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Why we're different

Our duty to the court sets us apart

The other day a non-lawyer asked me what it is that makes the legal profession different to any other profession.

My immediate answer was, of course, that we are all officers of the court.

While it might be argued that there are other differences that set us apart from doctors, architects or other professionals, this is undoubtedly the big one.

Other professions may have divided loyalties on occasion, but no other profession faces the challenges inherent in a duty to the administration of justice that must *always* come before the duty to serve the best interests of a client.

At times it can be difficult for us to reconcile this obligation with our client's wishes, and this is where our years of learning and experience come to the fore.

Further, it is the role of the trusted advisor: a counsellor who exercises good judgment and provides practical guidance that gives meaning to why we practise and have a life in the law.

It is also why we have the QLS Ethics Centre helping practitioners to serve the best interests of their client as well as uphold their responsibilities as officers of the court.

Many of you will have seen the weekly ethics quotes included in *QLS Update*, and these regularly explain and reinforce our duty to the court. This quote, from an address by Chief Justice Catherine Holmes, appeared in the 28 September edition last year:

"The judiciary, as we all appreciate, is an arm of government, but the functioning of the court in turn depends on its officers and their observation of the obligations which they assume as legal practitioners. Judges are in no position to make their own inquiries, to ascertain the facts except through what is presented to them.

"Without our being able to rely on your integrity and honesty in doing so, the administration of justice would become unworkable. The independence of the courts, which is critical in a democracy, requires also the underpinning of a profession independent from the expectations of clients and the aims of the executive."

The vast majority of Queensland's 11,000 or so solicitors consistently and honourably adhere to the profession's very high standards and commitment to the rule of law and to the members of the community in which they serve.

However, it is extremely disappointing when any lawyer abuses the responsibilities of their position and the trust that members of the public place in them. As an officer of the court, they deserve a harsh penalty imposed by the court itself.

QLS sets and demands very high standards of all solicitors granted the privilege of holding a certificate that allows them to practise in Queensland. We will take action when the conduct of any solicitor fails to meet the high standards, honesty and integrity required of all lawyers.

Honoured members?

In June, I congratulated former QLS president and now Chief Magistrate Ray Rinaudo AM on behalf of the Queensland profession for receiving an Order of Australia Medal in the Queen's Birthday Honours.

However, while perusing the lists released by the Governor-General it was disappointing to note that there appeared to be no Queensland solicitors there (and my apologies if I have managed to overlook someone!). There was the expected multitude of New South Wales and Victorian recipients from various backgrounds, but there also seemed to be a huge number from South Australia, compared to just a handful of Queenslanders.

While Queensland solicitors have been honoured in the past – Terry O'Gorman AM is one name that comes immediately to mind – their absence this year prompts me

to surmise that maybe there was simply a lack of nominations.

There is no doubt that many hundreds of Queensland solicitors give outstanding service to their communities, not least through direct pro bono work but also with any number of boards, clubs and charities.

As Queenslanders we can be a bit parochial – often proudly so – leaving the rest of the nation to get on with its own affairs, but I would like to ask solicitor members to take some time right now to think of colleagues whose service is worthy of national recognition.

There are forms on the Governor-General's website (gg.gov.au), and as the vetting of nominations apparently take 18 months to two years, now would be a good time to start nominating.

Forward thinking

As a statutory authority, Queensland Law Society is required to review and approve a strategic plan every four years for the following four years.

The QLS Council undertook significant strategic planning in 2016 and this year to prepare a draft strategic plan that was open to consultation.

We consulted with the membership, the Attorney-General, the Premier's office, and legal and internal stakeholders. Feedback was then considered or included in the draft.

In late June Council considered and approved the strategic plan for 2017-2021 (qls.com.au > About QLS > Corporate documents, and it is now time to thank all those who participated in the planning process for their involvement.

We look forward to advancing our vision for good law, good lawyers, and the public good.

Christine Smyth

Queensland Law Society president

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Vive la renewal

If it's good enough for the Doctor...



According to Patrick George Troughton, life depends on change and renewal – and he should know, being the second incarnation of Doctor Who, a personage who undergoes periodic and drastic renewal.

His words are not just applicable to Time Lords, however, as renewal is an important process for solicitors, in the sense that practising certificates must be renewed – and here at QLS we have just completed the renewal process for financial year 2017/18.

In truth I toss away quite a tale in one sentence, because the renewal process is the largest project undertaken by the Society on an annual basis, and involves a lot of hard yakka, sweat, the occasional tear and heroic volumes of coffee, but it did get done. I should take this opportunity to thank all the Society staff involved in the renewals effort, and the numbers tell the story of what an effort it was.

In two short months the team processed 10,742 practising certificate renewals, completed 13,614 transactions and answered around 8000 phone enquiries – a massive effort in which all involved went above and beyond.

Of course, while things went smoothly for the most part, there were some problems and we have already begun a review of the entire process, based on member feedback (both positive and negative) to ensure that things are even better next time. Our goal in this regard is nothing short of a flawless, stress-free and efficient renewal process for our members, and we welcome further feedback and suggestions from you.

The renewal process does produce other numbers though, which make for interesting reading, telling both good and not-so-good stories. In the not-so-good side, Indigenous

participation in the legal profession remains unacceptably low, with only 0.6% of full members of QLS identifying as Aboriginal or Torres Strait Islander.

That is a number we would all like to see on the rise, and an important step towards that goal was taken on 5 July when the Society launched its Reconciliation Action Plan, another huge project deserving another huge set of thanks to all involved. The evening was a great success, although it is only the start, with a lot of work to do, and thankfully the people, resources and enthusiasm to do it with.

Since the launch is covered elsewhere in this issue, I won't steal anyone's thunder by going into detail. I will observe, however, that eloquent ethics solicitor Shane Budden noted that he enjoyed the whole evening, but wondered if it was wrong that his favourite part was the Indigenous cuisine provided at the networking event. For me the best part was the sense of opportunity for the journey we are now to take.

The numbers tell good stories as well, including a story of great diversity within our ranks. The percentage of women holding practising certificates continues to surge towards primacy, with just under 50% of PCs now held by female lawyers, and this figure of course does not include government lawyers, who do not hold PCs.

That diversity extends to the solicitors' branch equivalent of Queen's Counsel – those who have achieved specialist accreditation in their area of the law. Of 530 specialist-accredited solicitors, 198 (37%) are women, and no doubt that percentage will increase rapidly in the coming years.

Also pleasing to note is the incredible number of languages now spoken by QLS members, no doubt a reflection of the broad church from which they are drawn. Over 70 different languages from all corners of the globe are spoken as second languages by the solicitors of Queensland. The top five are Mandarin, French, German, Japanese and Italian. I hope

that is an indication that neither language nor culture is a barrier to admission – or representation – in our fair state.

These figures show that the solicitors of Queensland reflect the wonderfully diverse melting pot that is Queensland, and we all hope this will soon be reflected in our state's magistracy and judiciary. You may have seen some commentary around this in our Law Talk blog, where we note that the best way to achieve much-needed diversity on the bench is to look to the many solicitors deserving of judicial appointment.

The figures also show that our practising certificates aren't the only things being renewed – in fact, it is our whole profession undergoing renewal. Whereas once upon a time Queensland's legal fraternity (and in those days it was indeed a fraternity) looked no different from the members' lounge at an exclusive gentlemen's club, it now resembles the world's backpacking community dressed up for a friend's wedding.

Our members come from a plethora of backgrounds, cultures, and continents, and just as they no longer fit traditional stereotypes, they are impossible to pin down in thought, word and deed. Their motivations and goals in the law are as diverse as they are, and they are driving our profession in innovative and surprising new directions; it will be a lot of fun to see where we end up.

So I say *vive la renewal* – if it's good enough for the Doctor, it's good enough for me!

Matt Dunn

Queensland Law Society acting CEO

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An historical moment for QLS ... presenters and panellists at the RAP launch.



RAP working group members and QLS staff involved in creating the RAP.

Our step toward reconciliation

Another first for Queensland solicitors

Queensland Law Society released the state's first reconciliation action plan (RAP) for solicitors last month at a launch event attended by Indigenous elders and state and federal representatives of government and the judiciary.

President Christine Smyth said the plan was the first of its kind for the Society, which was first established in 1883.

"This is a substantial step for the Society and the profession as a whole towards reconciliation in our nation," she said. Through this plan we aim to improve access to our legal system for budding lawyers who identify as First Nations peoples along with supporting our current Indigenous lawyers and Indigenous people who work in the solicitors' branch of the legal profession."

The QLS RAP was created by a working group comprised of solicitors, magistrates, legal students and Indigenous executives, with input from the wider profession.

The plan covers three areas – profession, student and community – that the profession can address through advocacy, support and opportunities.

RAP Working Group chair and Indigenous Lawyers Association Queensland president Linda Ryle said that the RAP created an alternative storyline for the legal profession in Queensland.

"Colonial institutions such as the Law Society, and many others, have never before been regarded, by us, as open or accessible – not Aboriginal-friendly, not Aboriginal-aware and not Aboriginal-interested," she said.

"This is BIG! And the potential that this body of work has to facilitate positive change is quite simply enormous.

"The RAP is a conversation in itself; it is an invitation to participate, encouragement to learn, a toolkit of expert support, and the opportunity to share. This RAP is an instrument of positive change."

The launch was well attended, with many delegates viewing a preceding seminar presented by professor and scholar Dr Diana Eades, who is an expert in linguistics.

President Smyth spoke at both events, leaving the audience with food for thought.

"To my mind, diversity is more than gender and age," she said. "It encompasses culture and experience. Diversity and inclusion broadens our vision and strengthens our capabilities, and this underpins a greater community engagement."

The QLS RAP is available at qls.com.au/rap.



1. Auntie Flo Watson with proud nephews Joel and Leon.
2. Dale Chapman's authentic bush tucker food was a hit on the night.
3. Community Elders Auntie Ravina Waldren and Auntie Collen Hurley at the launch event.

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Firms navigate a new course

Brian White & Associates, Cairns, has integrated with Thynne + Macartney's team of maritime and transport lawyers and P&I (protection and indemnity) correspondents, adopting the Thynne + Macartney name and brand.

The team, which came together from 1 July, forms Queensland's largest practice in P&I correspondency and contentious and non-contentious maritime and transport law.

The practice consists of nine staff across four offices – Brisbane, Cairns, Darwin and Port Moresby – providing a service across northern Australia and the western Pacific including Queensland, the Northern Territory, Papua New Guinea, Micronesia and Melanesia.

The Brian White team has been serving the shipping, transport and marine insurance industries for more than 30 years, while the Thynne + Macartney maritime and transport team has been a part of the firm and P&I Club correspondents for more than 100 years.

Notices not to employ

Michelle Louise Kenzler, a former employee of a Sunshine Coast law practice has authorised Queensland Law Society to publish that she will not attend or be present on the premises of any law practice in Queensland, other than for the purpose of taking legal advice for herself.

Set out below is a list of former employees of legal practices who are not to be employed unless the Council of the Queensland Law Society Incorporated gives its written consent to the person's employment:

Frances Ann Black, Kim Butcher, Sondra Maree Burns-James, Vanessa Melanie Clark, Thomas John Cuddihy, Margaret Dacey (also known as Margaret Rowe), Bronwyn Davidson, Michelle Wallace Dowzer (also known as Michelle Webber), Jessie Duffield, David Trevelyan Fisher (also known as Darnell David Gant), Rhonda Forde, Jack Gilroy, Lorena Se-Yoon Gower, Peta Griffiths, Caroline Grimmond, Rachel Lee Hartley, Tina Louise Heilbronn, Jodi Hitchcock, Donna Joy Hoskin, Susan Jane Howes (also known as Susan Jane Elser), Stephen Mark

Jetnikoff, Ruth Brigid Kenneally, Michelle Louise Kenzler, Victoria Ann Kerr, George Latter, Linda MacDonald, Andrea Joy Marolt, Barry John Matthews, Amanda Jane McKee, Christopher McVicar, Melissa Ann Mercer, Sandra Leslie Milne (also known as Sandra Leslie Wilson), Janelle Murphy, Lisa Prinz, Janette Deborah Oakhill-Young (also known as Janette Deborah Oakmill-Young), Tom Partos, Jason Reeves, Linda Robinson, Margaret Rowe (also known as Margaret Dacey), Brooke Suzanne Schrader, Jan Scodellaro, Robyn Maree Spurway, Sina Vickers, Julie Antonia Villiers, Susan Joy Walker (also known as Susan Joy Webb and Susan Joy Williams), Michelle Webber (also known as Michelle Wallace Dowser), Lisa Ann White, Susan Joy Williams (also known as Susan Joy Walker and Susan Joy Webb), Sandra Leslie Wilson (also known as Sandra Leslie Milne), Samantha Wynyard, Miranda Ziebell.

The following former employees of interstate law practices are not to be employed in legal offices unless the relevant interstate regulatory authority gives its written consent:

Samantha Jane Bonham (NSW), Benn Reginald Day (NSW).

Reconciliation Action Plan 2017-19

Last month the Queensland Law Society launched its inaugural Reconciliation Action Plan (RAP).

[Read our RAP initiatives now](#)

 qls.com.au/rap



Bond opens family dispute resolution clinic

A new family dispute resolution clinic at Bond University will provide affordable dispute resolution and mediation services to families coping with the difficulties of separation.

Family dispute resolution students working alongside experienced practitioners will staff the clinic, which opened last month.

The initiative, the result of a collaboration between the university's law faculty and its psychology clinic, will help families to access dispute resolution services to resolve parenting arrangements, as well as providing referrals to other experienced professionals to ensure parties receive the professional support, guidance and advice needed during what are often very challenging times.

Family Dispute Resolution Clinic co-director Libby Taylor (*above, left*) said the centre was focused on achieving the best possible outcomes for families and, in particular, the best interests of the children.

"The clinic has been developed to assist families and children who are facing the challenges of separation and who need assistance in making both short- and long-term parenting arrangements," she said.



"The students, under the guidance and supervision of accredited family dispute resolution practitioners, will work with these families to establish effective post-separation parenting arrangements, helping to reduce the negative effects of separation and conflict, particularly on children."

Psychology clinic director Deborah Wilmoth (*right*) said provisionally-registered psychologists, in conjunction with qualified staff, would provide support by helping identify psychological risk

factors that might need to be addressed as part of family dispute resolution and mediation.

"The new clinic will provide clients with a 'one-stop shop', where they can access psychological support as part of the family dispute resolution assessment, rather than needing to seek help elsewhere," she said.

"We will also be offering a dedicated course for parents who are going through separation to help them understand the impact it can have on children."

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Working for good law

The QLS Industrial Law Committee

An important function of Queensland Law Society is to advocate for good law, respond to law reform proposals and identify issues of concern for the profession.

The Society could not perform this function without the ongoing support and wealth of knowledge provided by the members of its policy committees, including the Industrial Law Committee. This year has been busy for the committee so far, with numerous submissions and engagement with stakeholders in the important areas of labour hire reform, workplace health and safety, and amendments to the *Fair Work Act 2009*.

The QLS Industrial Law Committee meets every six weeks and its members are highly experienced in this area of law, practising in firms which represent different interests in the employer-employee relationship and working for other employer/employee organisations.

The committee's main objectives are to consult with state and federal courts and tribunals on processes for industrial law matters, undertake proactive and reactive submissions, work on law reform issues being considered by state and federal governments in this area of law, and contribute to promoting awareness and the education of members by assisting the Society's learning and professional development team.



Key areas of engagement

The Industrial Law Committee has been involved in a large number of submissions on state and federal issues.

The Society made a submission to the Office of Industrial Relations on the Regulation of the Labour Hire Industry 2016 issues paper. The committee responded to several questions posed by the paper, including those relating to:

- appropriate regulations for a proposed licensing scheme
- criteria for a 'fit and proper person' test to obtain a licence

- the type of information to be regularly reported by licence holders
- any additional information and training labour hire firms should receive about their rights and entitlements.

The committee noted that the need for a licensing scheme is under debate, as the labour hire industry is already subject to state and federal regulation enforced by the respective bodies.

Following this submission, committee members attended a meeting with the Office of Industrial Relations to discuss the Labour Hire Licensing Bill 2017. The Bill was then introduced into Parliament and referred

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by Kate Brodnik and Pip Harvey Ross

to a parliamentary committee for inquiry. The Society's submissions to this inquiry relied on the expertise and experience of committee members.

Our submission highlighted several ambiguous elements of the Bill, including the effect of licences on interstate providers and workers. We noted that the definition of 'labour hire provider' was very broad and thereby captured a number of relationships that were not the target of the legislation.

We also submitted that the powers to investigate a labour hire provider by entering property, seizing documents and compelling information were excessive. Members of the Industrial Law Committee who attended the parliamentary committee's public hearing on this Bill reiterated these points and were able to answer subsequent questions from the committee.

The committee has made several submissions to the Senate Education and Employment Committee in regard to Bills seeking to amend the *Fair Work Act 2009*. The committee worked with the QLS Franchising Law and Corporations Law Committees to make a submission on the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

It was submitted that the amendments to make franchisors and holding companies liable for entitlements would counter the franchising model of independent businesses and that these provisions should be removed from the Bill.

The Society submitted that finding holding companies responsible for the contravention of a subsidiary would be impractical and difficult to apply to holding companies.

The committee made other submissions to the Senate Education and Employment Committee on the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017. In the submission, the Society supported the removal of the four-yearly modern award review as the primary mechanism for award review. We suggested that changes to allow for Fair Work Commissioners to fall within the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* should be made to that Act, rather than the *Fair Work Act 2009*.

In another submission to the Senate committee, on the Fair Work Amendment (Pay Protection) Bill 2017, we noted that proposed amendments would significantly alter the current legislation. We stated our general opposition to the introduction of provisions that imposed retrospective rights or liabilities on a person and voiced concern about imposing new requirements on existing enterprise agreements.

In addition to these submissions, the committee has written to the Federal Circuit Court about the delay in the delivery of judgments in industrial matters.

The committee has contributed to the best practice review of Workplace Health and Safety Queensland by making a submission

and meeting with the independent reviewer. Our submission sought more resources for Workplace Health and Safety Queensland to allow for higher numbers of investigations and prosecutions. The committee is eager to do more work in this space once the review is finalised.

The committee has hosted guest speakers at its meetings, most recently Deputy President Daniel O'Connor of the Queensland Industrial Relations Commission, and will soon be hosting Fair Work Ombudsman Natalie James and Deputy President Ingrid Asbury from the Fair Work Commission. The aim of these meetings is to reach out to the judiciary for advice on new developments in the courts and commissions, and to act as a conduit between such bodies and the broader QLS membership.

The committee has also contributed to the education of the profession, with a member recently presenting the 'Lawyers as employers' webinar, which provided information and guidance to lawyers and law practices recruiting staff.

The committee has more projects and submissions planned for the second half of 2017 and, in 2018, plans to back-up its recent success at the Industrial Relations Society of Queensland's trivia night.

Kate Brodnik is a policy solicitor and Pip Harvey Ross is a legal assistant with the QLS advocacy team.

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Privilege to protect counselling records

Victims of Crime Assistance and Other Legislation Amendment Act 2017



A new type of privilege covering the counselling records of victims of sexual assault will allow health practitioners to refuse to comply with subpoenas for their production. **Alex Cooper** looks at the impact of Queensland's *Victims of Crime Assistance and Other Legislation Amendment Act 2017*.



The enactment of the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* introduced provisions which provide for a new type of privilege to be endorsed in criminal matters, termed 'sexual assault counselling privilege'.

The provisions, included in the *Evidence Act 1977*, *Justices Act 1886*, *Criminal Code Act 1889* and the *Domestic and Family Violence Protection Act 2012*, will allow health practitioners an avenue of refusal to comply with subpoenas requesting medical records for victims of sexual assault. Similar provisions have already been enacted in other states and have been operating for some time.

While the Act was assented to on 30 March 2017, it is yet to commence.

The current law in Queensland

In Queensland, the issuing of a subpoena for the production of documents in criminal proceedings is available to parties pursuant to Rule 30 of the *Criminal Practices Rules 1999* (the Rules). Under r31, a person who produces a document pursuant to r30 can object to the document being produced, inspected or copied. If a person objects, they must provide grounds for the objection at the time of producing the material to the court.

For instance, in sexual assault matters, it is not unusual for defendants or their legal representatives to issue a subpoena for the production of the victim's counselling records. Generally speaking, defendants often seek this material in an attempt to discredit the prosecution's primary witness, which may arise, for example, should the victim have a propensity to claim sexual assault, or if the victim provides the health practitioner with a different version of events.

There are currently four key considerations for 'health care providers' such as doctors, psychologists and counsellors to consider when responding to a subpoena. These are:

- a. whether the subpoena is invalid, for example, because it is too wide

- b. if there is an objection to produce documents on the ground of privilege
- c. whether the parties should be permitted to inspect the subpoenaed documents
- d. what use of the subpoenaed documents, or the information they contain, should be allowed.¹

The case of *R v Spizzirri* [2000] QCA 469 determined the current status of subpoenaed medical records. In that case, the Court of Appeal decided that the defence should be allowed to inspect the subpoenaed documents, including the medical and psychiatric records of the complainant, in circumstances in which the documents could assist the defence in attempting to discredit the principal Crown witness. In his decision, Pincus JA set out the rules currently applied when considering whether the parties should be permitted to inspect documents produced under a subpoena.

At [24] his Honour said:

"It appears to me to emerge from the authorities that inspection of subpoenaed documents by the defence should be permitted, where that is required for some legitimate forensic purpose, which purpose must be sufficiently disclosed. The purpose may be or include the obtaining of information, in particular, in use in cross-examination as to credit. Further, Courts should be careful not to deprive the defence of documents which could be of assistance to the accused."²

Chief Justice de Jersey, who agreed with Pincus JA's reasoning, said at [6]:

"Courts are astute to the importance of properly protecting the privacy of a witness's personal affairs. This material contained details which the judge described as 'intimate', apparently including, for example, accounts of the complainant's consultations while in custody with medical experts including psychiatrists. But as a matter of principle, that consideration should not in these criminal proceedings have excluded the defence access to the material, where it could reasonably have been expected to disclose matters helpful to the legitimate forensic exploration of the credit of the Crown's central witness."

