

PROCTOR



Queensland
Law Society

February 2016 – Vol.36 No.1

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QLS Call to Parties | Beyond *Barbaro*



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Your symbol of pride

New QLS member logo launched



Last month, I introduced myself to members with a message to Queensland Law Society members in *QLS Update* and on our website.

Thank you to those who have emailed me their comments and congratulations; your thoughts are appreciated.

If you missed it, I have also included the message on this page. However, I would first like to announce something that reflects our collective pride in being Queensland solicitors and members of the organisation that represents our profession – the launch of an official QLS member logo.

All full members of the Society may now use this logo to highlight your membership across the profession and broader community.

This includes its use on your email, stationery, business cards, profile pages, website and marketing materials, including signage.

This logo will enable clients, colleagues and staff to instantly recognise your integrity and commitment to the quality and professional standards that you and your Society uphold.

For more specific details on this, please see page 27.



My message to members

Our profession has much of which to be proud and I am proud to be a Queensland solicitor.

As solicitors we have a privileged role in society, promoting and defending the rule of law, our courts and our system of justice. Recent events have again reminded us that the glue holding our society together is not the rule of public sentiment, but the rule of law.

Uniquely, our duty is first to the court, upholding the rule of law. We serve our clients by assisting them in navigating the legal process. Ethical principles and professional responsibilities are the cornerstone from which we do this.

My experience as a practitioner of 34 years is that the core of our profession is the responsible solicitor who with practical wisdom assists their clients. This is the role I want to celebrate and be at the centre of the way we represent the profession to the public. I believe solicitors fundamentally do a difficult job under increasingly changing economic circumstances and their good efforts and stories ought to be recognised and told.

I believe that advocacy for good law and educating the public as to what we do as lawyers is integral to enhancing and fortifying the reputation of Queensland solicitors. Advocacy is key to this process and I am honoured the profession has provided me the opportunity to make a difference.

Our profession faces unprecedented challenges. Economic and global competitive risks, technological change, regulatory compliance, higher rates of mental distress and graduate oversupply, are forces with which all Queensland solicitors contend.

It was a pleasure to begin the year with a visit to north Queensland and a catch-up with local district law associations. I'm pictured with QLS Council member Ken Taylor, *left*, and Townsville District Law Association president Samantha Cohen, treasurer Joanne Shearer, vice president Emma Micola and secretary Matthew Keating.

To respond to these challenges, I am committed to providing strong, cohesive representation for Queensland Law Society members and with my colleague Christine Smyth – deputy president, will work to progress this as our agenda over the next two years. Our vision is to realise the full potential of the QLS as a membership organisation for all Queensland solicitors, working with CEO Amelia Hodge to achieve this objective – crucially focusing on the stability and profitability of the profession through ethical and market-oriented engagement.

Our state has the largest proportion of regional practitioners in Australia. I intend to build on the fine work of past presidents and will work with regional lawyers, through their district law associations, on the issues important to their communities.

My priorities include:

- harmonising and modernising laws affecting the practice of law
- calling for more resources in Queensland for the Federal Courts
- making justice more accessible through better resourcing of community legal centres and legal aid
- consulting members on the proposal for a Human Rights Act for Queensland
- making the relationship between QLS and regulators more effective
- moving the Society's structure to a company limited by guarantee.

I look forward to working with our members to meet the challenges of the year ahead. It is important that QLS both be receptive and responsive to the concerns of its members. I look forward to members' feedback on issues of concern to the profession.

To learn more about Bill Potts, see the feature on page 24 of this issue.

Bill Potts

Queensland Law Society president

president@qls.com.au

Twitter: @QLSPresident



SHEN YUN: *Divine Culture Returns*

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shown us through the
performance has been
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and I’m in awe!”

— Judith Durham,
The Seekers

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Embracing change

How your Society is supporting your needs

Change. Though sometimes we view it with reluctance, we all know that, particularly in business, it is necessary and provides us with the opportunity to gain greater relevance, performance and sustainability over time.

As a profession, we face ongoing change through globalisation, economic imperatives and outsourcing, and, most significantly, the digital disruption of our practices brought about by online legal services and the growing application of artificial intelligence to legal processes.

Your Society also faces the realities of necessary change. After several months of careful consideration and planning, 2016 will see the manifestation of that change which is far more than a string of 'new initiatives'.

It is going to be an exciting year. With the overarching aim of providing greater and more valuable levels of support and engagement with our members, we have rebuilt our internal structures and processes to facilitate a new approach. We have acquired the skillsets that will transform the way you connect with your Society and provide leadership in this area.

Specifically, this means experienced appointments in the areas of membership and strategic partnerships, data analytics, government relations, advocacy, finance, brand and digital, and other highly skilled resources to build our systems and processes to provide the services and information you need in the most effective and efficient way.

This year will see our highly regarded Ethics Centre grow to incorporate practice support, providing a unified service based on the premise that combined ethical and practice support guidance leads to responsible lawyers imbued with practical wisdom.

We will pilot a firm outreach/consultancy program that brings this guidance directly to your firms, and rationalise and refine our extensive practice support guidance and educational resources.

As always, free and confidential guidance for members will remain just a phone call away.

Proctor, too, will change, emphasising its role as a vehicle for two-way communication with members of our professional community through discussion of the topics it addresses, both in print and online.

We intend to capitalise on the benefits of the global integration of print and digital to bring you legal news and information in the most convenient and accessible way. Your input on how you want to access *Proctor*, and how you would like to see it grow or change, is welcome. Please email your thoughts to proctor@qls.com.au.

Your invitation to Symposium

Other highly valued features of your Society will remain.

Of course, our flagship annual professional development event, QLS Symposium, is one of these and our aim is to continually refine its content and delivery.

I invite you to attend Symposium 2016, at the Brisbane Convention & Exhibition Centre on 18-19 March.

One of the key ways in which Symposium continues to be refined is the way in which the streams are structured, enabling you to tailor your learning experience to relevant and specific areas of law or practice.

We work hard to finely balance this with content to inspire and educate.

Don't miss our opening plenary, at which Rabia Siddique, an inspirational lawyer will motivate you to embrace the personal and professional changes we face. (See page 53 of the November *Proctor*).



Symposium has a range of speakers who will focus on the business of law. For example, make a note to catch the address by Colin Jasper in Saturday's Core CPD stream, with a session on how to improve client satisfaction through pricing. (See page 52 of the December *Proctor*).

When you add the pleasure of catching up with colleagues, along with the opportunity to hear the thoughts of our profession's leaders, including the Attorney-General and Chief Justice, you have a spectacular event. You can book or access more information at qls.com.au/symposium.

Dancing CEOs 2016

Progress has been made in my involvement with this wonderful fundraising initiative for the Women's Legal Service.

This year's participants had raised more than \$19,000 at the time of writing and I thank my friends and the legal community for their generous contributions of \$3185 toward this total.

I have purchased my dress and started dance choreography lessons, where I am working hard on my moves!

Please donate to the Women's Legal Service, which provides support for women and children who must sometimes live through the worst of circumstances. See my Dancing CEOs page (visit everydayhero.com.au/leaderboard/37041) and keep an eye on our Facebook page and website for photos and reports on my progress. I am very much looking forward to the Dancing CEOs gala event at Brisbane City Hall on 15 April.

Amelia Hodge
Queensland Law Society CEO

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First electronic conveyance by the rules

A historic event happened amid little fanfare on the afternoon of 18 December 2015.

The first settlement of an all-electronic transfer of ownership of Queensland real property occurred through the PEXA system.

Noosaville law firm bytherules Conveyancing conducted the transaction to transfer ownership of a house in Tewantin to herald a new start in conveyancing practice.

The process happened very smoothly – the 1pm settlement lodged at 1.04pm with funds electronically transferred and the land transaction registered in the Titles Office at 1.13pm.

E-Conveyancing introduces the completely online financial settlement of a transaction conducted in a law firm's own office. There is no need for bank cheques or having parties' legal representatives, financiers and other parties scramble to meet for a formal handover.

Queensland Law Society 2015 president Michael Fitzgerald expressed delight at the settlement in a media statement:

"E-Conveyancing is a revolutionary way of buying and selling property which will remove the manual processes and paperwork associated with land transactions. It enables land registries, financial institutions and legal practitioners to achieve contemporaneous settlement in real time."

Bytherules Conveyancing client services director Maggie Keene said PEXA married with the firm's style of business – using technology to allow staff to spend more one-on-one time with clients.

Queensland Law Society has a dedicated E-Conveyancing webpage for practitioners. See qls.com.au > Knowledge centre > Areas of law > Property law > E-Conveyancing (login required).



Mooting stars awarded

The fourth annual David Jackson Dinner was held at the Women's College, University of Queensland, on Tuesday 24 November.

The dinner, sponsored by North Quarter Lane Chambers, marked the achievements of more than 50 law students who participated in mooting and legal skills competitions in 2015.

More than 80 guests, including members of the judiciary, attended the function, which was hosted by TC Beirne School of Law dean Professor Sarah Derrington and director of mooting Associate Professor Peter Billings.

The Best Moot Team award, sponsored by Queensland Law Society, was presented to the International Air Law Moot team, who won the sixth Leiden Sarin International Air Law Moot Competition in Beijing in April.

Above: 2015 QLS president Michael Fitzgerald with Best Moot Team award winners Amina Karcic and Georgina Morgan.



Christmas cheer for graduates

Queensland Chief Justice Catherine Holmes presented certificates to graduates of the 2015 Queensland Law Society specialist accreditation program at the annual Christmas breakfast event held on 11 December at the Hilton Brisbane.

The event, with gold sponsor u&u Recruitment, marked the completion of the 20th year of the program. Areas of specialisation offered last year were family law, personal injuries, succession law, property law and taxation law.

Turn to page 39 of this issue of *Proctor* for more information.

Data breaches hit a third of companies – report

One third of in-house counsel have reported that their companies have experienced a data breach, according to the Association of Corporate Counsel (ACC) Foundation.

The foundation's *State of Cybersecurity Report* also said that, among the in-house counsel whose company data had been breached, almost half (47%) reported that breach occurred recently – in 2014 or 2015.

The global report, which is the largest study of in-house counsel on the subject of cybersecurity, also found that breaches were more than twice as likely at the largest companies and most likely to be the result of internal factors – employee error or an inside job.

"The report shows that 36% of in-house counsel within Australia have experienced a data breach at either their current or former company," ACC vice president and managing director Tanya Khan said. "Unfortunately, no sector or region is immune. The findings indicate that general counsel expect cybersecurity risk to only increase in the upcoming year."

Within Australia/New Zealand, only 8% of in-house counsel say their legal department spend has increased as a result of their company's approach to cybersecurity, compared to the global average of 23%.

"With such high incident rates it is important for organisations to engage their legal department early, as doing so can ensure the team plays an active role in cybersecurity strategy, risk assessment and prevention," Ms Khan said.

The survey-based report also looked at changes companies made following a breach, with 74% of respondents reporting that minimal, moderate or significant changes were made and 15% saying that no changes were made.

Although employee error is the most common reason for a breach in all global regions except Asia-Pacific, less than half of in-house counsel reported that mandatory training existed at their companies.

See acc-foundation.com/foundation/sr/.



Maurice Blackburn's Movember men

Maurice Blackburn staff participated in Movember 2015, raising nearly \$2400 for the charity through their national team known as MOrice Blackburn. Participants hailed from multiple office locations and featured a range of staff.

Above: Movember participants, from left, Phil Carlson, Rene Flores and Giri Sivaraman.

QLS LEGAL CAREERS EXPO 16

Queensland Law Society's Legal Careers Expo will be held on Tuesday 8 March 2016 at the Brisbane Convention and Exhibition Centre.

This event is held annually, attracting more than 500 university students. It provides students with the opportunity to engage with prospective employers and industry representatives, as well as attending relevant information sessions.

See qls.com.au/legalcareerexpo.



3 Degrees Networking founders Sarah Thomson, Lidia Vicca and Sarah Frost.

Networking by degrees

The first 2016 event for the new 3 Degrees Networking group will be on Tuesday 15 March, with venue and format to be advised.

The group aims to create networking opportunities for women that are unintimidating, fun and affordable. It was founded last year by lawyers Sarah Frost,

Lidia Vicca and Sarah Thomson, and held its inaugural event on 20 November at Bar Pacino, Brisbane, attracting more than 50 women from professional services backgrounds.

For more information, email 3degreesnetworking@gmail.com or look for the group on LinkedIn or Facebook.

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Flexibility in the round

On 26 November the Flexibility Working Group, a joint initiative of Queensland Law Society and the Women Lawyers Association of Queensland (WLAQ) hosted a roundtable discussion focusing on flexible work.

Four practitioners from diverse backgrounds – McCullough Roberston partner Duncan Bedford, Carter Newell special counsel Nola Pearce, Virgin Australia Airlines deputy general counsel Susan Schneider and Australian Securities and Investment Commission senior lawyer and senior policy officer Lesley Symons – each of whom work flexibly, shared their personal flexibility stories with more than 60 attendees.

WLAQ president Amelia Trotman then facilitated a discussion focusing on the panel's perspectives on:

- the biggest hurdles to obtaining a flexible work arrangement and how they overcame them
- the key matters which make their flexible arrangements work



From left, Amelia Trotman, Duncan Bedford, Nola Pearce, Susan Schneider and Lesley Symons.

- lessons learned about what does and doesn't work
- key tips and advice for asking for an arrangement and making it work.

Some key takeaway messages from the discussion for those interested in pursuing flexible work arrangements were:

- Be clear about why you are asking for flexible work. This will help you articulate the case to your partners/managers and assist in identifying what you will and won't be able to do.
- Be prepared to give and take, as you would if you were working non-flexibly. It's a two-way street and there are times when you might need to be flexible about your flexibility.

- Reliability, transparency and accountability are essential.
- Work to have a supportive team around you/take your team on the journey with you. Support from your colleagues and staff will be invaluable in making any flexible work arrangement succeed.

The discussion generated a lot of questions from the floor and animated discussion, which suggests this is an issue of keen interest to practitioners, managers and human resources. Watch for more initiatives from the FWG in 2016 to bring flexible work to the agenda in all legal workplaces!

My flexibility story, page 57

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Lexon lawyer named Australasia's 2015 Risk Manager of the Year

Brisbane-based lawyer David Durham has been awarded the Risk Management Institution of Australasia's 2015 Risk Manager of the Year award.

Mr Durham is the legal risk counsel for Lexon Insurance, and has overseen a 65% reduction in professional indemnity claims against Queensland lawyers since his appointment.

College of Law now self-accrediting authority

The College of Law Ltd has joined seven other non-universities to attain self-accrediting authority from the Tertiary Education Quality and Standards Agency (TEQSA), the national higher education regulator.

The college regularly achieves academic standards, governance and quality systems equivalent to that of a university, and went through a rigorous and extensive review process to apply for this authority.

Legal Aid Queensland increases fees for 2016

Last month Legal Aid Queensland (LAQ) increased fees paid to lawyers, social workers and psychologists undertaking select legal aid work, as well as increasing travel and accommodation allowances.

"We are committed to identifying and implementing financially sustainable opportunities to increase fees paid to private practitioners where appropriate," LAQ chief executive officer Anthony Reilly said

The following fee increases began on 18 January:

- 7% increase for fees paid to solicitors in family law matters from \$126 to \$135 an hour.
- hourly rates for social workers and psychologists who produce family reports/evidence from \$95 to \$102 an hour.
- the number of hours allowed for standard family reports:
 - initial family reports – rounded up to 15 hours, increasing the fee from \$1418 to \$1530.
 - updated family reports – rounded up to nine hours, increasing the fee from \$788 to \$918.
- 5% fee increases for criminal law duty lawyer, and outsourced advice fees increased from \$120 to 126 an hour.
- 5% fee increase for fee rates for domestic violence grants of aid from \$105 to \$110 an hour.

- for separate representatives in child protection matters, the hours available for inspection of the court file rise from two hours (\$252) to four hours (\$504), increasing the overall allowance for perusing relevant material including the departmental file to 10 hours. Hours available for trial preparation increase from 10 hours to 14 hours, increasing the preparation fee from \$1260 to \$1764.
- travel and accommodation allowances, including:
 - increasing the travel time allowance from \$60 to \$66 an hour.
 - increasing the travel expense allowance from \$0.60 to \$0.65 a kilometre.
 - increasing the accommodation allowance for major cities from \$186 to \$205 a night.
 - increasing the regional accommodation allowance from \$136 to \$165 a night.
- additional preparation fee for summary pleas involving 20 or more charges increases from \$165 to \$220.
- fees for inquests increase from \$95 an hour to \$110 an hour for solicitors and the counsel fee on brief, currently \$771, aligns with the summary trial rate of \$1200 for day one.

If lawyers or other practitioners have questions about the fee increases they can contact their firm's grants officer for more information.

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University of Queensland refurbishment is welcomed with graffiti

The University of Queensland's landmark Forgan Smith building, which houses the TC Beirne School of Law, will be dramatically refurbished over the coming 12 months.

Queensland judicial leaders farewelled the building with a graffiti session in November, recording fond memories of the school's alumni and over 10,000 law students throughout the past 66 years.

The refurbishments will not affect the historic sandstone façade but will see the internal space equipped with new technology, collaborative spaces and the latest educational facilities. Historic features such as the Moot Court – previously Brisbane's Supreme Court – will be preserved and re-installed in the re-modelled facility.



Above right: Supreme Court Justice John Bond leaves his mark on his alma mater.

Right: First-year law student Sean Tran leaves his temporary mark in this historic space.

Star role for legal service

Suncoast Community Legal Service (SCLS) has been appointed a regional service provider with the new Queensland Statewide Tenant Advice and Referral Service (QSTARS).

Based at Maroochydore, and with six community outreach locations, the service will be responsible for QSTARS service delivery within the region, which encompasses the Sunshine Coast and Noosa and Gympie local government areas, on a three-year contract.

SCLS is partnering with lead tenderer, Tenants Queensland Inc., and seven other accredited community legal centres to deliver the service across the state, which allows tenants and residents to access free tenancy information, advice and assistance.

SCLS principal solicitor Julian Porter said about a third of Sunshine Coast residents were tenants, and tenancy issues were one of the most common reasons for people seeking assistance from the SCLS.



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Sand up for cancer research

Corporate and social teams are invited to join this year's beach volleyball Corporate Battle Challenge to raise funds for the Cherish Women's Cancer Foundation.

The challenge will be held on Friday 15 April 2016 at the Sandstorm Beach Club, Mains Road, Mount Gravatt. For entry information and details, see thebattle.org.au.

Above: Norton Rose Fulbright partner Marshall Bromwich and special counsel Scott Francis launched this year's challenge in November with a demonstration match in the Brisbane CBD against Loan Market legal counsel Anna Tichborne and CFO Nicole Glen.

Bond University to establish legal education centre

Bond University has announced the establishment of a new Centre for Professional Legal Education which will conduct research and scholarship, and deliver legal training programs.

The centre will conduct coordinated research into professionally focused and skills-based legal education and embed the results of that research into the design and delivery of best-practice legal education and legal training courses.

The centre will become the third university research centre based at Bond, complementing two health and medical-focused facilities.

Letters to the editor: We invite and encourage our members and others in our professional community to engage in two-way conversation with Queensland Law Society and colleagues through letters to the editor, articles and opinion pieces, and by raising questions and initiating discussions on issues relevant to our profession, Email proctor@qls.com.au.

Making 'no win no fee' fair for all

I have a question for the president:
"How can the Society make 'no win no fee' fair for all lawyers?"

When I commenced practice 30 years ago I was told by some colleagues that I had missed the good times with conveyancing fees. My practice grew in other directions while others marketed themselves as cut-price conveyancers. We saw that as competition and the public experienced much lower conveyancing costs.

I soon learned that there were many competent barristers willing to help out with advice without payment on the basis that if successful work followed that advice they would be briefed and paid.

Soon clients who needed help emerged and there were counsel who advised and offered assistance and deferred payment of their fees until a successful conclusion.

I followed barristers' practice and informed my clients that there would not be any fees payable by them if they were not successful with their claims. There was a gradual increase in my personal injury files, the most memorable being *Kars & Kars* [1996] HCA 37 which concluded in the High Court. Excellent counsel, the then junior Michael Grant-Taylor and Sid Williams QC, provided their services on the basis that they would be paid if and when the client received payment of damages.

I perceived that some clients had problems with testator family maintenance/family provision claims. Many clients could not afford to fund litigation of this nature either. I briefed counsel who were prepared to forego payment until success was achieved.

My practice also provided assistance to people going through marriage breakups. Rather than put the clients through the cost of Hogan Orders to obtain legal fees, I took on cases on a similar basis.

While there always was a delay in being paid, there was no hitting the client up for additional fees for 'speculation'. The decision to proceed was one made in conjunction with the client and counsel for the usual fees with no uplift percentage. In the vast majority of cases the success of the client's case was more likely than not.

I believe that the majority of solicitors and barristers conducted themselves in a similar manner.

This type of provision of legal services was not advertised by the Law Society, yet the

Society referred clients to its members with a suggestion, at least, that they might retain solicitors on a speculative basis.

What causes me some concern is the advantage being taken of the goodwill engendered by solicitors and barristers over many years by the likes of Slater & Gordon, Shine Lawyers, Maurice Blackburn and others who have advertised for some years that they will accept instructions on a 'no win no fee' basis. They advertise this 'no win no fee' concept extensively, so much so that I often am told by clients that they want 'no win no fee' lawyers because they do work on a 'no win no fee' basis and that they didn't understand that I would do that.

Whereas 'no win no fee' once was thought to be the call of personal injury lawyers only, it now is clear that advertising reaches into family provision applications and family law property disputes.

Have the various law societies been blindsided by the 'no win no fee' advertisers who have taken the goodwill the profession has built up over many years and then added an uplift fee for good measure or, rather, good profit?

I do not blame the various law societies for the dilemma now faced by their members. I did not see it coming. My hindsight is far better than my foresight.

What I respectfully request of the Society is that it inquires of all members and the Bar Association of Queensland whether they think it worth informing the public through the media that the notion of 'no win no fee' is entertained by a large number of solicitors and barristers. Public awareness will create competition.

It seems to me that it would be beneficial to the public should the Society, on behalf of its members, advertise that 'no win no fee' is not a new concept offered by a few, but an established professional service offered by many members of both the Society and Bar Association.

I recall the Society imposing an advertising levy some years ago and I suggest that such a levy be raised again. I am concerned that the 'no win no fee' firms referred to earlier will place the Society under pressure to resist and it is for that reason I suggest that the Society seeks the support of the majority of members to take this forward. If there is not that support, then my fears for the careers of the next generation of our members must have been misplaced.

Peter Daley
Daley Law Practice Pty Ltd

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Have your say on a Human Rights Act for Queensland

This year, we face an historic opportunity to have our say on whether Queensland should introduce a Human Rights Act.

At the behest of Queensland's Attorney-General, the parliamentary Legal Affairs and Community Safety Committee (the committee) is conducting its Human Rights Inquiry, and is due to report to Parliament by 30 June 2016.

The path to the inquiry

Over the past half-century Queensland governments have considered the prospect of a Human Rights Act:

- In 1959, the Nicklin Country-Liberal Party proposed Constitutional provisions aligning with those set out in the Declaration of Human Rights of the General Assembly of the United Nations.¹
- Labor Attorney-General Matt Foley championed the reform in the late 1990s.

The current Labor Government's consideration of a Human Rights Act comes from a key commitment given by the Labor Party in return for Peter Wellington's support in helping it achieve government following last year's state election.

What is a Human Rights Act?

A Human Rights Act (sometimes called a 'Charter' or 'Bill of Rights') is a strong commitment to fundamental human rights and the consideration of rights in the introduction of new legislation and in policies. It does not, however, intrude on parliamentary supremacy in our democratic society. It does not stop governments pursuing policy objectives or introducing laws that affect rights. All rights have limits and in most situations, there are, in fact, competing rights that must be balanced depending on the needs of the time. A Human Rights Act can also be used by the courts to aid judicial interpretation in litigious disputes.

The considerations around a Human Rights Act are complex, manifold and it is certainly no 'silver bullet' for all the problems in our society. We are lucky to live in one of the most prosperous, developed and civilised societies in the world and there is an argument that this renders a Human Rights Act otiose. Yet there are, in fact, numerous human rights issues in Queensland right now which caution against complacency about the privileges we enjoy. These issues include women's rights in the context of domestic violence, access to health care and education in remote communities, access to justice and disability support.

Currently, Queensland lacks blanket legislative protection of basic human rights. There are some laws that incidentally offer protection for some human rights and our parliamentary committee system is charged with considering and protecting basic human rights. These measures have had mixed success.

