

PROCTOR



Queensland
Law Society

December 2017 – Vol.37 No.11

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Family violence – Fundamentals for family lawyers
Solicitors as advocates – Our heritage and our future

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A whirlwind, a wild ride and a great surprise



According to Einstein, the faster you travel, the slower time goes. Although I would never argue with him on that, my experience at QLS has been a little different; it seems I haven't stopped moving since I got here, and yet time has run well ahead of me! It feels like it was only yesterday that I started my term as deputy president, and now I am penning my last column as president; where did all that time go?

The journey has been something of a wild ride – ups, downs and things I am still not sure how to categorise. Some of it I expected, parts were a complete surprise, but some of the surprises were wonderful.

For one thing, I expected the Society staff to be good – I have known and worked with many of them for many years prior to my election, through both Council and committee – but I have been impressed by just how collaborative, competent and committed they are. As a not-for-profit, the Society relies on every staff member going above and beyond on a regular basis, and I can unequivocally confirm that QLS members are well-served by Society staff.

Working so closely with the teams to deliver on my initiatives has been the hidden gem in the role of president; I thank them all for their warmth, support and superlative work over the last two-years, you have been a joy to work with.

I asked where did all the time go, but looking back I can see where some of it has gone. I am very proud to have the support of QLS – to realise some reforms and initiatives that I hold close to my heart, and chief among them is the reform of the Trusts Act. This has long been desired by many of our members, and to hear the Attorney-General commit to

that reform earlier in the year – and follow through with a Bill now before parliament – was a proud moment. Whilst an election can derail even the most worthwhile agenda, I remain confident that these much-needed reforms will progress.

The Society's Modern Advocate Lecture Series, which I launched as deputy president, has gone from strength to strength. Although I consulted heavily with Society staff through the creation phase, I was still nervous when the series launched. With the final lecture this year attracting a large crowd at Law Society House (despite hovering storm-cells!) and an online audience of over 600 people, I am humbled to know that our profession has embraced the series with vigour.

Following on from that success, I am delighted to launch its natural progression, the Society's Solicitor Advocacy Course, a long-held passion of mine. Solicitors now do the bulk of the state's advocacy, and our members have been craving a way to formally hone their skills. This course provides that avenue, and our members have enthusiastically grasped the opportunity, as it sold out in four days. With that and a waiting list, we will be rolling out more courses throughout next year. With a commitment to our regions in addition to Brisbane, we will be holding them in Cairns and Rockhampton.

Throughout my presidency I have advocated for more judges for our overworked court system, and for those judges to more often be sourced from the solicitor side of the profession. This course will allow participants to do more advanced courses including appellate court work and, ultimately, judicial theory. It will ensure that solicitors have the formal skills needed to service their current clients and add confidence to them filling the ranks of the bench going forward.

I have also had the opportunity to drive, with the valued assistance of QLS Ethics Centre Director Stafford Shepherd and his team, Queensland Law Society's Practice Support Service, which has proved immensely

popular with members. This service embodies the true spirit and values of QLS, it is both collegially supportive and highly practical. Through this service, the Society's experts will visit any member and review their procedures, systems and general approach to practice to ensure that they are set for optimal success. When I started my term, one of my goals was to create a society that was accessible and provided real value to members – the sort of thing that I needed when I started my career. The Practice Support Service is the physical manifestation of that. I would have loved such a service 25 years ago, and am very proud to have delivered it for today's members.

One of the crucial roles of any QLS president is advocacy on behalf of the members, making – and speaking to – submissions that quite literally are for good law, good lawyers and the public good. I am very proud to have been able to elevate the profile and influence of the Society to unprecedented levels. I will never forget the privilege of giving a voice to the concerns of our members and speaking truth to power for the state's solicitors!

At the end of the day our profession is defined by collegiality, and I have been buoyed by the bonds I have formed with many colleagues, including QLS staffers who have contributed heavily to whatever successes I can claim. These friendships will endure well after my term and are the greatest reward I have received from holding this esteemed and storied office.

Finally I would like to extend a heartfelt thank you my fellow Councillors. Your determination to serve our members for the good of our profession is the embodiment of all QLS represents: service, fidelity, courage. Thank you.

Christine Smyth
Queensland Law Society president

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The year that was

2017 and beyond



As we come to the end of 2017, it is fitting that we reflect upon the year that was, and look towards the year that will be. This year has been a productive one for the Society, and we have achieved a lot: great successes via our advocacy work, improvements to our stakeholder engagement, and more than 100 professional development and networking events for our members.

We launched the first Reconciliation Action Plan (RAP) for Queensland solicitors, released our Search Warrant Guidelines with the Queensland Police Service, commenced a state-wide elder abuse awareness campaign, and introduced a new equity and diversity award, the "QLS President's Equity Advocate".

In 2018 we will build on our success and continue to raise awareness of our mission of good law and good lawyers for the public good. This will include celebrating good lawyers with our awards – for the first time – all being presented on the first night of our flagship Symposium event. Join us on 9 March for the popular Legal Profession Dinner and Awards, and QLS Symposium 9-10 March 2018.

We launched the first Reconciliation Action Plan (RAP) for Queensland solicitors, released our Search Warrant Guidelines with the Queensland Police Service, commenced a state-wide elder abuse awareness campaign, and introduced a new equity and diversity award, the "QLS President's Equity Advocate". In 2018, we have an exciting line up of awards which will – for the first time – all be presented on the first night of our flagship Symposium event. Join us on 9 March for the popular Legal Profession Dinner and Awards, and QLS Symposium 9-10 March 2018.

The Legal Profession Dinner and Awards is one of the Queensland legal profession's most prestigious evenings. QLS will officially welcome president-elect Ken Taylor, and celebrate good lawyers and good law, for the greater good in our communities through the presentation of industry awards, including for the first time the Agnes McWhinney Award. Nominations for the awards open in late November and tickets to the dinner are available now.

The dinner and awards coincide with the QLS Symposium, where attendees can earn 10 CPD points over two days. Both events provide a great opportunity for attendees to connect with the wider profession, and celebrate the achievements of our colleagues.

You can view our 2018 events as they are released via the QLS website at qls.com.au/events. On that note, I would like to thank our members for their support of our events this year, as well as our sponsors and presenters for their contributions.

Speaking of the future, one of the key items that will set the tone for 2018 is our Call to Parties statement, which we released at the end of October, following the State Government's announcement of the November 25 election. By the time this edition is published, the election will be done and dusted and we will have received a response from the major parties to our statement. Our advocacy team will provide a wrap up in the February 2018 edition of *Proctor*.

Each election – both federal and state – we release these statements following wide consultation with our profession, including our district law associations and the expert members of our 25 policy committees. This year's Call to Parties highlights 10 key legal and social justice issues for the major political parties to consider as matters of priority for Queensland solicitors.

In previous years, we have seen a great response by the parties to our issues, and have even seen our Call to Parties form the

basis for the government of the day's legal agenda. The 10 items we have flagged for reform this year include:

1. Queensland's law reform process
2. Judicial Commission for Queensland
3. Access to justice in Queensland
4. Court resourcing
5. Criminal law in Queensland
6. Children's law in Queensland
7. Family and domestic violence matters
8. Rights of small business and property owners
9. Access to fair compensation schemes in Queensland
10. Consumer protection for Queenslanders.

You can view our Call to Parties on the QLS website. These items will form part of the Society's advocacy platforms for 2018. I would like to thank all who consulted on this statement, as well as all of our committee and working group members for their work this year speaking on behalf of our members to encourage good law in Queensland.

As we come into the holiday season, I would like to take the time to thank our 2017 president, Christine Smyth, for her dedication and leadership this year. I would also like to thank our 2017 Council and our staff for their support of the Society. It is also fitting that we thank our advertisers, service providers and members of our other committees and working groups for their contributions this year.

I look forward to continuing to work with you all in 2018, as well as welcoming our incoming president, deputy president and vice president, and the new QLS Council.

Please note that Queensland Law Society will be closed from 4pm on Friday 22 December 2017 until 8.30am on Tuesday 2 January 2018 for the holiday season.

Happy holidays and Merry Christmas to you all.

Matt Dunn
Queensland Law Society Acting CEO

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Shining a spotlight on mental health

Queensland Law Society and the Bar Association of Queensland held a sold-out annual Tristan Jepson Memorial Foundation (TJMF) Lecture in November, focusing on mental health in the legal profession.

The event featured ex-lawyer and author of "The Wellness Doctrines for Law Students and Young Lawyers", Jerome Doraisamy who shared his personal insights on dealing with mental health challenges.

This lecture is an annual event, and a highlight of the wellness calendar, with the support of the QLS Wellbeing Working Group. QLS was also the first Law Society to be a signatory to the TJMF guidelines when they were first published, and continues to run mental health events throughout the year for Queensland's legal profession.

Society acting chief executive officer Matt Dunn spoke to attendees about the importance of bringing mental health out of the shadows and into the forefront.



"We all have our own journeys to travel, and our own ways of dealing with personal issues," he said.

"However, mental health is the same as physical health, and we must always ensure that we take care of ourselves and others."

If you feel you may be suffering from a mental illness or feel over-stressed, you can access LawCare as part of your QLS membership. LawCare provides many health and wellbeing services to QLS members, their staff and family. You can access the service at qls.com.au/lawcare.

National Mortgage Form

"Prepare yourselves – What you need to know about the National Mortgage Form" was published in the November edition of *Proctor*, authored by Gordon Perkins of Mullins Lawyers.

The article was drafted prior to the Land Title Practice Manual release on 9 October 2017, when the Department of Natural Resources and Mines inserted part 2A into the Land Title Practice Manual.

The change allowed the inclusion of two types of form 20 with the National Mortgage Form (NMF) for lodgement in Queensland: an enlarged panel relating to marksman executions by a mortgagor or mortgagee, and a schedule including additional terms and conditions in the NMF.

The schedule caters for transactions where mortgage terms are negotiated. It also overcomes some of the issues discussed in the article. In addition, PEXA expect that their next release scheduled for mid-November 2017 will allow for the attachment of an additional document to NMFs lodged through PEXA.

Titles Office changes

Settlement Notices to be replaced with Priority Notices from 1 January 2018

Form 23 Settlement Notices can only be deposited at the Titles Office up to close of business on Friday 22 December 2017.

The Registrar of Titles has advised that from 1 January 2018, Settlement Notices can no longer be deposited in the Titles Registry. The current Queensland Settlement Notice mechanism will be replaced by a Priority Notice mechanism as part of a move toward national consistency in a range of titling processes to support national electronic conveyancing in Australia. There will be no transitional period.

More information is available on the Titles Registry Alerts website – business.qld.gov.au/industries/building-property-development/titles-property-surveying/titles-property/titles-registry-alerts.

Celebrating women in law

Women Lawyers Association Queensland (WLAQ) held their annual awards dinner in October, with over 250 attendees, five awards presented and nearly \$6000 raised for Women's Legal Service.

Men and women from Queensland's legal profession, joined together to celebrate the achievements of female legal practitioners in 2017, at the 39th awards dinner. This year, award winners included a high ranking member of the judiciary, an experienced barrister and Queensland solicitors. The full list of awards and winners are below:

- **Woman in Excellence Award:**
Chief Justice Susan Kiefel AC, the High Court of Australia
- **Woman Lawyer of the Year:**
Kerri Mellifont QC, Barrister-at-Law
- **Trailblazer of the Year 2017:**
Clarissa Rayward, director of Brisbane Family Law Centre
- **Regional Woman Lawyer of the Year:**
Catherine Cheek of Clewett Lawyers
- **Emergent Woman Lawyer of the Year:**
Tanya Diessel of Gold Coast Community Legal Centre & Advice Bureau.

President Cassandra Heilbronn was pleased at the success of the event, and the calibre of award winners for 2017.

"Each year we have seen the WLAQ Annual Awards Dinner gain momentum and the current level of support and sponsorship is overwhelming," she said.

She went on to thank this year's sponsors, including Queensland Law Society, who once again provided their support of the event.

"Queensland Law Society has provided continuing support year in and year out through its dedicated team designing our Awards Book, place settings and seating charts. This assistance is invaluable and I was so pleased to see Jason and members of his team in attendance at the Dinner."

WLAQ has a full calendar of events for 2018, including the 80th Anniversary of the graduation of Una Prentice from the TC Beirne School of Law, and the release of their inaugural Top 15 Women Lawyers in Queensland list.

"In 10 years' time I hope that we all look back at 2016 and 2017 and say *that was* when it all changed for women in Queensland's legal profession," Ms Heilbronn said.

"Let it be said that this is the beginning of the way it should be."



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PI from all angles

The 17th annual QLS Personal Injuries Conference was held in November, and featured a keynote address from the Honourable Ian Callinan AC. QLS would like to thank gold sponsor, MediLaw, silver sponsor Assess Group and bronze sponsor Red Health for their support of this premier professional development event.



Thank you to our gold sponsor



Reaching the regions

The Society's downs and south-west members joined local and intrastate experts for a day of professional development in Toowoomba. Featuring sessions on ethics, practice support and multiple practice areas, there was something for everyone. QLS thanks sponsors Clarence, ESS, Elston, GlobalX, legalsuper and PEXA for their support of our regions.





Thank you from QLS

QLS Council, sponsors, advertisers, presenters, service providers, committee and working group members, and other friends of the Society came together at Queensland's State Library for a night of networking and appreciation in November. QLS president Christine Smyth warmly thanked all involved with the Society for 2017, noting that all success was a group effort. Sponsored by Law in Order.

Thank you to our sponsor


LAW IN ORDER



Quantum Meruit claims

Guidance for plaintiffs and defendants



It is now accepted that the concept of unjust enrichment underpins most restitutionary claims. However, it is not a definitive legal principle that amounts to a cause of action.¹

Accordingly, a pleading that simply alleges that the defendant was unjustly enriched at the plaintiff's expense is likely to be struck out.² In *SunWater Limited v Drake Coal Pty Ltd*,³ the Queensland Court of Appeal provided valuable guidance on how properly to plead an "action on a *quantum meruit*", which is a restitutionary claim for a reasonable sum of money for work done at the request of another.

SunWater: the facts

SunWater supplied water for commercial use. Drake and Byerwen were mining and exploration companies. SunWater entered into agreements with Drake and Byerwen, which required SunWater to undertake

preparatory work in anticipation of the possible construction of water pipelines.⁴ Drake and Byerwen later purported to terminate the agreements, after SunWater had already completed some of the work. SunWater commenced proceedings claiming, in the alternative to its contractual claims, reasonable remuneration for work done at the request of Drake and Byerwen.

Part of the defence denied that SunWater was entitled to recover by way of restitution because, it was alleged, SunWater "continued to incur costs and expenses and extend relevant dates in the contract when it knew it could not supply water to the [Drake's] mine".⁵ SunWater applied to have this part of the defence struck out, arguing that these allegations were "not capable, in law or fact, of giving rise to any legally recognised ground of defence to [its] claims".⁶ The primary judge, relying on the decision of the High Court in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*,⁷ accepted that Drake and Byerwen could rely on any matters that would

make it "inequitable in all the circumstances to require the defendants to make restitution", and dismissed the application.⁸

The Court of Appeal allowed an appeal. McMurdo JA delivered the leading with the judgment, with which Gotterson and Philippides JJA agreed. Philippides JA also delivered a concurring judgment.

Elements of the cause of action

The court usefully set out the elements of the cause of action to be pleaded. McMurdo JA analysed the decision of the High Court in *Lumbers v W Cook Builders Pty Ltd (in liq)*,⁹ and concluded that the cause of action is complete once the following facts are pleaded:

1. the plaintiff has performed work; and
2. the work was performed pursuant to an express or implied request by the defendant.¹⁰

Mohammud Jaamae Hafeez-Baig and Jordan English

explain how to plead restitutionary claims for work done at the request of another.



Prior to the decision in *SunWater*, there was still some uncertainty as to whether an action for restitution on a *quantum meruit* basis required a request (whether express or implied). This flowed from the decision in *Lumbers*, in which the High Court rejected an argument that (at least in that case) “acceptance of a benefit, without a request, suffices to found an action for work and labour done or money paid”.¹¹ In the latest edition of their book, however, Edelman and Bant argue that “[t]he remarks must be read in their context ... only to be a general proposition that request will *usually* be required”.¹²

The decision in *SunWater* has now made clear that in Queensland, an express or implied request must be pleaded. Philippides JA stated:

“The effect of the decision in *Lumbers* is that it is “both necessary and sufficient” that the work was done or the money paid at the other’s request to establish the restitutionary cause of action for a *quantum meruit*.”¹³

From a pleading perspective, two further points are important. First, pleading and establishing the above elements will only give rise to a right to be paid a reasonable remuneration for the work done. It will also usually be necessary to plead matters going to the objective value of the work done, from which the reasonable sum to be awarded will be quantified. Secondly, where the *quantum meruit* claim arises out of an ineffective contract, it will be necessary to plead facts demonstrating that the contract is void, or has been discharged or rescinded.¹⁴

Change of position defence

The court also made clear that in a *quantum meruit* claim, it is not open to a defendant to point to matters which would make it “inequitable in all the circumstances” to require restitution, including matters which might support a “change of position” defence. The court was critical of the primary judge’s reliance on *Hills*, as that case had considered the defence of change of position in the context of an action to recover a mistaken payment, and not a *quantum meruit* claim. Philippides JA said:

“Restitutionary rights of action comprise a number of distinct rights of action. Being distinct rights of action, they have distinct elements and defences. Accordingly, principles relevant to the right of action for

money had and received are not able to be transplanted to the right of action for work done at the request of another, on the assumption of there being a definitive legal principle of unjust enrichment.”¹⁵

Her Honour further stated that “[t]here is nothing in *Hills* to support the proposition that a relevant issue that may arise for consideration in a case for remuneration for work and labour done at the request of another includes a consideration of whether it is ‘inequitable in all the circumstances’ to allow that restitutionary claim”.¹⁶

No benefit conferred

Finally, the court held that, in respect of the restitutionary claim for work and labour done at the request of another, it is not open to a defendant to plead by way of defence that no benefit was conferred. As noted by McMurdo JA, once the elements of the cause of action are established “it is neither necessary nor appropriate to consider whether the defendant benefited from the plaintiff’s work”.¹⁷ Of course, this aspect of the decision does not prevent defendants from pleading matters that are relevant to the proper valuation of the work done, which will affect the quantification of the reasonable sum to be awarded.

Takeaways

In brief, the key points for practitioners pleading *quantum meruit* claims are:

1. The elements which must be pleaded in an action to recover a reasonable sum for work done are:
 - a. that the plaintiff performed work; and
 - b. that the work was performed at the express or implied request of the defendant.
2. It will also, in most cases, be necessary to plead matters going to the objective value of the work performed.
3. Where the claim arises out of an ineffective contract, it is necessary also to plead facts demonstrating that the contract is void, or has been discharged or rescinded.
4. In such a claim, it is not open to a defendant to plead by way of defence that it is inequitable in all the circumstances to require restitution, and such a pleading is likely to be struck out.

