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Queensland Law Society

July 2017 – Vol.37 No.6

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My mid-term progress report

Six months on, with much more to come

After six months in the president's chair, it is time to give my 'mid-term' progress report.

To my mind, my proudest moment this year came in April with the Federal Government's spectacular reversal of the proposed funding cuts to community legal centres. This followed the campaign I spearheaded on behalf of QLS members, and congratulations and thanks go to all of our members for their support in achieving this victory.

On the eve of last month's World Elder Abuse Awareness Day, I was proud to launch an awareness campaign to give a voice to elderly people who are suffering from abuse. My initiative aims to bring the issue of elder abuse to the surface and destigmatise the shame experienced by the elderly when someone they love and once cared for mistreats them.[1]

The campaign, in the form of a trial encouraging people to disclose suspected elder abuse to their local doctor, has gained national media attention and generated an enormous amount of interest. Implemented with the aid of the Australian Medical Association Queensland, it enlists the help of general practitioners and staff from 315 clinics to look out for the symptoms of elder abuse and assist by referring patients to support services such as the Elder Abuse Helpline and the QLS Find a Solicitor service.

Raising the public profile of Queensland solicitors and the value we bring to society has been a key objective of mine. I have worked hard to develop effective relationships with the media so that our message is heard and our advocacy for good law is brought to the community we serve. This is reflected in the hundreds of media requests I have been able to meet, bringing our message to print, radio and television outlets across Queensland and further afield.

Our formal advocacy has continued unabated, and since 1 January I have overseen and signed off on no less than 44 parliamentary submissions – too many to list here – which seek to create significant legislative improvements.

It takes a village to create change, and I am indebted to the RAP working group for actioning the QLS Reconciliation Action Plan, which will be launched this month. This is a template for change that goes beyond the Society into the profession and the greater community.

I'm particularly proud that my Modern Advocate Lecture Series initiative continues to flourish, as one of its major aims is to develop greater collegiality within the profession. This year's lectures have been booked to excess capacity.

Now sitting firmly within our professional development program suite, the series has received tremendous support from the judiciary and is clearly meeting a need of junior lawyers to acquire knowledge from the law's most learned practitioners. It provides real opportunities to foster collegiality by promoting equity and diversity.

Our continued advocacy for the return of diversionary justice has also borne fruit in the return of the Murri Court, the Drug Court and other specialised services.

The search warrant guidelines, a joint QLS-QPS project instigated last year by immediate past president Bill Potts, were implemented, and are now being looked at as a potential initiative on a federal level.

Working through the ravages of Cyclone Debbie and supporting our members across Queensland have been other priorities in what, to date, has been a very busy year. Much has been achieved – and there are other highlights not included here. I look forward to doing my best to add to these achievements over the next six months.

Judicial appointments

In the scale of things, appointments to the judiciary from the solicitors' branch of the profession are still relatively recent in Queensland. These will continue to grow, as there is an extensive pool of expertise and experience that our Parliament can now draw on.

It is heartening that there is also a growing number of QLS accredited specialists finding their way to the bench and other senior positions, among them recent magisterial appointees Michelle Dooley (mediation law), Catherine Benson (family law) and Mark Howden (criminal law), as well as Peter Shields (criminal law), who has become a deputy president of the Parole Board Queensland.

While we are all well aware of the many benefits that accredited specialisation will bring to a solicitor's practice, I think we can now observe that it will stand a practitioner in good stead for further career progression.

Christine Smyth
Queensland Law Society president

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LinkedIn: *linkedin.com/in/christinesmythrobbinswatson*

Notes

[1] A study by Monash University indicates that 60% of elder financial abuse is perpetrated by adult children. It is projected that, in 30 years, a quarter of the Australian population will be over 65.

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The winter of our content

Resources to help us through

For never-resting time leads summer on

To hideous winter and confounds him there;

Sap cheque'd with frost and lusty leaves quite gone,

Beauty o'ersnow'd and bareness every where.

Shakespeare *Sonnets*; Sonnet 5

Such is the power of winter that it moved the Bard to these words of woe, although to be fair, tragedy was never far from his pen.

Winter can be a bit like that, even in sunny Queensland, where winter days are such that you wonder why anyone is silly enough to live anywhere else.

In law, however, winter is also a time of renewal, in that the new financial year starts and it seems that we all have a clean slate, budgets zeroed in private practice and cost centres re-set in the public and in-house legal worlds. That renewal, however, can be a source of stress and anxiety in legal circles and we need to be aware of that as we sally forth into financial year 2017-18.

Even for those who have made – or even exceeded – budget, this time of year is a double-edged sword. Just as the elation sportspeople feel on winning a premiership begins to fade the moment they raise the trophy, so the kudos and bonuses which flow from exceeding budgetary targets become meaningless in the new financial year. The world of business can carry a 'what have you done for me lately' feel, and past success is often seen as just that – and can add the possibility of higher expectations. For those who have struggled to make budget, it can of course be worse.

With those issues in mind, now more than ever it is necessary for practitioners to look to their mental health, and that of their colleagues. It has been a focus of the Society to increase awareness of mental health issues and to provide practical assistance in how to prevent depression, anxiety and related issues, and to address them when they arise.

The Society has several useful articles in this regard on our Law Talk blog (**medium.com/qldlawsociety**), and many resources available on the QLS website. Members should also keep in mind the wonderful service provided by LawCare (**qls.com.au/lawcare**).

LawCare is a confidential, personal and professional development resource available to all Society members and staff, and their immediate families. The service provides a range of support and resources to assist the management of issues in work, health and life, and can be accessed face to face, over the telephone, via video, online, or via Live Chat, whichever is more convenient.

Of course, an ounce of prevention is worth a pound of cure, and I would urge all firms to be proactive about mental health care, especially in particularly stressful times. The QLS Ethics Centre will always assist with ethical enquiries, but members should know that the centre's broader remit is to support them in their practice.

This support is provided directly through the centre's Practice Support Consultancy Service, but also through the many areas of practice that ethics and professional responsibility influence. Many ethical dilemmas emerge from underlying issues with practice management, or individual stress and personal issues. The centre is always ready to be the first port of call for practitioners who find themselves in such circumstances.

The Society's learning and professional development program is also addressing these and other issues through upcoming events, with innovative and thought-provoking conferences and seminars. These conferences should be of value to new and established lawyers alike (or should I simply say it will be on for young and old?).

Next month will see a plethora of learning opportunities coming the way of our members, including a webinar on client communication in the modern age, and the Government Lawyers Conference, which will address issues pertinent to those members practising in the government arena. The conference will cover a wide range of topics, including dealing with vexatious litigants, the latest on e-contracts and signatures, and the role of government lawyers as the moral compasses of their organisations. I am also happy to note that the conference will be opened by Queensland Attorney-General Yvette D'Ath.

The month will close out with Law in the Tropics, a two-day 10 CPD point comprehensive conference covering everything from ethics and practice management to tips for solicitor advocates. This should be a great event in beautiful Port Douglas, and the first night will be crowned with a no-doubt entertaining and fact-filled (or perhaps fact-free) debate concerning who is tougher, lawyers from the tropics or southern city slickers?

So, though you read this in the depths of winter, the Society has plenty of support should you need it, and informative and entertaining events to keep you going through the cold months – and keep in mind that spring will be here soon. Or as another of England's great poets, Percy Bysshe Shelley, put it in *Ode to the West Wind,* "If winter comes, can spring be far behind?"

Matt Dunn
Queensland Law Society Acting CEO

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What's cooking at Carter Newell?

Carter Newell's 12th annual Bake Off on 26 May raised funds for the Cancer Council – and provided staff participating in the Biggest Morning Tea event with a selection of tasty treats.

The best savory dish award went to partner Bronwyn Clarkson for her mini quiches, while the best sweet dish was provided by marketing coordinator Ella Donlevy-Morrison with a five-layer butter cake layered with homemade raspberry coulis and fresh raspberry buttercream frosting.

The team division award was won by the combined resources and corporate teams, and the overall winner was partner Luke Preston who presented his *tarte aux fruits* – a fruit flan.

Entries were judged by the Cancer Council's Rebecca Lawrence, 2016 overall winner special counsel Amy Gill, filing clerk Michael Peel and CFO Daren White.

Law school plans statelessness centre

The University of Melbourne Law School is to establish the world's only academic centre devoted to the problem of statelessness.

The centre, which will open next year, is intended to conduct research, teaching and training, to support public policy and law reform, and to raise public awareness and understanding of statelessness.

It will be led by refugee and human rights law scholar Professor Michelle Foster and is being funded by a donation by alumnus Peter McMullin.

New national mortgage form

The Queensland Titles Registry has introduced a new national form for mortgages.

The National Mortgage Form is intended to standardise the content and presentation of mortgages lodged for registration through all lodgement channels with land registries in all Australian states and territories.

It is replacing the current Queensland Form 2 mortgage document, which will be phased out by 1 January 2018, and will be used for paper transactions as well as eConveyancing.

It is available under Titles Registry forms at business.qld.gov.au.

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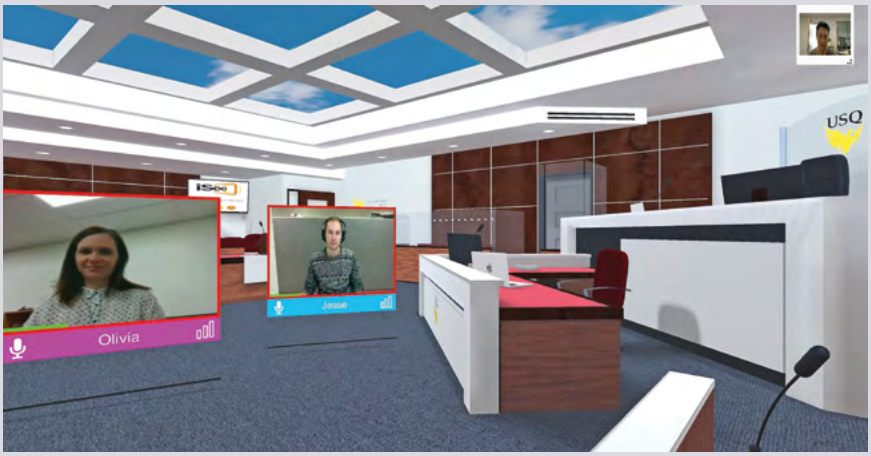

Olivia Milne, Jesse Sutherland and Alan Tai as 'Me-Vatars' in the virtual replica of the Toowoomba courtroom.

Learning in court, virtually

Law students at the University of Southern Queensland are now learning in Toowoomba's No.1 Courtroom, virtually.

Through virtual reality technology, the students are able to participate in the School of Law and Justice's moot court proceedings from any computer.

Appearing as 'Me-Vatars', they walk through the courtroom, role play, work in groups, and talk to their peers and engage with their lecturer while the full course is taught inside the virtual courtroom.

The head of USQ's School of Law and Justice, Professor Reid Mortensen, said virtual reality technology had a number of uses throughout the bachelor and post-graduate courses.

"Moot court is a vital part of every law student's education," he said. "Advocacy skills that a moot teaches are invaluable and an important part of USQ's law courses. Through the use of virtual reality technology, external students can now participate and interact in real time.

"We will also be looking to use this technology in the USQ Secondary Schools Moot Competition where more schools from farther away can participate."

LCA condemns political attacks on judiciary

The Law Council of Australia (LCA) has called for an end to political attacks on the judiciary, especially in cases where they might be perceived as interfering with matters currently before the courts.

LCA president Fiona McLeod SC said recent comments by senior federal MPs referring to "ideological experiments" supposedly being carried out by the judicial system were gravely concerning.

"It is inappropriate to suggest that judges decide their cases on anything other than the law and the facts presented to them by the parties," Ms McLeod said. "Attacking the independence of the judiciary does not make Australia safer; in fact it erodes public confidence in the courts and undermines the rule of law.

"It is Australia's robust adherence to the rule of law that has underpinned this nation's status as one of the most peaceful, harmonious, and secure places in the world."

Ms McLeod said the Law Council had particular concerns about reported comments made by three Government MPs about a terror-related case currently before the courts in Victoria.

Claim farming in Queensland

The Motor Accident Insurance Commission reports on claim farming in Queensland and the steps being taken to combat it.

Since claim farming was first reported in *Proctor* in March 2013 (Commission warns on crash 'scam'), the Motor Accident Insurance Commission (MAIC) has received increasing numbers of calls from the public and the legal profession about this practice.

The callers have notified MAIC that they, or their clients, have been contacted by a caller inquiring about an accident they may have been involved in. This practice, now identified as claim farming, involves the caller persuading and sometimes bullying the victim into lodging a claim. Farmed claims are then bundled and sold for a fee to Australian legal practitioners.

To tackle the problem, MAIC engaged Richard Douglas QC to report on this practice. His report, describing the practice and legalities of claim farming in Queensland, was delivered earlier this year.

It identified two types of claim farming:

1. The type described above, whereby a cold-caller commences the call based on false pretences, often describing themselves as working for a government agency (such as MAIC) and encouraging the victim to lodge a claim, which the caller can then sell for a fee to an Australian law firm.
2. Legal practitioner claim farming, whereby a holder of a Queensland or interstate practising certificate cold-calls an accident victim identified in media or social media as potentially injured in a Queensland motor vehicle claim, and solicits the victim to retain the legal practitioner. Unlike the non-practitioner cold-calling, there is no false pretext, rather the practitioner is defined.

Specifically, it is the paying and seeking of payment for soliciting or inducing of a potential claimant to make a claim that makes the first type of claim farming illegal.

The effects

For a motorist

One of the components which comprises the cost of vehicle registration is compulsory third party insurance (CTP). Currently, annual registration for a class 1 vehicle in Queensland is $704.90, of which the CTP insurance premium is about half ($352.60). When setting premium rates, some of the factors taken into consideration are claim frequency and cost. When claims are made which wouldn't have been, absent claim farmers, the impact is increased premiums for all motorists.

For a lawyer

The *Motor Accidents Insurance Act 1994* (Qld) provides that it is a function of the MAIC to monitor the efficiency of the statutory insurance scheme and, in particular, the proportion of the funds of the scheme paid to claimants or applied for their direct benefit (s10(1)(k)).

Often, claim farmers target lower value claims which have a higher than average proportion of legal costs, thus inflating the overall legal cost proportion across all claims in the scheme. The obvious correlation is that the proportion of funds of the scheme paid to claimants is lowered and the efficiency of the statutory insurance scheme decreased.

Of greater concern is commentary to the effect that claim farmers are coaching some potential claimants as to how to present their injuries, including statements that claimants should be prepared to lie to maximise their compensation. It is highly unlikely that the claim farmer is also advising the claimant about the risks of criminal prosecution if they do progress a false claim.

Not only do claim farmers and lawyers who interact with them introduce potential fraud into the scheme, they also sully the reputation of lawyers who run an honest practice.

For a member of the community

When claim farming introduces claims to the scheme which would not otherwise have been made, it adds unnecessary cost to honest consumers through added pressure on essential public services such as the health system and courts, and increased CTP premiums.

Normalisation of such behaviour is socially corrosive and erodes trust.

Current and potential claims experience

In the Queensland scheme, recent data in claims reporting shows an increase in lower severity claims, despite a reduction in reported road trauma.

New South Wales has recently passed the *Motor Accident Injuries Act 2017*, which is expected to commence from 1 December. One of the precipitators for change was an investigation into the NSW insurance industry which found CTP premiums rose by 70% between 2008 and 2016, with claim farming cited as a key contributor. The reformed NSW scheme is designed to reduce lawyers' involvement in lower value claims (often the target of claim farmers). As a result of the legislative changes in NSW, licensed CTP insurers have raised concerns that claim farming practices will increase in Queensland.

What is MAIC doing?

Following receipt of Mr Douglas's report, MAIC engaged in consultation with the legal and insurance industries. This has assisted to mould MAIC's response, which falls into four main categories:

Potential legislative amendments to:

1. reduce the incentive for interstate legal practices to participate in claim farming in the Queensland scheme
   a. require certification by all solicitors representing claimants to advise how the claimant came to be a client
   b. working with actuaries and insurers to identify trends through data which show potential claim farming activity
2. education of the public about effects of claim farming, which MAIC has begun through its website and social media
3. education of the legal profession. In consultation between MAIC and QLS, QLS has committed to take steps to further educate its members.

What to do if you become aware of claim farming?

We all have an obligation to ensure the efficient operation of the CTP scheme. If you become aware of any situations in which you suspect claim farming may be occurring and you require assistance in determining whether a matter requires investigation, please contact MAIC on 1300 302 568.

MAIC will continue to work with the Department of Justice and Attorney-General and the legal and insurance industries to combat claim farming.

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At home on the Gold Coast

Maybe it's something in the salt air, but Gold Coast practitioners are renowned for their collegiality, and this was very evident at the QLS Gold Coast Symposium 2017. It gave the 9 June event a comfortable, 'feels like home' atmosphere and a perfect setting for learning and sharing knowledge in the full-day professional development program, put together with the invaluable assistance of the Gold Coast Law Association. One of many highlights was the enthusiastic congratulations from attendees for 25-year membership pin recipients Edward Fawkes and Beau Harnett.

1. Ava Hartnett, Beau Hartnett, President Christine Smyth
2. Erin Ahearn, Matt Jackson, Brendan Nyst, Cherie Orevich
3. Mark Raeburn, Keith Hunter, Gerry Epstein

Truly illuminating

We promised a brilliant night, and we delivered. Attendees at this year's QLS Annual Ball on 26 May were enthralled by the superb decorations that turned the Brisbane Convention & Exhibition Centre Boulevard Room into an illuminated wonderland. The photo booth was also a big hit, as was Funk'n'Stuff, the dance band that had guests up and partying on the dance floor most of the night.

Many thanks go to Kayla and the team at Brisbane BMW for their sponsorship of the 2017 Annual Ball, with thanks also to u&u Recruitment Partners for sponsoring the photo booth.

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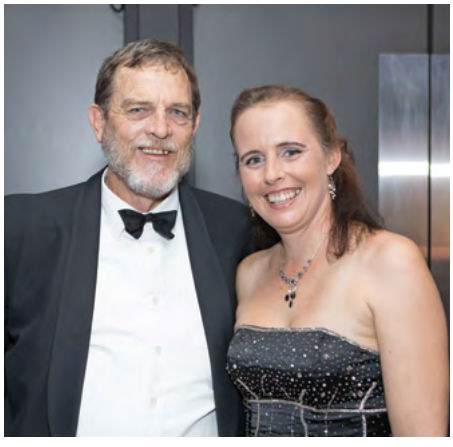

Constructing good law

The QLS Construction and Infrastructure Law Committee

The legal framework, regulations and guidelines that characterise Queensland's construction and infrastructure industry are considered by many to be some of the most complicated in the world.

As a result, the QLS Construction and Infrastructure Law Committee is kept busy reviewing the effectiveness of legislation, advancing practitioners' knowledge on how laws and procedures will affect their practices, and collaborating with key stakeholders in the development and improvement of legislation and judicial process.

More than anything else, the committee advocates for good law. Of late, this has been exemplified by its commitment to campaign for harmonised and uniform legislation across Australia, where possible. This effort was illustrated recently by the committee's contribution to a QLS submission on the Queensland Building Plan Discussion Paper.

