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Queensland Law Society

December 2016 – Vol.36 No.11

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Looking back, looking forward

A busy year gone, another to come

At the end of the year it is traditional to look backwards, count the successes and forget the failures.

However, it's also important to look forward, and I believe our Society's future is promising.

During the year we were determined to increase our role in advocacy – with government, with media and with stakeholders – so that we could truly have a voice for good law and good lawyers.

It was a pleasure to start the year by announcing the launch of the QLS member logo, a symbol of your integrity and commitment to the professional standards that you and the Society uphold.

It didn't take long before we were down to business, establishing a Human Rights Working Group to consult with members and provide advice to Council on the question of a Queensland Human Rights Act. It was entirely appropriate that our response to the Government looked at the arguments on both sides of the debate, and there is little doubt that our comments were considered in the Premier's recent decision to proceed with this.

Speaking of our enormous efforts in presenting even-handed advocacy, I must acknowledge that both the Attorney-General and the Shadow Attorney-General have been very open to communicating with and consulting with the Society about important pieces of legislation and the profession. I thank them for allowing us many opportunities to assist in the legislative process.

Other working groups also played a prominent role in our activities this year. Our Domestic Violence Working Group put in a fantastic effort to produce the *Domestic and Family Violence Best Practice Guidelines*, an essential guide for every practitioner in this area.

And now the Reconciliation Action Plan (RAP) Working Group is making real progress with the launch of a draft RAP. Please take the opportunity to provide your feedback on this important document (qls.com.au/rap).

We campaigned tirelessly on several key issues this year. These included the critical shortage of judges in the Family Court and resultant delays in the hearing of matters, and we suggested that there was a potential to divert money received under the *Proceeds of Crime Act 2002* to address this.

We provided input on so many matters that it is impractical to list all of them here. We contributed to the Taskforce on Organised Crime, produced a Call to Parties document prior to the federal election and spoke out against proposed changes that reversed the onus of proof in the Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016. Wisely, this Bill was eventually dropped.

Many of our suggestions found their way into legislation, underscoring our aim to work for good law. The Harper review of competition policy adopted several of our proposed improvements and our recommendations were taken into account with the Government's endorsement of a hybrid scheme for the National Injury Insurance Scheme.

There were revisions to the standard REIQ contracts and we took a considered stance on equitable briefing, opting to launch the Modern Advocate Lecture Series to assist the development of relationships between the two branches of the profession.

We have done significant work done through the QLS Ethics Centre, including our Practice Support Consultancy Service. QLS has also now launched a Trust Account Consultancy. We saw a reduction of up to 20% in Lexon premiums and a 50% reduction in Legal Practitioners' Fidelity Guarantee Fund fees. And there's more to be done – watch this space!

When I took on this role at the beginning of the year, I knew it would be demanding but didn't quite realise it would often involve working weeks up to 60 or 70 hours.

It is an entirely full-time job, but there are significant pleasures, which include meeting so many members around the state. It includes speaking up on behalf of the profession and making a change, a difference in the world. My intentions next year are to not merely fade away but to continue as I promised I would in the election manifesto and work in tandem with incoming president Christine Smyth.

Over this year I have developed a much deeper understanding, and appreciation, of our Society. In one sense it reminds of an iceberg. There is only 10% that a member will see. That 'tip' may be *Proctor*, or *QLS Update*, or when you attend a professional development event.

The reality is that, like the iceberg, it is actually a very imposing bulk, through its staff, activities, events, CPD functions, regulatory functions and Council. I assure members that they are getting very good value for their money. And the thing that most people want, and the reason why they remain members, is that they believe their professional association is speaking to them and for them in a practical way to improve their businesses, to improve the profession and to stand up for the rule of law. I have been called on many times to stand up to defend the courts, to explain the courts' role, and to demonstrate the role of the Society in furthering the course of justice and the rule of law in this state.

A final note

In conclusion, I would like to wish Court of Appeal president Margaret McMurdo well in her forthcoming retirement, auspiciously timed to follow the 25th anniversary of the court. She has completed her role with intellectual rigour and great poise and dignity.

My thanks go to the many, many people I have worked with over the year. Stay happy and safe; at Christmas spend some time with family and friends, and some time reflecting on the year past and year to come. I wish you every peace, and great happiness for next year.

Bill Potts
Queensland Law Society president

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Queensland Law Society

Our year to remember

And what's in store for 2017

It's December, and I can almost hear the collective sigh of relief in Law Society House as the Christmas holiday period finally comes into focus.

It has been another big year all round, from the highly entertaining Presidential election to more mass shootings in the US and horrific terrorist attacks in Nice and Brussels.

At home, we were appalled by revelations about youth detention and so very recently saddened by the tragic Dreamworld accident. From the courts, names such as Gerard Baden-Clay and Gable Tostee were on everyone's lips.

It wasn't all bad news – this year we've welcomed the return of the Murri Court and Sentencing Advisory Council, along with a number of judicious judicial appointments.

At Queensland Law Society it's also been a big year. Some of our highlights included the launch of a new member logo, a wonderfully successful Symposium and an overall reduction in the net fees for practising lawyers. We are working hard to build on these successes next year.

The launch of our QLS Practice Support Consultancy Service was welcomed, as was the release of our *Domestic and Family Violence Best Practice Guidelines*.

We were able to provide some useful little widgets for our members – a trust accounts date reminder and our online CPD audit tool. You may have also noticed that we are focusing strongly on, and investing in, technology. These initiatives range from the introduction of information-sharing articles by The Legal Forecast in *Proctor* to an IT roadmap for the Society itself, ensuring that our systems are modern and robust in order to serve our members more efficiently.

As you'd know, we are developing a reconciliation action plan (RAP) through our RAP working group, and we have developed search warrant guidelines in association with Queensland Police Service. A draft of these is currently available for your review, with final feedback needed by 14 December.

This year has also seen some remarkable achievements in our advocacy, and our president has more to say on this in his column this month.

Of course, not everything always goes to plan. The disaster preparedness guide we are compiling is still a work in progress as we work to ensure it contains the most up-to-date and relevant guidance for members. In the meantime, as we're into a time of year when disasters sometimes occur, I'd recommend **getready.qld.gov.au** as a very useful resource.

Looking at the year ahead, there are already a number of exciting changes and events coming up.

We'll have more sessions in the Modern Advocate Lecture Series – in March, May, August and October – and kick off the year officially on 2 February with our New Year president's welcome drinks. February will also see the launch of our new QLS Roadshow program, beginning in Bundaberg.

The Legal Profession Dinner will be in early February and then there's the QLS Legal Careers Expo on 1 March, followed by QLS Symposium 2017 on 17-18 March (please look at the interview with our keynote presenter, Holly Ransom, in this issue of *Proctor*).

I'd also like to take this opportunity to announce that we have reviewed our awards program for 2017 in order to better acknowledge the great work put in by members of our profession. You'll see significant changes, beginning with the introduction of three new awards at the Legal Profession Dinner.

Awards recognising innovation in law and the community legal centre of the year, along with the announcement of an honourary life membership, will join the presentation of the President's Medal at this event. Stay tuned for more news on our revitalised awards program.

Before closing, I'll like to return briefly to 2016 to mention that this year our Christmas greetings are going out electronically, so please don't expect a card in the post! Instead, the money saved on cards and postage is being donated to the Indigenous Literary Foundation (see **indigenousliteracyfoundation.org.au**).

For the Christmas break, we will close at 4pm on Friday 23 December and reopen on Monday 9 January.

My thanks go to our president, Bill Potts, for the enormous effort he has put in this year, along with our Councillors.

I look forward to formally introducing our incoming president, current deputy president Christine Smyth, who will be featured in the first *Proctor* of 2017 in February.

Personally, I would like to acknowledge the efforts of our hardworking QLS staff. It has been a year of enormous change, huge workload, almost 200 events and many competing priorities, some not always smooth nor easy. Their professionalism and ability to push through is greatly appreciated and respected by me and to be highly commended.

Personally this is my favourite time of year. It is an opportunity for me reflect on the learnings of the year and put together a framework for continuing personal and professional development into the new year. The Christmas break is a good time for us all, making the effort to slow down, spend time with friends and family, and recharge our batteries for an even bigger year in 2017. It's going to be a dynamic and exciting one, as our many plans start to bear fruit and move into delivery and implementation phases.

My best wishes to all for a safe and merry Christmas, I hope Santa is good to you.

Amelia Hodge
Queensland Law Society CEO

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This month's report from The Legal Forecast

Smart contracts 101 – Driverless deals

by Molly Thomas, The Legal Forecast

Automation is one of the key technological trends that has emerged over the last few years. Think, for example, of Amazon Prime's fully automated drone delivery system.

There's been a lot of discussion of driverless cars and pilotless planes, but what would a 'driverless' smart contract look like? And where would it leave 'manual' practitioners?

Smart contracts

Smart contracts are computer protocols which can execute or enforce the negotiation or performance of a traditional contract. Smart contracts run on computer code which is expressed in logic statements (generally an 'if this, then that' statement).

In this way, a contractual clause reading "On 30 June 2017, X will pay to Y $1 million AUD to Y's elected bank account" is reduced to the code: "If the date 30 June 2017 occurs, pay $1 million AUD to Y's bank account."

The transaction is automated and the risk of non-compliance is removed. The computer code automatically executes the payment on the specified date, removing any inefficiencies due to human error on the part of X.

The key thing here is efficiency of time and money. A simple smart contract can perform the function of a traditional contract at a fraction of the cost and a fraction of the time. The inventor of smart contracts, Nick Szabo, saw smart contracts as a great way to remove the costs of fraud, arbitration and enforcement.

Practical applications

Smart contracts could be a great way to remove the need for variation clauses. If parties wanted to tie a particular clause to the Consumer Price Index, they could choose to code with a clause which updates automatically based on data from the Australian Bureau of Statistics. If there were a number of key dates (such as in construction projects or a rental cycle), code could be written to automatically calculate those dates, and then automate the release or transfer of monies on those dates.

Smart contracts therefore would be of enormous use in the conveyancing sector, where there are a number of key dates and key transactions. These types of data are the easiest to reduce to logic statements. However, in the future, even wills could utilise this technology with the automatic vesting of beneficiaries occurring on particular maturation dates.

Balance

Despite the undoubted benefits of a smart contract, most agree there is still a need for human brains to be involved. For example, there are clauses in contracts that are impossible to automate. Parties are likely to be reluctant to enter into a smart contract in which they don't exercise any discretion.

For example, if a supplier of goods enters into a smart contract with a retailer, the parties may be happy to code the payment terms and have it self-execute on the date the goods are delivered. However, the retailer would be likely to request the inclusion of an indemnification clause to account for the possibility of late delivery or faulty goods. This clause would not be able to be coded, and would need to fall under the 'manual' part of the contract.

While a very simple contract may be able to be automated, more complex contracts will be a hybrid of automated and manual terms. While contracts generally don't cover all eventualities, they are created in the context of broader contract law, and therefore the solutions to various contractual issues can be found in the system into which those contracts are born.

It's also been pointed out that while code runs on pure logic, contractual agreements more often involve a level of nuance that necessitates the creativity and flexibility of a practitioner. Therefore, while a fully automated contract would function well for micro-transactions, the initial negotiation of the terms of a contract would still be reliant on traditional legal services.

Unresolved issues

The vast majority of smart contracts are executed using blockchain. For a refresher on blockchain, please see 'Blockchain 101 – Cracking the code' in last month's *Proctor* at page 6. Smart contracts can be executed either 'above' the blockchain (where the software runs outside the blockchain and then feeds information to the blockchain) or 'on' the blockchain (where the software is coded into blocks and runs inside the blockchain).

One of the issues with the reliance on blockchain is the non-reversibility of blockchain. Concerns have been raised in respect of the appropriateness of blockchain in the context of unforeseen events such as recessions or other financial crises. In such circumstances, you would want some form of *force majeure* clause. Australian Securities and Investments Commission chairman Greg Medcraft has suggested that it may be appropriate to have all smart contracts include a 'kill switch' to stop automatic execution in times of stress.

There are also fears about security and privacy. In June 2016, a group called the 'Digital Autonomous Organisation' used the Ethereum network's blockchain to operate an investment facility. The code was entirely self-executing and was able to raise US$150 million from 11,000 members without any sort of body managing the administration of the investment facility. Later in that month, a hacker utilised a loophole in the code to move US$50 million to a different account. This confirms the need for airtight code to be written to protect clients against dishonesty from third parties.

Overall, smart contract technology is promising, but will still require the supervision and expertise of professionals in order to function fully.

Molly Thomas is a student executive member of The Legal Forecast and in her fourth year of a Bachelor of Arts/Bachelor of Laws degree at the University of Queensland. Special thanks to Milan Gandhi, Angus Fraser, and Adrian Agius of The Legal Forecast for technical advice and editing. 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 who are passionate about disruptive thinking and access to justice.

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Below: The group poses for a photo on the deck at Queensland Gallery of Modern Art overlooking the Brisbane River

Cooper Grace Ward hosts Advoc Asia AGM

Cooper Grace Ward Lawyers recently welcomed 45 guests from across the globe for the Advoc Asia AGM, hosted in Brisbane from 19 to 23 October.

Countries represented by the guests included the United States, United Kingdom, China, India, Japan, Singapore, Italy and Poland.

Advoc is an international network of independent law firms, with nearly 100 members from 70 countries worldwide. Its Asia chapter meets each year in a member city, with this year marking the first time in the event's 22-year history that the meeting has taken place in Brisbane.

Hot topics for discussion during the forum included the globalisation of the profession, digital disruption, outsourcing and the changing needs of clients.

During their stay, guests also enjoyed a program of social activities including visits to the Gallery of Modern Art, Brisbane City Hall, the Court of Appeal and a day-trip to Noosa.

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Queensland Law Society

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Prescribed deposit accounts abolished

On 11 November 2016, the Bill for the *Limitations of Actions (Child Sexual Abuse) and Other Legislation Amendment Act* received royal assent.

This Act amends provisions of the *Legal Profession Act 2007* pertaining to the Legal Practitioner Interest on Trust Accounts Fund, which will be replaced by new funding arrangements through the Consolidated Fund. The amendments take effect from 1 January 2017.

The effect of the amendments is the abolition of the requirement for law practices to maintain a prescribed deposit account. Law practices therefore will be required to return all funds held in a prescribed deposit account to the law practice trust account, in accordance with section 74(1) of the *Legal Profession Regulation 2007* (the regulation).

It is recommended that law practices commence withdrawing funds from the prescribed deposit account between 2 December and 31 December 2016, given the ongoing requirements under section 74(3) of the regulation pending 1 January 2017.

Further deposits to the prescribed deposit account will not be required after 2 December 2016. Please ensure you become familiar with the new legislative requirements and contact the Society's trust account investigation team with any questions.

Note: Trust Account Calendar – If you have previously downloaded the calendar widget please, go to **qls.com.au** > Trust Accounting Resources to update your widget.

Societies oppose legal assistance funding cuts

Queensland Law Society last month joined with the seven other Australian law societies to publish an open letter to the Prime Minister on the impact of impending cuts in legal assistance.

The letter, published in *The Australian* on 4 November, said it was understood that that the legal assistance sector, including Legal Aid, Aboriginal Legal Service and community legal centres (CLCs) nationally, would face a Commonwealth funding cut of 30% – or the equivalent of $34.83 million over three years – from 1 July 2017.

"Adequate legal assistance services are critical in ensuring fairness and efficiency in our court system, and are essential to providing access to justice for the most financially disadvantaged," the letter said.

"However, funding cuts by successive governments have forced significant restrictions on both criminal and civil cases. In 2015, CLCs had to turn away 160,000 people due to lack of capacity. Many are also reporting a reduction in staff numbers.

"We note that this is taking place at a time when there is a growing 'justice gap' for the disadvantaged in Australia, particularly in relation to Indigenous peoples, who are the worst affected group experiencing unmet legal need."

The eight law societies, representing more than 60,000 practising solicitors, urged the Government to make a commitment to properly funding the legal assistance sector in the 2017 Federal Budget.

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Juvenile justice change welcomed

Queensland Law Society has welcomed the removal of the antiquated laws requiring 17-year-old offenders to be sentenced as adults.

President Bills Potts said the Society had advocated consistently for this humanitarian reform, replacing legislation that had been in place for almost 25 years and long abandoned by every other state and territory.

"By keeping children out of adult prisons we increase their chances of rehabilitation immeasurably, which is good for them and good for Queensland," Mr Potts said.

He spoke following the passing of amendments to the state's Youth Justice and Other Legislation Amendment Bill 2016 on 3 November, meaning that 17-year-old offenders will now be treated by the courts as juveniles, rather than entering the adult justice system.

Orange Sky this morning

Ashurst's Brisbane office hosted a morning tea last month to celebrate the second birthday of its valued pro bono client, Orange Sky Laundry, Australia's first mobile laundry service for the homeless.

Orange Sky founders Lucas Patchett and Nicholas Marchesi, who were 20 when they started the service in Brisbane in 2014, attended the function at which 50 Ashurst staff wore Orange Sky Laundry/Ashurst co-branded t-shirts screen printed at Orange Sky Laundry by the firm's employees.

Orange Sky Laundry operates custom fitted vans with industrial washers and dryers to service parks and drop-in centres across Australia, with the view to positively connect the homeless in the community by raising health standards, restoring respect and reducing strain on resources.

AFAD introduced

In the 2016 Queensland State Budget, the Treasurer announced that from 1 October 2016, the acquisition of certain residential land in Queensland by a foreign person (foreign individual, foreign corporation or trustee of a foreign trust) would be subject to additional foreign acquirer duty (AFAD).

The *Duties Act 2001* (Qld) has been amended to include AFAD provisions under Chapter 4.

AFAD applies to residential land that is used or will be used solely or primarily for residential purposes. This includes residential land such as established homes and apartments, vacant land on which a home or apartment will be built, land for redevelopment for residential use, and refurbishment of a building for residential use.

Additional transfer duty, corporate trustee duty or landholder duty at the rate of 3% will apply on these foreign acquisitions. In order to ensure payment by a foreign person, a first charge may be imposed over the acquirer's interest in the land. To protect the interests of non-foreign parties to the transaction, a statutory right of recovery between the non-foreign and foreign parties has also been introduced.

Practitioners who are registered as self assessors with the Office of State Revenue (OSR) are required to account for AFAD when processing residential property transfers.

The Queensland Government recognises that there may be some land acquisitions for developments where it would be appropriate to grant ex gratia relief from AFAD. The transactions for which ex gratia relief from AFAD may be considered are those undertaken by foreign corporations and trusts that are Australian-based and whose commercial activities involve significant development by adding to the supply of housing stock in Queensland when the development is primarily residential.

The guidelines for relief and the process for applying are set out in OSR 'Public Ruling DA000.15.1 – Additional foreign acquirer duty – ex gratia relief for significant development'.

More information on AFAD can be found at business.qld.gov.au/industry/professional-financial/transfer-duty/investors-and-transfer-duty/additional-foreign-acquirer-duty.

News briefs

'Hemmant's List' arrives

A group of Brisbane barristers have established Hemmant's List along the lines of the barristers' clerking system developed over the last 150 years in Victoria. It features barristers of different levels of seniority and diverse practice areas, and more than a third are female. See hemmantslist.com.au.

$12K prize for first-time legal authors

The Federation Press has announced the launch of the 2017 Holt Prize, a biennial competition for first-time authors of an unpublished legal work of an academic or practical nature. The $12,000 prize also includes a publishing contract and is named after Federation Press co-founder the late Christopher Holt. Submissions close on 31 March 2017. See federationpress.com.au > Holt Prize.

Nominations open for migration and settlement awards

Nominations for the Australian Migration and Settlement Awards are now open. The awards celebrate individuals, organisations or initiatives which have made an outstanding contribution to the Australian settlement of migrants and refugees. They include a number of categories, including a diversity and the law award. See migrationawards.org.au.

HAL Christmas drinks and fundraising event

The Queensland Chapter of the Hellenic Australian Lawyers Association will host Christmas drinks and a fundraising event in the foyer of the Banco Court, Queen Elizabeth II Courts of Law, on Friday 9 December from 6pm.

Profits from ticket sales will be donated to the Yugambeh Museum, Language & Heritage Research Centre, which collects and maintains items and intellectual property showcasing the language, history and culture of the traditional Aboriginal people of the Yugambeh region. The event will include performances by the Yugambeh Youth Choir and William Barton. See hal.asn.au > Events calendar.

Centre releases new pro bono editions

The Australian Pro Bono Centre has launched new editions of its two flagship companion publications, *The Australian Pro Bono Manual – A practice guide and resource kit for law firms* (3rd ed.) and *Pro bono partnerships and models – A practical guide to What Works* (2nd ed.). The High Court's Justice Virginia Bell AC launched the new editions on 26 October. See probonocentre.org.au.

Justice award for knowmore service

The Australian Lawyers Alliance (ALA) 2016 Civil Justice Award has been awarded to the knowmore legal service, which provides independent and free legal advice and assistance to the victims of institutional child sexual abuse. The award was announced on 24 October 2016 at the ALA's national conference in Port Douglas.

This year's top corporate lawyer

Brisbane Airport Corporation (BAC) general counsel and company secretary Sarah Thornton was last month named Corporate Lawyer of the Year by the Association of Corporate Counsel Australia.

Judges for the 2016 Australian In-house Awards said that Sarah had led the BAC legal department for more than five years and had implemented a sophisticated approach to the management of in-house legal resources, effectively increasing productivity and lowering costs.

Other winners included ResMed for Legal Team of the Year (small) and Challenger Limited for Legal Team of the Year (large).

Symposium DVDs bound for PNG

The Queensland Law Society International Law and Relations Committee has presented the Papua New Guinea Law Society with DVD resources, including presentations from the 2015 and 2016 Symposium, to include with its professional development resources.

Committee member Professor Jennifer Corrin recently met with PNG Law Society corporate secretary Robert Mellor to make the presentation.

The committee undertakes significant advocacy in international law and relations, and carries out many activities to promote awareness, education and support, particularly for Pacific island nations.

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Policy committees deliver in 2015-16

Queensland Law Society congratulates all members of its volunteer policy committees on their generous contributions in 2015-16 as advocates for good law.

A recent review of the committees' activities in 2015-16 highlights both the commitment of committee members and the impacts of the committees' work.

The Society's policy committees are vital to protecting the rights and interests of the Queensland community and legal profession. The 27 policy committees, covering different areas of law, provide expert advice to Council and develop policy positions, guidance materials and submissions on legislative and policy initiatives.

As at 1 July 2016:

- There were 297 members engaged in policy committees.
- This equated to 4701 equivalent member engagement hours during the year (based on conservative estimates of time)
- The value of the volunteer members' contributions was estimated at about $1.8 million (based on scale rates).
- Members attended 149 committee meetings, prepared 141 submissions and participated in a range of specialist projects.

This year, the policy committees were busy engaging in advocacy, education and other special projects. The work of the committees resulted in 102 'successes'. The Society calculated these successes by reference to:

- mentions of the Society in *Hansard* and the media
- publication of awareness materials in *Proctor* and other publications
- occasions when the Society has influenced the outcome of law reform
- increased engagement with stakeholders, including government and industry bodies.

The QLS policy committees assist the Society to:

- Fulfil the Society's vision to lead the legal profession by advocating for good law and supporting good lawyers.
- Fulfil its purpose as the profession's trusted advisor through providing quality advice, advocacy, learning and professional development for our members.
- Engage with member segments represented on the committees.
- Improve the value of our advocacy to members and the community.

The Society would not have been able to achieve this without the commitment of the volunteer members of its policy committees and is looking forward to another successful year working together.

Wendy Devine is a QLS policy solicitor.

Suggestions for a better Industrial Relations Bill

On 1 September 2016, the Queensland Government introduced the Industrial Relations Bill 2016 into Parliament.

The Bill seeks to:

- repeal and replace the current *Industrial Relations Act 1999*
- provide for a framework for the conduct of industrial relations within the state's industrial relations jurisdiction
- amend the *Holidays Act 1983* to make Easter Sunday a public holiday from 2017.

The Society, through its Industrial Law Committee, provided submissions to the parliamentary Finance and Administration Committee on the Bill.

