending time with his family, walking his two kelpies, playing electric guitar, surfing and reading. His Honour enjoys all things Norwegian and supporting the Hawthorn Football Club.

(source: The Federal Family Court and Federal Circuit Court website)

Almost four years ago Mr Potts said "Last financial year the 61 judges of the Federal Circuit Court dealt with 95,341 litigated cases and divorce applications, and gave 3444 written judgments. The 30 trial judges of the Family Court finalised 20,108 complex applications and gave 647 reserved written judgments.

"State-wide, Queensland has 13 Federal Circuit Court judges and only three Family Court trial judges for a population of about 4.8 million people.

"Our Queensland lawyers report very long delays for trial dates (often up to two years) in both courts and a shrinking pool of legal aid for family law matters. Even after getting a trial date, there are often delays in judgments bringing closure – 18 months is not uncommon.

"Our judges are neither lazy nor inept. Rather they have been overwhelmed with cases to hear and there are too few judges for the workload."

Family Court and Federal Circuit Court

To understand the crisis in the family law system, it's important to note which courts are responsible for resolving disputes.

Firstly, there is the FCC. Until 1999, the FCC was known as the Federal Magistrates Court of Australia and was created to alleviate the increased workload of the both the Federal Court of Australia and the FC, by hearing less complex cases and thereby freeing up the two higher courts to handle more complicated matters. On average, the FCC deals with about 80 percent of family law matters, but also handles various other complex areas of law such as migration, bankruptcy, human rights, admiralty law, copyright and trade practices.

The heavy workload shouldered by the FCC allows the FC to dedicate its time to the more difficult cases in which warring families are less likely to resolve their differences easily, and run long and litigious trials, which require judges to make tough decisions in cases in which none of the parties are likely to be satisfied with the end result.

But the priorities of both these courts in all cases focus on the rights of any children involved in family law disputes. Indeed, the Family Law Act requires judges to put the best interests of children ahead of the parents appearing before the court.

Chief Justice of the Family Court and Federal Circuit Court

Before December last year, both courts were run independently of each other and were headed by separate Chief Justices. That ended with the appointment of Chief Justice Will Alstergren as head of both jurisdictions.

Justice Alstergren was first appointed Chief of the FCC in October 2017 and then head of the FC almost a year ago. The aim of the Federal Government in appointing one head of both courts was to unite the courts, and came amidst public debate and discussion about the merging of both courts

In less than a year as Chief Justice of the nation's two most contentious and controversial courts, Edvard William 'Will" Alstergren, QC, 57, from Melbourne, has hit the ground running and is leading by example to reform, restructure and reinvigorate a system that he agrees has not been meeting its 'remit', and to provide swift and fair resolution of family law matters.

In an exclusive interview with *Proctor*, Chief Justice Alstergren is candid about the impact of delays, the need for more Federal Government funding and the appointment of at least one additional judge in every major registry across the country to be able to deliver his expected 20 to 30 percent improvement in courts' output over the next 12 months.

Justice Alstergren also gives his unique insight into calls for a Federal Judicial Commission – to handle complaints against judges, judicial appointments and increase the accountability of individual jurists – as well as his view on the need to merge the FCC and FC.

But first, he is quick to acknowledge previous systemic failures in delivering timely outcomes for families in crisis.

"There are (and have been) unacceptable delays," he said. "I don't think anyone can doubt that and part of that is caused by the litigants (families) themselves, because of protracted litigation. Some of it is caused by…the more litigious nature of the litigation and some of it is caused by non-compliance (to court orders)."

"But some of it is also caused by (the court). And by that, I mean you've got two different courts (the FCC and the FC). They have got very similar jurisdictions now – but are separated by complexity which is always a tenuous difficulty.

> "WE ARE REALLY LOOKING AT EVERY ASPECT OF THE COURTS AND WHAT WE CAN DO TO IMPROVE (THEM). WE ACCEPT THERE HAS TO BE CHANGE INTERNALLY...BECAUSE THERE IS FAR TOO MUCH DELAY."

"We've got a certain amount of resources and we are doing our best with those.

"Where you've got a situation, in some registries, where over 40 to 50 percent of cases are over 12 months old…and in some cases over 15 and 25 percent are over three years old – you've got to do something about that.

"Clearly we (the courts) have got to make sure we have got the right harmonisation – we've got to have rules, forms and case management systems which are complementary between the two courts because the two courts are inter-related to each other. One relies upon other and vice-versa. It's not two competing interests, but two that are inter-related – and by that I mean they have both got enormous independence and integrity, but the Family Court couldn't do what it does without the Federal Circuit Court doing the 90 percent of the work. And vice-versa, the Federal Circuit Court couldn't survive if a lot of the complex cases weren't being done by the Family Court. They are two different models and we have had to find a way to harmonise them."

Despite the public criticism of the court's failure to clear FC matters, Justice Alstergren said the FCC was also trying to cope with a massive increase in workload in other areas, particularly migration matters.

"There is an unrelenting workload, and an increasing workload, in both family law and migration (law)," he said

"Migration has been a massive issue for us. And the judges in the Federal Circuit Court are working incredibly hard. They've got workloads of anywhere up to 600 cases on a docket. We are trying to reduce that significantly by central listing. We are trying to get registrars involved to try and assist them, so that if there is work registrars can do what judges are currently doing we are going to allocate that around. But the judges are working incredibly hard.

"There is one thing people should understand. Judges will often work through their holidays, they will sit in court during judgment writing days…(and) days they should have off just to try and get matters done for litigants because they are desperate to try and just assist (people/parties).

"In the last year I've certainly seen a massive difference in the culture of the courts, in the sense that they are certainly working a lot better together."

To that end, in April, Justice Alstergren announced his plan to ensure an end to the confusion for those left to bounce between the FC and FCC in their handling of family law matters.

One national newspaper reported at the time: "Chief Justice Alstergren has appointed a retired judge to help harmonise rules and processes in the Family Court and lower-level Federal Circuit Court. About 1200 cases a year are estimated to switch between the two courts.

"The announcement comes after the Senate last week blocked the Morrison Government's controversial attempt to merge the two family law courts. The reform was aimed at streamlining the system, which currently has a backlog of about 20,000 cases."

Justice Alstergren told *Proctor* his plan to harmonise the two courts would be beneficial to the future culture and smooth running of the courts.

"What we did was to try and harmonise the rules, the forms and the case management systems, by having (me as the) one head of (both) jurisdictions since December. I (then) got together a group of judges (from the FCC and FC) and an independent chair, someone who has no skin in the game.

"So I got (Dr) Chris Jessup, who is a very smart industrial lawyer and former Federal Court judge and I said, `What I want you to do is chair this for me to get the best set of rules you can find to suit both courts'.

"So, what we've done is we've compared the Federal Circuit Court rules, the Family Court rules and Federal Court rules – all three – and we've hired two incredibly smart barristers from Melbourne, who are Oxford graduates, to come along and give us a hand in joining them up so we've got an outside independent view of what can be done.

"That has worked incredibly well. The judges have been working really well together. This is something we have not been able to do in 19 years and we're suddenly doing it."

Justice Alstergren, who spent a week in Brisbane in late September as part of public relations exercise with Justice Terry McGuire holding call-overs to case managers and attempting to resolve upwards of 250 local matters that had been languishing in the system for unacceptable periods of time, said while the judiciary was doing its best to clear the log-jam of unresolved matters, the legal profession and litigants also had an important role to play.

He said bringing the parties – either self-represented or those with lawyers – to court allowed everyone to identify which cases were suitable to settle by consent or undertake other forms of dispute resolution such as mediation or arbitration for property matters, or alternatively list them for trial and adjudication by the court.

"It's a matter, I think, of getting people to think a little bit differently. The difficulty is there have been so many delays and people's expectations of the system are pretty low because we've had difficulties getting cases through," he said. "We are changing the culture and the way we do things."

"We are also trying to educate people, particularly unrepresented litigants. They don't have to have their cases heard and determined to get a reasonable outcome. They can negotiate a reasonable outcome if they're given the opportunity.

"A lot of people who are entrenched in the (court) system often want to find a dignified way out, because at the end of the day there is only one pool of funds…and property which are diminishing with legal costs; and those costs are sometimes more disproportionate to what they are fighting over and at other times it is not doing the kids any good the longer it goes on.

"But, we are really looking at every aspect of the courts and what we can do to improve (them). We accept there has to be change internally…because there is far too much delay.

"I don't think there is any judge that would not accept that. I know that all of the judges have a good work ethic and their hearts are in the right place. They want to see the system improve.

> “I’D LIKE TO THINK IF WE HAD AN EXTRA JUDGE IN EVERY MAJOR REGISTRY IT WOULD MAKE A MASSIVE DIFFERENCE.”

“I think you will see, and I am expecting, there will be a 20 to 30 percent improvement in our performance in the next 12 months. Certainly from a family law point of view I think we are going to be a lot quicker.”

Need for more judges

Since Justice Alstergren was appointed Chief Justice of the FC, there have been seven judicial appointments – six of those having been elevated from the FCC – bringing the total number of FC judges to 34.

Justice Alstergren said the appointments would assist greatly in tackling the backlog of cases, but when asked if he thought he could do with more judges he immediately replied, “Oh, I think we do. We need more in both courts. We definitely need more judges.”

“And that’s because the cases are becoming more complex. Also, self-represented litigants are becoming more sophisticated in the way they are bringing cases in – and in some of the issues they’re claiming and some of the matters we are required to deliberate on.

“There is a need for more judges, I mean the Federal Circuit Court has got two problems. One is the increase in the Family Law matters, but secondly the increase in migration matters has made a big difference. Migration at the moment – we have got 10,000 migration matters pending before the court and almost every one of them needs determination by a judge. We’ve...got 17,000 pending Family Court matters – to give you an example – so the workload is huge.”

Over the past four years, QLS has advocated strongly on behalf of the courts and the need for more judges to ensure cases, particularly those backed up for years in the FCs, are dealt with expeditiously to alleviate the considerable emotional, financial and family trauma caused by such proceedings being drawn out.

“We worked very hard to convince the government that they should be appointing more Family Court judges and just before the election (in May) I managed to get seven new judges. Included in that there were six from the Federal Circuit Court who were people I knew could work incredibly hard and the government was prepared to elevate them.

“They have already brought in a remarkably good culture into the court, people are very happy, they are working very hard and the judges are very happy.”

When asked how many judges he thought were needed to provide swift, just and reasonable resolution of matters, Justice Alstergren clearly had some ideas but is also conscious it is the government who provides additional commissions.

“I’d like to think that realistically…well, it’s a bit hard to tell at the moment,” he said with some trepidation.

“I’d like to think if we had an extra judge in every major registry it would make a massive difference.”

While not committing to an exact number, *Proctor* has been able to establish there are between three and five “major registries” in Australia. Depending on who you talk to within the courts, those major family law registries include Brisbane, Sydney, Melbourne, Parramatta and Adelaide. There are also smaller registries in Newcastle and Canberra, as well as a number of single judge registries. There are additional general federal law registries in Darwin and Hobart.

Calls for a Federal Judicial Commission

Queensland Law Society has long advocated for the need for judicial commissions at both a state and federal level to strengthen public confidence in the administration of justice and also ensure all processes around judicial appointments, conduct and education remained open, transparent and independent.

In September last year, the QLS President Ken Taylor said, “Our judiciary is made up of qualified and intelligent legal experts who are at the coalface of our justice system.”

“We aren’t suggesting that there are major issues with any members of the judiciary, but we are supportive of anything that will strengthen not only public faith in our judges but also protect them from any unfounded allegations.”

“A judicial commission can also assist in removing the perception of political appointments, address allegations of judicial misconduct and provide not only independence but ongoing education and support to the judiciary.”

And QLS is not alone, with the Law Council of Australia backing the call for a judicial commission.

It may come as a surprise then that Justice Alstergren is not against the idea either.

“It’d be interesting to see what form it would take. If you looked at a New South Wales-type model, which has been successful there. There have been some other states where judicial models haven’t been as good.

“The difficulty in family law, if I can put it this way, is that we’ve got such a high volume of cases and no one is ever happy…because you’re breaking up the family home, you’re deciding about children. As a result of that, you often get complaints, whether they are justified or not. It is a very emotive area of law.

“A lot of our complaints are, whilst deeply held, they might be unreasonably unmeritorious. If there was a (judicial) commission they would have to be careful how they handle it because we would flood them with a lot of complaints which probably don’t need consideration.

“I have limited powers pursuant to the legislation. However,…used wisely, they are adequate for what we need to do and normally, you know, in most circumstances if there was ever a need for a judicial commission it’s only in circumstances where judges have either been over-working or…they’ve got too many cases they are doing and they can’t cope and fall off the grid. Or alternatively, there are other things going on. That’s one of the reasons we put in a very stringent health and wellbeing policy, which they [have] never had…before – in both courts.

“We’ve introduced health and wellbeing committees, as well. We we’ve introduced resilience training…because realistically if you keep the judges happy and healthy they are going to be able operate properly.

“I’m not opposed to (the introduction of a federal judicial commission). I’ve got a very open mind about it. It’d probably make my job in some ways a lot easier, but you’d have to have the right structure for it.”

Tony Keim is a newspaper journalist with more than 25 years’ experience specialising in court and crime reporting. He is the QLS Media manager and in-house journalist.

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E-CONVEYANCING

THE JOURNEY CONTINUES

BY WENDY DEVINE

It was a bold, ambitious and disruptive idea – the concept of settling property transactions online through an electronic platform.

No more travel to settlement rooms, no more bank cheques, no more rush to the Titles Office to lodge documents before closing time.

This would require cooperation between a myriad of different agencies and systems in both the public and private sectors – titles registries, state revenue offices and banks across the country, in every jurisdiction at state and federal levels. Could it ever work?

The first step was taken over 10 years ago, when in 2008 the Council of Australian Governments (COAG) agreed that there should be a national electronic system for settling real property transactions.

This was the genesis of what we now call 'e-conveyancing' and what has become a world first, sophisticated and unique system.

There have been many changes since 2008 and it is fair to say that the e-conveyancing market is at a crossroads. Some critical issues are being debated around competition and market structure, the lack of interoperability of service providers and the future regulatory requirements. The review of the InterGovernmental Agreement (IGA) between participating states and the Northern Territory has provided the opportunity to progress this debate.

Queensland Law Society has invited PEXA and Sympli to contribute to this edition of *Proctor* to provide their perspectives on the current challenges facing regulators and participants in the industry, and their comments appear on these pages.

QLS been involved in consultations from the very beginning of e-conveyancing to ensure that our members' interests have been represented, given the vital role of our members in the Queensland property market.

QLS supports all practitioners seeking to use e-conveyancing in their practices, however, QLS also considers that this is a business decision for individual practitioners. In other states, we have seen governments 'mandate' the use of e-conveyancing and electronic lodgment for most titles registry transactions. As explored further below, QLS does not support this approach in the Queensland market. There are some critical and complex issues that must first be addressed before such a step could be considered in Queensland.

A brief history

The timeline *(over page)* outlines the major milestones in implementing the e-conveyancing system, starting with National E-Conveyancing Development Limited (NECDL) established by New South Wales, Victoria and Queensland in January 2010.

Over time, other states joined the founding members and financial institutions became involved as well. Ultimately, PEXA emerged in 2014 and by late 2014, electronic lodgments commenced in Victoria and New South Wales. Queensland followed soon after in late 2015.

Some states have announced timetables for 'mandating' that certain titles office documents must be lodged electronically, starting initially with refinances or standalone mortgages. To date, Victoria, Western Australia and New South Wales have implemented mandates which essentially require all eligible discharges, transfers, mortgages, caveat documents to be lodged electronically, with limited exceptions.

The IGA provided for a review after seven years and Australian Registrars' National Electronic Conveyancing Council (ARNECC) appointed consultants Dench McClean Carlson to conduct the review in September 2018. QLS, the Law Council of Australia and other law societies, along with other participants in the market, have all contributed to this process. The draft final report was released in late July 2019 and a final report is anticipated shortly.

As highlighted by the ARNECC in announcing the review, some of the key changes since 2010 include accelerated take-up of electronic conveyancing in some jurisdictions, technology advances, two entities seeking to become Electronic Lodgment Network Operators (ELNOs), the trend to privatise and commercialise land registries and the proposed trade sale or IPO of PEXA Ltd.

The Australian Competition and Consumer Commission (ACCC) has also participated in the IGA review, indicating its support for facilitating competition in the market and its view that interoperability is a key mechanism to facilitate this competition.

Concurrently, the NSW Government has been considering these issues as part of the mandate process in that state. This has included establishing a broad-based industry working group on interoperability. The NSW Independent Pricing and Regulatory Tribunal (IPART) is also conducting a review of the pricing framework for e-conveyancing services in NSW, with a draft report released in August 2019.