In summary, the current state of the law is that:

- Subpoenas can be issued for the production of a complainant's medical records.
- Once produced, it is for the parties to determine whether the documents are of any substantial value, not the judge. It only needs to be 'on the cards' that the documents may assist.
- A legitimate forensic purpose includes obtaining documents for the purpose of using in cross-examination concerning the credit of a witness.
- The documents need not be admissible in evidence in any particular proceedings prior to the defendant and their legal representatives' access to the material.
- Special weight needs to be placed in favour with the defendant in providing access to inspect documents.

New ground of privilege in Queensland

In Queensland, objecting to produce material under a subpoena can potentially be successful on the ground of privilege. Counselling records are currently unlikely to fall under the umbrella of the categories of privilege applicable in Queensland which include, for instance, legal professional privilege or privilege against self-incrimination.

However, once commenced, the new Act will provide for a new category of privilege to be available in Queensland, sexual assault counselling privilege, which provides a protection for counselling records of victims of sexual assault-related offences.³

Who is a sexual assault victim ('the counselled person')?

The privilege applies to records relating to a victim of a sexual assault offence. A sexual assault offence includes an offence under chapter 22 (other than sections 224, 225 and 226) and chapter 32 of the *Criminal Code Act 1899*.

Who can claim sexual assault privilege over records ('the counsellor')?

Any person considered a 'counsellor' can refuse to comply with a subpoena to produce counselling records of a victim of sexual assault.

The definition of a counsellor is extremely wide and does not require the person to have formal training or qualifications but rather, that the counselling of the sexual assault victim was provided in the course of the counsellor's paid or voluntary employment. Therefore records of health practitioners including GPs, psychiatrists, psychologists and non-medically trained counsellors such as social workers will be able to claim the privilege.

It should be noted however, that religious representatives (such as bishops, priests and so on) do not fall within the definition of a 'counsellor' under the new Act.⁴

What type of records will be privileged?

The new Act inserts section 14A into the *Evidence Act 1977*, which provides that the records privileged will be the entirety of the records relating to the victim's counselling and not just those relating to the offending conduct relevant to the particular court proceedings. Such records include oral and written communications between the victim and the counsellor, as well as communications between a counsellor and a parent, carer or other support person for the purposes of furthering the counselling process.

The exception is when the records arise from a health practitioner conducting a physical examination of a victim of sexual assault in the course of an investigation into the alleged sexual assault. However, communications between the health practitioner and the victim that do not relate to the physical examination may amount to a protected counselling communication.

Absolute privilege

The new Act provides an entitlement to an absolute privilege in relation to documents for bail applications in committal proceedings. This means that counselling records will no longer be able to be disclosed to the defendant in these types of proceedings, for any reason.⁵

Qualified privilege

However, a qualified privilege is available for the production of counselling records for the purposes of sentences or trials. Domestic violence order proceedings and related civil proceedings also attract a qualified privilege.⁶

The qualified privilege means that a defendant cannot, without the leave of a court, "compel, subpoena, produce, adduce, otherwise use or otherwise disclose, inspect or copy a protected counselling communication"⁷ involving a victim of any offence of a sexual nature.

In summary, the court must be satisfied that:

- The protected counselling communication has substantive probative value.
- There is no other evidence available.
- The public interest in preserving the confidentiality and protecting the counselled person from harm is substantially outweighed by the public interest of allowing it into evidence.⁸

Section 7 of the new Act also inserts section 14H into the *Evidence Act 1977* (Qld), which requires the court to consider a wide range of factors when determining whether to grant leave to access evidence that falls within the sexual assault counselling privilege:

- "(1) The court cannot grant an application for leave under this subdivision unless the court is satisfied that—
- (a) the protected counselling communication the subject of the application will, by itself, or having regard to other documents or evidence produced or adduced by the applicant, have substantial probative value; and
 - (b) other documents or evidence concerning the matters to which the communication relates are not available; and
 - (c) the public interest in admitting the communication into evidence substantially outweighs the public interest in—
 - (i) preserving the confidentiality of the communication; and
 - (ii) protecting the counselled person from harm.
- (2) In deciding the matter mentioned in subsection (1)(c), the court must have regard to the following matters—
- (a) the need to encourage victims of sexual assault offences to seek counselling;
 - (b) that the effectiveness of counselling is likely to be dependent on maintaining the confidentiality of the counselling relationship;
 - (c) the public interest in ensuring victims of sexual assault offences receive effective counselling;
 - (d) that disclosure of the protected counselling communication is likely to damage the relationship between the counsellor and the counselled person;
 - (e) whether disclosure of the communication is sought on the basis of a discriminatory belief or bias;
 - (f) that the disclosure of the communication is likely to infringe a reasonable expectation of privacy;
 - (g) the extent to which the communication is necessary to enable the accused person to make a full defence;
 - (h) any other matter the court considers relevant.

...

- (8) In this section—

harm includes physical, emotional or psychological harm, financial loss, stress or shock, and damage to reputation."

Prosecution disclosure requirements

It is relevant to note that the new Act also introduces provisions into the *Justices Act 1886* and the *Criminal Code Act 1899*

which provide that the prosecution is no longer required to disclose documents considered protected counselling documents.⁹

Waiver of privilege

It is also clear that should the alleged victim of a sexual assault offence consent to the disclosure of their counselling records to a defendant, then such consent will waive any entitlement a counsellor had to claim privilege.

Summary and 'take home message'

The enactment of the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* significantly shifts the legal principles surrounding the production of counselling records of victims of sexual assault in criminal and domestic court proceedings in favour of the interests of an alleged victim.

In light of the above, criminal and health law practitioners alike need to properly consider the new ground of privilege when contemplating the production of medical records to a court, and, in particular:

- whether the subpoena is in respect to proceedings relating to a sexual assault offence
- whether the person receiving the subpoena falls within the definition of a 'counsellor'
- what type of proceedings it is for and whether the privilege would be qualified or absolute
- the risks associated with disclosing the records to a defendant
- whether the counselled person would consent to the disclosure of the records or not.

Alexandra Cooper is an associate at Moray & Agnew.

Notes

¹ *R v Spizzirri* [2000] QCA 469 at [23].

² His Honour also cites with approval *Alister v R* [1984] 154 CLR 404 where it was stated at [414]: "Just as in the balancing process, the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial ... so, in considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the Court must attach special weight in the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere 'fishing' expedition can never be allowed, it may be enough that it appears to be 'on the cards' that the documents will materially assist the defence."

³ Section 7 *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld).

⁴ Will insert section 14B into the *Evidence Act 1977* (Qld).

⁵ Will insert sections 14C and 14D into the *Evidence Act 1977* (Qld).

⁶ Will insert sections 14E and 14F into the *Evidence Act 1977* (Qld).

⁷ *Victims of Crime Assistance and Other Legislation Amendment Bill 2016 – Explanatory Notes* at page 10.

⁸ *Ibid.*

⁹ See, for example, s590APA *Criminal Code 1899* (Qld).

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Limited scope representation in dispute resolution

Guidance Statement No.7 – Limited scope representation in dispute resolution (published 8 June 2017)

1. Introduction

1.1 Who should read this Guidance Statement?

This Guidance Statement is for solicitors and law practices.

1.2 What is the issue?

In an increasing range of matters that have traditionally been handled by a solicitor from start to finish, solicitors are sometimes asked to assist clients with discrete tasks only under partial or limited retainers. This trend has been called 'limited scope representation' ('LSR'), as well as 'discrete task assistance' or 'unbundling' and, while it presents new opportunities to serve clients who may not otherwise be able to afford any representation, LSR also presents challenges.

This Guidance Statement is concerned specifically with LSR in the dispute resolution context.

1.3 Background

LSR work is an emerging form of practice to address growing client needs. It is an important way to enhance access to legal services for the many people who are not eligible for free legal services, but cannot afford the costs of a traditional full service retainer. The Productivity Commission has recognised LSR works as a potential solution to growing 'access to justice' concerns.

For commercial solicitors, the concept is not new, as they more commonly provide discrete legal services, such as reviewing contracts or providing tax advice. LSR can now be seen in areas such as family law and in the community and pro bono legal sectors, but is also emerging in property law and succession.

For solicitors acting in dispute resolution (with which this Guidance Statement is concerned), LSR may mean providing advice on drafting or checking documents only, providing discrete advice about a particular step, representation at mediation or making limited court appearances.

Ultimately, in LSR work the case remains mainly client-led rather than the traditional process involving a solicitor guiding the entire process. The purpose of this Guidance Statement is to outline some of the ethical principles and issues which solicitors should consider when acting on an LSR retainer.

1.4 Status of this Guidance Statement

This Guidance Statement is issued by the Queensland Law Society (QLS) Ethics Centre for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of the statement and following the guidance, it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct.

This Guidance Statement is endorsed by the QLS Ethics Committee as representing a standard of good practice.

2. Ethical principles

ASCR

While there are no specific Rules in the *Australian Solicitors Conduct Rules 2012* ('ASCR') relating to LSR, either generally or with respect to dispute resolution, of particular relevance are the following (emphasis added).

Rules 3.1, 4.1.1, 4.1.3, 7, 8.1 and 13.1 provide:

3. Paramount duty to the court and the administration of justice

- 3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

4. Other fundamental duties

- 4.1 A solicitor must also:
- 4.1.1 act in the best interest of a client in any matter in which the solicitor represents the client;
 - ...
 - 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;

7. Communication of advice

- 7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.
- 7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

8. Client instructions

- 8.1 A solicitor must follow a client's lawful, proper and competent instructions.

13. Completion or termination of engagement

- 13.1 A solicitor with designated responsibility for a client's matter must ensure completion of the legal services for that matter UNLESS:
- 13.1.1 the client has otherwise agreed;
 - 13.1.2 the law practice is discharged from the engagement by the client;
 - 13.1.3 the law practice terminates the engagement for just cause and on reasonable notice; or
 - 13.1.4 the engagement comes to an end by operation of law.

3. Challenges

Challenges that a solicitor may face when engaging in LSR include:

- assessing whether a case is suitable for LSR;
- managing and communicating the scope of the retainer with the client so that there is clarity about the service the lawyer is providing, including how it is reflected in any written costs agreement;
- dealing with third parties, including solicitors acting on the other side, so as not to misrepresent the scope of the retainer and to ensure that the 'no-contact rule' (ASCR, Rules 22.4 & 33) is being complied with. There is also a risk of miscommunication, where the client is dealing with the other side directly;

- making difficult judgments about how far to go in exploring facts and issues that are related to the work that is within the scope of the retainer, particularly if the solicitor is coming in after the matter has been going for some time.

Scope of an LSR retainer

Solicitors have a duty of care to apply the relevant degree of skill and exercise reasonable care in carrying out the task. While the agreed scope of the retainer is an important factor in determining this duty of care, there remains the risk that a broader scope may be found to exist for the purposes of determining professional negligence, once considerations such as the nature of the task and circumstances of the case are taken into account.

In *Trust Co of Australia v Perpetual Trustees WA Ltd and Others*¹ McClelland CJ observed:

"The duty of care owed by a solicitor to his client is to exercise reasonable skill and care. What is required for the performance of this duty in a particular case depends on the scope of the solicitor's retainer, the scope of any additional responsibility assumed by the solicitor and relied on by the client, the nature of the task entrusted to or undertaken by the solicitor, and the circumstances of the case."

The Queensland Supreme Court has also recently demonstrated a willingness to extend the scope of the retainer beyond that argued by the solicitor.²

In the UK, a court has looked specifically at the issue of professional negligence in the context of LSR work.³ In that case, the Court of Appeal upheld a decision that a solicitor on a retainer to redraft financial orders in a family law matter had no duty to advise on the underlying financial agreement. The court noted the increasing prevalence of limited scope retainers in family law work and its importance to litigants and the court and that good practice is to limit the scope of the retainer in writing.

4. Recommendations

To help solicitors to overcome the challenges presented by LSR in the dispute resolution setting, and to ensure that the client obtains the greatest benefit of this approach, it is suggested that the following approach be followed:

1. Is the matter suitable for LSR?

The limited scope of the proposed representation must be **reasonable** in the circumstances. Factors include whether the limited role will enable the solicitor to provide proper, diligent and competent representation. Solicitors should therefore have a process in place to assess whether a matter is suitable for LSR, including assessing the:

- Characteristics of the case.** As a general rule, the more complex and contested the case, the more cautious the solicitor should be about providing LSR. This may relate to:
 - *The facts of the case.* The solicitor must be able to achieve sufficient mastery of the facts and evidence to provide competent assistance on a limited scope basis. This may include verifying facts and evidence critical to the success of the matter.
 - *The law.* Where the law is complex, its application in this case may be difficult to assess, making the solicitor's job more difficult on a limited scope basis.
 - *The process.* Processes designed for self-represented litigants, or in which self-represented litigants are common, are generally more appropriate for limited scope assistance. As the process becomes more complex, the level of knowledge and skill required to succeed in the process increases.
 - *The level of conflict in the dispute.* Cases where there is a history of entrenched conflict between the parties pose obvious challenges for limited scope assistance.
 - *The stakes.* Cases where the personal consequences to an individual are greater (i.e. potential significant monetary losses or risks to an individual's liberty or reputation) require more careful consideration as to the appropriateness of a limited scope retainer.

- Characteristics of the client.** The client must appear to the solicitor to have the skills and ability to understand and carry out those tasks for which they are responsible in the conduct of the case. Some clients may lack the skills to conduct their part of the case, or their ability may be impacted by other factors such as acute emotional distress, health or logistical problems. Assisting a client to get into a dispute resolution process when they cannot manage the obligations imposed on them by that process may not be in the client's best interests. This is particularly so when the client is at risk of costs orders against them if they fail.
- Characteristics of the solicitor.** The knowledge and experience of the solicitor in the type of case is a relevant consideration. An experienced practitioner finds it easier to make sound judgments about the extent of instructions required from the client, and is more able to anticipate, recognise and manage problems as they arise.
- Capacity of the solicitor and client to work together to achieve the desired outcome.** Some litigants choose to self-represent because they have rejected the advice of their previous lawyers and want to conduct the case their way. Limited scope assistance is not appropriate unless the solicitor and the client are aligned about the best way to conduct the case, and each willing to play their part in doing so.

2. Review suitability continually.

Solicitors should constantly review whether a matter remains suitable for LSR. For example, where there are inadequate or poor quality instructions provided by the client, further clarification from the client should be sought before continuing any assistance.

3. Have a written costs agreement.

It is important to have a written retainer, even where a costs agreement would not otherwise be required having regard to the fees the solicitor proposes to charge. This retainer should:

- a. Identify the work that is within the scope of the retainer, that which is outside the scope and the client risks arising from the limited scope.

This is particularly important where the LSR work involves a departure from the more common or traditional manner in which the relevant services are provided. It may require expressly informing the client that this arrangement differs from the traditional way in which the work is done, the nature of the limitations and the risks of providing legal services in this manner, and how these risks may affect the client. Ideally, provide a list of things that will be included under the retainer and the things that the solicitor would ordinarily do but which are outside the scope of the retainer and identify the risks to the client's objectives in excluding that work. The client may also be provided with a list of the risks inherent in the work (for example a risk of a costs order).

- b. Establish when the retainer will be complete, and the grounds on which it can be terminated prior to completion of the work, for example failure by the client to provide adequate instructions or a divergence in opinion.

4. Clarify roles and responsibilities.

In addition to defining the scope of the retainer in writing in a costs agreement, the solicitor should satisfy themselves that the client understands the limited nature of the retainer, and the roles and responsibilities of the solicitor and the client in the conduct of the matter.

The solicitor should keep adequate diary notes of conversations with the client about the limited scope retainer. In some matters, this may require a face-to-face meeting with the client. Evidence of the client's acceptance of the limited scope retainer and the risks inherent in that arrangement, or an important step in the matter, for example an acknowledgement signed by the client, will assist the solicitor to demonstrate that the client understood and accepted the limited scope retainer.

5. Manage the scope.

During the course of the matter, the solicitor should continue to manage the scope of the retainer. For this purpose, it may be useful to define stages of the work, and confirm in writing when each stage is complete.

Aligning the fee and payment structure with this staging of work provides a useful mechanism to ensure the solicitor and client recognise when work agreed to under the retainer is complete.

If work outside the scope of the original retainer is to be done, this should be expressly communicated to the client in writing. Alternatively, consider referring the client to another lawyer where advice is needed on matters which are outside the agreed scope. For example, advice on the litigation itself, where the LSR is limited to settlement advice.

6. Confirm when the retainer is at an end.

When the retainer is complete, it is good practice to confirm this in writing to the client as soon as possible. When concluding the retainer, particularly where the client is continuing to represent themselves in a legal process, the solicitor should outline for the client in plain language the next steps that they should take, the potential risks and applicable deadlines and time limits, but confirm that the retainer is now at an end. This will be particularly important in the case of individuals or others who are not 'sophisticated'⁴ clients. However, the solicitor is not obliged to provide detailed instructions for how the client might conduct the matter themselves and without further legal representation. The written communication to the client should be explicit



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[^] Not applicable to all models.

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that the solicitor is taking no further steps in the matter, that the client is now responsible for taking all steps to protect their own legal rights and interests and that the client is responsible for meeting all time limits. For practices insured with Lexon, the Lexon Practice Pack contains a precedent letter that might be used.

7. Dealing with third parties.

Where the matter involves dealings with third parties, such as other parties, solicitors or the court, and it is otherwise necessary and proper, those parties should be informed of the limited nature of the representation. Consent may need to be obtained from the client before doing so.

Where a solicitor is aware that an opposing party has representation for part of a matter, consent should be obtained from the solicitor who has provided the representation before communicating with that party directly.⁵ However, this rule only applies as far as the communication relates to the matter or issue for which legal representation exists. If this is unclear, a cautious approach should be adopted.

8. Remember what has not changed.

The usual requirements of good legal practice apply equally to LSR work, in particular:

The same fiduciary duties are owed to the client. Obligations of confidentiality and the duty to avoid conflicts of interest are no less

applicable in this type of work. If working in this way results in a larger number of clients, this may increase the potential for conflicts of interest, so it is important that a firm has in place a robust conflict of interest policy and reliable procedures to support that policy.

Good file management practices, for example keeping complete files and having a bring-up system to manage deadlines and limitation periods, are equally important in this type of practice. Usual checks such as identification, authority, capacity and undue influence at the outset of the matter are also essential, despite the limited scope of the retainer.

This guideline is not intended to be prescriptive as each case will be different in the level of diligence required. In 2014, the Law Council of Australia made a submission to the Productivity Commission in which it supported the practice of limited scope works subject to the client giving informed consent and the limitation being reasonable. In the meantime, so long as solicitors have a good understanding of the risks and necessary safeguards, they should not be deterred from this growing area of work.

5. More Information

Solicitors are referred to *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners*, Queensland Law Society, June 2014.

For further assistance please contact an Ethics Solicitor in the QLS Ethics Centre on 07 3842 5843 or ethics@qls.com.au.

Notes

¹ (1997) 42 NSWLR 237 [247].

² See *Robert Bax and Associates v Cavenham Pty Ltd* [2013] 1 Qd R 476 [490]. In that case, the solicitor argued that he was only engaged to prepare and stamp mortgage documents. The court held that a letter written by the client's bank manager to the solicitor was evidence of a more extensive retainer, and that the scope of the retainer extended to providing advice as to the most effective method to protect the client's interest in the financing transaction. The court also found that the solicitor could not undertake the retainer "without ascertaining the extent of the risk the client wished to assume in the transactions, evaluating the extent of the risks involved in the transactions and advising in that regard". Further, the court found that the duty to advise "does not depend on advice or information being specifically sought by the client". Consequently, even in the context of a limited and specific retainer, it is possible that a solicitor's professional liability is triggered by reason of a general duty to advise their client.

³ *Minkin v Landsberg (practising as Barnet Family Law)* [2015] EWCA Civ 1152, [43].

⁴ *Legal Profession Act 2007* (Qld), Sch 2.

⁵ *Australian Solicitors Conduct Rules 2012*, rules 22.4, 33.

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Retirement village contracts have long-term financial consequences in the form of exit charges that apply when a resident leaves the village.

That is the basis of the village proposition – residents get a higher standard of living than their income would otherwise support, on the basis that they pay for it later on exit from the village.

Normally that works out to be a fair bargain. Market research clearly shows that most village residents are happy with their decision.¹

However there is still a significant number who are not, and they pose a risk to the solicitors who advised them on entry to the village.

Happy residents can pose risks too. Once they die or lose capacity, their family – often with an eye to the quantum of the estate – might question whether their parent was properly advised on entry to the village.

Residents who enter villages with their 'eyes open' to the potential long-term consequences of the exit charges tend to have a better experience than those who rush in based on inadequate, short-term advice. The latter often end up feeling 'tricked' and 'trapped', and that

can then become the tainted prism through which they view their entire village experience. Leaving the village may not be an option as the exit charges could leave them with inadequate capital to purchase suitable accommodation elsewhere – not an ideal retirement.

Solicitors can help retiree clients avoid this (and minimise their own professional risk) by ensuring they provide thorough advice to prospective residents.

Lexon has published a very useful Elder Law Kit,² including valuable information to assist practitioners in advising prospective village residents. The contents of the kit won't be

Clients anticipating the benefits of living in a retirement village are unlikely to consider the possibility of leaving, but it is a critical concern that every practitioner should discuss with them, as **David Wise** explains.



repeated here, but there are some wider issues practitioners should understand to give context to the kit and their advice to clients.

Point of engagement

Prospective residents normally do not seek legal advice until they have not only selected a particular village but also a unit within that village. Often they have already paid a holding deposit and signed an 'Application for Residence' or similar document that has triggered the commencement of their 14-day cooling-off period.³

They have usually approached the transaction like a traditional property purchase – checked that the 'up-front' cost and ongoing costs are affordable, and that the 'bricks and mortar' are to their liking. Often they are psychologically committed to the deal, and in their hands is a bundle of documents they want 'signed off' by their solicitor, as though it is just a formality.

But a retirement village contract is not one to be entered into lightly. Once a resident commits to a village, they cannot leave without a potentially significant loss of capital via the exit charges.

