PROCTOR

Queensland Law Society

February 2019 – Vol.39 No.1

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QLD developers and their lawyers embrace e-Conveyancing

Complimentary to a wider digital transformation initiative, QM Properties has made the decision to incorporate electronic property transactions, "e-Conveyancing", into its digital strategy. QM Properties sees e-Conveyancing as an integral component of this digital strategy.

Chloe Fadden, Sales Administration Manager at QM Properties shared QM's experience to date and that of its lawyers Quinn and Scattini during the transition.

"The **time saving benefits** were evident from the beginning. Currently, our Trust Accountant dedicates a significant amount of time to collecting, banking and receipting of settlement cheques. When it's a PEXA settlement, this isn't required. Now, we are able to **handle a greater volume of settlements** with far less manual intervention", said Chloe.

"Another advantage of PEXA is that the **GST is automatically transferred to the ATO**. This now means our GST requirements are completed electronically at settlement. Thanks to PEXA, the manual process of writing letters and physically posting cheques to the ATO is no longer required. We now have no concerns about cheques going missing in the post or liaising with the ATO for confirmation of receipt."

Chloe also shared that "Quinn and Scattini understood QM's digital vision from the outset and they took this opportunity to get involved and embrace digital conveyancing like their peers in neighbouring states."

Duncan Murdoch, a Director at Quinn and Scattini, shared his thoughts on the process thus far.

"As a legal practice, Quinn & Scattini regards it important to not only be on top of legislative changes but also to embrace technological enhancements in order to deliver the best outcomes for its clients. PEXA's electronic conveyancing platform has allowed Quinn & Scattini to assist QM Properties in achieving its desire to reduce paperwork and to ensure a same day electronic transfer of settlement funds. PEXA has provided Quinn & Scattini with tremendous assistance in both initial training and ongoing support which has allowed us to quickly understand their systems and to provide electronic conveyancing settlements to QM Properties and other clients."

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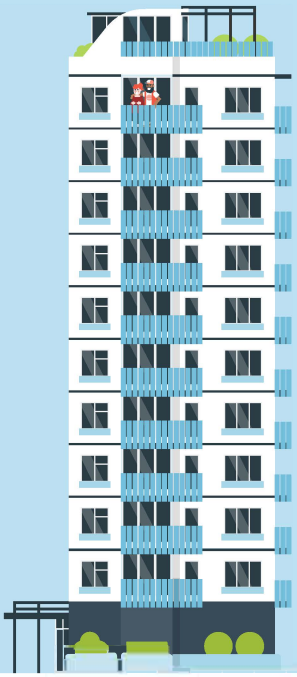

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Queensland Law Society

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The year ahead

In December of last year, I had the pleasure of attending the Queensland Law Society Past, Present and Future Presidents' Dinner which was an evening of fine food and fine conversation (and perhaps a glass of fine wine or two as well).

Although all Presidents have their particular focus and idea of what the direction of the Society should be, we are united in that we all tried, during our terms, to make the Society serve its members as effectively as possible. It was nice to catch up with a group with such a noble cause in common.

It was also pleasing that two of the Society's five female Presidents were able to make it. The Society elected its first female President some 32 years ago, and we have had four since. By some standards, this is laudable; our colleagues at the Bar have recently elected the first female President in their 115-year history.

In reality, the real wonder is why there hasn't been more diversity in our Presidency and Council. This year the Queensland legal profession will see men become the minority, as more than 50% of solicitors will be female. It is imperative that we work to empower that huge talent pool, to ensure that the profession becomes all it can be.

The key to answering the challenges we face – artificial intelligence, technology in general, global service providers, competition from other professions – is to harness the diversity of the solicitors of Queensland to ensure we have the greatest pool of innovators and leaders working for good law, good lawyers and the public good. We are greater than the sum of our parts, but to achieve that greatness we need to put those parts together.

In 2015, Queenslander and former QLS member Tony McAvoy was appointed Australia's first Indigenous QC; last year, Lincoln Crowley was the first Indigenous silk appointed from the Queensland Bar, and Judge Nathan Jarro became our state's first Indigenous judge. How soon can we expect the first Indigenous QLS President? The first President of Asian heritage?

We can't know, of course, but we can shorten the wait by creating a culture, within our profession and within our individual firms and practices, that celebrates diversity and gives everyone a great chance to succeed and rise to be leaders – a collegial, authentically Australian and thoroughly egalitarian culture that is inclusive and welcoming, and very keen to hear everyone's point of view.

One of the few good things about getting older is that it makes me, if not wiser, then certainly well fortified with experience!

I have been a member of Council since 2012, involved with many committees and of course travelled our great state as Deputy President and President, meeting and talking with members and concluding that without doubt the great strength of the Society is its membership. My goal is to harness the collective wisdom and ability of that broad church, to channel our diverse talents and viewpoints to work to achieve our goals.

I will continue the traditional work of Presidents past – advocating on issues and legislation and representing the profession's interests in every sphere. I also want to continue to provide practical tools and services that improve your practice and competence – things like the Solicitor Advocate Course, the Ethics and Practice Support services and Legal Matter Management workshops – but there is more that can be achieved.

I seek to empower the future leaders of our profession. Leadership is about stepping up and being counted, about finding your voice and using it; I want to ensure that every corner of our profession finds its voice and makes it heard.

One of my big projects this year will be to launch the Leadership Series, along the lines of (and indeed, complimentary to) the Society's stellar Modern Advocate Lecture Series. The series will go beyond the technical skills required to practise law and deliver the broad leadership skills required to run law practices, whether they be ILPs, in-house teams or government legal offices.

I can't do it alone though; I don't know everything and I don't have all the answers, but I am betting that collectively *we* do. To lead is also to follow, and while leading the profession I will also seek its guidance; the Society is your partner on this journey and we are most definitely all in this together.

No one should underestimate the challenges our profession faces, but then no one should underestimate our collective capabilities; there is little we cannot achieve when we are united in purpose and broad of mind. So let's go people – there's work to be done!

Bill Potts
Queensland Law Society President

president@qls.com.au
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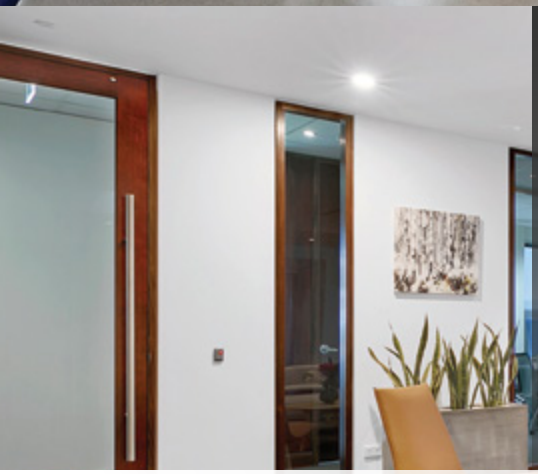

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CLARENCE

QLS welcomes new District Court judges

Queensland Law Society has praised the Queensland Government for the appointment of two District Court judges in December.

QLS 2018 President Ken Taylor said the appointments of silks John Allen and Vicki Loury to Queensland's District Court were another step towards adequate resourcing and swift replacements on the bench.

"I congratulate Mr Allen and Ms Loury on their new roles," Mr Taylor said. "It is always pleasing to see more resources dedicated to our busy justice system, and we urge the Government to consider additional appointments across all of our courts in the near future.

"We also congratulate Mr Allen on his additional appointment as Deputy President of the Queensland Civil and Administrative Tribunal, which he will take over from Her Honour Judge Suzanne Sheridan.

"Judge Sheridan hails from the solicitors' branch of the profession, and we congratulate her on her leadership role at QCAT which she held for three years."

Mr Taylor also welcomed the announcement of long-time District Court Judge Richards to replace Judge Michael Shanahan as Childrens Court President.

"We applaud the Government on these announcements and we look forward to seeing more meritorious appointments – including those from the solicitors' branch – into the future."

Letter to the editor

Some thoughts on family lawyers

Family lawyer and mediator Anne-Marie Rice was named the Leneen Forde AC Woman Lawyer of the Year at the Women Lawyers Association of Queensland 40th Annual Awards Dinner on 27 October 2018.

In accepting this prestigious award, Anne-Marie shared her perspective – gleaned from many years in practice – on being a female family lawyer.

Building on her theme of tiredness from her many roles within and beyond the law, Anne-Marie said the following (as recorded in *Proctor*, December 2018, page 8):

"But most of all I am tired from 20 years of doing a job through a prism that is inconsistent with who I am – a lens that I find fundamentally one-dimensional and inherently aggressive. It is inherently masculine. The way the law is largely practised invites lawyers to solve problems by first making them bigger and by then aggressively holding a position until a decision is imposed or a compromise based on brinkmanship is reached.

"I don't naturally think like that, but I have been taught that that's how my job is done. And I have learned how to excel at it. But I am tired.

"I am exhausted from walking that walk.

"It affects who I am.

"It dims my light."

Anne-Marie deserves much kudos for her candidness in sharing what she sees as the prevailing culture in family law practice. It is also sad that her experience was so negative and that young practitioners are still launching their careers and being mentored in such a culture.

There are, however, other ways. The collaborative law movement has sought to convince us of this.

In a paper entitled 'Excelling at Collaborative Law Practice' presented for LexisNexis some years ago, Freda Wigan, a Partner at HopgoodGanim, tells us that:

"Collaborative family law was founded by Stu Webb, a lawyer from Minneapolis, in the United States, in 1990. Stu Webb, suffering from the negative effects associated with family law trial work, discovered an alternative method of practising law, where settlement was the focus and where he would only represent clients in negotiations, and in the event the process broke down, he would withdraw and his client would find an alternative lawyer to litigate."

In 2008, a Canadian law professor, Julie Macfarlane, published *The New Lawyer – How Settlement is Transforming the Practice of Law*. As Macfarlane noted:

"The new lawyer's advocacy role is focused on developing the best possible outcome – often in the form of a settlement – for (his or) her client, using communication, persuasion, and relationship building in contrast to positional argument and 'puffing' up the case, but as one lawyer trained in the traditional advocacy put it:

'I mean, we're trained as pit bulls, I'm not kidding you, I mean we're trained pit bulls and pit bulls don't naturally sit down and chat with a fellow pit bull. The instinct is to fight and you just get it from the first phone call. I'm bigger and tougher and strong and better than you are.'."

Lawyers starting their careers could do far worse than to read the above text, which details a new model of lawyering with an emphasis on conflict resolution rather than protracted litigation.

It should be said, though, that collaboration between like-minded lawyers has always been one means of helping clients find a solution despite a fundamentally unfriendly and potentially hostile system. Collaboration between lawyers is not new.

The growth of mediation, particularly over the past two decades and the willingness of practitioners to refer to mediation is also a strong encouragement of the new pathway.

In the interim report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Commissioner Hayne listed the following tenets as basics of good banking:

"Obey the law. Do not mislead or deceive. Be fair. Provide services that are fit for purpose. Deliver services with reasonable care and skill. When acting for another, act in the best interests of that other."

These could equally be extrapolated as the principles of good lawyering.

Thanks Anne-Marie for calling it as it is.

Mike Emerson

Co-Principal, Brisbane Mediation
Principal, Advice Only Family Law

Queensland Law Society

Queensland Law Society Inc.
179 Ann Street Brisbane 4000
GPO Box 1785 Brisbane 4001
Phone 1300 FOR QLS (1300 367 757)
Fax 07 3221 2279
qls.com.au

President: Bill Potts
Vice President: Christopher Coyne
Immediate Past President: Ken Taylor
Councillors: Michael Brennan, Chloe Kopilovic, Peter Lyons, Kirsty Mackie, Luke Murphy, Travis Schultz, Karen Simpson (Attorney-General's nominee), Kara Thomson, Paul Tully.
Chief Executive Officer: Rolf Moses

Editor: John Teerds
j.teerds@qls.com.au | 07 3842 5814
Design: Courtney Wiemann and Alisa Wortley
Art direction: Clint Slogrove
Advertising: advertising@qls.com.au
Subscriptions: 07 3842 5921 | proctor@qls.com.au
Proctor committee: Dr Jennifer Corrin, Kylie Downes QC, Steven Grant, Vanessa Leishman, Callan Lloyd, Bruce Patane, William Prizeman, Christine Smyth, Frances Stewart, Anne Wallace.

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Fellowship winner seeks access to justice solutions

Brisbane lawyer Andrea Perry-Petersen has been awarded a Churchill Fellowship in recognition of her determination to increase access to justice through innovative approaches and emerging technology.

Andrea is one of 112 people across Australia to receive fellowships worth a total of $3.1 million. She was presented with her award by Queensland Governor Paul de Jersey AC at a ceremony on 23 November.

She will now travel to the Netherlands, Canada and the United States to explore how human-centred design, multidisciplinary collaboration and digital innovation may increase access to justice.

For the past few years Andrea has been researching innovative initiatives overseas and engaging with stakeholders at home, including the courts, legal assistance sector, universities, legal tech start-ups and technology companies.

"Through the fellowship, I hope to gain a deep understanding about what factors make a project effective and sustainable long-term, and return to implement those that are suited to our Australian context," said Andrea.

"I am looking forward to visiting organisations such as the Hague Institute for Innovation in Law, the Civil Resolution Tribunal in Vancouver and Stanford d.School, all of which run programs addressing the civil law needs of diverse groups, using principles of human centred design, collaboration and digital innovation.

"These approaches will make a real difference in developing understandable, effective self-help materials and pathways to dispute resolution mechanisms tailored to the literacy and ability levels and digital accessibility of different people."

Churchill Fellowship recipients with Queensland Governor Paul De Jersey AC. Andrea Perry-Petersen is on the far left.

Experts team up with pro bono lawyers

A new service for lawyers puts them in touch with experts who are prepared to offer their services for free or at low cost in matters where the lawyer is acting on a pro bono basis.

Professional services consultants ExpertsDirect will provide its services, including its research, case management and quality assurance teams, on a pro bono basis for participating pro bono law firms.

The ExpertsDirect pro bono service has been developed by the Australian Pro Bono Centre working with ExpertsDirect to tackle one of the key challenges in pro bono litigation – the availability of experts who are also willing to act pro bono in appropriate cases.

"ExpertsDirect engages with a wide range of professions, with expertise in fields ranging from medicine, rehabilitation and finance to technical fields such as construction, engineering and IT," ExpertsDirect CEO Richard Skurnik said.

"When we sent out an expression of interest to our curated panel of 5000 experts, we found that there's a genuine enthusiasm amongst many of our experts to 'give back' and a desire to make a difference to the future wellbeing of vulnerable people. Working with the Australian Pro Bono Centre, the new ExpertsDirect Pro Bono service plans to facilitate this."

Australian Pro Bono Centre CEO John Corker said the cost of expert reports, advice, attendance at meetings and providing evidence continued to be a barrier to lawyers taking on deserving matters on a pro bono basis.

"We are delighted that experts in a broad range of fields are willing to consider becoming involved in matters we consider appropriate for referral," he said. "It is important to realise that the scope of the task to be undertaken by the expert, and the charge, if any, for such service, will ultimately and properly be a matter for agreement between the pro bono lawyer and the pro bono expert."

Applications to ExpertsDirect Pro Bono should be directed to the Australian Pro Bono Centre at **probonocentre.org.au/expertsdirect-pro-bono-services**, while experts who may wish to become involved should contact ExpertsDirect at **expertsdirect.com.au**.

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New search tool for historical tidal works

The Department of Environment and Science is offering a new search tool on the Queensland Globe (qldglobe.information.qld.gov.au) that allows people to undertake a free search.

The search identifies if the department holds a record for a historical tidal works approval (issued under section 86 of the *Harbours Act 1955*, section 66 of the *Harbour Board Act 1892* or section 15 of the *Gold Coast Waterways Authority Act 1979*) for the period 1880 to 2005.

In the past, people were charged $158.70 for the department to undertake these searches on their behalf, with additional fees for each copy of an approved plan. However, less than 50% of paid requested searches confirmed a historical coastal approval on record.

The new search tool enables users the ability to perform this search for free. If the search identifies that there is a historical tidal works approval on record, a request can then be made to the department to provide an electronic copy of the approval through Searches (select Coastal development approval search). The fee for this request is $158.70 and an additional $22.65 per plan.

To locate this tool, search for 'Searches for Historical Tidal Works Approvals' at qld.gov.au/environment.

From left, Naomi Cox, Sarah-Jane MacDonald, Amie Mish-Wills and Georgia Soutar.

First all-female executive for Downs DLA

The Downs and South Western Queensland District Law Association (DSWQLA) has elected the first all-female executive in its 120-year history.

The members of the new executive – President Sarah-Jane MacDonald, Vice President Naomi Cox, secretary Amie Mish Wills and Treasurer Georgia Soutar – are all local, young, passionate solicitors, keen about social justice and equality before the law.

"Being given the opportunity to lead this association of lawyers that first commenced in the 19th Century is humbling, and to be part of its first all-female executive is amazing," Sarah-Jane said.

The DSWQLA provides continuing legal education and social events for lawyers from Toowoomba to the southern and western Queensland borders. It has been advocating for a permanent District Court judge for several years as well as improvements to facilities at the Toowoomba courthouse and increases in Legal Aid funding.

"We also raise funds for charities such as the women's shelter, while holding social opportunities for members of the local profession such as the annual Women in Law luncheon and the Law Ball," Sarah-Jane said.

"We just made a $500 donation towards the Delta Dog initiative, where puppies are brought to the courthouse on family law days to assist with relieving anxiety of people attending court. It really helps their stress levels."

For more information or to join the DSWQLA, see dswqla.com or facebook.com/dswqla.

New Chief Justice for Family Court

Judge Will Alstergren was sworn in as Australia's fifth Chief Justice of the Family Court of Australia on 10 December.

Chief Justice Alstergren, formerly Chief Judge of the Federal Circuit Court of Australia, succeeds Chief Justice John Pascoe AC CVO, who retired at 11.59pm on 9 December, one minute before reaching the statutory retirement age of 70.

Serving Family Court judge Robert McClelland was appointed as the court's Deputy Chief Justice at the swearing-in ceremony held at the Commonwealth Law Courts Building in Melbourne.

"I take very seriously the responsibility for ensuring the effective, orderly and expeditious discharge of the business of the court and to maintain public confidence in the court," Chief Justice Alstergren said. "The duty is not only to manage the existing work of the court but also to develop steps to improve the way the court goes about its work."

Chief Justice Alstergren, *left*, with Deputy Chief Justice Robert McClelland.

His Honour has a clear vision on how to improve the family law system for the benefit of the families who seek to resolve their disputes.

"Parties come to the family law system facing a variety of difficult circumstances," he said. "As a society, we are becoming more aware of the prevalence of complex issues such as family violence. The court is cognisant of its responsibility to recognise the impact of family violence when assisting parties to resolve their disputes and to ensure outcomes are in the best interests of the children who rely on this system.

"The volume of cases that have come into our system and the complexity of those cases has increased, as has the backlog. Without change, the system is not sustainable with the current level of resources.

"We have a great opportunity. An opportunity to embrace change. An opportunity to utilise the unparalleled cooperation that currently exists between the Family Court, Federal Circuit Court and Federal Court to drastically improve our system.

"I embrace making changes that will make a real difference to litigants. I will start this by working to harmonise the case management process across the two federal family courts. In so doing I commit to making the court process easier to understand and quicker to get to an outcome, whether by judgment or agreement. I intend to lead a collegiate, modern court that is interested in the views of those who come before it."

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Fundraiser supports Atkin monument

A fundraising event on Saturday 16 February will support the restoration of the Atkin monument in Brisbane and research into motor neurone disease.

Porta Lawyers and solicitor GR Brown are organising the event, which will be held at the Sandgate Town Hall and feature a five-piece band paying tribute to famed Australian singer/songwriter Paul Kelly.

The Atkin monument was erected in honour of Robert Atkin, a noted Queensland politician and father of Lord Atkin. See page 15 of the February 2017 edition of *Proctor* for background details about the monument and the effort to restore it.

Tickets are $55 and available from **eventbrite.com.au/e/lord-atkin-monument-motor-neurone-disease-fundraiser-tickets-49680638126** or call 07 3265 3888.

Vale Susan Hamilton

Leading Torres Strait Islander lawyer Susan Anne Hamilton passed away on 30 December.

Susan, who was most recently Chief Executive Officer of the Aboriginal Family Legal Service Southern Queensland, based in Roma, played a critical role in the landmark 2013 High Court case of *Akiba v Commonwealth*, which saw commercial fishing rights recognised for the first time under the Native Title framework.

She was also the first Torres Strait Islander to appear before the High Court as a lawyer, an accomplishment showcased at the National Museum of Australia.

Susan graduated from Griffith University in 2005 with a Bachelor of Laws, Bachelor of Commerce, Accounting and Finance and a Graduate Diploma in Legal Practice. From 2005-2007 she was associate to Justice DA Mullins of the Supreme Court of Queensland.