QLS has worked closely with PEXA, the first ELNO in Queensland, to support those members who chose to subscribe to the PEXA platform. We are now also working with Sympli, the new ELNO entering the Queensland market, to provide the same level of assistance. Both are approved to offer e-conveyancing subscription services in Queensland.

The advent of a new ELNO entering the e-conveyancing market has raised a number of new issues for debate, many of which are canvassed in the IGA review.

What are the regulatory arrangements?

ARNECC was established by the IGA to facilitate the ongoing management of the regulatory framework for National Electronic Conveyancing. The IGA signatories are Queensland, New South Wales, Victoria, Tasmania, South Australia, Western Australia and the Northern Territory. Tasmania and the Northern Territory have not yet commenced e-conveyancing and the Australian Capital Territory has not signed the IGA.

Under the IGA, the signatories agreed to develop the Electronic Conveyancing National Law (ECNL) which has subsequently been adopted by each participating state by way of separate legislation. In Queensland, this is through the *Electronic Conveyancing National Law (Queensland) Act 2013*.

The states also agreed to develop and maintain one national set each of Model Operating Requirements (MOR) and Model Participation Rules (MPR) to be implemented as Operating Requirements and Participation Rules respectively in each jurisdiction to facilitate National Electronic Conveyancing.

The effect of the ECNL and the Queensland legislation is that the registrar prescribes the Model Operating Requirements for an electronic lodgment network that connects to the registry and the Model Participation Rules for subscribers (legal practitioners) using the e-conveyancing system.

The Queensland context

The adoption of e-conveyancing in Queensland has been relatively slow in comparison with the other jurisdictions.

Issues raised by our members include:

- the cost of subscription to an e-conveyancing system and the cost per transaction
- the requirement to separately assess and pay transfer duty (stamp duty), as required by the Office of State Revenue
- the potential for technical issues in the system to delay settlement of conveyancing contracts, a particular risk in Queensland when conveyancing contracts are typically 'time of the essence' and regional internet connections can be unreliable
- the property conveyancing process has already been used by governments to achieve a number of unrelated policy outcomes such as pool safety fencing compliance, smoke alarm compliance, electrical safety switch compliance, conformity with neighbourhood disputes legislation orders, and GST withholding and collection compliance.

All of these issues have contributed to increased operational cost and change fatigue.

The approach to competition

The arrival of Sympli as a new ELNO in the e-conveyancing market has prompted an overdue debate about the structure of the e-conveyancing market, the scope of the IGA, the role of ARNECC and how the market could or should be regulated going forward.

QLS generally supports competition in the marketplace. Competition ensures that service providers seek to continuously improve their services to the benefit of market participants, including the consumer purchaser and vendor and the legal practitioner, and avoids risks associated with monopoly pricing.

At present, until another ELNO is fully operational across Australia, true competition is not available in the e-conveyancing marketplace as PEXA is the only ELNO.

QLS is concerned that mandating e-conveyancing in Queensland, at this stage, would require practitioners to subscribe to a monopoly private operator to continue to undertake property transactions for their clients.

QLS considers that where the service (electronic settlement of transactions) being delivered is not a publicly owned 'monopoly' service, then market choice of provider is a legitimate expectation of any industry participation in a free market.

Until there is true competition with a choice of three of more viable service operators, offering a full suite of services, QLS considers that e-conveyancing cannot be mandated in Queensland.

The interoperability debate

QLS considers that interoperability is a non-negotiable feature of the future of e-conveyancing.

Interoperability is the concept that a property transaction can be completed when solicitor A subscribes to one ELNO and solicitor B subscribes to a different ELNO. At present, the two authorised ELNOs do not interact, meaning that legal practitioners or conveyancers (in other states) must use the same ELNO to complete a transfer.

It is an unacceptable outcome to require all industry participants to register and use each licensed service provider, if those systems remain standalone. This approach will impose an undue and impossible compliance and training burden on subscribers to the various platforms.

It would also increase the risk of negligence and error adversely affecting users, because subscribers would be required to use multiple platforms with differing approaches.

QLS considers that practitioners must have their choice of providers without the risk of financial institutions influencing practitioners to adopt the use of their preferred supplier. Such influence does not promote a healthy competitive market.

If a mandate was to be introduced before all ELNOs are truly interoperable, the model would not be client and customer-centric but would risk being driven by convenience of regulators, ELNOs and financial institutions as mortgagees. QLS is advocating for interoperability between all ELNO participants in the e-conveyancing market.

There are broadly two models for interoperability – building direct connections between ELNOs or developing a 'central hub/data exchange' entity to which ELNOs connect in a wholesaler/retailer style model. The draft IGA review report and the draft IPART report consider variations of these models in their analysis.

QLS supports the achievement of interoperability, although acknowledges that there are challenges with each of the models proposed. As these reviews further develop the likely features of a preferred and workable model, it is critical that there is ongoing consultation with participants in the industry to ensure any selected model achieves the best outcomes for all.

Where to next?

QLS is strongly of the view that any timeline for mandating e-conveyancing should not be considered in any remaining jurisdictions, including Queensland, until:

- the structure of a contestable and interoperable e-conveyancing market is determined by ARNECC
- a detailed and workable interoperability model is developed and implemented as between all existing ELNOs, and which will apply to all future ELNOs
- more than two ELNOs are fully operational in Queensland, creating a truly competitive market.

QLS acknowledges that a wide range of liability and risk issues need to be resolved in an interoperable market. These issues also need to be resolved before any further mandating is proposed across the country.

A further challenge to be addressed is the regulatory future of the e-conveyancing market, including the role of ARNECC. As the prevalence of e-conveyancing grows, there is a recognition that ARNECC's expertise with land titles registries is only part of the picture and there is a need for financial, competition and other economic regulatory expertise to be involved in the future.

QLS will keep our members updated as this debate progresses and welcomes feedback from our members on their experiences and views on these issues. E-conveyancing is just one aspect of an increasingly digital future for legal practice and QLS will continue to ensure that you have the information you need to prepare for change and make decisions about the best future for your practice.

Wendy Devine is Queensland Law Society Principal Policy Solicitor.

E-CONVEYANCING: A BRIEF HISTORY

Date	Event
July 2008	The Council of Australian Governments (COAG) agrees there should be a national electronic system for settling real property transactions, to allow for the electronic preparation and lodgment of land property dealings with title registries; transmit settlement funds and pay associated duties and tax; and remove the need to physically attend settlements.
January 2010	New South Wales, Victoria and Queensland establish National E-Conveyancing Development Limited (NECDL) to progress the development of a national e-conveyancing system.
April 2010	COAG agrees NECDL would create, implement and operate the system.
2011 – 2012	Six states and the Northern Territory sign the Intergovernmental Agreement for an Electronic Conveyancing National Law, providing for the formation of the Australian Registrars' National Electronic Conveyancing Council (ARNECC).
August 2012	• The four major banks provide capital and subscribe for shares in NECDL. • Western Australia invests and joins the founding members of NECDL. • The government shareholders agree to maintain a majority holding in NECDL during the development of the system.
November 2012	E-Conveyancing National Law passed in NSW.
2012-2014	Further investment follows as Macquarie Bank, Link Market Services and Little Group join as shareholders.
2013	E-Conveyancing National Law proclaimed in: • New South Wales (January) • Victoria (March) • Queensland (May) • Northern Territory (July) • Tasmania (November).
March 2014	NECDL changes its name to PEXA.
June 2014	E-Conveyancing National Law proclaimed in Western Australia.
November 2014	First online property transfer in New South Wales.
February 2015	First online property transfer in Victoria.
December 2015	First online property transfer in Queensland.
January 2016	E-Conveyancing National Law proclaimed in South Australia.
October 2018	Victoria mandates electronic lodgment for most titles documents, with limited exceptions.
December 2018	Western Australia mandates electronic lodgment for most titles documents.
July 2019	NSW mandates electronic lodgment for most titles documents.
Early 2019	The government shareholders of PEXA sell their shares to a consortium comprising Link Group, Commonwealth Bank of Australia and Morgan Stanley Infrastructure Inc.

CHOICE AND COMPETITION

BY DAVID WILLS, CEO SYMPLI AUSTRALIA

Sympli entered the e-settlement market in 2018 with the clear purpose of representing industry's needs with a secure, reliable and efficient e-settlements service.

We're proud to be a platform built by users, for users, and are very supportive of the transformational work achieved by the Australian Registrars' National Electronic Conveyancing Council (ARNECC), PEXA, and the industry to date. We envisage a vibrant and innovative marketplace where the full benefits of digitisation are delivered to the Australian public.

With Queensland lawyers now having the ability to take up electronic property settlements, we understand the importance of having the right to choose between providers and the many other benefits of a competitive market.

The Australian conveyancing market is now at an important juncture in deciding how e-lodgment and e-settlements will operate, with multiple competing electronic lodgment network operators (ELNOs).

Having choice and competition between ELNOs was a cornerstone of the electronic property settlement industry. In a networked industry like ours, the most common solution is to require the networks to share information between them, so consumers don't have to. This is commonly referred to as 'interoperability'.

So, why should you care about interoperability? Put simply, interoperability is an enabler of choice and competition, which leads to better outcomes for consumers. The ACCC considers "interoperability to be a pro-competitive feature"[1] and says that, in its experience, "competitive pressure in a market generally promotes lower prices, increased efficiencies and innovation, and better-quality services".[2] The benefits of a competitive, interoperable market are tangible and include:

- **Freedom of choice:** Lawyers, conveyancers and financial institutions will have the right to choose the ELNO that best suits their needs.
- **Competitive pricing, better quality service and enhanced security:** Consumers are the real winners when ELNOs compete for their business by continuously improving their quality of service, enhancing security features and offering their products and services at lower prices.
- **Innovation:** The services provided by an ELNO are technology-driven. It should also come as no surprise that the technology industry is typified by innovation, and this is something that interoperability will undoubtedly spur with ELNOs and other service providers continuing to invest in new technologies for the benefit of consumers.
- **Market resilience:** Multiple ELNOs remove reliance on any single operator. For large and often time-critical transactions, having multiple ELNOs reduces risks in our industry and improves settlement certainty for consumers.
- **Prevention of monopolistic behaviours:** Commercial incentives that exist in a monopoly environment (for example, a monopoly ELNO competing with conveyancing services) are removed. In turn, it also eliminates the costs and challenges that arise from regulatory intervention of a monopoly market.

Industry stakeholders and regulators have been working together to explore and define the model for interoperability. What initially started as a New South Wales Government initiative now has widespread industry support across Australia. While various models for interoperability have been explored, the most effective solution is a bilateral ELNO-to-ELNO connection to share workspace information. Such a model can be designed in a way that ensures subscribers continue to interact with each other as though they are all subscribers to the same ELNO.

The preferred model does not require an interoperable ELNO to do anything that it doesn't already do as a standalone ELNO; therefore overall risk to the electronic settlements industry does not change. ELNOs will maintain the same high standards of security as they are already held to by ARNECC under the Operating Requirements.[3]

Under the model, ELNOs will communicate with one another via the sharing of an agreed data set which will securely flow between them using a shared 'Application Program Interface' (API). The Lodging ELNO will be responsible for final lodgment and settlement. A Lodging ELNO would be determined for every settlement based on an industry-agreed role (note: key industry stakeholders have already agreed that this should be the ELNO of the 'Responsible Subscriber').

Understandably, questions of risk and cost are raised frequently, but the reality is that these questions have straightforward answers from reputable industry stakeholders. The independent chair of the Interoperability Working Groups, Dr Rob Nicholls, noted that "the increase in complexity (and associated risk) that flows from the interoperability of [ELNOs] is not great compared with the complexity (and associated risk) of more than one ELN".[4] And as for the issue of cost, the Independent Pricing and Regulatory Tribunal of NSW released its report into e-conveyancing pricing which, after assessing the market, concluded that "the additional costs of interoperability to the ELNO market as a whole are small and are outweighed by the benefits".[5]

The industry is well supported by expert stakeholders, including the Australian Competition and Consumer Commission (ACCC) which, in its submission to the IGA review, said: "The ACCC considers that the models involving multiple interoperable ELNs, whether by direct connection or intermediated model, are the preferred models for promoting competition in the market."[6]

Additionally, the Law Council of Australia considers that "a lack of interoperability has the potential to negate the efficiencies of electronic conveyancing and to create unacceptable administrative costs for practitioners, financial institutions and clients".[7] It's undeniably clear interoperability between ELNOs can be designed in such a way that it continues to deliver secure and efficient lodgment and settlement for lawyers and conveyancers, with the full benefits of choice and competition.

David Wills is the CEO of Sympli Australia.

Notes

1 Australian Competition and Consumer Commission Issues Paper – Review of the InterGovernmental Agreement for an Electronic Conveyancing National Law, 26 March 2019.
2 Ibid.
3 See arnecc.gov.au/publications/model_operating_requirements.
4 Independent Chair of the Interoperability Working Groups, Interoperability between ELNOs, Final Report, 25 July 2019.
5 Independent Pricing and Regulatory Tribunal NSW – Review of The Pricing Framework for Electronic Conveyancing Services in NSW, 20 August 2019.
6 ACCC Issues Paper – Review of the InterGovernmental Agreement for an Electronic Conveyancing National Law, 26 March 2019.
7 Law Council of Australia, letter to Ms Jean Villani Chair ARNECC, 4 October 2018.

ADVOCATING A SAFE DIGITAL SETTLEMENT FUTURE

BY JAMES RUDDOCK, PEXA EXCHANGE CEO

Buying a home is typically one of the largest, most significant financial transactions in a person's life and, as a result, it can be one of the most stressful.

For close to a decade, PEXA has been working with industry to transition the 150-year paper process to a national electronic lodgment and settlement solution. A digital platform provides a faster, safer and more certain settlement experience for homebuyers and sellers, greatly decreasing instances of requisitions.

Thanks to this commitment, and cross-industry collaboration, PEXA has worked with close to 8500 members nationally to process more than three million property transactions valued in excess of $500 billion. This translates into more than three million homebuyers and sellers having that important property transaction processed efficiently and securely.

In Queensland, for Queensland

This growth is also felt in the Sunshine State, with more than 600 member firms already registered to the PEXA platform. Queensland members have direct access to PEXA Practitioner Specialists, who are at hand all over the state to deliver free, personalised, face-to-face support. The number of Practitioner Specialists dedicated to Queensland has doubled in the last 12 months and is set to expand as we continue to invest in the state.

Assigned to different regions, Practitioner Specialists not only help members with transactions, they act as partners to navigate the process and change management associated with making the switch to digital settlements. As a dedicated resource in the region, Practitioner Specialists form a unique connection with the members in their local area, fostering strong relationships, encouraging peer-to-peer interaction and collaboration among firms.

This hands-on service goes above and beyond the assistance we provide through our well-resourced call centre, as well as the digital help content available via our online community forum. This commitment has been fruitful, as today Queensland is settling four times more property on PEXA compared to six months ago.

As the number of transactions flowing through PEXA rises, it is crucial that we continue to provide a platform that is robust and secure. Apart from multi-factor authentication, alerts and handy tips provided to members, PEXA's Security Operations Centre actively monitors the network for unusual activity. Security of the network is our priority and we continue to invest and advance security measures with new innovations such as PEXA Key, to keep our members and their clients safe.

Digital solutions are innately flexible – and we're able to be incredibly adaptable with industry. Our technology has enabled us to integrate with many practice management systems and partners, providing many paths into the platform. Enhancements of the PEXA platform are always done in a deliberate, considerate manner, in consultation with members, with a focus on the benefit to the industry and network as a whole.

As a customer-centric organisation, our member's feedback is essential to any improvements we make, including the overall platform experience. Careful planning and industry engagement are also essential when dealing with a national platform affecting people's homes.

Putting practitioners and consumers first

With the successful national adoption of digital lodgment and settlement, we are in support of a vibrant, contestable marketplace for conveyancing services that delivers the best outcome for homebuyers and sellers.

Today, PEXA is actively participating in a number of reviews and forums on how a contestable market can evolve, and these discussions have revealed that there are still many issues that need to be worked through. Key to the adoption of any model is a comprehensive cost-benefit analysis to assess the different models proposed, in order to ascertain consumer benefits and ensure that no additional risk is introduced to the network and these critical transactions.

PEXA is committed to improving the home buying and selling process for Queensland lawyers and their customers alike. As our guiding principle, any new initiative PEXA introduces into this space must add value back to you through cost and/or time efficiencies that create a streamlined and seamless end-to-end property settlement experience. When it comes to your client's matter, we understand that you are the experts. Our role is to help you reduce requisitions and provide a simpler and safer means of effecting property settlements.

While a suitable operating model for a contested market has yet to be defined, our assurance to you is that we will continue to advocate for a solution that offers the least costly, most secure yet robust means of buying and selling property. We also need to ensure the needs of the end consumer sit at the heart of the solution.

