PROCTOR

Queensland Law Society

July 2018 – Vol.38 No.6

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Reflect before you react

Civility: Courtesy or obligation?

Civility and respect are the foundations of true professionalism. As guardians of the justice system in the state, we are held to a higher standard, with rules and ethical standards that assist in guiding us along the way.

My personal experience throughout my career has been that while my fellow Queensland solicitors will robustly put forward their argument on behalf of their client, they will, in the majority, remain civil towards the other side. We should enjoy and embrace our peer relationships, acknowledging that we are all professionals in the same field.

Not all jurisdictions are as lucky as Queensland, and civility has always been a hot topic of discussion. I would like to draw on some of these discussions from a different jurisdiction, and in fact, a different country, to provide some insight.

The American Bar Association (ABA) has often spoken about civility in the legal profession, producing resources, programs, discussion papers, journal articles and presentations throughout the years.

In 2013, the *American Bar Association Journal* published an article by lawyer and freelance journalist GM Filisko discussing the rising problem of incivility within the profession, the ways it was being addressed, and what more could be done to resolve the issue. Today the topic remains such a hot one that the article has been republished as a cover story on the *ABA Journal* website.

The four main areas that Filisko discusses include leaders of the profession and the judiciary calling out uncivil behaviour when it occurs; increased training in the profession that addresses civility and professionalism; the introduction of civility requirements in some state courts in the United States; and lawyers policing their peers and calling out incivility, including more mentoring for younger lawyers by senior practitioners.

Most recently, a panel discussion in Kentucky discussed 'The Breakdown of Civility in Political Discourse – What Does it Mean for the Legal Profession'. The panel addressed the ways that politicians could learn from lawyers who have been discussing civility for over 30 years, as well as the relationship between civility in law and in politics.

This issue is of such import to the American Bar that there is a taskforce within the ABA dispute resolution section dedicated to addressing civility issues. It has also released a model continuing legal education program for state and local Bar associations, recently releasing a discussion guide to provoke conversation and dialogue.

Reflect before you react

As mentioned, Queensland's solicitors on the whole are great role models for those entering the profession in terms of their level of civility. Also, in Queensland we are fortunate to have many magistrates and judges who exemplify professionalism and set a positive standard for practitioners.

We have training and guidance available for Queensland solicitors through our QLS Ethics Centre. The centre aims to equip lawyers with the information and tools they require to act ethically at all times, as well as educating the community on legal ethics. Services such as the QLS Senior Counsellor program also assist in providing a 'phone a friend' service to lawyers who have an ethical or professional query.

I encourage practitioners to go one step further and mentor younger solicitors and those who have an interest in law. By connecting with the next generation, we can instil in them some of the traditional values and standards of a tried and true profession. The key to maintaining civility and collegiality in the profession is to not only reflect before you react, but also to remain connected.

I challenge you to take the time to reflect upon your role in the justice system and the wider community from time to time. It is very easy to get caught up in the day-to-day tasks and to put aside the whole-picture view.

I also encourage you to find ways that you can engage with colleagues, your community, your Society and the wider profession. We are always learning and we can always teach others something new, or reaffirm their thoughts and practices. Civility is something we should all be able to expect from our colleagues. Our profession is known for its high ethical standards and so we must continue this into the future. I applaud you all for setting a high standard.

Queensland State Budget

Last month the Queensland Government handed down its 2018 Budget. We have wrapped up the justice system offerings in the news section of this month's edition. We were pleased to see a handful of allocations in the justice arena, including commitments to domestic and family violence, child protection, prosecutions and detention centres. However, we were disappointed to see a lack of funding for our court system including judicial appointments. It appears we are putting more money into the start and end of our justice system – police and detention – but nothing for the middle part of the process.

I hope to see more commitments to our courts in the future, as this is a pillar of our justice system and ensures that justice is served adequately and fairly in our state.

Ken Taylor
Queensland Law Society president

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2018 Legal Profession Breakfast

Supporting Women's Legal Service

Thursday 15 November

7-9am | Brisbane City Hall

Tickets are on sale for this anticipated annual event. Keynote addresses will be provided by Danny Blay, violence prevention trainer and policy advisor, and Rebecca Poulson, award winning author and domestic violence prevention campaigner.

All proceeds from the event support the free legal and welfare help Women's Legal Service provides to Queensland women and their children who experience domestic violence.

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#WeToo

Are we ready for this?

As the entertainment industry continues to deal with accusations and allegations of sexual harassment, it becomes increasingly obvious that this purgative process is likely to extend through the spectrum of industries and, indeed, professions.

The legal profession will not be immune, and already there are indications of significant change. In the United States, the New York City Bar ran 'Sexual Harassment & the Law: A Call to Action for Lawyers in the Era of #MeToo', while journalist Tracey Spicer told a Law Institute of Victoria luncheon that cases of sexual harassment were rife in the law.

Perhaps the strongest catalyst for change has come from the New Zealand Law Society whose president, Kathryn Beck, has written to members with the results of their survey following claims of sexual harassment.

She has described the results as "nothing short of disgraceful".

"As a profession, we must be ashamed and embarrassed at what our people have told us," she wrote. "I am also deeply saddened at the situation we are in and I am sure many members of our profession will feel the same."

The results included:

- Nearly one third of female lawyers have been sexually harassed during their working life; 17% in the last five years.
- Two-thirds of lawyers who have personally experienced sexual harassment described experiencing some form of unwanted physical contact.
- 12% of sexually harassed lawyers formally reported or made a complaint about the harassment.
- 52% of lawyers have been bullied at some time in their working life.
- 61% of lawyers who have been bullied at some time in their working life say the experience affected their emotional or mental wellbeing.
- 42% of those bullied say they resigned from their job or it affected their career prospects.
- 29% of all lawyers and 40% of lawyers under 30 believe major changes are needed to their workplace culture.

Full survey results at lawsociety.org.nz.

Ms Beck said the results indicated "a serious and systemic cultural problem in our profession".

"We are failing to keep our people safe, we are compromising their human rights and we are failing to treat all people with respect and consideration for the concepts of justice and equality," she said.

Do you have more to contribute to this conversation?

Email me at ceo@qls.com.au to share your stories and insight into how your organisation is dealing with this issue.

The NZ survey prompts us to ask whether we are doing enough to ensure that we work in healthy and safe work environments. Over the last 10 years I have been part of and seen the significant work undertaken in our industry on culture, particularly in many aspects of diversity and inclusion and gender equality.

I know that many legal firms, corporates and government bodies are leaders in areas of inclusion in the workplace focusing on, amongst other things, gender, ethnicity, sexual orientation, age and disability. Many have citations as employers of choice from the Workplace Gender and Equality Agency.

From my experience, I would postulate that the amount of awareness raising, training and support resources we have invested to deal with stress, wellbeing and mental health is at global best practice levels. But culture change is complex work and old patterns of behaviour and unhealthy ways of interacting and working still exist, and we know that notwithstanding our great progress, we still have serious work to do in this area.

The legal implications for both employees and employers are clear. In the *Australian Solicitors Conduct Rules 2012* (ASCR), Rule 42 specifically states that a solicitor must not, in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying.

Breaches of state or federal law in this area can lead to a complaint to the Legal Services Commission. (Under the proposed revision of the ASCR, the term 'sexual harassment' may be shortened to 'harassment' to ensure it includes non-sexual harassment.)

The formal process for the resolution of harassment and bullying claims is also clear. The Anti-Discrimination Commission Queensland deals with complaints made under the *Anti-Discrimination Act 1991* (Qld), including sexual harassment.

Initiatives like LawCare are ready to lend counselling and other assistance to both victims and perpetrators, but we need to change the way we work so that this behaviour is no longer acceptable.

It is up to us as individuals (and in particular those in management or supervisory roles) to reflect on the ways in which we work to ensure that we create healthy, safe and sustainable workplaces. We must not be bystanders; we must be available to assist those who report instances of wrongdoing. There is still a stigma of not reporting poor behaviour for fear of consequences. This has to change.

It comes back to how we interact as individuals, and that is a direct segue to our president's column this month and his comments on civility and its critical role within the profession. I commend it to you.

Rolf Moses
Queensland Law Society CEO

ADVOCATING FOR GOOD LAW

QLS regularly engages with policy-makers on behalf of members and the broader profession. Here we share some highlights from 2017/18* of the work undertaken as we advocate for good law.

153
QLS Policy committee meetings

133
Stakeholder engagements

176
Legal policy submissions

18
Parliamentary public hearings

*Figures from 1 July 2017 to 1 June 2018.

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Trust account investigations

S263 of the *Legal Profession Act 2007*

Queensland Law Society trust account investigators have observed a growing number of law practices operating without a law practice trust account.

There appears to be a belief that the absence of such a trust account immunises the law practice from a trust account investigation, but this is not so.

The Society undertakes investigations of the affairs of all law practices in Queensland, including those law practices that do not operate trust bank accounts. In accordance with Section 263(5) of the *Legal Profession Act 2007* (the Act), an investigation of the affairs of a law practice is a *trust account investigation*. The 'affairs' of a law practice are defined in Schedule 2 of the Act as:

a. all accounts and records required under a relevant law to be kept by the practice or an associate or former associate of the practice
b. other records of the practice or an associate or former associate of the practice
c. any transaction—
    i. to which the practice or an associate or former associate of the practice was or is a party, or
    ii. in which the practice or an associate or former associate of the practice has acted for a party.

Just because a law practice does not operate a law practice trust account does not mean that law practice does not receive or hold trust money. Examples of trust money – often found on investigation to be deposited to the general account by law practices without a trust account – include unpaid or unexpended outlays, deposited funds prior to the issue of a bill of costs or funds deposited without authority.

These trust monies should be dealt with in accordance with the Act; deposited in a law practice trust account and dealt with accordingly. A law practice receiving trust money into its general account is considered a significant breach of the Act (Sections 248 and 257).

A Section 263 investigation, if there is no trust account, usually takes one day and reviews the law practice's general or office account to ensure that general trust monies have not been incorrectly received by the law practice. There may be instances in which a law practice does not operate a general trust account but may operate controlled money accounts or power money accounts (client bank accounts to which a law practice associate is a signatory). The investigation would review any such accounts and supporting documentation, as well as a sample of client files, which are selected after reviewing the accounts.

The examination of general account records and sample of client files will conclude in a written report, whether matters have been conducted in accordance with clients' instructions and whether trust moneys have been properly dealt with. A copy of the report is sent to the law practice for comment. The report addresses breaches of the Act and Regulations.

An investigation report which identifies significant breaches will conclude an unsatisfactory result. The report and subsequent correspondence is referred to the Society's Professional Conduct Committee (PCC) for consideration.

There are a number of possible resolutions that could be made by the PCC:

a. a follow-up Section 263 investigation to be undertaken after three, six or 12 months
b. a request that the law practice's sole practitioner, managing director or ILP director undertake additional training on trust accounting
c. a request that the law practice reimburses the costs of the current investigation to the Society
d. referral of the matter to the Legal Services Commissioner for his consideration.

In light of the above, a law practice, as part of its risk management processes, should implement procedures to ensure all trust money is properly identified and accounted for.

Lifting the lid on elder abuse

Queensland Law Society marked the United Nations' World Elder Abuse Awareness Day with a call to lift the lid on elder abuse in Australia and raise awareness, education and reporting.

"Elder abuse is widespread and includes all forms of abuse from physical and emotional to sexual and financial," QLS president Ken Taylor he said. "Those targeted are among our most vulnerable – the elderly – particularly when mental or physical capacity is diminished and they are relying on relatives or carers to take care of them."

Mr Taylor said that there were three areas that needed to be addressed – awareness, education and reporting – by all levels of government and the community.

"A key issue with elder abuse is that there is a real lack of reporting, which means it is often kept silent and not addressed at higher levels," he said. "We need to encourage victims to not only report their abuse but also to understand what is classed as abuse, and that is where further education and awareness comes in.

"With 60% of elder abuse being perpetrated by the person's children, there is a lack of real understanding that they are being abused, as well as a fear for the consequences for their child."

Mr Taylor explained that alongside increasing awareness, education and reporting, was adequate access to legal assistance.

"We must ensure that victims of any type of abuse have access to legal assistance in their local area, should they require it," he said.

"Many elderly cannot afford independent legal advice from a private practitioner, and so rely on pro bono lawyers, community legal centres and legal aid.

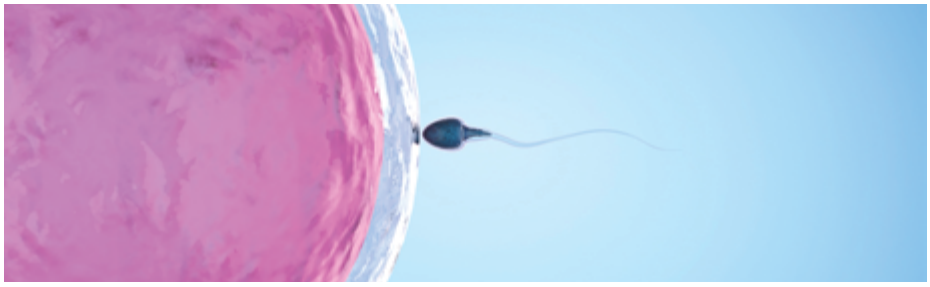
"More funding is required along with easy access to advice, with many barriers including not only finances but also mobility and distance for victims who may no longer be driving themselves or may not have access to technology such as Skype to speak to a solicitor.

"There must be access to justice and assistance at all levels, but for this to happen we must show an increase in reporting to show our governments that this is a widespread, serious problem for Australians."

The United Nations' World Elder Abuse Awareness Day is held each year on 15 June.

Court grants woman right to use deceased partner's sperm

by Tony Keim



A Queensland woman has won a landmark court ruling to become the first person granted the right to use the sperm of a boyfriend who died almost two years ago to start a family.

In the Supreme Court of Queensland on 20 June, Justice Brown granted Ayla Belinda Creswell, 24, of Toowoomba, the go-ahead to use the sperm of her partner of three years, bricklayer Joshua Davies, to commence IVF treatment in the wake of his unexpected death on 24 August 2016.

Ms Creswell was granted permission to remove Mr Davies' sperm within 24 hours of his death after an urgent 4.30am application before Supreme Court Justice Burns.

Justice Brown, in her written decision, said she was satisfied that, as a result of the "work and skill applied" in removing, separating and preserving the sperm, it was capable of being deemed "property".

"The present case arises out of the most tragic of circumstances," her Honour said. "Ms Ayla Cresswell and the deceased, Joshua Davies, had enjoyed a relationship for approximately three years when (he) – without any apparent warning signs or any obvious trigger – took his own life."

Justice Brown said the role of the court was to decide whether Ms Creswell had a right to "possession" of Mr Davies' sperm, removed shortly after his death.

"In making this application, Ms Cresswell has the support of her family and Joshua's family, in particular his father, Mr John Davies, and his mother, Mrs Ione Davies," her Honour said.

"The Court's power to order the removal and use of posthumous sperm has been the subject of uncertainty, particularly because many cases have had to be determined on an urgent basis, to ensure that the sperm is removed and preserved while it is still viable.

"While there is a statutory regime in Queensland for removal of sperm from a deceased person, there is in the present case a question as to whether that applies and whether it was satisfied. There is no statutory regime in Queensland which applies to the use of posthumous sperm.

"There has been no consideration in Queensland of the Court's jurisdiction to make orders as to whether a party is entitled to possess and use any sperm that has been removed. Such a determination depends on whether the sperm can be characterised as property, and if it is, who has rights in relation to that property."

Justice Brown said there were four issues to be determined in this case:

- the legal basis for the removal order made on 24 August 2016 and its present status
- in relation to the sperm that had been removed and whether it was property capable of being possessed
- whether Ms Cresswell had an entitlement to possession and use of the sperm removed from Mr Davies
- if Ms Cresswell did have such an entitlement, how it was affected by discretionary factors which must be considered in determining whether any declaration may be made in Ms Cresswell's favour.

Justice Brown also determined that, while Ms Cresswell should be able to use Mr Davies' reproductive tissue, it would be up to the particular medical clinic storing the sperm to decide if it was satisfied to go ahead with the any future IVF procedure.

"It is apparent from the reasons that this is a complex and developing area of the law," her Honour said.

"There are a number of matters which are unresolved in this area that do not arise for decision in the present case. It may be an area considered appropriate for consideration by a body such as the Law Reform Commission, even though there are a number of issues which are likely to need to be resolved by Parliament."

ALRC seeks input on class actions, litigation funding

The Australian Law Reform Commission (ALRC) has released a discussion paper (DP 85) seeking feedback on its questions and proposals for law and system reform of class action proceedings and third-party litigation funders.

Its terms of reference ask the ALRC to consider whether, and to what extent, class action proceedings and third-party litigation funders should be subject to Commonwealth regulation, and whether there is adequate regulation of conflicts of interest between third-party litigation funders, lawyers and class members; prudential requirements and character requirements of funders; and the proportion of settlement available to be retained by lawyers and litigation funders in class action proceedings.

The discussion paper provides 16 proposals and asks 11 questions that focus on the introduction of regulation appropriate for third-party litigation funders and strengthening the role of the Federal Court to further supervise funded class action proceedings.

It asks whether the introduction of contingency fee billing for solicitors acting in class actions would provide better protection for class members than the current system under which both lawyers and funders receive a proportion of settlement. It also proposes a system for regulatory collective redress, enabling potential class members to recover damages without going through the statutory class action regime.

The discussion paper is available at alrc.gov.au/inquiries/class-action-funding. Submissions are due by 30 July.

QUT team wins at NOOT

A Queensland University of Technology team has taken first place in this year's Administrative Appeals Tribunal (AAT) Negotiating Outcomes on Time (NOOT) competition.

The NOOT replicates the AAT's conciliation processes and is open to teams from Queensland and South Australian universities. It is held over four rounds with teams scored on their written work and negotiation skills.

The winning QUT team was Rhiannon Dudley (reserve), Bianca Stringer and Viktoria Naumova. The coach was Dr Lucy Cradduck.

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Academic prowess earns QLS prize

Some 250 Queensland University of Technology (QUT) students, staff and guests gathered at the 2018 QUT Faculty of Law prize ceremony on 22 May. Queensland Law Society Ethics Centre director Stafford Shepherd presented 2017 academic year joint winners Courtney David, *left*, and Chloe Hogan with the Queensland Law Society Prize for Ethics and the Legal Profession. These prizes were awarded to the students based on exceptional academic performance within the unit. Congratulations to Chloe, Courtney and all the prizewinners on their achievements.

Caxton refines practice name

Caxton Legal Centre has given a new title of 'Human Rights and Civil Law Practice' to what was previously known as the centre's general service.

The name-change recognises the significant human rights focus of the practice, which includes work protecting the rights of people struggling with banking and finance matters, seniors experiencing difficulty with retirement village contracts and individuals at work.

"We're extremely proud of the work our staff and volunteer lawyers do to help vulnerable people and felt that it was appropriate to reflect that in our name," practice team leader and coordinating lawyer Klaire Coles said.

More than 200 volunteer lawyers from private firms, community organisations and government contribute their time assisting Caxton Legal Centre's clients on a regular basis.

The practice encompasses discrimination, employment, parks and villages, consumer protection and coronial services. Services range from social work assistance and one-off legal advice through to major casework.

Staff from Caxton Legal Centre's human rights and civil law practice.

Budget initiatives welcomed, but more needed

On 12 June the Queensland Government handed down its 2018-19 State Budget, including a handful of allocations in the justice arena.

Queensland Law Society president Ken Taylor shared these key items via Facebook Live, noting that not all the profession's areas of concern were addressed.

Prior to each election, the Society releases a Call to Parties document compiled from member and committee feedback to the major political parties. Key items from the 2017 state election Call to Parties document included further funding for legal assistance services, court infrastructure upgrades and updated technology, more judicial appointments at all levels, and an electronic document management system in the courts.

Two other highlighted areas of concern for the profession were addressing elder abuse as well as domestic and family violence. Mr Taylor said he was pleased to see a Federal Government commitment of $22 million for elder abuse initiatives in its Budget and had hoped to see a similar commitment from the State Government. However, no new commitments were made on elder abuse in the State Budget, although funding allocated for domestic and family violence initiatives was welcome.