5. In such a claim, it is not open to a defendant to plead by way of defence that no benefit was conferred on the plaintiff, and such a pleading is likely to be struck out. Defendants may, however, plead matters that go to the valuation of the work done and thereby affect the reasonable sum to be awarded.

Mohammud Jaamae Hafeez-Baig is an associate at the Supreme Court of Queensland. Jordan English is an associate at the High Court of Australia.

Notes

- ¹ *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560, [73]-[74]; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, [85]; *Friend v Brooker* (2009) 239 CLR 129, [7]; *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, [85]; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 375 and 378; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256-257.
- ² *Lactos Fresh Pty Ltd v Finishing Services Pty Ltd (No 2)* [2006] FCA 748, [111].
- ³ [2016] QCA 255.
- ⁴ *Ibid* [24] (McMurdo JA).
- ⁵ *SunWater Limited v Drake Coal Pty Ltd* [2015] QSC 320, [6].
- ⁶ *Ibid* [1].
- ⁷ (2014) 253 CLR 560.
- ⁸ [2015] QSC 320, [15].
- ⁹ (2008) 232 CLR 635.
- ¹⁰ [2016] QCA 255, [40]-[41] (McMurdo JA) citing *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, [89]-[90].
- ¹¹ *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 665 [86]. See also *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307, 326 [47].
- ¹² James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 77.
- ¹³ [2016] QCA 255, [14]. The analysis is consistent with *Progressive Pod Properties Pty Ltd v A & M Green Investments Pty Ltd* [2012] NSWCA 225, [7], [38]-[39], [51], [63]-[65] and *In the matter of The Spanish Club Limited* [2015] NSWSC 661, [36]. It has since been endorsed in *TSW Analytical Pty Ltd v The University of Western Australia* [2017] WASCA 67, [63] and *Woolcorp Pty Ltd v Rodger Constructions Pty Ltd* [2017] VSCA 21, [132].
- ¹⁴ K Mason, J W Carter and G J Tolhurst, *Mason & Carter’s Restitution Law in Australia* (LexisNexis Butterworths, 3rd ed, 2016) [2915].
- ¹⁵ [2016] QCA 255, [19].
- ¹⁶ *Ibid* [10].
- ¹⁷ *Ibid* [41]. See also [18] per Philippides JA. See also *Hendersons Automotive Technologies Pty Ltd (in liq) v Flaton Management Pty Ltd* (2011) 32 VR 539, [60]-[62].

Family violence

Fundamentals for family lawyers





by Amy Sanders-Robbins

Domestic and family violence can affect anyone in the community regardless of age, gender, wealth or cultural background. Defining domestic and family violence has significant implications for how the criminal justice system, family law system, human services sector and wider community, recognise, understand, and respond to the complex nature of the issue.¹

Family violence in the Family Law Act 1975 (Cth)

Family violence is defined in s4AB of the *Family Law Act 1975* (Cth) (the FLA), and includes repeated derogatory taunts, unreasonably withdrawing financial support and preventing a family member from making or keeping connections with his or her family, friends or culture.²

The examples of behaviour outlined in s4AB(2) of the FLA do not constitute family violence on their own. The court must be satisfied that the described behaviour falls within the s4AB(1); that is, the behaviour coerces or controls a family member or the behaviour causes a family member to be fearful.³

Impact on parenting orders

When making a parenting order, the court must consider the best interests of the child as paramount, and also must consider the factors outlined in s60CC of the FLA. These factors comprise of two primary considerations and 14 additional considerations. The first primary consideration is the benefit of the child having a meaningful relationship with each parent, and the second is the need to protect the child from physical or psychological harm, from being subjected or exposed to abuse, neglect and family violence.⁴ The 2012 FLA amendments require the court to give greater weight to the right of the child to be protected from harm.

The difficulty with an evidence-based approach is that, by its very nature, family violence occurs in the context of intimate relationships which can be isolated/insulated from independent evidence. Further, victims have likely experienced barriers to disclosure as a result of the coercive and controlling behaviours directed towards them.⁵ Significantly, victims often have limited knowledge that the behaviour they have experienced falls within the definition of family violence. This, coupled with the sparse evidence and a system that promotes an ongoing interaction between parties (for contact purposes), can impact on how the court effectively responds to family violence.⁶ Studies have shown that contact with a violent parent is generally a negative experience for children because, *"everything that happens to children living in families where there is domestic violence also happens after separation."*⁷ Therefore, a family law system that promotes shared parenting and the maintenance of parent-child relationships after separation often minimises the relevance and impacts of family violence.

Parenting matters⁸ involving family violence are complex. Consistent with the objects set out in s60B of the FLA, the focus in these matters has to be protecting a child from harm and ensuring that the child is able to reach his or her full potential. This includes an honest recognition of the impact of family violence and its effect on each parent's capacity to care for the child.

An assessment of the parties ability to effectively communicate and parent free from coercion or control, or as part of a dynamic that previously or continues to be marred by family violence, is not explicit under s61DA or 60CC of the FLA. One of the criticisms of this legislative framework is that it does not adequately provide for an honest consideration of the dynamic of family violence, the personalities of the parents, differing parenting styles and the effect these factors have on the child and effective parenting.⁹ Significantly, research indicates that parenting orders in matters involving family violence are not substantially different from matters not involving family violence.¹⁰

It is incumbent on practitioners and judicial officers to be informed of the wide ranging types of family violence and related behaviours and the effect this behaviour has on children and each parent's capacity to parent during the relationship, separation and post-separation.

Family law matters exist in an environment where evidence is currency. Accordingly, practitioners have to ensure that they carefully consider the evidence that is submitted to the court and:

- Ensure affidavits clearly outline behaviours during the relationship and after separation that fall within the definition of family violence as well as the impact of those behaviours on the children and on each party's capacity to parent and coparent. If seeking to rebut the presumption of equal shared parental responsibility, clearly outline how family violence, conflict and dysfunction between the parties will affect decision making about the child and how this will compromise the child's best interests.
- Identify and obtain corroborating evidence in relation to the family violence and its impact.
- Obtain a family report from an appropriately qualified expert and tailor instructions to ensure the expert is alert to relevant issues, relevant material including subpoena documents are provided and authority is given to speak to the school, teachers, extended family members and counsellors or psychologists treating either party or the child.¹¹
- Obtain updated family reports to better inform the court about how the parenting arrangements are progressing and to identify any ongoing impacts of family violence.¹²
- Ensure that all submissions to the court focus on the need to protect the child from harm.¹³

Impact on dispute resolution

Prior to the commencement of parenting proceedings, s60I of the FLA requires parties to participate in family dispute resolution in an effort to resolve the matter or narrow the issues in dispute. This is mandatory, **except** where there are reasonable grounds to believe:

- there has been family violence or abuse; or
- there is a risk of family violence or abuse.

It is important for practitioners to be alert to these exceptions.

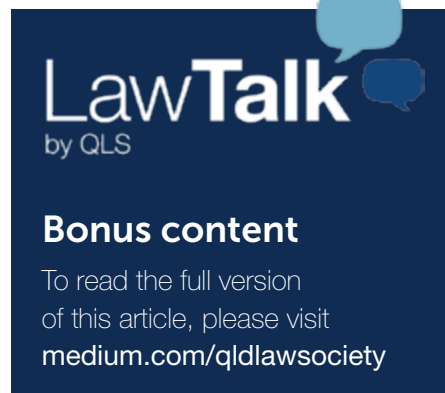
Notwithstanding the exceptions contained in s60I(9) of the FLA, family dispute resolution can occur when there are allegations of family violence, depending on the circumstances, complexities and needs of the individual family. It is important for practitioners and mediators to be aware of any family violence and to formulate a plan on how to manage its impact, such as developing a safety plan, arranging for a support person and ensuring that the client feels empowered to make their own decisions throughout the process. A party cannot effectively engage in family dispute resolution or mediation if they are concerned for their safety or are unable to freely provide instructions and make decisions.

Impact on property matters

The FLA provides family law courts with broad powers in relation to the property interests of married and de facto persons. These broad powers include the discretion to make property adjustment orders, superannuation orders, injunctions and maintenance.

The court's discretion to alter interests in property is limited by the requirement that the "court should not make an order under these sections unless it is satisfied that, in all the circumstances, it is just and equitable to make the order."¹⁴ There is no specific requirement for the court to take into account family violence when determining what is an appropriate property order to make in the circumstances having regard to s79 or 90SM of the FLA and s75(2) or 90SF(3) of the FLA.¹⁵

In *Marriage of Kennon* [1997] FamCA 27 ("Kennon"), the majority stated that where there is a course of violent conduct during the marriage which is demonstrated to have had a significantly adverse impact on a party's contribution to the marriage, or have made his or her contributions significantly more arduous, the trial judge is entitled to take this



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factor into account in assessing the parties' respective contributions pursuant to s79.¹⁶ The court emphasised that this principle would only apply in exceptional cases.

The test in *Kennon* is of a high threshold, and does not take into account the potential relevance of family violence to the factors set out in s75(2) and 90SF(3) of the FLA.

A significant implication of family violence is the affect it has on each party's bargaining power or capacity to negotiate. Where a party has experienced emotional abuse, intimidation or threats during the relationship, that dynamic often continues following separation.

In property matters¹⁷ where there is a history of family violence, practitioners should take care to highlight to the court relevant facts including:

- evidence of the family violence alleged
- the impact family violence has had on matters under sections 79 and 90SM of the FLA, in particular the financial and caregiving contributions and any mental or physical health impacts
- the impact that the family violence will have on relevant factors under s5(2) and 90SF(3) of the FLA, for example impacts on health, income earning capacity, caregiving of children and child support
- corroborating evidence from experts such as psychologists, psychiatrists or occupational therapists as to the effect that the family violence has had on the emotional, psychological and physical wellbeing of the affected party, and recommended future treatment plan and associated costs.

Social attitudes around family violence and its impacts have vastly changed in the 20 years since *Kennon* and, as such, the legislative framework relating to property matters ought to be reformed to ensure that the court is able to make orders that are just and equitable in all of the circumstances.

What's next?

The legal system that governs family relationships must effectively respond to domestic and family violence. Despite the 2012 amendments to the FLA, the emphasis on the benefit to a child of a meaningful relationship with both parents has not shifted to an extent that adequately prioritises protection from harm. This focus compromises the court's ability to effectively respond to the complex nature of family violence and make parenting orders that are genuinely in the best interests of children. This article has also highlighted the need for legislative reform to enable family law courts to take family violence into account in property matters, without having to meet the high test established by *Kennon*.¹⁸

Amy Sanders-Robbins is a senior associate with Hillhouse Burrough McKeown Lawyers and an accredited specialist in family law.

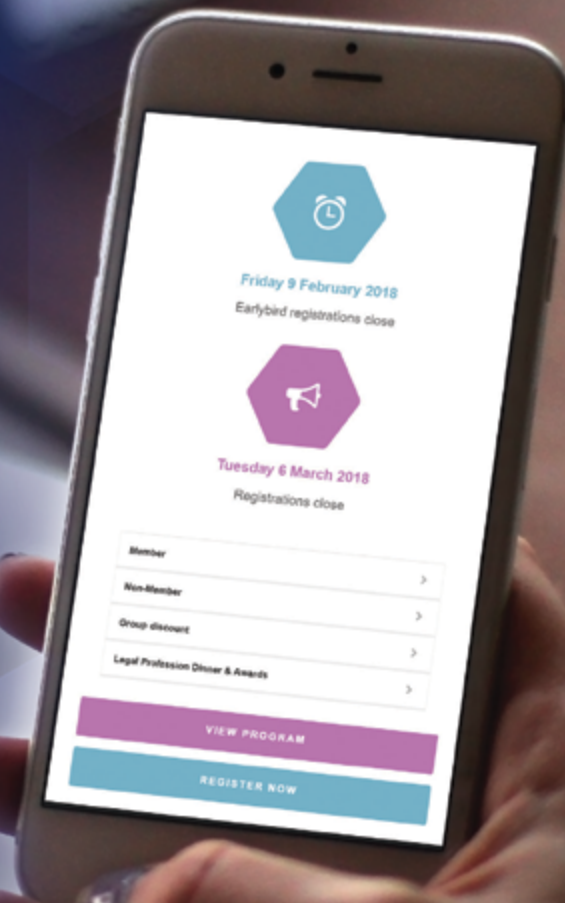
Notes

- ¹ *Special Taskforce on Domestic and Family Violence in Queensland, Not Now, Not Ever: Putting an end to domestic and family violence in Queensland*, Queensland Government, 2015, pp 69 and 71.
- ² s4AB of the *Family Law Act 1975* (Cth).
- ³ *Lyons and Adder* [2014] FamCAFC 6 and *French and Fetala* [2014] FamCAFC 57.
- ⁴ s60CC(2) of the *Family Law Act 1975*(Cth).
- ⁵ Jeffries, S, Field, R, Menih, H and Rathus, Z, *Good Evidence, Safe Outcomes in Parenting Matters Involving Domestic Violence? Understanding Family Report Writing Practice From the Perspective of Professionals Working in the Family Law System*, UNSW Law Journal, Volume 39(4), 2016, p 1357.
- ⁶ *Ibid* 39.
- ⁷ *Ibid* 39, p 1363; Radford, L and Hester M, *Mothering through Domestic Violence*, Jessica Kingsley Publishers, 2006, p 92-93.
- ⁸ The term 'matters' has been used to take into account parenting proceedings before the court and parenting matters that are resolved outside of the court process.
- ⁹ *Ibid* 39, 9 1359-1363.
- ¹⁰ Jeffries, S, *In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the "Expert" Assessments That Guide Judicial Determinations*, *Laws* 2016, 5, 14, p 5-7.
- ¹¹ *Ibid* 39, p 1384.
- ¹² *Ibid* 39, p 1384.
- ¹³ *Ibid* 39, p 1386.
- ¹⁴ s79(2) of the *Family Law Act 1975* for married couples and section 90SM(3) of the *Family Law Act 1975* for de facto couples.
- ¹⁵ s79 and 90SM of the *Family Law Act 1975* (Cth) and section 205ZG *Family Court Act 19975* (WA).
- ¹⁶ *Marriage of Kennon* [1997] FamCA 27.
- ¹⁷ The term 'matters' has been used to take into account property proceedings before the Court and property matters that are resolved outside of the court process.
- ¹⁸ *Marriage of Kennon* [1997] FamCA 27.

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International Commercial Arbitration 101



With the increasing internationalisation of business, more clients are engaging in cross-border commercial activities.

If your clients are involved in transactions with any foreign element, they need to be aware of the alternative dispute resolution mechanisms available so that they can avoid the prospect of litigation

in foreign courts. Should a final and binding determination to a dispute be required, the general global consensus is that arbitration is the most effective process due to the enforceability of arbitral awards. Transactional lawyers need to understand this, and ensure that the contracts they are drafting contain arbitration clauses. To fail to do so could mean that clients are left with no effective process to enforce their substantive rights.

What is international commercial arbitration?

Arbitration is a process by which parties agree to have their disputes determined by a neutral third party, namely an arbitrator or arbitral tribunal, in the form of a final and binding award.

An arbitration is commercial when it arises out of a relationship of a commercial nature.¹ The Model Law notes that the



Russell Thirgood and Erika Williams share the basics of international commercial arbitration, from start to finish.

term 'commercial' should be given a wide interpretation.

An arbitration is international if the parties to an arbitration agreement have their places of business in different countries or if the place of arbitration or a substantial part of the obligations of the commercial relationship is in a country outside that of the place of business of the parties.²

The legislative framework supporting international arbitration in Australia is the

International Arbitration Act 1974 (Cth) (IAA) which is based on the UNCITRAL Model Law.

Why choose arbitration?

There are a number of features which make international arbitration appealing but, by far, one of the most important features is the enforceability of the arbitration award. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) provides common

legislative standards for the recognition and enforcement of arbitration agreements and awards. At the time of writing, 157 countries were party to the New York Convention, meaning that if your client obtains an arbitration award in a 'convention country', that award should be capable of enforcement in the courts of the 157 convention countries. This is in stark contrast to the 36 countries with which Australia has reciprocal recognition of court judgments.

Another key feature of arbitration is confidentiality. Because arbitration is a private dispute resolution mechanism, it is generally accepted that it is confidential. This means that if your client finds themselves in a contested legal battle, they do not need to have dirty laundry aired in court where media or anybody can observe the proceedings.

Another feature is the ability to avoid litigation in a foreign jurisdiction. By choosing arbitration, parties can agree to have their disputes determined under the supervision of the law of a neutral third country and avoid encounters with unfamiliar legal systems.

How to choose arbitration

Parties can refer disputes to arbitration by including a simple arbitration clause in their agreement. Another option is for parties to agree to refer existing disputes to arbitration. Some of the basic elements to set out in the arbitration clause can include:

- selection of arbitration rules for the conduct of the arbitration
- selection of an arbitration institute to administer the arbitral process
- number of arbitrators – typically one or three
- language of the arbitration



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- seat of the arbitration – the seat of the arbitration is the jurisdiction which oversees the process of the arbitration.

In addition to the basic elements set out above, the parties to a contract can be creative and tailor an arbitration process that is efficient and cost effective. For instance, they may decide to place limits on disclosure, hearing time and even recoverability of legal costs. Generally, the more thought that is given to the arbitration clause at the beginning, the better and more appropriate the dispute resolution process will be should it be needed.

How to enforce an arbitration agreement

If your client has an arbitration agreement and another party attempts to commence court proceedings, it should be relatively straightforward to apply for a stay of that action and have the matter referred to arbitration. Australian courts are known for holding parties to their bargain and will take a '*broad, liberal and flexible approach*' to interpreting language used in a dispute resolution clause.³

How to enforce an arbitral award

The process of enforcing an award in Australia should also be straightforward, with enforcement being the default position subject to certain limited exceptions. The court may only refuse to enforce an award if a party proves to the satisfaction of the court that:⁴

- a party was under some incapacity at the time the arbitration agreement was made
- the arbitration agreement is not valid under the law of the agreement
- a party was not given proper notice of the arbitration proceedings or was otherwise unable to present its case



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- d. the award deals with a subject matter beyond the scope of the arbitration agreement
- e. the composition of the arbitral tribunal was not in accordance with arbitration agreement
- f. the award is not yet binding on the parties or has been set aside in the law of the country in which it was made
- g. the subject matter is not capable of settlement by arbitration; or
- h. to enforce the award would be contrary to public policy.

The IAA further clarifies what would be contrary to public policy by stating that the enforcement of a foreign award would be contrary to public policy if the making of the award was affected by fraud or corruption, or a breach of the rules of natural justice occurred in connection with the making of the award.