In the meantime, we'll remain committed to ensuring the PEXA platform is continually enhanced, inherently secure and provides you with the best tool for safe and efficient property settlements. We're here, supporting you every step of the way.

James Ruddock is the CEO of PEXA Exchange, having previously served as Group Executive, Finance and Corporate Services. He has been with PEXA since 2012 and has led the team through the negotiation and contractual framework governing PEXA's electronic conveyancing network.


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Planning for approval

Code and impact assessment under the *Planning Act*

BY HARRY KNOWLMAN

The *Planning Act 2016* (Qld) (PA) commenced on 3 July 2017, replacing the *Sustainable Planning Act 2009* (SPA) as the primary legislation regulating development in Queensland.

The provisions under which development applications are to be determined (approved or refused) are substantially changed in the PA.[1] How the court interprets and applies those provisions will be relevant to proponents, assessment managers, and opponents of any applications to be assessed under the newer Act.

Despite the changes, much of the basic framework of development assessment remains substantially unaltered. Assessment of applications is still carried out by an 'assessment manager', usually a delegate of the relevant local authority,[2] with the scope or 'level' of that assessment specified in the local authority's planning scheme (for example the Brisbane City Plan 2014), depending on the use, scale, location, and other characteristics of the proposal.[3]

The two possible 'levels of assessment' are 'impact assessment' (requiring assessment against the entire planning scheme, and including a formal public submissions process), and 'code assessment' (requiring assessment only against specified parts of a planning scheme, with no submissions process).[4]

Dissatisfied applicants and submitters can appeal an assessment manager's decision to the Planning and Environment Court.[5]

The SPA continues to apply to all planning appeals commenced prior to 3 July 2017,[6] however all appeals commenced since then are governed by the PA.[7]

Some 19 judgments of substantive appeals under the provisions of the PA have been handed down at the time of writing; these judgments are sufficient to give a good indication of the court's approach to application of the PA, in relation to both impact and code assessment.

For applications subject to impact assessment, important points emerging from the cases include that:

- The assessment manager's discretion to approve or refuse is now broader generally.
- Non-compliance with assessment benchmarks is no longer the focus.
- 'Relevant matters' (a PA term) will play a broader role than 'grounds' (the SPA equivalent).
- There will be greater emphasis on desired planning outcomes.

Similarly, for applications subject to code assessment:

- Approval is mandatory if prescribed assessment benchmarks are complied with.
- The relevant assessment benchmarks are those in the planning scheme as at the time of application.
- If assessment benchmarks are not complied with, the decision maker still has 'residual discretion' to approve or refuse.

Recent cases in which these points have arisen are discussed below.

1. Assessment generally

The two-part 'conflict and grounds' assessment test mandated by the SPA, which applied equally to both impact and code assessment and "resulted in a time consuming and unproductive enumeration of supporting and conflicting 'grounds'",[8] has been dispensed with.[9]

In its place, separate provisions apply to impact[10] and code[11] assessment under the PA, involving quite distinct assessment manager powers and obligations.

2. Impact assessment

A detailed analysis of the impact assessment regime under the PA, including the highlighting of changes from that in the SPA, was set down by Williamson QC DCJ in *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 *(Ashvan)*.[12]

Points of interest from that and other cases with respect to impact assessment under the PA are:

Discretion now broader generally

The assessment manager's discretion under s60(3) PA to approve all or part of an impact assessable application, approve all or part with conditions, or refuse the application, is now much broader than under the SPA.[13]

Nevertheless, several judges have pointed out that this discretion, while broad, is not unfettered.[14] Williamson QC DCJ has set out that this broad s60(3) discretion must be exercised:

1. based on an assessment carried out under s45 PA[15]
2. in a way that advances the purpose of the PA[16]
3. subject to any implied limitation arising from the purpose, scope, and subject matter of the PA.[17]

The end result is to be a "balanced decision in the public interest".[18]

'Relevant matters' will play a broader role than 'grounds'

Section 45(5)(b) PA provides that an assessment manager may consider any other 'relevant matter' in carrying out its assessment, giving examples, but no definition, of what that term encompasses.

Everson DCJ has specifically considered 'relevant matters', holding that the changed assessment rules mean that there is much more scope to consider relevant matters under the PA than was available for the

analogous 'grounds' under the SPA. In particular, he held that under the PA relevant matters can be considered as part of the assessment itself, regardless of whether any conflict has been identified, whereas under the SPA 'grounds were only to be considered at decision stage, and only in the context of being potentially sufficient to overcome identified planning scheme conflict(s).[19]

Williamson QC DCJ has also specifically considered 'relevant matters', holding that the term is not a synonym for a 'grounds' as defined in SPA, that it should be construed expansively, and that it may "include matters that militate for, as well as against, approval".[20]

Non-compliance with assessment benchmarks no longer has assumed primacy

In *Ashvan*, Williamson QC DCJ specifically noted that the terms 'comply', 'conflict', and 'grounds' do not appear at all in the PA in relation to the determination of impact assessable applications.[21] He concluded that "[d]ispensing with the so-called two-part test means that non-compliance with assessment benchmarks, which include planning schemes, no longer has assumed primacy in the exercise of the planning discretion".[22] His Honour found that, under the PA, the correct test to be applied is now "should the discretion conferred under s60(3) of the PA be exercised in favour of approval in the circumstances of this case?".[23]

It seems likely that this non-primacy will result in shorter and more focused lists of alleged non-compliances, particularly in circumstances in which a trend of judicial dissatisfaction with over-long lists of alleged non-compliances appears to be emerging.[24]

Greater emphasis on desired planning outcomes

A related change is that desired planning outcomes and good planning principles will take on a larger role generally under the PA. The explanatory notes to the Planning Bill state: "For both code assessment and impact assessment, it is intended the new assessment and decision rules should lead to a renewed emphasis on the quality, rigour, legibility and consistency of *policies in planning instruments*, and their *primacy in determining the outcome of performance-based development assessment*."[25] (*emphasis added*)

Underpinning this change is an acceptance that planning schemes generally represent the public interest in respect of development,[26] but that they cannot foresee every factual scenario, nor changes over time. In certain unforeseen circumstances, an exercise of the broad s60(3) discretion, guided by accepted planning principles, *may* better serve the public interest by approving a non-compliant proposal.[27]

In *Ashvan*, Williamson QC DCJ set out the tasks confronting the parties in a planning appeal under the PA. His Honour held that:

"[A party arguing for refusal] will need to identify the *planning basis* it relies upon to contend the non-compliance warrants refusal in the exercise of the discretion under s60(3) of the PA.",[28] and

"[A party arguing for approval]...is required to identify all of the matters that will, either individually or collectively, be relied upon to contend an approval should be granted in the exercise of the discretion."[29] (*emphasis added*)

In both *Ashvan* and *Smout v Brisbane City Council* [2019] QPEC 10 (*Smout*), his Honour went deep into the planning scheme's strategic framework (as well as the purpose and overall outcomes of applicable codes)[30] to look for the policy underpinnings of the various code criteria.[31] In the latter case the investigation led to an approval, in the former to a refusal. Likewise, in *Murphy v Moreton Bay Regional Council & Anor* [2019] QPEC 46 (*Murphy*), a proposal's support of underlying planning policy weighed strongly in its favour despite some non-compliance with detailed planning scheme provisions,[32] whereas in *Hotel Property Investments Ltd v Council of the City of Gold Coast* [2019] QPEC 5 (*Hotel Property*), a departure from a clear planning strategy of "development in centres" was fatal to the application, despite multiple favourable "relevant matters".[33]

3. Code assessment

While the assessment manager's discretion in determining impact-assessable applications has been expanded under the PA, in relation to some code-assessable applications it has been removed completely.[34]

Must approve

Section 60(2)(a) PA mandates that for code assessment, the assessment manager "*must* decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development". (*emphasis added*)

The significance of this change was highlighted in *Klinkert v Brisbane City Council* [2018] QPEC 30 (*Klinkert*), in which a code-assessable application to demolish a pre-1946 house at Toowong was refused by the council, and subsequently appealed by the owner.

Williamson QC DCJ held that all relevant assessment benchmarks were complied with so that s60(2)(a) was engaged, and that he, standing in the shoes of the assessment manager, was obliged by that provision to allow the appeal and approve the application. Significantly, his Honour noted that if s60(2)(a) had not been engaged, he would have dismissed the appeal.[35]

He also noted that, despite compliance with all assessment benchmarks, it had likewise properly been open to the assessment manager under the SPA (which was the governing Act at the time of the original assessment) to refuse the application.[36]

A second aspect of the reduced discretion was applied in *Delta Contractors (Aust) Pty Ltd v Brisbane City Council* [2018] QPEC 41 (*Delta Contractors*) , another appeal against refusal of an application for partial demolition of a pre-1946 house, but in this case the application also sought associated material change of use and preliminary building approvals.

Kefford DCJ found non-compliance with relevant assessment benchmarks in relation to the demolition and did not allow the appeal in relation to that part of the application, but was compelled by s60(2)(a) to approve those remaining parts of the application that did comply.[37]

A third aspect of the changed decision rules, set out in s60(2)(d) and considered in *Beauchamp v Brisbane City Council* [2018] QPEC 43 (*Beauchamp*),[38] is that the assessment manager may only refuse an application for non-compliant development if compliance cannot be achieved by imposing development conditions.[39]

'Assessment benchmarks' do not encompass changes to planning scheme post-application

The question of what is an 'assessment benchmark' is critical to whether ss60(2)(a) and (d) are engaged.

In *Klinkert*, Williamson QC DCJ provided a detailed analysis of s45 PA, as it sets out the relevant assessment benchmarks for code assessment,[40] in circumstances where the planning scheme has been amended between the making of an application, and determination of that application (including the determination of an appeal by the court).[41]

In essence, His Honour held that while s45(7),[42] which provides that 'weight' may be given to those changes, is relevant to code assessment, it does not modify the clear wording in ss45(3) and 45(6) which specifies that an application is to be assessed against the assessment benchmarks in place at the time an application is properly made.[43]

Kefford DCJ has taken a similar approach to the significance of post-application changes to a planning scheme in the context of the engagement or otherwise of s60(2)(a).[44]

Her Honour has also held that neither a strategic framework, nor issues which might otherwise be viewed as 'relevant matters', are relevant assessment benchmarks, as they are not so specified in s45(3) PA or the regulations.[45]

Still 'residual discretion' to approve despite non-compliance

Section 60(2)(b) provides that, even if there is non-compliance with assessment benchmarks, the assessment manager has discretion to approve an application, despite the non-compliance.

In *Klinkert*, Williamson QC DCJ held that, in these circumstances, a broad discretion is enlivened, which is (as for impact assessment) constrained by the decision having to be based on the assessment under the PA, and in particular s45(3).[46]

In addition to consideration of changes to the planning scheme since the application was lodged (pursuant to s45(7)),[47] his Honour gave consideration to a large number of factors related to, in particular, the fairness of giving weight to those changes. He clearly accepted that the giving of determinative weight to changed planning scheme provisions can be open under s60(2)(b).[48]

In this approach to the s60(2)(b) discretion, *Klinkert* was cited with approval and followed in *Delta Contractors* (where the discretion to approve was not exercised),[49] and *Di Carlo v Brisbane City Council* [2019] QPEC 4 (*Di Carlo*) (where the discretion was exercised to approve).[50] In this latter case, as a factor in exercising his discretion to approve, Everson DCJ, perhaps reflecting the increasing emphasis on planning principles in relation to the exercise of assessment discretion, referred to the lack of a proper planning basis for preventing demolition.[51]

Conclusion

Williamson QC DCJ has observed: "The change to the statutory assessment and decision making framework will, I expect, impact on the manner in which reasons for refusal are articulated. I also expect it will impact on the manner in which issues are articulated in an appeal before this Court. "[52]

Beyond this, an understanding of the new provisions could potentially inform decisions relating to the size, form and type etc of new proposals. For example, for a potentially controversial proposal, or a proposal facing an upcoming adverse planning change, it may be preferable to sidestep a high-risk impact assessment and look to design a proposal to fit a 'must approve' code assessment decision.

On a cautionary note, any court's interpretation and application of new legislative provisions naturally develops over time;[53] the court's approaches discussed here are unlikely to be exceptional in this respect.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Adam Moschella (amoschella@pottslawyers.com.au). Harry Knowlman is a Brisbane barrister.

Notes

1 Compare SPA s326 to PA ss60(2) and 60(3). Development generally is classified under the PA as either prohibited, accepted (not requiring an approval), or assessable (requiring approval) – see s44(1) PA. This article is limited to consideration of 'everyday' assessable applications.

2 By s48 PA, the assessment manager is identified by regulation – see *Planning Regulation 2017* (PR), s21.

3 To be more complete, s45(2) sets out that a 'categorising instrument' sets the level or 'category' of assessment. S43 defines 'categorising instrument'.

4 See s45(1) PA.

5 S229 PA; ss43-47 of the *Planning and Environment Court Act 2016* (PECA) empower the Planning and Environment Court to hear the appeals.

6 Indeed, the most recent substantive appeal judgment handed down by the Planning and Environment Court was decided under SPA provisions: *Lennium Group Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 17.

7 See detailed analysis by Kefford DCJ in *Jakel Pty Ltd v Brisbane City Council* [2018] QPEC 21 (*Jakel*) at [16]–[89], which has been generally accepted by the court – see, for example, *Klinkert v Brisbane City Council* [2018] QPEC 30 (*Klinkert*) at [38]–[39] (Williamson QC DCJ) and *WOL Projects Pty Ltd v Gold Coast City Council* [2018] QPEC 48 (*WOL Projects*) at [8] (Everson DCJ).

8 Explanatory notes to the Planning Bill 2015, p74.

9 See *Jakel* at [80], citing explanatory notes to PA, *Parmac Investments Pty Ltd v Brisbane City Council* [2018] QPEC 32 (*Parmac*) at [24] (Kefford DCJ), *Mirani Solar Farm Pty Ltd v Mackay Regional Council* [2018] QPEC 38 (*Mirani*) at [14] (Jones DCJ), *Mary Valley Community Group Inc & Anor v Gympie Regional Council & Ors* [2018] QPEC 58 (*Mary Valley*) at [24] (Jones DCJ), *Walters & Ors v Brisbane City Council & Anor* [2019] QPEC 3 (*Walters*) at [330] (Kefford DCJ), *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16 (*Ashvan)* at [38], [45]–[46], [50]–[51] (Williamson QC DCJ).As a corollary, it seems inevitable that the widely-applied three-step test set out in *Weightman v Gold Coast City Council* [2003] 2 Qd R 441 at [36], which relied on conflicts vs grounds evaluations, may no longer be applicable.

10 S60(3) PA.

11 S60(2) PA.

12 *Ashvan* at [39]–[86].

13 *Jakel* at [81], *WOL Projects* at [10] , *Hotel Property Investments Ltd v Council of the City of Gold Coast* [2019] QPEC 5 (*Hotel Property*) at [9], [12]–[13] (Everson DCJ), *Walters* at [330]–[332], *Ashvan* at [41], [43], [50] (noting the broad s60(3) discretion is reflected in s47 *Planning and Environment Court Act 2016* (PECA)). By contrast, under the SPA, assessment managers were obliged to refuse an application under certain circumstances – see s326.

14 *Ashvan* at [62]. See also *Parmac* at [20], *Mirani* at [22].

15 See PA s59(3). A s45 impact assessment is, typically, assessment against the provisions of the relevant planning scheme, with regard being had to any matters prescribed by regulation (such as a previous approval on the site) and any 'relevant matters'.

16 See PA s5, but also see *Harta Pty Ltd v Council of the City of Gold Coast* [2019] QPEC 37 at [28], where Everson DCJ, confronted with submissions from both sides that their positions advanced the purpose of the PA, opined that "...the purpose of the PA and what is said to advance it are expressed in such general terms, that such arguments do not assume any real significance or add in any way meaningful way to the issues I need to resolve in this appeal.".

17 *Ashvan* at [62]–[64], citing *Smout v Brisbane City Council* [2019] QPEC 10 (*Smout*) (Williamson QC DCJ).

18 See the explanatory notes p74, *Mirani* at [21] (citing the explanatory notes with implicit approval), *Ashvan* at [50]–[57].

19 *Hotel Property* at [12]-[13]. The relevant matters under consideration were site-specific benefits. See also *Mirani* at [110], likewise considering the benefits of a proposed development.

20 *Ashvan* at [79]-[82].

21 *Ashvan* at [38].

22 *Ashvan* at [51].

23 *Ashvan* at [86].