Inclusions in the 2018-19 Queensland State Budget for the justice system include:

- $5 million for 30 staff in the Office of the Director of Public Prosecutions, and funding for 44 additional staff at the Director of Child Protection Litigation
- $10 million to respond to increased workload in the administration of the Queensland Courts
- an $8.1 million funding boost over four years to expand the specialist Domestic and Family Violence Court in Townsville, including the circuit court in Palm Island and Mt Isa
- funding for the Office of the Public Guardian and Queensland Civil Administrative Tribunal to meet increased workloads associated with the NDIS rollout
- funding to continue the work of the Queensland Sentencing Advisory Council and increased financial support to victims of crime
- $7.2 million over the next three years to implement a new blue card system and streamline the application process to further protect Queensland children
- funding for the Anti-Discrimination Commissioner to support the operation and administration of the Human *Rights Act* for Queensland
- funding to continue the Murri Courts for four years, as well as funding to extend Court Link to Southport, Mount Isa and Ipswich
- $41 million in additional funding to provide a further 84 cells at the Capricornia Correctional Centre
- $10.6 million for additional positions at two Queensland youth detention centres, as well as funding for services and initiatives to reduce the remand of children and young people in custody
- Cleveland Youth Detention Centre to receive 12 new beds and existing work to provide 16 new beds at the Brisbane Youth Detention Centre
- funding for behavioural programs for domestic violence perpetrators, as well as funding to support children and young people in care with complex behaviours
- additional staff in the Office of the Child and Family Solicitor to provide advice to child safety workers on child protection matters
- funding for the expansion of the Supreme Court bail application service to male prisoners as well as funding for the expansion of parole and probation services
- improved service delivery for prisoners with a disability or mental illness
- a final $6.9 million in funding for recommissioning of the Borallon Training and Correctional Centre
- funding for 400 additional police officers across the state and 85 counter-terrorism specialists
- funding for the delivery of recording and transcription services in the Queensland Courts
- $2.5 million for additional review officers at the Office of the Information Commissioner
- $1 million over three years to engage with the community on how traditional Torres Strait Islander child-rearing practices can be recognised in law
- motor vehicle duty increasing by 2% on vehicle transfers above $100,000
- establishment of a Queensland artificial intelligence hub at the Precinct in Fortitude Valley to develop skills and encourage the use of AI in business
- an extension of the 50% payroll tax, rebate to June 2019 for apprentices and trainees' wages
- land tax to increase 0.5% for landholdings with a taxable value above $10 million
- Foreign Acquirer Duty to increase to 7% for land acquisitions.

Mr Taylor said that he appreciated the Government's commitment to justice initiatives and ongoing support of the system in Queensland, but looked forward to seeing further commitments in the future.

He noted that there would be more police officers and more places to put offenders, but as yet no extra funding to put them through the court system. Mr Taylor said that the justice system was nothing without a solid court system with adequate resourcing.

He said the absence of a commitment to increased judicial resourcing would add to the bottleneck in processing matters through the courts and housing accused criminals refused bail pending completion of their matters.

It was appropriate that government spending on justice had increased, but more needs to be done in areas such as funding to ensure access to justice for all Queenslanders, more judicial appointments, and for new initiatives in the area of domestic and family violence and elder abuse.

See **qls.com.au/qldbudget**.

Judges, legal professionals honoured

Several members of the legal community were honoured last month with recognition in the Queen's Birthday Honours list.

President of the Queensland Civil and Administrative Tribunal Justice Martin Daubney, recently retired Townsville District Court judge the Honourable Stuart Durward SC, Judge Michael Shanahan of the District Court and Judge Josephine Willis of the Federal Circuit Court were appointed Members of the Order of Australia.

Queensland Law Society member Terence Newman of Newman Family Law, Cairns, was a recipient of the Order of Australia Medal (OAM) for service to youth and to the law, as was solicitor and academic Iyla Davies for service to education.

QLS congratulates the Queensland legal professionals recognised in this year's Queen's Birthday Honours.

Gold Coast Symposium

On Friday 8 June we welcomed more than 80 practitioners to the 11th Gold Coast Symposium, held at Surfers Paradise Marriott Resort & Spa.

This year's program explored topical issues relevant to local solicitors and the profession at large, including resilience and focus, and the rise and risk of cybercrime.

At the end of the day, delegates networked and celebrated with the recipients of 25-year (Lesley Woodford-Carr and Julie Devery) and 50-year (Lex Bell) membership pins at our special event, 'celebrate, recognise and socialise'. See **qls.com.au** for details about upcoming presentations in your area.

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Proud heritage for new firm

More than 300 guests attended the launch of new Sunshine Coast firm Travis Schultz Law at Pier 33 Mooloolaba on 17 May.

One of the highlights of the evening was the unveiling of a portrait by artist Anna Rubin of Travis' grandfather, Jack O'Brien, an RAAF bomber pilot who survived more than 30 bombing sorties over Europe during World War II.

Travis also revealed that his firm's signature colours – purple and champagne – were chosen from the ribbon on the Distinguished Flying Cross, a medal awarded to his grandfather.

Travis Schultz Law is based in Mooloolaba with offices in Brisbane and on the Gold Coast.

QLS responds on family law reform

On 9 May 2017 the Turnbull Government announced its intention to direct the Australian Law Reform Commission (ALRC) to conduct a comprehensive review into the family law system.

The ALRC will consider reforms necessary to ensure the family law system meets the contemporary needs of families and effectively addresses family violence and child abuse.

On 14 March 2018 the ALRC released the Review of the Family Law System issues paper, based on the terms of reference provided by the Attorney-General. The issues paper sets out 47 questions covering a range of issues currently impacting the family law system.

In response to the issues paper, the Queensland Law Society Family Law Committee, with contributions from the Children's Law, the Reconciliation and First Nations Advancement, Equity and Diversity and Access to Justice/Pro Bono Law committees, made submissions to the ALRC and the Family Law Section of the Law Council of Australia.

The issues paper posed questions on how access and engagement could be improved, particularly for vulnerable and disadvantaged groups. We recommended that a range of strategies be considered to improve the accessibility of the family law system for Aboriginal and Torres Strait Islander people. These included the development of ongoing and culturally safe education programs on the family law system and that the family law courts adopt a structure and protocols similar to Queensland Murri Court for Aboriginal and Torres Strait Islander families.

Importantly, the Society noted that resistance by Aboriginal and Torres Strait Islander people to engagement with the family law system could be the result of the lack of commitment to previous reviews and implementation of recommendations; a historical lack of meaningful consultation and engagement with Aboriginal and Torres Strait Islander communities and organisations; hostile physical environments, policies and legislation, and a lack of Aboriginal and Torres Strait Islander people working within the family law system.

In relation to LGBTIQ individuals and families, we noted that any proposals to improve the accessibility of the family law system for this group must be considered in light of the legacy of the discrimination which, for some people, continues to be felt.

Parentage issues, in particular, disproportionately impact on LGBTIQ people and the current drafting of the *Family Law Act 1975* does not adequately deal with parentage issues for LGBTIQ families. The issue of who may be considered a parent is dealt with differently across various federal and state Acts, and these discrepancies require urgent resolution. In resolving this issue and creating a consistent approach to parentage, the Society supports the implementation of national status of children legislation.

We also highlighted the critical role of legal practitioners in the resolution of family law disputes. Legal practitioners identify relevant issues and assist in providing relevant information to the court. They are also essential in ensuring vulnerable and disadvantaged litigants are properly informed and understand their legal position. Access to legal assistance in the early stages of a dispute can prevent or reduce the escalation of legal problems and reduce cost to the justice system overall.

Sustained cuts to the legal assistance sector, including legal aid, community legal centres and Aboriginal and Torres Strait Islander legal services have impacted the ability of a significant proportion of the community to obtain access to specialist family law advice. We consistently advocate for additional funding to the legal assistance sector as essential to improving accessibility to the family law system and reducing cost to clients.

We also support the simplification of Part VII of the *Family Law Act*, including the current 'legislative pathway'. Critically, amendments should acknowledge diversity in family structures to enable the Act to apply consistently to all children, irrespective of their family structure.

The Society suggested consideration of the proposal set out by Professor Richard Chisholm in 'Rewriting Part VII of the Family Law Act: A modest proposal'.[1] This proposal removes any link between the presumption of parental responsibility and the need for the court to consider a particular care arrangement. Provisions around parenting should not prioritise or favour any particular parenting arrangement, as is currently the case.

As noted by Professor Chisholm, "the paramount consideration principle logically requires that the weight to be given to any considerations depends on their importance for the child in the particular consideration. Giving artificial weight or preference to any particular outcome involves a departure from that fundamental principle."

Similarly, QLS members have expressed the view that presumptions in relation to parental responsibility unreasonably fetter the discretion of the court. Parental responsibility should be a matter for the court to determine in the circumstances of each case, guided by the paramount consideration principle. In some circumstances, ongoing conflict over decision-making in the exercise of equal shared parental responsibility may be more harmful to a child than one parent exercising sole parental responsibility. Further, as noted in the issues paper, the presumption of equal shared parental responsibility has been widely misunderstood as a requirement that children should spend equal amounts of time with each parent.

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by Natalie De Campo and Pip Harvey Ross

The Society acknowledges that children's views are critical to the proper resolution of parenting matters and the rights children have to make their views known and participate in processes relevant to their care. However, the way in which a child's view comes before the court must be carefully managed, under the guidance of appropriately qualified experts who have a sound understanding of post-separation dynamics and the possible consequences of high conflict separation. Crucially, children's views must be heard in a manner that does not further expose children to conflict and burden children with adult responsibilities.

A substantial proportion of matters before the family law courts involve family violence. There is significant scope for improvement in terms of how parties who have experienced family violence can be supported at court. QLS members have expressed support for the implementation of recommendations from the Victorian Royal Commission into family violence, as set out in the issues paper, including:

- safe waiting areas and rooms for co-located service providers
- adequate security staffing and equipment
- separate entry and exit points for applicants and respondents
- private interview rooms for use by registrars and service providers.

Our full submission can be found at qls.com.au > For the profession > Advocacy.

On 30 May 2018 the Attorney-General announced the amalgamation of the Family Court of Australia and the Federal Circuit Court, effective from 1 January 2019. The new Federal Circuit and Family Court of Australia (FCFCA) aims to help families to resolve their disputes faster by providing a consistent pathway for family disputes dealt with through court proceedings.

Queensland Law Society has expressed support for measures that improve and simplify court processes for those engaged in the family law system. The Society supports the view that the existence of two separate courts, with different rules, procedures and processes produces unnecessary complexity and may contribute to delays.

However, the timing of this significant change is curious given the comprehensive review of the family law system currently under way. The ALRC will make recommendations in relation to the range of reforms necessary to ensure the family law system better meets the needs of Australian families. Importantly, these recommendations will be supported by expert advice and a thorough research and consultation process. The introduction of significant structural changes prior to the conclusion of this review may be premature.

The Society supports reforms that have instead been considered in a holistic manner.

Finally, family law is a highly specialised jurisdiction and the determination of family law disputes requires considerable expertise. We support a court system which reflects this. Further, support services currently provided through the family law courts, including family consultants, are crucially important to the system and must be maintained.

The ALRC is due to provide its report to the Government in March next year.

Natalie De Campo is a Queensland Law Society senior policy solicitor and Pip Harvey Ross is an advocacy clerk and coordinator of the QLS RAP.

Note

[1] Professor Richard Chisholm, 'Rewriting Part VII of the Family Law Act: A modest proposal', (2015) 24/3 *Australian Family Lawyer*.

A conversation with Magistrate Payne

‘Doing what’s required, is to do more’

This month it is a sincere pleasure to share with you my conversation with Magistrate Jacqui Payne, whose career to date is an inspiration for us all.

To be the first Indigenous woman admitted as a solicitor in Queensland is a huge milestone in itself, but Magistrate Payne followed that with 14 years of criminal defence work. She started at the Aboriginal & Torres Strait Islanders Corporation (QEA) for Legal Services (later to become the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd) and also ran her own successful practice before becoming a magistrate in 1999, serving in both the Brisbane Magistrates Court and the Murri Court.

And I was very impressed to learn that, while Magistrate Payne was building her career, she also raised six children, an amazing achievement by itself.

Rolf Moses, Magistrate Jacqui Payne and QLS president Ken Taylor.

How did your career in the law start?

I’m a mathematician and scientist at heart. When I was at high school in Gladstone I had to decide my university preferences, and I put down agricultural science. I had no relationship to agriculture, just an interest in science. Before the first round of uni offers came out, I changed it to law.

It was my father’s suggestion that I study law – even if I didn’t go on to work as a lawyer. He grew up in the depression. My father’s family was relatively poor and he had little opportunity to get an education. He knew what we needed most was not material possessions, but an education.

Did you plan your career out, or did it develop more organically?

It’s more happenstance. I never had a career goal or particular outcome in mind, I just take the next step.

You did articles at a private firm, then took your first role as a solicitor with ATSILS. Were there any particular experiences there that became important in formulating your views, values or your approach to working as a lawyer and then as a magistrate?

When I worked at the ATSILS, I only did criminal law. That was a natural fit for me. One of the values that I have from growing up is not that I am for justice but that I am against injustice – they’re different concepts.

We were raised to be offended if there was ever inequality, to be offended if someone didn’t get a fair go, to be offended if there was prejudice or bigotry. That came both from my mother and my father.

I hate injustice and the other thing which is something of a bad news insight as I’ve gotten older is that I like to save and rescue people; that’s a bad thing because not everybody wants to be saved and rescued, but if you‘re against injustice and you have an identity which helps people, then criminal law is a natural fit.

Do you think that your parents’ intolerance for injustice was to protect you and your siblings?

Not at all, although it’s interesting, my sister has just written a chapter in a book called *Growing Up Aborigine.* Her experience was different to mine, but the thing for me about being Aboriginal is that it wasn’t until I was about 13 that it started to dawn on me that I was – because my grandparents and uncle and aunties and cousins were black. I used to be asked a lot about being an Aboriginal lawyer and then as a magistrate to speak publically, and when I was younger I was a no to that.

One of the reasons I was a no is that I didn’t have a ‘poor black fella me’ story. What I got to see as I got older is that there’s not one story. When I grew up my mother used to say to me “never tell anyone your business”. I was never allowed to tell anyone my mother’s maiden name and then I started to join the dots and think that was because my mother was Aboriginal, and because of the racism that she had been subjected to when she was younger, she could avoid that for her and us. She died when I was 22, so I never got to have any adult conversations with her. But I’m told through my sister and cousins that she would have feared that we would be removed from her. She was born at a time of the assimilation policy.

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by Queensland Law Society CEO Rolf Moses

How did the values translate into your role at ATSILS

At ATSILS what I got was a training in criminal law and I also got to see the unfairness in the system. If I wasn't personally subjected to it, when I started working at ATLSILS I got to see unfairness, and the poor relationship between the Aborigines and police. I learnt there that a person's circumstances often dictated their later life outcomes, what is commonly referred to these days as adverse childhood experiences – childhood experiences that made it more likely for individuals to be drug or alcohol addicted, have mental illness, be in the criminal justice system, experience poverty or poor health. I got to see the relationship between being impoverished or adverse childhood experiences and then the consequences, including being caught up in the criminal justice system.

Did you start to formulate in your mind at that point that you could make a greater contribution to dealing with injustice?

No. I was there, and I just did what was required. I could see what was needed, that's all. It wasn't a career trajectory to anywhere or anything. Also, the other thing is that when you look at values or identity I would be a compassionate person so the criminal law and criminal defence work again was a natural fit for me. The joke I actually make myself – even though I'm a judge, I'm about the most non-judgemental person you'd meet.

So what are the difficulties and the challenges you face in your career?

One of my biggest challenges is that I have six children. My oldest son is the son of former clients. I was at ATSILS and was 25. I was going out with a handsome young doctor who was 26, the last thing I planned for was a foster child, but that's what was required, because his needs were greater than mine.

I generally raised my children alone and so there were really long hours as a sole practitioner. I was a mother so I just made it work. When the children were babies they would come with me to work. I got permission from the general managers of the prisons to take one of my daughters on legal visits. You probably wouldn't be allowed to do that now. When I went to court I would have a nanny with me, or one of my secretaries. I'd also have to a second nanny for night time because as you know as a sole practitioner, if you're home by 8pm you're lucky. So really that was the toughest thing. When I got home the nanny didn't stay with me, the nanny left and I had all those kids to raise and care for myself so that was really the biggest challenge. I had five children as a lawyer, my sixth child was born when I was a magistrate. Today I have outstanding children, loving, kind children that I'm proud of.

There was a big guilt industry when I was younger, about mothers working and children in childcare, that's probably not so much anymore. Young women need to give up all of that guilt.

Did you have ambitions to become a magistrate?

It just all happened – I was a criminal defence solicitor, I was at ATSILS. I then did some employed work, but eventually I opened my own law firm and I was principal of that practice for quite a while and at that time the system of judicial appointment was different, there was no application for it.

In terms of trying to find a commonality in your career, has it been a situation that you have a very clear identity in yourself and in what is needed to be done to fight against injustices in all of your roles and, as a result, you performed well, which has led to opportunities?

Yes…that's an eloquent way of saying I just did what was required.

Doing what's required, is to do more. So when I say to do what is required, I don't mean the lowest common denominator of what's required. What's required is a lot. So, I probably have a really high bar for what's required.

Do you think now with all the experience you've had as a magistrate, that you're delivering what's required, are you feeling a sense that you're addressing that fundamental value that you got early in life not to tolerate injustice, is that still driving you?

Absolutely. But I have learnt other lessons along the way. As criminal lawyers we take people's antecedents or personal story. I got to see the relationship between their history and criminal offending. I remember that at the time when they had the detention units at Sir David Longland Correctional Centre, where people were in 23-hour-a-day lockdown, Doctor Wendell Rosevear said to me, "treating people worse does not make them behave better".

The system often treats you worse and that's why concepts such as deterrence are in many circumstances a fiction. There is no specific deterrence or general deterrence for many people who offend, so what I'm interested then is why is it so? The social sciences often occur to me as having a real hit-and-miss as to why humans behave in a certain way, but I believe you can give an explanation why people behave if you have a look at the impact on the brain of adverse childhood experiences.

The good thing is that brain can be retrained so I'd be more interested in prisons having brain training, amongst other things, to address behaviours and deal with trauma.

This seems like a further approach for you to correcting injustice?

When you know what the right thing is to do, you've just got to go and do it.

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Financial agreements – still a good idea?

Thorne and Kennedy
[2017] HCA 49

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The High Court's recent consideration of spousal financial agreements provides practitioners with important guidance on how these may best be produced. Report by **Gavin Lai**.

A financial agreement made pursuant to Parts VIIIA and VIIIAB of the *Family Law Act 1975* (the Act) has been a useful tool, particularly for family law and estate-planning purposes.

Such agreements have enabled spouse parties intending to marry (or enter into a de facto relationship), already married (or in a de facto relationship) or separated, to enter into a private agreement in relation to their property and spousal maintenance affairs upon separation, without the involvement and/or scrutiny of the family law courts.

However, there have been many reported cases[1] in which the validity of a financial agreement has been challenged on account of a failure to properly comply with the strict legal requirements for the preparation and execution of the agreement.

Undoubtedly, this has provided challenges to lawyers in assessing whether it is ultimately in their client's best interests to enter into a financial agreement or not.

The High Court of Australia delivered its landmark decision in *Thorne and Kennedy*[2] on 8 November 2017, whereby a 36-year-old European woman (the wife) successfully fought to overturn a pre-nuptial financial agreement which she signed on the eve of her marriage to a 67-year-old millionaire property developer (the husband).

Brief relevant facts

The husband, a divorcee with three adult children, owned assets worth between $18 million and $24 million, while the wife had no substantial assets and spoke limited English. Seven months after they met, she had moved to Australia to marry him.

Only days before the wedding, a pre-nuptial financial agreement was signed at the husband's insistence. At the time, the wife received independent legal advice that the pre-nuptial financial agreement was "entirely inappropriate", the worst her solicitor had ever seen, and that "she should not sign it".[3] Despite receiving such emphatic legal advice, the wife still signed the pre-nuptial financial agreement. A substantially identical post-nuptial financial agreement was signed by the parties 30 days after the wedding.

Both financial agreements restricted the wife's property settlement claim to $50,000 (CPI adjusted) after three or more years of marriage, an amount the wife's solicitor described as "piteously small".[4] The financial agreements also included terms providing for the wife in the event that the husband died while the parties were living together.

The parties subsequently "divorced in 2011 after three years of marriage".

The wife commenced property settlement proceedings in the Brisbane Registry of the Federal Circuit Court of Australia, seeking a property settlement claim of $1.24 million, including spousal maintenance.

The husband died in 2014 during the court proceedings and his estate continued to prevent the wife's claim for a bigger slice of the husband's estate.

The primary judge's decision

Judge Demack (the primary judge) set aside both financial agreements on the basis that the wife's consent had been negated by way of undue influence or duress (as a form of unconscionable conduct), relying upon the following six factors in reaching this finding:[5]

- the wife's lack of financial equality with the husband
- the wife's lack of permanent status in Australia at the time
- the wife's reliance on the husband for all things
- the wife's emotional connectedness to their relationship and the prospect of motherhood
- the wife's emotional preparation for marriage
- the wife's "publicness" of her upcoming marriage.

The primary judge's decision was subsequently overturned by the Full Court of the Family Court of Australia, finding that the wife's consent had not been affected by undue influence and duress.

The Full Court's decision

The Full Court held that the primary judge's reasons were "inadequate because in the list of the six matters relied upon by the primary judge [as noted above], it was not possible to determine which of the factors were fundamental, and which were subsidiary, to the decision concerning either the first or the second agreement".[6]

The Full Court considered both financial agreements to be "fair and reasonable" because:[7]

- the husband had told the wife at the outset of their relationship, and she had accepted, that his wealth was intended for his children, and
- the wife's interest, which was provided for in the agreements, concerned only the provision that would be made for her in the event the husband predeceased her.

The Full Court was not satisfied that the financial agreements were negated by either undue influence or unconscionable conduct and overturned the primary judge's decision.