We previously made submissions to the McGowan Review and a number of these recommendations were adopted in the Bill.

In our submissions to the committee, we said it was appropriate for Queensland to maintain its own system of industrial relations and that we supported the Bill, particularly in:

- reframing the main purpose of the legislation
- retaining a minimum safety net in the form of the Queensland Employment Standards and introducing a right to domestic violence leave, a right to request flexible work arrangements, an entitlement to unpaid emergency service leave, and the requirement that new employees be given an information statement
- providing authority to the Queensland Industrial Relations Commission (the commission) including its power to resolve industrial disputes, and to introduce mechanisms for it to address gender wage equality, address workplace bullying, assist in enforcing workplace rights, and deal with work-related discrimination matters.
- continuing the arrangements for the appointment of industrial commissioners
- bringing the legal representation provisions in line with the national framework
- allowing a broader range of employees to access the simplified common law employment claim process.

While supporting the Bill, we recommended several improvements and raised a number of concerns with:

- creating a duty of mutual trust and confidence between employers and employees without further guidance and consideration of this issue
- changes to flexible working arrangements not containing explanation as to what may constitute reasonable grounds to refuse a request
- the unfettered right of an employer to direct an employee to take leave in any circumstance, noting this differs to the federal scheme
- the provisions relating to notice of termination, redundancy pay and the right to inspect wages and records not applying to all employees
- applications regarding gender pay gaps only being heard by a single commissioner rather than the full bench of the commission.
- employers not being given the option for partial payment to an employee involved in an industrial dispute
- employees being able to bring multiple actions for dismissal from employment
- requiring a lawyer to seek leave to appear but not a lay advocate.

In respect of amendments to the *Anti-Discrimination Act,* the Bill proposes that actions regarding "work-related matters" would now be heard by the commission. We said the that what was or what was not a "work-related matter" required further clarification.

The Society appeared before the Finance and Administration Committee's public hearing on the Bill on 12 October 2016. We were represented by president Bill Potts and Industrial Law Policy Committee chair Kristin Ramsey.

The committee's report was released on Friday 28 October and our submissions were extensively referred to throughout. The report is available on the Parliament of Queensland website.

Kate Brodnik is a QLS policy solicitor.

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QLS expresses concerns on serious and organised crime Bill

Queensland Law Society, with the assistance of its Criminal Law Committee, wrote to the parliamentary Legal Affairs and Community Safety Committee to provide comments on the Serious and Organised Crime Legislation Amendment Bill 2016.

The objectives the Bill are to implement a new organised crime regime and to improve the clarity, administration and operation of particular occupational and industry licensing Acts.

We expressed a preference that the Bill be passed in an amended form, rather than for the 2013 amendments to be maintained, and we were supportive of amendments to a number of Acts:

- *Bail Act 1980* in reinstating the presumption in favour of bail
- *Corrective Services Act 2006* in repealing the 2013 amendments and in managing offenders through the Queensland Corrective Services prisoner management regime
- *Crime and Corruption Act 2001* in overseeing the Crime and Corruption Commission's response function and in replacing fixed mandatory minimum sentencing for contempt with an escalating penalty regime.

We expressed concerns about amendments to the *Peace and Good Behaviour Act 1982*, in particular with:

- public safety orders, including the power to issue an order being given to a commissioned officer, the breadth of the orders that may be imposed, the lack of a right to review or appeal if less than 72 hours, and the power to seek an amendment or variation being given to a police officer but not a respondent.
- restricted premises orders, including the breadth of definitions, the capacity for a police sergeant to issue an order, the threshold for making an order, the limitations placed on the court's discretion upon making an order, the lack of limitations on searches on or seizures of property by police, the limitations placed on the court in returning property and the reversal of the onus in applications to extend orders
- fortification removal orders, including; the broad definition, the power to seek an amendment or variation being given to a police officer but not a respondent, and allowing powers to be exercised at any time and as often as required.

We also expressed several concerns in relation to the new consorting offence. These included the breadth of the offence and its potential to criminalise associations that are unrelated to criminal activity, the likely disproportionate impact on vulnerable and disadvantaged people, the lack of a low-cost review mechanism for official warnings, the infringement on the right to freedom of association and the inadequacy of defences.

We also appeared before the Legal Affairs and Community Safety Committee's public hearing on to the Bill on 12 October 2016, represented by deputy president Christine Smyth and Criminal Law Policy Committee member Rebecca Fogerty who reiterated our concerns with the consorting offences.

The committee's report was tabled on 1 November 2016. It refers to the consultation with QLS and discusses the issues raised in our submission and appearance before the committee.

In particular, the report refers to our views on measures that could be put in place to narrow the scope of the consorting laws and the potential disproportionate impact on Aboriginal and Torres Strait Islander people.

Binari De Saram is a QLS senior policy solicitor and Natalie De Campo is a QLS policy solicitor.

The authors gratefully acknowledge the assistance of work experience law student Ashleigh-Rae Bretherton in the preparation of these items.

Lecture for modern advocates

On Tuesday 25 October Queensland Law Society launched the QLS Ethics Centre's Modern Advocate Lecture Series, an initiative of QLS deputy president Christine Smyth, *below*, which aims to foster collegiality in the junior ranks of the profession and to imbue young practitioners with the knowledge and skills to sharpen their advocacy. The initial lecture was delivered by Chief Justice Catherine Holmes, *below right*, who spoke about the future of advocate's immunity following the High Court's decision in *Attwells v Jackson Lalic Lawyers Pty Ltd*.

Above from left, Dominique Mayo, Nola Pearce, QLS immediate past president Michael Fitzgerald, Susan McNeil and Denika Whitehouse.

Personal view of depression

On 16 November former Attorney-General Linda Lavarch shared her insights into depression at the annual Tristan Jepson Memorial Foundation Lecture at Law Society House. The diversity of the audience demonstrated that a willingness to address mental health issues extends across the profession, and attendees were inspired by Ms Lavarch's courage in speaking openly about the lows and highs of her personal battle.

QLS would like to thank networking drinks sponsor

QUT Law

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Succession and elder law

Succession and elder law practitioners joined a host of experts at the Surfers Paradise Marriott Resort & Spa last month for the annual Succession and Elder Law Residential. Across two days, delegates expanded their knowledge on a range of topics including later life relationships and the law, digital assets in wills, and bespoke estate planning strategies. The program featured a keynote presentation from Justice Lindsay of the NSW Supreme Court Equity Division, and an update on legislative reform for elder abuse by Professor Wendy Lacey of the University of South Australia Law School. Attendees also enjoyed a night of entertainment at the nautical-themed Residential Gala Dinner.

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The hard work put in by members of QLS committees and working groups was recognised on 26 October with an appreciation evening at the Brisbane Marriott Hotel. More than 130 guests learnt just how big a difference their output is making to Queensland's legal landscape and enjoyed an address by Queensland's Chief Entrepreneur, Mark Sowerby.

QLS would like to thank our event sponsor

LAW IN ORDER

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Employer liability – incrementally

High Court considers employees' actions in tort

In October 2016, the High Court handed down its decision in *Prince Alfred College Incorporated v ADC*.[1]

The decision provided a deep analysis of the principles applicable to determining when an employer will be vicariously liable for the wrongful acts of its employee.

Previous cases on 'course of employment'

The majority of the High Court in *Sweeney v Boylan Nominees Pty Ltd*[2] stated that there were "some basic propositions" central to the law of vicarious liability:

"First, there is the distinction between employees (for whose conduct the employer will generally be vicariously liable) and independent contractors (for whose conduct the person engaging the contractor will generally not be vicariously liable). Secondly, there is the importance which is attached to the course of employment."

The traditional test for whether (once a relationship of employment is established)[3] an employer will be liable for the acts of an employee is whether the employee was acting in the course of their employment.[4]

One way of looking at the question is to distinguish between the employee's wrongful mode of doing what they were employed to do (for which their employer will be liable) from an employee doing something outside of what they were employed to do (for which an employer will not be liable).[5]

By way of example, a bus company was not vicariously liable for the actions of an employed conductor (not employed as a

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Courts have long struggled with the borderline delineating an employer's vicarious liability for an employee's wrongful actions. A recent High Court case takes us closer to a workable approach, as **Rob Ivessa** explains.

driver) who, of his own volition, attempted to turn a bus around at a depot, injuring a third party,[6] but was vicariously liable for the actions of its driver who permitted a conductor to drive his bus.[7]

In such a case, it could not be said that the conductor's actions were a wrongful mode of doing what he was employed to do (sell tickets and supervise passengers) whereas the driver's actions were taken as a wrongful mode of doing his job (controlling the driving of the bus).

In *Deatons Pty Ltd v Flew*[8] the High Court held that the employer of a barmaid who threw a glass at a customer she was serving was not vicariously liable for her actions. The essence of the judgment was that the barmaid was not employed to keep order in the bar (or dispense rough justice for insults). She was employed to serve drinks to customers and her throwing the glass could not be seen a wrongful mode of doing her job.

The facts of Prince Alfred College

In *Prince Alfred College Incorporated* (PAC), a man was the victim of sexual abuse in 1962 at his school (the defendant, PAC) by his boarding master. The relevant limitation period expired in 1973 when the victim was 24 years old. It was not until the 1990s when the victim's son began attending the same school that the victim began to suffer from worsening post-traumatic stress disorder (PTSD) symptoms.

In 1997 the victim had a meeting with PAC in which the prospect of litigation was raised, but the victim accepted a small offer of financial assistance. After that time the victim's mental condition worsened.

In 2008 the victim commenced proceedings against PAC on the basis (inter alia) that it was vicariously liable for the wrongful acts of its employee. He also applied for an extension of the limitation period.

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The judgment in Prince Alfred College

The victim's claim and application were dismissed at first instance on the basis that liability had not been established and the defendant was too greatly prejudiced in being able to defend the claim by the delay. The primary judge held that the sexual abuse was:[9]

"...so far from being connected to [the boarding master] Bain's proper role that it could neither be seen as being an unauthorised mode of performing an authorised act, nor in pursuit of the employer's business, nor in any sense within the course of Bain's employment. I find that the defendant did not, by means of any proven requirement of Bain, create or enhance the risk of Bain sexually abusing the plaintiff."

The victim appealed. The Full Court of the Supreme Court of South Australia upheld an appeal as to liability and the extension application. PAC appealed that decision to the High Court.

The full bench of the High Court unanimously upheld the appeal and upheld the primary judge's conclusion as to the extension application, and said that it could not determine the liability question. Nevertheless, the principles governing liability for vicarious liability were fully considered as part of consideration of the extension application issue.[10]

Legal principles stated

French CJ, Kiefel, Bell, Keane and Nettle JJ said:[11]

"Vicarious liability is imposed despite the employer not itself being at fault. Common law courts have struggled to identify a coherent basis for identifying the circumstances in which an employer should be held vicariously liable for negligent acts of an employee, let alone for intentional, criminal acts."

The "course of employment" consideration had previously been described as a determinative "rule".[12] Its limitations were recognised and its status downgraded to a "touchstone for liability" in PAC, by French CJ, Kiefel, Bell, Keane and Nettle JJ:[13]

"Difficulties, however, often attend an enquiry as to whether an act can be said to be in the course or scope of employment. It is to some extent conclusionary and offers little guidance as to how to approach novel cases. … But it has not yet been suggested that it should be rejected. It remains a touchstone for liability."

The difficulty to which their Honours alluded was that the "usual case" in which a person does their job negligently works well with the "course of employment" test, whereas "novel cases" such as intentional torts (and in this case criminal acts) do not always.

Their Honours analysed alternative overseas approaches in which courts have had greater regard to 'general principles' and policy considerations (of whether it would be fair and just to hold an employer liable).

Ultimately their Honours eschewed that approach in favour of continued utilisation of an incremental approach:[14]

"...if a general principle provides that liability is to depend upon a primary judge's assessment of what is fair and just, the determination of liability may be rendered easier, even predictable. But principles of that kind depend upon policy choices and the allocation of risk, which are matters upon which minds may differ. They do not reflect the current state of the law in Australia and the balance sought to be achieved by it in the imposition of vicarious liability.

"Since the search for a more acceptable general basis for liability has thus far eluded the common law of Australia, it is as well for the present to continue with the orthodox route of considering whether the approach taken in decided cases furnishes a solution to further cases as they arise. This has the advantage of consistency in what might, at some time in the future, develop into principle."

Their Honours held that the mere fact that employment provided the *occasion* or the *opportunity* to commit a wrong will be of itself insufficient to found vicarious liability but both together may.[15] The "relevant approach" was held[16] to be:

1. "...to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim.
2. In determining whether the apparent performance of such a role may be said to give the 'occasion' for the wrongful act, particular features may be taken into account. They include:
   a. authority,
   b. power,
   c. trust,
   d. control and
   e. the ability to achieve intimacy with the victim.

The latter feature may be especially important." [*enumeration added*]

In the context the "particular features" should be read as each being over or with respect to the victim.

Gageler and Gordon JJ, in agreement with the other five judges as to the outcome in PAC, provided the following view of the "relevant approach" described above[17]:

"We accept that the approach described in the other reasons as the 'relevant approach' will now be applied in Australia. That general approach does not adopt or endorse the generally applicable 'tests' for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.

"The 'relevant approach' described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case."

Rob Ivessa is a barrister at North Quarter Lane Chambers, Brisbane.

Notes

1 *Prince Alfred College Incorporated v ADC* [2016] HCA 37 handed down 5 October 2016.
2 (2006) 226 CLR 161 at [12] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.
3 See *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [47] to [57].
4 *Greenwood v Commonwealth* [1975] VR 859 at 860.
5 *Goh Choon Seng v Lee Kim Soo* [1925] AC 550.
6 *Beard v London General Omnibus Co* [1900] 2 QB 530.
7 *Ricketts v Thos Tilling Ltd* [1915] 1 KB 644.
8 *Deatons Pty Ltd v Flew* (1949) 79 CLR 370.
9 *A, DC v Prince Alfred College Incorporated* [2015] SASC at [179].
10 At [10].
11 At [39].
12 Balkin and Davis, *The Law of Torts*, 5th ed. (2013) Lexis Nexis at [26.41] to [26.42].
13 At [41].
14 At [45] to [46].
15 At [80].
16 At [81].
17 At [130] to [131].

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Queensland Law Society

New era in retail shop leasing

Amendments to the *Retail Shop Leases Act* take effect

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New amending legislation governing Queensland retail shop leases has just commenced. **Kane Williams** explains the key changes.

The long-awaited amendments to the *Retail Shop Leases Act 1994* (Qld) (RSLA) commenced on 25 November 2016.[1]

These amendments are a result of a long process, starting with a statutory review in 2011[2] and culminating in their passing on 10 May 2016 (with royal assent on 25 May 2016). After numerous papers,[3] reports,[4] submissions, a lapsed Bill[5] and a six-month preparation period, they are in.

It is important to recognise the breadth and significance of the amendments. To illustrate this, just in page number terms, the 60-page amendment Act is more than half as long as the RSLA (just prior to amendment). Various highlights are canvassed below.

Exclusions and carve outs

Expanded and additional exclusions – not a retail shop

The RSLA will no longer apply to any retail shop with a floor area of more than 1000m^2, regardless of the type of tenant.[6] Previously, for this exclusion to apply, there was an additional requirement that the tenant had to be a listed corporation or a listed corporation's subsidiary.[7] This has been removed as it was considered that tenants of such sizable shops "are predominantly sophisticated businesses not requiring the protection of the Act".[8]

Certain non-retail leases[9] are also excluded from the operation of the RSLA.[10] In a multi-level building, a lease for non-retail premises is excluded if the retail area on the particular level is 25% or less of the total lettable area of the level.

In a single-level building, such a lease is excluded if the retail area of the building is 25% or less of the building's total lettable area. The time for assessing the percentage falls at the time the lease is entered into.[11]

A lease for a vending machine or an ATM within a common area of a retail shopping centre is also excluded.[12] This clarifies some previous uncertainty in the RSLA.

If premises are used wholly or predominantly for carrying on a business by the tenant for a landlord as the landlord's employee or agent, then it too is excluded.[13]

Government leases: New carve outs

For leases to the Commonwealth, a state or a local government, lessee disclosure statements as well as legal and financial advice reports are no longer required. Further, landlords do not have to give government tenants notice of option exercise dates.[14]

Major lessees: Easier and new carve outs

Major lessees[15] have previously been able to waive the minimum standards in the RSLA around the timing and basis of rent reviews by notice, after receiving legal and financial advice.[16] Such advice is no longer required.[17] Instead the tenant must give a written notice stating that the tenant agrees that subsections (2) to (7) of section 27 do not apply. This makes it easier for multiple rent review mechanisms to be agreed with major lessees.

Further, major lessees who waive these minimum standards are also taken to have opted out of the RSLA's prohibition[18] on 'ratchet clauses'.[19] So, the ratchet has been revived to a limited extent.

Financial matters

Outgoings – tenant's new right to withhold payment

If a landlord does not give a tenant an outgoings estimate or audited statement when required, then the tenant may now withhold payment of the apportionable outgoings until the landlord has provided this.[20]

Outgoings estimate – management fees

The landlord's outgoings estimate is required to include a breakdown of administration and centre management fees.[21]

New marketing plans

Where a tenant is required to make payments to the landlord towards promotion and advertising costs, then the landlord must provide or make available (for example, on a website) to the tenant a marketing plan detailing the proposed expenditure. This plan must be provided at least one month prior to the start of each accounting period.[22]

Legal and other fees

If the landlord and tenant negotiate a lease and agree on its terms, and the tenant gives the landlord a written notice requesting the landlord to prepare a final lease but pulls out after that final lease has been prepared, then the landlord can require the tenant to pay the landlord 's reasonable costs of preparing the lease.[23]

Also, landlords are no longer able to pass on the cost of obtaining mortgagee consent.[24]

Turnover information

If a tenant pays turnover rent, then the RSLA no longer mandates that the tenant provide monthly turnover certificates or annual audited statements.[25] This leaves it to the parties and the lease as to the turnover information that the tenant must provide.

Disclosure

New leases – waiving the disclosure period

Landlords still need to provide their prospective tenants with a lessor disclosure statement and the draft lease before the tenant enters into the lease.[26] However, tenants can now agree to shorten the seven-day disclosure period,[27] by giving a legal advice report (not required if it is a major lessee) and a signed waiver notice.

New leases – defective disclosure statements

The somewhat impractical limitation on the tenant terminating the lease because of a defective statement when the landlord acted honestly and reasonably, and the tenant is in substantially the same position, has been removed.[28]

New leases – seven-day lessee disclosure

Instead of a tenant having to give the landlord a lessee disclosure statement "prior to entering into the lease",[29] it must now provide this at least seven days before entry.[30]

New sub-leases and franchise licences – head lease and franchise disclosure

New provisions have been added to enable prospective sub-lessors and franchisees to comply with their disclosure obligations.

Prospective sub-lessors and franchisors may request a current disclosure statement from the head landlord.[31] The head landlord must provide it within 28 days of the request, but can pass on the expenses it reasonably incurred in preparing the statement.[32] The sub-lessor or franchisor is then to pass this statement onto the sub-tenant or franchisee with a written statement on matters that affect the information in the statement.[33]

Options for renewal – new lessor disclosure and ability to pull out after exercise

Landlords must now give tenants a current lessor disclosure statement within seven days of the tenant exercising an option[34] unless the tenant provides a signed waiver notice at the time that it exercises the option.[35] If the landlord fails to comply with this new obligation, the tenant will have a right to terminate the lease within the first six months of the option period. The new obligation is onerous and practitioners will need to consider this when instructed to prepare a lease or amendment following an exercise of option.[36]

Clearly this new obligation adds red tape, not reduces it – which was one of the key objectives of the amendments.[37] However, after some serious consideration, red tape reduction gave way to another key objective – enhancing the protection of retail tenants.[38] Without a current lessor disclosure statement, an existing tenant may not learn about material facts that could really impact upon the viability of its business, like the expiry of major/anchor tenancies and the landlord's intentions regarding future redevelopment or refurbishment.

Within 14 days of the tenant receiving the current disclosure statement, it now has the option of withdrawing the renewal notice.[39] The tenant is not required to have or supply any reasons for this decision and this right can even be exercised if the renewal period has commenced.

If a landlord considers that a tenant has not validly exercised an option or is not entitled to, then care will need to be taken. An unwary landlord could inadvertently waive its rights by issuing a disclosure statement, especially by use of a standard cover email or letter.

Assignment – seven-day assignor disclosure and waiving this disclosure period

When a tenant is selling its business and seeking to assign the lease, it must now give the prospective assignee an assignor disclosure statement and a copy of the current lease at least seven days before the earlier of the assignee entering into the business contract and the landlord being asked to consent to the assignment.[40] If the proposed assignment is not part of a business sale, then the assignor statement must be given seven days before the landlord is asked to consent[41] (which was the position prior to the amendments).[42]

The assignee can reduce the seven-day disclosure period by providing the assignor with a signed waiver notice.[43]

The amendment is an acknowledgement that prospective assignees could potentially be unconditionally bound to accept an assignment of the lease on executing the business contract.[44]

Assignment – copy of assignor disclosure to landlord

An assignor is now required to give the landlord a copy of the assignor disclosure statement that was given to the tenant on the day that the landlord is asked to consent to the assignment.[45]

Assignment – waiving the lessor disclosure period

Landlords are still required to provide the assignee with the lessor disclosure statement and a copy of the lease at least seven days before the assignment is entered into.[46]

However, this seven-day period can be reduced in the same way as the seven-day period can be reduced for a new lease – with a legal advice report (unless the tenant is a major lessee) and a signed waiver notice.[47]

Other

Release of guarantor on assignment

The assignor's guarantor, as well as the assignor, will now be released from liability under the lease resulting from a default of the assignee if the assignor's disclosure obligations have been complied with on assignment.[48]

Refurbishment provisions must be specific

Refurbishment obligations must give the general details of the nature, extent and timing of the refurbishment required, otherwise they are void.[49]

Limiting compensation

A lease can limit the compensation payable to a tenant for a disturbance that occurs within the first year of the lease being entered into if the landlord gives the tenant a detailed written notice before the lease is entered into. This notice must detail the specific nature and likelihood of the disturbance, as well as its predicted timing, duration and effect.[50]

These will be very useful for landlords when leases are entered into leading into, or during, construction or redevelopment of centres. Significantly, general statements will be of no effect so care will need to be taken in drafting these notices.

Transitional provisions

The RSLA Amendment Act contains only limited transitional provisions – it is intended that transitional arrangements will largely be dealt with in regulations. These had not been released at the time of publication.

Conclusion

At the risk of stating the obvious, precedent letters, standard lease terms and procedures will all need to be reviewed, and clients and staff alike may need further training, if such steps have not already been taken.

It is far from a new world in retail shop leasing in Queensland, but the RSLA is looking somewhat different and it is worth stepping carefully while you get used to traversing the new rules and paths.

This article appears courtesy of the Queensland Law Society Property and Development Law Committee. Kane Williams is a senior solicitor at McKays, in Mackay, and a member of the committee.

Notes

1 Being the date of commencement of the *Retail Shop Leases Amendment Act 2016* (Qld) (RSL Amendment Act) as fixed by proclamation (signed and sealed on 8 September 2016).

2 Under section 122 of the RSLA, a review of the operation of the RSLA must be carried out every seven years in order to decide whether its provisions remain appropriate.

3 See especially, Department of Justice and Attorney-General, 'Review of the *Retail Shop Leases Act 1994* (Qld): discussion paper', 2011, available at justice.qld.gov.au/__data/assets/pdf_file/0005/129749/retail-shop-leases-act-review-discussion-paper.pdf; Department of Justice and Attorney-General, 'Review of the Retail Shop Leases Act 1994: Options Paper', May 2013, available at justice.qld.gov.au > Community consultation > Community consultation activities and reviews > Review of the Retail Shop Leases Act 1994.

4 See especially, Department of Justice and Attorney-General, 'Report on statutory review of the Retail Shop Leases Act 1994', November 2014, available at parliament.qld.gov.au/documents/tableOffice/TabledPapers/2014/5414T6570.pdf; Education, Tourism and Small Business Committee, 'Report No.9, 55th Parliament – Retail Shop Leases Amendment Bill 2015', February 2016, available at parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T39.pdf [with its erratum: Education, Tourism and Small Business Committee, 'Erratum to Report No.9, 55th Parliament – Retail Shop Leases Amendment Bill 2015', 8 February 2016, available at parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T45.pdf].