24 See for example *K & K GC Pty Ltd v Gold Coast City Council* [2018] QPEC 9 at [13]–[14], [16] (Kefford DCJ), *Mirani* at [30]–[32] citing with approval *Bilinga Beach Holdings Pty Ltd v Western Downs Regional Council & Anor* [2018] QPEC 34 at [47]–[48] (Williamson QC DCJ), *Ashvan* at [65]–[66], *Peach v Brisbane City Council & Anor* [2019] QPEC 41 at [67]-[69], [79] (Williamson QC DCJ), *Mater Health Services North Queensland Ltd v Townsville City Council & Ors* [2019] QPEC 45 at [49] (Fantin DCJ) By contrast see *WOL Projects* at [7], *Mary Valley* at [18]–[19], *Bilinga Beach* at [50] for (perhaps implicit) judicial approval of confinement of issues, where appropriate.

25 Explanatory notes to the Planning Bill 2015, p74

26 See *Bell v Brisbane City Council & Ors* [2018] QCA 84 at [66] (McMurdo JA), also *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132 at [42], [48] (Sofronoff P, Fraser JA and Flanagan J agreeing).

27 See *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132, [67] (Sofronoff P): any such decision should ensure that "the desired deviation from the Planning Scheme serves the public interest to an extent greater than the maintenance of the status quo", cited with approval in *Brookside Estate Pty Ltd v Brisbane City Council & Anor* [2019] QPEC 33, at [21] (R.S. Jones DCJ). See also *Ashvan* at [57]-[61], *Peach v Brisbane City Council & Anor* [2019] QPEC 41 at [305] - [307],and *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council &Anor [2019] QPEC 46* [2019] QPEC 46 at [12]-[22] (Kefford DCJ).

28 *Ashvan* at [67].

29 *Ashvan* at [68].

30 The PA and PR regulate the content of planning schemes in detail – see s16 PA, and Part 2 Division 2 PR. Typically a 'strategic framework' sets out broad planning objectives for the planning scheme area, while specific criteria aimed at achieving those objectives are grouped into 'codes' applicable to various uses, planning zones, development types, neighbourhoods, and 'overlays' (specified parts of the scheme area to which other criteria are applicable, for example, bushfire, airport environs).

31 *Smout v Brisbane City Council* [2019] QPEC 10 (Smout) at (for example) [41]–[49] (Williamson QC DCJ), Ashvan at (for example) [88]–[94]. See also *Walters* at [332], [356]–[357].

32 *Murphy* at [201].

33 *Hotel Property* at [33].

34 *Brisbane City Council v Klinkert* [2019] QCA 40, at [32].

35 *Klinkert* at (100], [138].

36 *Klinkert* at [124].

37 *Delta Contractors (Aust) Pty Ltd v Brisbane City Council* [2018] QPEC 41 (*Delta Contractors*) at [23] (Kefford DCJ).

38 *Beauchamp v Brisbane City Council* [2018] QPEC 43 ("Beauchamp") at [45] (Rackemann DCJ).

39 See s60(2)(d) PA.

40 For code assessment, the relevant assessment benchmarks will usually comprise a limited number of planning scheme codes, such as, to take *Klinkert* as an example, the Traditional Building Character (Demolition) Overlay Code, and the Toowong-Auchenflower Neighbourhood Plan Code.

41 *Klinkert* at [82]–[97].

42 For completeness, it should be noted that s45 has now been amended, so that what were sections 45(6) and 45(7) are now sections 45(7) and 45(8) respectively, and there are some wording changes. However, the operation of the provisions appears to remain unaltered, so the earlier numbering has been retained here to match that cited in the majority of judgments (noting that at least one judgment, *Peach*, does refer to the amended numbering scheme).

43 The Court of Appeal subsequently affirmed Williamson QC DCJ's decision and reasoning in *Klinkert* – see *Brisbane City Council v Klinkert* [2019] QCA 40 at [35]–[40] (Boddice J), and at [6] (Gotterson JA, also agreeing with Boddice J), Philippides JA agreeing with both judges. See also footnote 49 in relation to now-modified sub-clause numbering in s45.

44 *The Planning Place Pty Ltd v Brisbane City Council* [2018] QPEC 62 at [122].

45 *Delta Contractors (Aust) Pty Ltd v Brisbane City Council* [2018] QPEC 41, [21], [104]–[105]. Also see s43(2)(c) PA, which provides that a 'strategic outcome' is not an assessment benchmark for code assessment.

46 *Klinkert* at [102], citing s59(3) PA. See also *Di Carlo v Brisbane City Council* [2019] QPEC 4 (*Di Carlo*) at [7] (Everson DCJ), also *Jakel* at [76], finding similarly, but noting the "common material", which covers significant ground (definition in Schedule 1 of the *Planning Regulation 2017*), can be considered.

47 See *Klinkert*, [101]–[148].

48 *Klinkert* at [131], [138].

49 *Delta Contractors,* at [101].

50 *Di Carlo* at [8].

51 *Di Carlo* at [13].

52 *Ashvan* at [65].

53 As an example, the Court of Appeal recently further clarified the interpretation and application of the assessment rules under the SPA, some two years after that Act was repealed, in *Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132 at, inter alia, [67].

Can you low bono?

Sometimes you can't afford to work for free

BY ELIZABETH SHEARER

The Access to Justice Scorecard project, conducted each year by the Queensland Law Society Access to Justice Pro Bono Committee, always identifies the affordability of legal representation as a key barrier to access to justice in Queensland.

As a profession, our response to this has been to:

- lobby the government for more legal assistance funding
- deliver significant amounts of pro bono legal services.

The traditional model for pro bono relies on lawyers voluntarily working for free to help clients who could not otherwise access the legal system.

Typically, medium-to-large law firms with a strong commercial client base have a pro bono program, through which they assist:

- individuals who would otherwise never be their clients
- with personal legal issues that that they would otherwise rarely assist with.

In economic terms they have sufficient 'producer surplus' from their work in commercial legal services to be able to apply this to assist individuals seeking legal services that they would otherwise not access.

This model has delivered immense benefit to those assisted, and to the community. However, it is a model that is unsustainable unless there is sufficient 'producer surplus' or profit. It is also a model that poses particular challenges to firms (usually smaller firms) which:

- participate only in the market for individual legal services
- have a client base that already includes people on middle and low incomes.

For these firms, working for free for some clients means that other clients pay more than they would otherwise have had to pay. These are clients who are paying from their hard-earned after tax dollars and, if given the choice, would probably not be convinced that they should subsidise the legal representation of others.

In this context, low bono is emerging as an interesting part of the solution to the access to justice gap. Low bono can mean just accepting a discounted fee for work. It is also becoming understood to encompass:[1]

Unbundled or limited scope services

In an increasing range of matters that have traditionally been handled by a solicitor from start to finish, solicitors are assisting clients with discrete tasks only, under partial or limited retainers.

This can make legal services affordable and accessible for someone who could not afford to pay for full representation. Many lawyers who offer unbundled legal services think of them as 'low bono' services, even though the lawyers are not necessarily lowering their prices; instead, they're limiting the scope of their work. QLS Guidance Statement No.7[2] provides information about how to do this work safely.

Passing on the benefits of improved efficiency

With technology reducing the barriers of entry to the profession, small firms can operate more efficiently with fewer overheads than have been required in traditional legal practices. This means that firms can pass on to clients part of the benefits of efficiency, by offering services at lower rates which more consumers can afford.

Self-help tools and emerging artificial intelligence solutions

Many firms provide free legal information on their websites, or link to information that can help individuals navigate the legal system. Artificial intelligence can tailor the information a person using a website receives to their own circumstances, and is emerging as a significant opportunity for solicitors to engage with and provide solutions to people who could not otherwise access services.

One of the exciting aspects of low bono for the profession is that it is not a zero-sum game. We are not just transferring producer surplus to consumer surplus, nor having some of our clients subsidise others.

The LAW Survey conducted by the New South Wales Law and Justice Foundation found that only 51% of people with a legal problem sought formal advice.[3] Low bono services give us the opportunity to serve those who are not currently accessing legal services. This has benefits for the many people served, and benefits for the profession.

This article appears courtesy of the Queensland Law Society Access to Justice Pro Bono Committee. Elizabeth Shearer is chair of the committee and a legal practitioner director of Shearer Doyle Law, whose services include Affording Justice (affordingjustice.com.au).

Note

[1] Forrest Carlson, 'The Changing Contours of Low Bono', published by the Washington State Bar Association on NWSideBar, 28 March 2016.

[2] See qls.com.au/ethics > Guidance Statements.

[3] See lawfoundation.net.au > Publications.

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Trustees' applications for judicial advice

BY KYLIE DOWNES QC AND PHILIPPA AHERN

An application for judicial advice is an important tool available to trustees.

Legislation in most Australian states confers rights on trustees to apply for judicial advice, although it is of practical importance to note that the sections are not uniform.[1] The court also has an inherent power to give such advice.[2]

In Queensland, s96 of the *Trusts Act 1973* (Qld) (the Act) provides:

96 Right of trustee to apply to court for directions

1. Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
2. Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.

The consequence of a successful application under s96 is stated in s97 of the Act:

97 Protection of trustees while acting under direction of court

1. Any trustee acting under any direction of the court shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the direction, notwithstanding that the order giving the direction is subsequently invalidated, overruled, set aside or otherwise rendered of no effect, or varied.
2. This section does not indemnify any trustee in respect of any act done in accordance with any direction of the court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the court making the order giving the direction.

Section 96 is broad in its scope, referring to "any trustee". This will extend further than may at first be obvious – for example, the responsible entity of a managed investment scheme may seek judicial advice in an appropriate case, as a responsible entity holds scheme property on trust for scheme members;[3] as may executors.[4]

In *Marley v Mutual Security Merchant Bank & Trust Co Ltd* [1991] 3 All ER 198, Lord Oliver of Aylmerton said at 201:

"A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court...

"[I]n exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties."

An important purpose of directions under s96 (and analogue legislation) is the protection of the interests of the trust: *Macedonian Orthodox Community Church St Petka Inc. v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [72]. The majority judgment made general points regarding such applications, including that:

a. There is no implied limitation on the power to give advice.[5] "Only one jurisdictional bar exists: the applicant must point to the existence of a question respecting the management or administration of trust property or a question respecting the interpretation of the trust instrument."[6]
b. There are no implied limitations on discretionary factors, including the adversarial nature of the proceedings about which the advice is sought.[7]
c. The procedure is summary in character.[8]
d. The advice is private and personal. Its function is to give personal protection to the trustee and it operates as an exception to the court's ordinary function of deciding disputes between litigants.[9]

The majority noted the important relationship between applications for judicial advice and a trustee's entitlement to a right of indemnity from the assets of the trust for all costs and expenses properly incurred in performance of the trustee's duties.[10] A successful application for judicial advice resolves doubt as to the propriety of the trustee's actions, when the trustee acts in accordance with the advice given by the court.

A trustee should always seek advice under s96 first, rather than seeking orders under s76 of the Act to be relieved from personal liability for any breach of trust that the trustee has committed.[11] This is because section 76 requires that an applicant demonstrate not only that it should be excused from the breach of trust, but also that it should be excused for "omitting to obtain the directions of the Court in the matter in which the trustee committed the breach".

The advice sought under s96 often includes seeking directions:

a. as to whether the trustee is justified in commencing, or defending, legal proceedings[12]
b. as to whether the trustee is justified in compromising a dispute, and/or legal proceedings, on a particular basis. Such applications are generally sought on the basis that such matters concern "the management or administration of the property subject to a trust",[13] but in Queensland may be sought on the additional basis that such matters concern "the exercise of any power or discretion vested in the trustee".[14]
c. where the trustee is in any genuine doubt about the propriety of any contemplated course of action, or about the nature and extent of the trustee's powers.[15]

It is not appropriate, though, for a trustee to apply for judicial advice to resolve a dispute between parties to a trust. The relevant distinction is "between deciding whether it would be proper for a trustee to sue or defend and deciding the issues tendered in the proceedings that it is proposed to institute or defend".[16]

It is important for a trustee, wherever practicable, to "engage beneficiaries in a dialogue, crystallising issues in dispute or in need of a judicial determination, before approaching the Court for relief" in respect of an application for judicial advice.[17]

If an application for judicial advice is made without due engagement of persons with an interest in the outcome of such an application, "…the ability of the Court to provide well measured advice may be affected to the extent that it is not given the benefit of a full appreciation of what competing interests might say".[18]

The court may invite an applicant to make material available to persons affected by the outcome of the application, but it cannot compel this to be done. The court may, however, "…indicate to a trustee that unless it was prepared to make certain material available then the advice that the Court was able to give might be qualified or limited because it would not have the assistance it might have been afforded had the affected persons had access to more material than the trustee was willing to provide".[19]

Nevertheless, it is often not possible to allow persons affected by the outcome of the application to view all of the material which the trustee relies upon. For instance, on an application for advice as to whether a trustee is justified in commencing or defending litigation, or in settling litigation on a particular basis, the court usually views confidential advice which the trustee has received from counsel as to prospects.[20] Such advice is privileged and cannot be provided to others (including beneficiaries) without waiving privilege.

Particular requirements of the Queensland legislation

Service on all persons interested in the application

Section 96(2) requires every application made under s96 to be served upon "all persons interested in the application or such of them as the court thinks expedient".[21]

Where the trust has a large number of beneficiaries, and/or the costs of effecting personal service on persons affected would be disproportionate, it is common for a trustee to apply for substituted service orders.[22] In Queensland, such substituted service orders may be sought on the basis that personal service is impracticable, and the proposed method/s of service will be effective in bringing the proceedings to the attention of beneficiaries.

In practice, the methods of service often adopted in respect of large trusts are to post the court documents on a website maintained by the trustee and to email notice of the application to beneficiaries, including a notification that court documents in respect of the application are available to be viewed and downloaded from the website.

Written statement of facts

Section 96(1) requires applications to be made "upon a written statement of facts".

An application pursuant to s96 is determined "primarily 'upon a written statement of facts'": *Corbiere & Monk v Dulley & Ors* [2016] QSC 134 at [29] per Burns J, although as his Honour noted, the practice has arisen of filing affidavit evidence on such applications, and (in particular) the statements of facts presented to the court are often verified on affidavit.

In *Kordamentha Pty Ltd & Anor v LM Investment Management Ltd & Anor* [2015] QSC 4 at [8] Martin J said:

"It is not appropriate, and not consistent with s96, for an applicant to point a judge towards a number of affidavits and, in effect, say 'the facts are in there for you to find'."

It is of particular importance that all the material on the application (including the statement of facts) is drawn carefully to ensure its accuracy. Although the court is entitled to act on the facts stated by the trustee, even if they are contested or controversial,[23] any misrepresentation by an applicant may therefore negate the benefit of an application for judicial advice.

Kylie Downes QC and Philippa Ahern are both barristers and members of Northbank Chambers in Brisbane. Ms Downes QC is also a member of the *Proctor* editorial committee.

Notes

1 For example, s63 of the *Trustee Act 1925* (NSW); O 54 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic.); s91 of the *Trustee Act 1936* (SA); s92 of the *Trustees Act 1962* (WA); s63 of the *Trustee Act 1925* (ACT). Tasmania and the Northern Territory do not have such legislation.

2 For example, *Re Beddoe* [1893] 1 Ch 547.

3 Section 601FC(2) of the *Corporations Act 2001*; *Re Homemaker Retail Management Ltd* (2001) 187 ALR 520 at [5]; *Re Centro Retail Australia Ltd* (2012) 35 VR 512.

4 *Glassock v The Trust Company (Australia) Pty Ltd* [2012] QSC 15 at [14].

5 At [56].

6 At [58]. The terms of s96(1) are wider still, concerning "any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee."

7 At [59].

8 At [61].

9 At [64].

10 At [71].

11 At [35].

12 *Macedonian Orthodox Community Church St Petka Inc. v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 was itself such a case.

13 *Re MF Global Australia Ltd (in liq.)* [2012] NSWSC 1524 at [14]; *Hodges v Waters (No.7)* (2015) 232 FCR 97 at [54]; *Re Securities Exchanges Guarantee Corporation Ltd* (2016) 306 FLR 253 at [23]; *Application by John William Kellert (No.2)* [2018] NSWSC 94 at [10]-[11]. These cases concerned applications pursuant to s63 of the *Trustee Act 1925* (NSW), which is narrower in scope than s96(1).

14 In *Re Centro Retail Australia Ltd* (2012) 35 VR 512 at [27] Almond J concluded that wide general powers conferred on the trustee, which permitted the trustee to act (inter alia) "as though it were the absolute owner of the trust assets", conferred power on the trustee to agree to terms of settlement.

15 *Marley v Mutual Security Merchant Bank & Trust Co Ltd* [1991] 3 All ER 198.

16 *Macedonian Orthodox Community Church St Petka Inc. v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [111].

17 *Re Estate Late Chow Cho-Poon; Application for judicial advice* [2013] NSWSC 844 at [8].

18 Ibid at [199].

19 *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand & Anor* (2006) 66 NSWLR 112 at 126.

