PROCTOR

Queensland Law Society

February 2018 – Vol.38 No.1

President Ken Taylor: Passion, experience and dedication

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Queensland Law Society

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Ken Taylor

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Working together

Looking forward as one

Welcome to 2018 – a new year of setting goals, achieving success and working together as one collegiate profession.

It is my pleasure to serve you – our members – as QLS president this year and I look forward to continuing the Society's great work promoting good law and good lawyers for the public good.

You will read more about my career path, motivations and goals for the year in an article further on in this edition, but I will briefly share with you the four areas I wish to look closely at during 2018 in this report.

In regard to technological change, I plan to work with QLS Council and staff to assist members with finding the best new solutions for their practice and avoiding the 'fads'. Looking at the issue of oversupply of law graduates, I am eager to look at ways to address this, but also to assist those starting out in their legal careers. Another key goal will be promoting the great work that lawyers do both within their communities and on a wider basis, and recognising these vital contributions. I am also passionate about improving access to common law rights for Queenslanders.

As a regional solicitor, I also plan to look at ways which we can further assist our regional members with access to information and support, as well as more opportunities to access professional development either in person or remotely. Our regional events will also provide me with a great opportunity to touch base with regional areas outside of my hometown of Townsville.

Of course, all solicitors from across Queensland face challenges in this ever-evolving climate, and as a fellow solicitor and business owner I am aware of many of the issues that both regional and city solicitors contend with. I will be spending much of my time this year in Brisbane, and I am eager to further observe the city branch of our profession.

I look forward to working with our new Council, incoming chief executive officer Rolf Moses, QLS committee chairs and members, QLS members, stakeholders and staff on numerous other important initiatives this year in addition to the above key areas. I have already begun meeting with key stakeholders, including Queensland's Attorney-General. There are many people who contribute to our mission and assist the Society in the work that we do day-in and day-out, and I am eager to meet with each and every one of them.

This year, my biggest goal is to work together for the good of the profession, and I trust that this will be the legacy that I leave to the Society and its members. We have a profession that is steeped in tradition, yet remains relevant in modern society, offering a lot to our community and the wider nation. Harnessing the excellence within our profession and promoting that to our community will be key for me in the coming months.

This is the first edition of *Proctor* since we announced the appointment of Rolf Moses as QLS chief executive officer and I would like to extend my congratulations to him on accepting this role, beginning 12 March. I look forward to welcoming Rolf to QLS.

Recently, I was able to kick off my presidency by attending the QLS member New Year Celebration. This event enabled me to share more of my vision for 2018 with attendees and to meet stakeholders and members face to face. I will be visiting Gladstone, Rockhampton, Mackay and Townsville this month, and I look forward to meeting more members and stakeholders in our regional areas.

There are many other events I will be attending throughout the year, and I encourage you to stay up to date with the latest offerings in professional development and networking via our weekly *QLS Update* e-newsletter, the QLS website, and of course, each edition of *Proctor*.

One event in particular which I am looking forward to is QLS Symposium. This yearly event provides a great opportunity for solicitors from across Queensland to come together for two days of professional development and networking with their colleagues. This year, we have combined the event with our Legal Profession Dinner and Awards, at which we recognise the great work that you all carry out.

I encourage all solicitors – members and non-members alike – to consider attending this year's event. I also extend an invitation to our regional members and trust that they will see the value in making the trip to Brisbane and taking advantage of our regional discount. QLS Symposium will be on 9-10 March, with the Legal Profession Dinner and Awards on 9 March. For more information, please visit the QLS website.

Your feedback as members is very valuable to myself, the QLS Council and our staff, and I encourage you to contact me via the email below throughout the year. You can also follow the QLS president Twitter account and the QLS social media pages for updates on what your Society is doing for you.

Ken Taylor
Queensland Law Society president

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Welcome to another big year

And the secret of Symposium success

A warm welcome to 2018!

Undoubtedly it will be another big year (aren't they all!). My key task next month will be to welcome our new CEO, Rolf Moses, who will join us on 12 March. Rolf has been Norton Rose Fulbright's Brisbane-based director of people and development and has had a long relationship with QLS as chair of the Wellbeing Working Group and also as a faculty member of the Practice Management Course.

It will be a pleasure to introduce Rolf to the CEO role. Perhaps it is a little bittersweet for me to step back from a task that has been challenging and fulfilling, but I relish returning to my preferred zone of activity as government relations adviser.

My thanks go to our QLS staff, who have worked so hard – and continue to work hard – to serve you, our members, and to our Council members, who have given me their unstinting support during this period.

Simple recipe for Symposium success

Since the 1960s, the Queensland Law Society Symposium has very much been a central fixture on the annual legal calendar.

It has succeeded year after year, decade after decade, because of its consistent focus on meeting our members' professional development needs and providing opportunities to share in the collegiality of our profession.

This year's event – QLS Symposium 2018, at the Brisbane Convention and Exhibition Centre on 9-10 March – will again deliver on those promises but, as we strive to do every year, in a way that is bigger and better than ever before!

One of the big changes is the inclusion of the Queensland Law Society's Legal Profession Dinner and Awards as an integral part of the Symposium program. Our 2018 president, Ken Taylor, will address attendees on his commitments and aims for the year ahead, as well as announce the winners of the President's Medal, QLS Agnes McWhinney Award, Innovation in Law award, the Community Legal Centre (CLC) Member of the Year and the QLS Equity and Diversity Awards.

Also featured will be our new First Nations Awards, which will recognise the Queensland First Nations Lawyer of the Year and Queensland First Nations Legal Student of the Year.

I encourage you to purchase your Legal Profession Dinner and Awards tickets now to celebrate the leaders in our profession.

This event, marking the end of the first day of Symposium, brings together the leaders of the Queensland profession in a relaxed and convivial atmosphere which offers plenty of opportunity for networking and catching up with friends.

While many delegates enjoy the social side of Symposium, its substance is of course the substantial professional development program, with seven streams – family, personal injuries, property and core CPD on day one, and commercial, criminal, succession and core CPD on day two – all bookended by high-level presentations from distinguished presenters, including the Chief Justice and Attorney-General, and plenary sessions that dovetail with this year's Symposium theme, 'Thriving in the complexity of legal practice'.

The latter sessions feature former Australian Human Rights Commission president Emeritus Professor Gillian Triggs speaking on 'Upholding the rule of law in a complex post-truth era' (opening plenary); noted author and lecturer Professor Gino Dal Pont from the University of Tasmania delivering an ethics plenary, 'Professionalism in the 21st Century', at the conclusion of day one; and Demographics Group managing director Bernard Salt AM talking on 'Thriving in the complexity of legal practice' (closing plenary).

Check the Symposium program and feature articles from Professor Dal Pont and Bernard Salt in this edition of *Proctor*, or learn more at qls.com.au. See you at Symposium!

Matt Dunn
Queensland Law Society Acting CEO

2017 IN REVIEW

Queensland Law Society achieves a lot each year as we strive to advocate for good law and support good lawyers for the public good. Below is a snapshot from January to December 2017. QLS will continue to update you on successes and key milestones each month.

197
Advocacy submissions

16
Networking events

1381
Media mentions

33
Bespoke ethics sessions presented to firms by QLS Ethics Centre

88
Learning and professional development events

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Queensland Law Society

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Launch for Pride in Law

In November 2017, members of the legal community gathered at Brisbane's Banco Court to launch Pride in Law.

This event was held during a time of public debate about equality before the law and prior to the results of the same-sex marriage postal survey.

The event was at capacity with all tickets sold in advance. Milton Griffin QC presented the keynote address, which was also streamed to locations across the state. It was entitled, 'I was there, and I survived, and I'm here', and moved through a history of LGBTIQ+ rights in Queensland, as experienced by the former District Court judge.

Among the night's attendees were current and former judges, barristers, solicitors and others within the industry, all at various stages of their careers.

President Dean Jones oversees Pride in Law, which is a not-for-profit, LGBTIQ+ legal networking association based in Brisbane – the first association of its kind.

"Pride in Law is an essential resource for all legal professionals seeking to embrace their LGBTIQ community," he said. "While I appreciate privacy, I also feel that if someone wanted to identify as part of the LGBTIQ+ community, fear of career progression should not be a reason for not identifying."

Following the launch, Pride in Law will now focus on its mission to erase homophobia, gender inequality and other affronts to individuals, families and communities by educating the legal community about LGBTIQ+ issues. Additionally, Pride in Law aims to enable younger LGBTIQ+ members of the profession to network with more experienced members able to share their experience.

Notice for members: myQLS

The portal on the QLS website (formerly Your QLS) has changed.

QLS members can now access more streamlined information about their personal and practitioner profile, membership of the Society, QLS events, CPD history, and QLS messages, forms and invoices via the new myQLS portal. Members are encouraged to log on today to check their details and contact records@qls.com.au to advise a change or raise a query.

Clarification

Two footnotes were omitted from the article, 'Solicitors as advocates', which appeared on pages 20 and 21 of the December edition of *Proctor*. For the paragraph beginning "By the fourth century, advocates…", this footnote should have been included: "Wikipedia, en.wikipedia.org/wiki/History_of_the_legal_profession. Accessed 7 November 2017". The following paragraph should also have a footnote: "Ibid." QLS apologises for these omissions.

60 years in law

An ongoing legacy

by Tony Keim

In 1958, the Australian Government was being run under the leadership of legendary Prime Minister Robert Menzies, the Cold War was in full effect between the USA and USSR, led by President Dwight D Eisenhower and then newly appointed Communist Party Secretary Nikita Krushchev.

It was a year which also saw the USA enter the space race with the establishment of NASA; the first ever computer microchip was invented; Elvis Presley, Frank Sinatra and Johnny O'Keefe were top of the Australian pops; Frank Nicklin was Queensland Premier; QANTAS introduced its first around-the-world service via the UK and live music show Bandstand was first aired on Australian television.

Meanwhile in Victoria, a promising legal career was launched when Richard Hyett graduated from Melbourne University and was admitted to practice on 3 March, 1958.

60 years on and Mr Hyett's enthusiasm and love of the law show no signs of diminishing.

Despite flirting with a career as a night club pianist at a young age, Mr Hyett says family tradition and the need to find a real and properly remunerated job dictated his future.

"I did contemplate a career as a pianist at a nightclub or a piano bar, but that was not considered by my father to be a proper job," he said.

"My family's history in law dates back to 1880 with my grandfather, uncle, father and older brother all solicitors.

"My grandfather spent countless hours working on the Australian Constitution with his partner John Quick, who was later knighted for his contribution."

Unlike millennial lawyers of today, early career lawyers in 1958 were unable to conduct internet or Google searches to quickly source case law or conduct research. In fact, almost all forms of modern technology were in their infancy. Even soon to be invented time savers have since been dispatched to the technological graveyard many decades ago.

That's not to say Mr Hyett hasn't been at the cutting edge of technology throughout his career – his firm installed Victoria's second ever computer in their offices in the mid-1970s. Over the years Mr Hyett has seen technology evolve from pen and ink, Dictaphones, manual type writers (using carbon paper) to golf-ball electric typewriters, and now computers.

There was also the introduction of facsimile machines where one had to go to the post office to transmit a fax, then Gestetner duplicators which evolved into modern day photocopiers, the first word processor (memory typewriter) which was the size of a large desk with the data being stored on a cassette tape.

"There has obviously been an enormous change with technology," Mr Hyett said.

"When I commenced practice there were no photocopies, fax machines or computers.

"Large libraries full of leather-bound Acts and legislation were kept up to date, but have now become less important as so much is available through Google. The law continues to be a changing landscape – for example e-conveyancing and email rather than post.

"Clients' expectations have also changed. Once people would wait for a reply to a letter. Now, with email and phones, people expect an immediate response, as though theirs is the only current file you have."

Mr Hyett's career as a Victorian solicitor was set-aside for a sea-change in 1994 when he moved from Bendigo to Queensland's Sunshine Coast.

Like most veteran lawyers, Mr Hyett has had more than a few laughs in the ordinarily dour confines of the criminal courts.

One case in particular that still affords him a guilty chuckle is the day he represented a probationary driver who recorded a low-breath alcohol reading, despite protestations of being stone cold sober.

"The accused gave evidence that he had not drunk any alcohol and then recalled that he had eaten his grandmother's trifle," Mr Hyett said.

"The magistrate replied: 'Quod lex autem non est de nguis.' The comment was lost on my client, but it gave me a good laugh. Translated from Latin the quote says 'the law does not deal with trifles'.

"Noting my amusement at his comment the magistrate dismissed the case."

At a time when most people of his age would swap a life of law for time on the beach, golf links or time in the slow lane, Mr Hyett is determined to carry on his life's work.

"I enjoy legal work, the discipline of being a lawyer and attending to the legal needs of people."

Tony Keim is manager of external affairs and journalist at Queensland Law Society.

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Appointment of receiver for Richard O'Neill & Associates, formerly of Sanctuary Cove

On 7 December 2017, the Executive Committee of the Council of the Queensland Law Society Incorporated (the Society) passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, Richard O'Neill & Associates.

The appointment of the receiver is limited to arranging for the orderly dispersal of a number of safe custody documents belonging to former clients of the law practice. Enquiries should be directed to Sherry Brown or Glenn Forster on 3842 5888.

Experience shared over dinner

In December, 14 Queensland Law Society presidents came together to speak about the highlights for 2017 over dinner. This annual event provides a great opportunity for past presidents to share their experiences with incoming presidents, and for the current president to share a summary of their term with peers.

Celebrating Christmas with ECLs

Early career lawyers celebrated the silly season with a special Christmas party at Bar Pacino. ECLs join together each year to relax with canapés and drinks, and finish the working year with their colleagues.

Breakfast with the Chief Justice

QLS accredited specialists joined Queensland Chief Justice Catherine Holmes for the Specialist Accreditation Christmas Breakfast at the Hilton Brisbane Hotel on 8 December. The annual event is a chance to congratulate newly accredited specialists, and celebrate current accredited specialists on their ongoing commitment.

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Dr Malcolm Wallace Joins the ASSESS Medical Specialist Team

It is our great pleasure to announce that Dr Malcolm Wallace, Consultant Orthopaedic Surgeon, has joined the ASSESS Medical specialist consulting team.

Dr Wallace is experienced in all aspects of general Orthopaedics, with a special interest in lower limb conditions including knee arthroscopy and reconstruction surgery, sports injuries and trauma.

Dr Wallace's induction into the team also coincides with another milestone for ASSESS Group with the official opening of a Queensland based ASSESS Medical office located at **Level 12, 295 Ann Street, Brisbane, QLD.**

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Passion, experience and dedication

What 2018 holds in store

Queensland Law Society president Ken Taylor shares his career and vision for 2018. Report by **Melissa Raassina**.

Passion, experience and dedication are three key traits of 2018 Queensland Law Society president Ken Taylor.

A personal injuries accredited specialist from Townsville in North Queensland, business owner, father of three and husband, Ken had never planned on a career as a solicitor. While completing secondary school, he had decided to enter the full-time workforce before undertaking tertiary studies.

"However, during my last year the opportunity to apply for a job as an articled clerk came up," he said. "I spent the next five or six years working in articles, finding out what happens in the law and loved it."

Ken explained that the advantage of five-year articles was that a person could work in all areas of law. When he speaks about personal injuries law, his face lights up as he explains the evolution of that space, noting the advantageous experience of having acted for both insurance companies and claimants.

"It gave you a good balance of both sides and you could see how injuries affected claimants and their families, while also seeing the insurer's side. Just the way that you could connect with people – the individuals and the claim managers and staff at insurance companies – was quite fulfilling and fascinating to me."

Asked about undertaking specialist accreditation in 1999, Ken described it as a "shock to the system". Ten years after his last university exam and being required to study again, he found it a worthwhile challenge.

"It really was a challenge and certainly worthwhile doing. I would recommend anyone in an area of law that has specialist accreditation available to consider it. It really does work as a very strong refresher course and tests you personally."

Ken listed several main issues he sees for the profession in Queensland, including technological change, the oversupply of law graduates, the potential for access to legal work shrinking, the lack of recognition of the role that lawyers play in society, and access to common law rights for Queenslanders.

On technology, he said that practitioners must have the ability to recognise and embrace the benefits it can bring to a practice, and understand how they can utilise those benefits.

> "It's a question of making the technology work for you as a practitioner and as a law practice. It's also a challenge to work out what will be a fad as opposed to what can be made to work long term."

Ken is also concerned about those working towards joining the profession and the potential for them to struggle finding employment. He plans to look at ways of addressing this issue, as well as ensuring that those entering the profession have awareness of and access to the information and support available to them.

An issue close to his heart is access to common law rights for Queenslanders. He says that it is an issue always in the background when not in the forefront.

"This is an issue not only for members but Queenslanders in general, and something about which we must be vigilant. We have access to excellent schemes such as CTP and worker's compensation in Queensland. It comes down to striking a balance between offering fair compensation to injured parties and the service providers being able to be profitable."

Along with these priorities, Ken is also eager to find ways to enhance and grow the value of membership with the Society, and is planning on looking at the current member offerings and exploring ways to continue to improve them. He also understands the important role the Society plays in setting and maintaining professional standards.

"I'd like to increase the relevancy of the Society to our profession, and I'd like to also engage our committees on an increased basis. We have a wealth of expert knowledge and we will be looking at ways to increase our opportunities to draw on that knowledge.

"Another thing which is very important to me is the value of relationships with those who have the ability to affect our members and their practice. I want to personally meet with everyone early on and see which issues – if any – are there and build on those relationships we have with them.

"It's a broad group and that includes not only external influencers but expanding our contact with members and meeting the QLS staff. All of this is important to me."

When asked how the profession has changed during his career, Ken laughed and said, "How long have you got? I started by sitting in the back room listening to the Telex clatter at the other end then being sent to run off to the Titles Office for an urgent search!"

He described his early career as one of great learning, and being required to learn how the profession operated on all levels. He explained that he had to learn how everything was done at the Titles Office, Stamp Duties Office and the courts.

Ken also cited personal contact as a large part of his early career, with a great deal of reliance on staying in touch with public servants and other practitioners – both senior and peers.

"The way the profession ran was that you just had to be there – whether it be at application days or you met others at functions as a young lawyer or articled clerk.

"There seemed to be a more personal touch about things. It's now very easy to send emails, but people are coming back around to recognising how important that personal element is."

When asked about the difference between practising in the city and country, he was adamant that the impact of time and cost were not to be underestimated.

“To attend a meeting, for example, it may be a two to three-hour meeting, you need to take into account the flight schedules and the time it takes to get to the airport. A two-hour meeting can mean a day of your time, or even two days if you live further from the airport.