The High Court decision

The wife appealed the Full Court's decision and was granted special leave to appeal to the High Court of Australia in March 2017, with the appeal heard in August 2017 and judgment delivered on 8 November 2017.

The High Court upheld the primary judge's decision to set aside the agreements and found that the financial agreements had been entered into by undue influence and unconscionable conduct.

Undue influence

With respect to undue influence, the High Court considered several factors:[8]

- whether the agreement was offered on a basis that it was not subject to negotiation
- the emotional circumstances in which the agreement was entered, including any explicit or implicit threat to end a marriage or to end an engagement
- whether there was any time for careful reflection
- the nature of the parties' relationship
- the relative financial positions of the parties
- the independent legal advice that was received and whether there was time to reflect on that legal advice.

Unconscionable conduct

With respect to unconscionable conduct, the High Court further held that the wife was at a "special disadvantage"[9] when entering both financial agreements, particularly due to the urgency surrounding the signing of both agreements just four days before the wedding and 30 days after the wedding, which the husband was aware of and took advantage of.

The High Court made the following orders:[10]

- appeal allowed
- set aside the orders of the Full Court made on 26 September 2016 and, in their place, order that the appeal to the Full Court be dismissed with costs
- the husband pay the wife's costs of the appeal to the High Court.

The case has now returned to the Federal Circuit Court awaiting judicial determination regarding the wife's application for property settlement and spousal maintenance.

So is a financial agreement still a good idea?

Contrary to some inaccurate and sensationalist media reports about this decision, yes it is, provided the financial agreement is:

- fair and reasonable
- takes into account various potential scenarios that arise during a relationship and post-separation
- there are adequate provisions for the financially-disadvantaged party, and
- both parties each receive independent legal advice, from a suitably-experienced and qualified Australian legal practitioner, as to the effect of the financial agreement and the associated advantages and disadvantages of entering the financial agreement at the time, having regard to that party's individual circumstances (both current and future).

Some practical considerations

While there is no requirement under the Act for the client to receive independent legal advice "in writing," it is generally considered good practice for you, as the legal practitioner, to prudently undertake the following steps:

1. At all client meetings, take detailed file notes and record the client's instructions as clearly and accurately as possible. Such instructions should be unequivocal with respect to what the client wants to achieve with respect to property settlement and/or spousal maintenance matters to be covered in the financial agreement.
2. Draft the financial agreement as precisely as possible to accurately reflect the mutual agreement and intention of the parties.
3. Regularly 'reality-test' the client's instructions and seek written confirmation from the client to confirm the accuracy of your understanding of your client's instructions.
4. Confirm your advice in writing, and preferably in plain English, so that the client understands the legal advice given 'on paper'. Simply attaching a copy of various sections under the Act to a letter of advice to the client is insufficient and not considered good practice. The advice should at the very least, and in compliance with Part VIIIA or Part VIIIAB of the Act (whichever is applicable), cover the effect of the financial agreement on the client's rights and the associated advantages and disadvantages to that client of entering into it (in accordance with the statement of independent legal advice which a solicitor must sign).
5. In addition to the above, your advice should be clear and detailed with respect to any limitations of the financial agreement and whether it covers any material change of circumstances (for example, birth of a child or children, care arrangements for a child/children, party's income-earning capacity, etc.). This is particularly so if you are acting for the 'financially-disadvantaged' party and if your advice to the client in such circumstances is 'don't sign the agreement' (or words to that effect); you should give clear and detailed reasons, preferably in plain English, justifying that advice so that the client can ultimately make an informed and voluntary decision to enter into the financial agreement or not.
6. If your client still wishes to proceed with the draft financial agreement, it is considered good practice for the client to sign:
   a. an irrevocable acknowledgment confirming that your client has received, perused and considered your written advice and that they have been afforded sufficient time to do so, and/or
   b. a deed of indemnity (if you are acting for the 'financially-disadvantaged' party and you have advised your client in those circumstances not to sign the financial agreement but they still want to)

   before you sign the requisite statement of independent legal advice.
7. You should only sign the statement of independent legal advice after *all* amendments have been made to the financial agreement and after your client has received your written advice, including any proposed amendments.

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8. Allow sufficient time at each stage of the financial agreement process, including:
   a. obtaining the client's initial and detailed instructions (with detailed file notes)
   b. providing legal advice to the client in writing
   c. preparing the draft financial agreement if so instructed after (or despite) the giving of such legal advice
   d. arranging for the parties to sign the financial agreement
   e. ensuring that one spouse party has the original agreement and the other spouse party has a copy of the agreement. Preferably, obtaining a certified copy of the agreement (while not mandatory) is considered good practice.
9. It is ultimately up to the client to make an informed and voluntary decision whether or not to enter into the financial agreement. It is the legal practitioner's primary role to provide legal advice to the client so that they can make such a decision. It is not the legal practitioner's role to merely object to drafting or witnessing a financial agreement or to sign the statement of independent legal advice, unless the client's capacity (or lack thereof) is an issue and/or you are not reasonably confident of your own advice (and in that regard, it may be best to seek a second opinion from counsel, if and as necessary).
10. After the agreement is signed by your client, it is considered good practice for you to immediately write to the client confirming the following specific matters:

    "I advise that I provided you with independent legal advice in our letter to you dated DD/MM/YYYY in relation to:

    1. the effect of the agreement on your rights; and
    2. the advantages and disadvantages at the time of you making the agreement.

    This advice referred to above was provided to you before you signed the agreement on DD/MM/YYYY."
11. As a further guide and from a risk management perspective, it is considered good practice to comply with the detailed checklist and helpful protocol with respect to financial agreements issued by Lexon Insurance.[11]

Upon closer consideration, it can be argued that this decision does not change, modify or alter the legislative approach regarding a financial agreement as set out in Part VIIIA and Part VIIIAB of the Act.

Rather, the better view would be that the decision reinforces the above long-standing approach pertaining to both pre-nuptial and post-nuptial financial agreements which legal practitioners should be aware of and thus advise the client accordingly.

For both family law and estate-planning purposes, a financial agreement has been and continues to be a protective and useful tool for spouse parties (whether married or de facto) without the involvement and/or scrutiny of the family law courts.

Gavin Lai is the senior managing solicitor of Emerson Family Law, based in the Brisbane CBD.

Notes

[1] *Black & Black* (2008) FamCAFC 7; *Ruane & Bachman-Ruane* (2009) FamCA 1101; *Pascot & Pascot* (2011) FamCA 945; *Parker & Parker* (2012) FamCAFC 33; *Abrum & Abrum* (2013) FamCA 897; *Hoult and Hoult* (2013) FamCAFC 109; *Logan & Logan* (2013) FamCAFC 151 & *Wallace & Stelzer* [2013] FamCAFC 199.
[2] [2017] HCA 49.
[3] Ibid at 12.
[4] Ibid at 8.
[5] Ibid at 47.
[6] Ibid at 50.
[7] Ibid at 51.
[8] Ibid at 60.
[9] Ibid at 64-65.
[10] Ibid at 67.
[11] lexoninsurance.com.au/login?a=0&l=Managing_your_risk.

A coach's view of negotiation

Two parties are in a dispute over $100,000. After an hour of negotiating, they are $5000 apart.

Each sits across the table, glaring at the other in silence. Neither is willing to make a move. What to do?

To the outsider, there is an obvious middle ground. But there is more here than 'meets the eye' – the parties have already 'split the difference'.

Whether we are trying to help our client get across the line or mediating a difficult dispute, we often reach the point where it seems there is an impasse. We have framed the dispute, set the agenda, discussed the issues, brainstormed and generated options, but then comes the 'conversation killer' – that moment when a party says, "This is getting us nowhere, I want to go to a hearing!" The negotiations threaten to unravel. Your hard work will be for nothing.

Of course, sometimes a matter cannot be settled and a hearing is necessary. But as 'solution providers' (whether as mediators or acting for a party), we also need to be a good negotiation coach. This starts with asking ourselves, 'have negotiations really come to an end or is there another way forward?'

You could do a 'mediator's bid', but have the parties really explored the options themselves? To answer this, you might want to try some other strategies first (allowing you to keep your mediator's bid for the right moment).

To be a good negotiation coach, you need to be ready to test those 'conversation killers'. Below are some common ones, and strategies on how you might approach them.

> "'People generally see what they look for and hear what they listen for."
>
> – Harper Lee, *To Kill a Mockingbird*

"This is going nowhere! Let's go to a hearing."

Ask the party *why* they think this is going nowhere. Even better, have them *tell the other party* why they think this is going nowhere. Invariably, their response will focus on why they believe the other party is being unreasonable. In most cases, this will evoke a response from the other party and regenerate discussions.

If not, you can follow up by asking *why* they believe the other party is being unreasonable. Their response will usually be about the reasonableness of their offer or the unreasonableness of the other party's offer. Either way, it allows the parties to recap and reflect on what got them to their 'impasse' – usually regenerating discussions.

If both parties remain silent – like our hypothetical parties above – consider allowing the silence or giving the parties time alone. Both strategies allow the parties to reflect, while they – and you – consider options and a way forward.

Whether you keep the parties together or break into private session will depend on your own assessment (paying particular attention to non-verbal cues and any heightened emotions). My personal preference is to keep the parties together as long as possible, to maximise their sense of ownership – of the dispute and its resolution.

"I'm leaving. I don't have to put up with this!"

Experienced mediators will be familiar with 'the walkout' and will have developed various methods to deal with it. It may be real or a gambit. Either way, it helps to:

- Acknowledge any emotion or the circumstance preceding the walkout.
- Remind the parties of why they are there.
- Explain the consequences of leaving (cost, risk, stakes increasing, etc.). Remember, the longer things 'drag on', the more likely parties are to become entrenched: "You may never get a better opportunity to settle than you will today with everyone here…").
- Break into private session to explore these themes and underlying reasons. If bringing the parties back together would be counter-productive, consider using yourself as a conduit for further offers ('shuttle negotiations').

"I know I'm right: the contract clearly says it."

Deciding who is right and wrong is what a hearing does. The aim of negotiations is to come to a solution *without* a hearing. While 'right and wrong' may be *a* consideration in negotiations, it is not the only consideration. The aim is to take the party beyond the 'right-wrong' paradigm (positional) into an agreement to address their underlying interests:

- Cases are rarely 'open and shut' and legal positions are rarely 'watertight'. If the contract is that clear, why is the other side here?
- The legal issue may not be the 'dispute driver'. Ask the party to listen to what the other party is saying. People talk about what is *important to them*, even – and especially – in conflicts. At some point, if you listen long enough, the other party will reveal the driver of the dispute. This often has nothing to do with the law.

by Bevan Hughes

- Once you identify the driver, you can tailor a solution to address it – which can be more targeted than traditional legal remedies. (For example, "I worked hard for you and you never once thanked me" transitions to acknowledgment + common understanding = agreement).
- Even if the party is 'right', proving it will cost time, money, lost opportunity and emotion. Is it more important to be 'right' or to come up with a solution to move forward?

"I don't want HIM coming back to fix anything!"

This often comes up in disputes with allegations of poor workmanship. The trader may offer to come back to fix the problem, but the client is hesitant. The relationship is damaged. The trust is broken.

You could try to use conventional 'reality testing' with the client (cost of legal proceedings, etc.). Or you could 'go with it' and convert the issue to time and money (important to, and understood by, everyone) and reframe the solution accordingly. This is attractive to both parties precisely *because the trust is broken.* The client no longer trusts the trader and fears having to re-litigate 'the fix'. Conversely, attempting to fix the problem exposes the trader to more liability.

Ask the client whether they would prefer to spend their time and money on fighting the trader or whether it would be a better use of their resources to fix the problem themselves. Ask the trader whether it really would be cheaper in the long term for them to do the work, compared with a settlement on the basis that they pay a sum in exchange for a release, allowing them to continue working on their other – more profitable – projects.

A bonus is that a time and money settlement (for example, "Trader will pay client $X by 31 December 2016") usually requires less 'legalese' and has less scope for further disputes around interpretation and compliance. This will give the parties clarity, simplicity and finality – always high priorities for clients.

"In the case of *X v Y*, the Honourable Justice Z (as Her Honour then was) held…" (etc., etc.)

A favourite with lawyers...we like to show our clients they are getting value for money. One way we think we might show this is by citing legislation and case law. While this might be appropriate in a hearing, our real value in settlement negotiations and mediations comes from our ability to provide *solutions*.

You might think citing case law generates discussion. While this might be true for the legal scholars among us, for clients it is at best 'what lawyers do' and at worst, excluding, confusing and concerning ("What are they talking about? How much longer is this going to go on? How much is this costing me?").

Case law is used to further a position. Deciding positions is what a hearing does. To negotiate a *solution* – instead of furthering a *position* – you want to generate discussions that target underlying interests. Try to save the case law for the judge.

Because case law entrenches positions, it can be counter-productive to discussions that provide solutions. One strategy to deal with this is to refocus the parties on their underlying interests and the purpose of settlement negotiations:

"We can spend today discussing the law, but you will get an opportunity to discuss the law at a hearing. Today is about trying to come to an agreement to save the time, cost and uncertainty of a hearing. How do you think we might best spend today?"

Of course, there are exceptions and case law may be relevant. For example, disciplinary proceedings and administrative reviews often involve interpretation of statutory provisions and policy. When the parties have differing views on the application of the law or relevant policy, focusing the mediation or negotiations on the relevant provision, policy and supporting case law may well be appropriate. The focus should still be to narrow the dichotomy. Ideally, you will have at least identified the issues in dispute or enabled the parties to have a clearer understanding of alternative positions – saving time and money at the hearing.

In all cases, you should ask yourself, what is the best use of time (and your client's money) in a mediation or settlement conference? You can always exchange authorities and case law by correspondence. Clients appreciate – and are best served by – mediations and settlement conferences that focus on solutions.

Conclusion

Regardless of the strategy you choose, the ultimate aim should be to ensure that the parties have fully explored settlement before they go off to a hearing and incur more cost, stress and risk.

You don't want a client sitting in a hearing thinking back to the day they were at the mediation or settlement conference with the other party and "were only a few thousand dollars apart". Sometimes, the parties are closer to a solution than they (or you) might think and just need some good coaching to help get to it.

Bevan Hughes is a full-time member of the Queensland Civil and Administrative Tribunal. He is a nationally accredited mediator and has mediated over 1000 matters with a 97% settlement rate. The views expressed are those of the author only and are not made on behalf of QCAT.

Investigations under the
Work Health and Safety Act 2011

May I act for more than one person?

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In the second of two articles **Stephen Keim SC** concludes his examination of the risks for practitioners who opt to represent more than one client in investigations of workplace incidents.

The *Work Health and Safety Act 2011* (Qld) (the Act) provides for the regulator[1] to appoint certain public service types[2] as inspectors.[3]

The functions of an inspector include the investigation of contraventions of the Act and assisting in prosecutions of offences.[4]

An inspector may enter a workplace at any time[5] and may enter places other than workplaces when authorised to do so by a warrant.[6] The inspector may require the person who has custody of or access to a document to produce it to the inspector.[7] Importantly, the inspector may require a person at the workplace to answer any questions put to that person by the inspector.[8]

The interviewee (and/or the inspector) may insist that the interview be conducted in private.[9] And, it seems, the interviewee may insist on having a representative present at the interview.[10] 'Representative' is defined to include the workplace health and safety representative for the worker, a union representing the worker, and any other person the worker authorises to represent him or her.[11]

Although no mention is made of solicitors, lawyers or legal representatives, such representation clearly comes within the catch all "any other person authorised by the worker". 'Worker' is defined very broadly and includes contractors and subcontractors, and even work experience students.[12] If the person being interviewed is not a worker, the term representative is not defined but would still clearly include a legal representative.

When a solicitor receives a request to act for multiple persons, including management, workers and the business itself in the investigation of an industrial accident, it may be expected that it will involve sitting in as a representative in interviews conducted pursuant to the inspectors' powers under the Act.[13]

Whatever assurances the solicitor may have received from the employer who is prepared to pay the costs of the solicitor in acting for the different people being interviewed, the potential exists for conflicts of interest to exist between the various participants, at least as acute as those involved in the criminal trial discussed in *part one*, in the scenario.

A solicitor's participation as a worker's representative in an interview is not restricted to the merely passive role of being there to provide emotional support and comfort. The Act acknowledges the right to claim privilege against incrimination.[14] It requires a person required to give information to provide the information notwithstanding the claim of privilege[15] but provides that the information provided may not be used in civil or criminal proceedings against the person providing the information.[16]

It is important, therefore, that a solicitor acting for a person in an interview is able to advise the client when privilege should be claimed. It is obviously only incrimination of the person giving the interview which gives rise to the privilege. It may not be claimed in respect of answers that may tend to incriminate a fellow employee or the employer or a contractor to the employer. The solicitor's advice when to claim privilege should not be influenced by concerns about what the answers may do to his or her other clients. The significance of the answers given to an inspector is such that the solicitor must not be distracted by the circumstances of other clients whose interviews may be yet to come.

From an inspector's point of view, there may be a proper concern that attendance at interviews of lowly employees may be used to prepare management and representatives of the business owner for the questions that they will be asked in their interviews. The privileged position of sitting in on a private interview, in those circumstances, could be subject to misuse to benefit other subjects of the investigation.

In addition to the provisions relating to conflicts of duty in rule 11, the Australian Solicitors Conduct Rules (ASCR) provide that a solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.[17] This paramount duty extends to an investigation or inquiry established or conducted under statute.[18] A solicitor must, therefore, keep in mind not only the juggling of obligations to his or her multiple clients, but also the impact that multiple representation might have on the administration of justice by its impact on the investigation being carried out under the Act.

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A solicitor may be tempted to deal with the potential conflict among the interests of different witnesses, all of whom are likely to be interviewed, by the doctrine of informed consent.[19] The ASCR permits a solicitor to act for more than one person in certain circumstances provided all clients are aware that the solicitor is acting for the others[20] and each client has given informed consent to the solicitor acting for everybody.[21]

It must be kept in mind, however, that the ASCR also provides that, when actual conflict does arise, the solicitor cannot continue to act for everybody and, if issues of information confidentiality are present, may be able to act for no one.[22] The likelihood of actual conflicts arising during an investigation under the Act must be considered in most situations to be quite high. It also must be kept in mind that permission to act for more than one party with informed consent is conditional upon the solicitor being able to discharge his or her duty to act in the interests of each and every client.[23]

The process of the solicitor taking instructions and obtaining documents from the various subjects of an investigation under the Act will, almost certainly and on most occasions, result in the solicitor obtaining information from one client which is confidential to that client but would be of great benefit to another client if it were communicated to that other client. When this occurs, the solicitor cannot be sure of discharging his or her duty to each client to act in that client's best interest. This has been expressed as putting himself or herself in a position where the solicitor could not, as an honest person, discharge the duty to one set of clients without, consciously or unconsciously, availing himself or herself of the information obtained while acting for the other client.[24]

It has been held that a solicitor's loyalty to a client must be undivided and there will be some circumstances in which, notwithstanding full disclosure to each client, it is impossible for any solicitor to act fairly and adequately for both clients.[25]

One should also keep in mind that consent by a lowly worker may not be very informed at the beginning of an investigation into the death of a workmate. The business owner and senior management may be aware of warnings from previous incidents of which the worker is unaware. Even the solicitor may not have been informed of these matters at the time the consent is given to act for the other parties. In those circumstances, what appears to be informed consent to the worker and the solicitor may be given without knowledge of a key circumstance.

A solicitor must also keep in mind the impact to his or her own reputation and that of the firm with which they are associated. Very poor perceptions may be created if a solicitor is seen to be acting in a conflict situation in circumstances in which the costs are being paid by only one of the clients involved.[26] Where things go wrong and one client is seen to have suffered from the arrangement, inferences may be easily drawn by others that the real client, in the solicitor's mind and for whom he or she was really acting, was the client who was writing the cheques.

For all of these reasons, the temptation to help out a client by acting for multiple clients in an investigation of an incident under the Act should be resisted and the request so to act should be refused.

Can I be prevented from acting in a conflict situation?

In most situations, it is for the professional concerned to decide whether an impermissible conflict situation exists which would make it inappropriate for the solicitor to agree to act for multiple parties in any transaction. Guidance is generally able to be obtained from other experienced practitioners simply by approaching them.[27] The Queensland Law Society Ethics Centre[28] provides a service whereby practitioners may seek non-binding ethics rulings on an issue of concern.[29]

Although a personal decision of the lawyer concerned, an error in reading the situation can have consequences in that a failure to comply with the ASCR is capable of constituting unsatisfactory professional conduct or professional misconduct.[30]

Decisions as to whether a solicitor may properly act are, in the first instance, for the practitioner. Nonetheless, an inherent discretion exists to prevent a solicitor from acting in court proceedings in which a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the solicitor not act for a particular party in the proceedings.[31]

The discretion is exceptional and should not be exercised without due weight being given to a party's right to be represented by a lawyer of their choice.[32] In this example, an order to this effect was made when there was a possibility that the solicitor might be called as a witness and his conduct might be called into question such that he was not necessarily impartial as to the way evidence came out.[33]

Applying these principles to investigations under the Act, there may be certain circumstances in which a solicitor who chooses to act for multiple parties could be the subject of a finding that the solicitor's action prejudiced the proper administration of justice. If that were to happen, a judge would have a discretion to order that the solicitor no longer act.

