PROCTOR

Queensland Law Society

July 2016 – Vol.36 No.6

Women in law: The facts | Rise of the drones
Chemo by court order

WR | WillRegistry

Let your will be done

Australia's Premier Will Registry

Providing a bridge between the public and legal practitioners.

Become a member now and **receive 6 months free** (for a limited time only).

12 Good reasons to choose us

- Unlimited wills registered for one membership fee
- Added to our public 'Find a Solicitor' database
- Solicitor profile page - linked to 'Find a Solicitor'
- Annual reminder on updating will details
- Free access to will search match details
- Free search of wills database *(Probate issue mitigation)*
- Will reference file locator (your office backup)
- Will data entry service
- Exposure to potential new clients
- Public exposure to wills you are holding
- QLR probate notice - email notification
- BDM death registration - email notification

What is Will Registry?

Here at Will Registry we are endeavoring to provide a bridge between the public who are searching for a will and the legal practitioner who is holding a will. There is also an avenue for the public to register the details of the solicitor or individual to contact for administration of their will. Please note we do not require the uploading of any documents, this is purely a registry of the location of your will.

Would You Like To Know More?

Please visit us at **www.will-registry.com.au**

Queensland Law Society

PROCTOR

Published by Queensland Law Society | ISSN 1321-8794 | RRP $14.30 (includes GST) | **qls.com.au**

FOR THOSE WHO DARE TO STEP FORWARD

THIS IS THE NEW LEXUS

LEXUS CORPORATE PROGRAMME

Lexus represents an incomparable driving experience, and the Lexus Corporate Programme builds upon this by providing a service uniquely tailored to our corporate customers, with exclusive corporate benefits offered to Queensland Law Society members across the entire Lexus range, including luxury hatch, sedans, coupes and SUVs.

In addition to the great benefits of the Programme, Queensland Law Society members can enjoy Preferential Corporate Pricing, an offering that rewards your important achievements.

LEXUS CORPORATE PROGRAMME BENEFITS:

- Preferential Corporate Pricing[1]
- 3 year/60,000kms complimentary servicing[2]
- Reduced delivery fee of $995 (ex GST)
- Priority ordering and allocation
- Encore Privileges Programme, including:
  - Service loan cars or complimentary pick-up/drop-off during servicing
  - Lexus DriveCare, providing 24 hour roadside assistance
  - 'Beyond by Lexus' magazine

lexus.com.au/services/corporate

To access the Lexus Corporate Programme please contact your nearest Dealer (lexus.com.au/contact/dealers) or dedicated Lexus Corporate Sales Manager:

Nataliya Yavtushenko
e. nataliya.yavtushenko@lexus.com.au
m. 0477 006 738

1. Conditions apply. See your Lexus dealer for further details.
2. Complimentary scheduled servicing expires at 3 years or 60,000kms from the date of first registration, whichever occurs first. Conditions apply. See your Lexus dealer for further details.

LEXUS
THE PURSUIT OF PERFECTION

Step-by-step reconciliation

New working group to build action plan

Queensland Law Society represents its members. In turn, our members represent and act for some of the most disadvantaged people in the community.

As lawyers, we see this disadvantage at first hand. And as lawyers we have a voice.

We have the privilege to know, and therefore we have the duty to speak and to act.

What we see is the over-representation of Indigenous people in jail, more deaths in custody and the under-representation of Indigenous people within our justice system.

It's been 24 years since the Mabo decision, 20 years since the last significant report on Indigenous deaths in custody, 18 years since the advent of National Sorry Day (26 May), and seven years since Australia gave its formal support to the United Nations Declaration on the Rights of Indigenous Peoples.

So why do I get the feeling that not much has changed?

Because no amount of legal expression of sorrow or regret, though appropriate, is going to be effective without concrete steps to ensure that some of the most vulnerable people in our society are dealt with equitably and fairly.

One concrete step we have welcomed is the re-opening of the Murri Court in our justice system.

The first of 14 Murri Courts was formally launched in Rockhampton on 13 April as part of the Government's election commitment to reinstate diversionary court options for Aboriginal and Torres Strait Islander (ATSI) people in Queensland.

Murri Courts first began in 2002 in response to the disproportionate number of ATSI people incarcerated in Queensland jails, but were axed in 2012.

These courts provide access to culturally-competent service providers and referral pathways to address the underlying causes of criminality. They have proven their worth in diverting people from the criminal justice system.

A Murri Court is a Queensland Magistrates Court which is available to sentence eligible ATSI offenders who have pleaded guilty. It is presided over by a magistrate, and supported by local elders or respected persons who provide cultural advice to the magistrate.

I hope that, as in Victoria, the Murri Court concept will in time be extended to the District Court.

The next concrete step is the announcement that we are forming a reconciliation action plan (RAP) working group to establish a RAP for the Society. It is hoped that this group will convene for the first time next month.

QLS is committed to promoting the principles and practice of equity and diversity in the Queensland legal profession and working towards supporting, promoting and improving access for Queensland Aboriginal and Torres Strait Islander lawyers.

A RAP is not simply some kind of motherhood statement. A RAP is a framework which sets out practical plans of action for an organisation to realise its vision for reconciliation, create social change and build on relationships and respect for ATSI Australians.

It starts with both internal and external discussions and reflections with stakeholders to set out the strategic direction and viable actions for reconciliation, recognition, support and promotion of Queensland ATSI lawyers.

The RAP working group will work closely with Reconciliation Australia and Reconciliation Queensland Inc. to settle the action plan for Council approval and ultimately formal recognition by Reconciliation Australia.

We look forward to working with Indigenous representatives and the profession in developing a QLS RAP.

With an Indigenous population of around 30% in Queensland prisons, another 'concrete step' I would like to see is greater Indigenous representation within the judiciary. Of the 90 or so magistrates in Queensland, a handful – four – claim an Indigenous heritage. For the judges of the District Court and Supreme Court, there is zero Indigenous representation, to the best of my knowledge.

While appointments to the judiciary should always be based on merit, more thought needs to be given to ensuring that it reflects the diverse composition and makeup of our society, and in this we need to consider issues such as the rate of Indigenous incarceration.

Finally, I will note that QLS has supported the LawLink program for many years. LawLink connects ATSI law students with the profession and provides an opportunity for them to gain a better understanding of the practice of law.

Events on the LawLink calendar for this year include an introduction to Crown Law on 16 August and a visit to Legal Aid Queensland on 4 October.

As always, I welcome your feedback on action plans, mentoring proposals and other initiatives you would like to see incorporated into our QLS RAP.

Bill Potts
Queensland Law Society president

president@qls.com.au
Twitter: @QLSpresident

Good lawyers deserve good rewards

The QLS Member Rewards# program gives you special discounts and exclusive rewards on a range* of lifestyle benefits and services.

We are continuously revising our program based on feedback from our members to ensure you get the best value from your QLS membership.

AMP · Bupa · BMW · CAR ASSIST MEMBER BENEFITS AUSTRALIA · CHILDCARE & EARLY EDUCATION PARTNERS · Europcar moving your way · Hilton HOTELS & RESORTS · QANTAS

qls.com.au/member-rewards

#The QLS Member Rewards program is only available to full and associate members.
*These reward partners represent only a selection of the discounts and special offers available. Visit our website for full details.

Queensland Law Society

DV best practice guidelines launch

And DV support for our employees

Earlier this year I reported on the work of our Not Now, Not Ever Working Group, chaired by Deborah Awyzio, which has now finalised the best practice guidelines for lawyers working with people who have experienced domestic and family violence.

The guidelines will address recommendation 107 of the Not Now, Not Ever Report – that Queensland Law Society develop best practice guidelines for lawyers – and it will be my pleasure to speak at the launch event for these on 27 July.

I anticipate that the guidelines will be available for practitioners following the launch.

In previous editions, this column has discussed several aspects of domestic and family violence.

What we haven't noted in great detail is the significant impact it usually produces on an employee's performance at work.

At Queensland Law Society, we seek to create a supportive work environment in which staff are comfortable requesting assistance for concerns related to domestic violence.

To reach this outcome, we are finalising a QLS domestic and family violence policy for the benefit of both our staff and Queensland law firms.

While our staff will receive information on their options for seeking help, in the knowledge that their request will be dealt with in a confidential and supportive manner, it is anticipated that the policy could also provide law firms with a template for their own domestic and family policies.

As a part of this policy package, we will promote and participate in related learning and development activities that will help firms to effectively communicate on and manage domestic violence matters that impact on their employees in the workplace.

Key elements of our policy relate to the assurance of confidentiality for employee disclosures and access to flexible working arrangements when required. The policy discusses the responsibilities for both employees and managers, and support services that can be accessed.

It covers a variety of leave entitlements, including up to 10 days a year of paid leave, and how these entitlements are applied.

Our aim is to reflect best practice in this policy, and to ensure that it accords with legislation such as the *Domestic and Family Violence Protection Act 2012*. However, our chief objective is to ensure that our workplace, and legal workplaces across Queensland, can provide their staff with appropriate assistance and a supportive work environment when they need these the most.

I look forward to providing more information on this initiative very soon.

Survival guide update

At the time of writing, the draft of our disaster readiness and recovery guide for members has been finalised and is being prepared for release, which I anticipate announcing later this month.

The guide will assist members and their practices by providing practical tools and suggestions to help them be ready for, and withstand, a multitude of disasters.

Our IT roadmap

Last month I mentioned the technology roadmap we prepared to provide members with an enhanced digital experience across all dealings with the Society. This plan has now been approved by Council, and we have started to update and improve our critical technology infrastructure and systems.

This will mean, at completion of this program of work, fuller integration between our membership data system and our website, greater functionality in our digital offerings, such as online learning, improved automation for processes such as renewals, and also provide us with full disaster recovery capability.

A substantial part of the roadmap relates to the systems that operate behind the scenes in providing our digital and member services, but we do anticipate that members will notice an enhanced online experience well before completion at the end of next year.

Our gratitude aids charities

Our professional development program relies on the hundreds of volunteer presenters who willingly share their knowledge with our members each year.

QLS and our conference and seminar delegates are invariably grateful to these presenters, whose selflessness and expertise provide members with the opportunity to grow their own skills through a range of exceptional professional development events.

In past years it was customary to thank each volunteer presenter with a small gift such as a bottle of wine, QLS cufflinks or similar.

Following feedback from our presenters, this practice has been changed to reflect a greater sense of corporate responsibility, opting instead to make a donation to one of our nominated charities or a non-profit organisation of the presenter's choice.

I am pleased to report that during the 2014-15 financial year almost $10,000 was donated in this way.

Our nominated charities – QPILCH and the Tristan Jepson Memorial Foundation – have both benefitted, as have a number of other community organisations.

For 2016-17, we are planning to support other organisations, which I will announce shortly.

Our gratitude goes to those members and presenters who give so generously to our professional development program.

Amelia Hodge
Queensland Law Society CEO
a.hodge@qls.com.au

Queensland Law Society

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

President: Bill Potts
Deputy president: Christine Smyth
Vice president: Kara Cook
Immediate past president: Michael Fitzgerald
Councillors: Michael Brennan, Christopher Coyne, Jennifer Hetherington, Chloe Kopilovic, Elizabeth Shearer, Kenneth Taylor, Kara Thomson, Paul Tully, Karen Simpson (Attorney-General's nominee).
Chief executive officer: Amelia Hodge

Editor: John Teerds j.teerds@qls.com.au | 07 3842 5814
Design: Alisa Wortley
Art direction: Clint Slogrove
Advertising: advertising@qls.com.au
Display Ads / Classifieds: advertising@qls.com.au / classified@qls.com.au
Subscriptions: Hayden De Waal 07 3842 5812
Proctor committee: Adrian Braithwaite, Dr Jennifer Corrin, Kylie Downes QC, Steven Grant, Vanessa Leishman, Greer Oliver, Bruce Patane, Hayley Schindler, Christine Smyth, Anne Wallace.
Printing: Print Works. Proctor is published monthly (except January) by Queensland Law Society.
Editorial submissions: All submissions must be received at least six weeks prior to the month of intended publication. Submissions with legal content are subject to approval by the Proctor editorial committee, and guidelines for contributors are available at **qls.com.au**
Advertising deadline: 1st of the month prior.
Subscriptions: $110 (inc. GST) a year (A$210 overseas)
Circulation: CAB, 31 March 2016 – 10,096

cab CIRCULATIONS AUDIT BOARD

Bond students take moot crown – five times

Bond Law students Justina Sebastiampillai and Jeremy Butcher, *pictured*, have won this year's Beijing Foreign Studies University (BFSU) Wanhuida Cup Intellectual Property Moot Court Competition.

Bond defeated 15 teams – 11 from leading Chinese universities, one from Taiwan and the others from the United States and Australia – to win the event for the fifth time.

The moot, held annually in Beijing, is an English-language competition that focuses on real-life intellectual property issues similar to some that have arisen in the Chinese business sector. This year's legal problem concerned employees claiming compensation for an invention created during their term of employment.

Justina also received the 'Best Oralist' award and was asked to deliver the prestigious thank-you speech to the judges, on behalf of all teams.

"Although the moot was in English, the case itself was Chinese, so research was a major challenge," she said. "Not only did we have to very quickly get to grips with Chinese law and the foundations of the Chinese legal system, but the sources of information at our disposal about the case were very limited, and largely in the Chinese language."

Bond Law's Professor William van Caenegem, who coached the team on the ground in Beijing, said they performed strongly from the start of the competition.

QLS backs call for more funding

Queensland Law Society has voiced its support for the Safety First in Family Law proposals and echoed the calls for more funding made by the Family Violence Committee of the Family Court and Federal Circuit Court.

Society president Bill Potts said: "It is vital that we do what we can to combat the scourge of family and domestic violence, but that needs more than just recommendations, it needs action – and action costs money.

"In addition to the funds needed to implement the proposals, we also need more judges in both the Family Court and federal courts – there is no getting around that fact."

Mr Potts said that more judges meant matters would get resolved more quickly and that this often helped reduce family violence.

"The Society provides a service chasing up delayed judgements for its members and the Federal Circuit and Family Courts are regular targets of these efforts for the simple reason that they don't have enough judges to handle the immense workload they face," he said.

"There are plenty of talented lawyers in Queensland who could and would make fine judges if extra positions were funded."

Mr Potts' comments follow a call by Family Court of Australia Chief Justice Diana Bryant for $17m in funding for family violence initiatives.

"There has been considerable focus on family violence by governments recently, and pleasingly, announcements have been made providing additional funding," her Honour said.

"However, there is a glaring omission as to where funding should be allocated and that is to the courts dealing with family law. The Family Court and the Federal Circuit Court are at the coalface in dealing with families impacted by family violence, and yet there has not been one extra dollar provided to the courts."

FCC Chief Justice John Pascoe agreed, saying: "The Courts have worked tirelessly over the years to provide judges and staff with ongoing professional development to ensure that cases with family violence allegations or risk indicators are appropriately supported, screened, assessed and adjudicated."

back to contents

LGBTI community recognises legal contribution

Awards night … Stephen Page, Wil Alam, Lia Volpe and Emile McPhee of the LGBTI Legal Service.

Members of the Queensland legal profession have been honoured for their contributions to the state's LGBTI community.

The 55th annual Queen's Ball Awards Gala, held at Brisbane City Hall on 11 June as a part of the Brisbane Pride Festival and attended by Deputy Premier Jackie Trad, included the presentation of the Activist of the Year award to Emile McPhee of McCullough Robertson for his role as director of the LGBTI Legal Service.