“The fact that you don’t have access to a lot of other resources or when your matters are based in Brisbane are also factors not to be underestimated. You can certainly utilise technology in that respect – but it’s only of use to a certain point. There is still the benefit of personal contact and talking to people across a table.

“And those of us from the regions – like everywhere – need court resources to have client matters dealt with. Access to justice is a common theme everywhere – and that means having fully-resourced courts. That is something I’m very keen to see.”

Ken had some advice for young lawyers as well, encouraging them to learn everything that they can about the profession and the way processes work.

“Now that extended articles are long gone, you need to try and work out how things get done – those behind-the-scenes tasks. If you know how systems work, then you can operate within them a lot more easily.

“Although it’s difficult to obtain that practical knowledge now that so much is done online, if you understand why courts insist on documents being in certain formats, it helps matters run more smoothly. And you don’t want to create problems when you want things to get done.

“Don’t underestimate the value of a support network – this is the main thing I would emphasise to young lawyers. That means either with peers, more senior practitioners in your firm and beyond. Don’t forget that when you’re engaged in litigation or advocacy or other areas, that it’s not your fight – you’re advocating on behalf of the client. The importance of maintaining those professional standards and ethics doesn’t change from wherever you are or whatever stage of your career you find yourself at.”

Outside of his legal career, Ken enjoys time with family and friends, volunteering for various organisations, coaching his son’s rugby union team – which he will miss during 2018 and fitness pursuits such as running.

He is looking forward to a big year in 2018, as he supposes everyone is. He hopes that if members and the profession remember one thing from his presidency, it is that, “Whatever I and the Council have done would have been done in the best interests of our members and the Society.”

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

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Professor
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Day 1 – Highlights

President Ken Taylor | **QLS President's Welcome**

The Honourable Chief Justice Catherine Holmes | **Chief Justice's Address**

Emeritus Professor Gillian Triggs | **Upholding the rule of law in a complex post truth era**

Professor Gino Dal Pont | **Professionalism in the 21st Century**

Family stream

Be immersed in expertly run sessions designed to address the complexities of practising family law. Enjoy lively masterclasses, updates and topical discussions including a focus on property settlements and spousal maintenance for retirees, the tax traps in family law (including a focus on the million dollar rule), and a sceptic's guide to using non-adversarial practise.

Personal Injuries stream

How do you calculate the true loss of opportunity for a newly self-employed client? What documents can and should you disclose when an injury file collides with a family law property settlement? Where will contemporary politics and common law rights take your PI practice next? This accelerated stream features fresh perspectives and practical sessions lead by experts in personal injuries.

Property stream

In a property market that is constantly changing, what do you need to know to build your property practice? Join the experts for a pragmatic and informative stream full of practical sessions that will set you up to thrive. Topics include the impending legislative reform, the increasing prevalence of electronic execution of property contracts, and a focus on managing transfer duty and tax issues for your clients.

Core stream

Calling all practitioners! Our two-day core stream features a kaleidoscope of sessions to assist you in navigating the changing legal marketplace. Tackle your cyber-risk head on, learn how to use cost-effective technology to your advantage, and discover how to effectively value your work.

QLS LEGAL PROFESSION
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Friday 9 March 2018

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Professionalism in the 21st Century

Maintaining your ethics in an evolving profession

With over 250 publications to his name, and a career spanning equity, legal ethics, costs and tax, and other areas, Professor Gino Dal Pont has made a name for himself as the go-to author for many legal practitioners.

Dal Pont's publications are widely used within both the Australian legal profession and the courts, and he also inspires the next generation of lawyers through his lectures at the University of Tasmania's School of Law. His unique combination of both admitted solicitor and certified practising accountant provide him with a varied perspective on what it means to be ethical in today's professional world.

When speaking about his initial interest in legal ethics, Dal Pont cited interest over passion as the starting point. This beginning spark would springboard his career into a life of ethics and academia – not a path he initially expected to pursue.

"When I was an accounting student, a core unit involved the study of accounting ethics," he said. "We were informed on the importance of ethics and how a profession required a 'code' of ethics. But what surprised me was that this was never mentioned during my law degree.

"This piqued my interest, and when I had the opportunity to study in the United States, I did some work on legal ethics. It was mandatory to study legal ethics as part of the US law degree, and had been for over 40 years in the aftermath of Watergate.

"They had this thought that if 'we teach them ethics they will somehow be ethical'."

Dal Pont explained that ethics conveyed a variety of things to different people, meaning that people set their own parameters on what was 'ethical'. He described ethics as not being a matter of how a person felt on the day to what was right, but a set of principles.

Legal ethics – as explained by Dal Pont – is primarily the law governing lawyers. He pointed out that, even if the professional obligation or law dictates what is inconsistent with a person's interests or contradictory to their morals, a person must continue to follow ethics.

"When talking about legal ethics, I am wary of a purely philosophical approach in this context. Legal ethics must be directly practical to what a practitioner does on a regular basis, in their day-to-day practice, and must foster the unique and valuable role lawyers perform in society.

"If we are going to place 'ethics' in a broader framework, two things come to my mind: honesty and unselfishness."

Dal Pont maintained that most people would say there was a close relationship between ethics and honesty, but unselfishness was based on whose interests a person was favouring. He illustrated the question of potential conflict by doing what you want to do or doing what may be in the best interests of someone else as being a question of whether a person is acting ethically or not.

Dal Pont does not see himself as a legal ethicist but as someone who comments upon the law that governs lawyers.

"In the end, if you are simply talking about pure philosophical ethics without thinking about direct translation in a specific way – such as lawyer to client or lawyer to court – you might be swayed in a way that is expected in those relationships."

When discussing the future of legal ethics, as opposed to the mechanics of legal practice, in a world with ever-evolving technology and legislation, he was not convinced that artificial intelligence (AI) would make a great deal of difference. He described artificial intelligence as a product with human input to some degree – with a degree of judgment and learning capabilities. He surmised that AI was unlikely by itself to demand any different standard of ethics, but accepted that it will influence matters of efficiency and create competition.

"Even sophisticated search engines will affect efficiency rather than ethics, as they also have some degree of human input. Each point has a downward pressure – efficiency and cost."

Regardless of the future, what can lawyers do to protect themselves? Dal Pont advised that one must focus on what is best for the client.

"Merely because something is client driven doesn't mean that it is beneficial to the client. A lawyer must believe that he or she can properly represent the client within the parameters of the engagement."

Dal Pont explained this in the context of limited-scope retainers, pointing out that this concept was not radically new. He recognised the benefit to clients as them being able to save money while also receiving some legal advice. However, Dal Pont reiterated that the boundaries must be stipulated clearly to avoid misunderstanding.

"Clients don't always understand where the boundaries are in an engagement. There may be circumstances where the lawyer sometimes goes beyond the boundaries to protect their client from harm, and this is where we can see potential issues arise within the retainer."

Professor Dal Pont concluded by saying that one thing that would give the legal profession a "different standpoint when it comes to commitment to public service, would be that law is the only profession to which the full gamut of fiduciary law actually applies."

Dal Pont will speak more about ethics in the legal profession at QLS Symposium, 9-10 March 2018.

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

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Tribes and trends

The future of the legal profession

by Melissa Raassina

Once a failed history and geography high-school teacher – being that he trained but never taught – Bernard Salt is now a successful and well-known social commentator, columnist and author.

He is perhaps most known for his proclivity for identifying and tagging new tribes and social behaviours. His insights assist everyday Australians with a unique way to view the world.

Salt recalls his interest in demographics and the future stemming from his academic background, and his long-standing curiosity around the history and geography of Australia.

"I started to work in consulting, doing feasibility studies for shopping centres," he said.

"All of this was driven by demographics – my view is that demographic trends really provide the background wallpaper to the success of Australian business."

In his day-to-day work, Salt shares with businesses and the wider public the tribes and trends he sees in Australia. He has a knack for breaking down the groups that make up the nation. When asked where he sees himself fitting into the landscape of Australian demographics, he explained that he fits in the middle of the baby boomer generation, as one that would traditionally be heading towards the end of his professional career.

However, he sees himself as similar to other baby boomers in that he, too, is reinventing himself at this stage of career and focusing more on doing what he enjoys. This trend, he says, will be much more prevalent into the future.

The average Australian is becoming more interested in trends and predictions, with Salt explaining that it is the story behind the numbers that interests people most and delivers a logic they can relate to.

"It's never the numbers – people find numbers boring.

"It's the story behind the numbers – it's being able to say 'here's a set of figures, here is what I think this set of figures is saying about the Australian people'.

"That is a unique perspective because it requires a bit of editorial courage to put yourself out there with an assessment of modern trends."

When speaking about the challenges and trends he sees for the legal profession in Australia, Salt says that automation, the rise of millennials, and the growth of regional centres will all impact on practitioners into the future.

His view on automation and the impact that artificial intelligence will have on the legal profession is optimistic, proposing that it will free practitioners from the 'drudgery' of repetitive work.

"It [automation] will free up time for more creative, more entrepreneurial pursuits in the future.

"Legal work in the future will be more around relationships, deals and contracts at a global level.

"I think this is where the opportunities lie for the future."

As for future generations and millennials in particular, he sees this group as very different to past generations. He says that millennials have a different mindset and are not as predisposed to working their way up the professional ladder patiently. Salt suggests that the future legal profession will be required to accommodate young lawyers coming in and out of the profession, rather than spending a whole career in the one firm or in one profession.

He also explains the potential growth for Australia as a nation, proposing a consistent growth in Queensland in particular, with major centres including Brisbane, the Gold Coast, the Sunshine Coast, Townsville and Cairns continuing to attract new residents. He also suggests that Rockhampton and Mackay will also see more growth.

The social commentator will be talking more about tribes and trends at QLS Symposium 2018, focusing on the future of Australia, the Australian people, Australian society, Australian assets, and the how the nation will work in the future.

When asked what advice he would give in the past to his young self, Salt emphasised having faith in oneself.

"Advice I would give to a young Bernard Salt is to have faith in yourself.

"People will give you a go, people will provide you with opportunities, but you need to be persistent and you need to work hard.

"If you keep working hard and if you keep persisting, the door will eventually open."

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

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

Bernard Salt AM

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Bucking Broncos

Court overturns $100 damages decision for loss of commercial opportunity

Brisbane Broncos Leagues Club Limited has felt the pain of an off-field loss – in Queensland's Court of Appeal. Report by **Janelle Payne**.

In *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited* [2017] QCA 254,the Queensland Court of Appeal overturned a Supreme Court decision, awarding damages for loss of commercial opportunity when there was only a slim chance of a profit.

This case provides timely guidance on how to measure the value of a commercial opportunity. It is a warning to anyone advising about the performance of a development contract or call option, as the repudiating party might be liable to pay damages, even if there was only a slight chance the other party would make a profit.

The facts

The case involved a call option deed for Principal Properties (the appellant) to buy land from the Brisbane Broncos Leagues Club (the respondent) within three years for $1 million. This option to purchase was contingent on the appellant obtaining a development permit for the planned construction on the land. It was found at first instance, and not challenged on appeal, that the respondent had repudiated the contract, entitling the appellant to terminate. The issue on appeal was contained to the question of damages alone.

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First instance

Initially, Justice Jackson of the Supreme Court found that it was more probable than not that the appellant would have lost money from the development. His Honour held that the natural consequence was, as a matter of law, that there was no compensable loss. Controversially, his Honour awarded only nominal damages of $100.

The appellant appealed on this particular question of law.

On appeal

With a leading judgment written by Philip McMurdo JA, the Court of Appeal concluded that the opportunity to develop land at a profit, which was denied by the respondent's repudiation of the contract, had *a* value. The court held, contrary to the trial judge, that the methodology found in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 (*Sellars*) was relevant for quantifying the value of said opportunity.

Damages for a lost opportunity

In agreeance with the trial judge, McMurdo JA noted (at [11]) that the appellant had to prove, on the balance of probabilities, that it had suffered a loss. It also had to prove that its lost opportunity had some value. Once proved, it would then be necessary to assess what that value was. This required a consideration of the possible impediments to the derivation of the profit which the appellant claimed would have resulted. See [12]-[13] in the decision for a more in-depth outline of the steps for advancing a claim for damages for a lost opportunity.

Where the trial judge and Court of Appeal differed was in the assessment of whether this opportunity was one of value.

Was this lost opportunity valuable?

The trial judge distinguished the present case from that of *Chaplin v Hicks* [1911] 2 KB 786 and the mining exploration industry, which his Honour thought more appropriate for the *Sellars* methodology. His Honour noted that in those instances there were two possible outcomes: (1) profit, or (2) not profit but suffer no loss.

The trial judge saw the problem (at [126]) with applying the *Sellars* methodology to cases such as the present as being:

"… a plaintiff who was more likely to have made a loss than a profit would be compensated by receiving a percentage of the possible profits, while the losses that were more likely would be left out of account."

This led the trial judge to conclude (at [149]) as follows:

"In my view, under the *Sellars* methodology, where the postulated loss of a valuable commercial opportunity is the opportunity to engage in a business that might have made a profit or a loss, the category of loss or head of damage should only be recognised as compensable because it is concluded on the balance of probabilities that it had some value, either because it was marketable, or because if the contract had been performed the plaintiff would have been more likely to have made a profit than a loss."

The Court of Appeal disagreed with the trial judge's decision to distinguish the present case. McMurdo JA noted (at [21]) that the relevant opportunity in this case was the opportunity to make a profit. His Honour further noted that, consistent with the trial judge's findings, there was a more than negligible chance that the appellant would have made a profit.

In determining, then, whether a commercial opportunity for profit is valuable, McMurdo JA made the following comments (at [23]-[24]):

"If a commercial opportunity has *no* chance of being profitable, it is an opportunity of no value and its loss could not be compensable. I would also accept that a commercial opportunity

which no rational investor would pursue, having regard to the relative probabilities of a profit and a loss and the likely magnitude of each, would be a valueless opportunity.

"However, I do not accept that the same may be said whenever it is more likely than not that the pursuit of the opportunity would have resulted in an investor's loss."

McMurdo JA further disagreed with the trial judge's choice to distinguish the present case from that of the mining exploration industry, on the basis that the appellant's opportunity could not be traded.

In justifying this disagreement, McMurdo JA looked to comments made by Vaughan Williams LJ in *Chaplin v Hicks* where it was noted that even if the opportunity had no market to be traded on, a jury might well recognise that if a market did exist this opportunity would have been of such value that everyone would recognise that a good price could be obtained for it.

Ultimately, McMurdo JA summarised his conclusions (at [28]):

"A likelihood that this would have been a loss making development did not, as a matter of law, preclude the award of more than nominal damages. The question is whether the opportunity to profit from this development had a value that was possible although a developer's loss was more likely than a profit. If it did have a value, there was a compensable loss and the extent of that loss would have to be assessed."

How the Court of Appeal quantified damages

Following the determination of the relevant legal test, the Court of Appeal went on to consider several challenges made by the appellant to relevant findings of fact made by the trial judge.

In assessing damages to order, the Court of Appeal worked from a $4,000,000 potential profit. This was based on the appellant's expert evidence, which was largely accepted by the trial judge except for a figure for management rights which was reduced by $1.2 million. The Court of Appeal decided the management rights amount should only be reduced by $500,000.

Applying *Malec v Hutton* (1990) 169 CLR 638, this figure had to be discounted to account for the various possibilities that could have prevented this profit from being derived in the first place. It was therefore discounted to allow for a 50% chance that a complying development permit would not be obtained, a 50% chance the land would not have been acquired, and a 60% chance that the required pre-sales would not have been reached at the proposed prices. This analysis produced an overall possibility of 10% of the adjusted profit amount, before discounting for any other risks including financing and sales risks.

In terms of financing risk, there was a 30% chance that development finance would not be obtained. The court noted that some allowance must also be made for the relatively small prospect that the project would have resulted in an overall loss.

However, the court found (at [113]) that a project with a 10% chance of a profit of $4,000,000, but no risk of a substantial loss would be a more valuable opportunity than the present one (of a repudiated contract).

This ultimately led the Court of Appeal to order that the respondent pay to the appellant the sum of $250,000, with interest of $62,307.37 – a significant difference from the $100 ordered at first instance.

The Court of Appeal's decision is available at archive.sclqld.org.au/qjudgment/2017/QCA17-254.pdf.

Janelle Payne is a Brisbane barrister and mediator.
The assistance of her research clerk, Georgie Bills, is gratefully acknowledged.

Inch by inch

Modernising the *Justices Act 1886*

by Sarah Ford

The commencement of the *Criminal Law Amendment Act 2017* (the Act) on 31 March 2017 brought welcome amendments to a number of key legislative instruments in Queensland.

The legislation which has benefited most from these amendments is the antiquated *Justices Act 1886,* with resultant changes to criminal procedures at the Queensland Magistrates Court.

This article provides an overview of the most important changes for legal practitioners with the carriage of criminal matters before the Magistrates Court.

Section 43A: Joinder of complaints

The joinder of complaints against multiple defendants in Magistrates Court proceedings has been a longstanding point of contention throughout the legal profession. Until 31 March last year, the *Justices Act 1886* was silent on the issue.

The insertion of s43A into the *Justices Act 1886* rectifies that by largely mirroring s568 (12) of the *Criminal Code*. The new section provides that two or more complaints against different defendants can be heard together "…if the matters of complaint in the complaints are founded on –

(a) substantially the same facts; or

(b) facts so closely related that a substantial part of the facts is relevant to all matters of complaint."

Importantly, s43A applies to complaints filed both before and after 31 March 2017, as the provision applies retrospectively.

The practical application of s43A was recently considered by President Martin in the Industrial Court of Queensland judgment, *Thomas v Harrison; Kilby v Harrison; Saxon Energy Services Australia Pty Ltd v Harrison* [2017] ICQ 003.

That matter involved an appeal of a decision by an industrial magistrate to join the complaints of three defendants (for the purposes of a summary hearing in the Industrial Magistrates Court). The complaints all arose out of the same industrial accident – those against Kilby and Saxon alleged the same wrongful act, whereas the complaint against Thomas alleged an omission. Each complaint did however contain the same circumstance of aggravation, namely causation of death.

The original decision of the industrial magistrate to join the complaints was made prior to the commencement of s43A. Nevertheless, it was necessary for the Industrial Court to consider the section because the appeal was by way of a rehearing according to the law at the time of the appeal.

It was agreed by the parties in the appeal that there was only one issue for determination, namely, was the circumstance of aggravation a 'matter of complaint' within the meaning of that term as used in s43A? If it was, then the discretion under s43A arose. If it was not, the matter of Thomas could not be joined to the other two matters.