5 *Retail Shop Leases Amendment Bill 2014* (Qld). This was introduced on 25 November 2014 and lapsed on 6 January 2015.

6 RSLA s5A(2)(a). This is a new section that was inserted by RSL Amendment Act s5. The definition of 'retail shop lease' in the Schedule (Dictionary) was omitted and replaced with simply a reference to this new section: RSL Amendment Act s61.

7 RSLA as at 1 July 2015, Schedule (definition of 'retail shop lease').

8 Explanatory Notes, Retail Shop Leases Amendment Bill 2015 (Qld) 3.

9 Being "not used wholly or predominantly for carrying on a retail business": RSLA s5A(3)(a).

10 RSLA s5A(3).

11 See RSLA s11 for when a lease is "entered into", which replaced the prior section 11: RSL Amendment Act s9. Also, especially if lease negotiations are protracted, the area percentages may change over time. So a lease that may have been excluded at the start of the negotiations may not be when it is entered into, if the tenancy mix has changed or other relevant leases have been entered into or surrendered.

12 RSLA s5A(2)(g)(iii),(iv).

13 Ibid s5A(2)(c).

14 Ibid s20B. This is a new section that was inserted by RSL Amendment Act s14.

15 Being tenants of five or more retail shops in Australia: RSLA Schedule (definition of 'major lessee').

16 RSLA as at 1 July 2015, s27(8).

17 RSLA s27(8). This was amended by RSL Amendment Act s24(2).

18 Ibid ss36A(1) and (2).

19 Ibid s36A(3).

20 Ibid s38C. This is a new section that was inserted by RSL Amendment Act s33(4).

21 Ibid s38A(3). This is a new sub-section that was inserted by RSL Amendment Act s33(4).

22 Ibid s40A. This is a new section that was inserted by RSL Amendment Act s35.

23 Ibid s48(3). This is a new sub-section that was inserted by RSL Amendment Act s49.

24 Ibid s48(1)(b).

25 RSL Amendment Act s22 removed RSLA as at 1 July 2015, ss25(3) and (4).

26 RSLA s21B(1). This is a new section that was inserted by RSL Amendment Act s15.

27 Ibid s21B(2).

28 Previously RSLA as at 1 July 2015, s22(5). This section was replaced with the new RLSA s21F: RSL Amendment Act s15.

29 RSLA as at 1 July 2015, s22A.

30 RSLA s22A. This was amended by RSL Amendment Act s15.

31 Ibid ss21C(1) and 21D(2). These are new sections that were inserted by RSL Amendment Act s15. Section 21C is for sub-leases (including by franchisors, as the note following RSLA s21D(1)(b) makes clear), with section 21D for licences from the franchisor to the franchisee.

32 Ibid ss21C(2) and 21D(3).

33 Ibid ss21C(3)(c) and 21D(4)(c).

34 Ibid s21E(2). This is a new section that was inserted by RSL Amendment Act s15.

35 Ibid s21E(3).

36 Ibid s21F.

37 Department of Justice and Attorney-General, 'Report on statutory review' above n4, 2; Queensland, *Parliamentary Debates*, Legislative Assembly, 13 October 2015, 2083-4 (Hon. YM D'ath, Attorney-General and Minister for Justice and Minister for Training and Skills); Explanatory Notes, Retail Shop Leases Amendment Bill 2015 (Qld) 1.

38 Department of Justice and Attorney-General, 'Options Paper' above n3, 51–3; Department of Justice and Attorney-General, 'Report on statutory review' above n4, Attachment 2, 24–5; Education, Tourism and Small Business Committee, 'Report No.9' above n4, 12; Queensland, *Parliamentary Debates*, Legislative Assembly, 13 October 2015, 2084 (Hon. YM D'ath, Attorney-General and Minister for Justice and Minister for Training and Skills); Explanatory Notes, Retail Shop Leases Amendment Bill 2015 (Qld) 3.

39 RSLA s21E(4).

40 Ibid s22B(1).

41 Ibid.

42 RSLA as at 1 July 2015, s22B(1).

43 RSLA s22B(1A).

44 See Department of Justice and Attorney-General, 'Report on statutory review' above n4, Attachment 2, 28–9; Education, Tourism and Small Business Committee, 'Report No.9' above n4, 14–5.

45 RSLA s22B(3).

46 Ibid s22C(1).

47 Ibid s22C(2). This was inserted by RSL Amendment Act s17.

48 Ibid s50A. This was amended by RSL Amendment Act s51.

49 Ibid s50B. This is a new section that was inserted by RSL Amendment Act s51.

50 Ibid s44A. This is a new section that was inserted by RSL Amendment Act s42.

Amended laws to better protect domestic violence victims

Minister explains changes to *Domestic and Family Violence Protection Act 2012*

The Palaszczuk Government is continuing to tackle domestic and family violence with new laws to protect victims.

The Queensland Parliament passed changes to the *Domestic and Family Violence Protection Act 2012* on October 11.

This raft of significant amendments will better protect victims and their families, hold perpetrators to account and strengthen both the police and justice response to domestic and family violence in Queensland.

Changes to court orders and processes

More tailored domestic violence orders

To ensure victims of domestic and family violence receive more tailored conditions, section 57 of the Act will now require a court, when making or varying a domestic violence order (DVO), to consider whether it is necessary or desirable to impose other conditions, in addition to the standard condition that the respondent not commit domestic violence. This means that a court must consider how a DVO should be tailored to protect an aggrieved person or other person named on an order.

In response to stakeholders' concerns about the duration of orders, section 97 of the Act has been amended to give a court discretion to make a protection order for any period the court considers is necessary or desirable to protect the aggrieved person or a named person from domestic violence.

This amendment makes it clear that a court may only make an order for a period of less than five years if it is satisfied that there are reasons for doing so. In deciding the duration of an order, the most important consideration for a court must be the safety, protection and wellbeing of people who fear or experience domestic violence, including children.

As a result, an aggrieved person will now have greater access to longer-term protection.

Family law orders

Importantly, section 78 of the Act has been amended to require a court making or varying a DVO to have regard to any family law order that is it aware of and to consider whether it should exercise its power under section 68R of the *Family Law Act 1975* (Cth), for example to vary or suspend the family law order. A court must not diminish the standard of protection given by a DVO for the purpose of facilitating consistency with a family law order.

Legal practitioners should ask their client whether there is an existing parenting order in place and provide a copy of the order to a court deciding whether to make or vary a DVO.

A respondent's compliance with an intervention order

To reflect the seriousness of a respondent's compliance with an order of a court, section 69 of the Act has been amended to change the name of voluntary intervention orders to intervention orders. The amendments also require a court to consider a respondent's non-compliance with an intervention order when deciding whether to make a protection order or vary a DVO. The amendments make it clear that a court must not refuse to make a protection order or vary a DVO merely because a respondent has complied with an intervention order. This will ensure a victim's protection is not diminished merely because a respondent has complied with an intervention order.

National Domestic Violence Order Scheme

The amendments provide for the future implementation of automatic recognition of DVOs across Australia under the National Domestic Violence Order Scheme. The changes mean that, in future, a victim will no longer need to re-engage with the justice system and manually register their DVO made in another state or territory. As soon as a DVO is made and served, its protection will automatically continue anywhere in Australia and it can be enforced in accordance with the laws of the jurisdiction where it is breached.

This is an important change that will provide better protection for clients who have an order from another jurisdiction or who have a Queensland order and intend to travel interstate.

Police protection notices

Police will now have expanded powers to issue police protection notices (PPNs) that provide immediate protection for not only the aggrieved person, but for the first time also children, relatives and associates. PPNs will also now be able to include ouster and non-contact conditions, to better tailor the protection police can provide.

A PPN will be enforceable when a police officer has explained the PPN and the conditions it contains, and tougher penalties will apply to respondents who breach a PPN or release conditions. The maximum penalty for breaching a PPN or release conditions has been increased to three years' imprisonment or 120 penalty units.

The Minister for Prevention of Domestic and Family Violence, **Shannon Fentiman**, discusses reforms introduced through amendments to the *Domestic and Family Violence Protection Act 2012*.

Information sharing

One of the most significant reforms is the introduction of a new framework to enable personal information to be shared between key government and non-government entities to assess and respond to domestic violence threats. While obtaining consent will remain the preferred approach, the new laws prioritise the safety of victims and their families by enabling information sharing to occur without consent.

The changes enable, but do not require, legal practitioners to disclose necessary information so that the risks to a client can be assessed and responded to – in the same way as other professionals, such as doctors.

Where this is done in accordance with the new laws, practitioners will be protected from criminal and civil liability, and will not breach any rules of professional conduct. Any information disclosed will still be covered by legal professional privilege and cannot be further disclosed.

Commencement

The changes will commence on a date to be fixed by proclamation.

I invite you to review the amendments at **legislation.qld.gov.au** and I thank members of the Queensland Law Society for their valuable input during the development and consideration of these important reforms.

The Palaszczuk Government is committed to working with our key stakeholders to drive reform and improve the justice response to domestic and family orders.

Shannon Fentiman MP is the Queensland Government Minister for Communities, Women and Youth, Minister for Child Safety and Minister for Prevention of Domestic and Family Violence. Before being elected to Parliament, she was a judge's advocate, solicitor and legal officer for the Australian Manufacturing Workers Union.

Women in law – this year's winners

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Thynne + Macartney partner Margaret McNamara is the winner of the 2016 Queensland Law Society Agnes McWhinney Award, which recognises the contributions of outstanding women in the legal profession.

Margaret leads the firm's wills and estates team and has been a QLS accredited specialist (succession law) since 2002.

The Agnes McWhinney Award was presented by QLS president Bill Potts on 21 October at the Women Lawyers Association of Queensland (WLAQ) 38th annual awards dinner.

Michelle has been a principal in her own practice since 2007 and has made significant contributions to the legal profession as an author, presenter and a volunteer mentor.

She believes that lawyers do their best work outside of the profession by working with community groups and is grateful for the strong women mentors she has had throughout her career.

"I started my career as a legal secretary and was persuaded to study law by a mentor," she said. "I was a single mother and continued to work full-time as a secretary while studying law part-time – a six-year slog.

"As a legal secretary at South & Geldard in Rockhampton I worked with Vicky Jackson, now the senior partner of that firm, and who has also been a recipient of this award.

"I would like to acknowledge the Women's Lawyers Association of Queensland, who encourage, support and mentor young women entering the profession as well as lobbying for the interests of women in the profession generally.

"Agnes McWhinney would have had a much easier start to her career and enjoyed more of the fruits of her labour if WLAQ had been around back then, but without Agnes none of us would have the careers we have today."

Also recognised were Michelle Lember of Lember and Williams Lawyers and Aimee McVeigh of Disability Law Queensland, who both received 2016 QLS Agnes McWhinney Outstanding Achievement Awards.

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The WLAQ named Brisbane barrister Sue Brown QC as the winner of the Woman Lawyer of the Year Award. Before going to the Bar, she was a senior associate at Minter Ellison in commercial dispute resolution.

The WLAQ's Regional Woman Lawyer of the Year Award went to Cairns barrister Tracy Fantin, while the Emergent Woman Lawyer of the Year winner was McKays Solicitors senior solicitor Kristy Dobson.

The Woman in Excellence Award was presented to former District Court and Childrens Court judge Sarah Bradley, who retired earlier this year.

1. Queensland Law Society president Bill Potts with 2016 QLS Agnes McWhinney Award winner Margaret McNamara of Thynne + Macartney.
2. Michelle Lember of Lember and Williams Lawyers was presented with a 2016 QLS Agnes McWhinney Outstanding Achievement Award.
3. A QLS Agnes McWhinney Outstanding Achievement Award was also presented to Aimee McVeigh of Disability Law Queensland.
4. WLAQ Woman Lawyer of the Year Sue Brown QC, Regional Woman Lawyer of the Year Tracy Fantin, Woman in Excellence Award winner her Honour Sarah Bradley and Emergent Woman Lawyer of the Year Kirsty Dobson.

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Using your ethical compass

Chelsea Baker explains a number of guiding principles for navigating the ethical duties of an Australian legal practitioner.

Once admitted to the legal profession and issued with a practising certificate by Queensland Law Society, we are required to ensure that our behaviour champions the basic underpinnings of ethical and professional conduct of officers of the court.

Our primary ethical responsibility is to the court and the administration of justice. A savvy solicitor who has been practising for a number of years would consider this to be a common principle, but legal trainees including practical legal training students might find such a concept difficult to master.

Although trainees and students might have learned about ethics and professional responsibility through theoretical and hypothetical perspectives, this occurs through manufactured environments which are limited in replicating the precise nature of actual experience that might arise in a firm.

Nevertheless, it is important, no matter where we are in our legal careers, to understand and interpret our own internal moral compass in an attempt to recognise and navigate through ethical dilemmas that may be fast approaching.

The *Australian Solicitors Conduct Rules 2012* (*ASCR*) is a good place to start in developing this internal compass. However, it takes time and practice, attention to detail, foresight and professionalism to understand how to best recognise and manage a dilemma without it resulting in a complaint being raised with the Legal Services Commission.

In 1992 Sir Gerard Brennan, then a justice of the High Court, told the Bar Association of Queensland:

"The first, and perhaps the most important, thing to be said about ethics is that they cannot be reduced to rules. Ethics are not what the [lawyer] knows he or she should do: ethics are what the [lawyer] does. They are not so much learnt as lived. Ethics are the hallmark of a profession, imposing obligations more exacting than any imposed by law and incapable of adequate enforcement by legal process. If ethics were reduced merely to rules, a spiritless compliance would soon be replaced by skilful evasion."

The fundamental duties identified by the ASCR provide a framework for solicitors to conduct their business with their clients, and r17.1 ASCR is an important reminder on how to best manage clients' matters. It says:

"A solicitor representing a client in a matter that is before the court must not act as a mere mouthpiece of the client or of the instructing solicitors (if any) and must exercise the forensic judgements called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable."

A solicitor must follow a client's lawful, proper and competent instructions (Rule 8), but r17.1 ASCR is designed to remind us of our obligations of professional independence. The *Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners* also provides context to r17.1, saying:

"A solicitor on the record as the Client's representative takes responsibility for the matter and cannot 'shelter' behind the client. They must exercise their independent forensic judgement, and cannot 'slavishly'… follow a client's instructions as to how a case is to be conducted, *Queensland Law Society v Stevens* [1996] 17 Qld Lawyer Reps 27, 30. Lawyers cannot allow themselves to be controlled by their clients, and to do so leaves them open to personal liability for costs, *Wentworth v Rogers* [1999] NSWCA 403, [46]-[47]. Where a client wishes to take over the conduct of the matter, a solicitor should withdraw from representation…"

As such, it is important to reflect on this rule and the serious ramifications that might arise in the event that it is overlooked. The case law also provides that a solicitor is to be restricted from avoiding the responsibility of careful investigations and supervisions, *Myers v Elman* [1940] AC 322. Then New South Wales Legal Services Commissioner Steve Mark told a professional development seminar in 2001 that the model conduct expected of an Australian legal practitioner should fall somewhere between investigative lawyering by way of exercising one's own forensic judgement and making their own enquiries, as well as advocating on behalf of a client. In *Perpetual Trustee v Cowley* [2010] QSC 56 it was further noted that a solicitor is not merely a passionate and gullible mouthpiece of their client.

As Sir Gerard Brennan emphasised, ethics cannot be reduced to rules; it is about who we are as a profession. We need to adhere to our core values of fidelity, service and courage. We need to remind ourselves that it is our integrity and professional independence that is a touchstone in our relationship with the client.

If you are experiencing a professional ethical dilemma, I would urge you to contact the QLS Ethics Centre on 07 3842 5843 or by email to ethics@qls.com.au for confidential guidance on any ethical issues. Alternatively, speak to a QLS Senior Counsellor, whose contact details are listed on page 64 of this edition of *Proctor*.

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee's Proctor working group is chaired by Greer Davies (GDavies@mcw.com.au) and Hayley Schindler (h.schindler@hopgoodganim.com.au). Chelsea Baker is a newly admitted lawyer working as a law clerk at Robbins Watson Solicitors. She is grateful to Christine Smyth and Michele Davis for their support and guidance in drafting this article and assistance with relevant case law.

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Foreign in-house counsel and legal professional privilege

by Stafford Shepherd

The Supreme Court of Queensland clarified an important question on legal professional privilege in 2013 in *Aquila Coast Pty Ltd v Bowen Central Coal Pty Ltd*[1] *(Aquila Coal)*.

Justice Boddice looked at the question of whether legal professional privilege might attach to the advice given by in-house counsel, or the instructions provided to in-house counsel, when the in-house counsel was not an Australian legal practitioner[2] but admitted to practice elsewhere.

In *Aquila Coal*, his Honour held that legal professional privilege could attach to communications between the employer and its general counsel, notwithstanding general counsel was not admitted as a legal practitioner in Australia, but was a qualified lawyer admitted to practice elsewhere.

The plaintiff and defendant had entered into a joint venture arrangement to develop a proposed mine in central Queensland. A dispute arose between the parties and an action was commenced in the Supreme Court.

In the course of disclosure the defendant asserted a claim that certain documents in its possession were not discoverable on the grounds of legal professional privilege.

As a preliminary point of contention, the plaintiff argued that, as the defendant's general counsel was not admitted to practise as an Australian legal practitioner, none of the advice given by the defendant's in-house lawyers, and none of the instructions provided to the in-house lawyers, could attract legal professional privilege.

The plaintiff contended that two Queensland decisions supported the contention: *Glengallan Investments Pty Ltd v Arthur Anderson*[3] and *GSA Industries (Aust) Pty Ltd v Constable*.[4] Boddice J noted that, on the facts considered in those cases, the person who was the subject of consideration was not admitted to practise as a lawyer anywhere.

The court held that "legal professional privilege may attach to communications involving an in-house lawyer who is a qualified lawyer admitted to practise elsewhere".[5] His Honour referred with approval to the judgment of McLelland J in *Ritz Hotel Ltd v Charles of the Ritz Ltd (No.4)*[6] (*Ritz Hotel*). In that case, the following was observed: "…it seems to me that legal professional privilege is not confined to legal advice concerning or based on the law of a particular jurisdiction in which the giver of the advice has his formal qualification."[7]

The holding of a current practising certificate may be a relevant factor in deciding whether legal professional privilege will apply to the communications of in-house lawyers. However, it is "not determinative of the existence of [the] privilege".[8]

His Honour concluded that legal professional privilege may attach to the disputed documents, notwithstanding that the defendant's general counsel was not admitted as an Australian legal practitioner, which was consistent with the rationale behind the privilege. The privilege is the client's – it exists so clients can "seek legal advice, and make frank disclosure in doing so, without fear of disclosure".[9]

Aquila Coal highlighted once again how fundamental legal professional privilege is as a common law right. It confirms that the privilege is not lost merely by reason that in-house counsel is admitted elsewhere. The important question is whether the advice "is, in truth, independent", and given during the course of the lawyer-client relationship.[10]

Stafford Shepherd is the director of the QLS Ethics Centre.

Notes

1 [2013] QSC 82.
2 *Legal Profession Act 2007* (Qld), s6(1).
3 (2001) QCA 115.
4 [2002] 2 Qd R 146.
5 *Aquila Coal*, [20].
6 (1988) 14 NSWLR 132.
7 *Ritz Hotel*, 102.
8 *Aquila Coal*, [23].
9 *Aquila Coal*, [26].
10 *Aquila Coal*, [8] citing *Re Proudfoot and Human Rights and Equal Opportunity Commission* (1992) 28 ALD 734, 740.

A level playing field for Queensland IR?

Significant changes in Industrial Relations Bill 2016

Since the introduction of the *Industrial Relations Act 1999* (Qld) (IR Act), the landscape for Queensland workers has evolved significantly.

The 2006 Howard Government Work Choices reforms meant Queensland's private sector workforce became covered by the federal system, while state and local government employees, sole traders, partnerships, unincorporated and not-for-profit entities remained under the state system.

The federal industrial relations (IR) system has seen several significant developments, while the Queensland framework many fewer. This caused a disjunct between the workplace protections available to the Queensland public sector and those available to private sector employees.

Following an independent review of the Queensland IR system, released earlier this year,[1] the Palaszczuk Government has introduced into Parliament an almost 800-page long Industrial Relations Bill 2016 (the Bill). If passed, the Bill will more closely align the Queensland and federal systems, and provide state and local government employees with new workplace protections similar to those available to employees under the federal system.

Changes to current IR legislation

In addition to repealing the existing IR Act, if passed in its current form, the Bill will amend other state laws including the *Workers' Compensation and Rehabilitation Act 2003,* the *Anti-Discrimination Act 1991* (Anti-Discrimination Act) and the *Public Service Act 2008* (PS Act). Significant changes will be seen across many areas including:

- changes to the Queensland Employment Standards
- the introduction of anti-bullying protections
- the introduction of general protections for workers
- the transfer of jurisdiction for all work-related anti-discrimination claims, including claims against private sector employers, to the Queensland Industrial Relations Commission (QIRC).

Changes to the Queensland employment standards

The Palaszczuk Government intends to keep minimum core employment standards – a concept modelled on the National Employment Standards in its 2012-2013 IR reforms. However, a number of changes are proposed under the Bill, including:

- prohibiting employers from asking or requiring full-time employees to work more than 38 hours a week[2]
- entitlements for employees to ask their employer for workplace adjustments, such as changes to ordinary hours of work, place of work, or the use of different equipment to accommodate a disability or injury[3]
- extending personal leave provisions to include compassionate leave, and introducing domestic and family violence leave.[4]

Workplace bullying

The Bill seeks to introduce anti-bullying protections, with the proposed regime to mirror the current protections under the *Fair Work Act 2009* (Cth) (FW Act) while allowing for jurisdictional adjustments. The definition of an 'employee' is to be broadened for the purpose of anti-bullying protections to include contractors, subcontractors, volunteers, employees, apprentices and work experience students.[5] Similar to the federal system, the definition of bullying specifically excludes "reasonable management action carried out in a reasonable manner".[6]

Workers will be able to apply to the QIRC for an order to stop bullying against them in the workplace.[7] The commission may make any order to prevent future bullying, however, it cannot order the payment of a pecuniary amount.[8]

General protections

The Bill introduces new workplace protections, which will reflect the general protections provisions under the FW Act and provide protections from:

- adverse action taken by an employer as a result of the exercise or proposed exercise of a workplace right
- coercion (taking action to prevent the exercise of a workplace right)
- misrepresentation about the exercise of workplace rights
- discrimination (enforceable by a claim for adverse action taken in the QIRC)
- dismissal due to a temporary absence
- undue influence or pressure on an employee to make a decision about an industrial agreement or instrument (widely defined)
- adverse action because someone has committed domestic violence against an employee.

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Sara McRostie and Laura Regan preview the significant changes anticipated under Queensland's Industrial Relations Bill 2016.

The Bill also mirrors the FW Act in facilitating the protection of workplace rights by:

- reversing the onus of proof for establishing an adverse action claim
- prescribing that the prohibited reason for taking adverse action needs only **one** unlawful reason (amongst other lawful reasons)
- making industrial associations subject to the general protections laws
- allowing for preventative and remedial orders to stop or improve the adverse action
- providing money compensatory orders.

It is likely the parameters of the new rights and protections will be robustly asserted and defended in early test cases.

Transfer of jurisdiction to the QIRC

The Bill contains a new framework for workplace discrimination proceedings under the Anti-Discrimination Act. The QIRC will have jurisdiction over all work-related anti-discrimination claims, including claims against private sector employers, and the Queensland Civil and Administrative Tribunal will retain jurisdiction over non-work-related discrimination matters.

The PS Act will also be amended to:

- formally recognise the transfer of public service appeals functions to the QIRC and the role of commission members to hear and decide public service appeals
- introduce a requirement to consult public agencies and employee organisations when a proposed directive affects a public service agency or public service employees who are entitled to be represented by an employee organisation.