Australia has also signed, and in some cases ratified, a number of international treaties and conventions that protect human rights; many of these conventions have not been implemented into the laws of Queensland (or of the Commonwealth) and therefore, are not binding on decision-makers. The issue of protection of rights is brought into sharper focus as Queensland is vulnerable, because Queensland's unicameral parliament lacks the checks and balances of bicameral legislatures.

Why is it important?

Australia is the only democracy in the world which has not adopted a Bill of Rights.²

This potential reform will impact all Queenslanders, especially members of the legal profession who are charged with a duty to uphold the rule of law and protect fundamental human rights.

Human rights are not just lawyers' tools; they benefit the community in general. Since Victoria's *Charter of Human Rights and Responsibilities Act 2006* came into force in 2007, Victoria's Human Rights Law Centre

by Dan Rogers and Julia Connelly



has published 100 cases citing the charter as having assisted in resolving matters positively across a broad spectrum of areas of law, including criminal, family, employment, property and guardianship.

In the context of domestic violence, a Human Rights Act has the potential to help to protect the rights of women and children to freedom from degrading treatment, to liberty and security of person, to the highest attainable standard of health, to equality in marriage and to life. A Human Rights Acts can give women who have experienced violence new tools when seeking protection of their rights, including access to adequate and appropriate services.

How can you help?

Queensland Law Society considers its role in helping to shape Queensland's human rights policy integral – a role which it can only carry out on behalf of you, its members, with the help of your input and expertise.

The Society is establishing a Human Rights Working Group (HRWG) to consult with its members and provide advice to the QLS Council about a position to be adopted on the fundamental issues raised by the inquiry.

Members of the profession interested in applying to be a member of the HRWG are encouraged to do so. The Society also welcomes comments from all members, who can email their thoughts to the HRWG at humanrights@qls.com.au. As this seminal issue develops, the HRWG will also establish a webpage for members to access useful resources and updates.

The HRWG anticipated holding its first meeting in late January (with submissions to the committee due on 18 April 2016).

Concluding remarks

At the time of writing, almost 20,000 people had signed the change.org petition in support of a Human Rights Act in Queensland. The focus on this issue will reach new heights throughout 2016 and, as members of the legal profession, we play a crucial role in the contribution to this debate.

Court of Appeal president Justice Margaret McMurdo spoke publicly on this issue in September last year. Her Honour said: "... I encourage each of you, as part of your celebration of 800 years of Magna Carta, to carefully follow and contribute to the parliamentary inquiry into whether Queensland should have a Human Rights Act."

Her Honour's speech is available at archive.sclqld.org.au/judgepub/2015/McMurdo230915.pdf. It serves as a balanced and useful starting point to those interested in the arguments for and against a Human Rights Act.

The introduction of a Human Rights Act could represent a strong statement about who we are as Queenslanders and who we aspire to be. A Human Rights Act also has the potential to help members of our Queensland community to better understand human rights and to build a safer, more respectful and caring society.

Dan Rogers is legal director of Robertson O'Gorman Solicitors and chair of QLS Human Rights Working Group. Julia Connelly is a Queensland Law Society policy solicitor.

Notes

¹ Justice MA McMurdo AC, 'A Human Rights Act for Queensland?', speech delivered at the University of the Sunshine Coast Inaugural Law Oration, 23 September 2015, archive.sclqld.org.au/judgepub/2015/McMurdo230915.pdf.

² Ibid.



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Australia's arbitral advance

Legislative changes to foster growth



The last decade has seen rapid growth in global investment, cross-border transactions and, perhaps inevitably, global disputes.

Procedural and cost advantages and confidence in an entrenched and tested legal framework have led commercial parties to increasingly favour international arbitration to resolve their disputes.

Parties to an arbitration agreement generally elect for proceedings to be conducted by a recognised international arbitral institution, such as the International Court of Arbitration, the London Court of International Arbitration or, in Australia, the Australian Centre for International Commercial Arbitration (ACICA).

Australia has grown as an arbitration venue in the Asia-Pacific because of the efficiency,

flexibility and certainty, and consequent cost advantages, of its arbitral process, as set out in the *International Arbitration Act 1974* (Cth) (IAA) and the ACICA's Arbitration Rules (Rules) and Expedited Arbitration Rules (Expedited Rules).

Recent amendments to the IAA, the Rules and the Expedited Rules, in particular the IAA's new 'opt-out' confidentiality process and the new consolidation and joinder provisions in the Rules, are consistent with international best practice and are likely to enhance Australia's status as an arbitration hub in the Asia-Pacific.

With continued growth in international arbitration expected in Australia in coming years, it is crucial for practitioners to be aware of the nature and commercial implications of the amendments to properly advise and protect the interests of their clients.

Amendments to the IAA

The *Civil Law and Justice (Omnibus Amendments) Act 2015* (Cth) (amending Act) entered into force on 13 October 2015. The amending Act makes key changes to the IAA relating to the recognition and enforcement of foreign arbitral awards and the confidentiality of the arbitral process which will have a significant impact on all arbitral proceedings conducted in Australia.

Recognition and enforcement of foreign arbitral awards

To date, the international framework contained in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (convention) has been adopted by 156 contracting states, including Australia.

Key amendments to legislation and procedural rules will enhance the growth of international arbitration in Australia. Report by Dr Kai Luck.



Papua New Guinea and East Timor, which represent some of the key operating markets for Australian businesses, particularly in the energy, resources and mining sectors, are among the states that have not yet ratified the convention.

Previously, a party to an arbitration agreement could not apply to an Australian court for the recognition and enforcement of a foreign award unless the award was made in a country which had ratified the convention or the party was otherwise domiciled or ordinarily resident in Australia or a country which had ratified the convention.¹

However, the amending Act removed this restriction so that all foreign arbitral awards will now be recognised and enforced in Australia, subject to limited statutory grounds of refusal set out in the IAA,² irrespective of the country where the award was made.

With one exception, before the amending Act was passed the statutory grounds of refusal were co-extensive with the uniform provisions contained in the convention³ and the Model Law on International Commercial Arbitration (model law),⁴ an international instrument of the United Nations Commission on International Trade Law adopted by 70 contracting states including Australia.

The exception related to circumstances in which a party to an arbitration agreement was under some incapacity at the time the agreement was executed. Previously, the IAA only allowed an Australian court to refuse recognition and enforcement of a foreign award if the party resisting recognition and enforcement was incapacitated. However, the amending Act corrected this discrepancy so that recognition and enforcement can now be refused if either the party resisting or the party seeking recognition and enforcement was incapacitated when the arbitration agreement was executed.⁵

Incapacity is unlikely to be a frequent basis for objection to the recognition and enforcement of a foreign award and indeed has not been the subject of a decision to date by an Australian court. Nevertheless, the amendment is still important because it eliminates an unprincipled distinction and

ensures that Australia's arbitration framework remains consistent with international best practice. That is a persuasive factor for parties in selecting an arbitration venue and the rules that will govern proceedings.

Confidentiality of the arbitral process

One of the key advantages of arbitration not offered by cross-border litigation is the potential for the parties to keep confidential both arbitral proceedings and arbitral awards. Indeed, this has proven to be one of the primary motivations for parties choosing to enter into an arbitration agreement as part of their commercial relationship,⁶ allowing the parties to limit public exposure and publicity that could be highly damaging to enterprise value and continued business operations.

Nevertheless, the High Court in *Esso Australia Resources Ltd v Plowman* (*Esso*)⁷ declined to follow English authority supporting an implied duty of confidentiality and held that arbitral proceedings and outcomes will only be confidential if expressly agreed to by the parties.

The amending Act changed the default confidentiality position under the IAA, originally introduced in 2010 to overcome the adverse effect of the *Esso* decision on Australia's popularity as an arbitration venue, from an 'opt-in' position to an 'opt-out' position. As a result, arbitral proceedings and outcomes in Australia will now be confidential (subject to limited carve-outs which preserve the parties' enforcement rights and ensure compliance with their legal obligations) unless the parties agree to the contrary.⁸ This is consistent with the position in leading arbitration venues in the Asia-Pacific such as Hong Kong⁹ and Singapore.¹⁰

While confidentiality was already the default position (absent an agreement by the parties to the contrary) under the Rules before the passage of the amending Act,¹¹ the revised IAA position is highly beneficial when the parties elect for arbitral proceedings to be conducted in Australia under alternative institutional procedural rules or in accordance with their own ad hoc rules.

The confidentiality amendment is therefore expected to play a significant role in continuing to drive Australia's growth

as an international centre of arbitration, removing the competitive advantage previously enjoyed by Australia's Asia-Pacific neighbours.

Amendments to the Rules

It is very common for cross-border transactions to involve multiple contracts between multiple parties. If a party has not executed an arbitration agreement, disputes involving that party cannot be referred to arbitration. However, even if a party does enter into an arbitration agreement, it may only apply to particular aspects of a transaction and it may be materially different to other arbitration agreements executed by the party and/or other parties in relation to the transaction. This creates the prospect of wasted costs and inconsistent arbitral awards arising from multiple arbitral proceedings.

Section 24 of the IAA allows an arbitral tribunal in Australia to make an order consolidating separate arbitral proceedings, potentially involving multiple contracts and/or multiple parties, if:

- a common question of law or fact arises in all the proceedings
- the rights to relief claimed in all the proceedings are in respect of or arise out of the same transaction or series of transactions, or
- there is some other desirable reason for an order to be made.¹²

Significantly, a consolidation order can be made even if the separate proceedings are being conducted before different arbitrators and/or under different arbitral rules.

Nevertheless, the utility of section 24 is limited by the fact that it only applies to a dispute if the parties to an arbitration agreement expressly agree.¹³

Webinar: International Arbitration Update

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This webinar will bring you up to speed with recent legislative amendments in relation to international arbitration and identify other Federal Government initiatives relating to international dispute resolution.

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The Rules did not previously provide any basis for an arbitral tribunal to consolidate separate arbitral proceedings. However, under the revised 2016 Rules, an arbitral tribunal can now consolidate two or more arbitrations being conducted under one or more arbitration agreements executed on or after 1 January 2016¹⁴ if:

- the parties have agreed to the consolidation
- all the claims in the arbitrations are made under the same arbitration agreement, or
- the claims in the arbitrations are made under more than one arbitration agreement but the arbitrations are between the same parties, a common question of law or fact arises in the arbitrations, the rights to relief claimed are in respect of or arise out of the same transaction or series of transactions, and the arbitration agreements are compatible.¹⁵

Although the Rules provide an arbitral tribunal with less discretion than the IAA and, unlike the IAA, only allow for the consolidation of separate arbitrations being conducted under the Rules (and not the procedures of another arbitral institution or those agreed to by the parties on an ad hoc basis), it is significant that the Rules permit consolidation even without the parties' express agreement. That, along with the new power in the Rules for an arbitral tribunal to order the joinder of additional parties to a proceeding (provided the parties are bound by the same arbitration agreement between the existing parties to the proceeding),¹⁶ offers additional flexibility, certainty and significant cost savings to disputing parties beyond that contained in the IAA.

The new consolidation and joinder provisions bring the Rules into line with those of other major regional arbitral institutions¹⁷ and are likely to further increase the status of Australia as an international arbitration venue for commercial parties.

Law governing the arbitration agreement

It is prudent for the parties to specify in their arbitration agreement:

- the procedural laws and rules that will govern the conduct of the arbitration
- the substantive laws that will govern the resolution of the underlying dispute
- the laws that will govern the arbitration agreement itself, including its interpretation and enforceability.

Reference by the parties in an arbitration agreement to the 'place' or 'seat' of the arbitration is taken to mean not just the physical venue of the arbitration but also the jurisdiction providing the arbitration's procedural laws and rules.¹⁸ While the matter is not without doubt, the preferred approach, outlined by the English Court of Appeal in *Weissfisch v Julius*,¹⁹ has generally been that the law of the place or seat of the arbitration will also govern the arbitration agreement if the parties have not expressly agreed otherwise.

This position has now been confirmed in an amendment to the Rules.²⁰ The amendment is of great value to contracting parties because, absent an express choice of law clause in an arbitration agreement, it avoids the potential for ambiguity and wasted costs on matters unrelated to the substance of the dispute.

Expedited arbitral proceedings

Previously, the Rules only allowed expedited arbitral proceedings to be conducted if all parties agreed in writing. However, the amended Rules now allow an arbitral tribunal to order expedited proceedings at the request of a single party in cases of exceptional emergency or where the amount in dispute is less than \$5 million.²¹ Given the significant time and cost savings that accrue to the parties from using the Expedited Rules' fast-tracked process, this amendment will further enhance Australia's appeal as an international arbitration venue.

Other amendments

The new Rules contain several other provisions which reflect international best practice, including:

- changing the exchange rate at which claims expressed in a foreign currency are to be converted into Australian dollars from the exchange rate applicable on the day ACICA receives a notice of arbitration to the day ACICA receives the relevant claim (being the time at which either a statement of claim or any applicable counterclaim or set-off defence is received).²² Because the day a claim is received may post-date the notice of arbitration,²³ this amendment may have a significant impact on the final nominated value of a claim.

- allowing notice to be provided by electronic means rather than physical delivery²⁴
- requiring the parties, rather than ACICA, to assume responsibility for serving a Notice of Arbitration and Answer to Notice of Arbitration²⁵
- providing ACICA with the power to appoint one or more independent experts to report on specific issues.²⁶

Conclusion

Australia is likely to see even greater growth in international arbitration in future years following recent amendments to the IAA and ACICA's Rules and Expedited Rules which protect confidentiality and ensure greater efficiency and reduced costs in the arbitral process.

As a result, practitioners should have a sound understanding of Australia's international arbitration legal framework and should keep abreast of new developments as the framework continues to evolve to meet the demands of a dynamic and often unpredictable regional economy.

Dr Kai Luck is a Brisbane lawyer.

Notes

¹ IAA, former s8(4) (now repealed).

² IAA, ss8(5)-8(8).

³ Convention, art. V.

⁴ Model law, arts 34(2), 36(1).

⁵ IAA, s8(5)(a) (as amended).

⁶ Malcolm Holmes, 'Drafting an Effective International Arbitration Clause' (2009) 83 *Australian Law Journal* 305, 306; John Wakefield and Katrine Narkiewicz, 'Australia's New Arbitration Regime: Five Years On' (2015) 2(1) *Law Society Journal* 72.

⁷ *Eso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

⁸ IAA, ss22(2)(ca)-22(2)(ce), 23C-23G.

⁹ Hong Kong Arbitration Ordinance (Cap.609).

¹⁰ Singapore, like the United Kingdom, relies on a judicially-recognised implied duty of confidentiality: see *Myanma Yangon Chi Oo Co Limited v Win Win Nu* [20003] SGHC 124.

¹¹ See new Rules, art. 22.

¹² IAA, ss24(1), 24(2)(a).

¹³ IAA, s22(5).

¹⁴ Rules, art. 2.5 (but note the parties can agree for an arbitration agreement executed before 1 January 2016 to be subject to the new consolidation and joinder provisions).

¹⁵ Rules, art. 14.1.

¹⁶ Rules, art. 15.

¹⁷ See, for example, arts 27-28 of the Hong Kong International Arbitration Centre Rules.

¹⁸ *Dubai Islamic Bank v Paymentech Merchant Services Inc* [2000] EWHC 228 (Comm).

¹⁹ [2006] App LR 03/08.

²⁰ Rules, art. 23.5.

²¹ Rules, art. 7.1.

²² Rules, appendix A, art. 2.2(c).

²³ Rules, arts 25-26.

²⁴ Rules, art. 4.1.

²⁵ Rules, arts 5.5, 6.4.

²⁶ Rules, art. 32.1.

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QLS Call to Parties

What progress has been made one year on?

A year ago we witnessed one of our state's most contentious elections.

The 31 January 2015 poll left Queenslanders waiting with bated breath until the minority Labor Government (with independent MP Peter Wellington's support) was announced almost two weeks later.

In the lead-up to the election, Queensland Law Society's Call to Parties document invited both major parties to articulate their policy on certain reforms identified by Society members as key Queensland legal issues.

It is timely, on the anniversary of the election, to review what the Society sought on behalf of our members, and identify the headway that our advocacy has achieved in terms of changes for the betterment of our laws, our lawyers and our community.

1. Queensland's law reform processes

The Society called for a commitment to evidence-based policy-making, including comprehensive consultation around new legislation. We also sought the use of justice impact statements in order to detail the prospective 'costs' of new Bills to the justice system. Both parties were entreated to remove existing clauses in community legal centre (CLC) contracts that restricted engagement in advocacy activities.

What has been achieved:

So-called 'gag' clauses have been removed from CLC contracts. Also, we have been heavily consulted on most legislative changes, and the Government has sought our expert opinion on a number of Bills, such as the Sugar Industry Bill and the proposed changes to parliamentary terms.

2. Queensland's judicial appointments process

The Society called for a commitment to establish a protocol for judicial appointments in Queensland, by reviewing current processes and consulting with stakeholders.

What has been achieved:

Following our advocacy and input from stakeholders, the Government released a discussion paper in relation to the best method for appointing judges and magistrates, covering several options including a standard protocol or a judicial commission.

We made comprehensive submissions on the discussion paper following feedback from our committees, and expect to attend the parliamentary committee hearing.

3. Access to justice in Queensland courts and tribunals

The Society called for a commitment to increase state funding of Legal Aid Queensland so Queenslanders' access to legal assistance was on par with the rest of Australia.

We also sought legal representation as of right in the Queensland Civil and Administrative Tribunal, and a comprehensive audit of all Queensland courts and tribunals with a view to improving facilities and services.

What has been achieved:

The Government has commenced an audit of Queensland Courts and tribunals, during the early stages of which the Society and its members have been consulted. We also have representatives on the working groups formed in relation to e-briefs and e-trials.

4. Criminal law in Queensland

The Society called for a commitment to refrain from the creation of new mandatory sentencing regimes, to evaluate the current mandatory sentencing regimes and to repeal anti-association legislation.

We requested a referral to the Queensland Law Reform Commission to investigate alternatives to incarceration. We also invited amendments to the *Crime and Corruption Act 2001* to require bipartisan support for commissioner appointments, and to ensure that the offices of chief executive officer and commissioner could not be filled by the same person.

We also asked the Government to reinstate Queensland's specialist courts, in particular the Murri Court, the Special Circumstances Court and the Drug Court.

What has been achieved:

The Government has moved to reinstate Queensland's specialist courts and this is progressing acceptably, with the Indigenous Issues List to become the Murri Court.

The Government has referred the Crime and Corruption Commission (CCC) to the Parliamentary Crime and Corruption Committee (PCCC) for review, with the Society making submissions and appearing at the PCCC hearing.

On 1 December 2015, the Attorney-General introduced the *Crime and Corruption Amendment Bill 2015*, referring it to the parliamentary Legal Affairs and Community Safety Committee to which we have made submissions. The Bill adopts the overwhelming majority of the recommendations made in the Society's submission to the PCCC.

5. Children's law in Queensland

The Society called for a commitment to remove 17-year-old offenders from Queensland's adult correctional facilities and place these young people within the jurisdiction of the *Youth Justice Act 1992* (the YJ Act).

We also urged the repeal of recent amendments to the YJ Act so that there is no publication of repeat offenders' identifying information (other than in exceptional circumstances and at the court's discretion), breach of bail is no longer an offence, all children's law matters are held in closed court, childhood findings of guilt with no conviction recorded are inadmissible when sentencing for adult offences, the principle of detention as a last resort is reinstated, and 17 year olds who have six months or more left to serve in detention are not automatically transferred from detention to adult corrective services facilities.

We also sought a review of the youth boot camps model.

One year after our last state election, what headway has been made in addressing the legal issues raised by Queensland Law Society members in the pre-poll Call to Parties document? Report by **Julia Connelly**.



What has been achieved:

On 1 December 2015, the Attorney-General introduced the Youth Justice and Other Legislation Amendment Bill 2015, which has been referred to a parliamentary committee.

The Bill's objectives include removing boot camp orders from the range of sentencing options for children; prohibiting the publication of identifying information about a child dealt with under the YJ Act; removing breach of bail as an offence for children; making childhood findings of guilt (with no conviction recorded) inadmissible in sentencing for adult offences; reinstating the principle of detention as a last resort; reinstating the Children's Court of Queensland's sentence review jurisdiction and expanding the jurisdiction to include magistrates' decisions in relation to breaches of community-based orders; and reinstating the principle of imprisonment as a sentence of last resort into the *Penalties and Sentences Act 1992* (the PS Act).

We have long advocated for these amendments through our submissions and in our 'Children and young people's issues' paper published in September 2012. The introduction of the *Youth Justice and Other Legislation Amendment Bill 2015* is an important step in addressing the concerns raised in the Call to Parties document and the Society commends the Government for the introduction of this Bill.

A particular highlight was that QLS was listed as the first key external stakeholder in the Attorney-General's first reading speech as well as the explanatory memorandum.

The Government has also advised of its intention (by way of media release) to phase out 17.5 year olds in adult prisons in 2016. This is an important step to bring Queensland in line with Australian states and territories.

6. Public administration decisions that impact elderly Queenslanders

The Society called for a commitment to increase funding for the Office of the Public Guardian each year by at least 3% or the CPI (whichever is greater) in light of its new and expanded statutory powers.

What has been achieved:

Whether there was increased funding in 2014/2015 is yet to be seen, as at the time of writing the Office of the Public Guardian is yet to publish its annual report; however, it is to be noted that the Office of the Public Guardian budget has more than doubled by virtue of the Commission for Children and Young People and Child Guardian (from \$11.754 million in 2013-14 to an estimated \$24.712 million in 2014-15).¹

7. Access to fair injuries compensation

The Society called for a commitment to repeal the impairment threshold for access to workers' compensation claims, to introduce a right of appeal to a court from decisions of the Medical Assessment Tribunal, and to guarantee that the introduction of the National Injury Insurance Scheme in Queensland will not result in the removal or reduction of existing common law claims entitlements.

What has been achieved:

The Government passed legislation removing the 5% threshold for workers' compensation claims on 19 September 2015. This followed the Society's submissions and appearance at a committee hearing. It is also worthy of note that the Government passed changes to the rights of firefighters in line with QLS submissions.

8. Public education about the Queensland justice system

The Society called for a commitment to establish and fund an independent statistical research body (or develop a partnership with an existing organisation) to publish regular analyses of Queensland crime and sentencing data.

We also sought the funding and implementation of a public education campaign to promote understanding and awareness of the Queensland legal system.

What has been achieved:

The Ministerial charter letter issued to the Attorney-General by the Premier included a direction to re-establish the Sentencing Advisory Council. In the Government's first budget, \$5.5 million over three years was allocated for this.

9. Appointments to key public service positions

The Society called for a commitment to fill key public service positions and statutory appointments (such as the Public Trustee and Public Guardian) within three months following merit-based selection processes.

What has been achieved:

There has been a recruitment process underway for the Public Trustee role, although no formal appointment has been made. Kevin Martin held the position of Public Guardian until August 2015.

Conclusion

The Society's campaign for government to take proactive measures towards reforming these nine key policy areas has catalysed substantive legislative change for better laws, helping you, our members, to become better lawyers and enjoy greater efficiency and predictability in your day-to-day practice.

On a broader advocacy plane, the Society's Call to Parties has also effected a significant shift in governmental consultation with us as a key stakeholder in its operations and policy development.

Our advocacy, on your behalf, at this high level sees the critical work of our 28 policy committees translated into tangible results on a regular basis.

Julia Connelly is a Queensland Law Society policy solicitor.

Note

¹ parliament.qld.gov.au/documents/committees/LACSC/2014/Estimates2014/que-15Jul2014.pdf.