In allowing the appeal and ordering that the matter of Thomas be heard separately, President Martin examined other provisions of the *Justices Act 1886* and held that, in each of the complaints, the circumstance of aggravation was not an element of the offence charged.[1] Accordingly, "…the matters of complaint necessary to establish the charge in each complaint do not include the circumstances of aggravation".[2]

This decision demonstrates the nuances that can apply in the application of s43A, even when charges against different defendants all arise from the same facts and circumstances.

Section 145: Bulk arraignments

Subsections have been added to s145, which allow for a defendant to enter a single plea to multiple complaints at the same time. Previously defendants were required to laboriously enter separate pleas to every charge, even when facing dozens of offences.

To enter a plea utilising the new provisions:

1. The defendant has to be legally represented.[3]
2. The defendant has to have obtained legal advice.[4]
3. The defendant has to be aware of the substance of each of the complaints.[5]

Section 148A: Admissions of fact

In respect of simple offences[6] or breaches of duty, at the hearing of a complaint, pursuant to the new s148A, a defendant may now admit any fact alleged against them,[7] and a complainant may admit any fact relevant to the hearing (if the defendant consents to the admission being made).[8]

An admission of fact made in such circumstances is sufficient proof of the fact without other evidence,[9] and s148A applies to complaints regardless of whether they were made before or after the commencement of the *Criminal Law Amendment Act 2017.*

Prior to the Act, although some practitioners and magistrates adopted a practice based on s644 of the *Criminal Code Act 1899* in summary proceedings, there were no express provisions in the *Justices Act 1886* which allowed for this process to occur.

Section 150A: Cash bail

For many years there has been a lack of clarity about the possible consequences of a defendant failing to appear in court after being granted cash bail by police. While the normal practice was for the bail amount to be forfeited and the matter resolved, there were no express provisions in the *Justices Act 1886* about the formal conclusion of proceedings.

The insertion of s150A remedies this by providing that, if a defendant is granted bail pursuant to s14 of the *Bail Act 1980*,[10] and the defendant fails to appear in court, the forfeiture of the money deposit in connection with the bail may be ordered, and the magistrate may order that the complaint is 'ended' (and that no further action be taken).

The same result can occur should the defendant appear in accordance with their bail undertaking,[11] or if the defendant's lawyer appears on behalf of the defendant (and applies for an adjournment).[12]

Conclusion

Given its age, the *Justices Act 1886* has long been an outdated and cumbersome Act, requiring a complete overhaul.

While the amendments introduced by the *Criminal Law Amendment Act 2017* are not so sweeping as to meet that wish, they do patch a number of procedural gaps that have been unattended for years, and provide clarity in areas of the criminal procedure which were previously ambiguous.

Sarah Ford is a solicitor with Gilshenan & Luton Legal Practice.

Notes

1 With reference to *Kingswell v The Queen (1989)* 159 CLR at 280 which stated that where circumstances of aggravation do no more than increase the maximum penalty, they do not alter the nature of the charge.

2 *Thomas v Harrison; Kilby v Harrison; Saxon Energy Services Australia Pty Ltd v Harrison* [2017] ICQ 003 at [38].

3 Section 145(2).

4 Section 145(2)(a).

5 Section 145(2)(b).

6 Other than a simple offence that is an indictable offence punishable on summary conviction (in which case regard must be had to s644 of the *Criminal Code*).

7 Section 148A(2)(a).

8 Section 148A(2)(b).

9 Section 148A(3).

10 Which allows for police to grant bail to a person and release the person from custody upon the making of a deposit of money (as security for the person's appearance before a court).

11 Section 150A(1)(b)(ii).

12 Section 150A(1)(b)(iii).

Good law: QLS and the Queensland election

by Binari De Saram
and Pip Harvey Ross

The year 2017 was another busy one for the QLS advocacy team, who produced 197 submissions advocating for good law. Throughout the year, our 25 expert policy committees worked tirelessly to improve and review laws affecting Queenslanders.

The Queensland State Election also allowed the Society to present suggestions and recommendations to the government on issues that required consideration. Each election – both state and federal – the Society releases a document outlining the legal profession's key items for the government to address. The issues are pulled together following wide consultation with district law associations and the expert members of our policy committees, with assistance by the QLS advocacy team and oversight by the QLS Council and president. We are pleased to note that the QLS 2017 Call to Parties Statement received responses from both the Australian Labor Party (ALP) and the Liberal National Party (LNP).

This statement was released following the State Government's announcement of the November election. The 2017 statement called for reform on 10 legal and social justice issues:

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

Both the ALP and the LNP made significant commitments for reform under each of the issues in their responses.

Law reform process

In our Call to Parties document, the Society advocated strongly for the implementation of a comprehensive consultation process for the formation of legislation. This included a one-month stakeholder consultation period prior to the introduction of a Bill in Parliament, with any departures from the process documented and tabled.

The ALP agreed with the call for longer consultation times, committing to six-week consultation periods on all Bills, unless declared urgent. The LNP conceded that the management of legislative timeframes had been mishandled in the past and noted the Society's advice on the proposed consultation timeframes.

Judicial commission

The Society also called for a commitment to establish a judicial commission to organise and supervise an appropriate scheme of continuing education and training. This call included the introduction of First Nations cultural awareness training for judicial officers, and a process to examine complaints against judicial officers. We specifically noted a process which would include the delays in delivering judgments and inappropriate or unreasonable conduct.

The LNP committed to appointing an expert panel of legal and academic experts to investigate options for the establishment of a judicial commission. The ALP suggested that the Judicial Appointments Advisory Panel – in operation for over a year – was the answer to this issue, but agreed to work with professional bodies and other stakeholders to ensure the protocol would represent the best process for judicial appointments.

Access to justice and court resources

The Society also flagged access to justice and the administration of justice as key issues in 2017. We said that in order to promote access to justice and facilitate the administration of justice, Queensland courts, commissions and tribunals must be better funded and resourced. The Society particularly called for a commitment to the appointment of more magistrates (including specialist Children's Court magistrates, at least five additional District Court judges and at least three additional Supreme Court judges). Both the ALP and LNP committed to invest further resources to improve court technology and to build on the investment in courts.

Moving forward

In its response, the ALP took the opportunity to reflect on its commitments in these areas over the last three years. The party responded to each of our 10 election issues, reflecting a similar stance on the majority of issues.

The ALP disagreed, however, with the call from the QLS to allow legal representation as of right in all actions in QCAT and other tribunals, instead stating that the existing provisions for legal representation in QCAT were adequate.

Following the announcement of the new Queensland Cabinet, the Society wrote to relevant Ministers to set out the current issues for the legal profession in relation to their portfolios. President Ken Taylor will meet with relevant Minsters and Shadow Ministers to continue the discussions and to continue to advocate on behalf of members.

Binari De Saram is acting advocacy manager and Pip Harvey Ross is legal assistant to the QLS advocacy team.

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Court, client and colleague

Our duties: Interlocutory applications

by Stafford Shepherd

The courts emphasise that, in litigation, the parties must identify the real issues.[1]

The parties and their legal representatives need to facilitate the "just and expeditious resolution" of the matters in disputation.[2]

For interlocutory applications, Kunc J in *Ken Tugrul v Tarrants Financial Consultants Pty Ltd*[3] identified a number of the professional duties we owe with respect to the conduct of interlocutory applications. The following is an adaption of these points for Queensland practitioners:

1. Rule 5 of the *Uniform Civil Procedure Rules 1999* (UCPR) is "not just a pious exultation to be acknowledged and then ignored";[4] the rule has real consequences for litigants and their representatives.
2. It is the essence of being a professional that we conduct ourselves with courtesy, civility and integrity. These qualities are not restricted to an actual appearance before a court but apply to all we do, whether scrutinised or not. This should be reflected in how we communicate with our clients and our colleagues. It is important to robustly advance our client's position, but we should not, at a client's behest, engage in action which may bring discredit upon us. We must always remain independent.[5]
3. Resolving an issue may mean picking up the telephone to sort out what may be a misunderstanding; a telephone call can also promote clearer understanding of the issues. Kunc J observed: "It has been suggested that some lawyers no longer speak to their opponents on the telephone for fear of being 'verballed' in an affidavit. If that is true, then that is a retrograde development… which the profession should reverse."[6]
4. A request for information to another practitioner should be reasonable, focused and justifiable. The justification should accompany the request.[7]
5. The recipient of a reasonable request for information should not meet it with "an unthinking denial of legal entitlement to the information". Rule 5 UCPR requires the parties and their lawyers to proceed in an expeditious way. Kunc J in the course of judgment said: "…if it is information that would be required to be produced in a response to a subpoena or notice to produce then it is contrary to section 56 *Civil Procedure Act 2005 (NSW)* (CPA) obligations of a party and that parties' lawyers do to resist providing it unless and until the court process is invoked."[8] In Queensland, Rule 5 UCPR is not as extensive as section 56 CPA (NSW). Notwithstanding this, attempts should be made to facilitate the just and expeditious resolution of issues between the clients. This may be possible by the provision of the information on the basis of an undertaking of the kind considered in *Hearne v Street*.[9]
6. Filing an interlocutory application should be a matter of last resort.[10]
7. Prior to filing an interlocutory application, "the putative respondent [should be] given final, written notice of the relief to be sought, the reason for it and a reasonable opportunity to respond".[11] As a rule of thumb, three clear business days is reasonable. If extensions are required, they should be justified. Prior to a challenge to pleading, opposing counsel should confer before a strike out application is brought.[12]
8. Once an interlocutory application is filed, the parties and their representatives should ensure that only the real or essential issues be litigated. It is unnecessary to deliver the whole of the file to provide the evidentiary basis on which the application is being made. The real and essential facts should be discerned before litigation commences.[13]
9. Similarly, in the days of instant 'note-up' sources, case citations should be an appropriate balance between our duty of candour and our obligation to prevent the introduction of extraneous, irrelevant or duplicate material.

Stafford Shepherd is director of QLS Ethics Centre.

Notes

1 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.
2 *Uniform Civil Procedure Rules 1999* (UCPR), Rule 5.
3 [2014] NSWSC 437.
4 Ibid [69]. The judgment referred to the equivalent NSW provision which is in similar but not identical terms.
5 Ibid [70].
6 Ibid [71].
7 Ibid [72].
8 Ibid [73].
9 (2008) 235 CLR 125.
10 *Tugrul v Tarrants Financial Consultants Pty Ltd [No.5]* [2014] NSWSC 437, [74].
11 Ibid [75].
12 Ibid [75].
13 Ibid [76].

Battening down the hatches

Insolvency Law Reform Act 2016: How to resist a request for documents from Mr Snoopy Creditor: part 1

It should now be clear to anyone involved with insolvency issues on a regular basis that the newly introduced provisions of the *Insolvency Law Reform Act 2016* (Cth) (ILRA) give creditors extraordinary and unprecedented rights to demand information, reports and documents from external administrators (EXADs).[1]

Insolvency Practice Schedule (Corporations)

Under section 70-45 (1) of the *Insolvency Practice Schedule (Corporations)* (IPS), an individual creditor may request an external administrator to:

a. give information
b. provide a report, or
c. produce a document

to the creditor.

The EXAD must comply with this request unless:

a. the information, report or document is not relevant to the external administration
b. the EXAD would be breaching his or her duties by complying with the request, or
c. it is "otherwise not reasonable" for the EXAD to comply with the request.[2]

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by Dr Garry J Hamilton

There is no guidance provided as to what may or may not be "relevant" to an external administration. Presumably any EXAD's litigation funding agreement, which traditionally has been treated confidentially by the courts,[3] would be relevant to an external administration. So, arguably, would be a retainer agreement between the EXAD and his or her solicitors, especially if the retainer provided for speculative work with an "uplift" in the event of a successful outcome for the EXAD. A costs agreement is not subject to legal professional privilege, except to the (rare) extent that it contains legal advice.[4]

These are examples of two documents which, if provided to a creditor who is being sued by the EXAD, may give that creditor a forensic advantage, such advantage not having been enjoyed by a creditor prior to the introduction of the ILRA.

Insolvency Practice Rules

Subsection (3) of section 70-45 of the IPS provides that the *Insolvency Practice Rules* (IPR) may prescribe circumstances in which "it is, or is not, reasonable" for an EXAD to comply with a request under subsection (3).

Section 70-15 of the IPR then specifies such circumstances. Apart from some rather gormless examples of circumstances set out by the drafter of the IPR,[5] the more substantive ones are where the EXAD, "acting in good faith",[6] is of the opinion that:

a. "complying with the request would substantially prejudice the interests of one or more creditors or a third party"[7]
b. "the information, report or document would be privileged from production in legal proceedings"[8]
c. disclosure of the information, report or document "would found an action by a person for breach of confidence"
d. "there is not sufficient available property to comply with the request"[9]
e. the request is "vexatious".

In respect of (d) above, sub-rule (5) of Rule 70-15 of the IPR provides that if one pays the EXAD, then one is entitled to the information, report or document. Somewhat mysteriously, it also provides to the same effect in circumstances where "the information, report or document has already been provided [to the requesting creditor]".

One may well ponder why anyone would pay an EXAD for information, a report or a document that one already has. But then, is the obligation to provide the information, report or document, if paid for, inconsistent with the fact that such a request is likely "vexatious"?

The meaning of much of the drafting of those parts of the IPS and IPR set out above is vague and uncertain.

Recommendation

In order to ensure that an annoying, demanding creditor, which the EXAD may be suing, does not get access to any funding agreement or retainer between an EXAD and his or her solicitors, the most obvious and indisputable mechanism is simply to ensure that both of those documents contain appropriately worded confidentiality clauses.

That should be done with any future funding agreements and retainers, and there would appear to be no compelling reason why existing agreements and retainers could not now be varied by the inclusion of an appropriately worded clause.

To be continued…

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Notes

1 For the purposes of this article and the *Insolvency Practice Schedule (Corporations)*, the expression external administrator means a voluntary administrator appointed under Part 5.3A of the *Corporations Act 2001* (Cth), the administrator of a deed of company arrangement entered into under that Part, or a liquidator or provisional liquidator.

2 IPS, section 70-45(2).

3 For example, by being the subject of an order that the affidavit exhibiting it be sealed.

4 See *Cook v Pasminco Ltd and Ors* (2000) 179 ALR 462 per Lindgren J.

5 Such as a request being "unreasonable" if "the information, report or document has already been provided [to the requesting creditor]".

6 Obviously the drafter was unaware of the legal presumption of regularity.

7 But that is not all. The drafter considered that something more was necessary for "balance" and so added in the qualifier that such "prejudice outweighs the benefits of complying with the request".

8 Those words are clear and would have conveyed the idea of legal professional privilege, however, for some reason, the drafter thought it necessary to add the words "on the ground of legal professional privilege".

9 This provision is unnecessary in liquidations as section 545 of the substantive legislation, the *Corporations Act 2001* (Cth), prior to the introduction of the ILRA and still, provides that a liquidator "is not liable to incur any expense … unless there is sufficient available property".

Suppression and non-publication orders in the Federal Court

In proceedings in the Federal Court, it is often necessary for parties to disclose or tender into evidence documents that contain confidential or commercially sensitive material.

For various valid reasons, parties may wish to prevent the dissemination of information contained in such documents and seek the court's assistance in this regard.

There is a tension between allowing such information to remain confidential and the fundamental principle that courts exercise their jurisdiction in open court.

In this context, it is important to remember that when a party to litigation is compelled to disclose documents or information, the other party, its servants and agents are bound not to use that disclosure for any purpose other than that for which it was given, unless it is received into evidence.[1] Although this is commonly described as an 'implied undertaking', it is more accurately described as a substantive legal obligation arising from the circumstances in which the material was generated and received.[2] Breach of this obligation may constitute contempt of court.[3]

Parties who seek further protection of information beyond the 'implied undertaking' bear the onus of demonstrating why this is warranted.[4]

Legislative framework

Section 17 and part VAA Division 1 of the *Federal Court of Australia Act 1976* (the Act) provide the legislative framework for claims to prohibit or restrict the publication or disclosure of information in Federal Court proceedings.

Section 17(1) sets out the basic principle that the Federal Court exercises its jurisdiction in open court:

"17 Exercise of jurisdiction in open court and in Chambers

(1) Except where, as authorized by this Act or another law of the Commonwealth, the jurisdiction of the Court is exercised by a Judge sitting in Chambers, the jurisdiction of the Court shall be exercised in open court."

Part VAA Division 1 of the Act permits the court to make:

(a) a 'non-publication order', defined in s37AA as "an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information)", and

(b) a 'suppression order', defined in s37AA as "an order that prohibits or restricts the disclosure of information (by publication or otherwise)".[5]

When deciding whether to make such orders, the court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.[6]

Section 37AF provides that non-publication and suppression orders made in respect of:

(a) information tending to reveal the identity of parties to or a witness in court proceedings, or persons related to or associated with them, and

(b) information that relates to a proceeding and is information comprising evidence, information about evidence or information obtained by the process of discovery, produced under a subpoena or lodged with or filed in the court.

Section 37AG(1) sets out four grounds on which the court may make suppression or non-publication orders, namely:

(a) the order is necessary to prevent prejudice to the proper administration of justice

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security

(c) the order is necessary to protect the safety of any person

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

When a claim in respect of confidential or commercially sensitive information is made, the relevant ground is usually subsection (1)(a). This ground will now be considered in more detail.

The relevant test: 'Necessary to prevent prejudice to the proper administration of justice'

An applicant will need to demonstrate that a suppression order or a non-publication order is necessary to prevent prejudice to the proper administration of justice.

Well-recognised examples of when the court will restrict the publication or disclosure of information under this ground include:

(a) claims in respect of duties of confidence or confidential information

(b) protection of trade secrets, particularly where parties are trade rivals

(c) personal or commercial information, the value of which would be seriously compromised by disclosure. This can include the terms and conditions on which a party acquires or sells products, being something which would give a competitor an advantage if it became privy to the information.

The latter category will include information that is market-sensitive as between trade rivals,[7] particularly if the information concerned is in continued commercial use, such as where the pricing or methodology employed remains current.[8]

Information that, if disclosed, would disrupt the orderly processes of commerce, such as details of an incentive arrangement not commonly offered, may also be protected.[9]

However, if an applicant fails to demonstrate that information remains market-sensitive, particularly after the passage of time, the claim will likely fail.[10]

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by Kylie Downes QC and Philippa Ahern

It is also necessary for an applicant to adduce evidence of specific prejudice, or apprehended particular or specific harm or damage, which could flow from disclosure of the material. Mere reliance upon the 'inherent confidentiality' of the material, in the absence of any evidence directed to the question of prejudice, will usually be insufficient.