The solicitor and the investigator

An investigation under the Act, as with all investigations, is a dynamic process. The solicitor, especially if he or she is acting for more than one person in the investigation, will learn things as the investigation proceeds and will continue to receive updated instructions from the various clients. These events may throw up conflict and complexities that were not apparent at the time when the solicitor agreed to act for more than one client.

The inspector who conducts the investigation will also impact upon the solicitor's role. Since the inspector is carrying out a statutory function in investigating contraventions of the Act,[34] the inspector has a duty to carry out that function in a conscientious manner and a duty to the administration of justice, more generally.

The inspector's obligation to conduct investigations in a way that is consistent with the objects of the Act may cause the inspector and the solicitor to come into conflict about the solicitor's role in the investigation. While the Act recognises a right of the interviewee to have a representative present at a private interview with an inspector,[35] that right may not extend to having a representative present whose presence, because of an involvement in past and future interviews, is likely to have a detrimental impact upon the administration of justice.

Were this type of issue to arise, the inspector might insist on the interview going ahead with a representative other than the solicitor whose involvement is seen to be detrimental to the investigation and, through it, the administration of justice.[36] If agreement cannot be reached, the impasse may find itself resolved only by an application to the court where the details of the solicitor's potentially conflicting obligations to different clients may be measured against the principles expressed in *Kallinicos v Hunt*[37] and other cases addressing similar problems.[38]

Conclusion

Acting in circumstances of conflict between duties owed to different clients is a matter of concern for legal practitioners[39] at most times.

The likelihood of acute actual conflicts of interest arising is high when a solicitor or firm acts for more than one defendant in criminal proceedings.[40]

The likelihood of actual conflict is also high where a solicitor or firm acts for more than one party in an investigation under the Act. However, the ability to identify the nature of particular conflicts between various people required to answer questions of an inspector may not be clear at an early stage of the

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investigation. For this reason, practitioners are urged to be particularly cautious.

While the decision on whether a practitioner should or should not act in a particular set of circumstances is normally a very personal one for that practitioner, there are circumstances where a court may intervene to prevent a solicitor from so acting.[41] This may occur where the court concludes, applying objective standards, that the administration of justice may be prejudiced.[42]

There are strong reasons, both in the interest of the practitioner and in the interest of others, to avoid acting for multiple parties in investigations under the Act unless there is no possibility of an actual conflict arising. The problem for the practitioner is that that knowledge may only be obtained long after the decision to act for more than one party has been made.

Stephen Keim SC is a Brisbane barrister.

Notes

1 Act, ss152-155.
2 The persons who may be appointed are set out in the Act at s156.
3 Act, s156.
4 Act, s160(e).
5 Act, s163(1).
6 Act, s165(4).
7 Act, s171(1)(b).
8 Act, s171(1)(c).
9 Act, s171(3)(b) and (a).
10 This right is acknowledged by Act, s171(4).
11 The definition is in schedule 5 to the Act.
12 Act, s7(1).
13 Pursuant to the Act, s171(1)(c), (2), (3) and (4).
14 Act, s172.
15 Act, s172(1).
16 Act, s172(2).
17 ASCR, rule 3.
18 ASCR, glossary, definition of 'court', sub-paragraph (f).
19 ASCR, rule 11.3.
20 ASCR, rule 11.3.1.
21 ASCR, rule 11.3.2.
22 ASCR, 11.5.
23 ASCR, rule 11.3.
24 *Rakusen v Ellis* [1912] 1 Ch 831, 936.
25 *Farrington v Rowe, McBride and Partners* (1985) 1 NZLR 83, 90, cited in QLS Ethics Centre, non-binding ruling, McCullough Robertson & WHSQ, 27 June 2014.
26 This potential is reinforced by the duty to the administration of justice in ASCR, rule 3.
27 The Queensland Law Society provides access to an identified pool of senior counsellors. See qls.com.au/Becoming_a_member/Member_benefits/Professional_benefits/QLS_Senior_Counsellors (accessed 22 February 2018).
28 See qls.com.au/knowledge_centre/ethics (accessed 22 February 2018).
29 The process is explained at qls.com.au/Knowledge_centre/Ethics/Non-Binding_Ethics_Rulings/Request_a_Non-Binding_Ethics_Ruling (accessed 22 February 2018).
30 LP Act, s227(2).
31 *Kallinicos v Hunt* (2005) 64 NSWLR 561, [91].
32 *Kallinicos v Hunt* (2005) 64 NSWLR 561, [92].
33 *Kallinicos v Hunt* (2005) 64 NSWLR 561, [89]-[90].
34 Act, s160(e).
35 Act, s171(4).
36 The power to make such a direction has been considered in other statutory contexts. See *Bonan v Hadgkiss* [2006] FCA 1334, [42]-[58] and *Hogan v Australian Crime Commission* [2005] FCA 913.
37 (2005) 64 NSWLR 561.
38 Including *Rakusen v Ellis* [1912] 1 Ch 831 and *Farrington v Rowe, McBride and Partners* (1985) 1 NZLR 83, cited earlier.
39 ASCR, rules 10 and 11.
40 *Pham*, [58]-[61]
41 *Kallinicos v Hunt* (2005) 64 NSWLR 561, [91].
42 *Kallinicos v Hunt* (2005) 64 NSWLR 561, [91].

NAIDOC 2018

Because of Her, We Can!

NAIDOC week, from 8 to 15 July, is a time to celebrate Aboriginal and Torres Strait Islander history, culture and achievements.[1]

It also provides us with an opportunity to recognise the contributions of Aboriginal and Torres Strait Islanders in our country.

Each year, the week is celebrated with a theme and the 2018 theme is 'Because of Her, We Can!' It is an opportunity to recognise, honour and celebrate Aboriginal and Torres Strait Islander women and their contributions to not only Aboriginal and Torres Strait Islander communities but to the broader Australian community.[2]

We thought we would take the opportunity to celebrate some Aboriginal and Torres Strait Islander women who are trailblazers for Aboriginal and Torres Strait Islander participation in the legal profession in Queensland.

Magistrate **Jacqui Payne** has been credited as being the first Aboriginal woman admitted as a solicitor in Queensland, practising in criminal defence for 14 years. In 1999, her Honour then went on to be the first Aboriginal person admitted as a magistrate, presiding over both the Brisbane Magistrates Court and the Murri Court.[3]

Magistrate **Catherine Pirie** has been credited as the first Torres Strait Islander woman admitted to legal practice in Queensland, in 1989. She then went on to be the first Torres Strait Islander to hold a judicial position in 2000.[4]

Barrister **Tammy Williams** was the first Aboriginal woman at the Queensland Bar, in 2002. Tammy is a leading Indigenous and human rights advocate and advisor.[5] In 2015, she co-authored *Not Just Black and White* with her mother, Aunty Lesley Williams, a memoir of two strong Aboriginal women and their determination to make sure history is not forgotten.

Susan Hamilton was the first Torres Strait Islander woman at the Queensland Bar and, in 2013, the first Torres Strait Islander to serve as a barrister in the High Court of Australia.[6] Susan's work on *Akiba on behalf of Torres Strait Regional Seas Claim Group v Commonwealth of Australia (2013)*[7] saw the High Court of Australia award commercial rights for the first time under a native title framework. Susan is a highly respected legal professional, academic and author, and is currently the CEO of the Aboriginal Family Legal Service Southern Queensland. She also sits on the Queensland Reparations Review Panel.[8]

Leah Cameron is a Palawa woman from Tasmania and the owner and principal solicitor of Marrawah Law, Cairns and Brisbane.[9] Marrawah Law is the only Supply Nation-certified Indigenous legal practice in Queensland. In 2016 Leah was awarded the federal Attorney-General's National Indigenous Legal Professional of the Year award in recognition for her achievements to improve justice outcomes for First Nations peoples.[10] Leah was awarded the Queensland Law Society's inaugural First Nations Lawyer

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by Candice Hughes and Bianca Hill-Jarro

of the Year in 2018 for her outstanding contributions and commitment to promotion of justice within her community and beyond.

There is much more that could be written about each of these women and their achievements. Also, there are many more Aboriginal and Torres Strait Islander women forging their own careers as legal professionals, barristers, government legal officers and law academics, all collectively paving the way for the next generation of Aboriginal and Torres Strait Islander female legal professionals.

We encourage you to find out more about NAIDOC Week at **naidoc.org.au** including the history of the week.

Bianca Hill-Jarro is a member of the QLS Reconciliation Action Plan Working Group. Candice Hughes is a member of the QLS Reconciliation Action Plan Working Group and QLS Reconciliation and First Nations Advancement Committee.

Notes

1 NAIDOC, 'NAIDOC Week', naidoc.org.au/about/naidoc-week (accessed 8 June 2018).
2 NAIDOC, '2018 theme', naidoc.org.au/get-involved/2018-theme (accessed 8 June 2018).
3 Australian Women's Archives Project 2016, 'Australian Women Lawyers as Active Citizens: Jacqui Payne', womenaustralia.info/lawyers/biogs/AWE5885b.htm (accessed 8 June 2018).
4 Australian Women's Archives Project 2016, 'Australian Women Lawyers as Active Citizens: Catherine Pirie', womenaustralia.info/lawyers/biogs/AWE5673b.htm (accessed 8 June 2018).
5 Australian Women's Archives Project 2016, 'Australian Women Lawyers as Active Citizens: Tammy Williams', womenaustralia.info/biogs/AWE5575b.htm (accessed 8 June 2018).
6 National Museum Australian, 'Goree: Aboriginal and Torres Strait Islander news from the National Museum of Australia', nma.gov.au/history/aboriginal-torres-strait-islander-cultures-histories/goree/news_items/susan-hamilton-sea-rights (accessed 8 June 2018).
7 250 CLR 209.
8 Aboriginal Family Legal Service Southern Queensland, 'Meet Ms Susan Hamilton', aflssq.org.au/meet-ms-susan-hamilton, (accessed 8 June 2018).
9 Australian Women's Archives Project 2016, 'Australian Women Lawyers as Active Citizens', womenaustralia.info/lawyers/biogs/AWE5666b.htm (accessed 8 June 2018).
10 National Indigenous Times, 'Young Leah scoops A-G's law awards', nit.com.au/leah-scoops-a-gs-law-awards (accessed 8 June 2018).

Statutory exception to the rule against hearsay

Section 1305 *Corporations Act 2001*

A statutory exception to the rule against hearsay is provided by section 1305 of the *Corporations Act 2001* (Cth) (the Act).

Section 1305 of the Act provides:

"Admissibility of books in evidence

A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book."

The section does not permit the admission of documentary hearsay evidence in the possession of a company in any circumstances.

Rather, in order to rely on the section, some important prerequisites must be satisfied, which are plain from the words of the section itself.

In particular:

- The section only applies only to books within the meaning of the Act.
- The section only applies to books which have been kept by the company.
- The book must be "kept by a body corporate under a requirement of" the Act.

Is it a book within the meaning of the Act?

The term 'books' has a wide definition under section 9 of the Act. It includes a register, any other record of information and a document, as well as financial reports or financial records, however compiled, recorded or stored.[1]

Has the book been kept by the company?

Subject to section 1305(2), which is discussed below, there must be evidence that the book has been kept by the company. The fact that the book is in the possession of the company is not enough. A book in the nature of a document or record which is maintained by the company in a systematic or periodic fashion will likely meet this requirement.[2]

Is it a book required to be kept under the Act?

There are a number of provisions in the *Corporations Act* which require books to be kept by bodies corporate.

Before seeking to tender a document pursuant to section 1305, practitioners and courts should satisfy themselves that there is in fact a proper basis under the Act by which the document is "required to be kept". It is not enough merely that the document was in fact kept; there must be a requirement to do so.

Similarly, practitioners who oppose the tender of such documents should carefully examine any claim made by their opponent about the nature of the requirement for the book to be kept.

The most common requirement which is likely to be relied on in support of a tender is section 286 of the Act, which sets out an obligation on companies to keep certain "written financial records".

Section 286 requires that companies keep written financial records that:

a. correctly record and explain its transactions and financial position and performance, and
b. would enable true and fair financial statements to be prepared and audited.

Breach of that provision is an offence. That provides a useful touchstone for practitioners considering the tender of such documents, or opposing it. Would the failure of the company to keep the document have attracted the sanction?

In the seminal decision of *ASIC v Rich*, Austin J explained that the requirement in section 286 related to documents "recording and explaining the company's transactions, financial position or performance and enabling true and fair financial statements to be prepared and audited".[3]

His Honour noted (at [299]) that what was significant in the discussion of the requirement in earlier cases was that "these documents were in fact prepared and kept, in circumstances where the court could infer that they were used as part of the process of recording and explaining, and therefore understanding, the company's transactions, financial position and financial performance and enabling the preparation and auditing of financial statements".

Effect of section 1305(2) of the Act

Section 1305(2) provides that a document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1).

This then begs the question. When does a document purport to be a book kept by a company?

As Austin J explained in *ASIC v Rich*:[4]

"There needs to be something on the face of the document to satisfy this requirement before s1305(2) can operate."

In that case, his Honour distinguished between the examples of a "folder full of invoices received by a company, labelled on its spine with the name of the company and the word 'invoices'" (which were documents purporting to be, or on their face were, a book kept by a body corporate) and "as an example, a document purporting to be a contract of sale, showing on its face no sign of having been retained in the custody of a corporation".

In *Emanual Management Pty Ltd and ors v Foster Brewing Group Ltd and ors* [2003] QSC 205, Chesterman J (as his Honour then was), a party attempted to tender memoranda and file notes as evidence of the truth of their contents and sought to rely upon section 1305 of the Act. This attempt was rejected.

In the reasons, his Honour stated:

"[1481] The grounds for objection are that the documents are hearsay, the maker of the statement was not called as a witness and that the authorship of the documents has not been proved.

[1482] Two of the documents appear to be inter-office memoranda of Thomson Simmons, solicitors for the Emanuel group. Most of the others purport to be telephone attendances by Mr Saint of Thomson Simmons on Mr Brebner, EFG's solicitor.

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by Kylie Downes QC and Mark Steele

[1483] I uphold the objections. …*The documents are not admissible pursuant to s1305 of the Corporations Act. They were not kept by a body corporate under a requirement of the Act nor do they purport to be so*. [*emphasis added*]

[1484] The other document objected to is Exhibit 89 2/118. It is in the same category as the others, being a file note of Mr Saint's. The grounds of objection are the same and I uphold them."

Practitioners seeking to tender a document under section 1305 should ensure that the document was in fact kept by the company (and that can be demonstrated by admissible evidence) or that it purports to have been so kept.

Conclusion

Section 1305 of the Act is not, in truth, an unlimited shortcut to enable documents in a company's possession or control to be tendered as evidence of the truth of their contents. Rather, it is a limited exception to the hearsay rule which enables the tender of a book kept by the company under a requirement of the Act.

If, for some reason, it cannot be demonstrated that a book was, as a matter of fact, kept by the company, reliance may be had on section 1305(2) to the extent that the document purports to be a book kept by a company.

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

Notes

1 It does not include an index or recording made under Subdivision D of Division 5 of Part 6.5.

2 Residues Treatment & Trading Co Ltd v Southern Resources Ltd (1989) 52 SASR 54.

3 (2005) 216 ALR 320 at [298].

4 At [255].

Right of entry dispute just a 'storm in a teacup'

Is a social visit to a site a breach of entry?

The Federal Court has rejected the Australian Building and Construction Commission (ABCC) application for breaches of the *Fair Work Act 2009* (Cth) (FWA) when two union officials had a cup of tea with a friend at a worksite in June 2014.[1]

Relevant facts

Accused union officials Mark Travers and Adam Hall attended a Melbourne building site operated by McConnell Dowell to see their friend and labourer Rod Duggan, who was also the Construction, Forestry, Maritime, Mining and Energy Union (CFMEU) shop steward. The trio spoke about recent holidays and four-wheel driving over a cup of tea in the lunchroom for about 20 minutes before the project manager, Luke Naughton, ordered the union officials to leave, threatening police action.

Under instruction from the operations manager, David White, Mr Naughton understood that the union officials did not have a right to be on the site as they had not given the 24 hours' notice required for union visits under s487 of the FWA. The union officials explained they did not have to provide 24 hours' notice as they were there in a social capacity and advised they would leave in five minutes.

Before this particular visit, McDonnell Dowell had not required the union officials to provide formal notice when visiting the site, given the good working relationship between the parties. However, the company had recently failed to comply with right of entry provisions at another site and had implemented new policies to prevent the risk of an exclusion sanction from the Fair Work Building Commission – the ABCC's predecessor.

This was the first visit by union officials without notice since the introduction of the new policies, so the operations manager was admittedly "jumpy about the situation" given the strict new procedures and recent refresher training.

When the union officials refused to leave, the project manager left the lunchroom to obtain further instructions from the operations manager, who again advised him to instruct the union officials to leave and to call the police if they refused. The project manager returned to the lunchroom, the union officials still refused to leave and the project manager called the police.

As per union practice, the union officials remained on site until the police arrived. While waiting, Mr Travers called the operations manager to discuss the situation and allegedly threatened that "if you call the police, you will be starting a war and we will deal with you like we have with Kane Constructions".[2] About 25 minutes later, the police arrived, took some personal details and left.

Section 500—exercising right of entry for the purpose of holding discussions

The ABCC alleged contraventions of the FWA's s500 by both officials. This provides that:

"A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner."

For the s500 allegations to succeed, the ABCC needed to establish that the union officials were exercising a right of entry "for the purpose of holding discussions" with an employee under s484 of the FWA:

"A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF workers:

a. who perform work on the premises; and
b. whose industrial interests the permit holder's organisation is entitled to represent; and
c. who wish to participate in those discussions."

Following a review of the evidence, Justice North found that because the union officials went on to site to pay a social visit to Mr Duggan over a cup of tea, no inference could be drawn that the union officials were on site for the purpose of discussing work issues. This conclusion stemmed in part from his Honour's finding that there were no safety or industrial issues at the site either before or after the visit.

Regardless of his Honour's findings, the ABCC submitted that s484 of the FWA was not limited to discussions about work and encompassed an entry by permit holders solely for the purpose of social discussions with workers on site. The ABCC further argued that failure to accept this construction would allow permit holders to avoid the operation of the FWA right of entry provisions and thereby create uncertainty for employers.

Following a review of the context of s484 and Part 3-4 of the FWA more generally, Justice North noted that the discussions referred to are those between a permit holder and a person who performs work on the site, and therefore must relate to the work performed and the representational role of the permit holder. In making this conclusion, his Honour noted that the circumstances surrounding an exercise of right of entry powers will commonly identify the purpose of the discussions without much room for debate and that the occupiers of sites are sufficiently protected by the laws of trespass.

Section 348—threatening action against another person to engage in industrial activity

The ABCC also alleged a breach of s348 by Mr Travers, which provides that:

"A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity."

The s348 allegation related to Mr Travers' alleged comments to the operations manager ("police involvement would start a war"). However, following a review of the evidence from Mr Travers and the operations manager, his Honour found there were no circumstances from which an inference could be drawn that supported one version over the other. Consequently, Justice North could not find that the ABCC had established, on the balance of probabilities, that the words had been said.

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Andrew Ross and **Matthew Giles** look at the ramifications of union officials visiting a worksite for a cup of tea and a social catch-up without notice.

Potential ramifications

Given the threat of an exclusion sanction from the ABCC, employers have taken a more rigorous approach to perceived breaches of the FWA, and the *Code for the Tendering and Performance of Building Work 2016*. However, this decision may cause employers to think twice before acting to remedy any perceived breaches and notifying the ABCC.

In particular, it will be of interest to see whether union officials will seek to enter sites under this same exemption, noting the peculiar circumstances of this case, and whether employers subsequently respond by taking action for trespass, noting the lack of protection under the FWA.

Justice North was particularly critical of the ABCC following the outcome of this case, having said that this was "just a really ordinary situation that amounts to virtually nothing",[3] and he didn't know what the inspectorate was doing engaging silk and conducting days of hearings over "such a miniscule, insignificant affair".[4]

It will be interesting to see whether this decision has any impact upon the appetite of the ABCC to prosecute, following the appointment of the new ABCC Commissioner, Stephen McBurney, and some recent success in both the Federal Court and the High Court.[5]

At the time of writing, Andrew Ross was a senior associate and Matthew Giles was a lawyer at Sparke Helmore Lawyers. The authors gratefully acknowledge the assistance of Lachlan Thomas in the preparation of this article.

Notes

1 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case)* [2018] FCA 402, [21].

2 *The Cup of Tea Case* [2018] FCA 402, [38].

3 afr.com/news/policy/industrial-relations/judge-turns-on-abcc-for-wasting-time-over-cup-of-tea-cfmeu-incident-20170311-guw6aw.

4 Ibid.

5 See, for example, *Australian Building and Construction Commissioner v Ingham (No.2) (The Enoggera Barracks Case)* [2018] FCA 263; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3.

