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SEPTEMBER 2019

PREPARING FOR THE NEW NORMAL

Innovation in law

2019 Legal Profession Breakfast

Supporting Women's Legal Service

Thursday 14 November

7-9am | Brisbane City Hall

Tickets are on sale for this highly anticipated annual event. The keynote address will be provided by Arman Abrahimzadeh OAM, co-founder of the Zahra Foundation Australian and a passionate advocate against domestic violence.

All proceeds from the event help Women's Legal Service Queensland to provide free legal and welfare assistance to women and their children who experience domestic violence.

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NEWS AND EDITORIAL

LAW

YOUR PRACTICE

OUTSIDE THE LAW

Vol. 39 No. 8 | ISSN 1321-8794

2019 COUNCIL ELECTION

PRESIDENT
DEPUTY PRESIDENT
VICE PRESIDENT
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Key Election dates

Roll of Electors close
9am AEST 9 September 2019

Nomination period
9 September to 4pm AEST
24 September 2019

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

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

Announcement of results
From 25 October 2019

Lead the profession

If you're ready to dedicate your experience and passion to ensuring the Society meets the needs of the legal profession, nominate for QLS Council.

SEE MORE INFORMATION ONLINE
qls.com.au/councilelection

Queensland Law Society®

Our evolution of innovation

The value of learning and open minds

"The good thing about science is that it's true whether or not you believe in it."

– Neil deGrasse Tyson

Wise words from one of the world's leading scientists, and borrowing from (or mangling?) Mr deGrasse Tyson, I might observe that the good (scary?) thing about innovation is that it happens, whether you actively pursue it or not.

I am old enough to remember when the first computers hit the desks of solicitors, and to be honest many weren't impressed. "A typewriter with a TV screen? So what?" was not an uncommon reaction; many a well-respected lawyer avowed they wouldn't use them, and many secretaries feared these new machines would take their jobs.

Of course, pretty soon people learned to love computers, and that was because they quickly found new purposes and ways of using computers; innovating, as it were, without even consciously attempting to do so. Some of the most ardent luddites became the most zealous users, and many secretaries doubled their outputs and became even more valuable (partly, it must be said, because they were very good at showing solicitors how to use computers).

Organic innovation usually works this way, with end-users finding ways to use new technology which were never dreamed of by the manufacturer. It is doubtful anyone at Apple had ever heard of a 'conflict check', but the advent of computers made this a hell of a lot easier for solicitors. Similarly, text messaging was developed as a quick and cheap form of communication, but solicitors found other ways of using it.

When rugby league player Sonny Bill Williams walked out on his contract with the Canterbury Bulldogs, he made legal action a bit difficult by secretly fleeing to France. Williams was hard to pin down while there, but he was still sending texts – and so was eventually served via text message. If I can mangle another saying, necessity is the mother of innovation.

There is a temptation to think of innovation as being exclusively technology-based, but that is far from the truth. The services that solicitors deliver, and how we deliver them, are constantly evolving as we take advantage of new paradigms and business structures.

For example, the integrated legal practice (ILP) structure permitted non-legal directors, and some firms are now utilising this to create a broader service to clients. Directors with skills outside of the law are coming on board, and firms are offering strategic advice via these non-legal experts – that is, seeking to keep clients out of trouble rather than riding to the rescue when they are in it. The fact that the strategic advice is being given by someone who has a direct stake in the firm, rather than a hired gun, gives many clients more confidence in that advice.

Because innovation so often happens in this exponential, occasionally chaotic fashion, it is hard to know which way it will move, but by ensuring we seek inspiration and solutions from anywhere (and not just the legal world) we can build a toolkit for facing the future.

That spirit is evident in the 'Establishing and maintaining positive client relationships' workshops which the QLS Ethics and Practice Centre has launched. These workshops take project management principles from other industries (for example, construction, software development, sales) and apply them to file management.

Despite being devised far from the legal world, these principles translate wonderfully well into client and case management. They make it easier for us to get clear instructions, comply with costs disclosure requirements and deal with many other aspects of our files. Solicitors do not have a monopoly on good ideas, and by casting our net wide and being prepared to learn from other industries we can be far more successful in helping clients, and thus far more profitable.

Looking beyond the legal profession for inspiration is also the aim of our newly-launched Aspire Leadership Lecture Series. This series aims to connect leaders in many fields with our members, so that we can use what they have learned to become leaders in our profession (and the wider community).

The first lecture back in July was delivered by Grata Fund founder Isabelle Reinecke. Isabelle's talk was about the new leadership paradigm, and it was good to hear a perspective from someone who operates outside of the legal profession (although she once operated within it as well). That exposure to new ideas, new strategies – the simple act of listening to a different point of view – is the best way to both foster innovation and prepare for it.

The bottom line is that despite having a reputation for being set in our ways, solicitors have been adaptable and innovative throughout history (indeed, our entire profession came from innovation applied to the staid and insular profession that was, and sometimes remains, the Bar).

We also, however, do not simply lurch lemming-like over the cliff[1] of every new thing that comes along. This is why we have things like the Aspire series; to see how others picked the wheat from the chaff, to learn to set trends rather than follow them and to avoid mistakes that other people have already conveniently made for us. In other words, to do as another great scientist, Carl Sagan, advised – keep an open mind, but not so open that our brains fall out.

Bill Potts
Queensland Law Society President

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

Notes

[1] Yes, I know lemmings don't really do that, but the alliteration was just too much to resist!

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Election 2019 kicks off

Why you should be a part of it

This month we move into QLS Council election mode, with the whole process beginning in earnest on Monday 9 September.

On that day (at 9am), the roll of electors will close, and I urge you to ensure your details are up to date before then via qls.com.au/myqls so that you eligible to nominate and/or vote.

At the same time we will officially give notice of the election and open nominations for the positions of President, Deputy President, Vice President and Council members.

As nominations are received, those which meet the eligibility requirements will be published on the website. Those nominees may also begin their election campaigning from that day. While campaigning, they will need to adhere to the QLS Election, Media and Engagement Protocol 2019.

Nominations will close at 4pm on Tuesday 24 September and voting will commence on Wednesday 9 October, closing at 4pm on Thursday 24 October, and I anticipate that we will be able to announce the results the following day.

That covers most of the technical aspects; what remains to be said is why you should consider nominating and why you should vote.

To my mind this ties in with the collegiality for which the legal profession is well known. Collegiality works on that feeling of belonging you share with your peers, being a part of something greater than the sum of its parts.

And you can make a difference in your profession by advancing good law and good lawyers for the public good. QLS plays a significant role in advocacy, upholding ethical standards and competence, guidance and education, recognition and networking.

If you choose not to nominate, I believe it is a part of your professional responsibility to ensure that the best candidates are chosen for these positions, and you should therefore take the opportunity to be a part of the election process by voting. As in past years, this will be a simple online process.

See qls.com.au/election for all the details.

2019 Legal Profession Breakfast – Supporting Women's Legal Service Queensland

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

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

This year's breakfast will see the presentation of the inaugural Dame Quentin Bryce Domestic Violence Prevention Advocate Award, which will recognise the contribution, commitment and professionalism of a Queensland legal practitioner who has worked tirelessly to prevent violence against women. Nominations for this new award are open in early September.

To purchase tickets or nominate a peer, see qls.com.au/legalbreakfast.

Also open for nomination in early September is a new award for an outstanding Accredited Specialist, the winner of which will be announced at this year's Specialist Accreditation Christmas Breakfast. This award will recognise the outstanding contribution, commitment and professionalism of an Accredited Specialist in the Queensland legal profession.

With these two new awards we formally launch QLS Awards season. Look out for nominations opening soon for our marquee awards like the President's Medal and Agnes McWhinney Award, along with more new awards to recognise your hard work, sacrifice and commitment to the profession and the community.

Access to Justice Scorecard

The annual Access to Justice Scorecard survey, now in its seventh year, wrapped up last month, and the report is now available on our website.

The Scorecard is an initiative of the Queensland Law Society's Access to Justice and Pro Bono Law Committee.

As with past years, this year's report informs our 26 standing legal policy committees and one working group to undertake action in a rage of areas to improve access to justice for Queenslanders.

The 'Seek legal advice' campaign

I hope you noticed the recent 'Seek legal advice' adverting campaign.

Our adverts reached Queenslanders through TV, social media, online and outdoor billboards and bus shelters, driving 11,000 members of the public to the qls.com.au/advice page.

On this page we educated the community about why and when you should see a solicitor and, most importantly, how to find one of our members.

There were 9000 searches via the 'Find a solicitor' search tool during the campaign and a poll of our *QLS Update* readers found that 64% of respondents saw the ads on TV and 80% of you thought that the ad campaign was effective.

Rolf Moses
Queensland Law Society CEO

Vale Des Butler

Legal researcher and university lecturer Professor Des Butler, from the Queensland University of Technology (QUT) Faculty of Law, passed away in July.

Prior to joining QUT full-time in January 1989, he worked as a solicitor at Feez Ruthning (which became part of Allens) in Brisbane, practising in commercial litigation.

QUT Vice-Chancellor and President Professor Margaret Sheil said Professor Butler was a gifted and inspiring teacher and valued staff member for three decades.

He was an early adopter of technology in legal education and his achievements were acknowledged by several national and international teaching awards. He is the only academic to have twice won the LexisNexis/ Australasian Law Teachers Association Award for Excellence and Innovation in the Teaching of Law (2008 and 2014). In 2015, he received the David Gardiner QUT Teacher of Year award in recognition of his sustained excellence in teaching.

Professor Butler served as the QUT Faculty of Law Assistant Dean, Research from 1997 to 2002, was lead investigator for a number of research projects on cyberbullying in schools, and appeared before House of Representatives and Senate inquiries to provide information on the privacy and civil liability implications of drones and automated vehicle technologies.

He also authored or co-authored numerous books and articles on legal education, contract, media, entertainment and maritime law.

QUT appoints law dean

Professor Dan Hunter will take up the position of Executive Dean of QUT's Faculty of Law from 1 November.

Professor Hunter is Founding Dean at Swinburne Law School and is an international expert in internet law, intellectual property and cognitive science models of law.

Before his appointment at Swinburne University of Technology, Professor Hunter was Head of the Intellectual Property and Innovation Program at QUT, and was the general editor of the QUT Law Review.

As an international leader in his discipline, Professor Hunter has taught at various national and international institutions, including the New York Law School, The University of Melbourne, The Wharton School at the University of Pennsylvania, the University of Cambridge and Deakin University. He was a barrister and solicitor prior to working in academia.

QUT Vice-Chancellor and President Professor Margaret Sheil said Professor Hunter's leadership would enable the Law Faculty to consolidate the many gains made under his predecessor Professor John Humphrey's leadership.

"Professor Hunter will position the faculty in areas that will be vital for the future practice of law and the strong ambitions of the School of Justice to understand and enact social change," Professor Sheil said.

Appointment of receiver for Harrington Legal Pty Ltd, Ayr

On 20 June 2019, the Council of the Queensland Law Society Incorporated passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, Harrington Legal Pty Ltd.

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

Enquiries should be directed to Michael Drinkall or Deborah Mok at the Society on 1300 367 757.


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IT HAS BEEN SAID THAT WE ARE GRIPPED IN AN ACCELERATING CYCLE OF CONTINUOUS IMPROVEMENT IN LAW, AND THIS IS THE NEW NORMAL...

Read more in our Innovation in Law special from page 22

Queensland Law Society

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Celebrating NAIDOC: Voice, Truth and First Nations in Conversations

On 22 July 2019 QLS extended its NAIDOC celebrations with a First Nations lunch, recognising its journey through the Innovate RAP, beginning its journey towards the Stretch RAP, and kicking off its inaugural First Nations in Conversations.

QLS staff were treated to two inspiring presenters – Ruth Link, Leader, Indigenous Sector Practice Northern Australia, Ernst & Young and Deanella Mack, Cultural Safety Empowerment Manager, Ernst & Young.

In continuing the 2019 NAIDOC theme 'Voice. Treaty. Truth.', Ruth and Deanella spoke to Western and Aboriginal law and how trauma-informed care helps strengthen First Nations People as well as cultural ecosystems, and how reconnecting with songlines is the game-changer to delivering sustainable impactful benefits and outcomes for First Nations People.

QLS staff took in the powerful images and analogies from the presentation, connecting Western and Aboriginal customs and lore, and thoroughly enjoyed the beautifully interwoven storytelling and yarning, delivering the very important message of ensuring cultural safety. To find out more about our RAP journey, head over to **qls.com.au/rap**.

Chantelle connects with Indigenous moot

Bond University law and international relations student Chantelle Martin is already receiving job offers after winning the 2019 Queensland Aboriginal and Torres Strait Islander Students' Moot.

The competition was held at the Commonwealth Law Courts in Brisbane on July 24 before Justice Philippides of the Supreme Court of Queensland, Chief Justice Allsop of the Federal Court and Justice Edelman of the High Court of Australia.

Chantelle will get the opportunity to shadow a barrister in the field of her choice as part of her prize and has already received work proposals.

"I had an immediate offer from someone after I won, but I'm still deciding if the dates will work," she said.

The competition centred on a legal case involving an Indigenous artist and fake Indigenous artwork, and the legal complexities of misleading conduct.

The Aboriginal and Torres Strait Islander Students' Moot is in its fifth year and the only moot competition of its kind in Australia.

"Because all the mooters are Indigenous Australians, we feel an inherent connection to the respondent in this matter, because she was the one who was losing her culture, losing her inherited ability to paint and losing her income," Chantelle said. "I've learnt a lot about myself and the actual law surrounding misleading conduct and consumer law. I hope to go into it one day."

Irrigation schemes transfer to local management

BY SIAN THOMAS

For irrigators in St George, Theodore and Emerald, the channel irrigation schemes have transitioned from Sunwater ownership to customer-owned entities in each community.

The changes were facilitated by amendments to the *Water Act 2000* (Qld) (Water Act) in 2016, which paved the way for each community to negotiate the terms of transfer with the Queensland Government.

In each community, customers of the channel schemes were given an opportunity to support the proposal and take up an ownership interest in the locally managed entity. A threshold of 70% by water volume in the relevant scheme had to support the proposal for it to proceed.

The St George Irrigation Scheme was the first to transfer on 1 July 2018 to Mallawa Irrigation Limited, a company limited by guarantee whose members hold water allocations in the scheme. Theodore followed shortly after and the Emerald Irrigation Scheme transferred most recently on 1 July this year to Fairbairn Irrigation Network Limited, a public company whose shareholders must be water allocations holders in the Emerald channel scheme.

A fourth scheme, in Eton, is in the process of preparing and issuing its proposal to customers and, should customers support the proposal, it is likely to transfer from Sunwater to local management in early 2020. The rules of each scheme provide that they must operate on a not-for-profit basis.

Importantly:

- The locally managed entities now own the channels, pipelines, pumps and drains in the scheme but not the bulk water storage facility (for example, Fairbairn Dam in Emerald and Beardmore Dam in St George).
- Sunwater remains the bulk water supplier of water in all schemes and customers must continue to have contracts with Sunwater for their bulk water supply. Sunwater continues as the resource operations licence holder for the areas.
- Each local irrigation entity is the distribution operations licence (DOL) holder for their scheme.
- Each local irrigation entity has its own standard distribution contract (supply contract) which is published on their website. On the transfer day, that document took effect as a contract between each customer holding a water allocation in the scheme and the relevant local irrigation entity by virtue of section 738I of the Water Act. The supply contract was:
  - based on the Sunwater standard terms used in the scheme prior to transfer
  - modified to facilitate the changed arrangements on the provision that the terms must not be capable of operating to the detriment, in substance, of a holder of the water allocation.

Solicitors advising clients who are selling land and water in these areas should be aware of the new structure. In particular, on the transfer of a scheme an administrative advice was recorded by the water registrar on each water allocation noting that the water allocation is an allocation to which a distribution operations licence applies.

It is a requirement under the Water Act that each local irrigation entity (as the distribution operations licence holders) has a disclosure statement prepared in accordance with section 155 of the Water Act. These disclosure statements are available directly from the local entity.

A water allocation holder must, before entering into a contract for the transfer or lease of the allocation give this disclosure statement to the proposed buyer or lessee together with an acknowledgement notice to be signed by the proposed buyer or lessee. The acknowledgement notice is a standard form published by the Department and Natural Resources, Mines and Energy (DNRME Form No.W2F164, available from **business.qld.gov.au** > Industries > Mining, energy and water > Water > Water authorisations > Forms and fees for water authorisations.

Under section 170(6) of the Water Act, the registrar must not record the transfer or lease until the registrar receives this acknowledgement notice. This is to ensure that the new holders are aware of the terms applying to the allocation. These allocations are subject to fixed charges. The supply contract will automatically apply to the new owner or lessee on the transfer (see section 738I(9) of the Water Act).

A water allocation holder should give the local entity prior notice of the proposed sale. Any change to the location at which the water allocation is being taken within the scheme requires the consent of the local entity. In addition, under the supply contract, as was the case under Sunwater, the allocation cannot be permanently moved out of the scheme without exit fees applying.

In addition, the transfer or lease cannot be registered without Sunwater (as the ROL holder) providing a signed 'Notice to registrar of water allocations of the existence of supply contract' (DNRME Form W2F152). Solicitors must contact Sunwater directly to obtain the necessary contract and forms that Sunwater requires on a transfer or lease.

Finally, a new customer to a scheme may also be eligible to become a member of their local entity. This process is different for each scheme, depending on their structure and constitution.

This is an exciting time for each of the new local entities to run them locally. More information on each of them can be found at **mallawairrigation.com.au**, **fairbairnirrigation.com.au**, or **theodorewater.com.au**.

Sian Thomas is the Legal Director at Sian Thomas Lawyers and has acted for the locally managed entities since early 2017 supporting them through the transfer process

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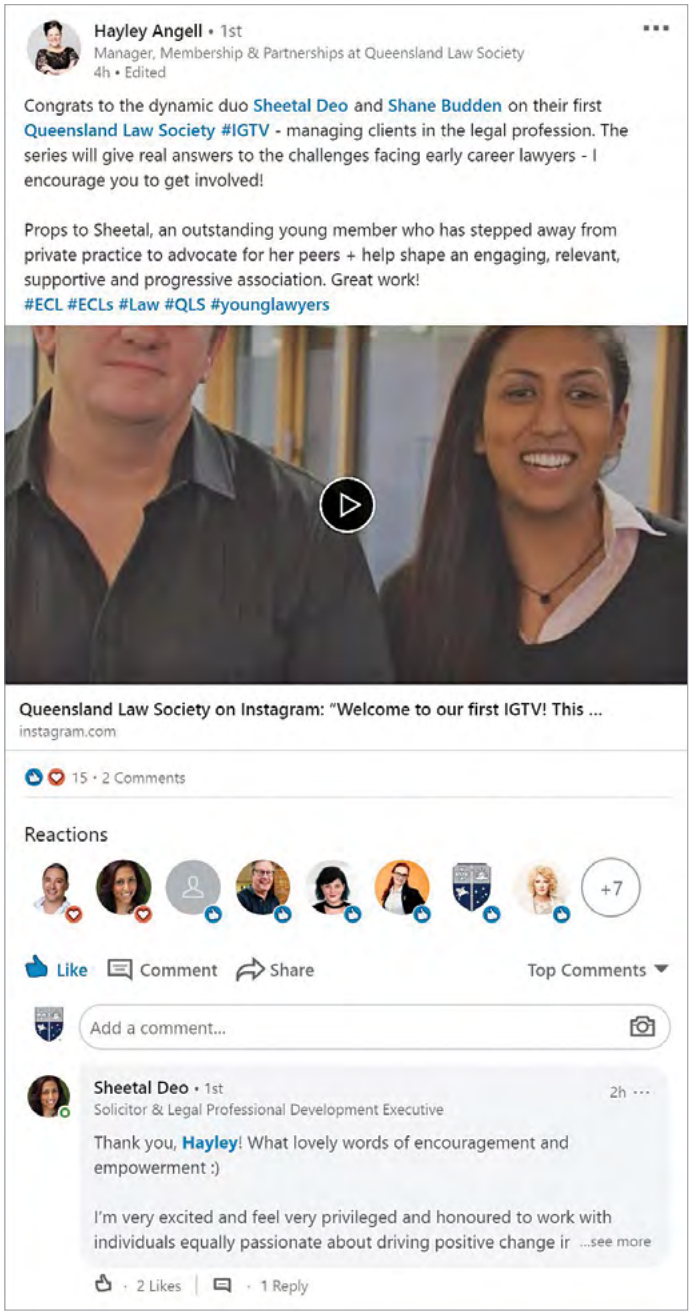

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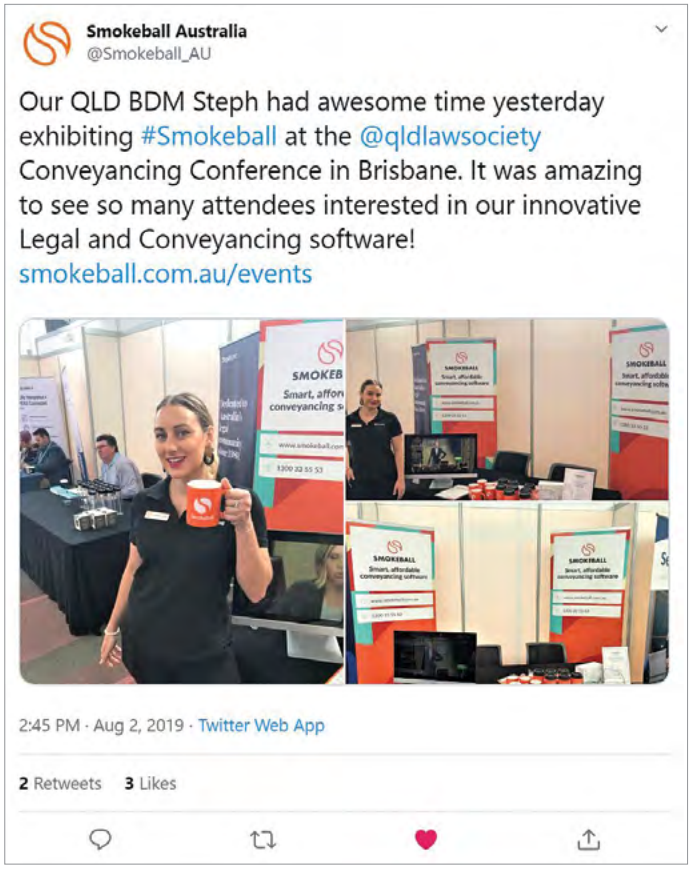

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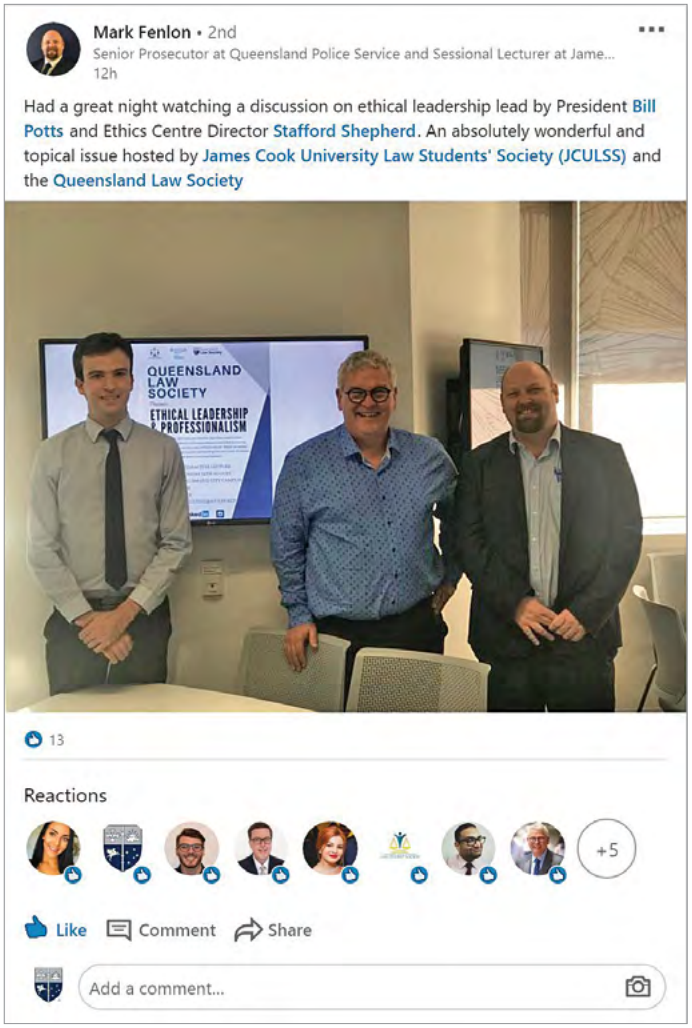

Touchdown for the Magistrates Court

The team from the Brisbane Magistrates Court topped the field when some 20 teams made up of more than 200 legal professionals battled for the 2019 QLS Touch Football Tournament trophy. Participants voted this year's event, held at Brisbane's Finsbury Park in suburban Newmarket on 10 August, another great success.