The Community Organisation of the Year was won by the LGBTI Legal Service, while the Young Person of the Year was won by Ben English, a law student at QUT. Another nominee in that category was Luke Furness of Clayton Utz, for his role as Queensland convenor of Out for Australia.

The LGBTI Legal Service provides legal advice and information to clients with legal problems arising from their identification as lesbian, gay, bisexual, transgender or intersex.

It will celebrate its sixth anniversary on 19 August at the Supreme Court of Queensland's Banco Court with guest speakers the Honourable Michael Kirby and Harrington Family Lawyers' Stephen Page, who won last year's Activist of the Year award.

See **facebook.com/LGBTILegalService/events**.

Submissions to Human Rights Inquiry

Queensland Law Society submissions to the parliamentary Human Rights Inquiry on 22 April are now publicly available. The Society's submissions put forward both the proponent and opponent views on whether Queensland should legislate for human rights, reflecting the full spectrum of input received from members. Please refer to the letter and submission at **qls.com.au** > For the profession > Advocacy > Human rights working group > Working group updates.

The committee's report was due by 30 June.

Appointment of receiver

On 7 June 2016, the Executive Committee of the Council of the Queensland Law Society Incorporated passed resolutions to appoint officers of the Society, jointly & severally, as the receiver for the law practice, McRae and Associates Lawyers, Teneriffe, as the principal of the law practice died on 18 May 2016.

The role of the receiver is to arrange for the orderly disposition of client files and safe custody documents to clients and to organise the payment of trust money to clients or entitled beneficiaries. Enquiries should be directed to Sherry Brown or Glenn Forster, at the Society on 07 3842 5888.

WLAQ sees positive change for women

MinterEllison senior associate Cassandra Heilbronn, *right*, last month stepped into her new role as president of the Women Lawyers Association of Queensland (WLAQ) – very carefully.

A couple of days before the 14 June WLAQ annual general meeting and election, Cassandra broke two bones in her right leg while playing club soccer.

However, a broken leg is unlikely to slow her down. Cassandra is an active and enthusiastic participant in not just her legal duties but also the broader community.

Nominated in the 2014 Westpac Women of Influence and Women of the Future awards, Cassandra was also named in the 2015 *Who's Who of Australian Women*.

She is social media manager for Australian Women Lawyers and a non-executive committee member of the Toowong Football Club. As well, she is completing the final subjects for her Masters of Law at the University of Queensland.

As WLAQ president, her priorities for the year ahead are to ensure that the WLAQ strategic plan endorsed in 2015 continues to be put into practice.

Her key goals include the adoption of the Law Council of Australia's Equitable Briefing Policy for Female Barristers and Advocates in Queensland, engaging with firms and seeking their participation through WLAQ's new corporate membership program, and encouraging male members of the profession to become advocates of change for gender diversity.

She said that WLAQ had a strong relationship with Queensland Law Society's Equalising Opportunities in the Law Committee and also with Queensland Male Champion of Change driver Dominic McGann.

"I hope to see more male lawyers, particularly those at the senior associate, special counsel and partner level, engage with WLAQ," she said. "The Flexibility Working Group will remain a key initiative of WLAQ, working with QLS and the group's members."

Cassandra said she believed that the issues facing women in the legal profession depended on their level and experience.

"We know that students sometimes struggle with the transition from university to full-time work, and WLAQ looks to overcome this through its mentoring program," she said. "The mid to senior women in the profession

back to contents

are calling for assistance as they apply to progress to more senior positions. WLAQ can provide access to these resources by referrals to business and executive coaches and leadership courses, such as the one led by Terri Mottershead.

"Lastly, WLAQ has found that women already in senior positions are requesting events that allow them to talk with other women in the same position from other firms and at the Bar. Each year, the WLAQ president hosts a lunch with female partners and QCs so that WLAQ can hear further about what is, and is not, working in terms of gender diversity initiatives."

Speaking on a personal level, Cassandra said she believed that the legal profession as a whole had realised that it could not continue to ignore gender diversity issues and must ensure that appropriate policies were being put into practice.

"Firms must ensure that their internal women's networks are representative of the firm as a whole and that they are allowing full and frank discussion from their employees," she said. "There needs to be support from all levels, and a recognition that the traditional firm models are changing, and with this flexible work arrangements need to be accepted as normal."

She said the present was an exciting time for WLAQ.

"The past few years have seen WLAQ return to its strategic focus and reengage with all members of the legal profession, including government and academia. Our relationships with other states are at an all-time high and WLAQ is confident that there will be positive change for women in the Queensland legal profession over the coming years.

"WLAQ has a strong executive committee and the new management committee is more than willing to contribute whatever they can to the organisation. It is important to have strong women on board who have the full support of their firms and chambers groups."

The Women Lawyers Association of Queensland (WLAQ) 2016-17 executive and management committee were determined at its annual general meeting on 14 June. The results were:

President	Cassandra Heilbronn
Vice president	Ann-Maree David, Amanda Stocker
Treasurer	Nichola Di Muzio
Secretary	Madeline Cameron Wardleworth
Ex officio president	Amelia Trotman
Student representative	Hannah Limberger-Forte
Committee members	Naomi Benton Bridget Camilleri Belinda Jeffrey Janelle Kerrisk Katrina Mawer Lauren Scott Jamie Shine Borcsa Vass Stephanie Williams

New DLA draws a crowd

Queensland's newest district law association, the Logan and Scenic Rim DLA, 'arrived' on 9 June with a welcoming event at the Chambers Pines Golf Club, Chambers Flat. More than 30 members and guests launched the DLA with the assistance of QLS deputy president Christine Smyth (second from left), pictured with DLA secretary Jocelynne Berry, founding president Michele Davis and treasurer Ben Wilcock.

Left: Michele Davis, opening address

Below: Paul Casbolt, Logan Country Financial Services; Kerry Menck, Logan Country Financial Services; Sylvia Hoefnagels, Robbins Watson

Another golden symposium

Our annual Gold Coast Symposium was again a great event on 10 June, with more than 120 attendees enjoying a varied and informative selection of professional development sessions. These ranged from an insight into Commonwealth Games preparations, including an overview of the new legislation to protect the Games' brand and commercial interests, to a closing session that encouraged delegates to 'lighten up' through laughter. Another highlight was the presentation of 25-year pins by president Bill Potts (*third from left*) to members Peter Hunt, Kate Mathews Hunt, Andrew Moloney, Jeff Dwyer, Tanya Atwill, Jason Prismall and Annette Greenhow.

Right: Presenter Jacqui Perkins addresses the topic of 'Communicating with Influence'.

Far right: Bond University Assistant Professor Hugh Zillmann with QLS president Bill Potts.

back to contents

Advocacy

Child protection changes from 1 July

New legislation to reform the state's child protection regime, including key changes long advocated by Queensland Law Society, commences on 1 July.

On 16 February, Attorney-General Yvette D'Ath introduced the Director of Child Protection Litigation Bill 2016. QLS prepared submissions and appeared at a public hearing to discuss this Bill, along with the Child Protection Reform Amendment Bill 2016, which was introduced by Child Safety Minister Shannon Fentiman.

The Bills represent recommendations from the 2013 Carmody Inquiry and include key QLS recommendations. In our submissions we supported the principles underpinning the Bills and said that they would:

- simplify and improve the efficiency of court processes
- simplify disclosure for the parties
- increase access to justice by parties and other involved individuals, improve governmental decision-making in relation to child-protection litigation
- simplify the processes in relation to contact and placement decisions during child protection proceedings.

On 11 May, Queensland Parliament passed the Bills.

Office of the Director of Child Protection

Importantly, the *Director of Child Protection Litigation Act 2016* establishes an independent statutory agency, the Office of the Director of Child Protection Litigation. Section 9 sets out its functions:

- to prepare and apply for child protection orders, and conduct child protection proceedings
- to prepare and apply for transfers of a child protection order or child protection proceeding to a participating state
- to prepare, institute and conduct appeals against the decisions made for child protection orders and transfers
- to provide legal advice to the chief executive (child safety) in relation to:
  - the functions of the chief executive (child safety) under the *Adoption Act 2009* and the *Child Protection Act 1999,* and
  - other matters relating to the safety, wellbeing or protection of a child;
- to represent the state in legal proceedings under the *Adoption Act 2009* and the *Child Protection Act 1999* or other proceedings relating to the safety, wellbeing or protection of a child
- for a matter involving the state to which the Convention on the Civil Aspects of International Child Abduction applies under the *Family Law Act 1975* (Cth), section 111B:
  - to provide advice to the state about the matter
  - to represent the state in proceedings relating to the matter
- any other function given to the director by this Act or another Act.

Office of the Child and Family Official Solicitor

The Department of Communities, Child Safety and Disability Services will also establish the Office of the Child and Family Official Solicitor. The role of the office is to:

- provide early, independent legal advice to child safety workers about child protection matters
- work closely with staff in service centres to prepare applications for child protection orders
- make applications for emergent and temporary orders to ensure a child's immediate safety
- brief the Director of Child Protection Litigation for child protection orders.

Departmental court coordinators and court services staff will form part of the Office of the Child and Family Official Solicitor and, over time, will hold legal qualifications.

The two new offices will provide a professional separation between frontline child protection services and legal advice and services, to ensure integrity and fairness.

The relationship between the two offices will be one based on strong ties of collaboration and partnership.

More information on the two offices is available from the webpage of the parliamentary Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee at parliament.qld.gov.au.

QLS continues to advocate for an evidence-based consistent approach to prevention of child abuse and neglect in Queensland. An In Focus session on the role of the new offices is being held on 1 July.

Annmaree Verderosa is a QLS policy solicitor.

Input leads to better shop leases

Recommendations from Queensland Law Society's Property and Development Law Committee were accepted by the State Government for its amendments to the *Retail Shop Leases Act 1994*.

The *Retail Shop Leases Amendment Act 2016* was passed on 10 May 2016, following extensive consultation with industry stakeholders during a statutory review process, and assented to on 25 May 2016.

The Government has indicated that the amendments will take effect six months after assent to allow industry bodies and associations to inform their members about the changes.

QLS was involved from the release of the initial discussion paper in late 2011. The Society was also part of the stakeholder reference group formed in June 2013 to provide technical input and make recommendations. The work of the reference group was specifically acknowledged by the Attorney-General in Parliament.

Many of the recommendations from the QLS Property and Development Law Committee in its submission of 24 November 2015 were accepted, and the Society acknowledges the significant work of the committee during this process.

As a result of concerns raised by QLS in its submission, the Attorney-General moved a number of amendments to the Bill during consideration in detail. Some amendments recommended by QLS will allow the status quo to continue in relation to assigning retail shop leases and other amendments clarify technical drafting issues.

A copy of all submissions to the Education, Tourism, Innovation and Small Business Committee, including the QLS submission, is available from the committees section of the parliamentary website, parliament.qld.gov.au.

Wendy Devine is a QLS policy solicitor.

back to contents

BRISBANE'S UNMISSABLE SHOPPING EXPERIENCE

Vintage Watch Co. stocks hard-to-find, collectable quality vintage and new watches from brands such as Rolex, Omega, Patek Philippe, Cartier and many more. Whether you want to purchase a watch for your collection or want advice on buying your first timepiece, Vintage Watch Co. can help.

Shop 12 & 13, Street level
3210 6722
vintagewatchco.com.au

UNIQUE TO BRISBANE ARCADE

VINTAGE WATCH CO.

The locally produced Pia du Pradal label has a very loyal following. Known for its sharp tailoring and flattering cuts, the range covers special occasion, race wear, career dressing and sporty day wear.

Shop 5A, Street level
3012 7441
piadupradal.com

MADE IN BRISBANE ARCADE

PIA DU PRADAL

Irma J Smith House of Fashion creates bespoke and ready-to-wear glamour under two labels, Irma J Smith House of Fashion and Miss Smith Collections. Their classically silhouetted suits and evening gowns use the most sublime European fabrics, vivid colours and faultless workmanship to create head turning allure.

Shop 14, Street level
3229 3098
irmajsmith.com.au

MADE IN BRISBANE ARCADE

IRMA J SMITH HOUSE OF FASHION

The Pen Shoppe is a treasure trove of wonderful gifts. Not only does it stock a superior range of the best writing implements and brands from around the world, but you'll also find desk accessories, stationery and other great gift ideas in store.

The Pen Shoppe is the exclusive Australian stockist for Caran d'Ache – the world's finest brand of premium pens plus art and colour tools and materials.

Shop 23, Street level
3229 8650
pensdeluxe.net

UNIQUE TO BRISBANE ARCADE

THE PEN SHOPPE

The iconic, heritage-listed Brisbane Arcade is a must-do on any Brisbane itinerary. Since 1923, it has been home to Queensland's 'royalty' of fashion and jewellery designers along with designer fashion retailers, distinctive gift emporiums, antique treasures and more.

Take a break from shopping to enjoy the Arcade's delicious culinary offerings, including delightful cafés serving high tea and tasty homemade treats, and our very own chocolatier.

www.brisbanearcade.com.au

facebook.com/brisbanearcade

@brisbanearcade #brisbanearcade

Brisbane Arcade operating proceeds benefit the University of Queensland Medical School and medical research

BRISBANE ARCADE
SINCE 1923
160 QUEEN ST MALL
BRISBANE QLD AUSTRALIA

Rise of the drones

Liability remains sky high for Australian business

Australian companies are embracing the benefits of drones in our skies. But with new regulations about to come into effect, they will need to ensure that they comply, as well as keeping an eye on liability and other issues. Report by **Tom Young** and **Samantha Nean**.

In April 2016 a drone hit a British Airways aircraft as it was preparing to land at Heathrow Airport.[1]

Such events are not uncommon – a quick search of the internet will reveal that drones causing damage or being involved in near misses are a daily occurrence.

In 2002, Australia became the first country to regulate the use of unmanned aerial vehicles (UAVs),[2] now referred to as remotely piloted aircraft (RPAs) or more commonly, drones.

The Civil Aviation Safety Authority (CASA) is responsible for managing Australian airspace, including the use of drones. In late March 2016 the *Civil Aviation Legislation Amendment (Part 101) Regulation 2016* (the Part 101 amendments) was registered on the Federal Register of Legislation in an attempt by CASA to better regulate this disruptive technology.

This paper provides a background to the Part 101 amendments, which are due to take effect on 29 September 2016.

Regulatory background

In 2002, Part 101—Unmanned Aircraft and Rockets was inserted into the *Civil Aviation Safety Regulations 1998* (Cth) (CASR). This remains the current law for drone operators in Australia, but it is complex and, due to the rapid expansion in drone technology, in many instances impractical to regulate the current multitude of uses of drones.

To use an RPA of any size for commercial hire or reward, CASA requires a business to obtain a UAV controller's certificate and an unmanned operator's certificate. Obtaining these certificates requires similar criteria to that of a pilot's licence, necessitating considerable training.[3]

As a result, there exists a current regulatory grey area surrounding the precise meaning of 'commercial use' under CASR, which has allowed many Australian businesses to interpret that their use of RPAs for their respective business operations is not commercial but ancillary to ordinary operations on their property.