When it comes to enforcement, there are a number of strategic matters that a client needs to consider with its legal advisors. Obviously, the enforcement process must take place in a jurisdiction where the award debtor has sufficient assets to meet the award. In addition to this, the client should consider bringing freezing orders to ensure that assets are not relocated and it is often

best that such applications be brought in appropriate courts and on an ex parte basis. Arbitration legislation based on the UNCITRAL Model Law will generally provide for these interim measures.

What now?

The dispute resolution provisions of contracts involving a foreign element need to be carefully considered. All too often, such clauses are given inadequate attention during the negotiation of contracts, and boilerplate jurisdiction clauses are inserted, which will destine any dispute to litigation in the nominated jurisdiction. Parties to such contracts would be better served by nominating international arbitration as their dispute resolution mechanism.

The choice of forum and process is in your client's hands when arbitration is selected as opposed to such matters being potentially dictated by a foreign court.



Notes

¹ Footnote to Article 1(1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (Model Law).

² Article 1(3) of the Model Law.

³ *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206.

⁴ IAA s 8.

Russell Thirgood is an arbitrator and partner at McCullough Robertson Lawyers. Erika Williams is senior associate at McCullough Robertson Lawyers and a member of the Alternative Dispute Resolution Committee.

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Litigation in Queensland courts

Reading list in Supreme and District Courts

A reading list is the list of material (being anything filed or to be filed by leave) which your side intends to rely upon at the hearing of an interlocutory application. It can be contained in a separate document or appear at the commencement of the outline of argument. Two copies should be brought to court to hand up at the hearing.

When you are preparing a reading list for an application in the Supreme Court¹ and District Court,² you should include the following information:

- Identification of each document (for example, affidavit of Mr Smith).
- Date on which the document was filed (not sworn). However, if the document has not been filed, the list should make it clear that leave is being sought to file that document at the hearing and, in that case, the date of the document should be stated (for example, affidavit of Mr Smith sworn 3 October 2017).
- E court number – the e court number for each filed document is obtained from apps.courts.qld.gov.au/esearching/.

Jurisdiction of the Federal Court

When bringing proceedings in the Federal Court, you need to ensure that the Federal Court has jurisdiction in relation to the dispute.

Section 39B(1A)(c) of the *Judiciary Act 1903* (Cth) confers³ on the Federal Court of Australia jurisdiction “in any matter arising under any laws made by the [Commonwealth] Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter”.

A matter arises under a federal law and satisfies s39B(1A)(c) if the determination of the relevant controversy turns upon rights and duties that arise under a Commonwealth statute.⁴

In this sense:

- the “matter” takes in the whole controversy,⁵ including any alternative causes of action or additional claims not grounded in a Commonwealth statute except to the extent they are wholly separate such that they should properly be brought in different proceedings⁶
- the conferral of jurisdiction is valid even if all points concerning federal law are decided against the relevant plaintiff (or the point not considered because the matter can be decided on other grounds), provided that the claim in as far as it relates to a federal law discloses an arguable case.⁷

Jurisdiction of the District Court

When bringing proceedings in the District Court, you need to ensure that the District Court has jurisdiction in relation to the dispute.

Your starting point will be to have regard to s 68 *District Court of Queensland Act 1967* (Qld). Section 69 of that Act addresses the powers of the District Court. Depending on the nature of the dispute, you may also need to consider whether any relevant legislation confers jurisdiction on the District Court such as, for example, the *Corporations Act 2001* (Cth).

It is critical to identify whether the District Court does or does not have jurisdiction before commencing proceedings, or when your client has been served with proceedings commenced in the District Court. Your client will not obtain the orders it seeks, or the orders sought will be able to be opposed successfully, if the court does not have jurisdiction. Further, if a proceeding is commenced in the Supreme Court when it ought to have been commenced in the District Court, this can impact on the costs to be awarded to the successful plaintiff by reason of rule 697 of the *Uniform Civil Procedures Rules*.

Urgent applications

The Federal Court’s website has a page dedicated to listings in the Queensland registry at fedcourt.gov.au/court-calendar/daily-court-lists/qld. On each day and on this page, you will find the contact details of the associates of the judges hearing urgent matters (general duty) and urgent matters (commercial and corporations). You will also find the mobile number to call for urgent after hours applications.

In the Supreme and District Court in Brisbane, the number to call for urgent hearings after hours is 3247 4771. Contact details for other courts in Queensland can be found at courts.qld.gov.au/contacts/courthouses.

The usual practice when seeking to bring an urgent application in the Supreme and District Courts during court hours is to contact the associate to the senior judge sitting in the Applications List listed for the day on which you wish to appear. The contact details of the associates to the judges can be found at courts.qld.gov.au. For example, see courts.qld.gov.au/contacts/judiciary-contacts/judges-of-the-supreme-court. If that fails, contact the applications list manager on 3247 4310 (Supreme Court) or 3247 4421 (District Court).

Pre-trial case management

In the Federal Court, a case is assigned to a judge who oversees and manages the case and makes directions in order to progress the case to trial. This is known as the individual docket system. One real advantage of this system is that the case is assigned to a judge in the relevant national practice area or “NPA”. For each NPA, there is a dedicated group of judges with expertise in the area of law. The NPA is nominated by a party when filing, but this can be changed by the court. A second advantage is that the docket judge becomes familiar with the case which results in savings in time and cost because of fewer and shorter listings.

Kylie Downes QC addresses some recurring issues which arise in litigation in Queensland.



In the Supreme Court, pre-trial case management can be undertaken by the Commercial List judge assigned to the case (if the matter is on the Commercial List) or the case can be managed on the Supervised Case List, or by a judge where the case involves self-represented litigants.

If a matter is not on one of these lists and a Request for Trial Date is filed, the case will be managed by a resolutions registrar. This process will include and require attendance at two case management conferences. The parties will receive a conference notice by email which will identify what they need to do to prepare for the conference. This process is being trialled for the next 12 months.

Security access card for Brisbane's law courts complex

If you find that you often attend the QEII Courts of Law Complex at 415 George Street, and you are a member of the Queensland Law Society, you can apply for a security access card through the Queensland Law Society. The application process is explained at qls.com.au/Becoming_a_member/Member_benefits/Professional_benefits/Enhanced_access_to_the_Brisbane_Law_Courts.

There are real advantages in obtaining such a card, because you can avoid having to line up to go through security by showing the card to the security staff.

Instructing counsel at court

Subject to the nature of the case and the particular requirements of the barrister you have briefed, it can be of great assistance to counsel when instructing at court, if you can bring to court the following: a spare copy of the critical documents; a working copy of the same documents for the judge; a pencil case with pens, highlighters, tabs, a hole punch; a calculator; a copy of any applicable legislation; a copy of the rules of court and any applicable practice directions; a copy of the most recent pleadings (if any) and the most recent correspondence file.

You may also be required to bring multiple copies of a reading list and draft order.

If in the Court of Appeal, it is useful to bring three copies of the Part B cases cited by the parties. If your counsel refers to a Part B case, it may assist the court for your counsel to hand up the copies so that the court can follow the submission.

In the end, you should discuss with counsel what you need to bring to the hearing.

If you need to bring a lot of documents to court (say for a trial), then you must ensure that arrangements are made *before* the day of the hearing to have the documents transported to court so that they arrive well before the starting time of the hearing.

Kylie Downes QC is a Brisbane barrister and member of the Queensland Law Society *Proctor* Editorial Committee.

Notes

- ¹ Amended Practice Direction 6/04 (issued on 11 August 2016) at paragraphs 5-7.
- ² Practice Direction 1/17 (issued on 13 June 2017) at paragraph 5.
- ³ This conferral operates to the extent permitted by ss.75-77 of the Australian Constitution.
- ⁴ *Felton v Mulligan* [1971] HCA 39; (1971) 124 CLR 367 at 374-375.
- ⁵ *Re Wakim; ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511 per Gummow and Hayne JJ at 585-586.
- ⁶ *Felton v Mulligan* [1971] HCA 39; (1971) 124 CLR 367 at 373.
- ⁷ *Moorgate Tobacco Co Limited v Philip Morris Limited* [1980] HCA 32; (1980) 145 CLR 457 at 476.

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Casenote: *Nichol v Nichol*

Digital document not correctly executed admitted to probate

by Stephen Lee

In *Nichol v Nichol*, the Supreme Court held recently that a digital document, not being executed in the manner required by s10 of the *Succession Act 1981 (Qld)* (the Act), should be admitted to probate under s18 of that Act.¹

Mark Nichol (the deceased) died by his own hand on 10 October 2016. He was survived by his wife of one year (Julie), who had left him days before his death. The deceased was survived by a son (Anthony) of an earlier relationship, but they had not maintained consistent contact. The deceased had a close relationship with his brother (David) and his nephew (Jack).

No formal Will of the deceased was found. But when his body was discovered, the deceased's mobile phone was nearby. It was found to contain an unsent text (SMS) message. The message, which had been saved on the phone as a draft, read:

"Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV and a bit in the bank Cash card pin 3636 MRN190162Q 10/10/2016 My will". [sic]

The message referred to the deceased's brother David Nichol and the deceased's nephew Jack Nichol. Trish was the deceased's first wife. "MRN190162Q" was a reference to the deceased's initials and his date of birth.

David and Jack applied successfully to have the unsent text message treated as a Will pursuant to s18 of the Act.

Her Honour said² that four matters had to be shown in applications under s18:

1. Was there a document?
2. Did that document purport to embody the testamentary intentions of the deceased?
3. Did the evidence satisfy the court that, either at the time the document was created or subsequently, the deceased by some act or words demonstrated that it was his/her then intention that the document should, without more on his/her part, operate as his/her Will?
4. Did the deceased have testamentary capacity?

Brown, J found that the unsent text message saved on the deceased's mobile was a "document" within the meaning of s5 of the Act. That section relevantly adopts s36 of the *Acts Interpretation Act 1954* (Qld) which contains a broad definition of "document".

Her Honour noted that testamentary intentions are the intentions about what is to be done with a person's property upon the person's death.³ It was not in dispute that the text stated the deceased's wishes in that regard.⁴

For the third requirement to be proven, what must be shown is that the deceased intended the document to operate as the deceased's final Will, without more on the deceased's part – that is, the deceased did not want to make any changes to the document.⁵

In holding that this was made out, Her Honour relied on the use of the words "my will", as well as the fact that the text message was created at about the time when the deceased was contemplating death.⁶ The text also had his initials and date of birth at the place where a signature might otherwise be placed. The text was also dated. The fact that the text was unsent and that it was saved as a draft message were "consistent with the fact that he did not want to alert his brother to the fact that he was about to commit suicide, but did intend the text message to be discovered when he was found".⁷ Her Honour also relied on evidence of

surrounding circumstances, including the evidence of the state of the respective relationships with Julie, Anthony, David and Jack.⁸ There was also evidence that the deceased had previously made a statement to the effect that David and Jack would get his estate and Julie would get nothing.⁹

Her Honour noted that, as there was no duly executed Will, there was no presumption of testamentary capacity and that such capacity had to be affirmatively established.¹⁰ Applying the classic test for testamentary capacity laid down in *Banks v Goodfellow*,¹¹ Her Honour found that such capacity did exist at the time the deceased created the text message. There was some evidence that the deceased had depression and had received counselling after an earlier suicide attempt four months before his death. However, Her Honour was satisfied from evidence of the deceased's interactions with others that he was able to think and function rationally. It was not irrational for him to leave nothing to Julie and Anthony, even though they could bring a family provision application.

Since introduced in April 2006, s18 has proven to be a wide jurisdiction.¹² Informal electronic documents were not readily accommodated under the previous regime of "substantial compliance" in the former s9 of the Act.

Stephen Lee is a Barrister-at-Law, 35westchambers.com/stephen-lee

Notes

¹ [2017] QSC 220 per Brown, J.

² [2017] QSC 220 [6], [8], applying *Lindsay v McGrath* [2016] 2 Qd R 160 [55].

³ [2017] QSC 220 [42].

⁴ [2017] QSC 220 [16], but see also [43].

⁵ [2017] QSC [47], see also [6], [7].

⁶ [2017] QSC 220 [59]–[60].

⁷ [2017] QSC 220 [30]–[35], [39], [55], [63]–[66].

⁸ [2017] QSC 220.

⁹ [2017] QSC 220 [29].

¹⁰ [2017] QSC 220 [8], [11].

¹¹ (1870) LR 5 QB 549, 565, confirmed by the Court of Appeal in *Frizzo v Frizzo* [2011] QCA 308.

¹² Succession Amendment Act 2006, s6.

Information disclosure to prevent harm

by Stafford Shepherd



Can I disclose information for the purpose of preventing imminent serious physical harm to my client or another person?

Rule 9.1 of the *Australian Solicitors Conduct Rules 2012* ('ASCR') provides that we must not disclose any information which is confidential to a client and acquired by us during the client's engagement to any person unless permitted by Rule 9.2 ASCR.

Rule 9.2.5 ASCR states:

"a solicitor may disclose confidential client information if the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person".

This is a permissive rule. When confronted by circumstances where this permitted exception may operate, ask the following:

- What is the prospect that the potential harm will occur and is it imminent?
- Are there other ways that the potential harm could be prevented?
- Under what circumstances has the information been obtained?
- How rational is the client?
- Are you aware of any previous threats?
- Is the client merely letting off steam?

Disclosure should be made only to the extent necessary to prevent imminent serious physical harm. Take a detailed note of any disclosure you make and the persons to whom you make it.

QLS Solicitor Advocate Course

The QLS Ethics Centre has collaborated with the Australian Advocacy Institute (AAI) to offer its first solicitor advocate course, an initiative of QLS president Christine Smyth.

The first course was fully booked within four days, and took place on the 17-18th November at the Magistrate's Courts.

This highly practical workshop enabled practitioners to experience and conduct a court scenario under the tutelage of senior practitioners and the judiciary. The QLS Ethics Centre and AAI intend to continue a series of these courses in 2018, including offering the course in regional centres.

Stafford Shepherd is director of QLS Ethics Centre.

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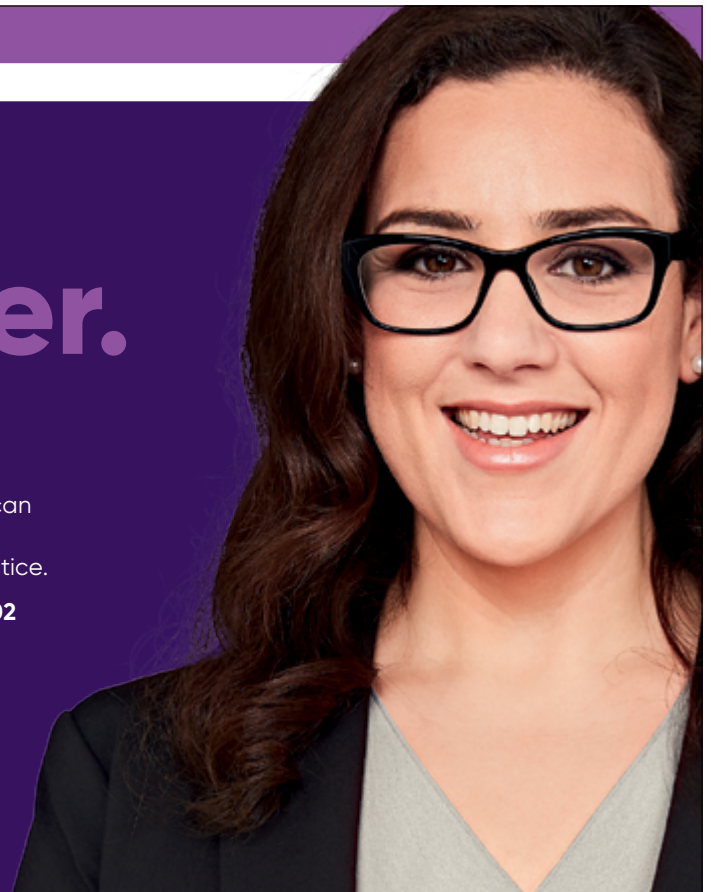
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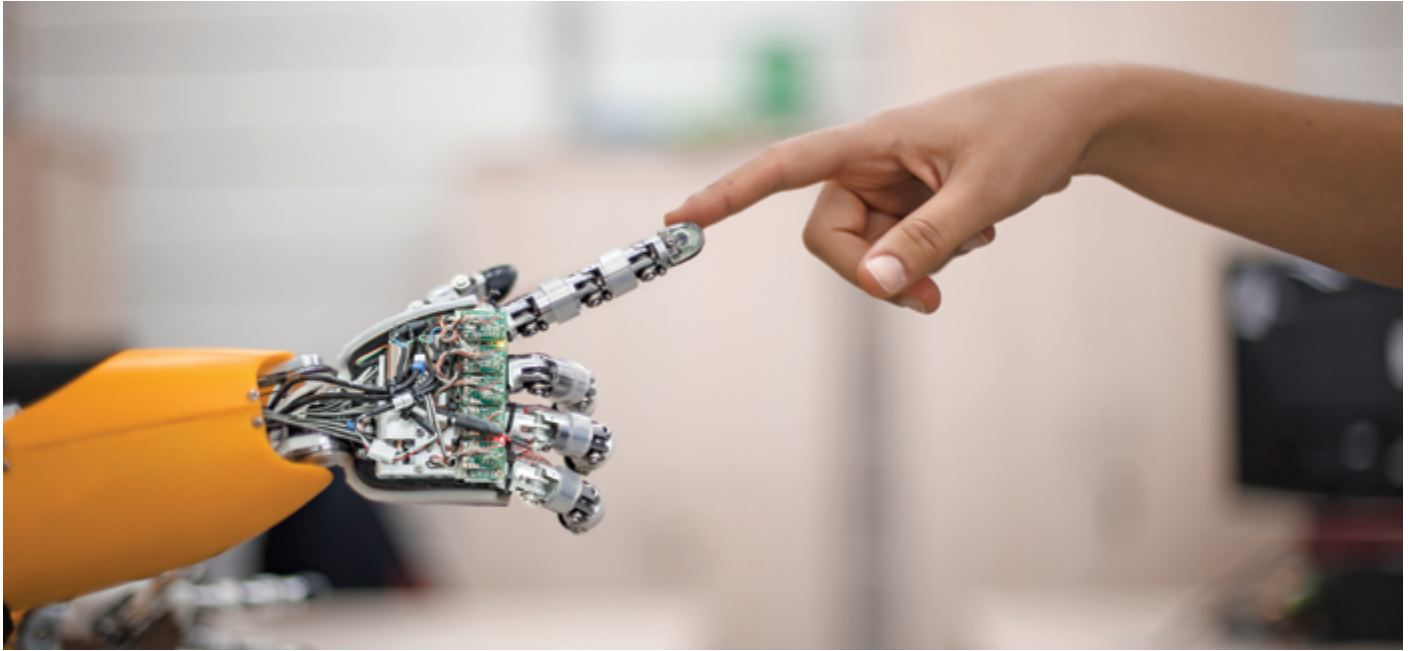
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Technology as a value add

Leveraging technology and demonstrating value



In stepping into my roles as QLS deputy president and president, I saw technology and its ability to challenge, change and enhance our profession as being central to all practice areas. As such, one of the themes of my presidency was to explore ways we can leverage technology to demonstrate our value as solicitors to the community.