Sun shines for coast DLA

More than 90 members and guests attended the Sunshine Coast District Law Association annual general meeting held at the Circa Rooftop Bar at Kon-Tiki, Maroochydore, on 6 August. The DLA claims to lead Queensland in membership, with more than 60% of Sunshine Coast practitioners amongst its members. QLS President Bill Potts spoke at the AGM, which saw the current office-bearers returned to their positions.

Making a difference in advocacy

Lecture three of the 2019 Modern Advocate Lecture Series on 8 August featured Judge Felicity Hampel SC, of the County Court of Victoria, talking on 'Making a difference' – the importance of commitment and courage in advocacy.

In-house solicitor role in focus

A LawLink event on the role of the in-house solicitor attracted First Nations students to Law Society House on 6 August. The event included a full panel discussion on the activities and duties of an in-house solicitor, following by a networking opportunity.

Aspiring to leadership

On the 24 July, the inaugural lecture of the Aspire Leadership Lecture Series was launched by the QLS Ethics and Practice Centre with Isabelle Reinecke of the Grata Fund as the first speaker. The series is the initiative of QLS President Bill Potts, who attended with Ethics and Practice Centre Director Stafford Shepherd.

THE WAY FORWARD WITH CONVEYANCING

This year's QLS Conveyancing Conference, held on 1 August 2019 at the Brisbane Convention & Exhibition Centre, drew a crowd of conveyancing practitioners with a packed program that included sessions on tax changes, retirement village conveyancing, risk management and an update from the Titles Office.

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POPULAR CRIMINAL PROGRAM

The annual QLS Criminal Law Conference on 2 August at the Brisbane Convention & Exhibition Centre offered delegates a full program, including analysis of recent cases, legislative updates and development in practical skills.

Sink or swim?

BY ELEANOR SONDERGELD

Life is full of moments where we feel thrown into the deep end without a life-vest.

There is a particularly high concentration of such moments in the first few years of legal practice. In rapid succession, we move from university to practical legal training (PLT), to practice. Finally, one day we wake up after admission to find the 'graduate' in 'graduate lawyer', has disappeared from our email signature.

At this moment, the excitement of progress pulls us back down to earth with the weight of expectation that new responsibility brings.

You *do* know what you're doing now…right?

I regularly hear from my peers (junior practitioners and graduates) that gaining enough practical training and 'on the job' guidance can be a challenge. While it might be argued that every generation has faced this challenge when entering the profession, research has shown that organisations provide substantially less training then they used to.

A United States study[1] found that, on average, new workers in 1979 received 2.5 weeks of formal training annually, while by 1995 this had dropped to 11 hours.[2] We can only guess what it has dropped to now.

This training deficit can be compounded by feelings of embarrassment to ask questions, or we may have been told that the only way to learn is by making mistakes.

If my years at university taught me anything (and I absolutely include myself in this cohort), it's that those who choose to make the law their profession are often not particularly comfortable with making mistakes, or admitting there might be something they don't know.

There is a separate conversation to be had about the value of embracing uncertainty and creating spaces where making mistakes is encouraged to drive innovation.[3]

Extending you skillset, or improving your competence in day-to-day tasks, can make a meaningful and positive difference to your confidence at work. I think there are two key ways junior practitioners can take control of their professional development in this regard.

Looking up

You should receive training to be able to complete tasks that are a part of your current role. However, if you want to get ahead and learn skills that are outside of this, it can be harder to justify to yourself, your colleagues or your employer the investment in time and/or resources for training in a skill that is not strictly necessary for your role.

Upskilling is often put in the 'nice to have' basket and is not always considered an essential part of training, but a simple way to build this into you day might be to ask if you can assist a colleague with a discrete part of a matter, or offering to take notes in client meeting.

Looking out

It goes without saying that the most valuable educational resource you have may be your colleague, sitting across from you. However, there is often great value in looking outside your firm to gain perspective on what else is happening in the legal landscape. Joining professional organisations, attending events or pursuing further study are all options to expand your knowledge horizons.

I have it on good authority that even when your email signature says 'partner', the feeling that maybe you might be in over your head continues to rise to the surface every now and then. No matter where you are in your practice, or your experience level, there are a great range of resources offered by Queensland Law Society.

So the next time you feel out of your depth have a look at our on-demand library (**qls.com.au/on-demand**), upcoming events, or let us know how we can help with your professional development needs by contacting events@qls.com.au.

Eleanor Sondergeld is a Queensland Law Society junior legal professional development executive.

Notes

1 By Peter Capelli, the Director of The Wharton School's Center for Human Resources.

2 washingtonpost.com/news/on-leadership/wp/2014/09/05/what-employers-really-want-workers-they-dont-have-to-train/?utm_term=.71b5fbf8073b.

3 I was inspired in regard to this by Stephen Scheeler's keynote address on breaking the mould at QLS Symposium 2019.

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EARLY-BIRD REGISTRATION CLOSING 27 SEPTEMBER

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11 Property Law Conference

Essentials | Masterclass | Hot topic

11–12 September | 8.30am–5.35pm, 8.30am–1pm
10 CPD

Brisbane

Developed in partnership with property and development law experts, this practical two-day conference is perfectly suited to practitioners of all levels. Delegates will learn about the latest developments and issues in property law. Don't miss out, registration closes 6 September.

PLE | PM&BS | PS | SL

13 Government Lawyers Conference

Essentials | Masterclass | Hot topic

8.20am–5.10pm | 7 CPD

Brisbane

Join your legal professional peers from across the government, policy and administrative spheres. Benefit from face-to-face learning relevant to everyone in federal, state or local jurisdictions, or in-house with government-owned corporations and universities. Hear from leading experts and connect with fellow practitioners over drinks after the event.

PLE | PM&BS | PS | SL

17 Contract law masterclass

Masterclass | 8.30am–12.45pm | 3.5 CPD

Brisbane

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

Career moves


Caren Klavsen


Michael Elliott


Brock Harm


Charmagne Haidley


Joshua Brown

Carter Newell Lawyers

Carter Newell Lawyers has announced that special counsel **Caren Klavsen** and senior associate **Michael Elliott** have returned to the firm.

Caren, an experienced corporate and commercial lawyer, returns after some years in the corporate practice of a national firm and, most recently, working in-house for a major energy company. Her experience in this time has included project and transactional matters, and providing operational and commercial advice on a multi-billion dollar joint venture.

Michael returns from a leave of absence to the construction and engineering team with an elevation to senior associate. For the past 15 months he has worked in-house for Bechtel in Oman, assisting Bechtel in its delivery of the Muscat International Airport.

Griffith Hack Lawyers

Jack Collings, who joined the firm as a law clerk in 2013, has been promoted to senior associate. Jack advises on all aspects of intellectual property, particularly trade marks and contravention of the Australian Consumer Law, with a focus on contentious matters.

MBA Lawyers

MBA Lawyers has announced the appointment of **Rebecca Weir** as an associate.

Rebecca has 13 years' experience as a commercial property solicitor and focuses on property development and body corporate matters.

Michael Lynch Family Lawyers

Michael Lynch Family Lawyers has welcomed **Rachel Stuart** to the team as a family lawyer.

In addition to almost two years as a Family Court judge's associate, Rachel has a broad general practice background, covering family law, wills and estates, conveyancing and commercial law.

McNamara Law

McNamara Law has welcomed special counsel **Emario Welgampola** to its family law team.

Emario, who was admitted to practice in England and Wales in 1992, has practised almost exclusively in family law in Brisbane since 2001. He has extensive experience in complex property and parenting matters, including international property settlements, parenting matters and international child abduction matters.

McNamara Law has also announced the promotion of six of its lawyers.

Abraham Arends has been promoted to special counsel in the personal injury team in the Springfield office. Abe, who joined the firm as a senior associate six years ago, has extensive experience in representing people with injuries arising from motor vehicle, workplace and public liability incidents, as well as medical negligence and sexual abuse claims.

Brock Harm has been promoted to senior associate and manager of Gatton Office. Brock has worked in the Gatton office for more than nine years and has extensive experience in commercial law, family law, criminal law and will and estates.

Charmagne Haidley has been promoted to senior associate in the family law team. Charmagne joined the Ipswich office as an associate three years ago and has worked in all facets of family law for 10 years. Her experience includes complex parenting and financial matters, domestic violence matters and cases involving the recovery of children.

Joshua Brown has been promoted to senior associate in the personal injury team. Josh has been with the firm for 11 years, practising predominately in personal injuries. He is also experienced in litigation and dispute resolution, superannuation insurance claims, and has a particular interest in animal law.

Rebekah Sanfuentes has been promoted to senior associate and head of the wills and estates team. Based in the Springfield office, Rebekah has been with the firm since 2003 and a lawyer for six years. Rebekah is a full member of STEP and is experienced in complex estate planning, administration and disputes.


Jack Collings


Rebecca Weir


Rachel Stuart


Emario Welgampola


Abraham Arends


Rebekah Sanfuentes


Daniel Brownlie


Emily Brown


Karen Jarman

Daniel Brownlie has been promoted to associate in the Springfield office. Dan's focus is on property and commercial structuring and contracts. Dan also works in family law with a particular interest in property issues.

Shand Taylor Lawyers

Shand Taylor Lawyers has welcomed **Emily Brown** as a lawyer in the commercial property team. Emily has experience across a broad range of commercial and property matters.

Slater and Gordon

Slater and Gordon has recruited **Karen Jarman** as an associate in its growing medical negligence team.

Karen has more than 15 years' experience in medical law claims in Australia and the United Kingdom, and has acted in some of Australia's largest and most complex medical law cases, including securing $11.6 million for her client after a four-week trial (*Panagoulias v The East Metropolitan Health Service* [2017] WADC 118).

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.

INNOVATION
IN LAW

The Queensland legal profession is being disrupted by a number of factors including technology, innovative ways of providing legal services, oversupply of graduates and undersupply of experienced lawyers, and the rise of legal operations providers. There is growing pressure for the business of law to change to be responsive to new client demands and to be competitive in a world used to digital engagement and on-demand solutions. To start that conversation in the profession, QLS Council has formed an Innovation Committee and this *Proctor* feature highlights some of the factors now shaping the way we will practise law in a changed market for legal services.

EXPLORE MORE RESOURCES AT **QLS.COM.AU/INNOVATION**

BY PETER LYONS

It has been said that we are gripped in an accelerating cycle of continuous improvement in law, and this is the new normal.

Amongst the factors driving change in the profession is the tsunami of younger female lawyers preferring to work in more flexible government and corporate teams rather than being constrained by rigid careers in private law firms.

The charts *below* illustrate the generational[1] change in the full members of the Queensland Law Society over the five financial years from 2013 to 2018.

Outside of the profession, the next generation of workforce and clients are digital natives and expect service and engagement at a different level.

Digital companies focused on meeting consumer needs have reset client expectations. Businesses such as Facebook, Google, Apple and Amazon are focusing on solving consumer problems and presenting convenient, immediate and accessible solutions powered by technology.

Advancements in technology are driving change as legal technology – or *legaltech* – is enhanced by improved use of artificial intelligence, document automation, client engagement and process enhancements for transactional work.

How the legal profession is to respond to change and disruption is a hard question. And how we prepare and transition the existing cohort of the profession for a future that is different to now is harder still.

QLS Council considered there was a need to form an Innovation Committee to assist members with answering these questions and to best position the profession to remain relevant through this disruption.

Innovation is executing new ideas to create value. Innovation culture is not just directed at new technology solutions, but may also be used to improve business-as-usual or extend existing services.

Innovation culture is the recognition and desire to change the legal profession to:

- meet new levels of client expectation
- make better and more engaging legal businesses
- make lawyers happier in their work
- improve wellness in the profession
- improve access to justice for the community.

The work of QLS' committee is directed towards three objectives:

1. Assisting QLS to provide leadership to the Queensland legal profession in responding to unrelenting and transformative change in the legal profession
2. Identifying the drivers of change in legal services operating in Queensland
3. Reporting on what the profession and QLS may do to:
   a. respond to the drivers of change
   b. enable the legal profession to cope with and manage change
   c. provide a clear benefit to the public and the profession.

The committee's membership includes:

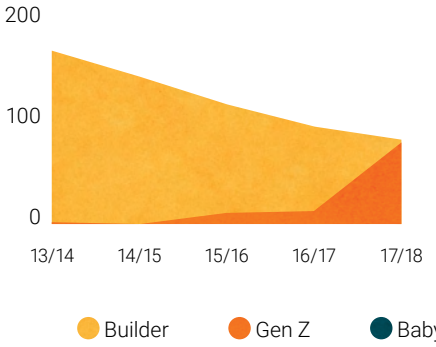
Peter Lyons	QLS Council
Chloe Kopilovic	QLS Council
Kate Avery	Kare Lawyers
Kate Clark	Enhanced Litigation Management Solutions
Erin De Monte	MinterEllison
Richard Gardiner	HopgoodGanim
Darius Hii	Chat Legal
Janelle Kerrisk	Helix Legal
Terri Mottershead	College of Law Centre for Legal Innovation
Angus Murray	Irish Bentley
Sandra Pepper	DLA Piper
Andrea Perry-Petersen	Independent Consultant – Reimagining Justice
Carolyn Reid	Family Law Tool Kits
Heidi Schweikert	Schweikert Harris
Andrew Shute	Carter Newell Lawyers
James Tan	Corney & Lind
Kim Trajer	McCullough Robertson.

The committee was also assisted by Mr Russell Hinchy of the UQ Law School and Mr Matthew Shearing, technology lawyer, consultant and podcast host.

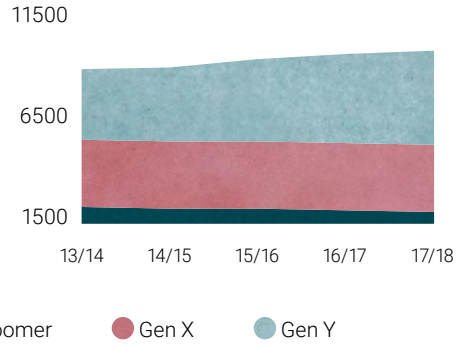
The committee is in stage 1 of its process, where it is preparing a draft report, which is expected to be delivered by later in the year, exploring:

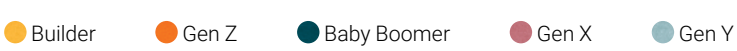
- the changing knowledge and skills required to be an effective lawyer
- the tools and technology affecting legal practice and how to augment human experience with digital labour
- supporting structures for legal practice – sustainable and next generation businesses.

MAJORITY GENERATIONS



OUTGOING AND INCOMING GENERATIONS





Peter Lyons is Chair of the QLS Innovation Committee and a QLS Councillor.

Notes

[1] We have used the following generational categories and year of birth ranges: Builders 1925-1945, Baby Boomers 1946 – 1964, Gen X 1965 – 1979, Gen Y 1980 – 1994, Gen Z 1995 - 2010.

THE LEGAL SUPPLY CHAIN AND THE FUTURE OF LAW FIRMS

BY JOEL BAROLSKY

There are six broad entities involved in the delivery of commercial legal services in the modern era: the law and legal system; legal technology, algorithm and data providers; law firms and law companies; in-house legal teams; the client organisations; and end consumers.

Collectively, we can think of these six entities, the value they each add and their inter-relationships as the 'legal supply chain'.

It is important to note that not all legal services involve all six entities; many don't follow the chain sequentially and some services start and end at different stages. Despite these exceptions, the legal supply chain is a useful conceptual framework, especially to predict the future of lawyers and the legal market.

Prediction 1: Traditional law firms will continue to lose market power

Traditional privately owned law firm partnerships have been at the core of the legal supply chain for well over 100 years. Their market power has been primarily based on the asymmetry of knowledge between provider and client and regulated barriers to entry.

Over the past three decades, the dominant position of traditional firms has been partially eroded by the rapid growth of in-house lawyers. To illustrate, the number of Australian lawyers working in-house grew by 69 per cent from 2011 to 2016 (*Source*: NSW Law Society). In-house lawyers have become more sophisticated purchasers and insourced some of the work previously done by private law firms.

Law companies – those providing legal process specialists, managed services and contract lawyering – have become a growing force over the past five to seven years. Recent Thompson Reuters research revealed that law companies had global revenues in excess of $A15.5 billion in 2018, and were growing at 12 per cent per annum.

Legal technology providers are the newest kids on the block, but their growth has been remarkable. Stanford Law School's TechIndex points to 1051 legal tech start-ups across the globe since 2016, all wanting to be part of the supply chain. Many of these new enterprises are focused on enhancing access to justice by leap-frogging the supply chain to connect end-clients more directly with the law and legal system.

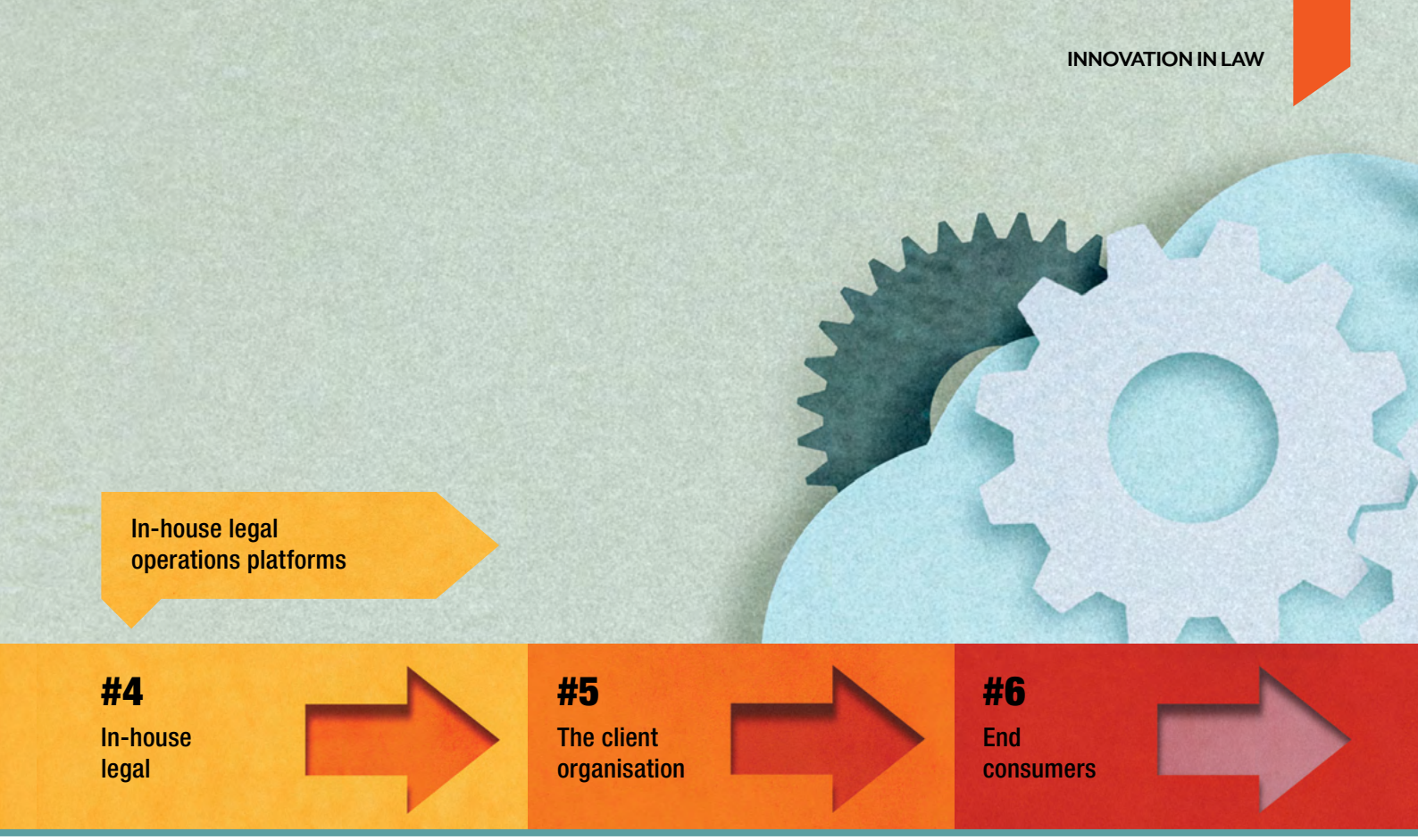
The net impact of the growth of in-house lawyers, law companies and legal technology providers is an equalisation of power across the supply chain. Traditional law firms will still play a critical role, especially in complex and new-to-world cases, but they will no longer dictate market rules and pricing.

Prediction 2: Many lawyers will become value-added resellers

Fast forward five years, and legal technology will have matured to the point that it will become integral to legal advice and delivery. Many commercial lawyers will become value-added resellers of sophisticated technology developed by third-party vendors.

To illustrate, Contract Probe software allows users to perform a comprehensive review of draft NDA, service, supply, consultancy, IP license or employment contracts within 60 seconds for a fixed fee of $100 or less. Created by former Allens TMT partner, Michael Pattison, Contract Probe generates an overall quality score out of 10, highlights key omissions and errors, and makes suggestions for improvement. Contract Probe uses a machine learning approach which means it gets better each time it is used.

In this world, there will be fewer junior lawyers doing the grunt process work but a greater demand for the 'human' elements in the client–lawyer exchange; that is, empathy, problem-solving, creativity and judgement. Competing as a reseller will require lawyers to have a profound understanding of how the technology works, and how it doesn't. They will also need to get a lot better at pricing their service to capture value beyond charging for their time. Resellers will live or die based on the depth of their client relationships and their ability to be true trusted advisors.



Prediction 3: Powerful platform providers will emerge

Many law firms are struggling to deal with the avalanche of new applications that are now available on the market. Each of these new solutions is useful in solving a single problem, but firms cannot cope with training and supporting their people in 15 different software tools.

In the United States, the leading firms have formed a collaborative venture, called Reynen Court, to develop a common platform for legal applications. Chaired by Latham and Watkins and Clifford Chance, Reynen Court will provide common standards, improved inter-connectedness and a more consistent user interface for legal apps. The idea is to make it easy, safe and efficient for major law firms to adopt AI, smart contracts and other new technologies.

In Australia, both PwC Legal and KPMG Legal recently announced collaborations with local providers of legal operations software for in-house legal teams. This SaaS technology provides a single scalable low-cost solution for in-house lawyers to do pretty much everything: transact with external counsel, manage internal workflows, prepare and store documents, service internal clients, communicate value to the C-suite and stay in control of their budget. This technology will allow for 'plug-ins' of future AI tools and technologies that are still to be invented.

While this software has been around for a while, attaching it to the world's most powerful B2B brands with deep change management expertise is a gamechanger.

Fast-forward ten years and one of the Big 4, or another provider like Elevate or Xakia, will have won the battle to be the dominant platform for in-house legal teams. They will have unrivalled data around law firm performance, pricing, client satisfaction, in-house productivity and a myriad of other benchmarks. They will own the screen of every in-house lawyer giving them extraordinary influence and leverage along the entire legal supply chain.

In this future scenario, this platform owner will become the intermediary that premium law firms, law companies and technology vendors have to deal with. They won't compete as clones of traditional firms but rather as the Google of the legal world.

A single platform will most likely lower transaction costs and improve choice, quality and responsiveness for client organisations. It won't displace or disrupt incumbent law firms, but it will most likely reduce their relative bargaining power.

It is worth noting that data security and legal conflict concerns are major obstacles in the way of a single legal operations platform developing. Notwithstanding these issues, the momentum for change in the 'more for less' era is significant.

In conclusion

The legal supply chain framework provides a useful lens to predict the future. It can also be used for individual firms to identify specific opportunities or threats. Firms may elect to move backward on the chain by acquiring legal technology capability, forward into a form of managed services, vertically by becoming more dominant in their step in the chain, or tangentially by morphing into or partnering with a platform provider. What's clear is that the strategic choices open to firms are more numerous and profound.

Supply chain analysis also shows that the consequences of the 'do nothing' default option are becoming more significant. Every firm should be deliberate and considered about its choices of where it plays along the chain and how it can win.

Joel Barolsky is Managing Director of Barolsky Advisors, Senior Fellow of the University of Melbourne and Creator of the Price High or Low app

*Law companies are also often referred to as 'Alternative Legal Service Providers' and include LPOs, Managed Services and Contract Lawyer and Staffing Services

PEOPLE-CENTRED LEGAL INNOVATION

IS THERE ANY OTHER KIND?