The exit charges

The exit charges usually involve an 'exit fee' percentage that increases annually during a resident's time in the village, to a certain cap. There is significant variance within the industry on the amount of the cap and the number of years it takes to be reached. In my experience the cap ranges from 20% to 60%.⁴

There is also variance on whether the exit fee percentage is applied on the amount the resident originally paid on entry to the village, or on the resale price of the unit when the resident leaves. This is often (but not always) linked to whether or not the contract allows the resident to share in any capital gain (or bear any capital loss) when they leave the village. If the resident gets a share of any capital gain, it is more likely the exit fee will be charged on the resale price when they leave.

The contract terms in relation to the exit fee and any capital gain (or capital loss) sharing will have a significant impact on the resident's financial returns when they leave the village. A recent client, on exit from a village, had not realised her 30% exit fee would be applied on the sale price of her villa rather than the original amount she paid for it. The unit originally cost about \$260,000 but was sold for \$540,000. Her contract allowed her 50% of the capital gain – which came to about \$140,000 – but that was more than offset by the 30% exit fee of \$162,000 based on the resale price. So despite a significant increase in the value of her unit, she was left with only \$238,000. After the deduction of reinstatement costs and the village's legal costs, she only received about \$230,000, which is 42% of what her unit resold for. Despite getting legal advice on entry to the village, she had never understood that almost 60% of the unit's final value would be lost on exit.

The exit fees and capital gain sharing arrangements vary not only between villages but also within them. Just as two villages can offer similar comforts, facilities and up-front costs on very different financial terms, it is possible for two neighbouring units within a village to be occupied under quite different financial arrangements. This can happen not only because the financial terms offered by villages can change over time but also because many villages offer a suite of different contracts for residents to select from. For example there may be a choice between a higher up-front cost in exchange for lower exit costs, or vice versa.

Practitioners should ensure their client has not only compared the deal they are getting with others available in the village they have picked but also with others available in their desired area. Clients won't be happy if they proceed with the contract after your advice only to find out there was a much better deal available at the same village or a similar village nearby.

The mandatory disclosure document provided by villages to prospective residents, known as a Public Information Document or 'PID', is intended to facilitate comparison between the financial deals available at various villages. However, in practice that doesn't happen as the PID must be in the prescribed form,⁵ and

that form requires details of the unit selected by a prospective resident to be included.⁶

By that stage the prospective residents have already looked at various villages, selected their preferred village, and been through the marketing process at that village to select a particular unit. They are highly unlikely to go through all that again at another village for the sake of getting another PID for comparison. The legislation around the PID actually undermines its purpose to an extent.

Client attitudes to the exit charges

When you raise the exit charges with prospective residents, they often just shrug them off on the basis that they intend to "leave the village in a box". This would be a reasonable attitude if that outcome could be guaranteed. In reality though, many residents end up leaving their village much earlier. Over the years I have assisted many residents on exit who never expected to be leaving the village in their lifetime.

So in advising prospective residents on entry it is important to push them through the leaving-in-a-box attitude and ensure they have considered the array of potential events that could in future require them to leave the village earlier than expected, and what their financial situation might be like if that happened.

Village exit charges generally mean you do not receive enough capital on exit to fund a new residence with an equivalent lifestyle elsewhere, unless you have other capital reserves. So it is important to plan for the contingency of an earlier-than-expected exit. I have assisted a client on exit who needed to leave a high-end village early for unforeseen reasons, and ended up having to move into a caravan park, as that was all she could afford after the exit charges.

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Moving to higher care

The most common cause of premature village exit is declining health. Villages usually only offer independent living arrangements, so when residents reach the point at which they require a higher level of care, it is usually necessary for them to enter an aged-care facility.⁷

Some villages will have aged-care facilities co-located. However, the disconnect between the state laws that govern villages and the federal laws that govern aged care means a place in a co-located facility cannot be guaranteed when a resident needs it. Practitioners should ensure prospective residents are aware of this if the client has selected a particular village based on a co-located aged-care facility.

Also aged-care facilities usually require an up-front capital payment, depending on the resident's assets. If this cannot be paid on entry, then normally it can be deferred subject to an interest charge. This is commonly done for residents coming from retirement villages as most village contracts don't require the village to pay the departing resident's exit payment until their unit is re-sold, which can take months to years.

Some contracts voluntarily impose a sunset date for repayment, but that is often five years, which is not really of much use. Villages in the not-for-profit sector tend to have preferable arrangements in my experience, with contracts providing for pay-outs within six to 12 months regardless of whether the unit has re-sold. If a contract does not provide a sunset date on the repayment, or the period is too long (such as five years) then practitioners acting for a resident on entry should seek instructions as to whether their client wants to try to negotiate a better deal in their contract.

It is unlike selling your own home because you do not have control over the marketing, the sale price, or the quality of the communal facilities. These are all important to a potential buyer's decision. The resale price is required to be a matter of negotiation between the outgoing resident and the village,⁸ and their respective interests often compete. The outgoing resident may need the sale more urgently than the village, to fund their higher-care placement or other healthcare needs. Villages certainly have an imperative to sell units – as they don't make their profit until a unit re-sells – but they often have a number of units for sale and don't have the same urgency to sell any *particular* unit.

Family reasons

Another common reason why residents leave villages prematurely is family. They might have selected their village on the basis that it was close to their grandchildren, but the grandchildren might end up moving away if their parents get a good job opportunity elsewhere.

Or the grandchildren's parents might separate, fracturing their geographical location.

The residents themselves could have a marital breakdown that would require one of them to leave. The resulting property settlement could require the retirement village unit to be sold.

Another scenario is when one party in an otherwise healthy resident couple has an unexpected critical health event, such as a stroke. That can leave them needing higher care than is available in the village, as well as healthcare expenses that could require the sale of their unit.

Rarer (but not unheard of) is the parents of the grandchildren passing away, or having a major medical issue, forcing the grandparents to take custody. Children are not allowed to live in retirement villages due to the age restrictions and other rules, so the grandparents taking custody would have to move out.

Conclusion

The bottom line is that prospective residents need thorough advice. It is not just a matter of summarising what the documents say in an extensive letter; practitioners must also discuss the practical long-term consequences of the exit charges in the contract based on various possible scenarios that could arise in the prospective residents' lives or in the property market generally. That will not only ensure that clients enter the village fully informed and better placed to have a positive village experience but will also minimise the long-term risks to the practitioner.

This article appears courtesy of the QLS Elder Law Committee. David Wise is a sole practitioner and a member of the committee.

Notes

¹ The McCrindle Baynes Villages Census Report 2013.

² lexoninsurance.com.au/Managing_your_risk/Elder_Law_Risk_Procedure_Pack (member log-in required).

³ Section 48, *Retirement Villages Act 1999* (Qld) (the Act).

⁴ I have also encountered contracts with 100% exit fees – the resident pays a discounted amount on entry on the basis that they receive nothing back when they leave. Such arrangements are dangerous unless the resident has ample other capital, as unforeseen issues could force them to leave the village earlier than expected.

⁵ Section 74(1)(a) of the Act.

⁶ Retirement Villages Form 1 – Public information document.

⁷ Unless sufficient care can be brought to them in their village unit, via a live-in carer or mobile care services.

⁸ Sections 60 & 67 of the Act.

ALRC tackles elder financial abuse

A report from the Australian Law Reform Commission proposes a national response to lessen the risk of financial abuse of older Australians. The commission's **Dr Julie MacKenzie** reports.



Elder abuse, which can be broadly understood as the abuse or neglect of an older person that occurs within a relationship in which there is an expectation of trust, is an area of growing community concern.

It is now the subject of an Australian Law Reform Commission (ALRC) report, 'Elder Abuse – A National Legal Response' (ALRC Report 131).

Available evidence suggests that financial abuse is one of the most common forms of elder abuse.¹ It can take a number of forms, one of which is the misuse of enduring powers of attorney.

Enduring powers of attorney (EPAs) are important tools that allow older people to choose the person (or persons) who will make decisions on their behalf should they lose decision-making ability in the future. They may also protect an older person with impaired decision-making ability from being exploited and abused by others. However, it is clear that they are capable of being misused, often with devastating consequences for the principal.

In the ALRC's recent elder abuse inquiry, its approach to reform of EPAs was to seek to minimise the risk of misuse of EPAs by enhancing safeguards relating to their execution and use, and to improve avenues for redress. However, it also sought to avoid imposing requirements so onerous that they could deter people from using them, which might itself increase the risk of financial abuse.²

Nationally consistent safeguards

The ALRC inquiry report recommended that state and territory legislation should include nationally consistent safeguards relating to enduring appointments, including:

- recognising the ability of the principal (or donor) to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances

- requiring the attorney to support and represent the will, preferences and rights of the principal
- enhanced witnessing requirements – two witnesses, at least one of whom must have prescribed qualifications, and
- restrictions on who may be appointed as an attorney, including if a person is an undischarged bankrupt or has been convicted of an offence involving fraud or dishonesty.

Compensation for loss as a result of misuse

The ALRC also recommended that state and territory civil and administrative tribunals have jurisdiction to order that an attorney pay compensation if they have breached their obligations under an enduring document causing loss to the principal. The tribunal should have the power to order any remedy available to the Supreme Court, and to refer a matter to the Supreme Court if the matter is complex or involves questions of law.

Vesting state and territory tribunals with the power to order compensation would provide a practical way to redress loss for older persons unable or unwilling to take action in the Supreme Court. It would also operate as a deterrent to misusing funds.

A national register

The ALRC recommended that a national online register of EPA documents be established. The existence of a register would not operate to prevent all misuse of powers of attorney – for example, it would not prevent misuse by a validly appointed attorney. Nonetheless, it would provide enhanced safeguards against some forms of abuse.

A register would prevent an attorney attempting to rely on an enduring document that has been revoked. A register would also prevent an individual attempting to arrange a subsequent enduring document in circumstances in which there is a question as to the decision-making

ability of the principal. It may also have an additional deterrent effect, putting attorneys on notice that there is an additional level of oversight of their appointments.

A national response to elder abuse

In addition to its recommendations about powers of attorney, the ALRC made recommendations for reform of other Commonwealth, state and territory laws, including in relation to family agreements, banking and superannuation, wills, aged care, social security, and guardianship and financial administration. The ALRC has also recommended the introduction of adult safeguarding laws in each state and territory.

These recommendations aim to achieve a nationally consistent response to elder abuse. The ALRC has also recommended that a national plan to combat elder abuse be developed. A national plan would enable integrated planning and policy development, and could include prevention strategies that complement, support and extend beyond legal reforms, such as national awareness and community education campaigns, and training for people working with older people.

The full report is available at alrc.gov.au.

Dr Julie MacKenzie is a senior legal officer with the Australian Law Reform Commission.

Notes

¹ Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016) 5.

² While this article focuses on reforms to prevent financial abuse through misuse of enduring powers of attorney, the relevant ALRC recommendations also extend to enduring appointments of a person to make lifestyle, personal, or medical decisions (these are known by various names across state and territory jurisdictions, including enduring powers of attorney, enduring guardianship and advance care directives).

Appeal overturns solicitor's contempt

with Robert Glade-Wright



Contempt – solicitor husband sentenced to six months' imprisonment

In *Bain & Bain (Deceased)* [2017] FamCAFC 80 (3 May 2017) the Full Court (Bryant CJ, Ainslie-Wallace & Rees JJ) heard an appeal by the husband, a principal of a law firm, in a case in which his terminally-ill wife had applied for an interim order that he transfer his interest in a life insurance policy over her life to her so that the children would benefit from it upon her death. The husband opposed the application, arguing that any insurance should be applied towards the parties' debts. He alternatively sought an order that any payment be held in his solicitor's trust account.

Hogan J dismissed the wife's application on the husband's undertaking that any payment would be held in trust. The undertaking was not given in court but noted in the order after being deposed to in the husband's affidavit and reiterated by his counsel. The husband did not attend court. The wife died and her legal personal representatives were appointed to continue the case under s79(8) *Family Law Act* 1975 (FLA). The husband received the insurance but applied it towards debt. The estate brought contempt proceedings under s112AP FLA. Hogan J found the husband guilty of contempt, sentencing him to six months' imprisonment, suspended pending his appeal.

The husband argued that the estate lacked standing to bring a contempt application; and that he was not told of his undertaking by his solicitor who simply said that the wife's application was dismissed.

In allowing the appeal, the Full Court ([64]–[96]) held that the wife's legal personal representatives did have standing to bring contempt proceedings. As to the finding of contempt, the court said ([117]):

"... [W]here her Honour did not identify in what way the husband's evidence was 'inherently unbelievable' in the sense that 'no reasonable man could accept it' and to the extent that the trial judge rejected the husband's evidence on that basis, it cannot be supported."

Property – order set aside for default (husband 13 months late to pay wife) during which his property value rose

In *Blackwell & Scott* [2017] FamCAFC 77 (28 April 2017) a consent order provided

that Mr Blackwell retain an investment property and pay Ms Scott \$130,000 within 90 days (so as to achieve an equal division of property). In the 13 months the appellant took to pay the respondent, the property increased in value from \$860,000 to \$1 million according to a valuer, the respondent arguing in her application under s90SN(1)(c) FLA that the order should be set aside as the increase meant that she would receive far less than an equal division of assets. Judge Brewster granted her application. Mr Blackwell filed an appeal which the Full Court (Aldridge, Kent & Watts JJ) dismissed. Aldridge J said (from [11]):

"The question posed by s90SN is whether the property orders made under s90SM continue to be just and equitable or appropriate, subject to the terms ... of s90SN(1)(c) being met, including the requirement that the relevant circumstances must have arisen as a result of default. It is therefore entirely proper to look at the content and effect of the s90SM orders to identify the relevant changed circumstances.

[12] ... [T]he evident purpose of the ... orders was to achieve an equal division ... Thus, to use the words of s90SM, it was just and equitable and appropriate that there be such a division and that that division be effected by a payment to the wife of \$130,000.

[13] The husband's delay in complying with the orders was ... substantial. By the time he did comply ... the wife did not receive anything close to 50 per cent of the matrimonial property, which was both the intent and effect of the orders at the time the parties consented to them. ...

[14] Thus whilst it is ... correct to say that the husband's default did not cause house prices to rise, that is not the relevant enquiry. The relevant enquiry is whether circumstances have arisen as a result of the husband's default that would make it just and equitable to reconsider the earlier orders. The circumstances that arose were that ... the wife received significantly less than an equal division of the property and the husband received considerably more. That difference resulted directly from the husband's delay in complying with the orders. The primary judge was therefore entitled to find that the position of the wife had arisen as a result of the husband's breach.

[15] It is not the point that the wife got the bargain to which she agreed. The point is that by reason of the husband's default the agreed equal division of the parties' property did not take place."

Children – recovery order discharged where court misled by evidence in which applicant failed to disclose material facts

In *Drew & Jensen* [2017] FCCA 656 (13 April 2017) Judge Altobelli considered an ex parte recovery order made by a Local Court. The father obtained the order by alleging that the mother had absconded with the parties' children. With the intervention of the police, the children were removed from the mother's care and delivered to the father. The mother then applied to the Federal Circuit Court seeking the discharge of the order and an order that the children live with her. The mother subpoenaed the father's criminal history and deposed that she took the children away to flee his violence.

After citing ([19]) the Full Court's decision in *Saleh* [2016] FamCAFC 100 as to a court's approach to disputed and untested allegations of family violence in interim parenting proceedings, Judge Altobelli said (from [54]):

"Let it be very clear – it is the opinion of this Court that any parent who has been violent to a former partner in the past, who has been convicted of the same, and who does not spend time or communicate with children from a previous relationship for reasons that include that violence, must put that material before the Court in all circumstances, let alone when ex parte orders are sought. (...)

[88] (...) An ex parte recovery order should only be made as a last resort, in circumstances where the Court is clearly concerned about a risk of harm to children. (...)"

The recovery order was discharged and an order made that the children live with the mother and spend alternate weekends with the father.

Robert Glade-Wright is the founder and senior editor of *The Family Law Book*, a one-volume looseleaf 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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Augmented and virtual legality

Were you one of those people who felt an obligation to 'catch 'em all' in 2016 through the mobile phone app, Pokémon Go?

You are not alone, as the game attracted millions of players around the world. The app uses augmented reality (AR), adding a layer of Pokémon characters onto a real image generated by the phone's camera in addition to using its GPS tracking system. The game generated several complaints of trespass and nuisance¹ in reality as people became absorbed in the virtual world.

It is easy enough to understand that users of virtual reality (VR) or AR should be responsible for their direct actions in the real world, but this article examines some of the legal opportunities and complications presented by VR and AR technology.

Gotta catch the benefits

While courtrooms have not yet utilised AR or VR, it may not be far off, provided the necessary legal reforms are made, as when video conferencing and voice recording for statements were introduced. There will be stifled acceptance and necessary criteria to meet, as there was for video conferencing following the landmark decision in *Polanski v Conde Nast Publications Ltd.*² AR and VR could be used

to recreate scenes, prepare witnesses and experts, and conduct police lineups.

There is a great deal of literature on the use of online tools and resources for teaching and learning in law – both as a substitute for, and a supplement to, face-to-face teaching.³ The use of AR and VR in legal education is also on the horizon, along with the appropriate policies and resources to ensure the virtual or augmented environment remains acceptable, as if it were the real world.

Research has suggested that, if you can run through your submissions in a room just like a courtroom, the experience is considerably more authentic and helpful.⁴ Imagine gaining real practical skills as a law student mooted in a virtual courtroom or interrogating a virtual witness.

Gotta avoid the complications

There are key intellectual property issues in the use of AR and VR. Earlier this year, Facebook was ordered by a United States court to pay \$500 million to ZeniMax after Facebook's Oculus VR headset was found to infringe intellectual property rights.⁵

It is expected the usual intellectual property protection laws will apply to virtual goods, and Australia may see claims pursuant to the Australian Consumer Law or common law principles, such as passing off.

There are notorious examples of virtual crime. A female player had her avatar's virtual crotch grabbed by another player and she claimed the virtual groping was the same as being groped in real life due to the resultant psychological trauma inflicted.⁶

While the Queensland Criminal Code would not treat virtual assaults as real assaults, this may change in the future as body-suit technology is developing to the point at which the user may feel a kick, punch or grab.⁷

In 2013, an English video game player was convicted after he stole virtual property by hacking into gamers' profiles in RuneScape to then sell the virtual assets for real money.⁸ Interestingly, he was charged with hacking rather than theft because the items he stole only existed in the virtual world and the victims had no redress for losing their virtual resources.

Countries are diverse in their taxing of the virtual currency sometimes used in AR and VR content. The United States has clarified it taxes and treats digital currencies as capital gains subject to capital gains taxes.⁹ From 1 July 2017, purchases of digital currency became exempt from GST in Australia, allowing digital currency to be treated just like Australian dollars.

Some intellectual property-owning entities in VR and AR have been criticised for shifting revenues to low-tax jurisdictions. Future taxing authorities may take the position that an extensive collection of personal data in a

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by Michael Bidwell, The Legal Forecast

country triggers a taxable nexus in that country irrespective of what type of currency is used.

VR and AR providers will need to assess if they are excessively collecting, using and sharing a wide range of users' personal information without the appropriate consents in place. In 2016, it was claimed that Facebook's Oculus' terms and conditions allowed Facebook to monitor users' movements and use it for advertising.¹⁰ Facebook responded at the time by saying the information was not shared, but that it may have a desire in the future to do so. The Full Federal Court said personal information must be "about an individual",¹¹ meaning metadata in some circumstances could be personal information.

Gotta understand the virtual world before we reform the law

A blogger for the European Commission has gone so far as to question whether VR experiences may ever be 'safe' from an ethical point of view, raising concerns about the lack of research into effects of VR on real human behaviour.¹²

AR and VR platforms are continually emerging through mobile devices providing greater access and lower costs, and the future for AR and VR will be challenging to our traditional legal system and society standards.

The administration of justice and rule of law have always been paramount in our real world and we will need to extend this to our virtual world. We will see which lawyers become the best – in fact, the very best – in this growing legal area.

Michael Bidwell is an executive member of The Legal Forecast and serves as its editor in chief. Special thanks to Adrian Agius and Angus Murray for their assistance with this article. The Legal Forecast (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 Andrew Rossow, 'Gotta Catch... A Lawsuit? A Legal Insight Into the Intellectual, Civil, and Criminal Battlefield 'Pokémon Go' Has Downloaded onto Smartphones and Properties Around the World' (2016) 16 *The John Marshall Review of Intellectual Property Law*.

² *Polanski v Conde Nast Publications Ltd* [2005] UKHL 10.

³ See, for example, Alan Davidson and Myles McGregor-Lowndes, 'Practical Strategies for Using Computers in Legal Education' (1995) 2(2) *Murdoch University Electronic Journal of Law*; Michael Geist, 'Where Can You Go Today? The Computerisation of Legal Education from Workbooks to the Web' (1997) 11 *Harvard Journal of Law and Technology* 141; Rebecca Enyon, 'The Use of ICTs for Teaching and Learning in Law Education: Some Innovators' Perspectives' (2006) 3 *Web Journal of Current Legal Issues* 1.

⁴ David Pope and Dan Hill, *Mooting & Advocacy Skills* (2007) Sweet & Maxwell, London 77.

⁵ 'Facebook Ordered To Pay \$500 Million In Oculus Lawsuit', Forbes, forbes.com/sites/kathleenchaykowski/2017/02/01/report-facebook-ordered-to-pay-500-million-in-oculus-lawsuit/#5d509417121d.

⁶ Jordan Belamire, 'My first virtual reality groping', 2016, mic.com/articles/157415/my-first-virtual-reality-groping-sexual-assault-in-vr-harassment-in-tech-jordan-belamire#.HropUbv9.

⁷ John Pavlus, 'Get a Virtual-Reality Punch, Feel Real Impact', 2015, technologyreview.com/s/543291/get-a-virtual-reality-punch-feel-real-impact.

⁸ Dan Bloom, 'Computer hacker stole virtual property from online fantasy gamers to pay off REAL gambling debts', 2013, dailymail.co.uk/news/article-2519425/Computer-hacker-stole-virtual-property-online-fantasy-gamers-pay-REAL-gambling-debts.html.

⁹ Internal Revenue Service, 'IRS Virtual Currency Guidance: Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply', 2014, irs.gov/uac/newsroom/irs-virtual-currency-guidance.