It is fair to say that the area of succession law can sometimes seem to be the last bastion of the old ways – bound original Wills in paper, signing requirements and the like. However, it is clear that while the legislation might well be trailing the technology, we succession lawyers are actually embracing new ways of doing things.

At the Society's 2017 Succession and Elder Law Conference, I participated in a panel dealing with many current issues in our discipline, which included the possibility of taking a Will on an iPad – using a checklist like the Lexon checklist, but using a PDF annotate app to write on the notes with a stylus in the same way as if they were printed checklists.

While this is a wonderful example of thinking outside the box and looking for ways to use technology for the benefit of the client, on balance, such a practice would not suffice for the purposes of making a formal Will in accordance with the *Succession Act 1981*.

Slowly but surely, we are moving towards electronic transactions and signing documents electronically. In Queensland, this is regulated by the *Electronic Transactions (Queensland) Act 2001* which prescribes the framework for electronic signatures and transactions. However, that Act is not applicable for testamentary purposes. Section 7A(1) of the Act provides that it “does not apply to a transaction, requirement, permission, electronic communication or other matter of a kind mentioned in schedule 1.” Schedule 1 details “Excluded Transactions” and excludes (at paragraph 6) “a requirement or permission for a document to be **attested**, authenticated, verified or **witnessed** by a person other than the author of the document”. [emphasis added by author].

A “document” is defined in section 5 of the Succession Act as:

“

- (a) For Part 2 [Wills], **other than section 18** [Court's power to dispense with execution requirements for will, alteration or revocation], means **any paper or material on which there is writing**; or
- (b) **For section 18**, see the *Acts Interpretation Act 1954*, schedule 1.” [emphasis added by author]

(Pursuant to section 4 of the *Acts Interpretation Act 1954*, a contrary intention appearing in any Act displaces the application of the *Acts Interpretation Act*.)

Therefore, for the purposes of section 10 (how a Will must be executed), the document is only **any paper or material on which there is writing**.

By that definition, an electronically signed document would likely not suffice for section 10. There is room for argument that “**material**” could refer to an iPad, however it would be, as Sir Humphrey was fond of telling his minister, ‘a very courageous’ lawyer who took that view.

with Christine Smyth



Accordingly, I would not encourage the use of electronically signed Will documents in the absence of legislative clarity, to form a formal Will.

Of course, probate of an electronically signed document could be sought under section 18 of the *Succession Act*. However, this is hardly ideal as it will (almost certainly) require a hearing of the probate application and dispensing with execution requirements. It's impossible to accurately predict matters based on hypotheticals, however there are other risks. For example, exposure to a claim for negligence in incurring greater costs in obtaining probate for failure to comply with the Will execution requirements of section 10 in the first instance. Additionally, there is also the risk of a greater negligence claim by disappointed beneficiaries if the section 18 informal Will application is unsuccessful for any reason and the Will is declared invalid.

Elsewhere in this issue of *Proctor*, you will find a case note on the now-infamous 'unsent text Will'. That decision shows that the courts are also moving forward even when the legislation is well behind – and it is indeed well behind. The electronic transaction and related legislation that governs digital issues is all almost two decades old; that it does not accommodate technology such as the iPad is not surprising since the iPad itself was only introduced in 2010.

The media interest around the unsent text Will shows that the intersection of law and technology is news to the general public, but they are not news to us. During my time as deputy president, I established the Electronic Will Register Working Group in order to identify ways to utilise technology to improve services to succession law clients. And I am pleased to announce the group is preparing its report as we go to print. QLS collaborated with representatives from key stakeholders including Queensland Government Departments, Queensland's Public Trustee and two senior practitioners that are accredited specialists in succession law. This ensured a significant cross section of government and public service providers who shared their knowledge and comprehensively explored issues in a way to ensure a cohesive and balanced report is formed, providing us with a guide for moving forward. The working group will

soon deliver its report identifying issues that have emerged from its deliberations, including:

- a. the changing nature of making Wills (electronic, etc)
- b. the growing incidence of elder abuse, including financial elder abuse
- c. how a Wills registry will assist the community, legal practitioners, and government
- d. which public institution is best placed to house and manage the registry.

The work that this group has done, and will continue to do, sets the Society and its members up to be well and truly ahead of the game on such issues. My personal thanks goes to the working group members for your time, commitment and open mindedness to this important project. A special thank you to our chair, Bryan Mitchell and deputy chair, Ann Janssen for lending us your immense intellects, time and coordination skills. But most importantly for providing your unyielding support for this complex project. A special shout out to QLS senior policy solicitor Vanessa Krulin for your fabulous support and guidance through the process.

We will need to continue our advocacy with government to ensure that our outdated legislation catches up with the digital present (it isn't the digital future anymore!). The incredible work of this group and their report will form an invaluable tool in our advocacy on these matters. Succession lawyers have come a long way since vellum and red wax; hopefully the government will catch up to us soon!

Christine Smyth is 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.

Notes

Thank you to my team at Robbins Watson for your support in assisting in the research for this and many other articles through the year. I am so very privileged to have the support of my Robbins Watson partners and staff during this time. I would also like to thank QLS Ethics Centre director Stafford Shepherd and ethics solicitor Shane Budden for their assistance and advice for my columns, but a special mention to Shane Budden for his wonderful word-smithery throughout the year.

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Industrial manslaughter offence: new era for WHS

Queensland breaks away from harmonised legislation

On 12 October 2017, the Queensland Government passed the *Work Health and Safety and Other Legislation Amendment Act 2017* (Qld) (the Act). Its introduction to parliament was preceded by mounting public pressure to crack down on the regulation of workplace health and safety (WHS) across the state, following two fatal incidents at Dreamworld and Eagle Farm in 2016.

The Government-commissioned report, “A Best Practice Review of Workplace Health and Safety Queensland” (the Report), conducted by independent reviewer Tim Lyons, made 58 recommendations to improve WHS across the state – many of these recommendations were addressed in the drafting of the legislation.

The Act introduces a number of significant provisions set to reshape WHS laws, most notably an “industrial manslaughter” offence – arguably, the biggest change since harmonisation. The offence, which was originally to come into effect from 1 July 2018, came into force on 23 October 2017 when the Act was assented to.

Industrial manslaughter offence

A person conducting a business or undertaking (PCBU), or a senior officer, may be found guilty of industrial manslaughter where a worker dies, or is injured in the course of carrying out work and later dies, and:

- the officer or PCBU’s conduct substantially contributed to the death of the worker, and
- they were negligent about causing the death of the worker by their conduct.

The maximum penalty for an individual found to have committed the offence will be 20 years’ imprisonment and body corporates could be fined up to \$10 million.

Minister for Employment and Industrial Relations, The Honourable Grace Grace, previously indicated the offence is aimed at preventing corporate avoidance of WHS obligations. In talking about the Bill, the Minister said that “...affected families...can take heart that individuals or companies responsible will be held accountable under our laws,” which she described as a “deterrent to employers tempted to cut corners when it comes to safety in the workplace”.¹

Operation of the offence

The omission of descriptors such as “gross” or “reckless” with respect to the phrasing of “negligence” is notable, and may leave room for debate as to what threshold is required to establish negligence under the industrial manslaughter offence.

The explanatory notes do, however, state that the existing standard of proof in Queensland for criminal negligence will be applied. Adopting this guidance, the common law criminal standard of proof of “beyond a reasonable doubt”, rather than the civil benchmark of “on the balance of probabilities”, will apply.

The causative element triggering contravention of the offence is that a PCBU or senior officer “substantially contributes” to the worker’s death. From a criminal perspective it has been held that “there may be more than one cause of death and that criminal liability may attach to an actor even though the act was not the sole or even the “main” or “most substantial cause of death”. However, it is clear that criminal liability will not attach unless the act was a “significant” or “substantial” cause of death.² From this reasoning, “substantially contributes” may not necessarily be taken to mean that the conduct had to be a dominant or primary reason causing the fatality. Before its passing, the Act was also amended to clarify that s 23 of the *Criminal Code 1899* (Qld) will not apply, essentially removing the accident defence.

Finally, the offence is expanded to encompass an injury later resulting in death. This poses an unanswered temporal limitation question. It is possible the offence may capture workplace conduct that leads to a death many years later. For example,

if a worker is negligently exposed to a substance in the workplace, which is found to substantially contribute to their death 20 years later, a PCBU or senior officer could theoretically be prosecuted under the offence. Barring prosecutorial discretion, there is no statute of limitations provision to prevent an industrial manslaughter charge being laid.

Other changes under the Act

Although the industrial manslaughter offence will likely be the most significant reform under the legislation, the Act introduces some other significant changes that will affect the current WHS framework.

Transfer of jurisdiction for reviewable decisions

The jurisdiction for reviewable decisions³ will be transferred from the Queensland Civil and Administrative Tribunal (QCAT) to the Queensland Industrial Relations Commission (QIRC). The Report recommended the QIRC’s jurisdiction be significantly expanded, to reflect its place as a specialised forum for workplace disputes within the state.

Under the Act, the QIRC is empowered to hear disputes about matters such as the provision of information to a health and safety representative (HSR), requests by HSRs for assistance, a WHS grievance resolution process or a cease work issue.

HSRs

The Act introduces various amendments to the functions and powers of HSRs. Among these changes are reintroducing the requirement for a PCBU to compile a list of HSRs and deputy HSRs to be provided to the regulator, and imposing mandatory uptake and refresher training for HSRs to continually improve WHS education levels in line with best practice.

The Act also requires PCBUs to provide a copy of “Provisional Improvement Notices” issued by HSRs to the Regulator.

Laura Regan and Mason Fettel look at how the recently passed *Work Health and Safety and Other Legislation Amendment Act 2017* will affect Queensland's safety landscape.



Prohibiting enforceable undertakings

The Act precludes the regulator from accepting enforceable undertakings for contraventions of the Act that result in a fatality.

Codes of practice

The Report found that duty holders currently experience uncertainty about whether codes of practice need to be followed to demonstrate compliance with their WHS obligations.

The Act restores the status of codes of practice (as it was under the former *Workplace Health and Safety Act 1995* regime) to simplify how WHS obligations can be met and what standards duty holders will be assessed against. This means codes will be mandatory unless a duty holder can demonstrate it has adopted equal or better safety measures than those under the respective code.

New statutory office

Following another recommendation from the Report, the Act establishes a new independent statutory office to lead WHS prosecutions for the state – the Office of the

Work Health and Safety Prosecutor. It will now handle all prosecutions under the Act, except for category one (the most serious offence under the previous WHS Act) and industrial manslaughter offences, which will be referred to the Department of Public Prosecutions. It is anticipated that moving the prosecutorial arm from the existing regulator into a new independent body will increase the consistency of prosecutions.

Appointment of work health and safety officers (WHSO)

The Act also states that a PCBU may appoint a WHSO. The functions of a WHSO include identifying hazards and risks, investigating safety incidents, ensuring their workplace adheres to its obligations under the WHS Act, and maintaining appropriate WHS standards by establishing education and training programs.

In her explanatory speech, Minister Grace described this provision as optional, to allow employers to assess whether it is appropriate to have a WHSO in their workplace. However, the Act states that the appointment of a WHSO can be used as an admissible evidentiary aid to show that a duty or obligation under the Act has been

complied with. Practically speaking, this will mean workplaces that choose not to appoint a WHSO may find themselves at risk of an allegation that they have not done everything they can to meet their WHS responsibilities.

What happens next?

Workplaces should brace themselves for the regulator's increased appetite to prosecute under the Act. Employers should immediately train and educate human resources, safety and managerial staff on the new obligations, and amend their systems, practices and policies to reflect the new requirements.

Laura Regan is a senior associate and Mason Fettel is a lawyer at Sparke Helmore Lawyers. The authors gratefully acknowledge the assistance of Edwina Sully in the preparation of this article.

Notes

- ¹ Explanatory Speech to the Work Health and Safety and Other Legislation Amendment Bill 2017 (Qld).
- ² *Dunkley-Price v The Queen* [2015] VSCA 310 at [39].
- ³ Under Schedule 2A of the *Work Health and Safety Act 2011* (Qld).

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End of year message from your library

with Supreme Court
Librarian David Bratchford



As another year draws to a close, I would like to thank Queensland Law Society (QLS) and its members for your continued support and patronage of the library during 2017.

It has been a year of substantial progress for the library, with a key focus of expanding and improving library services for QLS members.

In February, we considered the findings of the customer survey we undertook at the end of 2016. The results of that survey are helping to inform our strategies and planning so that we can improve your experience with us and deliver better, more relevant information services and products that meet your needs.

In late 2017, we began discussions with QLS to review how members access their free library services. We will continue this review in the new year to help us improve library registration and login processes, and enable better integration between the library and QLS.

Some of our key achievements for 2017 include:

- expanding the library collection with new titles to provide you with more relevant and useful legal content
- introducing a free online support and training service (via Skype) for members who are unable to visit the library in person
- increasing uptake and use of our "Virtual Legal Library" (sclqld.org.au/vll) – a free service for sole practitioners and firms with five or less practising certificates, which provides online access to 138 key legal publications across civil, criminal and family law
- growth in our online collection of unreported decisions of Queensland courts and tribunals, as well as increased use of our "CaseLaw" databases and the Queensland Sentencing Information Service
- launching two new legal heritage exhibitions (legalheritage.sclqld.org.au/exhibitions):
 - *Without fear or favour: exploring Queensland's legal system* uncovers significant developments that have shaped

the law in Queensland – Sir Harry Gibbs Legal Heritage Centre, ground floor QEII Courts of Law, weekdays 8.30am to 4.30pm, free entry.

- *Lord Atkin: from Queensland to the House of Lords* commemorates the 150th anniversary of Atkin's birth in Brisbane and examines his life, career and lasting legacy to the common law – Supreme Court Library Queensland, level 12 QEII Courts of Law, weekdays 8.30am to 4.30pm, free entry.
- hosting the popular Selden Society lecture series – recordings of all past lectures are available on the SCLQ YouTube channel.

We also attended a number of QLS conferences throughout the year to raise awareness of the library and promote our free services for QLS members. It was great to see some familiar faces and meet lots of new members at these events.

We look forward to working with you again in 2018. Best wishes for a safe and enjoyable festive season.

Christmas closure

The library will be closed for the duration of the Christmas court closure – from Monday 25 December 2017 to Friday 5 January 2018 inclusive.

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De facto relationship: 'Fly-in-fly-out worker'

with Robert Glade-Wright



Property – 'Fly-in fly-out worker' was in a de facto relationship

In *Cuan & Kostelac* [2017] FamCAFC 188 (12 September 2017) the Full Court (Strickland, Aldridge & Loughnan JJ) dismissed with costs Ms Cuan's appeal against Judge Baumann's declaration that she and Mr Kostelac had lived together in a de facto relationship. She argued that the parties were never de facto partners, that while she lived at the respondent's home in "Town L" she was a fly-in fly-out worker who travelled to live with her children in "City N" for two weeks after each six-week block of work in Town L. She said that in Town L she lived in the respondent's flat rent-free in exchange for her looking after him, doing his housekeeping and helping him manage his money ([4]). She said that they travelled overseas between 2010 and 2014 as friends.

Judge Baumann found that the parties lived together in a de facto relationship between April 2007 and late 2010, also granting the respondent leave to issue his property proceedings pursuant to s44(6). The Full Court said (at [7]) that Judge Baumann in the context of the matters set out in s4AA(2) of the *Family Law Act 1975* (Cth) had found:

- a common (though not exclusive) residence in Town L
- a sexual relationship (in Town L only)
- significant intermingling of funds (Ms C had authority to operate Mr K's bank accounts. \$93,000 had passed from his accounts to hers and been used to reduce mortgages over two properties of hers in City N)
- overseas travel but not as a mutual commitment to a shared life (separate rooms or beds)
- others in Town L saw them as a couple (although little evidence)
- evidence of Ms C's children that the relationship was not intimate.

The Full Court said (at [15]) that "if the finding of a de facto relationship is open on the evidence then no error will be identified, even if other judges may have come to a different conclusion".

Child support – mother wins appeal against setting aside of binding agreement despite father's inadequate disclosure

In *Telama & Telama (No. 2)* [2017] FamCAFC 194 (15 September 2017) the Full Court (Ryan, Kent & Cleary JJ) allowed the payee mother's appeal against Judge Henderson's decision to set aside a binding child support agreement. The payer's father successfully argued at first instance that the agreement should be set aside as his income had decreased from \$710,000 per annum (when the agreement was made)

to \$220,000 per annum and he had no other financial resources from which to pay child support. The Full Court said (from [15]):

"The central issues in this case were whether the respondent's changed financial circumstances constituted an exceptional circumstance for the purpose of s136(2)(d) [of the *Child Support (Assessment) Act*] and amounted to hardship within the meaning of the provision. (...)

"[19] The respondent conceded on appeal that he did not comply with his obligations as to disclosure ... that he had been served with a Notice to Produce ... but failed to provide ... his tax ... returns for the three most recent financial years ... [which] was particularly significant as ... his case for the 2013 agreement to be set aside was based on:

- A material reduction in his income ...
- That he had since become liable for 'significant and unmanageable debts' including ... to the Australian Taxation Office; and
- That he had since become liable for a significant claim to the liquidator of a company in which he had an interest.

"[20] Further, it was [his] contention that he would suffer hardship because he could not meet [his] obligations ... and had negligible other assets and financial resources on which to call. (...)

"[22] The trial transcript records her Honour's disquiet at the respondent's inadequate disclosure and her recognition that full and frank disclosure was central to the Court's ability to determine the application (...)