Modern awards

The Palaszczuk Government suspended the Newman Government's award modernisation process and sought to remodel it. The Government has re-introduced certain allowable award content, including award provisions relating to workload management and workforce planning.

The Bill further signals Queensland Labor's commitment to removing the restrictions placed on award content by the Newman Government. It is set to relax the Newman Government's crackdown on union disclosure requirements, notably the publication of credit card and cab fare receipt stipulations.

Rights of entry powers

In 2015, the Palaszczuk Government removed the requirement that unions provide 24-hour notification to inspect suspected safety breaches and re-empowered permit holders to direct employees to cease unsafe work (a power removed by the Newman Government).

Under the Bill, authorised officers will continue to be able to enter a workplace during business hours to review time and wage records and speak to members (or individuals eligible to be members) about matters under the IR legislation without prior notice, provided the authorised officer signals their presence and produces a copy of their authorisation if requested.

Health care

Provisions introduced by the Newman Government to assist with recouping overpayments in the health care sector will be retained. Queensland Health and Hospital and Health Services will continue to be able to recoup overpayments made to employees by deducting amounts in instalments.

Responses to the proposed Bill

While the Bill has generally received a positive response, not all stakeholders are pleased with the changes. The Local Government Association of Queensland (LGAQ) has been particularly vocal in its criticism, claiming the Bill further sidelines the independent QIRC and its ability to make decisions relating to local government workers' future pay and conditions under local government awards.[9] Additionally, Queensland's Chamber of Commerce and Industry has taken issue with the QIRC's exclusive jurisdiction to deal with workplace discrimination matters.[10]

Implementation timeline

Parliament is due to complete all submissions and hearings processes and receive the Finance and Administration Committee's report by the end of 2016. The Palaszczuk Government will initiate steps to pass the Bill. If successful, these changes are expected to commence in March 2017.

Next steps for Queensland employers

The amendments are significant and Queensland's industrial landscape will be noticeably different soon after the Bill passes in its present form.

State system employers should update and implement policies and procedures to reflect the new IR framework, as well as train their staff on these changes. State system employers should also look to national employers and the existing federal system for guidance on practices that comply with FW Act protections.

Sara McRostie is a partner and Laura Regan is a senior associate at Sparke Helmore Lawyers. The assistance of Edwina Sully in preparing this article is gratefully acknowledged.

Notes

1 'A review of the Industrial Relations framework of Queensland', published 4 March 2016.
2 Sections 23-26 of the IR Bill.
3 Sections 27-29 of the IR Bill.
4 Sections 47-49 of the IR Bill; Sections 52-54 of the IR Bill.
5 Workers will be as defined under section 7 of the *Work Health and Safety Act 2011* (Qld). Industrial Relations Bill 2016 s8(2).
6 Section 272(2) of the IR Bill.
7 Section 275 of the IR Bill.
8 Section 275 of the IR Bill.
9 See abc.net.au/news/2016-09-02/new-queensland-public-sector-ir-laws-slug-ratepayers-lgaq/7807750; couriermail.com.au/news/queensland/queensland-government/councils-accuse-grace-grace-of-betrayal-of-local-government-workers/news-story/3231bc6b682c8a870b201b7ed742aaf4 (subscription required).
10 theaustralian.com.au/national-affairs/industrial-relations/local-councils-hit-out-at-queensland-ir-Bill/news-story/fb41cc15384dad88909ba8b477130ecb (subscription required).

Federal Court launches national practice notes

On 25 October 2016, the Federal Court issued 26 new national practice notes which were effective on that date and apply to all proceedings whether filed before, or after, this date.

They can be found at **fedcourt.gov.au** > Law & Practice > Practice Documents > Practice Notes.

The 60 practice notes and administrative notices which existed previously were superseded by the new practice notes. The purpose of the practice notes is to provide information to parties in proceedings in the court on particular aspects of the court's practice and procedure.

There will no longer be any administrative state-based notices. In addition to the practice notes, a number of new guides and forms have been developed. The guides (**fedcourt.gov.au** > Law & Practice > Guides) cover topics such as (for example):

1. Guide to Communication with Chambers Staff[1]
2. Guide to Communication with Registry Staff[2]
3. Expert Evidence and Expert Witnesses.[3]

The new forms are available online at **fedcourt.gov.au** > Forms, Fees & Costs > Forms.

Categories of practice notes

The new practice notes fall into the following categories:

1. Central Practice Note

The Central Practice Note (CPN-1) is the core practice note for court users and addresses the guiding case management principles applicable to all national practice areas (NPAs).[4]

The nine NPAs are:

1. Administrative and Constitutional Law and Human Rights NPA
2. Admiralty and Maritime NPA
3. Commercial and Corporations NPA
4. Federal Crime and Related Proceedings NPA
5. Employment and Industrial Relations NPA
6. Intellectual Property NPA
7. Native Title NPA
8. Taxation NPA
9. Other Federal Jurisdiction.[5]

One of the main aims of the Central Practice Note is to ensure that case management is not process-driven or prescriptive, but flexible – with parties and practitioners being encouraged and expected to take a commonsense and co-operative approach to litigation to reduce its time and cost.

All practitioners who work in the Federal Court should read and be familiar with the Central Practice Note.

2. National practice area (NPA) practice notes

There are seven NPA practice notes issued in the areas of Administrative and Constitutional Law and Human Rights,[6] Admiralty and Maritime,[7] Commercial and Corporations,[8] Employment and Industrial Relations,[9] Intellectual Property,[10] Native Title[11] and Taxation.[12]

Each of the NPA practice notes states that it needs to be read together with the Central Practice Note. This means it is essential that you read and are familiar with the Central Practice Note.

Amongst other things, the NPA practice notes raise NPA-specific case management principles and can allow for expedited or truncated hearing processes and tailored or concise pleading and other processes. A starting point for practitioners is to read the NPA practice note applicable to the NPA in which your case falls (if there is an applicable NPA). For example, if you are doing a patent case, you would read the Intellectual Property (IP-1) practice note.

Parties may also seek to adopt the processes set out in one NPA practice note for use in a different NPA. You may therefore consider reviewing the other NPA practice notes to determine if an alternative process may suit your case better.

3. General practice notes (GPNs)

There are 17 new or amended general practice notes (GPNs). These practice notes are intended to apply to all or many cases across NPAs, or otherwise address important administrative matters.

For example, the following practice notes may be relevant to a number of different types of proceedings:

1. Usual Undertaking as to Damages[13]
2. Subpoenas and Notices to Produce[14]
3. Lists of Authorities and Citations[15]
4. Technology and the Court[16]
5. Interest on Judgments.[17]

The full list of GPNs is available at **fedcourt.gov.au** > Law & Practice > Practice Documents > Practice Notes. As they are of general application, you should be familiar with them or at least the topics which they address.

The court is seeking feedback from practitioners on the content of the GPNs from now until October 2017.

Please provide your feedback addressed to the deputy national operations registrar, David Pringle, via email to practice.notes@fedcourt.gov.au including a short summary of key issues you wish to bring to the court's attention and relevant contact details. The court will consider all feedback and acknowledge receipt of all feedback provided.

4. Appeals practice notes (APNs)

The court has made considerable changes to the management of appeals and related applications, and is in the process of preparing comprehensive practice notes outlining the management of, and requirements relating to, such appeals and related applications.

In the interim, the court has revoked Practice Note APP 1 – Listings for Full Court and appellate sittings; and partially amended and reissued Practice Note APP 2 – Content of appeal books and preparation for hearing.

The revised Practice Note APP2 can be found at **fedcourt.gov.au** > Law & Practice > Practice Documents > Practice Notes > Appeals Practice Notes (APN).

Citing practice notes

Each national practice note has been given a distinctive title, which varies depending on its category (for example, TAX-1 is the NPA practice note relating to Taxation; GPN-COSTS is the general practice note on costs).

When citing the national practice notes, the rule stated in the *Australian Guide to Legal Citation* generally applies. The unique Identifier becomes the practice note '*Number*'.

The Federal Court has streamlined information for practitioners with a new series of national practice notes, guides and forms. Report by **Kylie Downes QC**.

If the practice note is reproduced in a report series:

Court, *practice note number/unique identifier – title of practice note, citation of report series,* pinpoint.

If the practice note is not published in a report series:

Court, *practice note number/unique identifier – title of practice note,* full date, pinpoint.

Example: Federal Court of Australia, *Practice Note CPN-1 – Central Practice Note: National Court Framework and Case Management,* 25 October 2016, para 8.5.

Kylie Downes QC is a Brisbane barrister and member of the Proctor editorial committee. From 1 January 2017, she will be a member of Northbank Chambers.

Notes

[1] Found at fedcourt.gov.au > Law & Practice > Guides > Guide to Communication with Chambers Staff.

[2] As above … Guides > Guide to Communication with Registry Staff.

[3] As above … Guides > Expert Evidence & Expert Witnesses.

[4] Found at fedcourt.gov.au > Law & Practice > Practice Documents > Practice notes > Central Practice Note: National Court Framework and Case Management (CPN-1).

[5] For more information on the national practice areas, go to fedcourt.gov.au > Law & Practice > National-Practice-Areas.

[6] Found at fedcourt.gov.au > Law & Practice > Practice Documents > Practice notes > Administrative and Constitutional Law and Human Rights (ACLHR-1).

[7] As above … Admiralty and Maritime (A&M-1).

[8] As above … Commercial and Corporations (C&C-1).

[9] As above … Employment and Industrial Relations (E&IR-1).

[10] As above … Intellectual Property (IP-1).

[11] As above … Native Title (NT-1).

[12] As above … Taxation (TAX-1).

[13] As above … Usual Undertaking as to Damages (GPN-UNDR).

[14] As above … Subpoenas and Notices to Produce (GPN-SUBP).

[15] As above … Lists of Authorities and Citations (GPN-AUTH).

[16] As above … Technology and the Court (GPN-TECH).

[17] As above … Interest on Judgments (GPN-INT).

The grinch who stole my inheritance

Wills and undue influence

'The Grinch hated Christmas! The whole Christmas season!

Now, please don't ask why. No one quite knows the reason.

It could be his head wasn't screwed on just right.

It could be, perhaps, that his shoes were too tight.

But I think that the most likely reason of all

May have been that his heart was two sizes too small.'[1]

Christmas, a time we tend towards sentiment.

We muse on our relationships and the achievements of the year. Some are great, some not so. For many of us, age brings fragility and vulnerability. Life comes full circle – once we were carers for our children, then as we age they often become carers for us.

In these years of fragility, our affections, sentiment and gratitude can soften a once-hardened viewpoint, and these changes in our attitudes are frequently reflected in our testamentary intentions. But where is the line, the line between gratitude and undue influence?

When this question arises, families may query the validity of a will through the process of filing a caveat against the issue of a grant of probate. In doing this it is important for the parties to understand the law that the court must apply. Importantly, each matter turns on its own facts.

Montalto v Sala [2016] VSCA 240, delivered on 7 October, is a Victorian Court of Appeal decision addressing the issue of testamentary undue influence.

It was an unsuccessful appeal from the primary decision of McMillan J in which she found the particulars in support of a caveat against probate of the deceased's 2013 will were insufficient to sustain the caveat.

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with Christine Smyth

One of the deceased's sons filed a caveat challenging the validity of his mother's last will on the grounds of lack of testamentary capacity, undue influence and suspicious circumstances. His mother was 89 at the time of her 2013 will, in which she left disproportionate shares to her three sons.

Filing a caveat alone is insufficient. Clients must also identify the grounds of the claim and they must address the law with sufficient particularity to convince the court that the claims ought to be examined by the court in greater detail.

In this case the applicant's material included claims of exclusion from his mother by his brothers, by failing to advise him of the care home into which she was placed, a history of cognitive decline, and suspicious circumstances citing a substantial departure from prior testamentary dispositions coupled with a level of control over his mother by his brothers at the time of her will.

The primary judge struck out most of the particulars relating to testamentary capacity and suspicious circumstances on the basis they were "ambiguous, obscure or inadequate".

This left for determination the quality of the particulars addressing the claim of undue influence. The primary judge affirmed that, for this "equitable species of fraud" to be sustained "there must be coercion". Her Honour found the particulars did "not raise a reasonable suspicion that the testatrix was coerced" and struck out the claim.

The applicant appealed, contending: "that his particulars gave the respondents sufficient notice of the issues for determination at trial", and that "the test was not different under the Probate Rules as those that applied in the Supreme Court generally".

The Court of Appeal discussed testamentary freedom, observing that not all influences are unlawful and citing *Hall v Hall*[2] – noting affections, sentiment and gratitude as an acceptable persuasion, contrasted with pressure brought about through fear exertion and overpowering, which results in failed courage to resist and yielding "for the sake of peace and quiet" and "escaping from distress of mind or social discomfort", with the result that the testator's will is overborne.

The court affirmed *Trustee for the Salvation Army (NSW) Property Trust v Becker*[3] in which the court found that "[T]he basic point is that, to prove undue influence, it must be shown that the testatrix did not intend and desire the disposition. It must be shown that she has been coerced into making it."

The Court of Appeal determined that the primary judge was right to query the sufficiency of the particulars, finding at [31]-[32]:

"31. If the applicant were to adduce evidence at trial that supported these particulars, his allegation of undue influence would be dismissed. The allegations do not satisfy any test of undue influence such as that set out above. There is no allegation of influence let alone that the influence was undue. There is no allegation that, in making the dispositions under the 2013 Will, the testatrix was coerced or that her will was overborne in circumstances that her judgment was not convinced.

"The fact that an allegation of undue influence is a serious allegation does not mean that, in an appropriate case, it should not be made. But, the respondents to any such allegation are entitled to be given notice of how the allegation is to be advanced. Fairness demands no less. Particulars which are consistent only with the opportunity to influence a testator or testatrix are insufficient. Undue influence will not be presumed."

This case highlights the difficulty in sustaining a claim for probate undue influence. In dismissing the appeal, the court cautioned at [34]: "Particulars supporting an allegation of testamentary undue influence will vary considerably; comparisons between the particulars advanced in different cases will rarely be helpful."

If you consider that there has been undue influence or suspicious circumstances in the making of a will, it is important to act quickly and for the client to gather their evidence in an efficient and thorough manner.

As we head into Christmas I confess a leaning towards sentiment. Merry Christmas to all who have been so incredibly supportive and kind throughout the year, especially my partners and staff at Robbins Watson and all of the QLS staff. I wish each and every reader of *Proctor* a wonderful Christmas filled with kindness and love. May I leave you with this musing:

"I have always thought of Christmas time, when it has come round, as a good time; a kind, forgiving, charitable time; the only time I know of, in the long calendar of the year, when men and women seem by one consent to open their shut-up hearts freely, and to think of people below them as if they really were fellow passengers to the grave, and not another race of creatures bound on other journeys." – *Charles Dickens*

Christine Smyth is deputy president of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, QLS Specialist Accreditation Board, the *Proctor* editorial committee, STEP, and an associate member of the Tax Institute. Christine recently retired her position as a member of the QLS Succession Law Committee however remains as a guest.

Notes

1 *How the Grinch Stole Christmas* by Dr Seuss.
2 [1868] LR 1 P&D 481.
3 [2007] NSWCA 136.

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Practical, personal guidance for members

The QLS Senior Counsellor experience

Queensland Law Society Senior Counsellors provide confidential guidance to practitioners on professional or ethical problems.

The service has been functioning for over 40 years and today there are some 50 highly experienced practitioners across Queensland who can assist with issues such as professional/ethical concerns, career advice and reportable matters.

QLS Senior Counsellors can advise on issues such as whether a particular matter should be reported to QLS or the Legal Services Commission, or whether a notification should be given to a professional indemnity insurer. The counsellors further act as an intermediary between QLS and a practitioner wishing to remain anonymous.

This month, we profile three QLS Senior Counsellors who practise in the Townsville region – Chris Bowrey, Peter Elliott and Lucia Taylor.

Chris Bowrey

Partner, wilson/ryan/grose

What motivated you to become a QLS Senior Counsellor?

Having been admitted as a solicitor for 38 years, I felt it was necessary to make some contribution to the profession. I was concerned that law graduates were not sufficiently exposed to some of the professional and ethical requirements of being a lawyer, including how to interact with other members of the profession.

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

Having the opportunity to speak to other lawyers, including younger members of the profession and to assist with any practical and professional issues they encounter.

What do you like to do with your time off?

Watch cricket and rugby, as well as reading books on architecture.

What is your favorite area of practice?

I practise almost exclusively in family law with an emphasis on financial/commercial matters. I find defamation law very interesting.

Please provide an overview on your general experience as a QLS Senior Counsellor?

I find that many enquiries are from practitioners who like to seek a second opinion or to bounce their ideas off someone else. There are more enquiries in that respect than regarding fundamental ethical decisions. It is interesting that I receive a number of calls from outside the Townsville area.

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

Take advantage of what you will find to be the generous willingness of more senior practitioners to provide help and advice.

From a professional perspective, what do you like most about working in your region?

The Townsville legal scene is big enough to have a Supreme Court judge and District Court judges, together with some large firms, but small enough to know most of the lawyers in town. This is a real benefit to practice and allows many issues to be resolved quickly and cost-effectively, for the benefit of clients.

Peter Elliott

Consultant, Giudes & Elliott

What motivated you to become a QLS Senior Counsellor?

I am aware of the assistance I got from senior practitioners throughout my career, and I figured it was my turn to put something back.

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

Meeting others and exchanging ideas for the benefit of the profession generally.

What do you like to do with your time off?

Relax, exercise and try to get outdoors as much as possible.

What is your favorite area of practice?

Commercial law.

Please provide an overview on your general experience as a QLS Senior Counsellor?

Most people seeking assistance have a general idea of what they should do. I find they generally are seeking a second opinion or someone to assist when communications have broken down.

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

Keep in regular contact with your client (preferably by telephone).

From a professional perspective, what do you like most about working in your region?

Still having a personal relationship with most other practitioners.

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Lucia Taylor

Senior associate, Purcell Taylor Lawyers

What motivated you to become a QLS Senior Counsellor?

When initially requested to consider applying for the position of a QLS Senior Counsellor I recognised the need for more female Senior Counsellors, particularly in regional areas, to be available to assist practitioners who may encounter any ethical issues or simply need clarification or support in their daily practice. Having completed my articles of clerkship in Townsville and practised in various capacities for the last 25 years, my knowledge of the region's practices and practitioners enable me to provide the necessary support.

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

Being able to speak openly yet confidentially with practitioners who require assistance and/or support. I recall as a junior solicitor this was often a task undertaken by senior partners within firms. However, given the demands on all practitioners today and the significant number of start-up firms, this service is even more vital to our practitioners and provides them with immediate assistance.

What do you like to do with your time off?

Apart from spending time with family and friends, I am keen cyclist, often undertaking charity rides in far-off and exotic locations. I also make time for weekly yoga. At all other times I am driving my children to, and watching them at, their many and varied social and sporting activities.

What is your favorite area of practice?

I commenced practising in family law in the later part of my five-year articles. I have continued to practise in that area, however also practise in wills and estates. I have a preference for complex property settlements.

Please provide an overview on your general experience as a QLS Senior Counsellor?

Since my appointment early this year I have experienced a number of calls from practitioners grateful for the opportunity to often re-affirm their views on ethical matters. On a number of occasions I encountered practitioners in more social environments where they have sought assistance or advice. On average I have received two or three enquiries per quarter.

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

Don't ever be afraid to ask questions or seek assistance.

From a professional perspective, what do you like most about working in your region?

Having practised predominantly in Townsville and dealing with solicitors throughout North Queensland, the familiarity with both the legal profession, the judiciary and associated service providers lends itself to a more relaxed and friendly working environment.

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*.

Costs agreements and material non-disclosure

Despite their best efforts, it is not uncommon for law practices to find they have failed to comply in some respect with the applicable statutory disclosure requirements.

Under the *Legal Profession Uniform Law* (Uniform Law), applying in New South Wales and Victoria, one of the consequences of a contravention of the disclosure obligations is that the costs agreement concerned (if any) is void.[1]

The Uniform Law also imposes a duty on law practices to charge costs that are no more than fair and reasonable in all the circumstances, and in particular requires that costs are proportionately and reasonably incurred, and proportionate and reasonable in amount.[2]

On any costs assessment, the costs assessor must determine whether or not a valid costs agreement exists, and whether legal costs are fair and reasonable.[3] In considering whether legal costs for legal work are fair and reasonable, the costs assessor may have regard to any disclosures made by the law practice, among other matters.[4]

In Queensland, the implications for a costs assessment of a failure to comply with the disclosure requirements of division 3 of part 4 of the *Legal Profession Act 2007* (Qld) (LPA), are less certain. If a costs assessor is satisfied that there has been a failure to "comply in a material respect with any disclosure requirements of division 3", does the costs agreement remain relevant, or does s340(1)(c) of the LPA require the assessor to assess all costs by reference to the criterial set out in s341 of the LPA (criteria for costs assessment)?

Legal Profession Act 2007

Several provisions of the LPA will be relevant in considering whether there has been a failure to disclose, and the consequences of any such failure, including: s310 (How and when must disclosure be made to a client), s316 (Effect of failure to disclose) and s328 (Setting aside costs agreement). However the key provisions which require close analysis in determining the basis upon which the assessor will be obliged to assess the legal costs when there is a costs agreement in place are sections 319, 340 and 341 of the LPA.

Section 319 provides, so far as is relevant:

"319 On what basis are legal costs recoverable

(1) Subject to division 2, legal costs are recoverable—

(a) under a costs agreement made under division 5 or the corresponding provisions of a corresponding law; or

(b) if paragraph (a) does not apply—under the applicable scale of costs; or

(c) if neither paragraph (a) nor (b) applies—according to the fair and reasonable value of the legal services provided.

Note for paragraph (c)—

See Section 341(2) for the criteria that are to be applied on a costs assessment to decide whether legal costs are fair and reasonable."

Section 340 provides:

"340 Assessment of complying costs agreements

(1) A costs assessor for a costs application must assess any disputed costs that are subject to a costs agreement by reference to the provisions of the costs agreement if—

(a) a relevant provision of the costs agreement specifies the amount, or a rate or other means for calculating the amount, of the costs; and

(b) the agreement has not been set aside under section 328;

unless the costs assessor is satisfied that—

(c) the costs agreement does not comply in a material respect with any disclosure requirements of division 3

..."

Section 341(1) requires that in conducting a costs assessment, the costs assessor must consider:

(a) whether or not it was reasonable to carry out the work to which the legal costs relate

(b) whether or not the work was carried out in a reasonable way

(c) the fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that s340 applies to any disputed costs.

Section 341(2) sets out a broad list of 10 matters to which the costs assessor may have regard in considering what is a fair and reasonable amount of legal costs. The list includes "any other relevant matter".

Legislative framework

Division 5 of Part 3.4 of the LPA deals with costs agreements. It allows for costs agreements to be entered into between a solicitor and their client or an associated third party payer,[5] and for a costs agreement to be enforced in the same way as any other agreement.[6] A costs agreement that contravenes, or is entered into in contravention of, any provision of the division is void.[7]

The legislation provides that a client may apply to the Supreme Court or Queensland Civil and Administrative Tribunal (QCAT) to set aside a costs agreement if satisfied the agreement is not fair or reasonable.[8] One of the matters which is specifically mentioned as a matter to which the Supreme Court or QCAT may have regard in deciding whether a costs agreement is fair or reasonable is whether there has been any non-disclosure by the solicitors,[9] and there is no requirement that a non-disclosure be a material non-disclosure before it be taken into account.

Apart from issues which may arise under the Australian Consumer Law, costs agreements are therefore dealt with as any other agreement and it is only the court or QCAT that can set aside a costs agreement.[10] The LPA does not authorise or empower a costs assessor to set aside a costs agreement for the purposes of assessing costs. The wording of s340(1)(a) and (1)(b) reinforces this position by stipulating that a costs assessor must assess any disputed costs subject to a costs agreement by reference to the provisions of the costs agreement if the relevant provision specifies the method of calculation and the agreement has not been set aside under s328.