Symposium

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Day 1 – Friday 18 March 2016











8am Registration

8.30am Welcome

8.40am Chief Justice's Address

9am Opening plenary – Ripples and Waves

10am Morning tea

	FAMILY	PROPERTY	PERSONAL INJURIES	BUSINESS	CORE CPD
10.30am	Case law update: A year in review (10.30-11.30am)	Community title case and legislation update	NDIS and NIIS: Structures, progress and pitfalls for the injured and our profession Sponsors  	How to distinguish licences and distribution agreements from franchise agreements	Remaking law firms: Responding to the changing legal landscape
11.15am	Living dangerously: Managing risks in family law practice (11.30am-12pm)	Tax in context: A masterclass perspective	Workers compensation revisited Sponsors  	Key contractual clauses: What's implied	Building personal and professional resilience during times of change
12pm	Lunch				
	FAMILY	PROPERTY	PERSONAL INJURIES	BUSINESS	CORE CPD
1pm	Working with victims and perpetrators of domestic violence: Powerful insights, practical solutions	Form 7 Notices to remedy under the microscope	Spotlight on psychiatric injury claims Sponsors  	Shareholder agreements masterclass: The good, bad and ugly	Practical challenges in small legal practices
1.45pm		5 minutes to 5: Preparing for the worst	Return to work: Can't work or won't work? Sponsors  		
2.30pm	Afternoon tea				
	FAMILY	PROPERTY	PERSONAL INJURIES	BUSINESS	CORE CPD
3pm	Masterclass: Advocacy 202	E-Conveyancing in practice	Delegation of a duty of care: When and how Sponsors  	PPSA: While you were sleeping	You think your client is lacking capacity: Have you considered your ethical obligations?
4pm	Symposium debate: 'You're not a real lawyer unless you've been to court'				
5pm	Symposium by Night networking function				

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Day 2 – Saturday 19 March 2016

8am Registration

8.30am Welcome

8.40am Attorney-General's Address

	SUCCESSION	CRIMINAL	COMMERCIAL LITIGATION	BUSINESS	CORE CPD
9am	Succession law case update	What's new in criminal law? Case law and legislation update	Recent developments in commercial litigation	Sham-wow! Sham contracting in review	How to convert client enquiries into profitable business through excellent client service
9.45am	Solicitors' duties in advising trustees and attorneys: Practical steps to protect yourself	The critical role of the solicitor in a criminal trial	Limitation periods: When does your cause of action start to run?	E-business: A framework for advice	Waste and value: Improving workflow and process efficiency
10.30am	Morning tea				
	SUCCESSION	CRIMINAL	COMMERCIAL LITIGATION	BUSINESS	CORE CPD
10.45am	5 things you ought to know about... family provision applications, estate planning and estate administration	Confiscation proceedings: Current law, future predictions (10.45-11.15am)	An examination of the roles of equitable claims in commercial disputes	Small businesses behaving badly: Consumer law update	Sitting is the new smoking, it's just a different butt
		Applications to exclude evidence which has been obtained illegally or improperly (11.15-11.45am)			
11.30am		Advising clients on the consequences of having a conviction: A case study analysis (11.45am-12.15pm)	Beware of the traps! Tips for dealing with clients	Big gains, small business: Managing CGT issues	Contractors and casuals: Tips for law practices in adopting flexible staffing practices
12.15pm	Lunch				
	SUCCESSION	CRIMINAL	COMMERCIAL LITIGATION	BUSINESS	CORE CPD
1pm	Probate disputes: What are the options?	The Moynihan legacy: For better or worse? (1-1.45pm) Snapshot view of QLS Criminal Law Committee (1.45-2pm)	Protecting the integrity of evidence	Trade marks: Harnessing the asset	Improving client satisfaction through pricing
2pm	Closing plenary: Vocal Intelligence				
3pm	Close				

*Savings based on member both-day pricing.

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Potts in practice

Welcome to 2016 QLS president Bill Potts



Queensland Law Society welcomes its 2016 president, Bill Potts. In this interview with **John Teerds**, he previews a year with a focus on profit in practice.

Many Queensland Law Society members may already feel well acquainted with 2016 president Bill Potts.

They may have seen his face on television or in the newspapers, or heard his voice on radio, speaking on justice issues, often involving criminal law, the practice area he is passionate about.

Bill readily admits his penchant for fronting the media, and even confesses a once-held ambition to follow a career as a journalist.

"One of the things that I try to use the media for – and frankly that they use me for – is to comment on legal matters of interest to the community," he said. "Those matters might be about an individual case, an important legal issue, or the way that government policy impacts on legal rights."

Bill has appeared on radio and television programs across the country.

"There are some recurring themes which underscore what I talk about in the media, such as explaining court processes, defending the role of the courts, advocating for the allocation of public resources and raising the alarm when overzealous legislators impinge on basic rights and liberties."

A little history

But who is Bill Potts, and where did he come from?

"I am a Mexican in the sense that I was born and bred in Melbourne," he said.

"There has only been one other lawyer in my family, who also coincidentally bore the moniker of William Potts – my family was quite unadventurous in their names. He was a solicitor in Castlemaine and I still have his brass plaque in my office."

Educated at Melbourne's Monash University, Bill completed a Bachelor of Arts and a Bachelor of Laws, followed by one-year articles "where I wore down three pairs of shoes going about the Titles Office, the Companies Office and doing settlements and the like. I was working for a conveyancing factory."

"In retrospect, I had terrible articles because I was really nothing more than an animated gofer. Unfortunately, my experience was not unique at the time.

"The harsh reality was, though, that I always wanted to be a criminal lawyer, but there simply weren't that many jobs available at the time for aspiring criminal lawyers.

"I remember taking part in what was called the 'godfather scheme' while I was at university. It involved following around a barrister who practised in crime. So I enjoyed an early taste of criminal law during my university years which encouraged my early aspirations that came from my reading and played to my proclivity for talking and arguing – showing off basically – and taking on causes. At some level, the hanging of Ronald Ryan in Melbourne in 1967 first sparked my interest."

Moving to the Gold Coast in late 1981, he was offered a job as a litigator at Price and Roobottom, an all-service firm and the region's oldest established. Bill admits he may have talked up his litigation skills – "the reality was that I'm really not a litigator's bootlace" – but the firm's partners were eventually "kind enough and wise enough" to realise that and allowed him to begin practising in criminal law, which he had always wanted to do.

"At the time there was really only one other criminal lawyer on the Gold Coast and within six months I had a sizeable criminal practice," he said. "I'd like to say it was talent, but the reality was I was in the right place at the right time, and I was keen as mustard. I got on my feet and haven't stopped."

In 2009, after 28 years at Price and Roobottom, Bill and other key people spun off a boutique crime and civil litigation practice to exploit opportunities across Queensland and develop alliances interstate.

"Potts Lawyers now has the largest private criminal practice in the state. We co-founded the Australian Defence Lawyers Alliance, which is made up of a leading criminal law firm in each state. It gives our clients national coverage, which is important in white-collar matters and also gives us a forum to discuss and develop our businesses in a cooperative way.

"Because lawyers are often in competition with each other, they are generally loathe to discuss their business methods and consequently many often feel isolated. The opportunity to share ideas and experiences, good and bad, can be liberating."

A key theme

This brings us to one of the themes that will run through Bill's term as QLS president.

"I envisage an even greater role for the Society in helping members find ways to be more profitable within their own work areas," he said.

"Solicitors are often subject to significant stress and the financial pressures on practices have never been greater. It's in the area of practice management that many solicitors sometimes struggle.

"The starting point is the fees and charges attached to the practice of law. We are working for our members to reduce the costs associated with the business of law, from Lexon premiums to the various state-imposed levies and fees. We also want the Society to reach out to every member and offer tools and assistance to assist them in running their businesses."

He believes the Society can also do a great deal to assist lawyers in small practices, including helping them to comply with the requirements of the *Legal Profession Act*, complying with costs disclosure obligations and managing their trust accounting.

Other objectives

The practice of law is "a large mansion with many rooms, to borrow a Biblical phrase", and the variety in size, location, practice areas and culture of our many law firms presents unique challenges. While Bill admits the Society can't be all things to all people, he sees it meeting the desire of many lawyers in firms of all sizes who want to be members of a respected professional organisation and draw on the rich experience which membership can offer.

"There is good sense in harmonising some of our laws with other states so that our members can practise across states with minimal disruption."



He also sees the Society's advocacy role as an important one in a vibrant democracy.

"My vision for the Society is to increase our advocacy for and on behalf of our members" he said. "We have a very important role in articulating and educating on the rule of law and, if necessary, preserving the independence of the courts. We have an important role in calling for better resourcing and laws which will modernise the way in which we practise and respond to the challenges to the traditional business model, thereby delivering tangible value to our members.

"There are opportunities for us to engage with government with respect to proper and sustainable funding for the community legal centres that are going to get a fiscal clip in the next two years and to secure better resources for the Legal Aid office.

"One of the great challenges facing the legal system is that many simply can't afford lawyers and the courts are dealing with more unrepresented parties. It's all very well for us to say that we're trusted advisors, and we are, but if we are trusted advisors and people can't afford us or there is no mechanism whereby sometimes the most vulnerable people in society can't get access to good quality legal advice, then the system starts to crack.

"So I hope to engage with the other leaders of the legal profession, the judiciary and certainly governments. I hope to be a president for all members whatever their area of practice or business model.

"The Society is fundamentally a membership organisation. I see opportunities for me to speak both to members and for members

about matters of importance, such as the economics of their practices, such as mental health, such as legal reform which will all promote greater efficiencies and sustainability in the business of law.

"Law is in a state of flux; there is increasing splintering of smaller firms, and at the same time there is increasing consolidation of large law groups, not to mention the digital disruption that is occurring every day.

"The difficulty for lawyers is that often we're conservative; we think it's about dealing with the same clients over and over again, but there are all sorts of challenges which are only going to accelerate."

Particular priorities in dealings with the State Government include modernisation of the *Trusts Act* and property law, adding a voice to the inquiry on a Human Rights Act and pushing for the incorporation of the Society. He says the Society is ready to work closely with government and consult on policies affecting the legal system and its many stakeholders.

Bill welcomes the recent transfer of the Society's remnant role in investigating complaints back to the Legal Services Commission and the extension of Society-funded legal assistance to practitioners facing complaints.

"I see improvement of the Society's relationship with its regulator, the Legal Services Commissioner, and develop a degree of cooperation in maintaining professional standards and protecting the public from the small minority of practitioners who do not maintain minimum standards." He does not think that lawyers who make a mistake or fall down because of personal problems ought

to attract a disciplinary sanction when other rehabilitative measures might be more effective.

"One of the things we are very proud of at the Society is our Ethics Centre and the services it provides to members every day. It is in my view the leader in its field. Reminding ourselves of the key touchstones of our profession, of its ethics, of proper and appropriate communication, of collegiality, is a very important thing. The Society has been very active in developing practical ethical guidance resources for members and this will remain a priority.

"We hope the whole Council will become active in meeting with our members. The DLAs' energy and ideas and local knowledge should be utilised. We need to promote stories about the good things that lawyers do for their clients and for their communities."

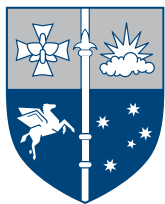
Central message

Bill says his key message boils down to pride in the profession. "In my past four years on the Council I've witnessed first-hand the contributions by solicitors from all types of firms to the Society's work, whether as committee members, presenters, senior counsellors, accredited specialists, patrons of events or users of its services. The time and energy invested in our Society by members is astounding.

"I'm proud to be a lawyer, and our Society represents an honourable profession, confident in our values and ethics and active in society, and I would like to see us further cement that; not just a slogan but something more visible."

John Teerds is the editor of Proctor.

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Beyond *Barbaro*

The High Court decision

Happily, the *Barbaro* saga may soon be at an end, says **Callan Lloyd**.



An article in the November 2015 *Proctor*¹ discussed the restrictions that *Barbaro v The Queen*² (and subsequent matters) placed on prosecutors and regulators in submissions on penalty in criminal and pecuniary penalty matters.

It foreshadowed the High Court's consideration of the restriction in pecuniary penalty matters following the grant of special leave from the Full Federal Court's decision in *Director, Fair Work Building Industry Inspectorate v CFMEU*³ (*CFMEU*).

It also identified the then recent decision of *Pharmacy Board of Australia v Jattan*⁴ (*Jattan*), in which Judge Horneman-Wren SC held the restriction did not apply in disciplinary matters.

On 9 December 2015 the High Court delivered its decision in the *CFMEU* appeal.⁵ The sole issue for consideration was whether the Full Federal Court erred in determining that *Barbaro* precluded a court from receiving an agreed (or other) submission from a regulator on the amount of a pecuniary penalty to be imposed under the *Building and Construction Industry Improvement Act 2005* (Cth) (the BCII Act).

The High Court unanimously overturned the Full Court's decision, holding that the *Barbaro* restriction has no application in pecuniary penalty cases under the BCII Act. The court's reasoning focused on the differences in nature between criminal sentencing and the imposition of pecuniary penalties.⁶ In particular, the High Court noted that:

1. Criminal prosecutions are accusatorial proceedings, in which the prosecution must establish guilt beyond reasonable doubt, and the accused cannot be required to assist in the prosecution of the alleged offence. Conversely, pecuniary penalty proceedings are civil and adversarial in nature, whereby the scope of available relief is largely framed and limited by the parties themselves.⁷
2. Criminal prosecutions are aimed at securing criminal convictions, whereas civil penalty proceedings are precisely calculated to avoid any notion of criminality.⁸

3. Criminal penalties are imported on notions of retribution and rehabilitation, whereas civil penalties are primarily, if not wholly, protective in nature and aimed at promoting the public interest associated with regulatory compliance.⁹
4. Criminal penalties involve a "uniquely judicial exercise of intuitive or instinctive synthesis of the sentencing facts" and balancing of relevant considerations by the sentencing judge.¹⁰ In contrast, in civil penalty matters the parties have considerable scope to agree on the relevant facts, consequences and appropriate remedies.¹¹
5. Under the BCII Act the regulator holds a unique position, including with it an expectation that it is appropriately positioned to provide informed submissions (in any pecuniary penalty litigation) of the effect of the relevant conduct on the industry, and the level of penalty necessary to achieve compliance.¹²
6. Unlike submissions from prosecutors in criminal matters, it is within the public interest that the regulator takes an active role in attempting to achieve a penalty it considers to be appropriate in civil penalty litigation.¹³

Accordingly, the High Court determined that *Barbaro* does not prevent a court from receiving submissions from either party as to an appropriate pecuniary penalty matters under the BCII Act. It is anticipated that, given the court's reasoning, the *Barbaro* restriction is unlikely to apply to pecuniary penalty matters more broadly.

Consequently, the position that existed prior to the Full Federal Court's decision in *CFMEU* will now return. That is:

"The Court will not depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case."¹⁴

It is anticipated that the High Court's decision will be welcomed by practitioners and clients, given the level of certainty that will return to negotiations with regulators in such matters.

Disciplinary decisions

As indicated, in *Jattan*¹⁵ his Honour held that the restriction from *Barbaro* was not applicable in professional disciplinary matters.¹⁶ In light of the basis for the High Court's decision in

CFMEU (namely the differences between criminal and civil proceedings), it would appear the position adopted in *Jattan* has now also been confirmed.

Queensland position

Of itself, the High Court's *CFMEU* decision may not suggest any likely change to criminal law practice implemented post *Barbaro*.¹⁷ As the High Court's Justice Gageler noted, no party before the court challenged the reasoning of the plurality in *Barbaro* in their submissions.¹⁸

In any event, the Queensland Government recently introduced legislation intended to return criminal sentencing to the pre-*Barbaro* practice through an amendment of the *Penalties and Sentences Act 1992*.¹⁹ This Bill was referred to the parliamentary Legal Affairs and Community Safety Committee following its first reading in early December.

Callan Lloyd is a solicitor at Gilshenan & Luton Legal Practice. He practices in the areas of criminal law, pecuniary penalty and professional discipline.

Notes

- ¹ Callan Lloyd, 'Beyond Barbaro: The story so far', *Proctor*, November 2015, pp24-27
- ² (2014) 253 CLR 58.
- ³ (2015) 105 ACSR 403.
- ⁴ [2015] QCAT 194.
- ⁵ *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors* [2015] HCA 46.
- ⁶ *Ibid*, [51].
- ⁷ *Ibid*, [52]-[53].
- ⁸ *Ibid*, [54].
- ⁹ *Ibid*, [55].
- ¹⁰ *Ibid*, [56].
- ¹¹ *Ibid*, [57]-[58].
- ¹² *Ibid*, [59]-[63].
- ¹³ *Ibid*, [64].
- ¹⁴ See *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285, 291.
- ¹⁵ *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] QCAT 194
- ¹⁶ That decision related to proceedings under the *Health Practitioner (Disciplinary Proceedings) Act 1999*, though as outlined in the November 2015 article his Honour's reasoning tends to suggest that position is applicable to disciplinary proceedings more generally.
- ¹⁷ See outline in Callan Lloyd, 'Beyond Barbaro: The story so far', *Proctor*, November 2015, pp24-27.
- ¹⁸ *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate & Ors* [2015] HCA 46, [69].
- ¹⁹ *Criminal Law (Domestic Violence) Amendment Bill (No.2) 2015*.



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A new standard for investigators?

Vega Vega v Hoyle & Ors [2015] QSC 111

The recent decision of the Supreme Court of Queensland in *Vega Vega v Hoyle & Ors* [2015] QSC 111 determined that the decisions of health service investigators can be decisions capable of review under the *Judicial Review Act 1991* (JR Act).

As a consequence, they require principles of natural justice to be followed leading to delivery of the report to the chief executive. This has implications for the way in which regulatory investigators deal with the concept of natural justice.

Role of investigators

A health service investigator (HSI) is appointed under s190 of the *Hospital and Health Boards Act 2011* (HHB Act) by the chief executive (that is, the director-general of the Department of Health).

The function of a HSI is to investigate and report on any matters relating to the management, administration or delivery of public sector health services, including employment matters (s189). Once the investigation is finalised, s199 of the HHB Act requires a report to be provided to the chief executive which may provide recommendations (s199(2)) on ways in which the administration, management or delivery of public sector health services, including employment matters, can be improved.

The power is then granted to the chief executive under s199(5) of the HHB Act, after considering the report, to issue a directive to the service, which must be complied with by the service under s199(6).

Argument in *Vega Vega*

In *Vega Vega* the applicant medical practitioner sought orders (on judicial review) that the HSI report be quashed and set aside, or that a declaration be made that the report was produced in breach of natural justice and therefore invalid. Further orders were sought to restrain the chief executive from taking any adverse action against the applicant based on the material contained in the HSI report.

The chief executive argued that the JR Act did not apply to the process for two reasons. The first was that the provision of the HSI report could not be characterised as a 'decision' captured by the JR Act "because they failed to exhibit the essential features of a decision and they lacked the character or quality of finality or an outcome reflecting something in the nature of a determination of an inquiry or dispute" as noted in the decision of *Wells v Carmody & Anor* [2014] QSC 59, [57]-[58].

The second was that "the Reports delivered to the Chief Executive of the Health Department had no legal effect and carried no legal consequences" so as not to invalidate the report under the principles applied by the High Court in *Ainsworth v The Criminal Justice Commission* (1992) 175 CLR 564.

Justice A Lyons noted that the structure of the HHB Act required that a direction of the chief executive could only be made once both a clinical review and a HSI report had been received and considered. Given this, Justice Lyons was of the view that "the Reports were a condition precedent to the making of a direction under s199(5) and not mere steps along the way" [at 199].

Further, as the HSI made recommendations and findings about the applicant's surgical skill and competence, his rights had been affected once the final report was provided to the chief executive [at 123]. In this way Justice Lyons was of the view that the very initiation of the HSI would have affected his reputation as contemplated by *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 585, "irrespective of what action ever flowed pursuant to s199(5)" [at 125].

Following these findings, Justice Lyons held that the HSI report was a decision reviewable under the provisions of the JR Act.

Principles of natural justice

The applicant argued that a number of principles of natural justice had not been adhered to during the progress of the investigation. One of the arguments was that despite his requests he was prevented from having access to the information and documentation relied on by the HSI, in particular the notes of the interviews conducted with some 58 witnesses.

Justice Lyons noted that the interviews were referred to in the final report so that the material provided by witnesses during those interviews was being relied on by the investigators in finalising the HSI report's finding and recommendations.

Justice Lyons noted the two reasons for non-disclosure of the interview notes were the requirement to provide confidentiality and that sufficient disclosure had been made of their contents [at 165]. In terms of confidentiality, Justice Lyons noted that it was not the confidentiality of the information being provided that was being protected, but the identity of the witnesses [at 168].

In Justice Lyons' view it was critical that the applicant knew whose evidence the investigators were relying on in forming the report [at 171]. Further, Justice Lyons said that "given the significance of the interviews, it was insufficient to provide extracts from statements rather than the entire content of the interviews" [at 177].

Regulatory investigations within the public sector may now require greater disclosure of information than previously anticipated. Report prepared by the Queensland Law Society Industrial Law Committee.

Her Honour found that there had been a breach of the rules of natural justice due to the failure to provide the interview notes. This failure also constituted procedural unfairness.

Conclusion on the HSI report

Justice Lyons concluded that:

1. The decisions of the HSI as contained in the HSI report provided to the chief executive were decisions of an administrative character made under an enactment.
2. Preventing the applicant from having access to the information and documents relied on by the HSI was a breach of natural justice.
3. Denying that information to the application and delivering the HSI report to the chief executive was a breach of natural justice.

Justice Lyons consequently regarded the applicant as being entitled to the orders he sought.

Conclusion

The functions of a HSI under the HHB Act are wide and an appointment will be dependent on the particular facts and circumstances involved. Similarly, as noted by Justice Lyons from the High Court's decision in *Kioa v West* (1985) 159 CLR 550, 627, "the rules of natural justice are not fixed and they depend on the particular statutory framework and the circumstances of each case, particularly the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting".

Notwithstanding these variables, those being investigated must be afforded natural justice by a HSI as the findings and recommendations necessarily required to be made by a HSI in delivery of the report to the chief executive will be decisions capable of judicial review.

Although *Vega Vega* deals with a specific regulatory regime, it is clear that the courts may adopt similar reasoning in relation to other regulatory investigations, such as those carried out by local and state government authorities.

Practitioners dealing with regulatory matters should bear in mind the implications of this case as it relates to disclosure of information relied on in making regulatory decisions.

This article appears courtesy of the Queensland Law Society Industrial Law Committee.



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Peter Lynch
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Preliminary discovery in the Federal Court

How to ‘fill in the gaps’ before starting proceedings

You may find yourself in a situation in which either the identity of the person your client wishes to sue is unable to be ascertained, or you simply do not have enough information at hand to properly consider whether or not your client can and should pursue a case against an identified respondent.

If you are contemplating proceedings in the Federal Court, then the *Federal Court Rules 2011* (Cth) (the rules) provide for a process of preliminary discovery whereby the court may order discovery of the necessary documents or information to ‘fill in the gaps’ so that you can commence proceedings.

Preliminary discovery under the *Federal Court Rules 2011*

Under Division 7.3 of the rules, there are two kinds of preliminary discovery, one of which is to ascertain the identity of a prospective respondent when that is not known, and the other to facilitate finding out whether a party has a case against a prospective respondent.

Rule 7.21 sets out the definitions of “prospective applicant” and “prospective respondent” used throughout Division 7.3.

Prospective applicant means “a person who reasonably believes that there may be a right for the person to obtain relief against another person who is not presently a party to a proceeding in the Court”. By necessity, the prospective applicant is the applicant for the purposes of an application for preliminary discovery under Division 7.3.

The prospective respondent is a person, not presently a party to a proceeding in the court, “against whom a prospective applicant reasonably believes the prospective applicant may have a right to obtain relief”.

When the identity of the prospective respondent is unknown

The first kind of preliminary discovery is governed by r7.22:

- (1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant satisfies the Court that:
 - (a) there may be a right for the prospective applicant to obtain relief against a prospective respondent; and
 - (b) the prospective applicant is unable to ascertain the description¹ of the prospective respondent; and
 - (c) another person (the other person):
 - (i) knows or is likely to know the prospective respondent’s description; or
 - (ii) has, or is likely to have, or has had, or is likely to have had, control of a document that would help ascertain the prospective respondent’s description.

Having regard to this rule, the applicant must show:

1. *First*, that it is a prospective applicant within the meaning of rule 7.21, which means that it believes that there may be a right for it to obtain relief against another person who is not presently a party to a proceeding in the court, and that the belief held is reasonable.² This appears to require evidence of the subjective belief of the applicant coupled with evidence to form the basis of a submission that the subjective belief held is reasonable (which evidence is also relevant to the next element).
2. *Secondly*, that it may have a right to obtain relief against a prospective respondent (which relief is able to be obtained in the Federal Court). This requires evidence of facts which may give rise to a cause of action against that prospective respondent being “a real case, which is not fanciful”.³ It will also

need to be shown that the prospective applicant may have a right to obtain identified relief against the prospective respondent based on that cause of action.

3. *Thirdly*, that it cannot identify the prospective respondent. This requires evidence that the applicant has made reasonable inquiries to try and find out the identity of the prospective respondent but has been unsuccessful, and evidence of why it has been unsuccessful so as to demonstrate the need to obtain the order from the court.
4. *Fourthly*, that the respondent to the application knows or is likely to know the identity of the prospective respondent, or (in effect) is able to access a document which reveals that identity. This will require more than speculation that the respondent has such knowledge or access – in the absence of direct evidence, evidence will need to be adduced from which the court can infer that the respondent has such knowledge or access.
5. *Finally*, that the court should exercise its discretion to make an order of the kind listed in rule 7.22(2). Factors which will affect the exercise of discretion will depend on the case at hand but may encompass matters such as the strength of the prospects of the proposed case to be brought against the prospective respondent, whether the prospective applicant has taken all reasonable steps to identify the prospective respondent, any explanation for not taking particular steps to identify the prospective respondent, prejudice to the respondent if the order is made, whether prejudice to the respondent can be overcome and whether the form of the order sought exceeds that which is required in the circumstances.