"[29] However, in this case the primary judge did indeed make findings as to exceptional circumstances and hardship to the respondent, notwithstanding his inadequate disclosure. In our view, where the fact of non-disclosure was so obvious and material it was necessary for the primary judge to explain how and why the respondent's oral evidence and unsworn explanations were sufficient to meet that deficiency and resolve the confusion created by his failure, for example, to produce necessary and requested documents. Her Honour's reasons do not address that conundrum and in circumstances where the legal onus sat with the respondent the findings as to 'exceptional circumstances' and 'hardship' were not available." [Italics added]

Procedure – adjournment of property trial sought by wife three days after her discharge from a mental health facility

In *Rusken & Jenner* [2017] FamCAFC 187 (6 September 2017) Murphy J (sitting in the appellate division of the Family Court of

Australia) allowed Ms Rusken's appeal against Judge Laphorn's dismissal of her application to adjourn a property trial and summary dismissal of her initiating application for property settlement. Murphy J said (from [8]):

"The evidence here relates to significant mental health issues suffered by the wife. ... a limited capacity on [her] part ... to ... conduct those proceedings ... [S]ubsequent to trial directions being made by his Honour on 6 February 2017 the wife was admitted to hospital and between then and the date of the proposed trial on 15 May 2017 the wife was subject to an involuntary treatment order pursuant to the *Mental Health Act 2016* (Qld) and was hospitalised pursuant to that order apart from periods of day release. She was released on 12 May; noting that the mooted trial was to take place some three days later. It is on that later date that the wife made her application for an adjournment. (...)

"[35] ... [I]t is not insignificant ... that although the wife failed to appear before the court on two occasions in June 2015, and despite her being self-represented ... she adduced medical evidence, through her brother, which *prima facie* suggested an appropriate reason for her failure to appear. ... [I]t is also significant of itself ... that the wife's brother, either on her request or on his own volition, appeared for her, rather than her simply failing to appear.

"[36] On 15 May 2017 the wife appeared self-represented and tendered a medical certificate which again sought to explain why she was unable to prepare her case. That certificate indicated that she had been admitted to a mental health facility ... between February and May 2017 (...)

"[39] In my view, there can be no doubt that the wife was very significantly mentally unwell during, at the very least, the period when she was hospitalised between 9 February 2017 and 12 May 2017.

"[40] In my view, justice demands that the orders made ... be set aside so as to afford the wife an opportunity to make and prosecute her case for settlement of property."

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

Hype, heuristics and humanity

Choosing a future for AI in the law

As the exuberance for artificial intelligence (AI) hits fever pitch, it's time to take a closer look at what it means for the legal world.

Beyond the hype

Rightly or wrongly, AI is a term commonly used to describe the performance of tasks by a machine, where such tasks were thought to require human intelligence. It is a designation which has been stretched to encompass myriad technologies, some as prosaic as a line judge in tennis.¹ "The Atlantic" recently published an article saying that, "[AI is] just a fancy name for a computer program".² Yet, Stephen Hawking has said that AI "could spell the end of the human race".³ Which is it?

It is important to appreciate the distinction between a machine that mimics the fruits of intelligence by performing specified functions, and a machine which is approximately your intellectual equal. Examples of the latter – sometimes called 'general' AI – and the topic of Hawking's concern, have thus far been confined to fiction. Consider the villainous computer HAL from *2001: A Space Odyssey*, and Pixar's *WALL-E*. These are the kinds of awe-inspiring machines that dominate popular notions of AI.

Examples of machines achieving outcomes which were once thought to be dependent on human intelligence – sometimes called 'narrow' AI – are wide ranging. As Richard Feynman observed, "...it is not necessary to imitate the behaviour of Nature in detail in order to engineer a device which can... surpass Nature's abilities." [sic].⁴ Consider IBM's supercomputer 'Deep Blue' (which famously defeated Kasparov in chess in 1996),⁵ driverless cars, and Netflix recommending another BBC period drama because its algorithm has uncovered your guilty pleasure.⁶

While Justice WALL-E seems a far cry from our present reality, it's nevertheless impressive that machines can play chess, drive cars and recommend television shows (and, for the most part, better than we can). Moreover – according to Richard and Daniel Susskind – when it comes to the evolving capabilities of machines, "there is no apparent finishing-line."⁷ What, then, are the ramifications for the legal world?

AI in law

Existing technologies can discern patterns, identify trends and make predictions on the basis of enormous data; automatically learn and improve from experience; recognise human language and speech (distinguishing, for example, 'abominable' from 'a bomb in a ball'); and recognise and respond to human emotion.⁸ The potential consequences are made all the more awe-inspiring by the one-trillion-fold increase in computing power since 1956,⁹ the ubiquity of personal devices and the internet, and the consequential fact that "more data has been created in the past two years than in the entire previous history of the human race".¹⁰

Exploiting some of these advancements, law firms have adopted tools to overtake low-level cognitive aspects of the lawyer's role, as well as augment high-level functions. Examples of the former include intelligent search engines like ROSS Intelligence,¹¹ algorithmic-assisted document review in eDiscovery,¹² and tools which contribute to the due diligence process by identifying and flagging anomalous contract clauses.¹³ Examples of the latter include systems which analyse voluminous amounts of data to predict the outcome of litigation,¹⁴ or to generate market insights.¹⁵

Notes

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³ Rory Cellan-Jones, 'Stephen Hawking warns artificial intelligence could end mankind', *The Guardian* (online), 2 December 2014 <<http://www.bbc.com/news/technology-30290540>>.

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⁵ Mark Anderson, 'Twenty years on from Deep Blue vs Kasparov: how a chess match started the big data revolution', *The Conversation* (online), 12 March 2017 <<https://theconversation.com/twenty-years-on-from-deep-blue-vs-kasparov-how-a-chess-match-started-the-big-data-revolution-76882>>.

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⁷ Daniel Susskind and Richard Susskind, *The future of the Professions – How Technology Will Transform the Work of Human Experts* (Oxford University Press, 1st ed, 2015) 159.

⁸ Ibid 275, 170.

⁹ Maddie Stone, 'The Trillion Fold Increase in Computing Power, Visualised', *Gizmodo* (online), 25 May 2015 <<https://www.gizmodo.com.au/2015/05/the-trillion-fold-increase-in-computing-power-visualized/>>.

¹⁰ Bernard Marr, 'Big Data: 20 Mind-Boggling Facts Everyone Must Read', *Forbes* (online), 30 September 2015 <<https://www.forbes.com/sites/bernardmarr/2015/09/30/big-data-20-mind-boggling-facts-everyone-must-read/#67f035e517b1>>.

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¹² Milan Gandhi, 'Technology-assisted review 101 – The Rise of machines in eDiscovery' (2017) 37(1) *Proctor* 6.

¹³ See, for example, Luminance: <https://www.luminance.com/>.

¹⁴ Jane Wakefield, 'AI predicts outcome of human rights cases', *BBC* (online), 23 October 2016 <<http://www.bbc.com/news/technology-37727387>>.

¹⁵ Misa Han, 'Bloomberg terminal for lawyers': Startup set to replace mundane legal research', *Financial Review* (online), 12 December 2016 <<http://www.afr.com/business/legal/bloomberg-terminal-for-lawyers-startup-set-to-replace-mundane-legal-research-20161204-gt3yrw>>.

¹⁶ Kevin Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age* (Cambridge University Press, 1st ed, 2017) 17.

¹⁷ Ibid 18.

¹⁸ Ibid 31.

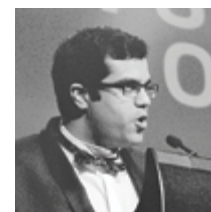
¹⁹ *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).

²⁰ Adam Liptak, 'Sent to Prison by a Software Program's Secret Algorithms', *The New York Times* (online), 1 May 2017 <<https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html>>.

²¹ Unknown author, 'State v. Loomis Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing', *Harvard Law Review* (online), 10 March 2017, <<https://harvardlawreview.org/2017/03/state-v-loomis/>>.

²² Will Knight, 'The Dark Secret at the Heart of AI', *MIT Technology Review* (online) 11 April 2017 <<https://www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai/>>.

²³ Hannah Devlin, 'AI programs exhibit racial and gender biases, research reveals', *The Guardian* (online) 14 April 2017 <<https://www.theguardian.com/technology/2017/apr/13/ai-programs-exhibit-racist-and-sexist-biases-research-reveals>>.



by Milan Gandhi, the Legal Forecast

There is a difference between retrieving information in response to a legal question – which, for example, ROSS Intelligence can do – and explaining the answer by “[reasoning] with the rules and concepts relevant to choice of law and legal subject matter.”¹⁶ Even if a tool like ROSS could recognise and extract legal arguments, “[it] could not itself construct the explanation from first principles.”¹⁷ According to Kevin Ashley, the next breakthrough in AI for the legal world will come with AI-generated “explanations and arguments in law”.¹⁸

Choosing a humane future

In 2016, Eric Loomis was convicted of a drive-by shooting and sentenced to six years in prison. His conviction was based, in part, on a trial court’s consideration of a software-generated report.¹⁹ The software’s underlying algorithm, which remains a trade

secret, predicted “a high risk of violence, high risk of recidivism, [and] high pre-trial risk.”²⁰ On appeal, the Wisconsin Supreme Court rejected Loomis’s arguments that judicial reliance on the software tool violated his due process rights. Loomis had argued that it did so by incorporating data about general groups into considerations of an individual’s sentence, and because the underlying methodology was kept hidden.²¹

Loomis’s arguments – albeit unsuccessful – are a reminder to look beneath the surface of technology. It has been argued before lawmakers of the European Union that “being able to interrogate an AI system about how it reached its conclusions [should be] a fundamental legal right.”²² Indeed, it must be borne in mind that the makers and beneficiaries of AI are human, and some of its worst failures may mirror our own. “The Guardian” newspaper reported, for example, that “[m]achine learning algorithms are

picking up deeply ingrained race and gender prejudices concealed within the patterns of language use.”²³

The marriage of law and new technologies is a rightfully tantalising prospect. However, as we rely on machines to solve many of our human problems, including in the law, we have a duty to ensure that we do not, by failing to scrutinise it, reinforce our old problems, or create entirely new ones.

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High Court and Federal Court casenotes

High Court

Constitutional law – Appropriations – statutory construction

In *Wilkie v the Commonwealth; Australian Marriage Equality v Cormann* [2017] HCA 40 (28 September 2017) the High Court upheld the validity of the appropriation made to allow the marriage equality postal plebiscite to be carried out. On 9 August 2017, the finance minister Matthias Cormann announced that the government would proceed with a postal plebiscite to ask electors whether the law should be changed to allow for same-sex marriage. The Minister also announced that he had made a determination, under s10 of the *Appropriation Act (No 1) 2017-2018* (Cth), providing for an advance of \$122 million to go to the Australian Bureau of Statistics to conduct the plebiscite. On the same day, the treasurer gave a direction to the Australian statistician, to collect the data from the plebiscite. The plaintiffs argued that the appropriation under s10 was constitutionally invalid; that s10 should not be construed to allow for the actions taken; that the finance minister's determination and the direction to the Australian statistician were invalid; and that the Australian Electoral Commission (AEC) had no authority to assist in the plebiscite. In relation to validity of the appropriation, the court held that it was actually s12 of the Act that made the appropriation. The Determination under s10 is an allocation of funds already appropriated under s12. The degree of specificity of purpose for the appropriation is a matter for the parliament. In this case, the appropriation was for an amount for a purpose that the parliament had lawfully decided could be carried out. In respect of the preconditions of s10, it was required that the Minister be satisfied the expenditure was urgent, not provided for and unforeseen. The court held that it was not necessary for the need giving rise to the expenditure to arise from a source external to government. Further, whether expenditure was urgent and unforeseen was a matter for the minister's satisfaction. The minister had formed the necessary satisfaction in this case. Urgency and whether the expenditure was unforeseen had been dealt with separately and sufficiently. There was no error of law in the minister's reasons or conclusion. The court further held that the direction to the Australian statistician was valid, as the information to be collected was "statistical information", collected in

relation to matters prescribed in the *Census and Statistics Regulation 2016* (Cth). There was nothing in the Act to prevent the treasurer specifying from whom information was to be collected. Lastly, the court held that the AEC was authorised to assist in the plebiscite. The court did not address arguments on standing as it was unnecessary and inappropriate given that the substance of the matter had been fully argued and the court had decided the grounds had no substance. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Answers to Special Case given.

Criminal Law – Sentencing – current sentencing practices

In *Director of Public Prosecutions v Charlie Dalglish (a pseudonym)* [2017] HCA 41 (11 October 2017) the respondent was charged with incest and sexual penetration of a child under 16 against complainant A, and incest and indecent assault against complainant B. The respondent's act of incest against A also caused her to fall pregnant, which pregnancy was later terminated. In respect of the charge of incest against complainant A, the respondent was sentenced to three and a half years imprisonment. The director appealed, arguing that the sentence was manifestly inadequate. In the Court of Appeal, at the court's request, the parties made submissions on the adequacy of sentencing practices, to which the court is required to have regard under the *Sentencing Act 1991* (Vic). The court reviewed the sentencing information and concluded that the current sentencing practice did not reflect the gravity of the offence or moral culpability of the offender. However, the court held that the sentence in this case, although very lenient, was not outside the permissible range as demonstrated by the current sentencing practices. The High Court held that the Court of Appeal was correct to find that the current sentencing practices were manifestly out of step with the gravity of offending and moral culpability. But having done so, the court should have corrected the effect of the error of principle it recognised. Further, current sentencing practices are just one of the matters for the court to take into consideration – it is not the controlling factor. Kiefel CJ, Bell and Keane JJ jointly; Gageler and Gordon JJ jointly agreeing. Appeal from the Court of Appeal (Vic) allowed.

Criminal law – Murder and manslaughter – intention and wilful acts

In *Koani v The Queen* [2017] HCA 42 (18 October 2017) the deceased was killed by a single shot from a shotgun that had been loaded by the appellant, given to the deceased and almost fully cocked. The gun was modified such that it could go off when not fully cocked. The trial judge did not leave murder to the jury because he considered that the "act" causing death in a firearm case must be a deliberate act. The judge left the alternative case to the jury that the accused would be guilty of murder if the accused failed to use reasonable care in the management of the gun at a time when he intended to kill or inflict grievous bodily harm. The appellant was found guilty. The High Court held that it was an error to leave the alternative case to the jury, because the act causing death and the required intention must coincide. On the alternative case, the intention occurred at a different time to the omission (the failure to use reasonable care) that caused the deceased's death. The court also held that it would be open to a jury to conclude that the loading of the gun, presenting it and pulling back the hammer were all connected, willed acts that caused the deceased's death. The primary case could have been left to the jury. Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from the Court of Appeal (Qld) allowed.

Constitutional law – Implied freedom of political communication

In *Brown v State of Tasmania* [2017] HCA 43 (18 October 2017) the High Court held invalid sections of the *Workplaces (Protection from Protesters) Act 2014* (Tas). The Act prohibited "protesters" from engaging in conduct on "business premises". Those premises relevantly included "forestry land", including land on which "forestry operations" were being carried out. The conduct was also prohibited in "business access areas", being areas reasonably necessary to enter or exit business premises. Under the Act, police officers had power to direct people away from business premises or business access areas. It was an offence to return to the land after being directed away or not to comply with a direction to leave, in certain circumstances. Police had power to arrest or impose criminal penalties on persons who refused to leave such areas or who returned to such areas after being directed away. Former senator Bob Brown and others were protesting in

with Andrew Yuile and Dan Star QC



the Lapoinya Forest in North West Tasmania when forestry operations were underway. They were arrested and charged under the Act, but charges were later dropped. They argued that provisions of the Act impermissibly burdened the freedom of political communication implied by the Constitution. A majority of the High Court upheld that argument. Kiefel CJ, Bell and Keane JJ jointly held that the Act burdened the freedom. It also pursued a legitimate purpose. But the provisions were not reasonably appropriate and adapted, or proportionate, to the pursuit of that purpose in a manner compatible with the maintenance of the system of representative and responsible government. They were therefore invalid. Gageler J, writing separately, took a different view of the test to be applied, but ultimately agreed in the orders of the majority. Nettle J, also writing separately, also agreed in the orders of the majority, but for separate reasons. Gordon J held that one of the impugned sections was invalid, but dissented in respect of the others found to be invalid by the majority. Edelman J dissented in respect of all the impugned sections. Questions to special case answered. Kiefel CJ, Bell, Gageler, Keane, Nettle, and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) allowed.

Administrative law – Appeal from Supreme Court of Nauru – migration

In *BRF038 v The Republic of Nauru* [2017] HCA 44 (18 October 2017) the High Court held that the Supreme Court of Nauru failed to accord the appellant procedural fairness. The appellant applied for refugee status in Nauru. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. An appeal to the Refugee Status Review Tribunal (RSRT) was dismissed. An appeal to the Supreme Court was also dismissed. The appellant argued that the RSRT had erred by applying the wrong test for persecution, by requiring a total deprivation of human rights; and by failing to accord procedural fairness, by failing to put to him country information about the tribal make-up of the police force in his home country. Procedurally, the High Court held that the Supreme Court was exercising original jurisdiction, meaning that an appeal to the High Court lay as of right. The court rejected the wrong test argument, holding that the RSRT was not articulating an exhaustive test. However, the information about the police was integral to the reasons for refusing

the application, and a failure to bring it to the appellant's attention was a breach of procedural fairness. The decision was quashed and sent back to the RSRT for reconsideration. Keane, Nettle and Edelman JJ jointly. Appeal from the Supreme Court (Nauru) allowed.

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Federal Court

Regulatory Law | Civil Penalties – Joint and several liability for a penalty – course of conduct principle – market harm/financial benefit – application by the Full Court itself of the principles for the imposition of a penalty

Pecuniary penalties for contraventions of statutory provisions are commonplace in Commonwealth (and state) legislation. Within the Federal Court's jurisdiction there is substantial enforcement litigation resulting in pecuniary penalties under the *Competition and Consumer Act 2010* (Cth) (CCA), the *Corporations Act 2001* (Cth), the *Fair Work Act 2009* (Cth) (FWA) and other legislation (such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)). The applicable principles for the imposition of civil penalties are well-established (in particular, the oft-cited "French factors" to be applied to determining an appropriate penalty listed by French J as a Federal Court judge in *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52,152-52,153). However, the High Court has had some important things to say in recent years in this area of the law, such as about agreed penalties (*Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482) and the importance of deterrence as the purpose of civil penalties (*Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [65]-[66]). The High Court is currently reserved on the question of whether the Federal Court has power to order a party not to indemnify another party in respect of a pecuniary penalty order made under s546 of the FWA (*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union & Anor*, M65/2017, reserved 17/10/2017).

Australian Competition and Consumer Commission v Cement Australia Pty Ltd [2017] FCAFC 59 (5 October 2017) is a

recent Full Court judgment (Middleton, Beach and Moshinsky JJ) that is likely to be often cited on some discrete principles relevant to imposition of pecuniary penalties under s76 of the CCA. It may also have relevance to other statutes providing for pecuniary penalties (allowing for any bespoke differences in the other legislative regimes compared to the CCA).

The Full Court upheld the ACCC's appeal, and dismissed a cross-appeal, against the penalties that the trial judge imposed on Cement Australia Pty Ltd (Cement Australia) and its related companies for making and giving effect to anti-competitive agreements.