BY TERRI MOTTERSHEAD

With so much buzz about legaltech and innovation, it's important to reflect, for a moment, on two essential truths:

1. That innovation is, at its core, change and people usually struggle with change – the bigger the change, the bigger the struggle.
2. People innovate; organisations do not.

The result: legal innovation won't advance without people. Seems way too simplistic, right? Let's do a very quick 'people-centred innovation' eight question checklist to see how your firm stacks up on that front:

1. Does your talent management strategy (who you employ, when, where, how and why) align with your business strategy?

There's no point in planning to deliver a service or product now or in the future if you don't have access to the right skilled workforce to make it happen. Your business plan is inextricably connected to your talent strategy.

2. Does your recruitment process align with the talent you need to employ?

Every law firm will become a client-centred, digitally fuelled business, so using the recruitment process to shortlist employees with these skills seems to make good sense. Law firms have started to embrace this by asking candidates to provide video CVs, conducting interviews via videoconferencing (because lawyers communicate with clients in the same way) and/or using apps or platforms that promote diversity (by eliminating information that could trigger reviewer/interviewer unconscious bias and/or providing a more comprehensive context of an applicant's achievements.[1])

3. Does your onboarding process set up your new employee for success or failure?

If you don't pay any attention to onboarding, then you have definitely moved the needle towards failure. Time taken to settle in a new employee saves the additional time and expense that flows from ongoing, rapid turnover of staff. Onboarding has changed from 'just in case' to 'just in time'[2] – providing enough information to start with and the opportunity to access advice and guidance as required, often via an on demand online learning portal that has captured the know-how of experienced lawyers. One thing is for sure, your best people will not stick around if they don't know what to do, and are not given the opportunity to shine – these people will always have somewhere else to go! And, when these people leave, it will damage your employer brand (yes, that's a thing) in the marketplace so next time it will be more difficult to attract great talent.

4. Is learning at your firm about CPD points or is it about collaboration, experimentation and continuous improvement?

If you don't have a learning program, support one, or outsource this by paying for you and your staff to enhance your capabilities, how can you stay relevant? Much can be achieved through regular 'lunch and learns' where everyone gets a chance to present or share experience ranging from new developments in law, through key takeaways from a recently completed matter/project, to the latest firm initiatives to combat cyberattacks. Learning doesn't have to be complex or expensive, but it does have to happen and it needs to be relevant. There's no point spending all your time upskilling your clients at industry or client events, only for them to find when they contact your firm that you haven't first provided that same knowledge or experience to your own people!

5. Are you proactively managing mobility?

The current legal workforce is more mobile and wants flexibility. That's hard to accommodate if your talent management strategy is predicated on most staff being full-time and permanent, the number of hours someone spends in the office, and being reluctant to re-employ anyone who voluntarily leaves the firm. And that strategy is also outdated. The gig economy is alive and well – lawyer platforms like Lawyers on Demand (LOD)[3] and Free Range Lawyers[4] would not exist otherwise – people want work to be a part of their life not vice versa. They also want to work differently in different places. At a time when creativity, adaptability and difference is important for law firms, experience in diverse places and encouraging that to come back to the firm through re-employment of alumni, seems to make a lot of sense.

6. Is your feedback process about coaching and mentoring 'just in time' or is it the once a year, dreaded, I hope we get to it, kind of thing?

The pace of practice and client expectations today demand that employer/employee communications are frequent, collegial and consequently support rapid course corrections as required. If an employee is not doing what the client/you need them to do, they need to know it immediately and get things back on track with their supervisor's support. And, this must be a two-way process. There are many opportunities in these conversations, if encouraged by supervisors, for employees to provide feedback on that supervisor's project management and communication skills. Law firms that have embraced reverse mentoring (employee-to-employer feedback), especially around the use of legaltech tools and apps[5] or to enhance diversity initiatives,[6] are benefiting not just in mutual skill enhancement, but also in developing a new type of collaboration built less on hierarchy and authority and more on engagement, mutual respect and beneficial outcomes.

7. Do you reward and promote what you need more of or what you needed 'back in the day'?

As the means by which we value and price legal services and products continues to shift to outputs and away from billable hours, so too must the way we reward and promote our people. If your law firm currently pays bonuses and promotes people on the basis of hours billed against predetermined minimum revenue targets or exceeding them, or revenue generated from repetition, what happens when you move to fixed fees and/or value pricing? How can you reward things like curiosity, creativity, experimentation, mentoring and coaching, increased profitability from increased

efficiency, client relationship building, high levels of engagement and a commitment to building a legacy…by the hour? In short, how can you reward and promote your intrapreneurs – the people with great ideas who want to stay with you and develop them versus the entrepreneurs who will leave to become your competitors? Good business is all about making a profit, but that can be achieved by means other than measuring your value and selling your expertise by the hour.

8. Is there a career path for everyone, not just your lawyers?

Legal services and products have never been delivered exclusively by lawyers. Don't agree? Ask all the other professionals in your firm to take the day off and see how things roll! With the emphasis on increased efficiencies, legaltech to support it, and the consequent changes to processes and systems, a skills gap has emerged in the lawyer population with the consequent need to prioritise capabilities outside their traditional education. Leaders and managers now need business qualifications/training and don't need a law degree to do that job in a law firm. Data scientists, data analysts, software developers, and process and system specialists (to name a few), have joined the more traditional roles in law firms of marketing/business development, HR, finance and IT (although these roles have changed too).

And, in some firms, these other professionals have become integral to the new or additional legal industry services/products being added to the firm's list of business capabilities like e-discovery, digital forensics, case management, contract management, cyber security advisories and legaltech advisories – they are revenue earners, sometimes earning more revenue on projects than the lawyers and/or referring more work to their lawyers than previously possible.

For these firms, a singular focus on lawyer careers to the exclusion of all others translates to a significant, career limiting move for any other professional joining them. The war for talent, once focused exclusively on lawyers, will seem like a drop in the ocean compared with the increasing demand and limited supply of these other legal professionals.

Some law firms have seen the light. Recent action taken by firms to employ graduates into these emerging roles from high school,[7] and others to encourage law graduates to join firms not as lawyers but instead into these roles,[8] signals the beginning of career paths for these talented professionals, acknowledges their change in status, and confirms the increasingly integral role they now play in the delivery of legal services and products.

New practice, new workforce – where do I start?

At first glance, some of the questions above may seem overwhelming or not relevant but they do, or will, apply no matter what the size of your firm. Why? Because they are the markers for the changing legal workforce forming and shaping around the future of legal work. So, if you are wondering how to align your people with your practice, here are some quick tips:

- review your client satisfaction surveys
- review your current business plan (you should be doing more of what your clients want and less of what they don't)
- reflect on what you can do better
- undertake an audit of workforce skills to ensure they align with what you need today and what you will need to future proof your practice for what's coming down the pipeline. *Hint: you'll probably need to employ some people that are not the same as you – cloning is not future proofing!*

Let's talk about succession planning

If the predictions are correct, by 2025, gen X, millennials and gen Y will comprise 87 per cent of the workforce[9] and, therefore, the majority of employers, employees and clients. Couple this with research that also suggests the baby boomers hold a significant number of the major clients' relationships in law firms and, consequently, remain the major revenue generators,[10] and we can safely predict that the legal industry is not only on the cusp of a major changing of the guard, but it will also lose a significant portion of institutional knowledge and experience too as baby boomers retire. It may seem a little strange to be emphasising this impending loss – a historical loss – in a discussion about innovation but it actually makes a lot of sense.

In times of disruption, there's a lot of change. There's also a need to understand history, to compare, contrast, make good choices and keep the rudder on the ship steady. Experienced lawyers can provide this history, not to impede progress or place obstacles in the way, but to provide bridges, close gaps, mentor and coach where this is needed. And, of course, these need to be the right experienced lawyers – so not those who are coasting to retirement or otherwise not performing; they should have been managed out long ago and would not be in the cohort of experienced lawyers referred to here. All of this combines to underscore how important it is right now, in the face of unprecedented innovation and change in the legal industry, that law firms prioritise and proactively manage succession so they evolve and adapt to the changing legal marketplace as smoothly as possible.

The innovation part of people

The law firms of the future will be doing different things differently, not the same things the same way or even the same things differently. As an industry, we won't make that change if we don't engage with different people with different skills while also retaining those skills most critical to the work lawyers do, like critical thinking, creativity, complex problem solving[11] and our humanity. And we won't find all of those skills in one person – our future lies in fully integrating our multi-disciplinary, multi-generational, multi-cultural and multi-talented human workforce with our digital workforce. It would seem the future of legal practice will evolve from drawing out and working with the innovation part of people as much as it will in fostering diversity in the people part of innovation.

Notes

[1] See for example Allen Linklaters adoption of the Rare Contextual Recruitment System (CRS) for its graduate recruitment process "to further increase diversity in its workforce": https://www.allens.com.au/insights-news/news/2016/06/allens-adopts-a-rare-approach-to-grad-recruitment/ (15 June 2016).

[2] Richard Susskind, *The End of Lawyers?: Rethinking the Nature of Legal Services*(Oxford University Press, 2008.

[3] See LOD website at: https://lodlaw.com/.

[4] See Free Range Lawyers website at: https://www.freerangelawyers.com/.

[5] Jerome Doraisamy, "Reverse mentoring will be 'invaluable' for BigLaw firms," Lawyers Weekly, 25 June 2019 at https://www.lawyersweekly.com.au/biglaw/25927-reverse-mentoring-will-be-invaluable-for-biglaw-firms

[6] See for example Reed Smith's reverse mentoring program: http://reedsmithpublications.com/associate-experience-external/r1/22/.

[7] See for example Clifford Chance's partnership with "apprenticeships specialists WhiteHat to train school-leavers in a range of project management skills and tools" in Thomas Connelly, Legal Cheek, "Clifford Chance launches first legal project management apprenticeship," 25 June 2019 at https://www.legalcheek.com/2019/06/clifford-chance-launches-first-legal-project-management-apprenticeship/.

[8] See for example Minter Ellison's Revolution program for law grads interested in legal operations: https://graduates.minterellison.com/clerkship-program.

[9] McCrindle: www.mccrindle.com.au.

[10] Debra Cassens Weiss, "As Baby Boomer partners retire, law firms face increasing costs and client issues," ABA Journal – Law Practice Management (30 August 2016) at: http://www.abajournal.com/news/article/as_wave_of_baby_boomer_partners_retire_law_firms_face_increasing_costs_and

[11] These three skills have been identified and discussed as the top skills for 2030 by McKinsey Global Institute, *Skill Shift Automation and Future of the Workforce* (May 2018) at https://www.mckinsey.com/featured-insights/future-of-work/skill-shift-automation-and-the-future-of-the-workforce.

Terri Mottershead is the Executive Director of the Centre for Legal Innovation (CLI) at The College of Law – a global think tank that translates the trends in legal disruption and innovation into practical solutions for practitioners (cli.collaw.com). Terri is also a Member of the QLS Innovation Committee.

WHAT IS YOUR PRACTICE WORTH

IF YOU WERE TO SELL IT?

BY STEVE TYNDALL

Asking what your practice is worth might seem to have little connection to legal technology, but starting with such a large and important question can be the best way to understand how and where technology can help.

Having headed up the IT function for law firms, consulted to many, and now as a provider of technology to law firms, I have seen many sides of the legal technology equation. I have seen firms that adopt technology just for technology's sake, firms that reject technology without even understanding it, and many (in fact, most) that are simply not sure what to make of it all. In order to best help firms understand where technology can help, it is critical to understand what it is supposed to be helping with.

Many mid-tier and large firms have teams of technologists and project managers, all working to automate legal and procedural processes, with a goal to improve profitability and reduce risk. Doing these things is critical in order to compete in a changing legal services market. If marketed correctly to staff, these process improvements can not only increase profit, but they can also improve staff satisfaction and help in recruiting and retaining the right people.

The challenge for many small firms though is that they simply don't have the same resources available to identify and execute on projects. Smaller firms often do not have the volume of work to offset the investment in automation.

I meet many practice owners in my work with the law societies. Many of these owners have run a successful practice for many years. Often, these owners have for the most part avoided needing to fully understand or heavily invest in technology. They are typically surrounded by people who just 'make things happen' and clients who trust their advice and value the relationship they hold. This can make for a good business to own and operate, but the problem is there is little attraction to anyone looking to invest or buy into that business.

Often a reason not to invest in technology is that the firm owners, who are in the later years of their career, have little incentive or reason to invest into something that is likely to have little return on investment for them personally. This may be a reasonable approach if the strategy is to simply turn the lights off permanently and lock the front doors on their last day, but I would argue that most firms have a much higher value than they are otherwise considered to hold.

If you have not heard the term 'data is the new oil', then turn your mind to the most valuable companies in the world, what they actually own and what they sell. In most cases they own a client base and use data to monetise it. Consider that Facebook does not create content, AirBnB does not own property, Spotify does not create songs, Google does not own website content, Uber does not own vehicles and Booking.com does not own hotels. While a law firm may not have millions or billions of 'customers', it does have clients, and those clients spend a lot more on average than Facebook, Google or others may hope to make from each customer on an annual basis.

Even without any technology automation, if a firm was to seek a reasonable sale price, what should be considered is the hundreds or thousands of relationships that are held and maintained. The sale of a firm typically incorporates a review of financials so that the buyer can understand revenue figures, but few firms factor in the value of the relationships they are selling. Consider dormant clients, referrers or contacts that your firm may have and how they would (or would not) represent themselves accurately on a profit and loss statement.

Placing value on the relationships (that is, the client-base) that a firm holds has traditionally been difficult to articulate. Having an old database full of out-of-date contacts is of little value to a buyer.

Having worked with many firms over many years, our team has developed a technology solution specifically designed to capture and demonstrate the breadth of communication a firm has across its client, contact and referrer networks. This work has brought us to understand that the value of a firm is far greater than just its annual fees, and all firms (even smaller or micro firms) are made up of very well-connected individuals.

Without needing to change the way you practice and without introducing any additional effort at all, using the communication data your firm automatically produces is what can prove your value and maximise the value of that 'golden handshake'.

Should you be interested in selling your firm (to someone either within or external to the practice) then you can at least use technology to maximise that sale value and ensure that the many years spent building your practice and forging relationships do not fade into nothing.

Steve Tyndall is the CEO and director of Client Sense and NextLegal

INNOVATION, TECHNOLOGY AND LEGAL PROFESSIONALS OF TOMORROW

BY TONY KEIM

All lawyers should be compelled to undergo regular technology competency training to ensure they fulfil client obligations in a world of innovation and increased technological impacts, according to a leading US legal authority.

The current state of 'innovation impacts' was of such concern, the esteemed law academic believes the legal profession has an obligation to guarantee the practice of law remained ethical.

University of Houston Law Centre Professor Renee Newman Knake – a leading scholar on innovation – said lawyers should be educated about the ethical implications of technology in legal practice during their university law education, and on a continued basis during practice.

Professor Knake spoke exclusively to *Proctor* during a recent visit to Australia to complete a six-month stint as Royal Melbourne Institute of Technology's Fullbright Distinguished Chair in Enterprise and Innovation.

"Innovation impacts all aspects of life, but for the legal profession there are particular concerns," Professor Knake said.

"Lawyers have special obligations to their clients and to the public to ensure that innovations – in other words, changes – in the practice of law are ethical.

"A different sort of concern from many parts of the profession is how to keep with the pace of innovation or even how to engage with it in the first instance.

"Many individuals become lawyers because they do not envision themselves as entrepreneurs or innovators, so it is important to provide lawyers exposure and training."

The commencement of training needed to be undertaken at an early stage of a lawyer's career and before entering the profession, Professor Knake said, and regular, ongoing education should be undertaken throughout a person's career.

"Lawyers should be educated about the ethical implications of technology in law practice during their law school education and on a continuing basis during practice," she said.

"The American Bar Association adopted new language in 2012 that expanded the duty of competence to include an affirmative obligation to 'keep abreast of changes in the law and its practice, including the risks and benefits of relevant technology.'

"Thirty-seven jurisdictions have adopted that language or some similar form of obligation. I believe that this sort of requirement should be followed universally throughout the US and around the globe."

On the topic of 'technological innovation', Professor Knake said the two need not be exclusively linked.

"Technology is important but that alone is not innovation," she said.

"Innovation can be changes in process or methods, some of which may be enhanced by technology, but not necessarily."

Professor Knake was also slightly guarded on whether entrepreneurial and innovative lawyers of today and tomorrow would have more rewarding and meaningful legal careers.

"Not necessarily, though I do think that it is a path toward creating a rewarding and meaningful career in the law," she said.

"This is certainly true for my past students who carved out new careers in roles that did not exist when I was in law school; for example, as legal solutions architects or innovation counsel."

Professor Knake was adamant, however, that collaboration beyond law and multi-disciplinary practices would be imperative in the years ahead.

"Most – maybe even all – clients with legal problems also need expertise from other disciplines to reach full solutions," she said.

"The more lawyers can collaborate with other professionals and service providers to resolve problems for clients, the better."

Professor Knake is an internationally recognised expert on professional responsibility and legal ethics. She has been invited to speak throughout the United States and in countries such as Australia, Canada, England, Guatemala, Mexico, and the United Arab Emirates.

She is regularly contacted to assist in legal matters involving lawyer discipline and judicial ethics, and has twice testified successfully before the Texas Supreme Court Special Court of Review to support reversal of discipline charges against judges.

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

IS TIME UP ON MISTAKE OF FACT?

Experts debate: archaic legal loophole or good, sound law?

BY TONY KEIM

QUEENSLAND CRIMINAL CODE 1899 – SECTION 24

Mistake of fact

(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

(2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

If you believe everything you read in the newspaper or watch on the TV news and have no legal experience you could be forgiven for thinking an 'archaic legal loophole' in laws established 120 years ago allows rapists to walk free by claiming they were so drunk they thought their victims had consented.

Fact or fiction? You'd be right if you chose the latter.

That analogy – put simply – is a work of fiction, a myth, urban folklore. It's been whipping people into frenzied debate about whether Section 24 of the 520-page Queensland Criminal Code is fit for purpose in a modern society where sexual consent has become a hotly contested and debated topic. Section 24, of course, is universally accepted by the vast majority of the legal profession to have served Queenslanders well since it was drafted and passed through Parliament in 1899.

To be clear, Section 24 is of general application to any criminal offence.

That means it can extend to cases alleging sexual offences such as rape – for example the accused person had an honest and reasonable but mistaken belief that the victim consented to the sexual act.

Queensland Law Society President Bill Potts, in a recent letter to Queensland Attorney-General Yvette D'Ath, said the defence of 'mistaken fact' is not one that is easily made in court and is certainly not a 'get out of jail free' excuse.

The Society – with consultation from our Criminal Law Committee – has adopted a position that there is no compelling evidence to change existing laws, although we did support a decision for the State Government to refer the issue to the Queensland Law Reform Commission for review.

Within days of QLS correspondence being sent to the government, Ms D'Ath and Minister for Women Di Farmer announced the matter would be referred to the (Queensland Law Reform Commission) QLRC as suggested. That decision came after more than 12 months of advice from the Society, including a similar letter penned by then President Ken Taylor in July 2018.

Mr Potts told *Proctor*: "While we are not aware of compelling evidence to change the existing provisions, QLS is supportive of a reference being made to the QLRC for a proper examination of the issue. The QLRC is best placed to provide informed, evidence-based advice on this important issue.

"We don't accept that a 'mistaken fact' defence is easy to make out and it's certainly not a get out of jail free excuse … but nevertheless, a discussion and evidence-based response from the QLRC is a welcome development.

"We support an objective review of the laws to determine if they are still effective and responsive to community standards. I am particularly keen for the public discourse and any assessment of our existing laws to be evidence-led."

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

Several days ago, the government released its terms of reference for the QLRC review and, to give a better insight into the issues at stake, *Proctor* has sought responses from people at the coalface of this topic. After reading their views on the matter we would like to hear from you, our members, to voice your opinions via our social media channels, letters to the editor or submissions to the QLRC.

HAVE YOUR SAY

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EVIDENCE PROVES IT'S TIME FOR CHANGE

BY JONATHAN CROWE

The evidence is in: the mistake of fact excuse for rape needs reform

I have been researching the mistake of fact excuse in Queensland rape law for more than 15 years. For the past two years, Bri Lee and I have been working together to deepen and extend my previous work on this topic.

We have found every recent (post-1990) Queensland appeal decision dealing with the excuse in rape and sexual assault cases. Our analysis of these cases formed the basis for a detailed report submitted to the Attorney-General in March. The report is currently under peer review for publication in a scholarly journal.

The mistake of fact excuse enables the defendant in a rape or sexual assault case to argue that, even if the complainant did not consent to his advances, he mistakenly believed that the person did. There is a perception that the excuse deals with genuine miscommunications. However, Ms Lee and I found a series of cases where the excuse was successfully relied upon at trial or on appeal by violent, calculated and repeat sexual offenders.

Appellate cases do not necessarily offer a representative sample of cases at the trial level. Appellate case law also adds a layer of issues about appellate procedure that can complicate legal analysis. Nonetheless, these cases provide a useful window into the kinds of issues being raised at trial and the jury directions and verdicts that follow. The patterns identified in our research raise serious concerns about the excuse's effect on the law.

Many of the cases we identified involved vulnerable complainants, including children, women with disabilities, survivors of domestic violence and linguistic minorities. The excuse has been successfully used in cases where the evidence indicated the complainant was asleep when initial sexual contact occurred, as well as where the complainant was, in fact, so intoxicated that she was comatose and therefore legally incapable of consenting (but where the defendant alleged a mistake as to the precise degree of her incapacity).

Queensland rape law recognises that passive non-resistance is not tantamount to consent. Consent cannot be established based solely on social behaviour by the complainant, such as flirting, consensual kissing or visiting the defendant's house at night. However, all these factors have been successfully cited by defendants and affirmed by the Court of Appeal as supporting the mistake of fact excuse. In this way, the excuse reinforces 'rape myths' that have been progressively removed from the definition of consent itself.

Ms Lee and I found several cases where the lack of robust and sustained resistance by the complainant allowed the defendant to rely on mistake of fact. This is concerning given that a 'freezing response' (or 'tonic immobility') is a very common psychological reaction to sexual aggression or trauma. There are multiple valid reasons why a complainant may not fight back even though she doesn't consent. Lack of resistance alone should not be a basis for acquittal where the evidence shows consent was not given.

Further problems arise in cases involving impaired capacity (such as intoxication, mental incapacity or linguistic incapacity) by the defendant or the complainant (or both). Each of these factors has been treated by the Queensland courts as lowering the bar for the excuse. Defendants can point to their own intoxication in arguing their mistake was honest; they can also point to the complainant's intoxication as showing that their mistake was both honest and reasonable, even though it may also have been what made the complainant vulnerable.

Two people who don't speak the same language need to show more care and attention, not less, when they engage in sexual activity with each other. The current law puts complainants at a significant disadvantage if they don't speak the same language as the person who is initiating intercourse. Defence counsel may exploit language differences to paint pictures of grey areas or miscommunications, meaning in effect that women who speak a different language are expected to fight back more vigorously than others.

Ms Lee and I canvass two proposals for reform in our report. The first would be to render the mistake of fact excuse inapplicable to the issue of consent in rape and sexual assault cases. This is a strong reform that has not been adopted elsewhere in Australia; it is therefore highly unlikely to be implemented in Queensland. However, we also consider an alternative reform, modelled on the current legislation in Tasmania, that is more moderate and feasible. This is the option we will be putting to the Law Reform Commission.

Our proposed amendment involves narrowing the mistake of fact excuse in rape and sexual assault cases where:

- the defendant was reckless as to consent
- the defendant did not take reasonable and positive steps to ascertain consent
- the defendant was in a state of self-induced intoxication and the mistake was not one he would have made if not intoxicated
- the complainant was in a state of intoxication and did not clearly and positively express her consent, or
- the complainant was unconscious or asleep when the acts occurred.

A model legislative provision to this effect can be found on our website at **consentlawqld.com**.

Ms Lee and I have gained wide public support for our work, but also pushback from some quarters. Robust and informed debate on legal reforms is to be welcomed, but some of the comments by lawyers on social media have been vitriolic and personal. I am an experienced and senior academic with a relatively thick skin; I can take it. However, I worry about what this kind of criticism shows about the culture of the legal profession, particularly the criminal bar. If it is not possible to advocate evidence-based reform without receiving ad hominem attacks, then no wonder critics of the status quo are often reluctant to come forward.

The Bar Association of Queensland and Queensland Law Society have both publicly opposed any change to the mistake of fact excuse. It is unclear what body of research their conclusions are based on. My sense is that they are relying primarily on the anecdotal impressions of their members. There is certainly much to learn in this area from the views of experienced practitioners. Ultimately, however, law reform must be based on evidence and research.