When you already know the identity of the prospective respondent

Rule 7.23 provides that an applicant may obtain preliminary discovery when the identity of the prospective respondent is already known:

Kylie Downes QC and Fiona Lubett discuss the steps necessary to identify a potential respondent or locate documents or details needed before commencing proceedings.



- (1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant:
 - (a) reasonably believes that the prospective applicant may have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained; and
 - (b) after making reasonable inquiries, does not have sufficient information to decide whether to start a proceeding in the Court to obtain that relief; and
 - (c) reasonably believes that:
 - (i) the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent's control documents directly relevant to the question whether the prospective applicant has a right to obtain the relief; and
 - (ii) inspection of the documents by the prospective applicant would assist in making the decision.
- (2) If the Court is satisfied about matters mentioned in subrule (1), the Court may order the prospective respondent to give discovery to the prospective applicant of the documents of the kind mentioned in subparagraph (1)(c)(i).

Having regard to this rule, the applicant must show:

1. *First*, that it is a prospective applicant within the meaning of rule 7.21, which means that it believes that there may be a right for it to obtain relief against the prospective respondent (which relief is able to be granted in the Federal Court) and that the belief held is reasonable.⁴ This appears to require evidence of the subjective belief of the applicant coupled with evidence to form the basis of a submission that the subjective belief held is reasonable (which evidence is also relevant to the next element).
2. *Secondly*, that it may have a right to obtain relief against the prospective respondent. This requires evidence of facts which may

give rise to a cause of action against the prospective respondent. It will also need to be shown that the prospective applicant may have a right to obtain identified relief against the prospective respondent based on that cause of action.

3. *Thirdly*, that it does not have sufficient information to decide whether to start a proceeding in the court to obtain that relief. This requires evidence that it has made reasonable inquiries (including identifying what those inquiries are). The application should also place before the court all of the evidence already available to it relevant to the sufficiency of the information it possesses.
4. *Fourthly*, that it reasonably believes that the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent's control documents directly relevant to the question whether the prospective applicant has a right to obtain the relief and inspection of the documents by the prospective applicant would assist in making the decision. Again, this appears to require evidence of the subjective belief of the applicant coupled with evidence to support a submission that the subjective belief is a reasonable one.
5. *Finally*, that the court should exercise its discretion to make an order of the kind listed in rule 7.23(2). Factors which will affect the exercise of discretion will depend on the case at hand but may encompass matters such as the strength of the prospects of the proposed case to be brought against the prospective respondent, whether the prospective applicant has made all reasonable inquiries to obtain the information necessary to decide whether to start a proceeding against the prospective respondent, as well as the nature of any explanation for not taking particular steps, prejudice to the respondent if the order is made (such as, for example, whether the order will require the disclosure of confidential or commercially sensitive documents), whether identified prejudice to the respondent can be overcome and whether the form of the order (for example, the voluminous nature of the preliminary discovery sought) exceeds that which is required in the circumstances.

The procedure for an application seeking preliminary discovery

Pursuant to rule 7.24(1), an application under rule 7.22 or 7.23 is made by way of a Form 14 originating application.

The originating application must be accompanied by an affidavit stating the facts on which the prospective applicant relies and identifying, as precisely as possible, the documents or categories of documents to which the application relates.⁵ The application and affidavit must be served personally on each person against whom an order is sought.⁶

The procedure for preliminary discovery is intended to be brief and is not intended to devolve into a trial of the underlying matter.⁷ Thus the evidence utilised is in written affidavit form and does not usually involve any cross-examination of the witness who has sworn the affidavit.

Costs of the application

By rule 7.29, a person against whom an order is sought or made under Division 7.3 of the rules may apply to the court for orders that the prospective applicant give security for the person's costs and expenses of, for example, complying with the order (r7.29(a)) and pay their costs and expenses (r7.29(b)).

Kylie Downes QC is a Brisbane barrister and member of the Proctor editorial committee. Fiona Lubett is a Brisbane barrister.

Notes

¹ The word 'description' is defined in the Schedule 1 Dictionary to the rules as (in the case of an individual) the person's name, residential or business address and occupation, and (in the case of a person that is not an individual), the person's name and the address of either the person's registered office, principal office, or principal place of business.

² *Dallas Buyers Club LLC v iiiNet Ltd* (2015) 112 IPR 1 at 14; [2015] FCA 317 at [52].

³ *Dallas Buyers Club LLC v iiiNet Ltd* (2015) 112 IPR 1; [2015] FCA 317.

⁴ *Dallas Buyers Club LLC v iiiNet Ltd* (2015) 112 IPR 1 at 14; [2015] FCA 317 at [52].

⁵ Rule 7.24(2).

⁶ Rule 7.24(3).

⁷ *Dallas Buyers Club LLC v iiiNet Ltd* (2015) 112 IPR 1 at [6].

Don't think twice, it's alright...

to take annual leave

by Kaitlyn Rafter



After reading the title of this article, it is probably unsurprising that I would begin with a reference to the myriad of health and wellbeing concerns, both mental and physical, which plague the legal profession.

I am sure that you have all seen the stats, and as such there is no need to repeat these, however it is, as always, a serious issue that requires acknowledgement.

It is again unsurprising that, as members of a profession which is renowned for being comprised of people exemplifying Type A personality traits (generally speaking, ambition and perfectionism, aka high-achieving 'workaholics'), that work takes precedence over our need to 'take a break'.

Add to this internal pressure the external pressure of the historical demons which still (to an extent) haunt our professional culture, and the result is that many young (and established) lawyers do not take their annual leave, namely for fear of it reflecting poorly on their dedication to their jobs and negatively impacting their career progression opportunities. Alternatively, they simply feel too busy.

Now, apart from the obvious financial liability to employers when employees continuously retain annual leave days (which is not really the point of this article), there are significant advantages to be gained from employees taking annual leave.

Having just cashed in every single one of my annual leave days, plus some more, I recently returned from the incredible experience that was backpacking Europe. I therefore thought this would be the perfect time to not only share with you the valuable lessons I learnt from taking a holiday, but also urge all young practitioners to exercise any and every opportunity to do the same.

Although it is important not to overstate the benefits of paid leave as a cure-all, a number of studies suggest there is significant benefit

associated with employees taking up *all* paid leave entitlements.¹ Not taking paid leave presents serious threats to health, for both men and women, predominantly in relation to heart attacks and cardiovascular concerns and disease.²

Obviously taking annual leave allows a person time to do things they enjoy and find meaningful. However, more importantly, doing so has been identified as an effective therapy for depression, anxiety and burnout.³ Do these words sound familiar? Accordingly, taking annual leave is therefore another tool available in the fight against mental illness, which as I mentioned earlier, is heavily impacting the legal profession.

On a (much) less academic and more personal level, I wanted to share what I learnt from taking *all* of my leave and trekking off around the world.

'It has become appallingly obvious that our technology has exceeded our humanity.'
– **Albert Einstein**

Travel forces you to switch off and relax. Literally.

I did not have international roaming activated on my mobile phone, and apart from sparse and incredibly poor wi-fi access, my phone became more of a glorified paper weight than what was once a permanent fixture in my hand. Further, while travelling I was rarely in possession of paper, let alone paper that required weighting and alas it was therefore a fairly useless object altogether.

I must admit however, at first I felt high levels of anxiety that I could not load my emails and consequently feared that the world as I once knew it could implode any second as a result. That feeling did pass, though, and I was forced to completely resign myself to trust my very capable colleagues to handle whatever may or may not happen on files while I was away.

(Spoiler: When I returned, the firm had not burnt to the ground because, let's be honest, as I am only a junior, everyone else was clearly more than capable to handle my workload).

'Travel and change of place impart new vigor to the mind.'
– **Lucius Annaeus Seneca**

Last but not most importantly, although I love what I do, I have discovered that there is so *much more* to living a life than to spend it only in the office. This may seem like a fairly obvious realisation to many and perhaps I am a little late to this party. However I had found that after six years of law school, the constant pressure to get good grades, so you can go through the stressful clerkship selection process, so that from that clerkship you are at least eligible to be considered for an interview for a graduate position, let alone the constant anxiety before you finally land that grad job (should you be so lucky!), there was very little that ever factored in my life other than getting to where I currently am. From that then comes along the emphasis on meeting billable hours and keeping clients happy.

I know that a significant portion of this inner turmoil was produced from those wonderful Type A personality traits I mentioned earlier. However it is great to finally gain back the perspective that I had let escape me. I also say with conviction that my legal capabilities have not been hindered as a result of essentially 'letting go' of that stress – rather, the opposite.

Having conveyed what I think is a somewhat convincing argument, my conclusion is therefore very simple: What are you waiting for?

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee's Proctor working group is chaired by Greer Oliver (GDavies@mcw.com.au) and Hayley Schindler (h.schindler@hopgoodganim.com.au). Kaitlyn Rafter is a solicitor at HopgoodGanim Lawyers.

Notes

¹ Skinner, N. & Pocock, B. (2013, in press). Paid annual leave in Australia: Who gets it, who takes it and implications for work-life interference. *Journal of Industrial Relations*, 55(5) 681-698.

² Ibid.

³ Joudrey, AD & Wallace, JE (2009). *Leisure as a coping resource: A test of the job demand-control-support model*. *Human Relations*, 62(2), 195-217; Walsh R (2011) Lifestyle and mental health. *American Psychologist*. Advance online publication January 17, 2011.

Termination hits a bump in the road

Kenny v BHP Coal Pty Ltd [2015] FWC 4231

Employers must ensure that an investigation of any employee is conducted with consistent standards and procedural fairness, as this recent case illustrates. Report by **Matthew Smith**.



A worker has been reinstated following a Fair Work Commission (FWC) hearing, after originally being dismissed for causing a vehicle rollover.

The dismissal, which was based on a questionable expert report, was held to have been made based on an invalid reason, with the FWC instead having favoured the applicant's evidence that the incident was merely an accident.

This case, *Kenny v BHP Coal Pty Ltd* [2015] FWC 4231, again highlights the interplay of the safety and employment spheres, which in-house lawyers and law firms need to understand. It also emphasises the importance of conducting thorough investigations to justify disciplinary action. In doing so, the case reiterates that, even in situations in which a serious incident has occurred, employees are guaranteed consistent standards and procedural fairness when subject to investigation.

Background

On 29 October 2014, Mr Michael Kenny, an electrician for BHP Coal at the Goonyella Riverside Mine, was scheduled to work a night shift from 6pm to 6.15am. However, at the start of the shift a large storm disrupted his normal routine and resulted in his failure to complete an Occupational Safety Performance Assessment Technology (OSPAT) test and a pre-start vehicle check, both of which are mandatory prior to the start of each shift.

During his shift, Mr Kenny was driving along an unsealed road in a Toyota Landcruiser when he somehow managed to roll the vehicle, claiming that he lost control in a soft spot of the road that was concealed by "bulldust". BHP instead relied upon an "expert report" conducted by a traffic incident expert, which suggested that

the cause of the rollover was the negligent or deliberate actions of Mr Kenny. Further, BHP argued that the combination of the pre-start failures and Mr Kenny's unsafe driving caused a loss of confidence in his ability to work in a safe manner.

Context is everything

Mr Kenny claimed the significant storm activity was the reason he didn't carry out the OSPAT test and the pre-start vehicle check. In addition, BHP acknowledged that without its finding of unsafe driving, the pre-start check and OSPAT test failures alone would not have been significant enough to result in termination. Therefore, much of the case turned on whether Mr Kenny's driving had, in fact, been negligent or intentional.

As an employee of BHP Coal for almost 28 years, Mr Kenny had at all times exhibited the behaviour of a prudent, experienced and safety-conscious employee, and there were several factors relating to the incident that supported this assertion. These were:

Mr Kenny was travelling about 20kmh below the maximum speed limit (80kmh) at the time of the incident.

The purpose of Mr Kenny's trip was to collect insulated reading glasses, equipment he considered essential for the safe execution of a task.

When Mr Kenny first arrived on site, he advised the outgoing crew of the potential hazards related to the storm.

Mitigating circumstances, such as Mr Kenny's length of service and his unblemished safety record, should perhaps have been afforded more weight by BHP when considering whether to terminate his employment, and demonstrate the strong position of long-serving employees in safety investigations.

Investigations

This case also raised questions about the adequacy of safety incident investigations

and their role in determining what, if any, disciplinary action an employer should take. The investigation in this case started poorly, when a report was completed on the basis of information supplied solely by BHP.

More specifically, the author of the report did not undertake a site visit and did not obtain material from or interview Mr Kenny. He was also not provided with information about the depth of the bulldust and conceded that the report was "simple" in nature. To make matters worse, the report asserted that the incident was caused by Mr Kenny's inattentive driving and panicked reaction.

An additional four ICAMs (a type of safety investigation analysis method) were then undertaken by BHP in an attempt to properly determine the root cause of the incident, each of which found Mr Kenny's reckless or intentional driving was the catalyst.

Summary

Regardless of BHP's various investigations, the FWC ultimately found Mr Kenny's driving had not been either intentional or negligent, and therefore held there was no valid reason for his termination. As a result, Mr Kenny was not only reinstated, but was also awarded restoration pay minus a deduction of two months due to the safety check omissions.

This case therefore highlights the need to ensure safety investigations are conducted swiftly, with a focus on obtaining detailed evidence to ensure that an objective and well-informed decision can be made. Further, it enforces the need for employers to ensure that procedural fairness is provided, including consideration of all relevant circumstances such as the employee's tenure and performance history.

Matthew Smith is a partner at Sparke Helmore Lawyers. The assistance of Mason Fettell in the preparation of this article is gratefully acknowledged.

Human rights, disability and adequate provision

‘To deny people their human rights is to challenge their very humanity’¹

Human Rights Day² was on 15 December 2015.

Three days later, on 18 December 2015, the Court of Appeal delivered its judgment in *Abrahams (by his litigation guardian The Public Trustee of Queensland) v. Abrahams* [2015] QCA 286 (*Abrahams*) which involved a determination that the primary judge, in refusing to sanction a compromise of the disabled adult's application for further and better provision (FPA), failed to have regard to human rights principles when ascertaining his needs.

It is estimated that 4.2 million Australians have a disability. In Queensland, that translates to 17.7% of the population, almost one in every five Queenslanders.³ In this context, the probability of estate-planning clients having a dependent family member with a disability is high.

While primarily concerned with the correct approach for the court in sanctioning compromises of FPAs, *Abrahams* provides guidance to testators, potential applicants and their advisors on the matters they should consider in ascertaining sufficiency of provision for eligible disabled applicants.

On 10 November 2015 the Court of Appeal made orders disposing of the application for further provision brought by the disabled adult son against the estate of his late father. The orders granted a sanction of a compromise reached between the estate and his litigation guardian, the Public Trustee⁴, which in the first instance, the primary judge refused to sanction. The decision delivered on 18 December set out the court's reasons.

The testator died on 7 January 2014, leaving a formal will dated 25 February 2010 and an informal will dated 12 December 2012. The informal will left a quarter of the estate to the applicant, however an application to propound that will failed,⁵ leaving the 25 February 2010 will as the last valid will. The 25 February 2010 will made no provision for the applicant.

The applicant was a 46-year-old man with Down Syndrome. He had “serious impairment”⁶ and had resided with his parents until the age of 41. In 2009 the Public Trustee of Queensland was

appointed his administrator for financial matters, after which the applicant secured accommodation in a group home with Multicap, a government-funded facility.⁷

The deceased's estate was valued at \$443,175.85,⁸ with the applicant's assets totalling \$21,472.⁹ The compromise was for the applicant to receive \$140,000, inclusive of costs.¹⁰ There were deserving, competing claims on the estate.

In evidence before the primary judge was a needs assessment report detailing the applicant's needs. The primary judge considered it to be “a contentious document, although there was no competing evidence”¹¹. The transcript revealed that the primary judge appeared to take the view that the applicant's needs were wholly met by his parents in their lifetime and at the time of the application wholly by the state.

His Honour observed that the applicant was “someone who doesn't go out on their own ... he can't just go down to the pub, have a few drinks, bet on the races ... go to the movies. He's not going to do that.”¹² In response, counsel for the applicant agitated to take the primary judge through the needs report, but this was refused.¹³

The grounds of appeal were that:

- (i) “The applicant suffered an injustice by being denied the benefit of a compromise of his claim under s 41(1) of the *Succession Act 1981* (Qld).
- (ii) The basis upon which the application was refused was inconsistent with community standards in relation to the exercise of the jurisdiction to make orders pursuant to s41(1) of the Act.
- (iii) The applicant was denied natural justice by refusing to hear further submissions on the basis for the compromise.
- (iv) The primary judge in making those errors failed to afford the applicant a proper exercise of the jurisdiction required to be exercised.”

The court found that the applicant was not afforded natural justice¹⁴ and that the primary judge had “failed to properly exercise the jurisdiction of the court”.¹⁵ He had either

operated under an “erroneous perception” or “substituted his own views about the applicant's needs, which were contrary to the evidence before him”.¹⁶

As to the nature of the court's jurisdiction in sanctioning FPAs, the appropriate approach for the court to take was set out in *Watts v The Public Trustee*¹⁷ – “Once the jurisdictional question had been satisfied, considerable weight must be given to the agreement and the ‘[t]he circumstances would be unusual indeed for the court to override the agreement of the parties who are of full age and where there is no evidence of undue influences at work in reaching the agreement’.”¹⁸

As to the community standards, the applicant's human rights were of key consideration:

“[T]he primary judge's reasons for refusing to sanction the settlement failed to acknowledge the significance of contemporary International Human Rights Instruments,^[3] which recognise the rights of people with disabilities, and failed to show an appreciation of the principles which should have been taken into account in making a decision in respect to a person with a disability. The primary judge failed to recognise that the applicant has the same basic human rights as anyone else and that he has a right to respect for his human worth and dignity.

[27] That dignity would be enhanced by extra financial assistance to provide him with new clothes and furniture including a functional television set. The applicant is a valuable member of the community. He should be recognised as such by being encouraged and supported to participate more actively in the community. Such participation would be facilitated by financial assistance from the estate of his late father to attend social and recreational activities and to undertake an annual holiday.

[28] The relevant human rights principles emphasise the importance of the applicant being encouraged and supported to achieve his maximum, physical, social, emotional and intellectual potential and becoming as self-reliant as possible.”¹⁹



with Christine Smyth

Probate requisitions – new practice

At a meeting with Probate Registrar Leanne McDonell late last year, we discussed ways in which the eCourts area of the courts' website could be improved.

As a result, Registrar McDonell has actioned an improvement to the eCourts website in regard to probate applications. Now, when a requisition on a probate application issues, the notice of the requisition will also include a reference to the subject matter of the requisition, by identifying the number of

the requisition as described on the list of common requisitions published on the Queensland Courts website.

It will also display the initial of the registrar or deputy registrar who issued the requisition. However, there will be requisitions which do not have a number, as they are uncommon requisitions.

Thank you Registrar McDonell for implementing this for the benefit of the profession.

Notes

- ¹ Nelson Mandela, address to the joint session of the House of Congress, Washington DC, United States, 26 June 1990.
- ² un.org/en/events/humanrightsday.
- ³ qld.gov.au/disability/community/disability-statistics.
- ⁴ See paragraph [1] for the orders made.
- ⁵ [11].
- ⁶ [23] Counsel's oral submissions.
- ⁷ [6].
- ⁸ [10].
- ⁹ Ibid.
- ¹⁰ [13].
- ¹¹ [14].
- ¹² [23].
- ¹³ [23]-[24].
- ¹⁴ [24].
- ¹⁵ [25].
- ¹⁶ Ibid.
- ¹⁷ [35] where the court recites the approach required in sanctioning FPAs.
- ¹⁸ [44].
- ¹⁹ [26]-[28].

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

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Family law and arbitration

Unfamiliar bedfellows?

One relationship likely to become stronger in 2016 is that of family law and arbitration. **Rebekah Bassano** explains how.



Mediation, as a form of alternative dispute resolution (ADR), is usually the first step in attempting to resolve family law matters.

However, in a family law financial matter,¹ parties also have the opportunity to engage with another ADR method – arbitration.²

While arbitration is used regularly in other areas of law, in family law it is not the 'go to' ADR process. While there are some practitioners who practise and use arbitration processes regularly, I would suggest the vast majority of clients and practitioners do not realise that arbitration is a possibility, let alone that it can be ordered by the court.³

Legislation

The *Family Law Act 1975* (the Act),⁴ *Family Law Rules 2004*⁵ and *Family Law Regulations 1984*⁶ provide for arbitration as a "non-court based family service". Section 10L of the Act provides a definition of arbitration and sections 10M through to 10P provide for the definition of the arbitrator, their ability to charge for arbitration and the immunity of the arbitrator in such proceedings. Practitioners are also required to make parties aware of arbitration (as an ADR process), and it is included in the Family Court/ Federal Circuit Court brochure, 'Marriage, Families and Separation', which must be provided to clients and the other party.

The Family Court and the Federal Circuit Court can also order parties to attend arbitration.⁷ On application to the court by a party, s13E of the Act allows – on the provision that the parties consent to arbitration – for the court to make an order referring the proceedings [family law financial proceedings] or any part of them, or any matter arising in them, to an arbitrator for arbitration.

Additionally, "a court that has jurisdiction under this Act [*Family Law Act*] may, on application by a party to relevant property or financial arbitration, make orders the Court thinks appropriate to facilitate the effective conduct of the arbitration".⁸

So why use arbitration?

So many family law proceedings are protracted. It could be likened to a war

in which "...in truth, everything which was to constitute moral depravity and human turpitude was to be found in it. It was pregnant with misery of every kind."⁹

Litigation does not allow the parties to take ownership of the process, and while mediation can assist in reducing part of the conflict, arbitration in my view is a form of dispute resolution that allows the parties more control and ownership of the process.

The parties and their respective legal representatives together with the decision-maker (the arbitrator) can agree to a number of matters including the date, time and place of the arbitration, timetables for material to be provided, how the arbitration is to be conducted (hearing or on the papers) and other matters relating to the arbitration agreement.¹⁰

While it sounds like the court process, it can be done within a specific time period, including when the award and the arbitrator's reasons for making the award are to be delivered. Additionally, the award can be registered with the court,¹¹ providing finalisation with respect to the issues requiring an award.

Additionally, some practitioners using arbitration also utilise it in conjunction with mediation, in either a med/arb or arb/med model. For example when parties cannot agree at mediation on an issue (or the entire matter), they can elect to arbitrate on the issue (or the entire financial matter) provided it is not within the exception of Family Law Regulation 67C – Matters that may not be arbitrated.

These practices are evolving and will require considerable thought as to what information is to be considered, or if there should be one mediator and one arbitrator, so that mediation discussions do not contaminate the arbitration process.

The year of family law arbitration?

So, in 2016 what direction do practitioners want to see the family law arena move toward? My view is that, if the parties have an ability to design the process in consultation with the arbitrator, then some turmoil could be reduced. Most parties become more focused once they are invested in the process and consulted.

The opportunity to have arbitration provides earlier certainty for parties and I would suggest

that it would certainly assist their emotional and financial wellbeing, as well as the wellbeing of family law practitioners. The burden borne by practitioners in constant litigation and drawn-out argument (which is not their own), from an anecdotal perspective, is significant. This process should be viewed as complementing the court system by supporting parties wishing to resolve financial disputes within an agreed timeframe¹² together with, at the least, a timely and cost-effective resolution.

The reality of the current court process is that financial matters are not afforded priority and parties are often left for a substantial time waiting for their 'day in court'. Maybe with arbitration (or a combination of mediation, litigation and arbitration) more parties will have their matters resolved in a more timely manner and legal practitioners will be able to "pronounce that the kingdom is undone".¹³

Editor's note: On 15 December 2015 the Family Court issued the Family Law Amendment (Arbitration and Other Measures) Rules 2015, which provide more certainty for practitioners utilising arbitration in family law.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee. Rebekah Bassano is principal of Bassano Law, Cairns.

Notes

¹ See Reg. 67C of the *Family Law Regulations 1984* for matters that may not be arbitrated.

² An arbitrator – see Reg. 67B of the *Family Law Regulations 1984* for the prescribed requirements for being an arbitrator. The Australian Institute of Family Law Arbitrators and Mediators (AIFLAM) also has a list of family law arbitrators.

³ Arbitration in family law proceedings can only occur for financial matters.

⁴ Part II – Non-court based Family Services Division 4 – Arbitration.

⁵ Part 10.3 – Summary Orders and Separate Decisions, Rule 10.14 (e).

⁶ Part 5.

⁷ *Family Law Act* Part IIIB – Court's powers in relation to court and non-court based family services, Division 4 – Court's role in relation to arbitration of disputes Section 13E.

⁸ Ibid, Section 13F.

⁹ William Pitt the Younger, 12 June 1781.