Indeed, CASA presently affords mining companies and farmers an exemption from obtaining regulatory approval to use drones if certain conditions are met, namely the drone:

- is operated by an employee
- it is not operated within 30 metres of a person
- is flown under 400 feet
- is not operated over a populous area
- is operated within the employer's private property
- is not operated within a certain distance of an airport and other restricted areas
- is operated within the line of sight of the operator.[4]

CASA also suggests that a drone not be flown within 30 metres of a building.[5] This is to ensure that reg. 101.055 CASR is complied with, which provides that a drone is not to be operated in a hazardous way; however, operating a drone within 30 metres of a building is not in itself hazardous.

Since 2002, the technological development of drones has rapidly accelerated. While most in the aviation industry can predict the design and specifications of what a new passenger aircraft will be in 15 years, the same cannot be said about drones.

Drones are used in various industries, for example, mining, agricultural and media, for many purposes, such as monitoring, the inspection of infrastructure, delivery of goods, photography and sporting coverage.

The design and manufacture of drones and drone software is a competitive market that continues to expand. Recent Goldman Sachs research has valued global drone sales for commercial purposes at $20 billion a year and consumer sales at $14.5 billion.[6] It has been suggested by one commentator that UAVs are evolving faster than "our ability to understand how, legally and ethically, to use them".[7]

As a consequence, CASA has undertaken various industry consultation processes. As part of this, on 14 May 2014 CASA published draft proposed amendments to Part 101 (the proposed amendments).

The proposed amendments defined small drones as weighing under 2kg.[8] A remote pilot certificate or an operator's certificate was to be required for the operation of RPAs *other than small RPAs* operated in the standard conditions.

The effect was that only drones weighing less than 2kg were 'deregulated'.[9] The preamble to the proposed amendments states that it "acknowledges the existence of a 'low risk' class of RPA operations, which are determined as small RPA with a gross weight of 2 kilograms and below while they are being operated under the standard RPA operating conditions".

It was on this basis that the proposed amendments did not require operators of RPAs under 2kg to possess the above-named certificates and that they were required for all other RPAs.[10]

Even then, the downside to doing so was recognised. CASA would "not have any visibility" of RPAs under 2kg and "no knowledge of the level of competency" of operators of those RPAs.[11]

The public response to the proposed amendments was negative. The Association of Australian Certified UAV Operators Inc. (ACUO) president, Joseph Urli, is quoted as saying: "It is the sub-2kg class of systems, operated by hobbyists, which are already the primary source of near-miss incidents involving manned aviation, and of emerging privacy complaints."[12]

ACUO's reply to a report issued by the Australian Government (*Aviation Safety Regulation Review*, 3 June 2014) says it believes "deregulation of an entire class of aviation – i.e. the sub-2kg category of RPAs – may have significant safety and risk implications for all aviation interests".[13] ACUO recommended the proposed amendments be suspended by direction of the Federal Government.[14]

His concern remains within the industry today. As recently put by director of Australian UAV Andrew Chapman, "we challenge anyone who says a 2kg drone is harmless to stand in a field while we fly one into them at speed".[15] CASA does not have the resources to monitor drone-related incidents; it is reliant on complaints to initiate investigations.[16]

Almost two years later, the Part 101 amendments were registered, providing that certain RPAs can be operated without licences that would otherwise be required, if those RPAs are "excluded RPAs" as set out in the amendments.[17] Relevantly, this includes a "small RPA" – now defined as an RPA "with a gross weight of at least 2kg but less than 25kg"[18] – if no remuneration is received and:

- it is used by or on behalf of the owner
- over land owned or occupied by the RPA's owner
- in standard operating conditions
- for a listed purpose, including the following activities, or those similar:
  - aerial spotting
  - aerial photography
  - agricultural operations
  - aerial communications retransmission
  - the carriage of cargo.

A definition of remuneration is not provided in the Part 101 amendments and nor is the term already defined in CASR. This introduces uncertainty and the Explanatory Memorandum provides little guidance. It merely says "provided that none of the parties involved receive direct remuneration".[19]

This suggests that an employee whose duties included but were not limited to operating a drone may fall within the definition of an "excluded RPA". It seems that CASA policy is that an employee not specifically contracted to operate a drone and only remunerated as part of their normal salary could operate an RPA under the exception for excluded RPAs.

A medium RPA, defined as weighing at least 25kg but not over 150kg,[20] may be operated in the same circumstances with the added requirement that the operator hold a remote pilot's licence.[21] However, an RPA operator's certificate would not be required for a medium RPA operated on private land in the above conditions.[22] As foreshadowed by the proposed amendments, the Part 101 amendments also permit the use of drones weighing under 2kg for hire or reward, without certification.[23]

The standard operating conditions include that the RPA:

- is operated within the visual line of sight of the operator
- is operated at or below 400 feet
- is not operated within 30 metres of a person not directly associated with the RPA's operation

back to contents

- is not operated in a prohibited area, a restricted area, a populous area, or within three nautical miles of a controlled aerodrome
- is not operated over an area where a fire, police or other public safety or emergency operation is being conducted (without the person in charge's approval), and
- the person operating the RPA operates only that RPA,[24] meaning a person must not operate more than one RPA at one time.

CASA policy is that the requirement not to fly within 30 metres of a person means that at no time, *no matter at what height the RPA is operating at*, should an RPA come within 30 metres of a person horizontally. CASA also recommends not operating an RPA within 30 metres of a building.[25]

The use of all drones is subject to the conditions outlined in Subparts 101.A, 101.B and 101.C of CASR, which prohibit hazardous operation, operation in controlled airspace, near aerodromes, in prohibited or restricted areas, operation above a maximum height, dropping or discharging things in a way that creates a hazard, and set weather and day limitations.

It is an offence to fail to operate an unmanned aircraft within the person's line of sight.[26] It should be pointed out that the exception in the new 101.245(3) CASR to the current offence of operating a UAV within 30 metres of a person not directly associated with operating the UAV (101.245(1) CASR) is not available to those operating an "excluded RPA".

Analysis

There has been a significant shift in what CASA considers to be 'low risk'. First it was proposed that only RPAs weighing under 2kg could be flown without a remote pilot certificate or an operator's certificate. Now, RPAs weighing up to 25kg are permitted to be flown in specific circumstances, as outlined above.

While the use of drones weighing over 2kg is limited to private land, the risk remains considerable – and is prima facie greater than the risk posed by a drone weighing only 2kg.

CASA has heralded the Part 101 amendments as "cutting red tape for remotely piloted aircraft".[27] This is an important consideration and, while it is difficult to see how the risk inherent in operating drones over 2kg has now been ameliorated, there is extensive regulation applicable to the use of drones from other sources.

Shortly before the registration of the Part 101 amendments, Director of Aviation Safety Mark Skidmore AM said, "there is no point in CASA writing regulations that can't be enforced".[28] On the same occasion, the director stated that the Part 101 amendments were being considered from a risk basis, based on potential harm and specifically identified RPAs under 2kg as low risk.[29] These statements do not explain why, from a risk perspective, RPAs up to 25kg are now permitted to be operated without certification as outlined above. However, the fact is that businesses which chose to utilise drones will face statutory duties, far broader than any that could be imposed by CASA, that mandate the safe operation of all RPAs.

While at first glance the Part 101 amendments could appear to ease the burden on Australian businesses utilising drones on their private property, a complex legal landscape remains. The 'grey area' has been cleared up; a remote pilot's license or an operator's certificate is now definitively not required. However, many other legislative regimes and common law principles regulate the behaviour of those utilising drones within the operation of their business.

Risk of liability stems from the communications and media regulatory framework,[30] a myriad of manufacturing standards required under various legislation,[31] operational health and safety legislation,[32] privacy issues,[33] trespass,[34] and a considerable potential for damage to person and property.[35] The consequences of failing to comply with this matrix include significant terms of imprisonment, hefty fines and an unforeseeable measure of damages. There is also potential for directors of a company to be held personally liable.

The heavier the drone, the greater the potential liability – not to say that this interplay of legal requirements does not also effect the use of drones under 2kg. Adding another layer of complexity is consideration of obtaining insurance coverage for the use of drones and whether business insurance would cover an incident caused by a drone.

There is enormous commercial potential in the use of drones in Australian businesses. Scope for their innovative use has broadened, but a complex web of regulation remains. Further, under the Part 101 amendments CASA may issue a Manual of Standards for Part 101.[36] CASA has confirmed this manual will be available to the public in the next two months.

This manual will be relevant industry information for duty holders under workplace health and safety legislation. The press currently surrounding these new regulations has focused on the potential for farmers, however the Part 101 amendments contemplate much broader use. Indeed, Market Merger data reveals that deals between mining, oil and gas, maritime and railway companies, drone manufacturers and investment bankers are already in the works.

While there may be less red tape, which certainly presents an opportunity, those looking to establish the use of drones within their own business are still subject to many important responsibilities. Legal expertise in navigating this emerging space and mitigating risk requires unique experience across broad practice areas and is essential for any business looking to take advantage of these new amendments come September; potential liability truly is sky high.

Tom Young is a partner at Norton Rose Fulbright Australia and leads the firm's national aviation practice. Samantha Nean is a graduate at Norton Rose Fulbright.

Notes

1 Kate Mansfield, 'Drone HITS British Airways plane moments before jet lands at Heathrow Airport', Express (online), 18 April 2016, express.co.uk/news/uk/661873/Drone-hits-British-Airways-plane-safe-landing-Heathrow-Airport.

2 Part 101—Unmanned Aircraft and Rocket Operations was inserted into the *Civil Aviation Safety Regulations 1998* (Cth).

3 See: Subpart 101.F, specifically 101.295, *Civil Aviation Safety Regulations 1998* (Cth), casa.gov.au/standard-page/remotely-piloted-aircraft-take.

4 Please note that many of these requirements are contained in the CASR, namely Subparts 101.A, 101.B, 101.C and 101.F.3 of the *Civil Aviation Safety Regulations 1998*.

5 Australian Government: CASA, *Flying with Control* (undated) CASA, casa.gov.au/sites/g/files/net351/f/_assets/main/lib100071/flying_with_control_model.pdf.

6 Tim Boreham, 'Drones are starting to swarm on the ASX', The Australian Business Review (online), 18 April 2016, theaustralian.com.au/business/opinion/tim-boreham-criterion/drones-are-starting-to-swarm-on-the-asx/news-story/c90e5a281c54fd49a639b684d8554a78.

7 Lev G (2013 Game of Drones. Time, 11 February).

8 Australian Government: Civil Aviation Safety Authority, 'Notice of Proposed Rule Making 13090Os – Remotely Piloted Aircraft System' (Notice of Proposed Rule Making 1309OS, Civil Aviation Safety Authority, 14 May 2014) Annex B, Reg. 22, page 7.

9 Medium RPAs – over 2 kg but under 150kg – were permitted to operate without a pilot certificate and operator certificate if operated for the purpose of sport or recreation or where it was in the operator's line of sight, not operated for hire or reward, and complied with Subpart 101.G as if it were a model aircraft. See Australian Government: Civil Aviation Safety Authority, 'Notice of Proposed Rule Making 13090Os – Remotely Piloted Aircraft System' (Notice of Proposed Rule Making 1309OS, Civil Aviation Safety Authority, 14 May 2014) Annex B, Reg. 21, page 6.

10 Australian Government: Civil Aviation Safety Authority, 'Notice of Proposed Rule Making 13090Os – Remotely Piloted Aircraft System' (Notice of Proposed Rule Making 1309OS, Civil Aviation Safety Authority, 14 May 2014) Preamble, page 2.

11 Ibid, page 11.

12 Steve Creedy, 'Drone-flyers back call for national regulation', The Australian (online), 18 July 2014, theaustralian.com.au/business/aviation/droneflyers-back-call-for-national-regulation/news-story/ac92f89031be198bf58bf42b2457d40a.

13 The Association of Australian Certified UAV Operators Inc., 'Reply to the ASRR Panel Report', (30 June 2014) page 9.

14 Ibid.

15 Mitchell Bingemann, 'Drone pro Andrew Chapman challenges CASA over safety regulations', The Australian Business Review (online), theaustralian.com.au/business/aviation/drone-pro-andrew-chapman-challenges-casa-over-safety-regulations/news-story/df877029fdc26d85f0c236e906620466.

16 'Australia drone laws to be relaxed this year but experts warn of safety threat', News.com.au (online), 9 April 2016, news.com.au/technology/gadgets/australia-drone-laws-to-be-relaxed-this-year-but-experts-warn-of-safety-threat/news-story/293de111202282e4a7c35533a12b397d.

17 Reg. 21 *Civil Aviation Legislation Amendment (Part 101) Regulation 2016* inserting 101.237 into the *Civil Aviation Safety Regulations 1998*; Reg. 30 inserting 101.252 and Reg. 37 inserting 101.270.

18 Reg. 97, *Civil Aviation Legislation Amendment (Part 101) Regulation 2016*.

19 Explanatory Memorandum, *Civil Aviation Legislation Amendment (Part 101) Regulation 2016*, Attachment A, page 1.

20 Reg. 93 *Civil Aviation Legislation Amendment (Part 101) Regulation 2016*.

21 Reg. 21 *Civil Aviation Legislation Amendment (Part 101) Regulation 2016* inserting 101.237 into the *Civil Aviation Safety Regulations 1998*.

22 Reg. 37 *Civil Aviation Legislation Amendment (Part 101) Regulation 2016* inserting 101.270 into the *Civil Aviation Safety Regulations 1998*.

23 See the new Division 101.F.5: Reg. 82, *Civil Aviation Legislation Amendment (Part 101) Regulation 2016*.

24 Reg. 21 *Civil Aviation Legislation Amendment (Part 101) Regulation 2016* inserting 101.238 into the *Civil Aviation Safety Regulations 1998*.

25 Australian Government: CASA, *Flying with Control* (undated) CASA casa.gov.au/sites/g/files/net351/f/_assets/main/lib100071/flying_with_control_model.pdf.

26 Reg. 10 *Civil Aviation Legislation Amendment (Part 101) Regulation 2016* inserting 101.073 into the *Civil Aviation Safety Regulations 1998*.

27 See casa.gov.au/aircraft/standard-page/part-101-amendments-cutting-red-tape-remotely-piloted-aircraft.

28 Mark Skidmore AM, Regulating RPAs for Safer Operation (7 March 2016) Australian Government: Civil Aviation Safety Authority, casa.gov.au/about-us/standard-page/regulating-rpas-safer-operations.

29 Ibid.

30 *Broadcasting Services Act 1992* (Cth), *Telecommunications Act 1997* (Cth), *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), *Radiocommunications Act 1992* (Cth); and *Criminal Code 1995* (Cth).

31 For example, the *Radiocommunications Labelling (Electromagnetic Compatibility) Notice 2008*; *Radiocommunications (Electromagnetic Compatibility) Standard 2008*, and *Radiocommunications (Compliance Labelling – Devices) Notice 2014*. There is also state-based regulation, for example the *Electricity Safety Act 1998* (Vic).

32 See: *Work Health and Safety Act 2011* (Cth) and relevant state legislation, for example the *Work Health and Safety Act 2011* (Qld).

33 See: *Privacy Act 1988* (Cth); and *Surveillance Devices Act 2004* (Cth).

34 Common law torts of trespass and nuisance, and relevant state legislation such as the *Civil Liability Act 2003* (Qld).

35 For example the *Damage by Aircraft Act 1999* (Cth) and relevant state legislation such as *Civil Liability Act 2003* (Qld).