In this submission, the committee raised concerns about the Government's introduction of new laws which would attempt to ensure security of payment for subcontractors in the construction and building industry through an initiative known as 'project bank accounts' (PBAs).

While the committee supported the policy objectives behind making sure people get paid in full, on time and every time, it resolved that the proposal contained a number of fundamental flaws that could result in a series of unintended consequences.

Echoing issues raised by key industry stakeholders (including Master Builders Queensland and the Housing Industry Association), the committee raised the following areas of concern:

Introducing PBAs would lead to a significant increase in costs and administrative burdens.

- For example, owners/principals will need to employ additional professional services to assess claims submitted through the head contractor on behalf of the subcontractor. Legal practitioners and accountants will also likely need to be consulted to ensure beneficiaries are clearly established and the trust is properly set up. As a result, the industry will be deprived of cashflow and working capital. This will have a detrimental impact across the industry.

The QLS Construction and Infrastructure Law Committee … helping to construct good law.

The substantive benefit is uncertain.

- PBAs will operate on two levels – (1) for progress payments and (2) for retention of moneys. The committee is concerned that, for progress payments, there will be little likelihood of any substantive benefit. The 'quarantine' period is short (that is, the limited period during which the money is held in the PBA). Additionally, the money is still paid out at the direction of the head contractor. Therefore, the proposed changes will not provide assurance or prevent a head contractor from siphoning money off to prop up its financial distress (for example, to other unprofitable projects).

PBAs will delay payment processing times.

- In 'Fact Sheet 1 Security of Payment', the Department of Housing and Public Works states that PBAs "can also increase speed of payment". The committee questioned the evidence behind this claim and was concerned that, in fact, the opposite might be true – by introducing additional regulatory layers, the payment process will actually be slowed down. QLS highlights that the administration of a PBA (as a trust account) is a complex process. For example, if the money is held in a PBA at the time of the head contractor's insolvency, various questions arise, including:
  - How does a subcontractor prove its entitlement?
  - Who assesses the amount to which each subcontractor is entitled and what if there is a shortfall?

  No one will know whether there is a shortfall until all subcontractors' entitlements are established. That could take a long period, particularly if there are disputes (including among subcontractors) over each subcontractor's entitlement. Further, if a head contractor has (perhaps innocently) undervalued a subcontractor's entitlement from past progress payments, presumably the head contractor has acted in breach of trust. If so, the money paid out in breach of trust could be subject to being traced – a costly and time-consuming process.

The proposal will not afford the desired protection to all stakeholders.

- The committee was concerned that the PBA scheme only dealt with the first layer of subcontractors. Sub-subcontractors and suppliers are denied the same level of industry support and protection.

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by Vanessa Krulin and Hayley Grossberg

The success of the model is uncertain in the private sector.

- The PBA model will be rolled out to both government and private sector projects over $1 million from January 2019, subject to successful outcomes from implementation on government projects worth between $1 million and $10 million. While PBA schemes have been adopted in both Australia and internationally for government projects, little evidence exists to suggest that PBAs have been successfully adopted by the private sector.

In the committee's view, ample remedies are already available. Rather than introducing additional legislation, the true solution lies in industry stakeholders being educated on the apparatus already available to them – namely, the protection afforded by the *Building and Construction Industry Payments Act 2004* and the *Subcontractors' Charges Act 1974.*

The committee resolved that any genuine progress would only be made through an education campaign targeting relevant industry stakeholders. Also, increasing regulation in an environment that is already significantly regimented would only serve to stifle the growth of the Queensland economy and reduce levels of investment.

This committee was assisted in forming this view by the wealth of knowledge provided by its chair, Ross Williams, who brings many valuable insights to the committee through his role as chair of the Law Council of Australia (LCA) Construction and Infrastructure Committee. Through this connection, the committee often collaborates with the LCA on legislative reform of industry relevance – a critical practice, given the general consensus among many in the industry that improving uniformity and harmonisation of legislation across jurisdictions will benefit the industry.

For now, the committee is considering what other changes and challenges the industry will face, including those which may arise in relation to the Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017.

Advocacy is useful when timely and relevant. If you have a construction-related issue that you think may require advocacy, we invite you to contact the Society's advocacy team (advocacy@qls.com.au) so that it may be brought before the committee.

Vanessa Krulin is a QLS policy solicitor and Hayley Grossberg is a paralegal in the QLS advocacy team.

Another makeover for PPS leases

With more changes likely

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Changes under the personal property securities regime that came into effect on 20 May significantly amend the definition of a PPS lease. **Craig Wappett** explains their impact.

The *Personal Property Securities Act 2009* (Cth) (PPSA) applies to security interests in personal property including, but not limited to:

- leases that 'in substance' secure the payment or performance of an obligation,[1] and
- the interest of a lessor of goods under a 'PPS lease', regardless of whether the interest secures the payment or performance of an obligation.[2]

Security interests (including PPS leases) that are not perfected by registration or otherwise:

- are exposed to the vesting rules under the PPSA and the *Corporation Act 2001* (Cth)
- may lose priority to other security interests, or
- may enable a third party to take a transfer of the relevant collateral from the grantor of the security interest free of the unperfected security interest.

The *Personal Property Securities Amendment (PPS Leases) Act 2017* (amending Act), which commenced on 20 May 2017, changes the definition of 'PPS lease' in section 13(1) of the PPSA so that if the lessor is regularly engaged in the business of leasing goods:

- A lease of goods for a term of more than two years (rather than the previous one year) will be a PPS lease from day one.
- A lease for a term of up to two years (rather than the previous one year) that is automatically renewable, or renewable at the option of one of the parties, for one or more terms that *might* exceed two years is also a PPS lease from day one.
- A lease for an indefinite term will be a PPS lease if the lessee retains uninterrupted (or substantially uninterrupted) possession for more than two years (but not until the lessee's possession extends for more than two years) – previously, leases for an indefinite term were PPS leases from day one.
- A lease for a term of up to two years (rather than the previous one year) will be a PPS lease if the lessor retains uninterrupted (or substantially uninterrupted) possession of the leased goods for a period of more than two years after the day the lessee first acquired possession (but not until the lessee's possession extends for more than two years).[3]

The amending Act does not affect the application of the PPSA to 'in substance' security interests such as finance leases and hire purchase agreements.

Rationale for PPS leases being deemed to be security interests

There are two main reasons why PPS leases that do not secure payment or performance of an obligation are deemed to be security interests under the PPSA:[4]

- First, this is intended to minimise disputes about whether a particular lease in substance secures payment or performance of an obligation – this determination would need to be made to ascertain if the PPSA applies to a particular lease in the absence of the deeming provision.
- Secondly, PPS leases raise the same issues of ostensible ownership of assets as leases that are 'in substance' security interests.[5]

Reasons for the changes

In his second reading speech for the Bill for the amending Act the Minister for Justice explained the reasons for the changes:

"In consultation with Australian businesses and particularly the hire and rental industry, it became clear that although the PPS Act was an important initiative, it has created several challenges for small business in particular. These include the imposition of significant administrative burden and substantial compliance costs, which does need to be addressed.

"Small and family businesses which do not have the resources to meet this significant burden are vulnerable to the risk of losing critical business assets. For example, under the Act as it stands, if a hire business fails to register a PPS lease (or registers incorrectly) and the lessee becomes insolvent while in possession of the goods, the goods vest in the insolvent estate of the lessee.

"…

"Many Australian businesses which lease goods to customers for short periods of time permit their customers to use the goods for as long as they need them. It often does not make sense for a hire business to insist on fixed terms for the lease of a chainsaw or cement mixer, for example. If the customer needs the goods for an extra day or a week, the lessor needs the flexibility to accommodate this without an onerous administrative burden."[6]

There is at least one reported case in which a lessor who failed to properly register its security interest under a lease for an indefinite term lost its interest in the leased goods when the lessee became insolvent.[7] Anecdotal evidence suggests this has not been an isolated occurrence and the concerns referred to in the Minister's second reading speech are well founded. This is not to say that the changes introduced by the amending Act are the best way of addressing these concerns.

The amending Act follows on from the repeal of the so-called '90-day rule' for leases of serial-numbered goods which took effect from 1 October 2015.[8] The 90-day rule deemed a lessor's interest under a lease of serial-numbered goods, such as motor vehicles, to be a security interest if the term of the lease exceeded 90 days or the lessee remained in possession for more than 90 days. The repeal of this rule was also aimed at reducing the administrative burden imposed by the legislation.

Interestingly, the statutory review of the PPSA which was concluded in February 2015[9] (the review) recommended that the minimum term of a PPS lease should not be changed from "more than one year" to a longer period.[10] However, the review did recommend that leases for an indefinite period not be caught by the PPSA until the lessee had retained possession for more than one year.[11]

Are there more changes to come?

The review of the PPSA also made a number of other recommendations in relation to PPS leases including:

- that all references to 'bailment' be removed from the definition of PPS lease[12]
- that the insolvency vesting rule for unperfected security interests in section 267(2) of the PPSA not apply to any PPS lease that does not secure the payment or performance of an obligation.[13]

It is not yet clear which, if any, of these recommendations will be acted upon by the Government, but it is quite likely that there may be more changes to come.

For example, the amending Act's changes to section 13(1)(d) of the PPSA have resulted in that section now referring to a "lease for an indefinite term". The section does not refer to a bailment for an indefinite term. This may be an oversight but is more likely a sign that the Government intends to adopt the recommendation of the review to remove all references to 'bailment' from the definition of PPS lease.[14]

Another area where further change is likely concerns registration timing requirements. PPS leases are one type of purchase money security interest (PMSI). PMSIs need to be perfected before, or within a specified time period after, the grantor (that is, the lessee in the case of a PPS lease) takes possession of the leased goods if the lessor is to obtain the super priority afforded to a PMSI holder under section 62 of the PPSA.[15]

Similarly, section 588FL of the *Corporations Act* requires security interests that are perfected by registration and no other means, to be perfected within 20 business days after the agreement that gives rise to the security interest comes into force. Failure to satisfy this timing requirement can result in the lessor losing its interest in the leased goods if the lessee becomes insolvent.

The amending Act does not clarify how these registration timing requirements are to be satisfied in the context of leases for an indefinite term which only become PPS leases (and therefore security interests) once the lessee has retained possession for more than two years.

A similar issue exists for leases having a term of up to two years if the lessee actually retains possession beyond the two-year period.[16] It is likely that the lessee's possession of the leased goods, for the purposes of section 62, will commence when the lessee has possession *under a lease to which the PPSA applies*, that is, when the lessee has had possession under the lease for more than two years. Likewise, it is arguable that a lease to which section 13(1)(d) of the PPSA applies will "come into force" for the purposes of section 588FL of the *Corporations Act* only when the lessee has had possession for more than two years, and the 20 business-day period starts from that time.[17]

These timing issues are not likely to arise very often in practice because most short-term lease, rental and hiring arrangements will not result in the lessee retaining possession for more than the specified two-year period. However, if this were to happen, there is some potential ambiguity in the operation and interaction between sections 13(1)(d) and 62 of the PPSA and section 588FL of the *Corporations Act*.

It is possible that the Government intends to clarify these matters through further amendments to section 62 of the PPSA and by repealing section 588FL of the *Corporations Act* – both of these measures were recommended by the review.[18]

Do the changes affect existing leases?

The explanatory memorandum for the amending Act indicates that it is not intended that the amendments will apply to leases of goods which would have been PPS leases prior to the commencement of the amending Act. At the same time, the explanatory memorandum makes the point that the latest changes to the definition of PPS lease will apply to lease, rental and hire arrangements entered into after the commencement of the changes, even if those arrangements incorporate the terms of a master or umbrella contract entered into before the commencement of the changes.

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At least in the short term, insolvency practitioners will need to consider whether a lease is entered into before or after the commencement of the amending Act, as this will determine which set of rules apply.

Assessing the changes

The repeal of the '90-day rule' has helped to ease the administrative burden imposed by the PPSA without adversely affecting commercial certainty or undermining the conceptual integrity of the legislation.[19] Time will tell whether the changes introduced by the amending Act achieve a similar outcome, but there is reason to question if this will be the case. In particular, the changes introduced by the amending Act:

- may increase the likelihood of disputes regarding the duration of a lessee's uninterrupted (or substantially uninterrupted) possession of leased goods and difficult evidentiary issues could arise in this context
- are arguably inconsistent with the new Australian Accounting Standard AASB16 which defines short-term leases as leases for a term of no more than 12 months[20]
- may mean there is less certainty as to whether goods in the possession of a business are subject to unregistered interests. Changing the threshold of "more than one year" to "more than two years" may undercut the ostensible ownership rationale for PPS leases being deemed to be security interests in the first place.
- may result in payments made to a lessor under a lease for a term of up to two years being more exposed to unfair preference claims.[21]

There is a certain inevitability that other amendments to the PPSA will be made as a result of the recommendations of the review and a number of these further changes will likely have a significant impact on lease, rental and hire businesses.

It is unfortunate that these changes are being made piecemeal rather than as part of a comprehensive package of amendments. Each time changes of this nature are made there is a need to review documents, systems and risk management processes. Piecemeal amendments are not ideal if the objective is to reduce the administrative and cost burden for affected businesses and promote commercial certainty.

This article appears courtesy of the QLS Banking and Financial Services Law Committee. Craig Wappett is a partner at Johnson Winter & Slattery, and a member of the committee. A version of this article appeared in the *Insolvency Law Bulletin* (LexisNexis) last month.

Notes

1 s12(1), PPSA.

2 ss12(3)(c) and 13, PPSA.

3 The definition of 'PPS lease' currently refers to both leases and bailment. For convenience, this article refers to leases only. Where the PPS lease definition refers to a lease, this should be interpreted as including hire or rental agreements.

4 PPS leases that do not secure payment or performance of an obligation are subject to the same rules as 'in substance' security interests with the exception of the enforcement provisions in chapter 4 of the PPSA.

5 A Duggan and D Brown, *Australian Personal Property Securities Law*, 2nd Edition, LexisNexis, 2016 at [3.34] to [3.35].

6 Second reading speech by Michael Keenan, Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism, House of Representatives, 1 March 2017.

7 *Carrafa, Goutzos & Lofthouse (as Liquidators of Relux Commercial Pty Ltd (in liq)) v Doka Formwork Pty Ltd* [2014] VSC 570.

8 *Personal Property Securities Amendment (Deregulatory Measures) Act 2015* (Cth).

9 Bruce Whittaker, 'Review of the Personal Property Securities Act 2009 – Final Report', February 2015 (Final report).

10 Final report at [4.3.5.5.3].

11 Final report at [4.3.5.4.3].

12 Final report at [4.3.5.3.3].

13 Final report at [8.7.4.3].

14 Final report at [4.3.5.3.3].

15 The applicable timing requirement depends on whether or not the leased goods will be inventory of the lessee; s62, PPSA.

16 This issue also existed prior to the commencement of the amending Act if the lease had a term of up to one year but the lessee actually retained possession beyond the one-year period.

17 C Wappett, *Essential Personal Property Securities Law in Australia*, 3rd Edition, LexisNexis, 2015 at [PPSA.13.A] and [PPSA.62.A].

18 Final report at [7.7.8.9] and [9.2.2.1].

19 The '90-day rule' was an ill-considered innovation. There was no equivalent rule in personal property securities legislation in New Zealand or Canada.

20 AASB16 requires a lessee to recognise assets and liabilities on its balance sheet for all leases for a term of more than 12 months, unless the underlying asset is of low value.

21 This is based on the assumption that payments under a PPS lease are more likely to be treated as secured debts than payments under a lease that is not a security interest for the purposes of the PPSA.

The advance of ATO data matching

Data analytics tool scrutinises millions for CGT

Sarah Blakelock and **Peter King** explore the scale and reach of the Australian Taxation Office's data-matching programs in the context of capital gains tax.

In what was described as "breathtaking"[1] back in 2015, the scale of the Australian Tax Office (ATO) data-matching program has continued to expand and evolve.

For more than 10 years, information from a variety of third-party sources has been compiled electronically, validated, analysed and used to ensure that taxpayers are correctly meeting their taxation obligations as part of what the ATO has acknowledged as "a powerful administrative and law enforcement tool".[2]

So, when the ATO was asked at the Senate Estimates hearing on 1 March 2017 about how it checks for capital gains tax (CGT) compliance, ATO Second Commissioner Neil Olesen answered that the ATO received data from third parties that gave the ATO "insights into potential capital gains" arising.[3] This is probably putting it lightly.

The ATO recognises that CGT potentially applies to a very broad range of transactions and events that occur every day. In many respects, CGT is 'all-encompassing'. Mr Olesen confirmed that there are ATO personnel who focus on particular tax risks that the CGT rules, in general, might present to the Australian tax system. In a system in which taxpayers generally self-assess their taxable positions, the system relies on taxpayers properly declaring the tax they owe, with the ATO running a risk-based approach to check that taxpayers have correctly reported and self-assessed their tax obligations.[4]

Mr Olesen went on to speculate before the Senate Estimates hearing that, in all of the systems the ATO administers, CGT revenue leakage could be "quite possibly a bit worse than some other parts of the system".[5]

This article explores the scale and reach of the ATO's data-matching programs in the context of CGT.

What is CGT?

CGT (or capital gains tax) is not a separate tax regime. Rather, the *Income Tax Assessment Act 1997* (Cth) (ITAA97) operates to include net capital gains in a taxpayer's assessable income. Net capital gains are the sum of all capital gains derived during the year net of certain capital losses.[6]

Fundamental to the CGT system is the notion of a 'CGT event' (for example, the disposal of an asset, the passing of title, the ending of rights, among others).[7] A CGT event must happen for a capital gain or capital loss to arise.[8]

In general, a capital gain arises where the capital proceeds from a CGT event exceed the taxpayer's costs associated with the asset, that is, the cost base of the CGT asset. Any gains or losses arising from the disposal of CGT assets acquired prior to 19 September 1985[9] are typically disregarded.

Common assets subject to the CGT provisions include real property, shares and intellectual property rights. This article will further explore the ATO's data matching programs in the context of real property and shares.

Real property

Under the program,[10] the ATO obtains data from various state and territory revenue offices, Land Titles Offices and residential tenancies boards dating back to 20 September 1985. All transfers of freehold and leasehold interests in real property executed within each jurisdiction are required to be reported.

The data obtained by the ATO includes the rental bond number or identifier, the full name and address of the landlord and the period of lease, as well as the dates and details of any property transfers, details of the parties to the transfer, and relevant valuation details.[11]

The ATO's stated objectives of the real property transactions data-matching program are to:

- promote voluntary compliance and strengthen community confidence in the integrity of the taxation and superannuation systems, and other programs administered by the ATO
- obtain intelligence about the acquisition and disposal of real property and identify risks and trends of non-compliance across the broader compliance program
- identify a range of compliance activities appropriate to address risks with real property transactions by taxpayers and others that are required to notify the ATO of dealings in real property
- work with real property intermediaries to obtain an understanding of risks and issues as well as trends of non-compliance
- support compliance strategies to minimise future risks to revenue
- ensure compliance with registration, lodgment, correct reporting and payment of taxation, superannuation and other obligations.[12]

The ATO expects that about 31 million records for each year will be obtained (30 million revenue and Land Titles Office records and one million rental bond authority records). These records are estimated to match around 11.3 million individuals.[13]

During the 2014-15 financial year, the ATO identified more than 8000 cases in which real property dealings had not been correctly reported by taxpayers and raised an additional $161 million in revenue.[14]

The ATO also tracks significant transactions as they are reported in the media, and often seeks to engage with taxpayers in real time as the transaction unfolds.