The LPA also does not permit a costs assessor to disregard a costs agreement for the purpose of assessing costs, except to the extent that s340(1)(c) may have this effect. That subsection provides that the costs must be assessed pursuant to the agreement unless the assessor is satisfied that:

"The **costs agreement** does not comply in **a material respect** with any disclosure requirements of division 3" [emphasis added]

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Paul Garrett and **Sheryl Jackson** consider the implications for a costs assessment in Queensland when there has been a failure to comply with the disclosure requirements under the *Legal Profession Act 2007*.

One construction – costs agreement remains relevant

It is suggested that s340(1)(c) of the LPA may be construed so as to require that the costs assessor must assess the costs pursuant to the costs agreement *except to the extent that the costs agreement does not comply in a material respect with any disclosure requirements*.

This exercise requires an administrative function (as distinct from a judicial or quasi-judicial function) of considering whether there has been a non-disclosure in a respect that is material to a charge raised under the costs agreement. If a charge has been raised in those circumstances, section 340(1)(c) is enlivened and that charge should be disallowed but otherwise the costs agreement is applied.

A number of considerations offer support for this construction, in that:

1. It gives efficacy to s340 generally, and also to s319(1)(a) of the LPA.
2. It is consistent with the scheme of the LPA, as reflected in s328, of confining the power to set aside a costs agreement in the event of non-disclosure to the Supreme Court or QCAT.
3. It provides a reason to apply to the Supreme Court or QCAT to set aside a costs agreement in the event of non-disclosure – there may otherwise be no reason to do so because the costs assessor would not be applying the agreement in any event.
4. It leaves some room for the operation of s328(c) of the LPA, which specifies the matters the court must consider regarding disclosure when deciding whether to set aside a costs agreement.[11]
5. When a costs agreement is in place, it is complementary to s316 of the LPA (effect of failure to disclose), which specifies that the amount of costs may be reduced by an amount considered by the costs assessor to be proportionate to the seriousness of the failure to disclose.

Alternative construction – costs to be assessed under LPA s341

The interaction between s340(1)(c) and s341 of the LPA was one of many issues which arose for consideration on a review from a costs assessor's decision in *Paroz v Clifford Gouldson Lawyers* [2012] QDC 151 (*Paroz*).

That decision provided the profession with valuable judicial guidance on several provisions of the LPA dealing with costs disclosure and assessment, and associated provisions of the *Uniform Civil Procedure Rules 1999* (Qld). For consideration of the range of issues dealt with in the judgment, see 'Full Circle on Costs' (2012) 32(9) *Proctor* 42.

In *Paroz*, the court found that the relevant costs agreement did not comply with the requirement as to timing of disclosure under s310 of the LPA (How and when must disclosure be made to a client) and that accordingly there was a material non-disclosure. As to the consequences that flowed from this, the court held (at [41]): "It follows therefore that s340(1) was not satisfied and the costs assessor was not required by that section to assess the disputed costs by reference to the provisions of the costs agreement. Accordingly, it was appropriate to assess them by reference to s341, including subsection (1)(c)."

It is significant to note, however, that the implications flowing from the non-disclosure do not appear to have been the subject of submissions to the court. In particular, it is clear that the court was not given the opportunity to consider the alternative construction of s340(1)(c) of the LPA suggested above.

Conclusion

A costs assessment which is approached on the basis that the costs assessor must assess the costs pursuant to the costs agreement *except to the extent that the costs agreement does not comply in a material respect with any disclosure requirements* is likely to align quite closely with an assessment conducted by reference to the costs agreement generally, particularly when the material non-disclosure is not far-reaching.

The approach adopted in *Paroz,* however, means that an assessment is significantly expanded if there is a costs agreement but there is general non-disclosure of a material nature. The assessor does not apply the costs agreement, or the applicable scale of costs, but must assess all of the costs by application of s341(1)(a) (b) and (c). Accordingly, the costs assessor must consider not only whether or not it is reasonable to carry out the work and whether or not it was carried out in a reasonable way, but also the fairness and reasonableness of the amount of legal costs having regard to the criteria as set out in s341(2) of the LPA.

Such an assessment may produce a very different outcome to one conducted under s319(1)(a) by reference to the costs agreement. If the fees are reduced by 15% or more there are also consequential implications for the law practice in relation to the costs of the assessment,[12] as well as a potential for disciplinary action against the legal practitioner.[13]

Although the approach adopted in *Paroz* certainly aligns closely with the position under the Uniform Law, the different statutory framework of the LPA may warrant a different outcome. It is to be hoped the Queensland courts will have the opportunity to further consider the issue, or that the position may be clarified by the legislature.

This column is prepared by Sheryl Jackson of the Queensland Law Society Litigation Rules Committee. The committee welcomes contributions from members. Email details or a copy of decisions of general importance to s.jackson@qut.edu.au. The committee is interested in decisions from all jurisdictions, especially the District Court and Supreme Court. Paul Garrett is deputy chair of the committee and principal of Paul Garrett Costs Assessor (07 3210 0446).

Notes

1 *Legal Profession Uniform Law* (NSW) s178; *Legal Profession Uniform Law* (Vic), s178.
2 *Legal Profession Uniform Law* (NSW) s172; *Legal Profession Uniform Law* (Vic), s172.
3 *Legal Profession Uniform Law* (NSW) s199; *Legal Profession Uniform Law* (Vic), s199.
4 *Legal Profession Uniform Law* (NSW) s200; *Legal Profession Uniform Law* (Vic), s200.
5 LPA s322.
6 LPA s326.
7 LPA s327(1).
8 LPA s328(1).
9 LPA s328(2)(c); *Barclay v McMahon Clarke (a firm)* [2014] QSC 20.
10 Courts can rectify contracts pursuant to its equitable jurisdiction but only in certain circumstances when the parties were in agreement as to the terms and it is not its function to rewrite a contract: *Frederick E Rose (London) Limited v William H Pim. Jn & Co Limited* [1953] 2 QB 450.
11 In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation: *Acts Interpretation Act 1954* s14A.
12 LPA s342.
13 LPA s343.

Failure to follow legal advice not 'duress'

with Robert Glade-Wright

Financial agreements – wife alleged duress – her 'real difficulty' was that she had received legal advice

In *Kennedy & Thorne* [2016] FamCAFC 189 (26 September 2016) the Full Court (Strickland, Aldridge & Cronin JJ) allowed an appeal by the husband's estate against Judge Demack's decision to set aside financial agreements under s90B and s90C for duress under s90K(1)(b). The parties met on a dating site ([6]). The husband was a 67-year-old property developer with assets of $18m ([8]). The wife was 36 and lived overseas when the parties met. At separation after three years, the wife challenged the agreements. The husband died and his case was continued by his estate.

Citing authority, the Full Court said ([71]-[74]:

" … There needed to be a finding that the 'pressure' was 'illegitimate' or 'unlawful'. It is not sufficient … that … [it] may be overwhelming … that there is 'compulsion' or 'absence of choice'. (…) … 'inequality of bargaining power' cannot establish duress. … In any event … [t]he … husband was at pains to point out to the wife from the outset that his wealth was his and he intended it to go to his children. The wife was aware of that … and … acquiesced … [T]he trial judge found that the wife's interest lay in what provision would be made for her [if] the husband pre-deceased her … not what she would receive upon separation."

In declaring both agreements to be valid, the Full Court concluded ([165]-[167]):

" … the fact that the husband required an agreement before entering the marriage cannot be a basis for finding duress. Nor can the fact that a second agreement was required. (…) Again … it was not … the case that the agreements were non-negotiable. Changes were made by the wife through her solicitor, and … were accepted by the husband. However, the real difficulty for the wife in establishing duress is that she was provided with independent legal advice about the agreements, she was advised not to sign them but she went ahead regardless."

Children – great-grandparents' application for time dismissed under s102QB – vexatious proceedings order also made – meaning of s65C(c)

In *Mankiewicz and Anor & Swallow and Anor* [2016] FamCAFC 153 (16 August 2016) a Full Court majority dismissed an appeal by great-grandparents against Watts J's dismissal under s102QB of their application for time. A vexatious proceedings order was also upheld, the appellants being found to have "acted in concert with … their son who ha[d] frequently instituted vexatious proceedings" ([2]). Ryan and Austin JJ said (from [14]):

" … [T]he appellants were found to lack standing to apply for parenting orders … in 2009. When they commenced fresh proceedings … in 2013 it was necessary for them to prove they then had standing under s 65C(c) … (…)

[15] … [B]ecause it was possible [they] had acquired standing since 2009 so as to permit prosecution of their fresh application … [Watts J] had both the authority and duty to decide whether their application lay within the limits of the Court's jurisdiction. (…)

[16] It therefore follows that [his Honour] had *jurisdiction* … but no *power* to exercise under Part VII … unless they proved their standing, since jurisdiction and power are distinct concepts … Because jurisdiction and standing both mark out the boundaries of judicial power (*Kuczborski v Queensland* [2014] HCA 46 …), it was necessary for [his Honour] to entertain the appellants' application to determine whether or not they had acquired standing.

[17] However, before deciding whether the appellants had acquired such standing, the … judge … ma[d]e … orders … under s 102QB(2)(a) to dismiss their … application and s 102QB(2)(b) to restrain them from bringing any further parenting applications. … His Honour incidentally found … [that] there was no evidence to suggest any change in circumstances about [their] lack of standing since dismissal of the … proceedings in 2009, but that finding was made after having … found that s 102QB was enlivened … (…)"

The majority concluded ([20]-[21]) that the fact that his Honour "could have, but did not … decide the proceedings by dismissal of the application due to … lack of standing … did not strip the proceedings of that characterisation" so that his "exercise of power under s 102QB … was … valid … while exercising jurisdiction in proceedings brought under the Act". Murphy J dissented, saying ([77]) that "the appellants did not have standing to seek parenting orders … [so] that the orders … were not validly made and should be set aside". Murphy J (at [78]-[93]) examined the meaning of s65C.

Property – wife's application for partial settlement of $10m to buy a new home dismissed – likely cash flow and tax effects were unknown

In *Sully (No.2)* [2016] FamCA 706 (25 August 2016) Stevenson J dismissed the wife's application for a partial property settlement of $10m to buy a new home for herself and the children. The husband estimated the net value of his business (X) as $55m after tax. Upon receiving $1.1m from the husband, the wife discontinued her interim maintenance application. The home was worth $10m, the husband had property of $9m in his name and the wife $7m in hers (her investment properties returned net rental income of $3700 a week) ([14]-[15]).

After citing *Strahan (Interim property orders)* [2009] FamCAFC 166 the court noted ([25]-[29]) the husband's evidence that he had no access to funds outside X; that its funds were reserved as working capital; that X would require capital for a development project; that a large tax debt would be generated if $10m were extracted from X; and that X's ability to honour commitments to third parties may be compromised. Stevenson J added ([29]) that such money could not be extracted from the parties' assets without a sale of the home which "would mean that the four children [and husband] … would need to be re-accommodated", although ([35]) "the children's future living arrangements are far from clear" ("the parties' son J having refused to spend time with the wife since separation and the husband seeking final orders for primary residence"). The court was not satisfied that the order sought would be just and equitable.

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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Queensland Legal Yearbook 2015

with Supreme Court Librarian David Bratchford

The Supreme Court Library Queensland is committed to preserving Queensland's legal heritage.

Each year we produce the *Queensland Legal Yearbook*, which provides an overview and enduring record of noteworthy Queensland legal developments for the year.

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Season's greetings

2016 has been another successful year for the library as we have continued to provide you with an expanding range of free and responsive information services.

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High Court and Federal Court casenotes

High Court

Tort – limitation of actions – vicarious liability

In *Prince Alfred College Incorporated v ADC* [2016] HCA 37 (5 October 2016) the respondent had been abused by a housemaster at Prince Alfred College (PAC) in 1962. The respondent brought proceedings in tort for breach of non-delegable duty of care, negligence and breach of duty of care, and vicarious liability. The respondent also required an extension of time. The trial judge held that an extension should not be granted, but also decided questions of liability. The Court of Appeal granted the extension of time and found that the PAC was vicariously liable. The High Court held that the extension of time should not have been granted as a trial would not be fair to PAC. Significant witnesses had died and evidence had been destroyed. The court also took into account that the respondent reneged on a deal made earlier between PAC and the respondent to lay the dispute to rest. Although the court said that the trial judge should not have considered liability, it did comment on some claims to clarify the state of the law. In relation to non-delegable duty, the court reaffirmed its decision in *New South Wales v Lepore* (2003) 212 CLR 511. The court also held that it is possible for vicarious liability to arise in relation to a wrongful act that is a criminal offence. But it is not sufficient only for employment to provide an opportunity for commission of a wrongful act. Any special role the employer has assigned to the employee, and the position of the employee and the victim are relevant. Particular features of authority, power, trust, control and an ability to achieve intimacy should be considered. In this case, it was not possible to reach a conclusion about those matters because of the lack of evidence before the court. French CJ, Kiefel, Bell, Keane and Nettle JJ jointly; Gageler and Gordon JJ concurring separately. Appeal from the Full Court of the Supreme Court (SA) allowed.

Discrimination – disability discrimination – juries and jurors

In *Lyons v Queensland* [2016] HCA 38 (5 October 2016) the High Court held that a deputy registrar of the Queensland Supreme Court did not unlawfully discriminate against the appellant, a deaf woman, by excluding her from a list of prospective jurors. The appellant would have needed an Auslan interpreter in court and for the jury deliberations. She argued that to exclude her was directly and indirectly discriminatory. The court noted that the common law requires that juries be kept separate and that the presence of a non-juror in jury deliberations is an incurable irregularity. There was no basis in the statute to alter that position for an Auslan interpreter. Further, there was no basis in statute to administer an oath to an interpreter assisting a juror. A prohibition on seeking disclosure jury deliberations in the *Jury Act* would also not apply to an Auslan interpreter. The court held that Queensland law did not allow for an interpreter to assist the appellant, and she was therefore incapable of performing the functions of a juror. The deputy registrar was required to exclude the appellant from the jury panel. That did not infringe the prohibition on unlawful discrimination. French CJ, Bell, Keane and Nettle JJ jointly; Gageler J separately concurring. Appeal from the Supreme Court (Qld) dismissed.

Real property – bodies corporate – disputes over common property

In *Ainsworth v Albrecht* [2016] HCA 40 (12 October 2016) the respondent sought an adjustment of common property in a community title scheme. The adjustment would give him exclusive rights over a portion of common property. Approval of such a proposal required a resolution without dissent from the body corporate. At a body corporate meeting, votes were split on the proposal. The respondent then applied to an adjudicator under the *Body Corporate and Community Management Act 1997* (Qld). The adjudicator could make an order deeming the proposal to have been passed if the opposition to the proposal was unreasonable in the circumstances. In this case, the adjudicator made such an order. The Queensland Civil and Administrative Tribunal (QCAT) overturned the decision, finding that the adjudicator had impermissibly substituted her own opinion for that of the body corporate, rather than considering whether the grounds of opposition were reasonable. The Court of Appeal set aside QCAT's decision. The High Court held that the adjudicator had misunderstood her function. The question was not whether the body corporate had acted reasonably, but whether the grounds of opposition of any dissentients were reasonable. It was not part of the adjudicator's role to strike a reasonable balance between competing positions. The grounds of opposition to the proposal raised questions about which reasonable minds could differ. Opposition to the proposal therefore could not be unreasonable. French CJ, Bell, Keane and Gordon JJ jointly; Nettle J concurring separately. Appeal from the Supreme Court (Qld) allowed.

Constitutional law – acquisition of property – allowances and benefits for former parliamentarians

In *Cunningham & Ors v Commonwealth of Australia & Anor* [2016] HCA 39 (12 October 2016) the High Court held that determinations and laws reducing entitlements to former members of the federal parliament were not acquisitions of property on other than just terms. The *Parliamentary Contributory Superannuation Act 1948* (Cth) provides for the payment of "retiring allowances" to retired members of parliament. Before 2011, this was done by reference to fixed percentages of parliamentary allowances. Since 2011, the Remuneration Tribunal has had power over parts of the calculation of retiring allowances. By way of determinations, the tribunal changed the method of calculation to effectively reduce the allowances. In addition, some retired parliamentarians received a "Life Gold Pass", which originally entitled them to free domestic travel. That entitlement was originally a non-statutory entitlement, but from 2002 was provided under the *Members of Parliament (Life Gold Pass) Act 2002* (Cth). That Act also capped the amount of travel that would be provided free. The plaintiffs argued that the two Acts and the determinations were invalid because they acquired property otherwise than on just terms. The court held that the retiring allowance amendments were not laws with respect to the acquisition of property. They did not remove the entitlement to an allowance, but altered the method of calculation. Further, the retiring allowances were statutory rights which, having regard to their character, and the context and purpose of the statute creating them, were inherently variable. Where a statutory right or entitlement has always been liable to variation, a variation later effected cannot properly be described as an acquisition of property. The Life Gold Pass entitlements fell into the same category. French CJ, Kiefel and Bell JJ jointly; Gageler J separately concurring in relation to the retirement allowances and dissenting in relation to the Life Gold Pass; Keane J, Nettle J and Gordon J each separately concurring. Answers to special case given.

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Federal Court

Consumer law – ambush marketing for the 2016 Rio Olympics Games – whether infringement of the *Olympic Insignia Protection Act 1987* – whether misleading and deceptive conduct under the Australian Consumer Law

In *Australian Olympic Committee Inc. v Telstra Corporation Limited* [2016] FCA 857 (29 July 2016) the court (Wigney J) dismissed an application by the Australian Olympic Committee (AOC) that advertising by the respondent (Telstra) in its 'Go to Rio' marketing campaign contravened the *Olympic Insignia Protection Act 1987* (Cth) (OIP Act) and the Australian Consumer Law (ACL).

The main facts were not in dispute (at [6]). The Summer Olympics Games are probably the largest and most widely recognisable sporting event in the international sporting calendar. The Olympic Games and all associated intellectual property are owned by the International Olympic Committee. Under the Olympic Charter, the AOC,

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as Australia's National Olympic Committee, has the right to use and protect property associated with the Olympic Games and Olympic movement. For many years, the AOC has entered sponsorship and affiliation agreements with national and multinational companies, granting the companies the right to promote themselves by association with the Olympic Games and allowing them to use terms such as 'Olympic', 'Olympics' and 'Olympic Games'. For many years, Telstra was the AOC's exclusive telecommunications sponsor. All sponsorship arrangements between AOC and Telstra came to an end in 2012. The AOC, however, entered an agreement with Seven Network (Operations) Ltd (Seven), granting Seven exclusive Olympic Games broadcast rights in Australia on television, mobile phones and tablet devices. As part of the agreement, Seven was permitted to sell broadcast sponsorships and advertising in connection with the Olympic Games, but could not grant its broadcast sponsors the right to use Olympic properties, including the words 'Olympic', 'Olympics' and 'Olympic Games'. In June 2016, Seven entered an agreement with Telstra to sponsor the broadcast of the Rio Olympic Games, allowing Telstra to use certain designations such as "Seven's Olympic Games broadcast is supported by Seven's official technology partner, Telstra" (at [19]). The agreement also allowed Seven to provide "Premium Content" to eligible Telstra customers. It was apparent from Telstra's marketing brief that it wanted to 'own' an association with the Olympic Games but could not imply any official association with the Olympics themselves (at [25]). The issue was whether any of Telstra's promotions crossed that fine line (at [26]).

The AOC initially sought interlocutory injunctions restraining Telstra from running certain promotions and campaigns. However, the parties sought and were granted an urgent final hearing. The trial was heard and judgment delivered prior to the commencement of the Rio Olympics Games. The trial concerned 34 separate types of advertisements (at [27]) such as televisions commercials, videos on third-party websites, Telstra catalogues, retail or point of sale material and Telstra emails and other digital materials.

Section 36(1) of the OIP Act provides that: "A person, other than the AOC, must not use a protected Olympic expression for commercial purposes." There was no dispute that the AOC did not issue a licence to Telstra to use any of the Olympic expressions during the time that any of the relevant advertisements, promotions or marketing materials were broadcast or otherwise made available for the purposes of the exception in s36(2) of the OIP Act (at [75]). Section 30 of the OIP Act sets out relevant situations in which a person is said to use a protected Olympic expression for commercial purposes. There was essentially no dispute that Telstra applied Olympic expressions ('Olympic', 'Olympics', and 'Olympic Games') to its services within the meaning of s28 of the OIP Act (at [79]).

The contested issue under s30(2)(c) of the OIP Act was stated by Wigney J at [80]: "The real question is whether, in each case, the application of the expression or expressions 'to a reasonable person, would suggest that [Telstra] is or was a sponsor of, or is or was the provider of sponsorship-like support for', relevantly, the AOC, IOC, the Rio Olympic Games or the Australian Olympic team or any section or member of it. That question involves an objective test. The question is what the application of the Olympic expressions would suggest to a reasonable person..."

Ultimately, the court held that the AOC had not proved that Telstra contravened s36 of the OIP Act because none of the advertisements that employed the Olympic expressions would suggest to a reasonable person that Telstra is or was a sponsor of, or is or was the provider of, sponsorship-like support to any relevant Olympic body (at [124]).

The AOC also argued that Telstra's advertising, considered individually or collectively, conveyed a false or misleading representation, or involved misleading or deceptive conduct and, accordingly, Telstra contravened either or both of s18 or ss29(g) and (h) of the ACL. Wigney J observed at [135]: "The critical question, in general terms, is whether Telstra's advertisements, marketing and promotions, conveyed, or were likely to convey, to reasonable persons in the class to whom they were directed or likely to be received, that Telstra had some form of sponsorship, licencing or affiliation arrangement with a relevant Olympic body. If that message or representation was conveyed, it was misleading and deceptive and Telstra's conduct in causing the advertisement to be published or disseminated was misleading and deceptive."

The court held, for essentially the same reasons as those given in dismissing the OIP Act claim, that the AOC's claim under the ACL failed (at [137] and [150]). It was insufficient for the AOC to prove that Telstra's advertisements were Olympic themed; there was no express reference to any Olympic body, or use of any Olympic symbols or emblems. Promoting a relationship with Seven, including with respect to the Olympics on 7 app, was not misleading or deceptive, or likely to mislead or deceive (at [140]). It was found at [142] that the message was of Telstra's association with Seven, not with any Olympic body, and therefore not misleading or deceptive. While Telstra clearly sought to exploit an association with the Rio Olympic Games, it did so by promoting its sponsorship arrangement with Seven in relation to Seven's Olympic broadcast, not to the Olympics itself. This was despite the fact that "Telstra intended to, and may well have succeeded in, capitalising or exploiting, in a marketing sense, the forthcoming Rio Olympics Games" (at [149]).

Penalty hearing – admitted misleading or deceptive conduct by underquoting the price range of a property by real estate agent – observations on instinctive synthesis in the assessment of penalty

In *Director of Consumer Affairs Victoria v Hocking Stuart (Richmond) Pty Ltd* [2016] FCA 1184 (6 October 2016) the court (Middleton J) considered the appropriate penalty and other orders that should be made in relation to admited contraventions of the Australian Consumer Law and *Fair Trading Act 2012* (Vic) (ACL (Vic)). The respondent, a real estate agent, admitted contraventions of both s18 and s30(1)(c) of the ACL (Vic). The admissions covered 11 separate contraventions (at [23]) regarding the sale of 11 residential properties in Richmond and Kew in Victoria during 2014 and 2015. The contraventing conduct was underquoting the price range in the marketing and advertising of the property in advertisements online on a website and in a hardcopy publication.

The court held a penalty of $30,000 for each contravention to be an appropriate penalty, amounting to a total penalty of $330,000 (at [83]). The respondent would also pay costs of about $80,000-$90,000.

The court considered the effect of the High Court's decision in *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113. Justice Middleton said at [41]-[42]:

"Consumer Affairs submitted that the sharp distinctions drawn by the High Court in principle and practice, between the criminal sentencing discretion and determination or resolution of civil penalty proceedings, suggests that while the resolution of civil penalty proceedings still requires the exercise of a broad discretion, the task is not met by the processes involved in 'instinctive synthesis'.

"I do not accept this submission. The process of determining the appropriate amount of civil penalty still involves an 'instinctive synthesis'. However, the relevant considerations to be taken into account between the imposing of fines in a criminal context and the imposing of a civil penalty are different."