She also dedicated her time to a number of community organisations.

Ending the year in style

As 2018 started to wind down, practitioners enjoyed a range of both serious and social events.

These included the Legal Profession Breakfast on Thursday 15 November at Brisbane City Hall, with guest speakers including policy advisor and violence prevention trainer Danny Blay and award-winning author and domestic violence prevention campaigner Rebecca Poulson.

QLS was a major sponsor of this event, with proceeds going to help Women's Legal Service Queensland in its work with women and children affected by domestic violence.

Continuing the QLS series of events acknowledging and thanking a range of contributors to the Society, a Cairns appreciation event was held on 21 November at the Hilton Cairns Simply Italian restaurant. It was well attended, with guests including professional development session presenters, local DLA executive members, and members of QLS committees and working groups.

While early career lawyers gathered to enjoy their 2018 Christmas party at Friday's Riverside on 6 December, past, present and future QLS Presidents were sitting down to enjoy fine fare at their annual dinner at 1889 Enoteca.

One of the regular end-of-year highlights, the specialist accreditation Christmas Breakfast with the Chief Justice, rounded off the year. The annual breakfast was a celebration for those practitioners who successfully completed their specialist accreditation courses during the year. Seventeen of 2018's successful candidates are pictured with Chief Justice Catherine Holmes and 2018 QLS President Ken Taylor.


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Early career lawyers' Christmas party sponsor:

LAW IN ORDER

Images 1-4, 10 and 13: Christmas Breakfast with the Chief Justice, including 1 – 2018 QLS President Ken Taylor; 3 – successful specialist accreditation graduates with Chief Justice Catherine Holmes; 4 – attendees Nicole Lloyd, Patty Tighe and Callan Lloyd; and 13 – Caite Brewer.

Images 5 and 6: Attendees at the dinner for past, present and future QLS Presidents.

Image 7: The Cairns appreciation event at Simply Italian.

Image 8: The Legal Profession Breakfast at Brisbane City Hall.

Images 9, 11, 12 and 14: The early career lawyers' Christmas party, including 9 – Catherine Nufer-Barr and Joanna Lane; 11 – Ebony Morris, Georgie Groves, Abbey John, Annalyse Harvey; 12 – Bec Gray, Mitch Page.

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The X7 Factor

Appeal adds to compulsory examinations case law

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R v Leach[1] is the next instalment in a series of cases that considers the implications of coercive powers and compulsory examinations in the criminal justice system. Report by **Sarah Ford**.

The Queensland Court of Appeal decision in *R v Leach* [2018] QCA 131 (*Leach*) provides a welcome reminder for practitioners of fundamental principles that have been espoused by the High Court, and those which underpin an accused's right to a fairly conducted criminal prosecution.

The issue

Legislation which provides for coercive powers and compulsory examinations is now common,[2] and the exercise of these powers by investigative bodies happens regularly.

Generally speaking, the legislative provisions under which the bodies exercise these powers abrogate the compelled person's ability to claim privilege against self-incrimination. The practical effect of that abrogation is that a person compelled to answer questions under examination (such as at a hearing or an interview) cannot refuse to answer questions on the basis that the answer may tend to incriminate them, as to do so would render them liable to prosecution.

For an inquisitorial purpose, this system presents itself as faultless, but where the cracks start to appear is in the interplay between compulsory examination powers and an accused's right to a fair criminal prosecution.

This issue is not a novel one; it is one which has plagued defence practitioners for decades. In recent years though, it has attracted much-needed judicial scrutiny, and a comprehensive articulation of some of the fundamental fairness principles underpinning Australia's criminal justice system.

The *X7* and *Lee* cases

In *X7 v Australian Crime Commission & Another* [2013] HCA 29 (*X7*), after being charged with criminal offences and prior to his trial, X7 was served with a summons requiring his attendance at a compulsory examination at the Australian Crime Commission (ACC). A refusal to answer questions at such an examination, even if the answer tended to incriminate a person, was an offence.[3]

At the examination, X7 was asked questions relating to the subject matter of his criminal charges and, on day two of the examination, he declined to answer further questions. He was advised by the ACC that he would be charged for failing to do so.

A majority of the High Court held that the ACC's compulsory examination powers[4] did not extend to requiring a person charged with a criminal offence to answer questions about the subject matter of that offence. To do so, would cause prejudice to the accused, and fundamentally alter the "accusatorial judicial process".[5]

Three months after *X7* was delivered, the High Court decided *Lee v New South Wales Crime Commission* [2013] HCA 39 (*Lee (No.1)*).

The Lees had been charged criminally, and whilst those proceedings were on foot, the New South Wales Crime Commission applied to the Supreme Court for confiscation orders, along with orders for the examination (on oath) of the Lees. Those applications were made under the *Criminal Assets Recovery Act 1990* (NSW).

The subject matter of the examinations was likely to overlap with the subject matter of the criminal proceedings, and so, as in *X7*, the question for the High Court was whether the applicable legislation[6] permitted the questioning of a person about the subject matter of that person's pending criminal charges.

By a majority, and in distinguishing *X7*, the High Court held that the *Criminal Assets Recovery Act 1990* (NSW) did authorise the examination of a person who had been charged (but not yet tried) criminally. Moreover, the potential to prejudice an accused's right to a fair trial was safeguarded by the legislature's choice of the Supreme Court as the examination forum.[7]

The Lees later returned to the High Court, appealing their post-trial criminal convictions, in *Lee v The Queen* [2014] HCA 20 (*Lee (No.2)*).

Prior to being charged criminally, the Lees had been subjected to compulsory examinations by the New South Wales Crime Commission (pursuant to the *New South Wales Crime Commission Act 1985*). At the examinations, a non-publication direction in respect of the evidence was issued by the commission.

Following the examinations, search warrants were executed and the Lees were charged.

Before the Lees' trial commenced, transcripts of their examinations were provided to police and to the Office of the Director of Public Prosecutions (DPP), and they were also shown to potential witnesses. It also became apparent that the DPP had used the transcripts to anticipate and prepare for potential defences.

The Lees were convicted after trial and appealed those convictions on a number of grounds, one of which asserted a miscarriage of justice due to the release of the transcripts to the DPP. The High Court allowed the appeal and unanimously held that the trial had miscarried and the provision of the transcripts to the DPP was for a "patently improper purpose, namely the ascertainment of the appellants' defences".[8]

Leach

Some four years since *Lee (No.2)*, the issue of compulsive examinations and their potential to jeopardise an accused's right to a fair trial has resurfaced – this time in the Queensland Court of Appeal decision, *R v Leach.*

In 2010 Leach was served with a notice from the Australian Taxation Office (ATO) pursuant to the *Taxation Administration Act 1953* (Cth) requiring him to give evidence and produce documents. Similar to the notices served on X7 and the Lees, it was an offence for Leach to refuse to answer questions under examination.

Following the examination and the ATO's associated investigations, in 2011 the ATO referred Leach to the DPP. In doing so, the referring ATO investigator provided to the DPP the transcript of *Leach's* compulsory examination, having formed the view that she was authorised to pursuant to s355-50 of the *Taxation Administration Act 1953* (Cth). In addition to the dissemination of the transcript to DPP employees, witness statements were provided by the investigating ATO officer, as well as the two ATO officers who interviewed Leach under compulsion.

In 2012, Leach was charged with 44 dishonesty-related offences. In 2014 he applied for a permanent stay of the indictment and for a ruling that the contents of the compelled examination were inadmissible at trial. In the alternative, Leach sought directions with respect to ensuring that the prosecution conduct the proceedings without having access to the transcript. The application was dismissed, and the charges proceeded to trial in 2017.

At the trial, the compulsive examination recording was tendered and played for the jury. The prosecution relied on the recording as evidence of Leach's "consciousness of guilt", and in doing so, identified six alleged lies told by Leach during the examination. The examination was also referred to by the prosecutor in his closing address, and by the trial judge in his summing up and directions to the jury. Leach was convicted of all charges.

The question on appeal was ultimately twofold:

1. Whether it was open to the DPP, in prosecuting the indictable offences, to base its case "…about the essential element of the appellant's state of mind upon proof of what the prosecution submitted were lies told in response to questions to which the appellant had been required to give an answer, by express threat of prosecution if he refused to do so, and in respect of which he was unable to claim any privilege against self-incrimination".[9]
2. Whether the *Taxation Administration Act 1953* (Cth) implicitly authorised the disclosure to, and use by, the DPP of the content of such a compulsive examination for the purpose of considering possible charges against the examinee (including for the formulation of those charges), and for use in the prosecution's case (and as evidence at trial to prove the criminal guilt of the examinee).[10]

In applying *X7* and *Lee (No.2)*[11] the majority[12] held that the disclosure to the DPP of the evidence given by Leach under compulsion, the DPP's use of that evidence to prepare for their prosecution, and its admission as evidence at the trial, constituted a miscarriage of justice.

Further, that there was nothing in the *Taxation Administration Act 1953* (Cth) which could implicitly authorise the use of compelled evidence as occurred in *Leach*.[13] Information obtained by "compulsory interrogation" in that context may be disclosed to aid the DPP's prosecution of offenders *other than* the examinee.[14] To effectively achieve its objects, the *Taxation Administration Act 1953* (Cth) does not render it necessary for the evidence of the examinee to be "… made available to future prosecutors of the examinee nor that such prosecutions would be frustrated or even hampered by a denial of access to the information".[15]

The convictions were quashed and a retrial ordered.

Implications of *Leach*

Beyond navigating the reader through the rabbit warren that is the practical application of cases like *X7*, *Lee (No.1)* and *Lee (No.2)*, President Sofronoff's judgment in *Leach* offers a welcome reminder of the fundamental fairness principles underpinning Australia's accusatorial system, and how the improper use of coercive powers can create defects in that system.

He reminds us, for example, that in a fairly conducted criminal prosecution, the accused has the freedom to make certain choices, and those choices are integral parts of the criminal prosecution process.[16] One such choice is whether or not to remain silent in circumstances where, in criminal proceedings, an accused cannot be compelled to give evidence.[17]

His Honour also reminds us that, as espoused by *X7*, it is a fundamental principle of the common law that the onus of proof rests with the prosecution, and it is a 'companion principle' that the prosecution cannot compel an accused to assist it.[18] No part of the criminal prosecution process imposes any obligation on an accused to assist the prosecution in proving its case.[19]

In *Leach*, the process was distorted by the DPP's access to and use of the accused's compelled evidence, because (in citing *X7*), "…the appellant could no longer determine the course he would follow at his trial according only to the strength of the case that the prosecution proposed to, and did,

adduce in support of its case that the offence charged was proved beyond reasonable doubt. The consequence is inescapable."[20]

As triumphant as this decision may seem (insofar as an accused's rights are concerned), it would be remiss to suggest that the position on this issue is settled. Justice Applegarth, in his dissenting judgment, made a number of observations and findings that cannot be ignored, and which undoubtedly leave the issue open to agitation on a case-by-case basis.

Amongst other things, Justice Applegarth raised the competing (and arguably compelling) view that, as fundamental as the privilege against self-incrimination is, the legislated abrogation of that privilege[21] tends to suggest that public interest in ensuring a successful prosecution of the 'guilty' outweighs the private interest in claiming privilege against self-incrimination.[22] Justice Applegarth's reasoning here seemingly echoes the public interest considerations of the minority in *X7*, suggesting that we are far from having a settled judicial position on the issue.

Conclusion

For many of us who practise in administrative and criminal law, the *Leach* scenario is all too familiar. With *X7,* the *Lee* cases, and now *Leach*, practitioners are armed with a collection of cases that they can use to help navigate their way through this complex and increasingly prevalent issue.

Having said that, what these cases make clear is that each case will turn on its own facts and applicable legislation. In the absence of a clearly settled judicial position, it is incumbent upon practitioners to be vigilant in ensuring that their client's criminal proceedings are conducted fairly, and the rules and principles about compelled evidence as articulated in these cases, remain intact.

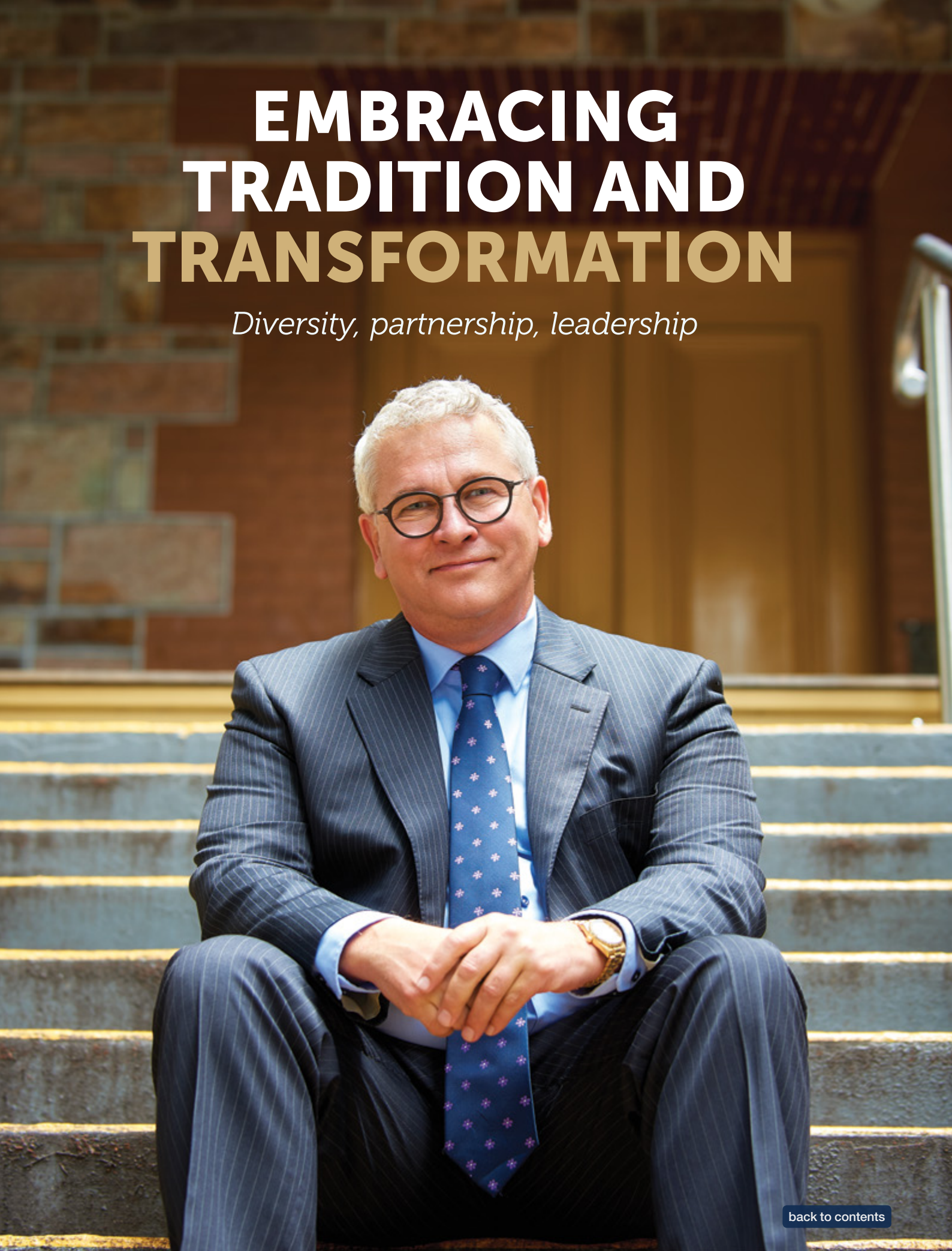
Sarah Ford is an associate at Gilshenan & Luton Legal Practice.

Notes

1 *R v Leach* [2018] QCA 131.
2 For example, the *Taxation Administration Act 1953* (Cth), the *Australian Crime Commission Act 2002* (Cth) and the *Crime and Corruption Act 2001* (Qld).
3 However upon a claim for self-incrimination privilege, the answer given would be inadmissible in evidence against that person in a criminal proceeding.
4 As provided for at the time in the *Australian Crime Commission Act 2002* (Cth), which expressly made compelled answers inadmissible in a criminal proceeding for charges against the examinee once privilege against self-incrimination had been claimed.
5 *X7 v Australian Crime Commission & Another* [2013] HCA 29 at [124]. Interestingly, the *Australian Crime Commission Act 2002* (Cth) has since been amended to allow examinations of an accused both pre and post-charging (see s24A).
6 Being the *Criminal Assets Recovery Act 1990* (NSW).
7 In that the court has, for example, the power to conduct the examination in private, to disallow questions, and to restrict publication (see [141].
8 *Lee No.2* at [39].
9 *Leach* at [27].
10 *Leach* at [39].
11 Along with *R v Seller & McCarthy* [2-13] NSWCCA 42 and *Deputy Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.
12 Being Sofronoff P and Philippides JA.
13 *Leach* at [85].
14 *Leach* at [89].
15 *Leach* at [91].
16 *Leach* at [99].
17 Section 8(1) Evidence Act 1977 (Qld).
18 *Leach* at [45].
19 *Leach* at [101].
20 *Leach* at [100].
21 Without corresponding protection against the use of compulsorily obtained evidence.
22 See, for example, Applegarth J's comments at [212].

EMBRACING TRADITION AND TRANSFORMATION

Diversity, partnership, leadership



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Queensland Law Society President Bill Potts reveals his priorities and passion for 2019. Report by **Melissa Raassina**.

When the name 'Bill Potts' is mentioned in Queensland, many will recognise him as a Gold Coast criminal lawyer, often called upon by the media to explain the law.

Many in the legal profession, media and government will also know him as 2016 and now 2019 Queensland Law Society President. Bill is no stranger to the Society, having been involved with QLS for decades through committee membership, as a QLS Senior Counsellor and presenting at events. He is now in his eighth year on QLS Council – a role he says has given him great insight into the workings of QLS.

"The Society is a membership organisation, with many moving parts," he said. "One of our key roles is in listening to our members, finding out the key issues of importance to them and providing the best solutions and training to get the job done."

A strong foundation

Bill is only the second practitioner in the Society's 146-year history to hold the office of President on two occasions – the first being George Roydon Howard Gill (1887-1974), who served in 1934-36 and 1943-44.

When asked how it felt to be the only living President to serve twice, Bill said that it was "an amazing honour to be working with an active and committed Council to serve our members".

While he returns with the same foundational priorities and passions for the role and the profession, Bill outlined a few other key issues he wishes to bring to the fore in 2019.

"Think words such as diversity, integrity, transparency, active partner, active leader, purpose, uncompromising, advocacy and service," he said. "I'm in a unique position as I am well known to many members throughout the length and breadth of Queensland, and I have had significant contact with government, Opposition and the judiciary.

"This contact has seen me furthering the interests of our profession and I have a history of standing up for the independence of the judiciary, lobbying for further court resources and reinforcing society's respect for the rule of law.

"This year, I can progress the many goals of QLS, through continuing to build on the work of past presidents and by prioritising the voices and values of our diverse membership."

Bill outlined his key priorities across several areas. He is passionate about promoting not only the value of solicitors in Queensland but also the Society as the peak professional legal body in Queensland, and a leading legal professional body in Australia.

"In Queensland, we have some of the most experienced and passionate solicitors who work diligently for their clients day-in day-out with little recognition," he said.

"At the Society, we draw upon not only their knowledge and expertise, but also the skills of our QLS Council and staff to provide the best services possible. We need to promote this great work wide and far."

Bill remains committed to representing the interests of professional solicitors and QLS members through this advocacy, while championing the value of members to community, government and judiciary.

"Our members' success is not only success for QLS but also the wider profession and the community we serve.

"While we ensure our members remain at the top of their game, we also will continue to lead and proclaim the profession's high-level of standards, whether it be through regulation of licensing to practise, trust accounting or ethical support."

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> “Let us move forward with purpose, renewed passion, integrity and uncompromising integrity…”

Bill believes that leaders turn to face difficulty, not turn their backs on it. He will focus on stepping up and being counted while proclaiming and standing by the standard for the profession.

“[US President] Dwight D. Eisenhower once declared ‘the supreme quality for leadership is unquestionable integrity. Without it, no real success is possible.’,” he said.

Key themes

As a leader, Bill articulates the way forward for members succinctly, through several key themes which bring together solicitors from all corners of the state.

He begins to explain his vision for QLS during his presidency to be the professional partner and a partner in the profession to all members.

“Part of partnering with our solicitors is to embrace diversity, advance our female practitioners to senior positions, and launch initiatives to encourage all members to become leaders.

“Bringing together all our members from the city to rural, regional and remote, those from all models of practice, all career backgrounds, all cultures and heritages, to those with disabilities, is key to embracing the next generation of lawyers.

“A truly inclusive profession is one that has the best chance of not only succeeding individually, but by triumphing as a group.”

Leading the way

Bill is no stranger to leadership, and encourages others to step up to follow in the footsteps of those who have led the way.