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Shares

Much like the real property transactions data-matching program, the ATO's stated purpose of the share transactions data-matching program is to ensure that taxpayers correctly meet their taxation obligations in relation to share transactions. These obligations include registration, lodgment, reporting and payment responsibilities.[15]

Since 2006, data relating to the sale and purchase of shares dating back to 20 September 1985 has been obtained from share registry service providers to enable cost base and capital proceeds calculations. This data has been compared with information included in income tax returns and matched against other ATO records to identify taxpayers who may not be complying with their taxation obligations on the disposal of shares and similar securities – particularly in relation to CGT.[16]

The data obtained by the ATO in respect of taxpayers include:

- full name
- full address
- holder identity number
- shareholder registry number
- entity name
- entity ASX code
- purchase date
- purchase price
- sale date
- sale price
- quantities of shares acquired or disposed of
- corporate actions affecting shareholders (for example, corporate reconstructions)
- broker identity
- transaction codes
- entity type
- direction indicator (buy or sell).[17]

The ATO estimates that it will receive data on more than 61 million transactions under its data-matching program. It is estimated these transactions will identify about 3.3 million individual taxpayers.[18]

ATO's remarks

With its data-matching programs kicking strong, the Commissioner of Taxation, Chris Jordan, explained at the Senate Estimates hearing that, over time, the data on transfer of title of a property will be "very useful" to the ATO, "as will stock exchange information regarding share trading". Commissioner Jordan proceeded to explain that "one of the potentials of this blockchain technology is to identify a person associated with an asset", which would be useful to the ATO "because then you would have all the share trading activity".[19]

Commissioner Jordan recognised that, together with the Land Titles Office data, this would cover, for most taxpayers, capital gains made on shares or on real properties.

What are the consequences for reporting your CGT incorrectly?

ATO investigations

The data-matching programs assist the ATO to identify risks of incorrect reporting or anomalies in a taxpayer's income tax return. Where the data-matching software flags areas in a taxpayer's reported information for attention, the ATO may choose to commence an investigation (usually in the form of a risk review and/or an audit) into the taxpayer's tax affairs. This often commences simply with a request for information concerning such transactions and may quickly escalate into a full audit of a taxpayer's tax affairs for a four or more year period.

Shortfall in primary tax payable

Given the complexities within the CGT regime, and the current system whereby taxpayers generally self-assess their taxable positions, there is an inherent and foreseeable risk that the CGT liability may be reported incorrectly, such that a shortfall in the primary tax payable may be discovered on ATO review.

Not only can an investigation by the ATO be an arduous and unpleasant experience for a taxpayer, when a shortfall is discovered there can also be significant monetary consequences. On discovery of a shortfall, the ATO will issue the taxpayer with an amended assessment requiring them to pay the shortfall within 21 days, and likely impose a penalty of at least 25% of the shortfall amount of the tax that otherwise would have been payable, as well as interest, compounding until paid.

As is usually the case with ATO investigations, the taxpayer may not be aware of the existence of any shortfall until discovery by the ATO at a later date. By this time, any gain received to pay that liability may have already been expended. Alternatively, the CGT liability may have arisen pursuant to the operation of the tax legislation in a way which was unintended by the taxpayer, with no monetary gain actually received by the taxpayer to pay that CGT liability.

ATO investigations – managing your risk

Documenting your position

At all times, taxpayers bear the onus of proof in evidencing their income tax (including CGT) positions. The ATO bears no onus in establishing that the amended assessment made after an investigation is correct, and can issue amended assessments for the amounts on which in the ATO's judgment (based on the evidence available to them) tax ought to be levied.[20]

Therefore, the onus is on taxpayers to maintain appropriate documentation and evidence which support the tax positions they take – even where that position may seem reasonably straightforward or non-contentious.

The importance of collating robust evidence contemporaneously or as operations are carried on is emphasised. By the time notification of an ATO investigation is issued, some months or years may have passed, making it difficult to locate robust evidence. With an increased time gap, there is a greater likelihood that relevant witnesses or decision-makers may have left the taxpayer's business, greater probability of loss of memory or knowledge of the relevant events, increased costs to locate documents, and increased possibility of inadvertent destruction or non-retention of the relevant documentation.

As nerdy tax dispute resolution fanatics, there are few things which are more satisfying than the ability to furnish the ATO with a robust, comprehensive, pre-collated file of documents which evidences the positions adopted by the taxpayer and the reasons for adopting those positions, when the ATO comes knocking.

Justifying your position retrospectively

There are a myriad of CGT concessions, rollovers and exemptions available which enable taxpayers to negate in whole or in part a CGT liability – for example, the same asset rollover. An interesting feature of the CGT provisions is that the choice to rely on these concessions, rollovers and/or exemptions is merely reflected in the way the taxpayer lodges their income tax return for the relevant year. There is no other form to submit or notification to be made to the ATO in respect of applying the concessions, rollovers or exemptions.[21]

When a taxpayer has neglected to make a choice in their income tax return, it may be possible for the taxpayer to amend their return to 'choose' to apply a concession, rollover or exemption, or to amend the return to 'undo' such a choice.[22] In each instance, the period for doing so is usually four years after the return is lodged (for a company) or an assessment is issued (for all other taxpayers). Taxpayers who seek to amend their return outside this period may need to ask the Commissioner to exercise his discretion to allow the 'choice' to apply the concession, rollover or exemption.

Understanding the law is one thing; understanding the evidence required to support a tax position adopted is an entirely different proposition. Expert advice from tax dispute professionals should be sought when the ATO comes knocking.

Concluding remarks

The recent Senate Estimates hearing provides a timely reminder to taxpayers (and their advisors) of the importance of ensuring compliance with their CGT obligations. The reminder is particularly ripe in light of the ATO's increasing focus on compliance in the CGT arena, and the ATO's proliferating ability to pick up on any errors made by taxpayers through its data-matching programs.

In an era of self-assessment, increasing complexities within tax law and formidable use of data and technology, there is no more-important time to ensure your tax 'backyard' is in order.

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Notes

1 Lisa Lynch, 'ATO real property data-matching focuses on CGT compliance' (11 January 2016) Tax Insight Thomson Reuters, taxinsight.thomsonreuters.com.au/ato-real-property-data-matching-focuses-on-cgt-compliance.

2 Australian Taxation Office, Data Matching (27 October 2016), ato.gov.au/general/building-confidence/in-detail/data-matching.

3 Evidence to Economics Legislation Committee Estimates, Parliament of Australia, Canberra, 1 March 2017, 66 (Neil Olesen, ATO Second Commissioner).

4 Ibid.

5 Ibid 67.

6 ITAA97 s102-5.

7 The CGT events are summarised in the table at s104-5 of the ITAA97.

8 ITAA97 s102-20.

9 The introduction of the CGT regime.

10 Australian Taxation Office, Real property transactions 1985-2017 data matching program protocol (7 December 2015), ato.gov.au/general/gen/real-property-transactions-data-matching-program-protocol.

11 Ibid.

12 Ibid.

13 Ibid.

14 Ibid.

15 Australian Taxation Office, Share transactions 2016-17 and 2017-18 financial years data matching program protocol (26 October 2016), ato.gov.au/general/gen/share-transactions-2016-17-and-2017-18-financial-years-data-matching-program-protocol.

16 Ibid.

17 Ibid.

18 Ibid.

19 Evidence to Economics Legislation Committee Estimates, Parliament of Australia, Canberra, 1 March 2017, 67 (Chris Jordan, ATO Commissioner of Taxation).

20 *Income Tax Assessment Act 1936* (Cth) (ITAA36) s167.

21 See ITAA97 s103-25 regarding how to make a choice for the purposes of the CGT provisions.

22 Lisa Lynch, 'ATO real property data-matching focuses on CGT compliance' (11 January 2016) Tax Insight Thomson Reuters taxinsight.thomsonreuters.com.au/ato-real-property-data-matching-focuses-on-cgt-compliance.

Advance care directives in Queensland

Two sides of the coin

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Queensland has an opportunity to review its approach to advanced care directives, but will need to look closely at both sides of the coin – health and legal. Report by **Karen Williams**.

Planning for future health and personal needs has been gathering increasing attention, internationally and nationally.

Various factors have contributed to this, including the greater role of technology in keeping people alive, legislative changes clarifying the status of documents at a national level, greater awareness around future planning documents, and aged care and disability policies that promote increasing autonomy and choice.[1]

Currently in Queensland there is a tension in this area. Since 1998, when the *Powers of Attorney Act 1998* (PAA) was enacted, Queenslanders have been able to document their health decisions in an advance health directive, and their specific health 'terms' as a component of 'personal matters', in an enduring power of attorney (EPA).

These documents are almost 20 years old and are under review by Department of Justice and Attorney-General. Though this review is necessary, the lag in reviewing them has perhaps led to the development of other documents. These include a statement of choices (SOC), which provides guidance and assistance for healthcare decisions, but has no basis in statute.[2]

Meanwhile, states such as South Australia and Western Australia have developed statutory directives for health and/or care.[3] A national program called Respecting Patient Choices[4] has been developed which showcases all state documents. Other states, such as New South Wales, have not put their focus on the development of a statutory form, instead stating that a person may write down their views and wishes which should be respected at common law,[5] following the approach in *Hunter and New England Area Health Service v A* [2009] NSWSC 761.

Historically, Queensland has not used the terminology of an advance care directive (ACD), preferring to refer to documents by their title, such as advance health directive or enduring power of attorney. Also, Queensland has been a jurisdiction unfamiliar with a common law approach.[6]

Within the national framework the term ACD is used to include common law and legislated instruments for future personal decision-making. Appointing a trusted substitute decision-maker can be useful, particularly when people are not sure of their future health needs. This facility can only occur via a statutory instrument such as the ones currently available in Queensland.[7]

Queensland has recently witnessed the emergence of two documents, the SOC and an advance health directive for mental health (AHD-MH), which is found in the *Mental Health Act 2016* (MHA).[8] The latter document has some legislative support in both the MHA[9] and PAA.

People with fluctuating capacity, as a result of their mental illness, can document their treatment preferences when they are capable, along with their views and wishes about personal matters. They can also appoint an attorney for decision-making that will form the basis for future consent for mental health care. These documents can be stored electronically in the mental health information system and can be used to provide 'future' consent, instead of involuntary treatment, if the treatment proposed is relevant to the person's needs at that time. There is a positive obligation on doctors and health professionals to check electronic records to see if the person has an AHD-MH and to read it and, if it is not followed, to record their reasons in the medical records.[10]

A SOC also records treatment preferences in advance, but is not aligned to the legislative framework. Arguably this form finds its legal basis in common law; however, in Queensland, unlike NSW, our focus has always been on statutory forms.

The SOC has two components, a form A, and form B. Form A is the document that you sign when you have capacity and Form B is the document that is signed by your substitute decision-maker. Both forms also require a doctor's signature – Form A to attest that the person had capacity and ensuring the doctor is not an attorney, relative or beneficiary under a will, while Form B seeks a doctor's declaration that the substitute decision-maker is 'appropriate', understands the importance of the document and is acting in the best interests of the person. [11]

This declaration places the doctor in a greater position of authority, asserting that they can make this judgement of 'appropriateness'. There is no information on the SOC about applying to Queensland Civil and Administrative Tribunal (QCAT) regarding the inappropriateness of decision-makers, or in relation to the validity of their appointment. Nor is there information that there can be a referral to the Office of the Public Guardian, who has authority to receive complaints and investigate the actions of a substitute decision-maker.[12]

In the information section for the SOC, the AHD and EPA forms are described as legally binding and the SOC, which is listed first, is described as a document used to assist a substitute decision-maker and guide healthcare decisions if the person is unable to communicate their views and wishes at the time. When looking at the questions listed on page one, it is clear that the views and wishes gathered are in relation to end of life choices.[13]

Differences in documents

AHDs and EPAs have a statutory basis in accordance with the PAA and the *Guardianship and Administration Act 2000* (GAA). If there is a dispute about someone's capacity, either to execute the document or when the document takes effect, or the validity of the document, that can be resolved in QCAT.[14] This decision is then subject to appeal through the QCAT appeals process.

The AHD-MH, while borrowing heavily from the PAA, is still a Queensland Health document. It is unclear about the options for independent resolution of disputes. For example, a declaration of capacity could be sought from QCAT, but in relation to the validity of the document, it is not clear that QCAT has jurisdiction to resolve that matter.

The SOC is less clear, as it is not attached to the legislative framework. It seeks to assist and provide guidance, but the decisions it applies itself to have severe and possible life-limiting consequences. Acting on these documents can result in the refusal of life-sustaining measures. There is currently little guidance for health professionals or lawyers about reconciling these different documents, if they state different preferences.

It is also difficult to know which documents to recommend for patients or clients and for what purpose, or where to have disputes resolved about the validity or application of the documents. There is uncertainty about what to advise patients, families and carers who wish to understand or challenge the documents and resulting decisions.

It is clear that there is also current tension between documents seen as 'legal' and others seen as 'health'. Greater clarity is required for both professions, and, more importantly for people within the general community who are considering making advance care plans. In Queensland we now have an opportunity, while the forms are under review, to integrate community, health and legal requirements to improve the current lack of clarity causing concern.

At this time, we can also look to other states and countries to consider how they have grappled with the current set of tensions.[15]

National framework

In 2011 a national framework for ACD was developed, giving some guidance for the situation described above. This document highlighted the growing community support for autonomy and self-determination, particularly around end-of-life issues. There was an increasing awareness of the limits of modern medicine and the need for mutual recognition and application of ACD in health and aged care. Also, that subsequent clinical and medical plans be informed by, and consistent with, any previous recorded ACD.[16]

Two sides of the same coin

Just as a coin can't bend to see what is happening on the other side, it appears that there is some difficulty for health and legal professionals in being able to appreciate the role that each plays in advance care planning. It is anticipated that the review of the AHD forms provides an opportunity to provide an integrated response, considering the needs of professionals and community.

Most people complete an ACD when they are well, while completing other documents with their lawyer relating to estate and financial planning.[17] At this stage, they cannot anticipate the course of any future illness, and they may just outline treatments or outcomes they prefer or wish to avoid, as well as nominating a substitute decision-maker who they consider will make decisions in accordance with their wishes.

The other side of the coin is when someone receives a diagnosis of a chronic or terminal condition and receives specific advice about the course of their illness and needs to make decisions on that basis for future treatment. This will often occur in health services.

Table 1

PROPOSED CORE COMPONENTS OF STATUTORY ACD
1. Focus on values, preferences and quality of life outcomes
2. Holistic understanding of health matters
3. Able to include health concerns relevant to short-term capacity fluctuations as well as long-term or permanent impaired capacity, including end of life and other chronic conditions
4. Compliant with PAA – capacity to execute and witnessing requirements
5. Form provides guidance in clear language for completion so people can complete it in a range of settings
6. Predominantly free text fields
7. ACD is the primary document which then informs other clinical documents and utilises current IT capability
8. Ethical framework adopted and training provided
9. Ability for SDM to be appointed and their decisions based on 'what the person would have wanted' (substituted judgement)
10. Guardianship framework utilised if document or SDM is challenged
11. Mutual recognition of Australian and New Zealand ACDs
12. Obligation on health professionals to perform basic checks for ACD before initiating/withholding treatment and care

It is clear that both sides of the coin, legal and health, quite legitimately exist. Any legislative or policy change should be made encompassing or in contemplation of both. Indeed, there is also a third dimension in that, with the growth of autonomy principles, it is clear that people want to be in control of the process that records their views, wishes and preferences.

People do not necessarily want to be reliant on professionals, be they legal or medical, and be able to complete the process themselves, or seek their own advice, from a professional of their choice.[18] In an evolution of the process of improving advance care planning, community, health and legal professionals have to be closely involved, and efforts at improving the current confusion must be completed in an integrated way.

The national framework supports a process focused on a person in the community being able to navigate the system themselves, rather than focusing on a patient in a health or care setting.[19]

The national framework also makes it clear that clinical and medical care plans are required in clinical and care settings, with or without an ACD. However, when there is an ACD, then this is the primary document that informs clinically and medically generated treatment and care plans.[20] This creates an opportunity for innovation for a technological response, involving the primary document being linked with medical, treatment and care plans.

In development of a legal framework, it is acknowledged that there are ethical components to the issues, and accordingly a national ethical code for ACDs has been proposed.

Proposed national ethical code[21]

1. ACDs are founded on respect for autonomy.
2. Competent adults are therefore entitled to make decisions about their personal and health matters.
3. Autonomy can be exercised in different ways according to culture, religion and historical background.
4. Adults are presumed competent.
5. Directions in an ACD may reflect a broad concept of health.
6. Directions can relate to future time.
7. The person themselves decides their 'own' quality of life.
8. A substitute decision-maker (SDM) has the same authority as person when competent.
9. SDM must honour residual capacity (only make a decision as the need arises and consider whether the person may be competent for that decision at that time).
10. The primary standard for SDMs is 'what the person themselves would have wanted' (substituted judgement).
11. The best interests test is only to be used when there is no evidence as to what the person wants.
12. An ACD can be relied upon if it appears valid.
13. A refusal contained in an ACD must be followed if relevant.
14. An ACD or SDM can consent or refuse, but not demand treatment.
15. Even if part of an ACD does not apply to the circumstances, remaining preferences and values remain valued and can guide care and the SDM.

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Problems so far

1. A person can't anticipate future health needs when well, and an ACD maybe not be subsequently updated when diagnosed with severe health problem.
2. An SDM is unable to interpret non-specific, old or uninformed directives.
3. An SDM may not understand their role (may either not act at all, or be too restrictive in carrying out their role).
4. Doctors may be unable to interpret an ACD, as it may be too vague or not relevant to current circumstances.
5. Doctors and health and care professionals may not follow an ACD or recognise the authority of the SDM.[22]

Proposed core standards for law and policy

The table on the opposite page is a list of possible requirements to be considered in the development of an ACD. They are taken from the national framework and they may form the beginning of a discussion for Queensland key stakeholders to consider what they want included. These proposed components can be amended or modified during the process.[23]

Conclusion

We have a unique opportunity in Queensland for a generational change in our approach to advance care planning. Tensions surrounding the state of our current approaches are an opportunity for community, health and legal professionals to develop an approach that meets a person's needs at home as well as when they have been diagnosed with a serious or life-limiting condition and in an acute hospital or care setting. When reviewing options for improvement and integration, looking beyond the other states to the approaches taken overseas may well be most informative.

This article appears courtesy of the Queensland Law Society Health and Disability Committee. Karen Williams is a Brisbane barrister and chair of the committee.