¹⁰ Andrew Griffin, 'Oculus Rift Terms and Conditions Allow Facebook to Monitor Users' Movements and Use it for Advertising', 2016, independent.co.uk/life-style/gadgets-and-tech/news/oculus-rift-terms-and-conditions-allow-company-to-monitor-users-movements-and-use-it-for-advertising-a6967216.html.

¹¹ *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4.

¹² Michael Madary, 'Are Virtual Reality experiences safe from an ethical point of view?', 2016, ec.europa.eu/digital-single-market/en/blog/are-virtual-reality-experiences-safe-ethical-point-view.

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Sobering lessons in workplace safety

Drug and alcohol policy breaches, a one-way ticket to dismissal

Following a string of unfair dismissal claims involving breaches of drug and alcohol policies, the Fair Work Commission (FWC) has affirmed that the provision of a safe working environment is the paramount concern.

Bennett v Viterra Operations Pty Ltd [2017] FWC 665 (*Viterra*), along with other recent decisions, reinforces that, in high-risk work environments with strong safety cultures, health and safety considerations outweigh other factors that may otherwise characterise a dismissal as harsh, unjust or unreasonable.

Safety outweighs unusual circumstances

Mr Bennett had been employed by Viterra (and its predecessors) in Port Lincoln, South Australia, for 19 years and had an unblemished employment record. His workplace duties as a full-time grade three operator/electrician included high-risk operations such as managing electrical systems of up to 415 volts and working on elevated platforms, trucks and boats. He also held a permit and licences to operate truck-mounted cranes.

Viterra mandated that employees operated under the Glencore/Viterra Alcohol and Other Drugs Policy (the policy). Under the policy, the alcohol limit for risk-exposed workers like Mr Bennett was strictly 0.02.

On 23 August 2016, Mr Bennett presented for work at 7am, having consumed three to four pint-sized¹ glasses of red wine the previous night. He was selected for random alcohol breath testing and received two positive results at 7.07am and 7.25am, with readings of 0.043 and 0.040 respectively – double the level prescribed by the policy. Consequently, he was stood down without pay.

Mr Bennett was surprised by the results and sought an independent assessment. During subsequent disciplinary discussions, he advised his employer that, for various reasons, he was metabolising the alcohol at a much slower rate than would be considered normal and would never have attended work had he believed there was a chance he could still be over the policy limit.

Nonetheless, Viterra dismissed Mr Bennett on 29 August 2016, citing a breach of the policy and breach of trust. On 14 September 2016, Mr Bennett submitted an application pursuant to s394 of the *Fair Work Act 2009* (Cth) (FW Act), seeking remedy for alleged unfair dismissal.

The arguments

Mr Bennett argued his dismissal was unfair because:

- There was no valid reason for his dismissal and its circumstances were harsh, unjust or unreasonable.
- There were irregularities in the amount of alcohol consumed and the breath test results indicated Mr Bennett's ability to metabolise alcohol was impaired.
- Viterra did not sufficiently account for his impaired metabolism, length of service and reduced employment prospects.
- The policy required these extenuating circumstances be considered.
- Viterra inconsistently applied disciplinary outcomes under the policy to other employees.

Viterra countered, submitting the dismissal was fair because:

- Breaching the policy was a valid reason for the dismissal – Mr Bennett was notified of this reason and provided with an opportunity to respond.
- Viterra's high priority of workplace safety outweighed Mr Bennett's explanation for his conduct and length of service.
- Like Mr Bennett, all other Viterra employees who had exceeded the 0.02 alcohol limit had been dismissed.

Finding

Commissioner Platt found Mr Bennett's breach of the policy constituted a valid reason for dismissal. Acknowledging the inherently high risk associated with Mr Bennett's role, the commissioner accepted Viterra's claim that it placed a high level of importance on safety, evidenced by the company's policies and handbook initiatives.

The commissioner also accepted Viterra's evidence that it enforced the policy consistently with other employees.

The commissioner was not satisfied there was sufficient evidence to show that Mr Bennett committed a breach of trust by allegedly failing to provide a consistent account of the amount of wine he had consumed the night before. The commissioner also did not accept that Mr Bennett sought to mislead Viterra, however denied the application for remedy for unfair dismissal nonetheless.

Safety reigns

Viterra is one of many recent decisions involving breaches of drug and alcohol policies in high-risk workplaces. In *Hafer v Ensign Australia Pty Ltd* [2016] FWC 990, Mr Hafer was dismissed from his job in a gas field after returning a positive drug test result in breach of the company's zero tolerance policy. Mr Hafer's unfair dismissal application failed despite some procedural deficiencies in the company's approach to the termination.

In another example, *Metro Quarry Group Pty Ltd v Ingham* [2016] FWCFB 47, Mr Ingham was selected for random alcohol breath-testing and returned a positive reading of 0.013. He was dismissed on the basis that allowing him to continue working would be a breach of the company's duty of care to him and his fellow workers. The commission agreed with the firm approach taken by the company.

These cases suggest the commission is inclined to prioritise the enforcement of a prudent health and safety policy over competing considerations such as employee tenure, age, prior unblemished records, or procedural deficiencies in the employer's dismissal process.

Sara McRostie and Mason Fettell examine recent dismissal cases involving breaches of drug and alcohol policies at high-risk workplaces.



A no-nonsense, consistent approach is key

In *Viterra*, the company's policy was clear and the disciplinary process was followed to a tee. The three cases above further emphasise that employers need to ensure employees are aware of company policy and maintain a consistent, no-nonsense approach to disciplinary action across the board.

Employers and employees also need to be aware of industry-prescribed safety standards (including drug and alcohol standards) and testing requirements. For example, the building, construction and mining industries are regulated by legislation, codes and standards that mandate workplace drug and alcohol policies and active testing.

Workplace drug and alcohol policies should be developed and implemented in line with the applicable legislative instruments.

Remember, safety first!

In high-risk work environments, safety is paramount.

Breaches of company safety policies and standards will constitute valid reasons for dismissal if:

- The employer has a strong safety culture, which is consistently communicated and reinforced with employees.
- The employee was aware of the employer's health and safety policy and consequences of breaches.

- The employer has maintained a consistent approach to disciplinary action for breaches of its health and safety policy.
- The breach was not trivial.
- The breach presented a safety risk to the employee and others.

At the time of writing, Sara McRostie was a partner at Sparke Helmore Lawyers, where Mason Fettell is a lawyer. The authors gratefully acknowledge the assistance of Edwina Sully in the preparation of this article.

Note

¹ Equivalent to a schooner-sized glass in Queensland.

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High Court

Criminal law – tendency evidence – similarity of facts – ‘significant probative value’

In *Hughes v The Queen* [2017] HCA 20 (14 June 2017) the appellant was convicted of nine counts of sexual offences against five underage girls. Part of the case against the appellant was evidence said to show a tendency that the appellant had a sexual interest in females under 16, used his social and familial relationships to get access to children, and engaged in conduct including sexual activity in the vicinity of another adult. Under the *Evidence Act 1995* (NSW), tendency evidence is to be excluded unless the court thinks it has “significant probative value”. The trial judge allowed the evidence in; the Court of Appeal dismissed an appeal. The appellant argued, relying on *Velkoski v The Queen* (2014) 45 VR 680, that tendency evidence needs to have sufficient common or similar features with the conduct in the charge in issue before it will have significant probative value. The High Court rejected that approach. The court held, by majority, that the admission of tendency evidence is not conditioned upon the court’s assessment of similarity between the evidence and the conduct in issue, though the probative value of such evidence will often depend on similarity. If the occurrence of the offence charged is in issue, the assessment of probative value includes two considerations: whether the evidence supports proof of a tendency; and the extent to which the tendency supports the proof of a fact that makes up the offence charged. The majority held that the tendency evidence in this case did have significant probative value because, when considered with other evidence, it tended to show that the appellant engaged opportunistically in sexual acts with underage girls, notwithstanding the evident risks of detection. That evidence was capable of removing doubt about the appellant’s conduct. Kiefel CJ, Bell, Keane, and Edelman JJ jointly; Gageler J, Nettle J and Gordon J separately dissenting. Appeal from the Court of Appeal (NSW) dismissed.

Trade practices – price fixing – ‘market in Australia’

In *Air New Zealand v Australian Competition and Consumer Commission*; *PT Garuda Indonesia v Australian Competition and Consumer Commission* [2017] HCA 21 (14 June 2017) the High Court held that air cargo services provided by the appellants, in relation to which price fixing was alleged, took place in a market in Australia. The Australian Competition and Consumer Commission alleged that airlines had entered into understandings for the imposition of fees and surcharges associated with carriage of goods from Hong Kong, Singapore and Indonesia to

Australia. The trial judge found the understandings to exist, and to have had the purpose, effect or likely effect of substantially lessening competition for the purposes of s45(2) of the *Trade Practices Act 1974* (Cth) (TPA). However, to breach the TPA, the actions had to lessen competition in a market “in Australia”, and the trial judge held that requirement not to be satisfied. That finding was overturned on appeal. Whether there was a market in Australia for the air cargo services in issue was the key question for the High Court. The court unanimously held that there was such a market. The plurality held that a market is a “notional facility which accommodates rivalrous behaviour involving sellers and buyers”. The location of a market is to be approached as a practical matter of business. The place where the decision to use a particular carrier is taken may have significance, but will not necessarily be determinative. It is the substitutability of services as the driver of the rivalry between competitors to which the TPA looks. The place of the interplay of supply and demand, driven by the conditions of substitutability, is important. In this case, as the services were for the transport of goods to Australia, as a matter of commerce, the geographical dimension of the market could include Australia. Further, Australia was not just the end of the line, but customers in Australia were a substantial and vital source of demand for the shippers’ services, and shippers competed for that custom. The interplay of supply and demand forces thus encompassed Australia. Two further issues arose in the case. Gordon J, with whom the plurality agreed, held that foreign law did not require or compel the airlines to enter into the understandings, and rejected an argument that there was an inconsistency between the TPA and an international Air Services Agreement. Kiefel CJ, Bell and Keane JJ jointly; Nettle J and Gordon J separately concurring. Appeal from the Full Federal Court dismissed.

Tort – negligence – duty of care of the state – revocation of special leave

New South Wales v DC [2017] HCA 22 (14 May 2017) concerned two sisters who had been subjected to sustained abuse by their stepfather for many years. In 1983, one of the sisters complained to the NSW Department of Youth and Community Services. Under the now repealed *Child Welfare Act 1939* (NSW), the director of the department was required to take action as he believed appropriate, which might include reporting matters to police. In this case, the department took some action, but did not report the complaint to police. In 2008, one of the sisters brought an action in negligence against NSW for not reporting the matter, claiming damages for abuse after the complaint. The trial judge held that the department owed the sisters a duty of

care and had breached that duty by failing to notify police. However, the trial judge was not satisfied that the stepfather had continued to abuse the sisters after the complaint. The Court of Appeal held that the abuse had continued, that the department owed a duty and that the duty had been breached. When special leave was granted, the state did not dispute that a duty of care was owed, but questioned the scope of the duty and the vicarious liability of the state. Special leave was revoked in relation to vicarious liability because legislation providing for vicarious liability was not in effect at the relevant time and no point of legal principle would be decided. In argument on the remaining ground, the state accepted that there would be cases in which the only reasonable exercise of powers would be to report the matter to police. The trial judge had found that no authority acting reasonably could have failed to report the matter, and made findings on causation that were not challenged. In light of those matters, the case was not an appropriate vehicle to consider the common law duty issue. Special leave was therefore revoked. Kiefel CJ, Bell, Gageler, Keane and Gordon JJ jointly.

Andrew Yule is a Victorian barrister, ph (03) 9225 7222, email ayule@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au. Numbers in square brackets refer to paragraph numbers in the judgment.

Federal Court

Administrative law – national security and procedural fairness

In *El Ossman v Minister for Immigration and Border Protection* [2017] FCA 636 (6 June 2017) the Federal Court set aside the applicant’s adverse security assessment made by the Australian Security Intelligence Organisation (ASIO) on the basis that the applicant was denied procedural fairness in the making of that assessment.

As Wigney J stated at [1]: “The issue that lies at the heart of this matter highlights the potential tension between the interests of national security and the requirements of procedural fairness in the context of the making of security assessments under the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act).”

The applicant is a citizen of Lebanon who was in Australia and married to an Australian citizen. He applied for a particular visa to reside in Australia. In October 2014 he was interviewed by officers of ASIO. In August 2015 ASIO provided the Department of Immigration and Border Protection with an “adverse security assessment” (a term defined in the *ASIO Act*) for the applicant. In September 2015 the Minister for Immigration and Border Protection cancelled

with Andrew Yuile and Dan Star QC



the applicant's bridging visa and he was taken into immigration detention.

It was common ground that ASIO was required to afford the applicant procedural fairness in the making of the security assessment. The issue in dispute was whether in the particular facts and circumstances and having regard to the particular statutory context the requirements of procedural fairness were satisfied.

More specifically, Wigney J summarised at [5]: "The question whether the interview afforded Mr El Ossman procedural fairness arose primarily because ASIO did not disclose to Mr El Ossman certain specific information it possessed which cast doubt on Mr El Ossman's denials [at the ASIO interview]. Some, but not all, of that specific information was immune from production, and therefore disclosure, to Mr El Ossman because disclosure would have been prejudicial to national security. Did ASIO's failure to disclose parts of the specific information which was not immune from production or disclosure so constrain Mr El Ossman's opportunity to propound his case for a favourable assessment as to amount to a practical injustice? Was Mr El Ossman given sufficient information to fairly put him in a position where he could make meaningful submissions about the assessment?"

The court set out the relevant principles on the content of procedural fairness (at [74]-[84]). Those legal principles were not in issue; what was disputed was the application of those principles to the facts of the case and the statutory context. The court examined the legal framework of the *ASIO Act* in order to ascertain the requirements of procedural fairness in that context (at [91]-[98]).

There was no doubt that ASIO was in possession of information that was adverse to the applicant and that it might and ultimately did take it into account in making the adverse security assessment (at [85]-[87]). ASIO did not disclose *any* of the adverse information to the applicant during the process of making the security assessment (at [87] and [102]). The interests of security did not preclude ASIO from disclosing some of the information, albeit in fairly general terms (at [104], see also [129]-[130] where this issue formed part of the court's ultimate reasoning).

The court held at [121]: "On balance, however, the Director-General's overall contention that sufficient information was disclosed to Mr El Ossman during the interview to enable him to make meaningful submissions, or to propound a case for why an adverse security assessment should not be made, cannot be accepted. On balance, the decision to make an adverse security assessment regarding Mr El Ossman was not made fairly in all the circumstances having regard to the legal

framework within which the decision was to be made. There was practical injustice."

The reasons for the court's conclusion are set out at [123]-[143].

A separate ground of challenge on the basis that the Director-General of Security's determination under s37 of the *ASIO Act* was binding was rejected (at [144]-[152]).

Corporations – whether summons for examination of liquidator is an abuse of process

In *Kimberley Diamonds Ltd v Arnautovic* [2017] FCAFA 91 (6 June 2017) the Full Federal Court set aside the orders of the primary judge permanently staying a summons for the examination of a liquidator under s596A of the *Corporations Act 2001* (Cth) on the basis that it was an abuse of process. The Full Court (Foster, Wigney and Markovic JJ) considered the correct statutory construction of ss596A and 596B of the *Corporations Act*.

The liquidators of the owner (KDC) of a diamond mine disclaimed their interest in the mine. KDC's sole shareholder, the applicant, was concerned that the disclaimer of the mine may have followed an inadequate and defective attempt by the liquidators to sell the mine. It requested the Australian Securities and Investments Commission (ASIC) to authorise it to make an application under s596A of the *Corporations Act* for a summons to examine Mr Arnautovic about the sales process. ASIC gave authorisation to do this and the applicant applied for and obtained a summons and order for production addressed to Mr Arnautovic. He successfully applied to the court for an order that the summons be discharged on the basis it was an abuse of process. The main submission that the examination was an abuse of process was that it placed an unnecessary imposition on the liquidator in circumstances in which there was no realistic prospect of the examination having any practical utility (at [58]). The applicant sought leave to appeal from the orders of the primary judge.

As the Full Court summarised at [4]: "The central issue in KDL's application for leave to appeal the judgment of the primary judge is whether the primary judge erred in principle in permanently staying the examination summons on the basis that it was an abuse of process. Did the primary judge misconstrue the statutory scheme concerning examination summonses in Part 5.9 of the *Corporations Act*? Did that cause her Honour to have regard to irrelevant considerations, or to effectively reverse the onus of proof and require KDL to justify the utility of the examination of Mr Arnautovic?"

The Full Court examined the statutory scheme in respect of examinations under Division 1 of

Part 5.9 of the *Corporations Act* (at [5]-[29]). The important distinctions between s596A and s596B were pointed out (at [20]-[24]).

The Full Court said there was no doubt that an examination process could be discharged or permanently stayed if the invocation of the examination process was for an improper or illegitimate purpose (at [84]). However, here, there was no evidence of an improper or illegitimate purpose (at [85]).

Further, the Full Court found that the primary judge erred in finding that examination summons was an abuse of process. Mr Arnautovic led no evidence which was capable of supporting a finding that the proposed examination would be significantly burdensome, costly or intrusive to him or his administration of the winding up of KDC (at [89]).

In addition, the primary judge's conclusion appeared to be based on the presumption or inference "that the examination of *any* liquidator in the course of the conduct of a liquidation would necessarily involve a substantial intrusion into the liquidation". That assumption or presumption appears to have been derived from her Honour's analysis of the authorities concerning the special position of liquidators, particularly the authorities concerning other statutory powers that permit inquiries into the conduct of liquidators, such as s536 the *Corporations Act*" (at [90]). The Full Court referred to the dangers of importing statements in those cases to the different legislative context of s596A (at [91] and [97]). The Full Court said at [93]: "The statutory scheme for examinations [under s596A] does not treat a liquidator differently to any other officer who might be subject to an examination".

The Full Court continued at [99]: "... the reasoning of the primary judge appears to be based on the premise that the purpose of s596A, being to benefit the company, its creditors, members or the public, can only be fulfilled if there is 'reason to believe', or there is a 'realistic prospect', that the examination will reveal conduct capable of supporting a claim and therefore have 'practical utility'. That premise is not supported by the terms of s596A or the statutory scheme for examinations."

The primary judge also erred in considering whether the examination summons was justified or had practical utility by reversing the onus of proof by requiring the applicant to justify the practical utility (at [105]). The burden of proving an abuse of process remained with Mr Arnautovic at all times (at [108]). Mr Arnautovic had not discharged that heavy onus (at [111]).

Dan Star QC is a senior counsel at the Victorian Bar and invites comments or enquiries on 03 9225 8757 or email danstar@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au.

Discretion to exclude evidence

– under s98 *Evidence Act*

Section 98 of the *Evidence Act 1977* (Qld) (Evidence Act) empowers a court to reject evidence when that evidence would otherwise be admissible by virtue of Part 6 of the Evidence Act.

On a literal reading of s98, the power to exclude is both expansive and defined vaguely. The provision states:

“98 Rejection of evidence

- (1) The court may in its discretion reject any statement or representation notwithstanding that the requirements of [Part 6] are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.
- (2) This section does not affect the admissibility of any evidence otherwise than by virtue of [Part 6].”

Courts have considered s98 and its New South Wales counterpart (which was repealed by the *Evidence Act 1995* (NSW)). The overall effect of the authorities is that the s98 discretion to exclude is applied less readily than its language might suggest.

When can the s98 discretion be invoked?

Section 98 can operate only in respect of material which is sought to be admitted pursuant to Part 6 of the Evidence Act. Part 6 allows for the admission of documentary evidence (such as written or taped statements) in certain circumstances and represents a significant exception to the rule against hearsay evidence. Section 92 is the most commonly cited exception which is usually relied on in civil proceedings in relation to business records provided certain criteria in that section are met.

Section 98 has no operation when material is admissible both under Part 6 and on some separate basis, provided the other basis is actually relied upon.

While s98 is available in criminal proceedings, its role is particularly important in civil actions for two reasons: Firstly, the scope of material admissible under Part 6 is broader in civil proceedings. Secondly, s130 of the Evidence Act already grants (or rather, preserves) a general power to exclude evidence in criminal proceedings, at least when that evidence is unfavourable to the accused.

Probative value and prejudicial effect

By its terms, s98 allows for the exclusion of evidence the admission of which would appear to be inexpedient to the interests of justice.

That formulation is very wide. It also bears at least a passing resemblance to the test for excluding evidence (in criminal proceedings only) pursuant to the principle referred to in s130 of the Evidence Act.

Section 130 states:

“130 Rejection of evidence in criminal proceedings

Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence.”

The provision does no more than preserve an existing common law discretion to exclude evidence in criminal proceedings. The relevant common law principle was recognised¹ in the English case of *R v Christie* [1914] AC 545. In *R v Hasler, ex parte Attorney-General* [1987] 1 Qd R 239, Thomas J stated that the court’s discretion was activated only when the evidence had “relatively slight probative value and the prejudicial effect of its admission would be substantial”.²

Consideration of s98 occurs against this backdrop. Courts have recognised that the discretion to exclude under s98 and s130 can involve similar considerations.³

In particular, it has been observed that the probative value of certain material under Part 6 of the Evidence Act—particularly an out-of-court statement made pursuant to s93A—will “in almost all cases be very high” and that therefore it is most unlikely that such a statement would ever be excluded on the basis that its prejudicial effect exceeds its probative value.⁴ The position is likely to be different, however, when the material is tainted by a lack of reliability.

Reliability of the evidence

In applying s98, courts will have regard to the reliability of the evidence in question. If evidence is unreliable, the discretion to exclude may be activated; the evidence need not be “demonstrably” unreliable.⁵ ‘Reliability’ can have either a narrow or a broad meaning. When used narrowly, reliability is concerned with the inherent reliability of the content of the evidence. On a broad formulation, reliability goes to extrinsic matters such as the circumstances under which the evidence was obtained.

Kylie Downes QC and Kurt Stoyke.



The position of the courts is that intrinsically unreliable evidence can more safely be put to the jury (often with a warning), because any relevant shortcomings will be apparent on the face of the evidence. The jury can then consider these shortcomings and weigh the material against other evidence in the usual way.⁶

On the other hand, when the unreliability of the evidence arises from external factors, putting the material to the jury may be inexpedient to the interests of justice. An important qualification applies: courts must not start from the position that a statement under Part 6 of the Evidence Act is unreliable relative to traditional oral evidence. That approach would be impermissible, because it would have the effect of nullifying or watering down Part 6 and amount to legislating from the bench.