What's new with CaseLaw

with Supreme Court Librarian David Bratchford

Over the last 12 months we have made significant enhancements to our IT infrastructure and systems to help us better support your legal information needs and improve access to our collections and services.

Last month we replaced the content management system (CMS) that underpins the library website and migrated our existing website content to it.

Now that we are confident that the foundation of our website is stable, robust and secure, we can begin developing improved site functionality and creating a better online experience for our visitors. Stay tuned over the coming months for details of new and improved website features.

In the process of upgrading the CMS we also made some immediate improvements to the CaseLaw database and resolved some known issues with its search functionality.

Subscribe to our new CaseLaw RSS feeds

You can now receive personalised alerts about recent decisions from Queensland courts and tribunals with our CaseLaw RSS feeds. Tailor your feed for specific courts or tribunals, and choose from civil or criminal cases, or both.

For help using RSS feeds and to subscribe to the CaseLaw feeds, visit **sclqld.org.au/caselaw**.

New CaseLaw collections

In addition to enhancing CaseLaw technology and systems, we also recently expanded the collection with the addition of:

- pre-trial rulings for the Supreme and District Courts of Queensland
- historical decisions of the former Land and Resources Tribunal.

Pre-trial rulings are judgments occasionally handed down by judges prior to a criminal or civil trial. They cover issues that commonly arise during the pre-trial process, and often involve analysis and determination of legal issues which form useful legal precedent for similar subsequent matters.

The pre-trial rulings collection includes publicly available rulings for criminal matters, as determined by the presiding judge, for the following courts:

- Queensland Supreme Court Trial Division (QSC)
  - **sclqld.org.au/caselaw/QSC**
  - Medium neutral citation: QSCPR
- Queensland District Court (QDC)
  - **sclqld.org.au/caselaw/QDC**
  - Medium neutral citation: QDCPR

The Land and Resources Tribunal (QLRT) was abolished in 2007 and its jurisdiction transferred to the Land Court of Queensland (QLC). The historical QLRT collection is now available via CaseLaw, giving you free access to over 1000 tribunal decisions from 2000 to 2007.

Making these collections publicly available is a significant addition to our CaseLaw content, improving access to Queensland unreported judgments and facilitating better legal research outcomes.

Our thanks go to Justice Helen Bowskill, Judge Catherine Muir and Land Court President Fleur Kingham for the key parts they played in making these projects possible.

Feedback and enquiries

We would love to hear what you think about the new CaseLaw features and collections, or how we can improve CaseLaw in the future.

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Probate, proof and probity

Who may declare the validity of a will?

with Christine Smyth

Only a court can declare the validity of a will.

Dispute compromises generally involve and bind only the parties to the dispute and they frequently involve commercial expedience. As such, the compromised agreement does not necessarily align with the evidence.

However, parties to a dispute about the validity of a will cannot compromise the validity of a will of their own accord. The reason for this is that: "Subject to limited exceptions, the Will is a binding determination at large, it cannot be 'gainsaid' even by another court."[1]

The most recent recitation of this principle comes from the decision of *McKeown v Harris & Anor*; *In the Will of Patricia Margaret Rice* [2018] QSC 87 (*McKeown*).

The deceased, Patricia Rice (Patricia), died on 28 July 2015, aged 95. She did not have any near survivors. By her will, dated 31 May 2004, she appointed as her executors Ernest Hanson, who predeceased her, and Mary McKeon, her niece (Mary). Patricia had a relatively small estate consisting mainly of a property called 'Golmoy', worth about $600,000, which ultimately had to be sold with the proceeds falling into residue.

Mary filed for a grant of probate of the will and submitted with it a signed handwritten note by the deceased, some of which was illegible. The note was dated December 2013 and referred to making a gift to Janelle Harris (Janelle).

Janelle and Timothy Harris (Timothy) filed a caveat against the grant and then a notice in support. Mary then filed a statement of claim seeking a grant in solemn form. Janelle with Timothy counter-claimed, asserting the handwritten note was an informal will, in which it was claimed 'Golmoy' was left to Janelle. In addition, they claimed the estate was estopped from asserting ownership and that they were the beneficial owners of 'Golmoy'. Mary claimed equitable compensation from the respondents.[2]

As is often the case with estate matters, the complexities of the legal issues bore no alignment to the value of the estate. In this matter the evidence included at least one affidavit exhibiting some 2433 pages of documents.[3] The court observed that, in itself, would require a trial of more than a week.[4]

> "I had an inheritance
> from my father,
> It was the moon
> and the sun.
> And though I roam
> all over the world,
> The spending of
> it's never done."
> – Ernest Hemingway,
> *For Whom the Bell Tolls*,
> chapter five.

It was plain to all that the legal issues in the matter outweighed the economics of pursuit and so the parties reached a compromise which was subsequently documented on 14 March 2018.

Nevertheless, the court was bound to make a determination on the validity of the will and the informal will, and proceeded to analyse the evidence, observing that Janelle and Timothy no longer pressed for the informal will:

"[T]he respondents no longer contend for the admission of the handwritten document to probate under s18 of the *Succession Act 1981* (Qld). No evidence has been led as to the circumstances in which the hand written document came into existence from which it may be reasonably concluded that the document embodied the testatrix's testamentary intentions and that the testatrix intended it, without more, to operate as a Will. The requirements of s18 of the *Succession Act 1981* (Qld) as explained in *Sadleir v Kahler & Ors* and *Lindsay v McGrath* have not been met. The document is in part unintelligible."[5] (*footnotes omitted*)

The court went on to analyse the law and process of compromising probate proceedings.

In summary, through this decision and its predecessors the following propositions can be identified:

- Probate is not a rubber-stamp exercise.[6]
- Through seeking a grant of representation, the parties are calling on the court to make the determination.
- In the probate jurisdiction, the court adopts an inquisitorial role, not an adversarial role.[7]
- This means the court has greater responsibilities of supervision and control of the proceedings.
- If parties seek for a compromise of an action that involves statements about the validity of a will to be approved or sanctioned by the court, the court cannot declare the document to be valid when the evidence does not support such validity.[8]

Christine Smyth is immediate past president of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, QLS Specialist Accreditation Board, the Proctor Editorial Committee, STEP, and an associate member of the Tax Institute.

Notes

1 *McKeown v Harris & Anor*; *In the Will of Patricia Margaret Rice* [2018] QSC 87, at [13] citing Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate*, 20th ed. (2015) at p564 [40-02].
2 At [6].
3 At [9].
4 At [10].
5 At [21].
6 *Lando v Sutton* [2013] QSC 339.
7 At [17] citing *Sholl in Re Levy (deceased) (No No.2)* [1957] VR 662 at 665 also see, *Re Montalto* [2016] VSC 266 citing *Re Fuld* [1965] P 405, 409F–411B; *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 (16 July 2014) [264] (Lindsay J).
8 *Lando v Sutton* [2013] QSC 339 per Philipides J at [5].

Opposing the self-represented litigant

Tips for early career lawyers

The ability to properly and effectively manage disputes involving a self-represented litigant (SRL) is beneficial to all parties and assists in resolving disputes before they become too lengthy and costly.

There are many ways in which early career lawyers can ease the burden for their senior authors and clients. Assistance available from Queensland Law Society includes 'Self-represented Litigants: Guidelines for solicitors', released in November 2017 (the QLS guidelines), and the QLS Ethics Centre's 'Guidance Statement No.9 – Dealing with Self-represented Litigants', released in December 2017 (the guidance statement). Some of the top tips from these publications include:

Communication is key

Communication is twofold, in that it is key not only with your client but also with the SRL.

It is important that your client is conditioned when opposing a SRL. You need to communicate and pre-empt complications which may arise and how they may affect your clients' case, and their budget.

Clients who have never opposed SRLs before may not be aware of the increase in resources and time, and the differing attitude of the courts. This discussion should occur early to avoid any issues along the way. The QLS guidelines and the guidance statement both note that, as a legal practitioner, you need to bear in mind your costs disclosure obligations in accordance with the *Legal Profession Act 2007* (Qld), including your obligation to warn of any changes to the cost estimate.[1]

In practice, it is appropriate and recommended that you update costs estimates, and do so often. A good time is following a directions hearing, or the provision of a pleading. Both these occasions will allow you to provide an updated, accurate cost estimate for your client.

In addition, an 'SRL buffer' amount included in the estimate may be appropriate when the SRL is unfamiliar with court processes and procedures, or has in the past been difficult to deal with. This will assist in preventing unwanted surprises at billing time.

Communication with the SRL is equally important and will assist in minimising issues as your matter progresses. The QLS guidelines and the guidance statement both suggest setting parameters with the SRL early on and, importantly, confirming that:

- they are not represented
- you act for your client and in their best interests
- your communications with them are not confidential and may be communicated to your client and the court (the exception being settlement negotiations), and
- they should seek independent legal advice as soon as possible.[2]

Ensure that all communications are clear and easily understood to avoid any misconceptions. Tone is also critical in these circumstances, and bear in mind that the usual language and tone you would use with an opposing solicitor may not be appropriate.[3]

Managing difficult behaviours

Most experienced practitioners will be able to tell you a story about dealing with a difficult SRL, and I have personally had my fair share. However, it is all about managing expectations and maintaining strong boundaries.

The first step should always be setting strong boundaries in the initial communication (as noted above). Be clear in your role and your obligations to your client. You will often find that the court and the SRL may rely on you to guide the process, however you need to be aware of your obligations to your client and the grey area you may find yourself in if some advice creeps into your communications.

If the SRL is particularly difficult, it may be appropriate to establish within your team a communication protocol. This will assist in ensuring that the SRL has a clear line of contact and that communication will not be missed.

In some instances the SRL may display some hostility towards you, particularly in court. Bear in mind that you are the face that the SRL sees and therefore may be subject to their frustrations. SRLs have a significant amount of personal interest in their matters and emotions are often running high, not to mention that court is a scary and unfamiliar process for those who have not been exposed to it. Ensure you maintain your professionalism and remember your duty to your client and the court.

When possible, it is also beneficial to get the court involved early. For example, the Supreme Court of Queensland has a dedicated supervised case list involving self-represented parties in Brisbane which assists in effectively managing disputes with SRLs. The purpose of the supervised case list involving self-represented parties is to ensure cases are properly prepared for trial, reduce the cost of litigation and minimise the risk and cost of a trial being adjourned.[4]

Regular directions hearings can assist in progressing the matter, holding the SRL accountable and avoiding inappropriate or unprofessional behaviour on behalf of the SRL. For more information on the supervised case list involving self-represented parties, consult Practice Direction 10 of 2014.

Cement your settlement

Reaching a settlement is likely to be the most cost-effective and quickest way to resolve a dispute with a SRL. Settlement negotiations with SRLs can be quite lengthy and it is important you ensure that any settlement is 'rock solid' and that any settlement deed can be used to prevent further proceedings against your client.

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Early career lawyers will find themselves facing self-represented litigants sooner rather than later. **Lidia Vicca** advises on the guidance available and suggests how it can make a difference for you and your client when you encounter a self-represented litigant.

The QLS guidelines advise that settlement negotiations can be hindered when a SRL party may misunderstand the settlement process and why offers are being made.[5] The QLS guidelines recommend that you should clearly explain to the SRL what you are doing when making offers of settlement and the reasons why a settlement offer is being made. Ensure that terms of the offer are clearly outlined and in particular the obligations on the SRL should a settlement be reached.

A SRL may take a settlement offer as an admission of liability and likely success, which is incorrect. This is also an appropriate time to recommend that the SRL seek independent legal advice as to the settlement. This may assist should any disputes on the interpretation of the deed arise in the future.

These tips are just a few ways to navigate matters when opposing SRLs. It is important to consult with more experienced practitioners and get their guidance on specific situations. However, by putting your best foot forward you will be in a position to efficiently resolve your clients' disputes and display your proactive skills when opposing SRLs.

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@awbale.com.au). Lidia Vicca is a senior commercial litigation lawyer at Clayton Utz.

Notes

1 ss308, 315 *Legal Profession Act 2007* (Qld).

2 Queensland Law Society, 'Self-represented Litigants: Guidelines for solicitors', November 2017, page 5; Queensland Law Society Ethics Centre, 'Guidance Statement No.9 – Dealing with Self-represented Litigants', 11 December 2017, paragraph 4.2.

3 Queensland Law Society, 'Self-represented Litigants: Guidelines for solicitors', November 2017, page 6.

4 Practice Direction Number 10 of 2014, 'Supervised Case List involving Self Represented Parties: Civil Jurisdiction Brisbane', Supreme Court of Queensland, paragraph 3.1.

5 Queensland Law Society, 'Self-represented Litigants: Guidelines for solicitors', November 2017, page 9.

Legal design thinking

Can it put the human back into law?

by Erika Ly, The Legal Forecast

There is immense curiosity in the concept of 'design thinking' in innovation literature.

Yet, for a phrase so ubiquitous, it is often misunderstood by lawyers. In practice, design thinking can be a useful framework for learning and change when it is undertaken with an understanding of its goals.

However, if hastily implemented with an incomplete understanding of its principles, especially in new professional contexts such as the legal industry, design thinking risks losing its long-standing credibility and being labeled as mere hype.

What is design?

Design is a notion that is rooted in the ideals of 19th Century Romanticism.[1] It is often confused with mere creativity and misconceived as a form of aesthetics associated with creative fancy. While it is true that creativity is seminal to design, design is actually a more comprehensive notion that spans beyond the artistic and creative professions.

The word 'design' first appeared in the Oxford Dictionary in 1588, defined as "a plan or scheme devised by a person for something that is to be realised."[2] As distinguished from art, eminent architect Christopher Alexander defines design as a rational process that displays "new physical order [and] organisation, form, in response to function".[3]

Speaking in the age of mass production, design theorist Victor Papanek's well-known definition of design is as a powerful tool "with which man shapes his tools and environments (and, by extension, society and himself)".[4]

Most importantly, design enables us to create conditions and systems that facilitate human interactions. It is perhaps the most pervasive means through which humans "*intervene*, directly and indirectly, in the lives of other humans".[5] Design is a general concept that canvasses the planning of interactions between people and technology, or products which serve as platforms for experiences or service offerings.

The notion of design as 'a way of thinking' can be traced back to Herbert Simon's book, *The Sciences of The Artificial*.[6] Further, the development of 'design thinking' processes originated in the engineering schools of the 1960s and 1970s which sought to apply a 'scientific method' to problem-solving.[7]

Since then, multiple models and methods have emerged and design process methodologies are well-covered elsewhere;[8] that said, the accepted methodology of design thinking can be stated to be:

- problem/frame → empathise/interpret → ideate/concept → produce/develop → evaluate/feedback.

While this appears to be a linear process, design thinking is an iterative process that grounds itself empirically. Design solutions take several cycles to adapt, amend and refine. It seldom takes the form of a single flash of inspiration: James Dyson created 5126 iterations of a wind tunnel design; Thomas Edison experimented with over 1000 designs of the light-bulb; the Wright brothers tested some 200 wing designs before coming to a solution – it is clear that design is an overwhelmingly iterative process.[9]

Legal thinking and legal design

In contrast to design thinking, a lawyer's mindset is one that seeks to break down facts, identify legal issues and find conclusions. While this skill is essential to our profession, *legal-service designers* are preoccupied with a genuine need to understand users and their needs as they progress through the experience.

Taking a design-thinking approach means learning to inhabit and adopt a creative, interdisciplinary, collaborative and experimental mindset, one which is wholly counterintuitive to how lawyers are trained.[10]

More importantly, design solutions follow a process to find solutions which may come as a combination of business, engineering, and architecture solutions – not strictly one that limits itself to a single discipline, like law. Design solutions situate problems in broader context focusing on the user. As Charles Eames once remarked, a good designer "is that of a good, thoughtful host anticipating the needs of his guests".[11]

Importantly, design focuses on humans rather than on organisations. It situates the user – us, as humans – at the heart of everything. The reason for this is a universal understanding held by all designers – the fact that every product or service will ultimately be used by a human.

Conclusion

Despite all its methods and processes, at the heart of design thinking, and where its immense value as a cognitive framework for lawyers is, lies a skill that is underappreciated in legal education: empathy.

This is the crucial differentiator between good and great design thinkers, and the crucial differentiator between lawyers and design thinkers. Ultimately, design thinking for lawyers as a method for innovation provides an opportunity for lawyers to play with creative thinking, learn new mindsets and methodologies, be exposed to working with others in different fields to generate solutions, and most crucially to refocus and put what is important back into the legal system – that is, to put the human back into the law.

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

Notes

1 Harold Nelson and Erik Stolterman, *The Design Way: Intentional Change in an Unpredictable World*, MIT Press 2012, 13.

2 Ibid.

3 Christopher Alexander, *Notes on the Synthesis of Form*, Harvard University Press 1964.

4 Victor Papanek, *Design for the Real World*, Pantheon Books 1971, ix.

5 Keith Murphy, 'Design and Anthropology' (2016), 45 *Annual Review Anthropology* 433, 435.

6 Herbert Simon, *Sciences of the Artificial*, MIT Press 1968.

7 Cal Swann, 'Action Research and the Practice of Design' (2002), 18 *MIT Design Issues,* 49, 50.

8 Among others, see Nigel Cross, 'A History of Design Methodology' in Marc de Vries et al. (eds) *Design Methodology and Relationships with Science,* Kluwer 1993, 15-27

9 Piyush Tantia, 'The New Science of Designing for Humans' (2017), 15 Stanford Innovation Review 29.

10 Margaret Hagan, 'Design Thinking and Law: A Perfect Match' (2014), *Law Practice Today*. Available at: americanbar.org/content/newsletter/publications/law_practice_today_home/lptarchives/2014/january14/designthinkingandlaw.html.

11 Charles Eames, 'Charles and Ray Eames', hermanmiller.com/designers/eames.

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Volunteering in retirement

Solicitors learn how to manage deadlines and demands in the course of their careers, but when it comes to retirement, solicitors can find themselves with not enough to do.

As they have also accumulated insights into human nature, social and corporate structures, politics and government, their withdrawal from a working life can be a withdrawal from mental stimulation.

Dan Pennicott, *right*, retired from Gadens in June 2016 after more than 33 years of distinguished practice (including 31 years as a partner) and commenced volunteering two days per week at LawRight. LawRight staff members appreciate his calm and comprehensive input into a range of matters and feel inspired by his generous donation of time. However, Dan maintains: "I gain at least as much from my involvement at LawRight as I give."

LawRight asked Dan...

How do you help at LawRight?

Dan*:* My volunteer role includes providing review, advice and assistance to LawRight staff members on issues as they arise in day-to-day practice across the various service groups, with particular emphasis on the Self Representation Service in the state courts and Queensland Civil and Administrative Tribunal (QCAT). I have assessed prospects and assisted self-represented litigants in matters such as:

- an application to the High Court for special leave to appeal a decision of the Federal Court upholding the rejection of a protection visa
- defending a claim for monies owing under a commercial agreement
- a father who, following the death of his son, wished to resist a demand by his daughter-in-law that he vacate a property registered in her name
- claims under the Australian Consumer Law regarding the supply of equipment that did not comply with the guarantees set out in that legislation
- claims for breach of contract and breach of trust
- a parentage application by an adult male under the Queensland *Status of Children Act*
- advice around capacity and enduring powers of attorney

- appeal to the QCAT Appeal Tribunal around residential tenancy issues
- matters arising under the Queensland *Guardianship and Administration Act*.

I have also assisted LawRight to draft a guide for family members of a deceased person regarding the processes which operate in a coronial inquest, and advised them on internal administration issues such as workplace health and safety procedures, conflicts of interest policy and general tenancy issues.

Why do you do it?

Dan: Whilst I was happy to retire from the commercial practice of the law, I was mindful that the skills acquired over years in practice could be put to use to advance the interests of people who sometimes do not have the access to justice which many of my clients over the years were able to take for granted. Volunteering at LawRight has given me the opportunity to continue to enjoy the practice of the law without the stresses of commercial practice and in circumstances where my contribution is hopefully of benefit. [LawRight: It is of great benefit, as you can see from Dan's previous answer!]

What have you learnt?

Dan: The commitment of the people [at LawRight] is a constant reminder to me that our justice system should be available to all – not just those who have the financial and personal capacities to access it.

Article contributed by LawRight.

Coping with leisure

In his book *In Praise of Idleness*, Bertrand Russell advocated a four-hour working day so that workers could enjoy life and leisure activities without the weariness of a long working week.

This approach would permit an easier transition to retirement; however Russell's radical sanity has not eventuated for the vast majority of people. Most retirees are faced with a sudden rush of time and greater freedom and control over their day.

In *The Pleasures of Leisure,* Robert Dessaix values idleness, but it can be difficult to master without feelings of 'guilt'. Having sufficient purposeful activities might offset those concerns.

For the Dalai Lama, the meaning of life is to be "happy and useful".

How to contribute

Volunteering at a community legal centre (CLC) is an excellent strategy to exercise professional skills and still make a contribution.

Free volunteer practising certificates are available if a solicitor volunteers at a CLC. There are also many tasks which don't require a certificate, such as providing general advice to young solicitors, mentoring and even administration.