36 Reg. 6 *Civil Aviation Legislation Amendment (Part 101) Regulation 2016* inserting 101.028 into the *Civil Aviation Safety Regulations 1998*.

back to contents

ELEVATE YOUR EXPERIENCE

EXCLUSIVE LEXUS AIRPORT VALET SERVICE

From the moment you are handed the keys, experience new heights of luxury with our dedicated Lexus Airport Valet Service*, available exclusively to Lexus of Brisbane Group owners.

To discover more about how our exclusive owner benefits extend all the way to the airport visit **lexusofbrisbane.com.au**

Alternatively, phone or SMS our dedicated Lexus of Brisbane Group representative Derek Klette to discuss our Lexus model range and all the benefits afforded to you as a Queensland Law Society member.

Derek Klette | Group Sales Manager
derek.klette@lexusofbrisbane.com.au | 0419 723 937

LEXUS | BRISBANE GROUP

LEXUS OF BRISBANE
lexusofbrisbane.com.au

LEXUS OF SOUTHPORT
lexusofsouthport.com.au

LEXUS OF SPRINGWOOD
lexusofspringwood.com.au

LEXUS OF MAROOCHYDORE
lexusofmaroochydore.com.au

*Lexus of Brisbane Group Airport Valet Service is not affiliated with Qantas Valet and all applicable charges will be payable to Qantas Valet on your return. Lexus Airport Valet Service is only available to Lexus owners who are in Lexus manufacturer warranty and purchased from a Lexus of Brisbane Group dealer which include – Lexus Brisbane, Indooroopilly or Fortitude Valley, Lexus of Maroochydore, Lexus of Southport and Lexus of Springwood. Additional terms and conditions apply, please visit www.lexusofbrisbane.com.au/about/about-us/benefits or contact a Lexus of Brisbane Group dealer.

Chemo by court order

Director Clinical Service, Child & Adolescent Health Service v Kiszko & Anor [2016] FCWA 19 and 34

The Family Court of Western Australia has ordered that a child undertake chemotherapy to treat a rare form of cancer, contrary to the parents' wishes.

Generally, parents have the power to make decisions about treatment and health matters for their own children. This is different to cases in which children require treatment say, for example, for gender dysphoria.

Parents do not have the ability to consent to medical intervention when the treatment is invasive and irreversible, and not for the purpose of curing a malfunction or disease. In those cases, orders of the court are required regardless of whether or not the parents agree to the treatment.

Background

The child, aged five at the time of the hearing, was diagnosed with a rare brain tumour and had surgery to remove the tumour in December 2015. The child suffered serious side effects post surgery, but there was medical evidence before the court that many of these side effects were improving.

Following the surgery, medical staff advised the parents that the child should receive chemotherapy, potentially followed by radiotherapy. The parents refused treatment and instead wanted the child to receive palliative care. The parents' argument was that they did not want their child to suffer anymore, and instead wanted to ensure a high quality of life for his remaining time.

After calling a number of meetings with the hospital's ethics committee and the parents, the hospital took the drastic step of filing an urgent application with the Family Court, seeking interim orders that the child commence chemotherapy immediately, followed by radiotherapy. The medical team proposed that treatment involving both chemotherapy and radiotherapy was the most appropriate way forward. The parents were refusing standard treatment, and wanted to explore alternative therapies for the child.

Medical evidence

The Family Court of Western Australia judge decided that, given the short time frames involved and the urgency of the case, he would make an interim decision at the hearing for the child to commence chemotherapy, with the decision about radiotherapy to be determined at a later date. The long-term effects of radiotherapy are much more serious than chemo, and include a potential reduction in cognitive ability, particularly when given to young children.

Stephanie Brown looks at the legal background to a recent case which made national headlines.

The hospital provided evidence that studies from similar cases showed that combined chemo and radiotherapy indicated a 50% to 60% survival rate in five years. The use of chemotherapy exclusively gave a survival rate of 30% after five years. Without treatment, the child was likely to die within months.

The court decision

On 24 March the court made interim orders for the child to commence chemotherapy immediately. The matter was again before the court on 16 May to determine whether it should also make orders that the child be required to undertake radiotherapy, noting the more long-term and serious side effects of this treatment.

With the benefit of additional time, the evidence before the court at the second hearing was far more extensive and included expert evidence that supported the parents' position, as well as experts in support of the hospital. There was also evidence that the child's chance of survival had significantly reduced, as well as more compelling evidence from the parents about the child's reaction to the treatment.

At the second hearing, an independent children's lawyer submitted that orders should be made that did not require the child to undergo radiotherapy.

One expert suggested that the chemotherapy continue, and the parents indicated that they would support this course of treatment. Thackeray CJ concluded that, given the hospital and the parents had agreed on this course of action, there was no need to mandate the ongoing chemo. On that basis, the court ordered that the previous orders be discharged, but rather than dismiss the proceedings, adjourned them and gave either party liberty to apply. This course of action would allow the hospital to bring a further application if it considered it was necessary and in the child's best interest.

Jurisdiction and standing

The hospital has standing to bring an application to the court as "any other person concerned with the care, welfare and development of the child".[1]

This case raises an interesting jurisdictional question, particularly when considering what effect the federal Act would have on such an application in Queensland.

In Western Australia, family law matters are governed by the state act, the *Family Court Act 1997* (WA). All other states and territories in Australia apply the *Family Law Act 1975* (Cth). The Western Australian Act in many ways mirrors the Commonwealth Act.

Generally, the Supreme Court has power to determine such matters under the common law jurisdiction of parens patriae. In this case, however, the court determined section 162 of the WA Act conferred the parens patriae jurisdiction on the Family Court. This section mirrors section 67ZC of the Commonwealth Act, which reads:

"In addition to the jurisdiction that a court has under this Act in relation to children, a court also has jurisdiction to make orders relating to the welfare of children."

When making orders under this general welfare provision, the paramount consideration for the court remains the best interests of the child.

There is an important difference, however, between the Commonwealth Act and the WA Act. The Commonwealth Act includes a limitation that the court may only make orders in relation to parental responsibility for a child of the marriage, and does not provide for the court to make similar orders for children of a de facto relationship.[2] The WA Act confers jurisdiction in relation to any child, whether the parents are married or de facto.

In that case, therefore, such an application in Queensland (where the parents of the child are not married) falls instead under the parens patriae jurisdiction of the Supreme Court. As the *Family Law Act* does not exclude the Supreme Court from applying its jurisdiction in this area, applications relating to children from married parents may also be brought before the Supreme Court.

There is some authority to suggest that, even if a child is born outside of marriage, the Family Court would have jurisdiction to hear the matter under the general power the court has to make orders about "any aspect of the care, welfare and development of the child or any other aspect of parental responsibility for a child".[3] The more recent parens patriae cases in Queensland, however, appear to have been brought before the Supreme Court.

Queensland cases

Recently, the Supreme Court of Queensland exercised its parens patriae jurisdiction and ordered that a child be provided with a blood transfusion if it became necessary during a liver transplant operation.[4] The parents were Jehovah's Witnesses and had agreed to the transplant but did not consent to the child receiving a blood transfusion during the operation. The hospital took the matter to court to obtain orders, prior to the operation, that the doctors could provide a blood transfusion. There was evidence that a blood transfusion was necessary in about 95% of such operations.

As outlined in that case, the primary consideration for the court when determining these matters is the welfare of the child. This is not dissimilar to the 'best interest' consideration under the *Family Court Act 1997* (WA) or the Commonwealth *Family Law Act 1975*.

Applications by 'third parties' requiring the intervention of the court into matters that many see as parenting issues are rare, and they raise important questions about the power of the court to make decisions in the place of parents.

In addressing this point, Thackray CJ in the Western Australian case said: "…parental power is not unlimited. It is to be exercised in the best interests of the child. In this case, there is a dispute as to what is in the best interests of the child, hence the necessity for the court to make the decision where others involved cannot."[5]

Although not common, it will be interesting to see whether, given the recent media attention on the Western Australian case, there is an increase in these types of applications before the courts.

See Family law, page 40

Stephanie Brown is a solicitor at Michael Lynch Family Lawyers.

Notes

1 *Family Court Act 1997 (WA),* s185(2), which mirrors s67C(1) of the *Family Law Act 1975* (Cth).
2 Section 69ZH *Family Law Act 1975* (Cth).
3 *Department of Health and Community Service v JWB and SMB* (1992) 175 CLR 218 (Marion's case).
4 *The Hospital v T and Anor* [2015] QSC 185.
5 *Director Clinical Service, Child & Adolescent Health Service v Kiszko & Anor* [2016] FCWA 19 at [73].

Women in law: The facts

How females leaving the profession affects the gender balance

The progress of women through the ranks of the Queensland legal profession is widely discussed, with much talk of gender equality and breaking through the glass ceiling.

The reality, however, may be bleaker than we imagine.

At Queensland Law Society, we have analysed historic practising certificate data focusing on those individuals who have not renewed their practising certificates over the last 20 years, thereby leaving the ranks of registered lawyers. This group was made up of 9015 individuals – 4678 males (51.9%) and 4337 females (48.1%).

Three main trends emerged:

1. Many more females than males leave the profession early in their careers.
2. Overwhelming numbers of females leave the profession in their 30s, while males leave at all stages of their careers.
3. Males hold on to their PC beyond the retirement age, while females do not.

We have looked at these trends in more depth, based on the three stages of a legal career:

- Early career lawyers (less than five years in practice)
- Career builders (five to 20 years in practice)
- Pinnacle practitioners (20-plus years in practice)

Early career lawyers

It is common knowledge that more women than men enter the legal profession. Over the last 30 years, the proportion of females becoming lawyers each year has risen from about 30% to 65%. *See figure one*.

The drop-off factor for early career lawyers is also well known in the industry and has been documented and debated elsewhere.

Anecdotally, this drop-off has been attributed to the large number of graduates, the lack of employment opportunities, and the difference between their expectations of the profession and reality.

back to contents

by Nigel Dearnley

Analysis of our data confirms that more females than males leave the profession in their early years, but the actual figures are quite startling.

Of the 9000 lawyers who left the profession, one in four females (25%) left with less than two years' experience, compared to 17% of males. *See table one, next page*.

By the five-year mark, more than half of the women (57%) had left, compared to 42% of males. By 20 years, this had reached 95%, compared to three-quarters of the males (77%).

From this, we can confirm that females are more likely to leave the profession earlier than males, and that females who gain their PC are 11% more likely than their male counterparts to leave the profession in the first two years of practice. *See figure two.*

Career builders

When it comes to career builders (five to 20 years), the trends observed in the early career lawyers become significantly more pronounced.

Of the study group, the median age for the females who had left the profession was 31 years of age while for males it was 40. Some 85% of females had left by their 40th birthday.

Although there is no firm data, the mass exodus at this point is at least partially attributable to child rearing and other family responsibilities.

The challenge of balancing work and life commitments is being increasingly recognised in the industry, with particular attention to the fact that females overwhelming shoulder domestic responsibilities. Many firms actively seek to retain career builder females, including Miller Harris Lawyers in Cairns, the winner of this year's QLS Equity and Diversity Award for small legal practices. The firm provides flexible work options and particularly encourages part-time work after childbirth.

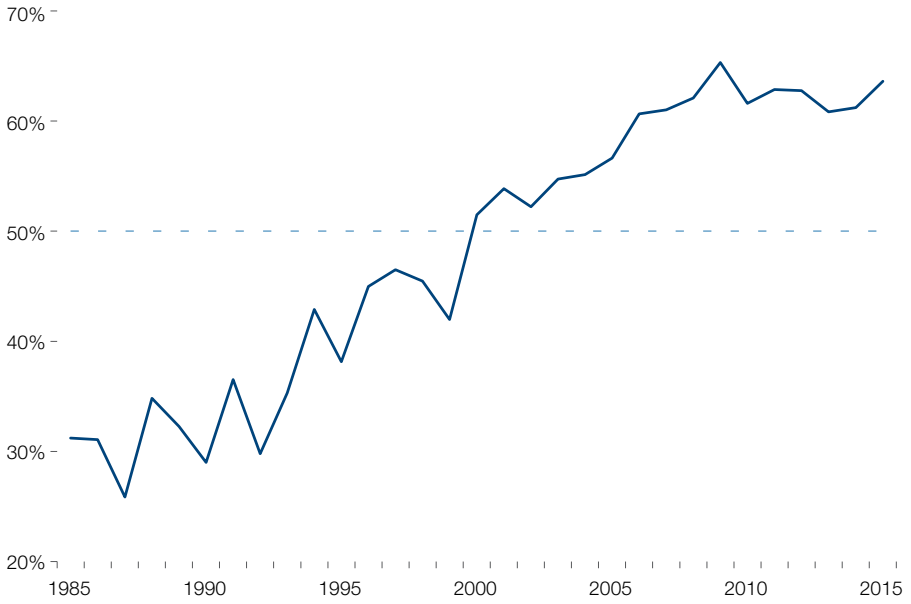


Figure one: How the percentage of females entering the legal profession has changed over the last 30 years.

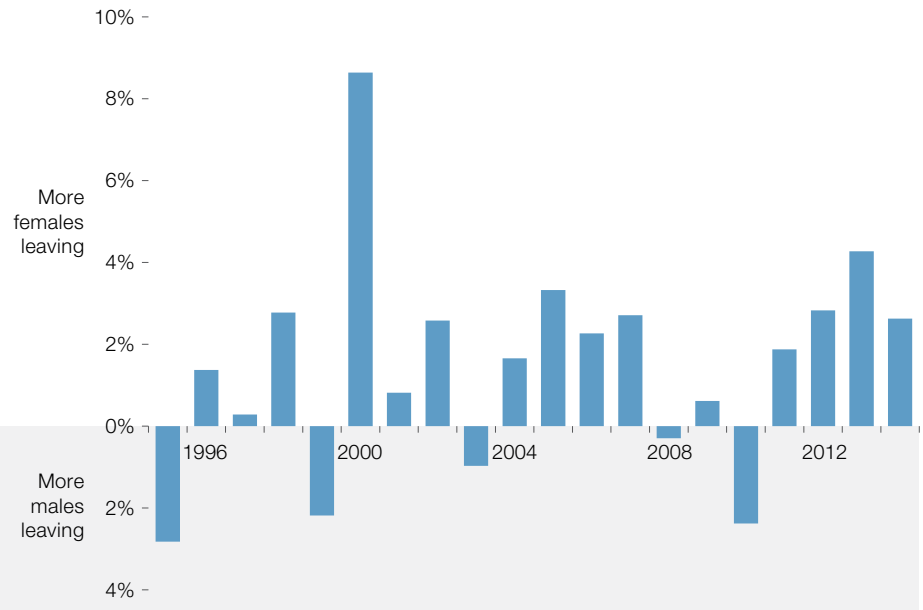


Figure two: The difference in the percentage between males and females who left the profession within two years.

Pinnacle practitioners

By late-stage career (more than 20 years), 95% of the females in the study group had already left the profession. By comparison, only 77% of males had left. This goes a long way to explaining why Queensland's pinnacle practitioners are overwhelmingly male. *See figure three*.

Females who stay into this later stage of their career generally retire much earlier than males. The study group had no female PC holders in Queensland with more than 40 years' experience. About 6% of male PC holders had more than 40 years' experience, with some having held a PC for more than 60 years. (Current data for the profession indicates that less than 3% of practitioners with more than 40 years' experience are female.)