The Court of Appeal has stated that courts should “exercise the discretion to admit or exclude [Part 6 statements] without any preconception that admission of such statements is unfair”⁷ or that the statements are unreliable. The court was referring specifically to statements taken under s93A in the case then at hand, but the point applies for Part 6 generally.

Something further than the status of the material as a Part 6 statement – and the associated loss of the ability to cross-examine the statement maker⁸ – is required in order to establish unreliability. The manner in which the evidence was obtained has been cited as one factor that is potentially fatal to the reliability of the material.⁹

Interests of justice and other matters

While courts have paid particular regard to the question of reliability,¹⁰ it has also been acknowledged (particularly in more recent authority) that the language of s98 is sufficiently broad to allow for the consideration of other matters.

In *R v Adcock* [2016] QCA 264, Morrison JA (with whose reasons the court agreed), stated at [70] that s98 “goes beyond ‘reliability’ and embraces exclusion in the interests of justice, and for reasons of unfairness and public policy”.

Kylie Downes QC is a Brisbane barrister and member of the *Proctor* editorial committee. Kurt Stoyke is a Brisbane barrister.

Notes

¹ The judge in *Christie* did not in fact state in the ratio of his decision that the relevant evidence could be excluded. His Honour simply suggested that the prosecution not lead it. Later decisions confirmed the courts’ discretion to exclude.

² *R v Hasler, ex parte Attorney-General* [1987] 1 Qd R 239 at 251 per Thomas J; which was applied in *R v CBL; R v BCT* [2014] 2 Qd R 331.

³ See, for example, *R v FAR* [1996] 2 Qd R 49 at 61 per Davies JA.

⁴ *R v D* [2003] QCA 151 at [18] per Davies JA.

⁵ *R v FQ* [2008] QCA 68 at [35] per Holmes JA (as her Honour then was).

⁶ *R v FQ* [2008] QCA 68 at [6] per McMurdo P.

⁷ *R v FAR* [1996] 2 Qd R 49 at 61 per Pincus JA.

⁸ *Supetina Pty Limited v Lombok Pty Limited* (1984) 5 FCR 439 at 446. In *Attorney-General for the State of Qld v Harvey* (2012) 263FLR 433, Martin J observed that the lack of cross-examination may actually operate to the advantage of the party responding to the Part 6 material, as that party could raise inconsistencies in submission, and the party relying on the Part 6 material would not be in a position to cure the inconsistencies by way of re-examination.

⁹ *R v Morris, ex parte Attorney-General* [1996] 2 Qd R 68 at 75 per Dowsett J.

¹⁰ See, for the Court of Appeal’s earlier position on the matter, the judgment of Davies JA in *R v FAR* [1996] 2 Qd R 49 at 61, in which his Honour stated (with Pincus JA agreeing) that reliability would almost always be the central question.

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This month, we profile four QLS Senior Counsellors in the Southport region – Warwick Jones, Ross Lee, Andrew Moloney and Bill Potts.



Warwick Jones

Warwick is a founding and senior partner of Jones Mitchell Lawyers and is a QLS accredited specialist in family law.

What motivated you to become a QLS Senior Counsellor?

When I commenced my current practice in 1990, it was the first exclusively family law specialist practice in Australia. Having studied medicine before law, I accept that my caring role of 'lawyer as peacemaker' makes me not a doctor, but the nearest thing this family lawyer can be.

What is the best part about being a QLS Senior Counsellor?

Getting to talk to other lawyers, often outside my normal family law sphere.

What do you like to do during your time off?

Family, surfing and travelling.

What is your favourite area of practice?

Family law.

Can you provide an overview on your experience as a QLS Senior Counsellor?

It is gratifying to be able to help fellow lawyers and colleagues (rather than simply family law clients) and give them some relief from the stress or pressure of the problem that caused them to seek help/advice in the first place.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

Don't get 'pigeonholed'. Try to get as much practice and experience in as many areas of law as possible, before you determine what area is best for you.

What do you like about your region?

The Gold Coast is 'beautiful one day, perfect the next'; seeing the GC's rapid growth (second fastest growing city in Australia) and positive developments.



Ross Lee

Ross is principal of Lee Lawyers and has strong practice experience in insurance and compensation claims, and is accredited as an ANZII Certified Insurance Professional.

What motivated you to become a QLS Senior Counsellor?

I knew and respected several counsellors as an early career lawyer, including Bill Potts, Rick Jones and Brian Cronin. Shortly after starting my own firm, I called Brian about a matter. He was very helpful and provided me with a practical way forward.

What is the best part about being a QLS Senior Counsellor?

It's just helping a fellow practitioner in need, especially new principals and early career lawyers. Much of what I've done is simply confirm a colleague's gut feeling – they tend to be pretty accurate.

What do you like to do during your time off?

Hanging out with my family and friends. It's good to have most of my family nearby and our kids to be close to their grandparents.

What is your favourite area of practice?

Insurance and civil dispute resolution because it's 'people law'. I like anything to do with helping folks, face to face.

Can you provide an overview on your experience as a QLS Senior Counsellor?

For me it's very positive and just an extension of being involved with colleagues generally.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

Balance your life: work hard but enjoy family and friends, healthy lifestyle and the little things.

What do you like about your region?

I especially like the Gold Coast way of enthusiasm and initiative. We are more neighbourly than some may appreciate, too.



To learn more about QLS Senior Counsellors, see qls.com.au > QLS Ethics Centre > QLS Senior Counsellors. Contact details for QLS Senior Counsellors are listed at the back of each edition of Proctor.



**Andrew
Moloney**

Andrew is a legal practice director at Moloney MacCallum Lawyers and has been involved in criminal law for more than 25 years. He is a member of the QLS Criminal Law Committee.

What motivated you to become a QLS Senior Counsellor?

I chose to become a QLS Senior Counsellor because I found a legal career can be daunting, difficult and stressful, for anyone, young or old. I wanted to use my knowledge and experience to help others (particularly those in regional areas) in the profession.

What is the best part about being a QLS Senior Counsellor?

Helping others with serious problems in a practical way. In addition, you can stop simple problems blowing up into big problems.

What do you like to do during your time off?

I am a keen touch football player and play as often as the body allows at my age. I have discovered hot yoga in the last 15 months, and it has helped me greatly.

What is your favourite area of practice?

I am a QLS accredited specialist in criminal law.

Can you provide an overview on your experience as a QLS Senior Counsellor?

I have really enjoyed the role. I didn't realise, before I started as a QLS Senior Counsellor, the large range of dilemmas that a solicitor can face in day-to-day practice.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

Seek advice when you need it but, more importantly, when you get it, follow that advice.

What do you like about your region?

I have made my career on the Gold Coast and have raised a family here. The stereotyping in the press about the negatives of the Gold Coast is irritating.



**Bill
Potts**

Bill Potts is one of Queensland's most senior criminal defence practitioners and the immediate past president of Queensland Law Society. He is a founding director of Potts Lawyers and has been a QLS Senior Counsellor for 21 years.

What motivated you to become a QLS Senior Counsellor?

I was approached by the president of the day about being appointed. I realised that it was important to me to put back into the profession. Although I thought I may have been too young, I soon realised that I could offer practical guidance.

What is the best part about being a QLS Senior Counsellor?

I enjoy helping solicitors. The QLS Senior Counsellors' role is about listening and then responding with thoughtful guidance. I get great satisfaction from the role.

What do you like to do during your time off?

I enjoy reading, walking and swimming.

What is your favourite area of practice?

Criminal law and occupational disciplinary issues.

Can you provide an overview on your experience as a QLS Senior Counsellor?

I help solicitors with understanding the criminal process, whether it is for them or their clients.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

Be kind to yourself, the practice of law requires perseverance, tolerance and ethics. If in doubt seek advice from colleagues, QLS Senior Counsellors or those who love you.

What do you like about your city/region?

The vibrancy of both the Gold Coast and Brisbane.

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Court of Appeal judgments

1-30 June 2017

with Bruce Godfrey



Civil appeals

Stuart v Queensland Building and Construction Commission [2017] QCA 115, 2 June 2017

Application for Leave *Queensland Civil and Administrative Tribunal Act* – where the applicant seeks leave to appeal against a decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal dismissing an application for costs – where s150 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCATA) limits appeals to the Court of Appeal to three matters: (a) decisions to refuse an application for leave to appeal to the appeal tribunal; (b) a cost-amount decision; (c) the final decision – where this is not an application for leave to appeal against a refusal of leave to appeal to the Appeal Tribunal; nor does it concern a cost-amount decision which is defined as a decision of the tribunal about the amount of costs fixed or assessed under s107 of the Act – where the expression ‘the final decision’ is defined in the Act’s Dictionary to mean the tribunal’s decision that “finally decides the matters the subject of the proceeding” – where the natural meaning of this expression when applied to the Appeal Tribunal would not include a costs order made when allowing or dismissing an appeal – where a costs decision is an ancillary decision made pursuant to the statutory power to award costs and which is a power conferred by s102 QCATA – where an order of the Appeal Tribunal dismissing an application for costs is not an order that can be made the subject of an appeal to this court under s150 QCATA – where one of the objects of the Act set out in s3(b) is to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick – where it would not tend to promote this object if decisions other than final decisions could be made the subject of an appeal to the Court of Appeal and indeed, it would be inconsistent with s100 of the Act, that the tribunal should be a low-cost jurisdiction – where this is a hard case – where the applicant was the subject of a complaint that proved to be unfounded and the original complainants were not prepared to put their own money at risk in pursuing their grievance – where, having won against the authority, the applicant is now out of pocket for a very substantial sum – where the respondent did not take any point about the jurisdiction of this court to hear the application for leave to appeal against the costs order – where the point was raised by the court at the hearing of the matter – where substantial costs were incurred in arguing issues about costs in the tribunal when this court lacked jurisdiction to decide those issues – where in the circumstances the parties should bear their costs.

Application refused. No order as to costs.

Watney v Kencian & Anor [2017] QCA 116, 6 June 2016

Application for Leave s118 DCA (Civil) – where the applicant, a private school principal, sued the respondents for defamation over a letter which was published to the director-general of the Queensland Department of Education, and republished to the chairperson of the Non-State Schools Accreditation Board – where the applicant alleged that the publication conveyed a number of meanings about him – where the jury found the publication conveyed the meanings, but found that none of the meanings were defamatory – where the applicant submits that the jury’s findings that none of the meanings were defamatory were perverse – where having regard to the character and seriousness of each imputation and the context in which the imputations were conveyed, each part of Question 3 compelled an affirmative answer – whether the findings that none of the proven meanings were defamatory were ones that no reasonable jury could make – where the issue for the jury was not whether the published matter in fact caused actual injury to the plaintiff’s reputation, it was the *tendency* of the proven meaning to affect reputation – where in answering each part of Question 3 in accordance with the trial judge’s directions, the jury was required to consider the likely effect of each imputation on a hypothetical reader (which Question 3 described as “the ordinary reasonable reader”) – where an ordinary, reasonable reader would inevitably think less of someone about whom such imputations were conveyed unless something in the context of the matter complained of suggested otherwise – where the fact that an ordinary, reasonable reader would have understood that the letter was written by a parent about the conduct of the school and that there was a history to the matter that resulted in the parent being dissatisfied with the outcome of the school’s investigation did not lessen the force of the things which the jury found the letter imputed about the applicant – where the fact that the letter was written by a parent, possibly over-excited out of a desire to protect a daughter, and asking for an investigation, did not alter the defamatory character of the meanings it conveyed about the applicant – where it is concluded that the letter’s context, including its annexures and the matters pointed to by the respondents in submissions, did little to supplement the imputations that the jury found were conveyed by it – where in the circumstances, a substantial injustice was occasioned to the applicant when judgment was entered for the respondents on the basis of the negative answers to Question 3 – where leave to appeal should be granted to correct that substantial injustice, and the appeal allowed – where the usual order in a case like this would be to set aside the judgment in favour of the

respondents, and order a new trial, restricted to the pleaded defences of qualified privilege and honest opinion and, if applicable, damages – where the respondents resist an order for a retrial, and invoke a principle derived from *Jameel v Dow Jones & Co Inc* [2005] QB 946 in support of an order the proceeding be permanently stayed – whether the court should decline to order a retrial based on the principle of proportionality – where it is inappropriate and unnecessary for this court to decide in this case whether the *Jameel* principle should be adopted.

Leave to appeal granted. Appeal allowed. Judgment entered on 3 August 2016 be set aside. The findings of the jury in answer to Questions 3(a) to 3(f) inclusive be set aside and affirmative answers be substituted for each of those answers. There be a new trial limited to the availability of defences of qualified privilege and honest opinion and, if applicable, damages. The respondents pay the applicant’s costs of the appeal, including the application for leave to appeal. Costs of and incidental to the proceeding at first instance be reserved to await the outcome of a new trial or further order in the event the matter does not proceed to trial.

Allianz Australia Insurance Limited v Mashaghati [2017] QCA 127, 9 June 2017

General Civil Appeal – where the respondent was injured in a motor vehicle accident for which the appellant admitted liability – where the respondent instructed two medical experts to observe the trial – where the respondent tendered fresh reports written by these experts midway through the trial – where the appellant objected to the admission of these fresh reports – where the trial judge admitted these reports into evidence at the trial – where these reports were relied upon by the trial judge in evaluating quantum – where the appellant claims that the admission of these reports midway through the trial was unfair – where it has rightly been said the spirit of the *Uniform Civil Procedure Rules 1999* (Qld) that is applicable in personal injury cases is that they require the parties to put their cards on the table and, indeed, to put the cards on the table face up – where the insistence in these rules upon timely and full disclosure of medical reports and evidence is shown by the restriction upon the court’s discretion to permit the calling or the tendering of evidence which has not been identified in a party’s statement of loss and damage – where rule 548(4)(c) restricts the exercise of discretion to cases in which such an applicant has shown a ‘special reason’ why non-compliant evidence should be admitted – where in this case the expert evidence on both sides related to examinations of the plaintiff which had been undertaken in 2012 and 2013 – where having regard to the quantum involved in the case it would not have been economically

practical to consider sending medical experts to Germany to examine the plaintiff – where there was no suggestion that any proper examination could not have been conducted by video conference – where in this case there was not merely the failure by the plaintiff to explain the omission to conduct an examination by video link prior to the trial – where the crucial fact here is that this procedure was adopted behind the back of the defendant's representatives – where Dr Mathew has stated that he was contacted on the morning of the second day of the trial and invited by the plaintiff's solicitors to attend court "for the purpose of observing Mr Mashaghati's state of mind" – where he did so while the plaintiff's representatives failed to disclose his presence to their colleagues representing the defendant – where it is difficult to avoid the inference that the failure to disclose his presence was purely tactical – where no explanation was offered to the trial judge for the failure to inform the appellant's legal representatives about the respondent's intention to instruct Dr Mathew and Ms Anderson to sit in court to observe the plaintiff giving evidence, nor has any explanation been offered to this court for that failure – where notwithstanding these matters, the trial judge gave leave to the respondent to tender the fresh reports – where for a number of reasons his Honour's discretion miscarried – where his Honour appears to have proceeded upon the basis that the applicable rule was rule 427 – where in this case, however, the relevant non-disclosure was a failure to disclose the report in the plaintiff's statement of loss and damage as required under rule 547 – where prohibition against the use of such a report is contained not in rule 427 but in rule 548(4) – where to overcome that absolute prohibition against admission into evidence an applicant for leave must establish a 'special reason' – where his Honour did not turn his mind to that issue and, consequently, did not find that any special reason had been established – where this was a material error of law that vitiated the exercise of discretion – where the consequences for the appellant of admitting the evidence were serious – where the evidence sought to be tendered by the respondent was undoubtedly relevant and, apart from the effect of rule 548(4), admissible – where the respondent's legal representatives' deliberate non-disclosure meant that those opinions, which were crucial to the outcome of the case, would, if the evidence was admitted, be placed before the trial judge for his consideration without the benefit of comment upon them by the appellant's experts – where admission of this evidence not only denied the appellant an opportunity to meet new evidence by its own evidence but also denied the court the benefit of such evidence – where the trial judge failed to take this highly material consideration into account – where his Honour was of the view that, because it was known before the hearing commenced that the respondent's credit would be the subject of a serious challenge by the appellant, and because the plaintiff and his representatives "were less equipped and were only left with the trial to meet what may first emerge during the plaintiff's evidence" the plaintiff's legal representatives were justified in the course they took – where that is the case in any trial of any kind in which a witness' credit is expected to be attacked – where it cannot

possibly constitute a basis for the exercise of discretion under rule 548(4) – where remarks by the trial judge appeared to comprehend that Ms Anderson's fresh report had particular value to the decision-making process because her opinions favouring the respondent's case were based upon recent observations that she had made and which had been shared by the trial judge – where, however, the problem with this as a rationale for the admission of the evidence is that it defines precisely the correlative disadvantage suffered by the appellant – where rather than constituting a basis upon which to admit the evidence, it constituted a reason to reject it – where there was a further problem in the conduct of the trial – where once the judge had made his decision to admit the evidence of Dr Mathew and Ms Anderson, counsel for the appellant applied for an adjournment, which was refused – where the rules under which such litigation is conducted create a reasonable expectation that parties will not engage in conduct such as retaining medical experts to make secret observations with the intention of tendering late reports – where no rational barrister would have expected his opponent to conduct the case in the manner in which this case was conducted for the respondent – where the trial judge was in error in thinking that the appellant's legal representative's failure to require its experts to attend court or the experts' own failure on their own initiative to do so justified a refusal of an adjournment – where his Honour's view that any prejudice could be overcome by "any diligent expert in the fields of psychiatry and clinical neuropsychology" failed to address the nature of the prejudice that resulted – where as a consequence, the matters that his Honour took into account did not constitute a basis upon which to refuse to grant an adjournment, rather, they constituted a reason to grant one – where the refusal of the adjournment constituted, in the circumstances of this particular case, a denial of procedural fairness to the defendant.

Appeal allowed. Orders made on 29 September 2016 be set aside. Order that there be a retrial. Costs. (Brief)

Leneghan v Legal Services Commissioner
[2017] QCA 137, 20 June 2017

Disciplinary Proceedings – where the respondent filed a Discipline Application alleging six charges under the *Legal Profession Act 2007* (Qld) (the Act) – where Charge 2 alleged a failure by the appellant to disclose in writing as soon as practicable a substantial change in the range of fees to be charged for work performed, contrary to s315 of the Act – whether s315 of the Act could apply to the appellant – where there can be no question, as the appellant correctly submitted, that Charge 2, as formulated, concerned a charge of contravention by the appellant of s315 – where as the appellant further submitted, although the tribunal found that Charge 2 had been established, it did not find that the appellant had breached s315, and it could not, in any event, have so found, since s315 applied only to a 'law practice', which the appellant was not – where it was submitted that the tribunal did not refer to other evidence that the appellant was not held out as more than a salaried partner – where the tribunal's failure to refer to



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that evidence may be considered in the context that it did not find it necessary to consider the extended liability of a 'principal' partner under s701; it made no finding that the law practice's contravention of s315 resulted in the appellant thereby being liable as a 'principal' of the legal practice – where accordingly, insofar as Charge 2 was to be construed as alleging a contravention by the appellant of s315, it was misconceived – where no such finding was made, nor was it able to be made, as no obligation was imposed on the appellant under s315 – where that the charge alleged was one that was not capable of being made out is a sufficient basis for allowing the appeal and setting aside the order made as to Charge 2 – whether Charge 2 could be determined as if it were one brought under s316 of the Act – where it is no answer to argue that, whatever the deficiencies in the formulation of the charge, they were overcome in this case by the manner in which the tribunal approached the charge; that is, as if it alleged a contravention of s316(7) by the appellant – where it is pertinent to note that it was accepted by all at first instance that, as a matter of law, the case had to be brought within the actual terms of the charges to be made out – where the appellant's counsel alerted the respondent to the failure to properly draw the charges but no amendment was made – where the erroneous formulation of the charge as one of a contravention of s315 and the consequent lack of relevant particulars of the appellant's 'involvement' in the contravention of s315 for the purposes of s316(7) meant that the appellant was not properly informed of the case against him – whether a rehearing which would allow amendment of Charge 2 would result in injustice – where the word 'aware' in s315 is unambiguous – where nothing in the text, context or purpose of s315 indicates that instead it means 'should be aware' – where the provision does not require the disclosure of that which is unknown – where the questions then were whether, and if so when, the appellant was aware of that which would trigger the obligation of further disclosure under s315 – where without a finding about when the appellant had become aware of the change from the original estimate, the tribunal could not assess whether there had been a failure to make further disclosure 'as soon as reasonably practicable' – where in essence, the tribunal concluded that there was a contravention of s315 upon the basis of an awareness which the appellant should have had, but did not have, at an earlier time – where that was a legal error – where it is unnecessary for this court to decide whether the tribunal was correct in holding that a practitioner could be "involved in the failure" under s316(7) without knowing of the facts constituting the elements of the contravention of s315 – where it may be noted that the tribunal's interpretation of s316(7) was, in part at least, a result of its interpretation of 'aware' in s315 – where once it is recognised that 'aware' means 'actually knows' in s315, the tribunal's interpretation of s316(7) is more difficult to accept.

Appeal allowed. Order of the tribunal upholding Charge 2 and finding the conduct of the appellant to be unsatisfactory professional conduct is set aside. Charge 2 is dismissed. Written submissions to be provided on costs.