The facts were complex and detailed and, given the focus of this case note is on penalties, it will suffice to give a basic summary. The respondents were related corporate entities involved in the manufacture and distribution of cement and concrete materials in Queensland. The proceedings concerned decisions to enter into or amend contracts with power station operators to acquire their supply of flyash. Flyash, a by-product of the burning of fossil fuels, was produced by the power stations. If it was of sufficient quality, it could be used as a partial substitute for cement in the production of concrete. The trial judge held that the relevant contracts with the power stations contained provisions that had the purpose, or had or were likely to have had the effect, of substantially lessening competition in the relevant markets. It was held that, by making each of those contracts, Pozzolan Industries Pty Ltd (PIPL), a company related to Cement Australia, had committed separate contraventions of s45(2)(a)(ii) of the then *Trade Practices Act 1974* (Cth) (TPA) and that, by giving effect to those provisions in certain instances, PIPL and other respondents had contravened s45(2)(b)(ii) of the TPA. Some respondents were also found to have been knowingly concerned in the contraventions. The trial judge ultimately imposed penalties totalling \$17.1 million against Cement Australia and companies in its group. Some of the penalties were imposed separately and some were imposed jointly and severally on the companies in the Cement Australia group.

The specific issues in the appeal were at [10]:

- “(a) whether the primary judge erred in law in assessing and imposing a single joint and several penalty on two respondents;
- (b) whether the making of and giving effect to the provisions of each of the contravening contracts ought to be separately penalised or treated as a single course of conduct;
- (c) whether the primary judge erred in his treatment of issues of market harm and financial benefits; and
- (d) whether the penalties imposed by the primary judge were manifestly inadequate as they were not of appropriate deterrent value”.

On the “joint and several issue”, the Full Court held that s76(1) of the CCA does not allow for the imposition of a single joint and several penalty against multiple respondents (at [376]). This conclusion was reached through “an orthodox application of statutory construction” (at [377]). The Full Court also said at [385] that the general principles governing the assessment and imposition of penalties also supported their interpretation. “The deterrent effect of a penalty at a personal level is potentially lessened if one party is able to avoid paying any portion of that penalty at all. This is not necessarily ameliorated by the respondents’ suggestion that deterrence would be sufficiently achieved at the level of

the corporate group”. Accordingly, the Full Court held that the trial judge erred because he was not empowered under s76(1) of the CCA to fix a joint and several penalty (at [391]).

The next issue in the appeal concerned the course of conduct principle, which seeks to ensure that an offender or contravenor is not punished or penalised twice for what is essentially the same conduct (at [393]; see also [421]). In the appeal there was not a dispute about the nature of the course of conduct principle. It was a dispute about whether the facts of the case supported the application (or non-application) of the principle in relation to certain contracts. Relevantly, the trial judge regarded the making of and giving effect to one particular contract as one course of conduct, however, he did not treat the making of and giving effect to the other contracts as single courses of conduct. The Full Court at [425] was “mindful that the application of the course of conduct principle requires an evaluative judgment in respect of the relevant circumstances”. Their Honours held that the trial judge erred where he regarded the making of, and giving effect to, a particular contract as constituting a single course of conduct stating at [431]: “We consider that the course of conduct principle must be informed by the particular legislative provisions relevant to these proceedings. In particular, we consider that weight must be given to the fact that the

legislature has deliberately and explicitly created separate contraventions for each of the making of, and giving effect to, a contract, arrangement or understanding that restricts dealings or affects competition: ss 45(2)(a) and 45(2)(b)”.

The question of market harm and the expected and actual benefits said to be causally connected to the contravening conduct was the next issue considered by the Full Court (at [443]-[565]). The ACCC’s grounds of appeal on these issues were fully rejected.

The final issue in the appeal was the quantum of penalties to be imposed (in light of the ACCC’s success on certain grounds) and whether the penalties imposed by the trial judge were manifestly inadequate. At trial and on appeal, there was a “canyon” between the parties. At trial the ACCC contended for total penalties of \$97 million while the respondents submitted appropriate penalties were in the order of \$4 million (at [316]). This gulf between the parties hardly narrowed in the appeal (at [575]-[577]). The Full Court decided for itself the penalties to be imposed and ordered total penalties of \$20.6 million (that is, an increase compared to the trial judge’s total penalties of \$17.1 million).

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Court of Appeal judgments

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Civil appeals

Brisbane Bears – Fitzroy Football Club Limited v Commissioner of State Revenue [2017] QCA 223, 6 October 2017

General civil appeal – taxes and duties – where the appellant as a member of the Australian Football League (AFL) employed coaches and players and is subject to payroll tax under the *Payroll Tax Act 1971* (Qld) (PTA) on taxable wages paid to players and coaches – where the central issue at trial was the characterisation, for the purpose of the Act, of payments made, pursuant to certain agreements, to players and coaches employed by the appellant for the use of image rights – where the agreements governing the employment relationships provided for marketing and promotional services – where the appellant made payments to players and coaches for the use of their image – where the appellant contends that the payments made for the use of the players' and coaches' images were not "wages" that were liable to payroll tax – whether the payments made by the appellant for the use of image rights were made in the course of the provision of marketing and promotional services – whether the payments were "for" services rendered, in the sense that they were "in connection with and by reason of" the player's service as an employee or "in respect of some incident of" his service as an employee – whether those payments were "taxable wages" and therefore liable to payroll tax – where his Honour thereby found that payments made by an employer to an employee were "in consideration of services performed or rendered" by that employee or "in the course of the provision of the services" – where, accordingly, there can be no complaint as to the test used in the findings of the connection between the payments and the services rendered or performed, which are entirely in conformity with the authorities – where nor, in the circumstances of this case, did his Honour's use of the words "in relation to services performed or rendered" or the words "related to or connected to actual performance" of services result in an erroneous enlarging of the meaning of "wages" – where central to the appeal

was that payments made by the appellant in the present case were, in part, for the use of the image rights of players and coaches under the licence contained in cl3.2 of each "Direct Additional Services Agreements", "Indirect Additional Services Agreements" and "Marketing and Promotional Services Agreements" – where it is said that, to that extent, they are not payments for services rendered by them as employees and, therefore, not taxable as wages – where it is said that, to that extent, they are not payments for services rendered by them as employees and, therefore, not taxable as wages – where cl2.1 of the ASA makes it clear that the player (or in the case of an indirect ASA that the company will ensure that the player) "shall perform" the additional services – where cl3.2 of the direct ASA provides that it is agreed that the fee (being the fee specified in schedule 2) entitles the club to the use of the player's image "for purposes related or connected to additional services as specified in schedule 1" – where the difficulty that arises in the construction presented by the appellant's argument, given that drafting of the ASA, is in seeing how one can sensibly extract the use of the image from the stated purpose which limits use to "purposes related or connected to additional services as specified in schedule 1" as if the use was entirely separate from and had nothing to do with the performance of the additional services – where the primary judge's finding was, correctly, that there was no warrant for a conclusion that payments made by the appellant, for the use of image rights, were made other than in the course of the provision of such services or independently from the provision of promotional or marketing services – where the payments made by the appellant under the ASA and MPSA were thus "wages" as defined in the Act and "taxable wages" that under s9 of the Act were liable to payroll tax. Appeal dismissed. Costs.

McGrory v Medina Property Services Pty Limited [2017] QCA 234, 13 October 2017

Application for Leave s118 DCA (Civil) – torts – where the applicant was employed by the respondent as a room attendant – where she was required to lift an ice bucket as part of her duties – where

she experienced pain while lifting the ice bucket – where she eventually had to cease working for the respondent due to ongoing pain and her inability to perform her duties – where the trial judge found the respondent liable in negligence – where three witnesses, including the applicant, gave evidence at the trial that supported the conclusion that the applicant had suffered a significant disability – where the first doctor (Dr Walters) gave evidence that was inconsistent with the evidence of the three witnesses – where the second doctor gave evidence that was consistent with the evidence of the three witnesses – where the trial judge accepted these witnesses as credible but preferred the evidence of the first doctor over the evidence of the second doctor – where the trial judge relied on the evidence of the first doctor when determining quantum – whether the trial judge erred in evaluating quantum by relying on the evidence of the first doctor over the evidence of the second doctor – where the first doctor concluded his first report with the sentence: "I think it is noteworthy that despite having to cease employment because of her symptoms [Ms] McGrory has apparently not sought Specialist medical advice regarding her shoulders during 2012 and 2013 years." [sic.] – where that observation was not one which was relevant for Dr Walters to make as a medical practitioner – where it was an argumentative observation that, if relevant, was one which the respondent's counsel could make – where it was not a medical opinion – where undoubtedly, in making that statement, Dr Walters was making the point that an inference could be drawn that the applicant had not suffered very much from the date of the incident until her resignation from the fact that she did not feel the need to seek medical attention – where however, the applicant's evidence, about which Dr Walters was ignorant, would not have allowed such an inference to be drawn – where her evidence about why she did not seek medical help was not challenged in cross-examination – where in a case such as the present, in which the evidence as a whole contains ample material upon which findings of fact can be made about the post-incident symptoms of a plaintiff and in which a submission is expressly made about the significance of that evidence to the ultimate issues of

injury caused by negligence, a trial judge who is performing the function of finding facts is obliged to consider that evidence comprehensively – where evidence of the kind given in this case cannot be put to one side so that a conflict between the evidence of medical experts is decided upon a narrow, and possibly mistaken, ground limited to their respective observations – where the applicant has demonstrated that there is a reasonable argument that his Honour erred in preferring the evidence of Dr Walters and, as a consequence, erred in concluding as he did in relation to the economic loss suffered by the applicant – where, in addition, the nature of the errors made by his Honour mean that the applicant's real case has not yet been considered – where the issues in the appeal concern only past economic loss and future economic loss – where the trial judge's decisions to make no award for past economic loss on account of the difference between what the applicant would have earned before trial if she had not resigned her employment and what she did earn in that period, and to make no award for future economic loss, resulted from the trial judge's conclusion that the applicant resigned from her employment for reasons

that were not related to the effects of her injury – where the trial judge found that her resignation was a consequence both of pressures upon the applicant, including the need to assist and care for her mother and the presence of her family at the Gold Coast, and discomfort in her shoulder which, upon the evidence of Dr Walters, was unrelated to the effects of her injury – where those findings should be set aside. Leave to appeal granted. Allow the appeal. If the parties are unable to agree upon the orders, including orders as to costs, that should be made to give effect to these reasons, the parties are to lodge and serve written submissions about the appropriate orders within 14 days of these orders.

***Berghan & Anor v Berghan* [2017] QCA 236, Orders delivered ex tempore 9 October 2017; Reasons delivered 13 October 2017**

General Civil Appeal – contracts – domestic, social and other agreements – where the appellants are the parents of the respondent – where the appellants advanced money to the respondent on several occasions and gave him the use of a credit card – where the respondent was the sole director of a company and some of the payments were made into

that company's bank account – where the appellants claimed that they informed the respondent that the funds had to be repaid and that the respondent stated that he would repay the funds – where the respondent denied that these conversations took place – where the respondent claimed that any payments made to him were made as gifts to himself or his company – whether there was an intention to create legal relations between the appellants and the respondent – whether the advancements were loans or gifts – whether the respondent's company was liable to repay the monies – where the trial judge made three factual findings that are relevant – where firstly, he accepted the evidence of the appellants as reliable – where secondly, he rejected the evidence of the respondent – where thirdly, he said that he "accept[ed] the evidence of the plaintiffs that it was the intention of the parties that the monies advanced by them to the defendant were to be repaid by him" – where those findings have not been challenged on appeal nor, indeed, have any of his Honour's findings – where his Honour did not explain in his reasons why he thought the payments made to the respondent, which his Honour had accepted had been made on terms that



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the money was to be repaid, and which were payments that even the respondent had admitted in writing were loans, were nevertheless transactions that the parties did not intend to be legally binding – where the issue was whether or not the circumstances known to both parties at the time of each transaction demonstrated, objectively, that the payments had been made by way of loan – where it is impossible to see how that was not so when, as we have said, even the respondent had admitted that they were loans at a time before the monies had been formally demanded from him – where the evidence led by the appellants, both their oral evidence and the documents that contained the respondent’s admissions, raised a strong case that these payments were loans – while the respondent bore no onus, it was forensically a matter for him to rebut the conclusion to which that evidence led – where he failed to do so – where once one accepts that the money was paid upon the express condition that it should be repaid, as the judge found, then the inescapable conclusion had to be that the resulting transaction was a contract of loan – where his Honour’s conclusion that the parties had no intention to create legal relations was an error and the finding

has to be set aside – where the evidence accepted by the trial judge leads to the inescapable conclusion that the payments made by the appellants to their son were contracts of loan in respect of which the monies were repayable on demand and were repayable by him personally – where in the absence of an express term in the oral contracts about when the money had to be repaid the law would imply an obligation to repay upon demand. Appeal allowed. Set aside the order made dismissing the appellants’ claim with costs. Judgment for the appellants in the sum of \$286,471.09 with interest from 20 April 2015. Costs.

State of Queensland v Roane-Spray
[2017] QCA 245, 20 October 2017

General Civil Appeal – torts – miscellaneous defences – where the respondent was injured when one end of a stretcher on which she was being moved by a paramedic collapsed when it was being taken out of the ambulance – where the respondent brought a claim for damages for negligence against the State of Queensland, as the employer of a paramedic, on the basis of vicarious liability – where the trial judge awarded damages to the respondent, rejecting the State of

Queensland’s reliance upon a statutory defence under s27 of the *Civil Liability Act 2003* (Qld) – whether the protection from civil liability afforded to prescribed entities, including the Queensland Ambulance Service, by s27 of the *Civil Liability Act 2003* was available to the State of Queensland – whether it is open to construe the reference to Queensland Ambulance Service as a prescribed entity in schedule 2 to the *Civil Liability Regulation 2003* (Qld) as a reference to the State of Queensland – where there is no such concept as “Queensland Ambulance Service in right of the State” – where the concept of the “Crown in right of the State” is a constitutional one, borne of the need to distinguish between the unity, or indivisibility, of the Crown, on the one hand, and the practical circumstance that its legislative, executive and judicial power is exercisable by different agents in different localities – where in Australian terms, there is a distinction between the “Crown in right of the Commonwealth”, and the “Crown in right of” each of the states – where in the case of the Queensland Ambulance Service, as the statute under which it is established presently provides, that it is an entity, within the meaning of the *Acts Interpretation Act*

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1954 (Qld), being an unincorporated body comprising the persons identified in s3B, as they may be from time to time – where it does not represent the state, and is not an emanation of the state – where there would need to be very clear language used before s27 could appropriately be construed as removing the vicarious liability of the State, as an employer, for the negligent acts of its employees – where the device of reading “Queensland Ambulance Service” in schedule 2 to the *Civil Liability Regulation* as a reference to the State of Queensland is not open on a proper construction of the provisions – where it may be correct to say that, in the present case, there was no cause of action against the Queensland Ambulance Service itself, but that is explicable by the fact that the claim was brought against the negligent paramedic’s employer, the state, on the basis of vicarious liability – where the Queensland Ambulance Service is not the employer, therefore has no vicarious liability. Appeal dismissed. Costs.

***Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited* [2017] QCA 254, 31 October 2017**

General Civil Appeal – damages – measure and remoteness of damages in actions for breach of contract – loss of profits – where the appellant sued the respondent for loss of a commercial opportunity to acquire and develop certain land at a profit under a contract – where the project was unlikely to have made a profit because of difficulties in obtaining development approval, finance for the purchase price and development costs, and likely cost overruns – where the trial judge concluded that on the balance of probabilities, the project would be more likely to make a loss than a profit – where the trial judge accepted that damages could be awarded where there was less than a 50% chance of making a profit but distinguished a case in which a loss was more likely than a profit – where the trial judge concluded that where a loss, as opposed to no profit or loss, was more likely than a profit, the plaintiff had not suffered a compensable loss – whether a plaintiff can recover damages for loss of a commercial opportunity which is more likely to make a loss than a profit, if the magnitude of the potential profit sufficiently exceeds the magnitude of the potential loss – where the judge described the relevant commercial opportunity as “the opportunity to engage in a business” – where that was something of a misdescription – where the relevant opportunity, which the appellant had to prove was something of value, was the opportunity to make a profit – where there was more than a negligible chance

that the appellant would have made a profit from this development – where if a commercial opportunity has *no* chance of being profitable, it is an opportunity of no value and its loss could not be compensable – where, however, it is not accepted that the same may be said whenever it is more likely than not that the pursuit of the opportunity would have resulted in an investor’s loss – where many investments are pursued with an appreciation that, more likely than not, they will not be profitable after money is spent in pursuing them – where they are pursued because the magnitude of the potential profit, considered against the relatively small amount of the potential loss, makes the risk, sometimes a high risk, of that loss one which is worth taking – where the trial judge identified, examples of such investments are found in the mining exploration industry – where his Honour said that in such cases, the commercial opportunity would be valuable, because the investor’s interest could be sold for a substantial sum, notwithstanding that on the balance of probabilities, it could not be said that the interest would have become a profitable mining operation – where his Honour considered that a case such as the present one was different, because the appellant’s opportunity could not be traded – where that is not a basis for distinguishing a case such as the present from the example (of the explorer for minerals) which his Honour gave – where although the appellant’s opportunity here might have been assigned, by exercising the appellant’s right, having exercised its option, to nominate another transferee of the land, let it be assumed that the appellant’s opportunity was not marketable – where nevertheless, it was capable of having a value, which could be assessed by considering what someone would be prepared to pay for it – where a likelihood that this would have been a loss making development did not, as a matter of law, preclude the award of more than nominal damages – where the question is whether the opportunity to profit from this development had a value and that was possible although a developer’s loss was more likely than a profit – where if it did have a value, there was a compensable loss and the extent of that loss would have to be assessed – where there was more than a negligible prospect that the appellant could have undertaken this development – where there were contingencies which could have prevented the development from proceeding: the car park question, the finance required to purchase the site, the finance required for construction and the achievement of pre-sales of 70% of the units – where

nevertheless there was a substantial, rather than a negligible, prospect that the land would have been developed – where there was some prospect that it could have proceeded, and if so, there would then have been a high probability that it would have been profitable – where there was an opportunity which a rational business person might have pursued, although many would not have done so – where there was an opportunity which had a value – where consequently this court should assess the worth of that opportunity. Appeal allowed. Set aside the order made on 7 November 2016. Respondent pay to the appellant the sum of \$250,000, together with interest upon that sum of \$62,307.37. Written submissions on costs.