The predominance of males amongst pinnacle practitioners is unlikely to be influenced by the higher numbers of female graduates in recent years.

Similarly, the efforts made now to retain female career builders through their 30s will take some time to change the gender balance of law professionals in the later stages of their career. This delayed effect is not isolated to the legal profession, but is echoed in other traditionally male-dominated industries such as engineering and technology.

Table one

Years of experience before leaving	Male	Female	Both
Less than two	17%	25%	21%
Less than five	42%	57%	55%
Less than 10	60%	81%	70%
Less than 20	77%	95%	86%

Until the gender distribution starts to equalise throughout the various stages of a law professional's career, there will be a dearth of role models and mentors for younger females who wish to remain a legal practitioner for the greater part of their lives.

The future

Much has changed in recent years. Today, Queensland has a female Premier, Attorney-General and Chief Justice, while QLS has a female CEO and next year will again have a female president.

QLS is actively involved in improving female participation in the legal profession and is working with many different organisations, and internally, to rectify the trends outlined above.

One way in which QLS is looking to address the imbalance is through the honorary membership process, which recognises practitioners at the pinnacle of their career.

At present, honorary membership at the QLS is bestowed on practitioners who have been a member for more than 50 years and in special cases.

Some 25 of the 128 QLS honorary members are female, however there are opportunities to increase this balance by introducing greater recognition of all females who make this milestone and by reviewing the criteria for those given an exemption for honorary membership outside of the longevity rule.

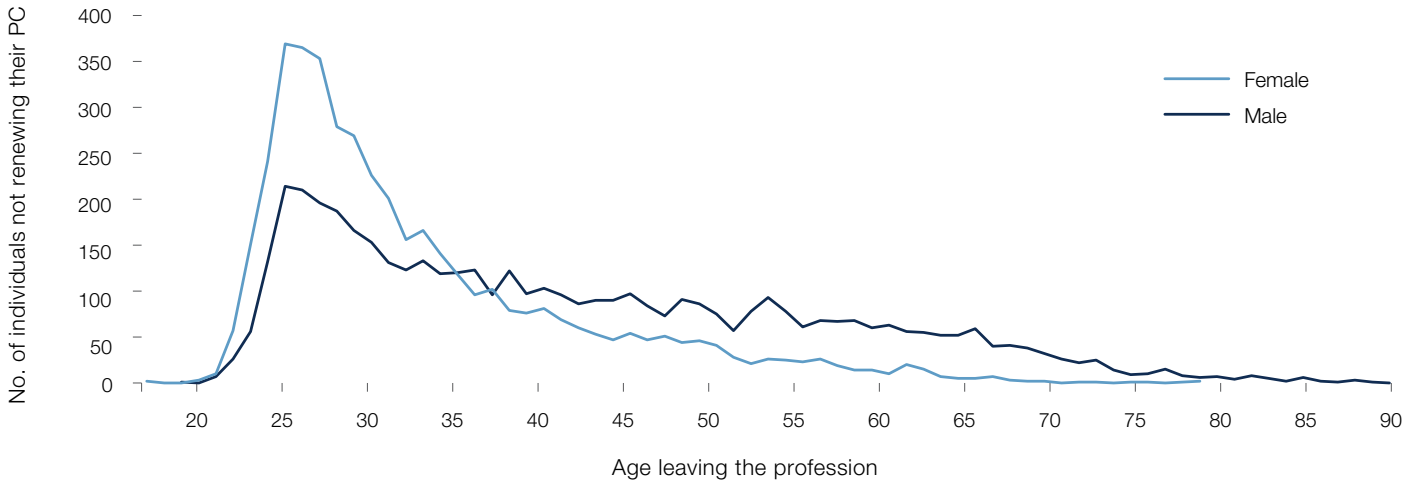


Figure three: Distribution by age and gender of the study group who have left the profession.

According to a *Lawyers Weekly* article, last month, general counsel roles at ASX 100 companies are increasingly being filled by women, although the number of women in other senior executive positions remains static.

A report by KPMG found the percentage of female CEOs at Australia's 100 largest companies was unchanged between 2011 and 2016 (5%) while the number of women in COO or deputy CEO positions was also stagnant (10%).

However, the percentage of female general counsel rose from 33% to 39%.

The high number of females entering the profession over the last 16 years indicates that improvements in gender balance such as this should become increasingly obvious over time across the profession. However, improved retention of female practitioners within the profession remains a work in progress.

Nigel Dearnley is a Queensland Law Society data analyst.

Admissions

Express and deemed admissions, and denials

A party to court proceedings may expressly or by default admit an allegation of fact that is made against it in the proceeding.

The admitting party accepts the truth of the relevant allegation for the purposes of the proceeding. Assuming the admission is not successfully withdrawn, serious consequences can follow, which may include judgment against the admitting party. The party will require the leave of the court to withdraw the admission.

Express admissions

A party may, through its pleadings, admit an allegation that an opposing party has made by express words.[1] An admitted matter is not in dispute between the parties and is taken as established in favour of the party making the allegation.

A party may make an express admission in two other ways. It may independently write to the other party and confirm that it admits a particular allegation,[2] or it may respond to the same effect when confronted with a notice to admit.[3]

Deemed admissions

Deemed admissions arise either by default or through ineffective pleading.

Under the *Federal Court Rules 2011* (Cth) (FCR), allegations that are not specifically denied are taken to be admitted.[4]

However, if an allegation is expressed to be not admitted in the manner provided by r16.07(3), the particular fact is taken to be denied.[5]

Pursuant to the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), a party is taken to admit an allegation if it does not meet the allegation with a compliant denial or non-admission.[6] A compliant denial must be "accompanied by a direct explanation for the party's belief that the allegation is untrue".[7]

As was explained by Justice Martin in *Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd*:[8]

"… In order to accompany a denial or non-admission, the explanation must be clearly connected with the denial or non-admission. It will not be sufficient for a non-admission to be in one paragraph and the explanation in another paragraph unless there is a clear statement of connection. A series of non-admissions may be pleaded with the explanation to be given by direct reference to the first non-admission and the explanation given for it, for example, "The defendant does not admit the allegation in para 10 of the Statement of Claim for the reasons set out in para 4 of this Defence." But an allegation in one paragraph of a defence will not, without more, accompany a non-admission even if it concerns the allegation the subject of the non-admission.

"The explanation must also be 'direct'. That is, it must unambiguously relate to the allegation and the non-admission…"

The decision in *ASIC v Managed Investments Limited & Ors (No.3)*[9] (appealed on different grounds) is authority that words to the effect "the party denies the allegation because it is untrue" will be insufficient, as they do not explain *why* the party believes the allegation is untrue. In *ASIC v Managed Investments*, Fryberg J specified that the correct formulation would be "the eighth defendant believes the allegations are untrue because [state reason]".[10]

In addition, a mere statement to the opposite of what is alleged by an opposing party is not a denial accompanied by a compliant explanation for that denial.[11]

Justice Daubney, in *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Limited*[12] (*Cape York Airlines*) observed that a party's direct explanation may take the form "this event alleged by the plaintiff did not occur at all", "this event did not occur in the manner alleged by the plaintiff", or "the alleged fact is so inconsistent with other matters that the defendant believes it to be untrue". His Honour clarified that these formulations were not to be regarded as templates and were not exhaustive.

A compliant non-admission must "be accompanied by a direct explanation for the party's belief that the allegation" cannot be admitted.[13] Courts have expressly acknowledged that the requirement here is less pedantic than for the purposes of the counterpart provision dealing with effective denials. Courts have accepted the formulation "the defendants are unable to attest to the truth or otherwise of the allegation"[14] and "the defendant … having undertaken reasonable investigations … remains unsure of [the allegation's] truth or falsity".[15]

The UCPR additionally requires that a party can only make a non-admission when that party has made reasonable enquiries and nevertheless remains uncertain as to the truth of the allegation.[16] A non-admission made in the absence of this element will not automatically give rise to a deemed admission; however the relevant non-admission may be liable to be struck out, which would lead to an identical result.[17]

A related issue is whether the explanation accompanying a denial is itself an allegation of a material fact to which the opposing party must plead – or otherwise be taken to make a deemed admission.

Justice Daubney in *Cape York Airlines* answered this question in the negative, stating at [30]:[18]

"The direct explanation [given for the denial or non-admission] is not a statement of a material fact for the purposes of r 149. It may be, however, that the nature of the direct explanation of the party's belief that an allegation is untrue necessarily compels the party to plead, in compliance with r 149, the material facts (not evidence) on which it will rely to controvert the allegation or other matters to prevent the opponent being taken by surprise. Thus, if the direct explanation given by a defendant is that the alleged fact is so inconsistent with other matters that the defendant believes it to be untrue, the defendant should plead those other matters by way of response, either as material facts under r 149(1)(b) or as matters required to be stated to prevent surprise under r 149(1)(c). On the other hand, if a party's direct explanation is, for example, that it believes that a particular event simply did not occur, it may, depending on the case which it would seek to advance at trial, not be necessary to plead any other matters."

Justice Jackson in *Callide Power Management Pty Limited & Ors v Callide Coalfields (Sales) Pty Limited & Ors; CS Energy Limited v Callide Coalfields (Sales) Pty Limited & Ors*[19] (*Callide Power*) observed that the reasons for denying an allegation could include either a traverse or a confession and avoidance. The latter basis of denial

back to contents

Kylie Downes QC and **Kurt Stoyle** explain the nature of admissions and their status under state and federal court rules.

relies on the plea of additional facts that change the consequences of the allegation; his Honour observed that the party making the initial allegation must in turn respond to these additional facts.[20]

The statements of Daubney J in *Cape York Airlines* and Jackson J in *Callide Power* anticipate a fairly clear delineation between the reasons given for a denial on the one hand, and allegations of material facts on the other, being allegations to which there must be a responsive plea. Most pleadings that are encountered in practice will not observe such a delineation; it will be for the recipient to identify those parts of the explanation that purport to double as new material facts requiring a response.

Having regard to the comments of Daubney J in *Cape York Airlines*, it is suggested that the best approach is to plead to any allegations of fact that, if no response is pleaded, could cause surprise at trial.

Sometimes a plaintiff's confusion as to which of the reasons given in support of a denial are in truth factual allegations requiring a response will motivate the plaintiff to include in its reply a bald statement that the plaintiff 'joins issue' with the defendant in respect of all outstanding issues. This is bad practice; the UCPR does not recognise the concept of joining issue.

The matters above notwithstanding, there will be no deemed admission when the relevant allegation is contained in the last pleading made before close of pleadings.

In jurisdictions other than Queensland, including under the FCR, unanswered allegations in the last pleading are deemed to be denied by the other party.

Under the UCPR, however, unanswered allegations in the last pleading are deemed to be the subject of a non-admission.[21] The effect of this position is that the party faced with the allegations cannot mount an affirmative case in response to them. If the party wishes to mount an affirmative case, the usual practice is for that party to amend its last pleading to set out the material facts that it seeks to establish.

Finally, a deemed admission may arise independently of the pleading process, when a party fails to respond within the required time to a notice to admit.[22]

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

Notes

1 UCPR r165(1); FCR r16.07(1).
2 UCPR r187.
3 UCPR r189(2); the provision does not actually provide for an affirmative response to a notice to admit, and instead simply provides that the allegation is admitted if the recipient fails to provide a negative response within the required period. An affirmative response, however, would separately qualify as a voluntary admission for the purposes of UCPR r187.
4 FCR r16.07(2).
5 FCR r16.07(4).
6 UCPR r166(1).
7 UCPR r166(4).
8 [2012] QSC 314 at [21] and [22].
9 (2012) 88 ACSR 139; [2012] QSC 74 at [47] per Fryberg J.
10 Ibid.
11 *Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd* [2012] QSC 314 at [22] (*Pinehurst Nominees*).
12 [2009] 1 Qd R 116; [2008] QSC 302 at [29].
13 UCPR r166(4).
14 *Barker v Linklater* [2008] 1 Qd R 405; [2007] QCA 363 at [47]-[49] per Muir JA.
15 *Aimtek Pty Limited v Flightship Ground Effect Pte Limited* [2014] QCA 294 at [9] per Fraser JA.
16 UCPR r166(3).
17 *Aimtek Pty Limited v Flightship Ground Effect Pte Limited* [2014] QCA 294 at [12] per Fraser JA.
18 This passage was cited with approval in the *Pinehurst Nominees* case at [16].
19 [2014] QSC 205 at [22].
20 Ibid.
21 UCPR rr168, 166(1).
22 UCPR r189(2).

Your legal research and training experts

with Supreme Court Librarian David Bratchford

sclqld.org.au

Our vision is to be Queensland's leading legal information service.

To achieve this, dedicated library staff offer their expertise and technical skills to assist Queensland Law Society members by providing you with timely, relevant information services.

This month, I would like to introduce two of our legal research and training officers, Marion Randall and Mabel Tsui.

Marion joined the library in November 2015 and has more than 15 years' experience in the legal industry as a research librarian and trainer for a publishing firm, conducting training for a wide range of users, designing and implementing training programs, and managing online training and support.

She is an experienced corporate project manager, who has conducted needs analyses of small-to-medium companies and assisted in restructuring companies. She has also woked as an academic supervisor of Master of Business students.

Prior to joining your member library, Mabel qualified as a lawyer before working at the Queensland University of Technology Clayton Utz Law Library and the University of Sydney's Fisher Library.

Above: Marion Randall. *Below*: Mabel Tsui.

In 2007 and 2008, Mabel was an associate to the Honourable HG Fryberg, Supreme Court of Queensland. She recently completed her PhD on Australian consumer law and pharmaceutical product liability.

Mabel is very experienced in using legal research databases including LexisNexis, Westlaw and CCH to conduct research on substantive legal issues as well as legal ethics and qualitative legal research.

We are excited to be working with Marion and Mabel to provide training and support to QLS members in making the best use of our extensive range of legal information resources and services. They and our other information services staff members will be working together to:

- anticipate and analyse our members' information needs
- develop a client-oriented and solution-focused approach
- design, implement and manage effective training solutions.

Your feedback is very important to us and will help us to develop and improve our information services to meet your needs.

Please email your comments to librarian@sclqld.org.au or if you are in Brisbane, drop in to see us.

Compensation for veterans

by Julie Patterson

Title:	*Veterans' Entitlements and Military Compensation Law* 3rd ed.
Author:	Robin Creyke and Peter Sutherland
Publisher:	The Federation Press 2016
ISBN:	9781760020460
Format:	Paperback/928pp
RRP:	$150

Robin Creyke and Peter Sutherland have provided practitioners with a useful 'one-stop' text in the third edition of *Veterans' Entitlements and Military Compensation Law*.

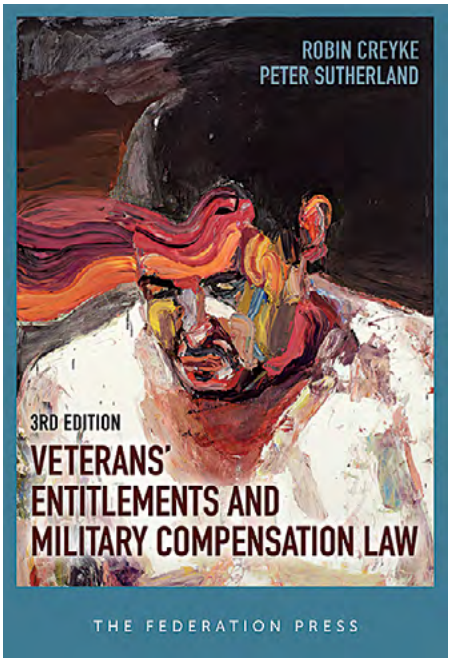
This edition contains easy-to-read annotated legislation that includes the *Veterans' Entitlement Act 1986* (VEA), *Military Rehabilitation and Compensation Act 2004* (MRCA) and *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (MCTPA), as well as commentary on the statement of principles referred to in this legislation.