With funding cuts, many CLCs are struggling to meet demand and senior volunteers can help without sacrificing their leisure. Above all, the skills and expertise of an experienced lawyer can be used by CLC lawyers to benefit highly disadvantaged clients.

There is no doubt that you can balance your leisure and your usefulness through volunteering at CLCs like LawRight.

LawRight is a community legal centre created by the legal profession to increase access to justice for vulnerable people through strategic partnerships with pro bono lawyers. See **lawright.org.au**

Court confirms de facto status of 'couple'

with Robert Glade-Wright

Property – de facto thresholds – evidence that parties 'presented as a couple' meaningless – bald denial without contrary evidence also inadequate

In *Crick & Bennett* [2018] FamCAFC 68 (13 April 2018) the Full Court (Ainslie-Wallace, Aldridge & Watts JJ) dismissed Mr Crick's appeal against Judge Tonkin's declaration that a de facto relationship existed while he lived in Ms Bennett's home from 2001 to 2014. He argued that, despite having a child in 2003, they had lived apart under one roof since 2004, never acquiring any joint property nor operating any joint account.

The Full Court said (at [9]-[10]):

"…[O]n many occasions the respondent gave evidence that the parties went out to particular events where they 'presented as a couple'. The appellant simply denied that they did so. …[T]he evidence does not add to those bald descriptions and denials to give any indication of what actually occurred at these events. It is difficult to understand what is meant by the phrase 'presented as a couple'. If it meant that the parties arrived at a function or event together and left together, then the phrase adds little to the evidence…already before the Court. If it is intended to suggest something else…it is not clear to us what that might be.

The appellant accepted that the parties attended many family, social and school events with the child but denied that when they were at these events the parties presented as a couple. He did not set out any facts or circumstances that could illuminate his assertion and, as with the respondent's evidence along similar lines, it is impossible to attribute any probative weight to that evidence."

The Full Court continued (from [64]):

"The appellant submitted that the notion of a 'couple', of itself, is not a relevant consideration for the purposes of s4AA(2).

[65] That is not entirely correct. The ultimate task of the court is to determine whether the parties had 'a relationship as a couple living together on a genuine domestic basis' (s4AA(1)(c)). The concept of a couple is thus part of the test. How that test is met is determined by the considerations required by s4AA(2). None of those directly refers to 'couple'. It is here that care needs to be taken not to add a gloss to the words of the section…

[66] …[T]he primary judge rejected many, but importantly not all, references to 'presenting as a couple'…on the ground that they were conclusions (…we assume by this that her Honour rejected th[at] evidence because it had no probative value – see *Britt & Britt* (2017) FLC 93-764 at 77,105–77,107). (…)

[69] Shorn of the gloss of 'presenting as a couple', it is clear that the primary judge found that between 2002 and 2013 the parties attended many social and family events and school functions with the child. These events included family Christmases and birthdays…at the home of the parties [and] the homes of other relatives. The parties…visited the respondent's sister (almost weekly) over the summer…

[70] This was significant evidence of the public aspects of the…relationship and supported a finding that there was a de facto relationship. If the appellant wished to contend that the parties' conduct at those events led to a different conclusion then it was incumbent on him to adduce evidence to support that proposition."

Property – escort agreed to move interstate with former client if he bought her a house – gift or loan

In *Higgins* [2018] FamCA 243 (15 February 2018) an escort (respondent) and her client (applicant) married after associating for some years but never living together. Each lived with a de facto partner and the respondent had a daughter. Meeting in 2006, the applicant was 64, the respondent 31. She was charging $275 per hour or $1500 overnight for her services until late 2007 when the applicant began supporting her and her daughter.

The respondent said ([34]) that she was to provide the applicant with "companionship" in return, although she continued working as an escort until 2010, saying ([36]) that she considered "repulsive" some things about the applicant. In 2010 she agreed to move from Brisbane to Melbourne if he bought her a house. He intended to live in a house near hers upon selling his business. He bought a house in her name for $1.1m structured as a loan from his company, PPL. She signed a loan acknowledgment.

The parties married in 2012 (still not cohabiting) but "separated" in 2015. PPL sued to recover the loan, the respondent seeking a declaration that the property was hers. She also sought maintenance.

Cronin J said (from [41]):

"The respondent claimed that she was spending time with the applicant and as a consequence, made 'sacrifices' and 'endured' his behaviour because of his earlier statement that he would buy her a house. That endurance included talking with him each night that she was away from him and reassuring him of her interest in him by replying to his text or email messages. She bought him gifts but with his credit card. Throughout these periods apart, the respondent continued to live with her partner and daughter…[which] was always known to the applicant. As such, it defies logic to say that this was anything other than a commercial arrangement except with friendship considerations thrown in.

[42] (…) The applicant was besotted with the respondent and generous because she fulfilled his needs. (…)

[48] (…) [T]he applicant agreed [to buy a house in her name] and then said he would also buy a home for himself near [her] so that they could 'see each other regularly'. That is… what happened."

As to the loan acknowledgment, the court (at [134]) cited *Israel v Foreshore Properties Pty Ltd (in liq)* (1980) 30 ALR 631 where it was held that "[w]hether a contractual relationship arises depends 'upon all the circumstances' so [that] all of what occurred is relevant". The court said (from [141]):

"The applicant wanted the respondent close by to continue an arrangement which suited them both and…the conversations until at least after settlement were [about] a gift because otherwise the respondent would not have come to Melbourne. (…)

[147] …I find that…the funds of PPL…needed to be documented for tax effective purposes."

Cronin J said ([180]) that unconscionability could not arise either "because the applicant got what he bargained for", concluding ([212]) that "it would not be just and equitable to alter the respondent's interest in her house".

Her application for maintenance was dismissed and she was ordered to repay $180,000 paid as an interim property settlement.

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High Court and Federal Court casenotes

with Andrew Yuile and Dan Star QC

High Court

Constitutional law – citizenship – Section 44(i)

In *Re Gallagher* [2018] HCA 17 (9 May 2018) the High Court held that Senator Katy Gallagher had been ineligible when she stood for election as a Senator in May 2016. Section 44(i) of the Constitution provides that a person shall be incapable of being chosen as a Senator or Member of the House of Representatives if they are a "subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power". In *Re Canavan* [2017] HCA 45 the High Court accepted that the s44(i) rule is subject to a qualification – a "constitutional imperative" – that the "Australian citizen not be irremediably prevented by foreign law from participation in representative government". The qualification applies where the person has taken all steps reasonably required by the foreign law to renounce their foreign citizenship. Senator Gallagher was a citizen by descent of the United Kingdom. Relevant papers and payment details were received by the UK Home Office on 26 April 2016. The fee was paid on 6 May 2016. On 31 May 2016, Ms Gallagher lodged her nomination for the Senate. On 20 July 2016, the Home Office sought from her additional documents, which were provided. On 2 August 2016, Ms Gallagher was returned as a Senator for the ACT. On 16 August 2016, her renunciation was registered by the Home Office. Senator Gallagher argued in the High Court that she did not cease to be a foreign citizen before her nomination because of matters beyond her control, which were an irremediable impediment to her participation in the 2016 election. The constitutional imperative was therefore engaged. The High Court held that the impediment must be a result of the foreign law itself. In this case, there was no aspect of UK law that prevented denunciation. It was only ever a question of timing. The "exception is not engaged by a foreign law which presents an obstacle to a particular individual being able to nominate". Accordingly, Senator Gallagher was not capable of being chosen as a Senator. Her seat was to be filled by a special count of the ballot papers. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly. Gageler J and Edelman J separately concurring. Answers given to questions referred.

Criminal law – appeal against conviction – prior inconsistent statement – application of 'proviso' without notice

In *Collins v The Queen* [2018] HCA 18 (9 May 2018) the court found that the court below erred in deciding, without notice, that no substantial miscarriage of justice had occurred (the proviso) notwithstanding error in the trial. The appellant was convicted of several sexual offences, including rape. At the trial, the complainant's mother gave evidence that the complainant had told her she had been raped. The complainant gave similar evidence of what she had said. In cross-examination, the mother conceded that at the committal (seven years earlier), her evidence had been that the complainant told her she "may have been raped" and that she had been drinking wine and didn't remember everything. The mother also accepted that her memory from the committal was her best recollection and better than her memory at trial. The jury was instructed that they could use the account from committal in assessing the mother's credibility and reliability, but the committal evidence was not evidence of what had been said. On appeal, the Court of Appeal found that the jury had been misdirected: the mother had adopted her evidence from the committal, and so it was evidence of what had been said. It could be used in assessing credibility of the complainant's evidence. Nonetheless, the Court of Appeal held that the proviso applied and dismissed the appeal. The court took that view notwithstanding a concession by the prosecutor that the proviso did not apply, and without allowing the appellant to be heard on the point. The High Court held that whether there had been a substantial miscarriage of justice "calls for a judgment upon which the parties are entitled to be heard". The court was not bound by the prosecution's concession, but was obliged to give the appellant a chance to be heard. The High Court also rejected a notice of contention of the Crown, asserting that there had been no misdirection. Last, the High Court considered for itself the proviso. The court held that the mother's earlier account, if accepted, was capable of affecting the jury's consideration. It was not possible to conclude that no substantial miscarriage of justice had occurred. Kiefel CJ, Bell, Keane and Gordon JJ jointly; Edelman J separately concurring. Appeal from the Court of Appeal (Qld) allowed.

Administrative law – appeal from Supreme Court of Nauru – migration

In *DWN027 v The Republic of Nauru* [2018] HCA 20 (16 May 2018) the High Court dismissed an appeal from the Nauru Supreme Court. The appellant applied for recognition as a refugee or a person owed complementary protection. His claim was made on the basis of fear of harm in Pakistan from the Taliban. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. The Refugee Status Tribunal (RST) affirmed the refusal on the basis that the appellant could relocate to a different part of Pakistan. The Supreme Court dismissed an appeal. On appeal to the High Court, the appellant argued that the RST erred in its consideration of complementary protection by taking into account a relocation test when such a test was not part of the law of Nauru; by failing to consider integers said to be relevant to reasonable relocation; and by failing to give primary consideration to the best interests of his children. On relocation, the court reiterated its holding from *CRI026 v Republic of Nauru* about the applicability of a reasonable relocation test. The court also held that the RST had not failed to take into account the integers claimed by the appellant. Last, the court held that it was unnecessary to consider whether the RST was bound to take into account the best interests of the child, because the appellant had not argued before the RST that this factor had to be considered, and also had put forward no persuasive evidence of the adverse impact on his child of refusal of the claim. Kiefel CJ, Gageler and Nettle JJ jointly. Appeal from the Supreme Court (Nauru) dismissed.

Administrative law – appeal from Supreme Court of Nauru – migration

In *EMP144 v The Republic of Nauru* [2018] HCA 21 (16 May 2018) the High Court dismissed an appeal from the Nauru Supreme Court. The appellant applied for recognition as a refugee or a person owed complementary protection. His claim was made on the basis of fear of harm in Nepal by reason of his political views. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. The Refugee Status Tribunal affirmed the refusal. It accepted that the appellant had suffered serious harm in the past and that he might again in the future in his home area, but it found that the appellant could relocate to a different part of Nepal. The Supreme Court dismissed an appeal. On appeal to the High Court, the appellant argued that the RST erred in its consideration of complementary protection by applying a reasonable relocation test when there is no such test in Nauruan law; by failing to alert the appellant to the fact that the relocation issue might be determinative; by failing to consider reasons the appellant gave for why he could not relocate; and failing to understand country information about Nauruan citizenship law. On relocation, the court reiterated its holding from *CRI026 v Republic of Nauru* about the applicability of a reasonable relocation test. The court further held that the RST had considered all the relevant relocation information. The appellant's representatives had also been on notice of the relocation issue and its significance from the outset. The court further held that the RST had not failed to take into account the relevant information, and had not misunderstood the country information. Kiefel CJ, Gageler and Nettle JJ jointly. Appeal from the Supreme Court (Nauru) dismissed.

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Federal Court

Corporations law – ASIC's BBSW case against Westpac

In *Australian Securities and Investments Commission v Westpac Banking Corporation (No.2)* [2018] FCA 751 (24 May 2018) Beach J gave his reasons for judgment on the liability phase of the contested trial between the regulator (ASIC) and Westpac Banking Corporation (Westpac). The case concerned Westpac's trading over the period 6 April 2010 to 6 June 2012 in 'Prime Bank Bills' in the 'Bank Bill Market', allegedly to influence the setting of the Bank Bill Swap Reference Rate (BBSW) (all terms defined in the extensive glossary at the end of the judgment).

ASIC's claims were summarised at [4]:

"(a) first, as contraventions of ss1041A and 1041B of the *Corporations Act 2001* (Cth) (the Corporations Act) involving market manipulation, market rigging and creating a false or misleading appearance with respect to the relevant market(s);

(b) second, as contraventions of ss12CA, 12CB and 12CC of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act), involving unconscionable conduct;

(c) third, as contraventions of s1041H of the Corporations Act and ss12DA, 12DB and 12DF of the ASIC Act, involving misleading or deceptive conduct and misrepresentation; and

(d) fourth, as contraventions of s912A of the Corporations Act, involving various breaches of Westpac's financial services licensee obligations."

The court held that ASIC had not made out its case against Westpac under ss1041A and 1041B of the Corporations Act concerning market manipulation or market rigging (that is, claim (a)): see summary at [24] and [2535].

However, the court did find that Westpac engaged in unconscionable conduct under s12CC of the ASIC Act (as in force prior to 1 January 2012) on four occasions by trading 'Prime Bank Bills' in the 'Bank Bill Market' with the dominant purpose of influencing yields and where BBSW set (that is, claim (c)): see summary at [26] and [2536].

Further, the court concluded that by reason of inadequate procedures and training, Westpac contravened its financial services licensee obligations under s912A(1) of the Corporations Act (that is, claim (d)): see summary at [27] and [2537].

All other claims of ASIC were dismissed (at [2539]).

Evidence law – privilege – whether bulletin document from class action lawyers to client class members protected by legal professional privilege and whether any privilege waived by its dissemination outside class members on WhatsApp

In *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2018] FCA 760 (28 May 2018) the court determined a dispute about legal professional privilege (LPP) in the context of two class actions proceedings. The disputed document was a bulletin (Bulletin 12) sent by the solicitors for applicant Levitt Robinson Solicitors (Levitt Robinson), to class members who retained the firm (client class members). One of the client class members subsequently disseminated the bulletin to a WhatsApp messaging group made up of franchisees and "interested parties", some of whom were Levitt Robinson's clients in the class actions and some of whom were not. An unidentified 7-Eleven franchisee who was not a client of Levitt Robinson provided the bulletin to 7-Eleven. By an interlocutory application, 7-Eleven sought a finding that Bulletin 12 was misleading or deceptive and orders directing Levitt Robinson to send a corrective notice to class members. The applicant objected to Bulletin 12 being relied upon on the basis that LPP applied.

The court (Murphy J) held that Bulletin 12 was a privileged document pursuant to s118 of the *Evidence Act 1995* (Cth) because it was a confidential document and/or communication between Levitt Robinson and that firm's clients (at [20]-[29]) for the dominant purpose of Levitt Robinson providing legal advice to those clients (at [30]-[39]).

Further, the court held the privilege was jointly held by those client class members to whom Levitt Robinson sent Bulletin 12 and the joint privilege was not waived by the unilateral act of one of those persons in sending the document to a WhatsApp group which included persons who were not Levitt Robinson's clients (at [44]-[64]). Murphy J noted that the common law position was that disclosure by one holder of joint privilege would not be sufficient to destroy the privilege for the remaining joint privilege holders (at [47]). Murphy J did not think that was anything to indicate that the legislature intended to modify the common law position as regards waiver of joint privilege, and the extrinsic material instead indicated an intent to more closely align waiver under s122 of the *Evidence Act 1995* with the common law position (at [50]). His Honour held at [64]:

"As joint clients of Levitt Robinson the client class members to whom Bulletin 12 was sent by that firm jointly hold the privilege in that communication, and they do so 'against the rest of the world'. Generally speaking, privilege must be waived by each privilege holder before it is lost: *Farrow* at 608; *MMI* at [41]; *Ampolex* 413. I am not persuaded that an unidentified class member's unilateral act in disseminating the bulletin to a WhatsApp messaging group, in all the circumstances and contrary to express warnings not to do so, is inconsistent with Davaria and other client class members objecting to 7-Eleven adducing the bulletin as evidence."

Finally, the court held that LPP was not waived through letters sent by Levitt Robinson to soliciors for 7-Eleven in relation to Bulletin 12, as those letters were not inconsistent with the applicant and the client class members maintaining a claim for privilege (at [65]-[74]).

Practice and procedure – bias – application to disqualify case managing judge on grounds of apprehended bias

In *Akiba on behalf of the Torres Straight Regional Sea Claim v State of Queensland* [2018] FCA 772 (29 May 2018) the court (Mortimer J) refused the application of the Torres Straight Regional Authority (TSRA) that the proceeding and a number of other native title proceedings be transferred to another judge of the Federal Court. The basis of the application was that Mortimer J should disqualify herself for apprehended bias.

The recusal application was not focused on a reasonable apprehension that the judge might not decide the claim for native title on its merits, being the controversy or matter with which the proceeding was concerned. The TSRA's principal objection was to having the judge having any involvement at all in the proceeding (and the other proceedings) in a case management role (at [23]). Mortimer J explained at [45]:

"...this application is premature, insofar as it might relate to any trial of the Part B Sea Claim, whether as to the whole, or as to a particular substantive issue. First, there may never be a trial if the matter is determined by consent. Second, the allocation of a trial judge is a matter for the National Operations Registry in conjunction with the Chief Justice, and any allocation will occur only if the matter is ready, or close to ready, for hearing. Third, any substantive interlocutory dispute will also be referred to the National Operations Registry for allocation. Accordingly, this application must be treated as one where the TSRA seeks that I disqualify myself from engaging in any case management of this proceeding, and the other six proceedings identified in the interlocutory application. The parties informed the Court they could not refer the Court to any authorities on apprehended bias which have arisen in a comparable situation. However, I have assumed in favour of the TSRA that an application for disqualification can be made in relation to case management functions. It seems to me in principle that is likely to be correct as during case management there are still contested matters which can arise, such as costs and minor contested interlocutory issues on procedure."

The court discussed the applicable principles for apprehended bias at [46]-[78]. Mortimer J proceeded on the basis that the approach binding her as a single judge was set out in *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 at [35]–[36] (Allsop CJ, Kenny and Griffiths JJ), and *Zaburoni v Minister for Immigration and Border Protection* [2017] FCAFC 205 at [62]-[63](Griffiths, Moshinsky and Bromwich JJ).

Following a detailed consideration of the many matters relied upon by TSRA to give rise to apprehended bias, the application was dismissed.

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Court of Appeal judgments

1 to 31 May 2018

with Bruce Godfrey

Civil appeals

Bell v Brisbane City Council & Ors [2018] QCA 84, 4 May 2018

Application for Leave *Planning and Environment Court Act* – where the second respondent sought and obtained approval from the first respondent for a material change of use to develop the former Australian Broadcasting Commission site at Toowong for residential use – where the proposed development is three towers that each significantly exceed the relevant height restrictions in the applicable planning scheme – where the applicant lives on adjoining land and made a submission about the development application to the first respondent – where the applicant's case is that the proposed development does not comply with the planning scheme – where the Planning and Environment Court concluded that there were sufficient grounds, in the public interest, to justify the decision to approve the proposed development despite the conflict with the planning scheme – where the application for approval required an 'impact assessment' under the *Sustainable Planning Act 2009* (Qld) (SPA), so that it had to be assessed against the planning scheme – where the question here was whether there was both a community need and an economic need 'for the development', an expression which unambiguously refers to the particular development which is being assessed – where the question arises in the context of the height of the development being inconsistent with community expectations for the relevant precinct, sub-precinct or site – where consequently, the question must be answered by reference to a development of this height – where the judge observed that this site had been unused for a decade – where he referred to the "disbenefit" to the community in that respect – where his Honour did not consider whether a development had to be of this height to satisfy community and economic needs – where his Honour said that there would be "an economic and community disbenefit if efficient development were to be refused with the consequence of the site remaining vacant until what might be regarded as a 'perfect' development can be achieved, whatever that might be." – where the question was not whether there was a need for some development of the site, nor was the question whether, as the judge put it, the proposal "*addresses*" economic and community need – where the question was whether *this* development was *necessary*, which did not require a consideration of whether there was a "perfect" development which could be achieved – where by endorsing the proposition that "a need exists if the wellbeing of the community is enhanced [by the development]", again his Honour addressed the wrong question – where the wellbeing of the community could be enhanced by something which provided *more than* the community needed – where accepting, as this court must, the judge's analysis of the evidence in his discussion of this question, his findings provided no basis for a conclusion that upon the proper interpretation of this provision, there was a demonstrated community need and economic need for this development – where in the absence of a demonstrated need of each kind, the development was inconsistent with overall outcome (3)(h) of the Toowong-Auchenflower Neighbourhood Plan – where the extent of that inconsistency was considerable: two of the towers exceeded the maximum number of storeys by more than 50% and the third tower was even higher – where s326(1) requires that the decision not be in conflict with a relevant instrument, including a planning scheme, unless the circumstances engage one of the four exceptions which are there stated – where s326(1)(b) will be engaged only where there is a tension between the application of the relevant instrument, here a planning scheme, and the public interest – where if that tension exists, it will be for the decision-maker to consider whether there are sufficient grounds, in the public interest, to depart from the instrument – where it is not for the decision-maker (including in this context a court), to gainsay the expression of what constitutes the public interest that is in a planning scheme – where the judge did not identify any way in which the scheme's specification of an acceptable height was to be disregarded as the result of an error in drafting, a change in relevant circumstances from those which existed when the scheme was prepared or a failure of the scheme to anticipate a need, in the public interest, for a development on this site with buildings of this height – where in essence his Honour formed his own judgment of what was in the public interest without recognising the relevance of the scheme to that question – where ultimately, by the judge substituting his own view of the public interest for that which was expressed in the scheme, there was a legal error which affected his conclusion under s326. Leave to appeal granted. Appeal allowed. Remit the matter to the Planning and Environment Court, to be further considered according to law. Costs.