Criminal appeals

***R v Roach* [2017] QCA 240, 17 October 2017**

Sentence Application – where the applicant pleaded guilty to one count of trafficking in a dangerous drug and one count of unlawful possession of a dangerous drug – where the dangerous drugs were steroids – where the applicant was sentenced to three years’ imprisonment with a parole release date fixed after one year on the count of trafficking – where the applicant was sentenced to one years’ imprisonment on the count of unlawful possession – where the sentences were ordered to be served concurrently – where the applicant applied for leave to appeal against the sentence on the ground that the time ordered to be spent in custody was manifestly excessive – whether there was a misapplication of principle by the learned sentencing judge – where the applicant submitted that the cases to which her Honour was directed involved more serious offending than the applicant’s and that the sentencing judge failed to make due allowance for that fact – where the cases referred to by the applicant do not support a finding that the sentence is manifestly excessive – while the range of appropriate sentencing is something upon which reasonable minds may differ and some may have been more lenient, that is not enough to warrant the granting of leave – where a review of the cases does not support the submission that there has been a misapplication of principle – where the applicant applied for leave to appeal against the sentence on the ground that the learned sentencing judge erred by failing to take into account differences between steroids and other scheduled drugs – where the applicant submitted that steroids have different features from other schedule 1 drugs by reference to quantity

and potential financial benefits – where the applicant submitted that the different features of steroids should have been taken into account in the assessment of the scale of trafficking and any sentence imposed – where the applicant in addition submitted that the application for leave to appeal ought to be granted on the ground that the learned sentencing judge failed to give adequate weight to the applicant's mitigating circumstances – while the difference in quantities between the drugs identified in schedules 3 and 4 may give some guidance as to the relativity between the amount of drugs which parliament considers to be an aggravating factor in terms of possession, that does not reflect a legislative intent that the quantity of steroids and the potential rewards are the principal features to be considered in assessing the scale of trafficking – where in the sentencing remarks, her Honour had regard to both the quantity and value of the drugs involved insofar as text messages evidenced the amount being bought and sold – where the amount of the steroids found to be in the applicant's possession was treated by her Honour as "stock in trade" and not as giving rise to any additional criminality – where her Honour also had regard to the fact that he appeared to be making money from the activities and the other indicia of carrying on business – where there was no error in her Honour's approach – where her Honour did not fail to consider the mitigating factors in the applicant's favour to the extent that they were established by the evidence – where in terms of the medical evidence, her Honour took account of the medical evidence but properly identified its deficiency in failing to address the applicant's steroid use or address the fact that the applicant had been trafficking. Application for leave to appeal refused.

Hemelaar v Brisbane City Council [2017] QCA 241, 17 October 2017

Application for Leave s118 DCA (Criminal) – where the applicant is a member of an organisation that engages in public activities intended to make known to members of the public the message of the Bible – where the means by which the organisation undertakes that endeavour includes public addresses through an amplification system, literature distribution and signs and banners – where the applicant was advised of the need to obtain the respondent's consent in relation to the use of an amplifier and other materials as part of the holding of the foreshadowed assembly in the Queen Street Mall – where that consent required an application by the applicant

and was subject to the payment of the applicable fee – where the applicant did not make application or pay the requisite fee – where the applicant was convicted in the Magistrates Court at Brisbane of eight breaches of the *Public Land and Council Assets Local Law 2014* (Qld) – where the applicant was unsuccessful in his appeal from those convictions in the District Court – where the applicant now seeks leave to appeal that District Court decision – whether there is substantial injustice or a reasonable argument that there is an error arising from the District Court decision sufficient to justify leave to appeal being granted – whether the *Peaceful Assembly Act 1992* (Qld) provides legal immunity to the applicant for the relevant breaches of the *Public Land and Council Assets Local Law 2014* (Qld) – where a consideration of the objects of the Act establishes two premises – where firstly, the Act enshrines a person's right to participate in a peaceful assembly in public – where secondly, the exercise of that right is subject to such restrictions as are necessary and reasonable in the interests of public safety, public order and the protection of the rights and freedoms of other persons – where the latter reference relates to a balance of the right of persons to participate in peaceful assembly against the rights of other members of the public to enjoy the natural environment and to carry on business – where the holding of an authorised public assembly in accordance with the relevant particulars of the notice given in respect of that public assembly is still subject to the requirements of the local law where that authorised public assembly is held in a pedestrian mall such as the Queen Street Mall – where the requirements of the local law that the holder of an authorised public assembly, even where notice has been given of the intention to use amplifying equipment and to distribute written material, must first make application to the relevant local authority for authorisation under the local law is not contrary to the provisions of the Act. Leave to appeal granted. Appeal dismissed. Costs.

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



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Mindfulness

Enhancing mental health in the law

As a litigation lawyer, I often found myself over-engineering courtroom scenarios in my head and when things didn't go to plan it would retrospectively cause me mental angst.

Many of my friends practising law are burnt out and share these sentiments, with some maintaining that whilst they may have the resilience to adequately deal with stress in the workplace, they are seeing an influx of their colleagues taking stress leave and suffering from anxiety and depression.

Recent studies show that one in five Australian employees have taken time off work due to feeling mentally unwell in the past 12 months and that untreated mental health conditions cost Australian workplaces approximately \$10.9 billion per year.¹

What is mindfulness?

You can be forgiven for being a little flippant when you hear the term *mindfulness*, as it seems to be the 'buzzword' used by every self-proclaimed personal development guru out there. In essence though, mindfulness is simply *the psychological process of bringing our complete and undivided attention to our internal and external experiences, as they are occurring in the present moment.*

What are the benefits?

The benefits of practising mindfulness are abundant. From a mental health perspective, it is a simple, non-prescriptive measure that can be used to alleviate stress, anxiety, depression, chronic pain and addiction. Generally speaking, practising mindfulness vastly improves mental health and performance in the course of our personal and professional lives.

Where's the evidence?

As a lawyer I insisted; *show me the evidence!* So I did some research and found that a technique known as *functional magnetic resonance imaging*, used to detect blood flow in the brain, confirms that when people are practising mindfulness, only the pre-frontal cortex becomes enlivened. This is the part of the brain associated with awareness, attention, control, concentration and decision making.

With prolonged practice, mindfulness increases neuroplasticity, which in turn enhances mental agility and performance. It is because of this scientific evidence – transcending it from a mere 'buzzword' to being a credible and powerful tool to enhance mental health – that we now have a range of successful CEOs, business professionals and leading institutions utilising mindfulness to enhance their performance.²

The question I then asked myself was: "If these successful bodies and people are using mindfulness to reduce stress and enhance their performance, why aren't I?"

How can I start practising mindfulness?

Daily meditation

The most powerful tool we know that can be used to practise mindfulness is meditation. I've personally been meditating for ten years now and don't believe I'd be able to get through my day without it. It anchors my being to everything that is important in my life and has taught me patience, tolerance and how to keep a birds-eye perspective on things.

If you haven't meditated before, or perhaps have tried and didn't have any luck in keeping your thoughts still, you should know that there are a number of methods you can use to meditate and that it isn't necessarily about keeping your thoughts still at all. Similar to practising mindfulness, meditation is simply about being completely present in the moment.

A minimum of 15 minutes in the morning and 10 minutes at night is the recommended time one should meditate.³ If you're able to maintain this practice, after a few weeks you will feel a tremendous benefit to your overall wellbeing. If you're a curious novice, you can visit msia.org.au/how-to-meditate/ for a meditation guide or simply Google 'guided meditation'.

Prolonged acts

Harvard University released a recent research paper that found we spend 47% of our waking lives thinking about matters that have either occurred in the past, or may/may not transpire in the future, and that it is this 'mind wandering' that is the root cause of our unhappiness and various mental health concerns.⁴ The older we get, we become more desensitised to our environment. We repeat actions so many times that they become a part of our subconscious programming. It is when we are in this 'auto-pilot' mode that our mind begins to wander.

You can introduce mindfulness during any prolonged act you may consider to be mundane or part of your daily routine to circumvent 'mind wandering'. For instance, it can be applied to the act of brushing your teeth, driving to work, having a cup of tea or going for a walk. If we were to take the act of your lunchtime walk for instance, your sole objective would be to bring your attention to your internal and external experiences as they are occurring in the present moment and to sustain this attention control from the beginning to the end of your walk.⁵

How mindfulness enhances mental health at work

With such a large percentage of our lives spent at work, employers not only stand to benefit from educating employees about mindfulness practice from an economical perspective but also have the opportunity to enhance the mental health, wellbeing and performance of their people, which is a win-win for everyone.⁶

When practising mindfulness, our conscious mind confronts our subconscious programming, so that we become the observer of our thoughts, anchoring our awareness to the present moment. When we're completely present in the moment, we're not concerned about matters outside our control, such as incidents that occurred in the past or may/may not happen in the future.

by Paul Pitsaras



Rather, we're operating from an objective birds-eye perspective, enabling us to remain composed and make rational choices. It is from this platform that we can also exercise overlapping psychological processes such as critical thinking, emotional intelligence and metacognition, allowing us to execute informed and unbiased decisions – skills that are fundamental in the legal profession.

Life is 10% of what happens to us and 90% of how we react to it. By practising mindfulness each day, we strengthen our prefrontal cortex allowing us to judiciously react to adverse circumstances. This ultimately leads to calm, rational and empowering decisions being made in the workplace, enriching mental health in the process.

Paul Pitsaras is a qualified lawyer, co-founder, speaker and managing director at The Open Mind Institute.

Notes

¹ This comprises of \$4.7 billion in absenteeism, \$6.1 billion in presenteeism and \$146 million in compensation claims: 'State of Workplace Mental health in Australia – Beyond blue/ TNS Social Research, 2017.

² From Mark Zuckerberg & Richard Branson, to Richard Gere, Sting & Labron James. Harvard University also rolled out a mindfulness program for its staff this year.

³ When meditating you should be in a comfortable position, with your spine up straight. Then shift your focus to your breath, being completely aware of the airflow entering your body (causing your diaphragm and stomach to expand as you inhale, and contract when you exhale). Anchor your consciousness to the present moment by focussing on your minds eye (area between your eyes) whilst simultaneously focussing on your breath, which should after a while get into a drawn out, calm and sustained rhythm.

⁴ <http://news.harvard.edu/gazette/story/2010/11/wandering-mind-not-a-happy-mind>

⁵ Starting with your breath, be aware of its tempo, the airflow and its affect on your body, your heart rate etc. before becoming aware of your senses and their contact with the outside world. Then moving to your external world, you'd be aware of the sounds around you, other people going about their day and the rest of your immediate environment; all along doing your best to remain unbiased, limiting your judgements and not labelling anything as good or bad. You keep this process going until the end of your walk and repeat it daily. In a matter of days you will find a profound sense of calmness, focus and clarity has been attained.

⁶ Organisations like The Open Mind Institute (www.tomi.org.au) deliver Mindfulness & Mind Fitness Workshops to employees that provide them with mental based techniques that can be used to achieve enhanced mental health & optimum performance in the workplace.

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Gillian's story: a voice for the voiceless

A lawyer's duty to uphold the rule of law





by Melissa Raassina

Professor Gillian Triggs has dedicated her life to upholding the rule of law and the rights of the people. Raised in a family with an interest in social justice, Triggs was introduced to the foundations of international law and human rights early on.

However, it was when attending lectures on the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948) that she first came to understand the true rule of law.

This interest would ultimately lead her to many roles across the globe as an academic, barrister, Australian representative, and finally her most recent roles as president of the Australian Human Rights Commission (until 2017) and as Acting Aboriginal and Torres Strait Islander Social Justice Commissioner (current).

When speaking about her initial interest in international law, Triggs discussed her curiosity around how states acquired territory, citing the validity of Australia's claim to 42% of Antarctica as an example of her early queries. Following this introduction to international law, she became interested as a public international lawyer in the difficulties of implementing international law in Australia's domestic legal system.

Gillian believes that the area of international law is emerging in a global legal context due to the present highly globalised environment.

"You can't afford to be just a domestic lawyer anymore," she said.

"You have to understand the global and regional legal context in which you operate."

Speaking about her career journey, Triggs' face lit up as she reminisced about her experience working on civil rights legislation in the United States of America.

She recalled with amusement, having to explain her accent was Australian rather than British, as many had assumed Australians spoke a different language entirely. It was a time early on in her career that she remembers with fondness as the first she truly realised the gap between the passing of laws and their implementation.

"My experience working in Texas on the 1964 civil rights legislation in the late 60s and early 70s was really an extraordinary experience for a very young lawyer," she said.

Triggs had just completed her Masters when she provided the local Chief of Police with legal advice on civil rights.

"You may ask why on earth he would ask me for legal advice? Well, he couldn't get that advice from the district attorney's office in Dallas, Texas, and I had already done the research and writing in that area and given him legal advice during a summer job."

Triggs' passion for civil rights, human rights and international law has only grown throughout her career, with her most recent interests falling in the area of the rule of law.

Speaking about the rule of law in conjunction with the newly recognised phenomenon of post truth, she said lawyers must accept their responsibility to stand up for the democratic principles and values that are incorporated in the idea of the rule of law.

"Lawyers have always relied on evidence, on facts, on expert reports and objective inquiries, and we are now moving into an area in which there is a surprising tolerance for the rejection of facts and evidence, in favour of a much more subjective and political view of how to deal with things."

She also addressed the misunderstanding that parliament and government were about politics, with judges merely applying the law as articulated by legislation. She reiterated that it was impossible to completely separate politics from the law or law from politics as judges were the original creators of law.

"There is a very difficult path that judges have to tread. They must apply the rule of law, but they also must respect the sovereignty of parliament and the legislation that emerges from parliament.

"One of the difficult problems arising, is what happens when parliament passes laws which breach fundamental rights? That is where we have to come back to the idea that even parliament, even elected cabinets, and of course judges, are subject to the rule of law.

"That principle goes right back to the Magna Carta over 800 years ago. These

are not new ideas but we do lose sight of them sometimes."

Triggs is clear on her position regarding the role of lawyers in upholding the rule of law, explaining they were best able, and best educated to understand excess power or laws that were disproportionate or not justified by legitimate aims.

"It's very important for all lawyers to stand up for the rule of law ... and the principles of democracy and freedom that have underpinned our relatively successful Australian multi-cultural community," she said.

Speaking locally, Triggs believes Queensland lawyers – in particular those from rural regions – can contribute a great deal to upholding the rule of law.

Describing regional lawyers as the trusted advisors in their local communities, saying they would often see discrimination firsthand in most of its forms and that it was their responsibility to stand up for the protection of fundamental human rights.

Professor Triggs will speak about upholding the rule of law in the post-truth era at Queensland Law Society's 2018 Symposium focusing on the impact of this phenomenon on the way in which the rule of law operates and the way in which lawyers practise.

This passion lives on in Gillian, carrying on the legacy she began many years ago when she graduated from the University of Melbourne in 1968.

She advises young lawyers to appreciate the hard work ahead of them in their careers, and not to rely purely on luck.

"I think it is critical for a young person to appreciate that, whilst luck has something to do with one's career, ultimately it's hard work.

"What advice would I give to my young self? It would be, to be certain that I've done my homework, that I've gotten my facts right and to continue to love the law."

You can hear more from Gillian at QLS Symposium 2018, held from 9-10 March. Visit qls.com.au/symposium for details.

Melissa Raassina is the acting editor of *Proctor* and media and public relations advisor at Queensland Law Society.

New QLS members

Queensland Law Society welcomes new members who joined between 29 September to 30 October 2017.

Kyu-Whan Lee, Hanon Systems
Patrick Flynn, Robert J Garvey
Melanie Ratcliffe, Onsite Law Pty Ltd
Dominic O'Brien, Beinro Legal & Advisory
Thea Price, HWL Ebsworth
Oswald Norton, Non Practising Firm
Daniel Bercolli, redchip lawyers Pty Ltd
Kyla-Jayde Johnstone, Australian Services Union
Melissa Lanthois, Cornerstone Law Offices
Timothy Sumner, King & Wood Mallesons
Jayden Bae, CDI Lawyers
Daniel Edwards, Cubic Transportation Systems (Aust) Pty Ltd
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Career moves

Brooke Winter Solicitors

Victoria Ward and Nathan Farr were appointed as associate solicitors with Brooke Winter Solicitors. Victoria is experienced in criminal law and family law. Nathan has experience in family law and domestic violence matters.

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DibbsBarker has appointed Ben Shaw as partner in the banking, insolvency and disputes team. Ben focuses on dispute resolution and litigation in the banking, financial services and insolvency industries.



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How will you compete in 2018?

A practice idea that might make a big difference



Use the Christmas break to reflect on how your firm really competes, and start off 2018 with some positive improvement plans.

This time last year I encouraged readers to think about how they allocate time. This year, I want to talk about competing for business, and how to better understand what matters.

A colleague, Mark Vincent, used to say there were only three ways to compete: you can be **cheaper**, **better** or **different**. That's it... so I'm going to discuss what these words mean. To start with, the terms are all client-defined, and potential client value flows from that.

Cheaper means different things to different people. All clients like paying less, but is *cheaper* their main driver? Your expertise (viz, **better**) will often get you onto the shortlist, and then some competitive amalgam of **cheaper** and **different** might win you the bid. Depending on the circumstances, cheaper may not even have to come into it. It is a kind of zero sum game – that is, **better** and **different** credentials give you some scope to trade out of *cheaper*. **Different** has many incarnations – hotlines, matter tracking portals, self-service components, payment terms, paperless relationships, and

so on. Indeed, what the world sees as **different** today may well be just normal tomorrow.

Remember – the terms are what the client defines them to be. Cheaper doesn't just mean lower price. It can mean removal or reframing of annoying extras. If your payment terms are different, cost of doing business with you may be interpreted as cheaper. Do you talk partner rates or blended rates? If you get your bills independently assessed, does the removal of potential lawyer opportunism translate into cheaper in your clients' minds? Inexperienced clients think all legal costs are expensive. But by making appropriate comparisons, you can almost make \$475/hr appear cheap. The key is to understand what is most important to your clients. And remember, if you are committed to lower pricing, figure out how to concurrently lower delivery costs.

In the hyper-competitive wills and estates space, the benchmark pricing in some cases is free of charge. This can be challenging! Pricing for reasonably standard testamentary trusts ranges from \$800 to around \$7,000. A crazy difference you might say. But in this kind of market, **better** is very hard to sell on legal technical grounds. Most clients wouldn't know. **Better** typically gets traction through an ability to articulate competing risks in a personable way. The greatest change going on in this market is all about **different**: new artificially intelligent

portals enabling fast, convenient access for accountants and financial advisors. Firms developing such channels and linking them to their own legal services will do very well.

NewLaw is a good microcosm of all three approaches. For most potential clients, online-sourced NewLaw providers are **different** as a channel type.... Not your average suburban firm. Then again, within NewLaw there are many service offerings, and clients are able to judge which attributes they regard as **better** than comparative others. The criteria are up to them. And finally, because so many NewLaw providers are built around some kind of cost and infrastructure sharing, they can be **cheaper** versus the overall market, while being **better** within the channel, and **different** simply by being a NewLaw channel.