¹⁰ Regulation 67F of the *Family Law Regulations 1984*.

¹¹ Regulation 67Q of the *Family Law Regulations 1984*.

¹² Legal Aid Queensland does have an arbitration program and AIFLAM provides information regarding names of qualified arbitrators.

¹³ William Pitt, 1st Earl of Chatham, 20 January 1775.



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Jodie Mills, Small Myers Hughes



Trial by jury election less of a trial

Kencian v Watney [2015] QCA 212

Defamation Act 2005 s21 – election by plaintiff for jury trial – whether election for jury trial could be abandoned – whether trial by jury should have been ordered under UCPR r475(1)

In *Kencian v Watney* [2015] QCA 212 the Queensland Court of Appeal allowed an appeal against the decision in *Watney v Kencian & Wooley* [2014] QSC 290 (see the March 2015 edition of *Proctor*, pp44-45) and ordered, pursuant to r475(1) of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), that the trial proceed as a trial by jury.

Facts

The respondent, who was the school principal at a school attended by the appellants' children, brought defamation proceedings against the appellants in respect of a letter sent by the appellants to school authorities. The respondent elected in his amended statement of claim for trial by jury. The defence, and all amended versions of it, did not contain anything to signify that the appellants elected to have trial by jury.

When tendering a signed request for trial date the appellants asked the respondent's solicitors to arrange the payment of the necessary jury fees and then tick the box for item G on the request form to confirm that payment. The respondent's solicitors did not tick item G when returning the signed request, and they advised in subsequent correspondence that they had instructions to give up the right to have a jury trial.

The appellants applied for a declaration that the respondent could not change his election to trial by jury and an order that the respondent pay the prescribed fees for a jury. In the alternative an order was sought permitting the appellants to pay the jury fees. In the further alternative, the appellants sought an order for trial by jury on the basis that they were entitled to elect for a jury trial but had not done so.

The application was dismissed at first instance, and the appellants appealed to the Court of Appeal.

Issues

The issues raised by the appeal were:

1. Can a party who elects for trial by jury abandon that election, by refusal to pay the jury fees, in the absence of a court order?
2. Should trial by jury have been ordered under UCPR r475?

Legislation

Section 21 of the *Defamation Act 2005* (Qld) (Defamation Act) allows any party in a defamation case to elect for a trial by jury. In relation to the right to elect, and manner of election, it provides:

21 Election for defamation proceedings to be tried by jury

- (1) Unless the court orders otherwise, a plaintiff or defendant in defamation proceedings may elect for the proceedings to be tried by jury.
- (2) An election must be made at the time and in the manner prescribed by the rules of court for the court in which the proceedings are to be tried.

Rule 472 of the UCPR provides the procedure for signifying the election, stating that "... a plaintiff may in the statement of claim or a defendant in the defence may elect a trial by jury".

Section 65(1) of the *Jury Act 1995* (Qld) imposes a requirement for payment before the trial begins of the fee for a civil jury trial prescribed under a regulation.

A court may order a trial by jury in the circumstances set out in r475 of the UCPR. That rule provides:

475. Changing mode of trial

- (1) The court may order a trial by jury on an application made before the trial date is set by a party who was entitled to elect for a trial by jury but who did not so elect.
- (2) If it appears to the court that an issue of fact could more appropriately be tried by a jury, the court may order a trial by jury.

Can a party abandon their election for trial by jury?

It was submitted for the appellants that the effect of s21 of the Defamation Act was that once a party has elected trial by jury that right cannot be unilaterally abandoned, and that the mode of trial could only be changed by way of an order under r475 of the UCPR.

Accordingly, the respondent was obliged to pay the jury fees.

The court rejected this contention. The lead judgment was delivered by Morrison JA, who found it was not supported by the terms of s21 of the Defamation Act. His Honour also regarded the contention to be inconsistent with legislative purpose of s21, which gives a right to a jury trial unless that right is taken away by court order. The appellants' contention would mean that a party who made an election would be forced to have a trial by jury even though it was not wanted.

The court concluded that a party who elected for trial by jury could dispense with the election by conveying that decision to the other party. Accordingly, this ground of appeal failed.

Should a jury trial have been ordered under UCPR r475?

The two matters raised by the appellants as warranting the order were:

1. Their solicitor had not elected for a jury trial because she had mistakenly assumed that if the respondent elected then there would be a jury trial unless the court ordered otherwise.
2. The solicitor believed there was no reason why a jury could not handle the issues at the trial.

The primary judge identified the applicable test to be whether "a jury could appropriately deal with the matter". Morrison JA confirmed that this was the correct test. Morrison JA also noted that, as the order below was discretionary, an appeal from the exercise of discretion required that the appellants establish an appealable error as identified in *House v The King* (1936) 55 CLR 499 at 504-505.

A Queensland Court of Appeal decision demonstrates that the procedural requirements for electing to have a trial by jury may be less inflexible than previously thought. Report by **Sheryl Jackson**.



The reasons given by the primary judge for his refusal to order the jury trial were:

1. In order to determine the defamatory meaning of the alleged publication, and the defences, the jury would have to scrutinise various investigations and responses by persons at the school, as well as the conduct and outcome of two investigations.
2. There were 181 disclosed documents, comprising 935 pages.
3. The need to navigate through the labyrinth of defences and prolonged examination of documents was likely to frustrate the just and expeditious resolution of the proceedings.

Morrison JA adopted the approach set out by Boddice J in *Rubin v Buchanan* [2011] QSC 275 at [21]–[23]. Boddice J stated in that case that the court has a discretion to order trial by jury, if satisfied that the proceeding could appropriately be tried by a jury, and that the discretion is to be exercised having regard to all of the circumstances of the case. Relevant factors included the nature of the proceeding, the issues in dispute, whether there was likely to be extensive expert evidence, and whether an order for a trial by jury was likely to unduly or unnecessarily lengthen the trial.

Morrison JA considered the reasons given by the primary judge, but concluded that there was nothing compelling in the matters raised by the evidence below to suggest that the proceeding could not appropriately be tried by a jury. His Honour particularly noted the following matters as supporting this conclusion:

1. The alleged defamation related to what was said in one document.
2. The number of documents disclosed were “not very great in overall terms”, and experience suggested that the number actually relevant to the trial would be substantially fewer.
3. There was no reason to suggest that a jury could not comprehend the documents that would be considered at trial.
4. In truth, the jury’s task would not be overly burdened by the documents, or the defences pleaded.

5. It could not really be concluded that the number or content of the documents was so burdensome that the proceeding could not appropriately be tried by a jury.
6. The defences were ones that juries deal with routinely in defamation cases.

Orders

The appeal was allowed, with the respondent to pay the costs of the appeal, and the application, on the standard basis. The orders of the primary judge were set aside and it was ordered in lieu that pursuant to r475(1) of the UCPR the trial proceed as trial by jury at the appellants’ election.

Comment

This decision provides some comfort for a party in the situation of the appellants. It is significant in confirming that, on an application for an order under r475(1), the court has a discretion to order trial by jury if satisfied the proceeding could appropriately be tried by jury. There is no requirement for the applicant to show that there is an issue of fact that could “more appropriately be tried by a jury”, as is relevant to the exercise by the court of the separate power under r475(2). The court also made it clear that the election for a jury trial need not be made in the first iteration of a party’s pleading.

Nevertheless, it remains prudent for practitioners to consider carefully whether their client should elect for trial by jury when preparing pleadings in proceedings for which jury trials are permitted.

Sheryl Jackson is an adjunct associate professor at the QUT School of Law. The Queensland Law Society Litigation Rules Committee welcomes contributions from members. Email details or a copy of decisions of general importance to s.jackson@qut.edu.au. The committee is interested in decisions from all jurisdictions, especially the District Court and Supreme Court.



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Litigation guardianship waived for Public Guardian

with Robert Glade-Wright



Procedure – litigation guardianship waived for Public Guardian

In *Public Guardian (Queensland) & Beasley and Ors (No.2)* [2015] FamCAFC 201 (21 October 2015) the Public Guardian was appointed for the mother by the Queensland Civil and Administrative Tribunal under the *Guardianship and Administration Act 2000* (Qld) and instructed Legal Aid (Qld) to act for her in a parenting case but refused to consent to being appointed as her litigation guardian. Judge Jarrett dismissed Legal Aid's application for an order dispensing with such an appointment whereupon the Public Guardian appealed to the Full Court. May J (with whom Strickland and Austin JJ agreed) said at [81]-[82]:

"... The public guardian will be able to take instructions from the mother to the extent she is able to communicate them, and brief Legal Aid to appear on her behalf – confirming an informal arrangement which has already occurred. (...)"

"In circumstances where the court can be satisfied that the mother's interests could be adequately represented and protected, and where there is no barrier to dispensing with compliance with r 11.09, it is clear the primary judge should have accepted Legal Aid's application to dispense with the FCC Rules."

Children – injunction against father leaving child alone with father's brother set aside

In *Solonose & Squires* [2015] FamCAFC 190 (30 September 2015) Strickland J heard the father's appeal against Judge Connolly's injunction preventing him from leaving his child alone with the father's brother who had an intellectual disability and was alleged to have been "sexually inappropriate" with the child. The allegation was investigated by the police and the Department of Human Services, and although the allegations could not be substantiated the father gave an undertaking to the department that he would not bring the child into contact with his brother [38]-[39]. He confirmed his undertaking in the court below but the mother expressed concerns about the brother's behaviour [40]. In allowing the appeal Strickland J said at [49]:

"... it was not open to his Honour to make the order for the reason that it would 'make [the mother] feel a lot more comfortable than the undertaking to the Department' ... his Honour needed to be satisfied that there were allegations that required an injunction to be made, and that clearly did not occur. ..."

Property – injunctions requiring husband's consent to wife's business and personal drawings over \$1000 varied

In *Cao & Hong* [2015] FamCA 884 (22 October 2015) Forrest J heard the wife's application for variation of injunctions made by Judge Coates before the case was transferred from the FCC to the Family Court. The parties had assets of \$200 million, of which \$27 million was the value of property in Australia. The wife managed the Australian investments and the husband managed their assets overseas. Forrest J said at [19]-[21]:

"The wife seeks variation of the existing restraints because every payment made in the management of the Australian companies over \$1,000 requires written consent of the husband without ... any exception in respect of payments made in the ordinary course of business or ... her reasonable living expenses."

"The evidence adduced by the wife demonstrated to my satisfaction that she was having difficulty getting the husband to even consider her requests, as well as difficulty getting him to agree to payment for her personal expenses. At the same time, the husband was not subject to any similar ... restraint in respect of his management of their Country D interests and his ability to access money there as he needed it."

"The wife deposed to the Australian companies having regular monthly payments of ordinary business expenses that well exceed the \$1,000 limit and she sought exception ... for expenses incurred in the ordinary course of business of those entities. At the same time, she deposed to having personal expenses of around \$20,000 per month which, in the past, she has caused to be paid from the accounts of the entities which have, she says, been treated by the company accountants as 'wages' paid to her."

Finding (at [38]) that the \$20,000 sought to be accessed by the wife to meet personal and household expenses was excessive, the court concluded at [37]:

"... I will grant injunctions that I consider restrain each of the parties ... from withdrawing funds from any personal accounts or accounts of the Australian companies or the Country D companies in excess of ... \$10,000 as opposed to the much smaller sum of \$1,000 previously provided for, without the consent of the other party or order of

this Court, subject to exceptions in respect to drawings made in the ordinary course of business; to meet already existing contractual obligations; for the wife to be able to meet personal and household expenses of up to \$15,000 per month; and for each party to pay legal expenses in these proceedings up to a limit of \$200,000."

Children – application to exclude unfavourable family report and for leave to obtain another report dismissed

In *Mullaly & Beddoe* [2015] FamCA 891 (23 October 2015) Hogan J dismissed the mother's application to exclude a family report prepared by a psychologist (Ms E) in a case where the mother was seeking a final order enabling her to relocate the parties' child to the United States. Ms E was appointed after a report was ordered, the mother to provide the father with a list of three potential experts ([3]). The mother objected to the admission of Ms E's report *inter alia* because she was not a Regulation 7 family consultant, "the father's position [being] simply that the mother is dissatisfied with the opinion expressed by Ms E ... and is attempting to seek ... another opinion ... supportive of her desire to relocate with the child to ... America" ([13]-[14]). Hogan J said at [22]:

"Nothing in the Act or Rules requires that all reports prepared by the agreement of parties ... be prepared by persons who are 'family consultants'. Section 62G of the Act simply empowers the Court to direct a family consultant to give the Court a report on matters relevant to the proceedings as the Court thinks desirable ... and provides that a report ... pursuant to the direction may be received in evidence in any proceedings under the Act. ..."

Hogan J also ([33]-[34]) dismissed the mother's application for leave to adduce evidence from another expert witness under FLR 15.49.

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

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Civil appeals

Francis v Crime and Corruption Commission & Anor [2015] QCA 218, 6 November 2015

Application for Leave *Queensland Civil and Administrative Tribunal Act* – where the applicant seeks to appeal the decision of the appeal tribunal of the Queensland Civil and Administrative Tribunal (QCAT) dismissing him from the Queensland Police Service – where the appeal tribunal held that no reasonable tribunal could have concluded that the sanction of dismissal should be suspended – where the applicant contends that the appeal tribunal misconstrued the QCAT member's reasons – where the applicant contends that the appeal tribunal failed to take into account the applicant's conduct and post-suspension performance – whether the QCAT member's decision was so unreasonable that it lacked an evident and intelligible justification – where the appeal tribunal noted that the applicant relied upon the references which “spoke of [the applicant's] positive attitude, professionalism, sound policing knowledge and diligence”, but the appeal tribunal also noted, accurately, that the member did not find that the references attested to the applicant having insight into his misconduct – where the applicant was formerly a member of the Queensland Police Service – where the applicant had engaged in improper conduct on multiple occasions – where the second respondent imposed the sanction of reduction in salary for Matters 1 and 3 and suspension from the Police Service for 12 months with no entitlement to salary, entitlement or accumulation of leave for Matter 2 – where the first respondent applied to the Queensland Civil and Administrative Tribunal (QCAT) for a review of this decision – where a QCAT member confirmed the sanction in relation to Matters 1 and 3, but set aside the sanction imposed for Matter 2, and instead imposed a 12-month suspension, reduction in rank and dismissal suspended for a period of three years – where the first respondent appealed to the QCAT appeal tribunal – where the appeal tribunal concluded that as a matter of law, the QCAT member's decision was unreasonable – where the appeal tribunal confirmed the sanction in relation to Matters 1 and 3, but set aside the sanction imposed for Matter 2 and instead imposed the sanction of dismissal – whether the purposes of police discipline would be defeated by a decision to allow the applicant to remain in the police force – where the appeal tribunal's conclusion necessarily implies that the applicant's misconduct did reveal permanent unfitness to continue to be a police officer – where the appeal tribunal noted, the purposes of disciplinary proceedings in the Police Service encompass the need to maintain the confidence of the community in the Police Service – where taking into account the limitations upon the weight capable of being given to the mitigating factors for which the applicant contended, the conclusion was open,

upon the facts found by the member, that the purposes of police discipline would be defeated by the member's decision to allow the applicant to remain in the police force despite the seriousness, variety and persistence of his misconduct during some four years.

Application refused with costs.

Nichols v Earth Spirit Home Pty Ltd [2015] QCA 219, 6 November 2015

Application for Leave *Queensland Civil and Administrative Tribunal Act* – where the applicant sought leave to appeal against a decision of the Queensland Civil and Administrative Tribunal, in its appellate jurisdiction, upholding a decision at first instance to enforce an entirely oral building contract between the applicant and the respondent – whether a wholly oral building contract is enforceable, having regard to certain provisions of the *Queensland Building and Construction Commission Act 1991* (Qld) which provided that a person who entered into non-written contracts for building work above a prescribed amount committed an offence, and related public policy considerations – whether the respondent was entitled to recover the judgment sum on a restitutionary basis – where the issue raised on the present appeal raises a matter of law as to the proper interpretation of significant statutory provisions that is wider than the interests of the parties and also involves almost \$250,000 – where in the present case, there is no contention that the making and performance of the contract was made expressly illegal by the Act – where it is significant that s67G of the Act, whilst providing that a builder who enters into a contract which is not in writing commits an offence, does not provide for any other consequences of a failure to comply with that section – where the absence in the Act of any other consequences for a failure to reduce the contract to writing strongly supports a conclusion that neither the statutory provision nor consideration of the scope and purpose of the statute favours a finding that the Act impliedly prohibits enforcement of a wholly oral building contract – where the relevant building contract arose in circumstances where previous contractual arrangements had been terminated and the arrangement the subject of the wholly oral building contract was entered into at the express request of the applicant or his agent and in circumstances where separate written contracts with each of the applicant's children were prepared for taxation purposes only – where there is nothing in the conduct of the respondent which justifies a conclusion, having regard to the legislative provisions, the nature and scope of the legislative scheme and all of the circumstances of the particular case, that principles of public policy favour a finding that the wholly oral building contract is unenforceable.

Application granted. Appeal dismissed. Costs.

Albrecht v Ainsworth & Ors [2015] QCA 220, 6 November 2015

Application for Leave *Queensland Civil and Administrative Tribunal Act* – where the applicant and the respondents are owners of homes in an architectural award-winning multi-dwelling complex, Viridian – where the applicant wanted to extend the deck area of his home – where the applicant could do so only if the body corporate, in an extraordinary general meeting, approved the proposal in his motion without dissent and granted him exclusive use of the common property airspace between his existing deck spaces – where at the extraordinary general meeting, seven of the 23 owners voted for the motion, seven voted against, one abstained, and the remainder did not vote – where the applicant applied for a referral to an adjudicator and sought orders that effect be given to his motion – where the question for the adjudicator was whether the respondents' opposition to the motion was unreasonable in the circumstances and whether the body corporate acted reasonably in refusing to give its approval – where the adjudicator granted his application and made the relevant orders, giving effect to the motion – where the respondents appealed from those orders to QCAT – where QCAT allowed the appeal and set aside the adjudicator's orders – where the applicant has applied for leave to appeal to this court contending that the appeal to QCAT should have been dismissed – where the appeal to QCAT was on a question of law only, and not an appeal by way of rehearing – where the applicant contends that QCAT erred in not clearly identifying the errors of law allegedly made by the adjudicator – where the applicant contends that questions of reasonableness and unreasonableness were questions of fact and it was not open to QCAT to review the correctness of the adjudicator's fact finding, except on orthodox administrative law grounds – where the applicant contends that QCAT conducted an impermissible merits review – whether QCAT erred in identifying errors of law in the adjudicator's reasons – whether the application for leave to appeal should be granted – whether the appeal should be allowed – where the role of the adjudicator in this case was to investigate the applicant's application and to decide whether it was appropriate to give effect to his motion before Viridian's body corporate to allow him to extend his decks – where the competing submissions and supporting material in this case, particularly the architectural reports, made the question of unreasonableness difficult to resolve – where the reasons of both the adjudicator and QCAT demonstrate, views as to what was reasonable or unreasonable involved value judgments on which there was room for reasonable differences of opinion, with no opinion being uniquely right – where the respondents contended the adjudicator applied an incorrect test and reversed the onus of proof in stating that she was not satisfied the

body corporate had acted reasonably in deciding not to pass the motion – where that contention is not made out when the adjudicator's reasons are considered as a whole – where the adjudicator's reasons make clear that she conscientiously considered all the material and submissions relied upon by the applicant and the respondents, made findings of fact, all of which were open on that material, and was ultimately satisfied as a matter of fact that the applicant's motion was not passed because of the respondents' opposition to it that in the circumstances was unreasonable – where there can be no doubt from her reasons read as a whole that the applicant satisfied her that the opposition to the motion was unreasonable – where she did not apply the wrong test or reverse the onus of proof – where QCATA erred in law in wrongly identifying that the adjudicator erred in these ways – where QCATA also erred in finding the adjudicator erred in law in making primary findings of fact about architectural integrity, "floodgates", the limited value of the common property airspace to anyone other than the applicant, and privacy and noise issues – where these findings of fact were open on the material before the adjudicator – where in referring to these matters, she was rightly taking into account material considerations in determining the ultimate question: whether the respondents' opposition to the motion was in the circumstances unreasonable – where QCATA allowed material to be placed before it which was not before the adjudicator – where QCATA's approach in not restricting references to facts by unrepresented respondents to those before the adjudicator, for reasons of expediency and practicality, was understandable – where QCATA stated, somewhat confusingly, that the new material would assist it to understand the appeal, although it would not make findings on it – where QCATA then referred to the additional material

early in its reasons and noted its inspections of Viridian on the judgment coversheet – where it is noted that while an inspection is not usually considered part of the evidence but merely an aid to understanding the evidence, it will often be imprudent in an appeal of this kind for QCATA to undertake inspections, especially when, as here, none were undertaken by the adjudicator – where QCATA erred in identifying errors of law in the adjudicator's reasons – there were none – where it followed that QCATA was not entitled to set aside the adjudicator's decision and to exercise the jurisdiction and powers of the adjudicator and to substitute its own decision.

Application granted and appeal allowed. Decision of QCATA is set aside and instead it is ordered that the appeal to QCATA is dismissed.

Criminal appeals

R v Manning [2015] QCA 241, 24 November 2015

Application for Extension (Sentence & Conviction) – where the applicant was convicted of one count of unlawful stalking of the complainant – where the stalking offence was committed during the five-year operational period of a suspended sentence of three years' imprisonment imposed on 27 June 2008, that sentence being imposed in respect of offences of unlawful stalking and dangerous operation of a vehicle – where on 6 February 2015 the applicant was sentenced to imprisonment for 18 months in respect of the conviction for the stalking offence – where his Honour ordered that the balance of the suspended sentence of imprisonment, a period of two years and 99 days (829 days), be served – where his Honour declared that 101 days of pre-sentence custody be declared time served under the sentences he imposed – where his Honour further ordered that Mr Manning be released on parole on

28 November 2015, after serving 13 months of the sentences – where it is uncertain whether the applicant pursues the appeal against conviction – where there is no merit in any ground raised and no miscarriage of justice – where it is evident that the sentencing judge intended that the commencing date for each of the sentences that he imposed, that is the suspended sentence that he ordered be served (pursuant to s147(1)(b) of the *Penalties and Sentences Act 1992* (Qld) (the Act) and the sentence for the stalking offence, be the date Mr Manning commenced serving time in prison in relation to that later stalking charge, that is 28 October 2014 – where Queensland Corrective Services has interpreted the orders made as requiring that the suspended sentence commence from the date of the order – 6 February 2015 – where that is so because s159A of the Act permits the declaring of time served in presentence custody to be made only in relation to offences in respect of which the offender was then being held – where Mr Manning was not being held in relation to his breach of the suspended sentence – where Mr Manning will therefore be exposed to a longer period of imprisonment that his Honour intended – where the prosecution do not oppose correcting the orders made to reflect the evident intent of the sentencing judge.

Application for extension (conviction) refused. Time be extended in which to bring an application for leave to appeal against sentence. Application granted, appeal allowed to the extent that the order that the applicant serve the whole of the suspended period of imprisonment being a period of two years and 99 days (829 days) be set aside and the applicant serve 728 days of the suspended imprisonment, otherwise the orders made on 6 February 2015 be confirmed.