Notes

1 The Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers Advisory Council, *A National Framework for Advance Care Directives,* 2011 p4. Also consider National Disability Insurance Scheme at ndis.gov.au/about-us and Consumer Directed Care Aged Care Policy at myagedcare.gov.au/help-home/home-care-packages/consumer-directed-care-cdc.
2 See metrosouth.health.qld.gov.au/acp.
3 See advancecaredirectives.sa.gov.au and health.wa.gov.au/docreg/education/population/HP11536_advance_health_directive_form.pdf.
4 See caresearch.com.au/caresearch/tabid/92/Default.aspx and advancecareplanning.au.
5 See health.nsw.gov.au/patients/acp/Documents/making-your-wishes-known.pdf.
6 The Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers Advisory Council, *A National Framework for Advance Care Directives,* 2011, p9.
7 Ibid, p5.
8 Guide and form located at health.qld.gov.au/__data/assets/pdf_file/0036/639864/Advance-Health-Directive-Guide-and-Form.pdf.
9 *Mental Health Act 2016,* s13, and s222, the latter of which sets out the relationship between the *Mental Health Act 2016* and Power *of Attorney Act 1998* regarding views, wishes and preferences for treatment.
10 *Mental Health Act 2016,* s43(4) & s54.
11 See metrosouth.health.qld.gov.au/sites/default/files/soc-metronorth-form-b.pdf.
12 *Public Guardians Act 2014,* ss19-32.
13 Above n9.
14 GAA s81(1)(d).
15 For examples consider current approaches by Western Australia, South Australia, Tasmania, New Zealand and Scotland.
16 Above n6.
17 Above n6 pp5, 8.
18 Above n6 p5.
19 Above n6 p11.
20 Ibid.
21 Above n6 pp13-14.
22 Above n6 p6.
23 Above n6, pp16-42.

Liberty to apply

Its role in 'working out the order'

During civil proceedings, an order may be made granting the parties liberty to apply.

Often, parties will ask for such an order when there is no need to do so and, sometimes, a party will attempt to bring an application pursuant to such liberty and fail because it falls outside the scope of the liberty which has been granted. It is important to understand the purpose and limits of such an order.

What does it mean?

When final relief has been granted in a proceeding, an order granting liberty to apply enables further orders to be made which are necessary for the purpose of implementing and giving effect to the principal relief already granted or, in other words, "working out the order".[1] This can include asking the court to resolve an argument about the detail of action already ordered to be undertaken.[2]

For example, following a trial, specific performance of a contract may by granted. The judge may also grant 'liberty to apply' to the parties to enable the parties to return before the trial judge and seek further orders which will facilitate the granting of the principal relief, being specific performance, such as the execution of particular documents.[3]

If there is a good prospect that ancillary orders may be needed to give effect to the orders made by the court, or the matter is a complex one, or one which requires court supervision, then an order should be sought that the parties have liberty to apply. Often, the grant of liberty is premised on a certain number of days' notice being given to the other parties. Occasionally, the grant of the liberty to apply is subject to express restrictions.

Sometimes, liberty to apply is also granted in interlocutory proceedings, although this is less common. However, and subject to the terms of any such order, the grant of such liberty serves the same purpose – that is, it enables further orders to be made which are necessary for the purpose of implementing and giving effect to the orders which have been made.

What does it not mean?

As a general rule, a party cannot rely upon the grant of liberty to apply to seek a variation of, or to set aside, the orders which have been made. In other words, a party cannot seek a different order than that made unless it is for the purposes of working out the existing orders. Nor can a party rely upon liberty to apply to ask a court to hear and determine a matter which it has already determined.

The rules of court provide the circumstances in which an application can be made by a party to vary or set aside an order. For example, rule 667 and rule 668 *Uniform Civil Procedure Rules* set out circumstances in which a party can apply to set aside or vary an order in the state courts.

A party cannot sidestep the requirements of such rules by seeking a variation of an existing order under the grant of liberty to apply, unless the variation which is sought is necessary for the purpose of working out the actual terms of the order so as to make it more efficacious in detail. In *Fylas Pty Ltd v Vynal Pty Ltd,*[4] McPherson SPJ (as his Honour then was) stated:

"A decree of specific performance in the limited form previously described nevertheless is a 'final' order for the purpose of appeal and otherwise, and so, at least as to issues litigated, cannot be discharged or varied under liberty to apply, notwithstanding that further decisions and orders may yet have to be made in working out its consequences. What cannot be done under the guise of 'working out' an order is to vary it. Of this, *Cristel v Cristel* [1951] 2 K.B. 727 is perhaps the clearest illustration. In respect of the former matrimonial home occupied by a wife and children, the husband obtained an order for possession that was by consent suspended until he provided suitable alternative accommodation, which was to be in the form of a 'house or bungalow'. His attempt to have the order varied under liberty to apply by adding the words 'or flat' after 'bungalow' was rejected by the Court of Appeal."

In *Perpetual Trustees Queensland Ltd v Thompson,*[5] Martin J identified the following principles:

a. When final relief has been granted in a suit, an order granting liberty to apply enables further orders to be made which are necessary for the purpose of implementing and giving effect to the principal relief already pronounced or, as it is sometimes called, "working out the order".

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Kylie Downes QC explains when to ask for 'liberty to apply' and, in turn, the circumstances when an application can be made pursuant to that liberty.

b. Liberty to apply cannot be used to alter the substance of an order already made.
c. What can be done under a reservation of liberty to apply depends on what needs to be done, in the particular case, to work out the particular orders that have been made.
d. If an order is one the working out of which of its nature involves deciding complex questions, or questions that were not specifically raised at the time the order was made, those questions can be raised and decided in the original suit pursuant to liberty to apply.

Interlocutory context

Until final orders have been made, the rules of court permit a party to bring an interlocutory application for relief, including the seeking of an order which varies a previous order (subject to satisfying the requirements of the rules relating to such applications).

For this reason, it is usually not necessary to include an order that the parties have liberty to apply as part of an interlocutory order. That is because a party can bring an application for interlocutory relief at any time (subject to compliance with the rules of court) and does not need leave to do so.

If liberty to apply is granted as part of an interlocutory order then, subject to its terms, it cannot be relied upon to seek an order which cannot be characterised as one which is needed in order to work out or implement existing orders.

For example, in *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No.3)* [2010] 1 Qd R 244, a freezing order was made (in the presence of both parties) which included 'liberty to apply'. The party which was the subject of the existing freezing order relied upon the liberty to apply to seek an order permitting it to use certain proceeds of sale of its properties to pay its reasonable legal expenses. The application failed. At [41] of the decision, White J (as her Honour then was) stated that:

"… This application is well beyond the usual express (or implied) leave to apply which is a feature of interlocutory orders... This application clearly does not concern the 'working out' of the order even on the broadest understanding of that expression."

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

Notes
1 *Perpetual Trustees Queensland Ltd v Thompson* (2012) 2 Qd R 266 at [29].
2 *Comcare v Grimes* (1994) 50 FCR 60 at 62.
3 *Abigroup Ltd v Abignano* (1992) 39 FCR 74 at 88.
4 [1992] 2 Qd R 593 at 598.
5 (2012) 2 Qd R 266 at [29].

Queensland set for WHS crackdown

Hefty penalties likely under harmonised legislation

Over the past five years, all Australian jurisdictions (with the exceptions of Victoria and Western Australia) have adopted harmonised work health and safety legislation (WHS legislation).

Under this legislation, monetary penalties for failing to ensure the health and safety of workers have increased significantly.

In particular, recent decisions in the Commonwealth and New South Wales jurisdictions have indicated that courts are now more willing to impose higher range penalties for WHS breaches in line with the legislation.

Penalties explained

Under the WHS legislation, penalties are scaled against the severity of the offence and fall under three categories.

A corporation charged with the most serious breach – a category one offence for recklessly exposing an individual to a risk of death or serious injury or illness – may face a maximum penalty of up to $3 million, while an officer may face a maximum penalty of $600,000 and five years' imprisonment. No corporation or individual has been convicted of a category one offence as yet, and it is only recently that a handful of prosecutions have been commenced under this section.

The more commonly prosecuted category two offence arises when an individual is exposed to a risk of death or serious injury or illness. A corporation faced with a category two offence may be subject to a maximum penalty of $1.5 million, while an officer faces a maximum penalty of $300,000.

Category three offences are breaches of the legislation when there has been a failure to comply with a health and safety duty, but without risk of serious harm or recklessness. In these cases, a corporation will be subject to a maximum penalty of $500,000 and an officer, $100,000.

The largest penalties on record

On 19 April 2017, the South Australian (SA) District Court handed down a fine of $650,000[1] – the largest penalty to date under the *Work Health and Safety Act 2011* (Cth), and almost $300,000 more than the highest penalty awarded under the previous legislation.

The incident involved a new chemical waste product that was being tested at the Wingfield Chemical Waste Processing Plant. The employees undertaking the process had been incorrectly advised what the temperature of the product should have been during the distillation process. When an employee opened the release valve, it caused an explosive rush of air, covering another employee in the undistilled material. Fortunately, the employee was wearing personal protective equipment (as required by the work manual) and only suffered a wrist sprain from the incident.

Despite the relatively minor injury, the employer was charged with a category two breach for failing to ensure, so far as reasonably practicable, the health and safety of workers and exposing them to a risk of death or serious injury or illness. In handing down the record-breaking fine, her Honour took into account that:

- A significant aggravating factor was that the risk of injury was foreseeable, even if the precise circumstances of the risk were not.
- The offence was further aggravated because the risk of injury was foreseen and an adequate response was not undertaken.
- The gravity of the consequences does not, of itself, dictate the seriousness of the offence or potential penalty, however death or serious injury may manifest the degree of the seriousness.
- The systematic failure by the employer to address a known or foreseeable risk.
- A neglect of simple well-known precautions to deal with an evident and great risk of injury takes the matter into the worst-case category.
- The defendant had committed three contraventions of the previous Commonwealth WHS legislation, dealt with by way of civil penalties.
- An explosion and fire had previously occurred at the site due to the distillation of what was then a new substance.
- A fine of $850,000 would have been appropriate, but for the early guilty plea.

NSW also saw its largest penalty handed down recently under the harmonised *Work Health and Safety Act 2011* (NSW) on 5 May 2017.

WGA Pty Ltd was convicted of a category two offence for failing to ensure the health and safety of the worker so far as reasonably practicable, having exposed them to a risk of death or serious injury or illness.[2] In this case, the director of the defendant company blatantly disregarded its safety obligations when he instructed a subcontractor to install angles on windows, knowing that scaffolding outside the apartments being worked on could not be used without a person coming within three metres of high voltage power lines. During installation, the angle the worker was holding came into contact with the power lines and he suffered a severe electric shock resulting in burns to 30% of his body.

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Laura Regan and **Matthew Giles** look at recent interstate penalties for WHS breaches and what this could mean for Queensland.

In handing down the massive $1 million fine, which was double the amount of the largest fine previously issued in this jurisdiction, his Honour took into account that:

- The risk to workers was clearly known and the likelihood of the risk occurring was high if control measures were not adopted.
- The likelihood of the risk was increased if workers were required to handle tools or materials that would come within close proximity of the power lines.
- The defendant was told of the risk posed.
- The gravity of the risk was significant and included a risk of death.
- The company had previously been issued with three prohibition notices on the same subject matter and an improvement notice relating to the risk.
- The defendant had knowledge of the content of the task that was required to be performed and of the steps required to eliminate and/or avoid the risk, including the need to isolate the power.
- The defendant was aware the power lines would not be isolated on the relevant date.
- The company took none of the steps that it had been informed of to eliminate or minimise the risk.
- The extent of the injury was significant.
- The defendant did not have any previous convictions.

What does this mean for Queensland?

To date, there have only been eight reported prosecutions under the harmonised *Work Health and Safety Act* (2011) (Qld) (WHS Act) that have resulted in fines of more than $100,000—the highest of which was $200,000, which is only equivalent to 13% of the maximum fine of $1.5 million.

However, in light of a number of tragic, fatal safety incidents during 2016, the Queensland Government has turned its attention to the state's work health and safety compliance regime. It announced a best practice review of Workplace Health and Safety Queensland in April 2017—including an assessment of whether current penalty levels act as a sufficient deterrent to non-compliance—and in May 2017 (before finalising this review) announced in advance that it would introduce a new criminal WHS offence of 'negligence causing death'. While the details of this offence are yet to be finalised, it is likely to impose significant penalties on directors and/or workers for WHS breaches.

Given the increase in penalties handed down interstate under the harmonised legislation and this renewed focus by the Queensland Government on the enforcement of the WHS Act, it is anticipated that prosecutions will rise, and that prosecutors and the courts may become more willing to consider larger penalties when confronted with serious breaches.

This change in climate should serve as a reminder to all duty holders that, should they fail to take proactive steps to ensure the health and safety of workers, serious charges could be brought against them accompanied by very significant financial penalties.

Laura Regan is a senior associate and Matthew Giles is a lawyer at Sparke Helmore Lawyers.

Notes

[1] *R v Cleanaway Operations Pty Ltd* (South Australian District Court, Judge Davison, 19 April 2017).

[2] *Safe Work (NSW) v WGA Pty Ltd* [2017] NSWDC 92.

'I'm with the Government'

Is this the practice area for you?

It can be easy to be swept up with the idea of big-firm private practice but overlook other opportunities. **Jessie Jagger** looks at some of the pros and cons that may help you decide whether to give government a go.

Pro: No billable hours

You heard that right, no billables! Government lawyers in Queensland generally work a 7.25-hour day (excluding lunch-break and rest periods). You should aim to be efficient enough to get the job done within this time. However, if you work overtime on a major case or have to travel to a regional court, you can accrue 'flex time', which could give you a day or half-day off in the future, at your manager's discretion.

Pro: Advocacy

If you aim to be on your feet in courts or tribunals (perhaps you are aiming for the Bar), starting out in government can be a huge advantage. It is not a given (as it may be in private practice) for statutory bodies to brief counsel or have senior lawyers run matters. Young lawyers may be expected to appear in court or tribunals for anything from mentions or directions hearings through to full trials. This can be an invaluable training ground.

Pro: Utilise your passion

Private firms can only take on a small percentage of graduates and getting a job in the law straight out of university is very competitive. This can make it incredibly difficult to find work after studying. You may have a passion or special interest to get your foot in the door in government. For example, are you an avid boater/fisher? Perhaps you have an accidental knowledge of fishing rules and regulations that could lead you to fisheries prosecutions. Did you work in healthcare or at a pharmacy at uni? You might be interested in occupational disciplinary work in the health space.

Con: Progression can be unpredictable

As government bodies tend not to record tasks to bill, it can be difficult to monitor who is adding value to the team and who is dragging their feet. This can be disheartening, particularly as you can be waiting a long time for a permanent position to open up. One way to counter this is by monitoring your own output and retaining positive written client feedback (when appropriate) for use in interviews. Keep track of your successful outcomes as against your teammates if you can.

Con: No rewards for performance

There are no monthly company-paid drinks, morning teas or bonus structures for making budget or performing beyond expectations. Your reward for getting through your work and closing legal files quickly and efficiently will likely be verbal gratitude from your manager and client, followed by a gift of more files. It is important to realise that the good opinion of your manager, team and clients can create benefits for you in the future, so try to remain positive.

Tips to get your foot in the door

If there are no positions available within your department of interest, ask whether they would be open to hiring a legal clerk or check vacancies in another business unit. I started out as a legal clerk before successfully applying for a lawyer position and had colleagues who started out in the records and contact centre units. You will gain business knowledge and be familiar with the legislation and policies by the time you interview for a lawyer position.

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee's Proctor working group is chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and William Prizeman (william.prizeman@legalaid.qld.gov.au). Jessie Jagger is a member of the Early Career Lawyers Committee. She started at the Queensland Building and Construction Commission before recently moving to McInnes Wilson Lawyers.

Civility is the essence of being an advocate and a professional

by Stafford Shepherd

Rule 34.1.3 of the *Australian Solicitors Conduct Rules 2012* (ASCR) provides that a solicitor must not in any action or communication associated with representing a client use tactics that go beyond legitimate advocacy, and which are primarily designed to embarrass or frustrate another person.

One of the fundamental duties is to act in the best interests of a client in any matter in which we represent the client.[1] The responsibility we owe our client does not mean that we should ignore or disregard the rights of third parties. Such third party rights may include restrictions on methods of obtaining evidence from third parties and interfering with the solicitor-client relationship of other practitioners.

This rule can be said to temper overzealousness in representing a client. Although we should act with robustness and dedication to our client's interests, we are bound by our duty to the administration of justice and, as officers of the court, not to engage in conduct that goes beyond legitimate advocacy and which is primarily designed to embarrass or frustrate another person.[2]

Evidence gathering may fall within the ambit of rule 34.1.3 ASCR. In dealing with an opponent[3] in relation to a case, we must not knowingly make a false statement,[4] or make a statement recklessly without care as to its accuracy. If we do, then we are required to take all the necessary steps to correct any false statement (whether made consciously or recklessly) that is made by us to an opponent as soon as possible after we become aware that the statement was false.[5]

Further we must not engage in conduct likely, to a material degree, to be prejudicial to, or diminish the public confidence in, the administration of justice.[6]

In *In re Comfort*[7] a lawyer wrote and then published an accusatory letter to another lawyer. The dissemination of the letter was seen by the court as designed to embarrass for no legitimate reason. The decision of *Legal Services Commissioner v Orchard*[8] also illustrates the rule's application. The judicial member described the material as a "scandalous document" which went "beyond the limits of a proper defence", containing descriptions which attempted to embarrass.[9]

The tribunal has this year considered an application against a practitioner where the "allegations against [x] had no reasonable basis and should never have been made, or should have been withdrawn when his attention was drawn to (section 487 *Legal Profession Act 2017* (Qld)).[10] The practitioner's conduct amounted to professional misconduct.[11]

Rule 34.1.3 ASCR is not limited to litigation and applies generally to our conduct.

Stafford Shepherd is director of the QLS Ethics Centre.

1 *Australian Solicitors Conduct Rules 2012* (ASCR), rule 4.1.1.
2 ASCR, rule 34.1.3.
3 'opponent' is defined in the glossary to the ASCR to mean:
- the practitioner appearing for a party opposed to the client of the solicitor in question, or
- that party, if the party is unrepresented.

4 ASCR, rule 22.1.
5 ASCR, rule 22.2.
6 ASCR, rule 5.1.
7 159 P.3d 1011 (Kan. 2007).
8 [2012] QCAT 583 (*Orchard*).
9 *Orchard* [8].
10 *Legal Services Commissioner v Jensen* [2017] QCAT 148, [20].
11 Ibid [39].

24-7 accessibility – servant or master?

by Angela Metri and Bianca Fernandez, *The Legal Forecast*

The Legal Forecast recently held a Brisbane event at which a panel of experienced legal industry personnel discussed technological advance in the legal sector.

A focus of the discussion was the ever-increasing accessibility of lawyers through advances in communications technology, with the associated desire for lawyers to be able to work flexibly and remotely.

The Law Council of Australia has acknowledged that the pressures associated with legal work can have a negative effect on a practitioner's well-being.[1] It follows that, with the increases in pressure on a lawyer as a consequence of always being contactable by clients and colleagues, this could impact on a lawyer's mental health and work-life balance.

The problem with advancement

No one is asking *why*. It's not as though there is a guard watching over each step forward and asking whether each technological advance is necessary. The question is, if we *can* change something in technology, then why *wouldn't* we?

The problem with this action-over-purpose route means that technology becomes the master rather than the tool we use to do our tasks. It is so easy to take advantage of the technologies in the work environment – after all, they are provided to make our work more streamlined and efficient.