Hung & Anor v Hung & Anor [2018] QCA 87, 9 May 2018

General Civil Appeal – where the appellant applied for summary judgment of principal plus interest on two loans of $170,000 and $260,000 that were outstanding for many years – where the appellants acknowledged they were liable for principal and simple interest – where the respondents claimed compound interest – where there was a dispute about whether the loan was made on the basis of a verbal agreement or a written loan acknowledgement – where the primary judge granted the summary judgment order for an amount incorporating compound interest – whether the primary judge erred in concluding that the appellants had no real prospect of successfully defending the respondents' claim for compound interest and that there was no need for a trial of that part of the claim – where the first respondent verified the respondents' statement of claim by the statement in his affidavit that it was filed on his instructions and set out his honest and true recollection of the history of property acquisition with his brother since they made their agreement in mid-1990 – where the allegation in the statement of claim that the loan was made on the basis of a verbal agreement which included a term that interest attracted to the principal describes an obligation by the appellants to pay only simple interest – where the terms of the alleged verbal agreement do not express an obligation to pay the interest on the principal at any time before the sale of the property, out of which the principal and interest was intended be recouped, much less an obligation to pay interest upon any interest that remained unpaid after it was due for payment – where in that context, the alleged term providing for interest to be "calculated annually" conveys no more than it says – where there is also no allegation in the later section of the pleading that an obligation to pay interest on interest is implicit in the express terms or implied in the contract – where in short, the statement of claim alleges that the loans were made on the basis of a verbal agreement under which the appellants are obliged to pay simple interest rather than compound interest – where curiously, it is the first appellant's affidavit which supplies most support for the respondents' argument that the Acknowledgment of Loan contains all of the terms of the parties' bargain – where the first appellant's statement that the financial arrangements were evidenced by written loan agreements does not necessarily mean that those agreements record all of the terms, and his characterisation of the Acknowledgment of Loan as "the loan agreement" is not determinative of the correct characterisation – where in any event, the first appellant's affidavit does not justify disregard of the evidence to the contrary in the respondents' statement of claim and its verification in the affidavit of the first respondent – where a trial judge would be required to take into account all of the evidence adduced at trial of the terms of the parties'

contract, regardless of whether or not evidence given by one party did or did not favour that party – where in this case, the evidence leaves open the answer to the question whether the Acknowledgment of Loan contains all of the terms of the parties' loan contract – where if that document is or records only one part of a contract which includes a verbal agreement for simple interest, the interpretation of the document would have to be approached from a very different perspective to that adopted by the primary judge – where the language of the Acknowledgment of Loan is sparse – whether or not the parties' contract imposes such an obligation cannot be reliably determined in the absence of evidence of what was said and done by the parties in concluding their contract – where applying the guidance in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 that "[t]he power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried," it is concluded that the requirements of r292(2) of the *Uniform Civil Procedure Rules 1999* (Qld) are not fulfilled in this case in relation to the respondents' claim for compound interest – where it follows that the order for summary judgment should be varied by reducing the judgment sum to the amount that represents the principal together with simple interest at the agreed rates – where the parties have agreed upon that amount and the manner of its calculation – where the primary judge ordered the defendants to pay the plaintiffs' costs of the application for summary judgment on the standard basis, to be assessed if not agreed – where the effect of the orders which are proposed is that the application for summary judgment succeeds only to the extent that judgment is given for the principal amounts of each loan together with simple interest, rather than the compound interest claimed – where nevertheless the costs order made in the Trial Division is not varied. Allow the appeal with costs. Order varied to the extent that judgment is given for the principal amounts of each loan together with simple interest, rather than the compound interest claimed. (Brief)

Murphy v Mackay Labour Hire Pty Ltd [2018] QCA 90, 18 May 2018

General Civil Appeal – where a proprietary limited company was a defendant in proceedings for breach of contract – where the proceedings did not proceed to judgment because the defendant company was placed into liquidation after the hearing of the evidence in the trial – when the matter came before the primary judge on 9 August 2016, the liquidator consented to an order dismissing the defendant's counterclaim against the respondent, with costs in favour of the respondent – where submissions were also made, orally and in writing, concerning the non-party costs application, with her Honour reserving her decision on that application – where it seems that the file was marked as settled but subsequently, in April 2017, it became apparent that the non-party costs application remained on foot – where an inquiry was made as to whether the respondent wished to offer any evidence on the question of the defendant's insolvency and the matter was adjourned to 2 May 2017 – where an affidavit deposed to by the appellant on 28 April 2017 was filed – where thereafter, on 2 May 2017, her Honour determined the application for non-party costs and ordered that the appellant pay the respondent's costs of the proceedings (including trial and reserve costs and costs of the application) incurred from 17 March 2016 – where the non-party costs order was made against the company's sole director and secretary – whether the trial judge erred in finding insolvency of the defendant company – where her Honour had sufficient evidence to support a finding of insolvency as at 20 June 2016 and for a period of up to three months before the defendant ceased trading on 17 March 2016 – where her Honour's findings were made in the context of the defendant having already gone into liquidation, the unchallenged evidence from the Form 509 from which it was open to infer that the defendant faced an unsustainable position with respect to the valuation of its debtors compared with the estimated realisation of those debts and that it was hopelessly insolvent – whether the trial judge erred in finding there was a positive obligation on the defendant company's sole director and secretary to warn of the defendant company's insolvency – whether the trial judge erred in finding impropriety in those circumstances – where the primary judge did not find that there was an "obligation" as alleged by the appellant but simply that there had been no disclosure of the defendant's financial position – where it is to be observed that the primary judge's reference to impropriety was made in the context of the argument that the respondent's failure to give advance warning of the non-party costs application weighed against the making of the order sought by the respondent – where her Honour found that the defendant was not only insolvent at the time the appellant signed the Form 509 but, given the absence of explanation by the appellant in his affidavit as to the timing of the defendant's collapse, that it had been so for the previous three months – where the matters which may have put the respondent on guard as to the need to bring such an application were not revealed yet, perversely, it was contended advance notice ought to have been given – whether the trial judge erred in the application of *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 in failing to consider the issues of the non-party's involvement or interest in the litigation – where the appellant was not only the sole director, he also deposed that it was his decision to put the defendant into liquidation, a matter that lies only in the hands of the members of a company – where it was clearly implicit, from the appellant's affidavit, that the appellant, as the primary judge stated, was not only the sole director but that the defendant was "his company" – where courts are traditionally vested with an unfettered discretion as to the award of costs including costs against a non-party and appellate courts are reluctant to interfere with decisions of practice and procedure – where in the present case, there was evidence before the primary judge upon which it was open to be satisfied that the criterion referred to in *Knight* for the making of a non-party costs order had been met – where it was open, in the circumstances, for her Honour to exercise the discretion as she did. Appeal dismissed with costs.

Criminal appeals

R v SCZ [2018] QCA 81, 4 May 2018

Sentence Application – where the applicant pleaded guilty to possession of a dangerous drug and received a court ordered parole order – where the applicant sought at the sentence hearing to tender a psychologist's report – where the sentencing judge asked if the report diagnosed the applicant with any mental illnesses and the applicant's counsel indicated it did not – where given what her Honour was told by counsel, her Honour could conclude that the report added nothing to the sentencing process and that it was within her Honour's discretion to refuse tender of the report – where the report in fact set out symptoms consistent with mental illnesses – where however, the psychologist did make diagnoses of post-traumatic stress disorder and major depressive disorder or, depending on how the report is to be interpreted, at least identified symptoms and factors consistent with those disorders – where it can be seen that the psychologist opined that the two clinically identified psychological disorders (or at least the identified symptoms of those disorders) were relevant to the applicant's tendency to comply with the will of others – where given other submissions made by counsel on the applicant's behalf, the psychologist's findings were directly relevant to the applicant's criminality and therefore relevant to sentence – where the applicant alleges that the imposition of parole instead of a suspended sentence of imprisonment was an error – where the major practical distinction between an offender being released on court-ordered parole or being released on a suspended sentence is the power of supervision vested in the executive where the prisoner is on parole – where it is desirable that the applicant is subject to some supervision and on the evidence presently before the court, release on supervision is likely to increase her chances of success in not reoffending – where the extent and nature of the supervision is a matter for the chief executive. Application to adduce further evidence be allowed and the court receive into evidence on the application for leave to appeal against sentence the report of psychologist, Sara Jones. Leave to appeal against sentence granted. Appeal dismissed.

R v CCA [2018] QCA 82, 4 May 2018

Sentence Application – where the applicant was convicted of four drug-related offences – where the applicant was sentenced to six years' imprisonment with parole eligibility after two years – where the applicant was raped by another prisoner while he was in custody before his sentencing hearing – where the applicant did not tell his legal representatives

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that he had been raped – where the sentencing judge did not know of, and therefore did not take into account, the rape and its physical impacts on the applicant – where the applicant sought to adduce evidence of the rape, its immediate physical impacts on him, and his reasons for non-disclosure – whether evidence of the applicant's rape, its immediate physical consequences, and his reasons for non-disclosure should be admitted – where it is noted that the applicant was not required for cross-examination in the event that the further evidence was admitted – where counsel for the respondent confirmed that the fact of the rape having occurred and the genuineness of the applicant's reasons for not disclosing it prior to sentence were not put in issue – where it is considered that the applicant has given credible reasons for not telling his legal representatives of the rape and for not wanting it aired in public at his sentence hearing – where there is no reason to doubt his statement that he was unaware of its relevance to his sentence – where the non-disclosure to legal representatives was consciously undertaken by the applicant – where however, it cannot be characterised as deliberate in the sense of being the result of exercise of free choice – where shame, concern for his family and concern for his own safety in detention operated strongly and understandably upon him – where it is accepted that the facts of the prison rape and its immediate physical consequences for the applicant were relevant to his sentence – where they have a moderating role to play in sentencing the applicant – where had they been taken into account, a lesser sentence may well have resulted – where the circumstance that the rape occurred in prison gives the moderating influence a greater cogency for determining the period of actual custody to be served for parole eligibility, than to fixing the duration of the prison terms themselves. Admit into evidence specified affidavits. Leave granted. Appeal allowed. Vary the sentences under appeal by deleting 4 April 2019 as the appellant's parole eligibility date and substituting for it 4 December 2018. The sentences are otherwise affirmed.

R v AJH [2018] QCA 86, 9 May 2018

Appeal against Conviction – where the appellant was convicted of a number of offences against the same complainant – where the appellant was convicted on a count of maintaining an unlawful sexual relationship with a child under the age of 16 years – where the appellant was also convicted on one count of indecent dealing with a child under 16 under care and one count of rape – where the jury was directed by the trial judge that they could rely on the indecent dealing count and/or the rape count, if they were satisfied beyond reasonable doubt of those counts, in proof of the maintaining count – where on the evidence given by the complainant at trial it became apparent that the rape count could only have occurred when she was 16 years old – where it follows that count 5 could not have been used by the jury in its consideration of the count of maintaining and it also follows that the trial judge was led into the error of directing the jury incorrectly that count 5 could be used by the jury in its consideration of the count of maintaining – where the obstacle to a conclusion by this court that there has not been a substantial miscarriage of justice lies in the emphasis given in the summing up to the significance of counts 3 and 5 – where because nobody at the trial had adverted to the timing issue concerning count 5, it is understandable that counts 3 and 5, being offences about which the complainant gave specific detailed evidence, would have constituted the simplest path of reasoning for the jury and one they would be invited to consider first – where it is only if the jury had not been satisfied in relation to one or both of those counts that it would have become necessary for the jury to consider the question raised by the evidence of uncharged acts – where the emphasis given to the significance of those counts is perfectly understandable and, once the defect in the reliance by the Crown on count 5 is revealed, that emphasis makes it impossible to conclude that the misdirection could have had no effect – where the complainant gave evidence at trial – where the complainant was declared a special witness under s21A *Evidence Act* 1977 (Qld) – where the court was closed during the giving of the complainant's evidence under s5 *Criminal Law (Sexual Offences) Act 1978* (Qld) – where the only special measure taken under s21A during the giving of the complainant's evidence was the provision of a support person who sat in the public gallery – where it was not apparent to the jury that a support person was present in the courtroom – where no warning under s21A(8) was given – whether the failure to give a warning under s21A(8) in the circumstances occasioned a miscarriage of justice – where the failure to give the direction was an irregularity but it gave rise to no miscarriage of justice in this case – where that is because the unexplained presence of the support person (and subsequently a substitute support person) sitting in the public gallery would not be capable of giving rise to any inference adverse to the accused person. Appeal allowed in part. Conviction on count 1 quashed. Retrial ordered on count 1. Otherwise, appeal dismissed.

R v Bennetts [2018] QCA 99, 29 May 2018

Appeal against Conviction – where the appellant was found guilty after trial of murder – where the deceased was last seen alive after she left school on Friday 14 August 2015 – where her body was not discovered until Wednesday 26 August 2015, when she was found on rural land near Gatton – where the appellant was spoken to by the police at 3.48pm on 18 August 2015 and then again at about 6pm on that day, following which he accompanied police to a police station – where he remained in the company of police until about midnight – where during that time, he provided a written statement to police (about how he knew the deceased, the last time he had seen her, and text messages he had exchanged with her), had an unrecorded conversation with police (about CCTV footage depicting him making withdrawals from the deceased's bank account, and an account from the appellant about what he and the deceased had done on the Friday afternoon) and then participated in a longer recorded conversation with police from 10.50pm to 11.56pm – whether the trial judge erred in refusing to exclude statements made and answers given by the appellant during police questioning – whether the evidence was unlawfully obtained – whether the appellant was, at the relevant time, in the company of a police officer for the purpose of being questioned as a suspect about his involvement in the commission of an indictable offence pursuant to s415 of the *Police Powers and Responsibilities Act 2000* (Qld) – where keeping in mind the appellant was in the company of the police until just after midnight on 18 August (making it then 19 August) it was plainly relevant to refer to the numerous reports of alleged sightings which were made from 15 August to the morning of 19 August – where in the context of the police officer's evidence that, during the evening of 18 August, they were still investigating a missing person, not questioning the appellant as a suspect in relation to a crime of any variety – where the finding of fact made by the trial judge, that the appellant was not, on the evening of 18 August 2015, in the company of the police for the purpose of being questioned as a suspect about his involvement in the commission of an indictable offence, was open and supported by the evidence before the trial judge – where, on the evidence of the police officers, whose credibility the trial judge had the opportunity to assess, and which her Honour accepted, it was plainly open to conclude that while the appellant was being questioned in the context of an investigation of a *possible* offence, he was not, as at the evening of 18 August 2015, being questioned as a suspect about his involvement in the commission of any indictable offence. Appeal dismissed.

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.

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17 PI claims and the dying plaintiff

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SL

19 Practice Management Course: Sole and small practice focus

19-21 | 8.30am-5pm | 10 CPD

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24 Townsville workshop

8.15am-5pm | 7 CPD

Mercure Hotel Townsville

This local workshop is tailored to address issues affecting the local practitioner. Topics include wellbeing, ethics, trust accounting, and the impact of technology on the legal operating environment. The day will conclude with a regional roundtable to discuss issues affecting the profession.

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24 Celebrate, recognise and socialise

5-7pm

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25 Engaging with the ATO on tax obligations and disputes

12.30-2pm | 1.5 CPD

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This complimentary livecast provides guidance directly from the Australian Taxation Office (ATO) on how it interacts with the profession. It will comprise four power sessions covering ATO investigations into aggressive tax planning, ATO's approach to non-lodgment, engaging with the ATO on tax debt matters, and an update on dispute resolution processes.

SL

25 Modern Advocate Lecture Series: 2018, lecture three

6-7.30pm | 0.5 CPD

Law Society House, Brisbane

Justice Andrew Greenwood of the Federal Court of Australia will deliver the third presentation of 2018. Networking drinks and canapés will follow the presentation. The lecture will also be shared via Facebook live on the night.

PLE

31 Essentials: Domestic violence

8.30am-12pm | 3 CPD

Law Society House, Brisbane

Developments in domestic violence (dv) law make this an increasingly important area for practitioners to understand, particularly those in criminal or family law practice. This workshop introduces delegates to Queensland DV laws, the factors that constitute DV, how the laws are used and enforced, key DV cases and legal issues, and new and topical DV issues.

SL

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Bill Purcell


Kerri Balaba


Nadia Sabaini


Charlie Young


Shireen Hazlett


Charlene Rayner


Shereen Parvez


Samantha Bolton


Fran Keyes


Jim Tealby


Amanda Sparkes


Samantha Vickery


Jasmine Evans

Career moves

Bennett & Philp Lawyers

Bill Purcell has joined Bennett & Philp as a director in the real estate team following a merger with his firm, Purcell Chadwick & Skelly. Bill has practised since 1965, mainly in contract disputes, industrial, commercial and residential conveyancing, and unit and land development. He is a QLS accredited specialist (property) and QLS Senior Counsellor.

Kerri Balaba, is also a member of the real estate team, focusing on property development and conveyancing.

Nadia Sabaini, has been promoted to director. Nadia focuses on finance, commerce and corporate law and assists all levels of business clients in start-up, growth, merger and acquisitions.

Charlie Young, has been promoted to director in the litigation team. Charlie practises in commercial litigation, estate disputes and elder abuse.

Shireen Hazlett, who has been promoted to associate, works in the personal injuries team with a practice spanning public liability claims, workplace accidents, motor vehicle accidents and insurance disputes.

Charlene Rayner has been promoted to lawyer following her recent admission. Charlene works with clients on their estate planning needs.

Shereen Parvez has joined the firm as a lawyer in the intellectual property team. Shereen advises on trade mark, patent, copyright and IP licensing matters.

Broadley Rees Hogan

Broadley Rees Hogan has announced a merger with Byroms Lawyers as of 1 July 2018, with **Michael Byrom** and **Alex Lam** joining the firm. Both have practised in different Brisbane firms over many years and will bring their expertise in property and commercial matters to BRH. Michael will also assist in the growth of BRH's body corporate practice.

CNG Law

CNG Law has announced its expansion to the Sunshine Coast, with director **Samantha Bolton** appointed to head up the new practice in Maroochydore. Samantha, a Sunshine Coast local who has practised there since admission, joins directors Tracy-Lynne Geysen, Drew Nelson and Thomas Christie. CNG Law Sunshine Coast offers services in family law, business and employment, criminal and traffic, property and animal law.

Keyes Tealby Legal

Workers' compensation and liability lawyers **Fran Keyes** and **Jim Tealby** have opened their legal and mediation practice, Keyes Tealby Legal. Jim was previously a partner at a medium-size law practice managing a team of workers' compensation lawyers, while Fran managed Queensland's largest workers' compensation team. Both are nationally accredited mediators and will continue to offer dispute resolution services to clients.

Keyworth Harris & Lowe Family Lawyers

Keyworth Harris & Lowe Family Lawyers has announced the appointment of **Amanda Sparkes** as a solicitor. Amanda joined the firm in November 2017 as a paralegal and was admitted to practice in April this year. Amanda practises in family law matters involving parenting, property and domestic violence issues.

McLaughlin and Associates Lawyers

McLaughlin and Associates Lawyers has welcomed **Samantha Vickery** as a senior associate. Samantha has more than 10 years' post-admission experience and focuses on family law and wills and estates.

VM Family Law

VM Family Law, which has recently expanded to offer its services in three locations – Brookwater, Brisbane CBD and Eight Mile Plains – has also announced the appointment of **Jasmine Evans** as a family lawyer. Jasmine, who has a passion for assisting with parenting matters, brings experience as an associate in the New South Wales Registry of the Family Court.

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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It's just a matter of time

A practice idea that might make a big difference

A time estimate that is clear in your mind may be totally unclear to your client.

While unhelpful per se, new clients unused to how you work may be put off even before they settle in. Heroic delivery commitments are also a potential killer. Here are a couple of hints to assist in doing these things better…

I learned in the project home-building business that a job that starts well usually finishes well. For example, there won't be workers on your site every day; the brick colour may be slightly different from the colour you inspected; all concrete slabs have filament cracks – it is perfectly normal. And so on. You get the picture? Unless we manage expectations, people will create their own – and suddenly life becomes unnecessarily dramatic.