During the hearing of the application, the court may examine documents to determine whether access should be granted, the degree of access that should be granted and whether access might be granted on certain conditions, such as only to a party's lawyers and experts, or the masking of certain passages, or the provision of suitable undertakings.[11]

Procedure for bringing application

Applications for a suppression order or non-publication order under s37AG of the Act may be made by parties to the proceeding or by any other person considered by the court to have a sufficient interest in the making of the order.[12] Such an order may also be made by the court of its own initiative, and it can be made during a proceeding or after its conclusion.[13]

An order can be made on an interim basis pending the determination of the application, which should be done as a matter of urgency.[14]

The following persons are entitled to be heard on the application, namely the applicant, a party to the proceeding, the Government of the Commonwealth or state or territory (or an agency), a news publisher and any other person who has a sufficient interest in the question of whether the order should be made (in the court's opinion).[15]

Form of order

The order made by the court:

(a) must specify the ground or grounds on which the order is made (being the grounds identified in s37AG)[16]

(b) may be made subject to such exceptions and conditions as the court thinks fit and specifies in the order[17]

(c) must specify the information to which the order applies with sufficient particularity to ensure that the court order is limited to achieving the purpose for which the order is made[18]

(d) must specify the period for which the order operates. That period must be no longer than is reasonably necessary to achieve the purpose for which the order was made.[19]

Kylie Downes QC is a Brisbane barrister and member of the QLS Proctor Editorial Committee. Philippa Ahern is a Brisbane barrister.

Notes

1 *Hearne v Street* (2008) 235 CLR 125 at 157 per Hayne, Heydon and Crennan JJ.

2 Ibid.

3 *Hearne v Street* (2008) 235 CLR 125.

4 *Cyclopet Pty Ltd v Australian Nuclear Science and Technology Org* [2012] FCA 1326 at [8].

5 As a superior court of record, the Federal Court also retains an implied or inherent jurisdiction to restrict publication: *Dye v Commonwealth Securities Ltd* [2010] FCAFC 115 at [6].

6 s37AE.

7 *ACCC v Cement Australia Pty Ltd (No.2)* [2010] FCA 1082 at [16], [18].

8 *ACCC v Air New* Zealand *Ltd (No.4)* [2012] FCA 1439 at [25]; *ACCC v Air New Zealand Ltd (No 12)* [2013] FCA 533 at [7].

9 *ACCC v Air New* Zealand *Ltd (No.4)* [2012] FCA 1439 at [26].

10 *ACCC v Air New Zealand Ltd (No.4)* [2012] FCA 1439 at [8], [12], [16] and [20].

11 *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at 40.

12 See s37AH(1).

13 See s37AH(1) and (3).

14 See s37AI.

15 See s37AH(2).

16 See s37AG(2).

17 See s37AH(4).

18 See s37AH(5).

19 s37AJ(2).

Criminal justice algorithms: AI in the courtroom

When one thinks of frontier areas of law, criminal law is hardly the first that springs to mind.

However, criminal justice has recently seen the emergence of artificial intelligence (AI) in the courtroom, causing great controversy. Particularly in the United States, where at least 10 states are using this software,[1] algorithms that assist in evidence gathering and risk assessment are being integrated in order to determine the likelihood of a defendant skipping bail or reoffending.[2]

Advocates advance arguments in favour of such technology on the basis that "as these tools become more sophisticated, they have the potential to alleviate the massive congestion facing our state and federal justice systems, while improving fairness and safety".[3] On the other hand, opponents have significant concerns about transparency, oversight and agency.

COMPAS and *Wisconsin v Loomis*

The case of *Wisconsin v Loomis*[4] (*Loomis*) placed the role of AI in criminal justice at the forefront of legislators' and legal advocates' minds. *Loomis* involved a defendant found guilty for his role in a drive-by shooting.

As he was being processed, he responded to a series of questions and the responses were then put into an AI algorithm called 'correctional offender management profiling for alternative sanctions' (COMPAS). The software gave him a 'high risk' score, meaning that he was deemed to have a high likelihood of reoffending.

The judge took the finding into account during sentence – though it was noted that the court would not have reached a different view without the assessment.

The creator of the COMPAS software, private enterprise Northpointe Inc., retains the right to protect its intellectual property interests and has not released *how* the software makes its assessments. It is this lack of disclosure that has caused the greatest concern within the legal fraternity, and it led to *Loomis'* counsel launching an appeal on the basis that their client should have been allowed to assess the algorithm.[5] The appeal was ultimately dismissed by the Wisconsin Supreme Court in a decision that has had far-reaching consequences for AI in the courtroom. This decision has compelled many to question the opaque nature of the software and its place in the criminal justice system, especially given two fundamental rights of an accused: the right to appeal and to due process.[6]

Allegations of racial bias

Opponents to criminal sentencing algorithms have been outspoken in the legal community over the past few years. The criticisms range from their bias against ethnic groups, to the simple fact that they just don't do what they say they do. A report by non-profit news website ProPublica found that a negative risk assessment "was particularly likely to falsely flag black defendants as future criminals, wrongly labeling them this way at almost twice the rate as white defendants", and that "white defendants were mislabeled as low risk more often than black defendants".[7]

The same investigation found that the algorithms used were not actually able to make predictions about the likelihood of future offending with any accuracy.[8] The results of the investigation are certainly concerning, particularly when one considers that then US Attorney-General Eric Holder cautioned against the rollout of such technologies before thorough testing was undertaken, and yet they were rolled out anyway.

The ethical arguments

Interestingly, those tasked with designing criminal sentencing algorithms are motivated by the thought that they can remedy the perceived faults of the current system. They are critical of the fallibility of human decision-making, believing that AI could be the saviour of justice by removing human error and delivering fairer and more reliable outcomes.

The argument for change is somewhat vindicated by the evidence out of the US, which for some time now has demonstrated that the criminal justice system is hardwired against black people.[9] A paper on extraneous factors in judicial decisions from 2011 shows fascinating and concerning findings that a person's chances of being granted parole could be dependent on whether the judicial officer had had their lunch or not, or even how well their local college football team was doing.[10]

Thus, this software has been promoted as being capable of removing such elements of human error, and has been touted as being capable of cutting crime by up to 24.8% with no change in jailing rates, and reducing jail populations by 42% with no increase in crime rates.[11]

The case for Australia

While these secretive algorithms are yet to make their way into courtrooms in Australia, they are already being used in police targeting operations in New South Wales for both adult and juvenile offenders.

The controversial technology has been criticised for the same reasons as COMPAS, in that it can learn gender and racial biases and target accordingly.[12] It seems therefore that it is only a matter of time before this becomes widespread in the Australian criminal justice system.

So what should be done to ensure that fairness and transparency are not compromised by the pursuit of easing the strain on the courts?

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by Richard Gifford, The Legal Forecast

Foremost, in the interests of transparency and due process, the software needs to be capable of being appealed. Legislation ought to be drafted in anticipation of the software's implementation in order to protect the rule of law and the transparency of legal decisions.

As former US Attorney-General Eric Holder advised, thorough studies into the software's utility, accuracy and bias must be conducted prior to implementation. These are only some suggestions and plenty of thought will need to be put into how to successfully employ AI in the courtroom. When the day comes for our jurisdiction, we must make sure we are prepared to ensure that the rule of law and due process are protected.

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

Notes

[1] Hamilton, M. (2017). 'We use big data to sentence criminals. But can the algorithms really tell us what we need to know?' [online] The Conversation. Available at theconversation.com/we-use-big-data-to-sentence-criminals-but-can-the-algorithms-really-tell-us-what-we-need-to-know-77931 [Accessed 10 Nov. 2017].

[2] Watney, C. (2017). 'It's time for our justice system to embrace artificial intelligence.' [online] Brookings. Available at brookings.edu/blog/techtank/2017/07/20/its-time-for-our-justice-system-to-embrace-artificial-intelligence/ [Accessed 9 Nov. 2017].

[3] Ibid.

[4] 881 N.W.2d 749 (Wis. 2016).

[5] Tashea, J. (2017). 'Courts Are Using AI to Sentence Criminals. That Must Stop Now.' [online] WIRED. Available at wired.com/2017/04/courts-using-ai-sentence-criminals-must-stop-now/ [Accessed 8 Nov. 2017].

[6] Above n1.

[7] Angwin, J., Mattu, S., Larson, J. and Kirchner, L. (2017). 'Machine Bias'. [online] ProPublica. Available at propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [Accessed 8 Nov. 2017].

[8] Ibid.

[9] See for example Alexander, M. (2010). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press.

[10] Danziger, S., Levav, J. and Avnaim-Pesso, L. (2011). Extraneous factors in judicial decisions. *Proceedings of the National Academy of Sciences*, 108(17), pp6889-6892.

[11] Kleinberg, J., Lakkaraju, H., Leskovec, J., Ludwig, J. and Mullainathan, S. (2017). Human Decisions and Machine Predictions. *The Quarterly Journal of Economics*, 27.

[12] ZDNet. (2017). 'NSW Police targeting shows the ethical dangers of secret algorithms', ZDNet. [online] Available at zdnet.com/article/nsw-police-targeting-shows-the-ethical-dangers-of-secret-algorithms/ [Accessed 13 Dec. 2017].

Culture and cremation – funeral disputes

"There are words like 'orphan', 'widow' and 'widower' in all languages. But there is no word in any language to describe a parent who loses a child. How does one describe the pain of 'ultimate bereavement'!"[1]

I recently returned from a holiday in New Zealand, soaking up the scenery, the vino and the culture. On my return and in turning my mind to this column, I was naturally drawn to the recent decision of *Abraham v Magistrate Stone, Deputy State Coroner* [2017] NSWSC 1684 delivered on 5 December 2017.[2]

Abraham is a decision marinated in sadness and loss. There are few things that impact quite so deeply as the loss of a child. In this case the family had suffered many losses throughout the lifetime of the deceased 17-year-old child.[3] They included the breakdown of the parental relationship,[4] the mother (for a time) losing the care of the deceased child,[5] the deceased child suffering permanent brain injury from an accident,[6] he being placed in care[7] and ultimately losing his life through an act of self-harm.[8] It was in this environment that the decision as to how his body would be dealt with came before the court.

"One of the major issues between the parties is the effect of Maori culture on the burial arrangements that should be effected."[9] Both parents are of Maori descent. The mother sought for her son to be buried in the ancestral lands of her tribe in New Zealand. The father proposed to conduct a "traditional Maori service"[10] after which the child's body would be cremated and the ashes divided equally between himself and the deceased child's mother.[11] Relevantly, the deceased child was born and mostly lived in Australia, where both parents resided at the time of the matter. He spent brief periods in New Zealand.

In making its determination, the court heard evidence from family members on Maori culture and traditions related to how final remains are to be resolved. There were differences in how each of the parties interpreted the traditions of their culture.[12] However, a consistent observation was that consultation with families on both sides, and the broader community within which they lived, was an important and necessary step in the process.

The court noted that the father had adhered to this practice. Relevantly, the evidence consistently identified that "in Maori culture, a body should be buried, but that recent generations have not followed the tradition to the letter and cremations occur but is not the preferable course".[13] To that extent the court emphasised that "the issue between the parties is not solely determined by a view as to Maori culture";[14] however, it was significant.

It was the tension between the cultural requirement of burial and the father's proposal to ultimately cremate, which laid the groundwork for the further development of jurisprudence in this area of law.

The court adopted[15] and considered the 15 basal principles established by Young J (as his Honour then was) in *Smith v Tamworth City Council*.[16] In doing so, it carefully examined and reconciled two of those principles – 6 and 8 which state:

> "6. Where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue.
>
> 8. Cremation is nowadays equivalent to burial."[17]

His Honour identified how Principle 8 stands alongside Principle 6, by clarifying that Principle 8 "is a statement as to general principle and not one that takes account of cultural issues".[18]

In considering the cultural and competing desires of each parent, the court was at pains to emphasise that the "Court is not King Solomon. Whatever happens, one or other party will be disadvantaged."[19] To that end, while his Honour "formed the view that the preferable course under Maori culture is for the body to be and remain buried, rather than cremated",[20] he observed that "within Maori culture cremation has occurred".[21]

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with Christine Smyth

In doing so his Honour paid particular attention to the discussion of how cultural issues are addressed in New Zealand[22] and the decision of the High Court of New Zealand in *JSB (a child) v Chief Executive, Ministry of Social Development*,[23] in which that court resolved the dispute "under Maori law that contemplate cremation".[24] Ultimately, the court determined the matter in favour of the father's cross claim,[25] so that the "orders that will allow a Maori cultural burial *service* in Australia and allow each of the important relatives the capacity to have ashes at the relevant ancestral or other burial location".[26] (*emphasis added*)

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Notes

1 Verma, N. (2016). *A Mother's Cry... A Mother's Celebration*, p50.
2 *Abraham*.
3 Born 17 January, 2000, died 17 October, 2017
4 At [6].
5 At [8].
6 At [9].
7 At [10].
8 At [11]-[13].
9 At [19].
10 At [43].
11 Ibid
12 At [20]-[33].
13 At[33].
14 Ibid
15 At [49].
16 (1997) 41 NSWLR 680; [1997] NSWSC 197.
17 At[48].
18 At [55].
19 At [45].
20 At [57].
21 At[59] citing *Doherty v Doherty* [2006] QSC 257.
22 At [57] citing *Takamore v Clarke* [2001] NZCA 587.
23 High Court of New Zealand, Heath J, 4 November 2009, unrep.
24 At [57].
25 At [43].
26 At [60].

Indemnification of personal penalties

A golden ticket out of legal obligations?

Insurers have traditionally offered statutory liability insurance policies (SLIPs) to protect against legal exposure from claims for breach of duty.

Typically these policies, subject to policy exclusions, will cover the legal costs of defending or settling litigation for a contravention of a safety or industrial obligation. SLIPs can also offer varying levels of protection against breaches of civil penalty provisions or fines.

Subject to any statutorily prescribed limitations or policy terms that exclude prohibited conduct resulting in a breach, they can seem like a golden ticket to escape the personal financial burden of breaching obligations.

There have been calls recently to amend the *Work Health and Safety Act 2011* (Cth) (WHS Act) to prohibit using SLIPs. Independent reviewer Tim Lyons echoed concerns about indemnification policies being used to protect against WHS fines in his *Best Practice Review of Workplace Health and Safety Queensland* report. The Government did not adopt this recommendation into the new *Work Health and Safety and Other Legislation Amendment Act 2017* (Qld), which was passed and assented to on 23 October 2017, but has not ruled out such a reform as part of a broader stocktake of the state's insurance markets.

Challenges have been made as to the use of SLIPs to protect against personal penalties and the courts have provided some guidance on the likely sentencing consequences when litigants choose to rely on their insurer for this purpose.

So what is the problem?

A number of interest groups have raised alarms about the availability of policies that indemnify an individual against personal penalties. Common concerns are:

- the public policy fear that some individuals can 'insure out' of their legal obligations, while others must pay the price for failing to meet them
- the availability of SLIPs negatively impacts the behaviour of those operating in industries or environments regulated by statute, and
- the availability of SLIPs weakens the deterrent effect and overall purpose of pecuniary penalty regimes or fines, which are often intended to have a targeted consequence on the individual.

On the other hand, SLIPs can help manage the commercial problem of individual risk and liability in decision-making. Without appropriate liability management, it can be harder to attract skilled individuals to senior executive roles as they become exposed to strict responsibilities and penalties for breaches (for which they may arguably not be at fault). For example, many breach provisions do not require intent on behalf of the wrongdoer and could foreseeably leave an individual bankrupt for an act of recklessness or negligence. Those that do ultimately assume these roles consequently become more risk averse.[1]

Indemnification of personal penalties

Civil penalties

It is accepted practice that directors can seek out personal liability shields from the financial consequences for breaches under the *Corporations Act 2001* (Cth). As noted previously, the classic argument against this is that these policies diminish the responsibility imposed on such individuals.

Civil penalties under the *Fair Work Act 2009* (Cth) (the FW Act) can be viewed similarly. The purpose of the regime is to ensure those responsible for the actual decision-making are held accountable. However, it is expected that future cases will examine the ability of the courts exercising their statutory and/or any inherent powers to make non-indemnification orders for breaches of legislation.

Criminal penalties

SLIPs that offer coverage against paying a fine for a criminal offence are even more controversial.[2] Detractors argue that this practice strikes at two key purposes of the criminal law – retribution and rehabilitation.[3]

In a workplace setting, these cases can arise in a safety context where the court is imposing a fine for criminal conduct committed by an officer. In Queensland such a scenario falls outside the scope of s272 of the WHS Act, which prohibits any contractual term from overriding the WHS Act's express provisions but does not make any limiting reference to indemnity policies. The court commented on these issues in *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22.

The employer, Ferro Con, operated a specialist steel business. In 2010, a falling beam struck and fatally injured one employee rigger and injured another while they attempted to move it into position. The employer was charged for breaching s19(1) of the *Occupational Health, Safety and Welfare Act 1986* (SA) (OHSW Act) for failing to ensure, so far as reasonably practicable, the safety of the rigger. The employer company had a sole director acting as the 'responsible officer' under the OHSW Act, who was also charged for not taking reasonable steps to ensure the employer met its obligations.

Both defendants pleaded guilty to the respective charges and believed the circumstances of their case warranted a penalty reduction. During sentencing, the court was disapproving of each defendant's decision to engage the employer's insurance policy. The court considered that sincere

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Andrew Ross looks at how relying on statutory liability insurance policies (SLIPs) as a complete ticket out of obligations may lead to heavier penalties.

remorse encompasses an expression of regret and an intention to change conduct in the future to avoid a similar incident occurring.

To show remorse, the court said there needs to be a real acknowledgment of the criminal wrongdoing and an acceptance of the penalties. In this case the reduction in penalty was not granted as the defendants' decision to rely on their insurance policy demonstrated a lack of sincere remorse.

The takeaway

The appropriateness of the indemnification of personal penalties in civil and criminal matters will continue to be debated in the courts. Thus far, the Australian judiciary has provided a clear warning against reliance on SLIPs as a complete ticket out of obligations, particularly where contraveners are attempting to make an argument for a reduction in penalty.

An intention to rely on an indemnity policy can lead to a compensatory increase in sentence or more adverse types of orders. In the long term, these decisions could make policies less effective, more difficult to obtain and more expensive.

Andrew Ross is a senior associate at Sparke Helmore Lawyers. The author gratefully acknowledges the assistance of Mason Fettell and Kate Archibald in the preparation of this article.

Notes

1 *Pecuniary penalties. Guidance for legislative design* [2014] NZLCR 133, chapter 15.