“I am excited particularly about our new Leadership Series, which will promote and encourage the theme of leadership at all levels of career and skill, with a particular emphasis on diversity in the profession.

“This series will complement our highly successful Modern Advocate Lecture Series (MALS), and will draw presenters from across numerous professions and experiential backgrounds.

“I look forward to this being available and applicable to the broader profession, being that it wholly aligns with my theme of inclusivity and diversity in our profession.”

Bill also explained that another moving part to this vision of leadership was the QLS Solicitor Advocate Course, launched in 2017 by the QLS Ethics and Practice Centre.

“This course is another offshoot of MALS, and we are passionate about rolling this out to practitioners in rural, regional and remote centres in ways that are accessible for them and workable for our facilitators.”

Onward and forwards

Bill is eager to hit the ground running and chalk up a busy year for the Society and the profession. He has plans to meet with numerous stakeholders and travel around the vast state of Queensland to meet with members.

“The future for QLS and Queensland’s legal profession is a bright one, and we can achieve much by embracing our differences, maintaining our ethical standards, advocating for good law, supporting good lawyers, partnering together and remaining transparent.

“I am proud to be a solicitor in Queensland, and equally proud to represent our profession as an officer of the court, a guardian of the justice system and a leader for the solicitors’ branch.

“Let us move forward with purpose, renewed passion, integrity and uncompromising integrity for what is right and good for the people of Queensland.”

Melissa Raassina is Media and Public Relations Advisor at Queensland Law Society.
Photographs credit: cathytaylorphotographer.com

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Focus on future law

Setting the scene for an active year ahead, Queensland Law Society's Legal Policy team reflects on some of the highlights of 2018. Report by **Pip Harvey Ross**.

As well as making more than 220 written submissions to government, parliamentary committees and leading research bodies in 2018, the QLS Legal Policy Team engaged with some 150 stakeholders to discuss legal policy issues.

Regular stakeholder engagements include a number of Queensland Courts groups such as the Court Users Reference Group, the Childrens Court Committee and the Queensland Civil and Administrative Tribunal.

Our participation in these forums allows QLS, as informed by its policy committee members, to provide the practitioner perspective throughout the policy and legislation development process.

Public hearings are held as a part of the parliamentary inquiry process. They provide subject matter experts and interested parties with the opportunity to expand on their written submissions and to discuss inquiry issues with parliamentary committees in a public forum. In 2018, QLS was invited to appear at 20 of these public hearings to discuss a range of legal issues.

In December, QLS representatives appeared at a public hearing before the parliamentary Legal Affairs and Community Safety Committee on the Human Rights Bill 2018. At the hearing we discussed the practical implications if the legislation is passed by Parliament.

In particular, the committee was interested to hear whether the Bill would negatively impact court resources and the speed of access to justice. We drew from the experience of similar legislation in Victoria, which did not see an increase or 'flood' of litigation, or an increase in the workload of judges due to that state's human rights legislation.

Consultation highlights

In early 2018, QLS was invited to participate in the 'Five yearly review of the Queensland workers' compensation scheme', conducted by Professor David Peetz of Griffith University. Our President and members of the Accident Compensation/Tort Law Committee met with Professor Peetz to discuss issues relevant to the workers' compensation scheme on behalf of members. We also provided a written submission to the review, which noted that the scheme was operating well, but highlighted a few issues that should be addressed.

The review report was completed in May 2018. Professor Peetz concurred that the scheme was operating well, but made a number of recommendations for improvement, some of which QLS had suggested.

Following the report, the Office of Industrial Relations convened a stakeholder group to consider 16 recommendations from the report which would require legislative change. Representatives from QLS attended two meetings of this group to discuss the proposed amendments and how they could best be effected.

Among these changes were proposals to include 'gig economy workers' in the scheme and to provide better and early rehabilitation to injured workers, including those who had sustained a psychiatric/psychological injury. QLS has supported these amendments and is eager to continue the consultation process this year, including reviewing the draft legislation.

The extensive consultation process undertaken by the Legal Policy Team was highlighted during the inquiry on the Termination of Pregnancy Bill 2018. QLS considered the issues involved at length, including those raised by the Queensland Law Reform Commission (QLRC) review of termination of pregnancy laws, those directly associated with the Bill, and more broadly the wider issues associated with termination of pregnancy that have surfaced over several years.

In 2012, we provided a letter of support to the Medico-Legal Society in response to its call for a review of termination laws in Queensland, and the Health and Disability Law Committee has been considering these laws in depth since 2017, prior to the QLRC inquiry.

In January last year, following the referral of the issue to the QLRC, we began wider consultation with members, who provided considerable feedback. A comprehensive review of the associated issues was undertaken by expert practitioners who practise in areas relevant to the inquiry.

In particular, the Health and Disability Law Committee, the Criminal Law Committee and the Domestic and Family Violence Committee assisted in compiling the QLS submissions to the QLRC inquiry and again in response to the Bill when it was introduced into Parliament in August last year.

The QLS submissions responding to both the QLRC inquiry and to the Bill focused on the legal implications of the suggested law reform and policy issues, such as the legality of safe access zones and the clarification of definitions. We were pleased to receive considered feedback from member practitioners following calls for consultation in QLS Update, as well as from members of several policy committees.

It was also pleasing to be invited to appear at the public hearing on the Bill in September last year to discuss the issues raised by our submission and to assist the parliamentary committee in determining its position on the Bill.

Pip Harvey Ross is a legal policy clerk with the Queensland Law Society Legal Policy Team.

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GUARDING THE RIGHTS OF ALL QUEENSLANDERS

Human Rights Bill 2018 (Qld)

On 31 October 2018, Queensland Attorney-General Yvette D'Ath introduced the Human Rights Bill 2018 into State Parliament.

The Bill has been referred to the parliamentary Legal Affairs and Community Safety Committee (the parliamentary committee), which is due to report to Parliament by 4 February this year.[1]

The objectives of the Bill[2] are wide-reaching and include measures to:

- establish and consolidate statutory protections for certain human rights
- ensure that public functions are exercised in a way that is compatible with human rights
- promote a dialogue about the nature, meaning and scope of human rights
- rename and empower the Anti-Discrimination Commission Queensland as the Queensland Human Rights Commission to:
  - provide a dispute resolution process for dealing with human rights complaints, and
  - promote an understanding, acceptance and public discussion of human rights.

Whether you agree or not with the legislative protection of human rights, this is a historic moment for Queensland. As a profession, we will need to embrace and understand this change to law-making, delivery of government services and judicial decision-making.

The path to the Bill

Queensland was, in fact, the first state or territory to consider the prospect of a *Human Rights Act* when, in 1959, the Nicklin Country-Liberal Party proposed Constitutional provisions aligning with those set out in the Declaration of Human Rights of the General Assembly of the United Nations. The Bill never passed.

Many years later, in 2004, the Australian Capital Territory introduced specific human rights legislation, followed by Victoria in 2006. Many argue that the introduction of similar legislation in Queensland will garner the necessary momentum for re-consideration of a federal *Human Rights Act*. Australia remains one of the only western democracies to not have such legislation in place.

Consideration of this reform was one of the things that Queensland's Palaszczuk Government agreed to with Peter Wellington MP in 2015, in exchange for his support on confidence motions. At the 2015 Labor state conference, members voted unanimously to conduct a parliamentary inquiry into a Queensland Bill of Rights.

Queensland Law Society invited all members to have their say on whether or not the Government should introduce a *Human Rights Act* for Queensland, and established its Human Rights Working Group, which ultimately produced a detailed submission to the parliamentary committee.

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With Queensland ready to enact a Human Rights Act this year, **Dan Rogers** reports on its proposed content and likely impact, and explains the role of Queensland Law Society in assisting the Bill's legislative progress.

What became clear during that process was that reasonable minds can differ greatly when it comes to the legislative protection of fundamental human rights. The Society presented two submissions to the parliamentary committee identifying the arguments for and against such legislation. The Society was then invited to appear before the inquiry. The Honourable Richard Chesterman AC presented the arguments against this legislation to the parliamentary committee and I had the great pleasure of presenting the arguments in favour.

Those who oppose this reform say that it is unnecessary because many of the rights – such as not to be tortured or enslaved, and property rights – are provided by existing criminal and common law. Other concerns expressed included that it might impose extra layers of regulation, greater costs and confusion due to perceived, contradictory rights.

At a higher level, it is sometimes suggested that the Act undermines parliamentary supremacy because judges can engage in law-making. However, the model proposed for Queensland does not allow judges to either strike down laws or to avail themselves of the ordinary task of legislative interpretation.

In my view, a *Human Rights Act* is an important legislative instrument that defines the relationship between the government and the people. Many say that a *Human Rights Act* ensures that the government binds itself to a commitment to protect, respect and fulfill our human rights. Experiences in other jurisdictions show that the legislation can improve law-making, delivery of government services, and judicial decision-making.

Ultimately, the Labor committee members supported the introduction of a Human Rights Bill and subsequently reaffirmed their commitment to introduce this legislation at the 2016 Labor state conference. There, Premier Anastacia Palaszczuk revealed that Cabinet had agreed to introduce a Human Rights Bill for Queensland, modelled on the Victorian charter. There is now a Bill before Parliament.

There are many iterations of a *Human Rights Act* (sometimes called a 'Charter' or 'Bill of Rights'). The content of Queensland's version will be critical in order to best ensure that it fulfills its policy objectives. The 'Society has again sought members' views on the reform but, in particular, the detail of the Bill before Parliament.

QLS recently reformed the Human Rights Working Group to assist the President in developing a submission to the parliamentary committee. This submission can be found at **qls.com.au** > For the profession > Advocacy (dated 26 November 2018).

The focus now is the content of the Bill as opposed to the idea itself. QLS supports 'good law, good lawyers, for the public good', so if a *Human Rights Act* is to be introduced, we have a duty to ensure that it is the best possible law available to assist us in advocating our clients' interests.

Human rights protected

The Bill, if and when passed, will apply to the Parliament, the courts and tribunals, and public authorities. Its objects and purpose are "to protect and promote human rights", "to help build a culture in the Queensland public sector that respects and promotes human rights", and "to help promote a dialogue about the nature, meaning and scope of human rights".[3] Only people have human rights; corporations do not.[4]

Often, there are competing human rights and interests. The Bill recognises this by saying that human rights do have limits, but such limits must be able to be "demonstrably justified in a free and democratic society based on human dignity, equality and freedom".[5] In deciding whether a limit is "reasonable and justifiable", a range of factors are relevant:[6]

a. the nature of the human right
b. the nature of the purpose of the limitation
c. the relationship between the limitation and its purpose
d. whether there are any less restrictive ways to achieve the purpose
e. the importance of the limitation
f. the importance of preserving the human right.

The set of rights in the Bill are largely derived from the International Covenant on Civil and Political Rights (ICCPR). In comparison to the Victorian model, Queensland has expanded the list of rights to include some limited economic, social and cultural rights. In particular, the right to education and health services. Further, the Bill recognises the distinct cultural rights belonging to Aboriginal and Torres Strait Islander peoples. The full list of rights protected include:

- the right to recognition and equality before the law[7] the right to life[8]
- the right to protection from torture and cruel, inhuman or degrading treatment[9]
- the right to freedom from forced work[10]
- the right to freedom of movement[11]
- the right to privacy and reputation[12]
- the right to freedom of thought, conscience, religion and belief[13]
- the right to freedom of expression[14]
- the right to peaceful assembly and freedom of association[15]
- the right to protection of families and children[16]
- the right to taking part in public life[17]
- cultural rights[18]
- the specific cultural rights of Aboriginal and Torres Strait Islander peoples[19]
- property rights[20]
- the right to liberty and security of person[21]
- the right to humane treatment when deprived of liberty[22]
- the rights of children in the criminal process[23]
- the right to a fair hearing[24]
- rights in criminal proceedings[25]
- the right not to be tried or punished more than once[26]
- the right to protection from retrospective criminal laws[27]
- the right to education[28]
- the right to health services.[29]
- QLS has also proposed that the Government considers including a 'right to freedom from violence, abuse and neglect'. This would be consistent with Article 16 of the Convention on the Rights of Persons with Disabilities, together with the Government's commitment to addressing domestic violence in all ways possible. A right to adequate housing has also been suggested by QLS as something essential for human survival and dignity.

New laws

When a Member of Parliament proposes a new law, they will need to accompany it with a statement that explains whether or not the law is compatible with the human rights set out in the Act.[30] Those new laws are then the subject of scrutiny by a parliamentary committee system to determine their compatibility with human rights.[31]

To be clear, *a Human Rights Act* will not prevent governments from making laws that impede human rights, and a government may declare that a law has effect despite a possible conflict with human rights.[32] A *Human Rights Act* will, however, ensure that the impact is identified and open for public debate.

In Queensland, where there is only one house of Parliament, such a dialogue between the Government and the community is of particular importance. In the end, Parliament may declare that an Act or other legislative instrument has effect despite being incompatible with human rights. This is known as an override declaration.[33]

Delivery of government services

When government agencies (including non-government agencies performing a public function) deliver services to the community, they are required to act consistently with human rights and give consideration to human rights when making important decisions that affect individuals.[34] A 'public entity' is defined to include:[35]

- government entities
- public service employees
- the Queensland Police Service
- local governments, councillors, and employees
- Ministers
- entities performing public functions
- members of portfolio committees acting in an administrative capacity
- entities performing public functions for the state or another public entity
- staff members or executive officers of a public entity.

The definition does not extend to the Legislative Assembly, a court or tribunal acting in a non-administrative capacity, or other specified entities.[36]

Judicial decision-making

Our courts, under a statute-based *Human Rights Act*, will not have the power to strike down laws.[37] Rather, courts will be required to interpret and apply legislation consistently with human rights.[38] In some cases, the courts may identify that a particular law is incompatible with human rights.[39] In that instance, the court has the discretion to make what is called a 'declaration of incompatibility'.[40] This declaration is then provided to the relevant Minister for their consideration and presentation to Parliament.[41] Consistent with parliamentary supremacy, it is a matter for government as to whether or not it chooses to remedy any human rights incompatibility identified by a court.

The Human Rights Commission: The complaints process

The Act will establish the Queensland Human Rights Commission, which has a range of functions, including:[42]

- to deal with human rights complaints
- to review the effect of other laws, if requested by the Attorney-General
- to review the compatibility of public entities, policies, programs, procedures, practices and services with human rights
- to promote understanding, acceptance and discussion of human rights
- to make information about human rights available to the community
- to provide education about human rights
- to assist in reviews of the Act
- to advise about matters relevant to the operation of the Act.

In order to carry out these functions, the commissioner will have the power to, "do all things necessary or convenient".[43] Lawyers will be able to appear for persons making a complaint and/or participating in a conciliation conference. There is a noticeable absence in the Bill of an independent cause of action and remedies for breaches of human rights.

Other provisions

The Act will amend both the *Youth Justice Act 1992* (Qld)[44] and the *Corrective Services Act 2006* (Qld) in order to limit its applicability to certain decision-making within adult and juvenile detention centres.[45] Many argue that these 'carve out' provisions are unnecessary, given that the Bill already recognises that human rights may be subject to reasonable limits that can be demonstrably justified.[46] The Bill also says that nothing about how and when the Act should affect any law applicable to abortion or child destruction.[47]

It is understood that the obligations imposed by the Bill will commence 12 months after the commencement of the Act. This is designed to allow sufficient time for public authorities to review and amend policies and practices in order to comply with the Act. The Act will be reviewed after about four and eight years of operation, with a recommendation within the eight-year review about whether a further review is required.[48]

Conclusion

A *Human Rights Act* is a great opportunity to create a more respectful relationship between our Government and the community.

A principal object of legislative protection of human rights is to encourage delivery of better laws and services. Clearly articulating and enshrining core human rights in an Act will assist lawyers to advocate for their client's rights, both in dealings with government and in litigation. Notably, a *Human Rights Act* will likely be of most benefit to vulnerable members of society; it will provide them with a remedy when treated unfairly.

However, the inception of a *Human Rights Act* also raises challenges for legal practitioners in Queensland. Lawyers across all fields will need to adapt to this important change in the state's legislative landscape. In particular, in safeguarding our client's rights, the presence of a *Human Rights Act* will require us to more actively engage with and make submissions about international human rights jurisprudence.

Dan Rogers is Principal of Robertson O'Gorman Solicitors and Chair of the QLS Human Rights Working Group.

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Your library – a history

with Supreme Court Librarian David Bratchford

"The Library shall be open for the use of the Members of the Legal Profession…"
– *Supreme Court Library Rules,* December 1862

The Supreme Court Library Queensland (SCLQ) has a long history of serving the legal community across the state.

This history is intertwined with the evolution of the legal culture of Queensland, including our close association with the Queensland Law Society (QLS).

Small beginnings

Our story began in 1862, shortly after Queensland achieved its own representative government. In that year the library began with a mere 61 volumes at our home in the old Convict Barracks on Queen Street, Brisbane.

There, the fledgling collection was housed in the courtrooms to allow easy access by judges and solicitors. One of these original items – a 1641 edition of Sir Francis Bacon's *Cases of Treason* – is still part of our rare books collection today.

The old Convict Barracks wasn't the ideal location for the Supreme Court, and the library's collection was frequently shuffled around the building when space became tight. In 1879 the collection was moved into new premises, a classical Italianate building overlooking the Brisbane River at North Quay.

The library's move stimulated further expansion of the collection, and two years later we published the first catalogue, which listed more than 500 volumes. During the 1880s, the histories of SCLQ and QLS overlapped, when the Society and the library started working together to publish law reports.

Fire and a new home

Over the next 90 years the library continued to grow in size and scope. But in 1968 disaster struck when the Supreme Court building was irreparably damaged by arson (see *Proctor*, October 2018).

Many of the books in the library's collection were destroyed, and the building was no longer safe enough to be used. Those books that could be salvaged were housed in the District Court building until 1981, when they were moved into a new permanent library in the purpose-built Law Courts complex on the corner of George and Adelaide Streets.

Our current location, on level 12 of the Queen Elizabeth II (QEII) Courts of Law.

Home of the library from 1879 to 1968.

A 1641 edition of Sir Francis Bacon's *Cases of Treason* was among the library's first 61 volumes.

In January 2008, the QLS law library amalgamated with SCLQ, which represented a significant step towards fulfilling the library's core purpose of providing services to the *whole* of the legal profession in Queensland – solicitors, barristers and the judiciary.

Finally, in 2012, we moved into our beautiful and comfortable current home on the 12th floor of the Queen Elizabeth II (QEII) Courts of Law, where we are ready to assist with all your legal research needs.

Today the library has a dual role, providing both a repository for the preservation of Queensland's legal heritage and a modern gateway to current legal information for Queenslanders.

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Playing with fire

Multiple client representation

Let us assume you have been approached by a warehouse owner to review and, if necessary, redraft the owner's contract of consignment.

A fire occurs at the warehouse, destroying the property of a third party. The third party commences proceedings against the warehouse owner to recover damages for breach of contract, bailment and negligence.

Your firm acts for the third party in the civil proceedings. The warehouse owner is represented by the insurer's solicitor.

The warehouse owner applies to the court to restrain you from continuing to represent the third party. The warehouse owner is a current client, not a former client. The retainer you have with the warehouse owner is specific rather than general.

Prior to accepting the instructions from the consignee, you have been told by the warehouse owner that it has no objection to you acting for the third party, as solicitors have been appointed by the insurer to act on their behalf. You are informed later that the insurer is miffed and would prefer that you did not act. The insurer of the warehouse owner has carriage of the defence. The insurers wish to see you prevented from acting for the consignee. At the same time the warehouse owner is happy for you to continue to provide legal services to it.

Three bases can be advanced to restrain you:

1. that to act for the consignee is inconsistent with the duty of loyalty owed by a solicitor to the client – the 'loyalty ground'
2. that you possess information to which an obligation of confidentiality in favour of the client attaches, which confidentiality will be actually or potentially compromised if you act for the consignee – the 'confidentiality ground'
3. that restraint is necessary for the protection of the integrity of the judicial process and the due administration of justice – the 'administration of justice ground'.

The 'loyalty ground'

The warehouse owner argues that your duty of loyalty, which you owe to them as a current client, means that you cannot act for the consignee. The warehouse owner relies on the following passage in the speech of Lord Millett in *Prince Jefri Bolkiah v KPMG*[1] at 234-5:

"[A] fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation."

This principle has been applied in later Australian cases in which the breach arose when the solicitor acted against a current client in the same or a related matter.[2]

In *UTi (Aust) Pty Ltd v The Partners of Piper Alderman*,[3] Barrett J said at paragraph [37]:

"The proposition that a lawyer is duty bound not to act against a current client 'in the same matter' or 'in the same or a related matter' may thus be seen to be a reflection of the duty to avoid conflicting duties or conflicting loyalties, with the 'same' or a 'related' matter as no more than a description of one particular context in which the conflict arises. It could arise in other ways as well – for example, where a lawyer acting for one client in a particular suit was called upon to attack the credit of another client who was a witness in that case."