The benefits

The accessibility offered by technology means that working arrangements can be fixed to suit different lifestyles and responsibilities. The most prominent advantage is the ability of legal practitioners to work remotely. In the hours spent on travel, waiting in airports or in various modes of transport, or at home for the day, practitioners can use the time to work, in effect often lengthening their workday. In addition, flexible work arrangements open the talent pool to applicants who might not otherwise consider the position as a viable option.

The ability to work remotely means practitioners can contact their clients without having to wait for a physical meeting, and the convenience means they can structure their day more productively because there is more control of the start and finishing times. There's also transparency – both to clients and within the firm.

The benefits are usually only fully realised when the tool is used for the intended purpose, but when there's full use and minimal strategy, some significant issues can come into play.

The dilemma

Previous research done by the Brain and Mind Research Institute Monograph attests that the legal profession suffers from competitiveness, a fear of failure, pessimism, disillusionment and perfectionism.[2]

Logically it follows that, an increase in accessibility enables the question 'could I be doing more?', which serves to exacerbate these traits. Every day, a practitioner can always be doing more, and the industry suggests that we do. Increased isolation due to more screen time doesn't ease these traits either. Increased mobility and accessibility mean there is nearly no reason why client wishes and billables can't be fulfilled.

Queensland Law Society has said that "solicitors are natural perfectionists", and while this often ensures high quality work, it can also mean a lawyer is unlikely or unwilling to delegate tasks that increase the practitioner's workload.[3]

On a personal level, perfectionism can manifest as a form of anxiety and lead to depression. It has been widely publicised that lawyers experience higher incidents of depressive symptoms compared to other professions.[4]

Knowing that lawyers are more likely to be perfectionists and at a higher risk of developing depression than other professionals, how can we safeguard the profession to ensure that the increased accessibility to lawyers through technology does not diminish the importance of maintaining a work-life balance?

Implications

If accessibility for lawyers continues to increase as it has, what will this mean for the future of the legal industry, both for law students still completing their studies and practitioners? As the number of law graduates has increased in recent years, competition may encourage 24-7 work habits to continue. This is particularly perilous if graduates believe that working longer hours will help them achieve a desired position.

To change the perception of work-life balance and increase awareness of good mental health in the legal industry, more experienced practitioners should consider how technology can be made to work *for* us, and not the other way around.

It is important for firms to acknowledge the negative implications associated with unlimited accessibility. For example, multinational corporation BP has stopped making it mandatory for senior managers to be supplied with smart devices, because constantly staying connected to work goes against the company's work-life balance philosophy.[5]

Work-life balance policies will have a better chance of success if implementation is led by senior management. If significant players in the industry start questioning the norm and advocate a need for change, it will certainly penetrate the ranks. As for the other end of the spectrum, students have a choice. Most students were born into the age of technology and have the ability to use it to their advantage – to ensure that it is a useful servant but remembering it as an equally dangerous master.

Angela Metri is an executive member of The Legal Forecast NSW team and Bianca Fernandez is a student executive member of The Legal Forecast. Special thanks to Michael Bidwell of The Legal Forecast for technical advice and editing.

The Legal Forecast (thelegalforecast.com) aims to advance legal practice through technology and innovation. It is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

Notes

1. *Mental health and wellbeing in the profession,* Law Council of Australia, lawcouncil.asn.au/policy-agenda/advancing-the-profession/mental-health-and-wellbeing-in-the-legal-profession.
2. *Lawyers, law students and depression* (March 2014) Legal Services Commission, lsc.qld.gov.au/headline-issues/lawyers,-law-students-and-depression.
3. *Beware of being a perfectionist,* Queensland Law Society, qls.com.au/For_the_profession/Practice_support/Resources/Practice_support_tips/Beware_of_being_a_perfectionist.
4. *Mental health and wellbeing in the profession,* Law Council of Australia, lawcouncil.asn.au/policy-agenda/advancing-the-profession/mental-health-and-wellbeing-in-the-legal-profession.
5. Susan Fenton, 'Firms say work-life balance boosts productivity' (June 2007), Reuters, reuters.com/article/us-hongkong-employment-idUSHKG13052720070606.

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Your questions answered

with Supreme Court Librarian David Bratchford

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'Causation and loss of opportunity' *with speaker Justice David Jackson (Supreme Court of Queensland), commentator Professor Kit Barker (University of Queensland), and chair Justice James Edelman (High Court of Australia)*

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Banco Court,
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High Court and Federal Court casenotes

High Court

Criminal law – meaning of 'inflicted' where accused caused contraction of disease – recklessness and foresight of risk

In *Aubrey v The Queen* [2017] HCA 18 (10 May 2017) the appellant had unprotected sex with the complainant when the appellant knew he was HIV positive. The complainant was infected with HIV. The appellant was convicted on an alternative charge of maliciously inflicting grievous bodily harm on the complainant, contrary to s35(1)(b) of the *Crimes Act* (NSW). There were two questions for the High Court. First, whether causing the contraction of a disease can come within "infliction" of harm. And second, whether recklessness, fulfilling the mental element of malice, was satisfied if the appellant foresaw the possibility, as opposed to the probability, of the contraction of the disease. On the first question, the High Court held that the decision in *R v Clarence* (1888) 22 QBD 23 should not be followed. For several reasons, including developments in English authorities since, the infliction of harm does not require a direct or immediate application of force resulting in injury. Just as "infliction" can encompass psychological injury, it can encompass actions that result in the transmission of a serious infectious disease to a person who is ignorant of the accused's condition. (Legislative changes after the events in this case also confirm that position.) On the second question, the court held that the level of foresight required to fulfil recklessness can depend on the circumstances of the crime, in the sense that reasonableness of an action and degree of foresight of harm are connected. In this case, it was sufficient for the Crown to make out the foresight of the bare possibility of harm. Kiefel CJ, Keane, Nettle and Edelman JJ jointly; Bell J dissenting. Appeal from the Court of Appeal (NSW) dismissed.

Criminal law – justification and excuse – manslaughter – criminal responsibility

In *Pickering v The Queen* [2017] HCA 17 (3 May 2017) the appellant was acquitted of murder but convicted of manslaughter. Section 31(1) of the *Criminal Code* (Qld) provided that a person is not criminally liable for an act if the act is reasonably necessary to resist actual and unlawful violence. Section 31(2) removes that dispensation for an act that would constitute the crime of murder or an offence of which grievous bodily harm to the person of another is an element. The jury was instructed to consider manslaughter if they acquitted of murder, but were not directed to consider s31. The Court of Appeal upheld that result, reasoning that s31(2) encompassed any offence for which an element is grievous bodily harm, even if the offence was not charged. The High Court held that s31(2) directs attention to the offence or offences with which a person has been charged. The relevant "act" is the physical act, rather than the consequence of it (here, the stabbing rather than the physical harm). Section 31 is not concerned with the quality of such acts. The inquiry is whether the offence in question is murder or an offence of which grievous bodily harm is an element. Manslaughter is not such an offence. As it was admitted that there was evidence going to the s31 defence and that the outcome might have been different if the jury had been instructed differently, the appeal had to be allowed and a retrial ordered. Kiefel CJ and Nettle J jointly; Gageler, Gordon and Edelman JJ jointly, concurring. Appeal from the Court of Appeal (Qld) allowed.

Migration law – power to detain – transfer for temporary purposes – duration of detention

In *Plaintiff M96A/2016 v Commonwealth* [2017] HCA 16 (3 May 2017) the High Court upheld the validity of provisions of the *Migration Act 1958* (Cth) allowing for the temporary detention of "transitory persons" in Australia. The plaintiffs arrived on Christmas Island and were subsequently removed to Nauru. They were brought to Australia pursuant to s198B for the temporary purpose of having medical treatment and were therefore "transitory persons". They were detained in onshore detention centres and, subsequently, in community detention. Sections 198AD and 198 require that transitory persons be removed, as soon as reasonably practicable, once they no longer need to be in Australia for the temporary purpose. Section 189 requires that unlawful non-citizens, including transitory persons, be detained until they are removed or the Minister allows them to apply for a visa. The High Court has previously held to be valid the detention of non-citizens for the purposes of removal, determination of a visa application or consideration of whether to allow an application for a visa. The plaintiffs in this case argued that their detention was invalid because it was not for one of those purposes and the duration of the detention was not objectively determinable. The High Court rejected those arguments. The court held that the purpose of detention remained the subsequent removal of the plaintiffs; that is, once the temporary purpose for their being in Australia was finished. Further, the court held that it is the criteria for detention, and not the duration of detention, that must be objectively determinable. The relevant criteria fulfilled that requirement in this case. Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ jointly; Gageler J separately concurring. Proceeding on demurrer dismissed.

Criminal law – fault element – intention – application of inferential reasoning

In *Smith v The Queen; The Queen v Afford* [2017] HCA 19 (10 May 2017), the High Court held that the process of inferential reasoning from *Bahri Kural v The Queen* (1987) 162 CLR 502 is applicable to proof of an intention to import a border-controlled substance contrary to s307.1(1) of the *Criminal Code* (Cth) (the code). Smith was convicted of importing a commercial quantity of illicit drugs, secreted in golf sets, shoes, vitamins and soap. Afford was also convicted of importing drugs, secreted in the lining of his suitcase and laptop bag. In both cases, a key issue at trial was whether the accused intended to import a substance. Under the code, that required the accused to have meant to import the substance. In *Kural*, the court upheld a process of reasoning by which it could be inferred that the accused meant to import the substance. Smith and Afford argued that the reasoning in *Kural* could not be applied to s307.1 of the code. Each argued that the jury directions were inadequate based largely on this argument. Afford also argued that his conviction was unsafe. The court held that the *Kural* reasoning could be applied to the code. If it can be established that an accused perceived there to be a real or significant chance of a substance being in an object that they brought into Australia, it is open to infer from all the facts and circumstances of the case that they intended to import the substance. The court also gave examples of how that inference might be drawn and the distinction between inference and recklessness. The court further held that the jury directions were sufficient, unanimously in the Smith case and by majority in the Afford case. The plurality also gave an example of how directions on this point might be structured. These conclusions meant that the appeal in Smith was dismissed and the appeal in Afford was allowed. Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ jointly; Edelman J separately, dissenting in relation to the Afford directions and otherwise concurring. Appeal from the Court of Criminal Appeal (NSW) dismissed (Smith); Appeal from the Court of Appeal (Vic) allowed (Afford).

Procedure – enforcement of Australian judgment overseas – operation of *Bankruptcy Act*

In *Talacko v Bennett* [2017] HCA 15 (3 May 2017) the High Court held that s58(3) of the *Bankruptcy Act 1966* (Cth) acted as a "stay" within the meaning of s15(2) of the *Foreign Judgments Act 1991* (Cth), meaning that a certificate of finality under the *Foreign Judgments Act* could not be issued. After extensive litigation, the respondents obtained judgment against the appellant in the Victorian Supreme Court for more than 10 million Euros. The appellant was subsequently made bankrupt by order of the Federal Court. The respondents sought from the Prothonotary of the Supreme Court a certificate of finality under the *Foreign Judgments Act*. They intended to file the certificate in proceedings against the appellant on foot in the Czech Republic. However, s15(2)

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with Andrew Yuile and Dan Star SC

of the *Foreign Judgments Act* provided that an application for a certificate could not be made until the "expiration of any stay of enforcement of the judgment in question". Section 58(3) of the *Bankruptcy Act* relevantly provides that it is not competent for a creditor to enforce a remedy against a person or the property of a bankrupt in respect of a provable debt after the debtor has become bankrupt. The question was whether s58(3) operated as a "stay" for the purposes of s15(2) of the *Foreign Judgments Act*. The High Court held that a "stay" was not limited to a court order. It is capable of including any legal impediment, including statutory barriers, to execution upon the judgment. The purpose of s15(2) is to prevent the issue of certificates that would facilitate the enforcement overseas of a judgment not enforceable in Australia. The effect of s58(3) is to preclude a creditor from enforcing a remedy against the person or property of a bankrupt. It would elevate substance over form and undermine s58(3) to interpret its effect as falling outside s15(2). Kiefel CJ, Bell, Keane, Gordon and Edelman JJ jointly; Gageler J and Nettle J separately concurring. Appeal from the Court of Appeal (Vic) allowed.

Andrew Yuile is a Victorian barrister, ph (03) 9225 7222, email ayuile@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au. Numbers in square brackets refer to paragraph numbers in the judgment.

Federal Court

Tort law – misfeasance in public office – elements of the tort – whether complaint to regulators was exercise of power attached to public office

In *Nyoni v Shire of Kellerberrin* [2017] FCAFC 59 (13 April 2017) the Full Federal Court by majority allowed an appeal in part. The successful appeal ground concerned the tort of misfeasance in public office. The other appeal grounds, which raised issues such a trespass and misleading or deceptive conduct, failed.

The appellant, Mr Nyoni, was a pharmacist who operated the only pharmacy in Kellerberrin, Western Australia. He contended that Mr Friend, the chief executive officer (CEO) of the Kellerberrin Shire Council (shire), provided false information about the pharmacy to the Pharmaceutical Council of Western Australia and the Western Australian Department of Health in order to have them take action against Mr Nyoni with the effect of causing him to cease operating the Kellerberrin pharmacy and ultimately be replaced by another pharmacist.

The primary judge dismissed the claim of misfeasance in public office on the basis that Mr Friend was not exercising the powers attaching to his public office of CEO when making the complaint about Mr Nyoni's conduct to the regulatory bodies (at [66]). The key issue in the appeal concerning misfeasance in public office was whether the primary judge was correct to hold that Mr Friend did not exercise the powers attaching to his public office of the shire's CEO when making his complaint to the regulators.

The majority of Full Court (North and Rares JJ) undertook a detailed examination of Australian and overseas jurisprudence regarding misfeasance in public office (at [76]-[100]). This included the High Court authorities of *Northern Territory v Mengel* (1995) 185 CLR 307 and *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146. The joint judgment of North and Rares JJ explained at [97]: "The elements of the tort of misfeasance in public office have been crafted carefully to ensure that they do not encompass the negligent or unintentional acts or omissions of a public official. The tort requires, *first*, a misuse of an office or power, *secondly*, the intentional element that the officer did so either with the intention of harming a person or class of persons or knowing that he, she or it was acting in excess of his, her or its power, and, *thirdly*, that the plaintiff (or applicant) suffered special damage or, to use Lord Bingham's more modern characterisation, 'material damage' such as financial loss, physical or mental injury, including recognised psychiatric injury (but not merely distress, injured feelings, indignation or annoyance): see *Watkins* [2006] 2 AC at 403 [7], 410 [27]".

North and Rares JJ found that each of these elements was established. Based on the primary judge's findings, Mr Friend acted for an ulterior and improper purpose of intending to injure Mr Nyoni (at [75] and [118]). Further, the making of the allegation by a public officer or body, such as Mr Friend or the shire, to another government agency or authority with regulatory powers over a person in Mr Nyoni's position, should be presumed (as it would in cases of slander) to cause sufficient material or actual damage to support the action of misfeasance in public office (at [101]).

Although Mr Friend did not have power in his capacity as the shire's CEO to direct the regulator's actions, the majority held that the position of CEO included the power to make complaints to other governmental authorities about matters directly affecting the interests of the shire (at [106]).

In an analysis of the law at [109], the joint judgment said: "The tort of misfeasance in public office involves a misuse of the power of the office. The officer must either intend that misuse to cause harm (whether or not the exercise of the power is within its scope) or know that he or she is acting in excess of his or her power: *Mengel* 185 CLR at 345. That is, depending on the officer's state of mind in exercising the power, the misuse can be one that would be within the power (i.e. a use that, if coupled with an intention to use it that was not to cause harm, would be lawful) or in excess of the power (i.e. a use for which, in essence, there is no power because the officer knows that the act is beyond – in excess of – the power). Nonetheless, it is necessary to establish that the alleged misfeasance is connected to a power or function that the officer has by virtue, or as an incident, of his or her public office."

The majority distinguished cases involving false reports to superiors (such as *Emanuele v Hedley* (1998) 179 FCR 290) on the basis that Mr Friend's exercise of his power was complete upon making the complaint, and that the regulatory bodies were not superiors (at [111]-[114]).

The majority judges remitted the assessment of damages, including aggravated and or exemplary damages, to the primary judge who had the advantage of seeing and hearing the witnesses over a lengthy trial (at [119]).

Justice Dowsett dissented. His Honour found that it had not been demonstrated that safeguarding the availability of pharmaceutical services in Kellerberrin was part of the shire's function, let alone the function of its CEO (at [164]-[165]). Further, Dowsett J held Mr Friend's conduct to be no more performed in public office than the reporting of a conversation to a superior as in *Emanuele* (at [165]).

Practice and procedure – evidence – advance rulings under s192A of the *Evidence Act 1995* (Cth)

In *Australian Securities and Investments Commission, in the matter of Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd* [2017] FCA 324 (30 March 2017) ASIC applied for a ruling under s192A(b) of the *Evidence Act 1995* (Cth) about whether certain documents in ASIC's possession were prevented by ss118 or 119 of that Act from being adduced in evidence at the final hearing of these proceedings. Justice Gleeson considered the principles relevant to the court's discretion whether to make an advance ruling on the admissibility of evidence (at [21]-[24]). Her Honour held it was appropriate to give the ruling applied for by the ASIC (at [29]) and proceeded to do so.

Dan Star QC is a senior counsel at the Victorian Bar and invites comments or enquiries on 03 9225 8757 or email danstar@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au.

Court rejects order on $350k of husband's super

with Robert Glade-Wright

Property – enforcement order compelling husband to access his super to pay wife $350,000 set aside on appeal

In *Mackah* [2017] FamCAFC 62 (3 April 2017) the Full Court (Thackray, Aldridge and Moncrieff JJ) allowed the husband's appeal against an order of the Family Court of WA (on the wife's application to enforce a consent order that he pay her $350,000) that he apply to the trustee of his self-managed superannuation fund (of which he was sole member) for payment of a transition-to-retirement pension, the trustee to pay that pension to an account nominated by the wife but in the husband's name, with authority for "either to sign".

Thackray J (with whom Aldridge and Moncrieff JJ agreed) said ([27]):

"… [I]t is unnecessary to consider all of the grounds and the … argument … in support … as I … consider [that] the orders are inconsistent with the legislative scheme regulating Australian superannuation entitlements, and therefore cannot stand."

Thackray J continued (from [28]):

"It is not in dispute that the superannuation fund is a regulated superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth). (…)

[29] Regulation 6.22 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) … relevantly provides:

(1) Subject to … regulations … 7A.13, 7A.17 and 7A.18, a member's benefits in a regulated superannuation fund must not be cashed in favour of a person other than the member or the member's legal personal representative … (…)

[38] The wife's … counsel submits … that … no provision of [the order] formally contravenes this requirement. (…) Instead, the trustee must pay the husband's superannuation income into an authorised deposit account with authority for 'either [party] to sign' …

[39] The effect of the orders is clear – money is to be removed from the husband's superannuation fund and paid to the wife in satisfaction of a debt.

[40] In my view, this is a clear contravention of reg 6.22 since the benefits in a regulated superannuation fund are being cashed in favour of a person other than the member of the fund or his legal personal representative."