Consider I can get onto this pretty quickly. What does it mean? For a busy lawyer, it may mean late next week. For the client, it will probably be interpreted as a guarantee of tomorrow or the next day at the latest. If this is the case, the client will see you as unreliable (to your probable dismay).

So, the first lesson is, when estimating time, use language which has exactly the same meaning for you and for your client. Regular readers may recall we have made a similar point about fee estimates. It shouldn't be too much means absolutely nothing.

The next most common case doesn't involve vague language. It is more about lawyers being dumb by making impossible commitments yet believing they are doing the right thing. This is how it works…The client says can I have x? You ask when by? The client says day after tomorrow. You know, based on the matter before you, that the timing is not critical, but without thinking through all your other commitments, you say no problem. Unfortunately to a client (particularly a new one) no problem = solemn promise. You probably did satisfy the client in that brief moment, but when you don't deliver, that brief satisfaction will pale into insignificance. You and your client will always be better off by estimating longer and delivering earlier.

Also, don't fall into the trap of saying by Friday week but I'll do my best to get it to you this Friday. The moment you say that, they recalibrate that the due date is now this Friday. All you are doing is creating an unnecessary expectation and placing unnecessary pressure on yourself – and for no gain.

Effective client managers know how to manage expectations by judiciously saying no, or not now, or subject to when it makes sense to do so. With the right delivery style, it will rarely cause offence, and almost certainly reduce dramas at the other end.

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

Accountancy

Agency work

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Agency work continued

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KENNETH CARL EGLIT

Would any person or firm knowing the whereabouts of a will or other document purporting to embody the testamentary intentions of **Kenneth Carl Eglit**, late of 12a/382 Bilambil Road, Bilambil NSW 2486 who died on 27 February 2018 please contact O'Reilly & Sochacki Lawyers, on (02) 6672 2878 or enquiries@oslawyers.com.au.

Missing wills continued

CLINTON PATRICK DELAND

Would any person or firm holding or knowing the whereabouts of a will or other document purporting to embody the testamentary intentions of the late **Clinton Patrick Deland** late of 3/666 Kingsford Smith Drive Hamilton QLD 4007, who died on 25 March 2018 please contact Stacks Law Firm Tamworth of 1/1 Fitzroy Street, Tamworth NSW 2340. Phone:

02 6767 2000 or kbyrne@stacklaw.com.au.

Public Trustee

ALFRED JAMES PASSFIELD (also known as JIM PASSFIELD) late of 7 Chisholm Way, Balga, Western Australia and also 616 Lower King Road, Lower King, Albany, Western Australia died on 25 July 2017 at Nedlands, Western Australia.

Would any person holding the last Will and Testament of **ALFRED JAMES PASSFIELD** (also known as JIM PASSFIELD) or knowing the whereabouts of such last Will and Testament please contact the Public Trustee at 553 Hay Street, PERTH, WA 6000 on (08) 9222 6660 within one (1) month of the date of publication of this advertisement quoting reference DE 33146245 EM213.

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From Spain by plane for Aussie fame

with Matthew Dunn

Often overlooked and sometimes underappreciated, wines from Spain are an excellent new frontier for exploring and experimentation.

Winemaking in Spain is old and unique. Wine has been made on the Iberian peninsula for around 5000 years from more than 400 indigenous grape varieties.

The fortunes of Spanish wine have risen and fallen like the seas as empires, invaders, conquistadors, military dictators and the European Union have all played a part in the evolving story. Spanish wine warmed Roman border sentries in Britain, beguiled and befuddled Oxbridge dons and charmed Falstaff into saying:

"If I had a thousand sons, the first human principle I would teach them should be to forswear thin potations and to addict themselves to sack."[1]

Happily, Spanish wine today is rarely the sweet fortified white wine of Falstaff's beloved 'sack'. The wine journey of Spain has produced a quality wine scene with all the passion of Italy and the variety of France.

The problem for the Queensland quaffer is sourcing the good stuff, but fortunately the better Spanish wines have now started to make their way here in the same way that proper Italian wines are in plentiful supply. So what is worth trying?

Start with bubbles. Italy has prosecco and that is starting to make a dent locally. Spain (or, more accurately the not-yet-independent state of Catalonia) has cava. Cava is big in the United Kingdom, where summer holidays breed familiarity, but is yet to rise in Australia.

It will make its presence felt before long, as cava usually provides good quality bubbles at an affordable price point. Made mostly in the Penedès region of Catalonia, cava is made in the same method as champagne but using the local macabeu, parellada and xarel-lo grape varieties. Codorníu, Freixenet and Segura Viudas are locally available brands worth seeking out.

Spain does still produce a great array of white wines from its diverse climatic conditions. The palomino grape makes a thousand varieties of sherry near the city of Jerez de la Frontera in Andalusia. Generally these wines are not sweet and rely on oxidization, ageing, blending and sometimes a cap of flor yeast inside the barrel to create magic.

A distinctive dry white wine is albariño, best known from the Rías Baixas area in Galicia in the distant north-western region of Spain. The wine is botanical and light in body with good acid and a perfect foil for the seafood dishes of its home region. Galicia is well known for the Camino de Santiago pilgrim trail, often part-walked as penance by Queensland lawyers. Less known is Galicia's Celtic roots and that they have their own bagpipes!

Quality red wines abound and usually involve the varieties tempranillo, garnacha (better known as grenache) and monastrell (better known as mourvèdre or mataro).

One of the best and most accessible Spanish red wines available in Australia is Rioja. Located in the far north of Spain, Rioja wines are usually predominantly tempranillo and garnacha blends aged in oak barrels. The basic Rioja must spend a year in oak, while Rioja Gran Reserva must have at least two years in oak and three in bottle before sale.

Rioja owes much to Bordeaux in style as many Bordelaise 'evacuated' to Rioja when the phylloxera louse decimated the Bordeaux vineyards in the late 19th Century, bringing with them new techniques and technology. Today Rioja is adopting a more 'international' style of full-bodied red wine not unfamiliar to Australian palates.

The rain in Spain may fall mainly on the plain, but the wine from Spain comes our way mostly by plane.

Note

[1] William Shakespeare, *Henry IV Part 2*, Act 4, Scene 2.

The tasting

Three examples of Spanish wine were examined in close proximity to a paella for cultural authenticity.

The first was the **Abellio Albariño 2016 Rías Baixas DO** which was pale straw in colour and had a nose of feisty grapefruit and honeysuckle. The palate was forward with a mix of fresh fruit salad, crisp acid and a little lifted forest floor for good measure. A wine to tame fish dishes.

The second was the **Bozeto de Exopto 2016 Rioja DOC**, which was deepest black with a burgundy tinge in the glass. The nose was vanilla oak and spicy white pepper. The palate was a savoury rollercoaster of oak, plummy five spice and crackling peppery tones. Moreish and approachable.

The last was the **Enrique Mendoza La Tremonda Monastrell 2014 Alicante**, which was dark deep red from the Spanish Gold Coast of the Costa Blanca. The nose was a firm oak and red fruits. The palate was a rich red and deep robe of savoury fruit, topped with hints of leather and Dutch match. A great wine with a fine future.

Verdict: The best in show was the Rioja, winning praise for its firm but approachable face.

Matt Dunn is Queensland Law Society policy, public affairs and governance general manager.

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A Homage to local ingredients

by Dominique Mayo

At dusk, as the soft autumn light turns to nightfall, I venture into Homage Restaurant at Spicers Hidden Vale, Grandchester, expecting to feast on good local produce in a warm, homestead-style setting.

I opt for a signature Ink Gin and tonic (G&T) with Husk Plantation Distillery hand-crafted, butterfly pea floral-infused dry gin. Later, I discover that the botanicals are prepared and measured, then placed in a hand-beaten copper pot still and combined with 100% Australian grain spirit and the water that originally fell as rain over the volcanic rocks of the caldera.

Interestingly, the natural floral infusion gives the Ink Gin a remarkable and lustrous quality that changes colour when mixed with tonic water, from a deep blue to a soft lilac owing to the butterfly pea flower petals being pH sensitive.

It is certainly a very drinkable G&T, and pretty at that.

For the entrée, I am delighted to indulge in a wild-shot 'Rabbit baked in rarebit'.

I am conscious that the availability of wild-shot rabbit, here in the country, is also serving a wider purpose and so I take full advantage of the offering in a restaurant that seeks to showcase local produce. The braised rabbit is mixed with smoked cheddar and pickled carrot, cooked in parchment neatly packaged by hessian, and served on a small wood tray.

The little cheesy parcels of rabbit are a sheer delight to eat, and I am ever hopeful that the dish will never come to an end. Interestingly, the pickled carrot accents create a fruity sensation, and one I was by no means expecting.

A bite-sized piece of wood-fired damper with smoked rosemary is served, between courses, on a tree stump – the rosemary still crackling from the fire.

I decide to continue the theme of locally wild-shot produce and select the 'Wild shot venison' for my main (*lower right*).

Onion crisps sit atop the morsels of venison loin, with onion puree and onion powder to garnish. I pour a generous amount of jus, out of a cute little white pourer, onto my plate before tucking into the hearty dish.

Little do I know, the onion on my plate holds a hidden surprise – slow-braised venison, which playfully spills out of the onion, when prodded. The robustness of the venison is well matched by the robustness of the onion, seemingly cancelling out one another and resulting in a very tame taste combination. A green-leaf salad, straight from the onsite market garden only metres from the kitchen, tastes as if it has only been plucked from the garden moments prior to consumption.

For my sweet finish, I decide on the 'Apple and rose' (*top right*). When the dish arrives, I am impressed by its eclectic beauty – a minimalist dessert at its best, I daresay. The dessert is designed to simulate something of an apple crumble, but it is so much more than that!

Apple poached in rose syrup, adopting a deep red hue, is presented in the shape of a rose atop charcoal, which acts as the crumb. Sitting opposite the rose is vanilla bean ice cream heavily dusted with rose powder. From a taste perspective, each facet of this dessert complements the other, and is perfectly balanced. Quite apart from its striking appearance, this dessert would appeal to sweet-tooths as well as those, like me, who appreciate a less sweet dessert option.

Having feasted on my favourite game meats and indulged in a dessert that I consider to be one of the best I've had, I leave remarkably pleased to have experienced the elegant dining experience offered at the Homage Restaurant, hopeful to return again sooner rather than later.

Dominique Mayo is a senior lawyer at Clayton Utz

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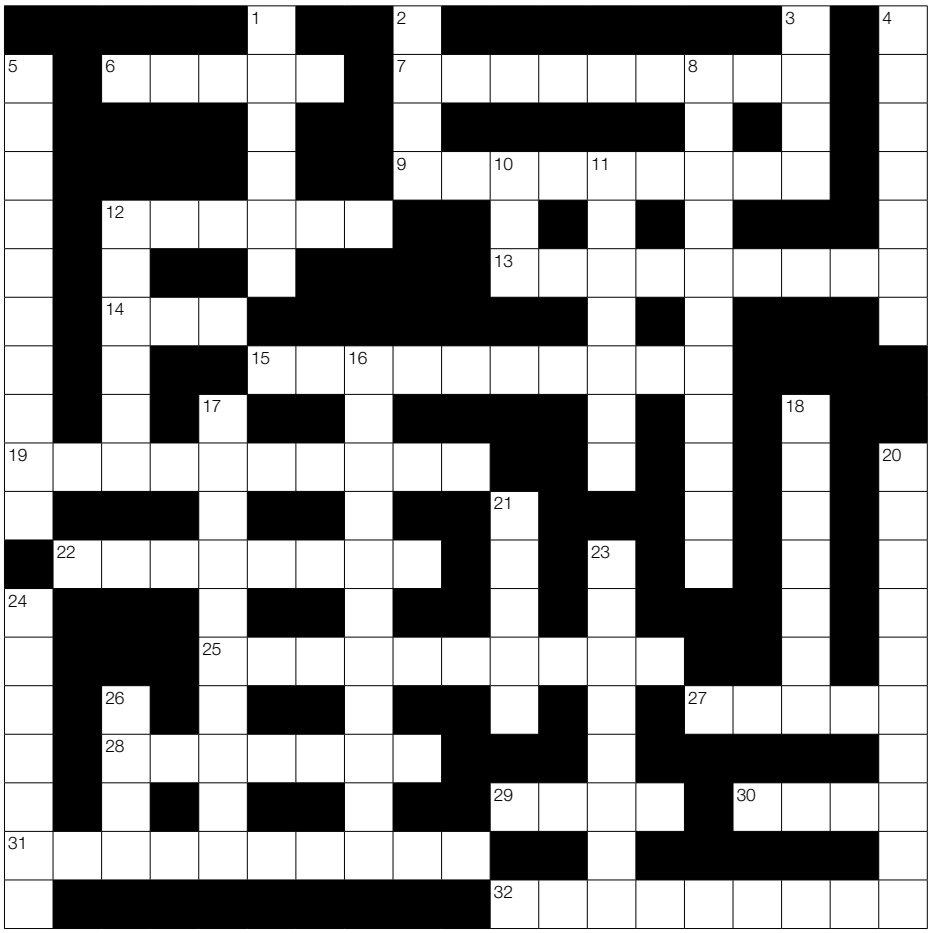
Mould's maze

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



Across

6 The 'Medical Records Access Case' handed down by the High Court of Australia in 1996, ... *v Williams*.(5)

7 Provisions in contracts that allow one party to terminate upon the insolvency of the other, ... clauses. (4,5)

9 Location of the first sitting of the High Court of Australia on 6 October 1903. (9)

12 The De ..... principle provides that a court cannot take into account as an aggravating factor a circumstance that would warrant conviction for a more serious offence. (6)

13 Melbourne gangland identity known as 'The Black Prince of Lygon Street', Alphonse ..... . (9)

14 Property settlement contract, the setting aside of which notoriously breaches the parol evidence rule. (Abbr.) (3)

15 Incorporeal. (10)

19 Process by which a trademark owner loses their rights as a result of their trademark being used to refer to any product or service of its kind. (10)

22 Formal request for court action, for example, to issue a subpoena. (8)

25 The right to dismiss or excuse a potential juror without reason, ... challenge. (10)

27 Of one's own right, *sui* ..... . (Latin) (5)

28 Queensland Court of Appeal decision relating to future economic loss under the *Civil Liability Act 2003*, *Ballesteros v* ..... . (7)

29 A family provision application must be commenced within .... months after the death of the deceased. (4)

30 A very dull submission! (Slang, abbr.) (4)

31 Profit from crops sown. (10)

32 Partners, principal/agent, director/company, master/servant, solicitor/client, life tenant/remainderman all stand in this relationship. (9)

Down

1 An application made when a trustee is unable to obtain an indemnity from the beneficiaries, particularly for direction relating to the exercise of their powers and duties. (6)

2 Solicitor's business or premises. (4)

3 One garment worn over a jabot. (4)

4 Lawyer practising admiralty law. (7)

5 Ethics, especially dealing with duty, moral obligation and right action. (10)

8 A court's own amendment to a judgment. (11)

10 Employees' demands in an industrial dispute, ... of claims. (3)

11 A provision in a will, probate order or property settlement that disposes of property not otherwise specifically referred to, ... clause. (7)

12 Induce a person to give false testimony. (6)

16 Actor who played Tom Cruise's wife in *The Firm*, Jeanne ..... . (11)

17 A ..... right gives the first opportunity to purchase a new issue of stock of that company in proportion to the amount of stock already owned by that shareholder. (10)

18 Offer evidence for admission at trial. (7)

20 A written promise by one party to pay money to another, ... note. (10)

21 A personal action for which the amount claimed is not more than $1..,000, after an admitted set off or otherwise, may be commenced in a Queensland Magistrates Court. (5)

23 Servient tenement, ... lot. (8)

24 Make a law more strict, more efficient or less likely to be avoided. (7)

26 A worker who takes the place of a worker on strike. (Slang) (4)

Solution on page 56

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My defamation safety net

Unless the dog reads this

by Shane Budden

Many people think, because of this column's low degree of factual content and lack of anything remotely resembling a point, that very little thought goes into its production – but this is in fact not true.

I put a great deal of thought into the column, often as many as three thoughts, such as:

Have I missed the deadline?

What month is it?

Where do I work again? I'm pretty sure it is an acronym…

So you can see that I put a lot of thought into it, way more than I ever put into any of my law assignments (just ask my lecturers). That thought, of late, has included my dog, and whether or not he might sue me.

If it seems improbable that a creature who is regularly surprised by the discovery of his own tail would sue me, think on this: recently, a monkey sued a photographer over a selfie. OK, so technically it was a group known as People for the Ethical Treatment of Animals (PETA) that did the suing, arguing that the monkey took the selfie and therefore owned the copyright to the photo.

The case was unsuccessful, partly because the monkey in question had given exclusive rights to his story to *Women's Weekly* and so refused to take the witness stand until the magazine was published, but still I worry. PETA may take up my dog's cause, saying that I make fun of him regularly in my column and should pay $250,000 in damages, which they of course would administer for my dog until he gained maturity. Since that is unlikely to occur until the Earth has careened into the sun billions of years from now, it seems to me like PETA would be getting too much of a good deal.

To avoid this, I will not make fun of my dog in this column, nor – in the interests of avoiding real law suits, will I make fun of any real people. I will make fun of people who do not actually exist. I have come to realise that there are many fictional people for whom I do not care, in the same way that I do not care for the New South Wales State of Origin team (I can mention the NSW Origin side because, let's face it, their reputation could not get any worse – and based on their defence they do not appear to exist either).

For example, on the rare occasions that I watch horror films, I end up kind of cheering for the monster, because the victims are sufficiently stupid that their demise could only improve humanity's gene pool; case in point, the victims in *Blair Witch Project*.

For younger readers, this was a movie about three kids who seek to make a documentary about a witch, and naturally disappear, their fate being revealed when the movie they were making is found. The angle taken to make things really scary was that the movie marketers pretended the story was actually true, and the movie the actual videotape that the missing kids made.

This meant that the premise was cactus from the start, because videotapes in absolutely pristine condition, straight out of the packet, pretty much never worked (which is why you younger readers haven't got a clue what they are; I would explain, but there are some things you are not meant to know). The idea that you could find one that had been in the wild for a year, roaming free with feral videotapes that lived in the woods, and that it would still work, is ludicrous.

In any event, the people in the movie – who, I stress for legal reasons, are *fictional* people – wander off into the deep woods to track down a kid-murdering witch, and promptly get lost. They respond to that development by throwing away their map, which I feel was a poor choice and made me think that they deserved whatever they got.

This was exacerbated[1] by the fact that they had walked into the woods following a stream that flowed out of said woods; to get back they needed only to walk back downstream. Let's face it, if the witch didn't get these kids they would have killed themselves attempting to use toe clippers.

Similarly, the film *The Evil Dead* inspired no empathy for the victims in myself or my friends when we watched it back in 1981. This was another film intended to be extremely scary (and ended up being marketed as a horror/comedy, despite being neither amusing nor terror-inducing) but which failed to deliver. The plot involved – as such movies often do – less thought than this column and was roughly that a bunch of college friends decide to holiday in a house in the deep woods where the last holidaymakers mysteriously disappeared. That is a bit like inviting Norman Bates over to play *Murder in the Dark* – no good can possibly come of it, and people with better than a single-figure IQ would not do it.

The kids of course all meet their demise, the last one at the hands of the never-seen chief monster in the forest. This monster was played – for sound dramatic reasons, being that the movie did not have a large budget – by a mini-bike with a camera mounted on the petrol tank, which was driven slowly through the trees and then the film was speeded up. In this way the scary effect of only ever seeing the point of view of the monster – and not the monster itself – achieved its dramatic purpose of saving a lot of money.

Unfortunately, the position of the camera meant that every now and then you saw the handlebars of the bike and the gloved hand of the rider. Even as callow youths, we felt it unlikely that a monster brought to life by reciting ancient Egyptian spells had somehow obtained, and learned to ride, a Honda MR 50. Also, the only monster we knew that wore one glove was Michael Jackson, so suspension of disbelief became difficult.

And don't get me started on cartoon characters – they make me so mad I start sentences with conjunctions!

So you can see, it is possible to go a whole column and make fun only of people who don't exist, although I confess I am now waiting to be contacted by someone running a class action on behalf of the reality-challenged. For those who are concerned about my reference to Michael Jackson, I think that it wouldn't be too hard to establish, in a court of law, that he wasn't a real person either. My bet is that he was a robot which escaped from one of the Disneyland attractions.

Note

[1] From the Latin, meaning 'really annoying to me'.

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Crossword solution

From page 54

Across: **6** Breen, **7** Ipsofacto, **9** Melbourne, **12** Simoni, **13** Gangitano, **14** BFA, **15** Intangible, **19** Genericide, **22** Praecipe, **25** Peremptory, **27** Juris, **28** Chidlow, **29** Nine, **30** Mego, **31** Emblements, **32** Fiduciary.

Down: **1** Beddoe, **2** Firm, **3** Robe, **4** Proctor, **5** Deontology, **8** Corrigendum, **10** Log, **11** Omnibus, **12** Suborn, **16** Tripplehorn, **17** Preemptive, **18** Proffer, **20** Promissory, **21** Fifty, **23** Burdened, **24** Tighten, **26** Scab.

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