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Court of Appeal judgments

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with Bruce Godfrey

Civil appeals

Paul v Westpac Banking Corporation [2016] QCA 252, 7 October 2016

General Civil Appeal – where the appellant's claim sought relief from a guarantee and associated mortgages the appellant gave the respondent to secure repayment of money the respondent lent to a company of which the appellant's son is the sole director and shareholder – where the appellant was refused leave to amend his claim and statement of claim to include a new cause of action for which the period of limitation had ended – where it was found that the new cause of action did not arise out of the same or substantially the same facts as the causes of action for which relief had already been claimed – where the respondent's additional argument that other matters made it inappropriate for the court to grant leave was rejected – where the appellant contends that the primary judge erred in finding that the new cause of action did not arise out of substantially the same facts as the existing causes of action – where the respondent contends that the primary judge was correct in so finding – where the respondent further contends that it was not an appropriate case for leave to be granted – whether the new cause of action arises out of substantially the same facts as the original causes of action – whether it is appropriate under the circumstances to allow the amendment – where the better view is that the contractual cause of action should be regarded as arising out of substantially the same facts as the existing statutory cause of action – where the nub of the primary judge's decision was that, although a substantial number of facts relied upon in support of the new contractual claim were already pleaded in support of the statutory claim, the contractual cause of action did not arise out of substantially the same facts because the focus or sting of the amendment included new allegations about the standard required of a diligent and prudent banker in selecting and applying its credit assessment methods and forming its opinion about the borrower's ability to repay – where the contrary conclusion is reached that the obligation which is now sought to be derived from an express term of the contract finds a close analogue in the facts relied upon for the existing statutory claim – where the substantial identity between facts already pleaded and the facts invoked for the contractual claim, including the similarity between the standard applicable in deciding whether the respondent did not have reasonable grounds for making the representations and the contractual standard expressed in cl 25.1 of the Code of Banking Practice, make it seem unlikely that the introduction of the contractual claim should introduce any substantial difficulty for the respondent in adducing relevant evidence in defence of the latter claim – where it is accepted that the appellant has established his ground of appeal that the primary judge incorrectly concluded that a change of focus in the proposed amended statement of claim meant that the proposed new cause of action did not arise out of substantially the same facts as the pleaded causes of action – when the evidence of the respondent's investigation in 2011 of the appellant's claim of contravention of cl.25.1 is taken together with the absence of any evidence by the respondent upon the topic and the allegations in the statement of claim (filed in February 2013) of facts which do not differ substantially from those relied upon for the proposed contractual claim, the appropriate conclusion is that the appellant proved that the respondent was unlikely to be materially prejudiced by the addition of the new cause of action.

Appeal allowed. Set aside the order dismissing the application. Order instead that the appellant have leave pursuant to r376(4) of *Uniform Civil Procedure Rules 1999* (Qld) to amend his claim and statement of claim. Costs.

SunWater Limited v Drake Coal Pty Ltd & Anor [2016] QCA 255, 11 October 2016

General Civil Appeal – where the appellant commenced proceedings in the Trial Division claiming damages in contract and, in the alternative, reasonable remuneration for work done in preparation for the construction of various pipelines – where the appellant brought an application to strike out multiple paragraphs of the respondents' draft defence and counterclaim, contending that the respondents pleaded matters that were irrelevant to the restitutionary claim – where the trial judge dismissed the application – where, subsequent to the trial judge's order but before the appeal, the respondents filed an amended defence and counterclaim – where this appeal was filed against a judgment which had considered a different pleading and consequently this court is without the benefit of a consideration by the primary judge of some parts of the current pleading which are now challenged – where this court must consider the judgment under appeal and therefore the pleading which was there discussed – where for present purposes two points of principle are explained in [89]-[90] of *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 – where the first is that the necessary elements of the presently relevant right of action are that the plaintiff has performed work and at the request of the defendant – where in those circumstances there is a right to be paid a reasonable price for the work – where the second is that if those elements are established, it is "neither necessary nor appropriate" to consider any of the other circumstances listed in *Angelopoulos v Sabatino* (1995) 65 SASR 1 "in deciding whether [the plaintiff can] recover a fair price for the work …" – where, in particular, it is neither necessary nor appropriate to consider whether the defendant benefited from the plaintiff's work or whether there is any "particular circumstance (such as change of position) by virtue of which it would be unjust to require [the defendant] to remunerate [the plaintiff]" – where the plurality in *Lumbers* were in [89]-[90] identifying what was or was not relevant, from the nine considerations listed in *Angelopoulos*, to both the proof and defence of a claim for payment for work done at a defendant's request – where the ninth of the factors in *Angelopoulos* was the absence of "a particular circumstance (such as change of position) by virtue of which it would be unjust to require the [defendant] to remunerate [the plaintiff]" – where clearly any such circumstance, in particular a change of position, if relevant would be a *defendant's* issue, meaning that it would be for a defendant to at least plead if not also prove the circumstance – where the primary judge appropriately referred to the need for caution upon an interlocutory application before depriving a party of part of its case proposed for the trial – where the effect of the joint judgment in *Lumbers* is clear and the primary judge was persuaded to decline to strike out these allegations upon an incorrect basis – where consequently the primary judge should not have dismissed the appellant's application – where because the pleading which was considered was a *proposed* defence, the appropriate order on the application was to direct that a pleading not be filed which contained paragraphs 48(k)(vi)-(xi), 61(k)(vi)-(xi) and 68(o)(vi)-(xi) of the draft defence – where the amended defence filed in March this year repeats the allegations about the RATCH agreement (described as an existing water allocation in favour of the companies which were the owners of the Collinsville Power Station) – where it attributes a different legal significance to them, in apparent recognition of the weakness of the previous pleading – where the allegations about the RATCH agreement do not have the same defect as their predecessors in the pleading considered by the primary judge, because they are now given a relevant legal significance, namely that they affected the content of any relevant request for the subject work to be performed – where instead the apparent problem in the current pleading is that it alleges a factual case which could not be correct – where at present it appears to be an allegation that the content of any relevant request for work which was performed by November 2012 was affected by subsequent events and circumstances – where that could not have been the fact – where although the pleading considered by the primary judge could be thought to have been superseded by the 2016 pleading, there is still utility in allowing the appeal and setting aside the order which dismissed the appellant's application – where this would allow the primary judge to reconsider the application consistently with this court's reasons – where consistently with its challenge (made only on the hearing of this appeal) to the current

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pleading, the appellant would be expected to amend that application to address the current pleading, consistently with this court's reasons.

Appeal allowed. Set aside the order pronounced on 12 November 2015 which dismissed the appellant's application filed 2 October 2015. Remit the matter to the primary judge for consideration of that application according to this judgment. Costs.

Smith v Lucht [2016] QCA 267, 20 October 2016

Application for Leave s118 DCA (Civil) – where there was a finding at first instance that defamatory imputations concerning the applicant were made by the respondent – where the respondent relied on s33 of the *Defamation Act 2005* (Qld) (the Act) – where the trial judge dismissed the applicant's claim for defamation on the basis of s33 of the Act – whether the trial judge erred in finding that a defence had been made out under s33 of the Act – where s33 enacts the defence of triviality to the publication of defamatory matter – where the applicant's primary submission however, is that assuming "any harm" is limited to reputational harm, the trial judge erred in the application of the defence of triviality to the circumstances of the case – where the applicant acknowledges he did not contend at trial that the reference to "any harm" in s33 extends to hurt feelings – where the applicant's defamation claim arose from three publications, one written and two oral, in which the respondent referred to the applicant as "Dennis Denuto", described by the trial judge as "a central character in the popular Australian film *The Castle*" – where his Honour made the finding that he was satisfied that the defendant had proved that, at the time of the publication of the defamatory matter, the circumstances of publication were such that the plaintiff was unlikely to sustain any harm to his reputation – where this is the correct test – where no error is disclosed in his Honour dismissing the applicant's claim on the basis of the defence of triviality – where the word "any" in s33 should not be interpreted as seeking to qualify the nature of the harm the plaintiff was likely to sustain – where the better construction is to interpret the word "any" as referring to the degree of harm – where the respondent's submission is accepted that the word "any" in s33 does no more than clarify that a defendant is required to establish not merely that the plaintiff was unlikely to suffer serious (being great or substantial) harm to his or her reputation, but rather, harm to reputation at all – where s33 places the onus on a defendant to prove that the circumstances of publication were such that there is an absence of a real chance or real possibility that the plaintiff would sustain any harm – where the inquiry as to reputational harm for the tort of defamation focuses on what is conveyed to the ordinary reader or listener, whereas s33 focuses on the circumstances of publication and the likelihood of harm – whilst the defence proceeds on the premise that the plaintiff has been defamed (and therefore his or her reputation presumably harmed) the operation of the defence does not seek to establish that the plaintiff's reputation was not in fact harmed.

Leave to appeal be granted, limited to the grounds of appeal concerning the application and construction of s33 of the Act. Appeal dismissed. Costs.

Woolworths Limited v Grimshaw [2016] QCA 274, 28 October 2016

General Civil Appeal – where the respondent slipped on a grape near a grape display in the appellant's store – where the appellant contends the judge erred in concluding it should have placed a mat adjacent to the grape display as this would have probably prevented the fall – where the judge applied *Wyong Shire Council v Shirt* (1980) 146 CLR 40 and held a reasonable employer, in the appellant's position, could have foreseen the risk of injury and would have placed mats in front of the grape display to reduce this risk – whether the appellant was negligent in not placing mats in front of the grape display – where it was commendable that Woolworths had made considerable efforts to avoid slips and falls as a result of grapes on the floor by educating its employees and customers about the dangers and making some efforts to pre-package the grapes – where its published fact sheet for employees noted that in the 2009 financial year it had 1463 incidents in stores where employees or customers slipped on fallen grapes; about 10% of all customer injuries were specifically grape-related – where under a factsheet heading 'What can you do to prevent people from slipping on grapes in your store?', the fifth of seven suggestions was, "Place mats in front of your displays to help if customers do drop grapes whilst selecting their fruit." – where the evidence established that there was a foreseeable risk of a slip injury to employees and customers from grapes falling to the floor, particularly at the grape display; Woolworths knew this; it also knew that mats in front of the grape display would help reduce that risk – where Woolworths did not put down mats in front of the grape display, even though they were not costly; were available; and could easily have been utilised and there was no evidence of any reason not to put down the mats – where the appellant contends expert evidence was inadmissible as it was not provided with reference to objectively ascertainable criteria that could be independently verified – where the expert evidence was in a field of specialised knowledge concerning identified and proved facts which the judge found were established on the evidence – whether the expert evidence was admissible – where the expert's (Mr Kahler's) evidence was in a field of specialised knowledge concerning identified and proved facts as discussed in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 – where the appellant contends the respondent was trained in risk assessment, was aware of the risk and knew to keep a lookout for grapes, and her failure to keep a lookout was not mere inadvertence – where the appellant should have, but did not, place mats next to the grape display – where the appellant could not expect employees to scan the floor for fallen grapes at every step – whether the respondent was contributorily negligent – where Woolworths should have, but did not, place mats next to the grape display to avoid employees slipping on fallen grapes – where it could not expect that, because it had alerted

employees to the dangers of fallen grapes and encouraged them to pick them up, employees heading to the lunchroom on a break would necessarily scan the floor at every footstep for fallen grapes – where the appellant contends the respondent failed to mitigate her losses by not taking steps to secure alternative employment and by refusing the appellant's offer of vocational assistance – where the appellant contends the judge failed to sufficiently discount past and future economic loss for contingencies and adopted an incorrect starting figure for the calculation of economic loss – where the appellant's offer for rehabilitative assessment was not genuine and was made after it was clear that the respondent could not continue in her pre-injury employment – where under s268(7) *Workers' Compensation and Rehabilitation Act 2003* (Qld), Woolworths was obliged to make rehabilitation available to her in sufficient time for the parties to comply with their obligations under the Act dealing with the 'Pre-court procedures', 'Settlement of claims', and 'Start of court proceedings' – where the respondent's prognosis was poor and there was evidence that she was permanently unable to work – where the judge discounted the respondent's claim for future economic loss by 20% due to a pre-existing degenerative condition – where the appellant's contention that the discount should have been at least 30% is not made out – whether the judge erred by taking into account future wage increases in determining future economic loss – where, as the primary judge stated, Woolworths' late interest in this rehabilitative assessment just after Ms Grimshaw commenced her court action smacked of a self-serving paper trail for litigious purposes rather than a genuine attempt to assist her rehabilitation – where Ms Grimshaw did not fail to comply with s267(2) but Woolworths failed to comply with s268(7) – where in *Todorovic v Waller* (1981) 150 CLR 402 the High Court determined that wage increases and inflation should not be taken into account, save by applying the relevant discount to reach present value – where the primary judge erred in failing to apply *Todorovic* and taking into account Ms Grimshaw's future predicted wage increases had she continued in her pre-injury position with Woolworths in determining her future loss of earning capacity – where this error has resulted in her obtaining judgment for $54,000 more than she should – where the appeal must be allowed and her award reduced by this amount.

Appeal allowed. Judgment in favour of Ms Grimshaw is varied by substituting the sum of $437,037.26 for the sum of $491.037.26. Submissions invited on costs.

Criminal appeals

R v SCO & SCP [2016] QCA 248, 5 October 2016

Appeals against Conviction – where the first appellant was tried on an indictment charging 20 counts of indecent treatment of a child under 16 under his care – where the counts concerned his alleged offending against five complainants, who all gave evidence against him at trial – where, on appeal, the first appellant submitted, inter alia, that there was a miscarriage of justice because there should have been separate trials for each complainant – where no application was made at trial for there to be separate trials – where the way the trial was conducted strongly suggested that there was a perceived forensic advantage for the first appellant in conducting the trial as a joint trial – whether it would be appropriate, in the circumstances, for the court to sustain a complaint that there should have been separate trials – where in this case not only was no application made for the complainants to be heard separately, but rather the appellant gained forensic advantage from having the complainants heard at one trial – where firstly, there was cross-examination of the first complainant and the fifth complainant designed to show that there had either been collusion or at least inadvertent contamination of their evidence – where secondly, counsel for the first appellant referred to inconsistencies between the evidence of various complainants to undermine the credibility of each of the complainants – where two factors strongly suggest that there was a perceived forensic advantage for the first appellant in conducting the trial as a joint trial – where it would be inappropriate in those circumstances for a successful complaint to be made on appeal that there should have been separate trials – where the first appellant submitted, inter alia, that certain evidence of the appellant's uncharged sexual acts and other discreditable conduct was inadmissible and that its admission had caused a miscarriage of justice – where the evidence was relevant to explaining or making intelligible the context or environment in which the offences occurred – where the trial judge gave careful directions about the limited way in which the jury could use the evidence – whether the evidence was properly admitted – where in this case, the jury were thoughtfully and properly instructed as to the use that they could, and could not, make of this evidence – where the careful instructions made a distinction between the evidence relevant to all of the complainants and the evidence relating only to the first complainant or the second complainant – where the evidence was relevant and admissible and any risk of unacceptable prejudice was satisfactorily dealt with by the comprehensive directions given to the jury – where the second appellant submitted, inter alia, that the trial judge misdirected the jury as to the use that could be made of the evidence led against her co-accused, the first appellant – where the admissible evidence in the trial overwhelmingly dealt with the first appellant – where the trial judge's summing up included a misstatement that the relevance of evidence to the three counts against the second appellant was a matter for them – where the trial judge summarised the evidence on those counts without making any distinction between the evidence against the first appellant and the evidence against the second appellant and without referring to the second appellant's evidence on those counts other than when summarising her counsel's submissions to the jury – whether as a result of the misstatement and omissions in the summing up, the second appellant was denied a fair trial.

Appeal by the first appellant dismissed. Appeal by the second appellant allowed. Verdicts of guilty against the second appellant on counts 14 and 15 are set aside. A retrial of the second appellant on counts 14 and 15 is ordered.

R v Dobie [2016] QCA 250, 7 October 2016

Appeal against Conviction & Sentence – where the appellant was convicted by jury of one offence against s134.2 *Criminal Code* (Cth) of obtaining a financial advantage from a Commonwealth entity by deception – where the appellant contends the verdict is unreasonable and cannot be supported by the evidence – whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt – where the evidence raised for the jury's consideration questions whether the appellant intended that the completed BAS related to a business or businesses other than Chocolate Blonde Enterprises and whether the appellant believed that the ATO appreciated as much – where it was open to the jury to find that the appellant knew, as was the case, that he was not entitled to recover as payments or credits pursuant to the BAS the amounts totalling $17,392 claimed in the BAS – where it was reasonably open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt that the appellant acted dishonestly by declaring to be true and correct amounts claimed in the BAS which he knew he was not entitled to claim in the BAS – where the trial judge directed the jury as to the mental element of 'intention' but gave no direction as to the issue of deception – where the appellant's case at trial raised the defence of mistake of fact under s9.1 of the *Criminal Code* (Cth) – where the trial judge directed the jury as to a mistake of law – where the trial judge further directed the jury that the mistake must be 'reasonable' in order to establish the defence – whether the misdirections amounted to a miscarriage of justice – where counsel for the respondent acknowledged, the trial judge's directions upon this topic are difficult to differentiate from directions given in *R v Navarolli* [2010] 1 Qd R 27 which were found to be wrong in law – where the respondent also acknowledged that the mistake articulated by the trial judge was not a mistake of fact – where the cumulative effect of those legal errors was that the trial judge's directions wrongly conveyed to the jury that the suggested mistake by the appellant was irrelevant if the respondent proved beyond reasonable doubt that the mistake was unreasonable – where the misdirection made the path towards conviction unduly easy for the Crown and it did not involve any forensic advantage for the appellant – where the parties submitted that the court should assume that an incorrect transcription of the appellant's formal admissions was provided to the jury – whether the unintentional inclusion of the incorrect transcription amounted to a miscarriage of justice – where the purported admission made a nonsense of the appellant's case that the BAS did not concern Chocolate Blonde Enterprises but a different business or businesses which did trade in the relevant period – where it is not possible to exclude the hypothesis that the jury, acting upon the misstatement of the appellant's admission, found that the appellant did not conduct any business under his ABN during any of the four quarters to which the BAS related and, for that reason alone, he knew when he signed each of the BAS that the figures in it were false – where the respondent contends that notwithstanding any miscarriage of justice established by the appellant, such a miscarriage is not 'substantial' for the purposes of s668E(1A) of the *Criminal Code* (Qld)

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and the proviso ought to be applied – whether a substantial miscarriage of justice has actually occurred – whether the proviso is applicable – where the determinative question then is whether or not a "substantial miscarriage of justice has actually occurred" within the meaning of that expression in the proviso; it is those statutory words which govern, rather than subsequent judicial expositions of their meaning: *Weiss v The Queen* (2005) 224 CLR 300 – where in this case the jury may have concluded that the supposed mistake of fact (which was in truth a supposed mistake of law) was necessarily unreasonable in light of the supposed admission (which the appellant did not in fact make), and that (applying the trial judge's wrong directions about criminal responsibility under s9.1 of the Commonwealth Code) it inevitably followed that the appellant could not possibly be relieved of criminal responsibility upon the grounds advocated by defence counsel – where such a combination of the admitted errors at the trial may have resulted in the real issues not being considered by the jury at all, so that which bore the outward appearance of a trial by jury was not in substance a trial by jury.

Appeal allowed. Set aside the conviction. Order a new trial.

R v Bowley [2016] QCA 254, 11 October 2016

Sentence Application – where the applicant pleaded guilty to a total of seven offences committed on three occasions in November and December 2014 – where the sentencing judge made a finding that the offences were committed while the applicant was under the influence of illicit drugs – where s9(9A) of the *Penalties and Sentences Act* 1992 (Qld) (PSA) provides that voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor for a court to have regard to in sentencing the offender – whether the sentencing judge erred in concluding that the offences were committed while the applicant was under the influence of illicit drugs and accordingly did not properly give recognition to his mental condition as a mitigating factor – while his Honour referred to matters from the psychiatrist's report relating to the applicant being delusional, his substance-induced psychosis, and the likelihood of profound pathological changes in the brain biochemistry, these matters do not appear to have been taken into account in mitigation of the sentence – where no consideration as to whether the applicant's moral culpability was reduced by the psychiatric condition is apparent in the sentencing remarks – where it was not described as a mitigating factor – where it seems that such a state is something quite distinct from "voluntary intoxication … by … drugs" – where it was therefore erroneous to exclude it from consideration in the sentencing process, by reference to s9(9A) of the PSA – where the sentencing judge had determined to take into account the period of pre-sentence custody and had done so in relation to the parole eligibility date – whether the sentencing judge erred by failing to give effect to non-declarable pre-sentence custody in relation to the head sentences – where given the uncertainty about a grant of parole, there is reluctance to reflect the effect of time already spent in custody only by setting a parole eligibility date.

Application granted. Appeal allowed. Sentences are varied, by imposing a term of seven years' imprisonment in lieu of each term of eight years' imprisonment; a term of six years' imprisonment in lieu of the imposed term of seven years' imprisonment; and a term of two years and nine months' imprisonment in lieu of each term of three years and three months' imprisonment. The date on which the applicant is eligible to apply for parole is 10 March 2018.

R v Kay; Ex parte Attorney-General (Qld) [2016] QCA 269, 25 October 2016

Reference under s668A *Criminal Code* (Qld) – where the respondent is to be tried on one count of serious animal cruelty in the District Court – where pursuant to s590AA *Criminal Code* a judge of that court ruled certain evidence was admissible in the respondent's trial – where in a separate s590AA application in a similar trial, another judge of that court ruled similar evidence was inadmissible, excluded other evidence, and accepted defence counsel's no case submission over the prosecutor's objection – where, when it became apparent that the second judge would then preside over the trial of the respondent, the prosecutor applied for the judge to recuse himself on the basis of apprehended bias because of his rulings in the other application – where the judge made a ruling and direction that he would try the matter the following day but provided no reasons for dismissing the prosecutor's application – where the Attorney-General refers to the Court of Appeal under s668A *Criminal Code* (Qld) for its consideration and opinion the question of whether a judge must give sufficient reasons for refusing an application to recuse himself or herself – where the respondent contends that the reference is invalid – whether the judge's ruling was a ruling or direction "as to the conduct of the trial" – whether the reference is of a question of law of "general application and importance" – whether a judge, when refusing to recuse himself or herself, must give reasons for refusing the application that are sufficient for a fair-minded lay observer to appreciate why that observer could not reasonably apprehend that the judge may not bring an impartial mind to the performance of his or her duties – where it may be noted that the Attorney-General's argument, that the purpose of the court's advice under s668A is to affect the conduct of the trial of the case from which the point has arisen, indicates a possible flaw in the present reference – where a curious feature of this reference is that the point of law did not matter to the ruling and direction which the judge made – where therefore an answer to the question in the reference, either way, would have no consequence for the conduct of the trial – where Koppenol DCJ saw fit to place on the record that the prosecutor had not asked him to give reasons, either before or after his ruling – where it fairly appears then that there were reasons which were unexpressed – where as it appears that there were reasons which the judge would have expressed had he been asked to do so, it thereby appears that there were reasons which he ought to have expressed – where that is not the question raised by the reference – where clearly the question has been framed by reference to the test for apparent bias as stated by the plurality in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 – where the answer to the question, as framed in the reference, must be that it depends upon the circumstances – where the question cannot be answered in the affirmative for a case where the decision to refuse the application was wrong – where the difficulty framing the question here is understandable: the point must be one of general application yet, as is well established, what constitutes a sufficient expression of reasons is dependent upon the facts and circumstances of the individual case – where the question raised by the amended reference cannot be answered in the affirmative, at least because the suggested measure of the sufficiency is inapplicable to a case where the judge's decision, that he or she is not apparently biased, is incorrect.

The question raised by the amended reference be answered "not in every such case".