The 'confidentiality ground'

Further, the warehouse owner submits that they have at equity to restrain you from acting for the consignee because not to do so would compromise confidentiality to their prejudice.

The duty of confidence has been stated by Lord Millet in *Prince Jefri Bolkiah* at 235-6 as follows:

"Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant."

His Lordship also referred to the evidential burden (at 237):

"Once the former client has established that the defendant firm is in possession of information which was imparted in confidence and that the firm is proposing to act for another party with an interest adverse to his in a matter to which the information is or may be relevant, the evidential burden shifts to the defendant firm to show that even so there is no risk that the information will come into the possession of those now acting for the other party."

As Barrett J notes in *UTi* at paragraph [45]:

"In essence it is for a client or former client seeking to enjoin a lawyer to show that the lawyer possesses confidential information, that the client or former client has not consented to the use or communication of the information and that there is a real and not fanciful or theoretical risk of disclosure."

The 'administration ground'

With respect to the 'administration of justice' ground, the jurisdiction of the court was described by Brereton J in *Kallinicos v Hunt*[4] as follows:

"[T]he court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice."[5]

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by Stafford Shepherd

His Honour later said:

"The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice."[6]

His Honour added that "[t]he jurisdiction is to be regarded as exceptional and is to be exercised with caution"[7]; and that "[d]ue weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause".[8]

Barrett J said in *UTi* at paragraph [53]:

"Informed consent of the client or former client will cause the client or former client to fail in any attempt to prevent the lawyer's acting where reliance is placed on the loyalty ground or the confidentiality ground. It is also likely to preclude resort to the administration of justice ground."

Informed consent can be express or implied.

The suggested fact scenario outlined above is based on the decision in *UTi.* Barrett J refused to restrain Piper Alderman. His Honour held:

1. that Piper Alderman by acting in the civil proceedings for the consignee was not acting against UTi in the same or related matter
2. that Piper Alderman by having done work for UTi in the past had gained some insight into the contract practices of UTi. This was, however, nothing more than general knowledge a solicitor could gain whilst practising in this area of law. Such generic information could not be seen as confidential.
3. the circumstances of the fire had not been discussed between Piper Alderman and UTi. UTi had not adduced any evidence as to the content of the information which it claimed was confidential. It needed to do this for the court to assess whether there was a real and sensible possibility of misuse of confidential information. Further it had been suggested that Piper Alderman understood UTi's attitudes and appetite for risk in contract negotiations, this being confidential information. This was rejected by Barrett J. His Honour thought the real issue was the attitude of the insurer to the question of settlement and not the attitude of UTi itself.
4. as a defendant in the civil claim UTi is actuated by its insurer
5. it was only at a late stage in the litigation that objection was taken to Piper Alderman acting for the consignee and the fact that UTi continued to instruct Piper Alderman and was satisfied with the legal services provided meant that a fair-minded reasonably informed member of the public could not be satisfied that the administration of justice should require Piper Alderman to be restrained. The jurisdiction should only be exercised in exceptional circumstances.
6. UTi was informed in advance that Piper Alderman intended to act for the consignee and did not express any objection or disquiet. The consent of UTi was clearly implied.

Stafford Shepherd is the Director of the Queensland Law Society Ethics and Practice Centre.

Notes

1 [1999] 2 AC 222 ('*Prince Jefri Bolkiah*').
2 *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324, [14]–[19].
3 [2008] NSWSC 219 (*UTi*).
4 (2005) 64 NSWLR 561.
5 Ibid 582 [76].
6 Ibid.
7 Ibid.
8 Ibid.

Preparing a trial bundle

A trial bundle is a compilation of copies of relevant documents in one or more folders (usually but not always ring binders) which are (ideally) tendered to become one exhibit by consent.

Having a compilation of relevant documents become one exhibit at trial, with a working copy for the trial judge, facilitates a quicker and more efficient trial because witnesses can be referred to particular documents in the one exhibit during their evidence, as can the trial judge during opening and closing submissions.

It is usual for pre-trial directions to include a direction about the preparation of a joint trial bundle but, even if no directions are made, the parties should consider whether having a trial bundle will assist the presentation of the case.

Agreeing on the index

As it is desirable for a trial bundle to be tendered by consent, parties should attempt to agree on the index of documents that will be in the trial bundle (including reaching agreement that those documents are admissible).

If parties cannot agree on the index to a trial bundle, a party may decide to prepare its own bundle. However, if each party decides to prepare its own bundle, this can lead to duplication of documents in the bundles – an undesirable choice for that reason.

The contents of the trial bundle will depend on a number of factors, such as:

a. the type of bundle, which depends on its purpose, such as whether it is a core bundle or intended as a complete compilation of all relevant documents in the case, or something else (discussed further below)
b. whether the entire bundle is to be admitted by consent or whether objections are taken, or likely to be taken, to the admissibility of any documents (discussed further below). If a serious objection is to be taken to a particular document by your client, then you should consider objecting to the document being included in the trial bundle at all because, once the document forms part of the bundle, it is difficult to ignore it or forget about it.
c. whether any documents are referred to in the pleadings. Usually, all documents referred to in the pleadings would be included in the trial bundle. However, the pleadings themselves should not be in the trial bundle. As to the latter, a better approach is to prepare a small folder containing a working copy of the current pleadings and particulars for the trial judge – separate to the trial bundle – and to provide that to the trial judge at the commencement of the trial.
d. the core documents in the case. The documents which are likely to be referred to numerous times during the trial should appear in a section at or near the start of the first volume. At least some of these documents will be referred to in the pleadings as well.
e. the common ground between the parties on the pleadings (such as that a contract was executed)
f. the facts in issue in the proceeding (which turns on the pleadings) and is relevant to those facts in issue. It is very important that you do not pad out the trial bundle with irrelevant documents. For example, correspondence between the solicitors is not usually relevant to the facts in issue
g. whether any documents have been briefed to any experts in the matter. While those documents should, as a general rule, be included in the trial bundle, the experts' reports should not be included in the trial bundle.

Taking into account these matters, the index should be drafted in a logical manner. For example, it may be appropriate for the documents to be listed chronologically in the index. Do not list them in reverse chronological order.

Another approach may be to divide the documents into different categories by reference to particular issues (but chronologically within those categories). For example, the index may contain these sections:

1. the parties (which contains Australian Securities and Investments Commission (ASIC) searches of the parties and any other documents relating to the parties themselves)
2. core documents (being those documents central to the dispute)
3. documents referred to in the pleadings (other than those in the core documents section)
4. documents relevant to damages
5. miscellaneous (which may contain, for example, a previous order of the court).

When seeking to reach agreement about the trial bundle, a party should not propose an index which contains the entire list of that party's disclosed documents. Such a proposal demonstrates that the party is making no real attempt to focus on the real issues likely to be ventilated at the trial. Further, the trial judge will not be impressed with a trial bundle which contains every document which has been disclosed by a party.

Physical preparation of the trial bundle

Usually, the preparation of the trial bundle falls to the plaintiff or applicant. This should be no hardship because, as the moving party, it is in that party's interests that the case is presented smoothly.

The trial bundle should be paginated, with an index identifying the content of the entire trial bundle by reference to those pages at the front of each folder.

Each folder of the trial bundle should be identified by a number visible on the spine and the front of the folder. The index should also make clear which documents are contained in each volume.

You should ensure that the ring binders used for the trial bundle do not contain too many pages because this will prevent the pages from being turned easily and may also lead to the clasps falling open.

You should also ensure that the photocopying of each page in the bundle is done carefully, so that the content of each page can be viewed or read, and nothing has been cut off.

Do not include copies of documents which have been highlighted or annotated unless that forms part of the document as it was in its original state or unless a better copy cannot be obtained.

You should include spreadsheets as one large spreadsheet which is in the bundle but is folded up, rather than having the spreadsheet divided and appearing on separate A4 pages. The content of any spreadsheet, including numbers, should be in a legible font of at least 9 point.

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Kylie Downes QC explores the different approaches that can be taken in preparing a hardcopy trial bundle for a civil trial.

The trial bundle needs to be prepared as soon as possible prior to the trial dates, and a copy provided to your counsel. This will enable counsel to prepare examination in chief, cross-examination and submissions by reference to the volume and page numbers of the trial bundle.

When getting the trial bundle copied, be aware that at least one copy will need to be provided to each other party, which may request and agree to pay for additional copies to be prepared and provided.

You should also scan the trial bundle onto a USB hard drive as searchable PDF documents, as some judges prefer to receive their working copy of the trial bundle in this format or in addition to the hardcopy trial bundle. You should provide a copy of the USB drive to counsel also, as this can assist counsel in having access to their copy of the trial bundle after hours or if their copy remains in the courtroom. If a copy of the USB drive is given to the judge, copies will also need to be provided to each other party.

Core bundle

A core trial bundle is a trial bundle consisting of core documents in the case. Usually, these will be the documents which are central to the dispute between the parties and will be those documents identified in the pleadings, plus a limited number of further documents to which the trial judge is likely to be taken by both parties during the trial.

A core trial bundle is useful when the parties are unable to agree on an index for an enlarged trial bundle or if there are disputes about the admissibility of numerous documents.

Trial bundle index with objections

As noted above, the trial bundle is a bundle which should be tendered by consent, which means that all documents in the bundle are admitted into evidence.

An alternative approach to the preparation of a trial bundle is to include all documents, including those to which a party takes objection, and to record the objection in a column in the index to the trial bundle. An example of an index to this type of trial bundle is available at **courts.qld.gov.au/court-users/practitioners/pre-trial-case-management-in-the-supreme-court**.

If this alternative approach is taken, attempts should be made to resolve objections to the admissibility of documents prior to trial. Most objections to documents fall away by the time the trial commences, either because the party seeking to include the document accepts the basis for the objection or the objection is withdrawn. When objections are resolved, documents should be removed from the trial bundle or the objection removed from the index.

Depending on the proximity of the trial dates, if an objection results in a document being removed by agreement, you do not need to redo the pagination of the bundle. Instead, amend the index to make it clear that there is no document in the bundle bearing the particular page numbers, for example:

168.	Letter sent by plaintiff to defendant dated 18 May 2018	Pages 93-94
169.	REMOVED	Pages 95-98
170.	Letter sent by defendant to plaintiff dated 6 June 2018	Page 99

Conclusion

Preparation of a trial bundle requires identification of the purpose of the trial bundle and, with that purpose in mind, identification of relevant documents which are assembled as early as possible and in a manner which facilitates an efficient trial.

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

Home is where the risk is

Moving forward on defect liability

In 1995, the High Court in *Bryan v Maloney*[1] *(Bryan)* held that a builder in Tasmania was liable in negligence to compensate a plaintiff for economic loss she had suffered in purchasing a house, which was discovered to have defective foundations.

The house had been built by the defendant for a third party unrelated to the plaintiff, some seven years earlier.

As the limitation period for negligence actions in these circumstances does not begin running until the defects become (or should have become) apparent,[2] the judgment arguably had the effect of imposing a time-unlimited, automatically transferrable warranty on residential builders to rectify 'latent defects' in dwelling house construction, regardless of who owned the house when the defects became apparent, and of when they occurred.[3]

In a very cost-competitive industry, *Bryan* has been much despised by builders. The High Court, with masterly understatement, observed that "…*Bryan v Maloney* has not escaped criticism".[4]

Nevertheless, since *Bryan*, two further negligence cases have been decided by the High Court, at roughly 10-year intervals – *Woolcock St Investments Pty Ltd v CDG Pty Ltd*[5] (*Woolcock St*) and *Brookfield Multiplex v Owner's Corporation Strata Plan No.61288*[6] (*Brookfield*).

The three cases were decided by (almost) entirely differently comprised benches,[7] yet neither of the later cases overturned *Bryan*. However, they did confine the authority of it, and the introduction of transferrable statutory warranties has reduced the need to rely on it.

While today's 'water-cooler' discussions often involve suggestions that *Bryan* is no longer of significance, *Brookfield* confirmed it is still authority which is relevant to (at least) latent foundation defects in dwelling houses,[8] and that a builder's liability in negligence to subsequent building owners for pure economic loss cannot be ignored as an issue, even for non-residential construction.

At the same time, the reasoning in these three cases, and particularly that in *Brookfield,* suggests provisions which could be considered for inclusion in construction contracts to limit builders' future liability to subsequent owners as far as possible. Some possible terms are outlined below. Terms such as these may more directly engage *Brookfield* and earlier reasoning than the equivalent terms appearing in a number of relevant standard construction contracts.

A caveat

This article discusses principles emerging from these cases that may assist builders. There are other important factors relevant to these types of actions which cannot be affected by proactive contractual provisions, and which are therefore not addressed. In particular, the 'vulnerability' of a subsequent owner (a measure of its ability to protect itself against the risk of pure economic loss due to latent defects, say by proper investigation/ inspection of the property, or by negotiating contractual protection),[9] while definitely still relevant to a builder's liability to subsequent owners, is not discussed in depth as it is a characteristic of unknown third parties and therefore beyond a builder's control.

Brookfield – a way forward?

In *Brookfield*, the court found that no duty of care to prevent pure economic loss was owed by a builder to an owners' corporation (a subsequent owner) in circumstances where both the building contract with the original owner (the developer, Chelsea) and the on-sale contract to individual owners (represented by the owners' corporation) clearly set out the rights of the owners to have defects repaired.

In what may be viewed as a landmark judgment for builders (the Joint Judgment), Crennan, Bell, and Keane JJ set out two important principles.

Firstly, they held that parties to a contract are free to negotiate the risks and warranties inherent in an arrangement without fear of those agreed positions being superseded or replaced by tortious duties. This confirmed the primacy of the law of contract over the law of tort:

"The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort…[10] In the present case, the liability of the appellant to the developer was the subject of detailed provisions relating to the risk of latent defects…They set out the extent of the appellant's obligations...To supplement them with an obligation to take reasonable care to avoid a reasonably foreseeable economic loss to the developer in having to make good the consequences of latent defects caused by the appellant's defective work would be to alter the allocation of risks effected by the parties' contract."[11]

Secondly, they held that the extent of the duty to the original owner places a limit on what duty can be owed to subsequent owners:

"To impose upon a defendant builder a greater liability to a disappointed purchaser than to the party for whom the building was made and by whom the defendant was paid for its work would reduce the common law to incoherence..."[12]

The other judges in *Brookfield* were either more equivocal about both these principles, or did not comment on them.

In relation to the first principle, French CJ, and in a joint judgment Hayne and Kiefel JJ, all specifically declined to make judgments on the proper provinces of the laws of contract and tort.[13] Gageler J did not comment on the point. Nevertheless, in *Bryan,* Brennan J (as he then was, in dissent) had supported this principle,[14] and the plurality in *Bryan* had accepted that the contract can affect the existence of a duty of care to the original owner,[15] and more specifically they accepted that contractual exclusions or limitations *will trump tortious liability*.[16] The joint judges in *Woolcock St* also accepted that contract can affect tortious liability, whilst not relying on any such effect for their decision.[17]

In relation to the second principle, while not going as far as the Joint Judgment, French CJ did accept the importance of the duty owed to the original owner in assessing whether a duty was owed to a subsequent purchaser.[18] Further, Hayne and Kiefel JJ

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Litigating over builder liability for defects uncovered by subsequent owners of a property remains an uncertain area. **Harry Knowlman** suggests that residential and commercial builders could consider contractual measures to help them resist potential negligence claims.

held (perhaps implicitly) that a disconformity in duty *could* deny the existence of a duty of care to subsequent owners.[19] Nevertheless, an equivalence between the two duties was accepted in both *Woolcock St* and *Brookfield* as having been an essential step in the reasoning of the majority in *Bryan*.[20] The Joint Judgment's incoherence argument was also perhaps presaged and supported by the reasoning of Brennan J in *Bryan* (although Brennan J proceeded from the viewpoint of the subsequent purchaser rather than the builder).[21]

The Joint Judgment therefore appears to reflect a growing judicial emphasis on the duty owed to the original purchaser, and so a very clear, negotiated contractual allocation of risk seems an extremely sensible measure for attempting to limit future liability. It *may*, depending on judicial development and specific facts, result in no duty of care being found to a subsequent owner – even if that subsequent owner is 'vulnerable'.

Suggested contract terms

To this end then, a "Contractual Allocation of Risk, and Limitation of Liability" heading could be considered, with a term limiting the builder's post-completion duty to rectifying defects within the warranty period, and excluding liability at any time for any other damages or losses including consequential losses, whether brought in contract, tort, or otherwise.

The term could make clear that the builder will have no liability to rectify or compensate for defects, whether patent or latent, beyond the warranty period (this will, in the case of a regulated domestic building contract in Queensland, have to be a minimum of six years (possibly plus six months) for structural defects, and one year for non-structural defects)[22].

It could further state that the post-completion warranty and exclusion of liability (and thus, logically, the duty owed to the original owner) have been discussed and negotiated, and that this negotiated contractual allocation of risk was an important factor in setting the contract price agreed by the parties.

To further emphasise the negotiated nature of these provisions, consideration could be given to offering, for a price, optional warranty extensions which would cover both patent and latent defects for a longer period, with the options chosen noted and separately initialled.

Such terms would appear to engage the main thrust of the Joint Judgment, but perhaps even more could be done, particularly for domestic builders. For example, given that the scale of residential projects does not typically support a full-time supervisor on site, the risk to a residential builder that a defect could be incorporated into the job whilst no supervisor is present is not insignificant. That risk could also be negotiated and contractually allocated, by offering, for a price, supervision 'upgrades', so that the client is made aware that this service costs money and that more money can be spent by them to lessen risk of defects. The same could be done for site investigation.

In addition to contractually allocating risks, the suggested provisions also arguably weigh against any notion of excessive assumption of responsibility by the builder, as discussed in *Woolcock St*,[23] and indeed in *Bryan* itself.[24] If clients choose to save money by limiting their warranty and/or selecting the lesser services, the assumption of responsibility by the builder, and the resulting standard of care to which it might be held, should arguably be lower than it might otherwise be.[25]

Conclusion

In an industry in which clients are content to commission minimal-cost construction of houses under a subcontract system which often involves limited on-site supervision and slim margins, the effective imposition of a time-unlimited warranty on builders appears unfairly onerous. While the Queensland Parliament has legislated a six-year structural warranty as an appropriate warranty period for domestic construction,[26] it unfortunately did not rule out actions in negligence beyond that time.[27]

Builders are entitled to minimise their exposure to long-term negligence claims, and some measures they can take which may assist have been discussed. However, these are measures that can only be taken at contract time. Once a building contract has been signed, no further opportunities along these lines are available.[28]

Although 'vulnerability' of subsequent owners is still uncontrolled and uncontrollable, Kirby J's observation from 2004 is relevant still today: "…the law on this subject remains in a state of active development".[29] There appears to be a noticeable trend of High Court jurisprudence towards the primacy of contractual risk allocation over rights in tort, and it may develop further – but as it can only be engaged up front, now is the time to act.

In a residential context, the options suggested could be positioned as an optional additional service, one not offered by competitors – a chance to upgrade quality (through increased supervision and more reliable foundations), and a chance to extend a warranty.

Commercial contracts, while probably safe from direct *Bryan* authority, will also more easily engage *Brookfield* and *Woolcock St* reasoning if similar terms are included. These two later 'pro-builder' cases will often be factually distinguishable, so it seems prudent to take all steps possible in all types of construction contracts, not just contracts for domestic dwellings.

Although contractual provisions cannot directly protect builders in Queensland against decisions to issue 'directions to rectify' by the Queensland Building and Construction Commission,[30] they could also be relevant to those decisions,[31] and to reviews of such decisions.[32]

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and Adam Moschella (AMoschella@PottsLawyers.com.au).

Harry Knowlman is a Brisbane barrister, a registered professional engineer Queensland (RPEQ), and holds an open builder's licence from the Queensland Building and Construction Commission. Inclusion of contractual terms along the lines suggested should not be viewed as guaranteeing immunity from a successful action, nor a definite increase in prospects of success.

Notes

[1] *Bryan v Maloney* (1995) 182 CLR 609.

[2] *See Hawkins v Clayton (1988) 164 CLR 539.*

[3] See arguments raised by PA Keane QC (as he then was) in *Woolcock St Investments Pty Ltd v CDG Pty Ltd* 216 CLR 515 at 521: "[T]he Court is here asked to create what is in effect a transmissible warranty of quality of indefinite duration in respect of commercial buildings" – which is exactly what the High Court imposed in respect of residential dwellings in *Bryan*. In fact Brennan J (as he then was) (in dissent) did raise this effectively indefinite warranty as a policy concern in *Bryan* itself (at 644), a concern accepted and shared by Callinan J in *Woolcock St* (at 587, [209]).

[4] *Woolcock St*, at 528 [16] (Gleeson CJ, Gummow, Hayne, Heydon JJ). In the same case Callinan J opined at [211] that "There is…reason to question the correctness of *Bryan v Maloney* itself".