2 An offence that must be proven beyond reasonable doubt. A 'criminal record' eventuates from a conviction – for example, see *Criminal Law (Rehabilitation of Offenders) Act 1985* (Qld).

3 See T.F. Bathurst, 'Insurance Law – a view from the Bench' (19 September 2013) *Australian Insurance Lawyers Association National Conference,* Sydney, [38].

Free library services for QLS members

with Supreme Court Librarian David Bratchford

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Online bride wins High Court appeal

with Robert Glade-Wright

Financial agreements – fiancée (and as wife) wins appeal to the High Court

In *Thorne & Kennedy* [2017] HCA 49 (8 November 2017) the High Court allowed with costs Ms Thorne's appeal against a decision of the Full Court of the Family Court of Australia. In a joint judgment Kiefel CJ, Bell, Gageler, Keane and Edelman JJ (Nettle and Gordon JJ giving separate reasons) said (at [1]-[2]):

"This appeal concerns … a pre-nuptial agreement and a post-nuptial agreement which replaced it … between a wealthy property developer … and his fiancée … The parties met online on a website for potential brides and they were soon engaged. In the words of the primary judge, Ms Thorne came to Australia leaving behind 'her life and minimal possessions ... If the relationship ended, she would have nothing. No job, no visa, no home, no place, no community' … The pre-nuptial agreement was signed, at the insistence of Mr Kennedy, very shortly before the wedding … [where] Ms Thorne was given emphatic independent legal advice that the agreement was 'entirely inappropriate' and that Ms Thorne should not sign it.

"One of the issues before the primary judge, Judge Demack, was whether the agreements were voidable for duress, undue influence or unconscionable conduct. The primary judge found that Ms Thorne's circumstances led her to believe that she had no choice, and was powerless, to act in any way other than to sign the pre-nuptial agreement. Her Honour held that the post-nuptial agreement was signed while the same circumstances continued, with the exception of the time pressure. The agreements were both set aside for duress, although the primary judge used that label interchangeably with undue influence, which is a better characterisation of her findings. The Full Court of the Family Court of Australia … allowed an appeal … concluding that the agreements had not been vitiated by duress, undue influence, or unconscionable conduct [saying at [167] that the wife's 'real difficulty' was that she had received independent legal advice]. … [T]he findings and conclusion of the primary judge should not have been disturbed. The agreements were voidable due to both undue influence and unconscionable conduct."

After a discussion of case law as to duress ([26]-[29]), undue influence ([30]-[36]) and unconscionable conduct ([37]-[40]), the majority said (at [60]):

" … [S]ome of the factors which may have prominence include … (i) whether the agreement was offered on a basis that it was not subject to negotiation; (ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or to end an engagement … (iii) whether there was any time for careful reflection; (iv) the nature of the parties' relationship; (v) the relative financial positions of the parties; and (vi) the independent advice that was received and whether there was time to reflect on that advice."

Children – court's approval no longer required for Stage 2 treatment of gender dysphoria if child can give informed consent or the parent responsible authorise it

In *Re: Kelvin* [2017] FamCAFC 258 (30 November 2017) a full bench of the Full Court (Thackray, Strickland, Ainslie-Wallace, Ryan & Murphy JJ) heard a case stated by Watts J as to an application by the father concerning the administration of 'Stage 2' medical treatment for gender dysphoria for his then 16-year-old child (Kelvin) who was born female but "transitioned socially as a transgender person" from Year 8 ([27]). The court said at [6] that gender dysphoria was "the distress experienced by a person due to incongruence between their gender identity and their sex assigned at birth".

The child's father sought the court's sanction for the commencement of Stage 2 treatment in accordance with *Re: Jamie* [2013] FamCAFC 110. The Full Court held in that case that the court's approval under s67ZC *Family Law Act* was not required in respect of 'Stage 1' treatment ("puberty blocking treatment") but that Stage 2 treatment ("gender affirming hormone treatment") involving the use of oestrogen or testosterone with irreversible effects would require the court's approval.

Thackray, Strickland & Murphy JJ at [35]-[41] described Kelvin's experience of gender dysphoria since he was nine; his anxiety and self-harming; his distress from experiencing female puberty due to not undergoing Stage 1 treatment; the improvement in his mental health since "taking steps towards a medical transition"; his parents support; the necessity of Stage 2 treatment for his future wellbeing and his wish (at 17) to commence such treatment.

Their Honours (at [51]) observed that between 2013 and 2017 the Family Court had "dealt with 63 cases involving applications for Stage 2 or Stage 3 treatment for Gender Dysphoria" and that "[i]n 62 of those cases the outcome ha[d] allowed treatment".

The majority said from [147]:

" … [T]he Full Court [in *Re: Jamie* held that] Stage 1 treatment is therapeutic in nature, and is fully reversible. Further, that it is not attended by grave risk if a wrong decision is made, and it is for the treatment of a malfunction or disease, being a psychological rather than a physiological disease. Thus, absent a controversy, it fell within the wide ambit of parental responsibility reposing in parents when a child is not yet able to make his or her own decisions about treatment. (…)

[149] As to Stage 2 treatment … the Full Court agreed … that although Stage 2 treatment is therapeutic in nature, it was also irreversible in nature (at least not without surgery). (…)

[162] The consensus of the applicant, the ICL and all but one of the intervenors is that the development in the treatment of and the understanding of Gender Dysphoria allows this Court to depart from the decision of *Re Jamie*. In other words, the risks involved and the consequences which arise out of the treatment being at least in some respects irreversible, can no longer be said to outweigh the therapeutic benefits of the treatment, and court authorisation is not required. (…)

[164] The treatment can no longer be considered a medical procedure for which consent lies outside the bounds of parental authority and requires the imprimatur of the Court. (…)

[167] We note though that … we are not saying anything about the need for court authorisation where the child in question is under the care of a State Government Department. Nor, are we saying anything about the need for court authorisation where there is a genuine dispute or controversy as to whether the treatment should be administered; e.g., if the parents, or the medical professionals are unable to agree. There is no doubt that the Court has the jurisdiction and the power to address issues such as those."

Ainslie-Wallace & Ryan JJ (at [187]-[188]) agreed upon different reasoning.

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High Court and Federal Court casenotes

High Court

Parliamentary elections – Section 44(i) – parliamentary elections – qualification to be elected

In *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No.2]; Re Joyce; Re Nash; Re Xenophon* [2017] HCA 45 (27 October 2017) the High Court considered the proper interpretation of s44(i) of the Constitution and whether persons referred to the court were incapable of being chosen or sitting as a senator or member of Parliament. The ultimate question was whether any of the referred persons were "under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power" as at the time of their nomination to the Parliament. Four different constructions of s44(i) were argued. Three of those impliedly included a mental element informing the acquisition or maintenance of foreign citizenship, but varied with respect to the degree of knowledge required and whether a voluntary act of acquiring or retaining foreign citizenship was necessary. The court rejected those approaches, holding that knowledge of foreign citizenship was not required for a person to come within s44(i). The court also held that the reasonableness of steps taken by candidates to inquire as to whether their personal circumstances gave rise to disqualification under s44(i) was immaterial to the operation of s44(i). The only question was whether a person had the status of foreign subject or citizen, as determined by the law of the foreign power in question. If a person had that status when they nominated, they would be disqualified unless the foreign law in question was contrary to the "constitutional imperative" that an Australian citizen not be irremediably prevented from participation in representative government. That exception was engaged where a person could show that they took all steps within their power and that were reasonably required by the foreign law to renounce his or her citizenship. The court went on to apply these principles to the facts of the references. The court held that Mr Ludlam, Ms Waters, Senator Roberts, Mr Joyce MP and Senator Nash were disqualified; Senator Canavan and Senator Xenophon were not disqualified. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Answers to Questions Referred given.

Criminal law – appeal against conviction – fresh and compelling evidence

In *Van Beelen v The Queen* [2017] HCA 48 (8 November 2017) the High Court considered s353A of the *Criminal Law Consolidation Act 1935* (SA), which allows the Full Court of the South Australian Supreme Court to determine a second or subsequent appeal against conviction when there is fresh and compelling evidence that should, in the interests of justice, be considered. The appellant was convicted of the murder of a schoolgirl in 1973. Appeals against conviction were dismissed. After a petition for mercy, the case was referred to be heard as if on appeal. That appeal was also dismissed. The new appeal concerned evidence relied on by the Crown at trial, which specified the time of death based on gastric emptying (the speed at which food is processed by the body). That evidence had been relevant in putting the appellant at the scene of the victim's death. It was argued that scientific research since the 1970s showed the inaccuracy of the gastric emptying technique, undermining the evidence placing the appellant at the scene. The Full Court accepted that the evidence was fresh, but held it was not "compelling" because it only confirmed evidence given at the trial by an opposing defence expert. The High Court unanimously held that the evidence was compelling and should have been considered in the interests of justice. It went on to review the evidence, finding that there was a window of about 20 minutes after the appellant left the scene, during which it could not be excluded that the deceased had died. However, the court held that this did not significantly reduce the improbability of a person other than the appellant being the killer. There was not a significant possibility that a properly instructed jury, acting reasonably, would have acquitted the appellant even absent the Crown's original evidence about the time of death. Bell, Gageler, Keane, Nettle and Edelman JJ jointly. Appeal from the Supreme Court (SA) dismissed.

Family law – pre and post-nuptial agreements – undue influence and unconscionable conduct

In *Thorne v Kennedy* [2017] HCA 49 (8 November 2017) the High Court held that pre and post-nuptial agreements in substantially identical terms should be set aside. The appellant was an Eastern European woman with almost no assets. The respondent was an Australian property developer with assets of between $18 and 24 million. The couple met online and the appellant came to Australia to be with the respondent. The respondent told the appellant that he would marry her if he liked her, but she "would have to sign paper". The appellant did not see the content of the pre-nuptial agreement until about 10 days before the wedding. She obtained independent advice to the effect that the agreement should not be signed and protected only the interests of the respondent. By this time, the wedding arrangements were made, including guests having flown in from overseas. There was also evidence that the appellant believed she had no choice but to sign the agreement, which she did four days before the wedding. The post-nuptial agreement in the same terms was signed shortly after the wedding. The couple separated approximately four years later. The appellant sought to have the agreements set aside as void for duress, undue influence or unconscionable conduct. The Federal Circuit Court at first instance set the agreements aside; those orders were overturned by the Full Family Court. The High Court reinstated the original orders. The court upheld the factual findings of the primary judge and overturned a ruling of the Full Court that there was a fair and reasonable outcome available. The court said that the vitiating factors were better described as undue influence than duress, so there was no need to assess the extent to which the pressure came from the respondent, nor whether the pressure exerted was improper or illegitimate. It was open to the judge to find that the appellant considered that she had no choice or was powerless other than to enter the agreements. Kiefel CJ, Bell, Gageler, Keane and Edelman JJ held that the agreements were void for undue influence and unconscionable conduct. Nettle J concurred. Gordon J held that the agreements were vitiated by unconscionable conduct only. Appeal from the Full Family Court allowed.

Administrative law – appeal from Supreme Court of Nauru – migration

In *HMF045 v The Republic of Nauru* [2017] HCA 50 (15 November 2017) the High Court held that the Nauru Review Status Review Tribunal (tribunal) failed to accord the appellant procedural fairness. The appellant is a Nepalese citizen who sought refugee status in Nauru after being transferred there under regional processing arrangements. The application was refused by the secretary of the Department of Justice and Border Control of Nauru. An appeal to the tribunal was dismissed. An appeal to the Supreme Court was also dismissed. In coming to its conclusion, the tribunal referred to a report published on the website of the Nepalese army. The appellant argued that he

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had been denied procedural fairness because the report had not been put to him. He also argued that the tribunal had applied the wrong test in determining his complementary protection claim. The court held that the tribunal had erred by not putting the appellant on notice of the significance that it proposed to attach to aspects of the report and giving him the opportunity to address the issue. The court rejected the argument that the wrong test had been applied. There was no reason to decline relief. The decision was quashed and sent back to the tribunal for reconsideration. Bell, Keane and Nettle JJ jointly. Appeal from the Supreme Court (Nauru) allowed.

Constitutional law – Section 44(iv) – qualification to be elected – holding an office of profit under the Crown

In *Re Nash [No.2]* [2017] HCA 52 (orders 15 November 2017, reasons 6 December 2017) the High Court held that Hollie Hughes was disqualified from being elected as a Senator for New South Wales to fill the vacancy left by the disqualification of Senator Fiona Nash. Ms Hughes failed to win a seat in the Senate after contesting the 2016 election. On 1 July 2017, she was appointed as a part-time member of the Administrative Appeals Tribunal (AAT). On 27 October 2017, the High Court declared Ms Nash to be disqualified from being elected as a Senator, with the vacancy to be filled by a special count of the ballots. That same day, Ms Hughes resigned her position in the AAT. Ms Hughes was ascertained to be the candidate that should fill the vacancy left by Ms Nash. The Attorney-General for the Commonwealth sought an order that Ms Hughes be declared duly elected as a Senator. The issue before the court was whether Ms Hughes was "incapable of being chosen" pursuant to s44(iv) of the Constitution because she held an office of profit under the Crown. There was no dispute that her position with the AAT was an office of profit; the issue was whether the "incapability" imposed by s44(iv) extended past the original day of polling to the time Ms Nash was disqualified. The court held that the processes by which electors choose members of Parliament and Senators do not end with polling, but continue until a candidate is determined. That would normally end with the declaration of the result. In this case, however, because of the disqualification of Ms Nash, the process of choice had not been completed. In the intervening time, Ms Hughes accepted an office that disqualified her from being chosen as a Senator. Accordingly, the court refused to make the order sought. Kiefel CJ, Bell, Gageler, Keane, and Edelman JJ jointly. Answers to Questions Referred given.

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Federal Court

Constitutional law – defamation – practice and procedure – trial by jury in the Federal Court?

Pecuniary penalties for contraventions of statutory provisions are commonplace in s39 of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act) which provides that civil trials are to be without a jury "unless the Court or a judge otherwise orders". Section 40 of the Federal Court Act is a broad discretionary power of the court in civil proceedings to direct trial of issues with a jury.

In *Wing v Fairfax Media Publications Pty Ltd* [2017] FCAFC 191 (27 November 2017), the Full Court determined an interlocutory application seeking an order pursuant to s40 of the Federal Court Act that, to the extent permitted by law, the proceeding be heard by a jury. This was in relation to the applicant's claim for damages for defamation under the *Defamation Act 2005* (NSW) (the NSW Defamation Act). The court had jurisdiction because the applicant alleged that the matter complained of was published in (among other places) the Australian Capital Territory: *Crosby and Another v Kelly* (2012) 203 FCR 451.

There was a constitutional law issue before the Full Court by reason of an alleged inconsistency between ss21 and 22 of the NSW Defamation Act and ss39 and 40 of the Federal Court Act for the purposes of s109 of the *Commonwealth of Australia Constitution Act*. The parties agreed (as did the court) that ss21 and 22 of the NSW Defamation Act were inconsistent with ss39 and 40 of the Federal Court Act within s109 of the Constitution (at [21] and [23], Allsop CJ and Besanko J). The point on which the parties disagreed was whether the court in exercising the discretion under s40 of the Federal Court Act may have regard to ss21 and 22 of the NSW Defamation Act. The Full Court held ss21 and 22 of the NSW Defamation Act did not apply to the proceeding and the sections were not relevant to the exercise of the discretion in s40 of the Federal Court Act (at [30]-[34], Allsop CJ and Besanko J, and [49], Rares J).

The Full Court also dismissed the respondents' interlocutory application under s40 of the Federal Court Act seeking an order that the proceeding be heard by a jury (at [46], Allsop CJ and Besanko J, and [66], Rares J). In doing so, the Full Court considered the authorities and principles relevant to exercising the discretion to order a trial by jury in the Federal Court (at [36]-[44], Allsop CJ and Besanko J, and [51]-[60], Rares J).

Justice Rares noted at [59] that "in the 40 years of the existence of ss39 and 40 in the *Federal Court Act*, *Ra* 183 FCR 148 is the only occasion on which a judge has ordered a jury trial". *Ra v Nationwide News Pty Ltd* (2009) 182 FCR 148 was in fact an decision of Rares J. In *Wing*, Rares J agreed Allsop CJ and Besanko J with that his view of the certain factors in *Ra* was erroneous (at [40]-[42], Allsop CJ and Besanko J, and [49]-[50] Rares J).

Equity – native title – fiduciary duties of persons constituting an applicant for bringing a native title determination application

In *Gebadi v Woosup (No.2)* [2017] FCA 1467 (7 December 2017) the court considered fiduciary obligations that arise in equity in the context of statutory arrangements under the *Native Title Act 1993* (Cth) (the Act).

The applicants were persons who brought proceedings in a representative capacity on behalf of the Ankamuthi People. The respondents (Mr Woosup and Ms Tamwoy) were formerly two of 13 persons authorised by the Ankamuthi native title claim group to prosecute the native title determination application under s61 of the Act.

The main issues in the case were summarised by Greenwood J at [52]: "... the central contention in these proceedings is that Mr Woosup and Ms Tamwoy owed fiduciary obligations to the *Ankamuthi* native title claim group when acting as applicant and that they failed to discharge those obligations. In the case of Mr Woosup, it is said that he has taken for his *own* benefit, benefits payable under the Gulf agreement for and on behalf of the *Ankamuthi* native title claim group. The first question is whether Mr Woosup and/or Ms Tamwoy owe fiduciary obligations to the *Ankamuthi* native title claim group, that is to say, are they in a fiduciary relationship with that group? The second question is, if fiduciary obligations are owed by either of them to the claim group, what are the obligations so owed? The third question is, have either of them failed to discharge those obligations? ..."

As to whether and how fiduciary obligations arose, Greenwood J held at [96] that the applicable principles "...are the essential principles which determine whether a person has accepted or assumed fiduciary obligations to another. The *context* in the case of Mr Woosup and Ms Tamwoy, in accepting and undertaking to act as persons constituting *the applicant*, is the *relevant context* but the *principles* to be applied in determining whether they owed fiduciary obligations to the native title claim group are the same principles determined in our jurisprudence for deciding whether a person has, in all the circumstances, assumed particular fiduciary obligations to another". At [97]-[98], Greenwood J relied on the extensive discussion of principles on whether particular parties owed fiduciary obligations to another from his judgment in the Full Court (with whom White J agreed) in *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141 at [236]-[269].