Members of the Australian Defence Force can apply for rehabilitation and compensation for various injuries, diseases and death sustained in the course of their service under the VEA, *Safety Rehabilitation and Compensation Act 1988* (SRCA) and MRCA, depending on a number of factors.

Because a claimant's injury, disease or death may be covered by either or all of those statutes, the MCTPA was enacted to provide rules to determine which legislation will apply to an injury, disease or death that relates to defence service either on or after the commencement of the MRCA.

It also contains provisions to allow a person to choose between making a claim under the MRCA and applying for an increase in pension under the VEA. It also makes the relevant consequential amendments to the VEA, SRCA and various related legislation.

In 2009 a review of military compensation arrangements was undertaken by the Department of Veterans Affairs, with the Veterans Affairs Minister releasing its report on 18 March 2011. The review set out 108 recommendations. Subsequently, on 8 May 2012, the Australian Government accepted 96 out of the 108 recommendations and committed $17.4 million over four years to implement the proposed changes. This text includes the resultant legislative changes made up until 1 November 2015.



This area of law is complex. It involves service periods over decades and three main areas of claims – injuries, diseases, or death – that may entitle a claimant to compensation, which can include rehabilitation, payments of pensions, medical and other treatments such as home care, aged care and other allowances.

This text gives the practitioner a broad overview of what is involved in this area of law and where to start.

To lighten this comprehensive text, the authors have reprinted wonderful artworks from Australian portrait artist Ben Quilty, the 2011 Archibald Prize winner, and Geoff Pryor throughout the text.

Julie Patterson is a Brisbane legal practitioner.

Solicitor negligence in will making – Are we clear?

'There is a precipice on either side of you – a precipice of caution and a precipice of over-daring.'[1]

On 11 May 2016 the High Court handed down its much anticipated decision in *Robert Badenach & Anor v Roger Wayne Calvert* [2016] HCA 18, allowing the appeal from the decision of the Full Court of the Supreme Court of Tasmania.

It has been a heady, if not headachy ride for solicitors monitoring the progression of the case from its decision in first instance, through appeal to the Full Court of the Tasmanian Supreme Court, to its final decision by the Full Court of the High Court.[2]

The matter explored the extent of a solicitor's duty of care to a beneficiary under a will to advise the testator of the options available to the testator in order to avoid exposing his estate to a claim under family provision legislation.

In March 2009 solicitor Robert Badenach took instructions for a will from Jeffrey Doddridge at a time when the testator was 77 and terminally ill, which was known to the solicitor. The will was executed on 26 March 2009. The testator left his entire estate to the plaintiff, Roger Calvert, "whom he treated like a son",[3] and with whom he held property as tenants in common.

The testator had a biological daughter and he did not provide for her. He did not instruct the solicitor as to the existence of the daughter, and the solicitor did not inquire as to the testator's family circumstances. Notably, the firm had drawn previous wills, one of which made reference to the existence of the daughter.

The testator died late in 2009. The daughter subsequently brought a successful claim for further provision from the estate and was awarded $200,000, plus costs. The plaintiff's claim for negligence rested on the assertion that "the solicitor and his firm were negligent in that they (a) failed to advise the testator of the risk of the daughter making a claim under the TFM Act [*Testator's Family Maintenance Act 1912* (Tas.)], and (b) failed to advise him of the options available for him to arrange his affairs so as to reduce or extinguish his estate, so as to avoid or partly avoid any claim which could disturb his testamentary wishes".[4]

The key to the decision was the scope of the client retainer and whether the interest of the beneficiary was co-extensive with that of the testator. While the High Court found that it was "a lot to expect for the price of a will"[5] to impose a requirement on a solicitor to advise a testator "that he could transfer some or all of his property during his lifetime so as to avoid exposing his estate to such a claim",[6] a prudent solicitor ought to make enquiry as to the family circumstances of the testator,[7] though the duty did not extend to a beneficiary where the interest of the beneficiary and the testator were not aligned as was the case here, with the beneficiary holding the property as tenants in common with the testator. In reaching its conclusion, the High Court reviewed the line of authority stemming from the seminal decision of *Hill v Van Erp* (1997) 188 CLR 159, finding *Hill v Van Erp* did not apply in this instance:

"[43]The duty recognised in *Hill v Van Erp* arose in circumstances where the interests of the testatrix and the intended beneficiary were aligned and where final testamentary instructions had been given to the solicitor. The solicitor's obligation was limited and well defined.

(…)

"[58] The duty of care which a solicitor who is retained to prepare a will owes to a person whom the testator intends to be a beneficiary is more narrowly sourced and more narrowly confined. The duty arises solely in tort by virtue of specific action that is required of the solicitor in performing the retainer. The duty plainly cannot extend to requiring the solicitor to take reasonable care for future and contingent interests of every prospective beneficiary when undertaking every action that might be expected of a solicitor in the performance of the solicitor's duty to the testator. If the tortious duty of care were to extend that far, it would have the potential to get in the way of performance of the solicitor's contractual duty to the testator. Extended to multiple prospective beneficiaries, it would be crippling.[*footnote omitted*]

"[59] The solicitor's duty of care is instead limited to a person whom the testator actually intends to benefit from the will and is confined to requiring the solicitor to take reasonable care to benefit that person in the manner and to the extent identified in the testator's instructions. The testator's instructions are critical. The existence of those instructions compels the solicitor to act for the benefit of the intended beneficiary to the extent necessary to give effect to them."

The takeaway point for solicitors is to identify the scope of their retainer with the client and, within that, raise the issues the client must consider.

Aquamation cremation alternative

In the July 2012 edition of Proctor, I published an article on alkaline hydrolysis[8] as a then new and some would say, greener, alternative to cremation. In 2012 New South Wales passed legislation to include alkaline hydrolysis in the definition of 'cremation' for deceased bodies disposed of in NSW.[9] Four years on and NSW now has its first Aquamation facility, which opened in Newcastle in May, offering families an alternative to cremation.[10]

Probate practice update – Brisbane Registry

As part of Queensland Law Society's consultation with the Supreme Court registries, we are pleased to advise of further practices that will assist the profession.

The registries receive many inquiries and endeavour to assist whenever possible. To that end, Supreme Court Registrar of Probate (Brisbane Registry) Leanne McDonnell is willing to give advice on procedural and practice matters, but not on legal matters.

back to contents

with Christine Smyth

In particular, if practitioners have queries regarding unusual grant applications, Ms McDonnell invites practitioners to email the documents to the registry before filing and advertising, to reduce requisitions. The email address is wills&estates@justice.qld.gov.au.

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

Notes

1 British Prime Minister and wartime leader Sir Winston Churchill.

2 *Calvert v Badenach* [2014] TASSC 61, in the first instance;
Calvert v Badenach [2015] TASFC 8, Appeal, appeal allowed, Special Leave Granted
Badenach v Calvert [2015] HCATrans 279; hearing re above
Badenach v Calvert [2016] HCA 18, (judgement date 11 May 2016), Appeal from the Supreme Court of Tasmania.

3 At [2] *Calvert v Badenach* [2014] TASSC 61.

4 At [4] *Calvert v Badenach* [2014] TASSC 61.

5 At [66] *Badenach v Calvert* [2016] HCA 18, (judgement date 11 May 2016), Appeal from the Supreme Court of Tasmania.

6 As above.

7 At [27]-[30] *Badenach v Calvert* [2016] HCA 18, (judgement date 11 May 2016), Appeal from the Supreme Court of Tasmania.

8 For further reading, see C Smyth, 'Alkaline Hydrolysis —Alternative to Cremation' (2012) 14(9) REP 122.

9 See regulation 49 of the *Public Health Regulation 2012* (NSW), with the enactment of the *Public Health Regulation 2012* (NSW) enabling the commencement of the *Public Health Act 2010* (NSW), both of which took effect from 1 September 2012. The legislation governs the disposal of dead bodies in NSW.

10 mmdnewswire.com/aquamation-cremation-and-burial-131769.html.

Equipment leasing and the PPSA – another painful lesson

Forge Group Power Pty Limited (in liquidation) (receivers and managers appointed) v General Electric International Inc. [2016] NSWSC 52

A recent NSW Supreme Court decision, although not surprising, is yet another painful lesson for lessors who ignore the operation of the *Personal Property Securities Act 2009* (Cth)(PPSA).

Key points

The key points to note from *Forge Group Power Pty Limited (in liquidation) (receivers and managers appointed) v General Electric International Inc.* [2016] NSWSC 52 are:

- GE, the lessor of mobile turbine generators to Forge, failed to register on the Personal Property Securities Register (PPSR) and lost its rights to about $60 million worth of equipment under the 'vesting' provisions[1] when Forge appointed voluntary administrators.
- The decision includes some useful commentary on when a lessor is "regularly engaged in the business of leasing goods".[2] This is relevant to whether an operating lease is a PPS lease, and therefore a security interest, for the purposes of the PPSA.[3]
- The court confirmed the common law test of what is, or is not, a fixture applies under the PPSA. Because the PPSA does not apply to fixtures, this is often a critical issue in insolvency disputes.

Background

The dispute arose in connection with the installation, at a site near Port Headland, Western Australia, of mobile gas turbine generator sets as part of a temporary power station established by Horizon Power.

Horizon Power and Forge were parties to a design, build, operate and maintain contract entered into in January 2013 (head contract).

On 5 March 2013 Forge entered into a contract for the rental of power generation equipment and the supply of associated services with GE, under which GE agreed to rent the turbines to Forge for a fixed term and provide Forge with certain services including the installation, commissioning and demobilisation of the turbines (the lease). No financing statement was registered on the PPSR in respect of the lease.

On 11 February 2014, soon after the turbines had been installed at the site, Forge appointed voluntary administrators and on 18 March 2014 Forge went into liquidation.

Forge sought declarations from the court that the interest of GE, and two other parties to whom GE had assigned its rights and title in the turbines, vested in Forge immediately before the appointment of the administrators.

GE argued that the PPSA did not apply to the lease on the basis that:

- GE was not regularly engaged in the business of leasing goods, and therefore the lease was not a PPS lease (or a security interest) for the purposes of the PPSA, and
- in the alternative, the turbines were fixtures and therefore the PPSA did not apply to the lease.[4]

Was GE regularly engaged in the business of leasing goods?

The court concluded that:

- The test of whether a person is, or is not, regularly engaged in the business of leasing goods is to be determined having regard to that person's activity wherever it occurs, and not only to activity in Australia – GE had argued that its activities outside Australia should not be considered.
- This test applied at the time the lease was entered into.
- When the lease was entered into, and at all material times afterward, GE was regularly engaged in the business of leasing goods in Australia.

The court noted some differing views on the meaning of "regularly engaged in the business of leasing goods" under the equivalent legislation in both Canada and New Zealand. Significantly, Hammerschlag J. observed that 'regular' can mean "normal, that is, not abnormal in the context of the lessor's business, but a proper component of it"[5] and:

"Engaging in the business of leasing is clearly a concept of wider reach than merely entering into leases. For example, a person who sets up a significant infrastructure, including, say, acquiring significant capital equipment for lease and then advertises its ability and willingness to lease that equipment would be engaged in the business of leasing, and may be doing so regularly, before any particular transaction is concluded and in my opinion, even if none ever is.

"In my opinion, the correct approach is to recognise that frequency or repetitiveness of transactions is a factor relevant to, and in an appropriate case may be the critical factor in, the assessment of whether the leasing business being engaged in is regular. But it is not to be equated with it...

"The New Zealand approach would not, incorrectly, in my opinion, permit a conclusion of regularity where an initial transaction was intended to be followed by others, but no more transactions of the type concerned actually eventuated, despite the best intentions, advertised willingness over a significant period of time and ability of the lessor to enter into more. In my opinion, in considering frequency or repetitiveness as an element of regularity of business, account may be taken of more than simply actual transactions entered into."[6]

In any event, the court found that, on the facts, GE was regularly engaged in the business of leasing even if the frequency or repetitiveness of transactions was a necessary component of the test.

back to contents

It's happened before, but a recent New South Wales case drives home the message that lessors who do not perfect their purchase money security interest are likely to find themselves in a perilous and costly position. Report by **Craig Wappett**.

Did the turbines become fixtures?

In section 10 of the PPSA 'fixtures' is defined as "goods, other than crops, that are affixed to land".

GE and the other defendants contended that the definition in section 10 introduced a specific meaning of "affixed to land", being "a non-trivial attachment". Forge argued that the common law test of what is, or is not, a fixture applies under the PPSA. The common law test focuses on the intention of the person affixing goods to land. Intention is imputed from the degree of annexation and the object or intention of annexation based on the facts of each case.[7]

The court held that:

- The words "affixed to land" in the definition of fixtures in section 10 meant affixed according to common law concepts, and
- the turbines did not become fixtures.

The court observed that one of the critical features of the PPSA is its non-application to interests in land. Land is expressly excluded from the definition of personal property[8] and various other provisions in the PPSA make it clear that interests in land are not subject to the operation of the Act.[9] The court believed that applying the common law meaning of fixtures was more consistent with the exclusion of interests in land from the scope of the PPSA than the alternate approach suggested by GE.

Having determined that the common law meaning of fixtures applies in the context of the PPSA, the court went on to find that the turbines had not become fixtures. In reaching this conclusion, the court considered the following factors:

- The turbines were designed to be demobilised and moved to another site easily and in a short time. Relevantly, the turbines remained mounted on wheeled trailers while leased.
- The turbines were only intended to be in position on the temporary power station site for a rental term of two years, subject to some limited rights of extension.
- Forge was contractually obliged to return the turbines at the end of the rental term.
- Anchoring equipment intended to prevent damage to the turbines during cyclonic weather conditions was designed to be easily removed for demobilisation and re-use at a new site.
- The attachment of the turbines to the land, through the use of anchoring equipment, was for the better enjoinment of the turbines and not for the better enjoinment of the land.
- Removal of the turbines would cause no damage to the land.
- Removal of the turbines from the site would not destroy or damage the turbines.
- The cost of removal of the turbines from the site was modest in comparison to the value of the turbines.
- The head contract included an express term that property in the turbines would not pass to the owner of the land.
- The lease included a term that the turbines would remain at all times personal property notwithstanding that they may be affixed or attached to any other personal or real property.
- Forge was not the owner of the site and it plainly did not intend to make a gift of the turbines to Horizon Power.
- GE prescribed the mechanism for attachment of the turbines at the site and plainly did not intend the turbines to become the property of the owner of the land.

Conclusion

The decision in the *Forge* case is not exceptional, but it does confirm the perilous position of lessors who do not perfect their purchase money security interest, and it helps to clarify a couple of threshold issues which have been the subject of some debate.

This article appears courtesy of the Queensland Law Society Banking and Financial Services Law Committee and was previously published in the Insolvency Law Bulletin (LexisNexis), March 2016. Craig Wappett is a partner at Johnson Winter & Slattery, and a member of the committee.