Ms Lee and I have done the hard yards on this issue. We have conducted more detailed research on the mistake of fact excuse in rape law than anyone else in Australia (and quite possibly the world). We have spent countless hours not only compiling research, but also answering questions and giving interviews on our findings. We recognise that criminal excuses and defences should not be narrowed without strong reason, so we have not rushed to judgment. At this point, however, the evidence is in. Reform in this area is badly needed.

Jonathan Crowe is a Professor of Law at Bond University.

'HONEST AND REASONABLE IS ENOUGH'

BY LAURA REECE

The recent campaign to remove the defence of mistake of fact (section 24 of the Criminal Code) in sexual offences was alarmist and misleading.

Much use was made of the expression 'loophole', with the clear implication that acquittals secured on the basis of this defence are somehow illegitimate. The key criticisms were starkly put and oft repeated, for example:

"We have the most archaic legislation around consent with the 'mistake of fact' defence allowing defendants to use their own drunkenness to secure acquittals," wrote Bri Lee[1].

Julie Sarkozi, a solicitor at the Queensland Women's Legal Service, said criminal cases had failed because sexual assault victims had been "drunk, asleep, intoxicated, disabled and even unable to speak English"[2].

Many of these statements are simply not true and are damaging to our system of justice and the faith our community has in it. This piece is not intended to be an academic riposte to these arguments, but a review of the leading appellate cases on one of these issues is instructive. While the level of intoxication of an accused person might be relevant to the honesty of their belief as to consent, it has no application to the question of whether that belief is a reasonable one. As Kennedy J sitting in the Western Australian Court of Criminal Appeal in *Daniels v The Queen*[3] said:

"Intoxication is, no doubt, relevant to the question of whether an accused person has an actual belief in the existence of the state of things in terms of s24 of the Criminal Code; but, if he does have that belief by reason of his state of intoxication at the time, it does not avail him if a reasonable man would not have been *mistaken.* As his Honour observed, a reasonable man is a sober man..."[4]

The defence of mistake of fact is a defence of general application. It provides that a person who does an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person believed to exist. As a general proposition it is hard to see why this is less acceptable now than it was at the time of drafting, over a hundred years ago and, prior to that, at common law.

The defence is run (often unsuccessfully) in sex offence trials all over Queensland, in cases which inevitably involve differing factual scenarios and credibility of witnesses. Its application to sexual offences reflects a difficult and sensitive aspect of human interaction in which there can be genuine misunderstanding as to the state of someone's willingness to engage in sexual contact with another person. These matters often boil down to very different recollections, impressions or versions of the same incident. This is a challenging feature of sex cases as they often turn on matters which cannot be corroborated. This doesn't mean that complainants shouldn't be believed, but neither does it mean that accused persons must be condemned simply because an accusation has been made.

By their very nature they are difficult to prosecute and difficult to defend. Juries are asked to decide these matters based on their impressions of the witnesses and the common sense and experience that they bring with them to that important duty. They often reject defence cases invoking the defence of mistake of fact, which indicates that they are applying themselves to these questions seriously and sensitively as to what they think is right and reasonable.

References to the age of the section belie the fact that the criminal law is constantly evolving – as it must – to adapt to the changing social values and mores of our times. In the case of sexual offences against both adults and children, the law has undergone profound changes over the past 30 years. Contrary to what has been publicly stated, the law in Queensland is not lagging behind other states. While this does not mean that we have achieved a perfect system, any calls for change must be evidence-based and subjected to the level of scrutiny which is appropriate when such profound change is being suggested.

It is important to recognise that lawyers have publicly advocated and fought for the major criminal justice and social justice reforms of our times. Current prosecutors, government lawyers and judicial officers are precluded from commenting publicly on these matters due to the terms of their employment. Self-employed barristers and solicitors in private practice are in a different position which is why they are often at the forefront of commentary on the more controversial aspects of law reform. Many of us also defend individuals charged with serious criminal offences. We represent everybody regardless of what they are accused of – this is how a justice system works.

I reject wholeheartedly the suggestion made by some in their commentary on this issue that this somehow compromises our ability to comment on and contribute to the process of reforming the law. Traditionally many of us have been loath to make individual comment, as to do so would be to hold ourselves out as experts, or expose us to personal attacks. It may be time to reconsider our position.

In June this year I moved a friend's admission. In her speech to the newly minted legal practitioners, Chief Justice Catherine Holmes made the following comments:

"You as lawyers may sometimes have to represent unpopular people and unpopular positions and you may find yourselves criticised for doing so. But that's your job: you must act fearlessly for your clients, and in doing so play your part in preserving the rule of law. Without that, the system of justice would be ruled by the loudest voice.

"One way you can help ensure access to justice for everyone is through pro bono work or volunteering with community legal organisations which help disadvantaged people. And take an informed interest in controversial legal matters. Engage in the debate whether publicly or privately. You are all no doubt deeply enmeshed in social media; use it where you can to correct misconceptions; for example, about the rule of law, its importance and how it is maintained."

I found her Honour's comments both reassuring and galvanising. I have raised my voice in opposition to the loudest voices being heard on this issue, and hope that others will join me.

In July this year the Attorney-General referred this matter to the Queensland Law Reform Commission (QLRC). This referral was supported by the QLS and the Bar Association of Queensland. A timetable for submissions and reporting will no doubt be published on the QLRC website in due course.

Laura Reece is a Brisbane-based barrister and member of Queensland Bar Board's Criminal Law and Human Rights committees.

Notes

1 'If you've been abused as a child, Queensland is the unluckiest state to be in' by Bri Lee, *The Guardian*, 13 December 2018.

2 'Campaign for change puts Queensland's rape laws under the spotlight', by Ben Smee, *The Guardian*, 24 May 2019.

3 (1989) 1 WAR 435, followed by the Queensland Court of Appeal in *R v O'Loughlin* [2011] QCA 123 at [28]

4 Ibid, at 445

APPLYING THE PRINCIPLE OF FAIRNESS

BY RACHAEL FIELD

In liberal democratic legal systems such as we have in Australia, principles of good government, justice and civil order are grounded in the ideal of the rule of law.

AV Dicey identified three main tenets of the rule of law:

1. The state can only justify punishing a person if it is proven in court that the person has breached a law.
2. Everyone is equal before the law and no one is above the law.
3. The fundamental rights of citizens should arise from the ordinary law.

Sir Ninian Stephen, a judge of the High Court of Australia and Australia's twentieth Governor-General, would add that the rule of law requires that those who administer the law (such as the executive and judiciary) must be independent from the legislature; and the citizenry must have appropriate access to the courts.

Lord Bingham of Cornhill, an eminent British judge and jurist, would further add that the law must be accessible, intelligible, and clear; laws must afford adequate protection to human rights; those in authority must exercise their power reasonably and without exceeding their limits; and any adjudicative procedures provided by the state should be fair.

When considered together, these elements of the rule of law essentially point to a fair and accountable legal system. For this reason, the rule of law is the paradigm within which the appropriate and ethical operation of the law, and of legal processes and practice, is justified. While the rule of law is by no means a paradigm that translates perfectly to practice, in the words of Lord Bingham, it is nevertheless "the foundation of a fair and just society, [and] a guarantee of responsible government".

The principle of fairness in the rule of law is key. Tom Tyler, a Yale Law School professor of psychology and law, commented that "the public's law-related behaviour [is] powerfully influenced by people's subjective judgments about the fairness of the procedures through which the police and the courts exercise their authority".

Mistake of fact is an important general criminal defence for having committed a crime that sits well within the paradigm of the rule of law. While ignorance of the law is no excuse, section 24 of the Queensland Criminal Code recognises that if a person commits a crime as a result of an honest and reasonable mistake, then it is fair that they avoid conviction for that crime.

Consider, for example, a situation where a person honestly and reasonably believes (incorrectly) that they are not married, and they go ahead and marry someone. It turns out that they are in fact at the time of that marriage, legally married to someone else. They made a big mistake – but it was an honest and reasonable mistake.

For this reason, the law says the mistake constitutes a defence to the offence of bigamy. I would suggest that a poll of people in the street would think this was fair and just. It would be unfair to convict a person of bigamy in these circumstances. It is equally fair that some offences, for example, vehicle offences involving liquor and drug use, specifically exclude the operation of the defence for obvious public policy reasons.

The test for the operation of mistake of fact contains two distinct elements that *should* contribute to its fair operation: the subjective test of honesty, but also the objective test of reasonableness. This constitutes a double protection of fairness. Not only must the accused honestly make the mistake, but on an objective analysis of the facts and circumstances their mistake must be considered reasonable. In this way, mistake of fact operates in a balanced and fair way, consistent with the rule of law.

However, like the paradigm within which it operates, mistake of fact is not perfect in the way in which it manifests in practice. There are some contexts in which it doesn't work well. One of these contexts is rape and sexual assault. We know this due to a strong evidence base, including the lived experience of rape survivors, which cannot be ignored.

Jayne recently shared her experience with *The Courier-Mail* for an article published on 13 July entitled 'Battered by Twin Traumas'. The person accused of raping Jayne was acquitted. This was despite evidence that she had repeatedly asked for him to stop, had told him that what he was doing was hurting her, and at the time she (and presumably he) could smell the blood resulting from his violent actions. Putting yourself in the shoes of the accused, do you think mistaking this situation for consent is reasonable? A reasonable person in these circumstances would understand that there was no consent.

Jayne's story is just one of many. Ms Bri Lee and Professor Jonathan Crowe have gathered together a significant body of evidence to show that mistake of fact is not operating in the context of rape and sexual assault as the rule of law would have it. Their research shows that reliance on the excuse is resulting in unjust acquittals because there are, among other things, significant problems with the analysis of whether the mistakes claimed in such cases were reasonable.

How can we get the rule of law principle of fairness back into the operation of mistake of fact in the context of rape and sexual assault? One possible approach, as advocated by Ms Lee and Professor Crowe, is to narrow the defence to ensure that the objective requirement that the mistake is shown to be a reasonable one, is better met. This approach is consistent with the current law in Tasmania.

Reform to the mistake of fact excuse in this way is rational and appropriate because it will ensure that mistake of fact works fairly in support of just outcomes in rape and sexual assault matters. And yet there are zealous opponents who, despite the extant evidence base, choose to ignore the potential unfairness and injustice resulting from its operation in these cases. Indeed, some of the recent commentary against reform of mistake of fact on social media has fallen well below the standards of intelligent professional discourse and debate – and that is disappointing.

The rule of law provides an assurance to the citizens of Australia that they will be governed responsibly, and that the operation of the law and the legal system will be just and fair. Lawyers, as custodians of the rule of law, can look to its values for purpose and meaning in our professional lives. It is right that lawyers advocate zealously for their clients' interests in any legal context, and perhaps especially in criminal law contexts. However, our primary ethical duty is to the court and the administration of justice.

This means that when an aspect of our system is not working congruently with the principles of the rule of law, we need to work together to fix it. The rule of law creates an imperative to reform mistake of fact as an excuse for rape and sexual assault offences so that its operation is fair and just. For this reason, Ms Lee and Professor Crowe, along with the Women's Legal Service Brisbane, rape and sexual assault survivors and workers, and many others, are to be commended for achieving a referral to the Queensland Law Reform Commission (QLRC) on this issue. The recommendations of the QLRC's enquiry will be much anticipated.

Rachael Field is a Professor of Law at Bond University and President of Women's Legal Service QLD.

THE UNIVERSAL RIGHT TO PLEAD ONE'S CASE

BY REBECCA FOGERTY

Our criminal justice system has been long criticised for how it deals with sexual crimes. A maxim for activists in this area is to "believe victims". This is important in the therapeutic realm but harder to reconcile in a justice system where a central tenet is the presumption of innocence.

There are now calls for defendants in sexual assault cases to be banned from using the 'mistake of fact' defence. This is a mistake and would undermine the integrity of our system of justice.

Of note about the current discourse is the significant confusion about the defence, even among those who oppose its abolition. Section 24 of the Queensland Criminal Code contains the defence. It applies to all Code offences, not just sexual crimes. It arises from the simple moral argument that if someone unwittingly breaks the law because of a reasonable but mistaken belief, they shouldn't be convicted of a crime. To take an uncontroversial example, if you buy a second-hand TV on Gumtree that turns out to have been stolen, you may not truly be guilty of receiving stolen property.

There are limits to how the defence can be used. The mistaken belief must be both honestly held and objectively reasonable. If the TV was well below market price and the seller insisted on cash, it will be harder to convince a jury that you honestly and reasonably thought the transaction above board.

Contrary to recent media reports, it is well established that a defendant's drunkenness does not, in and of itself, give rise to a mistake of fact defence[1]. If you were so drunk that you missed the clues about the stolen TV, your belief may well have been honest, but it still isn't reasonable.

Some have described the mistake of fact defence as a loophole that enables violent, predatory and repeat sexual offenders to evade responsibility. Of course, this might be said to apply to the full corpus of criminal offences and defences, including insanity, emergency, and accident. It is a reality of our diverse society that some defendants will be recidivists both for sexual and (more commonly) non-sexual offending.

More to the point, the idea that a defence might be used to evade responsibility is an existential question that goes to the very purpose of a system of criminal justice. A tenet of our law is the accused's right to a fair trial. Fundamental to that right is the ability to plead one's case. If a person is accused of a crime, then surely, they have a right to say why they believe they are not guilty. It is then up to the jury to scrutinise this claim and return a verdict.

Critics of s24 have focused on a series of successful appeals where, inter alia, the Court of Appeal held that mistake of fact was not properly put to the jury during trial directions[2]. The cases have attracted controversy because of the victims' apparently clear lack of consent. In reality, most of these appeals were either dismissed or allowed for reasons entirely divorced from the quality of the complainants' evidence or the merits (or lack of) associated with the s24 defence. In many cases, the defendants did not even argue mistake of fact at trial. There is also nothing remarkable about a jury being directed about potentially peripheral defences: it is a standard procedural safeguard.

One reason for the attention on mistake of fact is changing social attitudes about consent. Some have expressed concern that s24 makes it easier for defendants to secure an acquittal if the victim was too intimidated to say no, or was unable to physically resist.

If there is truth in this, s24 is not the culprit. The absence of a verbal or physical protest does not automatically give rise to a proper basis for the defence. The jury must consider all the facts and circumstances in determining whether a) the mistake was genuine and b) reasonable in the circumstances. The objective test of reasonableness is a safeguard ensuring that the system does not excuse callous or reckless disregard for consent.

In considering whether s24 meets its intended purpose, we need to ask: is it possible, within the messy spectrum of human experience, for a person to be honestly mistaken about consent? If it is even a remote possibility, we must permit an accused person to mount a defence and let a jury decide whether the mistake was reasonable.

Removing s24 will lead to more unsafe convictions, as would any effort which hobbles a person's right to defend themselves against criminal charges. In a legal system with a high burden of proof, there will always be (thankfully rarely) trials with outcomes that seem unfair, including acquittals that seem unreasonable. These naturally attract media attention. My experience, however, and that of my criminal law colleagues, is that juries usually get it right.

Our adversarial system can be painful to victims of crime. This is perhaps especially true for sexual matters, where there are often no witnesses and the process of cross-examination can leave victims feeling drained and exposed.

How we address these systemic issues is beyond the scope of this article, but our response cannot be to abolish a fundamental defence for one of the most serious crimes in the Code. The mistake of fact defence is not an outdated relic from a less enlightened era, but a basic and sensible element of any fair justice system.

Rebecca Fogerty is a QLS Criminal Law Accredited Specialist solicitor and Chair of QLS's Criminal Law Committee.

Notes

1 *R v O'Loughlin* [2011] QCA 123

2 The cases include: *R v Duckworth* [2016] QCA 30; *R v Hopper* [1993] QCA 561; *R v Cook* [2012] QCA 251; *R v Soloman* [2006] QCA 244; *R v CU* [2004] QCA 363; *R v Cannell* [2009] QCA 94; *R v SAX* [2006] QCA 397; *R v Awang* [2004] QCA 152; *R v Elomari* [2012] QCA 27; *R v Motlop* [2013] QCA 301; *R v Cutts* [2005] QCA 306; *R v Lennox; R v Lennox; Ex parte Attorney-General (Qld)* [2018] QCA 311; *R v Rope* [2010] QCA 194; *R v Phillips* [2009] QCA 57; *R v Dunrobin* [2013] QCA 175; *R v Mrzljak* [2004] QCA 420; *R v Kovacs* [2007] QCA 143

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."

She has also undertaken further study in the area of governance foundations, and recently received a scholarship for the company directors course through the Australian Institute of Company Directors.

"As a lawyer, I am excited to promote women in senior positions and the gender balance on boards, providing cultural diversity and experience to the community," Nareeta said. "I envisage also having a mentoring role to other Indigenous women who may wish to explore the path of board and governance, and a professional pathway. This will greatly enhance reconciliation by providing indigenous people with knowledge and education."

She said that the QLS award cemented her belief that she was on the right path to being an active role model to others, showing that hard work and sacrifice could reap rewards big and small.

She was appreciative of Queensland Law Society for its support in building her confidence during her journey and for selecting her as one of the first QLS law student ambassadors.

Nareeta said she believed that it was very important that Indigenous people remained firmly connected to their family spiritually and emotionally, as this assisted their confidence in pursuing academic and career pathway with vision and clarity.

"I believe that being an active community member and a positive role model is important to encourage others to pursue a legal career," she said. "I actively volunteer to speak to high school students and mentor law students in the region. I also tutor law students who are studying law to reach their full potential. It is important to demonstrate to the community that lawyers can have very diverse career paths.

"I have always welcomed new opportunities that have come my way, but always remaining kind and giving to the homeless community is most important to me."

John Teerds is the editor of *Proctor*.

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Lexon
INSURANCE

End of financial year review

Pleasingly, both claim numbers and overall claims cost for the 2018/19 insurance period were down on last year, with the profession's commitment to risk management continuing to bear fruit.

As at 30 June 2019, we recorded 327 new matters in the 2018/19 year compared to the 362 received in the equivalent period for the 2017/18 year. This downward movement was welcome, but we nonetheless remain slightly above the five-year average of 313.

Claims value diminished year on year by over $2.5million (to $13.1million). This improved claims performance, which came despite the continuing exposure to cyberfraud, partially offset lower than expected returns in our investment portfolio. Overall, the scheme position remains strong.

Claims profile

Conveyancing continues to be the most frequent type of matter (27.8% of all files) and contributed 35.0% to overall portfolio cost. While conveyancing file numbers were lower than in 2017/18 (91 compared to 99), the claims value grew to $4.6million – meaning the average value of conveyancing claims increased.

We are mindful that cyberfraud is a growing area of concern in conveyancing and we will continue to work closely with the profession to assist in the management of that risk (see the September hot topics section on the next page for more on cyberfraud).

Commercial claims decreased in both number and overall value. There were 64 files opened in 2018/19 – the second lowest number in the last 10 years – and the overall claims value at 30 June represented 33.9% of the portfolio cost.

The remaining elements of the portfolio were in line with the 2017/18 year.

The graphic below compares the portfolio breakdown by area of law for 2018/19 with 'all years'. Overall claims values are in line with the long-term average despite a growing profession. Claims containment remains our primary goal.

Policy enhancements in 2019/20

- **TRUST ACCOUNT DEFICIENCY COVERAGE CLARIFIED**

The wording relating to trust account deficiencies has been recast to provide greater clarity for insureds. It remains consistent with the principles of coverage applied for the 2018/19 year.

- **TOP UP**

A stand-alone endorsement has been added to address the top-up elements of the policy. This has simplified the 'main' certificate of insurance and provides a self-contained reference point for those with top up.

- **FOREIGN LAW COVERAGE**

The foreign law exclusion has been updated with coverage not predicated upon prior written consent from Lexon. However, practitioners must still be able to establish the work was of a type that the practice was "appropriately qualified and authorised to provide in the relevant Foreign Country". For practices that require specific confirmation ahead of transactions, the capacity to obtain a written authorisation from Lexon remains.

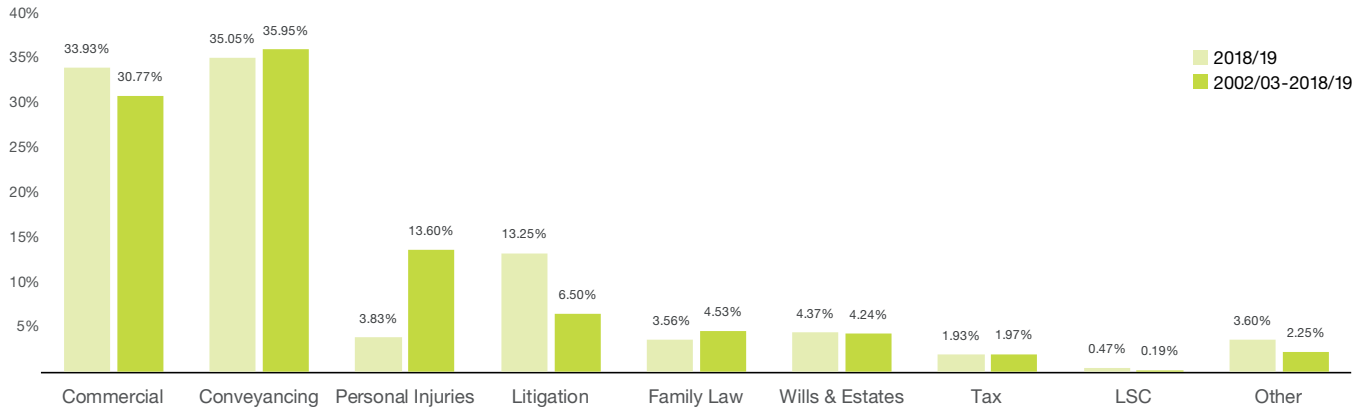
- **CONVEYANCING PROTOCOL DETERRENT EXCESS**

The wording has been refined to reflect the simplified Conveyancing Protocol (including new conveyancing letters and checklists) introduced for 2019/20 and the manner in which Lexon's deterrent excess will apply.

The changes to the insurance coverage are further explained in the document entitled 'Outline of Changes to Master Policy No.QLS 2019 and the 2019-2020 Certificate of Insurance', which can be found at lexoninsurance.com.au.

Michael Young
CEO

Claims cost by area of law



Cyberfraud risks – steps you should be taking

Whilst Lexon's policy may respond to third-party losses resulting from cyberfrauds, prevention is certainly better than a cure which involves excess, potential deterrent excess, IT downtime and potential levy consequences, together with the stress and time of managing a claim.

Some of the practical steps you can take are outlined below:

Use Lexon's risk management letters, tools and checklists

Use the relevant suite of tools developed by Lexon for use in your matter to reduce the risk of the loss of funds through cyberattacks. Cyber is not just a conveyancing issue, attacks have occurred across other areas of practice as well. All of our risk packs have updated cyber warnings and prompts included.

Email footers

Note our risk alert advice to not put electronic instruction warnings **only** in your email footer – fraudsters have intercepted these communications and have deleted the footer before sending the fake email – make the warning a part of your standard first retainer letter. You should also use our recently updated Client Cyber Alert (found in our Initial Client Contact Pack) as the first page of your first communication to a client in a new matter.

Use 'two factor authentication' before any funds are transferred

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

Have all your staff complete our complimentary online cyber security training course

Lexon has released a bespoke online cyber training course. This course has been designed to assist practices to identify situations in which cyber and related fraud risks exist which might expose the law practice to financial losses. Your practice was sent log-on details earlier this year and we strongly encourage you to complete the initial modules that have been released. If you have any queries regarding accessing the course, please contact Anthony Walduck at anthony.walduck@lexoninsurance.com.au.

PEXA platform users

If your practice uses PEXA, undertake a *regular* review of all registered users to check they are your staff. PEXA is aware of instances of compromised practitioner email accounts, allowing an unknown person to intercept a change-in-password email and enter the PEXA system. You will find Lexon's Cyber Fraud Coverage Information Sheet, which includes a discussion about PEXA issues, on our cyber webpage.

Maintain good cybersecurity and be vigilant!

Ensure that:

- Your virus protection, firewall and operating systems are patched and up to date (note earlier comments on specific PEXA IT obligations if using this platform).
- You never click on a link included within an email without first hovering to check the link address. Many of the recent cyberattacks originated from clicking on a link in an email, where there appeared to be no immediate effect. When in doubt, call the apparent sender of the email to query the legitimacy of the email.
- You never reveal user credentials and passwords (fraudsters may try and get these by masquerading as potential clients or using other targeted communications – this is covered in our complimentary cyber security training course).
- You adopt a less trusting mindset to email communications – healthy scepticism is required.
- If you think you may have been compromised, you immediately:
  - change your passwords (for example, personal, server, domain hosting, PEXA)
  - have your IT support provider review the matter
  - contact our risk team who can discuss other *time critical* steps to take to minimise exposure.
- You visit the Australian Government cybersecurity site, **staysmartonline.com.au**.