20 For example, *Corbiere & Anor v Dulley & Ors* [2016] QSC 134 at [29].

21 Analogue legislation may differ on this point; for example, s63(4) of the *Trustee Act 1925* (NSW) provides that "unless the rules of court otherwise provide, or the Court otherwise directs, it shall not be necessary to serve notice of the application on any person".

22 *ASIC v Letten (No.19)* [2012] FCA 375, *Owen v Madden (No.2)* [2012] FCA 312.

23 *Macedonian Orthodox Community Church St Petka Inc. v His Eminence Petar The Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [80]-[81].

Diversity and inclusion – tech solutions

BY MICHAEL BIDWELL, THE LEGAL FORECAST

PwC's global diversity and inclusion survey[1] reports that 87% of global businesses say diversity is an organisational priority.

However, 42% of people agree or strongly agree that diversity is a barrier to progression at their organisation.

As an openly gay lawyer, editor-in-chief for The Legal Forecast and Vice President for Pride in Law, I wanted to write this article to showcase some technology that may assist your firm or clients with measuring and increasing diversity and inclusion.

Job descriptions

In addition to setting employer and potential employee expectations for a role, job descriptions grant the public insight into how your firm speaks about diversity and inclusion.

Social scientists have found evidence that using traditionally masculine words (adventurous, challenging and dominant) rather than traditionally feminine words (compassionate, modest and polite) could discourage women from applying.[2]

I have had some female lawyers tell me that they have not applied to certain firms because they perceive the firms to be a 'boys' club' from the job descriptions.

Textio is one of several artificial intelligence tools that aim to help you address this issue. Textio has examined hundreds of millions of job listings around the world, as well as the amount of time it took for each position to be filled, in order to identify phrasing and words that are most conducive to inclusion for applicants.

Textio analyses in real time as you draft a job description, highlighting phrases and words that are often perceived as masculine or feminine.

There are several other forms of technology that assist with diverse and inclusive recruitment (for example, removing identifying details from resumes, artificial intelligence reviewing resumes without unconscious bias and candidate cultural alignment scores).

Under-reporting

Earlier this year, the International Bar Association released the largest-ever global survey of bullying and sexual harassment in the legal profession. Australia provided the highest number of respondents. It was found that 57% of bullying cases and 75% of sexual harassment cases worldwide were never reported.[3] There are several reasons staff do not report these incidents.

One app seeking to address this under-reporting is Allie. Allie seeks to assist organisations as a chatbot accessible to employees to anonymously report all types of behaviour, including micro-aggressions (for example, always being interrupted and inappropriate comments).[4]

Importantly, Allie does not report on individual data, rather it assesses all the reports by staff and gives the organisation actionable data analysis on the trends and narratives. This informs the organisation on what training may be required to prevent the behavior, and to also empower employees to call out the behaviour and report it.

Regardless of whether you decide to implement technology for under-reporting, we must all speak out for one another and call out inappropriate behaviour.

Staff training

There have been some law firms providing non-mandatory training to staff focused on diversity and inclusion. In my experience, this training is often attended by people who already genuinely care about diversity and inclusion. It does not increase awareness in those who may be ignorant to issues faced by people not like them.

Equal Reality is a virtual reality service that portrays you as someone who is different to who you are based on gender, sexual orientation, race, age and ability.[5] You experience a virtual workplace and networking function as that other person and there are moments of discrimination so the user understands how it feels to be that person. You can even co-design the virtual reality experience with Equal Reality based on your identified gaps of knowledge in staff.

There are several other virtual reality services seeking to provide diversity and inclusion training in a meaningful and easily accessible way, so staff can privately undertake the training with the virtual reality headset.

Conclusion

This article has sought to raise awareness of technology that may assist you or your clients with increasing diversity and inclusion.

You may choose to not implement any technology, but I hope that this article has then raised potential areas of focus for your diversity and inclusion initiatives. Overcoming prejudice requires us to identify our unconscious biases and rewire them to embrace difference and make others feel a sense of belonging.

Michael Bidwell is the editor-in-chief for The Legal Forecast (TLF). TLF (thelegalforecast.com) aims to advance legal practice through technology and innovation. It is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

Notes

1 PwC global diversity and inclusion survey 2017, pwc.com/gx/en/services/people-organisation/global-diversity-and-inclusion-survey.html#data.

2 Gaucher D, Friesen J, Kay A, 'Evidence That Gendered Wording in Job Advertisements Exists and Sustains Gender Inequality' (2011) *Journal of Personality and Social Psychology* fortefoundation.org/site/DocServer/gendered_wording_JPSP.pdf?docID=16121

3 International Bar Association, 'Us too? Bullying and Sexual Harassment in the Legal Profession'.

4 Allie, alliebot.com.

5 Equal Reality, equalreality.com.

Notice of Meeting of Beneficiaries

Beneficiaries are advised that a meeting of beneficiaries pursuant to the provisions of the constitution of Queensland Law Foundation Pty Ltd and the provisions of the trust deed establishing the Law Foundation-Queensland Trust will be held on Friday 13th December 2019, at 5.00pm at the offices of Lexon Insurance Level 18/307 Queen Street Brisbane.

TO ELECT EIGHT HONORARY DIRECTORS

- **The Chair Mr Raoul Giudes** in accordance with the provisions of the company constitution and the trust deed retires and offers himself for re-election.
- **Mr Michael Meadows** in accordance with the provisions of the company constitution and the trust deed retires and offers himself for re-election.
- **Mr Glenn Ferguson** in accordance with the provisions of the company constitution and the trust deed retires and offers himself for re-election.
- **Mrs Joan Bennett** in accordance with the provisions of the company constitution and the trust deed retires and offers herself for re-election.
- **Mr Peter Short** in accordance with the provisions of the company constitution and the trust deed retires and offers himself for re-election.
- **Mrs Annette Bradfield** in accordance with the provisions of the company constitution and the trust deed retires and offers herself for re-election.
- **Mrs Claire Hart** in accordance with the provisions of the company constitution and the trust deed retires and offers herself for re-election.

Nominations for the position of director may be submitted up to the time of commencement of the meeting but such nominations should be in writing and the person so nominated is required to be nominated by two beneficiaries, if that person is a beneficiary, or by twenty beneficiaries if that person is not a beneficiary.

A. PROXIES

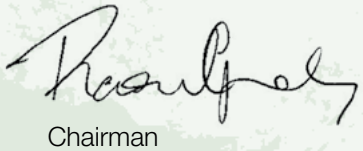
A proxy form is enclosed as an insert with this edition of *Proctor*. Each beneficiary is entitled to nominate a proxy.

Proxy forms are required to be lodged with the secretary of the trustee company either personally at the office of the Queensland Law Foundation Pty Ltd located on Ground Level, Law Society House, 179 Ann Street, Brisbane, or by mail to GPO Box 1629, Brisbane, by 5.00pm on Friday 6th December 2019. Proxies will not be accepted after that time.

Members who are unable to be present personally are requested to complete, sign and return the attached form of proxy which must be in the hands of the secretary by Friday 6th December, 2019 at 5.00pm.

Dated this fourth day of October, 2019

By order



Chairman
Queensland Law Foundation Pty Ltd.

Law Foundation Queensland

Super powers and personal representative problems

WITH CHRISTINE SMYTH

What is the extent of a personal representative's duty to call on superannuation proceeds?

Given the analysis of this question undertaken in *McIntosh v McIntosh* [2014] QSC 99 (*McIntosh*) and *Brine v Carter* [2015] SASC 205 (*Brine*), practitioners would be forgiven for thinking the permutations around that duty were settled.

However, thanks to two recent Western Australian decisions – *Denise Hilda Burgess as administrator of the estate of Brian Michael Burgess v Burgess* [2018] WASC 279 (*Burgess*) and *Gonciarz v Bienias* [2019] WASC 104 (*Gonciarz*) – the courts have considered a number of nuanced circumstances that broaden and deepen our understanding of the extent of the duty.

In *McIntosh* and *Brine*, the conduct of the personal representatives was less than optimal. Both behaved in a covert and misleading manner to advance their own interests. But what of a personal representative who honestly, but mistakenly, makes a competing application, who then takes all steps to rectify the mistake, and who is transparent and open to the parties and the court as to the circumstances?

Burgess was one such circumstance. The court opened its judgement with an experience most of us have with clients.

"The facts underlying the present application are relatively commonplace, but the problem they present is legally complex."[1]

A de facto couple with two young children was struck down when the husband and father died without a will. While at the time of his death he was in stable fixed employment, prior to that he was a fly-in, fly-out worker who had accumulated four different superannuation policies with benefits, including death benefits attaching on his death.[2]

There was about a year between his date of death and his de facto becoming appointed as administrator of his estate.[3] Prior to her appointment, she made application for the proceeds of two funds to be paid to her in her personal capacity. One superannuation fund paid the proceeds to her prior to her appointment as administrator. However, the second fund paid it to her six months after her appointment.[4] The third superannuation fund paid modest proceeds to the estate.[5] The fourth fund had not made a determination at the time of the hearing.

So, the application presented "an issue concerning the likely conflict of interest"[6] between her position as an administrator of the estate in which she owed fiduciary duties to the estate and that of her position and entitlements as one of three beneficiaries of the estate.

Underlying the application was the manner in which an intestate estate is distributed on death. This is relevant in the context that intestacy entitlements differ from state to state, as do the eligible persons.[7]

In this case, the intestate estate was distributed between the widow and her

two infant children for which she had the responsibility of care.

The primary question before the court was whether the widow was required to account for the funds that she had received after the grant, and whether she was able to receive the funds being held in abeyance in the fourth fund. In seeking those answers, she sought for the court to distinguish *McIntosh* on the facts, or for it not to be followed.[8]

In considering the matters, the court was at pains to observe that there was not "the slightest suggestion of any misdealing conduct or misappropriation of any of the superannuation payment funds received by Mrs Burgess".[9] In respect of the facts of this matter, the court lamented that "hard cases make bad law".[10]

The court went through how the widow had dealt with funds she received, with a significant portion being put towards a home for herself and her children,[11] and the creation of an apparent estate's proceeds trust for her children.[12]

Mrs Burgess sought to rely on s75 *Trustee Act 1962* (WA), a provision that empowers the court to excuse the actions of a trustee when those actions are honest, reasonable and ought fairly to be excused. This provision is mirrored in other states.[13]

After carefully considering the submission and the applicable passages from *McIntosh*, the court focused on the duty. It found:

"The nature of an administrator's fiduciary position is such that it requires the fiduciary's undivided loyalty in pursuing exclusively the interests of beneficiary parties – to the exclusion of all other rival interests. The rigor of the fidelity required of trustees and those who discharge equivalent positions by courts of equity over centuries has never diminished. Across time, celebrated prior cases such as *Keech v Sandford* (1726) Sel Cas 61; 25 ER 223 and *Boardman v Phipps* [1966] UKHL 2; [1967] 2 AC 46 provide merely two of many examples of situations where what on the face of it might otherwise be regarded as a harsh result taken against the actions of a trustee, was necessary to preserve the integrity of the office of trustee…[14]

"In an age of increasing moral ambivalence in western society the rigor of a court of equity must endure. It will not be shaken as regards what is a sacred obligation of total and uncompromised fidelity required of a trustee. Here, that required the administrator not just to disclose the existence of the (rival) estate interest when claiming the superannuation moneys in her own right from the fund trustee. It required more. It required her to apply as administrator of the estate for it to receive the funds in any exercise of the fund trustee's discretion."[15]

Martin J went on to affirm that "…the approach of Atkinson J taken in *McIntosh* cannot be faulted as a matter of law. I would respectfully apply it here, even though the underlying facts are different. The interest of a deceased estate require a 'champion' who cannot be seen (even if they are not) to be acting halfheartedly, or with an eye to achieving outcomes other than an outcome that thoroughly advances the interests of the estate – to the exclusion of other claimants."[16] And on that basis the court refused her application and would not excuse her breach;[17] and so ordered that she account, although the accounting was structured as a trust in the house for the children with offsets against the funds already placed into trust for them.

So, if the duty of a personal representative to the estate is one of "sacred obligation of total and uncompromised fidelity"[18] and a court will not excuse the breach, is there another means open to disentangle what might otherwise be an innocently ignorant breach?

Gonciarz involved those elements.

It was a matter that came before the courts within about six months of the decision of

Burgess, with the relevant events occurring before and crossing the decision. The deceased died intestate, on 4 August 2017, survived by his wife, brother and mother. His wife was appointed administrator of his estate on 18 December 2017.

His wife had two children from a prior relationship. Under West Australian intestacy laws, the deceased's wife, brother and mother shared equally in his modest estate, the net value of which was $140,000.[19] He, however, had a superannuation fund with a death benefit of $541,412.20. There was no binding nomination.

Prior to marrying the administrator, however, the deceased had made a non-binding nomination in favour of his brother. Prior to her appointment as administrator, the deceased's wife completed a claim form calling for the superannuation to be paid to her. In completing the form, she did not identify any other claimant.

After she was appointed administrator, the fund sought for the details of the deceased's stepchildren and brother to be provided. The wife's solicitor complied with the request. The trustee subsequently determined to distribute the entire proceeds to the wife. However, the deceased's brother objected to that decision.

Crucially, the brother asserted that he did not believe the deceased and the testator were living together at the date of the deceased's death.[20] The wife then commenced a claim for further provision from the estate, naming herself in her capacity as the administrator of the estate.

The brother and mother of the deceased then started a campaign of complaining about the administration of the estate. It escalated to the point that they lodged an application for her to file and serve accounts along with a plan of distribution.[21] They then raised the issue of her claim for the superannuation fund, referring her to the decision of *Burgess* pressing the issue of conflict. As a result of becoming aware of the decision, the administrator promptly wrote to the superannuation trustees seeking for them to "disregard"[22] all her previous claims on the funds. The trustee subsequently determined to pay the proceeds to the estate.

However, in advising of the decision the trustee revealed that the deceased's brother asserted that the deceased and the administrator were not in a de facto relationship at the time of his death and that this was a factor in their determination.[23]

This allegation distressed the administrator and she sought for the brother and mother to consent to her resignation as administrator in order that she be free to respond to the allegation made to the superannuation trustee. They declined, resulting in the administrator applying to the court to resign as administrator.[24] Relevantly, the administrator was suffering from depression and under medical care for the depression from within months of her husband's death through to February 2019.[25]

The court considered its powers to revoke the grant,[26] while considering, referring to and affirming the decisions of *McIntosh* and *Burgess*. The court considered the fact that she was making a claim for further provision in the estate, the acrimony between the parties, and how that would likely affect the matter moving forward.

Observing that the overarching principle in personal representatives acting in an estate is always contingent on the due administration of the estate, the court affirmed that "the death benefit is not an asset of the estate. Rather, it is a benefit that may vest in the estate, if, and only if, the Trustee exercises its discretion to pay the benefit to the estate and not wholly to the plaintiff."[27]

The court found that the administrator was in a conflict of interest with the estate, that it was in her own interest to challenge the trustee's decision, and that compelling her to administer the estate when she no longer wished to do so was not for the benefit of the estate. It would be "inimical to the due and proper administration of the estate and to the interests of the parties beneficially entitled to it. If the plaintiff was compelled against her wishes to continue with the administration I fear that is inevitable the level of disputation experienced in the past will be perpetuated."[28]

So, what do the cases tell us?

1. A personal representative, be they an administrator or executor has the same fiduciary duty of "sacred obligation of total and uncompromised fidelity"[29] to the estate to the exclusion of all others.
2. A conflict will arise when a personal representative seeks to raise a claim on the superannuation for themselves after they have been appointed, or receive the funds after they have been appointed.[30]
3. Timing is relevant to the duty being engaged, that is a decision or payment by the trustee made after the appointment will place the personal representative in conflict.[31]
4. In respect of an executor, the conflict can be authorised by the testator, however, it requires evidence that the deceased was fully informed of the circumstances.[32]
5. When the executor is not authorised by the testator, then as to whether the conflict is excused will be a matter of whether there was consent of the beneficiaries. Crucial to this aspect is a factor of causation.[33]
6. When in conflict a personal representative must account to the estate, however the mechanism of that accounting can involve considerations of how the personal representative has dealt with the funds received at the time of the application.[34]
7. A personal representative who finds themselves in conflict may be able to extricate from that conflict by applying to the court to have the grant revoked. Whether it will be revoked is contingent on the status of the administration of the estate and the conduct of the parties.[35]

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, and member of the QLS Specialist Accreditation Board, *Proctor* Editorial Committee, QLS Succession Law Committee and STEP.