[5] *Woolcock St Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515: By a margin of six to one, the High Court found that no duty of care to prevent economic loss was owed by engineers who had designed a commercial building, to a subsequent purchaser.

[6] *Brookfield Multiplex v Owner's Corporation Strata Plan No.61288* (2014) 254 CLR 185: Seven High Court judges unanimously found that no duty of care to prevent pure economic loss was owed by a builder to an owners' corporation (a subsequent owner).

[7] Hayne J sat in both *Woolcock St*, and *Brookfield Multiplex*.

[8] See, for example, *Tracey and Anor v Olindaridge Pty Ltd and ors* [2014] QCAT 617, involving a first (not subsequent) owner, in which breach of contract and statutory warranty claims were time-barred, but, citing *Bryan v Maloney*, a duty of care nevertheless founded a claim in negligence.

[9] Typically, purchasers of domestic dwellings have been viewed by the courts as 'vulnerable', and of commercial properties, as 'not vulnerable'. However, that distinction is not a 'bright line'.

[10] *Brookfield* at [132], citing, inter alia, *Hill v Van Erp* (1997) 188 CLR 159 at 179, 223, 231-234.

[11] *Brookfield* at [144].

[12] *Brookfield* at [69] (Crennan, Bell, and Keane JJ, citing *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 532 [28], also citing *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101 at 120).

[13] Brookfield, at [36] and [59] respectively.

[14] *Bryan*, Brennan J, at 643: "The doing of work for reward is a matter governed by the agreement between the party doing the work and the party requesting that the work be done. They fix their own rights and liabilities on issues of purely economic significance. The work to be performed, the quality and value of that work and the cost of repairing defects in work ill-done are thus properly the concerns of the law of contract."

[15] *Bryan*, Mason CJ, Deane and Gaudron JJ at 621: "In other circumstances, the contents of a contract may…even exclude the existence of, a relevant duty of care." See also Toohey J at 665.

[16] *Bryan*, Mason CJ, Deane and Gaudron JJ at 62, citing with approval *Central Trust Co. v Rafuse* (1986) 2 SCR, at 204-205: "A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort."

[17] *Woolcock St* at [28]: "There would be evident difficulty in holding that the respondents owed the appellant a duty of care to avoid economic loss to a subsequent owner if performance of that duty would have required the respondents to do more or different work than the contract with the original owner required or permitted."

[18] *Brookfield*, at [28] (French CJ): "There is no reason to regard the existence, or non-existence, of an anterior duty of care to a prior owner as more than an important factor relevant to the existence of a duty of care in respect of pure economic loss to a subsequent purchaser."

[19] *Brookfield*, at [60] (Hayne & Kiefel JJ): "As in *Woolcock Street*, it is not necessary to decide in this case whether disconformity between the obligations owed to the original owner under the contract and the duty of care allegedly owed to the subsequent owner would *necessarily* deny the existence of that duty." (*emphasis added*, footnotes omitted).

[20] *Woolcock St* at 527, [14] – [15] (Gleeson CJ, Gummow, Hayne and Heydon JJ), referring to *Bryan*: "…the decision in the case depended upon the anterior step of concluding that the builder owed the first owner a duty of care to avoid economic loss of that kind… Most importantly, they depended upon equating the responsibilities which the builder owed to the first owner with those owed to a subsequent owner." See also *Brookfield* at [28] (French CJ, different wording) and at [60] (Hayne & Kiefel JJ): "The absence of disconformity was an essential step in the reasoning in *Bryan v Maloney*."

[21] *Bryan*, at 641 (Brennan J): "If the financial interests of the remote purchaser were to be protected by the law of negligence rather than by the law of contract, those interests could be affected by the scope of the building contract to which the purchaser was not a party. In the present case, e.g., it would have been critical to determine whether Mrs. Manion [*the original client, for whom the house was built*] gave Mr. Bryan authority to commission – and was willing to pay for – the soils investigation that would have revealed the presence of reactive clays." (square brackets added).

[22] See *Queensland Building and Construction Commission Act 1991* (Qld), schedule 1B, part 3, section 29 – statutory warranty period for structural defects is six years, or six years and six months for defects becoming apparent in the final six months of the six-year period.

[23] *Woolcock St,* at 532 [26] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[24] *Bryan*, at 627 (Mason CJ, Deane & Gaudron JJ)

[25] *Woolcock St* at 531-2, [25]-[26]: Gleeson CJ, Gummow, Hayne, and Heydon JJ held that, since the first owner in *Woolcock St* had, on the basis of economic considerations, issued directions to the engineer not to conduct a site investigation, no assumption of responsibility by the engineers existed, and thus the existence of a duty of care to a subsequent owner was not supported by the reasoning in *Bryan*. However, ultimately the reason no duty was found by the joint judges was that the plaintiff was not relevantly 'vulnerable'.

[26] See *Queensland Building and Construction Commission Act 1991* (Qld) (QBCCA), schedule 1B, section 29.

[27] See *Tracey and Anor v Olindaridge Pty Ltd and ors* [2014] QCAT 617.

[28] The contract could of course be varied by agreement after signing.

[29] *Woolcock St* at 582, [190].

[30] Under s72 QBCCA.

[31] S72(3) QBCCA.

[32] Internal and external reviews are available under Part 7, Division 3 QBCCA.

FCC must follow FCA decisions unless plainly wrong

with Robert Glade-Wright

Child support – application for maintenance of stepchild must also seek child maintenance – FCC must follow FCA decisions unless plainly wrong

In *Eames* [2018] FamCAFC 204 (1 November 2018) the Full Court (Alstergren DCJ, Aldridge & Austin JJ) dismissed with costs the father's appeal from Judge Bender's summary dismissal of his application for credit of child support payments he made to third parties in respect of the parties' children and a declaration that he was lawfully obliged to maintain his new partner's stepchildren.

Judge Bender followed decisions of the Family Court of Australia to the effect that an application for maintenance of stepchildren under s66M *Family Law Act* must be coupled with an application for child maintenance under s66F. The father appealed on the ground that there was Federal Circuit Court of Australia (FCC) authority that contradicted that authority.

The Full Court said (from [24]):

"…[W]e do not agree that there are competing authorities on the point. The position has been settled by a number of first instance decisions of the Family Court of Australia. There are two decisions of judges of the then Federal Magistrates Court of Australia to the contrary. (…)

[26] It is clear that a court…is obliged to follow decisions of a court to which an appeal lies (*Viro v The Queen* [1978] HCA 9…)

[27] However, no appeal lay from a decision of a judge of the [FMC] or lies from a judge of the [FCC] to a single judge of the Family Court of Australia sitting at first instance. [FCC] judges are therefore not bound to follow first instance Family Court decisions. (…)

[28] This does not mean that the decisions of the Family Court should not have been followed. Judicial comity required that those decisions be followed unless a judge was convinced that they were 'plainly wrong'. (…)

[29] A similar principle applies between judges of first instance (…)

[30] The course taken by the primary judge entirely accorded with these principles. …"

Property – mother of post-divorce children fathered by former husband denied leave to apply for property order 30 years out of time

In *Emerald* [2018] FamCAFC 217 (13 November 2018) the parties married in 1977 and divorced in 1984. Post-divorce three of their five children were born, they bought two properties together and the wife lived with the husband and his new wife for nine years. They separated in 2004. The husband applied to the Victorian Civil and Administrative Tribunal (VCAT) for a declaration that he was the sole owner of a joint property, whereupon the wife, after seeking legal advice, applied to the Family Court of Australia for leave to seek property and maintenance orders. Cronin J relied on s44(4)(b) and the wife's Centrelink pension in granting leave for a maintenance application, but (at [66]) found that as the wife had not particularised her claim, a finding of hardship if leave for a property case was refused was "difficult if not impossible".

In allowing the husband's cross-appeal against leave for a maintenance case, the Full Court (Alstergren DCJ, Strickland J and Murphy JJ) held (at [32]-[35]) that Cronin J erred by applying s44(4)(b), which did not come into operation until after the wife's time limit had expired and (at [94]-[97]) that VCAT lacked jurisdiction to hear the husband's claim, the wife's proceedings being "a matrimonial cause…within the exclusive purview of courts exercising jurisdiction under the Act [which] plainly…does not include VCAT". The Full Court also agreed (at [38]-[39]) that the criteria for hardship for maintenance were different to those for a property order.

Alstergren DCJ and Strickland J said (at [49]-[66]) that in the absence of particularisation of her property case, the wife had failed to satisfy the test referred to in *Sharp* [2011] FamCAFC 150 that she had a prima facie claim worth pursuing. Murphy J disagreed, saying (at [119]) that "it was not reasonably open for his Honour to conclude that the absence of particularity in the wife's claim for s79 relief should lead to the conclusion that the wife would not suffer hardship if leave was refused".

The wife's application for leave to proceed for maintenance was remitted for re-hearing.

Children – mother wins appeal against order that children live with father if she relocated to the United States

In *Kerson & Blake* [2018] FamCAFC 215 (12 November 2018) the parents and two children were US citizens who moved to Canberra in 2012. Upon separating in 2015, the parties shared the children's care for two years until the mother filed a relocation application to return with the children to the US.

Gill J found it a "finely balanced case" and a "choice between good parents" ([21]) but that the father would be more likely to facilitate the children's relationship with the mother. An order was made for equal shared parental responsibility and that if the mother relocated the children live with the father. The mother appealed, contending that that finding was not open on the evidence.

The Full Court (Alstergren DCJ, Ainslie-Wallace & Austin JJ) said (from [10]):

"…[H]is Honour found that up to the time of the trial the parties had co-operated in an equal shared care arrangement… [and] concluded that the parents each had been 'generally supportive of each other's relationship with the children although this ha[d] taken place in the context of severe conflict between them'. (…)

[32]…[C]ounsel for the mother argued that his Honour's…conclusion that the father was likely to better support the children's relationship with the mother was based solely on what occurred in the July/August 2017 trip to the USA. (…)

[40]…[W]e accept that his Honour placed determinative weight on th[at] one occasion… to support the finding that the mother was hostile to that communication and then, relying on this finding,…found…that the mother's commitment to fostering the relationship was called 'into question' based, it seems, not on the whole of the mother's evidence which his Honour clearly accepted…"

The appeal was allowed and the case remitted for re-hearing.

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

The rise of the DAO

Disrupting 400 years of corporate structure

There is a revolutionary movement of computer scientists, hackers and libertarians who are trying to create a new and more efficient way of conducting enterprise.

The new 'entity' (for want of a better word) is known as the decentralised autonomous organisation (DAO). The proponents of DAOs promise an organisation:

- in which the constitution (or shareholders agreement) is replaced with code
- which removes human processing that does not add value
- that can make international transactions autonomously and almost instantly
- that operates in a global jurisdiction
- that is completely transparent
- that is controlled fully by shareholders
- that is not subject governments or regulations.

Whether you consider this to be lunacy or the dawning of bright new libertarian age, it raises several questions. Do we need a new form of organisation? Who would use it and for what purpose? How will our jurisdictionally focused legal systems react? And are we just adding more complicated technology in an attempt to fix human-centric problems?

The modern corporation

While company organisation and regulation has developed since the first government-sponsored monopoly corporations such as the Dutch East India Company, Hudson Bay Trading Company and The South Seas Company,[1] 400 years later corporations still operate under that same fundamental model.

Despite the odd financial crisis, bubble, fraud and default, it is a model that has created immense wealth, diversified enterprise risk and become an essential part of the machinery in the global economy. Are DAOs actually going to solve a problem? Or are they a solution in search of a problem?

Rise of the DAOs

One of the technologies that enable DAOs are 'smart contracts', which are neither smart nor contracts; rather, they are code stored on a distributed ledger (the most well-known being blockchain).[2] As DAOs run on public, distributed ledgers, the code is completely transparent and auditable.

A distributed ledger, is essentially just a ledger. The utility of distributed ledgers lies in their decentralisation and immutability. These two concepts require some explanation:

'decentralisation' – The ledger exists in no single place; there is no central point of failure and no central authority. This is achieved by it having a strict set of rules (known as a protocol) and running on a network of computers agreeing on what has and has not been added to the ledger.

'immutability' – Unlike a normal ledger which you can edit, backdate, delete or vary, you can only add information to a distributed ledger.

A country could shut down a group of these computers running such a network, but the rest of the network could take up the slack (and would be happy to, as there is a reward for running the network).[3] Trying to shut it down then becomes an endless game of global governmental regulatory whack-a-mole.

Like attempts to eradicate tax evasion through transfer-pricing, there will always be a jurisdiction willing to capitalise on the opportunity to be a tax-haven for the wealthy. For example, the North Korean Government is rumoured to have sophisticated cryptocurrency mining operations.[4]

At first glance, DAOs may seem like a redundant complication of our current processes, throwing more technology at issues which are inherently human problems. This view is a little shortsighted, as the technological backend of DAOs creates a 'trustless' environment, which removes the human element.

The simplest smart contracts allow the transfer of cryptocurrency from one person to another. The DAO takes these smart contracts a few steps further and translates the clauses usually found in constitutions and shareholder agreements into code. However, only those clauses that are mechanical in nature can be translated into code; code and subjectivity do not mix well.

This removes the mechanical elements carried on your behalf by humans in the administration of the company. Just like most corporations, token-holders (shareholders) may vote on resolutions to determine how the company is run, to elect a board or change the rules (constitution) upon which it operates.

Taking a step back from DAOs, consider the costs of creating and administering a unit (or fixed) trust over 30 years with the accompanying costs of lawyers, accountants, audits, bank transfers, and trustees to undertake what is essentially a mechanical process with logical certainty. All of this could be replicated in code, placed on a distributed ledger, the money would come in and be automatically distributed. There would be no difference practically, except that you have reduced costs significantly and removed the human element, particularly the opportunity for fraud or error.

This is just one application – consider security interest registers, land titles registries, conveyancing, stock exchanges, escrow and even banks.

Where does a DAO fit into our legal framework?

DAO advocates will tell you that, because of the decentralised model and there being no centralised point of failure, they operate in new global and untouchable jurisdiction.[5] However, two concepts spring to mind, partnerships and unincorporated associations – if you do not give an organisation a legal structure, the courts may impose one on you.

The major flaw with both these structures, and why lawyers will tell you to avoid them at all costs, is unlimited liability.[6]

There is yet to be a case in a common law jurisdiction to prove this common hunch. However, from a regulatory perspective, we can look to Zachary Coburn, the creator of EtherDelta, the first decentralised cryptocurrency exchange. EtherDelta is essentially the ASX, with no gatekeeper, entirely automated, no human intervention, but with ERC-20 tokens (tokens on the Ethereum network) instead of stocks.[7]

While Zachary Coburn had no control over EtherDelta, the United States Security and Exchange Commission had no trouble in charging him for operating an unregistered securities exchange (he eventually settled the claim for $400,000).[8]

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by Iain McGregor-Lowndes,
The Legal Forecast

Where next for DAOs

How have the DAOs fared so far in their short history? One of the first large DAOs (confusingly named 'The DAO') raised $150 million in crowdfunded cryptocurrency when launched. Around three weeks after its launch 'The DAO' was drained of $50 million worth Ether (a cryptocurrency) when a bug in its code was exploited.[9]

However, to disregard DAOs after some false starts and legal issues would be folly. The South Seas Company bubble resulted in the *Bubble Act 1720*,[10] which forbade the creation of joint-stock companies without royal charter. This was short-lived and only delayed the eventual and inevitable modern corporate form.

A project named 'Aragorn'[11] is the front-runner in the field at the moment. Aragorn provides the infrastructure for creating a DAO but it is still very much in its infancy. With lessons from previous failures in hand many in the community think this project may take hold.

While the DAOs are yet to prove themselves useful to mainstream society, less revolutionary and less complex implementations of smart contracts and distributed ledgers are being taken up across the world. For example, title registries are being turned into code on distributed ledgers globally. Many jurisdictions already run on this technology, including, Sweden, Ukraine, Estonia and parts of the United States. The New South Wales Titles Registry announced the trial of a proof of concept in October.[12] The ASX plans to go live with a new backend driven by smart-contracts in 2020.[13]

Whether our mostly slow-moving and jurisdictionally focused legal systems can keep up with DAOs or hinder them to the point of no utility remains unanswered. If they can be fine-tuned and find a place in legal systems, they may just be the shakeup a 400-year old model needs.

Iain McGregor-Lowndes is a Queensland Executive Member 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

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Informal video will declared valid

with Christine Smyth

As we make our way through the new year, we tend to reflect on old conversations and experiences with a mind to see how they might shape our approach to the year ahead.

The decision of *Radford v White* [2018] QSC 306, handed down late last year, had me reflecting in a similar manner.

Many years ago my children had a great music teacher, who also had a recording studio. In 2006 Queensland introduced amendments to the *Succession Act 1981*, implementing the informal will provision through s18.

About that time, I got a call from him. He had been approached with a proposal for a possible new venture. The idea was that people could hire his recording studio to make videos about what their wills meant. I didn't say much, other than, to query if he was keen to be a witness in a will dispute? Of course, I went on to explain the impact of s18. Since then there have been numerous s18 applications seeking the court's imprimatur to all manner of documents that constitute informal wills, with some unusual documents being deemed to be a final valid will.[1]

Sadly, for Katrina Radford, she had a moment of looking to the future that saw her dealing with the death of her partner and a complex application to the court for a determination as to whether a video he had made satisfied the elements of s18 of the *Succession Act 1981* sufficient for it to constitute his final will.

On 21 November, 2016 Ms Radford's partner, Mr Schwer, bought and then rode, for the first time, his new motorcycle. Before going for that ride, Ms Radford urged him to make a will. Heeding her concern, but in his own words being "too lazy"[2] to make a formal will, he instead made a video recording on his computer. He then rode the bike, had an accident and suffered serious head injuries.[3]

Just over a year later, on 24 January 2018, he died[4], never having formalised his testamentary intentions beyond the video recording. Having suffered the loss of her partner and father of her child (born after the accident), Ms Radford found herself in the Supreme Court seeking a determination as to the validity of the video recording as his last will. A transcript extract of the video appears at paragraph 5 of the judgment. It reveals complex family relationships and property arrangements.

> "A good solution applied with vigor now is better than a perfect solution applied ten minutes later."
>
> – General George Patton

Mr Schwer was still married to his former wife, Ms White, both at the time of making the video and at the time of his death. They also had a child together, Aleena. The video recording went into elaborate detail as to conditions attaching to gifts to his daughter Aleena, as well as intricate details associated with her care and contact with her mother. It also dealt with his three superannuation policies. He was also quite emphatic that his "soon to be ex-wife",[5] Ms White, was to receive nothing from his estate. (On 15 April, 2015 (prior to the accident) Ms White and Mr Schwer had entered into consent orders in Family Court of Australia by way of final property orders.)[6]

S18 is proscriptive in its elements. In short, the court must be satisfied:

1. There is a document not executed in accordance with the formal requirements.
2. It contains testamentary intentions.
3. It is intended to operate as a final will without anything more.

Here the court was readily satisfied that the video recording fitted the definition of document and that it clearly contained his testamentary intentions. The focus was on the question of whether it was intended to operate as a will without anything more. Central to that question was a statement by the deceased, that he would "fill out the damn forms later", but continued with the words "but as sound mind and body".[7]

The question being whether the reference to completing forms at a later date meant that he intended to do something more to formalise his testamentary intentions. The court found that the phrase "sound mind and body" denoted formality of language that was "intended to convey that this was his testamentary instrument",[8] noting that "[t]he starting point is that a will made under Part 2 of the Act is not made so as to operate from some future nominated date or some future nominated event other than death. It is an instrument that disposes of property, in the event of death, that operates upon death unless revoked sooner."[9] The court found that the deceased not completing forms at a later date was explained by reference to the head injury he suffered in the accident.[10] As such, the court declared the video recording in the terms of the transcript at paragraph five of the judgment to be the deceased's will.

Ms Radford's foresight, combined with s18, ensured Mr Schwer died with a will. Unfortunately, a close read of the judgment manifests a number of associated issues indicating this application was simply the start for Ms Radford's long and distressing journey.

The document did not appoint an executor, with the court commenting the application for orders might have been better made as an application which included the appointment of an administrator.[11] The gifts to his daughter Aleena were subject to various conditions raising issues of construction; the will did not and could not have contemplated the birth of his child with Ms Radford, raising prospects of an FPA, and then there was the question of whether the superannuation funds fell into the estate to be dealt with in the estate and the attendant issues of raising a claim upon those funds.

While s18 provides relief for informal wills, it cannot be, and is not, a substitute for fulsome estate planning advice that covers the issues s18 simply cannot address.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, and Consultant at Robbins Watson Solicitors. She is an Executive Committee member of the Law Council Australia – Legal Practice Section, member of the QLS Specialist Accreditation Board, Proctor Editorial Committee and STEP and an Associate Member of the Tax Institute.