R v Allan; Ex parte Commonwealth Director of Public Prosecutions [2016] QCA 270, Orders delivered ex tempore 22 June 2016; Reasons delivered 25 October 2016

Sentence Appeal by Director of Public Prosecutions (Cth) – where the respondent was convicted of abuse of public office and receiving a bribe – where the respondent was a Commonwealth department employee and unlawfully approved visas for 59 people – where the respondent received over $560,000 in bribes from a co-offender – where the respondent, once arrested, made full admissions and provided high value information that was likely to be crucial in prosecuting a co-offender – where the respondent pleaded guilty at an early stage, was co-operative with authorities and gave an undertaking to provide future co-operation – where the respondent was sentenced to an effective sentence of two years, with release after eight months – where the judge erred in taking into account co-operation other than future co-operation when discounting the sentence under the *Crimes Act 1914* (Cth) s21E – where the respondent's offending was serious and general deterrence was important – where abuse of public office and bribery are serious offences and the respondent's conduct constituted concerning examples of those offences – where save in exceptional circumstances, such offending calls for a significant term of actual imprisonment to denounce the conduct, punish the offender, and deter others from committing such offences – where in determining the appropriate sentence, and in achieving consistency in sentences for federal offences, this court should consider sentences imposed for like offending throughout Australia – where the cases to which counsel has referred, clearly demonstrated that a sentence which required the respondent to spend only eight months in actual custody was manifestly inadequate, given the objective seriousness of the offending.

Appeal against sentence allowed. Sentenced on count 1 to two years' imprisonment and on count 2 to 2½ years' imprisonment. On each count to be released after serving 15 months with a recognisance release order in the sum of $1000 conditioned that he be of good behaviour for four years. Sentences imposed at first instance 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 sclqld.org.au/caselaw/QCA. For detailed information, please consult the reasons for judgment.

Time for a dispute resolution centre?

Congestion. We've all experienced it – peak-hour bedlam, the stop-start traffic. Like our roads, the courts are not exempt from congestion.

Well before Charles Dickens was first published, 'bottlenecks' in the courts were already the subject of public debate.

In mid-20th Century Queensland, congestion in our courts was attributed to the much earlier abolition of the District Court. In the intervening period, case loads in the Magistrates and Supreme Court steadily increased, creating another bottleneck. Reinstating the District Court in 1952 brought some relief. However, by 2008 a 10% shortfall in required staff and judicial officers was identified.

Since then, Brisbane has expanded at about 1.6% a year. Caseloads in Queensland courts have also increased.

Soon there will be fresh calls for the appointment of more judicial officers and staff, or another body to share the load.

Could a Queensland Dispute Resolution Centre (DRC) provide some relief?

Many dispute resolution models (other than judicial determination) are viable and cost-effective solutions to conflict resolution.

Indeed, our own *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) were amended to provide power for judicial officers to require and refer parties in proceedings to attend mediation or case appraisal.

However, when parties are dissatisfied with the mediation or case appraisal, the UCPR simply allows the parties to elect to continue the proceedings.

What if parties had more choice in the type of dispute resolution used to resolve their conflict?

What if courts had powers to refer parties to a greater range of dispute resolution solutions?

What if parties or courts could take or refer matters to a DRC?

What is a DRC? It could be many things, but is typically a one-stop shop, or an all-in-one facility at which individuals, businesses and large corporations might find dispute resolution practitioners with a broad range of skills and expertise including:

- arbitrators
- mediators
- expert determiners
- adjudicators
- facilitators
- conciliators.

By way of example, services provided by some DRCs are listed in the table below.

Is there a role for a Queensland DRC?

What types of facilities are needed to support dispute resolution in Queensland?

Which dispute resolution services are needed in Queensland?

How could the UCPR be updated to embrace a wider variety of dispute resolution services, and facilitate broader adoption of those services?

What skills, training and support would practitioners need?

How would a DRC be funded?

Over the next few months, the Queensland Law Society Alternative Dispute Resolution Committee, together with the Resolution Institute, will explore these questions, and we welcome your feedback to advocacy@qls.com.au.

Help us design Queensland's DRC.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee.

	Singapore	Canada	London	Sydney
Adjudication	✓ available at Singapore Mediation Centre		✓	✓
Arbitration	✓ low-cost arbitration through Law Society of Singapore, international arbitration through SIAC	✓ both domestic and international commercial arbitration	✓ both domestic and international	✓ both domestic and international
Neutral evaluation	✓ available at Singapore Mediation Centre		✓	✓
Expert determination			✓	✓
Mediation	✓ free service in State Court, available at the Singapore Mediation Centre	✓ at cost in DRC	✓	✓
Register of professional	Some institutions have their own.	✓	✓	✓
Training/education/ accreditation	✓ available at Singapore Mediation Centre	no	✓	✓
Room hire	Some institutions use the same facilities which are all part of the international 'hub' and operate from the same building.	✓	✓ through the International Dispute Resolution Centre	✓
Admin support	✓ depending on which institution (mostly for international level)	✓	✓ through the International Dispute Resolution Centre	✓

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New QLS members

Queensland Law Society welcomes the following new members, who joined between 10 October and 4 November 2016.

Monica Appleby, King & Wood Mallesons
Lily Berkeley, Kilroy & Callaghan Lawyers
Catherine Bloor, Stephens & Tozer
Lisa Brass, McCullough Robertson
Raquel Brehmer, DJ Gilmore & Associates
Maria Buci, Priala Legal Pty Ltd
Elicia Calligaris, CPB Contractors Pty Limited
Rachel Choi, King & Wood Mallesons
Jacob Cooke, Colwell Wright Solicitors
Natalie Craig, Grace Lawyers Pty Limited
Adrienne De Bruyn, McCullough Robertson
Meghan De Pinto-Smith, Dowd and Company
Anna Doughan, McLaughlins
Catherine Fricker, LawLab Pty Limited
Romy Fulljames, Brandon & Gullo Lawyers
Roohi Gill, King & Wood Mallesons
Ravi Gosal, McCullough Robertson
Rachel Greenslade, Creevey Russell Lawyers
Robert Gunningham, Comino & Associates
Nicola Hall, White Jordin
Robert Haseldine, Certus Legal Group
Blayde Hemmings, Brandon & Gullo Lawyers
John Herbert, McCullough Robertson
Zachary Herps, Hillhouse Burrough McKeown Pty Ltd
Mariel Hoare, King & Wood Mallesons
Steven Hodgson, Radcliff Taylor Lawyers
Christine Houston, Moray & Agnew
Anna Huang, Freeman Lawyers
Evanna Hudson, Melrose Keys Lawyers
Lachlan Huggins, King & Wood Mallesons
Ivan Ingram, Queensland South Native Title Services
Maddison Jago, Creevey Russell Lawyers
David Kapa, KAPA Legal Services
Rebecca Keys, Hall Payne Lawyers
Lindsay Kiemann, King & Wood Mallesons
Stephanie Killer, Certus Legal Group
Kathryn Klein, King & Wood Mallesons
Matthias Klepper, JHK Legal Australia Pty Ltd
Ekaterina Komarovskaya, Hall & Co Solicitors
Gyongyi Kruchio, Shand Taylor Lawyers
Anthony Lau, Bannister Law
Evan Leong, Thynne & Macartney
Rebekah Lines, Go To Court
Prudence Lupton, King & Wood Mallesons
Kim Manning, Cooper Grace Ward
Nathan Mark, Roberts Nehmer McKee
Brett Mason-Smith, HQF Lawyers
Nicholas Maymann, Certus Legal Group
Harry McCay, non-practising firm
Benjamin McIlroy, Batch Mewing Lawyers
Kevin McVeigh, Murdoch Lawyers
Joshua McVey, King & Wood Mallesons
Taylor Mobbs, Carter Newell Lawyers
Jessica Moore, O'Reilly Stevens Lawyers
Lara Moreton, King & Wood Mallesons
Ebony Morrison, SR Wallace and Wallace
Jennifer Mougan, Gouldson Legal
Rodney Mugford, Jeff Horsey Solicitor
Andrew Needham, Turner Freeman
Andrew Nicholls, ACCIONA Energy Australia Global Pty Ltd
Allison O'Connell, McInnes Wilson Lawyers
Jennifer O'Dowd, Evans & Company Family Lawyers
Christine O'Neill, Shand Taylor Lawyers
Shereen Parvez, Salvos Legal Humanitarian
Annabelle Paxton-Hall, King & Wood Mallesons
Teritia Peart, WRA Insolvency Pty Ltd
Jacqueline Puig, MSF Sugar Limited
Demi Quadrio, Moloney MacCallum Lawyers
Samantha Robinson, Creevey Russell Lawyers
Michael Rodrigues, James McConvill & Associates
Rebecca Rutland, SR Wallace and Wallace
David Saunders, McCullough Robertson
Eleanor Savill, CLO Lawyers
Alexia Schar, PA Khoury Lawyers
Warren Searle, Terence O'Connor
James Semit, King & Wood Mallesons
Kayla Sinnott, Farrellys Lawyers
Alexandra Skilling, McCullough Robertson
Jami-Lee Sorbello, ALF Lawyers
Jessica Stanley, Gouldson Legal
Samantha Stewart, Bosscher Lawyers
Terry Strong, Ashworth Lawyers
Leanne Stuchbery, Burns Law
Fiona Stumpo, Insurance Australia Group Ltd
Vada Sun, Hallett Legal
Shannon Talty, Fox and Thomas Pty Ltd
Kimberly Thornley, North Queensland Women's Legal Service Inc.
Vernon Ting, Brisbane Airport Corporation Pty Limited
Nicola Turner, Connolly Suthers
Daniel Tweedale, Merlo Law
Gretal Wee, Park & Co Lawyers
Jaime Wild, Colville Johnstone Lawyers
Patrick Williams, King & Wood Mallesons
Erika-Jane Wilson, McCullough Robertson
Spencer Wright, Aitken Whyte Lawyers


Mark Wiemers


Alecia Connor


John Salter

Career moves

Barry.Nilsson.

Barry.Nilsson. has appointed workers' compensation lawyer **Mark Wiemers** as a partner in its Brisbane insurance practice. Mark, who acts for four of the largest self-insurer corporates operating under the Queensland legislative scheme, has more than more than 14 years' experience in insurance law with particular expertise in advising on dust disease-related claims made against self-insureds, and public liability and property damage claims on behalf of insurers, and corporates with significant deductibles.

Best Wilson Buckley Family Law

Best Wilson Buckley Family Law has announced two new appointments – **Alecia Connor** as an associate in the firm's Ipswich office and **Deepal Raniga** as senior solicitor in Brisbane. Alecia has practised exclusively in family and de facto relationship law for five years and Deepal has practised exclusively in family law for four years. She has an interest in complex property settlements involving trusts, corporate structures and businesses.

BTLawyers

BTLawyers has announced the appointment of insurance lawyer **Kerrie Jackson** as the firm's first female equity partner. Kerrie joined BTLawyers in 2012 after working for firms including McCullough Robertson, Mullins Lawyers and Maurice Blackburn.

Her appointment follows the firm's introduction of three new practice areas – family law, debt recovery and insolvency, and employment law. Family law is led by special counsel and nationally accredited mediator **Vanessa Hernandez**, who has worked in family law since 2007, focusing on property, parenting, domestic violence and international matters.

Aamena Hussein heads up debt recovery and insolvency, after returning from an eight-year stint in Sydney. As well as working with insolvency practitioners, her focus is on helping small businesses, companies, bodies corporate and government bodies to resolve debt recovery issues.

The employment law practice provides an integrated service offering with the firm's new joint venture HR/industrial relations consultancy, BTS Accord, established as a partnership between the firm and **John Salter**. John joins the BTLawyers team with more than 25 years working in private sector manufacturing firms and for employer organisations.

Connolly Suthers

Connolly Suthers has welcomed back **Nicola Turner** after 10 months in London, where she worked for a Norwegian sovereign wealth fund and travelled widely in her spare time. She is resuming her career in the litigation team and will continue to focus on personal injuries, commercial litigation, debt recovery, bankruptcy, insolvency, general litigation, estate planning and estate litigation.

Dean Kath Kohler Solicitors

Dean Kath Kohler Solicitors has announced the promotion of **Naomi Cox** to associate. Naomi will continue to focus on representing clients in all facets of family law.

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Deepal Raniga


Kerrie Jackson


Vanessa Hernandez


Aamena Hussein


Nicola Turner


Naomi Cox


Jenny Lyons


Peter Thelwell


Justin Paddon


Richard Seneviratne


Vanessa James-McPhee

Department of State Development

Jenny Lyons has been appointed as general counsel for the Queensland Department of State Development. Jenny has been with the department since 2009 and has major projects experience in both the public and private sectors. She has provided legal advice on approval pathways for infrastructure projects, real estate developments, resources projects, native title, tender processes and market-led proposals.

IP Partnership

Peter Thelwell has been promoted to partner of IP Partnership, previously known as Ivan Poole Lawyers. Peter is a committee member of the QLS Franchising Law Committee and has worked exclusively in franchising and intellectual property since starting with the firm in 2010.

Kennedy Spanner Lawyers

Justin Paddon has joined Kennedy Spanner Lawyers' Brisbane office, focusing on children's matters, property settlement, separation and divorce. He is also experienced in sports law, commercial and property law and estate litigation.

Mahoneys

Mahoneys has announced the promotion of **Richard Seneviratne** to associate in its Brisbane office. Richard joined the firm's commercial and corporate team in 2011 and his experience includes corporate structuring, the sale and purchase of businesses, Australian consumer law and employment law.

TressCox Lawyers

TressCox Lawyers has welcomed new senior associate **Vanessa James-McPhee** to the Brisbane office and its national employment, IR and workplace safety team.

Vanessa previously worked with the National Retailers' Association and employment law firm Latitude Lawyers. She has advised clients, including multinational corporations and owners of small-medium businesses from various jurisdictions, on all areas of HR, employment law and workplace relations.

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.

The ‘new apprentice’ still going strong

After turning 80 last month and notching up some 58 years of practice, Jim Byrne isn’t thinking of retiring any time soon.

Jim spent many of those 58 years running his own firm in the Brisbane CBD, and it was only in 2014 that he decided to sell to Bennett & Philp because he was “getting on in years”. Joining Bennett & Philp as a consultant, Jim still works in the office two days a week, handling other matters by email when necessary through his long-time personal assistant, Marie Wilson.

“I still enjoy doing the work, obviously, and I enjoy meeting and helping people,” he said. “If I get paid for it, all the better. I still have clients that I’ve had for over 40 years and quite a few of them are still alive, and many of those that aren’t have become estate clients.”

Of course, things were very different when Jim commenced his legal studies. He said that, at the time, the University of Queensland expressed the wish that students who wanted to become solicitors do their three-year articles in the last three years of the course.

“I didn’t want to do that because I had an opportunity to do my articles with Tom McCormack, who had a very strong clientele and excellent reputation, so I succeeded in convincing the university I could deal with academia and articles simultaneously.

“Lectures were pretty sparse in those days. There were only 10 or 12 hours a week of lectures, so the rest of the gang spent a lot of time at the Regatta Hotel, or going to the movies or the beach when they weren’t at lectures, but I used to come into town and work in the office – initially for £1 per week with annual increases of ten shillings per week.

“The result was that, by the time they were starting their articles, I had almost finished mine, and I was familiar with the CBD, the courts and the other important government offices. But I was then getting £15 a week, which was a fortune, and they were on bread and water!

“There were 12 of us admitted on 18 December 1958 – I was the youngest and the only one still practising today.”

Tom McCormack was a rugby diehard and became so involved in the administration of the game that in 1959 he left the 22-year-old Jim to run his practice while he toured with rugby teams in England, South Africa, New Zealand and other countries.

“When he came back later that year he was happy with what he found, and Tom offered me junior partnership, which ultimately matured into a 50:50 partnership which lasted almost 20 years as Thomas McCormack and Byrne,” Jim said. “It was a good general practice; we even had a little criminal work, but a very solid clientele.”

Many things were different back then.

“All of the registered property documents were typed on heavy almost cardboard-like paper, and when you had to do three carbon copies of a lease or other documents required – it was quite difficult to produce something that was readable on the third copy,” he said.

“Dictation machines didn’t exist; it was all shorthand. Fax and copiers were not widely available. Staff were not tattooed or pierced, and professional ethics and courtesies were expected and observed. Absence of Facebook ensured undivided attention to the job at hand.”

When Tom McCormack left the business in January 1978, Jim continued as a sole practitioner in the building next to the Regent Theatre in Queen Street until 1980, when he relocated to the Reserve Bank on King George Square.

“To get into the Reserve Bank you had to go through an inquisition by the property manager, and he said to me, ‘now what sort of clients have you got? Criminals?’

“I said, ‘No, I haven’t got any criminals.’

“‘Oh, he said, that’s OK.’

“He was an ex-army major, almost had a baton under his arm, and he said, ‘you know, you’re lucky to get this space.’

“And I said ‘yes, I did inquire a few months back and there wasn’t any space.’

“He said, ‘it’s an excellent building and we’ve got a high expectation in tenants’ activities.’

“And I said, ‘yes, that’s good. How come I was able to get a space?’

“And he said, ‘A fellow had convinced us that he’d meet our standards, but when he arrived it turned out that he was a manufacturer’s representative for women’s underwear. Of course, you understand we couldn’t have that in here!’

“So I stayed 34 years in the building and was the longest tenant until 2014.”

Jim practised in a many areas of civil practice, was a Queensland Law Society Council member from 1965 to 1972, CEO of the Australian Legal Convention in 1969, sat on the QLS Statutory Disciplinary Committee from 1973 to 1985, and became a notary public in 1978.

Today he is still a QLS Senior Counsellor. And after 58 years of practice, Jim continues to enjoy his work, and values his good relationship with Bennett & Philp.

“The transition from an office of five people to one of 65 or 70 was full of apprehension as far as I was concerned,” he said. “But the principals and staff have been most hospitable and helpful and respectful, except when they introduce me – 20 years older than the next eldest, but they introduce me to clients as ‘the new apprentice’!”

– John Teerds

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My flexibility story

Sarah Neideck, a senior associate working in workplace relations in Brisbane, firmly believes that maternity leave is not the 'career killer' many women lawyers fear.

"Taking maternity leave didn't set me back in my career," she said. "Having a child and starting a family has made me a better person, personally and professionally. There is so much I learnt after starting a family that I never realised would have an impact on my professional world, for instance, my multi-tasking abilities are amazing now!"

Sarah began work at HR Law, which has six staff, in April 2011. In late March 2015 she took six months' maternity leave, returning in October 2015.

"While I was on maternity leave, there were discussions about how to best facilitate my return to work," she said. "There was a real focus on ensuring that the best arrangement was put in place for myself, my family and my colleagues.

"I am very fortunate to work in a very friendly and collaborative workplace, where my colleagues are very supportive. I am not the only employee who has a flexibility arrangement in place; we all have our own arrangements in place and we even find a lot of our clients have flexible work arrangements."

Although she was initially going to return to work three days a week, Sarah was able to get her son in for more days of day care than expected.

"I found I really missed work and wanted to be back more than three days a week. I found four days was easy to manage and had every Thursday off. Because my day off was a mid-week day, not a lot of my work had to be handed over and I found I could pick most back up when I returned to work on Friday.

"I slowly increased my hours and days of work before returning to a working week of five days. Now I finish work at 4.30pm every afternoon. I also work from home and adjust my hours on occasion, depending on my workload and personal commitments."

With the support of her firm and colleagues, Sarah's working arrangements remain flexible.

"It really depends on the week," she said. "For instance, tomorrow I will probably work from home for a couple of hours and then go to a client meeting. I will come into the office after my meeting. Last week I left early and worked from home for an hour or so because my husband had to start work earlier than normal (he was working a night shift).

"I would say that I don't work regularly from home; it's not a weekly thing. This is something I agree to with my boss on a case-by-case basis.

"There have only been a few occasions when I haven't been able to leave at 4.30pm and normally it's because a meeting has run over. However, everyone I work with is very conscious that I leave at 4.30pm, so meetings aren't typically set for late in the afternoon. And if someone needs me to sign off on an advice, they don't give it to me at 4.30; they make sure they give it to me in enough time for me to still be able to get out at 4.30pm.

"Leaving at 4.30pm for me means I am home by about 5.20pm. This means I am in time for a little play time, dinner and bath time – family time. At the moment, while the weather is nice and the sun is up a little longer, my husband and son meet me at the bus stop which is near a park. My son then has a play in the park for 10 to 15 minutes before we walk home. I really value this. It means that I am getting home and able to enjoy spending some time with my family rather than coming home to find my son already in bed."

Sarah said her relationships with clients had not suffered through her maternity leave or flexible arrangements.

"Clients won't forget you while you are away, quite the opposite," she said. "When I returned from maternity leave I spent the first few weeks catching up for coffee with so many clients who wanted to reconnect once they knew I was back in the office. Don't worry about your career; it will still be there when you are ready to come back."

This article appears on behalf of the flexibility working group, an initiative of the Queensland Law Society and Women Lawyers Association of Queensland. The group needs your story – good or bad. Please contact flexibility@qls.com.au and share your experiences with flexibility in the legal profession.

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

Webinar: Urgent Applications and Interim Orders

THU 1 DEC

Online | 12.30-1.30pm

There are a number of reasons why you may need to make an application before the court for orders in a family law matter, but are you ready to make an urgent application? Do you know which orders you will need, what the court will require, and how to make persuasive oral submissions that will achieve the outcome you need?

Whether you are an experienced family law practitioner or a junior solicitor in this space, this practical and relevant webinar is sure to set you up for more success and less stress when making urgent applications for interim orders.

SL

1 CPD POINT

PMC Encore

THU 1 DEC

Law Society House, Brisbane | 5.15-7pm

To celebrate the success of our Practice Management Course alumni, Queensland Law Society invites course graduates to our complimentary PMC Encore.

This year's keynote speaker is Client and Brand Director at CXINLAW, Carl White, who will share insights on how to strategically define service objectives, deliver client insight and improve performance.

PM&BS

1 CPD POINT

Register now **qls.com.au/events**

Specialist Accreditation Christmas Breakfast with the Chief Justice

FRI 2 DEC

Hilton Brisbane | 7.30-9am

A highlight of Queensland Law Society's event calendar, the Specialist Accreditation Christmas Breakfast with the Chief Justice provides an opportunity to toast the achievements of our newly accredited specialists, and for the profession and the judiciary to celebrate 2016 in a relaxed breakfast setting.

Early Career Lawyers Christmas Party

THU 8 DEC

Aquila Caffe Bar, Brisbane | 6-8pm

To kick-off the countdown to Christmas, Queensland Law Society invites early career lawyers to the annual Christmas party. Dust off your Santa hats, get your jingle bells on and join us over drinks and canapés for a merry evening at Aquila Caffe Bar.

Save the date

Practice Management Course – Sole and Small Practice Focus	16,17 and 24 February 2017
QLS Legal Careers Expo	1 March 2017
Practice Management Course – Medium and Large Practice Focus	23-25 March 2017
Symposium 2017	17-18 March 2017

Leading into change

Firms that prospered in yesterday's legal environment may struggle without new strategies and approaches in a rapidly changing landscape. Symposium keynote speaker Holly Ransom will look at the way forward, particularly with an intergenerational workforce. Report by **John Teerds**.

As law firms contend with upheaval across the profession, an understanding of today's intergenerational change will be critical to successfully leading firms into the future.

And the person who will help the Queensland legal profession obtain this understanding is Holly Ransom, our Queensland Law Society Symposium 2017 opening keynote speaker.

"I want to speak to the legal community about understanding intergenerational change and how they can position themselves to be successful with the trends and transformations we are seeing," she said. "My talk will be about the changing nature of engagement, leadership and the style and structure of work."

Holly is the CEO of Emergent, a company which specialises in the development of high-performing intergenerational workforces, leadership and social outcomes. At 26, she already has a huge list of achievements – the world's youngest-ever Rotary president, the youngest of Australia's '100 Most Influential Women', chair of the G20 Youth Summit, co-chair of the United Nations Global Coalition of Young Women Entrepreneurs, and the youngest-ever female director of an AFL club (Port Adelaide Football Club), to name but a few.

Holly is an endurance triathlete and has degrees in law and economics, and has developed a reputation as a global keynote speaker, having presented across six continents.

She said her address would also focus on the practical side of leading through change.

"I'll be talking about how to make sense of these trends and how to best position for success," she said. "I'll also provide some key things for the toolkit around leading in an intergenerational workforce and leading in a time of constant change, because that actually requires us to develop and build new skills and competencies to what we've had when things were a little more stable and structured.