The court held that Mr Woosup and Ms Tamwoy owed fiduciary obligations to members of the Ankamuthi native title claim group (at [101]-[104]) and that they had breached those obligations (at [154]). The court granted declaratory relief and also made orders for the respondents to pay monies into court of the financial benefits they derived in breach of their fiduciary obligations (at [163]-[169]).

Industrial law – freedom of association – contraventions of ss346, 348 and 349 of the *Fair Work Act 2009* (Cth)

In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Quest Apartments Case)* [2017] FCA 1398 (30 Novembr 2017) the court found contraventions of ss349, 346 and 348 of the *Fair Work Act 2009* (Cth) (FW Act) by the respondent union and Mr Farrugia, the union's representative and a shop steward. The contraventions arose from threats made and action taken by Mr Farrugia to prevent a worker from working on a construction site because he did not pay membership fees to the CFMEU.

Following a contested trial, the court found that the contraventions on 17 March 2014 by the shop steward were:

a contravention of s349 of the FW Act by knowingly making a false representation to two workers that each was obliged to engage in industrial activity by paying fees to the CFMEU in order to work on the site (at [53] and [58])

a contravention of s348 of the FW Act by threatening to take action against a worker, by threatening to prevent him from working on the site if he did not pay fees to the CFMEU, with intent to coerce him to engage in industrial activity by paying the fees to the CFMEU (at [72])

a contravention of s346(b) of the FW Act by taking adverse action against a worker, that is, prejudicing him in his employment or in relation to his performance of a contract or services, by threatening to prevent him from working on the site, because he had engaged in industrial activity by not paying the fees to the CFMEU (at [87] and [89]-[90]).

There were also contraventions of s348 (at [74]-[75]) and s346(b) (at [87]-[90]) of the FW Act by the shop steward on 31 March 2014. The contravening conduct on 31 March 2014 was constituted by the shop steward taking action against the worker. The union was found to be liable for each of the contraventions by the shop steward pursuant to ss363 and 793 of the FW Act (at [92]-[93]). The court will have a further hearing on 5 February 2018 on final relief (specifically declarations and penalties).

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Court of Appeal judgments

1 to 30 November 2017

with Bruce Godfrey

Civil appeals

McQueen & Anor v Mount Isa Mines Ltd & Ors; CMA Assets Pty Ltd & Anor v Mount Isa Mines Ltd & Ors [2017] QCA 259, 3 November 2017

General Civil Appeal – Limitation of Actions – where Mount Isa Mines Ltd (MIM) brought an action against various defendants (the appellants) alleging breaches of contract and negligence – where MIM filed and served an amended statement of claim (ASOC) without first seeking leave to do so – where the appellants allege that the amended statement of claim added new causes of action which were out of time and for which leave was required – where the key complaint of the appellants in this appeal is that the amendments made to [26] to [29] added a new cause of action by pleading a different case on causation, which was not referred to in [28] of the statement of claim (SOC) – where, in particular, it is contended that the allegation that MIM was prevented or delayed from carrying out works necessary to achieve a commercial aim of increasing zinc/lead ore throughput by the second half of 2008, is a new allegation and a different case on causation – where McQueen/IPA Personell Pty Ltd (the IPA appellants) frame the argument slightly differently, contending that the SOC did not plead any material facts in relation to the alleged causal connection between the fire and the claimed consequential loss and the pleading of those facts in the ASOC necessarily constitutes a new cause of action – where the appellants applied to have various paragraphs of the amended statement of claim struck out with no liberty to re-plead – where the primary judge refused the application – whether the primary judge erred – whether the amended statement of claim pleaded new causes of action – whether "cause of action" has a different meaning under the *Limitations of Actions Act 1974* (Qld) than under the *Uniform Civil Procedure Rules 1999* (Qld) – where in accordance with s16(3) of the *Civil Proceedings Act 2011* (Qld), the circumstances in which the rules of court provide for amendments to be made are set out in *UCPR* r375 and r376 – where by expressly referring to the power to permit amendments notwithstanding the expiration of a limitation period, it is evident that the legislative intent of s16 of the *Civil Proceedings Act* is that "cause of action" in the *Civil Proceedings Act* has the same meaning as "cause of action" under the *Limitation of Actions Act* – where consistent with this interpretation, r376 applies where leave for amendment is sought after the relevant period of limitation has expired – where the context in which "cause of action" is used in r376 makes it clear that it does not refer to a meaning other than that which it has under the *Limitation of Actions Act* – where the limitation on adding a new cause of action in r376(4) only arises – where the time for instituting proceedings in respect of the cause of action has expired – where "cause of action" is an undefined term – where in the context of limitation statutes, the courts have had regard to its meaning at common law – where at common law, a cause of action accrues once the plaintiff is able to issue a statement of claim capable of stating every existing fact which is necessary for the plaintiff to prove to support his or her right to judgment: *Central Electricity Board v Halifax Corporation* [1963] AC 785 – where the appellants relied particularly upon the decision of PD McMurdo J in *Borsato v Campbell & Ors* [2006] QSC 191 (*Borsato*) in support of their contention that it refers to material facts pleaded to claim the relief sought – where in *Borsato*, PD McMurdo J found that the amended case did plead a new cause of action on the basis that it pleaded a different breach which gave rise to a different assessment of damages, from that already alleged – where the amendments pleaded a breach of the duty to warn as opposed to a breach of the duty of care as to the performance of surgery which was pleaded originally – where his Honour found the amended case involved "a different breach with a different consequence" – where in substance it was such a different case from that pleaded originally involving the negligent performance of surgery that it could not be said that the amendments were merely further particularisation of the case already pleaded – where it is unremarkable therefore that a different breach which arose at a different time and gave rise to different damage was characterised as a new cause of action – where his Honour did not find that any change in a pleading amending the damages claimed constitutes a new cause of action – where the decision provides no support for the appellants' contention – where in this case there was no error by his Honour in finding the amendments did not plead a new cause of action by reference to the meaning of "cause of action" as contended for by the appellants – where the amended statement of claim pleaded additional loss – where the appellants contend that the causal link between the alleged tortious breach and the consequential loss was first pleaded in the amended statement of claim – where the appellants contend that the amended statement of claim added a new cause of action by pleading a different case on causation – whether the statement of claim pleaded material facts of the causal connection between the alleged negligence and the consequential damage – whether the additional facts pleaded in the amended statement of claim constitute new causes of action – where the claim here is for loss consequential upon property damage – where there is no claim for pure economic loss which requires different matters to be pleaded to establish a duty of care – where in the present case therefore, the cause of action for negligence, where the breach of duty is said to have resulted in the fire, was complete and time began to accrue when physical damage was suffered by the mine infrastructure as a result of the fire – where the fact that consequential damage was suffered for loss of production and sales of zinc as a result of the property damage caused by the fire does not recommence the time at which time begins to accrue for limitation purposes – where in the context of the present claim for negligence, there is no set cause of action by amending the pleadings to claim additional loss arising from the same breach – where properly characterised the amendments further particularise the loss – where the primary judge's conclusion that, applying a broad brush comparison test, the additional facts pleaded in the ASOC do not constitute the addition of new causes of action, but rather, further particularise claims that had been previously advanced, was not in error and was supported by his comparison of the pleading – where the ASOC claims losses under the same four categories as the SOC – where as his Honour found, this is not a case where the amendment sought to allege a different contractual obligation or tortious duty or a different breach.

Appeals dismissed with costs to follow the event.

Wagner & Ors v Nine Network Australia Pty Ltd & Ors [2017] QCA 261, 3 November 2017

General Civil Appeal – defamation – where the appellants brought a defamation action in relation to a *60 Minutes* broadcast and a subsequent internet publication about the 2011 Grantham Floods – where the primary judge ordered that certain paragraphs of the appellants' amended statement of claim be struck out on the basis that the imputations pleaded therein were incapable of arising – whether the pleaded imputations were capable of arising as a matter of law – where there is no dispute that the thrust of the broadcast was that the flood that devastated Grantham was not a natural consequence of the rain that had fallen in the previous 24 hours in the catchment area north-west of Grantham but was due to the collapse of the wall of a quarry owned by the appellants to the west of the town – where the broadcast was also capable of giving rise to imputations beyond that concerning the cause of the flood being attributable to the collapse of the quarry wall – where it was also capable of conveying that

the collapse of the wall which caused the flood was due to "man-made interventions and failings" – where the statements that the deadly flood was a "man-made" intervention and that what occurred was "not just a freak flood but a man-made catastrophe that should have been avoided but wasn't" were capable of being understood as conveying that someone was responsible and at fault for failing to ensure that the quarry wall did not collapse – where on a consideration of the broadcast as a whole, the imputation that the appellants caused the deaths in Grantham by failing to take steps that should have been taken to prevent the wall from collapsing and causing the catastrophic flood was not untenable – where the threshold test as to whether an imputation is unarguably bad or manifestly hopeless is a high one – where the imputations struck out in paragraphs 18(a) and 19 were not able to be characterised as so unarguable that they could not be made out and should not, therefore, have been struck out on that basis – where, given the view that the imputation that the appellants caused the catastrophic flood that turned deadly by failing to take steps that they should have, but did not take, to prevent the wall from failing was open and, bearing in mind also the finding by the primary judge, the imputation in paragraph *18(b) that the appellants had "sought to conceal the truth from becoming known about the role [their] quarry played in causing the catastrophic flood that devastated Grantham" was also open, it cannot be said that the imputation in* paragraph 18(c) is untenable – where that the imputation was available is reinforced by assertions that the town needed to know the "truth" about how the flooding turned "deadly", the suggestion of the resorting to secrecy in the obtaining of footage in the broadcast and the concerns voiced about the need to preserve the "now crumbled" quarry wall "could prove to be key evidence" – where given these factors, the imputation alleged in paragraph 18(c) of the amended statement of claim was not incapable of arising.

Appeal allowed. Orders of the primary judge striking out paragraphs 18(a), 18(c) and 19(a) of the amended statement of claim are set aside. Unless written submissions are filed on costs, the respondents are to pay the appellants' costs of and incidental to the appeal and the application below. (Brief)

Amos v Wiltshire [2017] QCA 279, 14 November 2017

Application for Extension of Time s118 DCA (Civil) – where the respondent brought a claim against the applicant in 2009 – where Amos sought damages for negligent advice by Wiltshire about the prospects of success in a court application – where the respondent was successful at first instance but the Court of Appeal ordered a retrial – where the Court of Appeal order on 22 October 2010, was that "the judgment and order of the District Court made on 25 March 2010 be set aside and that there be a new trial of the proceeding" – where since the basis of the order for a new trial was that relevant fresh evidence had come to light, which had been previously held back by a failure on Amos' part to comply with an order for discovery, it is not surprising that the Court of Appeal directed a new trial be held – where on no reasonable reading of the order made on 22 October 2010, could it be suggested that the Court of Appeal was issuing some form of mandatory injunction by which the only thing the District Court could do was have a trial – where it is plain that the Court of Appeal intended that the District Court would be in a position to deploy any and all of its powers under the *Uniform Civil Procedure Rules 1999* (Qld) to progress the proceedings once again to a trial, so that the issues could be finally determined on a proper basis – where the respondent applied for special leave to the High Court of Australia and instituted other proceedings relevant to the appeal judgment – where special leave was refused – where the respondent has not taken steps to proceed to a retrial as ordered by the Court of Appeal – where seven years have passed since the Court of Appeal ordered a retrial – where the primary judge dismissed the proceedings for want of prosecution because of the respondent's failure to take steps and the risk of unfairness to the applicant – whether the respondent has taken a step in the proceedings – where the primary judge found that Amos's steps by way of appeals were not steps to prosecute the District Court proceedings – where since October 2010, a binding determination that a new trial was warranted to properly determine the issues in the District Court, taking into account the evidence which Amos had withheld because he breached his duty of disclosure – where that provides the prism within which the question of prosecution of the District Court proceedings had to be considered – where of particular importance is the conclusion that Wiltshire was denied a fair trial because Amos breached his duty of disclosure, the result being that the judgment was unfairly obtained – where all of the steps taken by Amos since that time, in courts other than the District Court, have been in an effort to sustain the unfairly obtained District Court judgment, rather than to progress the new trial ordered by the Court of Appeal – where the lack of any reasonable basis for the steps that were taken by Amos prevents them being characterised as prosecuting the proceeding – where Amos' pursuit of that course deserves censure – where the six years spent subsequent to the Court of Appeal's decision for a new trial, were occupied largely by baseless attempts to overturn the Court of Appeal's decision, in a way that cannot be described as progressing the proceedings – whether there is a substantial risk of unfairness to the applicant – where the primary judge's reasoning in respect of the risk from non-genuine recollections is unassailable – where given the finding by the Court of Appeal and Martin J as to Amos' tailoring of evidence, and the adverse credit findings against him, there can be no great confidence that his account of the new trial will consist of anything but a reconstruction – where the same cannot be said of Wiltshire, but the fact is that such a long period has now elapsed that there must be a risk that genuine memory has gone, and in its place will be the entrenched memory based on previous evidence or previous affidavits – where

there has been an extraordinary period of delay and interference with Wiltshire's life, caused by Amos making attempts to overturn a Court of Appeal decision, and all those attempts have been without a reasonable basis – where there cannot be any real question, but that Wiltshire has suffered prejudice by having the vexation of the case for so long – where overlaying all of those factors is the extraordinary conduct of Amos in refusing to repay that which he had been twice ordered to repay – where Amos' refusal to comply with orders of the District Court and the Court of Appeal add an extra layer to the prejudice suffered by Wiltshire over the period of delay – where despite having been ordered to repay those sums, Amos acted in defiance of the courts, presumably because of his attempts to overturn the Court of Appeal order of 22 October 2010 – where the fact that those attempts lacked any reasonable basis makes his defiance all the more deplorable.

Grant leave to appeal *nunc pro tunc*. Appeal dismissed. Costs.

Logan APZ Pty Ltd v Council of the City of Logan [2017] QCA 288, 22 November 2017

General Civil Appeal – where the appellant and the respondent entered into an agreement for the lease of land – where the respondent asserted it had terminated the agreement – where the appellant brought a claim for specific performance of the agreement and damages – where the primary judge made orders for security for costs on application by the respondent – where the appellant appeals the quantum and form of the security for costs – where Mr Tony Garrett of Hickey & Garrett, Legal Costs Consultants, swore an affidavit on which the respondent relied in support of its security for costs application – where for the appellant, reliance was placed upon the affidavit of Mr Graham Robinson, barrister, who practises in the area of the law of costs – where having regard to the criticisms made by the parties of their opponent's respective reports, his Honour determined to make a substantial discount to the respondent's Part A costs as assessed by Mr Garrett to allow for "certain matters as identified by Mr Robinson" – where his Honour accepted that he should set the security of the costs amounts "having regard to the Court scale" – where Mr Garrett's assessment ventured, in an admittedly imprecise way, to convert the hours-based information he was given to what, in his experience, would approximate the outcome if the scale was applied, incorporating the discretions allowed within it – where Mr Robinson's approach aligned more with the methodology of the scale, however his Honour instanced what he considered to be an unrealistic application of it – where in the circumstances, it was clearly open to his Honour to be guided by both reports and to adopt a figure between the respective assessments – whether the primary judge erred by having regard to the actual legal costs chargeable between solicitor and client rather than predicting the costs assessed on the standard basis after a trial – where here, the experienced primary judge's feel for the case was instrumental in the impression he gained of the number of documents that would need to be reviewed and the extent to which senior counsel would need to be briefed – where it was also instrumental in his assessment of the likely duration of the trial, which, it might be noted, the appellant has not criticised on appeal – whether the primary judge failed to discount his assessment of the amount of security to acknowledge the prospects of an early resolution – where it is accepted that his Honour did not state how he discounted for the prospects of the case collapsing by stating a percentage rate or similar for the discount – where, however, it was neither necessary nor appropriate for him to have discounted in such a manner – where in this context, the process of discounting is not one of allowing discrete deductions for conceivable contingencies that might shorten the proceeding – whether the primary judge erred by excluding security in the form of a registered mortgage over land – where it clearly was open to the primary judge to have made the order he did make for security by way of bank guarantee – where there was no error in principle on his part in not leaving the form of security to the satisfaction of the Registrar, especially in circumstances where the only other form of mooted security was wholly unparticularised – where it goes without saying that it would not have been a sound exercise of the discretion to order security in the form of a registered mortgage over unidentified land.

Appeal dismissed. Costs.

Criminal appeals

R v OT [2017] QCA 257, 3 November 2017

Appeal against Conviction & Sentence – where the appellant was found guilty by a jury of 14 offences of a sexual nature, committed against his stepdaughter at various times over a three-year period – where the appellant was convicted of all 14 counts, and was sentenced to various concurrent terms of imprisonment – where the only evidence of the offences came from the complainant – where three other witnesses gave evidence of her preliminary complaints – where the trial judge instructed the jury that they had to give separate consideration to each charge – where the trial judge summarised each of the final addresses – where those summaries did not contain a particularisation of the counts – where the prosecution's final address did not repeat the particulars – where the appellant argues that the jury could not have discharged its duty to consider each charge separately without being properly reminded by the trial judge of the particulars in relation to each charge – whether there was a miscarriage of justice because the trial judge did not instruct the jury as to the particular facts which had to be proved for each charge – where in order for the jury to properly consider an individual charge, the members of the jury had to have an understanding, and importantly the same understanding, about what conduct was the subject of that charge – where the case was properly particularised by the prosecutor's opening and the question is whether that was sufficient for the jury's purposes, at the end

of the trial, when they were considering their verdicts – where although the jury had listened to that opening, much of it would not have been clear in their minds by the end of the case – where it is correct to say that ordinarily a jury should be presumed to have followed the directions of a trial judge – where however, in the present case, there is a real risk the jury did not follow the judge's instructions to consider each charge separately, because absent a clear recollection and understanding of the particularisation of the prosecution case provided at the commencement at the trial, it is unlikely that the jury could have done so – where even assuming that the jury did consider the charges separately, there is a risk that they each misunderstood what constituted the relevant evidence for a particular charge, or alternatively that within the jury there were different understandings on that matter – where with the exception of counts one and nine, there was a miscarriage of justice – where counts one and nine were of a remarkably different character, for which the jury could not have been under any relevant misunderstanding.

Appeal be allowed on the convictions for counts two, three, four, five, six, seven, eight, ten, eleven, twelve, thirteen and fourteen on the indictment. Convictions on those counts be set aside and a retrial be ordered. Appeal against the convictions on counts one and nine be dismissed. Written submissions as to whether the application for leave to appeal against sentence for counts one and nine should be refused.