Child support – Full Court overturns order staying Canadian child maintenance liability

In *Child Support Registrar & Vladimir and Anor* [2017] FamCAFC 56 (31 March 2017) a Canadian Court made child maintenance orders in 2011 and 2013 in favour of the mother (who lived in Canada) against the Australian resident father, which in 2014 were registered by the Child Support Registrar (CSR) under s13 of the *Child Support (Registration and Collection) Act 1988* (Cth) (CSRCA and CSRC Act). The Full Court (Thackray, Strickland and Ainslie-Wallace JJ) granted the CSR's application for leave as a non-party to appeal, allowing the appeal from a consent order made by the Federal Circuit Court (FCC) in 2015 staying those orders.

The Full Court ([30]-[38]) said that the Canadian order was an "overseas maintenance liability" as defined by s4 CSRCA ("a liability that arises under a maintenance order made by a judicial authority of a reciprocating jurisdiction"); that Canada was prescribed by Schedule 2 of the *Family Law Regulations* to be a reciprocating jurisdiction, and that the order was a registrable maintenance liability which, when registered, became a debt due to the Commonwealth under s30 CSRCA.

The FCC granted the father a stay under s111C pending hearing of his application for variation of the maintenance order under FL Reg 36 (a Reg 36 order being provisional under Reg 38 until confirmed by the reciprocating jurisdiction under Reg 38A). The CSR argued ([45]) that "the proper construction [of s111C(1)(a)] requires that there be 'proceedings' on foot 'where the Court's jurisdiction to hear and determine those proceedings arises under the CSRC Act'. If that construction is correct, then his Honour did not have jurisdiction to make the orders under s111C, because the proceedings on foot were … proceedings pursuant to the Regulations, and not the CSRC Act".

The Full Court agreed, adding ([47]):

" … Indeed, that construction has support from at least one decision at first instance … *Leisel* [2011] FamCA 624 at [14]-[17]. Thus, his Honour did not have jurisdiction to make the stay order under s111C."

Property – wife was two days late to refinance under property order – husband's appeal of enforcement order granted to wife dismissed

In *Bebbington* [2017] FamCAFC 31 (8 March 2017) consent orders required the husband to transfer his interest in real property to the wife within 45 days, she contemporaneously to refinance a mortgage and pay him $33,000, the property to be sold in default ([4]). While a transfer was signed and refinance approved, the wife was unable to settle until the 47th day. The husband refused to complete, invoking the sale clause.

Upon the wife's enforcement application, Judge Purdon-Sully ordered the transfer, refinance and payment to occur within 28 days. The order was carried out and the husband paid but he appealed, arguing that the court had "varied the substance" of the consent orders ([11]). After citing authority as to the discretionary nature of enforcement, Kent J on appeal said ([25]-[26]):

" … [I]mportantly in this case there is no executory order to be carried into effect. The husband, not having obtained a stay of the … orders, acquiesced in them being carried into effect. … "

Kent J continued ([34]-[35]):

" … The orders did not prescribe that time was of the essence for the acts to be performed nor can the orders as a whole be sensibly interpreted as producing that result … to mean that if the 45 day period was not strictly adhered to but performance by the 47th day was achievable (as was the case) the … substantive rights conferred by the orders would be, as a result of such delay, materially different.

The primary judge found [that] '[w]hilst having made the consent orders … the Court is *functus officio* with no power to vary the substance of the orders, it does have the power to make machinery orders to give effect to the orders'. No issue is taken with this statement of principle."

In dismissing the appeal Kent J said that the order "extending the time for the transfer to be effected did not alter the right of the husband to seek the sale of the property if the wife was unable to refinance the mortgage", thus ([45]) "[t]he orders … were consequential or machinery in nature".

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

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Court of Appeal judgments

1-31 May 2017

with Bruce Godfrey

Civil appeals

Guirguis Pty Ltd & Anor v Michel's Patisserie System Pty Ltd & Ors [2017] QCA 83, 9 May 2017

General Civil Appeal – where the first respondent granted a franchise to the first appellant to operate a 'Michel's Patisserie' business in Townsville – where the second appellants guaranteed the first appellant's obligations under the franchise agreement – where the first appellant claimed damages for negligent misstatement and breach of contract, but the main focus at the trial and in this appeal was upon the appellants' statutory claims under the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act* 2010 (Cth) (the ACL) – where the appellants claim they suffered loss and damage by entering into the agreements because of misleading conduct arising out of misrepresentations made and omissions to disclose certain events – where those representations were not included in a deed of prior representations – whether the pleaded representations had been made – whether the pleaded representations should be characterised as "conduct that is misleading or deceptive or is likely to mislead or deceive" – whether a non-disclosure amounted to misleading conduct in the circumstances – whether the representations not included in the deed of prior representations could later be relied upon – where one of the cases cited by the primary judge, *Juniper Property Holdings No.15 Pty Ltd v Caltabiano (No.2)* [2016] QSC 5, Jackson J, after referring to authority for the proposition that courts adopt a cautious approach to assertions of reliance in this context, observed that "I must look to see what other evidence supports the defendant's evidence that he would not have entered into the contract but for the alleged representations" – where, unfortunately, the primary judge did not undertake that enquiry – where, rather, the primary judge confined his Honour's attention to part of the evidence upon which the respondents relied in support of their cases that the pleaded conduct did not influence the appellants' decision to enter into the agreements – where an aspect of this approach was the primary judge's departure from the conventional methodology of making findings about causation only after first having made findings about the logically anterior questions whether the respondents had engaged in the pleaded conduct and whether that conduct should be characterised as misleading – where although the primary judge had the benefit of detailed submissions about the evidence and the law relevant to all of the issues, the primary judge made no findings about what, if any, of the alleged conduct had occurred and whether that conduct or any of it should be characterised as misleading – where the primary judge made findings about credibility, and did so with reference to only part of the evidence – where the primary judge failed to take into account other evidence of reliance – where the primary judge erroneously concluded that the respondents were not obligated to disclose any of the events alleged by the appellant – where the primary judge made no findings about which, if any, of the representations had been made and whether those representations, or any of them, should be characterised as misleading – where the fundamental error made by the primary judge though was deciding the causation issue without first finding what alleged conduct the respondents engaged in and whether that conduct was misleading – where in these circumstances, the proper conclusion is that the primary judge failed to fulfil the duty of a trial judge to consider and reflect upon the entirety of the evidence viewed as a whole – where in the result, "the question at issue has not been properly tried or determined, and adequate findings about credibility and the essential facts of the dispute have yet to be made": *Mitchell v Pacific Dawn Pty Ltd* [2003] QCA 526 – where most experienced judges subscribe to the view expressed by Goff LJ in *Armagas Ltd v Mundogas SA* [1985] 1 Ll L Rep 1 (The 'Ocean Frost') that it is essential "when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities" – where this is not a recent revelation – where about 60 years earlier, for example, Atkin LJ, after observing that "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour", confirmed that trial judges were encouraged "to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events": *Societe d'Avances Commerciales (Societe Anomyme Egyptienne) v Merchants' Marine Insurance Co (The 'Palitana')* (1924) 20 Ll L Rep 140 – where the primary judge's failure to consider and make findings about many aspects of the evidence, including evidence relevant to causation, deprived his Honour of those important tools for judging the credibility and reliability of the contentious oral evidence – where the absence of many necessary findings of fact about the evidence precludes the court from deciding the appeal in favour of the appellants upon the basis that the evidence upon which the respondents relied could not rebut an inference derived from the nature of the alleged misleading conduct that it was likely to have been a cause of the appellants' entry into the agreements – where the appeal succeeds on questions of law – where because the primary judge made findings about credibility, and did so with reference to only part of the evidence, it should be ordered that the retrial be conducted by a judge other than the primary judge – where because the order for a retrial is required by errors of law made by the primary judge to which no party contributed, an indemnity certificate should be granted in favour of the respondents under s15 of the *Appeal Costs Fund Act 1973* (Qld) – where the effect of such an indemnity certificate is to entitle the unsuccessful respondents to be reimbursed any amounts they pay for the appellants' costs of the appeal and of the new trial and for the respondents' own costs incurred in the appeal and the new trial, in each case subject to the provisions of the Act, but the Act does not confer any power upon the court to order reimbursement of any parties' costs of the first trial – where there being no basis in this case upon which the court could properly order any party to pay another party's costs of the trial, the regrettable fact is that those costs must lie where they fall.

Appeal allowed. Set aside the order made in the District Court at Brisbane on 27 May 2016 dismissing the plaintiffs' claim, except insofar as that order dismissed the first plaintiff's claim against the first defendant for damages for breach of contract and breach of warranty and the first plaintiff's claim against all defendants for damages for negligent misrepresentation. Set aside the other orders made in the District Court at Brisbane on 27 May 2016. Order that there be a new trial of all claims and counter-claims, other than the first plaintiff's claims against the first defendant for damages for breach of contract and breach of warranty and the first plaintiff's claim against all defendants for damages for negligent misrepresentation, the new trial be conducted by a judge other than the judge who conducted the original trial. Costs. Grant the respondents indemnity certificates in respect of the appeal.

Peterson Management Services Pty Ltd v Chief Executive, Department of Justice and Attorney-General [2017] QCA 89, 12 May 2017

Application for Leave *Queensland Civil and Administrative Tribunal Act* – where the applicant is a licensed real estate agent – where it conducts a caretaking and letting business at a resort, where owners of units appoint it in writing – where, as is a common practice in the letting industry, the form of appointment states a single sum for certain fees or charges, for example, a single sum for the service of cleaning a one-bedroom unit – where its written appointment does not break down the expenses it incurs in providing that service – where the respondent took the view that this practice did not accord with the requirements of the now repealed *Property Agents and Motor Dealers Act* 2000 (Qld) (PAMDA), and commenced a disciplinary proceeding in the Queensland Civil and Administrative Tribunal, alleging four separate contraventions – whether

stating a fixed dollar amount in the appointment form as the reward for service complies with s133 of the PAMDA – whether the Appeal Tribunal misconstrued s133 – where the Appeal Tribunal, without close attention to the text of s133(3)(c)(ii), interpreted s133 as requiring the form to state the expenses the agent in fact incurs as a means of ascertaining what the Appeal Tribunal referred to as "a letting agent's personal fees, as distinct from external expenses" – where what was meant by "personal fees" and "external expenses" was not explained – where neither term is used in the Act – where the Appeal Tribunal's resort to these terms begs the question of whether, for example, an employed cleaner's wage is an "external expense" – where the "expense" to which s133(3)(c)(ii) refers, and to which s140 and s141 relate, is not any cost or expense incurred in performing the service – where it is an expense which the agent is "authorised to incur" in connection with the performance of each service – where the Appeal Tribunal's adoption of the vague term "external expenses" for the purpose of dissecting expenses and arriving at the agent's "personal fee" derives no support from the terms of the Act or the apparent purpose of s133, s140 and s141 – where the essential fact in this case is that the client received the service it contracted for at the price it contracted to pay, being the fee or charge stated in the schedule to the appointment form for the "clean and service" of a unit and the monthly Foxtel services – where s133(3)(c)(ii) is not concerned with all the expenses the agent actually incurs, but is concerned with expenses "the agent is authorised to incur" in connection with the performance of the service – where clearly one of the purposes or objects of the Act was consumer protection – where, as here, legislation seeks to strike a balance between the pursuit of differing objectives, it is "to the text of the legislation that the court must look for instruction": *Jomal Pty Ltd v Commercial and Consumer Tribunal* [2010] 2 Qd R 409 – where the legislature chose not to pursue consumer protection to the fullest extent by requiring disclosure of all of the expenses which the agent incurs in connection with the performance of a service – where a tribunal or a court is not entitled to adopt a construction of the legislation that leads to a result which is contrary to the manifest intention of the legislation – where the Appeal Tribunal thought that the consumer policy of the Act required that clients "should have ready access to such information" without identifying where in the Act such a kind of information is described and adopted terms such as "personal fees", "external expenses" and "payments to third parties" – where to expect the Appeal Tribunal to carefully analyse the terms of the relevant provisions and to note the distinction between a reward and the kind of expenses at which s133(3)(c)(ii) is directed was not to require "exquisite semantic dissection": *Chief Executive, Department of Justice and Attorney general v Peterson Management Services Pty Ltd* [2016] QCATA 163 at [15] – where it required a conventional approach to statutory interpretation – where by resorting to the object of consumer protection without sufficient analysis of the terms of the Act and regard to the apparent purpose of s133(3)(c)(ii), the Appeal Tribunal did not properly interpret the statutory provision which was to be construed – where the Appeal Tribunal was required to decide a question of statutory interpretation in relation to s133 in the context of s140 and s141 – where the interpretation which it adopted was not supported by the text of those provisions or their context – where the Appeal Tribunal misconstrued s133 and thereby erred in law – where the Appeal Tribunal failed to give reasons for finding a contravention of s139 of the PAMDA – where the respondent concedes that the appeal should be granted in part because of the failure to give reasons – whether the amount collected by a booking agent from a tenant is the "amount collected" within the meaning of s139(2) of the PAMDA – where there is no reason in principle why a licensed agent might not engage an agent, whether in the form of a debt collector who collects rents owed by a variety of tenants or a booking agent who collects the rent which a holiday-maker agrees to pay to let the premises – where in the circumstances, the primary tribunal was correct to interpret s139(2) of PAMDA on the basis that the amount received by Wotif from the tenant as rent was "the amount collected" – where given the interpretation adopted of the expression "the amount collected" in s139(2), the primary tribunal was also correct to find that the fourth disciplinary ground was not established.

Application for leave to appeal granted. Appeal allowed. Orders made by the Appeal Tribunal on 24 October 2016 are set aside. Costs.

D'Arro v Queensland Building and Construction Commission [2017] QCA 90, 12 May 2017

Application for Leave *Queensland Civil and Administrative Tribunal Act* – where liquidators were appointed to each of a group of companies associated with the applicant – where the applicant was made bankrupt – where the respondent decided that the applicant was an excluded individual – where the applicant applied to the respondent to be categorised as a permitted individual for each of those five relevant events – where the respondent refused those applications – where that decision was subject to a review hearing – where after the hearing in the tribunal but before the tribunal made its decision the *Professional Engineers and Other Legislation Amendment Act 2014* (Qld) (PEOLA Act) amended the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act) – where after the hearing in the tribunal but before the tribunal made its decision the PEOLA Act amended the QBCC Act – where the amendments commenced on 10 November 2014 – whether the amendments to the QBCC Act made by the PEOLA Act apply retrospectively – where it might be said that the statutory description of the applicant as an excluded individual disadvantaged the applicant in the sense that any licence he held might be cancelled and any application for a licence he might make would be refused, but until such an event occurred the disadvantage should not be regarded as an accrued liability or a completed transaction – where in *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR 537, Windeyer J discussed a provision which was relevantly in the same form as s20(2) of the *Acts Interpretation Act* and observed: "But I do not think it is the sense in which it is said that an amending Act does not disturb existing liabilities arising out of past transactions. That to my mind describes a liability having become complete by past events rather than a situation in which some future event must occur to make the effect of past events create a completed liability." – where the last sentence describes the distinction regarded as applicable in this case – where some support for that approach may be found in Chesterman JA's judgment in *McNab Constructions Australia Pty Ltd v Queensland Building Services Authority* [2010] QCA 380 at [113]-[115] – where the respondent's argument that the application of the amendments in the tribunal would attribute a retrospective operation to the PEOLA Act is rejected.

Application for leave to appeal granted. Appeal allowed. Set aside the orders made in the Queensland Civil and Administrative Tribunal Appeal Tribunal on 20 May 2016. Order that the appellant's applications for review of the respondent's decision made on 3 July 2009 that the appellant is an excluded individual by reason of the appointment of a liquidator to Innovare Developments Pty Ltd on 22 May 2009 and the respondent's decision made on 2 October 2012 to refuse to categorise the appellant as a permitted individual be returned to the Queensland Civil and Administrative Tribunal for reconsideration by a member of the tribunal according to law.

Woodforth v State of Queensland [2017] QCA 100, 23 May 2017

Application for Leave *Queensland Civil and Administrative Tribunal Act* – where the applicant, who had a severe hearing impairment, reported to police an assault allegedly committed by her housemates – where the applicant alleged that the police were unduly slow in responding to her complaint and failed to take necessary steps to organise AUSLAN interpreters – where the applicant alleged that the police discriminated against her because of her hearing impairment, in contravention of the *Anti-Discrimination Act 1991* (Qld) – where the applicant instituted proceedings in QCAT seeking orders including a public apology, training programs for the police and compensation – where s10 of the *Anti-Discrimination Act* requires a comparison between the treatment of a person with a protected attribute and a person without that attribute "in circumstances that are the same or not materially different" – where s8 of the *Anti-Discrimination Act* extends the definition of discrimination to include discrimination on the basis of a "characteristic" that is often imputed to a person with a protected attribute – where the tribunal member made the comparison required by s10 by comparing the treatment of a person with a hearing impairment and communication difficulties against the treatment of a person without a hearing impairment but with communication difficulties – whether the appropriate comparison was between the treatment received by a person with a hearing impairment and communication difficulties and that of a person without a hearing impairment and without communication difficulties – whether difficulty in communication is a "characteristic" of a person with a hearing impairment within the meaning of s8 or a "circumstance" in which the comparison is to be made under s10 – where the Appeal Tribunal whilst adverting to s8, overlooked its effect upon the operation of s10 – where further the Appeal Tribunal incorrectly likened this characteristic of the applicant's impairment with the occurrences of violent behaviour that

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constituted the relevant circumstances in *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92 – where the Appeal Tribunal misunderstood the relevance of the reasoning in *Purvis* and thereby erred in law in identifying the relevant comparator – where the applicant's case required a comparison between her treatment as a person with a hearing impairment and an inability to communicate effectively by conventional speech and a person without that impairment and that characteristic – where this error affected the Appeal Tribunal's conclusions on relevant factual issues – where in effect, the applicant's case as to the findings of fact which should have been made by the QCAT member was not properly considered, because in each case the wrong legal test was applied.

Grant leave to appeal. Allow the appeal. Set aside the decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal. Remit the matter to the Appeal Tribunal for rehearing. Costs.

The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103, 26 May 2017

General Civil Appeal – where after a trial in the District Court, the respondent was awarded damages of $454,935.68 for a psychiatric injury which was found to have been caused by the appellant, her employer – where the respondent was employed by the appellant as a community support worker – where the respondent was working alone with a 15-year-old boy with a history of drug use and aggressive, sometimes criminal behaviour, including conduct directed towards support workers – where, one evening, the boy became verbally abusive and physically aggressive to the respondent, including kicking a window and brandishing a large shard of glass in a threatening manner and attempting to steal the keys to a staff car – where the respondent successfully de-escalated the situation and telephoned her supervisor who was also employed by the appellant – where her supervisor did not offer to relieve her from her shift or send another worker to support her and advised her against calling the police – where the respondent consequently spent the remainder of the night at the house alone with the boy – where the respondent contracted post traumatic stress disorder (PTSD) – where the trial judge found that the appellant was not negligent in failing to prevent the incident but was negligent in its response to the telephone calls from the respondent – where the psychiatric evidence was that the violent incident was a primary cause of the PTSD and the appellant's response may have been a secondary cause or 'stressor' – where the evidence was that, but for the appellant's negligence, there may have been 'a less severe PTSD' but there was only a 'remote possibility' that there would have been no PTSD at all – whether the respondent had discharged her onus to prove that the damage was caused by the appellant's negligence under s305D *Workers' Compensation and Rehabilitation Act 2003* (Qld) – where at no point did the trial judge apply the 'but for' test: she did not consider whether, but for the acts and omissions which she found constituted the breaches of duty, the injury would not have occurred – where the respondent bore the onus of proving that, more probably than not, the injury would not have occurred from the incident alone – where the injury may not have been inevitable because there was a 'remote possibility' that, absent the breach of duty, it would not have occurred, but that was not proof of causation on a balance of probabilities – where because the trial judge did not answer the 'but for' question under s305D(1)(a), it is necessary for this court to do so – where at its highest, the psychiatric evidence proved no more than a possibility that, but for the breach of duty, the injury, as it was pleaded, would not have occurred – where the result is that the respondent suffered a serious injury at work but one which was not caused, in the required sense, by the breach of duty which was found by the trial judge.