Did you know?

- In 2018 Lexon added cyber workshops to our extensive list of free in-house risk visits. Our cyber risk consultant, Cameron McCollum, takes practices through some simple measures that could have prevented claims we have seen, and system level controls that you can discuss with your IT adviser. If you'd like to get a headstart, you can download our Cyber Security LastCheck and arrange a meeting with your IT adviser now to work through it.

  If you haven't already scheduled your practice for a visit, email cameron.mccollum@lexoninsurance.com.au to register your interest. Cameron will be progressively visiting all areas where insured practices have offices.
- For the 2019/20 insurance year QLS Council arranged with Lexon to again make top-up insurance available to QLS members who sought the additional comfort of professional indemnity cover beyond the existing $2million per claim provided to all insured practitioners. An application form can be found on our website.
- We remind practitioners acting as directors or officers of 'outside' companies (or any other body corporate) that the Lexon policy only responds to claims arising from the provision of legal services. Practitioners who assume those roles may wish to seek appropriate advice as to whether they have, or require, directors' and officers' insurance.

Breaking down the barriers

Embrace the privilege of pro bono service

CONTRIBUTED BY THE QLS ACCESS TO JUSTICE PRO BONO COMMITTEE

Last year Queensland Law Society's Access to Justice Scorecard revealed that more than 70% of respondents believed affordability of legal representation, and inadequate funding of legal assistance, were the most significant barriers to Queenslanders accessing justice and legal services.

While the efforts of lawyers should never been seen to relieve the government of its obligation to provide for its citizens, the reality is that legal aid in Australia is in a funding crisis. The result is that thousands of Australians are being deprived of access to justice and legal service each year.

Pro bono lawyering meets part of this gap. Lawyers have the privilege and fortune of being members of an esteemed profession and officers of the court. With such privilege and fortune comes a responsibility. It's a moral and professional responsibility to not only promote access to justice and uphold the rule of law, but to also take steps to ensure those less fortunate in society have access to justice and legal services.

Many QLS members are volunteers at community legal centres around the state, where individual lawyers give of their time to provide advice and assistance.

LawRight also plays an integral role in helping practitioners do pro bono work.

At the recent QLS Open Day, the QLS Access to Justice Pro Bono Committee (the committee) facilitated a session dedicated to the importance of pro bono work. The panel discussion (*pictured*) highlighted how easy it is for practitioners, from all parts of the profession and of all ages, to undertake pro bono work.

Importantly, the discussion focused on pro bono work as the provision of legal services on a free or significantly reduced fee basis, without the expectation of a commercial return. This work also includes the provision of limited scope, or discrete task legal services, on a free, or reduced fee, basis.[1]

The Deputy Chair of the committee, Steve Herd, chaired a panel discussing the ease with which members of the profession can work with community and other legal services to provide pro bono assistance. The panel members were:

- Rose Mackay, a senior lawyer and the Supervisor of LawRight's Pro Bono Connect and Legal Clinic Service
- Charlotte Yellowlees, a senior associate with Salvos Legal
- Matilda Alexander, a solicitor with Legal Aid Queensland and President of the LGBTI Legal Service
- Brandon Hoffley, a lawyer with Moray and Agnew
- Luke Furness, a lawyer with Clayon Utz
- Alexandra Moles, a partner with HopgoodGanim.

During the discussion, Rose explained how LawRight connects practitioners with those in need of pro bono legal help. LawRight's core service is the Pro Bono Connect Referral Service, which is made up of the Public Interest Referral Service, the Queensland Law Society Referral Service and the Bar Association of Queensland (BAQ) Referral Service.

Through this service, LawRight coordinates pro bono referrals in civil matters for disadvantaged and vulnerable people who cannot afford private legal services or obtain Legal Aid. Referrals can be matched with firms appropriately located and with the expertise and capacity to assist.

Firms that elect to become members of LawRight, to enable them to participate in all of LawRight's services, pay a membership fee. No fee is payable to participate in the QLS and BAQ pro bono services. There is also no obligation on member or participating firms to accept a matter that has been referred.

LawRight assists the practitioner and client to establish their relationship, including setting a clear scope, managing expectations, discussing disbursements and addressing any potential for the matter to be handled on a reduced fee or speculative basis.

In response to the need to assist those people who are not able to obtain pro bono representation, LawRight established its Self Representation Services (SRS) in the Supreme and District Courts, Queensland Civil and Administrative Tribunal and the Federal Court.

Alexandra Moles, a partner at HopgoodGanim, answered questions about the firm's involvement in pro bono matters.

How does HopgoodGanim encourage involvement in pro bono matters?

Alexandra: The partners at HopgoodGanim are committed to ensuring the success of the firms' pro bono programs and encouraging involvement by all members of the firm.

Each partner is responsible for promoting and encouraging participation by their team members and impressing upon their teams the importance of pro bono work as a key aspect of their work at HopgoodGanim.

Each lawyer's contribution to pro bono work is measured and taken into account in performance discussions, calculation of incentive payments and in fee relief. Full fee relief is achieved for all pro bono work undertaken over and above the national pro bono target of 35 hours per year.

All graduate lawyers participate in different aspects of the program (including partnerships with LawRight, Caxton Legal Centre and the Federal Circuit Court) with the aim of developing the strength of the pro bono culture as they move into more senior roles within the firm.

What benefits do you derive from undertaking pro bono work?

Alexandra: There are multiple benefits derived from undertaking pro bono work, not the least of which is the ability to attract quality junior staff by offering them the flexibility to dedicate time to pro bono work.

A junior practitioner describes the benefits of participation in the program by saying: "My first introduction to HG was through participation in a pro bono matter. That project had a huge influence on my career. Since joining the firm in 2015, I have had the opportunity to volunteer in diverse civil and administrative law matters under the supervision and mentorship of respected partners from across the firm, with whom I would not otherwise have had the opportunity to work. I derive great personal satisfaction in positively affecting people's lives through our pro bono work."

If you think you may be interested in becoming involved LawRight's Pro Bono Connect referral service, please contact Pro Bono Connect on 07 3248 1165 or email probonoconnect@lawright.org.au.

If you are interested in the work of the QLS Access to Justice Pro Bono Committee, contact committee Chair Elizabeth Shearer by email elizabeth.shearer@shearerdoyle.com.au.

This article appears courtesy of the Queensland Law Society Access to Justice Pro Bono Committee. It includes contributions from LawRight Pro Bono Connect senior lawyer Rose Mackay, committee Deputy Chair and Fisher Dore Lawyers Principal Steve Herd, and committee Chair Elizabeth Shearer, who is Legal Practitioner Director at Shearer Doyle Law.

Note

[1] It is recommended that practitioners undertaking, or considering undertaking, discrete task work take the time to read the relevant guidance statement published by the QLS Ethics and Practice Centre.

When is unpaid work lawful?

A guide for law students, graduates and legal practices

BY MARCELLE WEBSTER

Unpaid work arrangements include unpaid vocational placements, unpaid internships,[1] unpaid trials and unpaid work experience.

These arrangements may be useful for an individual to obtain 'on the job' experience, or as a means for an employer to test a person's skills and suitability for a role. However unpaid work arrangements are only lawful in specific circumstances and therefore students, graduates and employers should be cautious when entering into an unpaid work arrangement.

An unpaid work arrangement is only lawful if:

a. the arrangement is a 'vocational placement' as defined in section 12 of the *Fair Work Act 2009* (Cth) (Fair Work Act);[2] or
b. the person undertaking the work is not an 'employee' (that is, the relationship between the person undertaking the work and the employer is not an employer-employee relationship).

As a general rule, legal practices should avoid engaging law students or graduates in long-term unpaid work arrangements. Where work is to be undertaken over an extended period, consideration should be given to engaging the person as an employee and providing them with the benefits of employment.

Vocational placements

Students completing vocational placements as defined in the Fair Work Act are not considered to be employees,[3] and may therefore lawfully enter into an unpaid work arrangement.

'Vocational placement' is defined in section 12 of the Fair Work Act as a placement that is:

a. undertaken with an employer for which a person is not entitled to be paid any remuneration, and
b. undertaken as a requirement of an education or training course, and
c. authorised under a law or an administrative arrangement of the Commonwealth, a state or territory.

If the vocational placement meets all of the above requirements, the student is not an employee and therefore is not entitled to wages or other entitlements under the Fair Work Act.

To assess whether a vocational placement meets the requirements of section 12, consider the indicators listed in the table on the facing page.

Unpaid practical legal training (PLT) placements

In *Mitchell Klievens v Capello Rower Lawyers*,[4] Fair Work Commissioner Johns found that Mr Klievens (a law graduate who had undertaken unpaid work experience for his mandatory PLT) was not an employee during the relevant time, as the work arrangement met all three conditions of a 'vocational placement' as defined by section 12 of the Fair Work Act, namely:

a. Mr Klievens had no entitlement to be paid.
b. The placement/work was a requirement of a training course.
c. The placement/work was authorised under New South Wales law.

Indicator	No employer-employee relationship	Employer-employee relationship
Reason for the arrangement Is the reason for the engagement to provide the person with work experience or to require them to help with the ordinary operation of the business?	Where the primary reasons for the arrangement are: a. to assess a person's skills, or b. to provide the person with work experience.	Where the predominant reason was for the person to help with the ordinary operation of the business.
Length of engagement	A very short period of arrangement (which is no longer than necessary to assess a person's skills).	An arrangement for an indefinite or longer period is more likely to make the person an employee. **Tip:** Employers should consider the status of students who seek to 'stay on' after their placements.
Was the work productive?	Work undertaken solely to observe Work undertaken is not productive work No obligation for the person to meet KPIs or to generate revenue.	Expectation that the person will perform productive work. Expectation that the person will meet KPIs and/or be obliged to generate revenue. The work undertaken by the person is ordinarily undertaken by paid employees.
Who is getting the benefit?	The person is getting the primary benefit of the work arrangement.	The business (employer) is getting the primary benefit of the work arrangement.

In Queensland, Schedule 1 of the *Supreme Court (Admission) Rules 2004* (Qld) defines the mandatory requirement of 'workplace experience' to be "supervised employment, or equivalent unpaid engagement, in an office principally engaged in legal practice". Unpaid workplace experience, undertaken for the purpose of being admitted as a lawyer, is authorised under Queensland law.

However, for an unpaid PLT placement to meet the definition of a 'vocational placement' it is important that the work arrangement meets the specific PLT course and training requirements, including in regard to the duration of the placement and the nature and type of work to be carried out by the student.

Person is not an employee

An unpaid work arrangement that does meet the criteria of a vocational placement may still be legal, provided that there is no employment relationship between the person undertaking the work and the employer.

Whether or not an employment relationship exists depends on many different factors. No single factor will determine whether a person is an employee – the whole context of the relationship must be considered. In determining whether an employment relationship exists, courts will make a decision based on the facts and circumstances of each case.

Some of the relevant indicators are listed in the table on the facing page.

Other considerations

Students and graduates should also be mindful of insurance implications while they are undertaking unpaid work. Some universities may offer a level of insurance to students undertaking work experience, however the student should check with the university about the precise terms and extent of the coverage of the insurance.

	s12 Fair Work Act requirement for vocational placement	Factors to consider
1	The placement must be "undertaken with an employer for which a person is not entitled to be paid any remuneration"	Is the employer a 'national system employer' as defined in s14 Fair Work Act? Does an employment relationship exist? [See part 3 below] Will the person be paid wages (or in a similar manner) for work done?
2	The placement must be "undertaken as a requirement of an education or training course"	Was the arrangement initiated by the student or by the educational or training institution? Does the type of work to be undertaken by the person meet the requirements of their course? Is the duration of the arrangement limited to comply with the requirements of their course? Do the requirements of the course require the work to be supervised? **Tip:** You should review the requirements of the course (for example, the relevant college's practical legal training (PLT) course requirements and work experience rules – Queensland) to ensure that the work arrangements meet the course requirements.
3	The placement must be "authorised under a law or an administrative arrangement of the Commonwealth, a State or Territory."	Is the institution delivering the course which provides for the placement authorised under an Australian state or territory law or an administrative arrangement of the Commonwealth or a state or territory to do so? Note: Universities, TAFE colleges and schools will satisfy this requirement.

Legal practices and businesses should also make the necessary enquiries to ensure that the student or graduate will be covered by professional indemnity, workers' compensation, public liability and any other relevant insurance policies prior to offering or engaging in an unpaid work arrangement.

If a person is not working under a lawful unpaid work arrangement, then law practices need to ensure that the person is being paid correctly for the work that they undertake. In this respect, among other laws, the *Legal Services Award 2010* and the Fair Work Act are likely to be relevant.

It is important to emphasise that the above is general information only. There are a range of roles and types of employees engaged by law firms. Employers and law practices should make their own enquiries and ensure that they are meeting their legal obligations with respect to individuals undertaking both paid and unpaid work.

This article appears courtesy of the Queensland Law Society Industrial Law Committee. Marcelle Webster is a special counsel at Tucker & Cowen Solicitors and a member of the committee. The author is grateful for the input of members of that committee and the QLS Early Career Lawyers Committee in the preparation of this this article.

Notes

1 In the Federal Circuit Court decision in *Fair Work Ombudsman v Her Fashion Box Pty Ltd & Anor* [2019] FCCA 425, the court said that 'general deterrence should constitute a significant element in the assessment of a penalty', in circumstances where there was evidence that other businesses in the fashion industry engaged individuals as 'interns' but were 'in fact engaged as employees' [86] – [87].

2 The definition of 'national system employee' in Section 13 of the Fair Work Act excludes persons on vocational placement.

3 Section 13 Fair Work Act.

4 *Mitchell Klievens v Capello Rower Lawyers* [2017] FWC 5126.

Plugging you into a world of knowledge

BY SUPREME COURT LIBRARIAN DAVID BRATCHFORD

Supreme Court Library Queensland is the state's leading law library.

Legal practitioners across Queensland use our range of free services in a variety of ways to help them better advise and represent their clients.

Have you ever wondered how the library can help you?

This month, we hear from Queensland Law Society Senior Counsellor Elizabeth Shearer, who gives her perspective on the library services she uses and how they help her do her job.

Elizabeth Shearer

Legal Practitioner Director, Shearer Doyle Law

Elizabeth Shearer has been a member of the library for many years. Her first memory of visiting the library was as a student in the 1980s at our former premises on George Street in Brisbane's CBD.

Elizabeth regularly uses the library's "prompt and efficient" legal research service. She has found our research assistance particularly useful in finding answers for complex and "tricky and unusual" issues.

"The [library collection and research services] plug us in to a world of knowledge that we could not otherwise access," Elizabeth said. "And the people are always very helpful!"

Elizabeth runs a small general law practice. She is a regular user of the Virtual Legal Library (VLL), which provides free online access to a large number of key legal publications from leading publishers spanning civil, criminal and family law.

"VLL gives us access to a range of materials that we could never afford to have on subscription ourselves," she said. "As a small general practice, this is invaluable."

The library hosts a diverse range of exhibitions and displays about our legal system, the law, and our legal heritage. While Elizabeth doesn't often visit the library in person (preferring to access our services online), she does enjoy visiting our exhibitions. She describes them as shining a light on interesting aspects of our legal history and giving her a unique perspective of her role in that history.

> **The Virtual Legal Library (VLL) gives us access to a range of materials that we could never afford to have on subscription ourselves. As a small general practice, this is invaluable.**

So what are you waiting for? Come and visit *your library* today or go to **sclqld.org.au** to see how we can help you.

(Elizabeth is Chair of the QLS Access to Justice Pro Bono Law Committee, a member of the QLS Practice Management Course Committee, the QLS Ethics Committee and the QLS Professional Conduct Committee. She is a QLS Senior Counsellor and Chair of the library's Financial and Risk Management Subcommittee.)

Elizabeth's top three library services

1. Free research assistance (**sclqld.org.au/research**) – QLS members receive up to 30 minutes of free research and 10 free documents a day.
2. Virtual Legal Library (**sclqld.org.au/vll**) – VLL provides free access to key legal publications including core commentary services, law reports, textbooks and journals. It is available to sole practitioners and members in firms with five or less practising certificates.
3. Exhibitions and heritage displays (**sclqld.org.au/legalheritage**) – the library invites anyone with an interest in the law, our legal system and legal heritage to visit our free exhibitions.

Brisbane Open House 2019: QEII Courts of Law

For the second year running, we are opening the doors of the Queen Elizabeth II Courts of Law to the public for behind-the-scenes tours of the Brisbane Supreme and District Courts, and Supreme Court Library Queensland.

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

Saturday 12 October, 10am to 4pm

- tours run every half hour – bookings essential
- bookings open 27 September
- free entry.

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

Pleading breach of contract

BY KYLIE DOWNES QC AND MAXWELL WALKER

Breach of contract is one of the most common forms of civil claim.

There are some matters which need special attention when pleading this cause of action in the state courts in Queensland. This article considers a simple claim for damages for breach of contract.

Forms

In the state courts, the relevant forms generally used for a breach of contract case are a Claim (Form 2) and Statement of Claim (Form 16).[1]

There are prompts in the forms available on the Queensland Courts website that will help practitioners follow the *Uniform Civil Procedure Rules* (UCPR). For example, the prescribed form for a claim contains notices regarding suing in a representative capacity and the application of cross-vesting legislation, which can be removed if inapplicable.

Reusing a claim which was drafted for another client or used in a different proceeding may result in a failure to include these mandatory notices. The prescribed form should be used each time a new pleading is prepared, and the relevant notices removed if applicable in each case.

For claims in the Magistrates Court and District Court, the plaintiff must show that the relevant court has jurisdiction to decide the claim.[2] Regard needs to be had to the current monetary limits of the jurisdictions of these courts.

Elements of cause of action

In summary, the elements of a cause of action in contract are the existence of a valid and binding contract, the breach of that contract, and an entitlement to the relief which is claimed, such as damages or specific performance.

To succeed at trial, and depending on the matters raised in defence of the claim, you must show that:[3]

1. A contract was made between the plaintiff and the defendant.
2. The defendant has breached the contract as correctly construed.
3. Performance is not excused by an exempting provision or invalidating factor.[4]
4. The contract was not terminated before the breach.[5]
5. The remedy being sought is available.[6]
6. It is not unconscionable to make the claim.[7]

Rule 149(1)(b) of the UCPR requires a statement of claim "to contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved".

Rule 150(1)(a) requires every breach of contract to be specifically pleaded.

Regard should also be had to the rules relating to claiming damages, namely rules 150(1)(a) and 155 UCPR.

Step one: Who are the parties?

Practitioners should identify a legal entity as the plaintiff and defendant. That will usually be either a particular person, or a corporate entity (for example a company with an Australian Company Number, an incorporated association,[8] or a body corporate).[9] There are special rules for claims involving partnerships and business names.[10]

If it is alleged that a contract was formed with a corporate entity, the link between the entity and the method of formation of the contract should be pleaded. Usually this will be a simple matter of pleading an agency relationship between the person who concluded the contract and the company.

For example, if the contract was negotiated on behalf of a plaintiff company, ABC Pty Ltd, by its director, Jane Smith, the statement of claim would allege that the plaintiff was at all material times a company capable of being sued, and that Jane Smith was at all material times the plaintiff's director and its duly authorised agent in respect of the matters pleaded in the statement of claim.

The same pleading of agency would be made in respect of the person negotiating the contract on behalf of a corporate defendant (for the example below, we will assume Bob Lane was the defendant's director).

Step two: Mechanism of agreement

Most contracts are formed either orally, in writing, or partly orally and partly in writing.

The pleading will need to set out the communication of terms between the parties, and the ultimate agreement to those terms.

For example, in an oral contract, an example pleading may state:

"2. On 7 January 2019, in a telephone conversation at Brisbane between Jane Smith on behalf of the plaintiff and Bob Lane on behalf of the defendant:

(a) Jane Smith said words to the effect that the plaintiff would buy 100 computers for $1000 each from the defendant, and otherwise the terms set out on the defendant's website would apply;

(b) Bob Lane said words to the effect that the offer was accepted."

This paragraph has pleaded the mechanism of the agreement (partly oral and partly in writing), the consideration ($1000 per computer), and the place, date and time that the contract was entered.

It is generally acceptable to plead the effect of words spoken.[11] Obviously when Bob Lane, in the example above, said "Yep, that sounds like we have a deal", that would translate to "words to the effect that the offer was accepted". However, in respect of the critical terms of an oral agreement, care should be taken to be as precise as possible as the words spoken form the basis of the liability of the parties.

Step three: Terms

The plaintiff only needs to plead the terms that lead directly to its entitlement to damages.

Using the example above, a pleading of relevant terms may be:

"3. At the time of the conversation pleaded above:

(a) the defendant's website was www.abc.com.au;

(b) the website contained terms and conditions, which included an express term that all orders would be delivered for free within Brisbane within seven days of an order being placed.

4. In the premises of the matters pleaded in paragraph [2] and [3] above, a contract was formed between the plaintiff and defendant on 7 January 2019 which contained the following express terms:
   (a) the plaintiff would buy 100 computers for $1000 each from the defendant;
   (b) the computers would delivered for free within Brisbane by 14 January 2019."

Step four: Breach

The next step is to plead the facts relied upon to allege breach of the contract as well as pleading the allegation of breach itself.

This requires the plaintiff to identify what the defendant did that it should not have done, or what it failed to do that it should have done, and then making an express allegation of breach of contract.

Using the example above, assume that the alleged breach of contract is that the defendant did not deliver the computers. A simple example plea of breach of contract could be as follows:

"5. The plaintiff requested that the defendant deliver the computers to 100 Queen Street, Brisbane.

6. The defendant has failed to deliver the computers to 100 Queen Street, Brisbane by 14 January 2019 or at all.

7. In the premises of paragraphs 2 to 6 above, the defendant has breached the contract."

Step five: Causation and loss

A plaintiff must plead material facts by which the plaintiff contends that a link can be inferred between the acts complained of (breach) with the subsequent loss suffered by it.[12]

In *Graham & Linda Huddy Nominees Pty Ltd v Byrne* [2016] QSC 221, Jackson J stated at [26] that (footnotes omitted):

"[26] However, there is no shortage of relevant case law [concerning the extent of pleading required to establish causal link between breaches of contract or negligence and loss]. In *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd*, Chesterman J said: "In any cause of action in respect of which causation is an essential element it is necessary to plead the material facts which are said to give rise to the causal connection. In particular it is necessary to plead the facts which lead to a reasonable inference that the acts complained of (here the relevant non-disclosure) and the alleged later event (here the making of the dragline agreement) stand to each other in the relation of cause and effect. …"

In addition, the plea of damages alleged to have been caused by the breach of contract needs to comply with rule 155 UCPR.

Having regard to the example above, if the plaintiff had entered another contract pursuant to which it agreed to sell the computers to a third party for a profit, and it was a condition of that further sale that the computers would be delivered to the third party by a particular date, and the third party terminated the contract because the computers were not delivered, the statement of claim will need to plead out that story and identify the lost profits as the damages suffered as a consequence of the breach, including identifying the quantum of damages and their manner of calculation.

Final step: The prayer for relief and the claim

The final step is to identify the relief which the plaintiff is seeking. That should appear in a prayer for relief at the end of the statement of claim as well as in the claim. If the claim is for damages for breach of contract, consideration should be given to claiming interest. The prayer for relief should also claim costs.

Notes

1 courts.qld.gov.au/about/forms.
2 Rule 22(2)(c).
3 *Cheshire and Fifoot Law of Contract,* 11th Australian ed., LexisNexis, 2017 at [1.7].
4 This would not need to be pleaded but should be considered before any proceedings are commenced.
5 This would not need to be pleaded but should be considered before any proceedings are commenced.
6 This will turn on the facts, and the quality of the evidence which tends to prove those facts, as well as the outcome which your client wants.
7 This would not need to be pleaded but should be considered before any proceedings are commenced.
8 *Associations Incorporation Act 1981* (Qld), s21.
9 *Body Corporate and Community Management Act 1997* (Qld), s33(2).
10 Rule 89 to 92 (as to business names), Rule 82 to 88 (as to partnerships).
11 Rule 152.
12 *Chan & Ors v Macarthur Minerals Ltd & Ors* [2017] QSC 13 at [37]-[40].

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Computer says no

…but then what?