"We'll look at how you go about transforming businesses that have often operated unbelievably successfully for decades but now need to encourage people to do things differently and pursue new ways of operating in order to continue to be successful."

She said one of the major features of the millennial generation was due to the fact that their parents brought them up in an environment in which they were told to pursue their passion and that they could be anything they wanted to be.

"I think the freedom and licence that the baby boomer generation has given this millennial generation is that they really want to be able to pursue their purpose through their vocation," Holly said. "In the research we see around this generation, an overwhelming majority – more than 80% – want to be able to work for an organisation that believes in a footprint bigger than just the bottom line."

This means that, not only do they want to progress and earn a good income, but also want to know how they can have a meaningful role in the community.

"When it comes to interview time, HR people are fielding questions about how many days a year employees can volunteer, and who they will be working with from a corporate social responsibility standpoint," she said.

Holly's own background points to a strong desire for positive community change.

"I did a law/arts degree with a major in economics and a minor in political science," she said. "My theory was that, if you wanted to understand how to implement and effect change, then you needed to have an understanding of the existing legal, economic and political structures. I firstly want to understand the framework of the world in which we live and how people interact.

"I found that law has given me a good grounding in how to think. In an age of information when we are bombarded from all sorts of different sources, that ability to be able to say, 'OK, what's the key point here?', or 'What is it that I really need to care about that is going have an impact on the outcome?', that ability to discern and make sense of information is one of the best things my law degree prepared me for."

John Teerds is the editor of *Proctor*.

It's nearly Christmas, so think mid-year reviews

A practice idea that might make a big difference

Mid-year performance reviews can be really beneficial, provided you go about them the right way.

Theory and practice regarding performance management is constantly evolving and reshaping. There are, though, some enduring boxes to be ticked. They are:

- Do we review?
- When do we review?
- How do we go about it?
- What criteria should we review against?

Do we?

An emerging view (although not universally embraced) suggests formal reviews are not particularly helpful, and instead, an ongoing coaching process is superior. The guiding principle here is that improvement is incremental and so continuous feedback is the most helpful. This view neatly connects with feedback-hungry millennials.

Our view is that a combination of continuous coaching and point-in-time reviews remains the better approach. A law firm is an economic enterprise. It has financial goals which link to the aggregate performances of all firm members. So the point-in-time review assists with *where you are* and the continuous coaching assists with *how you get there.* Point-in-time can be used to identify skills or deficiencies, while continuous coaching should link to these with a view to improvement. To be effective, the two must work together.

When do we review?

As the title to this piece suggests, a question is, *should we go mid-year?* Our view is that interim reviews are really helpful. A year is a long time. More frequent formal reviews are probably overkill. People get review burnout. It becomes counterproductive.

Our view is that, for best effect, use your output measures sparingly in mid-year reviews. Focus more on motivations, capabilities and relationships – the essential inputs to performance. This then helps to guide ongoing coaching and supervision.

Firms that do this poorly exhibit three common characteristics – (i) an excessive focus on outputs, (ii) insufficient and rushed time devoted to the process, and (iii) a disconnect between the formal process and the necessary guidance for the supervisor and employee in the future.

How do we go about it?

Suffice it to say that employed lawyers generally value the feedback and input of other lawyers more than that from professional HR and general management staff. That said, the larger the firm, the more involvement from support staff is needed to manage the process in a consistent, predictable and disciplined way. Reviews are not typically top of the partner fun list, and without some overriding discipline, the process will degenerate. So it's a compromise.

What criteria should we review against?

You really need to consider the whole six drivers of performance to understand what is going on. Only then can you constructively move forward. These are:

Expectations: Do they know exactly what is expected of them?

Evaluation: Do they get the feedback they need, when they need it, against the expectations?

Motivation: What internal and external issues are influencing the attitude they bring to work?

Capacity: Do they have the skills (including the time) to do what is expected?

Infrastructure: Do the tools they rely on work as they should? (for example, all aspects of IT)

Support: Are they supported in the team at a personal level?

Poor review processes focus just on the first two drivers – which really makes no sense. It's a bit like Wayne Bennett saying "I want you to win by 20 points; you didn't achieve that last week, so this week I REALLY want you to win by 20 points – now go and do it" without any attention to what needs to change to get there.

Have a great Christmas and see you again in February.

Dr Peter Lynch
p.lynch@dcilyncon.com.au

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Accountancy

Agency work

Agency work continued

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Would any person holding or knowing the whereabouts of a Will of the late **DEBBIE ROSINA RANGER** late of 11 Sunata Street, Shailer Park, Brisbane, QLD 4128, who died on the 22 July 2016 please contact The Public Trust, New Zealand, PO Box 13846, Christchurch, 8141, New Zealand (or E-mail Siobhan.Jackson@publictrust.co.nz)

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Would any person or firm holding or knowing the whereabouts of any original Will of **STANLEY THOMAS DEAN**, late of Carrington Nursing Home at 22 Miles Street, Albion (formerly of 30 Joffre Street, Ashgrove, Queensland 4060 who died on 15 December 1993, please contact Crouch & Lyndon Solicitors of Brisbane Club Tower, Level 18, 241 Adelaide Street, Brisbane, or by telephone on (07) 3221 2527 or by email to bjohnson@crouch-lyndon.com.au within 14 days of this Notice.

Missing wills

Would anyone or law firm know the location of a will of the late **Matthew David Morcus**. Born 19 September 1970. Resided at Unit 1 / 10 Keating Court, Goodna, QLD 4300. Contact Carol (mum) on 07 3381 8374.

Darren Allan Chick
12 March 1965
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Karen Chapman - 0459 822 403

Maria Gonzalez

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The wine gift that keeps on giving

with Matthew Dunn

Christmas is a time for mistletoe and wine, as the song goes, but wine can be more than a standard accompaniment for the ritual feast – it can also be a superbly long-lived gift.

Utilising a rather neat idea that came my way, Christmas gift wine can be enjoyed long after the summer humidity has faded, the new children's toys are broken, and unwanted cut-glass grapefruit dishes have been pushed deep into the back of a cupboard.

The idea is that wine as a gift should be about giving an experience rather than a commodity.

While it is easy to find a handsomely expensive bottle of plonk for a cherished relative (or more economic offering depending on the quality of the relationship) and stand proudly upon the unveiling, this can fall a little flat unless the receiver is familiar with the wine and has an interest in it. If giver and receiver have similar tastes and wallets, this frontal assault method can be brutal but effective.

However, on a cautionary note, wine writers are often givers of olive oil rather than wine amongst their ranks, in order to avoid a vinous arms race. A battle of gift-giving one-upmanship may not be the desired result of Christmas conviviality.

A chance conversation with a QLS colleague revealed a potentially safer and more interesting form of Christmas wine-giving – the tasting pack. This involves selecting a recent release wine of good pedigree, buying a few bottles and a notebook, and wrapping the whole lot up with a big bow. The idea is as simple as it is profound. The receiver drinks one bottle of the wine a year and notes down their thoughts in the notebook (keeping the stock in a cooler place between times).

Over the years the wine changes and develops in the bottle, and the receiver can get a sense of the way the wine develops over time. The genius is that the gift lasts for as many years as the number of bottles, or the resolve of the receiver remains strong.

An extension of the idea for the truly fastidious is to gift the new vintage of the same wine each year, permitting the receiver to do their own side-by-side tastings of different vintages and compare both the changes in each year's bottling, as well as the way each vintage develops.

Some good choices for tasting pack gifts might include Eden Valley riesling, Barossa shiraz, Coonawarra cabernet sauvignon, Margaret River cabernet merlot, Hunter Valley semillon, Yarra Valley pinot noir, Tasmanian chardonnay or Queensland strange bird wines from the Granite Belt.

The tasting

Three eminently presentable wines were subject to scrutiny.

The first was the **Leeuwin Estate Art Series 2015 Margaret River Riesling** which was the palest touch of yellow in colour. The nose was lime and currently subdued floral jasmine. The palate was dry, deeply minerally at its core with a hint of honey surrounding the zing of citrus and granny smith apple. A layer of floral and sweeter flavours lurked just below the surface waiting to emerge.

The second was the **Clonakilla 2015 Hilltops Shiraz**, which was deepest, darkest red with a purple tinge. The nose was a beguiling mix of toasted oak mixed with ripe blood plum dusted in pepper and nutmeg. The palate was layers of dark fruit flavour with white pepper and the crack of leathery freshly cleaned tack hanging up in the tackroom. Bold tannins appeared in mid to long palate, heralding years of development to come.

The last was the **Wynns Coonawarra Black Label Cabernet Sauvignon 2014**, which was black with a purple red tinge when light managed to force its way through the liquid. The nose was chocolate bars wrapped in fresh mulberry leaves. The palate showed a core of blackberry and blackcurrant fruit with a richness and strong undercurrent of tannin. While superbly drinkable now, with time an even greater wine will emerge as the primary fruit settles and the subtle undergrowth comes more to the fore.

Verdict: A great selection of wines for a tasting pack. The clear favourite was the Wynns, which would make an excellent study of the rewards of patience over two, five, 10, 15 and 20 years, and beyond.

Matthew Dunn is Queensland Law Society government relations principal advisor.

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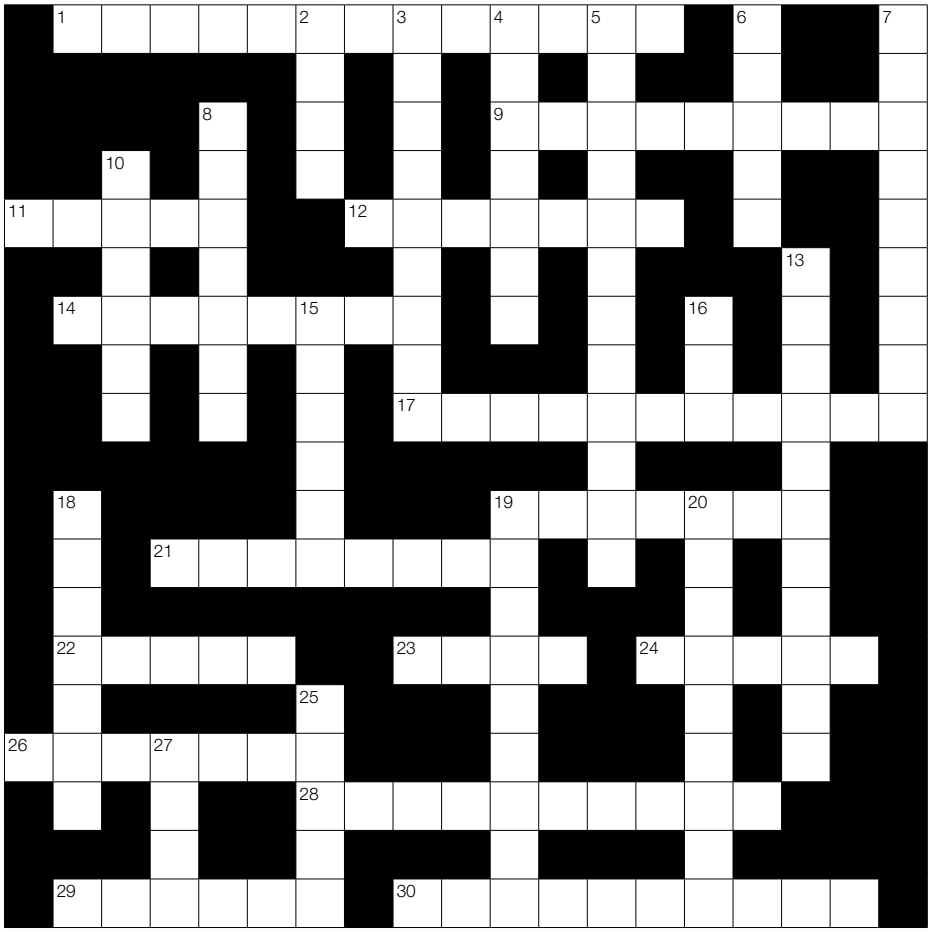
Mould's maze

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



Across

1 Balance of probabilities, …… of the evidence. (US) (13)

9 Liquidated damages paid to a shipowner for delays beyond the chartered contract period. (9)

11 Court proceeding to establish a person's title to property, ….. title action. (5)

12 Grantor of a trust. (7)

14 The name of the blindfolded female statue holding a set of weighing scales and a sword. (8)

17 The *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) provides for this process. (11)

19 Leave required to appeal to the High Court. (7)

21 National general manager of Shine Lawyers, Grant …… (8)

22 The practice of charging excessive interest on a loan. (5)

23 Testamentary trust, ….-over will. (4)

24 Criminal intent or malice. (Civil law) (5)

26 Express severe disappointment. (7)

28 Party filing for bankruptcy. (10)

29 Indictable offence. (US) (6)

30 Request by a party without cause that a judge not allow a prospective juror to be empanelled, ……. challenge. (10)

Down

2 One acting without formal appointment as representative for someone legally incapacitated, …. friend. (4)

3 Removal of a charge, responsibility or duty. (9)

4 Increase by a judge of damages awarded by a jury. (US) (7)

5 The …… rule provides that when two or more people die in circumstances in which it is not possible to determine who died first, the younger is deemed to survive the elder (12)

6 A certificate of a witness that the document was sworn by the person who signed it. (5)

7 Vexatious litigant. (9)

8 Research tool that provides the subsequent history of reported decisions. (7)

10 Terms of settlement, …… of consent. (6)

13 Court proceeding upon a default in a mortgage to vest title in the mortgagee. (11)

15 Gable Tostee used this social medium to meet Warriena Wright. (6)

16 The right of everyone to receive the guarantees and safeguards of the law, … process. (US) (3)

18 A mortgage is an example of this type of debt. (7)

19 Separate a jury from the public during its deliberations. (9)

20 When the total debt of an entity is greater than its property. (9)

25 A rejoinder responds to this pleading. (5)

27 Court registry stamp. (4)

Solution on page 64

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Return of the Jedi solicitors

Let's end those endless sequels before they start

by Shane Budden

I write this column in the afterglow of attending a national ethics conference, meaning I am now so filled with ethical purity that I am sure superpowers will soon kick in.

Also, I need to warn you that during this column I may well vanish in a puff of intense integrity and re-appear on top of a mountain in Tibet next to Albert Einstein and Obi-Wan Kenobi.

In fact, being an ethics solicitor is much like being a Jedi, except that you actually have a positive obligation to tell the Stormtroopers that these are indeed the droids they are looking for (although ethics solicitors would not end the sentence with a preposition). In retrospect, it is probably a good thing for the rebellion that they teamed up with Jedi knights and not ethics solicitors.

I should digress here to allay the fears of any older readers who will have noted the references to *Star Wars* but fear the younger generation will not get them due to their general poor taste in movies (the younger generation's poor taste, I mean, not the references).

Fear not older readers – they released a new *Star Wars* movie and pretty much copied the original movie word for word, so the youngies have effectively seen it, albeit probably on Snapchat, Instagram or Slack (assuming that you can watch things on those apps) (assuming those things are apps).

In any event, ethics solicitors and Jedi knights have enough in common that I think it appropriate that from now on, ethics solicitors are referred to as Jedi solicitors, mostly because it sounds much cooler.

Also, the idealism of science-fiction is often applicable in the world of legal ethics, although I would advise any students reading this and doing ethics at uni that it would be wiser not to directly reference science-fiction in your exams and essays; Spock may be a creature of pure logic, but few lecturers are. Plus they aren't cool enough to watch *Star Trek*.

Speaking of *Star Trek* (said the king of the segue) it is particularly inspirational in that just as solicitors are bound by fundamental duties, Kirk and his crew are bound by the Prime Directive. For those of you who aren't nerds (and I point out that by reading this you are probably undermining any credible claim of non-nerdiness) the Prime Directive is as follows:

"No identification of self or mission. No interference with the social development of said planet. No references to space or the fact that there are other worlds or civilisations."

The point of that directive is that the crew of the Starship Enterprise aren't allowed to let people on the planets they visit know that they are from outer space, and to generally prevent Kirk and his team from interfering with the inhabitants of those planets.

The fact that they violated this directive pretty much every episode was, of course, a plot necessity; a TV show about people simply watching strange and often primitive beings wander cluelessly about the place would be pretty boring, and in any event the idea has already been used by *The Block*.

Of course, a solicitor's job is much more complicated than that of your average spacefarer. In Captain Kirk's case, his job was simply to distract the leaders of the alien civilisation until he could get the chance to take the prettiest alien female to dinner; the *Star Trek* universe, of course, was filled with attractive alien females who couldn't resist Captain Kirk.

Solicitors deal with much more complex dilemmas than your average sci-fi movie heroes, although of course we are well-familiar with the curse of being incredibly attractive, a burden we bear with admirable stoicism (especially we Jedi).

On the subject of movies (I am *rocking* the segue today!), with Christmas upon us it is – if you have children, or are simply fairly immature – the season to watch movies you wouldn't otherwise watch under pain of torture, for no other reason than the kids will be distracted from other school holiday activities such as painting the dog and seeing just how many repetitions of *Everybody Loves a Panda Party* (a 'hilarious' novelty song to the tune of *Kung Fu Fighting*) it takes to turn mummy homicidal (in my wife's case, I'm guessing it is the very next time it is played). This season, moviemakers have gone out on a limb and – now here's a shock – opted for sequels; who would have thought?

By the time you read this, another film in the Harry Potter universe will have been released, although it doesn't feature Harry – presumably because the producers thought *Harry Potter and the Enchanted Zimmer Frame* would be a hard sell. There will also be another *Star Wars* movie, a Troll-doll (Google it) movie and the 19th – yes, 19th! – Pokémon movie; this will no doubt generate another wave of people using their – unwisely named in this instance – 'smart' phones to chase imaginary creatures through other people's front yards.

It is quite possible that the reprehensible spawn of Beelzebub who brought us the *Police Academy* movies will be inspired by this and start to plan another movie in that series. Just in case, I propose that the UN form a Coalition of the Willing to Commit Murder to Prevent Another Rubbish Sequel, to track down these people and prevent them making the movie (I would lead this coalition).

My preferred method of prevention would be to stuff them all in an experimental spaceship bound for Mars – along with Donald Trump, because why waste the opportunity? – preferably with very little food and water, and the *Panda Party* song playing on a continuous loop.

In any event, whatever you decide to do for Christmas, please stay safe and look after each other, and if you are going to the work Christmas party always remember two golden rules: alcohol does not make you funnier (no, it doesn't) and at all times wear pants (NB: wearing them on your head doesn't count; also, it is always nice if they happen to be your own pants).

If you do happen to find people looking for Pokémon in your front yard, remember this old Jedi trick: Say calmly and quietly, "These aren't the Pokémon you are looking for." Then hit them on the head with the Christmas tree.

Queensland Law Society

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Crossword solution from page 62

Across: 1 Preponderance, **9** Demurrage, **11** Quiet, **12** Settlor, **14** Justitia, **17** Expungement, **19** Special, **21** Dearlove, **22** Usury, **23** Pour, **24** Dolus, **26** Censure, **28** Petitioner, **29** Felony, **30** Peremptory.

Down: 2 Next, **3** Exonerate, **4** Additur, **5** Commorientes, **6** Jurat, **7** Querulant, **8** Citator, **10** Minute, **13** Foreclosure, **15** Tinder, **16** Due, **18** Secured, **19** Sequester, **20** Insolvent, **25** Reply, **27** Seal.

Interest rates

For up-to-date information and more historical rates see the QLS website **qls.com.au** under 'For the Profession' and 'Resources for Practitioners'

Rate	Effective	Rate %
Standard default contract rate	2 November 2016	9.25
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 July 2016 to 31 December 2016	7.75
Federal Court – Interest on judgment debt for half year	1 July 2016 to 31 December 2016	7.75
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 July 2016 to 31 December 2016	5.75
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 July 2016 to 31 December 2016	7.75
Court suitors rate for quarter year	To 30 Dec. 2016	0.73
Cash rate target	from 2 November 2016	1.50
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2016	8.00

Historical standard default contract rate %

Nov 2015	Dec 2015	Feb 2016	Mar 2016	Apr 2016	May 2016	June 2016	July 2016	Aug 2016	Sep 2016	Oct 2016	Nov 2016
9.45	9.45	9.45	9.45/9.55	9.55	9.55/9.60	9.60	9.35	9.35	9.35	9.25	9.25

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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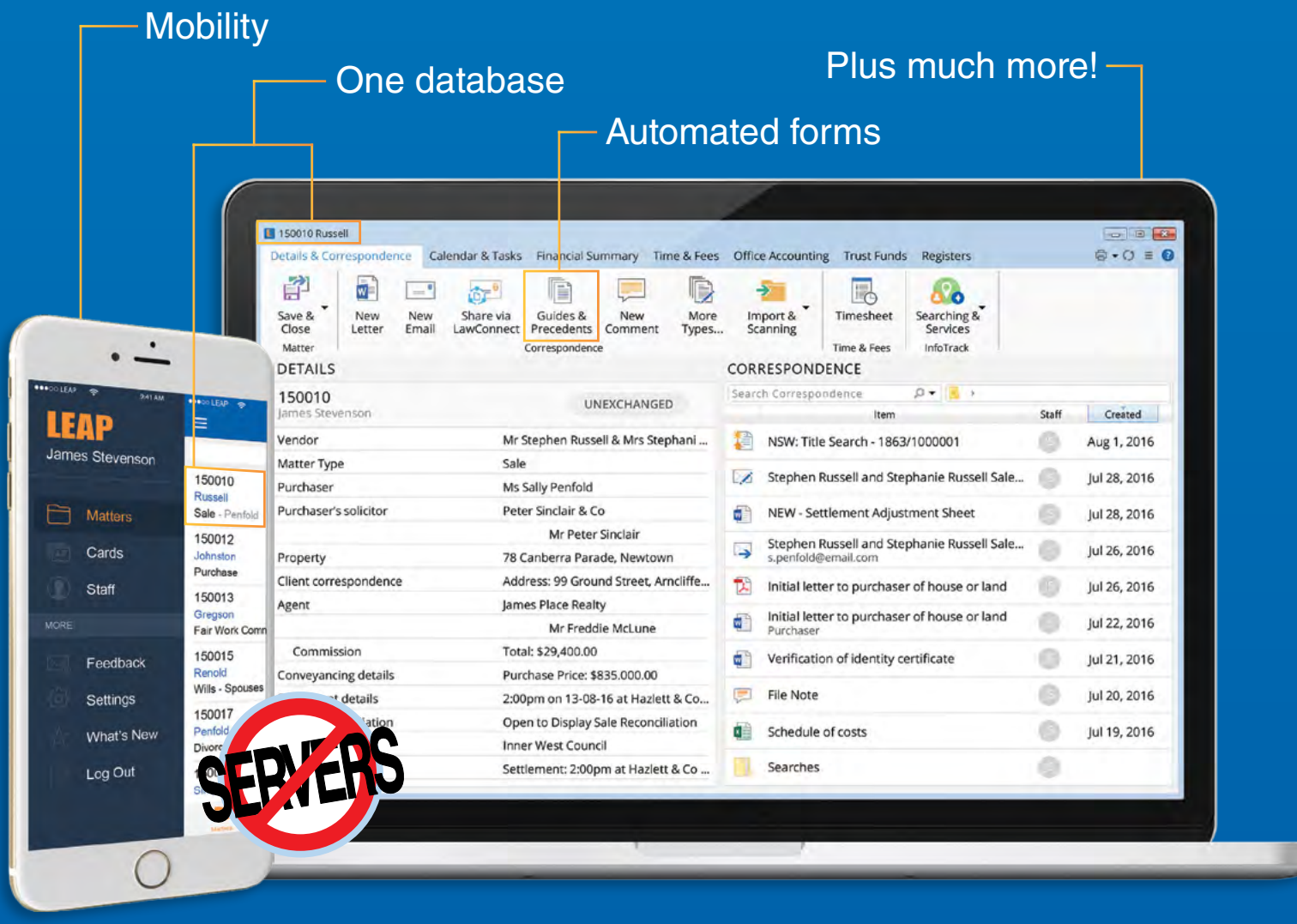

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