Rogers v Roche & Ors [2017] QCA 145, 23 June 2016, Judgment delivered 16 December 2016; Further Order delivered 23 June 2017

General Civil Appeal – Further Order – where judgment in the appeal was given – where the parties were given leave to make submissions about costs – where the respondents' primary contention was that the costs in the Trial Division and in the appeal should be costs in the cause – where the appellant contended that he is entitled to costs orders that reflect his substantial success – where the appellant argued that he is entitled to recover costs for the time occupied in the litigation under the *Chorley* exception (*London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872) – whether, under a costs order against a party to a proceeding in favour of another party, who is an Australian lawyer entitled to practise in the court, the lawyer is entitled to recover professional costs referable to relevant items in the relevant scale of costs – whether the regulatory scheme in Queensland is materially different in effect from the legislative provision considered in *Guss v Veenhuizen* (No.2) (1976) 136 CLR 47 – where the regulatory scheme is more detailed and complex, but nothing in it detracts in a material way from the generality of the power conferred upon courts by s15 of the *Civil Proceedings Act 2011* (Qld) to order a party to proceedings to pay another party's costs – where, unless and until the High Court decides to the contrary or the regulatory scheme is reformed in a material way, where a costs order is made by a court under s15 of the *Civil Proceedings Act 2011* against a party to a proceeding in favour of another party who is an Australian lawyer entitled to practise in the court, the lawyer is entitled to recover costs described in applicable items in the relevant scale of costs.

The respondents should pay 60% of the appellant's costs of the respondents' application in the Trial Division and the appellant's costs of the appeal, to be assessed on the standard basis.

KMB v Legal Practitioners Admissions Board (Queensland) [2017] QCA 146, 27 June 2016

General Civil Appeal – Further Order – where the appellant sought a declaration that certain matters would not affect the board's assessment as to whether he is a fit and proper person for admission – where the board refused to grant such a declaration – where the appellant successfully appealed to the Court of Appeal and the court granted that declaration – where the appellant made further submissions seeking the costs of the appeal – where the board enjoys an immunity from civil liability conferred by s707 of the *Legal Profession Act 2007* (Qld) (LPA) – where the respondent disputed the appellant's submission that the board should be liable for the costs of the appeal – where it is not the role of the board to decide the fate of applications for admission or even to decide in any determinative way whether or not an applicant for admission is or is not a fit and proper person to be admitted – where its role is, and can only be, as s39 LPA declares, to help the Supreme Court – where in fulfilling this role, the board may form an opinion about the character of an applicant for admission and communicate that opinion to the court in order to assist it – where the board's function in determining whether to make a declaration

under s32 is *quasi-judicial* in some respects – where the Legal Practitioners Admissions Board is a statutory adjunct to the court in the sense that it performs for the court the function of determining, among other things, whether an applicant is a fit and proper person to be admitted – where it has been given a statutory right to appear before the court and to be heard by the Supreme Court by way of assistance – where it is a genuine *amicus curiae* – where accordingly, it would be incongruous if the Act were to provide for an award of costs to be made against the board when the board is present to 'help' the court – where the board is not in any sense whatsoever a party to litigation – where it appears by reason of its statutory entitlement to appear and to be heard upon a question in which the court is interested for its own purposes – where the immunity against civil liability conferred by s707 LPA renders the board immune against an order for costs of a proceeding at which the board appears before the court as part of its function provided the order sought is not based upon the board's dishonesty or negligence – where the function of the board as the court's helper, and the status of the board's members as honorary members fulfilling a professional duty, strongly favours a construction of s707 which would immunise the members of the board against an order for costs in such cases – where the board's function remains, even when appearing before the court, "to help the Supreme Court by making a recommendation about each application for admission" in terms of s39(1) LPA – where the board neither wins nor loses an appeal such as this, nor does the appellant.

No order as to the costs of the appeal.

Criminal appeals

R v Collins [2017] QCA 113, 2 June 2017

Appeal against Conviction – where the appellant was convicted by jury of one count of indecent assault, two counts of indecent assault with a circumstance of aggravation and one count of rape – where the complainant's mother was called as a witness at the appellant's committal hearing and later at his trial – where the account which the complainant's mother gave in evidence in chief at the trial regarding a telephone conversation with the complainant was different to the account which she gave on the same topic at the committal hearing – where the witness admitted the making of the prior inconsistent statement and the accuracy of the committal hearing transcript – whether the prior inconsistent statement was proved by virtue of either s18 or s19 of the *Evidence Act 1977* (Qld) – where the appellant contended that Ms M's "previous statement" had been "proved by virtue of" s19 because: (1) her evidence was recorded; (2) it was reduced to writing in the form of a transcript which formed part of the depositions; (3) it was relative to the subject matter of the proceeding; (4) Ms M's attention was called to those parts of the transcript that were to be used for the purpose of contradicting her; and (5) when she "accepted the accuracy of the transcript, her evidence in chief was contradicted" – where based on that series of propositions, the appellant argued that the jury had been misdirected as to the use to which the version which Ms M gave at the committal hearing

of the telephone conversation with her daughter could be put and, further, that a substantial miscarriage of justice occurred by reason of that misdirection – where unlike the section that precedes them, ss18 and 19 are concerned with cross-examination and, in particular, cross-examination on a ‘former’ or ‘previous’ statement made by the witness relative to the subject matter of the proceeding – where the term, ‘statement’, is defined to mean “any representation of fact, whether made in words or otherwise and whether made by a person, computer or otherwise” and because the expression, ‘former statement’, is otherwise unqualified in s18, that provision has application to both oral and written statements – where as such, s19 comprehends a previous statement relative to the subject matter of the proceeding that was either (1) made by the witness or (2) expressed by the witness and reduced to writing by another – where a workable distinction between ss18 and 19 might be that the whole focus of s18 is on what must be established by the cross-examiner before a previous inconsistent statement of the witness may be proved in evidence and the primary focus of s19 is on relieving the cross-examiner from the common law obligation of having to place the previous statement before the witness: s19(1) – where it is only when the cross-examiner intends to contradict the witness by the previous statement that s19(1A) goes on to lay down what must be done before such “contradictory proof can be given” – where in this sense, then, s19 may be regarded as supplementary to s18 – where s18 is “essentially declaratory of the common law”:

Nicholls v The Queen (2005) 219 CLR 196 – where by its terms, proof that a witness has made a prior inconsistent statement can only be given if the witness “does not distinctly admit that the witness has made such statement” and if the former statement is inconsistent with “the present testimony of the witness” – where inconsistency must be demonstrated – where importantly, “before such proof can be given”, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and the witness must be asked whether he or she made the statement – where in the first-mentioned respect, the particular occasion on which the previous statement was made must be identified in sufficient detail to provide the witness with an opportunity to distinctly admit (or not) that he or she made the statement – where is only if the witness fails to distinctly admit its making that the previous inconsistent statement will be receivable in evidence under s18 – where at this point, where the previous inconsistent statement is in writing and its authenticity is either not in issue or has been satisfactorily established by other evidence, it (or, more precisely, the parts of it that are inconsistent with the witness’ present testimony and relative to the subject matter of the proceeding) may be tendered – where in the case of an oral previous inconsistent statement, evidence will need to be adduced as to its making – where it is important to a proper consideration of this appeal to keep in mind that part of the rationale for the common law rule requiring the laying of a proper foundation before receiving a

prior inconsistent statement into evidence is that, if the witness admits that the statement was made, proof of the statement becomes unnecessary – where it follows that, where the making of the previous inconsistent statement is admitted by the witness, and regardless of whether the witness goes further to admit that its contents are true, the statement cannot be proved under s18 – where indeed, to the point of this appeal, it will only be where the prior statement was in writing or reduced to writing and it is intended to contradict the witness by that writing pursuant to s19(1A) that it can be proved and then received into evidence – where it follows that where, as here, the witness distinctly admits the making of a previous inconsistent statement and does not dispute the truth or accuracy of that earlier statement, it cannot be proved in evidence pursuant to either s18 or s19 – where in particular, s19(1A) can have no operation because there is nothing left to contradict ‘by the writing’ and no other basis to advance it into evidence – when a witness admits the making of a previous statement which is inconsistent with his or her earlier testimony at trial (in which case, s18 cannot apply) and goes further to adopt or accept the truth of the relevant portions of that previous statement (in which case, there is no work for s19(1A) to do), those portions become part of the witness’ oral testimony at trial – where once the witness, having had the relevant facts in the previous inconsistent statement drawn to his or her attention during the course of cross-examination, confirms in court that they are true, that confirmation is every bit as much evidence of those facts as the evidence the

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witness gave in evidence in chief on the same topic – where it is therefore important to distinguish between a case where a witness, in cross-examination, does no more than admit that he or she has made a prior inconsistent statement and a case where the witness goes further to swear that the relevant facts in the prior inconsistent statement are true or, expressed another way, that they are accurate – where thus, if the maker of a prior inconsistent statement adopts as true (or accurate) the facts stated in it, the “witness, by doing so, will be giving evidence of those facts, which evidence can be relied on independently of the statement” – where it will be for the jury to make their own assessment of the testimony in order to decide whether the version first advanced in evidence in chief or the version from the prior inconsistent statement which the witness adopted during cross-examination ought to be accepted – where as to this, the jury’s task is no different to that which would confront them when assessing testimony that is internally inconsistent – where it was submitted on behalf of the appellant that when Ms M “accepted the accuracy of the transcript [of her committal hearing evidence], her evidence in chief was contradicted” – where in this case, as soon as Ms M “accepted the accuracy of the transcript”, any conflict disappeared where there was no longer any need to contradict her testimony and, for that reason, no proper basis to advance ‘the writing’ into evidence – where put another way, her committal evidence could not have been tendered even had that been attempted – where the account Ms M gave at the trial of the telephone conversation with her daughter was preliminary complaint evidence – where if accepted by the jury, her evidence could not establish the truth of any of the underlying facts – where at best it went to establish the *consistency* in the making of the complaint by her daughter and, if accepted by the jury, it may have supported her daughter’s credit – where in other words, although Ms M could give evidence of what she was told, her evidence was not capable of proving that what she was told was true – where the appellant’s counsel sought to have the witness: (1) distinctly admit that she had given evidence at the committal hearing relative to the subject matter of the proceeding; (2) agree that the parts the witness was taken to were more reliable than her trial testimony because her “memory was better back in 2007”; and (3) accept that those parts were true (or accurate), that is to say, that they “represented the best recollection [she] could give to the court” – where all three objectives were achieved – where Ms M’s adoption of what she had said in evidence at the committal hearing became part of her oral testimony at the trial – where the result was that there was before the jury two competing accounts from Ms M as to what her daughter had said on 12 January 2000 and, assuming Ms M was otherwise accepted as a witness of truth, it was for the jury to decide which account to accept – where follows that it would be wrong to direct the jury that Ms M’s evidence could only be used to assess her credit because that evidence was also available to assess the consistency of the complainant’s complaint and, in that sense, to assess her credit – where his Honour erred when he instructed the jury that “what the mother said to the committal court seven years ago is not evidence of the fact that the complainant said

those things to her” – where although it was correct to direct the jury, as his Honour immediately did thereafter, that such evidence is “not evidence of the truth of the contents of the statement”, Ms M’s prior account had become part of her oral testimony at trial and was therefore available for use by the jury when considering what the complainant said by way of preliminary complaint to her mother – where thus the use to which the evidence could be put extended beyond merely using it to assess Ms M’s credit; if accepted, it was also available to determine the consistency or otherwise of the preliminary complaint and, therefore, the complainant’s credit – where there was a misdirection – where the Crown conceded on the hearing of the appeal that, if the appellant’s argument was accepted, it could not be submitted that there had been no substantial miscarriage of justice – where, although the argument that Ms M’s prior account was ‘proved by virtue of’ s19 for the purposes and within the meaning of s101 cannot be accepted, the point, that the prior account was available to the jury to assess the credit of the complainant, was still good – where the court is of the opinion that, notwithstanding the misdirection, no substantial miscarriage of justice has actually occurred – where the guilt of the appellant on each of the offences for which he was convicted was proved beyond reasonable doubt.

Appeal dismissed.

R v Huston [2017] QCA 121, 9 June 2017

Appeal against Conviction – where the appellant enlisted the help of a co-offender to rob the victim, a seller of the drug ice – where there was evidence that the appellant intended to assault the victim and rob him but did not intend to use a weapon – where there was evidence that the appellant told the co-offender not to bring a knife – where the co-offender nonetheless brought the knife and stabbed the victim, who ultimately died – where there was evidence that the appellant was upset and angry at his co-offender after the stabbing – where s8 of the *Criminal Code* (Qld) extends criminal liability where two or more persons have a common intention to prosecute an unlawful purpose and the commission of an offence is a ‘probable consequence’ of that purpose – where the trial judge, in summing up, referred to the test under s8 as requiring the offence to be a ‘likely’ consequence of the unlawful purpose, rather than a ‘probable consequence’ – where the trial judge nevertheless, on 24 occasions, referred to the correct test of ‘probable consequence’ – where the expression ‘a probable consequence’ in s8 of the code does not mean ‘on the balance of probabilities’ – whilst the interchange of the words ‘probable’ and ‘likely’ may, in certain circumstances, be unhelpful, there is no reasonable prospect the jury would have understood, by the use of such words in this summing up, that the consequence under s8 of the *Criminal Code* merely had to be ‘likely’ rather than ‘probable’ – where the trial judge correctly stated the requirements of s8 *Criminal Code* (Qld) according to the Bench book direction and asked the jury to consider what the common intention to prosecute an unlawful purpose was, whether the offence of murder was committed in the prosecution of that purpose, and whether that offence was of such a nature that its commission

was a probable consequence of the prosecution of that purpose – where there was a live issue between the prosecution and the defence about what the common unlawful purpose was – where the judge did not identify the evidence which had to be considered specifically on the question of what the common purpose was – where it was possible that the common intention had ‘prescribed a restriction’ on the nature of the offence which the secondary offender was deemed to have committed because the jury may have concluded that the common purpose was to rob without the use of a weapon and that murder was not a probable consequence of that common purpose – where this was a case, like *R v Keenan* (2009) 236 CLR 397 and others, where the common purpose question required the jury to determine the level of violence which was commonly intended – where a miscarriage of justice has occurred here because it is reasonably possible that the failure to direct properly on this question may have affected the verdict – where there is a risk that the appellant was thereby found guilty of an offence which was beyond the scope of his criminal responsibility from the prosecution of a common purpose.

Leave to amend the notice of appeal granted.

Appeal be allowed and the conviction be set aside. The appellant be retried.

R v White & Sao Pedro Fishing Pty Ltd; Ex parte Director of Public Prosecutions (Cth) [2017] QCA 140, 21 June 2017

Sentence Appeals by Director of Public Prosecutions (Cth); Application for Leave to Adduce Further Evidence – where the respondents pleaded guilty to offences concerning carrying out commercial fishing activities in a Commonwealth reserve – where the respondents were fined, with the sentencing judge concluding that an overall fine of \$10,000 was appropriate and sentenced Sao Pedro Fishing to a fine of \$5000 in respect of the four counts against it, and Mr White to a fine of \$5000 in respect of the four counts against him – where the Commonwealth Director of Public Prosecutions appeals from both sentences – whether the sentencing judge erred in finding that the respondent in CA No.204 of 2016 was negligent, not reckless – where there was not the slightest suggestion of Mr White’s having made a deliberate choice to run the risk of being detected, with a view to making a profit – where the evidence did not support the lack of concern as to whether the fishing was taking place in a marine park which would be necessary to justify the characterisation that Mr White was being reckless as to where he set the Sao Pedro’s line – where on both appeals, the Crown’s case is that the sentence was manifestly inadequate – where in order to succeed, the Crown must persuade this court that it should infer the existence of error – where the considerations which were explicitly taken into account by the sentencing judge were all considerations which were open on the evidence before the sentencing judge (indeed no case of specific error was argued other than that raised by the first ground of appeal) and which were strong pointers towards the correctness of the sentencing judge’s conclusion that Mr White’s criminality was not great – where the sentencing judge did not explicitly advert to Mr White’s financial circumstances and the question of the effect that

any sentence or order under consideration would have on any of the person's family or dependants – where such material as there was touching upon that consideration also supported choosing a fine at the low end of the spectrum – where inference of error is not supported by the fact that the sentencing judge determined an appropriate fine and then split it between Sao Pedro Fishing and Mr White – where the Crown submitted that the failure to mention the fact that the maximum penalty for a corporate offender is five times the maximum penalty for a natural person, and the imposition of identical fines, lends weight to the submission that error must be inferred – where that submission is rejected – where the explanation for the approach which his Honour took is that in a closely held family company like this, it would be important to avoid a sentence which would in substance amount to punishing Mr White twice for what was essentially the same criminal conduct – where finally, it remains to consider comparable cases and the extent to which they operate as a yardstick against which to examine the proposed sentence – where the Crown conceded, correctly, that there were limited comparable sentences for offences contrary to s354A(5) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and none at an intermediate appellate level, and that the cases were of limited assistance – where ultimately, it is clear from the sentencing remarks that, as he was obliged to do, the sentencing judge took into consideration personal factors unique to Mr White as well as the issues of punishment, general deterrence and denunciation – where the sentencing judge gave greater weight to the former

factors than to the latter factors – where another judge might have accorded greater weight to the latter factors and imposed a greater fine – where however, when all relevant circumstances are taken into account, the sentence cannot be said to be so lenient as to justify the inference that the exercise of the sentencing discretion miscarried.

The respondent's application to adduce further evidence is refused. The appeals are dismissed.

R v Frith [2017] QCA 143, 23 June 2017

Sentence Application – where the applicant was sentenced to imprisonment for six years for trafficking in dangerous drugs – where the application of *Drugs Misuse Act 1986* (Qld) s5(2) meant that the applicant must then serve 80% of that sentence – where the applicant contends that the sentence imposed is manifestly excessive – where the applicant contends that the sentencing judge failed to have proper regard to the applicant's rehabilitation – where the applicant contends that the sentencing judge erred in imposing a sentence which enlivened the provisions of *Drugs Misuse Act 1986* (Qld) s5(2) – where the evidence before the sentencing Judge demonstrated that the applicant had been rehabilitated – where absent a positive finding of successful rehabilitation, the sentence of six years' imprisonment imposed on the applicant for the offence of trafficking was within a proper exercise of the sentencing discretion – where notwithstanding that situation, the sentencing judge made no finding that the applicant was rehabilitated from his drug use – where despite

acknowledging the impressiveness of the material placed before the court and dismissing a lurking fear as to its genuineness, the sentencing judge sentenced the applicant on the basis he had taken 'steps towards' and had made 'efforts at' rehabilitation – where that conclusion failed to give proper weight to the evidence of rehabilitation – where an appropriate exercise of the sentencing discretion must give sufficient recognition to successful rehabilitation – where the failure to make findings in relation to that material meant the sentencing judge did not properly give due regard to the applicant's rehabilitation when exercising the sentencing discretion – where the presence of rehabilitation was central to the applicant's submissions – where the failure to make a finding of rehabilitation, in those particular circumstances, constituted an error which infected the exercise of the sentencing discretion – where as that discretion has miscarried, it is necessary to re-exercise the sentencing discretion.

Leave to appeal be granted. The appeal against sentence be allowed. Sentence varied by substituting a sentence of five years, suspended after the applicant has served 3.5 years, for an operational period of five years, on the count of trafficking in dangerous drugs. Other sentences imposed on 24 November 2016 are otherwise confirmed.

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 scld.org.au/caselaw/QCA. For detailed information, please consult the reasons for judgment.

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Mitchell has joined the team at RSM in Brisbane, leading the Restructuring & Recovery division in Queensland.



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Discourteous and offensive behaviour

by Stafford Shepherd



To be honest and courteous in all our dealings in the course of legal practice is a fundamental ethical duty.¹

In April 2013, the Supreme Court of Western Australia removed from the roll a practitioner who had been involved in a number of instances of discourteous and offensive behaviour towards a judicial officer, members of the police and court staff. The practitioner was also found to have knowingly (or alternatively, recklessly) misled a court.

In *Legal Profession Complaints Committee v in de Braekt*,² five incidents of misconduct were identified as constituting misconduct by the practitioner. Four incidents were concerned with discourteous and offensive behaviour. The incidents included: persistent discourtesy and offensiveness to a magistrate, discourteous and offensive emails to police officers, and discourteous and abusive actions directed towards a security supervisor at a court.

The Legal Profession Complaints Committee (the tribunal) found that while the finding of misconduct relating to these incidents would not, if each were viewed in isolation, warrant the removal of the practitioner from the roll, when viewed collectively, they “demonstrated a character and course of conduct on the part of the practitioner which was inconsistent with

the privileges of practice as a member of the legal profession”.³ The tribunal noted⁴:

“...the maintenance of appropriate relationships between legal practitioners and others engaged in the proper functioning of the criminal justice system, such as police officers and court officers, was a matter of considerable importance ... the practitioner’s conduct seriously undermined the reputation of the legal profession.”

The Full Bench of the Supreme Court held:⁵

“Discourtesy, in many instances, will be insufficient to warrant a finding of professional misconduct. Even less frequently will that discourtesy result in, or contribute to, a finding that the practitioner should be removed from the Roll. However, the importance of courtesy in the legal system, and in the relationship between the legal profession, the court system, and general public should not be understated. While a practitioner should advocate fearlessly on behalf of the interests of their client, that is not an excuse for discourtesy ... Discourtesy can undermine the reputation and standing of the legal profession in our community, and the efficient function of the legal system itself.”

The Full Court agreed with the tribunal that the acts of discourtesy and the offensive nature of the practitioner’s conduct “demonstrated a persistent disregard for the duties of a legal practitioner, the professional standards

expected within the legal profession, and the need to maintain and respect the goodwill and trust reposed in the legal profession by the general public, and by those in regular contact with the legal profession, such as police and court staff”.⁶

The Full Court held that it was in the public interest, both in terms of the protection of the public and the maintenance of the reputation and standards of the legal profession, for the practitioner’s name to be removed from the roll.

If we are discourteous or use offensive tactics, the gains (if any) will only be momentary. Such actions undermine our effectiveness in promoting our clients’ best interests.⁷ We can be “fair and tough-minded while being unfailingly courteous”.⁸ We are at our best when we are civil, courteous, and fair-minded.

Stafford Shepherd is director of the QLS Ethics Centre.

Notes

¹ *Australian Solicitors Conduct Rules 2012* (ASCR), Rule 4.1.2.

² [2013] WASC 124.

³ *Ibid*, [17].

⁴ *Ibid*.

⁵ *Ibid*, [28]-[29].

⁶ *Ibid*, [34].

⁷ ASCR, Rule 4.1.1.

⁸ Justice Matthew B Durrant, ‘Views from the Bench: Civility and Advocacy’ (2001) 14 *Utah Bar J* 35.