Notes

1 s267(2), PPSA.
2 s13(2)(a), PPSA.
3 A lessor's interest under a finance lease is an 'in substance' security interest pursuant to s12(1), PPSA. A lessor's interest under an operating lease is only a security interest if it is a PPS lease; ss12(3)(c) and 13, PPSA.
4 s8(1)(j), PPSA.
5 [2016] NSWSC 52 at [49].
6 [2016] NSWSC 52 at [51] to [53].
7 See, for example, *Holland v Hodgson* (1872) LR7CP 328; [1861-73] All ER Rep 237; *Reid v Smith* (1905) 3 CLR 656; 12 ALR 126; BC0500022; *Commissioner of Stamps (WA) v Whiteman Ltd* (1940) 64 CLR 407; 14 ALJR 260; BC4090104; *Lees & Leech Pty Ltd v Cmr of Taxation* (1997) 73 FCR 136; 97 ATC 4407; 36 ATR 127; BC9702029; *Australian Provincial Assurance Co Ltd v Coroneo* (1938) 38 SR (NSW) 700; 55 WN (NSW) 246; *Loiero (aka Lero) v Adel Sportswear Pty Ltd* (2010) 15 BPR 29,689; [2010] NSWSC 1133; BC201007558; *Attorney-General (Cth) v RT Co Pty Ltd (No.2)* (1957) 97 CLR 146; 31 ALJR 504; BC5700320; *Metal Manufactures Ltd v Federal Commissioner of Taxation* (1999) 99 ATC 5229; 43 ATR 375; BC9908011; *National Dairies WA Ltd v Commissioner of State Revenue* (2001) 24 WAR 70; 47 ATR 31; [2001] WASCA 112; BC200101603; *Pegasus Gold Australia Ltd v Metso Minerals (Australia) Ltd* (2003) 16 NTLR 54; [2003]NTCA 3; BC200300346; *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* (2010) 241 CLR 576; 273 ALR 134; [2010] HCA 49; BC201009579; *Commissioner of State Revenue v Uniqema Pty Ltd* (2004) 9 VR 523; 56 ATR 19; [2004] VSCA 82; BC200402775; *Commissioner of State Revenue (Vic) v Snowy Hydro Ltd* [2012] VSCA 145; BC201204715; *Agripower Australia Ltd v J & D Rigging Pty Ltd* [2013] QSC 164; BC201310475; *Re Cancer Care Institute of Australia Pty Ltd (admin apptd)* (2013) 16 BPR 31,529; [2013] NSWSC 37; BC201300325; *Agripower Barraba Pty Ltd v Bloomfield* [2013] NSWSC 1598; BC201314682.
8 s10, PPSA.
9 s8(1)(f)(i), 8(1)(j).

Dealing with witnesses

by Stafford Shepherd

Our civil system for determining disputes contemplates that each party to the proceeding will marshal the evidence that the party intends to lead to either establish the action or cause, or to defend the allegations.

To better secure an open adversary system there are certain fundamental principles to which we adhere when dealing with witnesses of fact. These are:

- There is no property in a witness of fact.[1]
- Either side to a proceeding can approach a person thought to be able to give relevant evidence as to the matters in dispute, and it is for that person to determine the extent to which he or she will cooperate in providing information prior to the hearing.[2]
- There is no obligation on a person possessing information relevant to litigation to disclose it otherwise than in accordance with a direction of the court.[3]
- No potential witness is obliged to give a statement prior to trial to the solicitor for any party to the litigation.[4]
- If no statement is given, the only course open to the parties to the litigation is to have that person called to the witness box, pursuant to a subpoena if necessary.[5]
- A potential witness may, of course, provide a statement to each side in the litigation – there is no obligation on the witness to do so, it is a matter of free choice.[6]
- A potential witness may inform the solicitor for the other party to the proceeding what has been told to the other solicitor.[7]
- The mere fact that a potential witness has given a statement to one side does not mean that he or she is prevented from telling either the world at large or the other side what information he or she has provided.[8]

These principles arise "because the court has a right to every man's evidence. Its primary duty is to ascertain the truth".[9]

We are not obliged to disclose to an opponent the existence of a witness who could assist the opponent's case as against our own client.[10] But we cannot "prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings".[11]

We will not breach Rule 23.1 *Australian Solicitors Conduct Rules 2012* (ASCR) simply by telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed, or by advising about relevant obligations of confidentiality.[12]

As noted in *Deacon v Australian Capital Territory*[13] a solicitor "whilst not permitted to obstruct or hinder or dissuade a witness from coming forward or cooperating with enquiries, would not be acting unlawfully merely by advising the witness that he or she is not obliged to come forward or respond to enquiries",[14] unless the prospective witness or witnesses are required by statute or court order to do so.

A person who has information that may be of relevance to a proceeding is not obliged to confer with us. If the prospective witness or witnesses chooses not to assist then we should respect that decision.

In *re Disciplinary Action against Dvorak*,[15] an attorney was held to have unlawfully obstructed another party's access to evidence by attempting to dissuade a witness from providing particular information to the court.

The attorney represented a husband in a bitter child custody dispute. The attorney had written a letter to a witness who had given evidence at a deposition that the witness had defamed her client by making false and malicious statements. The attorney stated that if the witness failed to correct those statements her client would commence a defamation action against the witness.

The statements made by the witness were privileged and could not serve as the basis for a defamation action. The court held that a lawyer would violate the rule not only when denying access to a witness completely, but also when attempts are made to dissuade[16] a witness from providing particular information to the court.

The attorney was also found to have used tactics that went beyond legitimate advocacy by writing to the witness' employer primarily for the purpose of embarrassing the witness.[17] The letter sought preservation of any documents relevant to the custody action and that they be removed from the public domain. The witness had used her employer's computer to complete a questionnaire from the independent child representative.

The letter had also contained a statement that the employee had provided false information. It was that statement which was held to have been designed to embarrass.[18]

Stafford Shepherd is the director of the Queensland Law Society Ethics Centre.

Notes

1 *Harmony Shipping Co. S.A. v Saudi Europe Line Ltd* [1979] 1 WLR 1380, 1384 (per Lord Denning MR).
2 *Commonwealth Bank of Australia v Cooke* [2000] 1 Qd R 7, 12 (per Williams J).
3 Ibid.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid, 12-13.
8 Ibid, 13.
9 *Harmony Shipping Co. S.A. v Saudi Europe Line Ltd* [1979] 1 WLR 1380, 1384.
10 *New South Wales Bar Association v Thomas (No.2)* (1989) 18 NSWLR 193, 205 (per Kirby J: "Thus the failure or refusal to call an available relevant witness, done for tactical reasons, may be entirely proper.").
11 ASCR, Rule 23.1.
12 ASCR, Rule 23.2.
13 (2001) 147 ACTR 1.
14 Ibid, [111].
15 611 N.W.2d 147 (N.D. 2000) (*Dvorak*).
16 Compare ASCR, Rule 23.1 where the term 'discourage' is used.
17 See ASCR, Rule 34.1.3.
18 *Dvorak* at 151.

back to contents

Practical, personal guidance

The QLS Senior Counsellor experience

Mareeba sole practitioner Peter Apel, *right*, says that being a Queensland Law Society Senior Counsellor is a rewarding experience.

"It is gratifying to be able to help another solicitor who is in difficulty, and it has also made me learn a lot more about the ethical and regulatory structure by which we practise, which has been good for my practice too," he said.

Peter originally came from south-east Queensland but after graduation obtained articles in Cairns in the late 1980s before moving to the Atherton Tableland in 1990.

"I bought in as a partner in a small practice in 1992 and the partnership continued very successfully until 2004 when my partner retired from private practice," he said. "I currently have a senior associate and an employed solicitor working with me.

"I enjoy the challenge of practising in a wide variety of areas – there is always something new to learn."

Peter works in most areas of law, apart from family law, which his associate handles.

He said that the legal profession was generally very collegiate in North Queensland, and particularly on the Tablelands.

"We have a good informal network and everyone gets along pretty well," he said. "I have always seen the ability to have someone to call to discuss an issue or get some advice as a great support in practice. It was really only a small step to become interested in becoming a Senior Counsellor and be available to assist other solicitors in a more structured way."

A couple of years ago he read an article seeking expressions of interest in becoming a Senior Counsellor, and received a positive response.

He said the usual types of questions involved subjects such as liens over files, recovery of unpaid fees and ethical matters, but he found being able to help his fellow practitioners a rewarding experience.

About QLS Senior Counsellors

QLS Senior Counsellors are experienced practitioners available to provide guidance to a practitioner on any professional or ethical problem. The service should be seen by practitioners as 'calling a professional friend'.

Areas in which a QLS Senior Counsellor may be able to assist include:

- guidance on a professional or ethical problem
- career advice on options such as employment and partnership offers
- whether to report a particular situation to QLS or Legal Services Commissioner
- whether a notification should be made to a professional indemnity insurer
- acting as an intermediary between QLS and a practitioner wishing to remain anonymous.

QLS Senior Counsellors are appointed by QLS Council for a term of three years. The appointment can be renewed for a further three years. See qls.com.au/ethics (logon required).

Alternate routes to document access

AP v RD [2016] QDC 49

UCPR r223 – court orders for disclosure of documents – existence of documents – whether documents in control of party – whether party should be directed to obtain copies of documents under UCPR r367 – alternative direction

In *AP v RD* [2016] QDC 49 Long DCJ considered an application by the plaintiff for orders relating to disclosure of material by the defendant.

Facts

The proceedings involved a claim by the plaintiff for an injunction and damages in relation to alleged defamatory publications in communications with staff members of a school attended by the defendant's daughter (the child). It was pleaded that each publication carried imputations that the plaintiff engaged in illegal sexual activity, was a paedophile, and was a sexual offender and a sexual deviant. The defendant denied the pleaded imputations, and also pleaded defences of truth, substantial truth and qualified privilege.

The defendant disclosed an updated report of a social worker, which was provided following a counselling session with the child. That report referred to a number of disclosures made by the child about interactions she had had with the plaintiff, and referred to communications her mother had with the school about the plaintiff. The report also recorded the social worker's assessment of the impact on the child of the inappropriate actions and attention of the plaintiff.

The plaintiff applied for orders requiring the defendant to disclose to the plaintiff the recording of the social worker's session with the child and notes made by the social worker during the session, along with a copy of the social worker's curriculum vitae and documents relating to her training or experience in questioning child witnesses.

Legislation

Under r211 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) parties to a proceeding have a duty disclose to each other party each document in their possession or under their control which is directly relevant to an allegation in issue in the pleadings. Privileged documents are excluded from this duty by r212, subject to the qualification in r212(2) that a document consisting of a statement or report of an expert is not privileged from disclosure.

The court has power under rr223(1) and 223(2) of the UCPR to order a party to disclose a document or class of documents, or to provide an affidavit as to the non-existence of such documents or as to the circumstances in which the documents ceased to exist or passed out of the party's possession or control. This power is limited by r223(4), which provides:

> "(4) an order mentioned in subrule (1) or (2) may be made only if –
>
> (a) there are special circumstances and the interests of justice require it; or
>
> (b) it appears there is an objective likelihood –
>
> (i) the duty to disclose has not been complied with; or
>
> (ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party."

The court has a wide power under r367 of the UCPR to make any order or direction about the conduct of a proceeding it considers appropriate. In deciding whether to make an order or direction, the interests of justice are paramount: r367(2).

Submissions

In relation to the question of whether there was, within r223(4)(b)(i) of the UCPR, an objective likelihood that the duty of disclosure had not been complied with, it was the common position that it had not been demonstrated that any of the documents sought were in the actual possession, or physical custody or control of the defendant. However, the plaintiff submitted that the documents sought were under the control of the defendant because:

a. The defendant arranged the session with the social worker and had "the right to the provision of certain information arising from that session" as demonstrated by the fact that the defendant had been supplied with the report, and
b. "the defendant could, in the exercise of her rights, obtain the information and should do so because the report cannot be fully understood without the requested documents."

The plaintiff submitted in the alternative that the unfairness and prejudice to the plaintiff in not being "able to fully test and confront the allegations made by the defendant in the publication" satisfied the requirements of r223(4)(a) of the UCPR.

Analysis

Existence of documents or failure to disclose?

Long DCJ accepted the submissions for the defendant that it had not been demonstrated that the documents sought by the plaintiff other than notes made during the session, and the social worker's curriculum vitae, were then in existence, or had ever existed.

The rationale offered by the plaintiff for its submission that the documents sought were within the control of the defendant was viewed as evidencing an underlying misconception that the social worker's report was disclosed as an expert report. Long DCJ noted that there was nothing to suggest that there was any allegation in issue to which any opinion expressed by the social worker may have been relevant, and that the defendant expressly disavowed any reliance on the report as an expert report.

back to contents

Access to documents under the control of a third party is not always straightforward. **Sheryl Jackson** looks at a case which illustrates the variety of alternate routes that may need to be followed.

His Honour also observed that the report could not be regarded as in the nature of a witness statement of the child. Rather, it was the social worker's account of what the child had said. Accordingly, his Honour described the basis on which the report of the social worker was disclosed as in an "uncertain and unsatisfactory state".

In addition to this issue, Long DCJ found that the assertions for the plaintiff did not lead to a conclusion that those of the documents sought that did exist were otherwise than the social worker's property and not within the control of the defendant. His Honour referred to the statement in *Taylor v Santos Ltd* (1998) 71 SASR 434 at 438 that the obligation to disclose hinges upon having "a right or actual and immediate ability to examine the document", and that this requirement is not satisfied if it is necessary for a third person, who has control of the document, to agree to permit inspection.

His Honour also noted that this issue was considered in *Erskine v McDowall* [2001] QDC 192, in which it was held that documents which were amenable to an application by the respondent under the *Freedom of Information Act 1982* (Cth) were nevertheless not within the respondent's "control".

It was concluded that neither of the requirements of r223(4)(b) of the UCPR were satisfied so as to warrant an order under that subrule.

Special circumstances and interest of justice?

The alternative submission for the plaintiff that the requirements of r223(4)(a) of the UCPR were met was also unsuccessful. Long DCJ concluded that it would be inappropriate for any order to be made under that subrule in relation to documents that were not proven to exist or documents that were not, at least, objectively likely to be within the control of a party.

Direction to take steps to trigger disclosure obligation?

Long DCJ then considered whether there was a power for the court to give directions under r367 of the UCPR requiring the defendants to seek documents from the social worker, so as to then trigger an obligation of disclosure to the plaintiff.

His Honour referred again to the decision in *Erskine v McDowall* [2001] QDC 192, in which Robertson DCJ made an order directing the defendant to make an application under the *Freedom of Information Act 1982* (Cth) to obtain copies of specified documents from Centrelink and/or the Department of Social Security and to disclose those parts which contained reference to particular matters of direct relevance to the proceedings.

Long DCJ noted in particular that the direction in that case was given in circumstances in which:

- the documents were necessarily documents brought into existence by the defendant in the past, for the purpose of submission to the named agencies, but where there were no retained copies.
- the particular documents were seen as potentially bearing on a critical issue in dispute in the proceedings
- it was common ground that as a result of s207 of the *Social Security (Administration) Act 1999* (Cth) non-party disclosure was not available in respect of the documents.