BY ANGUS MURRAY, THE LEGAL FORECAST

"What was once inconceivable, that a complex decision might be made without any requirement of human mental processes is, for better or worse, rapidly becoming unexceptional…

"The legal conception of what constitutes a decision cannot be static; it must comprehend that technology has altered how decisions are in fact made and that aspects of, or the entirety of, decision making, can occur independently of human mental input."[1]

These are the insightful words of Justice Kerr in the recent decision of *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79. For some, the exercise of the discretion to remit general interest charges may not be an invigorating read; however, this recent decision does raise the important and interesting consequences of automated decision-making.

It is unquestionable that technology has become prevalent in most of our day-to-day lives. Indeed, you may have a smartphone screen staring at you as you read this article or an Apple Watch that's about to remind you that you have a meeting in 15 minutes.

The increased use of technology raises significant questions about the role of technology, as well as the ethical and legal parameters that could be applied to computerised or computer-assisted decision-making. This article does not intend to answer these questions; however, it briefly outlines the current administrative use of computer programs and provides a potential basis for the legal profession's response to emerging technology.

Computerised decision-making

Computerised decision-making has made its way into many government agencies, in areas such as intellectual property and migration law. Broadly, there are two common themes with computerised decision-making. Firstly, the responsible human decision-maker may, under their control, arrange for the use of a computer program for any purpose that exists within their (delegable) mandate.[2]

Secondly, the human decision-maker may substitute a different decision. In regard to the second point, it is interesting that a consistent approach has not been taken between citizenship decisions (which require specific notice that the computer program was not functioning correctly)[3] and intellectual property decisions (which require the registrar to be satisfied that the decision by the computer program is incorrect).[4] In either approach, there is an obligation that a human decision-maker retains control of the computer program and is sufficiently tech-literate to identify and ensure that the program is operating correctly.

The recent issues with Centrelink's automated debt collection process highlights that these systems are not perfect[5] and that errors do occur with computerised decision-making.

The interesting consequences that flow from automated decision-making are not something that have been comprehensively or even clearly tested before the courts, and certainly the legislature and the courts have a difficult task ahead to properly address automation within decision-making. This task becomes even more complex as the decision-making process is enhanced by artificial intelligence.

In this context, there is a global discussion about the ethical use of artificially intelligent technology. Some examples of this are the recommendations to the European Commission on Civil Law Rules on Robotics[6] and the European Commission's 'Ethical Guidelines for Trustworthy Artificial Intelligence' released in December 2018.[7]

Australia has also begun exploring the roles and responsibilities of advanced technology with the Australian Human Rights Commission's 'Human Rights and Technology Issues Paper' and the subsequent 'Artificial Intelligence: governance and leadership' white paper,[8] as well as the most recent 'Artificial Intelligence: Australia's Ethics Framework' discussion paper introduced by the Department of Industry, Innovation and Science in April this year.[9]

These consultations are useful and will hopefully enable greater statutory clarity regarding the ambit of responsibility and consequence of automated decision-making; however, these tools are being used today across the legal profession and a more immediate response is required.

The duty of competency

In 2012, the American Bar Association amended Rule 1.1 of its Model Rules to include keeping "abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject" (*emphasis added).*

This is known as the 'duty of competency', and it is a seemingly progressive step taken by our colleagues in the United States; however, in the writer's view, this duty already exists in Queensland by virtue of the affirmation of office provided at r18 of the *Supreme Court (Admission) Rules 2004*, as follows:

"I, [state full name] do sincerely promise and affirm that I will truly and *honestly conduct myself*, in the practice of a lawyer of this Court, according to law *to the best of my knowledge and ability*." (*emphasis added*)

This affirmation positively obligates lawyers to conduct themselves with honesty, knowledge and ability and, where technology is applied in legal practice, these obligations subsist in the supervisory control of new and emerging technology.

In the future, it will not be good enough to simply rely on technology and a likely consequence of the introduction of ethical and legal principles surrounding technology is a positive obligation to understand exactly why a computer might say 'yes' or 'no'.

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

Notes

1 *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79 at [47]–[49] per Kerr J.

2 See, for example, s48(1) of the *Australian Citizenship Act 2007*, s135A(1) of the *Designs Act 2003*, s223A(1) of the *Patents Act 1990* and s222A(1) of the *Trade Marks Act 1995*, s66 of the *Business Names Registration Act 2011*.

3 See, for example, s48(3) of the *Australian Citizenship Act 2007*.

4 See, for example, s222A(3) of the *Trade Marks Act 1995*.

5 Luke Henriques-Gomes, 'Centrelink robodebt scheme faces second legal challenge', *The Guardian* (online), 12 June 2019, theguardian.com/australia-news/2019/jun/12/centrelink-robodebt-scheme-faces-second-legal-challenge.

6 European Parliament resolution dated 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)).

7 See ec.europa.eu/futurium/en/ai-alliance-consultation.

8 See tech.humanrights.gov.au.

9 See consult.industry.gov.au/strategic-policy/artificial-intelligence-ethics-framework.

Conflicts of interest

To act or not to act?
To restrain or not to restrain?

WITH CHRISTINE SMYTH

The Australian Solicitor Conduct Rules (ASCR) commenced on 1 June 2012 in Queensland,[2] replacing the Legal Profession (Solicitors) Rule 2007 (Solicitors Rules).

Before that, reliance was primarily on the common law to direct us in our duties. The common law very much looks to community standards as a measure against which rights and wrongs are defined. Remembering, only as recently as 2017 the gay panic defence was abolished in Queensland law.[3]

If you practise law long enough you get to experience these type of fundamental shifts, especially in how law is practised and the standards against which we are judged. However, for most, few areas of practice will have you concerned about a file you managed six years ago, or even a decade ago, unless you practise as a succession lawyer.

Why? Because that will you drafted yesterday may not be acted on for decades, and much can happen in that time, such as the introduction of the ASCR in 2012 to replace the Solicitors Rules, noting specifically ASCR rules 10 and 11, which replaced rules 4 and 8 in the Solicitors Rules, and all of which relate to conflicts of interest concerning former and current clients.

Prior to the 1980s, 1990s and much of 2000s, it was not uncommon for lawyers to act for related parties, not for nefarious reasons, but simply because most lawyers and law firms were a part of our local community, operating in our local towns for families, often down the generations.

There was a connectedness to community and clients that many now pine for, but which rarely exists today. The difficulty is that between then and now much has changed in the way law is practised, including the rules and standards by which our courts judge our performance.

> **'Rights can be considered wrongs, depending on who is judging.'**[1]

It is against this history that I profile the matter of *Hutchinson v Timmins*: *Estate of Kevin Henry Fox* (Deceased) [2018] NSWSC[4] (*Hutchinson*), with a view to identifying for practitioners, both new and long-standing, how easily will instructions can descend into the murky waters of should you or shouldn't you have, many years, if not decades, later.

Hutchinson explores the longtail impact of will instructions, how they can wrap their wrongdoings around the rights and reputations of others, exposing the risks in taking will instructions from two will-makers in circumstances where there is evidence of a mutual will agreement between them – all of this compounded by the Daedalus nature of acquiring law firms, their files and employing their people.

The application that gave rise to this decision was for enforcement of a subpoena and an application to restrain a successor law firm from acting in the estate of Kevin Fox. The plaintiffs were the daughters of the late Joyce Fox, who was married to the late Kevin Fox for 38 years.[5]

This proceeding was one of a number they issued against the estates of their late mother and late stepfather.[6] In reaching its decision, the court found it necessary to scrutinise the pleadings in the "revocation proceedings". The revocation proceedings sought to set aside a settlement in the "FPA proceedings" on the grounds that the release in the FPA proceedings was "procured [by] the release of their rights by misleading and deceptive and unconscionable conduct, and non-disclosure of material facts ('impugned conduct')".[7]

The daughters' revocation proceedings against Kevin's estate included allegations that the solicitor for their mother and subsequently their stepfather, Mr Mitchell, was an active party in the impugned conduct.[8] Their submission was that by virtue of the evidence thrown up by the subpoena, Mr Mitchell (employed by Mason Lawyers) was a material witnesses to the revocation proceedings, ergo the firm Mason Lawyers ought to be restrained from acting.

During her lifetime Joyce made a number of wills, all prepared by Mr Mitchell[9] while he was with the firm Thomas Mitchell Solicitors (and the former firm, Thomas, Mitchell & Co.).[10] Joyce and Kevin owned a home together in joint tenancy which formed the bulk of her estate.[11] In 2011, Joyce consulted Mr Mitchell, who gave advice about severance of tenancy of the matrimonial home.[12]

Joyce instructed that she and Kevin agreed Kevin would change his will to ensure her daughters would benefit from his estate should she predecease Kevin and that he would not change his will thereafter. With that in mind, she did not sever the tenancy.

Afterwards, the firm Thomas Mitchell Solicitors dissolved. Mr Mitchell took on the files and records of that firm and he carried on (for a short time) as a sole practitioner, at which time, his sole practice and the records held, were acquired by Mason Lawyers Pty Ltd. Mason Lawyers Pty Ltd employed Mr Mitchell on a full-time basis for a number of years, reducing to a casual consultancy, at the time of this proceeding.

About three months after Joyce gave her instructions, by which time Mr Mitchell was in sole practice, Kevin attended Mr Mitchell and gave instructions for his will that reflected the agreement referred to by Joyce.[13] Joyce subsequently fell ill, was diagnosed with dementia and within a year of the diagnosis was admitted to hospital where she died 10 days later on 24 June 2014.[14]

During the period of her illness and just prior to her death, Kevin attended on Mr Mitchell (who by this time was employed by Mason Lawyers Pty Ltd) and changed his will. There was evidence that, at the time Mr Mitchell was taking these subsequent instructions from Kevin, Mason Lawyers knew Joyce had dementia, provided Joyce's daughter Gail a copy of her power of attorney[15] and that Kevin instructed Mr Mitchell not to send material related to his will instructions to the matrimonial home.[16]

After Joyce died, her daughters issued proceedings seeking further provision from her estate. Mason Lawyers acted in that matter on behalf of Kevin. The daughters entered into an agreement with Kevin on that claim, which was then resolved by way of consent orders.

At the time of the agreement they said they were of the belief that they were beneficiaries of Kevin's estate. Part of the recitals to the deed included a denial by Kevin that there was any agreed promise between him and Joyce, and that the parties acknowledged the recitals to the deed were correct to the best of their knowledge, and that Kevin had received legal advice.[17]

Less than a year after the consent orders issue, Kevin died on 19 May 2016. His executor, Mr Timmins, then instructed Mason Lawyers to act in Kevin's estate[18] to seek a grant of probate. Joyce's daughters filed a caveat against Kevin's will in the probate proceedings, issuing a subpoena. During the disclosure process in response to the subpoena, despite evidence of an extensive search, it becomes apparent that the controversial will file to Kevin's 2011 will could not be located.[19] With that, the plaintiff daughters brought their application for compliance with the subpoena and seeking the restraint.

In respect of the subpoena, the court, found that "all the searches that could reasonably be expected"[20] had been done and that "a simple order now for Mason Lawyers to comply with the subpoena is pointless: *Quach v Vu* [2009] NSWSC 131 at [7]".[21]

On the restraint issue, both parties argued their positions around the principles "as stated by Brereton in *Kallinicos* at [76], together with the subsequent authorities such as Burrell", with the court applying those principles:[22]

"• The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice;

- The jurisdiction is to be regarded as exceptional and is to be exercised with caution;
- Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause;
- The timing of the application may be relevant, in that the cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief."

In coming to its conclusion, the court noted issues related to the quality of the daughters' pleadings in the revocation proceedings and as well as noting possible issues around the quality of advice they received in the FPA proceedings. However, the court found that at critical times Mr Mitchell was involved in the events the subject of the revocation proceedings[23] as such, "Mr Mitchell's personal performance of various retainers is going to come under close scrutiny and criticism. He will be a highly material witness in these proceedings. He is still a casual employee of Mason Lawyers…the Court is concerned about the extent of the criticism of his conduct that is likely to arise and that may ultimately flow over to the firm Mason Lawyers defending its own reputation, whilst he and the firm attempt to defend his reputation."[24]

Taking into account that the application was "made early, so as to minimise any disruption to the defendant",[25] the court ordered that Mason Lawyers be restrained from acting on and from the conclusion of all issues relating to the defendant's strike-out motion filed on 7 September 2017.[26]

It remains a reasonably common practice that firms act for spouses in their will instructions, and this reality is recognised by the QLS Ethics and Practice Centre in its ethics note on mirror wills, which provides suggestions on how to manage the issue of changed instructions after separation or divorce.[27]

It points out that ASCR Rule 10.2 permits the taking of instructions in this circumstance. However, there is a significant caveat in the rule and that is where to do so *would not be detrimental* to the interests of the former client.

And therein is the crux of the issue when deciding whether you ought to act or not act. If you choose to act, then your actions may be sheeted home to your colleagues, who in addition to the former client and their beneficiaries, you also owe a duty. And so in the words of Woody to Buzz Lightyear: conflicts, conflicts everywhere…

Postscript:

If a picture paints a thousand words, then a time-line table reduces a lengthy complex judgement of 12,334 words into a digestible format for time-poor readers and publishers with limited space. I have produced a table to assist practitioners process the labyrinthine factual matrix of *Hutchinson v Timmins*: *Estate of Kevin Henry Fox* (Deceased) [2018] NSWSC. It can be accessed by this link at **qls.com.au/successionseptember2019**.

Notes

1 Suzy Kassem, *Rise Up and Salute the Sun: The Writings of Suzy Kassem*.
2 New South Wales did not adopt the ASCR until 1 January 2014, at which time it replaced the Professional Conduct and Practice Rules (Solicitors Rules) (NSW).
3 Criminal Law Amendment Bill 2017 section 304.
4 *Hutchinson*– my thanks to QLS Ethics Solicitor Shane Budden for drawing this case to my attention.
5 At [5].
6 At [29] family provision proceedings 2015/98270;at [37] caveat in probate proceedings no 2016/175383; at [40] statement of claim (proceedings 2017/137987) (the revocation proceedings).
7 At [2].
8 At [3].
9 At [6].
10 The firm changed its name in 1985, see [6].
11 At [12] – noting in NSW jointly owned real property can be caught by the notional estate provisions of the NSW *Succession Act* – see section 80.
12 At [13].
13 At [13]-[15].
14 At [17].
15 At [21]-[26].
16 At [25].
17 At [77].
18 At [36], application for probate of Kevin Fox's last will (proceedings no 2016/175383) (the probate proceedings).
19 At [53]-[60].
20 At [80].
21 At 82.
22 Noted at [91] applied by the court at [102]-[125].
23 At [104].
24 At [103].
25 At [123].
26 At [126].
27 qls.com.au/ethics > Ethics resources > Conflicts concerning former clients > Mirror wills…

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High Court and Federal Court casenotes

WITH ANDREW YUILE AND DAN STAR QC

High Court

Administrative law – migration – detention pending removal – special case – drawing of inferences

Plaintiff M47/2018 v Minister for Home Affairs [2019] HCA 17 (orders 13 February 2019; reasons 12 June 2019) concerned whether ss189 and 196 of the *Migration Act 1958* (Cth) gave authority to the Commonwealth to detain the plaintiff for what he alleged would be an indefinite period. Section 189 of the Act requires an officer who knows or suspects a person to be an unlawful non-citizen to detain that person. Section 196 of the Act requires unlawful non-citizens to be detained under s189 until they are removed or deported from Australia. Section 198 requires that unlawful non-citizens be removed "as soon as reasonably practicable" if the non-citizen is a detainee and an application for a visa has been refused and finally determined. The plaintiff was an unlawful non-citizen who had been in detention since 2010. He had used several names with overseas officials and had also made visa applications in Australia using different names, nationalities and other personal details. His accounts of his background were inconsistent. He admitted that some applications contained false details. He also did not cooperate with Australian officials who were trying to establish his identity and nationality. The plaintiff, who argued that he was stateless, commenced proceedings in the High Court arguing that his detention was unlawful because the mandate to detain in ss189 and 196 is suspended where removal from Australia is not practicable at all or in the foreseeable future. In the alternative, the plaintiff claimed that the provisions exceeded the legislative power of the Commonwealth. The parties did not agree, for the special case, that there was no real prospect of deporting the plaintiff from Australia in the foreseeable future. The plaintiff submitted, however, that inferences to that effect could be drawn. The plaintiff agreed that if none of the inferences he argued for could be drawn, the questions in the special case did not arise. The court unanimously held that the necessary inferences could not be drawn, because it could not be assumed that it was beyond the plaintiff's power to provide further information concerning his identity, and that might alter his prospects of removal. It followed that there was no factual basis to question the lawfulness of the plaintiff's detention. Kiefel CJ, Keane, Nettle and Edelman JJ jointly; Bell, Gageler and Gordon JJ jointly concurring. Answers to questions stated in the special case given.

Trade practices law – consumer protection – unconscionable conduct

Australian Securities and Investments Commission v Kobelt [2019] HCA 18 (12 June 2019) concerned the meaning of "unconscionability" in s12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth). That section provides that a person must not, in trade or commerce and in connection with the supply of financial services, engage in unconscionable conduct. The respondent operated a general store in Mintabie, South Australia, selling goods including food, fuel and second-hand cars. Almost all of his customers were resident in two remote Aboriginal communities. The respondent provided credit through a system known as 'book-up', where customers provided the respondent with a debit card linked to a bank account into which wages or Centrelink benefits were paid (with their PIN). The respondent provided goods and was authorised to withdraw funds as they arrived from customers' accounts to reduce customers' debt. 50% was applied to debt and 50% was made available for customer use. Customers had little practical opportunity to access the funds themselves. The respondent also exercised a degree of discretion over what was bought from the store, especially when customer funds were low, and enabled purchases through other stores nearby. The only issue was whether the respondents' actions under this system were unconscionable. The primary judge found that they were, because the respondent "had chosen to maintain a system which, while it provided some benefits to his Anangu customers, took advantage of their poverty and lack of financial literacy to tie them to dependence on his store". The Full Court allowed an appeal. The Full Court held that the customers were vulnerable under the system, but the respondent's actions were not unconscionable given customers' understanding of the system, their voluntary entering into the contracts, actions that customers could take, and that the respondent had not acted dishonestly or had exerted undue influence on his customers. There was also anthropological evidence suggesting some benefits to customers culturally under the book-up system. A majority of the High Court dismissed an appeal. Although customers under the book-up system were more vulnerable, no feature of the respondent's conduct exploited or otherwise took advantage of their vulnerability. The basic elements of the system were understood and accepted. The acceptance of the system reflected cultural matters, not lack of financial literacy. Kiefel CJ, Bell J jointly; Gageler J and Keane J each separately concurring; Nettle and Gordon JJ jointly dissenting; Edelman J separately dissenting. Appeal from the Full Federal Court dismissed.

Trusts and corporate law – external administrators – receivers – trustee company – rights of indemnity – trust assets

In *Carter Holt Harvey Woodproducts Pty Ltd v Commonwealth* [2019] HCA 20 (19 June 2019), the High Court considered whether property held on trust by a corporate trustee operating a trading trust was property of the company when insolvent, and the creditor priorities in respect of that property. Amerind Pty Ltd carried on a business solely in its capacity as trustee of a trust. After being unable to settle demands for payment from a bank, receivers were appointed and the company was wound up. The trust assets were realised and the bank's demands satisfied. At issue in this case were the priorities applicable to realised surplus funds. The respondent claimed it was entitled to payment for benefits of Amerind's employees in priority to other creditors, under ss433, 555 and 556(1)(e) of the *Corporations Act 2001* (Cth). Those provisions allow, amongst other things, for payment of certain employee benefits to be paid in priority out of property of the company coming into the receiver's hands, or property comprised in or subject to a circulating security interest. As a trustee, Amerind did not itself own the assets of the trust, but did have a right to be indemnified out of the trust assets. Questions arose as to whether the right of indemnity could be assets of the trust, and whether the property held on trust by Amerind could itself be property of the company for the purposes of s433(3). The trial judge said that the assets held on trust were not part of the assets of the company, meaning that the employees would not get priority. The Court of Appeal reversed that decision, finding that the right to be indemnified out of the trust assets was property of the company. It also found that the trust assets were themselves assets of the company. The High Court held that, "the 'property of the company' that is available for the payment of creditors includes so much of the trust assets as the company is entitled, in exercise of the company's right of indemnity as trustee, to apply in satisfaction of the claims of trust creditors." But proceeds from an exercise of the right of exoneration may be applied only in satisfaction of trust liabilities to which the right relates. Kiefel CJ, Keane and Edelman JJ jointly; Bell, Gageler and Nettle JJ jointly concurring; Gordon J separately concurring. Appeal from the Court of Appeal (Vic.) dismissed.

Constitutional law – federal jurisdiction – s79 *Judiciary Act* – meaning of parent

In *Masson v Parsons* [2019] HCA 21 (19 June 2019), the High Court considered the operation of s79(1) of the *Judiciary Act 1903* (Cth) and whether it operated to pick up provisions of the *Status of Children Act 1996* (NSW) concerning parentage. The appellant provided semen to the first respondent for the purposes of artificial insemination. The first respondent conceived as a result. The appellant believed himself to be fathering the child and would support and care for the child. His name was entered on the child's birth certificate as the father. The child lived with the first respondent and her partner, but the appellant had a continuing role in the child's financial support, health, education and welfare. The first respondent and her partner decided to move to New Zealand with the child. The appellant instituted proceedings in the Family Court seeking orders, amongst other things, sharing parental responsibility and restraining the relocation of the child. The issue at first instance was whether the appellant was a legal parent of the child. Section 60H of the *Family Law Act 1975* (Cth) deals with children born as the result of artificial conception. The judge at first instance held that the appellant did not come within that section so as to qualify as a legal parent, but s60H was not exhaustive of establishing parentage and he qualified as a parent "within the ordinary meaning of the word". On appeal, the Full Court held that s79 of the *Judiciary Act* picked up and applied, in federal jurisdiction, s14 of the *Status of Children Act*. That section provides a series of presumptions about legal parentage. The appellant had not rebutted the presumptions and as a result was not a legal parent. The High Court noted that the purposes of s79 of the *Judiciary Act* is to "fill a gap in the laws which regulate matters coming before courts exercising federal jurisdiction…by picking up the texts of State laws governing the manner of exercise of State jurisdiction and applying them as Commonwealth laws". Section 79 does not pick up and apply state laws determinative of an individual's rights and duties, as opposed to a law directed to the manner of exercise of jurisdiction. In this case, s14 of the *Status of Children Act* operated as an irrebuttable presumption of law. It was determinative of rights. It was not a law relating to evidence or regulating the exercise of jurisdiction. As such, s14 was not a law to which s79 of the *Judiciary Act* was capable of applying. The High Court also held that s79 could not apply in this case because the *Family Law Act* had "otherwise provided". Finally, the respondents argued that, if not picked up by s79, s14 of the *Status of Children Act* was a valid law of New South Wales applying of its own force in federal jurisdiction. The court accepted that s14 could generally apply of its own force, but held that s14 was inconsistent with the *Family Law Act* pursuant to s109 of the Constitution, meaning that s14 could not apply in this case. Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ jointly; Edelman J separately concurring. Appeal from the Full Family Court allowed.

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Federal Court

Class actions – dispensation from giving notice to group members of the commencement of the proceedings, of their right to opt out of the proceedings, and of the application for approval of the settlement

In *Sister Marie Brigid Arthur (Litigation Representative) v Northern Territory of Australia* [2019] FCA 859 (30 May 2019), the court made orders:

- pursuant to s33X(2) of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act), for the applicant to be relieved from the requirement to give notice to group members of the commencement of the proceeding and of their right to opt out of the proceeding; and
- pursuant to s33X(4) of the FCA Act, for the applicant is relieved from the requirement to give notice to group members of the application for approval of the settlement.

The proceeding is a class action under Part IVA of the FCA Act seeking declarations and injunctions for alleged breaches by the Northern Territory and/or those in charge of the certain detention centres of duties owed by them under the *Youth Justice Act 2005* (NT), the *Youth Justice Regulations 2005* (NT), policy determinations made under the regulations and, in addition, for alleged breaches of the *Racial Discrimination Act 1975* (Cth). Group members comprise children detained in Alice Springs Youth Detention Centre and the Don Dale Youth Detention Centre. No damages are sought by the proceeding.

The parties negotiated a settlement of the proceeding, approval of which has not yet been heard or determined by the court. Justice White exercised discretions under s33X(2) and (4) to relieve the applicant from having to give notice to group members of the commencement of the proceedings, of their right to opt out of the proceedings and the application for approval of the settlement.

Contracts – specific performance – 'fourth category' of *Masters v Cameron*

In *Lucas v Zomay Holdings Pty Ltd* [2019] FCA 830 (4 June 2019), the court determined a dispute about the sale of a pharmacy business in the Eastlands Shopping Centre at Rosny Park, in Tasmania. The applicant contended that he entered into a legally binding contract for the purchase of the Priceline Pharmacy Eastlands business and he sought specific performance of it. The respondent contended that the offer to purchase was not binding.