1-31 December 2015

Civil appeals

Hail Creek Coal Pty Ltd v Haylett & Anor [2015] QCA 259, 4 December 2015

General Civil Appeal – Employment Law – where the first respondent (Haylett) commenced employment with the appellant as an operator in January 2009 – where from 2010 until September 2014 Haylett worked solely as a drill rig operator – where on 23 September 2014 the second respondent, as the nominated medical adviser, completed a health assessment report for Haylett – where on 23 September 2014 the second respondent assessed Haylett as fit for the proposed/current position of drill rig operator but "unfit for heavy or continuous jarring and vibration" and "unfit for heavy haul trucks or dozers" – where on 30 September 2014 the appellant asked the second respondent to reconsider his assessment and to assess Haylett against the occupation of "operator" rather than "drill rig operator" whereupon the second respondent revised his assessment and determined that Haylett was unfit for

the proposed/current position of operator – where Haylett applied to the Supreme Court for declarations that, for the purposes of the regulation, the task for which he was employed was that of drill rig operator and that the health assessment report of 30 September did not meet the requirements of the regulation – where the primary judge found that both the 23 September and 30 September health assessment reports were dependant on matters extraneous to the form and were therefore invalid – where the primary judge gave orders declaring the health assessment report of 30 September was not in accordance with law and was of no effect under the regulation – where the appellant appeals contending that the primary judge erred in finding that the health assessment report of 30 September was invalid – where Haylett cross-appeals contending that the primary judge erred in failing to find that the task for which he was employed was that of drill rig operator, and that the court erred in finding that the 23 September health assessment report was dependant on factual matters extraneous to the form – whether the second respondent carried out the health

assessment reports on 23 September and 30 September 2014 were not carried out in accordance with the instructions and matters in the form but in accordance with advice Dr Parker otherwise received – where the form as partially completed on 23 September 2014 was capable of inferentially addressing the question of the task or tasks for which Mr Haylett is or is to be employed so that Dr Parker could complete his assessment – where there was nothing in the form to lead him to conclude that Mr Haylett was or was to be employed as an operator of something other than a drill rig operator – where on that information, he was entitled to conclude as he did that Mr Haylett was "fit to undertake the proposed/current position" of operator subject to the restrictions that he was unfit for heavy or continuous jarring and vibration, and for work above shoulder height, but was fit for drill rig operation although unfit for heavy haul trucks or dozers – where Dr Parker's assessment was carried out in accordance with the instructions and matters in Sections 1, 2 and 3 of the completed form – where on 30 September 2014 Hail Creek Coal's Mr Lawler telephoned

Dr Parker instructing him to assess Mr Haylett for the “full and substantive role of a mobile equipment operator [including] but...not limited to drill rigs, haul trucks, dozers, graders and water-carts” – where Mr Lawler was not merely reminding Dr Parker of the requirements of the form and the regulation; he was “instructing” Dr Parker to consider matters not in the form – where her Honour correctly found that Dr Parker acted on matters extraneous to the form – where Mr Haylett has had considerable success in his cross-appeal but the orders he seeks are problematic in that they differ from the orders he sought at first instance – where despite her Honour’s conclusion that neither the assessment of 23 September 2014 nor that of 30 September 2014 were carried out in accordance with the regulation, the only declaration given was that Dr Parker’s assessment of 30 September 2014 was not in accordance with law and is of no effect under the regulation – where ordinarily it would follow that in the absence of any declaration of invalidity in respect of the 23 September 2014 assessment, that assessment remains valid – where this appears to be inconsistent with her Honour’s statement that both the assessment of 23 September 2014 and the assessment of 30 September were dependant on matters extraneous to the form – where in the interests of clarity it is prudent to allow the cross-appeal and make the declaration sought by Mr Haylett.

Appeal dismissed with costs. Cross-appeal allowed. Declaration that the health assessment report of Dr Parker dated 23 September 2014 is valid and meets the requirements of the regulation.

William James Watson & May Marlene Watson as trustee for the WJ & MM Watson Superannuation Fund v Scott [2015] QCA 267, 8 December 2015

General Civil Appeal – Summary Judgment – where the appellants commenced proceedings in the District Court against the respondent, Scott and others, claiming \$595,900 from the respondent as guarantor under a guarantee, together with several alternative claims including for damages or compensation for \$595,900 under the Australian Consumer Law – where this appeal is from the order dismissing their application for summary judgment against the respondent – where the appellants and the respondent entered into a property syndicate agreement whereby the appellants’ superannuation fund advanced money to Denbraise, repayable by a specified date or earlier upon certain events arising – where the respondent recommended an insurance clause in the agreement to ensure that should he die or become incapacitated the appellants would be reimbursed the full amount of their advance – where Denbraise defaulted under the agreement – where the appellants subsequently terminated the agreement and demanded repayment of all amounts owing, which Denbraise failed to meet – where the appellants then made demand on the respondent as guarantor – where the respondent denied he was a guarantor of the loan as the agreement did not contain a promise from him to guarantee the loan – where the respondent claimed his delegation under the agreement as guarantor was merely to meet the insurance clause – where the real question in this appeal is

whether the respondent is liable for Denbraise’s debt as guarantor under the agreement – where the term “guarantor” is defined in cl.1, Definitions and Interpretation, cl.1.1.8, as meaning “the person shown in the Schedule and any other person who has guaranteed, or who in the future guarantees, the borrower’s obligations and performance under this agreement” – where the guarantor in Schedule 1 is stated to be the respondent – where it is considered the ordinary, unambiguous meaning of those words as conveying that the person named in the schedule as guarantor (the respondent) has guaranteed Denbraise’s obligations and performance under this agreement – where even when Schedule 2 is read together with the definition of “Guarantor” in cl.1.1.8 and the agreement as a whole, there can be seen no ambiguity as to the obligations of the respondent as guarantor under the agreement – where taking into account the objective background facts surrounding the signing of the agreement on 1 July 2013; its terms read as a whole; and adopting a commercially sensible approach to an unsecured loan of this kind, a reasonable person in the position of the parties would have understood the agreement as requiring the respondent as guarantor to guarantee Denbraise’s obligations and performance under the agreement – where it follows from this construction of the agreement, that the respondent finds no comfort in s56 *Property Law Act* as the agreement was a written agreement, signed, sealed and delivered by the respondent to guarantee Denbraise’s liability to the appellants under the agreement – where the appeal is from a discretionary judgment, but, for the reasons given, the primary judge erred in not concluding under *Uniform Civil Procedure Rules* 1999 (Qld) r292 that the respondent has no real prospect of successfully defending the appellants’ guarantee claim and there is no need for a trial of it.

Appeal allowed. Set aside orders 1 and 3 made on 12 January 2015, instead order that the judgment be entered for the appellants against the respondents with costs.

Witness J A v Scott [2015] QCA 285, 18 December 2015

General Civil Appeal – Contempt – where the appellant sought leave to appeal against an order sentencing him to two years and six months’ imprisonment following a finding that the appellant’s conduct constituted a distinct and “second contempt” within the meaning of s199(8B) of the *Crime and Corruption Act 2001* (Qld) – whether s62 of the *Supreme Court of Queensland Act 1991* (Qld) conferred a right of appeal against an order made in the Trial Division that a person be punished for contempt – where there was no basis for limiting the general, unambiguous and sufficient language of s62(1) – where the respondent’s argument that the appellant had no right of appeal and that s62 did not apply was rejected – where the appellant was first sentenced to five months and 27 days’ imprisonment for refusal to answer a question during a 2013 commission hearing and was then sentenced for refusal to answer the same question when he appeared in response to the same attendance notice when the hearing resumed in 2014 – whether the contempt for

which the appellant was punished in 2015 was a different contempt from that for which the appellant had been punished in 2013 and if not, whether there was any power to punish him again – where the hearing which he attended on 29 May 2013 was adjourned many times but it was the same hearing which the appellant attended on 11 September 2014 – where it is conceded by the respondent to this appeal (and by the Attorney-General supporting his submissions in relevant respects) that the question which was put in September 2014 is relevantly the same as that which he was asked on 29 May 2013 – where in September 2014, his response to that question was a persistence in his failure to provide the information which the question sought – where this was not a distinct contempt but simply a manifestation of his continuing defiance of the requirements of s190(1) and the authority of the commission – where, as here, the contemnor has been punished not by an interim order but by a judgment which has determined the appropriate penalty for a continuing contempt which will not be purged, the court can make no further order – where the court having enquired into the alleged contempt should have dismissed the proceeding which the present respondent had commenced.

Appeal allowed. Order made on 11 March 2015 be set aside. The appellant be discharged forthwith. Costs.

Abrahams (by his litigation guardian The Public Trustee of Queensland) v Abrahams [2015] QCA 286, Orders delivered ex tempore 10 November 2015; Reasons delivered 18 December 2015

See this month’s succession law column, page 36.

Gambaro Pty Ltd as Trustee for the Gambaro Holdings Trust v Rohrig (Qld) Pty Ltd; Rohrig (Qld) Pty Ltd v Gambaro Pty Ltd [2015] QCA 288, 18 December 2015

General Civil Appeal – Building and Construction Industry Payments – where the contractor served a payment claim pursuant to the *Building and Construction Industry Payments Act 2004* (Qld) (BCIPA) – where Gambaro commenced proceedings against Rohrig for a declaration that Gambaro was not liable to Rohrig for \$913,014.23 of the amount of monies claimed by Rohrig under its payment claim, an order that Rohrig make restitution to Gambaro of that amount, and consequential orders – where Rohrig applied in the Trial Division to strike out Gambaro’s claim and its statement of claim or, in the alternative, specified paragraphs of the statement of claim – where Gambaro applied for summary judgment upon its claim with the primary judge refusing both applications – where the principal only paid a portion of the claim – where an adjudicator appointed under BCIPA subsequently made an adjudication decision that the amount to be paid by the principal to the contractor was greater than what had been paid – where the principal paid this amount – where the principal commenced proceedings for a declaration that it was not liable for this amount and an order for restitution of the difference – where the principal argued that because the adjudicated amount exceeded the total of the amounts assessed by the superintendent in prior progress certificates



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it was unjust for the contractor to retain the excess – where the object of BCIPA is to ensure that building contractors are entitled to receive and recover progress payments – where ss99 and 100 of BCIPA prohibit the contracting out of the provisions of BCIPA – where BCIPA contemplates that a statutory payment might differ from the contractual payment – whether the object of BCIPA was exhausted upon the payment of the adjudicated amount by the principal – whether the contractor was liable to repay the adjudicated amount – where the mere fact that Rohrig was not contractually entitled to a progress payment on account of the contractual remuneration cannot make it unjust for it to retain the adjudicated amount of a progress payment for the same work which Gambaro had a statutory liability to pay and Rohrig had a statutory entitlement to receive on account of the contractual remuneration – where Gambaro's pleaded claim must fail because it relies only upon contractual provisions concerning the amount of progress payments to be paid on account of the contractual remuneration which do not detract from the statutory rights and liabilities created by Pt2 and Pt3 of BCIPA, rather than upon contractual provisions which determine Gambaro's liability for and Rohrig's entitlement to the contractual remuneration on account of which the adjudicated amount of a progress payment was paid.

Gambaro appeal: Dismissed with costs. Rohrig appeal: Appeal allowed. Set aside that order with costs. Gambaro's statement of claim filed 11 September 2014 be struck out, with leave to file an amended statement of claim within 28 days of the date of this order.

Criminal appeals

R v Baden-Clay [2015] QCA 265,
8 December 2015

Appeal against Conviction – Murder – where the appellant was convicted of murdering his wife – where three expert forensic witnesses gave evidence about a set of abrasions and scratches on the appellant's cheek – where they considered that the abrasions were typical of injuries caused by fingernails, but were equivocal about the cause of the scratches – where two of the expert witnesses considered that the scratches were inflicted after the abrasions – where the appellant gave evidence that the abrasions and scratches were all caused by him shaving with a blunt razor blade – where the appellant argues that the trial judge erred in directing the jury that if the appellant had attempted to disguise the abrasions by placing shaving cuts near them, that conduct could support an inference of guilt of murder or manslaughter – where the trial judge gave an *Edwards* direction in respect of the use the jury could make of the appellant's assertions that he had caused all his facial injuries while shaving, if they found them to be false; no issue was taken about that direction – where in addition, however, his Honour, over objection, directed the jury that if the appellant had attempted to disguise the abrasions by placing shaving cuts near them in an attempt to provide an innocent explanation for the injuries, that conduct could

support an inference of guilt of murder or manslaughter – where it was open to the jury, after considering all the features of the injuries, to reach the conclusion that they had been inflicted separately, by different means and with the red scratches occasioned later – where that conclusion being open, the direction was properly given – where the deceased's blood was found in a family vehicle and her body at a nearby creek – where the appellant argues that findings that the deceased's blood was left in the vehicle at the time she disappeared and that he transported her body to the creek were indispensable intermediate steps in arriving at the conclusion that he had unlawfully killed her – where the trial judge declined to direct the jury that they needed to be satisfied beyond reasonable doubt that the appellant transported the deceased's body to the creek – where the trial judge was not asked to direct the jury that they needed to be satisfied beyond reasonable doubt that the deceased's blood was left in the vehicle at the time of her disappearance – where it was not necessary for the jury to reach any particular view about how the body arrived at the creek, although, of course, to find that it had been taken there by the appellant in the *Captiva* would certainly go to reinforce the conclusion of guilt – where there was no error in the trial judge's direction so far as the standard of proof concerning the conveyance of Ms Baden-Clay's body to Kholo Creek was concerned, and no omission in the directions relating to the bloodstain such as to give rise to any miscarriage of justice – where the appellant was convicted of murdering his wife – where the appellant argues that the verdict was unreasonable because the jury could not properly have been satisfied of the necessary intent for murder – where the appellant argues that a reasonably open hypothesis was that the deceased had scratched the appellant in the course of a physical confrontation; the appellant had killed her unintentionally; and his subsequent conduct was attributable to panic – where the respondent argues that intent to kill could be inferred from marks on the appellant's face and body, lies told by the appellant about the cause of the abrasions on his face and his attempt to disguise them, the disposal of the deceased's body at the creek, and emotional and financial pressures which might have caused the appellant to behave with uncharacteristic violence – whether the post-offence conduct was consistent with consciousness of a lesser offence – whether there was a reasonable hypothesis consistent with innocence of murder open on the evidence – where the critical question was whether it was also open to conclude that when the appellant caused his wife's death he intended to do so, or at least to cause her grievous bodily harm – where it is important to note that the Crown did not at trial contend that the killing of Mrs Baden-Clay was in any way premeditated or that the appellant might have been motivated by some benefit he stood to gain from his wife's death – where there remained in this case a reasonable hypothesis consistent with innocence of murder: that there was a physical confrontation between the appellant and his wife in which he delivered

a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm; and, in a state of panic and knowing that he had unlawfully killed her, he took her body to Kholo Creek in the hope that it would be washed away, while lying about the causes of the marks on his face which suggested conflict.

Appeal against conviction allowed. Verdict of guilty set aside and a verdict of manslaughter is substituted. Procedural orders for filings in relation to sentencing submissions.

***R v Johnson* [2015] QCA 270,
11 December 2015**

Appeal against Conviction – Rape – where the appellant met the complainant on Facebook – where the appellant and complainant had a seven-week relationship – where the appellant engaged in “more assertive and rougher sexual encounters” than the complainant was used to – where the complainant asked the appellant to be less sexually aggressive – where the complainant alleges she withdrew her consent during sexual intercourse and that the appellant raped her – where the appellant pleaded not guilty to one count of rape – where the appellant was found guilty by jury after trial – where the evidence of Ms NEAM was that she withdrew consent during the sexual intercourse that took place on 18 September – where that was made plain well before she kicked him off, by her saying: “stop” three or four times, “this is hurting”, “I don’t want any part of this”, “stop, you have to stop. What do you not understand about this is hurting? ... what do you not understand about not hurting me?” – where it was open to the jury to accept Ms NEAM’s evidence of saying to stop, and why, and be satisfied, beyond reasonable doubt, that Mr Johnson did not have a reasonable and honest, but mistaken, belief that she consented – where the appellant submits that defence counsel undertook a flagrantly incompetent cross-examination of the complainant – where the appellant submits that the trial judge engaged in legal argument, rulings, and admonishment of the defence counsel in the presence of the jury – where the appellant alleges that the trial judge and the Crown prosecutor engaged in cross-examination of the complainant – where the Crown concedes that the cross-examination was, at times, argumentative, repetitive, prolix, it resulted in Ms NEAM becoming confused, and counsel had demonstrated difficulty in confining it to what was relevant – where it was accepted that it “achieved a standard far less than that of a textbook example of the art” – where there is no doubt that trial counsel for Mr Johnson at times experienced difficulty with repetitive questions, formulating unobjectionable questions, irrelevant questions and trying to establish one of the motives he was putting forward for what was said to be a false allegation of rape – where it is not considered that the attempts to convince the jury that Ms NEAM was lying or unreliable, tedious though they may have been, would have had a significant impact on the jury’s fair-minded consideration of the evidence – where the jury were more likely to see them for what they

were, inept attempts to attack the Crown’s case – where it has to be noted that there was no submission that Mr Johnson’s trial counsel was not adhering to his instructions.

Appeal dismissed.

***R v Agius* [2015] QCA 277, Orders delivered
ex tempore 4 December 2015; Reasons
delivered 18 December 2015**

Appeal against Conviction & Sentence – Attempted Robbery – where the appellant was convicted by a jury of attempted robbery – where the appellant handed the complainant a note containing an implied threat – whether the handing over of the note when in close proximity to the complainant was sufficient to prove the assault element of the offence – where the use in s412 of the Criminal Code of the word “and” indicates that an “assault” is a distinct element from the accompanying threat to use actual violence, although, in some cases the same act may constitute both the elements of assault and threat – where as to the element of assault, the definition of assault in s245 of the Criminal Code recognises two forms of assault – where the definition encompass what historically were separate offences at common law of battery (in the first limb of the definition) and of assault (in the second limb) – where by the second limb, an assault occurs where there is an attempted or threatened application of force – where the question for determination is whether the act of handing over the note amounted to a bodily act or gesture by which force was threatened to be applied within the meaning of the second limb – where the starting point is that words alone are insufficient to amount to the requisite conduct comprising an attempt or threat to apply force for the purposes of the second limb definition of assault; that is made clear by the wording of the second limb which requires that there be a “bodily act or gesture” – where the use of the word “by” in s245 is significant – where what is required is that there is the attempt or threat “by” some act or gesture to apply force to another – where the threat implicit in the words on the note did not convert the act or gesture of handing over the note into the act by which force was threatened to be applied – where the act of handing over the note was the means of communicating an implied threat but, even so, clearly there was no threat to apply force “by” that act itself – where the handing over of the note was not itself an act or gesture by which force was attempted or threatened to be applied, even when viewed in the context of the words on the note – where the contents of the note did not convert the act in question into one by means of which a threat was to be effected.

Appeal against conviction allowed. The verdict of conviction is set aside and instead a verdict of acquittal is entered.

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



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This month ...

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Beach House Hotel, Hervey Bay | 8.30am-5pm

Take the opportunity to receive updates in substantive law, develop your essential skills, and interact with experienced presenters and local colleagues by attending the 2016 Hervey Bay Intensive. This one-day event is the perfect opportunity for regional practitioners to learn from the experts without the need to travel far from home.

Already have your 10 CPD points? Set yourself up for the following CPD year! CPD points gained by attending the 2016 Hervey Bay Intensive can be claimed in either the 2015/16 or 2016/17 CPD year. Full-day or half-day registrations are available.



7 CPD POINTS

FRI
5
FEB

Practice Management Course – Sole Practitioner to Small Practice Focus

Law Society House, Brisbane | 8.30am-4.45pm

As the professional path to practice success, Queensland Law Society's Practice Management Course (PMC) equips aspiring principals with the skills and knowledge required to be successful principals.

The QLS PMC provides:

- practical learning with experts
- tailored workshops
- interaction, discussion and implementation
- comprehensive study texts
- leadership profiling
- superior support.



10 CPD POINTS

THU
11
& FRI
12
& FRI
19
FEB

Core CPD Webinar: Six Principles of Influencing

Online | 12.30-1.30pm

Relevant for all practitioners, this webinar will discuss the six principles of influencing and provide practical tips on how you can apply the principles to create effective solutions for your clients. The six principles of influencing are grounded in science and are fundamental to the way we work and communicate in modern society. An understanding of these six principles will greatly enhance your communication skills not only with clients but also with judicial officers, mediators and your colleagues, thus improving your client outcomes, client relationships and repeat work and referrals.



1 CPD POINT

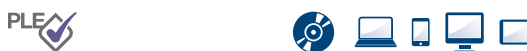
WED
10
FEB

Core CPD Webinar: Client Legal Privilege

Online | 12.30-1.30pm

Client legal privilege is an important right of the citizen. It plays an essential role in protecting the 'dignity and freedom' of clients. However, understanding the distinction between privilege and confidentiality is critical. Presented by the QLS Ethics Centre in the context of selected case studies, this session will consider:

- How is confidentiality different to client legal privilege?
- What common law exceptions exist?
- When can privilege be waived?
- What are the ethical responsibilities of a solicitor when served with a subpoena, order, notice to produce or a warrant?



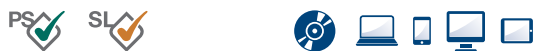
1 CPD POINT

WED
17
FEB

Webinar: International Arbitration Update

Online | 12.30-1.30pm

In October 2015 the *International Arbitration Act 1974* (IAA) was amended in an effort to bring Australia in line with international arbitral laws. While relatively minor, the amendments bring consistency to the existing domestic arbitration laws. They also remove restrictions to increase the enforceability of arbitral awards in Australia and reinforce the confidentiality of arbitrations. It is anticipated that the changes will make Australia an attractive jurisdiction for arbitration. This webinar will bring you up to speed with the recent amendments and identify other Federal Government initiatives relating to international dispute resolution.



1 CPD POINT

THU
11
FEB

Essentials: Enforcing Judgments

Law Society House, Brisbane | 9am-12.20pm

You've done the hard yards to obtain judgment for an outstanding debt – now what? This workshop, aimed at early career lawyers, will provide you with a broad overview of the options available to enforce that hard-earned judgment. Deciding the most appropriate and effective enforcement method is a challenge for all practitioners; accordingly our presenters will guide you through the various enforcement options, including bankruptcy and winding-up proceedings, offering practical legal advice along the way.



3 CPD POINTS

THU
18
FEB

Legal Profession Dinner

Sofitel Brisbane Central, Brisbane | 7-11pm

Bring your colleagues along to welcome 2016 president Bill Potts and join members of the judiciary, politicians and other key legal professionals. Justice Susan Kiefel AC will give the keynote address. The winner of the QLS President's Medal will also be announced. A highlight of the legal corporate calendar, this is an event not to be missed!

FRI
19
FEB

Masterclass: Business Planning

Law Society House, Brisbane | 8.30am-12.30pm

Whether you are a sole practitioner in a regional area or a partner in a global firm, business planning is essential to securing your practice success. This masterclass will give you practical guidance on how to:

- decide on the best structure for your business
- clarify your practice's positioning
- future proof your business
- settle on and implement strategy
- differentiate yourself in a crowded market.



3.5 CPD POINTS

TUE
23
FEB

Specialist Accreditation Information Evening

Law Society House, Brisbane | 5.30-7pm

Are you interested in becoming a Queensland Law Society accredited specialist in criminal law, business law, immigration law, workplace relations, commercial litigation or personal injuries in 2016? Don't miss this information evening. Gain valuable information on the application and assessment process, insight on preparatory and exam techniques from current accredited specialists and have the chance to speak directly with members of the specialist accreditation advisory committees prior to applications closing on 15 April 2016. A complimentary DVD of the evening will be available for regional members unable to attend this event.



WED
24
FEB

Practice Management Course Information Evening

Law Society House, Brisbane | 5.30-7.30pm

Are you interested in obtaining a principal practising certificate?

Queensland Law Society's Practice Management Course (PMC) equips aspiring principals across all practice sizes with the skills and knowledge to become successful principals.

At this complimentary event, learn about:

- the course structure, including study requirements, workshops and assessment items
- applications, waivers and deferments
- how the course prepares participants for practice challenges
- the ongoing support and assistance provided before, throughout and after the course.

Some PMC faculty and past delegates will be on hand to share their experiences and discuss any specific aspects of the course in detail. Networking drinks will also be offered.

Register to join us on the night to find out more about the QLS PMC.

THU
25
FEB

Can't attend an event?

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QLS Symposium	18-19 March
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Family Law Residential	21-23 July
Government Lawyers Conference	26 August
Property Law Conference	8-9 September
Criminal Law Conference	16 September
Personal Injuries Conference	21 October
Succession and Elder Law Residential	4-5 November
Conveyancing Conference	25 November

Earlybird prices and registration available at
qls.com.au/events

Career moves



Therese Tonkin



Tracy Carr



Kara Cook



Andrew Evans



Emily Murphy



Alan Strain



Susan Isaac



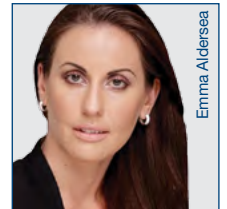
Chris Herral



Dan Sutherland



Paul Jones



Emma Aldersea

Blackstone Legal Costing

Therese Tonkin has joined Blackstone Legal Costings as general manager to head up the Queensland division, following the company's expansion to Brisbane. She is a local costs lawyer who has practised in legal costs for 17 years in both Queensland and Victoria, and is a Queensland Courts appointed costs assessor.

Broadley Rees Hogan

Broadley Rees Hogan has announced the appointment of Tracy Carr as a solicitor in its property services team. Tracy has worked in commercial and property law for four years, with a focus on commercial property including acquisitions and disposals, commercial and retail leasing, and community title development.

COOKLEGAL

COOKLEGAL has been established in Brisbane by Kara Cook. The practice will provide domestic violence and family law assistance to clients across Queensland. Kara has 10 years' experience working with domestic violence clients.

Creevey Russell Lawyers

Andrew Evans has joined Creevey Russell Lawyers as a partner and litigation team member. He has worked in commercial litigation and insolvency, and practised as both a solicitor and barrister. Andrew also has experience in partnership disputes, corporations law, governance and property law disputes.

K&L Gates

K&L Gates has appointed three partners to its Brisbane office.