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05 QLS Touch Football Tournament 2017

8.30am-5pm

Newmarket, Brisbane

The QLS Touch Football Tournament is back! This hotly contested tournament will be a six-a-side mixed competition with a cap of 14 players per team. The winning team receives the tournament trophy and, more importantly, bragging rights! Show your prowess on the field, make stronger connections with your colleagues, network with peers and have lots of fun!

08 Introduction to Conveyancing

8-9 | 8.30am-5pm Tue, 8.30am-3.50pm Wed | 10 CPD

Law Society House, Brisbane

Designed for junior legal staff and practitioners in need of a refresher, this comprehensive workshop covers the fundamentals of conveyancing. Over two days our experts will break down the jargon and provide the key concepts and knowledge needed to confidently glide through the conveyancing process.

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11 Government Lawyers Conference 2017

8.20am-5.35pm | 7 CPD

Law Society House, Brisbane

This is the key professional development event in the Queensland calendar for legal professionals in the government, policy and administrative spheres, whether in federal, state or local jurisdictions, or in-house with government owned corporations and universities. Hear from, and network with, experts in their field and colleagues from a range of government departments.

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17 QLS Roadshow: Law in the Tropics

17-18 | 12-5.30pm Thu, 8am-5pm Fri

10 CPD (full Roadshow)

Sheraton Grand Mirage Resort, Port Douglas

QLS is bringing local and intrastate experts to you for a premium professional development event set against the magnificent backdrop of Port Douglas! Receive the latest in legal updates, enhance your essential skills in practical workshops, and pick up the tools and techniques you need to advance the way you practise.

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22 Essentials: Rules of Evidence in Practice

8.30am-12pm | 3 CPD

Law Society House, Brisbane

Especially designed for legal practitioners looking for a refresher on evidence law, this half-day seminar provides an opportunity to improve your understanding of the practical application of the rules of evidence to civil proceedings.

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25 Essentials: Credit Management – Engagement Letter to Cash

9am-12.30pm | 3 CPD

Law Society House, Brisbane

Anyone who earns business income needs to understand the fundamentals of credit management for their business. This Essentials workshop is designed for sole practitioners and micro to small-sized firms, as well as finance managers and office managers of law practices involved in the credit management of their practices. Whether you are looking to understand the fundamentals or are seeking a refresher on the topic, this workshop will help you to better assess risk and collect with confidence.

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30 Modern Advocate Lecture Series 2017, Lecture three

6-7.30pm | 0.5 CPD

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Featuring eminent members of the judiciary, each presentation in the highly regarded Modern Advocate Lecture Series deals with practical advocacy relevant to junior practitioners. Lecture three for 2017 will be delivered by Justice Peter Applegarth. Networking drinks and canapés will be provided after the presentation.

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28 Sep Masterclass: Insolvency



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Stephan Cerni



Tai Laves



Stephanie Murphy



Rebecca Petrie



Nicole Treacey



Ann Watson



Fiona Sears



Regina Michaelatos



Navinder Sathar

Career moves

Batch Mewing Lawyers

Batch Mewing Lawyers has announced two promotions and the appointment of **Chris Hargreaves** as a special counsel.

Chris has more than 10 years' experience in dispute resolution, with a focus on litigation, insolvency and securities. This includes advising construction industry participants on subcontractor charges, the operation of PPSA legislation and the impact of insolvency events.

Ben McIlroy, who has been promoted to associate, is a dual Australia and UK-qualified solicitor who joined the firm last year and has experience in construction arbitration and litigation.

Julian Pryde, who has also been promoted to associate, has experience in front-end construction and engineering projects, as well as claims brought under the *Building and Construction Industry Payments Act 2004 (Qld)*.

Bennett & Philp Lawyers

Bennett & Philp Lawyers has announced three key promotions, with **Nicole Murdoch** and **Maurice Hannan** appointed as directors and **Sandy Zhang** promoted to associate.

Nicole, who was a senior associate in the intellectual property team, is also a qualified electrical engineer and trade mark attorney. She has been involved in complex matters, especially relating to privacy law, information security and trade marks, designs, copyright and patents infringement.

Maurice, previously a special counsel in the business and commercial team, focuses on commercial, health and franchising law. With dual qualifications in law and pharmacy, he assists clients in the health industry as well as advising on business and property sales and acquisitions, negotiation and preparation of leases to lessors and lessees, and franchising advice and contractual arrangements.

Sandy, who has contributed to the intellectual property team, speaks fluent Mandarin and plays a significant role in establishing legal and business opportunities for the firm in China.

BTLawyers

Samantha Cathcart and **Tristan Higham** have joined BTLawyers as associates.

Samantha, a member of the insurance litigation team, advises and represents insurers and employers in workers' compensation claims across an array of industries.

Tristan, who works predominately in personal injuries law, has experience in complex catastrophic claims and will now provide advice to employers and in workers' compensation claims.

King & Wood Mallesons

King & Wood Mallesons has announced the promotion of seven lawyers to the firm's Australian partnership, including Brisbane mergers and acquisitions lawyer **Kirsten Bowe**.

Kirsten focuses on large IT and commercial transactions, as well as intellectual property and consumer law, procurement, outsourcing and business transformation projects.

Five of the seven new partners are female, bringing the firm's total number of female partners in Australia to 45, or 27% of the total partnership.

Other promotions in King & Wood Mallesons's Brisbane office include **Priscilla Lal** (dispute resolution) and **Chris Pitson** (projects and real estate) as special counsel, and **Stephan Cerni** (banking and finance), **Tai Laves** (projects and real estate), **Stephanie Murphy** (projects and real estate) and **Rebecca Petrie** (projects and real estate) as senior associates.

Macpherson Kelley

Macpherson Kelley has announced 15 promotions nationally, including that of **Nicole Treacey** to senior associate. Nicole practises in property and construction law in the firm's Brisbane office.

McCullough Robertson

McCullough Robertson has welcomed two new partners, four special counsel and two senior associates.

New partners **Aaron Dahl** and **Peter Williams** work in the corporate and commercial sphere. Aaron began with the firm's graduate program in 2006, rotating litigation and dispute resolution and aged care before settling on corporate advisory. He focuses on capital raisings, mergers and acquisitions, business and share sales and ASX listings to public, private and non-profit clients.



Sandy Zhang



Samantha Cathcart



Tristan Higham



Kirsten Bowe



Priscilla Lai



Chris Pitson



Aaron Dahl



Peter Williams



Lydia Daly



Frances Fredriksen



Lyndon Garbutt



Melinda Peters



Dan Rawlings



Christine Smith



Morgan Jane



Chad Gear



Dr Garry Hamilton



Gregory Grunert

Peter also began as a graduate in 2008 and worked with law firms in London between 2011 and 2015 before returning as a senior associate in the commercial team. He focuses on unregulated mergers and acquisitions (including the sale and acquisition of major mining and resource assets), establishment and operation of joint ventures, infrastructure arrangements and long-term operating contracts.

Also at McCullough Robertson, **Lydia Daly** (employment relations and safety), **Frances Fredriksen** (estates), **Lyndon Garbutt** (tax) and **Melinda Peters** (commercial) have been promoted to special counsel, while **Jeremy Perier** (intellectual property and competition) and **Ann Watson** (litigation and dispute resolution) have been promoted to senior associate.

Mullins Lawyers

Mullins Lawyers has announced the promotion of property lawyer **Fiona Sears** to partner. Fiona has more than 14 years' experience in retail and commercial leasing transactions advising large institutional landlords, national corporate and retail tenants, not-for-profit organisations, property developers and individual property owners. Since joining the property and hospitality team in 2008, she has worked on multiple large leasing projects, including shopping centre wholesale redevelopments.

NB Lawyers

NB Lawyers has welcomed **Regina Michaletos**, a nationally accredited mediator, as a special counsel in its commercial division (including litigation and ADR).

Nyst Legal

Nyst Legal has expanded its litigation and criminal law practices, welcoming newly admitted Queensland lawyer **Navrinder Sathar** and senior associate **Dan Rawlings**.

Navrinder is also an advocate and solicitor to the High Court of Malaya and brings international experience in civil litigation, succession law, construction and insolvency law. He is bilingual in his native Malay and English, and can converse in Cantonese, Mandarin, Hindi and Punjabi.

Dan has more than 16 years' post-admission experience in criminal defence law, having practised in both New Zealand and Australia. He joins the criminal, traffic and corporate regulatory team following some years working as a barrister and solicitor for the Aboriginal Legal Service in Western Australia.

O'Reilly Workplace Law

Christine Smith has joined O'Reilly Workplace Law as a solicitor. Christine is an expert in workplace relations with extensive experience advising and providing representation in work health and safety law, and in all areas of employment law, including employee entitlements, enterprise agreements, workplace investigations, redundancy, unfair dismissal, general protections, discrimination, confidential information, post-employment restraints, and work health and safety incidents, investigations and prosecutions.

Stewart Family Law

Morgan Jane, who recently joined the team at Stewart Family Law, has been practising in family law since her admission in 2014 and has specific experience in domestic violence and child protection matters.

Taylor David Lawyers

Taylor David Lawyers has announced the appointment of **Chad Gear** as partner to lead the commercial litigation team. Chad has focused in commercial litigation and insolvency for more than 10 years, acting in a range of corporate, commercial and insolvency disputes.

The firm has also announced the appointment of **Dr Garry Hamilton** as a senior legal consultant. As a highly experienced and recognised reconstruction and insolvency lawyer, Garry has been involved in many of the largest insolvencies in the country within the past 20 years.

Gregory Grunert has also been appointed as a solicitor in the Brisbane office. Greg works in the firm's insolvency and commercial litigation team. Greg previously worked for counsel, and at national and international firms.

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.

New QLS members

Anita Aarons, Bancroft Lawyers

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Zameer Ali, PricewaterhouseCoopers

Katrina Alidenes, Minter Ellison

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Maria Anciaes Felicio, Felicio Law Firm

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Craig Barker, Australian Defence Force

Lauren Barton, The Law Office

Adine Barton, Australian Building and Construction Commission

Russell Baxter, Russell J. Baxter

Kevin Beattie, Gall Standfield & Smith

Harry Bechmann, non-practising firm

Vincent Berry, Sajen Legal

Amanda Bibi, BDO

John Bingham, Law At Work

Wensley Bitton, Queensland Health – Legal Unit

Julie Bligh, Wilson/Ryan/Grose

Matthew Bode, Colin Biggers & Paisley Pty Ltd

Mark Bolster, Bolster & Co.

Tegan Boorman, Radcliff Taylor Lawyers

Vittorio Borzillo, Colin Biggers & Paisley Pty Ltd

Laura Britton, Maurice Blackburn Pty Ltd

Steve Brkic, Enterprise Law

Penelope Brooke, Piper Alderman

Andrew Brown, Brown & Associates Commercial Lawyers

Venetia Brown, McCullough Robertson

Justine Burgess, Shine Lawyers

Jodie Burnett, GM Lawyers

Eric Butler, Armstrong Legal

Clare Byrne, Dwyer Law Group Pty Ltd

Benjamin Caldwell, Colin Biggers & Paisley Pty Ltd

Sarah Camm, non-practising firm

William Campbell, Budd & Piper

Matthew Castley, Colin Biggers & Paisley Pty Ltd

Marjorie Cawayan, Spink Legal

Gabrielle Chaikin, Charltons

David Clarke, David S Clarke & Associates

Kellie Clee, HopgoodGanim

Nardine Collier, Collier Lawyers

Nicole Collins, Rees R. & Sydney Jones

Robina Cox, RVC Legal

David Crompton, Church & Grace

David Crossan, Stacks/the Law Firm

Zung Dang, Salvo Migration

Frederick Darby, McLaughlins

Darren Davies, The Uniting Church in Australia Property Trust (Q.)

Tracey de Simone, Department of Communities, Child Safety and Disability Services

Tiffany Dinh, Shine Lawyers

Anna Domalewski, Rice Naughton McCarthy Family Lawyers

Elodie Drevelle, Bond University

Rachel Duckworth, Go To Court

Nigel Duffield, Corrs Chambers Westgarth

Timothy Eakin, Eakin McCaffery Cox

Victoria Eastwood, Hogan Stanton Lawyers

Matthew Eden, Royal Military College of Australia

Asha Egan, Small Myers Hughes Lawyers

Lisa Fairley, Russell-Cook LLP

Jessica Fantin, PricewaterhouseCoopers

Andrea Ferle, Stephens & Tozer

Amaya Fernandez, Ashurst Australia

Nicholas Filippow, O'Keefe Mahoney Bennett

David Fitzgerald, Macrossan & Amiet

Jameelie Fletchett, Great Barrier Reef Marine Park Authority

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Paul Fordyce, Devenish Law

Tyron Foster, Shine Lawyers

Mark Foy, Nexus Law Group

Sally Fraser, PPM Tax & Legal Pty Ltd

Alexandra Gaggin, K&L Gates

Phoebee Gahan, Norton Rose Fulbright

Freya Gardon, Brisbane Family Law Centre

Ian Gladstone, Ian Gladstone Solicitor

Mark Glaser, Glaser Lawyers

Jerry Gomez, Gomez Lawyers

Emma Gordon, Eversheds Sutherland (International) LLP

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The challenge of change for lawyers

You can cope, mindfully

The legal profession is on the same roller-coaster of unprecedented levels of change as the rest of the world.

We think we are used to change because that is the nature of law, thanks to the changing landscapes of courts, the business environment, technology and government. Now we are also experiencing a world in which books, DVDs, taxis and hotels are being replaced by alternatives.

Banks are experiencing pressures from peer-to-peer lending and accountants from software which can rapidly provide the same advice that previously only they could.

What is changing for lawyers?

The following five trends are impacting the legal profession:¹

1. Outsourcing

This trend has already impacted other professions and is now impacting the legal profession. Some paralegal and litigation support tasks such as coding and document review are being outsourced, saving time, money and the need for some skills.

2. Artificial intelligence

Legal research has been done online for some time, but artificial intelligence will only become more clever at predicting rulings, conducting research and making recommendations. Although it will make our roles much more efficient, it will also come with a whole new set of challenges in how we charge for time and how we ensure the advice we are giving is correct.

3. Social media

It has now become part of how we market our legal services, how we recruit, how we conduct research into the people we are recruiting, and how we gather evidence to support our client's position. It is so ingrained in some of our lives that one lawyer I know reaches for her smartphone in the morning to check social media before she says good morning to her partner.

4. A multi-generational workforce

For the first time we now have four generations working side by side in the legal workspace. We have traditionalists, baby boomers, generation X and generation Y working together. People are now working longer, and it means in some places there is a generation gap of more than 50 years between the youngest and the oldest employees.

5. Alternative billing models

The traditional billable hours model was not popular with our clients and was seen as rewarding inefficiency. New models for billing have arrived and will continue to evolve as the use of artificial intelligence becomes more common in our roles. You will be faced with difficult choices about how much to bill a client when what would previously have taken you 30 hours of detailed research can now be done in minutes thanks to intelligent software. Clients are also seeking certainty in relation to their legal fees for the year and in some cases would prefer to be paying a monthly retainer, rather than paying for piecemeal legal advice.

Global research by Deloitte has found other issues from a worldwide survey of legal clients. Nearly half of all legal service providers interviewed indicated that regulatory compliance, mediation and arbitration, and litigation were growing areas in their businesses. However, the same researchers also found that loyalty to a law firm was not guaranteed. More than half (55%) of those interviewed said they had recently reviewed their arrangement with their legal supplier or would be doing so within 12 months.

Deloitte also found that what people wanted from their law firm was now changing. Instead of pure legal advice, clients also wanted their lawyers to have more industry, commercial or non-legal expertise. They thought it would be helpful if they had digital, data, privacy and cyber security skills, and if they were more proactive with their knowledge-sharing. This may eventually result in law firms having partnering arrangements with other professions so that client needs can be more fully serviced.

Interesting changes that have already happened

What changes have I already seen professionals undertake? Here are some:

- A not-for-profit family law firm.
- The use of emoticons in all emails by one law firm because putting a happy face at the end of an email makes sure the other party knows you aren't looking to escalate a dispute.
- Networking with other professionals such as accountants, bankers, financial planners, insurance brokers, health professionals or anyone else who may potentially make referrals to you (and vice versa). This networking is being done not only face to face over coffee, but also via monthly seminars to which clients and a range of professionals are invited. In one case, each month three people are invited to make a 10-minute pitch on what they are doing, to see if there are avenues for working together with anyone else in the room.
- One firm has a 'digital festival' every six months to keep clients up to date on some of the latest technology they could be using in their business and any legal issues associated with it.
- Apps which help people track what stage their file is at (for example, a text alert when a search is sent off to a government department or when a lease is sent to a tenant), when their next meeting is, the government bodies they will need for different issues, etc.
- Strategic positioning of law offices into non-traditional physical locations such as health or innovation hubs.

How to mindfully embrace the change

As lawyers, we are traditional and conservative, and now we are being asked to embrace some of the biggest changes our profession has seen in years if we are to stay relevant. Change requires energy, motivation and some level of discomfort as we head into uncharted waters.

Change can be a good thing. If you are old enough to remember cassette tapes you had to wind with a pencil when they broke,

What do you do when faced with what seems like a world of change in the legal profession? **Petris Lapis** has some suggestions.



you will know what I am talking about. Have you ever sold your home? After a frenzy of cleaning, moving and fixing things you'd tolerated for years, you stepped back the day before the first open home, looked at this sparkling house and wondered why you ever wanted to leave such a lovely place?

Your legal practice could probably benefit from the same treatment. Take this disruption as an opportunity to practise innovation and see new ways of operating which you hadn't previously paid attention to.

Mindfulness asks that you acknowledge and accept the need for change. It is neither good nor bad; it is what it is. The coming changes are inevitable and we can embrace and prepare for them or we can practise denial and play catch-up later.

Acceptance requires us to look honestly at where we are and then start gently taking the steps we need to get to where we want to be. Tackling change in one huge leap is overwhelming, but if you can find one small thing to change at a time, you will slowly but surely absorb the changes that are coming. Start with something easy, such as meeting or ringing one new contact a week who could be part of your referral network.

Each time you take a step, however small, towards changing the way your business is done, your brain gives you a squirt of its internal reward drug, dopamine. Each time you take a step towards a goal or cross something off your 'to do' list, dopamine is also the reason you get that nice little 'feel good'. Open a Twitter account and get the 'feel good'. Set up a Facebook page for your business and

feel good. Look at ways of expanding your network of referrals and feel good. Start small. Start anywhere, and begin embracing the journey of change that is coming our way.

Remember, it is neither good nor bad; it is merely an opportunity.

Petris Lapis holds commerce and law degrees from the University of Queensland and a Master of Laws from the Queensland University of Technology. She is also trained as a Master Results Coach, Master Performance Consultant and a Master of Ericsonian Hypnosis. See petrislapis.com.

Note

¹ legalscoops.com/7-trends-changing-legal-industry/, Deloitte Future Trends For Legal Services Global research study, June 2016, thebalance.com/trends-reshaping-legal-industry-2164337.

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Cutting through fear of criticism or failure

A practice idea that might make a big difference



Fear of criticism and fear of failure are common concerns of early career lawyers.

The sources of these fears are divergent, but there are common threads. Graduates will often have been the brightest and the best at school, where failure was a rare experience.

Also, university learning style is structured and predictable, compared with the pressurised environment of practice (including budgets). So it isn't hard to see how some new lawyers find the transition to practice difficult.

The elements of these fears can be quite pernicious... fear of criticism technically leading to drafting paralysis, for example, a two-hour sentence, and fear of criticism personally – *Why doesn't he like me? Nothing I ever do is right.*

Supervisors can respond in three ways. The first is just to relentlessly send signals that the junior isn't good enough. Some will cope with this. Most will be driven over a cliff. Some may even leave the profession. The second is the babysitter approach – being *too understanding* – perhaps lowering

production standards, technical standards and time disciplines. The third way is *the Goldilocks solution* – in which through choice of style and language, you try to reduce the experienced fear while maintaining work standards and productivity.

So here's a few tips that might help...

Try not to lose patience and revert to *just do this*. Explaining *why* not only quadruples speed of learning, but it is a style of shared conversation which can reduce personal fear as well. Unfortunately, *why* takes a little longer. And copping out under deadlines is too easy. Try the Socratic approach... *Why do we say that in the opening sentence?* Over time, your trainee will develop a habit of intuitively asking the right questions and be much more self-sustaining.

Secondly, remember your three relationships with your producers – you are a friend, a professional colleague, and a boss. If you just choose *boss* (particularly command and control), you will drive all your millennials out the door. Know which hat to wear in different situations. Being a friend and a colleague at the right times can cut through fear.

Thirdly, explain your attitude to *having a go*. What you are trying to do here is remove/

reduce the anticipation of negative feedback, while building confidence. Let them know that you don't expect perfection but that they must have a go. Apply a clear time deadline. Review the work calmly and methodically. This approach allows the young lawyer to concentrate on the task, instead of the consequences of underachieving.

Finally, get into the habit of using positive language. Rather than say "I'll be really disappointed if...", say "I'll be really happy when..."

Nothing in this article says you can't have robust conversations when they're needed. Nor does it say that you can't maintain your standards. The reality is that some people simply won't come up to scratch. But to get the best out of any cohort, it's just a question of the style and language you use, and the environment you create.

Dr Peter Lynch
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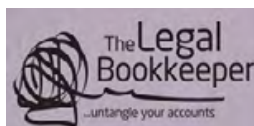
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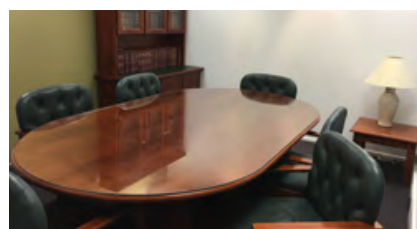
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Would anyone know of the whereabouts of the
will for the late **John Kenneth James Barrett**,
DOB 19/09/1947, from Sunnybank Hills.
Please contact Suzanne Northcott
on 0447 722 760.

Missing wills (continued)

Would any practitioner holding any document or
having knowledge of the existence of a Will or
any other document purporting to embody the
testamentary intentions of **CRANSTON
ROBERT DOYLE** who died on 24 October 2016
late of Cabin 20, Canberra South Motor Park,
250 Canberra Ave, Symonston, ACT. Please
contact Brenda Leiper of the Public Trustee
and Guardian, PO Box 221, Civic Square ACT
2608 Tel: (02) 6207 9800 Fax (02) 6207 9811
or email: ptg@act.gov.au.