Notes

1 *Burgess* at [1].
2 At [2]-[3].
3 At [3].
4 At [8]-[9].
5 At [9].
6 At [13].
7 In Western Australia the entitlements of a de facto spouse will depend on the number of years the parties were in a de facto relationship. The precondition of the number of years changes and increases from two to five if the deceased was also legally married at the time; if so it will then depend on the status of that marriage during that time frame. And it will also alter when there are children. See s15 *Administration Act 1903* (WA).
8 At [11].
9 At [24].
10 Per Martin J at [16].
11 At [24].
12 For a discussion on estate proceeds trusts, see the writer's co-authored article published by the *Australian Tax Institute Journal*, 'Successful Succession: Estate proceeds trusts: benefits for families', by Christine Smyth and Katerina Peiros, Taxation in Australia Vol.51(4).
13 See s76 *Trusts Act 1973* (Qld); s85 *Trustee Act 1925* (NSW); s67 *Trustee Act 1958* (Vic.); s56 *Trustee Act 1936* (SA); s50 *Trustee Act 1898* (Tas.); s85 Trustee Act 1925 (ACT).
14 At [83].
15 At [84].
16 At [85].
17 At [86].
18 Ibid.
19 *Gonciarz* at [5].
20 At [8]-[13].
21 At [14].
22 At [22].
23 At [25]-[27].
24 At [27]-[29].
25 At [30].
26 At [31]-[38].
27 At [38]-[43].
28 At [40].
29 *Burgess* at [84].
30 *McIntosh, Burgess.*
31 *Burgess.*
32 *Brine.*
33 *Brine.*
34 *Burgess.*
35 *Gonciarz*.

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Court confirms adjustment for wife's premium payments

WITH ROBERT GLADE-WRIGHT

Property – joint decision to obtain disability insurance – contributions-based adjustment made for wife who paid the premiums

In *Falcken & Weule* [2019] FamCAFC 140 (16 August 2019) the wife suffered a stroke during a 21-year marriage, receiving $235,152 from her income protection insurer. Having found a net asset pool of $1.8 million, a judge of the Family Court of Western Australia assessed contributions at 53:47 favouring the wife, with no further adjustment under s75(2). In dismissing the husband's appeal, the Full Court (Strickland, Aldridge & O'Brien JJ) said ([14]-[15]):

"The evidence relied on by the husband demonstrates that at some stage during the marriage the parties agreed that they should each obtain income protection insurance… Thereafter, the wife paid the premiums, seemingly from her income. Nonetheless, it was a joint decision to use family funds to obtain income protection.

"We accept that this can be a relevant consideration but we do not accept the husband's contention that it follows…that there has been an equal contribution to the receipt and use of the benefits of the policy."

The court referred (at [16]-[21]) to the authorities and said (from [22]):

"The upshot of these authorities is that a joint decision to take out insurance is a contribution by both parties. It is worth recording that in none of these cases was that contribution regarded as being anywhere close to equal.

[23] The primary judge recognised the disability insurance payment was received by the wife for being totally and permanently disabled. It was compensation for her not being in a position to receive income for what would otherwise have been the rest of her working life.

[24] It was, however, not used by the wife to support her over those years, but was entirely spent on supporting the family prior to separation.

[25] Consistent with the above authorities, the primary judge found that this was a significant contribution by the wife.

[26] Although his Honour did not expressly refer to the joint decision to take out insurance, that does not mean that it was not taken into account…"

Property – husband granted sole occupancy of his pre-marital property – wife also ordered to remove her caveat

In *Tailor* [2019] FamCA 383 (2 July 2019) an 83-year-old wife and her 90-year-old husband lived together in a house which he had owned for 30 years before their marriage. The husband had other assets and the wife owned an apartment. Conflict led to the wife obtaining an intervention order. The husband filed an application for sole occupation of the house which the wife opposed, arguing that the parties could continue living together. The wife lodged a caveat, alleging that she had stayed in the marriage due to an agreement that she would receive the house in the husband's will and that the husband had broken his promise by revoking that will.

The husband (who had undertaken through his lawyer not to deal with the property without notice) also sought an order for the removal of the wife's caveat, opposed by the wife who argued an equitable interest. The husband deposed ([23]) that "the presence of the wife…[wa]s causing him acute strain and distress in circumstances where he is extremely elderly and unwell, and that her presence cause[d] difficulty to his carers (…)".

McEvoy J granted sole occupancy, accepting the husband's submission [41] that a court must consider what is 'proper' for the purpose of s114(1) and the Full Court's rationale in *Davis* [1982] FamCA 73 where it was said:

"All that is necessary…is that the Court should regard the situation between the parties as being such that it would not be reasonable to expect them to remain in the home together."

Concluding ([50]) that "in all the circumstances it would not be reasonable… to expect the parties to continue to reside in the…property together", the court also ordered the wife to remove her caveat, saying ([61]-[73]) that the wife had failed to satisfy the court that "there [wa]s a serious question to be tried…to justify…the preservation of the status quo*";* that it [wa]s…arguable that the caveator ha[d] a caveatable interest" and, if so, that "the balance of convenience favour[ed] the retention of the caveat".

Spousal maintenance – s44(3) time limit did not apply to wife's maintenance application where two prior orders had been satisfied

In *Blevins* [2019] FCCA 1923 (11 July 2019) Judge Baker heard an initiating application for spousal maintenance of $400 a week, filed 23 years after the parties separated (21 years after their divorce). The parties were 69 and 71. A final maintenance order was made in 1999, requiring the husband to pay $750 a month until 8 July 2009 and providing that "thereafter the wife shall be at liberty to seek the payment of further spousal maintenance".

In 2009 a further final order was made for lump sum maintenance of $275,000 which contained a notation that the payment would "finally determine any obligation by the former husband to provide…maintenance to the former wife". In 2017 the wife lost her ability to claim an aged pension, saying that she was reliant on her savings and superannuation, which did not generate enough income to support her. The husband sought dismissal of the application, arguing that the wife was out of time and that he would suffer prejudice if leave were granted, he having remarried and attempted to achieve finality through the previous orders.

The court ([37]-[38]) cited *Atkins & Hunt* [2016] FamCAFC 230 (FC) (followed in *Lambton & Lambton (No.2)* [2017] FamCAFC 230) in which it was said:

"…[Section] 44(3) does not impose an impediment to the wife pursuing an order for maintenance pursuant to s74…so as to seek the revival of 'an order previously made in proceedings with respect to the maintenance of a party'. Indeed…the Act contemplates applications for maintenance that sit squarely outside any 'finality' said to be effected by the earlier section."

Judge Baker concluded ([40]-[41]):

"The…maintenance order made in proceedings with respect to the maintenance of the applicant in 1999 is an order previously made. The order was properly made within time. I consider that the applicant therefore does not need to obtain leave pursuant to s44(3)…

"This means that potentially the respondent may be required to pay…maintenance, if he has the ability to pay and the applicant can demonstrate a need. This will be determined at trial."

Children – mother's unilateral relocation – review of registrar's refusal to exempt father's filing of FDR certificate

In *Conlon* [2019] FCCA 2195 (13 August 2019) the mother unilaterally relocated with the parties' five-month-old baby to live with her parents in a town 2.5 hours' drive away. After a police incident at the home the mother left but returned and the parties attended counselling. After counselling, the father went to Sydney for the weekend, but came home to find that the mother and child had left.

The parties arranged a meeting for father and child at a mid-way town but the father applied for an urgent recovery order, seeking an injunction for the return of the mother and child and an order that he spend time three times per week with the child or an order that the child live with him if the mother did not return.

A registrar refused to file the father's application on the ground that there was no family dispute resolution certificate, nor an exemption made out under s60I(9). Upon the father's application for review of that decision, Judge Terry said (from [23]):

"The father's solicitor submitted that the matter was urgent because it was important that the father was able to spend regular short periods of time with the child in order to establish a strong bond with him and that without court intervention compelling the mother to return…this would not occur.

[24] He submitted that the father had a strong case to compel the mother to return because she had unilaterally relocated. In support of that he referred to *C & S* [(1999) FamCA 66]…

[25] The father gave no evidence about having sought any mediation to resolve the parenting issues. When I asked the father's solicitor why, he replied to the effect of 'Do you have any idea how long that takes?"

The court concluded ([32]-[33]):

"…[N]ot all matters can stay out of court. Issues such as family violence, drug use or alcohol abuse, the fact that a parent has a personality disorder or a serious mental illness or that a parent has an unrealistic expectation about outcomes and proposes equal time for a young child or has an ulterior motive for proposing no time just to name a few can make it either undesirable for dispute resolution to be attempted or impossible for even a skilled mediator to assist parties to reach their own agreement.

"Based on the father's affidavit no such issues exist in this case…[T]he case described by the father is the kind of case where the parents should be making a genuine effort to resolve their dispute before coming to court."

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

Statutory construction – mutual recognition principle – exceptions

Victorian Building Authority v Andriotis [2019] HCA 22 (7 August 2019) concerned whether the appellant had a discretion to refuse to register the respondent and whether Victorian character requirements fell within an exception to the mutual recognition principle. The respondent registered as a waterproofer in New South Wales. In his NSW application he falsely stated his work experience. He later sought registration in Victoria under the *Mutual Recognition Act 1992* (Cth) (MRA). That Act allows for a person registered in one state, after notifying a second state registration authority, to be registered in the second state for the equivalent occupation. Section 19 of the MRA allows for a person to lodge a notice seeking registration. Section 20(1) provides that a person who lodges a notice is entitled to be registered as if registration in the first state was a sufficient ground of entitlement to registration. Section 20(2) provides that the local authority "may" grant registration in the second state on that ground. Section 17(2) provides for a limited exception to the mutual recognition principle: a law in the second state will apply if it applies to all persons seeking to carry on the occupation, but only if it is not based "on the attainment or possession of some qualification or experience relating to fitness to carry on the occupation". The respondent in this case was refused registration on the basis that he did not meet a "good character" requirement applicable in Victoria under s170(1)(c) of the *Building Act 1993* (Vic.). The Administrative Appeals Tribunal upheld the refusal. On appeal to the Full Federal Court, the appellant argued that s20(3) of the MRA confers a discretion to register; and that the good character requirement came within the exception in s17(2). The full Federal Court rejected both arguments. The High Court unanimously dismissed the appeal. The court held that s20(2) of the MRA is empowering and does not admit of a broader discretion. And the limit on the exception s17(2) was to be interpreted broadly, so that not only qualifications of an educational or technical kind were caught. The limit on s17(2) encompassed the subject matter of s170(1)(c) of the *Building Act 1993* (Vic.), meaning the exception could not apply. Nettle and Gordon JJ jointly; Kiefel CJ, Bell and Keane JJ jointly concurring; Gageler J and Edelman J each separately concurring. Appeal from Full Federal Court dismissed.

Constitutional law – implied freedom of political communication – Australian Public Service Code of Conduct

In *Comcare v Banerji* [2019] HCA 23 (7 August 2019) the High Court held that an exception to the provision of compensation based on reasonable administrative action taken in respect of the respondent's employment did not impermissibly burden the implied freedom of political communication. The respondent was employed by the then Department of Immigration and Citizenship (the department). Under Twitter handle @LaLegale, the respondent broadcast more than 9000 tweets, many of which were highly critical of the department, other employees, department policies, and government and opposition policies. A complaint was received about the respondent's actions and an investigation was conducted. A delegate of the secretary of the department proposed to find that the respondent had breached the Australian Public Service (APS) Code of Conduct and also proposed to terminate the respondent's employment. The code, which is set out in s13 of the *Public Service Act 1999* (Cth) (the PS ACT), relevantly provides that an APS employee must at all times behave in a way that upholds the APS values, and the integrity and good reputation of the APS. The APS values, which are set out in s10 of the PS Act, include that the APS is apolitical and delivers services fairly, efficiently, impartially and courteously to the public. After her termination, the respondent lodged a claim for compensation under s14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). That Act provided that no compensation was payable for an "injury" suffered as a result of reasonable administrative action taken in a reasonable manner in respect of an employee's employment. A delegate of the appellant rejected the respondent's claim on the basis that it came within that exception. The Administrative Appeals Tribunal found that the use of the APS Code impermissibly burdened the respondent's freedom of political communication and set the appellant's decision aside. The respondent also argued that her anonymous tweets did not fall within the scope of the PS Act provisions (the construction argument). On appeal to the Federal Court, the matter was removed into the High Court. The High Court unanimously rejected the respondent's construction argument. The court further held that ss10(1), 13(11) and 15(1) of the PS Act had a permissible or legitimate purpose; that is, consistent with the constitutionally prescribed system of representative and responsible government. The purpose was the maintenance of an apolitical public service. The court also held that the provisions of the PS Act were reasonably appropriate and adapted or proportionate to their purpose. Accordingly, they did not impose an unjustified burden on the implied freedom. Kiefel CJ, Bell, Keane and Nettle JJ jointly; Gageler J, Gordon J and Edelman J each separately concurring. Appeal from the Administrative Appeals Tribunal (removed from the Federal Court) upheld.

Electoral law – counting of votes – power to publish information about indicative counts

Palmer v Australian Electoral Commission [2019] HCA 24 (Orders 7 May 2019, reasons 14 August 2019) concerned the power of the Australian Electoral Commission (AEC) to publish an indicative two-candidate preferred count (indicative TCP count) of votes in an election. The *Australian Electoral Act 1918* (Cth) (the Electoral Act) requires the scrutiny of votes in an election for each division to include an indicative TCP count. The count is a count of preference votes (other than first preferences) "that, in the opinion of the Australian Electoral Officer, will best provide an indication of the candidate most likely to be elected for the Division". The plaintiffs were candidates at the May 2019 election. They challenged the AEC's practice of publishing the identity of candidates selected for the indicative TCP count and the progressive results of the count after polls had closed for the relevant division, but while polls in other places were still open. The plaintiffs argued that the Electoral Act did not authorise the publication of that information before all polls were closed; and that publishing the information before the close of all polls would distort the voting system in a manner that would compromise the representative nature of a future Parliament, contrary to the Constitution. The High Court rejected the factual basis for the challenge. It was not shown that publication of the information suggested the giving of an imprimatur to any particular candidate or outcome. The selection of candidates was not shown to be inaccurate or misleading. There was no factual foundation for the contention that the publication of the information after the polls had closed in some, but not all, places had any effect on the constitutional requirements for elections. Section 7(3) of the Electoral Act, which gives the AEC power to do "all things necessary or convenient to be done for or in connection with the performance of its functions", empowered the AEC to publish the indicative TCP count and

related information in the way the AEC did. Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ jointly; Gageler J separately concurring. Application for constitutional writ dismissed.

Costs – judicial discretion to order costs – impecuniosity of unsuccessful party

In *Northern Territory v Sangare* [2019] HCA 25 (14 August 2019) the High Court held that it was erroneous to decline to order costs only because the unsuccessful party to the litigation might not be able to pay the debt. The respondent brought defamation proceedings in the Northern Territory Local Court arising from a briefing note that the appellant prepared for the Northern Territory Minister for Infrastructure. The briefing note was part of a process for seeking a visa to work in Australia. The respondent alleged that the briefing note contained fabricated material. The matter was transferred to the Supreme Court, which dismissed the proceeding. An appeal was also unsuccessful. The appellant sought its costs of the trial and the appeal. The Court of Appeal acknowledged that the appellant, having been successful, would normally have its costs on the basis of the rule that costs normally follow the event. The Court of Appeal declined to make that order, however, because making such an award would be futile because the respondent was impecunious. The High Court unanimously allowed the appeal. The court noted that the power to award costs is a wide discretion, but must be exercised judicially. The guiding principle is that a successful party is generally entitled to an order for costs by way of indemnity against the expense of litigation that "should not, in justice, have been visited upon that party". In this case, there was no conduct of the appellant that would have disentitled it to costs, or that would have weighed against the usual exercise of the discretion. It was also not relevant that the appellant was a public body. Impecuniosity of a wrongdoing is not a reason for declining to pay damages, and in the same way, impecuniosity of an unsuccessful party is not a reason to decline to order the payment of a successful party's costs. The courts have consistently rejected futility due to impecuniosity as a reason not to order costs. Kiefel CJ, Bell, Gageler, Keane and Nettle JJ jointly. Appeal from the Supreme Court (NT) allowed.