R v Carlisle [2017] QCA 258, 3 November 2017

Sentence Application – where the applicant was sentenced to 10 years' imprisonment for drug trafficking – where the applicant submits that the nominal sentence adopted by the sentencing judge was manifestly excessive and did not reflect the criminality of the offending – where the applicant submits the reduction of two years from the nominal sentence of 12 years' imprisonment was a manifestly inadequate reduction for his very early guilty plea and the one year served in pre-sentence custody – whether the sentence was manifestly excessive in all the circumstances – where the similarity between *R v KAQ; R v KAQ; Ex parte Attorney-General (Qld)* [2015] QCA 98 and the applicant in terms of offending, as well as similarities and differences in their personal circumstances, supports an effective sentence close to the indicative sentence for KAQ, namely slightly less than 10 years – where if, however, a similar process of reasoning is adopted to that of the sentencing judge in arriving at a nominal sentence before account is taken of the guilty plea and that nominal sentence is 10 years or more, then the very early guilty plea would be recognised by a substantial reduction from a nominal sentence of not more than 12 years – where either way, one arrives at a sentence of slightly less than 10 years – where upon analysis of the comparable cases, it is concluded that, as a result of inadequate account being taken of the applicant's very early plea of guilt, he did not receive a sentence of less than 10 years – where the consequence was an automatic non-parole period of nine years rather than a non-parole period appropriate to a head sentence of less than 10 years – where this resulted in a manifestly excessive sentence – where for reasons given, a sentence of slightly less than 10 years seems appropriate before account is taken of pre-sentence custody – where the applicant was not the principal of the business and there is no evidence that he was responsible for procuring any firearms or that he used them – where the imposition of a serious violent offence declaration as a matter of discretion would result in an excessive sentence in all the circumstances – where having taken the plea of guilty into account in arriving at an effective sentence of nine years, it is not considered that the applicant should be eligible for parole at the usual one third point on account of his early plea – where although a subsidiary in the operation, and an addict, he played an essential role in a major trafficking operation – where considerations of personal deterrence, general deterrence and denunciation justify parole eligibility later than the usual one third point.

Leave granted. Appeal allowed. Sentence varied by reducing the 10-year term of imprisonment imposed on count 1 to nine years and set aside the automatic serious violent offence declaration. Parole eligibility date of 24 February 2020 be fixed.

R v Berry [2017] QCA 271, 10 November 2017, Orders delivered ex tempore 8 November 2017; Reasons delivered 10 November 2017

Sentence Application – where the applicant had conducted a large methylamphetamine trafficking operation and had been a user of methylamphetamine himself – where the applicant was convicted of one count of trafficking in dangerous drugs, one count of possessing a dangerous drug in excess of two grams and three related summary charges – where the applicant was sentenced to 10 years and two months' imprisonment – where the sentencing judge made a serious violent offence declaration, thereby obliging the applicant to serve 80% of his sentence before being eligible for parole – where the applicant was aged between 24 and 25 years at the time of offending – where there was evidence that he had ceased using drugs and had commenced rehabilitation after being charged with the present offences – where the applicant had secured employment while on bail for the present offences – whether the sentencing judge adequately took the applicant's rehabilitation efforts into account when imposing sentence – where the applicant submitted that the head sentence of 10 years and two months is an unusual period and the reasons for its imposition are not discernible from his Honour's reasons – where at the hearing of the application the Crown were unable to explain this peculiar period of imprisonment – where his Honour did not refer to any of the previous sentences relied upon by the Crown and the applicant as comparable – where there were over 10 of these and some of these were capable of informing the sentence in this matter – where these cases, and others like them, demonstrate that youthful offenders who plead guilty and who have demonstrated sincere efforts towards rehabilitation and, at least, early success at fighting addiction have received significantly lesser terms of actual imprisonment than their older and less pliable colleagues in this industry – where the comparative sentences would indicate that a head sentence of less than 10 years is appropriate in the case of a youthful offender, even one who trafficked at a wholesale level, in cases in which a real and voluntary effort at rehabilitation has been made – where the sentence imposed in this case is inconsistent with the cases referred to and the reasons do not disclose why, in these circumstances, his Honour imposed it.

Leave granted. Appeal allowed. Set aside the orders made on Charge 1. Order that the applicant be imprisoned for nine years. Declare that 256 days of pre-sentence custody be imprisonment already served under the sentence. The applicant be eligible to apply for parole after serving four years of his term of imprisonment. (Brief)

R v Gibb [2017] QCA 280, 15 November 2017

Miscellaneous Application – criminal – where the appellant was convicted in the District Court on one count of entering a dwelling with intent at night while armed and in company and one count of robbery while armed or pretending to be armed – where the appellant has brought an appeal against conviction and sentence – where the appeal is yet to be heard – where the appellant has requested the Registrar to issue 33 subpoenas in relation to her appeal – where some of these subpoenas are directed to the production of documents and some are directed to compel the attendance of witnesses – whether the Registrar should issue these subpoenas before the court hearing the substantive appeal, has decided whether or not it will grant leave to adduce further evidence – where because of the requirement to obtain the court's leave before evidence can be called on an appeal, the actual marshalling of the evidence to be called and the calling of witnesses and tendering of evidence in the usual case need not occur until or unless the court grants leave under r108 of the *Criminal Practice Rules 1999* (Qld) – where the issue of subpoenas will, in most cases, be premature until such leave is given – where in some appeals, perhaps in most appeals, the issue whether a subpoena should issue should be referred to the Court of Appeal as a matter to be determined before the hearing of the appeal proper – where although in the ordinary case the question of leave to adduce evidence will be decided by the court that is constituted to hear the appeal itself, subpoenas should not be issued in anticipation of leave being granted unless the Registrar, for good reason, thinks it right to do so or the court makes a direction to that effect – where to do otherwise may result only in inconvenience, disruption, waste of time and cost to parties with no interest in the proceeding – where in this particular case the appellant has applied for the issue of 33 subpoenas, some to compel the attendance of witnesses to give evidence and some to compel

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the production of documents and other forms of evidence – where it would be premature and unnecessary to issue subpoenas to compel the attendance of so many people when it is not yet known whether the evidence that they can give will be admitted or not.

Registrar directed not to issue the subpoenas requested by the appellant until the court makes a further direction, except for the subpoena directed to Vanessa Brookes of the West Moreton Hospital and Health Service (directed to the production of documents which the appellant says she requires for her imminent bail application). The question whether the remainder of the subpoenas should issue will be directed to the court that is to hear the appeal. (Brief)

R v Succarieh [2017] QCA 282, 17 November 2017

Appeal against Conviction & Sentence – where the appellant was convicted of extortion by a judge sitting without a jury – where the appellant gave evidence of a belief that the complainant owed money to a third party – where the prosecution alleged several threats were made against the complainant, including threats to take over the complainant's business, bring the demands to the attention of the complainant's wife and daughter and cause physical injury to the complainant – where the appellant denied the threat to cause physical injury – whether it was reasonably open to the trial judge to conclude that the appellant's belief as to indebtedness was not based on reasonable grounds – whether it was reasonably open to the trial judge to have rejected the appellant's denial of the threat to cause physical injury to the complainant – where there was no explicit acknowledgment of any debt by the complainant – where the manner in which the appellant arranged to meet, and first met, the complainant supported the finding now challenged – where the appellant did not at first identify himself and he gave the complainant the impression that he was interested in buying the café – where an honest and reasonable belief that a debt was owed and that the appellant was authorised to pursue collection of it could not have provided reasonable cause for making a demand with the threats which were found to have been made, including the threat that the complainant's legs would be broken if he did not pay – where the appellant claims he had a reasonable and honest belief that a debt was owed by the complainant and he was authorised to collect it – where some of the threats allegedly made by the appellant were unlawful – where s415(1) of the *Criminal Code* (Qld) states that a person who, without reasonable cause, makes a demand with intent to gain a benefit for any person and with a threat to cause a detriment, commits a crime – where the appellant submits that, as a matter of law, the phrase "without reasonable cause" applies only to the demand itself and not to the alleged threat – whether the trial judge erred in finding the scope of the phrase "without reasonable cause" extends to the detriment threatened – where the scope of the application of the phrase "without reasonable cause" is turned to – where it is adverbial in that it is a qualification upon the act of making a demand – where thus, when a demand is made with such an intent and threat, both are incidents of the making of the demand – where accordingly, the scope of application of the phrase "without reasonable cause" extends to the detriment threatened in the course of making the demand – where a consideration of whether there is reasonable cause for making a particular demand involves consideration of any detriment threatened in the course of making the demand – where it is not limited to a consideration of whether there is reasonable cause for that which is demanded be done – where the interpretation adopted by the trial judge is correct and did not involve an error of law – where it accords better with the ordinary meaning of the language in which s415(1) is enacted than does the appellant's interpretation – where it has support in judicial interpretation of the analogous statutory provision in the United Kingdom and has been preferred in decisions of this court – where the applicant was sentenced to two years and nine months' imprisonment – where the applicant was already serving a sentence for four years and six months' imprisonment for Commonwealth offences to which he pleaded guilty – where the parole eligibility date for the subject offending is eight months after the parole eligibility date for the Commonwealth offending – where the combination of the two sentences result in imprisonment for a period of about five years and 5½ months – where the applicant will serve three years and eight months of the combined sentence before becoming eligible for parole – where that period approaches 70% of the total combined sentences – whether the requirement to serve almost 70% of the combined sentences makes the sentence manifestly excessive – whether it was necessary for the sentencing judge to explain why the sentence was imposed with that result – where it was not unreasonable for his Honour to require that the appellant serve some period of the period of imprisonment that he was imposing before the appellant would become eligible for parole – where he was not constrained by any requirement that the percentage of the Commonwealth sentence to be served for parole eligibility under it be maintained or not exceeded, when that sentence was combined with the sentence he was about to impose – where the result that the appellant would have to serve about 70% was obvious from the interaction of the separately imposed sentences under separate regimes – where no explanation was necessary.

Appeal dismissed. Application for leave to appeal against sentence refused.

R v Angel [2017] QCA 287, Orders delivered ex tempore 8 September 2017; Reasons delivered 22 November 2017

Appeal against Conviction – where on 3 March 2017 the appellant was convicted by a jury of two counts of possessing dangerous drugs – where the appellant was sentenced to an effective three-year head sentence – where the appellant contends that the trial judge erred in admitting into evidence her admission of past drug use – where the appellant contends that the trial judge erred by excluding evidence of criminal convictions of another occupant of the appellant's residence – where in ruling the defendant's admission that she used drugs now and again admissible, the trial judge found the appellant's statement was "plainly relevant evidence" – where a finding that the admission had some probative value rendered the evidence admissible, the trial judge erred in concluding that evidence was not prejudicial, other than its effect to connect the defendant – where the statement made by the appellant was in response to an assertion by police that they suspected the appellant was a drug dealer – where in that context, an assertion by the appellant that she used drugs now and again could not properly be considered an admission supportive of a conclusion that drug users are known to possess drugs in commercial quantities – where any probative value of that statement to the issue in question, namely the appellant's knowledge of the existence of the drugs the subject of each count, was slight – where by contrast the prejudicial effect of the admission of that evidence was significant, particularly having regard to the Crown's address to the jury – where in that address the Crown specifically invited the jury to conclude that the probability that the defendant knew of the presence of the drugs was enhanced by the fact that the appellant was a user of drugs now and then – where the evidence of the appellant's admission had a substantial prejudicial effect over and above its effect in proving the offence – where that evidence could logically add nothing to a determination of whether the appellant knew of the presence of the drugs the subject of the counts or had reason to believe they were present – where the trial judge ruled the criminal history of the child inadmissible as it was relevant – where the child's criminal history established the child was dishonest generally and inclined to break the law – where it is correct that criminal history contained no previous convictions for drug offences, it did not follow that evidence of the existence of criminal behaviour by that child was irrelevant to the facts to be determined by the jury – where the Crown invited the jury to determine who was more likely to have had drugs buried in the backyard, the "drug using home owner" or the "sober 14 year old child" inaccurately conveyed to the jury that the child did not engage in criminal conduct – where in that context the ruling that the child's criminal history was inadmissible deprived the appellant of the opportunity for the jury to consider, as a real possibility, a conclusion that someone other than the appellant had concealed the drugs in the residence – where that history was relevant as it could rationally show that the character and personality of the child is such that she, rather than the appellant, may have hidden the drugs the subject of the counts – where as a consequence the appellant was deprived of the real possibility of an acquittal of the counts on the indictment.

Appeal allowed. Set aside the convictions on counts 1 and 2 on the indictment. The appellant be retried on those counts.

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

Zen interrupted

This month we break from tradition and feature a first-person account of life lived in the quest of wellbeing by 'zen master' **Dr Rachel Baird**.

I recently went on a yoga retreat. Now, before you dismiss me as a clichéd overpaid lawyer, pause and remember I work at QLS. Nor can you label me a "mother in lycra faze" as I embrace my full inner dag and wear hole-ridden supermarket brand yoga pants.

So, let's start again: I went on this yoga retreat. It sounded like a good idea at the time – I was worn out from a massive team effort in 2017 to pull off 70-plus innovative learning and professional development events, three specialist accreditation programs and eight Practice Management Courses. Mr 17 had given us a year's worth of material – enough to write a tome on parenting survival. The working title is "I used to be a functioning adult once and then I had kids," subtitle: "Learn from our mistakes, don't do it to yourself."

Back to the retreat: my intention was to take some time out to decompress. I'd been intrigued by the 'Leading Wellbeing' sessions we had included in the PMC in 2017 and wanted to explore that message more.

But I should have heeded the signs. They were there. Just like the warning signs for burn out, but much easier to spot. First it was a vegetarian retreat – I lasted until day two and then snuck off to the Billinudgel pub for a steak. Second, I went with my younger sister. In my family, the words 'retreat', peace' and 'sister' do not work well in any sentence.

In addition to abstinence from partaking in the culinary delights of steak, fish or fowl, we had been encouraged to abstain from talking in the early mornings. We were observing 'noble silence' and after a year of work, thoughts, problems, emotions and self-doubt crowing in my head, I rather liked the idea of some silence to create space to process and sort the clutter.

The problem was my sister, who had obviously read the no-meat memo – for she frowned upon my Billinudgel expedition and shared it with the disapproving vegetarian yogis – but had not read the no-talking memo. As I cleaned my teeth and listened to the cacophony of bird calls (thanks Sir David), she started talking at me. Did I want some tea? Did I think mum was okay living alone? I thought I was very restrained in holding my forefinger to my lips to shush her. But, undeterred, she kept talking. "What would be a good Christmas present for Dad?" she asked.

We are so conditioned to the conventions of politeness that I felt it rude to say nothing. Yet I was trying to be nobly silent. I tried various evasive techniques to avoid talking, but as the one-way conversation continued, I could feel the stress building inside. By this time, we were walking to the yoga room for morning meditation and so unfortunately the blissed out virtuous yogis witnessed my meltdown. "Oh for (expletive deleted) sake." I exclaimed. "I am trying to be nobly silent!"

That's when I realised that wellness is not a 'tick the box' exercise. A retreat, yoga or noble silence were not going to suddenly make me 'well'. I realised it was a path or direction I chose to pursue amongst the chaos of a normal life. It was tuning in with my mental health regularly throughout the year. Hoping three days of intense vegetable-fuelled yoga was going to put me back together was putting a lot more pressure on myself. To start with, I am not a happy camper on tofu and lettuce.

However, it was not actually a total waste of a weekend. My failed yoga retreat made me reflect upon the need for a regular wellness journey – along the way taking in small digestible chunks at a time, mulling them over, taking what works, and then turning to the next chunk of information.

I am truly hoping that Queensland Law Society's wellness program for members in 2018 does just this. With offerings in March, May, August, October and November, you can dip in and out of the wellness path to suit you. For my part, I will ensure there are animal protein snacks and no noble silence.

Dr Rachel Baird is Queensland Law Society learning and professional development manager.

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Katrina Peters


Rebekah Lamb


Zion Saint

Career moves

Barry.Nilsson.

Andrew Ward has been appointed a senior associate at Barry.Nilsson. in the Brisbane insurance and health law team. Andrew advises on complicated coverage issues and acts for clients in high-value and complex litigated and non-litigated claims and disputes in multiple jurisdictions across various industries and professions.

Cooper Grace Ward Lawyers

Cooper Grace Ward has appointed **Sam Adams** as a partner and **Andrew Corkhill** as a special counsel in the commercial team. Sam has more than 14 years' experience across commercial and property law, having acted for a range of clients across State Government, local government, banks, developers and more. Andrew has previously worked with Cooper Grace Ward and has experience in large-scale mergers and acquisitions, joint ventures, and energy and resources matters.

CRH Law

Peter Porcellini has joined CRH Law in the elder law services team. He has over 30 years' experience, half of which focuses on a variety of succession and elder law issues for a diverse range of clients.

Jeneve Frizzo Estate Law

Sally-Ann Hayward has joined Jeneve Frizzo Estate Law as an associate. Sally-Ann practises exclusively in estate law, advising clients on estate planning, will drafting, powers of attorney, other end-of-life considerations and estate litigation.

Marino Law

Marino Law has appointed **Asmara Tesfa** as a solicitor. She focuses on family law and has experience in all areas of family law.

Ramsden Lawyers

David Nematalla has joined Ramsden Lawyers as a partner and head of the property law group. David has nearly 20 years' experience in property and commercial law, with expertise in property development law, hotel and specialised assets, child care and general real estate. **Renae Barrett** has been appointed as associate at the firm. Renae has a background in residential and commercial conveyancing transactions, business sales and acquisitions, pub and hotel transactions and management rights.

Shand Taylor Lawyers

Shand Taylor Lawyers has promoted **Jacob Bowman** and **Gyöngyi Kruchió** as associates in the property and commercial team. **Andrew Pine** has joined the property and commercial team at the firm. **Melissa Jarvin** has joined the dispute resolution team.

Statewide Family Law

Katrina Peters has joined Statewide Family Law as a solicitor. Katrina has experience in family law and has worked for more than 17 years in the legal profession. She advises on all areas of family law and conducts litigation matters in the Family and Federal Circuit Courts.

Stone Group Lawyers

Stone Group Lawyers has appointed **Rebekah Lamb** and **Zion Saint** to the firm in the family law and litigation divisions respectively. Rebekah's background is in social justice and Zion advises on various disputes.

New members

December 2017 and January 2018

Queensland Law Society welcomes new members who joined between 1 December 2017 and 31 January 2018. The full list of new members can be found on the QLS website at **qls.com.au/newmembers**.

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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In February ...

Brisbane Online Regional

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

1 QLS member new year celebration

5.30-7.30pm

Banco Court, Brisbane

Join fellow QLS members to ring in the new year at this relaxed, social evening. Hear addresses from Queensland Chief Justice Catherine Holmes and Queensland Law Society president Ken Taylor, and connect with members of the profession over drinks and canapés.