You have to decide how you will compete. The short examples above are just a drop in the ocean. Where will you place your emphasis – on **cheaper**, **better**, or **different**. Remember, professional expectations are relatively low so you may discover a beneficially **different** way of practising without too much investment! If in doubt, ask your clients (ask them anyway). Then think about potential improvements over Christmas. Have a good break.

Dr Peter Lynch
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Would any person or firm knowing the whereabouts of a will or any other document purporting to embody the testamentary intentions of Anthony John White late of 2/10-04 Kovan Rise, Kovan Regency, Singapore who died on 8 April 2017 please contact George Szabo of Szabo & Associates Solicitors, PO Box 282, Surry Hills NSW 2010. Tel: (02) 92815088 or Email: george@szabosolicitors.com.au.

Would any person or firm knowing the whereabouts of **Kevin John White and Coral Anne White**, the parents of the late **Anthony John White** late of 2/10-04 Kovan Rise, Kovan Regency, Singapore who died on 8 April 2017 or the whereabouts of the deceased's brother please contact George Szabo of Szabo & Associates Solicitors, PO Box 282, Surry Hills NSW 2010. Tel: (02) 92815088 or Email: george@szabosolicitors.com.au.

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The cradle

with Matthew Dunn



In a world of faddish reimagining of noble western European wine varieties, the cradle of winemaking may make for a new frontier for those who have tried it all.

The cradle of winemaking is surprisingly not in western Europe – not France, not Italy, not even Greece. The cradle of winemaking is not even in Europe (depending on where you draw the wine in the Caucasus Mountains) but in the country of Georgia.

Georgia may be the new frontier for those searching for wine's next discovery. It comes with a formidable pedigree:

- archaeological evidence shows wine has been made in the country for over 8000 years
- it is most likely the place winemaking was invented
- there are over 500 indigenous grape varieties which have little recognition outside of the region
- it has a proud and very long history for making quality wine and consuming its products at Georgian feasts
- it has a handy array of both red and white varieties
- the Soviet Union prized Georgian wine over more Russian wines from Moldova and the Crimea.

From ancient times, the local winemakers of Georgia employed clay vessels, called qvevri, to make their nectar. The qvevri would be coated on the inside with bees wax, it would be partially buried in the ground, filled with crushed grape juice and sealed with a wooden lid and perhaps topped with earth. The grape juice would slowly ferment during the winter and emerge in the warmer months as wine. The Georgians speak of the earth giving birth to the wine in this way and it makes for an evocative picture as the dirt is cleared aside, the lid unfastened and the new vintage emerges directly from the ground at the temperature of the mother earth.

The world culture and heritage organisation UNESCO added the "ancient Georgian traditional Qvevri wine-making method" to its fabulously named Representative List of the Intangible Cultural Heritage of Humanity in 2013 as a measure of its significance.

Georgia is a nation of Orthodox Christianity with its church stemming from the preaching of Saint Nino in the 4th century AD. The coming of Christianity only served to further emphasise the role wine played in daily life by adding holy ritual to the mysticism of wine from the earth. Legend in Georgia is that Nino preached with a cross made from vine stem and the story of Jesus emerging from the underground tomb reborn must have seemed oddly familiar to the Georgians.

Over the years, the fortunes of Georgia as a nation have risen and fallen, and after dealing with the Mongols, Ottomans, the Russian Empire and its descendant the Soviet Union, Georgia has emerged as its own state again (albeit with a little Russian occupation in Abkhazia and South Ossetia).

During the Soviet era however, Georgia was the wine jewel in the Union's crown and since independence the industry has been modernising and continuing to make wine of quality from local and international varieties.

The most familiar Georgian variety to most Queensland drinkers will be saperavi. Made by Ballandean Estate, it won champion wine at the Queensland wine awards in 2013. But to sit alongside this monster red wine there are around 520 other native Georgian wine varieties with around 40 in commercial production. The team at Pheasant's Tears in Georgia have set about establishing a library vineyard with all 520 known Georgian varieties and have planted around 400 varieties so far. They plan to make a single vineyard wine from the project.

In many respects, Georgia is a place yet to be discovered by wine enthusiasts but has all the elements needed to be a big player on the international stage – ancient traditions of natural winemaking, numerous 'new' varieties with flavours largely unseen, and a backstory to bring it all home.

The tasting

Only one Georgian wine was found to try for this article. Pheasant's Tears wines are imported by Vinous Imports in Sydney.

The **Pheasant's Tears 2015 Chinuri** (dry unfiltered amber wine) from Kartli was 11% alcohol and says it was made in the traditional way in a qvevri. The colour was dark gold with a touch of cloud that settles a little with time rather than amber but it was most unusual and said to be produced by leaving the juice on the skins and some stem



for a time. The nose was green pear sitting on a moist wettex. The palate was not like anything else ever tasted. There was crisp green pear fruit, some soft acid balancing to dryness as the first burst. The mid palate had growing intensity of savoury mouth-filling tones akin to tobacco or leather you might expect in a hunter shiraz and some

underlying minerality to carry it through. The wine was completely unique and otherworldly. It was definitely unfamiliar yet oddly engaging and very happily drinkable. If it were a wine which emerged from the earth itself I wouldn't have been surprised.

Matt Dunn is acting chief executive officer at Queensland Law Society and government relations advisor.

Mould's maze

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

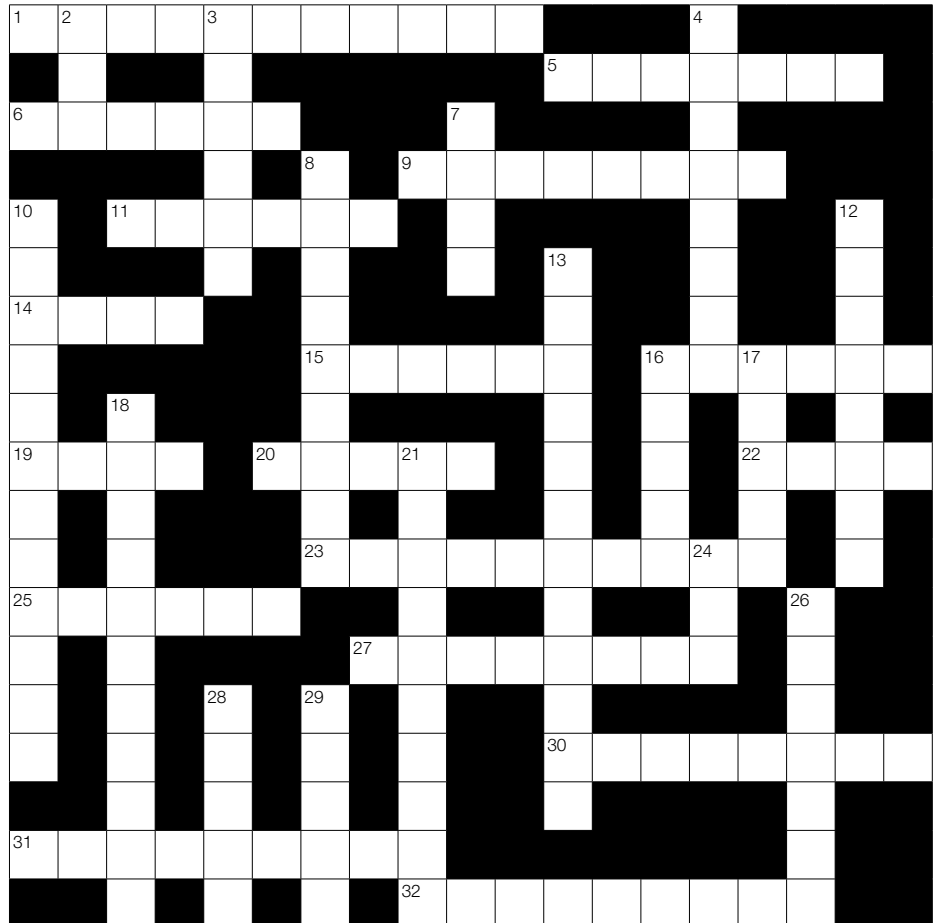


Across

- 1 The right of an insurer to be substituted for an insured to recover an insurance loss (11)
- 5 If an insured's loss is made good by a third party the insurers are entitled to a credit accordingly for any sum received, indemnification (Lat.) (7)
- 6 A statute of is similar to a statute of limitations but not ordinarily subject to extension or exception (6)
- 9 Title that constitutes ownership of real property independent of any superior landlord or Crown grant (8)
- 11 Recent female High Court Chief Justice who left school in Year 10 (6)
- 14 English common law title established by deed which restricts the alienation of real property, fee (4)
- 15 Melbourne drug trafficker who fled to and was recaptured in Athens in 2007, Tony (6)
- 16 A court will only make a parentage order upholding a surrogacy arrangement that was entered into the subject child was conceived (6)
- 19 Two High Court cases involving the same defendant and the priority of the proportionality principle in criminal sentencing, v. *The Queen* (4)
- 20 A retailer's newspaper article is generally at law merely an invitation to (5)
- 22 Make an inculpatory admission, up (Jarg.) (4)
- 23 The common law presumption that a child born within the subsistence of a marriage is deemed to be the child of the husband (10)
- 25 Where a person entitled to take any part of an intestate's residuary estate does not survive the intestate for a period of days, that part of the residuary estate shall be treated as if that person died before the intestate (6)
- 27 A prerogative writ to commence an action for review of an administrative decision (8)
- 30 The maximum amount of damages for non-..... loss that may be awarded in Queensland defamation proceedings is \$250,000 (8)
- 31 The *Civil Liability Act 2003* (Qld) imposes both a and a reactive duty upon doctors to warn of the risk of injury (9)
- 32 Disclosure (9)

Down

- 2 Employ (3)
- 3 A condition of an order prohibiting a respondent from remaining at, entering or approaching premises (6)
- 4 Generally considered or reputed to be (8)
- 7 back provisions are inserted into employment contracts of financial firms by which bonuses may be recovered if performance on a product fails (4)



- 8 Lawyers may owe a duty of care in tort to avoid foreseeable accruing to clients even where their retainer does not expressly require (9)
- 10 An order involving a domestic violence respondent attending an approved program or counselling (12)
- 12 1948 High Court case involving custody of a child who was swapped at hospital at birth, *Jenkins v.* (8)
- 13 Unascertained damages left for a judge to be determined (12)
- 16 The Queensland Act defining a lot owner agreement for a duplex (Abbr.) (5)
- 17 If a driver of a motor vehicle in Queensland had a self-induced blood alcohol concentration (BAC) of at least 0.15%, the driver will be presumed to be contributorily negligent in an accident of at least % (5)
- 18 An eye for an eye (11)
- 21 A Queensland court cannot now award exemplary, punitive or damages in relation to a personal injuries claim unless intentionally caused or an unlawful sexual assault or misconduct (10)
- 24 Every owner of a lot in a ... is a member of a body corporate; a legal entity created when land is subdivided and registered under the *Land Title Act 1994* (Qld) (Abbr.) (3)
- 26 The *Offences Act 2005* (Qld) makes it an offence to wear or carry an item that can be seen from a public place which has the symbol "1%er" (7)
- 28 James Richard bit off one of his own fingers and swallowed several antennas prior to his trial for the fire at the Whiskey Au Go Go nightclub in 1973 (5)
- 29 Queensland legislation that legally recognises same sex relationships, *Partnerships Act 2011* (Qld) (5)

Solution on page 56

Growing older

Losing my hearing: I blame the music scene

by Shane Budden



The chief advantage of getting old is that it is better than the alternative. Other than that it has few charms, unless you count having permission to find fault with pretty much everything. I have managed to find a few, however:

For example, my hearing is becoming quite poor, in the same way that New South Wales' recent record in State of Origin is quite poor. That may not seem like an advantage, but it comes in handy if you are trapped at a dinner function with people you don't really care to listen to, such as televangelists, people with strong opinions about "The Bachelorette", and Justin Bieber (the singer himself, I mean, not people who have strong opinions about him. Although I doubt they have much worth saying either). Since I cannot hear anything being said if there is a lot of background noise, I am spared passionate commentary about why Fred didn't get a rose despite being such a nice guy and regularly reciting French poetry (although that last piece of information would certainly explain it for me).

When I find myself trapped at a dinner table with people who could bore a troop of birdwatchers to death (or worse, the birds themselves), I simply keep a serious look on

my face, nod regularly and occasionally say, "fair enough, too" and this gets me through most situations, excluding one occasion when I said "fair enough, too" just after a fellow had, as it turns out, told me his mother had just been charged with credit card fraud. It was ok, though, because he didn't speak to me the rest of the evening which was just as effective as not being able to hear him.

If you are sitting there thinking that, from my astonishingly youthful photo, I am a bit young to be suffering hearing loss, I can say that you are right (and that age appears to be affecting your eyesight). However, when I was younger I suffered work-related hearing damage, in that my work was foolish enough to pay me sufficient money to afford going out to see bands on Friday and Saturday nights. Young kids these days wouldn't believe it, but back in the day, bands played things called 'instruments' which were plugged into other things called 'amplifiers'. During the day, amplifiers were used to generate sound waves powerful enough to carve train tunnels (at least, the ones used by the bands we used to see were), and at night they were used to assault listeners' ears with about the same volume as your average 747 achieves during take-off.

The bands did this for a very good, technical musical reason: they sucked. Standard operating procedure for any bad band – and trust me, I have been in some of the worst – is to make up for lack of ability with volume. The advantage to this is that venue management can't get close enough to tell you to stop (or unplug your equipment)

without risking having their heads explode like the people who heard God's voice in the movie "Dogma" (no, I won't explain except to note that in a sad development for Christians everywhere, Alanis Morissette is God in that movie). This means that you can finish your set and insist on being paid; everyone is a winner except the audience, but by then their ears are ringing too badly to be any trouble.

The bands sucked because back then Brisbane had what was always described as a 'thriving local music scene', probably because calling it a 'thriving group of talentless people who somehow managed to afford musical

instruments' doesn't bring the tourists in. This meant that anyone could not only form a band but actually perform live, regardless of whether they sounded pretty much like the noise you would hear if a semi-trailer driver was careening down a hill and accidentally threw the truck into reverse instead of fifth.

This meant that my friends and I saw many bands who, under other circumstances, might not have seen the light of day nor indeed been let out without adult supervision. Sometimes this had a unifying effect on an audience – I recall one band, named "Earth Reggae" (in retrospect the name should have been a red flag) who were so bad that the entire audience, no matter what religion, race, colour, creed or football team they followed, agreed that they were the worst band any of us had ever seen. Debate did rage as to whether they were actually a band or just a group of car thieves who happened to steal a van full of musical instruments. Ironically, my hearing was working perfectly the night we saw them, and the lead singer's fake Jamaican accent (he was a skinny white guy who probably had a day job at his dad's bank) is something I have never been able to shake.

The point is that my failing hearing often allows me to appear as if I am involved in a conversation which I am actually studiously avoiding, and I am sure people my age and older have done the same to me, which is fair enough too.

In closing, I want to note that this year I got my 25-year membership pin from the Society, something I thought would not happen because when I started work here I found out that I could not stay a member, and just three years shy of a pin. I had a whinge to just about everybody about that, but got nowhere until I told president Christine Smyth, who then requested Council pass a resolution recognising service with the Society as counting towards your pin; it meant a number of other people who would have missed out were also able to collect their pin. This sort of thing is typical of Christine's member-focused, collegial leadership style and that sort of concern for members and staff puts a spring in your step on the way to work! It has been a genuine pleasure working with you, president – many thanks!

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



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Lexon

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Room bookings

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Crossword solution from page 54

Across: 1 Subrogation, 5 Aliunde, 6 Repose, 9 Allodial, 11 Kiefel, 14 Tail, 15 Mokbel, 16 Before, 19 Veen, 20 Treat, 22 Fess, 23 Legitimacy, 25 Thirty, 27 Mandamus, 30 Economic, 31 Proactive, 32 Discovery.

Down: 2 Use, 3 Ouster, 4 Putative, 7 Claw, 8 Penumbra, 10 Intervention, 12 Morrison, 13 Unliquidated, 16 BCCMA, 17 Fifty, 18 Retribution, 21 Aggravated, 24 CTS, 26 Summary, 28 Finch, 29 Civil.

DLA presidents

District Law Associations (DLAs) are essential to regional development of the legal profession. Please contact your relevant DLA President with any queries you have or for information on local activities and how you can help raise the profile of the profession and build your business.

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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	1 July 2017	9.30
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 July 2017 to 31 December 2017	7.50
Federal Court – Interest on judgment debt for half year	1 July 2017 to 31 December 2017	7.50
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 July 2017 to 31 December 2017	5.50
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 July 2017 to 31 December 2017	7.50
Cash rate target	from 3 August 2016	1.50
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2017	7.50

Historical standard default contract rate %

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

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

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open letter to the legal industry

It was with great excitement earlier this year that we announced to you all that Medilaw had joined the MedHealth family of companies. Medilaw is now positioned to be your national health risk management partner across all services and states, whether that be in early treatment advice, routine IME's, or fitness for duty assessments.

Over the last 10 months we have seen a series of exciting initiatives that will directly improve your firms experience with our organisation:

1. Expanded our interstate coverage with a strategic alliance with Next Health (WA-based IME provider), and MindSense, a psychiatry focused business to strengthen Medilaw's national coverage and build on our existing east coast capabilities to meet your requirements. By the end of the year this national footprint will be completed as we expand our service offering into NSW.
2. Clinic Investment with brand new facilities in Far North QLD (Townsville) and a new clinic in Collins St, Melbourne.
3. Merging of capabilities, the Medilaw family of businesses now includes Next Health, MindSense and 2018 having CaseWorks, a Melbourne based Claims support and specialist consulting firm, joining. We expect to add to this group further in 2018 with advance negotiations underway to expand in key markets and to bolster existing markets with broader solutions and specialists.
4. Expansion of consultants is crucial to support your needs, and it is with pleasure we can nominate 15 new consultants that have joined the group, with expectations this will grow significantly in 2018 - stay posted.
5. Products and solutions are now expanding to meet your end to end requirements, not just IMEs. We now have finance, case support and expanding allied health capabilities that mirror your requirements.
6. Education is crucial for our specialists and we have driven this through formal training initiatives such as the ABIME course to ensure more doctors are accredited to deliver leading edge, balanced opinions. This education continues with our regular client focused training of monthly seminars, and fortnightly newsletters providing helpful insights for staff development.

Since opening in 2000, Medilaw success would not be possible without the ongoing support of our legal clients. Therefore, we too have extended this appreciation back into our community through our social responsibility program with donations to Queenslanders affected by Cyclone Debbie in May, our collection of toiletries to support women in need, through the Share the Dignity foundation in October, and we will round out the year with our cash and soft toy support of the Salvation Army's Gift Appeal.

Stay safe over the holiday season and we look forward to working with you again in 2018.

Thank you,

The Medilaw Team

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