Notes

1 @[13] digital video disc – *Mellino v Wnuk* I [2013] QSC 336; audio recordings – *Re Estate of Carrigan* (deceased) [2018] QSC 206; see also unsent text message – *Re Nichol; Nichol v Nichol* [2017] QSC 220.
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3 @[6].
4 @[2].
5 @[5].
6 @[10].
7 @[16].
8 @[16].
9 @[17].
10 @[19].
11 @[25].

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High Court casenotes

with Andrew Yuile

High Court

Abuse of process – practice and procedure – permanent stay – abuse of process

In *UBS AG v Scott Francis Tyne as Trustee of the Argot Trust* [2018] HCA 45 (17 October 2018) the High Court considered the power of courts to permanently stay proceedings as an abuse of process, where related proceedings were brought in another jurisdiction. The respondent, Mr Tyne, started proceedings in the Federal Court in his capacity as trustee of the Argot Trust. The proceedings concerned representations made by UBS to Mr Tyne and, through him, related entities, including the former trustee (ACN 074) and an investment company (Telesto Investments Limited). At all times, Mr Tyne was the controlling mind of these entities. ACN 074, Telesto and Mr Tyne (in his personal capacity) had previously brought proceedings in the NSW Supreme Court arising out of the same facts and making essentially the same claims. In addition, UBS had earlier brought proceedings in Singapore against Telesto and Mr Tyne for default on credit facilities. Mr Tyne and the Trust ultimately discontinued their claims in the NSW proceedings. The NSW proceedings were then permanently stayed on the basis that Telesto was trying to re-litigate causes of action that had been determined in the Singapore proceedings. UBS applied to have the Federal Court proceedings stayed as an abuse of process. The claims in the Federal Court arose out of the same facts, and were essentially the same claims, as those in the NSW proceedings. The primary judge made the stay, because the trust could and should have brought its clams in the NSW proceeding. A majority of the Full Federal Court allowed an appeal, in part because the trust's claims had not been decided on the merits. A majority of the High Court allowed the appeal, reinstating the stay. The majority held that "timely, cost effective and efficient conduct of modern civil litigation takes into account wider public interests than those of the parties to the dispute". In this case, the time to agitate the factual issues underlying the trust's claim were the NSW proceedings. After the final determination of those proceedings, UBS was entitled to think the dispute was at an end. It was an abuse of process for the Federal Court to allow for staged conduct of what is factually one dispute prosecuted by related parties under common control, with all the duplication, vexation and waste of resources that followed. Kiefel CJ, Bell and Keane JJ jointly; Gageler J separately concurring; Nettle and Edelman JJ jointly dissenting; Gordon J separately dissenting. Appeal from the Full Federal Court allowed.

Criminal law – evidence – context evidence – propensity evidence – uses of evidence

Johnson v The Queen [2018] HCA 48 (17 October 2018) concerned the admission of historical evidence of sexual misconduct other than the conduct charged for purposes of "context". The appellant was tried and convicted of five counts of historical sexual offences against his sister. Count 1 concerned an indecent assault when the appellant was 11 or 12, and he was presumed *doli incapax*. At trial, to rebut the *doli incapax* presumption and to provide context of the relationship between the appellant and his sister, the Crown relied on evidence from the complainant about the appellant's other sexual misconduct against her, including one that occurred in a bath. The Court of Criminal Appeal quashed the verdicts on charges 1 and 3, but rejected a contention that joinder of those counts with the others had occasioned a miscarriage of justice. The High Court unanimously held that the whole of the evidence except for the evidence about the bath incident was admissible in respect of the remaining counts. The evidence was relevant context of the appellant's highly dysfunctional family background. Its probative value outweighed its prejudicial effect. Although evidence of the bath incident should not have been adduced, its wrongful admission did not lead to a miscarriage of justice in light of jury directions and other relevant evidence. Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from the Supreme Court of South Australia dismissed.

Criminal law – evidence – tendency evidence – significant probative value

McPhillamy v The Queen [2018] HCA 52 (orders 9 August 2018, reasons 8 November 2018) concerned the admission of evidence of previous acts of sexual misconduct as tendency evidence. The appellant was charged and convicted of six sexual offences against 'A' said to have taken place in 1995 and 1996. At the time of the alleged offending, A was an 11-year-old altar boy under the supervision of the appellant, an acolyte. The appellant's case was that A had made up the allegations to get compensation from the Catholic Church. A had previously admitted to making false statements about part of the alleged offending in his compensation application. At trial, the Crown led evidence (over objection) from two men who alleged to have been the victims of sexual misconduct of the appellant in 1985. The evidence was led to show that the appellant had a sexual interest in male children in their early teenage years under his supervision. The evidence of the two men was not challenged at trial. The issue on appeal was whether the evidence had "significant probative value". A majority of the Court of Criminal Appeal held that the evidence strongly supported the Crown case and was rightly admitted. The High Court held that the evidence was capable of showing that the appellant had a sexual interest in young teenage boys (the first step of assessing the probative value of tendency evidence). However, there was no evidence to show that the tendency had manifested in the 10 years prior to the present charges (that is, that the appellant had acted on the sexual interest) and the previous conduct occurred in different circumstances. The evidence was not capable of significantly affecting the assessment of the likelihood of the appellant committing the offences alleged by A (the second step in assessing probative value). Kiefel CJ, Bell, Keane and Nettle JJ jointly; Edelman J separately concurring. Appeal from the Court of Criminal Appeal (NSW) allowed.

Andrew Yuile is a Victorian barrister, phone 03 9225 7222, email ayuile@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au.

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Court of Appeal judgments

1-30 November 2018

with Bruce Godfrey

Civil appeals

Nine Network Australia Pty Ltd & Ors v Sheppard [2018] QCA 301, 2 November 2018

Application for Leave s118 *District Court of Queensland Act 1967* (Qld) (Civil) – where the respondent is the plaintiff in defamation proceedings – where the applicants produced and broadcast, by television telecast and through the internet, an episode of the program which concerned the respondent, who is the plaintiff in the proceedings, and his now deceased father – where in his amended statement of claim, the respondent pleads various statements made about him in the episode of the program and pleads that the statements give rise to two imputations, namely: (i) "whilst his father was alive, the plaintiff had dishonestly caused monies belonging to his father to be withdrawn from his father's bank account for the benefit of the plaintiff" (the first imputation); and (ii) "the plaintiff was an untrustworthy person" (the second imputation) – where the primary judge struck out particulars of a paragraph in the defence to the defamation action – where the struck-out paragraphs went to the financial circumstances of the respondent – where the applicants submit that the striking out narrows the material facts that can prove the allegations in remaining paragraphs of the defence – whether the matters struck out were capable of being probative to the allegations in the pleading – where the applicants' submission that the allegations concerning the bankruptcy of the respondent and the statements made in the statement of affairs should remain in the pleading in support of some general allegation of "untrustworthiness" should be rejected – where the only fact pleaded to support the truth of the second imputation namely, that the respondent is untrustworthy, is the allegedly dishonest depositing of the funds by the respondent into his bank account – where in the applicants' written argument and in the course of argument on the appeal, the applicants' true case emerged – where the applicants' case is that the respondent "was in a poor financial position" and that motivated him to misappropriate the money – where that motivation is clearly an allegation as to the respondent's state of mind which must be pleaded – where it has not been pleaded and, without such a plea, the entirety of paragraph 20(v), including the subparagraphs which have been struck out, are irrelevant to the plea in paragraph 20(g) – where paragraph 20(g) alleges that the depositing of the money by the respondent was dishonest – where even if the allegations made in subparagraphs 20(g)(v)(B) and (C) were relevant to the allegation that the respondent "was in a poor financial position", that allegation is not then relevant to the allegations of dishonesty in paragraph 20(g) – where the striking-out order did not cause an injustice to the applicants.

Application for leave to appeal refused. Costs.

Monto Coal 2 Pty Ltd & Ors v Sanrus Pty Ltd & Ors [2018] QCA 309, 9 November 2018

General Civil Appeal – where this proceeding was commenced in the Trial Division on 1 October 2007 – where it is listed for trial over 16 weeks in 2019 – where on 11 December 2007, a consent order was made, on the defendants' application, requiring the plaintiffs to provide security for the formers' costs of and incidental to the proceeding in the sum of $250,000, which was duly provided – where on 4 December 2017, the defendants exercised the liberty conferred by that order to apply for an increase in the security – where they did so by filing an application pursuant to r671(a) of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) for security for the defendants' costs up to and including the first day of trial in the sum of $4,000,000 – where relief by way of damages is sought by the plaintiffs against Macarthur Coal on the pleaded basis that it procured and/or induced Monto Coal 2 to breach its obligations as alleged – where the claim against Monto Coal is based on alleged breach of the Management Agreement in failing to use all reasonable efforts to obtain a grant of the mining lease for the Monto Coal deposit prior to 21 April 2005 – where the damages claimed by the plaintiffs for the losses alleged to have been incurred by them respectively as a result of the alleged breaches of contract exceed $1,190,000,000 – where, as the pleadings indicate, this proceeding is evidently a complex one – where the primary judge dismissed the application – where, under r671(a) of the UCPR, a pre-condition for an order of security for costs is that "there is reason to believe that the plaintiff will not be able to pay the defendant's costs if ordered to pay them" – where although the primary judge set out r671(a), he did not discuss the meaning of "reason to believe" – where the conclusion that the court was to reach, for the threshold question to be answered in the affirmative, was put in terms of it being satisfied that the plaintiff corporations will not be able to pay the defendants' costs if ordered to do so – where no mention was made of the court being satisfied that there was reason to believe that that will be so – where it is inferred that the test his Honour applied was one of whether he was satisfied that the plaintiff companies will not be able to pay the defendants' costs if ordered to do so – where it is a test that required his Honour to have been satisfied on the balance of probabilities that the plaintiff companies will not be able so to pay – where put at a level of satisfaction on the balance of probabilities and without regard for "reason to believe", the test applied by his Honour is more demanding than that prescribed by r671(a) – where the primary judge erred by applying an incorrect test for the first stage of the process under r671(a) and that Ground 1 has been made out – where it follows that the conclusion his Honour reached by applying an incorrect test must be set aside – where it is for this court to reach its own conclusion with respect to the threshold question to be answered in the first stage of the process – where in reaching a conclusion on the threshold question, it is relevant to bear in mind that it is the applicant for security who bears the persuasive onus of establishing that there is reason to believe that the other party to the litigation will be unable to pay the costs of the litigation if unsuccessful – where, on the evidence adduced, there is no reason for inferring that the realisation of the combined interest would take longer than the determination of the costs payable – where it is not satisfied that there is reason to believe that the plaintiff companies would not be able to pay the defendant companies' costs if ordered to do so – where the threshold question is answered in the negative – where it follows that the discretion to order security for costs under r671(a) is not enlivened, nor is it neither necessary nor appropriate to engage in the second stage of the process – where although the conclusion of the primary judge on the threshold question is set aside, upon a reconsideration of it, the same conclusion is reached as his Honour found.

Appeal dismissed. Costs.

Sentinel Robina Office Pty Ltd v Clarence Property Corporation Ltd [2018] QCA 314, 13 November 2018

General Civil Appeal – where the parties are in a commercial arrangement akin to a joint venture – where the appellant and respondent are joint owners of an office building at Robina on the Gold Coast – where they are also parties to a deed which regulates their respective rights and obligations in relation to their shared ownership of the building – where that deed requires the parties act in "utmost good faith" – where the appellant contends that the respondent recruiting a particular employee (Mr Kennedy) breached that requirement – where the primary judge found that the deed and the requirement of utmost good faith related to dealings between the parties and not other matters – where the duty of good faith is directed towards the bargain between the parties and their mutual contractual objectives – where the very subject matter of the protection afforded by the duty of good faith

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is the contract between the parties – where unless the impugned conduct is directed towards the bargain, or has an effect upon the bargain, or was intended to have an effect upon the bargain, it is contractually irrelevant – where the respondent's recruitment and employment of Mr Kennedy had nothing whatsoever to do with the relationship of the appellant and respondent under the deed – where he was not recruited because he was the manager of the joint venture business; he was recruited because the respondent judged him to be an able manager of commercial property – where nor did his departure from the appellant's group of companies have any effect upon the appellant *vis a vis* the venture business or, indeed, the appellant's own business – where that being so, the respondent's conduct did not relate to the parties' dealings in the course of their relationship under the deed – where the respondent's conduct did not bear any relationship to the contract or to the bargain between the parties or to the contractual objectives which each sought to achieve.

Appeal dismissed.

Criminal appeals

R v Kelly [2018] QCA 307, 9 November 2018

Sentence Application – where the applicant pleaded guilty to two counts of fraud and one count of receiving tainted property – where the applicant was sentenced to five years' imprisonment on each count, to be served concurrently with the others and suspended after 20 months, for an operational period of five years – where the respondent has, with commendable candour, drawn to the court's attention an erroneous footing on which the sentencing judge proceeded in sentencing the applicant – where the error is not referred to in the self-represented applicant's application for leave or his written submissions – where the sentencing judge was informed by the prosecutor that the maximum penalty for all counts was 14 years' imprisonment, when, in fact, the maximum penalty for the two counts of fraud was only 12 years' imprisonment – where a material error was made in the exercise of the sentencing discretion – where courts have, as a general rule, characterised a misapprehension of the maximum penalty for an offence as being a material error which vitiates the sentencing decision and which, consistently with *Kentwell v The Queen* (2014) 252 CLR 601, requires consideration to be given to the re-exercise of the sentencing discretion by the appellate court – where a re-exercise of the sentencing discretion is not one of adjusting for identified error below, nor is it confined by submissions made to the sentencing judge or how he dealt with them – where this court must make its own independent assessment of the sentence appropriate for the applicant's offending – where broadly similar offending occurred in two cases on which the parties placed reliance at the sentence hearing – where these sentencing decisions indicate that a sentence of least five years, of which he must serve one third in actual custody, is appropriate for the applicant's offending – where in *Kentwell*, the plurality held that if in the exercise of its independent discretion, the appellate court concludes that the same or a greater sentence is appropriate, in neither case is the court required to re-sentence – where it may grant leave to appeal against sentence but dismiss the appeal.

Leave to appeal granted. Appeal dismissed.

R v Lennox; R v Lennox; Ex parte Attorney-General (Qld) [2018] QCA 311, Date of Orders: 31 October 2018; Date of publication of Reasons: 13 November 2018

Appeal against Conviction; Sentence Appeal by Attorney-General (Qld) – where the appellant was convicted by a jury of rape and sentenced to 4½ years' imprisonment suspended after 14 months – where the appellant was acquitted on counts of sexual assault for episodes which occurred before and after the rape – where the trial involved two notorious sources of potential trouble for prosecution cases: complicating one criminal episode with an unnecessary number of charges and reliance on lies – where as to the former, in respect of the five counts the prosecution chose to indict for one episode of allegedly non-consensual activity in a parked car, the jury returned one guilty verdict, three not guilty verdicts and failed to agree on one count – where as to the latter, the prosecution's reliance on the appellant's lies to the complainant about his eligibility as an attractive dating proposition risked being misused as going beyond credit to guilt but no direction was given to the jury as to the use to which the jury could put those lies – where the appellant appeals on the basis of inconsistent verdicts – whether the inconsistency complained of requires the conviction to be set aside to prevent a possible injustice – where in respect of counts 1 and 2 it was alleged, and the appellant accepted, that he touched and applied his mouth to the complainant's breasts – where on the complainant's evidence, she repeatedly and unambiguously told the appellant she was not consenting to that behaviour – where on the appellant's account, the complainant said no such thing – where the factual difference was clear – where if the complainant's evidence of her expressly telling the appellant she was not consenting was accepted, it left no room for the jury to harbour a reasonable doubt as to whether or not the appellant honestly and reasonably believed she was consenting – where this was not a case in which there was any room for doubt on the complainant's account about the fact that she did not want the appellant to reach under her clothing and touch or suck her breasts – where the only way to reconcile her evidence that she said no to her breasts being touched and sucked, with the jury harbouring a reasonable doubt as to whether the appellant honestly and reasonably believed she was consenting, is that the jury did not accept she had been as unambiguous in saying no as she testified she was – where such reservation about the reliability of the complainant's evidence of her clear communication of non-consent is in stark contrast to the absence of such reservation implicit in the jury's decision to convict on count 4 (rape) – where it is a concerning inconsistency, particularly given the temporal and physical proximity of the events – where the touching of the breasts, the kissing of the breasts and the sexual intercourse did not occur on materially different occasions – where they were all part of the same allegedly unwanted sexual encounter inside the appellant's car – where on the complainant's account she was saying "no" throughout – where there was no reasonable basis to infer she did not mean it throughout – where if there was reasonable doubt about her evidence as to the fact she said no in respect of counts 1 and 2 then it is difficult to understand why that reasonable doubt was likewise not present as to that fact in respect of count 4 – where the jury's acquittal of the appellant on count 5 materially exacerbates the concerns arising from the contrasting verdicts on counts 1, 2 and 4 – where count 5, the alleged procuring of the act of masturbation of the appellant's penis contrary to the will of the complainant, occurred soon after what the jury purportedly found was an act of penile rape – where the issues on count 5 were whether it happened at all and, if so, whether it happened without the consent of the complainant – where it is difficult to see how the jury could have doubted the complainant's claim the act of masturbation happened if they had been sufficiently confident in the complainant's reliability to have convicted the appellant of raping her by penile penetration a short time earlier – where if the jury entertained a reasonable doubt about the complainant's assertion that the act of masturbation happened, it must have been because they entertained a reasonable doubt she was telling the truth – where if the jury entertained a reasonable doubt of the complainant's truthfulness about the commission of such a significant act by the appellant against her, it is difficult to see how they would not likewise have entertained a reasonable doubt about another significant aspect of her evidence, namely that she had clearly indicated her absence of consent to sexual intercourse – where for the jury to have harboured a reasonable doubt whether the masturbation by the complainant occurred or alternatively a reasonable doubt whether the complainant did not freely and voluntarily consent, was irreconcilable with its purported satisfaction beyond a reasonable doubt that the complainant had been raped – when the features underlying the mixture of verdicts in this case are considered collectively, it is impossible to avoid the conclusion that the combination of verdicts returned are an affront to logic and common sense – where the acquittals on counts 1, 2 and 5 compel the conclusion the jury, if acting reasonably, should have harboured a reasonable doubt as to the appellant's guilt of count 4 – where looking for a solution amidst its folly of having indicted so many charges, the respondent submitted the jury may have thought the prosecution "overcharged and corrected that by returning [a] guilty verdict on the charge that represented the culmination of the one transaction" – where

the effect of such a submission is that the jury applied its innate sense of justice and fairness and decided to take a global approach to the indicted charges and only convict on the most serious one – where the fact the jury were unable to agree on all the indicted charges demonstrates it must not have decided to take such a global approach to the indicted charges – where further to that obstacle, convicting the appellant of the most serious charge against him was hardly redolent of mercy – where the combination of verdicts, given the facts and conduct of the case, compels the conclusion there was a compromise of the performance of the jury's duty and that this court's intervention is necessarily required to prevent injustice – where the conviction of the appellant on count 4 should be quashed – where the acquittals in this case on counts 1, 2 and 5 mean the jury could not reasonably have come to the conclusion of guilt on count 4 – where it thus carries forward the logic of the acquittal verdicts to enter a verdict of acquittal in respect of count 4 – where in addition the appellant appeals on the grounds of directions not given as to the use to which the jury might put lies told by the appellant other than those in his interview with police – where the appellant lied in his recorded interview with police – where further lies the appellant told the complainant in endeavouring to cultivate a relationship with her were relied upon – where the need for the direction was raised before, and considered and rejected by, the trial judge – where the jury should have been directed about the limited use to which the lies to the complainant could be put, including that they could not be used as potential evidence of guilt – where the trial judge erred in not so directing – where it provides a further basis for quashing the conviction on count 4.

Appeal allowed. Conviction on count 4 quashed. Verdict of acquittal on count 4 entered. Attorney-General's appeal against sentence dismissed.

R v Woods (No.2) [2018] QCA 312, 13 November 2018

Appeal against Conviction and Sentence – where the applicant was convicted by a jury of doing grievous bodily harm to Mitchell Robinson and unlawfully wounding Tiffanie Hansen – where the applicant was sentenced to 5½ years' imprisonment for grievous bodily harm and two years for the unlawful wounding – where the conviction for unlawful wounding was quashed on appeal – where after appeal the prosecution elected not to pursue the charge of unlawful wounding – where the prosecution contends the wounding forms part of the circumstances of the offence of grievous bodily harm – where in conceding this the court ought to sentence afresh in respect of the offence of grievous bodily harm the prosecution contends the wounding of Ms Hansen forms part of the circumstances of the offence of grievous bodily harm upon Mr Robinson in a way which should influence this court's calculation of the appropriate sentence – where the level of inherent dangerousness was especially high because the risk of incidental injury to bystanders or potential interveners was especially high – where that is because of the circumstances that the protagonists were in an enclosed space with persons closely associated with them nearby – where those circumstances elevated the seriousness of the applicant choosing to use a knife against Mr Robinson – where the fact of Ms Hansen's wounding illustrates that seriousness but ought not, as a matter of logic or fairness, increase the sentence which should otherwise be imposed upon the applicant for the offence of doing grievous bodily harm to Mr Robinson in those circumstances – where the abdominal injuries suffered by Mr Robinson, from which he recovered after treatment, were life threatening – where knives are used to commit offences upon the person, particularly where such grave harm results, it is inevitable that significant weight must be given to general deterrence – where a head sentence of four years' imprisonment would be a just sentence in the circumstances of this case.