Appeal allowed. Set aside the judgment delivered on 5 August 2016. Judgment entered for the appellant against the respondent. Costs, unless written submissions seeking a different order.

Criminal appeals

R v Succarieh; R v Succarieh; Ex parte Commonwealth Director of Public Prosecutions [2017] QCA 85, 12 May 2017

Sentence Application; Sentence Appeal by Director of Public Prosecutions (Cth) – where Mr Succarieh was sentenced for four offences involving conduct preparatory to the commission of a foreign incursion offence – where the applicant pleaded guilty to two counts of preparing for incursions into a foreign state (s7(1)(a) *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)) and two counts of giving money for incursions into a foreign state (s7(1)(e) *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)) – where the applicant was sentenced to imprisonment for four years for the s7(1)(a) offences and one of the s7(1)(e) offences – where the applicant was sentenced to imprisonment for four years and six months on the remaining s7(1)(e) offence – where the applicant seeks leave to appeal against his sentence on the sole ground that they are manifestly excessive in all the circumstances and did not, as required by s16A of the *Crimes Act 1914* (Cth), constitute a sentence of "severity appropriate in all the circumstances of the offence" – where the sentencing judge noted that the maximum penalty for the offences is ten years' imprisonment – where the maximum penalty serves as a basis for comparison between the case before the court and the worst case of offending – where there are few comparable cases that are of assistance – where the sentencing judge considered many factors required to be considered under s16A of the *Crimes Act 1914* (Cth) – whether the sentences are reconcilable with the few comparable cases – whether the sentencing judge erred in her consideration of relevant matters – whether the sentence was manifestly excessive – where the Commonwealth appellant appeals against the sentences imposed on the grounds that the sentencing judge did not properly assess the respondent's prospects of rehabilitation when exercising the sentencing discretion – where the appellant must demonstrate error on the part of the sentencing judge – where the appellant contended that the sentencing judge did not make a finding on whether the respondent showed prospects for rehabilitation – where the sentencing judge identified a number of factual matters that were relevant to rehabilitation – where the appellant alleged that the respondent had failed to acknowledge that his actions were criminal – where it is unclear whether the sentencing judge made a positive finding on the issue of rehabilitation – whether the sentencing judge erred in failing to assess prospects for rehabilitation – where the sentencing judge identified a number of factual matters which were not in contention, including Mr Succarieh was a relatively young man; he had responsibilities to his family; he lacked prior convictions of a similar nature; he had gotten into a lot of trouble at school for violent fighting, but as he got older he did not have any similar offending; he had, until recently, a lifetime of solid, hard work where he had contributed through that hard work and also through charitable activity – where given those factual findings, when the sentencing judge said "those things bode well for your future", that was no more than a finding that there were reasonable prospects of rehabilitation – where it is true to say that different judges might express such a finding differently, what her Honour intended is quite clear – where the appellant appeals against the sentences imposed on the grounds that the sentences are manifestly inadequate – where the appellant must demonstrate error on the part of the sentencing judge – where the alleged error was that the sentence of four years and six months' imprisonment for one of the s7(1)(e) offences failed to properly comprehend the objective seriousness of the offending – where the matter identified as support for that contention were subject to careful examination by the sentencing judge – whether the sentencing discretion was applied properly – whether the sentence was manifestly inadequate – where all of the matters referred to were the subject of careful examination at a number of levels during the sentencing hearing – where the sentencing judge adverted to the sentencing principles and considerations found in s16A of the *Crimes Act*.

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

R v Noble; Ex parte Attorney-General (Qld) [2017] QCA 86, 12 May 2017

Sentence Appeal by Attorney-General (Qld) – where the respondent pleaded guilty to 15 counts of serious animal cruelty arising from greyhound live baiting on the respondent's property – where the respondent was sentenced to three years' imprisonment wholly suspended for an operational period of five years – where the sentencing judge took into account many relevant factors, including the respondent's early and continued guilty plea, his mental and physical health, his role as primary carer of his wife, his loss of livelihood, lifestyle and social structure and the vilification within, and ostracism from, the greyhound racing industry that he has experienced – where the sentencing judge also took into account the need for public denunciation and general deterrence – where the appellant contends the matters in mitigation did not justify a wholly suspended sentence – whether the sentence imposed was manifestly inadequate – where the provision under which the respondent was charged was enacted by s27 of the *Criminal Law Amendment Act 2014* (Qld) and commenced on 15 August 2014 – where because of the recency of the enactment of s242,

this is the first occasion on which this court has been required to review a sentence passed under it – where in written and in oral submissions, some attention was given to whether the absence of appellate authority establishing a sentencing pattern for offending against the section was of itself a difficulty for the appellant – where later, at the hearing of the appeal, counsel for the respondent, by his oral submissions, conceded that in light of the observations in *R v Goodwin; Ex parte Attorney-General (Qld)* (2014) 247 A Crim R 582, the appellant's case was no more difficult because of the absence of comparable sentences – where the sentencing judge arrived at a sentence by a process in which he took into account many relevant factors – where he sought to synthesise from them a just sentence – where it is unpersuasive that the sentence he devised and passed is manifestly inadequate – where it is beyond question that the respondent's conduct was inhumanely cruel and protracted – where, however, to proceed upon some kind of rule of thumb that such offending must always be punished by actual imprisonment could, in an individual case, contort the sentencing process and result in insufficient regard being given to other factors relevant to that individual.

Appeal dismissed.

R v Knight [2017] QCA 98, 23 May 2017

Appeal against Conviction – where the appellant was convicted by a jury of five counts of indecently dealing with a child under 16 years of age – where for present purposes, it is sufficient to note, as the trial judge observed in his summing up, that there were "obvious inconsistencies" and other possible inconsistencies between the complainant's statement to police and her pre-recorded testimony and inconsistencies between the account given to police and the pre-recorded testimony of one of the child preliminary complaint witnesses – where, in the closing address at trial, the prosecutor remarked to the jury that there was no apparent motive for the complainant to make false allegations against the appellant – where the trial judge directed the jury that it was for the prosecution to prove that the complainant was telling the truth and that any failure or inability on the part of the appellant to prove a motive to lie did not mean the complainant was telling the truth – where the trial judge did not otherwise direct the jury that a motive may still exist, that the defendant may not know of it, and that there may be many reasons why a person makes a false complaint – where no further or other direction was sought by defence counsel at trial – whether the direction cured the prejudice to the appellant arising from the prosecutor's remarks – whether there was a miscarriage of justice – where in *Palmer v The Queen* (1998) 193 CLR 1, the plurality, Brennan CJ, Gaudron and Gummow JJ, affirmed the principle that a complainant's account gains no legitimate credibility from the absence of evidence of motive to lie – where the remarks of the prosecutor in his closing address in this case impermissibly transgressed the principle – where they were made in a context of the jury's assessment of the complainant – where there can be no doubt that those words conveyed to the jury that the absence of evidence of an apparent motive was relevant to their assessment of the credibility of the complainant's evidence – where consistently with the principle affirmed in *Palmer* what those remarks conveyed was incorrect – where they were prejudicial to the appellant and their prejudice was heightened by the fine balance in the Crown case – where the issue that next arises for consideration is whether the directions given by the trial judge were sufficient to correct the misconceptions conveyed by the prosecutor's remarks and neutralise their potential prejudicial effect – where given that they were made in the context of an assessment of the complainant's credibility, it is considered that it was necessary that the jury had been directed expressly that the absence of evidence of a motive to lie on the complainant's part was irrelevant to the assessment of her credibility – where it was both appropriate and necessary to direct them that that was entirely neutral – where no such direction was given by trial judge to the jury in this case – where the directions given were insufficient on that account – where there was therefore a miscarriage of justice arising from the prosecutor's impermissible remarks and the insufficiency of the directions to neutralise their impact.

Appeal allowed. The convictions on all counts of which the appellant was convicted are set aside. The appellant is to be retried on all such counts.

R v Eadie [2017] QCA 109, 29 May 2017

Sentence Application – where the applicant pleaded guilty to one count of unlawfully

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producing a dangerous drug – where she was sentenced to a term of 18 months' imprisonment with a parole date fixed at six months – where she had been charged on the same indictment as her mother (Read) – where the applicant's mother had manufactured the methylamphetamine and the applicant had only supplied materials for the manufacture of methylamphetamine – where the applicant was involved in the manufacture of methylamphetamine for the purpose of meeting her daily living expenses – where the applicant plead guilty and showed cooperation with the administration of justice – where his Honour made two errors of fact in the course of imposing his sentence – where the first is that his Honour sentenced the applicant upon the basis that there had been "some cooperation with the administration of justice" – where in fact, the applicant had candidly admitted her role in the offence when questioned by police immediately after her arrest – where she also volunteered facts that implicated the principal offender, her mother – where further, she had done all she could have done to ensure the entry of a guilty plea at the earliest possible date by instructing her barrister and solicitors that she would plead guilty – where by some error in communication for which she was not responsible, she pleaded not guilty at her arraignment, some six months before her sentence – where consequently, there was not merely "some cooperation with the administration of justice" by the applicant – where rather, her cooperation had been absolute – where the second error concerns the extent of the applicant's participation in the offence – where it appears, from the transcript, that his Honour had inferred from the presence of the applicant's fingerprints on some of the equipment used to manufacture the drug that she had assisted her mother in more than purchasing necessary items – where this inference was not correct, as the prosecution conceded below and on appeal – where Read's production of methylamphetamine had a commercial purpose, in the sense that she intended to sell the drug after she had made it, this enterprise of hers was a very modest one, evidently undertaken by a woman who was in desperate financial straits, not least because she was supporting her dependent children and her mother – where the applicant's criminality was even more modest – where she evidently gave her help because Read was her mother – where she was living in her mother's house where she supported her young son – where as a side benefit, she expected to be given a small quantity of the drug which she could give as a gift to her then partner but this was hardly capable of being a motive for what she did – where her assistance, while criminal, did not evidence deep involvement in a criminal enterprise; nor was it undertaken for personal gain – where in summary, the dominant factor against the applicant lies in the seriousness of the offence itself – where previous sentences and previous authorities of this court demonstrate that participation in the offence of producing methylamphetamine will, in general, result in a sentence of imprisonment although exceptional cases will arise – where the production of this vicious drug with a view to its distribution is something that the sentences that are imposed should serve to deter because of the known evil consequences of its use and the ease of its production – where otherwise, the applicant's counsel on appeal points, rightly, to the applicant's youth, to her previous criminal history of only minor offences not comparable to the present offence, to her role as a mother, to the fact that her involvement was evidently motivated by her wrongheaded desire to help her own mother make ends meet, to the long delay during which the applicant suffered with an uncertain future, and to his client's wholehearted cooperation with police and prosecution authorities after she was caught.

Leave to appeal granted. Appeal allowed. Set aside the sentence imposed on 28 November 2016. The applicant is sentenced to a term of imprisonment for 12 months. Declare that the period of 26 days be imprisonment already served. Order that the applicant's parole release date be fixed as today.

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.

In July ...

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05 Webinar: Varying Parenting Orders

12.30-1.30pm | 1 CPD

Online

Do you want to increase your prospects of success when seeking to vary parenting orders? This webinar will be beneficial to family law practitioners and general practitioners who wish to develop their knowledge and skills or those who are looking for a refresher.

SL

07 QLS Essentials Conference 2017

8.30am-5.05pm | 7 CPD

Law Society House, Brisbane

Discover new horizons at this one-day event designed to give solicitors the fundamental practical advice needed to grow and maintain a successful and lasting career in the legal profession. Hear from award winners and future thinkers on how to build courageous, impactful careers that take full advantage of your personal passions.

PLE PM&BS PS

11 Webinar: Introduction to Legal Research

12.30-2pm | 1.5 CPD

Online

Undertaking research and effectively using the results is an essential skill for junior legal staff, improving their ability to work efficiently with supervisors, clients and third parties. Conducted by legal research experts, this webinar provides a guide to freely available legal research tools and resources, and explains how to apply results to the problem at hand.

PS

13 Practice Management Course

13-14, 21 | 8am-5pm | 10 CPD

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Master the art of strategic business management with the QLS Practice Management Course. Increase your client attraction and retention skills in the new law environment, managing business risk, trust accounting and ethics knowledge. Designed by a team of experts who know legal practice, the course provides the practical skills and expertise crucial to facing your next challenge with confidence.

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13 QLS & FLPA Family Law Residential 2017

13-15 | Thu 5-7pm, Fri 9am-4.30pm, Sat 9.30am-4.30pm | 10 CPD

Sheraton Grand Mirage Resort Gold Coast

Join us at the premier professional development event for family lawyers and other interested professionals in Queensland. Gain a big-picture view of modern family law and the practical skills you need to be a fearless family law professional in the 21st Century. The program features three concurrent streams over two consecutive days:

- children and parenting
- property/financial
- essential skills in day-to-day family law practice.

PLE PM&BS PS SL

20 Masterclass: Contract Law

8.30am-12.45pm | 3.5 CPD

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Queensland Law Society is delighted to welcome back Jeffrey Goldberger, an expert in contract law and one of our highest rated presenters. In this practical, interactive Masterclass Jeffrey will explore:

- recent key developments in contract law
- assessment of damages for breach of contract
- termination of contracts.

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25 Essentials: Intellectual Property

8.30am-12.05pm | 3 CPD

Law Society House, Brisbane

Targeted at junior lawyers and those seeking a refresher on intellectual property (IP) basics, this event helps practitioners to develop the skills needed to better advise clients on strategies to protect and manage their IP assets and avoid infringing on others' rights.

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27 Webinar: New Planning Laws

12.30-2pm | 1.5 CPD

Online

Calling all property, planning and environment, construction, and government lawyers! Update your development advice toolkit in an extended 90-minute webinar specifically designed to get you up-to-speed on the new regulatory planning regime and its key supporting instruments – in operation from 3 July.

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2 Aug	Masterclass: Advanced Drafting and Advocacy
3-5 Aug	Practice Management Course – Sole and Small Practice Focus
5 Aug	QLS Touch Football Tournament 2017
8-9 Aug	Introduction to Conveyancing
11 Aug	Government Lawyers Conference 2017
17-18 Aug	QLS Roadshow: Law in the Tropics

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New QLS members

Queensland Law Society welcomes the following new members who joined between 13 May and 9 June 2017

Thomas Allan, Marland Law Legal Practice
Joseph Auclair, Legal Guru Pty Ltd
Melissa Bate, McMillan Criminal Law
Chloe Buchanan, Hickey Lawyers
Cho Chan, Aejis Legal
Anthony Colavitti, ULR Lawyers
Shona Condon, Minter Ellison – Gold Coast
Annabel Dunn, Fair Work Ombudsman
Amee Grattan, The Public Trustee of Queensland
John Gray, Anderson Gray Lawyers
Claudia Guglielmino, Gadens Lawyers – Brisbane
Yuko Harding, Bennett & Philp
Susan Henson, Williams Graham Carman
Alysha Jacobsen, Condon Charles Lawyers
Stephanie Jeston, BlueKey Conveyancing Pty Ltd
Jordan Kopittke, Gadens Lawyers – Brisbane
Michelle Langhorne, Hallett Legal
Jungwon Lee, Park & Co Lawyers
Thomas Massey, Colin Biggers & Paisley Pty Ltd
Rachel McCarthy, Synkronos Legal
Theresa Moltoni, IRIQ Law Pty Ltd
Michael Neville, Certus Legal Group
Hamish Nicholson, Gadens Lawyers – Brisbane
Bobby Pallier, Shaw McDonald Lawyers
Simon Playford, Clifford Gouldson Lawyers
Daniel Rawlings, Nyst Legal
Elizabeth Smith, PD Law
Christine Smith, O'Reilly Workplace Law
Rachel Stubbs, non-practising firm
Travis Sturgeon, Union Legal SA
Isabella Su, Anthony Delaney Lawyers
Mitchell Thams, CDI Lawyers
Navina Thirumoorthi, Results Legal
Edith Truelove, Mission Aviation Fellowship (MAF) International
Marie Vella, Atherton Tablelands Law
Sean Webb, Williams Graham Carman


Alex Wynn


Geoff Smith


Annette Wojtyna


Alexandra Hamlyn


Shona Sahay


Michelle Chadburn

Career moves


Brent Weston

Bell Legal Group

Bell Legal Group has been joined by family law practitioner **Alex Wynn** as a senior associate. Alex, who previously worked as a sole practitioner on the Gold Coast, emigrated in 2005 from England, where he was involved in litigation and industrial and commercial matters. However, since then he has focused on family law, with a strong interest in creating outcomes without the need for litigation.

McLaughlins Lawyers

McLaughlins Lawyers has announced four new appointments.

Geoff Smith, who has more than 37 years' experience, has joined the firm as a consultant, while **Annette Wojtyna** has been appointed as an associate in the commercial department.

Alexandra Hamlyn has worked in family law and commercial law as a law clerk, and has been appointed as a solicitor following the completion of her PLT at the firm and admission. **Shona Sahay** has joined the family law team as a solicitor.

NB Lawyers

NB Lawyers has announced the promotion of **Michelle Chadburn** to associate in its employment law and workplace relations team. Michelle will continue her focus on litigation matters, unfair dismissals, general protections, discrimination and sexual harassment claims.

Tucker & Cowen Solicitors

Tucker & Cowen Solicitors has announced the appointment of **Brent Weston** as a special counsel. Brent's experience covers technology licensing and intellectual property law, franchising, and manufacture and distribution in Australia and overseas. He will lead the firm's front-end commercial practice.

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Accountancy

Agency work

Agency work continued

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Agency work continued

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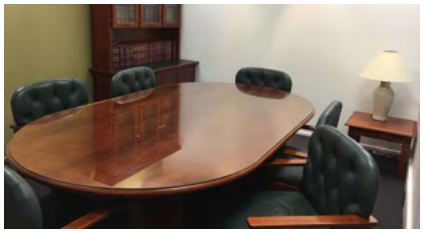

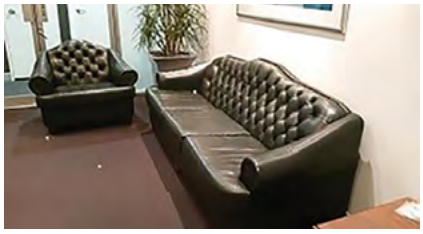

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Would any person or firm holding or knowing the whereabouts of any original will of **ELIZABETH JOY MORRISON** late of Holland Park Aged Care, Birdwood Road, Holland Park and formerly of 2 Kooringal Drive, Jindalee who died on 8 February 2017, please contact Yarrabilba Legal, PO Box 214, Waterford Qld 4133, telephone (07) 5602 2249 or email info@yarrabilbalegal.com.au

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An old vines tale you must hear

with Matthew Dunn

Grenache is one of the latest beneficiaries of the renewed respect for old vines in South Australia.