Philip Vickery has experience in the agribusiness and resources sectors, with a focus on M&A and capital raising. He has coordinated legal teams and advised listed and private multinationals.

Brian Healey has worked in agribusiness for two decades, acting in markets such as beef, cotton, almonds and grain, and advising overseas companies on their investments in Australian agriculture. He has worked for local and international agribusinesses, primary producers and investors, with a focus on rural land and water and commercial matters.

Paul Hardman has advised on safety and employment issues, as well as commercial disputes and administrative law matters. He has a focus on the defence of regulatory prosecutions, including under the *Work Health and Safety Act*, *Environmental Protection Act* and *Corporations Act*.

McCullough Robertson Lawyers

McCullough Robertson has announced the appointment of dispute resolution partner Jennifer Turner to its Sydney office. Jennifer has more than 15 years' experience in dispute resolution for construction, engineering and infrastructure projects across Australia.

Moulis Legal

Emily Murphy has been promoted to senior lawyer with Moulis Legal. Emily is in the commercial litigation and dispute resolution team and has been involved in litigation matters, including contractual disputes and complex litigation claims relating to commercial transactions and corporate negligence.

Mullins Lawyers

Mullins Lawyers has announced five internal appointments, including a promotion to partner.

Alan Strain has been promoted to partner, and will strengthen the firm's employment and industrial relations practice. He has previously held a partnership position in a global firm in Scotland, and served as an employment judge in the United Kingdom.

Susan Isaac has been promoted to special counsel. She is a QLS personal injuries accredited specialist.

Chris Herral has been promoted to a senior associate. She advises private clients on wills, powers of attorney, estate planning, estate administration, estate litigation, trusts, asset protection, family disputes and general advice.

Krystal Bellamy has been promoted to senior associate. She provides advice on estate administration, estate litigation and general advice.

David Callaghan has been promoted to senior associate. He has provided corporate and business advice, and focuses on mergers and acquisitions. David also provides advice to sporting organisations on different commercial matters.



Philip Vickery



Brian Healey



Paul Hardman



Jennifer Turner



Krystal Bellamy



David Callaghan



Brian Briggs



Stuart MacLeod



Andrew Young



Tristan Higham



Tim Lucey



Ashley Burgess

Slater and Gordon Lawyers

Slater and Gordon has announced eight senior promotions and appointments in Queensland.

Brian Briggs has been promoted from practice group leader to national military compensation expert in Brisbane. Brian is a QLS personal injuries accredited specialist and has more than 20 years' experience.

Stuart MacLeod has been appointed to state practice group leader Queensland, workers' compensation in Brisbane. Stuart is a litigation lawyer and has led teams at a state level since 2005. He has experience in compensation claims including workers' compensation, compulsory third-party insurance, public liability and product liability.

Dan Sutherland has been promoted from practice group leader (metro) to state practice group leader Queensland, motor vehicle compensation in Brisbane. Dan has experience in compensation claims, including workers' compensation, compulsory third-party insurance, public liability and product liability.

Paul Jones has been promoted from associate to senior associate, compensation claims in Robina. Paul has worked in workers' compensation, motor vehicle, total and permanent disability, superannuation and income protection, and public liability claims.

Emma Aldersea has been promoted from associate to senior associate, criminal law. Emma has worked as a criminal lawyer for more than eight years and has successfully defended clients in a range of criminal matters.

Andrew Young has been promoted from associate to senior associate, commercial and project litigation in Brisbane. Andrew provides advice and representation to clients involved in civil disputes. He also pursues compensation and other remedies for individuals and small businesses who have suffered loss and hardship as a result of misleading and deceptive conduct, the negligent advice of solicitors or financial advisors and breaches of contract.

Tristan Higham has been promoted from lawyer to associate, motor vehicle compensation in Brisbane. Tristan has worked in motor vehicle claims, compulsory third-party insurance and public liability.

Tim Lucey has been appointed as a special counsel Queensland. Tim has more than 20 years' experience in the practice of law.

Sparke Helmore Lawyers

Sparke Helmore Lawyers has announced the promotion of **Ashley Burgess**, a member of its Brisbane insurance group, to senior associate. Ashley acts primarily in social security, Commonwealth and military compensation, and administrative appeals. He has also been seconded to government departments to assist as an in-house advocate and review officer.

Proctor career moves: For inclusion in this section, please email details and a photo to proctor@qls.com.au by the 1st of the month prior to the desired month of publication. This is a complimentary service for all firms, but inclusion is subject to available space.

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New QLS members

Queensland Law Society welcomes the following new members, who joined between 1 December 2015 and 10 January 2016.

Lauren Abbott, Thomson Geer
 Jordana Abela, Kelly Legal
 Cherie Alexander, Andrew Wheldon Solicitor
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 Rene Zwart, Irish Bentley

Carla Parsons

Bell Legal Group



What's your current employment and position?

I am a partner of Bell Legal Group, a longstanding firm on the Gold Coast.

Career path?

My legal career started straight from high school as a five-year articulated clerk, studying my law degree by correspondence through QUT. After admission, I continued on at the same firm and progressed from the role of solicitor to associate practising in succession, banking and finance, and property law. After taking a year off to travel America, I returned to Australia with a determination to focus solely on succession law and was fortunate enough to secure a position in Brisbane at a highly regarded boutique succession law firm. In addition to the opportunity to be involved in very interesting and complex matters, I was very much inspired by my peers and colleagues at the firm to continue to build and perfect my knowledge of succession law. Consequently, I commenced a Master of Applied Law in wills and estates through the College of Law.

After some very enjoyable and busy years in Brisbane, I returned to the Gold Coast, taking up a position of senior associate at Bell Legal Group. I have since completed my Masters studies, been promoted to partner and also recently successfully completed QLS specialist accreditation in succession law.

Why did you decide to practise law?

I was a keen legal studies student at high school and in my senior year was made aware of the opportunity to undertake a five-year articulated clerkship straight from school. I was successful in securing a position before the end of Year 12 and the rest is history!

What's your most memorable moment in the law?

As I studied my law degree by correspondence, my admission day was a very special occasion. The Specialist Accreditation Christmas Breakfast on 11 December last year was also a very special day for me as well.



What is the most useful piece of advice you've received?

In respect to the law, make no assumptions! More generally, the wise words once shared that 'you can have it all, just not all at once' are much appreciated words of wisdom.

As a newly qualified accredited specialist,* how do you think this accreditation will benefit your career?

I found specialist accreditation a great way to increase, polish and sharpen my knowledge and skills. I believe with the expanded professional network and personal profile, I will have not only a competitive edge but also the tools and ability to assist and achieve great outcomes for my clients.

What motivates you to continue your legal practice?

The satisfaction of being able to assist people, often in very difficult and trying times.

What is the greatest enjoyment in your work?

As above – the satisfaction of being able to assist people, often in very difficult and trying times.

What would you like to be doing in 10 years' time?

Running a successful succession law team, with a strong reputation for knowledge, skills and achieving the right outcomes.

What legal issues are you most concerned about?

Currently, the ever-increasing onerous duties which seem to be laden on lawyers practising in succession law.

What activities unrelated to work do you enjoy?

As a Gold-Coaster, the beach of course!

Having an international family, overseas travel is also very high on the list.

How do you manage work-life balance?

With discipline! Sometimes work, and in recent years study, require (or demand) extra attention, so for me it is a matter of ensuring that during the less busy times (or when the opportunity arises), I ensure that my family and friends are my topmost priority.

**Carla was the highest achiever in last year's QLS succession law specialist accreditation program.*

Proctor career spotlight: If you are a lawyer with a story to tell and would like to be featured in Career spotlight, send an email to proctor@qls.com.au.

Susan Elin Thomson

30 September 1961 – 29 October 2015

Susan Elin Thomson died on 29 October 2015 after a battle with cancer that started in her teens.

Susan was a lawyer and, as with all things in Susan's life, she did this with the highest level of perfectionism. The outpouring of messages of dismay and sympathy that have circulated throughout the legal community in Cairns, Townsville and beyond since Susan's death are testimony to the respect and high regard in which she was held.

Susan was committed to the law and to her clients, several of whom attended her recent celebratory memorial in Cairns along with many of the profession and members of the local judiciary. Susan's daughters, Chloe and Imogen, have been showered with tributes to their mother, who was not only highly respected but also popular amongst her colleagues and the judiciary Australia wide.

Susan came to the law as a mature age student. She was a single mother seeking to provide security for her family. She attended James Cook University in Townsville, where she completed a Bachelor of Laws. Despite being a single mum raising two young children on a very tight budget, she did exceptionally well, qualifying to undertake Honours. Instead, she started work and preferred to spend time away from work with her family.

Judge Josephine Willis of the Federal Circuit Court spoke at Susan's memorial about how she met Susan when she had just been admitted as a solicitor around early 1998. In the years that followed, Susan and (the now) Judge Willis developed a professional and personal friendship. Judge Willis noted that, as an instructing solicitor, Susan was meticulous in preparing the brief, and in court she had command of the file and every document.

Susan worked her way from the most junior solicitor right through the ranks, seemingly unaware of any glass ceilings, and made it to an equity partner – another major achievement. She worked tirelessly to achieve and maintain this position.

Susan appeared in the Magistrates Court, the Family Court, the Supreme Court, the District and the Federal Circuit Court running her cases. In all courts she was considered to be a solicitor of high standing. She was a model of respectful conduct and a practitioner who loved the law, and so had an excellent knowledge of the rules in each court and all



relevant legislation. There was nothing Susan liked more than to have a legal problem and to unravel it.

A feature of her practice was the quality of her written work, which included drafting orders for use in court. Susan's drafting skills were acknowledged at the highest level, on one occasion by Deputy Chief Justice Faulks, who having read orders drafted by Susan said in court, that "these orders are drafted with an elegance rarely seen".

Susan also did many oral presentations and joined Judge Willis in doing a joint presentation on self-represented litigants at an international family law conference for the Association of Family and Conciliation Courts in Ottawa around the turn of the century. Former Chief Justice Nicholson, together with Canadian superior judges, complimented Susan on her part of the presentation and encouraged her to do more. Conferences were often the opportunity to explore a new region and many road trips ensued.

As a practitioner Susan was held in high regard by the judges before whom she appeared, and socially she engaged with them, and her fellow practitioners with fun, and that impish sense of humour. In times of adversity, Susan remained calm and gracious... always. Her motto was that whatever happened, personally or

professionally, we were to carry on with "business as usual".

Susan continued to work despite cancer again attacking her health. She transferred to the Brisbane office and went to work every day while undergoing radiotherapy. On other occasions she hobbled into work with open wounds. When first offered equity partnership she did not accept due to her concerns that she may not be able to pull her weight.

Susan established her own practice in 2014. The name Ethica Law Co. reflected her high expectations of herself and others. Establishing the firm gave Susan the chance to do some things differently. She worked for fixed fees and undertook pro bono work.

Susan was also a talented artist, musician and singer. She was beautiful and smart. She was fun to be with. She had a strong faith which gave her great strength and comfort. But above all that, she was a loving mother to her daughters. She was also a loving daughter, sister, aunty and grandmother. For myself, and for many others, Susan was a much loved friend and admired colleague. She will be missed.

The writer, Patricia Cope of Cope Family Law, Cairns, gratefully acknowledges the generosity of Judge Willis in providing a copy of the eulogy that she presented at Susan's celebratory memorial and from which substantial content has been drawn.

My flexibility story

The support of colleagues, available technology and acceptance of flexible working arrangements are key to success. **Renee Bennett** explains how these have benefitted her family and firm.

I commenced at wilson/ryan/grose Lawyers in 2000 and am a partner and head of the succession law department.

The firm has a head office in the Townsville CBD which accommodates about 50 staff. Wilson/ryan/grose now has a local presence on the Sunshine Coast, consistent with its regional focus that suits the communities of regional south-east Queensland.

I work every day in the office at reduced hours, and aim to finish early most of these days to care for my three-year-old twins. This, of course, is dependent on client and staff needs, functions, marketing events and court appearances. When I do finish early, I remain available on my mobile and email for both staff and clients with urgent matters.

There are also days when I stay late or am available after hours. As I have full-time care arrangements for my children, I am able to have another level of flexibility when required.

My flexibility arrangements are perhaps different to some others, as I was a partner when they were negotiated with my fellow partners.

The arrangements are not rigid in the slightest, and are very flexible, with the needs of our clients foremost in our minds when considering such agreements.

Our firm has had staff at all levels working flexibly for many years, and has worked hard to create team environments in which everyone supports each other to meet the needs of our clients.

We also have sophisticated precedents, quality assurance, and record systems and procedures in place that assist with flexible arrangements. It certainly isn't always easy, as not being in the office full time requires my time in the office to be truly productive. It certainly pays to be very organised! One of the greatest assets I have in working flexibly is my personal assistant, who is truly exceptional.

I am very lucky in that I don't have any real difficulties with my arrangements. However, with the ever-increasing sophistication of digital technology, I am technically available all of the time. The access to emails, phone calls, checking mail and settling documents remotely is of great benefit



when outside of the office. This also means that there is no real downtime, but this is the same for all practitioners.

I feel very privileged to have flexible working arrangements, and as a result, I work much harder than I had to prior to children to ensure that my flexible hours don't impact adversely on our clients, staff or my fellow partners.

Developments in digital dictation and remote access have been a blessing for me, although leaving early in the afternoon often means I will work at home late at night. It is a trade-off, but one that I think is worth it and that works for me.

Flexibility has not attracted a negative reaction from staff at our firm, as there have been 25 years of flexibility at all levels. I have four professional staff and three support staff in my direct workgroup, with three of the professional staff and two of the support staff also working flexible hours.

Our firm has an excellent culture with much support from other staff. We all accept that there is give and take with our flexible arrangements and it works well for both us and our clients.

In addition to my work within the firm, I am also lucky to hold positions on various boards and committees, including the QLS Succession Law Specialist Accreditation

Advisory Committee. I am also an adjunct lecturer in the masters program for the College of Law.

In my dealings with other organisations on which I hold positions, I have been provided with support and encouragement from board and committee members to be flexible in fulfilling my duties. Attending board meetings via phone or Skype and other initiatives are quite the norm these days, regardless of gender.

In my experience, I also find that many other firms and organisations now see the real benefit in allowing staff meaningful flexibility in order to meet their obligations both at home and in the office.

My flexibility arrangements are successful because I work hard, and I am blessed to have the support of my fellow partners, staff and particularly my family. The benefits that myself and my family have received as a result of my flexible arrangements are immeasurable.

This story appears on behalf of the flexibility working group, an initiative of Queensland Law Society and the Women Lawyers Association of Queensland. The group needs your story – good or bad. Please contact flexibility@qls.com.au and share your experiences with flexibility in the legal profession. Renee Bennett is a partner at wilson/ryan/grose.

Culture – the ultimate differentiator

... and path to delivering strategic outcomes



Culture is far more than a 'nice to have' for any firm or organisation. **Dr Peter Ellender** explains its critical role in delivering positive results.



The days of the strategic plan are apparently long gone, according to the gurus.

No longer do organisations look forward five years and decide where they want to go and how they plan to achieve the goals. The days of endless SWOT analysis and week-long planning retreats are no longer, with emphasis now on the 'one pager' to provide direction and with the ability to be communicated by social media.

Whether the market conditions change more rapidly than in the past or digital disruption has hit the profession, or there is just not the fortitude to stick to a plan, is debatable. However, the challenge was always to produce an outcome which describes a point of difference – what is our differentiator? – one that could be believed and owned by all staff, readily implemented as well as being visible to, and valued by clients.

Daily priorities overrun strategic implementation

Planning exercises also have a history of poor outcomes. Creativity can be strong, with many good ideas being floated for discussion, and can also be a time when blue sky unattainable and unachievable goals are contemplated, for example – we should expand into... or let's acquire firm X...

Although high energy levels are often put into the activity with rigorous debate and solid thinking, the plans are then reviewed infrequently, generally ignored and implementation is partial, at best. Planned actions and activities typically slide down the priority list as day-to-day imperatives take over or environmental factors take precedent.

The story of the frogs sitting on a log is apt here.

There were five frogs perched on a log which hung over a pond. After a discussion each of the five frogs decided to jump into the water below. How many frogs were left on the log?

Well, there were five. Why? Because deciding to jump and actually jumping are different actions, just like deciding on a direction and implementing a plan are different activities. Most plans fall down at the implementation phase, not the directional decisions or the actual planning component.

Entrepreneurial firms allow individuals to 'get on and do their own thing', to drive their business unit and be successful with encouragement to spend time on innovation and creativity. For those who are successful, this is a good model as they produce a win-win solution for the organisation and themselves, but this is only if the outcomes are replicable and sustainable.

This is typically a 'me' culture and not one for sharing and expanding, often leading to the well-known phenomena of a 'siloed organisation', which is merely a loose conglomerate of business units operating separately under a common brand. Of course there will always be exceptions and a few organisations of this type will be successful, but for how long?

Many companies, including law firms, have not been at the forefront of articulating their thinking going forward and are not definitive about how to go about identifying, creating and maintaining any perceived differentials in a way that staff can readily get on board with. Many sessions attempt to capture their point of difference and often come back to familiar statements. Some overused statements that get rolled out regularly have been identified by Joel Barolosky:¹

- 'Our employees set us apart.'
- 'We strive for excellence.'
- 'We provide fantastic client service.'
- 'We're trusted advisors to our clients.'

While identifying and implementing what truly differentiates one law firm from another can be difficult to articulate, many law firms ignore the 'elephant in the room' – that of the organisational culture.

Culture impacts differentiation

Culture not only impacts on establishing points of differentiation, but importantly shapes the environment in which a firm can implement and maintain that differential once established.

Here is where the market is moving faster than ever. Competitors react quickly and close the gap when a tangible differential, a new initiative or service becomes apparent and is making a difference to clients. However, differentiation is often built from a number of elements that, when combined, set a firm apart from competitors, with the most difficult element to combat being culture.

Barolosky² coins the term 'cultural differentiation' as a real factor in a firm's success and argues that it is established when "an internal culture creates value, both internally and externally". Cultural differentiation is very powerful, mainly because it:

- creates value – benefits clients
- is difficult for competitors to gain visibility
- is extremely difficult and time-consuming for competitors to match.

The well-known phrase originated by Peter Drucker and made famous by Ford president Mark Fields that "culture eats strategy for breakfast" is most pertinent here, as cultural differentiation may be seen as the ultimate in delivering strategic outcomes.

Cultural differentiation occurs when there is close alignment between the goals of the organisation and the goals of individuals driving the firm, namely the partners. It flows from the leadership of the organisation such that debates and discussions are more productive in terms of driving the business and areas like client service rather than wasted effort on unimportant internal issues and conflicts.

An organisation can be seen to be in the slipstream of cultural differentiation when partners spend their time working to build the business, support each other and importantly do not have to spend time on core areas which are well understood, agreed on and set. As a senior partner in one such organisation said:

“... it is the things we don't have to talk about that enable us to concentrate on the issues that are critical for clients and our business.”

This does not mean that there is total agreement on everything, but it does enable robust debate and decisions to be made from a common base and solid platform, one that has a core value set across the partners.

Culture can also be a success factor in moving plans from the drawing board to reality and it can be infectious whereby the wider team is engaged in achieving a step forward in the plan when they see colleagues making moves and taking action. The impetus to ‘jump off the log’ can be a major influence on outcomes and culture is a factor in generating activities to drive a plan. Culture is also powerful in breaking down silos.

Virgin Australia chief executive officer John Borghetti describes culture³ with a different slant. He says: “So if you can make the individual as comfortable as possible, they will perform better. It's about letting people know what the business means for them.” He argues for creating the right atmosphere in which staff feel comfortable and can be guided to a way of operating. Here then is where a differential can be realised, and it is the genesis of cultural differentiation.

Culture, the personality of a firm

Culture has been described as the personality of an organisation, and the importance of the culture of an organisation is seen both internally and externally. It is clear that the image and branding of a firm, which can have a major influence on its reputation, cannot be different externally to that which exists internally. So a law firm with a poor internal culture is unlikely to be able to do anything different externally and this impacts clients, client service and relationships.

While it may be possible over the short term, it is not possible for an organisation to have split personalities over a prolonged period, and sure enough the effects of the culture emerge over time. This can often be seen in key metrics such as client satisfaction, client retention, partner churn and staff turnover, but also in firm results. Short-term success may mask some elements of a poor culture, but over time reverse cultural differentiation occurs and reputation is diminished. Staff are the best indicator here, including partner churn rates.

Successful businesses work on organisational culture

Getting the culture right makes very good business sense and lifts returns though the creation of cultural differentiation, a strategic imperative for competitive advantage. It has been said that a healthy culture can increase discretionary effort and in doing so improve service levels, client experience and productivity.⁴

The culture of a firm strengthens the psychological contract between staff and the firm, and the importance of culture only registers with younger solicitors after some time. As one young lawyer said: “At interviews culture was stressed but at that stage I only wanted a job; now I'm running my own firm and completely understand the importance of culture.”



In professional services businesses which operate in highly competitive markets, as most law firms do, the need to establish a distinguishable difference from your competitors is critical. In a mature market this comes down to marginal positive differences across a range of elements which, in total, make up a competitive offering. The one area that is difficult to establish precisely as planned and even more difficult to mirror is that of the organisational culture which ultimately produces cultural differentiation leading to superior results for the firm.

The power of cultural differentiation

Cultural differentiation is an extremely powerful, competitive weapon which emanates from and is directly correlated with cultural leadership. Creating and maintaining the right atmosphere, the right culture in a law firm should be a leadership priority.

Dr Peter Ellender is the chief executive officer of Carter Newell Lawyers.

Notes

¹ '10 Reasons Why Culture Eats Strategy for Breakfast', a blog by Joel Barolsky of Barolsky Advisors.

² Ibid.

³ 'Leadership for Growth – How to Keep Your Cool', Patrick Durkin, *Boss Magazine*, Volume 16 p24, November 2015.

⁴ 'Leadership for Growth – What Makes a Company Culture Respected', Henriette Rothschild, *Boss Magazine*, Volume 16 p26, November 2015.

Resolve to talk more in 2016

A practice idea that might make a big difference



Email, messaging and various other forms of social media seem to have skewed much of our *first choice* communication away from speech and into text and pictures.

These communication styles obviously serve a purpose. They can be quick, they leave an evidentiary trail, most of the people we deal with see them as normal, and at times, they enable us to constructively avoid discussion when that suits our purposes.

And it goes without saying that in the legal profession the written word has a special value for all kinds of reasons.

Having said all of that, I do worry a little about how this seemingly habitual and compulsive adoption of text and email actually thwarts effective communication.

In its most absurd form, two colleagues in the same office can engage in a dozen back and forth email exchanges (some of a page or more) when a 10-minute conversation may have negated much of the need for all the written detail. Face to face is even better. This kind of thing can be extraordinarily ineffective – especially with the escalating competitive pressure against time charging.

Talking is also infinitely superior in any communication when the issues are contentious, when you want people to actually do something, or when any bad news is involved. Consider some simple examples.

If you are chasing slow payers, there is no substitute for getting on the phone. Sure – all the documentation may end up supporting your claim at law, but emails, and accounts rendered are too easily ignored. On the phone you can confirm the debt, confirm when and how it will be paid, discuss and resolve any contentious issues, and basically steer the debtor into action.

When supervising another person's work, written criticism is time-consuming, and doesn't accommodate the subtleties of coaching, style and constructive exchange.

Without speech, conveying bad news to clients can quickly degenerate into warfare, when a conversation may have landed upon some shared understanding and compromise.

And then there is the basic matter of taking instructions – and through listening and questioning, carefully deconstructing what it is that our clients really need...

Email and text-based communications are here to stay. But next time, before instinctively hitting the keyboard, ask yourself – would this be easier, clearer, faster, more personal and less contentious if I just picked up the phone?

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

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Wines of the ark

with Matthew Dunn



Australia has many treasures in her vineyards. They are not gold, iron or coal, but pieces of living history – old vines.

The significance of these vines is global because of phylloxera, a yellow sap-sucking insect related to the aphid which made its way from North America to Europe courtesy of Victorian-era plant hunters. Once established in Europe, it decimated vineyards from 1863 onwards, killing precious ancient vines and destroying livelihoods.

However, in 1832 the legendary James Busby had brought to the Sydney Botanic Gardens some 363 vine varieties collected on a tour of the great vineyards of Europe before the louse took hold. Cuttings from this vinous ark, as it has been called, then formed the basis for many of our original vineyards. By the time the phylloxera louse was devastating Europe, Australian winemakers were expanding into new sites in the Hunter Valley, Barossa Valley, the Yarra Valley and southern Queensland.

Through a mixture of good management and good fortune, Australia escaped the worst ravages of the phylloxera louse, though over the years our stock of old vines has faced other challenges, the greatest of which included

the Depression, government-sponsored vine-pulling and changing faddish tastes.