The court considered the category of contract dubbed the 'fourth' category of agreements to contract described in *Masters v Cameron* (1954) 91 CLR 353 at 360-361: at [60]-[63]. O'Callaghan J stated at [70]: "In my view, the Offer to Purchase is clearly an agreement that falls within the so-called fourth category of *Masters v Cameron*. That is to say, the parties intended to be bound immediately, notwithstanding that they contemplated the need for further documentation."

The court would have granted declaratory relief and made an order for specific performance: at [89]. However after the hearing, but before judgment, an administrator was appointed to the respondent so the court did not do so yet, having regard to the operation of s440D of the *Corporations Act 2001* (Cth).

Practice and procedure – application for extension of time – apprehended bias

In *Gambaro v Mobycom Mobile Pty Ltd* [2019] FCA 910 (14 June 2019), the court granted an application for an extension of time for leave to appeal from interlocutory orders of Federal Circuit Court of Australia. Rangiah J held that the applicant's proposed appeal had sufficient prospects of success for apprehended bias and unfair conduct by the primary judge: at [23]-[24] and [29]. The appeal is to be heard by a Full Court.

Industrial law – breach of right of entry laws by union and union officials – personal payment orders

In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Laverton North and Cheltenham Premises case) (No.2)* [2019] FCA 973 (21 June 2019), the court imposed pecuniary penalties in total of $100,000 on the union, $7800 on one union official and $11,500 on another union official. The penalties were for a number of contraventions of s500 of the *Fair Work Act 2009* (Cth) (FW Act) and also for a contravention of s340(1) of the FW Act: at [108].

Bromberg J made personal payment orders against the union officials so as to require the individuals to pay the penalty imposed and not to seek or encourage the union to pay to him any money or provide any financial benefit referable to the payment of the penalty, and additionally, not accept or receive from the union any money or financial benefit referable to that payment: at [86]-[94].

Bromberg J explained at [93]: "The systemic willingness of the CFMMEU, through the Divisional Branch, to support the unlawful conduct of the officials of the Divisional Branch by paying the pecuniary penalties imposed upon them demonstrates that it is likely that officials of the Divisional Branch will not personally pay for penalties imposed for their contraventions. But that is not all. It also demonstrates that there will be no condemnation or other detrimental consequence inflicted upon those officials by the Divisional Branch."

Furthermore, at [94]: "The unique circumstances demonstrate that it is likely that, in the absence of a personal payment order, MacDonald and Long will not feel the sting or experience the burden of any pecuniary penalty imposed upon them."

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Mother's 'wrong beliefs' lead to appeal loss

WITH ROBERT GLADE-WRIGHT

Children – threshold hearing on *Rice & Asplund* – application dismissed

In *Mahoney & Dieter* [2019] FamCAFC 39 (7 March 2019) the Full Court (Alstergren DCJ, Ryan & Kent JJ) dismissed the mother's appeal against dismissal of her application for variation of a final parenting order made by the Family Court Division of the District Court of New Zealand (NZ) and registered in 2018 in Australia where the father lived with the parties' child pursuant to that order. The order, made after a finding that the mother posed a risk of harm, removed the child from the mother's care and permitted the father to relocate with the child from NZ to Australia, the mother to spend supervised time with the child during school holidays in NZ.

The mother later obtained a medical report that she was mentally stable, and applied to the Family Court of Australia for the child to spend unsupervised time with her (and ultimately live with her in NZ). Austin J dismissed the application as the mother had failed to establish a sufficient change in circumstances to warrant reconsideration of the order.

On appeal, the Full Court said ([10]):

"In describing the reason for the child's removal from the mother's care…the [NZ] court explained that:

'…The transfer was necessary for the welfare and safety of [the child] because of the mother's intense fixed and wrong beliefs about the father's behaviour…These beliefs are not related to his parenting…If [the child] learns about these beliefs the damage to her will be adverse and lifelong.'"

The court continued ([12]):

"At the final parenting hearing the mother attributed the cause of her parental difficulties… to…a brain injury and hypothyroidism, which she had addressed. However, the evidence before the [NZ] court revealed that the mother continued to hold fixed and wrong beliefs about the father's behaviour…(including that the child was conceived through rape). (…)"

The court concluded ([39]):

"A proper reading of the [NZ] judgment demonstrates that…the decision turned not on whether or not the mother had a mental illness, but that [her] fixed beliefs…whatever their genesis or label, posed a risk of harm to the child. …"

Property – transfer of house by husband to sister and brother-in-law held to have been for good consideration

In *Deodes* [2019] FamCAFC 97 (11 June 2019) the wife lost her appeal from dismissal of her application for a declaration that a property the husband transferred without her knowledge to his sister and brother-in-law weeks before the parties' wedding was held on trust for the husband. The husband had owned the property since 1992; the parties began living together in 2001 and the transfer was in 2004.

The husband and transferees gave evidence that at the time of transfer the property was worth $232,000 and that the consideration paid to the husband was $152,000, the $80,000 balance being credited against a debt the husband then owed to his sister. The wife claimed that there was an oral trust between the husband and transferees to hold the property on trust for the husband.

At trial Magistrate Walter of the Magistrates Court of Western Australia found that the $80,000 loan *was* then owing, held that the property had been transferred for good consideration and dismissed the wife's application for a declaration of trust.

The Full Court (Strickland, Kent & O'Brien JJ) agreed, concluding (at [29]):

"Her Honour found that the husband owed the second respondent $80,000 at the time of the transfer. She was not persuaded that the transfer was designed to defeat any claim the wife might have. She was satisfied that appropriate market value had been paid, and that the husband benefited from the sale by the discharge of his debt secured by mortgage, the discharge of his debt to [his sister]…and the receipt of cash. …"

Children – mother's secretly taken video of handovers admissible – her audio of father's private conversations with the children inadmissible

In *Coulter & Coulter (No.2)* [2019] FCCA 1290 (15 May 2019) Judge Heffernan heard the father's application to exclude the mother's secretly made video recordings of the father's attendance at her home for handovers and two audio recordings of conversations between him and the children.

After referring to a court's discretion (under s135 the *Evidence Act 1995* (Cth)) to exclude evidence if its probative value is substantially outweighed by the risk of prejudice, being misleading or wasting time, or (s138) exclude improperly or illegally obtained evidence unless the desirability of admitting it outweighs the undesirability of doing so, the court said ([10]):

"I am satisfied that it was not improper for the mother to make the video recordings of the two handovers. …Handovers occur in circumstances where the mother has a legitimate interest in her personal safety…and in preventing the children from being exposed to conflict and unpleasantness between the parties. At the time that the mother made the video recording, it is her evidence that she had been having ongoing difficulties of that sort with the father. The mother had an ongoing concern about the father's apparent obsessiveness with matters personal to her and his abusive, coercive and controlling behaviours and past episodes of violence. She was in the process of seeking an intervention order against him to deal with those issues. …Recording his behaviour was not improper in that context, even allowing for the secrecy with which it was done. In considering the question of impropriety, I also give weight to the conclusion…that the conduct in recording the handover was not contrary to a relevant Australian law.

[11] In my view, it was improper of the mother to make secret audio recordings of private conversations between the father and the children. It involved a significant breach of trust with respect to the children, who were entitled to privacy in their conversations with their father irrespective of any motives he may have had to enlist them in his dispute with the mother."

The court found ([12]-[23]) that the video was not illegal but that the audio contravened the *Listening and Surveillance Devices Act 1972* (SA) and that ([24]-[25]) discretion should be exercised to exclude the audio recordings because the desirability of admitting that evidence (as relevant to the mother's case of parental alienation) was outweighed by the undesirability of doing so, having regard to the children's right to have private conversations with their father.

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

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WITH BRUCE GODFREY

Civil appeals

Bond v Chief Executive, Department of Environment and Science [2019] QCA 137, 16 July 2018

Planning and Environment Appeal – where the applicant was issued with an environmental protection order (EPO) as a related person of Linc Energy Limited – where the operation of the decision to issue the EPO was stayed pending the final determination, by appeal or otherwise, of specified preliminary matters concerning the order – where the applicant was subsequently charged with five counts of wilfully and unlawfully causing serious environmental harm in connection with the activities of Linc Energy Limited – where the preliminary matters were determined adversely to the applicant, and the applicant in turn applied to stay the operation of the decision to issue the EPO pending the final resolution of the criminal prosecution – whether the decision to refuse the stay was infected with legal error – whether substantial injustice would arise unless leave to appeal was granted – where the primary judge plainly was familiar with the principles expressed in *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 – where his Honour quoted extensively from that decision and discussed other cases – where the applicant did not seek to identify any error in that aspect of the primary judge's analysis – where, however, in the application of the relevant principles the primary judge understated the degree and significance of the overlap between the criminal proceedings against the applicant and the applicant's civil proceedings – where the potential defences in the criminal proceeding under s493(4) *Environmental Protection Act 1994* (Qld) very closely mirrored issues under paragraph 28G of the amended notice of appeal and there was then evidence that it was anticipated that the applicant would give evidence related to those issues in both proceedings – where that overlapping of issues was both substantial and significant for the administration of justice notwithstanding that other issues in the appeal had no counterpart in the criminal proceeding – where it is correct, as the primary judge considered, that the stay would result in further and very significant delay in the determination of the appeal, but that delay lacks substantial significance for present purposes in circumstances in which the EPO is not stayed – where the public interest in prompt completion of the specified rehabilitation works and in the lodgement of a guarantee to secure compliance by the applicant with his obligations under the EPO was already secured against the applicant, so far as that was practicable under the statutory provisions, by the refusal of a further stay of the EPO – where it follows that any prejudice to the respondent and the public was not significant in comparison with the prejudice risked by the applicant if his appeal were not stayed – where in these circumstances the applicant should not be forced to make the invidious choice between giving evidence in support of a ground of his appeal and risking prejudice by self-incrimination in the prosecution against him or not giving such evidence and incurring the risk of prejudice in his appeal.

Leave granted. Appeal allowed. The applicant's appeal in the Planning and Environment Court against the decision to issue the EPO be stayed pending the final resolution of the criminal prosecution. The application for leave is otherwise dismissed. Written submissions on costs. (Brief)

Commissioner of the Australian Federal Police v Kanjo & Ors [2019] QCA 143, 26 July 2019

General Civil Appeal – where the commissioner, as a proceeds of crime authority, brought an ex parte application pursuant to s25 and s26(4) of the *Proceeds of Crime Act 2002* (Cth) (POCA) seeking restraining orders in relation to specified property of Ms Kanjo and the second respondent – where the restraining orders were sought pursuant to s18(1)(d) of the POCA on the basis that there were reasonable grounds to suspect that Ms Kanjo had engaged in money laundering in breach of s400.9 of the *Criminal Code* (Cth), provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and the *Crimes Act 1958* (Vic) – where that order exempted from restraint the completion of a contract of sale on that real property, subject to several conditions – where those conditions included that the sale proceeds would be used in the discharge of moneys secured by two registered mortgages, with the balance to be held by the Official Trustee and in so doing to be inaccessible to the first respondent – where one of the mortgages was instead discharged by the second respondent after the making of the restraining order, significantly increasing the balance of the proceeds of sale – where the first respondent successfully applied for a variation to the restraining order, exempting from restraint an amount equal to the discharged mortgage – where the judge who varied the restraining order held that that amount was not the subject of that order – where the primary judge's observation that the $404,000 mortgage debt was paid from "unrelated funds" which were not proven to have been derived from unlawful activity is beside the point – where the issue was not the source of those unrelated funds which were not subject to restraint – where the restraining order permitted dealing with property by a third party and distribution of proceeds to a third party – where that recognised that each third party may separately have applied for exclusion of its interest in the property – where the primary judge's observations that the variation order would mean that the proceeds retained by the Official Trustee would be the same as if events had unfolded as envisaged by the order overlooks the different nature of the interests involved in each scenario – where Ms Kanjo brought what was, in truth, an application for an exclusion order which could only have been brought under s29 POCA – where to exercise the s39 POCA discretion in favour of the suspect applicant in this case would have the effect of permitting the limitations imposed by s29 of the POCA to be circumvented at the choosing of the suspect applicant without notice to the commissioner and without explanation.

Appeal allowed. Paras 2 and 3 of the orders made on 15 June 2018 be set aside. The application filed on 29 May 2018 be refused. Costs.

Nursing and Midwifery Board of Australia v HSK [2019] QCA 144, 26 July 2019

Appeal *Queensland Civil and Administrative Tribunal Act* – where the appellant appeals two separate decisions of the Queensland Civil and Administrative Tribunal (QCAT) – where both decisions were made in the course of a single proceeding in which the respondent, a registered nurse, sought an administrative review of a decision of the appellant to impose conditions on the respondent's registration on the grounds that the respondent had an impairment within the definition of the *Health Practitioner Regulation National Law Act 2009* (Qld) – whether the tribunal erred in law in holding that there was no power, in the course of determining the administrative review, to direct that the respondent to undergo a further health assessment – where at the hearing of the appeal, the appellant did not press the appeal against the second decision – where the appellant sought only to pursue the

appeal against the first decision, on the basis it involved a question of law as to QCAT's power to direct a further health assessment as part of hearing a review of a reviewable decision – where the appellant accepted that such a course meant there was no longer a live controversy between the parties as to the outcome of the proceedings commenced by the appellant against the respondent – where the appellant also accepted that in those circumstances an issue arose as to whether this court should entertain the appeal – where as a general rule, this court should be slow to entertain an appeal where the issue which was in dispute between the parties has become moot – where to do otherwise is to engage in a determination of legal rights in a circumstance where one party to the controversy has no interest in advancing a particular outcome – where there are, however, circumstances where a determination serves a practical point – where the present circumstance is one such case – whether QCAT, in conducting an administrative review of a decision of the appellant to impose conditions for the protection of the public, has power to order that the respondent practitioner undergo a further health assessment is a matter which can impact upon the conduct of review proceedings by QCAT generally – where a determination of this issue is also relevant to the public interest in ensuring that administrative reviews are decided on a consideration of all relevant material – where a power to compel an interference with the liberty of an individual litigant is not generally considered a direction necessary for the speedy and fair conduct of a proceeding – where other directions, procedural in nature, can address what is necessary for the speedy and fair conduct of a proceeding where, for example, if a registered practitioner refused to voluntarily consent to a further health assessment, procedural directions could include staying the proceeding until the registered practitioner voluntarily attended upon a health assessment – where a direction requiring an interference with the liberty of an individual litigant has generally been viewed as requiring specific statutory authority – where the need for a specific statutory power to make directions involving a compulsory act which interferes with an individual's liberty has been recognised in legislation concerning claims for the recovery of damages as a consequence of the sustaining of personal injuries – where there was no error of law in QCAT's finding that s62 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) did not authorise the making of a direction that a registered practitioner undergo a further health assessment as part of a review of a reviewable decision – where QCAT also correctly concluded that s169 of the *Health Practitioner Regulation National Law Act 2009* (Qld) did not provide a power to order a further health assessment as part of the determination of a reviewable decision – where a reading of that section, in the context of the National Law as a whole, supports the conclusion that the power given to the appellant to require a registered practitioner to undergo a health assessment is limited to the investigative phase of the appellant's concern that a registered practitioner has, or may have, an impairment.

Appeal dismissed.

Jin & Anor v Passiontree Velvet Pty Ltd & Anor [2019] QCA 148, 30 July 2019

Application for Leave s118 *District Court of Queensland Act 1967* (Qld) – where the second applicant (the franchisee) executed a franchise agreement with the first respondent (the franchisor) – where the first applicant is a director of the franchisee – where the franchisee and the first applicant instituted proceedings against the franchisor seeking damages for unconscionable conduct and misleading or deceptive conduct, and against the lawyers (Emmanuel Lawyers) for breach of duty – where the franchisor filed an application seeking that the proceedings be stayed and service of claim set aside for want of jurisdiction, and that the District Court of New South Wales was the appropriate jurisdiction to determine the matters in the proceedings – where the primary judge made the declaration and granted the stay on the basis of a clause in the franchise agreement that stated that "the parties hereby submit to the jurisdiction of the Courts of New South Wales" – where the first applicant is not a party to the franchise agreement – where it is difficult to understand any basis upon which it could be said that the first applicant was bound by the jurisdiction clause – where none was articulated in the reasons of the primary judge, who seemed to deal with him on the basis that he was caught merely by being a party to the proceedings – where it is evident that the first applicant's appeal must succeed on that ground alone – where in the District Court and before this court, the franchisor contended that the jurisdiction clause was an exclusive jurisdiction clause under which the parties to the franchise agreement could only litigate in New South Wales, and nowhere else – where the relief sought is for damages only – where the claim in the District Court does not seek to enforce the franchise agreement, nor does it seek relief under it – where the claim does not even seek to have the franchise agreement varied as part of the relief for misleading or deceptive conduct – where though the primary judge recorded in his reasons that the claim was for damages, it seems to have been simply assumed that such a claim would be caught by the jurisdiction clause – where, as is evident from the pleaded case in the Queensland proceedings, the claim was not based on the contract and had nothing to do with the enforcement of the terms of the contract – where, in the course of argument in the District Court, counsel for the lawyers commenced submissions on the application – where, after further submissions, the primary judge ruled that the lawyers did not have an interest in being heard or making submissions – where the lawyers had an interest in being heard on the application and had they been permitted to make submissions the significance of their pleading of an apportionable claim under the *Civil Liability Act 2003* (Qld) (CLA) might have drawn attention – where the questions raised on the appeal are of sufficient importance to warrant the grant of leave – where there was no want of jurisdiction for the franchisee's claim and no basis to stay that proceeding where, further, the effect of the declaration and stay is inconsistent with the statutory purpose and operation of the CLA, which permits the joinder of concurrent wrongdoers so that a claimant will advance a claim "against all persons the Claimant had reasonable grounds to believe may be liable for the loss and damage": s32(1) of the Act – where, finally, there was a denial of natural justice by the refusal to hear the lawyers.

Application granted. Appeal allowed. Set aside the orders made on 21 November 2018 and in lieu thereof dismiss the application. Costs.

Criminal appeals

R v Palmer; Ex parte Attorney-General (Qld) [2019] QCA 133, Date of Order: 11 June 2019; Date of Publication of Reasons: 4 July 2019

Sentence Appeal by Attorney-General (Qld) – where the respondent pleaded guilty to one count of dangerous operation of a vehicle causing grievous bodily harm – where the respondent was sentenced to two years' imprisonment to be suspended forthwith for an operational period of three years – where the respondent was driving a prime mover and crashed into a line of cars that had stopped on a highway due to roadworks – where there were two signs signifying that there were roadworks ahead and that vehicles were to slow down – where the respondent claimed that he "zoned out" and failed to see the signs – where the respondent had .02 milligrams per kilogram of amphetamine and 0.2 milligrams per kilogram of methylamphetamine in his blood at the time of the crash – where toxicology experts for both parties agreed that the effect of these drugs upon a particular user could not be deduced from the blood concentration – where the sentencing judge found that the respondent was not adversely affected by the drugs – where the sentencing judge found that the respondent's inattention was due to familiarity with the road as a professional truck driver – where the sentencing judge identified the respondent's remorse, early guilty plea and unremarkable traffic history as factors in mitigation – whether the sentencing judge erred in exercise of discretion when weighing up the factors in mitigation against the weight of the respondent's drug use – where an appeal against sentence by the Attorney-General is different from an appeal against sentence by an offender because the jurisdiction conferred upon the court conflicts with the time-honoured concept that a person should not be put in jeopardy for a second time – where an Attorney-General's appeal puts an offender in jeopardy of losing the freedom that has been promised beyond the sentence imposed at first instance – where one way in which the oppression by reason of double jeopardy may be avoided is by the court being astute to avoid injustice that might be caused to a convicted offender by reason of delay between sentence and the appeal – where if a person who has been sentenced has been

at large in the community for a considerable period of time before an appeal is determined, because the sentence did not require actual incarceration, a second sentence that requires imprisonment may be unjust for a number of reasons – where relevantly for the purposes of this case, imprisonment at that stage of the criminal process may interfere with an offender's rehabilitation to an extent that would be contrary to the public interest and would be oppressive to the offender – where, what is more, having been left "in a state of limbo and uncertainty" during the pendency of the appeal process, an offender's life after sentence may have been built up in part upon the faith of the finality of the sentence imposed at first instance – where it has been said that "except in unusual or egregious cases, [that would be] inimical to the proper administration of justice": *Director of Public Prosecutions (Cth) v Gregory* (2011) 34 VR 1 – where reasons such as these inform what has been termed the court's "residual discretion" to dismiss an Attorney-General's appeal even when there has been demonstration of error and despite showing that a sentence was wrong – where the objective facts and the personal circumstances of the respondent meant that general deterrence and denunciation of such offending by professional drivers of heavy vehicles required actual incarceration – where the "residual discretion" refers to the requirement, in certain cases, for the Attorney-General to demonstrate not only error in the exercise of discretion and not only to establish that the sentence imposed was inconsistent with principle, but also that it would not be unjust to impose a fresh sentence that is more severe – where in this case the respondent was convicted and sentenced on 25 October 2018 – where the Attorney-General's notice of appeal was filed on 23 November 2018 – where the hearing of the appeal took place almost seven months later – where having regard to specified matters, including the respondent having been in rehabilitation for his drug use, the delay between the institution of the appeal and the hearing of the appeal is regarded as a reason to decline the exercise of discretion to resentence notwithstanding that the Attorney-General has succeeded in demonstrating error and has established that the original sentence was manifestly inadequate – where the Court of Appeal endeavours to detect matters in which a very prompt hearing is desirable – where an appeal by the Attorney-General is such a matter and appeals by the Attorney-General have been afforded prompt hearings – where, however, having regard to the reasons why this appeal should be dismissed, it is desirable that the Director of Public Prosecutions ensures that appeals by the Attorney-General in which such issues may arise are brought to the notice of the Court of Appeal promptly after the filing of the notice of appeal.

Appeal dismissed.

R v Zarnke [2019] QCA 141, 26 July 2019

Sentence Application – where the applicant was sentenced to 13 years' imprisonment for manslaughter – where the applicant had a personality with a propensity towards violence, suffered from a severe and at times treatment-resistant schizophrenic illness, and had a long history of drug use – whether the sentencing judge erred by imposing a sentence beyond that which was appropriate, for the purpose of protecting the community – where the sentence was determined by the sentencing judge taking into account in one process all of the relevant factors, including the protection of the community – where that clearly appears from the sentencing judge's remarks as a whole, and in particular by the reference to "balancing the competing considerations that apply…the need to protect the community is a significant and very real concern" and the conclusion that "in the circumstances, balancing the factors that I have mentioned and the considerations that I find are applicable" the appropriate sentence was 13 years' imprisonment – where during the hearing of the application in this court the respondent's counsel was referred to the sentencing judge's remark "that there may be some substance to your counsel's submission that you're showing a benefit in the recent past of the drug regime that has been finally worked out for you" and was asked whether the sentencing judge had accepted the submission by the applicant's counsel that the applicant was in a mentally stable state – where the respondent's counsel replied that it was implicit in the sentencing remarks that the sentencing judge had accepted the submission – where the sentencing remarks should not be parsed and analysed as though they were in a reserved judgment – where the terms of the remark merely reflected the sentencing judge's findings about the continuing risk to the community posed by the applicant arising both from the risk of a relapse in the applicant's currently stable mental health in prison (in which, as the sentencing judge remarked, the applicant had been "closely monitored and closely treated") if he were instead outside the prison setting and from the anti-social aspects of the applicant's personality.

Application dismissed.

Prepared by Bruce Godfrey, research officer, Queensland Court of Appeal. These notes provide a brief overview of each case and extended summaries can be found at sclqld.org.au/caselaw/QCA. For detailed information, please consult the reasons for judgment.

Leadership, people management and personality

BY GRAEME MCFADYEN

Noted American psychologist Daniel Goleman concluded in a 1996 *Harvard Business Review* article that emotional intelligence (EI) was twice as important as technical skills and IQ in effective leadership of corporations.[1]

He said that EI enabled these corporate leaders "to inspire people to perform at a higher level and thereby increase organisational productivity and profits".[2] Essentially, EI transfers the focus from the individual to the team.

This conclusion is supported by numerous other business management authors, including Stephen Covey[3] in his bestselling *The 7 Habits of Highly Effective People.* Covey's Habit 4 (*Win/Win*) and Habit 5 (*Seek First to Understand Then Be Understood*) incorporate the EI elements of self-awareness and empathy.

So how does this EI stuff work? And why should it work in law firms? EI works on the principle that the extent to which people respond or engage at work is determined to a very significant extent by the manner in which they perceive that they are being treated.