7 Core PS: How to be a resilient lawyer

9am-12.20pm | 3 CPD

Law Society House, Brisbane

Leading change expert Robyn Bradey will provide you with practical tips and strategies to help you and your staff manage a range of workplace challenges with ease – ensuring consistent performance and meeting daily client demands.

PS

7 Core PS: Dealing with difficult clients and colleagues

2-4pm | 2 CPD

Law Society House, Brisbane

A complement to the 'How to be a resilient lawyer' workshop, this session will arm you with the knowledge and skills to effectively resolve conflict with clients as well as with colleagues to support creativity, productivity and increased profit.

PS

8 Practice management course – Sole practitioner and small practice focus

8-10 | 9am-5pm | 10 CPD

Law Society House, Brisbane

Climb the legal career ladder by developing the skills to manage a successful legal practice. Designed by a team of experts, the QLS practice management course provides the most authoritative source of guidance and professional development for trust accounting, ethics and risk management.

PLE PM&BS PS SL

14 Amendments to the *Marriage Act 1961*: Livecast Q&A

12.30-1.30pm | 1 CPD

Livecast

Especially designed in consultation with Queensland Law Society's Family Law Committee and industry experts, this critical one-hour professional development livecast will get you up to speed on the recent amendments to the *Marriage Act 1961*.

PM&BS SL

16 Dispute resolution conference

8.30am-5pm | 7 CPD

Law Society House, Brisbane

Join us for the latest updates on complexities in international arbitration, the co-mediation model revisited, ethical issues for dispute resolution practitioners, a look inside the psychology of difficult disputes, and powerful techniques for communicating with influence during negotiations. Encompassing recent trends in alternative dispute resolution, this workshop is not to be missed by practitioners practising in dispute resolution and litigation, succession law and family law.

PLE PS SL

20 Core PM&BS: An essential guide to profitability

12.30-1.30pm | 1 CPD

Livecast

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Getting employment basics right

by Robert Stevenson

Welcome to 2018! It's time to implement that New Year resolution to get your employment basics in order. Observing these basic rules will pay dividends in managing your business:

Don't rush in when deciding to create a new position.

Consider whether your business really needs that new position, or if there are other ways in which the outcomes of that job can be delivered.

Take the time to engage the right employee.

Have meaningful selection criteria and an appropriate selection process to match skills and character with your business.

Make sure there is a clear, accurate and relevant position description in place, including key performance indicators which will help you and the employee measure performance.

Setting out these expectations in advance can go a long way to minimising job dissatisfaction and subsequent poor performance. Position descriptions should be reviewed periodically to ensure they are up to date.

Make sure an employment agreement is in place before the employee starts work as it can be more difficult once work has started.

You should at least have a basic agreement for every employee setting out their role, hours of work and pay rates.

Have up-to-date and relevant policies, and ensure employees know about them.

Many operational issues can be addressed in policies rather than the contract of employment, e.g., email and internet usage. But in order to rely on a policy, an employer must show the employee was aware of and understood the policy. So, employees should receive an induction session when they commence work, be provided with access to policies, and sign a record of having read and understood the policies. Regular refresher training is also wise.

Comply with the minimum entitlement requirements of the National Employment Standards under the *Fair Work Act 2009* (Cth), the *Legal Services Award 2010* (for support staff and graduates) and your employment contract.

This means being aware of hours and leave, pay rates (including overtime and allowances) and break entitlements.

Terminate employment within the statutory minimum employment period (MEP) if the relationship is not going to last.

It's not perfect, but termination during the MEP (12 months if you have less than 15 employees/ six months if you have 15 or more employees) will minimise the risk of legal action.

Ensure there is a regular and appropriate performance appraisal process for employees.

Breakdown in communication is often a reason for breakdown in the employment relationship. While a formal appraisal process is desirable, it is practically advisable to maintain a regular dialogue with employees about their performance (covering things the employee is doing well, things they are not doing well and how to improve). Active management is the key.

Be procedurally fair when dealing with employees.

Don't act rashly or in a discriminatory way. Treat employees how you would like to be treated yourself.

Keep a paper trail of notes of meetings and letters.

This helps in justifying later actions.

Rob Stevenson is principal at Australian Workplace Lawyers and an accredited specialist in workplace relations law. rob.stevenson@workplace-lawyers.com.au, workplace-lawyers.com.au.

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JEMINA GABRIELLE DUNN (Died 12/10/17). Would any person or firm knowing of the existence or whereabouts of a will for JEMINA DUNN (late of Clayfield & Ascot) contact Pam Dunn: 0428 548 088 / 02 6681 6844 or e-mail: geopam2@bigpond.com.

Office relocation

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Tawny and friends make a comeback

with Matthew Dunn

Australian port now offers some of the best value around for the discerning drinker. From age-old tradition and blending comes some sweet choices.

Port is a simple but much maligned form of wine. It doesn't deserve the bad rap it's received thanks to oversupply, overproduction and clever marketing to more sophisticated consumers by dry wines since the 1970s. From then, at least two generations of wine drinkers have carried the misapprehension that port is staid and old fashioned.

But today, some things old are new again. Gin is making a resurgence as cool, following a long while of 'mother's ruin' being nothing to request in polite company.

So, too, is it time for Australian port to make a comeback and there are some very good reasons for this:

- First, Australia is very good at making port, with the perfect hot climate to fully ripen the fruit.
- Second, Australia has been making fortified wines for a long time and there are significant stocks of aged material to blend.
- Finally, being less fashionable, Australian port is sold at lower price points, making it generally a bargain for the age and quality of the wine.

The word 'port' is an Anglicisation of the Portuguese city of Oporto, from where the fortified wines of the Douro River Valley would be landed, stored and shipped to England. Port came to the English-speaking world largely as a result of the 1703 Methuen Treaty between England and Portugal to provide a thirsty England with wine in times of war and blockade with France. Favourable customs tax treatment ensured the wine from Oporto became a favourite at English upper-class tables. English port shipping houses introduced familiar names to the domestic market: Dow, Osborne, Cockburn, Sandeman and Taylor.

In the new colonies of Australia, producing port-style wine for export to old England was a lucrative trade. Houses such as Seppelts, Yalumba and Penfolds laid down new wines year after year to build up soleras filled with liquid gold and history. Seppeltsfield, for example, has released a tawny every year since 1878 and is the only winery in the world to release a 100-year-old vintage wine (the old Para Tawny) each year. Most port makers have a blend of at least 10 or 20 years age which includes older material. This wine is held at the maker's cost for many years to be enjoyed by the consumer.

On shelves in shops, however, you will seldom see the word port used on an Australian wine these days. Australia signed up to a labelling treaty for geographic indications which was implemented domestically for port in September 2011. From that time on, makers have used the words Tawny or Vintage Fortified wine to describe their products. Despite the name, the soul of the product in the glass remains the same and today is great value for discerning drinkers.

The tasting

Three tasty tawnys were subjected to scrutiny.

The first was the **Penfolds Father 10-year-old tawny**. The colour was a light caramel brown. The nose was deep and raisins in a glass with some aged savoury complexity. The palate was smooth and sweet but mellow with generous age, nuts and rich fruit.

The second was the **Penfolds Grandfather 20-year-old tawny**. The colour was a deep red and caramel brown. The nose was a tour de force of sweet fruit and rich nutty rancio flavours. The palate was a symphony of sweet mellow rich ripe fruit with a note of savoury tannin.

The last was the **Seppeltsfield Para Grand Tawny non-vintage**, which was the colour of teak and burnt orange. The nose was raisins and a short burst of heat from the alcohol. The palate was spice, sweet fruit and a firm backbone to carry it through.

Verdict: The preferred tasting was the Grandfather tawny for its depth, but the Father tawny showed up very highly for great flavour and great value.

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

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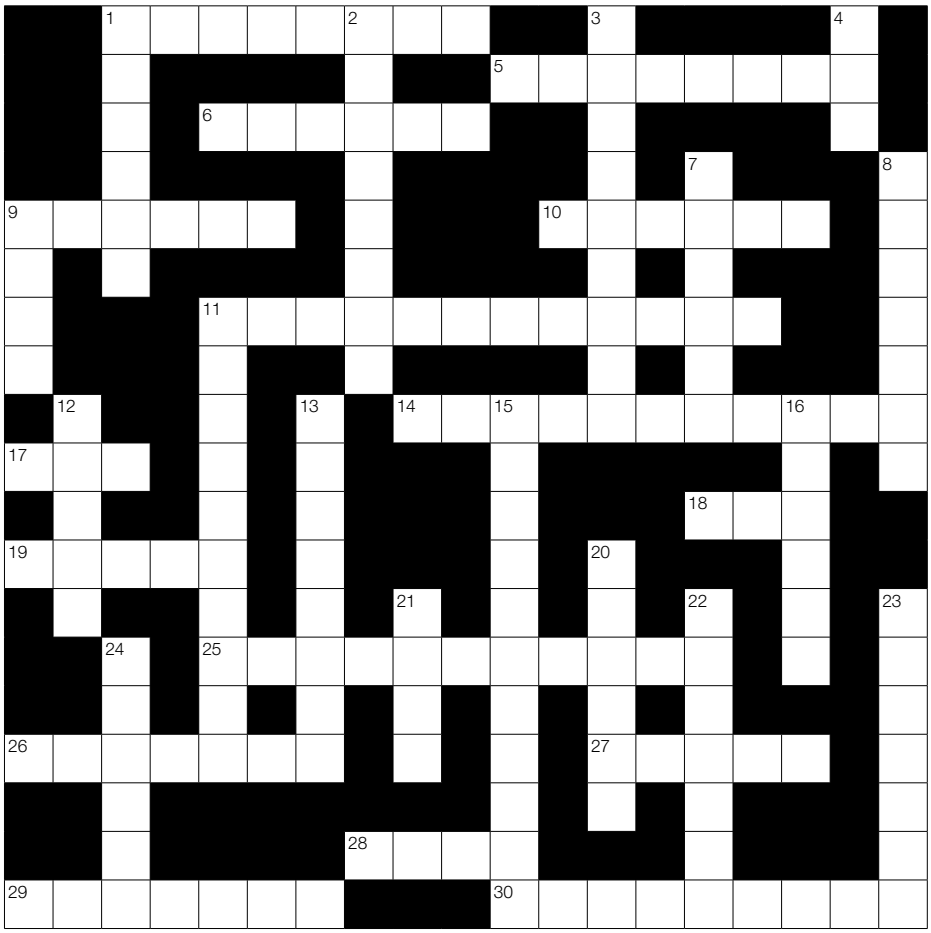
Mould's maze

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



Across

1 The preamble of the Commonwealth Constitution refers to "humbly relying on the blessing of …… God". (8)

5 Archaic cause of action to reclaim goods that have been distrained. (8)

6 Serious offences. (6)

9 Justice Hayne's wife and replacement on the High Court. (6)

10 …… Piddington was the shortest serving Justice of the High Court (one month in 1913), never actually sitting on the bench. (6)

11 A person may apply for an …… order if they are under a liability for property that is the subject of adverse claims by two or more other persons. (12)

14 A tortious act, as opposed to a tortious omission. (11)

17 Preside. (3)

18 The sport Jason Moran was attending when he was fatally shot. (abbr.) (3)

19 The doctrine of ….. poenitentiae provides an exception to the principle that a trust cannot be enforced at law if it is immoral or illegal purpose where that purpose is abandoned. (Latin) (5)

25 The duration of a suspended term of imprisonment is its …… period. (11)

26 Justice of the Supreme Court of Queensland appointed in 2012 married to barrister Janice Crawford. (7)

27 Criminally collaborates. (5)

28 The jurisdictional area of a Brisbane Magistrates Court includes, if the division has a common boundary with another district, thirty-…. kilometres of the common boundary. (4)

29 Judge's conclusion to the jury at the end of counsels' submissions, ……. up. (7)

30 Youth imprisonment. (9)

Down

1 A creditor accepting payment less than the debt owed, ... and satisfaction. (6)

2 Synonym for 'drunk' suggested by Hayne J in argument in *Joslyn v Berryman*, "well and truly ……". (8)

3 Pertaining to an appeal. (9)

4 The Australian Constitution was created on 1 January 190.... (3)

7 A court often …… charges on an indictment if a joinder may cause prejudice or if it is desirable to order separate trials. (6)

8 A respondent is entitled to be paid from the Appeal Costs Fund following the issue of an indemnity certificate an amount not exceeding $..,000. (7)

9 Non-independent and non-executive officers of a company, ... directors. (4)

11 The *Crimes Foreign ..... and Recruitment Act 1978* (Cth) makes it illegal to engage in hostile activity against a foreign country unless enlisted in the Australian armed forces. (10)

12 The primary purpose of an inter ..... trust is to make assets more easily transferable to beneficiaries without the encumbrance and expense of probate. (5)

13 The Commonwealth Parliament has legislative power in respect to aliens under this placitum of Section 51. (8)

15 An order for ..... service dispenses with the requirement of personal service of a claim. (11)

16 The leading authority of whether misleading or deceptive conduct occurs in trade or commerce: *Concrete Constructions (NSW) Pty Ltd v* …… . (6)

20 Sir …… Stephen famously said in *WA v Commonwealth*: "To read words into any statute is a strong thing and, in the absence of clear necessity, a wrong thing." (6)

21 Gyton Grantley played this convicted murdered and drug trafficker in the TV series *Underbelly*, ... Williams (4)

22 High Court Chief Justice who once said " ...psychiatrists might explain my presence at the moment by reference to a number of influences or pressures that produce that consequence". (7)

23 Punishment appropriate to the wrongdoing. (7)

24 Defence relating to a lack of understanding of the legal nature of a document, non est ……. (6)

Solution on page 60

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In praise of tradition

Backyard cricket and other causes to celebrate

by Shane Budden

Australia is a country of many great traditions, reflecting our strong and enduring national trait of being fairly keen on taking a day off.

I suspect we would happily celebrate national Tinea Awareness Day if it involved a public holiday, particularly if that holiday fell the day after State of Origin. Indeed, at least one political party called for an Origin public holiday, plus three others, which would bring the total number of public holidays in Queensland to around 163.

Another fine Australian tradition is putting the boot into the Poms after we win the Ashes, and I am pleased to say that as I type this the Ashes are back where they should be, in Australia.

Well, technically they aren't actually here, since the Poms refuse to hand them over even when we win (apparently the Ashes get airsick and cannot travel internationally). We do have a very nice replica of them though, which looks a great deal like the real Ashes – appropriate really, since England sent out a very nice replica of a cricket team, just like an actual cricket team, apart from the bit where you actually have to play cricket.

As I type this, my family is getting over another great source of traditions – Christmas. Christmas, as we all know, is the celebration of that day, 2000-odd years ago, when in a divine moment that would inspire people throughout the world for generations to come, the first Christmas Day backyard cricket game was started (followed almost immediately by the first backyard cricket argument, as to whether or not the one-hand, one-bounce rule applied even if the fielder was not holding a stubbie).[1]

Indeed, some families take this tradition so seriously that these Christmas Day battles have been the training ground for many professional cricketers, as well as a fertile source of family, criminal and estate work, depending on how serious the argument gets over the course of the day.

Our family's Christmas traditions do not involve backyard cricket, as my wife and children display extremely poor taste – which I can only assume comes genetically through my wife's side – having so far displayed the same overall interest and passion for cricket as they do for Tracing Transcontinental Sand Transport (this is a real thing, and you can read all about it in Volume 18, Number 11 of the *Journal of Sedimentary Research*, which is also – inexplicably – a real thing).

It was a traditional part of my family's Christmas Day when I was growing up, and even into adulthood when – the last time we played – I bowled my brother first ball, and consequently decided to retire from Christmas cricket and just lord it over him for the rest of our lives (it is also for this same reason that I have only ever played chess once with my mate Mal, retiring after my victory to ensure an all-time 100% record against him; the secret to happiness is knowing when to quit).

We do have some of our own Christmas traditions of course. For example, we never put our decorations up before 1 December, although to be honest this is because the previous year's decorations are often still up well into November. I can assure you that I leave the decorations up due to the fact that I strive to preserve the magic of Christmas for my children for as long as possible, and not because I am as lazy as a union rep on Valium; remember that if you drive past my place and the Christmas lights are still up.

Another tradition we have is ensuring that Santa and his reindeer are fully provided for when they visit our house – an exercise which has become more elaborate each year, to the point that very soon Santa will be sitting down to filet mignon and Grange, and his reindeer will be getting hand-fed quinoa and julienned carrots while having their hooves done.

This year my daughter insisted that each reindeer be provided with its own carrot, and she baked cookies for Santa and left him a bag to take the cookies with him if he couldn't eat them all then and there.

Clearly, my daughter is an extremely kind and caring individual, or she has cottoned on to the value of bribes.

After a long night of staying up late to ensure Santa's filet mignon is the way he likes it and that all the reindeer have perfect hooves, there is nothing like having a good lie-in and being awoken by the sound of birds tweeting on a bright Christmas morning – and indeed, every Christmas morning my wife and I wake up nothing like that. The tradition my children have established is to wake us up at 4.55am by jumping up and down and screaming, 'Santa's been!' at the same approximate volume of an AC/DC concert.

After the presents are opened and at least two of them have been broken or have proved to require special batteries made only in Latvia before they will operate, we have breakfast and my wife and I take turns at rescuing each other from drowning after we fall asleep face-down in our cereal (if this sounds familiar, it is the same thing that happens in Charles Dickens' *A Christmas Carol*).

All in all though, we had a wonderful Christmas and I hope you and yours did as well. Here's hoping it braced you for the year ahead, filled your heart with joy and left you with the same seasonal thoughts that I had – that is, that one day my kids will have kids of their own, and they will be the ones being woken at dawn; I will then laugh myself sick.

 Shane Budden is a Queensland Law Society ethics solicitor.

Notes

[1] No.

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Crossword solution

From page 58

Across: 1 Almighty, **5** Replevin, **6** Crimes, **9** Gordon, **10** Albert, **11** Interpleader, **14** Misfeasance, **17** Sit, **18** AFL, **19** Locus, **25** Operational, **26** Jackson, **27** Abets, **28** Five, **29** Summing, **30** Detention.

Down: 1 Accord, **2** Hammered, **3** Appellate, **4** One, **7** Severs, **8** Fifteen, **9** Grey, **11** Incursions, **12** Vivos, **13** Nineteen, **15** Substituted, **16** Nelson, **20** Ninian, **21** Carl, **22** Gleeson, **23** Condign, **24** Factum.

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