KEITH HARRISON

Would any person or firm holding or knowing
the whereabouts of a Will of the above (formerly
of NZ but last known addresses
98-100 Alfred St or 31 Barlee St, both in
St George, 4487; date of death 29 April 2017)
please contact Gary Knight of Patient &
Williams, Lawyers, Christchurch NZ. Contact
addresses P.O. Box 25276 Christchurch 8144
NZ, (0064).3.365.5791 or gary@pandw.co.nz.

Would any person or firm holding or knowing the
whereabouts of a Will of the late **Michael Allen
Howells**, born 27 June 1972 in Tasmania and
died 10 June 2017 in Tasmania but previously
residing in Ballarat, Townsville and Tasmania,
please contact Jeanette Clinton on 0417534114
or keryn.welch6@gmail.com.

If any person or firm holding or knowing of any
Wills of the late **JANINA POKOJ** please contact
Chloe Kopilovic of Sajen Legal, Level 3, 360
Queen Street, Brisbane QLD 4000
Ph (07) 5443 6600 | mail@sajenlegal.com.au

Would any person or firm holding or knowing
the whereabouts of a will of the late **Adrian
Richard Ross** of 27 Livistona Drive, Doonan
Qld. who was born 7 June 1961 and who died
on either 13 or 14 June 2017, please contact
Cartwrights Lawyers on 07 5447 3122 or
admin@cartlaw.com.au.

Would any person or firm holding or knowing
the whereabouts of a will of the late **Victor
Bruce Dawson** of Noosa Aged Care Facility,
119 Mooindil St, Tewantin Qld (previously of 1
Columbia Drive, Sunrise Beach Qld), who died
on 12 May 2017 contact Cartwrights Lawyers
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The chianti fiasco

with Matthew Dunn



Chianti, the ubiquitous red wine of Tuscany, is often called the ‘Bordeaux of Italy’ on account of the volume of red wine sent into world markets, and was once synonymous with a funny-shaped wine bottle known as a fiasco.

Fiasco. The word has two meanings: a disaster or complete failure, usually of the political kind; and an ancient form of Italian wine bottle. The fiasco bottle is a squat bulbous bottle coming to a thin neck and is particularly well known for its half coverage with cord or dried reeds making a flat base. It is such an old form of bottle that Botticelli painted two cord bound fiascos front and centre in his painting *Feast in the Forest* (1483).

Over the years the fiasco became the wine bottle of Italy for regional and famous wines. By mid-last century, the fiasco had come to symbolise Italian wine, while red and white-checked tablecloths came to symbolise the décor, as in the American-Italian restaurant stereotype immortalised by Billy Joel in *Scenes from an Italian Restaurant* (1977). The bottle shape was iconic and by the time Billy Joel was singing of his New York, the contents of the fiasco were also iconically chianti.

Chianti. Chianti is a red wine, mainly from the Tuscany region of Italy. Like Bordeaux, the region where chianti can be made is large and there are more specific local wines which are often of higher quality and limited to coming from a named locality.

The wine itself is predominantly made from sangiovese grapes with a small permitted addition of local red grape canaiolo and other French-origin red grapes as blenders. Depending on the regulations for the area, chianti has cropping density limits, minimum alcohol levels and mandatory oak aging periods (between three and 10 months).

The biggest growing region is the Chinati Denominazione di Origine Controllata e Garantita (Chianti DOCG), covering vineyards anywhere between the west of the province of Pisa, the Florentine hills in the north, the province of Arezzo in the east, and the hills of Siena in the south. The more salubrious Chianti Classico DOCG is in the heart of Tuscany, lying between the cities of Florence and Siena. This region was first set by the Medici Grand Duke of Tuscany Cosimo III in 1716.

Within the broader Chianti DOCG there are eight subregions which can append their names to the wine to demonstrate a more local and purportedly superior product. The most notable include the Colli Fiorentini south of Florence; Chianti Rufina in the north-east

around the commune of Rufina, and the Colli Senesi in the Siena hills. The Colli Senesi also takes in two areas where some of the best Italian wines are made – the legendary and expensive Brunello di Montalcino and Vino Nobile di Montepulciano.

Unfortunately, today's chianti production is something of, well, a fiasco.

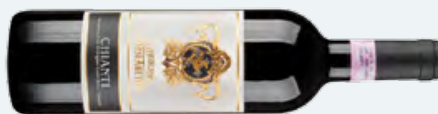
The chianti fiasco. While chianti producers have put effort into lifting their product quality, chianti suffers from a similar ill to Bordeaux. The better subregion wines tend to be costly and the general wine can be less than impressive. Under the base Chianti DOCG, the wine can be a blend from anywhere within the large demarcated region, from three-year-old vines and with only three months' aging.

As with Bordeaux, some producers appear to trade on the historic name of the region and look to volume rather than quality. The resultant chianti wines can smartly accompany a plate of pasta, but look a little thin on their own. Whenever possible, look for Chianti Classico, or Rufina if the budget permits.

The tasting



The first was the **Castellina Chianti DOCG 2014** in a beautiful fiasco and the colour of ruby port. The nose was a jammy bottled red plum with star anise. The palate was light with some acid and a delicate savoury note up front with a little red fruit.



The second was the **Viticoltori Senesi Astini Chianti DOCG 2014** which was also a ruby port colour and had a nose of violets and peppery spices. The palate was savoury Kentish cherry with some soft fruit, tannin and a firm but soft line.



The last was the **Santa Margherita Chianti Classico DOCG 2013** which was a lighter ruby port colour and had a softer nose of floral hints and some savoury spice. The palate was savoury red fruits and a fine tannin supporting the light frame of the wine through to a pleasing mid palate.

Verdict: The three wines were accessible and good expressions of the lighter weight of entry-level chianti. The firmer notes of the Senesi Astini were favoured, probably as it was closer to more familiar Australian sangiovese.

Matthew Dunn is Queensland Law Society acting CEO and government relations principal advisor.

Mould's maze

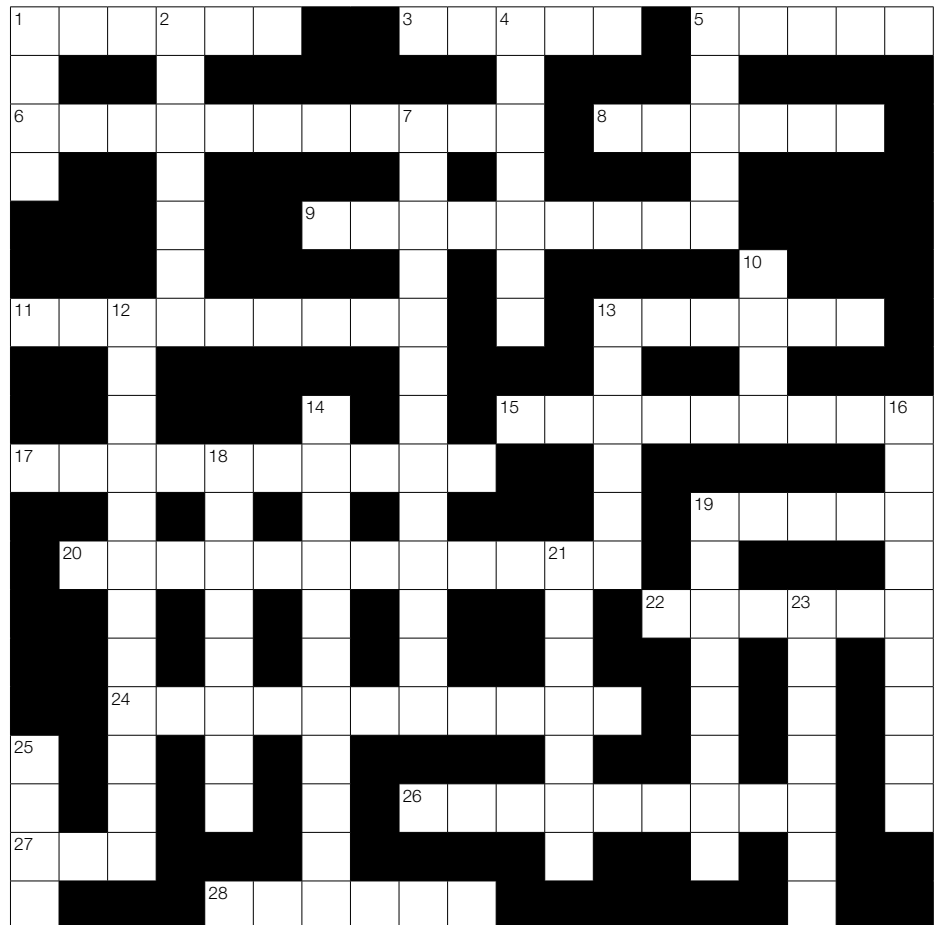
By John-Paul Mould, barrister
jpmould.com.au

Across

- 1 Improbable or untrue account. (Slang) (6)
- 3 Written defamation. (5)
- 5 Stock issued by a company; a certificate or receipt used to redeem credit. (5)
- 6 Legal system used in common law countries where two advocates represent their parties' case before an impartial tribunal. (11)
- 8 A case occurs when one court asks another superior court for its opinion on a legal question, often relating to a constitutional provision. (6)
- 9 The Australian legislatures' preferred approach to interpreting statutes. (9)
- 11 *Autodesk Inc. v Dyason* held that could subsist in electronic pulses. (9)
- 13 *Ubi jus ibi remedium* means that, where there is a right there is a (6)
- 15 A sentence served in the community under strict supervision of the parole office, correction order. (9)
- 17 A person who is not a party to the proceeding, but asks the court to make orders protecting their interests. (10)
- 19 Criminal sentences should be within to avoid appellate grounds of manifest inadequacy or excess. (5)
- 20 A form of alternative dispute resolution, especially arranged by Family Court registries. (12)
- 22 A victim statement informs the court of the personal effect of an offence. (6)
- 24 A defence of a medical practitioner denying full disclosure to a patient when such disclosure would be harmful to the patient's health or welfare, privilege. (11)
- 26 Governmental powers or functions conferred onto a specific person by name, rather than onto an office, for example, conferral of a non-judicial power onto a particular judge, *persona* (Latin) (9)
- 27 Antonym of expert. (3)
- 28 Common surname of Queensland solicitors Barry, Andrew, John and Emma, barristers Rick and Matt, former cricketer Mark and former High Court Justice Sir Alan. (6)

Down

- 1 An Attorney-General can give their to allow a person to bring court proceedings when they would not normally have a right to do so. (4)
- 2 Commonwealth and State Parliaments have power to legislate subject to the limits of the Commonwealth Constitution. (7)



- 4 A order involves a plaintiff who has succeeded against only one defendant and the court requires the plaintiff to pay the successful defendant's costs to be included in those payable to the plaintiff by the unsuccessful defendant. (7)
- 5 A complaint fails for unacceptable delay. (5)
- 7 Divorce requires an breakdown of marriage. (13)
- 10 Make an inculpatory statement, up. (Slang) (4)
- 12 Chief court registry clerk. (12)
- 13 Initial mention of a court matter, first (6)
- 14 An authoritative judicial proclamation about how a legal or factual issue in a dispute should be resolved absent coercive orders against one of the parties, judgment. (11)
- 16 Proceedings involving eviction of a tenant. (9)
- 18 A order authorises the return of children to a party's care. (8)
- 19 Proceedings involving a higher court sending proceedings back to a lower court to determine facts of a dispute. (8)
- 21 An officer or agency whose mandate has expired, *functus* (Latin) (7)
- 23 Monies owed. (7)
- 25 An indication that judgment was not given *ex tempore*, *cur. adv.* (Latin) (4)

Solution on page 60

The tradie take on time travel

Stand by for *Mad Max 6: Wombats of the Wastelands*

by Shane Budden



Recently, my wife and I decided to get our house painted, due to the fact that the previous paint had become somewhat thin, and by thin I mean transparent.

I suspect people walking past could see our silhouettes moving around inside, which was not an ideal situation, as I am not really comfortable with people knowing what goes on inside our house.

I know what you are thinking, but it is nothing like that – once you know what it is like to have kids, you are less likely to risk having any more – it is just that I would prefer our neighbours to think I am doing meaningful things like developing a perpetual motion machine or reading all seven volumes (J.B. Bury edition) of Edward Gibbons' *Decline and Fall of the Roman Empire*, rather than yelling at the kids to get off their iPads, and sitting on the couch watching MUTV¹ all day.

So, in order to maintain our hard-earned reputation in the neighbourhood ('Owners of the largest and stupidest dog in the street' two years running), my wife and I decided to have our house painted, which meant finding and engaging a licensed painter.

I realise that many people possess the necessary skills and abilities to paint their own homes, but of course I used to work for the building regulator and have seen first hand what well-meaning home owners (and very unwell-meaning unlicensed persons) can do to a home. I have seen home owners who, with little more than a paintbrush, a ladder and a 'can-do' attitude, have managed to turn neat little three-bedders into the set for the next *Mad Max* movie (*Mad Max 5: Emu Apocalypse*) so I am somewhat wary of owner-builder work, in the same sense that Taiwan is somewhat wary of China.

The only difficulty with engaging licensed tradespeople is that we have engaged them before, and like anyone who has experience in dealing with tradespeople, we approach the prospect in the same way we would approach a rabid badger who has somehow managed to obtain, and learn how to use, an AK-47.

This is not because they are bad people or do poor work – indeed, the tradies we have engaged over the years have always done very good work – but due to the fact that time for tradies is not necessarily a linear thing. They have well and truly embraced Einstein's famous theory of special relativity, which states that there is no such thing as absolute time, 'specially if you are dealing with a tradie.

Just as in our universe we cannot say that, if it is 2pm Tuesday afternoon in Brisbane it is also 2pm Tuesday afternoon on Pluto, in tradie world 2pm Tuesday afternoon can be anytime from 4pm last Monday to 1pm next Easter (indeed, the closest thing to absolute time allowed in Einstein's theory is that 2pm Tuesday afternoon will absolutely *not* be 2pm Tuesday afternoon according to your watch).

The practical effect of this theory is that site meetings with tradies are like the horizon – more of a concept than an actual thing – and much time is spent waiting for tradies to turn up, although statistically speaking you have a better chance of seeing Harold Holt.

This Tradie Time Dilation Effect (TTDE, patent pending) would not be so bad if it wasn't for the fact that tradies all sign up to the same phone plan, which gives them unlimited calls with the trade-off that the phones only function when they need to advise you that the original estimate will be exceeded by 175%. The phones automatically lock and emit a high-pitched distress signal if a tradie ever attempts to call a client to advise that the tradie will be late/isn't coming/got distracted and found themselves on holiday in Germany.

The other issue with tradies is that it is often unclear when the job is actually over, partly because the completion dates they put into contracts are as reliable as a budget estimate in an election year, but also because in our experience they leave many of their tools and materials on site long after the job – to the untrained eye – appears complete.

Under our house we still have a few tools and some building materials left over from a renovation we had done four or five years ago, and on current progress they will still be there when the Earth crashes into the sun, unless sometime before then but after our

civilisation has crumbled (I give it four years with the current Senate) future archaeologists discover rusted tools under houses and conclude that we used them as currency. ('This 'Bunnings' of which we find remains must have been one of the 'big four' banks so much of their literature mentioned," future history teachers will say, because they will be just as boring in the future as they are now.)

Obviously, I could just throw these things out in a council clean-up (after of course cutting them down to permitted size – a bizarre requirement of council clean-ups, given that if the things we throw out on clean-up days were of moderate size we would have put them in the wheelie bin years ago, but I digress). However, I am concerned that, as a solicitor, I have accepted them on bailment and cannot dispose of them without client permission (this is a real thing and the reason you can't destroy clients' documents even after seven years without permission; check ASCR rule 14 if you don't believe me).

I think the government should hold an 'abandoned tool amnesty' to address this crucial issue, although care should be taken as people might also hand in anyone wandering the streets wearing a NSW Origin jersey.

In truth, I must admit that the painters we got in did a great job and worked quickly and well, and collected the last of their equipment from our place a mere month or so after finishing, so all's well that ends well.

I should like to add that I really hope filmmakers are indeed working on *Mad Max 5: Emu Apocalypse*, as I have an idea for a sequel (*Mad Max 6: Wombats of the Wastelands*). It will involve humanity's last survivors, thousands of years from now, fighting over the few remaining caches of abandoned tools, when a mysterious stranger arrives apologising for being late and looking to give me a quote for a new pool fence.

© Shane Budden 2017. Shane Budden is a Queensland Law Society ethics solicitor.

Notes

¹ That's the Manchester United TV channel, for those who still believe that the earth is flat and footballs aren't spherical.

Contacts

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1300 367 757

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07 3842 5843

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07 3842 5962

Crossword solution from page 58

Across: 1 Furphy, 3 Libel, 5 Scrip, 6 Adversarial, 8 Stated, 9 Purposive, 11 Copyright, 13 Remedy, 15 Intensive, 17 Intervener, 19 Range, 20 Conciliation, 22 Impact, 24 Therapeutic, 26 Designata, 27 Lay, 28 Taylor.

Down: 1 Fiat, 2 Plenary, 4 Bullock, 5 Stale, 7 Irretrievable, 10 Fess, 12 Prothonotary, 13 Return, 14 Declaratory, 16 Ejectment, 18 Recovery, 19 Remittal, 21 Officio, 23 Arrears, 25 Vult.

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Legal Aid Queensland, Rockhampton
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Rate	Effective	Rate %
Standard default contract rate	1 July 2017	9.30
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 July to 2017 to 31 December 2017	7.50
Federal Court – Interest on judgment debt for half year	1 July 2017 to 31 December 2017	7.50
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 July 2017 to 31 December 2017	5.50
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 July 2017 to 31 December 2017	7.50
Court suitors rate for quarter year	1 April 2017 to 30 June 2017	0.795
Cash rate target	from 2 November 2016	1.50
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2017	7.50

Historical standard default contract rate %

Aug 2016	Sep 2016	Oct 2016	Nov 2016	Dec 2016	Jan 2017	Feb 2017	Mar 2017	Apr 2017	May 2017	June 2017	July 2017
9.35	9.35	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.30

NB: A law practice must ensure it is entitled to charge interest on outstanding legal costs and if such interest is to be calculated by reference to the Cash Rate Target, must ensure it ascertains the relevant Cash Rate Target applicable to the particular case in question. See qls.com.au > Knowledge centre > Practising resources > Interest rates any changes in rates since publication. See the Reserve Bank website – www.rba.gov.au – for historical rates.

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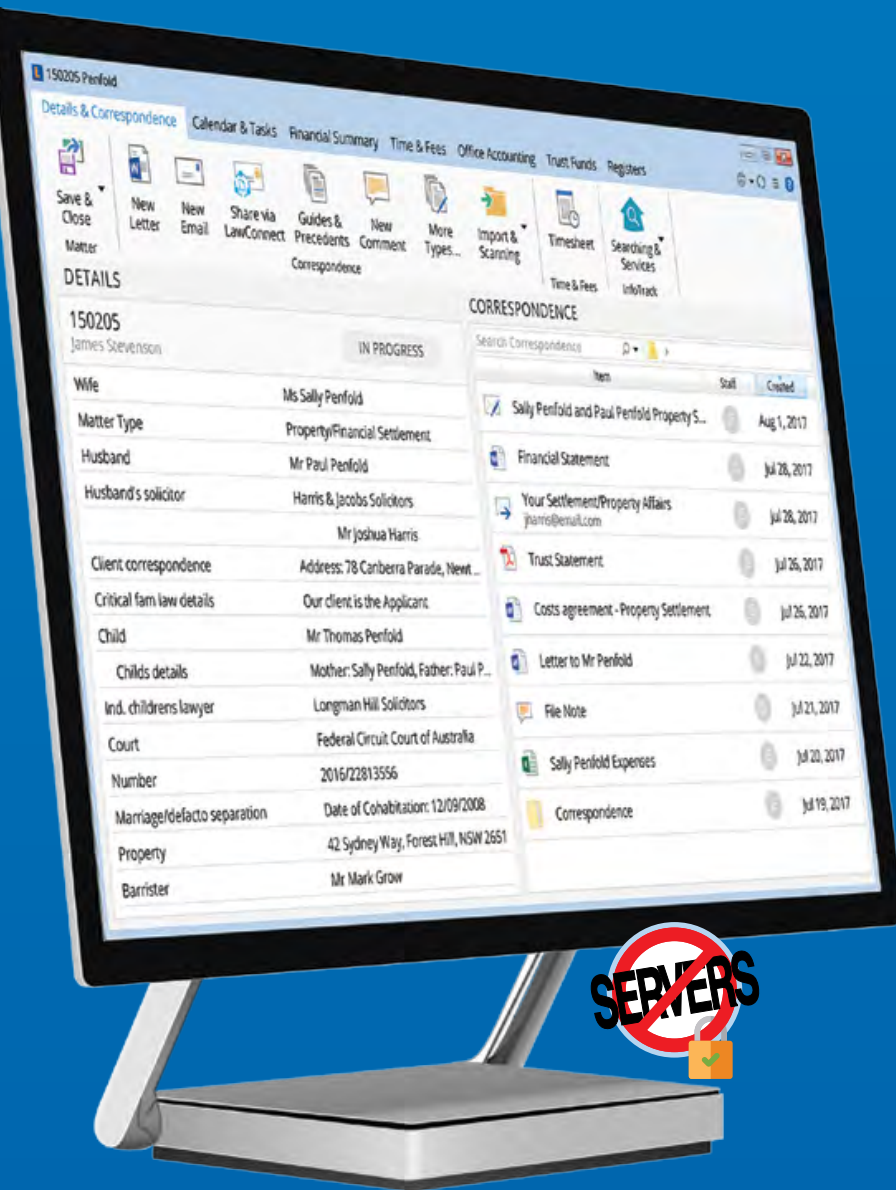
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- ✓ Billing & Time Recording
- ✓ Automated Forms
- ✓ Integrated Guides & Precedents
- ✓ Integrated Searches
- ✓ Mobile Access

\$239* per user per month

One Seamlessly Integrated Platform

*Plus GST

Contact us for an obligation free demonstration

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