Numerous surveys have found that the primary motivators for people in the workplace (and this includes partners as well as employed staff) are recognition, acknowledgement and promotion.[4] The factors which cause the biggest turn-off are irrelevant or inappropriate company policies, the quality of supervision and work conditions. Interestingly, provided that the salary is regarded as reasonable, it is not seen as a major attractor although if it is seen as well below market, it becomes a source of significant dissatisfaction.

Goleman has identified six common leadership styles.[5] These are:

1. *Coercive*, which demands immediate compliance – "Do what I tell you."
2. *Pacesetting*, which sets high performance standards – "Just do as I do."
3. *Authoritative*, which mobilises people towards a vision – "Come with me."
4. *Affiliative*, which builds emotional bonds – "People come first."
5. *Democratic*, which seeks consensus – "What do you think?"
6. *Coaching*, which develops people for the future – "Let's try this."

Research has found that the most strongly positive approach is #3, 'authoritative', which demonstrates both confidence and empathy, as it encourages team members to accompany the leader into a new future. Approaches #4, #5 and #6 are also well received, as they all involve a level of cooperation between leaders and team members.

GREAT LAWYER		GREAT LEADER
Focus on own results	➡	Focus on team results
Be the expert	➡	Be the coach
Give the right answers	➡	Ask the right questions
Provide advice	➡	Provide space
Present focused	➡	Future focused
Competitive	➡	Collaborative
Stoic	➡	Vulnerable

The leader attributes are all team-focused consistent with EI which, as stated earlier, transfers the focus from the individual to the team.

On the other hand, the 'coercive' approach at #1, not surprisingly, is regarded as very negative as it insists on the adoption of a particular focus or strategy with no opportunity for input. Sound familiar? And so too is 'pacesetting' at #2, which may disappoint and confuse a number of partners who, confident that their own success is attributable to their strong technical skills, are enthusiastic to promote their expertise. Neither the coercive nor the pacesetting approaches do anything to develop trust or collaboration.

So you can see from this style analysis that the positive leadership models principally revolve around the EI factors of empathy, communication and cooperation.

To understand the apparent failure of the pacesetting approach to inspire enthusiasm and commitment it is necessary to delve into the lawyer personality. There has been much written on this subject which has given rise to the classic descriptor of 'herding cats'.

According to research by United States legal management consultants Altman Weil,[6] lawyer personalities consistently differ from those of the broader community in a number of well-defined areas. The dominant traits identified are:

- scepticism (lawyers score 90% compared to 50% for the general population)
- autonomy (89% v 50%)
- urgency (71% v 50%)
- resilience (30% v 50%)
- sociability (12% v 50%).

Disappointment with the pacesetting approach referred to above is attributable to a combination of the lawyers' intense scepticism and their desire for autonomy – "It's common for lawyers to resist being managed, to bridle at being told what to do and to prize their independence."[7]

The audience that the pacesetter is seeking to impress is really not too interested, as they believe that they already know what they need to do and are unimpressed that someone has sought to either educate them or introduce new ideas. Not surprisingly, this combination of scepticism and autonomy also produces deep resistance to change, because they deny the possibility of a better outcome. Anyone involved in the management of law firms will be familiar with this attitude.

A high score on urgency is characterised by impatience, a sense of immediacy and the need to get things done. Urgent lawyers seek efficiency and economy, which is highly laudable, but unfortunately this sometimes means they can also be brusque and poor listeners, which can have a significant negative impact on both staff and client relationships. If your firm has a high turnover of support staff, then perhaps this observation may provide a guide to the cause.

Then we have resilience. People low on resilience tend to be defensive and may be hypersensitive to criticism, either real or perceived. Again, people involved with the management of lawyers will be all too familiar with this dimension. This characteristic speaks to the high rate of depression which afflicts the legal profession.

Finally, there is the sociability trait in which lawyers consistently display little interest in social occasions or conversations not immediately relevant to either their professional life or personal interests.

Noted professional services author David Maister also notes the consistently negative personality traits of lawyers in his observations, "the combination of a desire for autonomy and high levels of scepticism make most law firms low trust environments"[8] and "management challenges occur not in spite of lawyers' intelligence and training but because of them".[9]

Queensland leadership development expert Midja Fisher neatly demonstrates the psychological metamorphosis required to journey from great lawyer to great leader[10] in the table *above*: The leader attributes are all team-focused consistent with EI which, as stated earlier, transfers the focus from the individual to the team.

So you can see that, consistent with the EI approach, the more respectful the communication and personal styles that we adopt, the more receptive and appreciative the audience will be. In a commercial context this appreciation takes the form of higher levels of staff engagement which translate into consistently superior service, and in professional services superior service usually translates into superior profitability.

Fortunately EI skills can be learned. So there is no reason why lawyers in general, and partners in particular, cannot be trained to overcome their instinctive defensiveness and embrace a more collaborative and productive approach.

Notes

1 'What Makes a Leader?', Daniel Goleman, *Harvard Business Review*, June 1996. This was also previously mentioned in the *Proctor* article, 'Leadership, Profitability and Culture', in May this year, page 53.
2 Ibid.
3 *The 7 Habits of Highly Effective People*, Stephen R Covey, Freepress 1989.
4 'How Do You Motivate Employees?', Frederick Herzberg in 'HBR's 10 Best Reads on Managing People', *Harvard Business Review* (HBR) 2011.
5 'Leadership that Gets Results', Daniel Goleman in HBR op cit.
6 Herding Cats: The Lawyer Personality Revealed', in Altman Weil's *Report to Legal Management*, August 2002.
7 Ibid p9.
8 *Strategy and the Fat Smoker,* David Maister, The Spangle Press 2008, p231.
9 Ibid p229.
10 *Great Lawyer to Great Leader*, Melinda Fisher 2019 p45.

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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Missing wills continued

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The real moscato steps forward

WITH MATTHEW DUNN

Moscato is misunderstood in Australia.

Real moscato is a delight that bucks the trend and invites us to question whether bigger is necessarily better.

In this country we are obsessed with the heat of alcohol in our wines. We almost always ripen to full potential sugar and ferment to dryness following the German tradition of eking out every last drop of flavour and natural Baumé that Mother Nature will allow.

Often a 12% white is considered light, and many heavy reds from South Australia reach 15% (fortified ports often start at 18%). Lighter wines seem somehow lesser, more trivial creations or perhaps gateway options for those graduating from the ready-to-drink market. We are a nation of gutsy full-throttle wine consumers.

How then do we put aside our conditioning and begin to understand what a good moscato should be? Perhaps not always easily.

In Italy, Moscato D'Asti is a prized fine wine and fulfils a noble and important purpose in the pantheon of *vini italiani*. Noted as a fragrant, lightly sweet, gently fizzy dessert wine, it is directed toward delicacy of fresh fruit flavour, musky and white peach notes, and a deceptive, if not coquettish sweetness. It is ideal as a refreshing digestive or beguiling mid-summer terrace wine.

This real deal comes from Piemonte in north-west Italy and is made from the highly regarded muscato bianco grape or muscat blanc a petit grains, as it is called in France. This noble variety has a very long pedigree. Pliny the Elder reputedly labelled it *uva appiana* or 'grape of the bees', as it was so attractive to these life-giving creatures. Muscat may also be the first variety to be identified and grown specifically for wine production around the Mediterranean.

The production of Moscato D'Asti traditionally uses only the best and ripest grapes from the crop. It can be described as 'partially fermented', as the fermentation process is stopped manually when the wine reaches 5.5% alcohol to ensure the natural character of the grape is not lost and its fragrancy and perfume is at its greatest.

The wine is then bottled at a higher atmosphere of pressure to give it a pleasing frizzante, but not sparkling, bubble. The end product is a wine designed to accentuate the clean fruit of its origin, beguile with heady aromas of its natural musk and summer stone fruit, and with a pleasing but not dominating core of residual fruit sweetness. Think partnering zabaglione.

The resulting Moscato D'Asti has been given the premier Italian appellation of DOCG. This not only guarantees the constituents and process of the wine, but also recognises it as one of the classic wines of Italy.

Sometimes this moscato is confused with the less inspiring Asti from Piedmont, which is a fully sparkling 9% alcohol intentionally sweet crowd-pleaser. The intention behind real moscato is starkly different.

In this country, we mostly miss the point of moscato in attempts to create a still sweet wine to tempt the mass-market. One local label proudly states: "This vibrant, crisp and joyful Moscato is a great example with all its flavours of sweet musk, sherbet and fairground fairy floss." This is everything real moscato is not.

The tasting

Two reference wines were examined to understand Moscato D'Asti.

The first was the **Ca'D'Gal Lumine 2018 Moscato D'Asti DOCG**, which was a pleasing frizzante and the colour of yellow young hay. The nose was striking passionfruit and honeysuckle. The palate was delicate and crisp fruit flavour without a cloying sugar with an obvious sweet core. The notes of ripe summer peaches showed this was a refined and perfect dessert wine to lift the end of a meal or to refresh in the afternoon on a castle terrace somewhere.

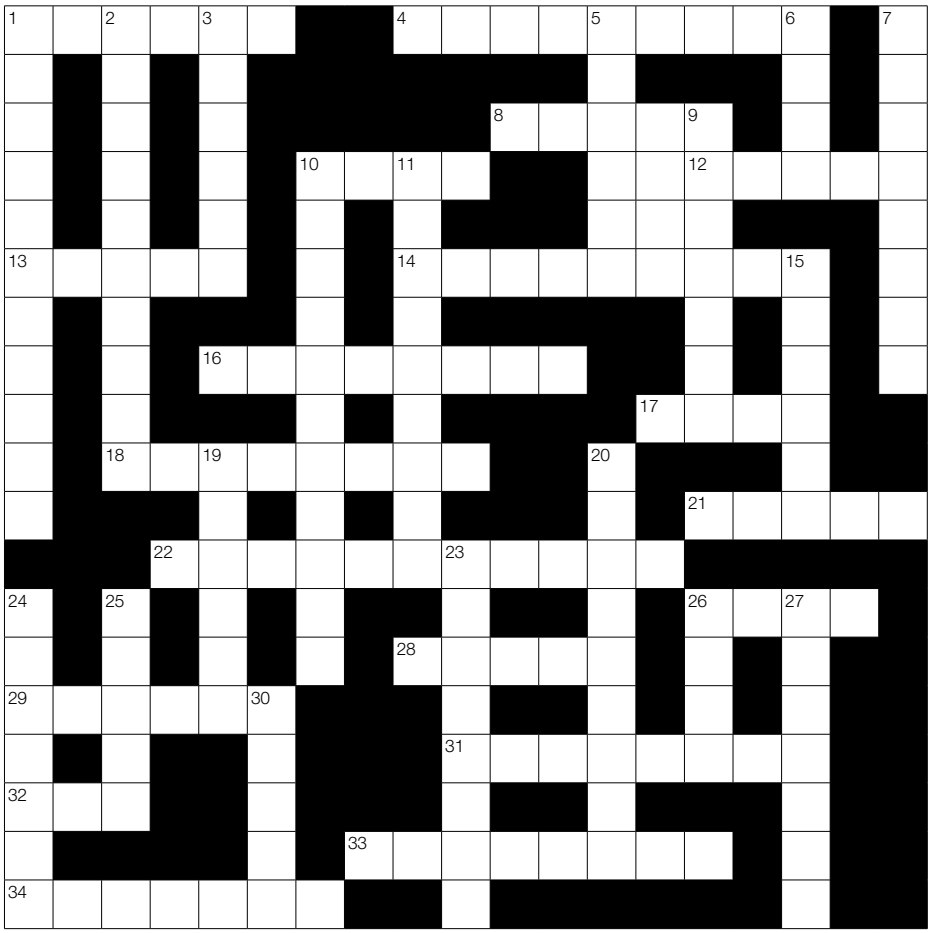
The other choice was the **Cascinetta Vietti 2017 Moscato D'Asti DOCG**, which had a green straw hue and a fine bead of fizz. The nose was a very beguiling lime and jasmine flowers aroma. The palate was a symphony in the mouth, the obvious core of fruit sweetness dominated by a complex flavour profile of musk, white nectarine and beautifully pitched acid. The light frizzante set out the moreish wine build for an afternoon pleasure.

Verdict: The preferred of the two excellent options was the Cascinetta, as the mixing of classic musk with white nectarine was the perfect refresher for spring.

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 'It seems that', usually referring to an obiter statement. (Latin) (6)

4 A certificate that allows an amount payable as taxed costs. (Latin) (9)

8 De ..... *asportatis* refers to the tort of conversion. (Latin) (5)

10 The .... Theory of Law was propounded by Austrian jurist Hans Kelsen. (4)

12 Acknowledgment of guilt, *mea* ..... (Latin) (5)

13 The Australian ..... Law Reports included decisions of the High Court and Privy Council. (5)

14 Factors destroying the legal validity of a contract. (9)

16 To hand down a decision concerning an identical question of law that is in direct opposition to an earlier decision of an inferior court. (8)

17 A form of advertising made illegal under the Australian Consumer Law. (4)

18 Obsolete common law action involving actual redelivery of goods. (8)

21 To revoke a gift made in a will by destroying, selling or giving away the gift during the testator's lifetime. (5)

22 To argue that a case is not binding because of its different factual features. (11)

26 Gaol. (UK slang) (4)

28 An old weather-beaten wig. (5)

29 The principle that when a gift is made by will or trust and the recipient of the gift no longer exists, the estate or trustee must make the gift to an entity which comes closest to fulfilling the purpose of the gift. (two words, French) (6)

31 *Generalia specialibus non* ..... is a rule of statutory interpretation meaning general provisions cannot derogate from specific provisions. (Latin) (8)

32 The mandatory minimum licence disqualification period of a person convicted under s79(1) of the TORUM Act who has not been similarly convicted within the previous five years, is ... months. (3)

33 Solemn or dignified demeanour. (Latin) (8)

34 The place on a deed where a seal is affixed, usually shown by the circle containing 'L.S.', *locus* ..... (Latin) (7)

Down

1 ..... law determines rights and obligations as opposed to procedural law, which governs the process for determining them. (11)

2 A person who feigns illness or injury. (10)

3 The maxim 'equity aids the vigilant not the indolent' is the basis of this equitable defence. (6)

5 Barter arrangement, ... deal. (6)

6 Land is classified as .... property. (4)

7 Compensation for emotional pain and suffering, used primarily in the area of compulsory acquisitions. (Latin) (8)

9 Law derived from custom, tradition or usage, *lex non* ..... (Latin) (7)

10 When there is ambiguity in a document, it will be construed against the party relying on it, *contra* ..... (Latin) (11)

11 The right of a lessor to repossess property at the end of a lease. (9)

15 Hearsay may be admissible when it forms part of the *res* ..... (Latin) (6)

19 Denoting a judge of a superior court who is not the Chief Justice. (6)

20 A person who without legal authority assumes control of a deceased's property, *executor .. ..* (three words, Fremch) (9)

23 A lay person appointed to represent a minor or someone of unsound mind, ... *ad litem*. (Latin) (8)

24 The doctrine of precedent is founded upon the principle of *stare* ..... (Latin) (7)

25 A Queenslander under the age of 14 is not *doli* ..... unless proven at the time of the alleged offence the person had capacity to know that he/she ought not do so. (Latin) (5)

26 Injunction ordered from a threat of damage, ... *timet*. (Latin) (4)

27 Order restraining a person from remaining at, entering or approaching certain premises. (6)

30 The troublesome animal in *Donoghue v Stevenson*. (5)

Solution on page 68

A change worth weighting for?

France's loss a gain for all

BY SHANE BUDDEN

As you are no doubt aware (like fudge you are), the definition of kilogram has changed recently.

For many decades, if you really wanted to know how much a kilogram was, you had to compare with the official kilogram, which is in France and known as Le Grand K.

That was problematic, partly because it allowed France to hold the rest of the world to ransom ("Stop calling your sparkling wine champagne, or we will not tell you how fat you are. Ha-ha-ha!"), but mostly because France has a pretty poor record when it comes to regulation.

Remember, this is the nation that couldn't figure out that Lance Armstrong was on drugs, despite the fact that he regularly completed stages of the Tour de France faster than Jeremy Clarkson, even though Clarkson was in a Lamborghini.

So it is probably a good thing that France isn't in charge of the kilogram anymore, but there are downsides to this new development. For a start, the new definition depends on a unit called Planck's constant, and many Australians associate planking with an extremely non-scientific practice of lying face-down somewhere and having a friend photograph you.

In my day, that occasionally happened to people by accident (presuming you can consume 27 beers by accident), but these days it is done deliberately. It was first popularised by rugby union players when they were out drinking (duh!) and may explain why it is that the Wallabies currently couldn't win a scrum against the Dubbo Knitting Society's reserve grade croquet team.

The new definition is also trouble for any Young Earth Creationists out there, because they do not accept Planck's constant and now cannot even believe in weight. That may actually become a recruiting point for them. Some people will no doubt conclude that ceasing to believe in weight would be a hell of a lot easier than going to the gym and actually losing any.

Also, the new definition may well create tension between Germany and France, because Planck was a German – so Germany will now have physics bragging rights over France. This is bad because there is already a certain amount of tension between Germany and France, in the same sense that there is a certain amount of tension on Clive Mensink's belt buckle.

There are also misgivings in the scientific community. For example, Perdi Williams from the National Physical Laboratory in the United Kingdom has expressed a somewhat mixed reaction to the news.

"I haven't been on this project for too long but I feel a weird attachment to the kilogram," she said.

I know how she feels; I have a weird attachment to about four kilograms, which I haven't been able to sever despite adopting a gruelling regime of coffee, wine and chocolate, as well as being dragged through miles of parkland by my dog. In fact, when I heard that the definition of kilogram was changing I was kind of hoping it was going to double in weight, so I could claim to be half what I do weigh, but no such luck.

The new definition may also play havoc in the United States, which weirdly fought a war to get rid of the British, but decided to keep Britain's inexplicable and unworkable system of weights and measures, which involves things like miles, gallons, pounds, ounces, tidbits and chads. The resultant confusion may well be seen by Donald Trump as an opportunity to energise his base (which sadly does not involve attaching electrodes to his backside) and impulsively declare war on physics.

This is possible because (a) Americans care a great deal about weight, and (b) Trump does not generally exhibit a concrete-like stability in making decisions, especially if he cannot find a coin to toss.

When my wife and I were travelling in the US, we noticed that many TV shows and newspaper articles were devoted to serious discussions about the obesity crisis, and what the cause could be. Interestingly, none of the wise talking heads seemed to hit on the reason that we, after several minutes of rigorous observation, came up with – they eat too much.

The US Constitution specifically mandates, somewhere near the back I think, that any restaurant which serves a meal which weighs less than two kilos (17.5 tidbits in US vernacular) commits a federal offence. The owners can be deported, even if they were born on the observation deck of the Statue of Liberty and delivered by Dr Drake Ramoray.

OK, so maybe it doesn't, but it might as well. Restaurant owners in the States seem very concerned to ensure that you leave their establishment two sizes larger than when you entered. Tired of leaving more than half of every meal on her plate, my wife ordered a salad one day; it came in a bowl that could have doubled as a bathtub, and fully one quarter of the space was taken up by crumbled blue cheese. Presumably this was because the chef had detected a meal without fat in it heading out the kitchen door, and he was damned if he was going to let that happen on his watch.

On another occasion, our tour guide dragged us all to a place where, for eight dollars, you could eat basically everything, possibly including the furniture. The 'salad bar' included steaks, half chickens etc. and as many of them as you like. My wife and I put together normal-sized plates, with only one steak each, and several of our fellow diners inquired if we were ill.

In any event, Le Grand K is to become 'die kleine *h*' because *h* is the symbol for Planck's constant, and because calling it 'the big P' would make the teaching of physics to schoolboys everywhere impossible, due to the level of snickering involved.

(NB: I am not being sexist here by specifying schoolboys, it is simply the truth. Feminists will just have to accept that schoolboys develop a much more sophisticated and finely-tuned sense of humour than do schoolgirls, as long as by 'sophisticated and finely-tuned' we mean 'immature and smutty').

So you can now rest assured that, however unhappy you were with your current level of weight, you can now be far more accurately unhappy with it. Personally, I plan to start telling people that I weigh 1.3 chads.

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Crossword solution

From page 66

Across: 1 Semble, **4** Allocatur, **8** Bonis, **10** Pure, **12** Culpa, **13** Argus, **14** Vitiating, **16** Overrule, **17** Bait, **18** Replevin, **21** Adeem, **22** Distinguish, **26** Quod, **28** Caxon, **29** Cypres, **31** Derogant, **32** Six, **33** Gravitas, **34** Sigilli.

Down: 1 Substantive, **2** Malingerer, **3** Laches, **5** Contra, **6** Real, **7** Solatium, **9** Scripta, **10** Proferentum, **11** Reversion, **15** Gestae, **19** Puisne, **20** Desontort, **23** Guardian, **24** Decisis, **25** Capax, **26** Quia, **27** Ouster, **30** Snail.

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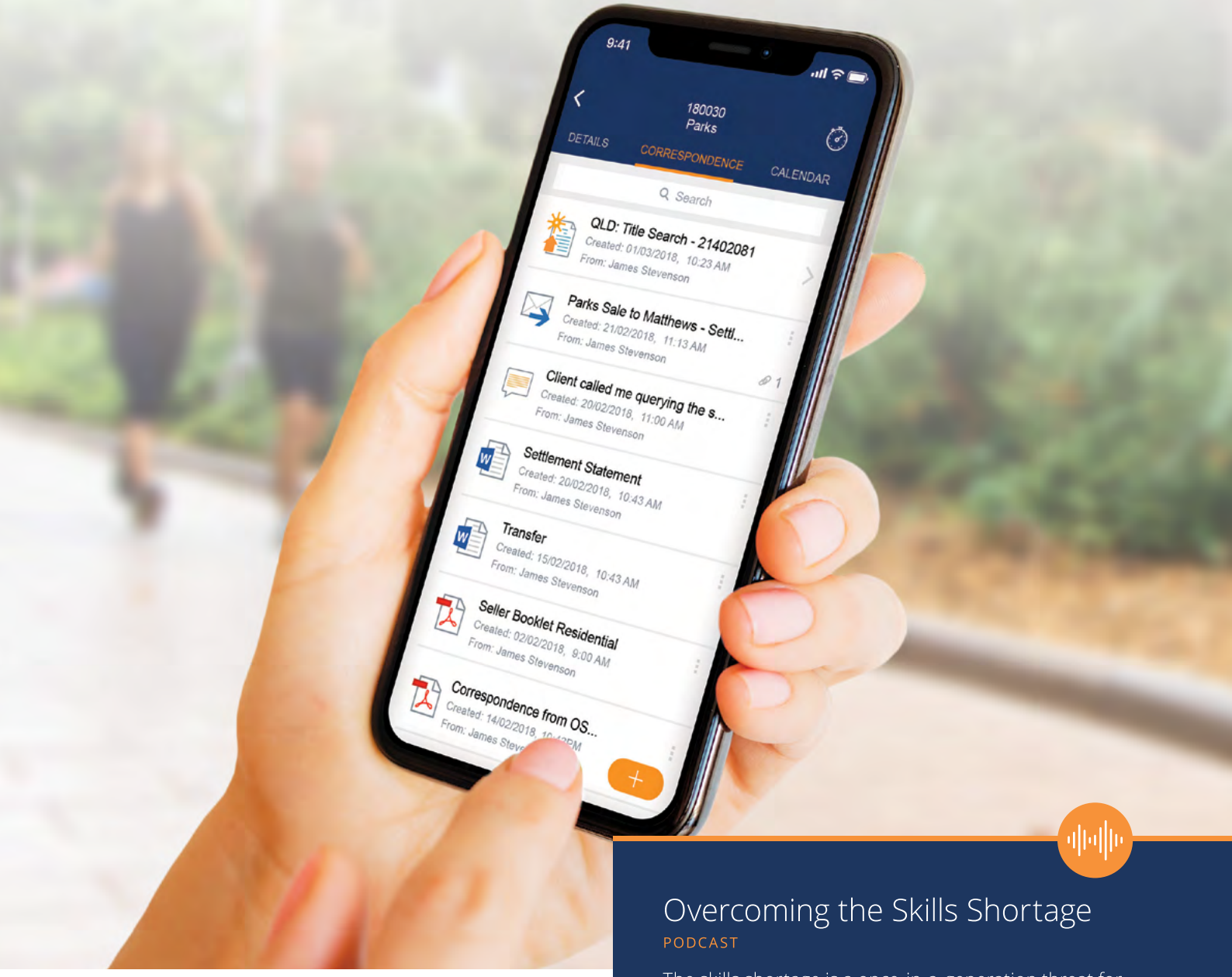

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