The application for leave to appeal against sentence is granted. The appeal is allowed. The sentence imposed for grievous bodily harm is set aside and instead the applicant is sentenced to four years' imprisonment.

R v Mackay [2018] QCA 313, Date of Orders: 11 September 2018; Date of publication of Reasons: 13 November 2018

Appeal against Conviction – where the appellant was convicted of one count of assault occasioning bodily harm arising from an incident where the complainant was "sucker-punched" at a nightclub he attended with two of his friends and his brother-in-law – where the central issue at trial was the identity of the assailant – where the complainant gave evidence that he saw men "hassling" his brother-in-law and that he recognised one of the men from the gym and tapped him on the shoulder and that he was then "sucker-punched" on his right cheek from the side by another man – where the complainant gave evidence that the assailant was someone who he had seen on numerous occasions at the gym but not previously spoken to and had seen on Facebook as "Matty A" – where the evidence included a prior inconsistent statement by the complainant of the colour of the t-shirt worn by the person who attacked him – where in the complainant's statement to police he described the person who attacked him as having blonde hair but it was common ground at trial the appellant had dark hair – where CCTV footage of the complainant being punched was obscured, not the focus of the camera shot, and in black and white – where the prosecution invited the jury to resolve the case based on the CCTV footage and the trial judge failed to warn the jury that it would be dangerous for them to do so – where the critical issue in this case concerned the reliability of the identification of the appellant assailant – where the matter that the jury had to be satisfied beyond reasonable doubt about was that the appellant referred to by the complainant as "Matty A" was not only present but also was the person who, in fact, punched the complainant – where the respondent accepted there were undoubted weaknesses in the identification evidence given by the complainant – where his identification of the appellant as the assailant was inconsistent with Senior Constable Currey's evidence that the complainant had told them that he had recognised the appellant as a person present who he knew, but that it had been a person in the appellant's group, and not the appellant, who had struck him – where the appellant argued that the quality of the CCTV footage was poor – where, having viewed the footage a number of times, the appellant's submissions as to the quality of the footage have great force – where the footage showed the melee in which the complainant was struck, that it involved a number of people swinging blows and moving around and that a number were in white shirts and in black shirts – where however, not only was the footage grainy, but, as the Crown had accepted at trial, the actual moment of the assault was obscured 0 CCTV footage diminished its probative value in identifying the appellant as the assailant – where having considered the whole of the evidence, and making full allowance for the advantages enjoyed by a jury, the deficiencies in the evidence both as to its quality and sufficiency, as outlined, are such that there is a significant possibility that an innocent person has been convicted.

Appeal against conviction allowed. Acquittal verdict entered.

R v FAR [2018] QCA 317, 16 November 2018

Appeal against Conviction – where the appellant was found guilty after trial of one count of maintaining an unlawful sexual relationship, one count of rape and other sexual offences against the same child, and was found not guilty of three further counts of rape and two counts of indecent treatment of a child under 16 – where in in respect of each count in which verdicts of guilty were returned by the jury, the complainant had given consistent accounts, both in her interviews with police and in her evidence at trial, sufficient to support a conclusion that the appellant was guilty of each offence, beyond reasonable doubt – where the jury were properly directed as to the need to consider carefully the complainant's testimony, and to have regard to any non-acceptance of that evidence in determining whether or not they accepted the complainant's evidence on other counts beyond reasonable doubt – where however, the evidence placed before the jury did not merely include evidence of acts which were uncharged acts – where that evidence included evidence of acts which had been the subject of acquittals at the appellant's previous trial – where the direction from the trial judge did not expressly direct the jury that if the jury accepted the complainant's account in respect of those events, the jury could not use that account as evidence that those events had in fact occurred, thereby questioning or discounting the effect of those acquittals, bolstering the complainant's credibility – where there was good reason for the jury to closely scrutinise the complainant's evidence – where in circumstances

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where there was good reason for a jury to closely scrutinise the complainant's evidence, it cannot be said that the failure to direct the jury to the effect that the appellant had been acquitted of those offences and that they could not use that evidence in a manner inconsistent with the full benefit of those acquittals, did not deprive the appellant of a fair chance of acquittal on the counts he was ultimately found guilty on.

Appeal allowed. Jury's verdicts of guilty on Counts 1, 2, 5, 6, 9, 11 and 12 be set aside. A new trial be ordered on each of those Counts.

R v Sutton [2018] QCA 318, 16 November 2018

Sentence Application – where the applicant was sentenced to concurrent sentences of two years' imprisonment for possession of the dangerous drug cocaine in excess of 2 grams, 18 months' imprisonment for possession of the dangerous drug cocaine, six months' imprisonment for possession of the dangerous drug trenbolone, with parole eligibility after serving eight months' imprisonment – where the sentencing judge held that the applicant's possession of cocaine was for his personal use and not for the business of holding cocaine to sell it – where the sentencing judge was referred to a clinical psychologist's report that indicated the applicant met the criteria for a diagnosis of stimulant use disorder, cocaine, severe in early remission; major depressive disorder, severe recurrent episode; and social anxiety disorder – where the clinical psychologist's report referred to the applicant's suicidal ideation and suicide attempts following arrest – where the report indicated that if the applicant were to receive a custodial sentence it is highly likely that the stress associated with imprisonment would have a negative impact on his mental well-being – where notwithstanding that the sentencing judge recorded that the applicant met the criterion for a number of mental health diagnoses according to the clinical psychologist, her Honour expressly stated in the last paragraph of her sentencing remarks that she saw no reason to further moderate the sentence beyond that required to reflect the pleas – where the sentencing judge's approach to the sentencing discretion miscarried in that there was error in failing to take into account the applicant's significant mental health issues and their correlation with his offending, including the impact on him of a custodial sentence – where although the sentencing judge remarked that there was no evidence that the applicant had managed to overcome his cocaine use and addiction and that, absent demonstration of complete rehabilitation, the applicant was "a huge risk for future criminal offending", the psychologist's report stated that, at the time of the report, the applicant had successfully remained abstinent from cocaine use for a three-month period, and, as mentioned, assessed the applicant's risk of reoffending as low – where moderation is warranted to the custodial component to reflect the need to moderate the sentence to take into account the mental health issues of the applicant and to recognise that incarceration is particularly onerous for him having regard to the matters raised in the report of the clinical psychologist and also the further material disclosed in the psychological report of Ms Krishnan.

Grant the application for leave to adduce evidence. Grant the application for leave to appeal against sentence. Appeal allowed. Vary the sentences imposed by varying the parole release date from 29 April 2019 to 21 December 2018.

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.

A client guide to divorce

by Sheetal Deo

There are a plethora of issues to consider for someone going through a divorce or separation.

Moving On: What you need to know about Separation and Divorce by Julie Hodge, 'The Family Lawyer', addresses quite a few of them, if not all.

Written for the client, this practical guide walks a person through the entire divorce and/or separation process. It covers what to do and what not to do when communicating with the other party, when to seek legal advice, how to prepare for your initial appointment with your lawyer, through to a very non-lawyer, reader-friendly explanation of the various court processes. The book also provides a helpful table of resources for clients who are unfamiliar with the 'type' of help they need and who to contact.

Title: *Moving On: What you need to know about Separation and Divorce*
Author: Julie Hodge, The Family Lawyer
ISBN: 9780648389804
Format: Paperback/163pp
RRP: $24.95

As someone who doesn't practise in the family law space, I found the book useful as a guide on what to do and what to expect in a divorce or separation matter and what issues I, as the practitioner, ought to consider.

New and seasoned practitioners may benefit from reading the book as a reminder of the fragility of their client and the holistic approach required in separation and divorce matters.

Alternatively, I would recommend having a copy of this book on hand and providing it to your clients as a helpful resource when they are going through a separation or divorce. The book even includes tips on how clients can facilitate the legal process and, in doing so, make your job easier.

Sheetal Deo is a legal professional development executive at Queensland Law Society.


Emily Ownsworth


Michael Burrows


Craig Van Der Hoven


Kirsten Dengler


Jo Maloney


Jos Basson


Rachael Brennan


Blake Lashmar


Terryn Berardone


Sophie Callister


Angela Kurtz


Andrew Young


Alex Myers


Ashleigh Simpson-Wade

Career moves

Armstrong Legal

Armstrong Legal has announced two appointments and a promotion.

Emily Ownsworth has been promoted to solicitor in the family law team following her admission as a legal practitioner in November. Emily has been with the firm for almost four years as a legal assistant and paralegal.

Michael Burrows joins the firm as head of the criminal, corporate and traffic law team in Queensland. Michael brings a wealth of knowledge from his time as a principal of a leading criminal practice in the Northern Territory and has diverse experience across multiple Australian and international jurisdictions.

Craig Van Der Hoven has also joined the criminal, corporate and traffic law team, having previously worked at a boutique Gold Coast criminal law firm. Craig has appeared for clients in Magistrates Court sentence hearings and has experience in the District and Supreme Courts on a wide range of criminal law matters.

Best Wilson Buckley Family Law

Best Wilson Buckley Family Law has announced the appointment of two new staff members, including the introduction of an in-house estate planning solicitor.

Kirsten Dengler has been appointed as a solicitor in the firm's Toowoomba office. Kirsten has a background in family law and the victim compensation scheme, and has been practising in these areas since her admission in 2006.

Jo Maloney has been appointed Senior Solicitor – Estate Planning. Jo has been practising in wills and estates law since her admission in 2005.

Doyle Wilson

Doyle Wilson has welcomed **Jos Basson** to the firm's Brisbane team as Special Counsel.

Jos is a founding member of the Brisbane practice and previously led a law firm owned by a Queensland ASX 200 company, managing 65 professionals across three states.

He has extensive experience in debt recovery and commercial litigation.

Marino Law

Marino Law has expanded into new premises at Mermaid Beach on the Gold Coast, and has also announced five appointments.

Family lawyer **Rachael Brennan** has joined the team as a senior associate. With 16 years' experience, Rachael works across all areas of family law, including parental disputes, property settlements, de facto relationships and mediation.

Blake Lashmar has also joined the firm as an associate in the litigation division. His experience includes matters such as adverse possession, statutory demands, building and construction, lease and contract disputes, body corporate matters and defamation.

Terryn Berardone has joined the firm as a solicitor with the property and commercial team after gaining experience in the administration and co-ordination of off-the-plan contracts.

Solicitor **Sophie Callister** has joined the property and commercial team after gaining experience across a range of business and personal services areas. Sophie regularly volunteers at Robina Community Legal Centre.

Marino Law has also appointed **Angela Kurtz** as Practice Manager. Angela brings more than 18 years of management experience in legal professional services.

Results Legal

Results Legal has announced three promotions.

Andrew Young, who was promoted to special counsel, joined the firm in 2016, taking a lead role in the supervision of the commercial litigation and insolvency (CLI) team as well as running large, complex litigation.

Alex Myers was promoted to senior associate and has built a reputation as a strategic litigator, acting for creditors, equity holders and insolvency practitioners in legal recovery, insolvency and commercial litigation.

Ashleigh Simpson-Wade, who was promoted to associate, joined the firm in 2016 after a successful career as a CPA specialising in insolvency.

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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Break the mould to embrace disruptive leadership

by John Teerds

According to Stephen Scheeler, leadership has changed dramatically in the 21st Century.

The former Facebook CEO for Australia and New Zealand says that breaking the mould – changing the way we lead – is critical for today's business leaders.

"I think breaking the mould is something that all of us have to do in the 21st Century," he said.

"The way I've done it is I've reinvented myself as a leader – being humble, being curious opens the aperture on the types of ideas and types of talent that you can bring into your world, and that makes you more successful than you can possibly be on your own.

"In my career, one of the things I've done is try to be curious about technology, curious about learning, to make sure I was always trying to figure out: what's this new stuff and how can I use it in my business or in the industry that I'm working in?

"It's held me in really good stead. There's plenty of things that I know nothing about, that I'm actually ignorant about, but that's when I turn my curiosity on most, and before you know it I actually know enough to make good use of that information.

"In the next few years, data is going to become the important resource that every business on earth has at its disposal, and businesses that don't make that transition aren't going to survive."

Stephen, a keynote presenter at Symposium 2019, says that in his presentation he will share what he calls the eight elements of disruptive leadership.

"These are the eight things that leaders need to be really good at to be successful in the 21st Century," he said.

As well as being an inspiring, in-demand speaker, Stephen is a seasoned business leader, with a career that spanns over 25 years across consumer products, retail, ecommerce, automotive, financial services, media and technology. He has also served in senior executive roles at global leaders Westfield and Inchcape, and at Australian consumer products giant Lion.

As founder of global advisory The Digital CEO; Senior Advisor to McKinsey & Company; and Executive-in-Residence at Asia-Pacific's leading business school, the Australian Graduate School of Management, Stephen partners with the senior leaders of some of the world's leading companies to help them to build world-beating strategies, capabilities, culture and leadership. These companies include Qantas, nab, Westpac, Macquarie Bank, ANZ Bank, Commonwealth Bank, IAG, Suncorp, Telstra, Wesfarmers, AMP, CUB, Brambles, Google, DellEMC, Lenovo, Seven West Media, MCN, QBE, Hollard, BAT, JB Hi-Fi, Bunnings, Flight Centre, Mirvac and the Australian Government.

He is also a member of the Prime Minister's Knowledge Nation 100.

Stephen Scheeler will appear at Symposium 2019 by arrangement with Saxton Speakers Bureau.

John Teerds is the editor of *Proctor*.

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Your professional development 2019

CPD due diligence: Choosing value for money

When it comes to your professional development and the quality of your advice for clients, your choice in CPD programs and program providers is vital. For leading legal professionals, the choice is not just about the dollars per CPD point; it's also about quality of content, delivery and accessibility.

At QLS, we survey delegates after every CPD event to ensure we collect quantitative and qualitative data that informs program content and future events. We ask our delegates to scrutinise content, presenters, venue, event organisation, catering and registration.

In 2017/2018 delegates gave us an overall rating of 4.5 stars.

With the CPD year fast approaching, now is the time to do your due diligence. When choosing your 2019 CPD options, consider asking for proof of rating and make the most of your investment.

QLS CPD in 2019

Our core CPD sessions help you to be a well-rounded practitioner and business leader. Set yourself up for success in 2019 by planning for the end of the CPD year. Our collection of professional development events and on-demand resources will ensure you can:

- collect your CPD points with ease, including mandatory core areas
- develop your legal and business knowledge and skills
- access a range of different formats to collect your CPD including face to face, livecast and on-demand
- access valuable networking opportunities.

For a full listing of events and to register, go to **events.qls.com.au**, or visit the QLS Shop to purchase an on-demand resource.

International Women's Day: Panel discussion

Celebrate and connect with your professional peers on 7 March at this International Woman's Day panel discussion, jointly hosted by Queensland Law Society, the Bar Association of Queensland and Women Lawyers Association of Queensland.

Register today to secure your seat at this engaging evening of discussion, of engaged panel reflecting on the experiences of women in the legal profession.

Our esteemed panellists will address the challenges that confront female practitioners, share personal experiences and recognise the past and continued contributions of women in law. Afterwards, connect with your peers in the profession during the networking drinks.

As inspired by the theme of #BalanceforBetter, the event will reinforce that, if we better the balance, we better the world.

QLS Symposium 2019

QLS Symposium on 15-16 March, is the premier event for Queensland's legal profession.

Attend thought-provoking sessions from leading experts who will inspire new approaches to your practice. Our streamlined program features substantive streams in commercial (encompassing business law and commercial litigation), criminal, family, personal injuries, property and succession, plus a two-day core agenda.

Join topical discussions and master common tax and revenue issues. Explore the crossover between two areas of law and get up to speed in our ever-popular key legislative and case law updates. Don't miss our earlybird member pricing that closes on Friday 15 February. Visit **symposium.qls.com.au** to register.

Solicitor Advocate Course – advocacy in family matters

Increase your skill base for advocacy work in the courts and tribunals.

The QLS Ethics and Practice Centre and the Australian Advocacy Institute are offering an intensive and practical workshop that specifically focuses on family law at the Federal Circuit Court.

The workshop is valued at nine CPD points. It will be held on 22-23 February. If you are interested in attending, please contact events@qls.com.au to register. Please note: QLS experiences high demand for this workshop. Registrations usually reach maximum capacity, early in the year.

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In February...

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February

12 Cost agreements – clarity for clients

Essentials | 12.30-1.30pm | 1 CPD

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PM&BS SL

13 Drafting pleadings and particulars

Essentials | 8.30am-12pm | 3 CPD

Brisbane

Be guided by litigation experts on the fundamentals of drafting succinct pleadings and particulars.

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20 Drafting statements and affidavits

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21 Trust Accounting

Essentials | 9am-12.30pm | 3 CPD

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PS PM&BS

22 Solicitor Advocate Course – advocacy in family matters

22-23 | Solicitor Advocate Course
5-7pm | 8.30am-4.30pm | 9 CPD

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PLE PS SL

27 Drafting contract terms and better business writing

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Join Sue Tomat for a hands-on workshop that will use a case study to guide you through the contract drafting process. Learn how to take instruction, draft clauses from scratch, negotiate effectively and perform a final review.

PS

March

06 Legal professional privilege

Essentials | 12.30-1.30pm | 1 CPD

Livecast

PLE

07 International Women's Day: Panel discussion

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What's working – and what isn't?

by Graeme McFadyen

The legal industry is changing both rapidly and radically.

Technology, disruptors, virtual law and more intense price competition are now the realities of the market. Both business and personal clients have generally become more demanding and more fee sensitive. Consequently the level of profitability of legal practices is under intense pressure.

To ensure that they devise appropriate strategies, law firm principals should review a series of key practice performance indicators (KPIs) monthly to ensure that they are making decisions on an informed basis. It is relevant to note that former Harvard Business School Professor Noam Wasserman reports that 65% of startups fail due to ineffective management by the founders.[1] The legal industry is no different. The KPIs provide the necessary insight into the machinery of your practice.

It is important to critique the performance of each area of practice rather than just the practice as a whole. The idea is to ensure that you are familiar with the performance measures of each area of practice so that decisions to enter or vacate areas of practice are made on an informed basis. The descriptor 'informed' is the critical word, as opposed to simply continuing to service a given area because you have always done so.

The usual KPIs are outlined in the table, *right*.

Conclusion

Principals need to engage in careful strategic planning to ensure that they are practising in those areas of law which are likely to realise a reasonable profit. The regular analysis of performance against appropriate KPIs forms part of that larger brief.

Of course, if you wish to practise in particular areas which you find especially satisfying, albeit not too rewarding, then that is entirely your prerogative, but best to ensure that you know the cost of doing so.

Graeme McFadyen has been a law firm GM/COO/CEO for more than 20 years. He currently provides consulting services to law firms.

KPI	Rationale
Gross profit as % of revenues for each area of practice	Gross profit % (GP%) is revenue minus the cost of legal staff involved in the provision of the legal services expressed as a % of revenues. Its calculation may require the allocation of some legal personnel costs on a pro rata basis. The objective is to ensure that the staff numbers and staff mix are appropriate to the provision and delivery of the respective areas of law. Overall you would hope that firms achieve a minimum GP% of 65% so as to produce a net profit of 25%, as overheads consistently represent around 40% of revenues.
Net profit as % of revenues for each area of practice	This is the net profit of the practice. Well-run practices should target 25-30%. Most efficient small practices find themselves around 30% (although the Macquarie Bank 2017 benchmarking survey found the majority of small (<$4M) and medium ($4-$20M) practices were achieving only 12-13%). This suggests that performance in this sector is deteriorating.
Aged WIP for each area of practice	Except for contingent fee arrangements, you should bill all WIP greater than $500 monthly and, regardless of the sum, no more than 90 days after the work was done. In part the rationale for this is that it acts as a trigger to maintain communications between client and lawyer. Clients resent being billed six months after the event.
Aged debtors for each area of practice	If a client has not paid your account within 30 days of issue, then you need to understand why. Sending a statement is a waste of time. If there is a misunderstanding then it needs to be resolved and if the client is using you as a bank, then you need to make a conscious decision whether to continue to act for the client.
Productivity	Fee earners should produce around three times their salary costs including superannuation. If they consistently fall short, then you need to ascertain whether the problem is salary, chargeable hours produced or charge rate. If the work does not justify the charge rate, then you need to address the staffing, the technology employed and the desirability of the work.
WIP recoverability	Not enough attention is paid to the amount of WIP written off at time of billing. Principals need to be mindful of the actual realisable value of the WIP. As with the comments under 'Productivity' above, you need to ascertain whether the problem is salary, chargeable hours or charge rate. If you insist on doing work which is subject to competitive pricing, then you need to be especially sensitive to both technology and staffing.