Some commentators are saying that, with the right treatment, it is better than shiraz.

Grenache has quite a history in Australia. In its spiritual home of McLaren Vale, there is a movement to bring out from the shadows excellent expressions of place and season from the old bush vines that still exist in the region. Some of these wines are exemplary, and even led respected wine writer Max Allen last year to write words some readers may accord with heresy:

"In warm climate regions such as South Australia's McLaren Vale, grenache is a better grape than shiraz, especially when it comes to making wines that taste of where they're from."[1]

Despite any immediate impulse to call for the Spanish Inquisition, Allen might just have a point. Grenache in McLaren Vale has finally become valued for what it can really do, and winemakers have been free to experiment with the variety without the strictures of expectation.

McLaren Vale shiraz is well known and most people are disappointed if it isn't big, burly and laced with chocolate and spice, regardless of the conditions of the year. But with grenache McLaren winemakers have a grape that is perhaps better suited to their climate and no preconceived ideas in the market about what it's meant to taste like. They can respond to the season, their individual site conditions and any innovative ideas with a degree of freedom.

The saving of McLaren Vale grenache is also a wonderful backstory. Originally from the old kingdom of Aragon (or perhaps Sardinia depending on who you listen to), grenache came to Australia with James Busby in his vine ark of 1832 and to South Australia with Dr Christopher Rawson Penfold in 1844 for his Magill medical practice called 'The Grange'.

From there grenache became the hot weather favourite, with irrigation producing thin but plentiful red wine ideally suited for fortified wines. A 1956 'grape census' had grenache as the mostly widely planted red in Australia, a title lost in the 1970s to shiraz.

Concerns about oversupply of red wine in the early 1980s led to many of McLaren Vale's grenache vines being over-grafted to the much more profitable chardonnay (grenache selling at $190 per tonne, chardonnay at $420). The drastic step of a vine-pull scheme was even legislated in South Australia in 1987, paying growers to remove old vines or unwanted varieties, and leave their land unplanted.

In McLaren Vale it is legend that d'Arry Osborn of D'Arenberg refused to remove his old grenache vineyards and, after buying other sites, that company now holds nearly one third of McLaren Vale's old bush vine grenache.

From these treasured old bush vines the new crop of wines is being made. Lessons from the fortified days have been learnt and now no irrigation, close pruning and high heat on bush vines up to 120 years old come together to produce concentrated and even perfumed wines with forest berries, tobacco, and liquorice. These are the new (old) McLaren Vale grenaches, and a treasure they are.

Note

[1] The Australian, April 16, 2016, available at theaustralian.com.au/life/food-wine/wine/jauma-wines-mclaren-vale-grenache-is-too-good-to-ignore/news-story/192bf52176fc4f3f97f5ec44f1cffb06.

The tasting

Three examples of fine McLaren Vale grenache where subjected to scrutiny.

The first was the **d'Arenberg The Custodian Grenache McLaren Vale 2013**, with a colour of blood plum. The nose was spicy pepper and the body had immediate impact with oak and tannin coating a core hiding away with liquorice and jammy fruit, perhaps hints of star anise and berry.

The second was the **Kay Brothers Basket Pressed Grenache McLaren Vale 2014**, with a colour of violet and dark plums. The nose was engaging and redolent of savoury spice, black pepper and summer fruits releasing their heady scent in warm afternoon sun. The palate was round, supple and velvety with rose Turkish delight, leather, cigar box, allspice and a hint of leather wound together in a beguiling and perfectly balanced harmonium.

The last was the **Rouler McLaren Vale Grenache 2015**, with a dark brick red colour. The nose was roses and spice but a little demure. The palate was a young and spritely mix of spicy floral fruit.

Verdict: The favourite of the selection was by far the Kay Brothers, which danced on the senses and charmed the sensibilities. Probably the best wine I have drunk this year.

Matthew Dunn is Queensland Law Society acting CEO and government relations principal advisor.

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Dress to impress for success

How to build a winning professional wardrobe

We all want to make the best impression in our professional lives, and there's no better way to start than by making the right choice in the clothes we wear, as **Clare Sheng** explains.

When you meet someone for the first time, what do you notice about them? Their confidence, their handshake and their attire.

Make yourself be remembered for the right reasons.

The clothes you wear and the way you groom yourself change the way other people hear what you have to say. Whether it be for a case, a client or a job, someone who wears clean, well-tailored and elegantly styled clothing will instantly appear to be the winner over someone whose clothes are unkempt and ill-fitting.

It doesn't matter which area of law you practise in, dress each day as if you are about to face your worst enemy.

In *Suits*, the first must-do advice Harvey Specter gave the freshly hired Mike Ross was to buy a properly tailored suit. So keep these important tips in mind:

1. Buy well

Quality clothes in a fine fabric will last longer and be more comfortable to wear. Choose one or two mid to high-end brands that suit your shape and look, and invest in building a professional wardrobe to last the test of time.

2. Get it tailored

It doesn't matter how much the clothes cost, if they're not tailored to your body, they will look out of date and unkempt. Invest a bit of time and money when you first purchase an outfit in clothing alterations. A well-experienced tailor will help you elevate your look by making sure every line is tailored to complement your shape, while providing comfort.

3. Maintenance

Clothes that are worn directly on the body should be washed or dry-cleaned after you've worn them two or three times, and jackets every three months. This prevents discolouration and makes the clothes last longer. Any ripped seams and holes should be mended immediately by a professional alterations service, to avoid looking careless and unobservant.

4. Don't follow trends

Trends should not apply to a professional wardrobe, because high fashion usually means cheap, disposable clothing that breaks easily. Don't waste time buying something you can only wear for six to 12 months, as you'll just need to go and purchase another one when it breaks or goes out of style.

5. Stick to the same colour scheme

Having too many different colour palettes in your wardrobe means that you will end up spending more time each morning trying to match outfits. Instead, choose two or three of your favourite staple suit colours – for example, navy, light grey and black – and build a collection of complementary coloured shirts and ties to match.

6. Accessorise

This is when you should buy well, and the colour scheme comes into play again. Choose timeless pieces to complement your staple looks – for example, a good-quality leather handbag, three to four professional belts and leather shoes in brown and black. Simple jewellery, watches and lapel pins can elevate the look, but keep the total number to no more than two. Silk neck ties are also a good investment, in classic colours such as maroon, navy and grey. A pocket square finishes the look, but should never be in the same colour as the tie.

7. Build a signature look

Nothing saves more time than building a signature look, because everything in your wardrobe will already match. Family lawyers may like to wear more colours and softer lines, whereas corporate lawyers could wear sharply tailored suits in lighter shades.

Clare Sheng is the director of the Fitting Room on Edward. See thefittingroomonedward.com.

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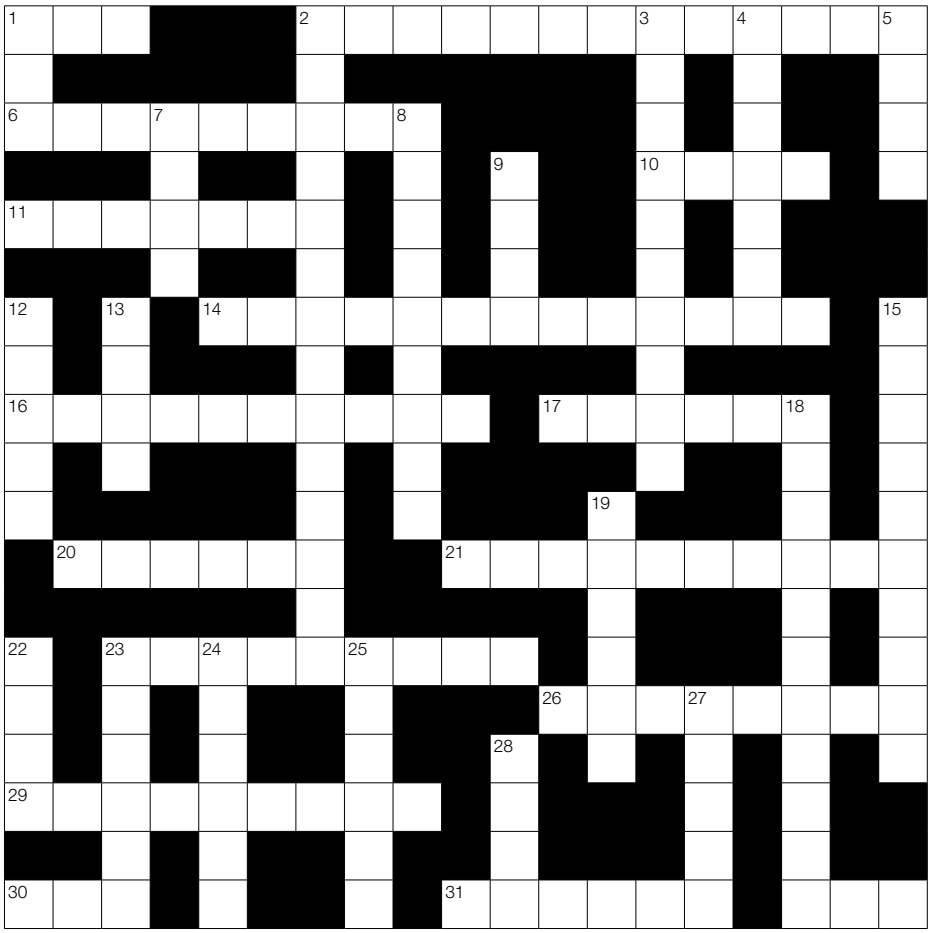
Mould's maze

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



Across

1 High Court case concerning the power to amend pleadings close to a trial date, … *Risk Services Pty Ltd v ANU*. (3)

2 Defamatory defence of truth. (13)

6 Common type of agreement used for software licences that requires the user to manifest their assent by clicking an 'OK' or 'I agree' button. (9)

10 Successfully apply for appointment as senior counsel, …. silk. (4)

11 Federal Court decision concerning the grounds upon which indemnity costs will be awarded, *Colgate-Palmolive Co. v ……. Pty Ltd*. (7)

14 The legal right of a first-born son to inherit his parents' entire estate. (13)

16 The right to construct in the airspace above a railway, ……. lot development. (10)

17 Child whose famous matinee jacket was found at Uluru three years after her mother was wrongly convicted of murdering her. (6)

20 Estoppel which prevents a party from bringing proceedings when they should have been pursued in earlier proceedings. (6)

21 Criminal sentences that do not overlap. (10)

23 Involved in a crime to some degree. (9)

26 Office of a judge or barrister. (8)

29 Actions per quod …… amisit arise when an employer sues a third party for injuries to their employee which reduce their ability to perform the services of employment. (9)

30 Antonym of expert in relation to witnesses. (3)

31 High Court case concerning whether there is property in a spectacle, *Victoria Park Racing and Recreational Grounds Co. Ltd v ……* . (6)

Down

1 High Court case that set parameters for declaring legislation invalid, *Project Blue Sky Inc. v …* . (abbr.) (3)

2 Error discussed by the High Court in *Craig v South Australia*. (14)

3 Defamatory defence falling within this description: "The words don't mean that. They mean something else which is actually worse, and correct", ……. truth. (10)

4 High Court murder appeal concerning Yolngu clan leader Dhakiyarr Wirrpanda and his right not to give evidence at trial, ……. *v The King*. (7)

5 Litigation guardian, …. friend. (4)

7 Cause of action instituted for the recovery of damages for an injury unaccompanied with force or where the damages are consequential, trespass on the ….. (4)

8 How Emily Perry's three husbands all died, leading to the High Court considering the admission of similar fact evidence. (9)

9 Entrepreneur responsible for the invention of the Stackhat who succeeded in a suit brought by the NAB for the enforcement of a bank guarantee, John ….. (4)

12 Ronald Ryan was the last person executed (hung) in Australia on 3 February 196…… (5)

13 Civil case, spanning over two decades and four nations, …. *Group NV (in liq) v Western Australia*. (4)

15 Element of negligence explored in *The Wagon Mound (No.1)*. (10)

18 An …… of time is granted in cases for which a hearing is short-listed. (11)

19 High Court justice convicted of perverting the course of justice (which was appealed to the High Court) after allegedly seeking favourable treatment from a NSW magistrate for a friend who had been charged with Commonwealth offences and was facing a committal hearing. (6)

22 *Ebner v Official Trustee in Bankruptcy* concerned the rule against …. whereby a judge held shares in a bank that stood to gain from the outcome of the decision. (4)

23 The lawyer in *Liar, Liar*, Jim ……. (6)

24 In *Secretary, Department of Health and Community Services v JWB and SMB*, also known as ……'s Case, the High Court had to determine the parental authority to sterilise an intellectually disabled child. (6)

25 Imprison. (6)

27 A will made by a ….. is not valid unless married or in contemplation of a marriage that does take place. (5)

28 Maliciously, …. fide. (Latin) (4)

Solution on page 52

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Dog, gone

But whatever he ate will be back

by Shane Budden

Regular readers may recall, during their rare moments of lucidity, that my family has acquired a dog, although the jury is still out on what breed.

My suspicion – based on the size, intelligence and capacity for causing widespread destruction – is that he is the last surviving member of the prehistoric ancestors of dogs. It would certainly explain a great deal if it turned out he had a brain the size of a pea.

You may also recall that he has the delusion, shared by almost all species of dog and the former members of the Palmer United Party, that the world is made entirely out of food, which means that they – dogs, not ex-Palmer United Party members (although it is likely no coincidence that they were referred to as PUP) – tend to attempt to eat pretty much anything, safe in the knowledge that their bodies – which are much smarter than their brains – will expunge items that aren't food (one way or another). Man, that was a long sentence.

In these enlightened times, of course, what dogs expunge from the, shall we say, tail region, is a bigger deal than it was. We dog owners carry plastic bags to clear the environment of dog waste, and it is a good thing too – if I had a choice between stepping in that and stepping in radioactive waste, I would go the radionuclides every time, because dog waste is possibly the most toxic substance in the universe; certainly it smells that way.

Also, it can only be removed from running shoes via flamethrower, which tends to result in a sub-optimal shoe. As a runner, I fully support both the laws which require people to clean up after their dogs, and transportation to the 7th circle of Hell for people who fail to do this (if Hell is full, they can go to Sydney instead).

Nevertheless, in the old days it was different. As a kid I lived in the Moreton Shire, when the dog laws were much simpler than they are now. I believe the full text of the laws went like this:

1. If you have a dog:
   (i) Good! We like dogs!
   (ii) Please feed your dog.
   (iii) We are not interested in any puppies you are giving away.
   (iv) Really, we aren't.

Years later, after I became a solicitor (honest, I did) I worked for the Ipswich City Council prosecuting breaches of local laws, including

dog laws. The Ipswich laws were a little stricter, and went something like this:

1. If you have a dog:
   (i) Guilty.

Note to officious letter-writers, potentially litigious local governments and the sorts of law nerds that actually look these things up: the above characterisation of the Ipswich Local Laws is an artifice employed for comedic effect (it's funny, trust me) and I intend no denigration of the excellent minds behind the true laws (of which I was one) which it goes without saying are fair, reasonable and bathe anyone who reads them in a glow of pure justice that has been shown to lower blood pressure, vaporise kidney stones and cure acne (note: there may be more than one artifice in this column). In other words, don't sue me. (*Don't send letters to the editor either – Ed.*)

Anyway, my point, I think you will find, is that I have a dog that can destroy things, largely by attempting to eat them. This generally doesn't create too much of a problem, especially if the thing destroyed holds little value, such as, for example, sticks, tennis balls and real estate agents offering to give me a free valuation of my house.

In fact, let me just pause there and address any real estate agents who are having this read out to them. The only effect of you offering to value my house – whether in person, via mail or through cutting down a Tasmania worth of trees and turning them into junk mail and newspaper inserts – is that I will never, even if the choice is between you, Sauron and the guy who shot Bambi's mother, use your services. For the record, I have never met anyone who feels any differently about this, although some of the younger ones refer to Voldemort rather than Sauron because young people have no real idea of what is cool.

Unfortunately my dog occasionally destroys something of value, which recently included my Valleys Rugby League Football Club hat (note to concerned Valleys fans: it wasn't one from the good old days, but a recently purchased one, so don't worry). Most hats are safe from dogs because they are usually on people's heads, often with the peak pointing backwards if the hat is being worn by a certain kind of person known to top people scientists as 'morons'.

Unfortunately my wife comes from a long line of jockeys, and my dog from a long line of horses, and he was able to snatch it from her head. My wife doesn't understand why this upset me so much, as she – like many women – was born without the gene that allows a person to apply ludicrous and unjustifiable significance to the following of sports teams (there are no men who do not have this gene). She does understand – now that my hat, and not hers has been eaten – that she cannot wear a hat while walking him.

In fact, many people who meet my wife walking our dog find it amusing to point out that she would be better off riding him. I can't tell you how hilarious my wife finds this, but I can describe it. You know how you feel when someone who likes Monty Python just a little too much feels the need to recite the entire Dead Parrot sketch to you, including poorly imitated British accents, no matter how many times you say you have already heard it?

That's how my wife feels when she hears that joke; I suspect that one day I will come home to find the police taking her away for stabbing someone to death with her keys after hearing that comment. Fortunately she will get off, because the dog will have eaten the evidence (before you complain, I mean the keys, not the body, OK?).

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Crossword solution from page 50

Across: 1 Aon, **2** Justification, **6** Clickwrap, **10** Take, **11** Cussons, **14** Primogeniture, **16** Volumetric, **17** Azaria, **20** Anshun, **21** Cumulative, **23** Complicit, **26** Chambers, **29** Servitium, **30** Lay, **31** Taylor.

Down: 1 ABC, **2** Jurisdictional, **3** Contextual, **4** Tuckiar, **5** Next, **7** Case, **8** Poisoning, **9** Rose, **12** Seven, **13** Bell, **15** Remoteness, **18** Abridgement, **19** Murphy, **22** Bias, **23** Carrey, **24** Marion, **25** Immure, **27** Minor, **28** Mala.

Interest rates

For up-to-date information and more historical rates see the QLS website **qls.com.au** under 'For the Profession' and 'Resources for Practitioners'

Rate	Effective	Rate %
Standard default contract rate	1 July 2017	9.30
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 January 2017 to 30 June 2017	7.50
Federal Court – Interest on judgment debt for half year	1 January 2017 to 30 June 2017	7.50
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 January 2017 to 30 June 2017	5.50
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 January 2017 to 30 June 2017	7.50
Court suitors rate for quarter year	1 April 2017 to 30 June 2017	0.815
Cash rate target	from 2 November 2016	1.50
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2017	7.50

Historical standard default contract rate %

July 2016	Aug 2016	Sep 2016	Oct 2016	Nov 2016	Dec 2016	Jan 2017	Feb 2017	Mar 2017	Apr 2017	May 2017	June 2017
9.35	9.35	9.35	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.25

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

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