Legal professional privilege – advice privilege – whether legal professional privilege only an immunity or also an actionable legal right

Glencore International AG v Commissioner of Taxation [2019] HCA 26 (14 August 2019) concerned whether legal professional privilege (LPP) can be deployed as an actionable legal right, as opposed to an immunity only. The plaintiff pleaded that it had received legal advice from Appleby (Bermuda) Limited (Appleby), a law practice in Bermuda. That advice was part of a cache of documents stolen from Appleby's electronic file management system and provided to the International Consortium of Investigative Journalists. The court also assumed that the documents had been further disseminated. The advice came into the possession of the defendants. Upon learning of that, the plaintiff requested the return of the advice, asserting that the documents were subject to LPP. The defendants refused, and the plaintiff brought proceedings in the High Court's original jurisdiction, seeking an injunction to restrain the use of the documents and seeking their return. The only basis on which the proceeding was brought was LPP, the plaintiff arguing that LPP is not limited to operation as an immunity. The plaintiff did not rely on breach of confidence and the court noted some difficulties that might have been encountered in relying on such a breach given that the documents are in the public domain. The defendants demurred, arguing there was no cause of action disclosed entitling the plaintiff to the relief sought. The High Court unanimously upheld the demurrer and dismissed the proceedings. The court held that LPP is "only an immunity from the exercise of powers which would otherwise compel the disclosure of confidential communications". It is not a legal right founding a cause of action. There was no justification in policy for the creation of such a right. On the present state of the law, once privileged communications are disclosed, a party must turn to the equitable doctrine of breach of confidence to protect the material. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Proceeding in the original jurisdiction of the court dismissed.

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

Federal Court

Administrative Law – procedural fairness – *McKenzie* friend

For a third time, the Federal Court has made orders setting aside orders of the Federal Circuit Court in litigation in bankruptcy proceedings involving Brett John Hayes. In *Hayes v Pioneer Credit Acquisition Services Pty Ltd* [2019] FCA 1260 (13 August 2019) Rangiah J set aside a sequestration order against the estate of Mr Hayes on the ground of a denial of procedural fairness.

At the commencement of the hearing in the Federal Circuit Court, the primary judge refused to allow Mr Hayes to be represented by Mr Welch, who was not a lawyer. His Honour also directed Mr Welch to leave the area where he was sitting behind the bar table near Mr Hayes and move to the public gallery. The primary judge subsequently called security staff into the courtroom and threatened to remove Mr Hayes. However the hearing continued, with Mr Hayes making submissions on his own behalf.

In the appeal, the Federal Court considered the concept of a *McKenzie* friend from *McKenzie v McKenzie* [1971] P 33: at [25]-[30]. Rangiah J stated at [30]: "In Australia, the prevailing view is that in criminal cases, the court has a discretion as to whether to allow a litigant a *McKenzie* friend: for example, *Smith v R* (1985) 159 CLR 532 at 534; *R v EJ Smith* [1982] 2 NSWLR 608; *R v Dodd (No.2)* [1985] 2 Qd R 282 at 283–284; *Crown v Burke* [1993] 1 Qd R 166 at 167, 173, 178–179. The position is different in civil cases. I understand the Queensland Court of Appeal to have held in *Coffey v State of Queensland* [2010] QCA 29 at [37]-[38] that in a civil case, an unrepresented litigant may have a person attend as a *McKenzie* friend, subject to the power of the court to disallow such assistance where that becomes necessary."

The court held at [31] and [40] that Mr Hayes was denied procedural fairness by being denied that assistance of Mr Hayes as a *McKenzie* friend. However, it was not shown that it was unreasonable for the primary judge to call in security staff, or that it was otherwise an error in doing so (at [39]). The matter was remitted again to the Federal Circuit Court for a new trial.

Consumer and credit law – ASIC case – alleged contraventions of s128 of *National Consumer Credit Protection Act 2009* (Cth)

In *Australian Securities and Investments Commission v Westpac Banking Corporation (Liability Trial)* [2019] FCA 1244 (13 August 2019) Perram J dismissed ASIC's case that Westpac breached the *National Consumer Credit Protection Act 2009* (Cth) (the Act) in the manner in which it extended hundreds of thousands of Westpac-branded home loans across the period 12 December 2011 to March 2015. The court considered the provisions in Division 3 of Part 3-2 of Chapter 3 of the Act.

Relevantly, the Act requires a credit provider to ask itself only whether "the consumer will be unable to comply with the consumer's financial obligations under the contract" or, alternatively, whether the consumer "could only comply with substantial hardship": s131(2)(a) (the s131(2)(a) Questions) (at [3]).

The alleged breaches fell into two categories. The first was an allegation that, in approving its home loans, Westpac failed to have regard to any of the living expenses declared by consumers on their loan application forms. The court rejected this case on the facts (at [2], [21]-[35] and [86]). In any event, the court held that the Act does not operate as ASIC alleged (at [56]-[85] and [87]-[92]). Perram J summarised his conclusion at [4]: "Whilst I accept that the Act requires a credit provider to ask the consumer about their financial situation (s130(1)(b)) and, in turn, to ask itself — and to answer – the s131(2)(a) Questions, I do not accept that this has the further consequence that the credit provider must use the consumer's declared living expenses in doing so".

The second category of alleged contraventions of the Act were where Westpac calculated proposed repayments with principal amortised over the life of loans in the case of loans having an initial interest-only period before payment of principal was required (at [7]-[8]). ASIC's case on these allegations were also rejected (at [93]-[103]).

Continued page 64

Legal workplace culture need not be toxic

BY GRAEME MCFADYEN

Lawyers Weekly recently reported a survey[1] which found that satisfaction among lawyers working in law firms across Australia had dropped to its lowest point in five years.

The survey noted that the average level of satisfaction on a scale of one to five fell from 4.37 in 2015 to 3.81 in 2019 after peaking at 4.45 in 2017: a 14% drop.

The 3.81 satisfaction rate is an average across a number of demographics ranging from 3.67 for those aged 26–34 to 4.16 for those aged 65+.

A high turnover rate seems to be a consistent structural feature for most Australian law firms. The historical turnover of lawyers in larger (revenue > $10m) commercial law firms is around 20%.[2] The above 14% decline suggests that the average attrition rate has increased to 23%.

The above outcome is not a surprise. Indeed, it is merely one of a number of surveys conducted over the past decade which has found there is a real need for law firms to prioritise a greater focus on culture and engagement than currently occurs.

Immediately following publication of the above survey results, Brisbane-based legal HR consultant Gerard Petersen observed: "Much of the dissatisfaction that I hear about comes from the cursory, superficial, performance-focused manner in which most firms continue to engage with their lawyers, yet at the same time their websites refer to these same people as their greatest assets."[3]

This comment suggests that there are some real reservations about the sincerity of law firm claims that they prioritise the welfare of their staff.

And Mr Petersen is not alone in his observations. In 2014 the Law Council of Australia (LCA) conducted a survey into lawyer attrition. Legal HR consultant Kriss Will reported that the research "painted a picture of the legal profession as one where bullying and gender discrimination are at high levels. Survey respondents also reported high turnover due to discontent with workplace culture, leadership and direction."[4] The LCA survey revealed that 50% of women and 38% of men reported workplace bullying, while a staggering 47% of women reported gender-based discrimination.

These Law Council findings are not novel. In 2015, PsychSafe conducted a survey of 800 white-collar professionals, including 370 lawyers from law firms and the Bar, and 170 lawyers working in government or in-house.[5] According to an *Australian Financial Review* (AFR) report on the study, lawyers were more likely than other professionals to be exposed to toxic behaviour in the workplace. The report found that the main perpetrators of mistreatment were typically male partners. No surprises there, as anyone involved in law firm management can attest.

So where to from here? In the same AFR article, McCabe Lawyers principal Terry McCabe said he was among those who suffered depression and anxiety throughout his career. "It is a problem which the profession needs to deal with honestly and head-on," he said. "We need to acknowledge we are human beings before we are lawyers, and if we don't we are going to lose good people from the profession."[6]

Mr McCabe said that helping individuals made good financial sense. His boutique firm employs about 320 people and had reduced its turnover rate from 40% in 2009 to about 7% in 2015. "We looked at the culture and values, and recognised that a positive environment and work-life balance is important to productivity," he said.

Recognising that culture means different things to different people, Gallup Inc., an international HR consulting company (which also conducts public opinion polls globally) has produced a culture questionnaire for use by global corporations anxious to establish a metric around their culture.[7] These questions are noted below. The answers to these questions inform Gallup's Culture Index for global boards.

1. **Ethics and compliance:** If I raised a concern about ethics and integrity, I am confident my employer would do what is right.
2. **Diversity and inclusion:** At work I am treated with respect.
3. **Leadership trust:** I trust the leadership of this organisation.
4. **Leadership inspiration:** The leadership of my company makes me enthusiastic about the future.
5. **Disruption:** We have the speed and agility to meet customer and marketplace change.
6. **Employee engagement:** There is someone at work who encourages my development.
7. **Performance management:** I have received meaningful engagement in the last week.
8. **Wellbeing:** My company cares about my wellbeing.
9. **Sustainability:** My company makes a significant contribution to the world.
10. **Mission and purpose:** The mission or purpose of my organisation makes me feel my job is important.

For any concerns about workplace culture, QLS provides information and support tools for individuals and organisations within the legal profession to manage the pressures of work and life. See **qls.com.au/wellbeing**.

Conclusion

The high attrition rates of lawyers in Australian law firms have long been recognised, yet the overall attrition rate is still alarmingly high.

This situation is reversible, as Mr McCabe has demonstrated. It requires a deliberate strategy focused on improving the work environment, including the behaviour of partners and other senior staff.

The fact that this has been a significant issue in the legal profession for so long suggests that achieving this outcome is considerably more complex than it seems.

Graeme McFadyen has been a senior law firm manager for more than 20 years. He is Chief Operating Officer at Misso Law and is also available to provide consulting services to law firms – graeme@misso.edu.au.

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From page 57

There is a section in the court's judgment about the Household Expenditure Measure (HEM) benchmark, which measures household expenditure across the Australian community (at [26]-[47]). ASIC did not allege that Westpac was entirely prohibited by the Act from using the HEM benchmark, rather its case was that Westpac had not used the consumer's declared living expenses and had, rather, relied solely on the HEM benchmark (at [10]). While following the judgment there was media comment about this aspect of the case, Perram J stated that the HEM benchmark was of "marginal relevance" to the case (at [36]). Further, "the capacity of the HEM benchmark to serve as a proxy for substantial hardship is not an issue which is actually live in the litigation" (at [38]).

Consumer law and damages – damages assessment under s236 of the Australian Consumer Law

In *Flogineering Pty Ltd v Blu Logistics SA Pty Ltd (No.3)* [2019] FCA 1258 (9 August 2019) Greenwood J determined an interlocutory dispute concerning the production of documents and particulars following the court's judgment on the separate question in which it was held that the respondents had engaged in conduct in contravention of ss18 and 29 of the Australian Consumer Law (ACL). The interlocutory dispute related to the applicant's claim for damages pursuant to s236 of the ACL. The court considered the formulation of the text on causation in s236 of the ACL of "a person suffers loss because of [contravening] conduct" as compared with the earlier test of s82(1) of the *Competition and Consumer Act 2010* (Cth) of "a person who suffers loss or damage by conduct of another..." (at [23]-[28]). Greenwood J held that, notwithstanding the difference in text, the principles in the cases on s82 "properly characterise the approach to s236, having regard to the text, context and purpose of the *Competition and Consumer Act 2010* (Cth) and Schedule 2 to that Act" (at [27]).

Native title and adminsitrative law – tension between gender restriction orders and the natural justice hearing rule

In *Stuart v State of South Australia (Oodnadatta Common Overlap Proceeding)* [2019] FCA 1282 (15 August 2019) the court heard an application for orders to take account of cultural and customary concerns of claimant groups regarding the evidence in proceedings for the determination of two overlapping claims of native title. One of the claimant groups (the Walka Wani People) sought a range of orders the effect of which would preclude any Aboriginal man who has not been initiated into the relevant Men's Law which is to be the subject of evidence from hearing that evidence or being informed of it. The other claimant group (the Arabana People) and the state objected to aspects of the orders, namely the limitation with respect to the Aboriginal men who may hear or be informed of the evidence. In the case of the Arabana People, that was because the restriction would preclude any member of the Arabana People from hearing or being informed of the male gender-restricted evidence, and such a restriction would thereby inhibit their ability to give instructions concerning that evidence, to contest that evidence to the extent thought appropriate, and to give evidence themselves concerning those matters (at [17]).

The court considered its powers authorising the exclusion of persons from a hearing (s17 of the *Federal Court of Australia Act 1976* (Cth)) and in native title matters to take account of the cultural and customary concerns of Aboriginal peoples and Torres Straight Islanders (s82 of the *Native Title Act 1993* (Cth)) (at [25]-[39]). The court also considered the entitlement of a party to litigation to hear, or at least be informed about, the evidence presented for the purpose of defeating the party's claim as an incident of the natural justice hearing rule (at [45]-[48]).

Justice White held at [66]: "In summary, I am satisfied that orders in the form proposed by the Walka Wani Applicants would prejudice unduly the Arabana People in the proceedings as they would involve an abrogation of the natural justice hearing rule with respect to matters which appear to be at the heart of the contest between the two claimant groups. As already indicated, that rule is fundamental to the provision of procedural fairness. Taking account of the cultural and customary concerns of the Walka Wani by precluding any member of the Arabana People from hearing, or being informed about, the restricted gender evidence would, in my judgment, prejudice the Arabana People unduly."

Practice and procedure – application by litigation representative for approval of settlment

In *James v WorkPower Inc.* [2019] FCA 1239 (8 August 2019) the court made an order approving the settlement by a litigation representative of the applicant's claims of discrimination contrary to the *Disability Discrimination Act 1992* (Cth) and a contravention under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

After referring to rules 9.70 and 9.71 of the *Federal Court Rules* which deal with settlement of a proceeding involving a litigation representative and approval by the court, Mortimer J said at [11]: "...in determining whether or not to approve a settlement, for the purpose of rendering it binding on an applicant under a legal incapacity, the Court must be satisfied the settlement is in the applicant's best interests, or beneficial to the applicant's interests. That is not a requirement of the Rules themselves but stems from the nature of the jurisdiction exercised by the Court where a party is under a disability and unable to conduct or conclude a proceeding himself or herself."

The court also noted that a relevant factor in considering the risks attending the full litigation of a proceeding include the emotional and psychological strain of litigation on the person under a disability (at [14]).

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

Spritz to the party finish line

WITH MATTHEW DUNN

Despite having been painfully on trend, spritz – the wine-based cocktail of north-eastern Italy – is the perfect antidote to the legal party season.

The very mention of spritz usually brings to mind the Aperol spritz, a heady orange fizz concoction marketed relentlessly in the summer months as the go-to of savvy young professionals. While Rebekah Peppler of *The New York Times* bluntly assured us that "Aperol Spritz is not a good drink",[1] it still barnstorms its way into our fashionable riverfront bars in the warmer months as the embodiment of sophisticated Italian Riveria chic.

But spritz is a good drink and it is perhaps not as one-dimensional as we may have been led to believe. The spritz cocktail is said to have originated from north-eastern Italian bar staff trying to find a way to tempt the taste buds of their Austro-Hungarian army occupiers. The Austrians were used to lighter whites and evidently found the wines of the region too strong without the addition of soda water (as the ancient Greeks were once wont to do). The name 'spritz' is a legacy of those German-speaking troops.

The wine cocktail arose in the '20s and '30s with the addition of a bittering agent (Campari or Aperol) to make a more adult *aperitivo*. With the surge of popularity of prosecco in the 1990s, the Italian spritz took on a new dimension with additional body and bubbles.

The accepted recipe of the spritz calls for proportions, one measure soda water, two measures bittering agent and three measures of prosecco. The marriage of ice, soda, bitter liqueur and sparkling wine is the prescription for serious refreshment and a damn fine way to start a meal or a party in a law firm in the heat of a Queensland summer.

The liqueur component need not be just Aperol. A cursory Google will throw up a multitude of spritz variants using bitter cherry, herb-infused wine, gin-based fruit concoction, elder flower or any astringent spirit imaginable. For those who need to know, it is said the great guru of **goop.com**, Gwyneth Paltrow, favours the French wine aperitif Lillet in a pseudo-spritz[2] (followed by a Mexican Carrot Orange Margarita).

So, the party season for the legal profession in Queensland is often likened to endurance running throughout November and December, and there is a call for a refreshment which enhances and does not obliterate. This year, firms could do far worse than selecting an aperitif liqueur and mixing the staff a spritz with lots of ice. Cool, refreshing, stylish and perhaps it will assist many to make it to their activities of the next day in good shape and with a clear conscience.

Notes

1 nytimes.com/2019/05/09/dining/drinks/aperol-spritz.html.

2 goop.com/recipes/lillet-spritz.

The tasting

A volunteer cohort was subjected to three forms of spritz mixology to road-test party options.

The first was the **Lillet Blanc GP Spritz**, which was the colour of wheat and had a demure nose. The palate was very dry and quite herbal with a hint of lime juice and an apple cider tang. With ice, it was a blast of refreshment and preferred by many as the essence of adult *aperitivo*. Made in proportions of two parts Lillet blanc, three parts good sparkling wine, one part soda water and lots and lots of ice in a lo ball glass. Perhaps add a slice of crisp apple as garnish.