Notes

[1] Reported on page 20 of *Company Director*, September 2018.

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Alexander ‘Lex’ MacGillivray AM

3.3.1930 – 22.11.2018

Alexander ‘Lex’ MacGillivray AM (Member of the Order of Australia) passed away quietly and peacefully on 22 November, leaving a rich legacy of a life well lived, with many significant personal and professional achievements.

Lex MacGillivray…raconteur, trusted advisor and mentor, firm friend, devoted family man and leading practitioner.

Early life and family

Lex was born on his mother’s birthday, 3 March 1930, to Doris Helen Anyon and Patrick Alexander MacGillivray. He was the eldest of two boys, and is survived by his brother, John.

Lex performed well academically, but left secondary school when offered a law clerk’s position and soon became articled to leading practitioner Virgil Power. Lex completed the Solicitor’s Board of Queensland course a year early, at age 20, but had to wait until he was 21 to be admitted as a solicitor.

In 1953, he met his future wife, Jean Frances Adel Barron – ‘Del’. They courted in Brisbane, and if ever parted, corresponded ardently by mail. Each kept the letters sent and received, and at some point combined them. Their family discovered them recently, tied with a red ribbon.

They were married on October 29 1955 at St Paul’s Church in Ann Street.

Their children followed in very quick succession – five in under six years – Mark, Jonathan, Jane, Fiona and Rachael. Lex and Del were then lucky enough to eventually welcome 11 grandchildren – in order of appearance, Katie, Ellie, James, Becky, Sally, Madeleine, Sarah, Libby, Lucy, Claudia and Matthew.

Everyone had a ‘Lex story’

At Lex’s wake, family, friends and colleagues shared their many stories of Lex, including:

Lex’s practical jokes – From the simple – a house brick in his child’s school bag – to the incredibly complex, Lex was a dedicated practical joker. Long-time legal partner Brian Halligan was often the victim, suffering fake renovations in his office and an often-missing car.

Family and close associates were not his only victims. Former Liberal MP Jim Killen was confronted early one morning at his home by “surveyors” plotting the road widening through his front yard. Lex, with his distinctive snowy white mane of hair, would often not be there for the joke, but took great enjoyment from knowing the trick had been played, and that he was the anonymous author.

Queensland Law Society was not immune. Lex was once convinced that no one ever read the articles he prepared for *Proctor*, and they were simply submitted to the printer as delivered. On one occasion he included a string of invective in a long article on consumer credit to find out if anyone actually read his work. They had, fortunately.

The trombone – Lex greatly enjoyed playing his trombone, and his interest in jazz generally led him to found the ‘Choses in Action’ with other jazz aficionado lawyers. The Choses in Action found captive audiences at several QLS functions, though it was agreed by all, including a despairing tutor, that Lex may well have been tone deaf.

This did not stop him from dispatching articled clerks to his home to get the instrument should Lex discover it was a colleague’s birthday. Friends living overseas have said they will miss being woken at 2 or 3am by a birthday serenade from Lex.

Lunches, parties and holidays – Friend and colleague of 60 years Ian Harris spoke at the wake of Lex’s incredible work ethic and his serious commitment to the practice of law.

After hours, however, things were different. Lex was great fun to be around, a wonderful raconteur whose invitations were warmly welcomed and highly regarded. Parties, particularly pool and fancy dress parties, were held at the family home at Indooroopilly or at the beach house at New Brighton.

Lex and Del treasured their time on holidays at New Brighton with family. It was a work-free zone with no telephone allowed, and anyone arriving from work wearing a tie would find, much to their surprise, it snipped in half neatly below the knot. Lex kept scissors at the ready for this particular purpose.

The infamous ‘QLS working lunch’ would also be unleashed by Lex in order to achieve a specific goal of law reform, or to ensure that a particular Minister or senior bureaucrat got whichever point Lex was trying to make.

Legal legacy

Lex was a people person who unintentionally lit up the room when he entered. He mentored and assisted many junior lawyers, both within and outside of his firm. His generous interest in and support of those lawyers led to many

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becoming leading practitioners in the law, mainly in Lex's area of practice, banking and finance (particularly retail credit).

Lex was chair of the QLS Banking and Finance Committee and the undisputed leading practitioner in this area of the law for well over 30 years. He took great care in engaging all of the committee members in its work – particularly in the preparation and drafting of submissions on legislative reform, both at state and national levels, and the writing of articles for legal publications, particularly the monthly banking and finance column of *Proctor*.

This being said, Lex was always the person who developed and drafted the final-but-one submission, ensuring that recommendations were practical and effective and that the submissions were concise, well-argued and influential.

Lex would leave it to the industry and consumer groups to argue the partisan points; his submissions were all about fairness and effectiveness, the rule of law and the efficient and fair administration of the law.

It was understood that the government bodies considering the various submissions on a proposed legislative change or the like would always put to one side the QLS/Lex submissions to be read last, as they would be sure that this would most likely be the submission that 'tipped the scale' on difficult and contentious matters.

Of course, Lex would never publicly claim any of this, but rather pass it off as the joint work of the committee. As noted at his wake, Lex once remarked that "You can achieve anything…as long as you don't care who receives the credit", and this indeed was his method of operation.

It proved effective, as Lex's submissions were sought and carefully considered by governments at state and federal levels, and he held one of the best strike rates of all stakeholders in terms of the success of his recommendations.

Conclusion

Lex was a great family man and lawyer, a wise mentor and firm friend to many lawyers junior to him.

But hidden behind that mischievous and hale-fellow-well-met persona was a razor-sharp mind, a golden heart with no evil intent for anyone, and a substantial legislative legacy in the areas of law in which he practised and which still serve us well today.

Lex's legal legacy was acknowledged at a celebration dinner at QLS for Lex and Del after Lex's resignation from his beloved QLS Banking and Finance Committee.

His contribution was celebrated by the profession and the then Regional Commissioner of the Australian Securities and Investments Commission, as well as his counterpart from the state's Office of Fair Trading, who jointly acknowledged Lex's significant personal contribution and thanked him on behalf of all those who had benefited from his insight. It was a wonderful night and appropriate that his peers had the chance to thank Lex in person, and also in the company of his beloved Del.

At his wake, we were reminded that the name 'Alexander' means 'defender of men'. Lex's contribution to the many aspects of his huge legacy – his family, legacy in law reform and indeed all of his wonderful life well lived ensures that he will be remembered as a stout defender indeed of the rule of law, its efficient administration, a wonderful family man, but most of all as a unique personality the like of which we are unlikely to see again.

Vale Lex and thanks for all you did and were for us – your family, friends and colleagues.

This article has been compiled by Lex's family members, friends and colleagues, based on recollections at his wake.

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Moldova in the middle

with Matthew Dunn

There is a European country blessed with fine vineyards that are filled with mature international vine varieties.

It has thousands of years of winemaking experience, great soils, the largest wine collection in the world,[1] an ideal climate, and is on the same latitude as Burgundy. Yet it is the poorest country in Europe and at the centre of an East/West tug of war around wine.

Unheard of in Australia, few would feel confident pointing to the Republic of Moldova on a map. However, its critical strategic location – wedged between Ukraine and Romania and the mighty Dniester and Danube rivers – has blessed and cursed in turn its winemaking fortunes as the tides of geopolitics wash over it.

The people are Romanian, by a slim majority, yet within Moldova's borders is the disputed pro-Russian unrecognised state of Transnistria. Unfortunately, the political tug west to Europe and east to Russia has kept Moldovan wine out of Dan Murphy's.

Amphorae winemaking in the region goes back thousands of years. Greek settlements at the mouths of the major rivers were wine centres in the 5th Century BC. The Romans traded wine in the 1st Century AD, and the medieval kingdom known as Moldavia exported high-quality wine to the nearby kingdoms of Poland, Ukraine and Russia.

The Ottoman Turks closed down the wineries in the 15th Century and winemaking did not return until the 19th Century. The same period saw much political uncertainty as Moldavia was split and annexed to the Tsar of Russia before breaking away to be united with Wallachia to form Independent Romania, and then ceded back to Russia again.

Following the Russian Revolution of 1917, Moldavia once again broke away and reunited with Romania. Its independence was disputed by Russia, but it wasn't until 1940, under the Molotov-Ribbentrop Pact, that Moldavia was abandoned by Romania to the Russians. It briefly regained independence during World War II, but Russia reasserted control in 1944 and it remained within the Soviet Union until its collapse, regaining independence and a name change to Moldova in 1991.

Despite the political turmoil, wine was reinvigorated by the Russian Tsars, who encouraged the planting of modern European varieties and investment in technology and imported skills from France. The Tsar then stocked his cellar with the fine wines of Moldova.

During the Soviet era, quality was forsaken for quantity, with mass planting programs and mass production, as wine was seen as a healthier option for the workers than vodka. Gorbachev's 1985 anti-alcoholism campaign stopped that, and land privatisation following independence conspired to decimate the over-planting of vineyards and reduce over-production.

Following independence, the majority of Moldovan wine production was exported to Russia, but politics intervened again in 2006 when Russia issued a health ban on Moldovan and Georgian wine imports citing contaminants – strangely, this coincided with a dispute between Russia and Moldova on the breakaway Transnistria.

The silver lining was a renaissance of quality-focused production and international joint ventures lifting the industry with a western focus. The Russian ban was lifted in 2007, but with limits on volume. A subsequent ban was introduced in 2010, lifted and imposed again in 2013 when Moldova flirted with signing a treaty with the European Union.

There are signs that this ban may be lifted, but given the country's turbulent history, nothing is certain. Moldovan winemaker Alexandru Luchianov[2] summed it up when he said, "Moldova is split between Europe and Russia. Half of us want to go one way, the other half a different direction. But both will gain, at least when it comes to wine."[3]

Matthew Dunn is Queensland Law Society Policy, Public Affairs and Governance General Manager.

Notes

1 milestii-mici.md/en.
2 etcetera.md.
3 politico.eu/article/winemakers-in-moldova-eye-thirsty-russian-market.

The tasting

Two Moldovan wines were obtained and examined for this article.

The first was the **Asconi Sol Negru Pinot Grigio 2014**, which had the light gold colour of age and full body. The nose was greengage plum sliced on a granite worktop. The body was light but with a viscousness in the mouth, the balance of sweetness carried away with the acid and a long palate unique with spice appearing after some time. Perhaps the attack was lemon with beeswax and mineral tones; it was delightful and engagingly different.

The second was the **Albastrele Wines Select Cabernet Sauvignon 2013**, which was red black in colour and had very familiar blackcurrant, black pepper and capsicum leaves on the nose. The palate was textbook cabernet with tannin, blackcurrant and red forest fruits on spice which moved into a frame of oaken wood. A long palate and a very varietal expression. Clean, crisp and very approachably familiar.

Verdict: The two wines were hard to compare, and it was impossible to select a favourite with the cabernet being as familiar as the pinot grigio was exotic.

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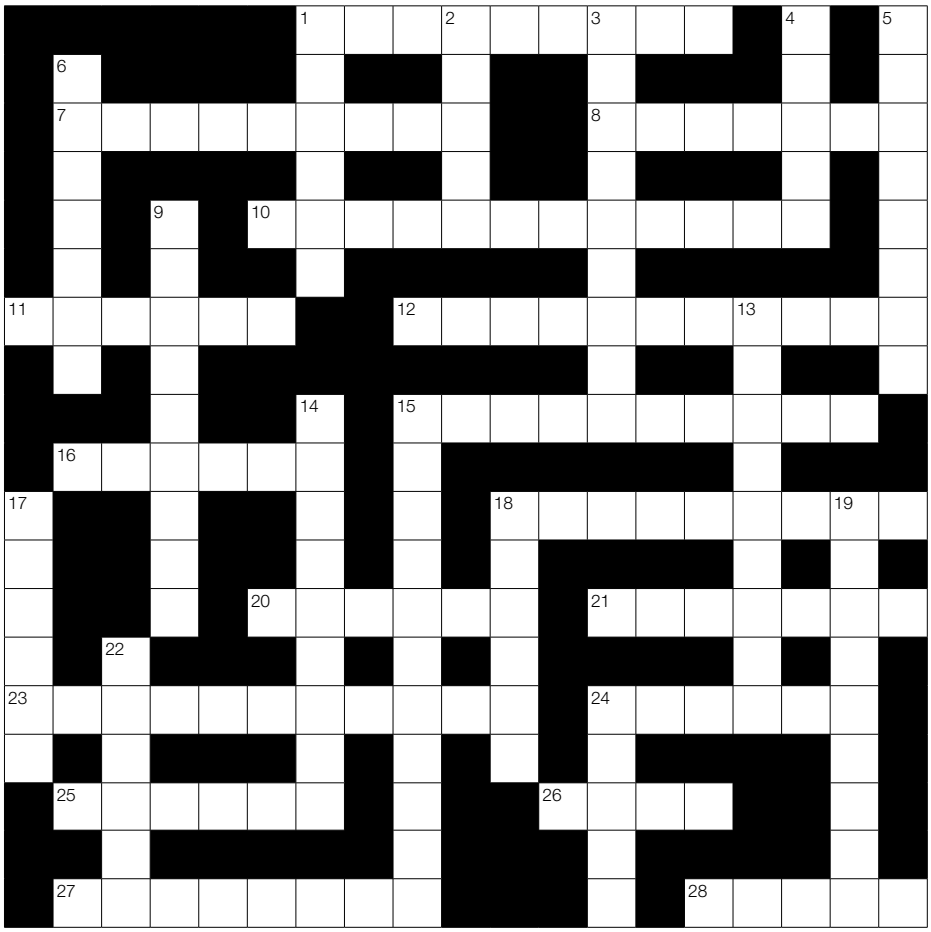
Mould's maze

By John-Paul Mould, barrister
and civil marriage celebrant
jpmould.com.au



Across

1 Interruption of a proceeding upon the pleading by a defendant of a matter that prevents the plaintiff from going forward with the suit, ... of proceedings. (9)

7 A case .....'s decision is not binding on parties to a civil dispute until the time for filing an election to go to trial has lapsed and a court gives effect to the decision. (9)

8 Compromise between a bank guarantee and no security, letter of ..... (7)

10 Threshold for overturning an administrative decision, ... unreasonableness. (10)

11 Surname of the Chief Justice of the High Court of Australia. (6)

12 When an order is made for equal shared parental responsibility, the court must then consider whether a child's best interests are best served by orders granting equal time or substantial and ..... time. (11)

15 Surname of the Chief Judge of the Federal Circuit Court of Australia. (10)

16 Mrs Donoghue found a snail in her bottle of ..... beer at a cafe in Paisley in 1928. (6)

18 *Ex parte HV McKay*, commonly known as the ..... case, required the court to determine what was a "fair and reasonable" wage. (9)

20 High-profile solicitor facing fraud and money laundering charges, Adam ..... (6)

21 Cost of an insurance policy. (7)

23 A solicitor must give to the court at a civil trial a ..... stating the duty of disclosure has been fully explained to their client. (11)

24 A ..... clause in a statute provides that the law shall cease to have effect after a specific date. (6)

25 Common legal title for a car park attendant, storage company owner or kennel owner. (6)

26 Ground for judicial recusal. (4)

27 Supreme Court justice appointed in 2015 as an Officer of the Order of Australia for distinguished service to the judiciary and law reform. (8)

28 Former Federal Circuit Court judge and current District Court judge. (5)

Down

1 Complied. (6)

2 An originating application must be filed and served at least ..... days before the allocated hearing date. (5)

3 A right to represent a principal within a market free from competition, ... agency. (9)

4 Department of Public Prosecutions, The ..... (5)

5 The bane and …….. rule requires that the natural and ordinary meaning of the statement be ascertained with reference to the context in which it is used and the mode of publication. (8)

6 Surname of the Supreme Court justice who is President of the Queensland Civil and Administrative Tribunal. (7)

9 Surname of the President of the Queensland Court of Appeal. (9)

13 Process serving is not permitted on Good Friday or ..... Day. (9)

14 Tending to prove. (9)

15 Proceedings for statutory trusts for sale or partition of property held in co-ownership may only be initiated by ..... (11)

17 A defence of qualified privilege is defeated if the plaintiff proves that the publication was actuated by ..... (6)

18 Surname of the Chief Justice of the Supreme Court of Queensland. (6)

19 The Family Court will not sanction a property settlement unless satisfied it is just and ..... (9)

22 Absent without permission. (6)

24 Rockhampton District Court judge and solicitors Clinton, Janette, Garth, Cordell, Harriet and Verity. (5)

Solution on page 56

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Rapunzel, Rapunzel, wherefore art thou?

Boys, beware of fathers with shovels

by Shane Budden

Welcome to 2019, an ominous year if ever there was one, and in no small part because it even sounds like a countdown when you say it (20, 19…).

Yes, here in 2019 you have to be nervous, or at least I do, and if you want to know why, I can explain it in four words (or five, depending on the kind and level of pedantry to which you subscribe):

My daughter started high-school. *(Editor's note: The pedantic editor says five words – 'high school', unless it is used adjectively, such as 'high-school years'.)*

I must admit I am not sure how to feel about this – my daughter going to high school, not English grammar, which no one ever truly understands, anyway – partly because it is a confusing and concerning time for a dad, and partly because due to deadlines and publishing needs, I am actually writing this in 2018 and 2019 hasn't technically (even as far as quantum physics is concerned) started yet.

Also, this isn't really how I thought my daughter's high-school years would play out (no matter what may be actually happening as you read this) because I had envisaged them more simply. I was pretty much decided on having her locked in the top of a tower until her hair grew long enough for the right boy to come along and climb her hair to the top of the tower, at which point I would jump out from behind a wardrobe and whack him in the face with a shovel.

My wife – despite not even being a lawyer – feels there may be some sort of legal problem with this, and not just blatant copyright violation of a story now owned by Disney and thus likely to cost *Proctor* a fortune just by my mentioning it. Plus, it turns out building a tower costs a lot of money (even if Mexico pays for it) and my having a lot of money rather depended somewhat on *Proctor* paying me to write this column (*Editor's note: I would comment here, but have just broken several ribs laughing*), so we decided that we would send her to an actual high school.

The thing is, I am not sure what she should expect at high school, because I went to an all-boys high school, which I loved, although it wasn't perfect, largely due to the fact that there weren't any girls there. My old school prepared my fellow students and me (no, it isn't 'and I' trust me. Or I. Who really knows?) for many things we would encounter in life – academic challenges, physical adversity, the possibility of being called upon to knot a tie four different ways – but it did little to prepare us for fatherhood.

To be honest, fatherhood lessons would have been justifiably regarded as a waste of resources at the time; in high school, my classmates and I (yes, this time it is I) possessed the same overall desirability as any other bag of malfunctioning hormones with bad hair. Think Donald Trump with zits.

The point is that we appeared to have the same overall chance of becoming fathers as we did of becoming Pope – an appearance we shared with every other adolescent boy on the planet (the appearance of becoming fathers, I mean, not the appearance of the Pope). I suspect IVF was invented by a high-school teacher who felt we needed an option other than the men of the future to ensure the survival of the race.

So I am not sure what my daughter should expect, although I am thankful that she can be pretty sure not to expect rugby. My school played rugby, and even after many years of watching it and occasionally not being able to avoid playing it, I still do not understand it.

I understand, and happily played, soccer, rugby league, cricket and many other sports I cannot recall (largely due to having played rugby league), but rugby union? I suspect the rules were made by feeding pictographs from the Rosetta Stone into one of the early Atari computers, and having a monkey translate the result in to medieval English. Those cursed with refereeing the game simply pretend they understand them and make incomprehensible proclamations about the result, the way people do with Woody Allen movies and modern art.

Anyway, I doubt my daughter will have to deal with that because it is much harder to convince girls to engage in a game which largely involves running into one another for about an hour. Boys, on the other hand, do it whether you want them to or not.

Speaking of boys, I think I should close by putting on the record some words of fatherly wisdom: you do not have to climb to the top of a tower to be hit in the face with a shovel...

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Crossword solution

From page 54

Across: 1 Abatement, **7** Appraiser, **8** Comfort, **10** Wednesbury, **11** Keifel, **12** Significant, **15** Alstergren, **16** Ginger, **18** Harvester, **20** Magill, **21** Premium, **23** Certificate, **24** Sunset, **25** Bailee, **26** Bias, **27** Atkinson, **28** Coker.

Down: 1 Abided, **2** Three, **3** Exclusive, **4** Crown, **5** Antidote, **6** Daubney, **9** Sofronoff, **13** Christmas, **14** Probative, **15** Application, **17** Malice, **18** Holmes, **19** Equitable, **22** Truant, **24** Smith.

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