The Yarra Valley, for example, was completely returned to agriculture in the early part of the 1900s before replanting started in 1963 at Wantirna Estate.

Today, Australia's inventory of hidden treasures makes for compelling, if not surprising, reading.

The oldest known shiraz vineyard in the world is said to be at Langmeil in the Barossa, planted in 1843 and still in production, making The Freedom 1843 Shiraz. Turkey Flat is not far behind in shiraz, with a vineyard established in 1847 and those old vines contributing to its commercial wine. Chateau Tahblik in Victoria has its half hectare of ungrafted, pre-phylloxera original estate planting of shiraz vines from 1860, creating its 1860 Vines Shiraz.

Cirillo Wines in the Barossa is fortunate to have one of the oldest surviving mixed vineyards in the world with three hectares of grenache, one hectare of semillon and a half hectare of shiraz planted in 1850. The remarkable grenache vines are still producing and thought to be the oldest continuously producing vines of that variety in the world.

Rimfire vineyard on the Darling Downs in Queensland (sadly now closed) had its mysterious '1893 vine'. Reputed to have

been brought to the area in 1893 by a German settler, the original vine lingered and cuttings were propagated into a small planting which produced an interesting dry white. The name '1893 vine' stuck, as DNA testing could not identify the vine as being any variety known in Australia.

Chambers Rosewood in Rutherglen has a small, 100-year-old planting of the very rare variety, gouais. This historical curiosity was widely planted in medieval France, but was regarded as a wine variety for peasants. Now it is virtually extinct everywhere except Switzerland and the Chambers vineyard, a highly unlikely connection possibly explained by the early Swiss influence on the Victorian wine industry. Gouais also has a remarkable claim as it is the biological parent of both chardonnay and riesling.

St Huberts in the Yarra Valley was established by Swiss settler Hubert de Castella in 1862, and was originally planted with hermitage, cabernet sauvignon and marsanne. Cuttings from those original marsanne vines populated the Chateau Tahblik holdings, which now date from 1927 and are said to be the largest single holding in the world.

In the vineyards of Australia there certainly are important treasures worthy of curation and their own protection as our liquid heritage.

The tasting Three examples of legacy wines were subjected to close inspection.



The first was the **Chambers 2005 Gouais**, kindly supplied by Rutherglen enthusiast Mr Arjuna Nadaraja, director of transnational practice at the Law Council of Australia. The colour was the greeny tinge of ripe gooseberry and the nose was a most unusual, but not unapproachable mix of lime and mineral notes. The palate showed the lime flavours strongly at the core surrounded by a richer layer of stone fruit with a zesty finish. At 10 years of age, it is a mere pup and the acid promises many more happy years of enjoyment to come. Top drawer.



The second was the **St Huberts 2005 Yarra Valley Roussanne**, which was the colour of gold and had a nose of grapefruit, lime and flint. The palate was racy zesty citrus and a long lingering finish of soft acid, building to some intensity in the mid-palate of richness cut with grapefruit acidity. A 10-year-old wine of much body and substance, again with years ahead of it. Excellent with salmon.



The last was the **Cirillo 2014 Barossa Valley 'The Vincent' Grenache**, coming from 80-year-old vines and the colour of light cherry red. The nose brought blackcurrants, white pepper and nutmeg to start. The palate showed the spice to the fore with pepper and liquorice based around warm red cherry and fruits – making a soft yet firm red wine almost tasting of warm summer afternoons in the Barossa. A red to enjoy on its own.

Verdict: The three wines were each superior in their own way, the gouais was a very worthy surprise packet, but the sentimental favourite was the Cirillo on the day.

Matthew Dunn is Queensland Law Society government relations principal advisor.

Mould's maze

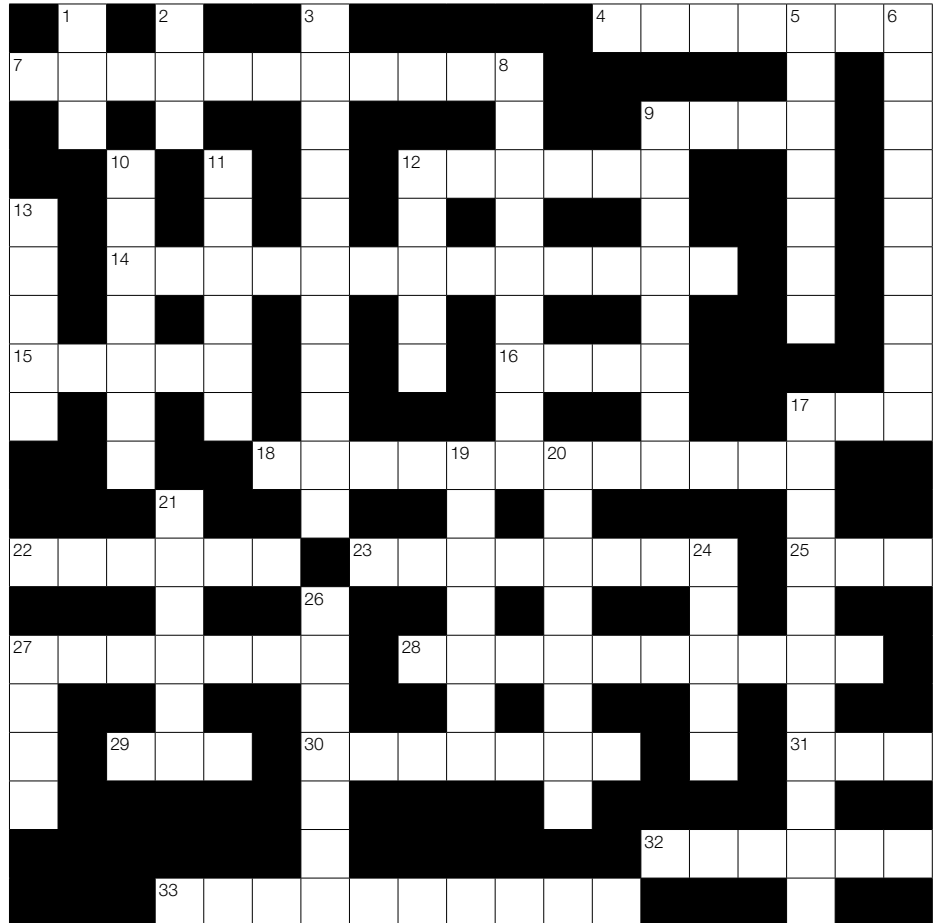
with Sunshine Coast barrister John-Paul Mould.

Across

- 4 Determining points of law according to precedent, stare (Lat.) (7)
- 7 Ground of appeal, of justice. (11)
- 9 Common Christian name of male solicitors with the surnames Brown, Balchin, Carlton-Smith, Dwyer, Hempenstall and Magill. (4)
- 12 The rule in v *Minahan* provides that a statute will be interpreted not to abrogate an important common law right, privilege or immunity in the absence of clear words or necessary implication. (6)
- 14 Pillory. (13)
- 15 Reason. (5)
- 16 A person seeking to live alone in the family home upon separation can apply for a occupation order. (4)
- 17 Crystal methamphetamine hydrochloride. (Jargon) (3)
- 18 The *Telecommunications (..... and Access) Act 1979* (Cth) makes it an offence to privately record phone calls. (12)
- 22 Relieving solicitor, locum (Lat.) (6)
- 23 Canon of statutory construction by which the questionable meaning of a word can be derived from its association with words surrounding it, a sociis. (Lat.) (8)
- 25 Queensland statute that regulates the noise levels permitted by refrigeration equipment at various times of the day. (Abbr.) (3)
- 27 Swore. (7)
- 28 A right to reject jurors without reason, challenge. (10)
- 29 Code to diagnose psychiatric illnesses and injuries. (Abbr.) (3)
- 30 A order for costs is usually made where a plaintiff succeeds against one defendant and fails against another. (7)
- 31 Offence involving the loss of a body part, serious disfigurement or an injury of such a nature that if left untreated it would be likely to cause permanent injury to health. (Abbr.) (3)
- 32 Cite as an example or means of proof in an argument. (6)
- 33 A claim for gratuitous domestic care, *Griffiths v* damages (10)

Down

- 1 Occupational regulation revolves around a ... and proper person test. (3)
- 2 Antonym of omission. (3)
- 3 Illegal trade. (11)



- 5 Order sought by a plaintiff when a defence with no merit has been filed, judgment. (7)
- 6 Antonym of joinder. (9)
- 8 The parol evidence rule applies to exclude the use of evidence in determining the meaning or effect of words used in a contract. (9)
- 9 Oral submission. (8)
- 10 Version; invoice. (7)
- 11 First female Chief Justice of the Supreme Court of Queensland. (6)
- 12 The Court of Sessions existed in Queensland until 1965, exercising jurisdiction over small debts, licensing, children's matters, coroners' inquiries and police matters. (5)
- 13 Judicial direction given to the jury urging them to reach a verdict. (5)
- 17 Period of time during change of government. (11)
- 19 Case involving the principle that one parent's time may be limited when the other parent is unhealthily anxious because of a genuine but mistakenly held belief that the children had been abused by the first parent: v. *Close* (7)
- 20 Section 134A of this Act is an administrative mechanism for third party discovery. (8)
- 21 The Court was introduced in Queensland in 1992 to enable certain minor offences to be dealt with by the automatic issuing of fines. (6)
- 24 The principle that a case establishes, decidendi. (Lat.) (5)
- 26 Notional inclusion of non-existent items into a pool of assets within a property settlement. (7)
- 27 Not putting your client's case to the opposing witnesses is a breach of the rule in *Browne v* (4)

Solution on page 68

So, what do you do for a living?

But don't give me *War and Peace*

by Shane Budden



What do you do for a living?

Don't answer that – for a start, I can't hear you, and if you are reading this article there is a fair chance that you are a lawyer (although that may not last if the partners catch you at it).

It is an important question, however, as we tend to define ourselves by our jobs. If someone at a party asks "what are you?" you never respond with your religion or state that you are a human (especially not in our profession). You say you are a plumber, because admitting that you are a lawyer will ensure you spend the entire party providing pro bono advice on minor criminal offences and spurious personal injuries claims.

My point is that what you do tends to define you, and the question is a big one – and one which will be a little bit harder for my dad to answer from now on, as he retired at the end of 2015 after almost 48 years with the same employer.

Admittedly, the place was the PMG when he started and Telstra when he left, by way of Telecom in between, but almost five decades with the same employer is not a bad effort. What was very cool about the whole thing is that he was able to drive the same car to work on his last day as he did on his first, since he has owned his 1961 Holden for over 50 years.

Dad's retirement got me thinking about my own work history, which began at a supermarket during university days. This was more dangerous than it sounds. Sure, painting the Story Bridge carries the danger of plummeting to your death, but compare that to the risk of being driven temporarily insane by a combination of summer heat and hearing *Rudolph the Red-nosed Reindeer* 2178 times over shopping centre PA systems in the lead-up to Christmas.

OK, so the death thing is worse, but not by much. I imagine that shopping centre workers today would be regularly involved in explosions of rage caused by Christmas Carol Saturation Syndrome, except for the fact that they can't hear the Christmas carols because they are listening to what passes for music these days on their iPhones.

Back when I was working part-time at a large retailer of food at Redbank Plaza ('The Diamond of the West') during the Pleistocene Epoch, the wearing of headphones was strictly

forbidden, along with the wearing of nose-rings, eyebrow studs and anything other than the hideous official uniforms, which I believe were designed by the same people that Mao Zedong got to make the boilersuits favoured by China during the cultural revolution. (I suspect they also did his hair).

The point is, these uniforms may have seemed ugly, but I can assure you they were uncomfortable as well. I believe they may have been the first large-scale objects with quantum properties, because just as Schrödinger's cat was both alive and dead (don't ask me about it, you'll regret it – check with anyone who knows me on this) these uniforms were both stiflingly hot in summer and completely useless against the cold in winter.

I suspect they were also made by poorly co-ordinated prisoners who had taken up sewing as an anger-management technique, because in the entire time I was there no one ever had a uniform that actually fitted them.

Some people had coats that were so big they could have rented them out to the boy scouts to use as tents, whereas others had uniforms tight enough to cut off blood circulation. Thankfully, we rarely noticed our physical discomfort because we were distracted by the mental anguish flowing from the way they looked.

The cut and fit of the uniforms produced the same overall stylish coolness that one usually associates with clothing favoured by golfers – except that even golfers wouldn't wear those colours. The jacket worn by male staff was the same hue displayed by a piece of liver just before it goes off, and the women's dresses were the exact shade of blue that people turn just before they die from hypothermia on the slopes of Everest.

Anyway, my point is that headphones were not part of the uniform, and we were not protected from the mind-bending effects of Christmas carols, which is one of the big dangers we all face at the end of each year.

The start of the year is dangerous too, because this is when people often decide to finally do something they were always going to do, such as read *War and Peace* or get fit. Faced with the idea of hours of gruelling exercise or reading *War and Peace*, most people go for the exercise – because after the first two pages of *War and Peace*,

even running up Mt Coot-tha while dragging a fridge seems like a pleasant idea.

Unfortunately, the start of the year is the worst time to make a commitment to fitness because it is the middle of summer, and summer – this is a true scientific fact coming up here – is *hot*. When it is hot, it is much harder to exercise, because of the greenhouse effect; attempts to get fit in summer almost always turn into hours of cricket-watching, and also beer.

The best thing to do in the heat is to find someplace cool to be, which is why – remember, I had no protection against the insanity-creating Christmas carols – my family and I decided to spend the week after Christmas in Townsville visiting my brother and his family. There are hotter places than Townsville in high summer, but not this far from the sun.

Anyway, by the time you read this we will have been up there and back – don't get too spooked, but due to *Proctor* deadlines I am speaking to you from the past (cue *Twilight Zone* music). We are going up to see my new nephew, who will be celebrating his first Christmas by drooling on his presents while my mother takes upwards of 14,000 photos.

My children are of course keen to see their cousin – my daughter because she thinks he is the coolest doll she has ever had (he makes noise without needing batteries) and my son because he considers my nephew to be an excellent obstacle over which to drive remote-controlled cars.

The point is that it is too dangerous, at this time of the year, to go around making resolutions and such things – but if you must, then keep it to things you actually will do. For example, instead of resolving to lose weight, resolve to lose your keys; it might not be as healthy but it is far more likely to happen. Rather than resolving to read *War and Peace* resolve to read the Wikipedia synopsis, or even better the synopsis of something that is actually interesting.

Most importantly, get yourself some headphones, because Easter is just around the corner and *Here Comes Peter Cottontail* can give *Rudolph* a run for his money when it comes to driving you insane.

© Shane Budden 2015. Shane Budden is Queensland Law Society advocacy and policy manager.

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Crossword solution from page 66

Across: 4 Decisis, 7 Miscarriage, 9 Adam, 12 Potter, 14 Collistrigium, 15 Cause, 16 Sole, 17 Ice, 18 Interception, 22 Tenens, 23 Noscitur, 25 Epa, 27 Deposed, 28 Peremptory, 29 Dsm, 30 Bullock, 31 GBH, 32 Adduce, 33 Kirkemeyer.

Down: 1 Fit, 2 Act, 3 Trafficking, 5 Summary, 6 Severance, 8 Extrinsic, 9 Argument, 10 Account, 11 Holmes, 12 Petty, 13 Black, 17 Interregnum, 19 Russell, 20 Evidence, 21 Setons, 24 Ratio, 26 Addback, 27 Dunn.

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Bundaberg Law Association Mr Rian Dwyer
Fisher Dore Lawyers, Suite 2, Level 2/2 Barolin Street
p 07 4151 5905 f 07 4151 5860 rian@fisherdore.com.au

Central Queensland Law Association Mr Terry Tummon
Swanwick Murray Roche,
74 Victoria Parade Rockhampton 4700
p 07 4931 1888 ttummon@smrlaw.com.au

Downs & South-West Law Association Ms Catherine Cheek
Clewett Lawyers
DLA address: PO Box 924 Toowoomba Qld 4350
p 07 4639 0357 ccheek@clewett.com.au

Far North Queensland Law Association Mr Spencer Browne
Wuchopperen Health
13 Moignard Street Manooora Qld 4870
p 07 4080 1155 sbrowne@wuchopperen.com

Fraser Coast Law Association Mr John Milburn
Milburns Law, PO Box 5555 Hervey Bay Qld 4655
p 07 4125 6333 f 07 4125 2577 johnmilburn@milburns.com.au

Gladstone Law Association Ms Bernadette Le Grand
Mediation Plus
PO Box 5505 Gladstone Qld 4680
m 0407 129 611 bleggrand@mediationplus.com.au

Gold Coast Law Association Ms Anna Morgan
Maurice Blackburn Lawyers,
Lvl 3, 35-39 Scarborough Street Southport Qld 4215
p 07 5561 1300 f 07 5571 2733 AMorgan@mauriceblackburn.com.au

Gympie Law Association Ms Kate Roberts
Law Essentials, PO Box 1433 Gympie Qld 4570
p 07 5480 5666 f 07 5480 5677 kate@lawessentials.net.au

Ipswich & District Law Association Mr David Love
Dale & Fallu Solicitors, PO Box 30 Ipswich Qld 4305
p 07 3281 4878 f 07 3281 1626 david@daleandfallu.com.au

Mackay District Law Association Mr Kane Williams
McKays Solicitors, PO Box 37 Mackay Qld 4740
p 07 4963 0888 f 07 4963 0889 kwilliams@mckayslaw.com

Moreton Bay Law Association Ms Hayley Cunningham
Family Law Group Solicitors,
PO Box 1124 Morayfield Qld 4506
p 07 5499 2900 f 07 5495 4483 hayley@familylawgroup.com.au

North Brisbane Lawyers' Association Mr Michael Coe
Michael Coe, PO Box 3255 Stafford DC Qld 4053
p 07 3857 8682 f 07 3857 7076 mcoee@tpg.com.au

North Queensland Law Association Ms Kristy Dobson
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North West Law Association Ms Jennifer Jones
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South Burnett Law Association Ms Caroline Cavanagh
Kelly & Frecklington Solicitors
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Sunshine Coast Law Association Mr Trent Wakerley
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p 07 5443 9600 f 07 5443 8381 trent@krugerlaw.com.au

Southern District Law Association Mr Bryan Mitchell
Mitchells Solicitors & Business Advisors,
PO Box 95 Moorooka Qld 4105
p 07 3373 3633 f 07 3426 5151 btmitchell@mitchellsol.com.au

Townsville District Law Association Ms Samantha Cohen
BCK Lawyers, PO Box 1099 Townsville Qld 4810
p 07 4772 9200 f 07 4772 9222 samantha.cohen@bck.com.au

Interest rates

For up-to-date information and more historical rates see the QLS website
>> qls.com.au under 'Knowledge centre' and 'Practising resources'

Rate	Effective	Rate %
Standard default contract rate	5 January 2016	9.45
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 January 2016 to 30 June 2016	8.00
Federal Court – Interest on judgment debt for half year	1 January 2016 to 30 June 2016	8.00
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 January 2016 to 30 June 2016	6.00
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 January 2016 to 30 June 2016	8.00
Court suitors rate for quarter year	To 31 March 2016	1.34
Cash rate target	from 2 Dec. 2015	2.00
Unpaid legal costs – maximum prescribed interest rate	from 1 Jul 2015	8.00

Historical standard default contract rate %

Dec 2014	Feb 2015*	Mar 2015*	Apr 2015	May 2015	Jun 2015	Jul 2015	Aug 2015	Sep 2015	Oct 2015	Nov 2015	Dec 2015
9.95	9.8	9.8	9.8	9.7	9.7	9.55	9.45	9.45	9.45	9.45	9.45

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.

*Note: The rate printed in the February and March 2015 editions of Proctor was not shown as updated due to production deadlines.

QLS senior counsellors

Senior counsellors are available to provide confidential advice to Queensland Law Society members on any professional or ethical problem. They may act for a solicitor in any subsequent proceedings and are available to give career advice to junior practitioners.

Brisbane 4000	James Byrne	07 3001 2999
	Glen Cranny	07 3361 0222
	Peter Eardley	07 3316 2300
	Peter Jolly	07 3231 8888
	Peter Kenny	07 3231 8888
	Bill Loughnan	07 3231 8888
	Justin McDonnell	07 3244 8000
	Wendy Miller	07 3837 5500
	Thomas Nulty	07 3246 4000
	Terence O'Gorman AM	07 3034 0000
	Ross Perrett	07 3292 7000
	Bill Purcell	07 3218 4900
	Elizabeth Shearer	07 3236 3233
	Dr Matthew Turnour	07 3837 3600
	Gregory Vickery AO	07 3414 2888
	Phillip Ware	07 3228 4333
Redcliffe 4020	Gary Hutchinson	07 3284 9433
Toowong 4066	Martin Conroy	07 3371 2666
South Brisbane 4101	George Fox	07 3160 7779
Mount Gravatt 4122	John Nagel	07 3349 9311
Southport 4215	Warwick Jones	07 5591 5333
	Ross Lee	07 5518 7777
	Andrew Moloney	07 5532 0066
	Bill Potts	07 5532 3133

Bundaberg 4670	Anthony Ryan	07 4132 8900
Toowoomba 4350	Stephen Rees	07 4632 8484
	Thomas Sullivan	07 4632 9822
	Kathryn Walker	07 4632 7555
Maroochydore 4558	Glenn Ferguson	07 5443 6600
	Michael Beirne	07 5479 1500
Nambour 4560	Mark Bray	07 5441 1400
Gladstone 4680	Chris Trevor	07 4972 8766
Rockhampton 4700	Vicki Jackson	07 4936 9100
Mackay 4740	John Taylor	07 4957 2944
Mareeba 4880	Peter Apel	07 4092 2522
Caboolture 4510	Kurt Fowler	07 5499 3344
Cannonvale 4802	John Ryan	07 4948 7000
Townsville 4810	Peter Elliott	07 4772 3655
	Chris Bowrey	07 4760 0100
Cairns 4870	Russell Beer	07 4030 0600
	Anne English	07 4091 5388
	Jim Reaston	07 4031 7133
	Garth Smith	07 4051 5611

Practice Management Course dates

Sole practitioner to small practice

February	11, 12 and 19
April	14, 15 and 22
June	2, 3 and 4
September	1, 2 and 9
November	10, 11 and 12

Medium to large practice

March	3, 4 and 5
July	21, 22 and 23
October	13, 14 and 21

Information Evening – Thursday 25 February 2016

For further details and to register your attendance
visit qls.com.au/pmc or email pmc@qls.com.au



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Financial Statement

FORM 13 Family Law Rules ~ RULE 13.05

Please type or print clearly and mark [X] all boxes that apply. Attach extra pages if you need more space to answer any questions.

Filed in:

- ☒ Family Court of Australia
☐ Family Court of Western Australia
☐ Federal Circuit Court of Australia
☐ Other (specify)

Filed on behalf of:

Full name: STAT DEP

MARK [X] IN THE BOX THAT APPLIES TO YOU

- ☐ Husband/father
☐ Wife/mother
☒ Other (specify) STAT DEP

This form is to be used by a party to financial enforcement.

Part A About you

1 What is your family name as us

Client ID Jones
File Number 0044612
Filed at Brisbane
Filed on 12/06/2015

Time Recording

Timesheet

File Edit View Tools Help				
Judy Evelyn Tim Murphy John Stevens Incomplete (5)				
New	01 April	Start/Stop Timer	Open Matter...	
Matter No.	Client	Billing Description	Units	Elapsed
120010	Falcon Building Suppl...	Contract Amendments	6	00:33:20
120019	Mr Paul Cummings	Letter to Defendants Solic...	3	00:18:27
120018	Mr Dan			
120034	Mr Pat			
120007	Mr Pau			
120055	Mr Mich			
120022	Mr Tom			
120043	Miss Sa			
120062	Miss A			
120444	Mr R B			

Accounting

Pre Billing Guide

Aged Unbilled	Total	Current	>30 days	>60 days	>90 days
Fees (WIP)	\$3,940.00	\$3,940.00	-	-	-
Disbursements	\$4,606.66	\$4,606.66	-	-	-
Anticipated Payments	\$3,333.33	\$3,333.33	-	-	-
Cost Recoveries	\$440.00	\$440.00	-	-	-
Journals	-	-	-	-	-
Payments	\$833.33	\$833.33	-	-	-
	\$8,546.66	\$8,546.66			

Time/Fees By Staff	Unbilled				Billed			
	Hours	Hours amt	Fee amt	Total amt	Hours	Hours amt	Fee amt	Total amt
0.00	-	-	-	-	8.57	\$570.00	-	\$570.00
0.70	\$440.00	\$3,500.00	\$3,940.00	0.00	-	\$3,400.00	\$3,400.00	
0.70	\$440.00	\$3,500.00	\$3,940.00	8.57	\$570.00	\$3,400.00	\$3,970.00	