The second was the classic **Aperol Spritz**, which was the colour of sienna orange and with a nose of hyper tang-y orange. The palate was intense orange with a dry cut of bitters, reminiscent not of childhood Tang but an adult subtext of clear fresh fruit and acid cut. It was not sweet or cloyed cold and made for a fine warm afternoon refreshment. Made in proportions of two parts Aperol, three parts good sparkling wine, one part soda water and lots and lots of ice in a lo ball glass. Perhaps add a slice of lemon to enhance the acid cut and evoke old St Clements.

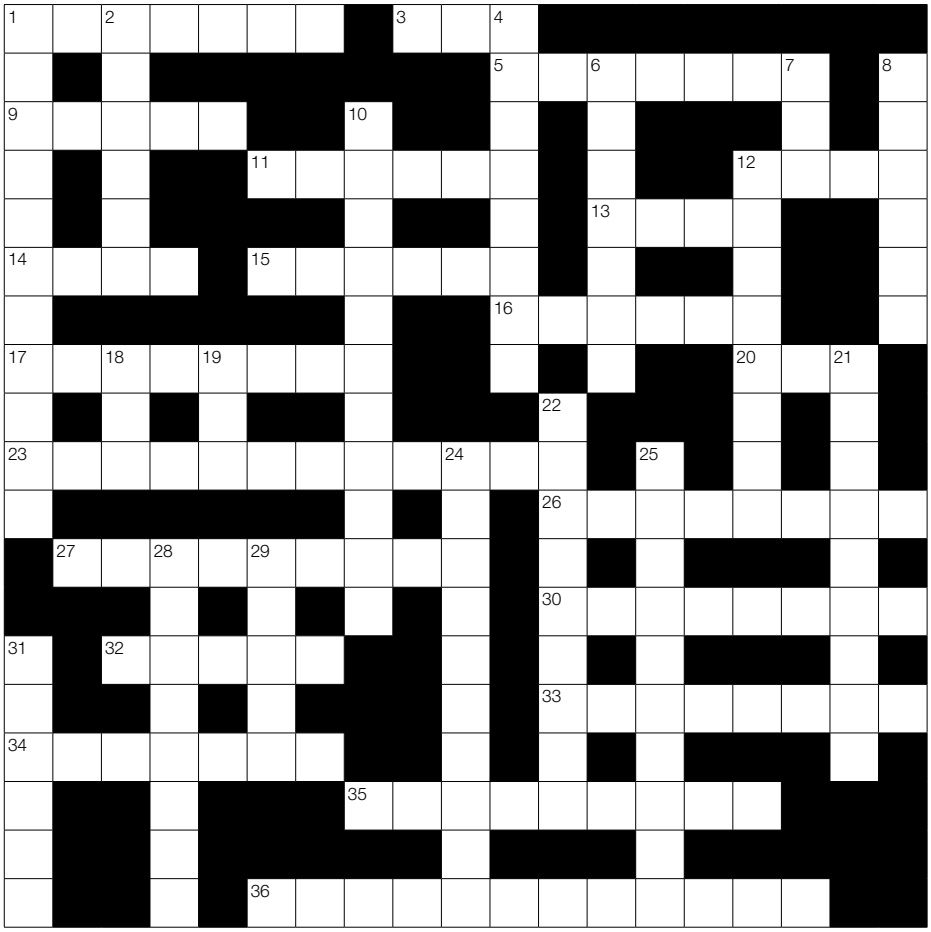
The last was a **Pimms Spritz**, which was a copper brown colour and had the classic nose of Pimms. Normally offered as a Pimms and lemonade, this option is less sweet and brings out the herb and cucumber notes of the Pimms as an object of pure refreshment. The sparkling wine provides length and the acid of the Pimms comes out without the sugary mixer. Hailed as refreshment for the tennis, this is made in proportions of two parts Pimms, three parts good sparkling wine, one part soda water and lots and lots of ice in a lo ball glass. Perhaps add classic strawberry or cucumber as garnish.

Verdict: While favourites were mixed, the Lillet blanc proved a handy and somewhat novel take on this Italian classic.

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 Select a jury. (7)

3 Essentially mandatory pre-proceeding mediation process in parenting disputes. (Abbr.) (3)

5 Antonym of implied. (7)

9 Outright ownership of property, ... title (5)

11 Punish with a fine. (6)

12 Judges customarily break the tips of their .... after handing down a death sentence. (4)

13 Time in .... is a holiday instead of payment of overtime. (4)

14 The requirement to tender an original of a document is an example of the .... Evidence Rule. (4)

15 Procedure for bringing an accused to court, notice to ..... (6)

16 Friend of the court, ... *curiae*. (Latin) (6)

17 Assistant or deputy. (8)

20 Employ. (3)

23 The fact of living together as a couple. (12)

26 Liability of a company's creditor which relates to the company's assets as a whole and may become fixed in particular circumstances such as liquidation, ... charge. (8)

27 Assertive of authority. (9)

30 A ..... order authorises the return of children to a parent's care. (8)

32 Submit. (5)

33 Abolish or cancel, as in a law, right or agreement. (8)

34 The pleasantness, benefits and enjoyableness of an environment. (7)

35 Eviction. (9)

36 Knowledge imputed to a person, ... notice. (12)

Down

1 Proprietary burden, for example, mortgage or easement. (11)

2 Makes a formal written allegation in a civil proceeding. (6)

4 A government department to which a planning permit must be sent for advice before it is granted, ... authority. (8)

6 Steal. (7)

7 Commence civil proceedings. (3)

8 The Courts of ..... were periodic tribunals held around England and Wales until 1972, being replaced by a single, permanent Crown Court. (6)

10 Offender. (11)

12 By authority of or in accordance with, ... to. (8)

18 Nickname of former Queensland Premier, Sir .... (3)

19 Itemised credit note. (3)

21 Absolve from blame or fault. (9)

22 A citizen who tells police that a criminal offence has occurred, generally a complainant. (9)

24 A formal written document that has a legal effect. (10)

25 A sentence that runs at the same time as another. (10)

28 Evidence obtained by scientific methods, for example, ballistics, DNA and blood tests. (8)

29 Worksite of the judicature. (5)

31 Done without any legal obligation, ex ..... (Latin) (6)

Solution on page 68

Parting ways with pay TV

It's easier said than done!

BY SHANE BUDDEN

I've been thinking a lot about advertising lately, mostly because I am seeing it a lot for the first time in 20 years.

This is because my wife and I recently cancelled our pay TV service. In the interests of injecting an element of dramatic tension to this column – and also to avoid being sued – I will not name the pay TV provider.

I stress that there was nothing wrong with the service, but my wife and I decided that the cost of it could not be justified based on our use of it, which consisted mostly of me forgetting to watch the football. My kids, of course, are digital natives, and only watch shows and movies on non-standard devices, such as smartphones, tablets and wristwatches (I made that last one up, but it is probably true anyway). So we got rid of it.

We didn't just get rid of it, of course, because it turns out quitting pay TV is much harder than, for example, quitting heroin. In fact, I think there is a market for reformed heroin addicts to provide counselling services for people quitting pay TV, since they have the requisite skills and experience to resist persuasive techniques. Plus, they clearly have more resilience than your average pay TV customer, many of whom attempt to quit and wake up the next day with a more extensive package and an undertaking to hand over a kidney to pay for it.

When I rang up to quit, the pay TV people reacted with the same overall reserve and calm that federal politicians display when their citizenship is called into question. Somewhere, alarms went off, and the nice young fellow on the phone kept mentioning, over and over, that as such a long-term customer I couldn't seriously be quitting. Apparently he was of the view that I had passed a point of no return, and was a customer for life, and possibly beyond.

He quickly offered up a much better deal than the one I currently had, with even more shows that I could forget to watch, and available only to good customers like me and, it seems, only when we quit. I asked why that wasn't made to me long before I quit, and the guy gave me a rambling soliloquy around it not being his area of expertise, extenuating circumstances and something about the Constitution. At least, that's what it sounded like.

I was then warned that if I did quit, and wanted to come back, I would be treated like any brand new customer, as if I had never been one before; while they did not specifically say it, it was clear that if they passed me in the street they would ignore me. I was beginning to feel like one of Taylor Swift's ex-boyfriends, and began to worry that they would pay her to write a nasty song about me.

Finally, I convinced them that I really was going, and all was finalised except that I had to return their set-top box. Sure, they had delivered and installed it and factored its cost into my monthly fee, but they wanted it back. If I did not return it in time, I would be hit with a large fee, and maybe – at this point I was thinking anything was possible – two guys named 'Knuckles' and 'The Toe Collector' would show up to collect it.

Quitting pay TV is a pretty serious thing, not up there with leaving a bikie gang, but certainly more problematic than the Edward VIII abdication crisis. I suspect there is a business opportunity for contract lawyers extracting people from pay TV, but I digress.

Anyway, as I said, it got me thinking about advertising, because there is just bales of it on free-to-air TV. There is some on pay TV too, but it is just ads for more shows I can forget to watch, so it is easy to ignore.

Specifically, I have noticed that a lot of the time, advertising is somewhat disingenuous in the same sense that Donald Trump's presidency has been somewhat tumultuous.

For example, many ads these days are for apps that allow you to place bets, right from the comfort of your own lounge room, bedroom or bathroom, which allows you to avoid all that annoying socialising and watching actual sport that would otherwise be necessary. These ads present gambling in this fashion as just about the most Australian thing you can do, and also that you pretty much win all the time.

In fact, the way the ads portray it, it's as if the gambling industry had a bunch of money and they thought they should just give it away to people, out of the goodness of their hearts; but that seems hard to believe, because you'd think that eventually they would run out, right? These ads also always show happy people at co-educational, multi-racial BBQs and other events happily winning away; maybe this is because everyone pays attention to the lightning-quick, sotto voce admonishment at the end of every ad to 'gambleresponsibly'?

Also, ads for the military seem designed to convey the idea that life in the services is basically a big, fun camping trip during which you also learn how to be an engineer, or an electrician or a helicopter pilot. There is no mention of going overseas and being shot at, bombed on and being visited by whoever is Prime Minister that week and used as props to address his or her poor polling numbers (which quite frankly makes being shot at sound like a Swedish massage).

So my advice would be to be wary of advertising, unless of course it appears in a highly ethical source such as *Proctor*.

 Shane Budden is a Queensland Law Society ethics solicitor.

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PO Box 518, Bundaberg QLD 4670
p 07 4152 2311 f 07 4152 0848 erowan@charltonslawyers.com.au

Central Queensland Law Association — **Samantha Legrady**
ATSI Legal Service (QLD) Ltd
PO Box 894 Rockhampton Qld 4700
p 07 4927 5711 sjlegrady@gmail.com

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MacDonald Law
PO Box 1639, Toowoomba QLD 4350
p 07 4638 9433 f 07 4638 9488 sarahm@macdonaldlaw.com.au

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

Fraser Coast Law Association — **John Willett**
John Willett Lawyers
134 Wharf Street, Maryborough Qld 4650
p 07 4191 6470 mail@johnwillettlawyers.com.au

Gladstone Law Association — **Paul Kelly**
Gladstone Legal
PO Box 5253, Gladstone Qld 4680
p 07 4972 9684 paul@gladlegal.com.au

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Stone Group Lawyers
PO Box 145, Southport Qld 4215
p 07 5635 0180 f 07 5532 4053 mbehlau@stonegroup.com.au

Gympie Law Association — **Kate Roberts**
CastleGate Law, 2-4 Nash Street, Gympie Qld 457
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luck@taylors-solicitors.com.au

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p 07 3014 5044
f 07 3236 1966 hsutherscrowhurst@mauriceblackburn.com.au

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Pender & Whitehouse Solicitors
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p 07 3356 6589 f 07 3356 7214 pwh@qld.chariot.net.au

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Townsville Community Legal Service Inc.
PO Box 807 Townsville Qld 4810
p 07 4721 5511 f 07 4721 5499 solicitor@tcls.org.au

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LA Evans Solicitor, PO Box 311 Mount Isa Qld 4825
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Level 2, Tenancy T1.214, Maroochydore Qld 4558
p 07 5406 0545 f 07 5406 0548 sbolton@cnglaw.com.au

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PO Box 1025 Townsville Qld 4810
p 07 4759 9686 f 07 4724 4363 fenlon.markg@police.qld.gov.au

QLS contacts

Queensland Law Society
1300 367 757

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07 3842 5843

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Interest rates are no longer published in Proctor. Please visit the QLS website to view each month's updated rates **qls.com.au/interestrates**

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

Crossword solution

From page 66

Across: 1 Empanel, **3** Fdr, **5** Express, **9** Clear, **11** Amerce, **12** Pens, **13** Lieu, **14** Best, **15** Appear, **16** Amicus, **17** Adjutant, **20** Use, **23** Cohabitation, **26** Floating, **27** Officious, **30** Recovery, **32** Argue, **33** Abrogate, **34** Amenity, **35** Ejectment, **36** Constructive.

Down: 1 Encumbrance, **2** Pleads, **4** Referral, **6** Purloin, **7** Sue, **8** Assize, **10** Perpetrator, **12** Pursuant, **18** Joh, **19** Tab, **21** Exonerate, **22** Informant, **24** Instrument, **25** Concurrent, **28** Forensic, **29** Court, **31** Gratia.

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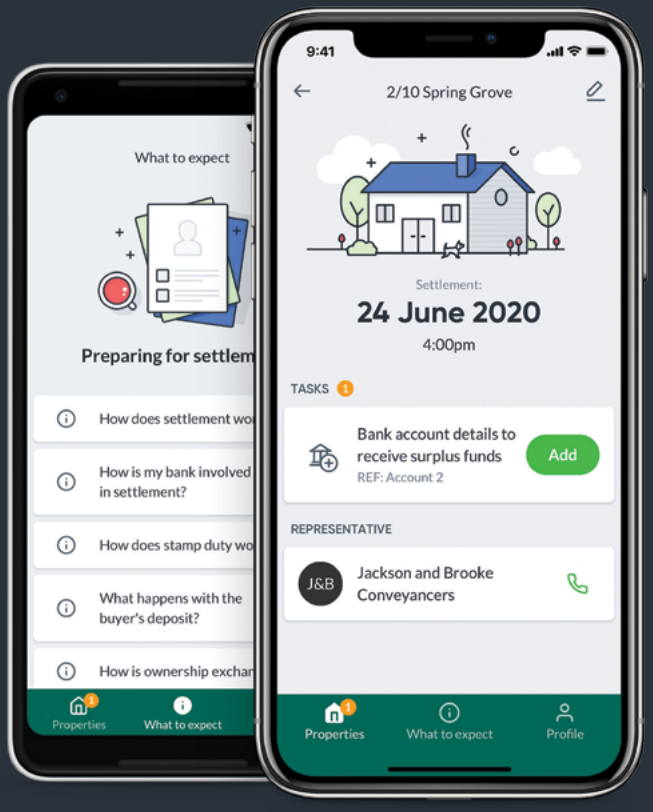

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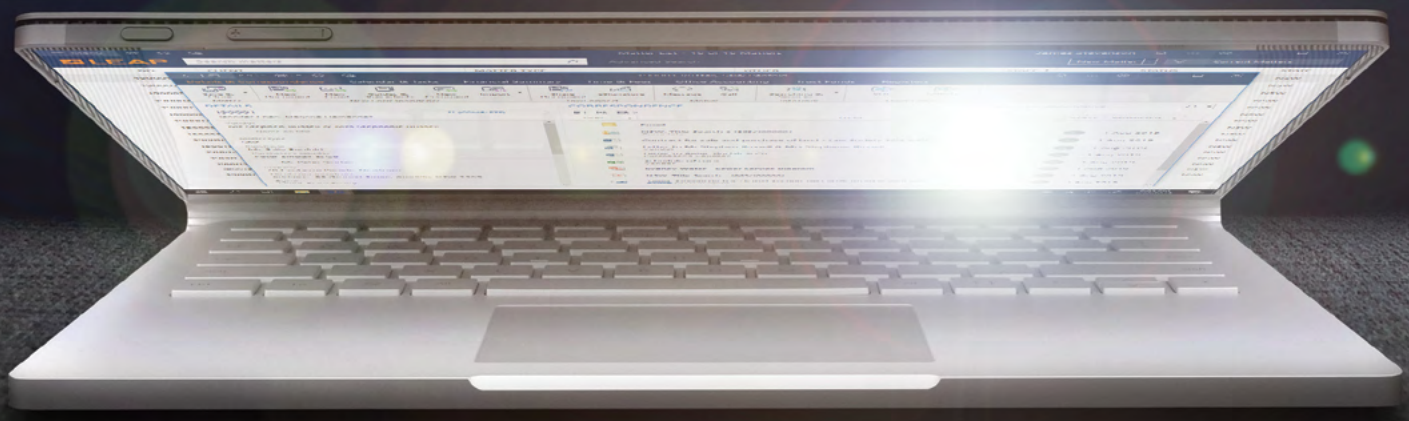

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