Reference was also made to the observations in *Psalidis v Norwich Union Life Australia Ltd* [2009] VSC 417 at 124. It was emphasised in that case that the power to make an order of this kind remains a matter of discretion, and that it is usually exercised when there has been a real difficulty about using ordinary processes under the rules of court to obtain the relevant information or documents.

Long DCJ accepted that it was conceivable that an order could be made in relation to the written notes made by the social worker. However, he found no reason to conclude that those documents would not be amenable to processes that might be engaged by the plaintiff under the UCPR, particularly subpoena or non-party disclosure. Accordingly, he declined to exercise his discretion to make a direction under r367 of the UCPR.

Other direction?

Long DCJ regarded a result which simply dismissed the plaintiff's application as one which would leave the unsatisfactory basis on which the social worker's report was disclosed largely unresolved. His Honour noted the potential application of r367 to make a different direction, and in particular that r367(3)(j) expressly empowers the court to order the provision of "statements of witnesses the parties intend to call".

Following further submissions addressing this issue, his Honour made a direction requiring that any evidence to be given in the proceeding by the child be given by way of affidavit, to be filed within 60 days.

Comment

In circumstances in which there is a procedure available to one party to a proceeding to obtain documents sought by another party, the potential for the court to make an order under r367 of the UCPR of the kind made in *Erskine v McDowall* [2001] QDC 192 should be considered. A similar order was made by Reid DCJ in *Bowenbrae Pty Ltd v Flying Fighters Maintenance and Restoration* [2010] QDC 347.

However, in order to persuade the court to exercise the discretion to make an order of this kind, it is important to ensure that other avenues have been exhausted. Such avenues may include processes under the rules of court. In appropriate cases they may also extend to an application under the state or commonwealth right to information/ freedom of information legislation by the party seeking the order.

As demonstrated by this case, it is also important not to overlook the potential for the wide powers of r367 to enable the court to make an alternative order in "the interests of justice" under that rule.

This column is prepared by Sheryl Jackson of the Queensland Law Society Litigation Rules Committee. The committee welcomes contributions from members. Email details or a copy of decisions of general importance to s.jackson@qut.edu.au. The committee is interested in decisions from all jurisdictions, especially the District Court and Supreme Court.

Work experience – or exploitation?

The grey areas of unpaid placements

by Amy Ashton

Gaining work experience while in high school, studying towards a law degree or during practical legal training (PLT) is an important step for emerging lawyers.

There are numerous benefits for both the student and the law firm or organisation. While the student gets to apply skills and theory gained from their study and demonstrate their work capabilities, firms have the opportunity to enrich student experiences while gaining fresh ideas and perspectives.

However, student placements should be meaningful and fulfilling for both the student and the law firm.

As explained by the Fair Work Ombudsmen, unpaid work can take on different forms, including vocational placements, unpaid internships and unpaid work experience. With some arrangements, it's okay not to pay the person doing the work. With other arrangements, the person is actually performing the work of an *employee* and should be paid as such.[1] It is important that students and law firms have a sound understanding of what does and does not constitute unpaid work experience.

Under the *Fair Work Act*, vocational placements that meet the following criteria are lawfully unpaid:

1. **There must be a placement.** This can be arranged by the educational or training institution, or a student may initiate the placement with an individual business directly, in line with the requirements of their course.
2. **There must be no entitlement to pay for the work the student undertakes.** If a student's contract with the host business entitles them to receive money for the work they perform, the vocational placement will likely have turned into an employment relationship. Similarly, work arrangements covered by industrial awards or agreements are not vocational placements.
3. **The placement must be done as a requirement of an education or training course.** The placement must be a required component of the course. It doesn't matter whether that subject is compulsory or an elective chosen by the student.
4. **The placement must be one that is approved.** The institution delivering the course which provides for the placement must be authorised to do so. Courses offered at universities, TAFE colleges and schools satisfy this requirement, as will bodies authorised to offer training courses under state or territory legislation.[2]

How do I tell whether someone is actually an employee?

The Fair Work Ombudsmen provides five indicators on how to tell if a work experience student or intern is actually an employee:

1. **Reason for the arrangement.** Is the purpose of the work experience or internship to give the person work experience or to get the person to do work to help with the ordinary operation of the business? The more productive work that's involved, the more likely it is that the person is an employee.
2. **Length of time.** Generally, the longer the period of the arrangement, the more likely the person is an employee.
3. **Significance to the business.** Is the work normally done by paid employees? Does the organisation need this work to be done? If the person is doing work that would otherwise be done by an employee, or it's work that the business has to do, it's more likely the person is an employee.
4. **What the person is doing.** Although the person may do some productive activities, they're less likely to be an employee if they aren't expected or required to come to work or do productive activities.
5. **Who's getting the benefit?** The person who's doing the work should get the main benefit from the arrangement. If a firm benefits from engaging the person, it's more likely the person is an employee.[3]

Amy Ashton is Queensland Law Society people and culture business partner. This article is an updated version of an article which appeared in the December 2014 edition of *Proctor*.

Notes

[1] https://www.fairwork.gov.au/pay/unpaid-work.
[2] https://www.fairwork.gov.au/pay/unpaid-work/student-placements.
[3] https://www.fairwork.gov.au/pay/unpaid-work/work-experience-and-internships.

Example:
Unpaid vocational placement

Fraser is undertaking his practical legal training (PLT). One requirement is 75 days in the delivery of legal services while supervised by a practising legal practitioner. As the placement is part of his course, it meets the definition of a vocational placement. This means he is not an employee and is not entitled to be paid wages or receive other conditions of employment. If a firm wishes to pay Fraser, they can do so at their discretion.

Example:
Unpaid work experience/internship

Sage is a second-year law student who will undertake work experience with a criminal law firm for a week in her university holidays. Sage has a structured program comprising observational activities for 'a day in the life of' five solicitors within the firm. She will also assist with some basic research and administrative duties. The firm is careful to make sure that the role is mainly observational and there's no expectation for her to perform productive work.

Sage pursued this opportunity directly with the firm. She has her university's support for this placement via the student centre and the university is providing her insurance coverage. If the firm wishes to pay Sage, they can do so at their discretion.

Example:
Paid work experience/internship

Savannah has recently been admitted. She has agreed to do an unpaid internship for three days per week for three months with a law firm. She has been promised a full-time role on completion of the three-month period.

The firm gives Savannah specific tasks with deadlines and she is expected to be at work in normal business hours.

While Savannah has agreed not to be paid, she will be doing work that would have otherwise been done by a paid employee. This indicates an employment relationship exists, and she should be paid for all of the hours that she works.

back to contents

Whistleblower protection

Public interest disclosure by an employee

Candice Lee looks at the protections available to employee whistleblowers.

A whistleblower is "a person who alerts the public to some scandalous practice or evidence of corruption on the part of someone else".

In the workplace, they call attention to internal deficiencies of their employer, usually by reporting issues within their organisation first, then to external regulatory authorities and, in a number of cases, to the media.

Whistleblowers may potentially cause interruptions or risks to employers by inviting external scrutiny. Nonetheless, whistleblowing protections in the workplace enforce important public goals of minimising maladministration and misconduct.

Legislative protections

Several pieces of legislation protect whistleblowers in the workplace at both the state and federal levels.

The main protections for private sector employees are found in the *Fair Work Act 2009* (Cth) (the FW Act) and the *Corporations Act 2001* (Cth) (the Corporations Act), while public sector employees are afforded protection under the Public Interest Disclosure Acts.

The FW Act prohibits employers from taking adverse action against employees for certain prescribed reasons, including where "the employee is able to make a complaint or inquiry in relation to their employment".[1] Further, an employer is not allowed to terminate an individual's employment because they have made a complaint against the employer or started proceedings against them.[2]

The Corporations Act protects whistleblowers reporting breaches of the Corporations Act or the *Australian Securities and Investments Commission Act 2001* (Cth). However, the Corporations Act places limitations on these protections by outlining who may disclose such information, who the information must be disclosed to and what information must be disclosed.[3]

The *Public Interest Disclosure Act 2013* (Cth) provides protection to public officials who make "public interest disclosure" reprisals against other persons in the workplace. Alternatively, this Act does not contain many of the limitations found within the Corporations Act, such that a disclosure may be made to anybody if there is a substantial and imminent danger to health or safety.[4]

Disclosures by Brumbies CEO

An April 2016 decision involving Michael Jones, the CEO of the ACT Brumbies Rugby Union team, has attracted considerable media attention and somewhat questioned the extent of whistleblower protections.

The case concerned disclosures made by Mr Jones to the Vice Chancellor of the University of Canberra and the CEO of the Land Development Agency (the LDA) regarding various commercial arrangements, including "the sale of the club's premises to a developer and the transactions connected to a sponsorship and accommodation agreement with the University of Canberra".[5]

Consequently, the club came under considerable pressure from its sponsors at the university and the ACT Government, and it decided to suspend Mr Jones pending further legal advice.

Under the ACT's whistleblower legislation, the *Public Interest Disclosure Act 2012* (ACT), Mr Jones applied to the ACT Supreme Court for an injunction to prevent the Brumbies from standing him down. He argued that he had made disclosures in the public interest and was the victim of detrimental action by the Brumbies Board and others.

Refshauge J agreed to give Mr Jones whistleblower protection, as the KPMG report (a report containing the Brumbies transactions and believed to be the centre of tensions) provided a reasonable basis for Mr Jones to believe the conduct was disclosable. The court also found that this was disclosable conduct because both the university and the LDA were public sector entities and the allegations concerned maladministration or a substantial misuse of public funds.

An injunction was ultimately ordered preventing the Brumbies' board from terminating Mr Jones's employment. This injunction was limited to the extent that the club was able to exercise any rights under the contract to terminate other than for public interest disclosures made by Mr Jones. Unfortunately, the case didn't develop further as Mr Jones resigned from his position after agreeing to a confidential settlement with the club.

Lessons to be learnt

Whistleblowers are afforded a varied range of protections under both state and Commonwealth legislation. Despite any adverse impact a whistleblower may have on an organisation, the organisation needs to be aware of what action, if any, it is entitled to take under the relevant legislation.

Organisations should ensure that their employees are aware of the legislative protections provided to whistleblowers and encourage employees to disclose relevant information if and when it arises.

Organisations should implement internal policies and procedures that provide protection and support to whistleblowers and facilitate appropriate disclosure.

Whistleblowing protections will not interfere with an employer's right to validly terminate an employee for reasons unrelated to a public interest disclosure.

Candice Lee is a senior associate at Sparke Helmore Lawyers. The assistance of Matthew Giles in preparing this article is gratefully acknowledged

Notes

1 *Fair Work Act 2009* (Cth), Pt 3-1, s341(1)(c)(ii).
2 *Fair Work Act 2009* (Cth), s772(1)(e).
3 *Corporations Act 2001* (Cth), ss1317AA-1317AE.
4 *Public Interest Disclosure Act 2013* (Cth), ss25, 26.
5 Workplace Express, 'Brumbies' "whistleblowing" leader steps down after injunction win', 3 May 2016.

back to contents

WA court overrules parents on chemo

with Robert Glade-Wright

Children – Family Court of WA subjects child to chemotherapy against parents' wishes

In *Director Clinical Service, Child & Adolescent Health Services & Kiszko & Anor* [2016] FCWA 19 (24 March 2016) Thackray CJ of the Family Court of WA heard an application filed by Princess Margaret Hospital (PMH) on 18 March 2016 for an order against the wishes of the parents that their child, Oshin (who had become ill in December 2015 and was to turn six on 1 April), be required to undergo chemotherapy and radiotherapy. The hearing was listed urgently due to PMH's expression of concern that the parents may remove the child from Australia for other treatment and was preceded by an ex parte Watch List order being made by a magistrate ([5]). The parents were given 24 hours in which to secure legal representation ([9]). The father appeared in person and an application by the mother's solicitor for an adjournment to brief senior counsel and adduce expert evidence as to appropriate alternative treatment was denied ([11]-[16]).

The child was diagnosed with a brain tumour which was removed by PMH on 3 December 2015 with the parents' consent although the mother deposed to being "disturbed about Oshin's reaction to the surgery". The father in court said that the child had been having "hysterical fits" and that "the anaesthetists … were quite disturbed at Oshin's behaviour after his last wake up from the … anaesthetic". The intention of the mother (who had studied naturopathy) was to trial alternative therapies ([28]-[29]) and PMH's ethics committee "was 'a little divided' on the question of whether there should be active therapy" ([31]). The court referred to the mother's evidence that the family was feeling pressured by a "dismal prognosis" and that "they felt that the doctors were trying to frighten them into complying with treatment" ([36]). The court said (at [48]):

"Certainly … there has been fairly consistent advice that if the combined radiotherapy and chemotherapy regime is attempted, studies indicate that there is a 50 to 60 per cent chance of survival after five years. This is the period at which it might be considered that there had been a 'cure'. If chemotherapy only is attempted, then the survival rate might be 30 per cent after five years."

The court added that "[m]ost significant for the parents to take into account is all the suffering that Oshin will have to go through if he does have the chemotherapy and then the radiotherapy"([51]) and that "[p]arents … are probably in the best position to assess the impact of procedures on their child" ([53]), but that "parental power is not unlimited" ([73]).

The court (at [76]) applied *Minister for Health v AS* [2004] WASC 286, citing the following "critical statement" by Pullin J:

"Where faced with the stark reality that the child will die if lifesaving treatment is not performed, which has a good prospect of a long-term cure, it is beyond doubt that it is in child's best interests to receive that treatment... "

The court continued (at [78]):

" …The evidence makes clear, beyond all doubt, that Oshin will die within a few months if measures are not taken to prevent his death. The evidence indicates that there is about a 30 per cent prospect of survival after five years if he undertakes the chemotherapy that could commence tomorrow."

Before ordering that chemotherapy commence the court added (at [80]):

"It is equally true to say that there is a prospect that there will not be a cure, and I do not proceed in any way on the basis that there is any guarantee of a cure. In fact, there is a high prospect that there will not be a cure… "

Editor's note: cf. *Re: Lucy (Gender Dysphoria)* [2013] FamCA 518 in which it was held that the treatment of a 13-year-old child with gender dysphoria by injections of a drug called Lucrin to stay the progress of puberty did not require the court's approval (that is, came within the scope of parental responsibility or in that case – as both parents were deceased – state guardianship). Murphy J in that case (at [87]) referred to Rule 4.09 of the *Family Law Rules* (applicable in WA via Rule 4(1) of the *Family Court Rules*) which "provides a list of matters upon which evidence 'must' be given in applications for a 'medical procedure'". Also see at [2016] FCWA 34 the court's decision delivered 20 May 2016 as to PMH's application for an order for radiotherapy.

Child support – father appeals AAT's assessment of his percentage of care as 60% for time child was at boarding school at his expense

In *P v Child Support Registrar* [2015] FCA 116 (27 February 2015) Katzmann J of the Federal Court of Australia heard an appeal by the father (P) from AAT's assessment of 60% as his percentage of care of a child A whose boarding school fees as a weekly boarder at a private school in Sydney P had paid. A spent alternate weekends and half school holidays with each parent ([6]). P relied on s54A of the *Child Support (Assessment) Act 1989* which provides that "the actual care of a child that a person has had … during a care period may be worked out based on the number of nights that the Registrar is satisfied that the child was … in the care of the person during the care period" ([13]). The court said (at [18]) that, in rejecting P's contention that A was entirely in the care of P when he was boarding because P pays or is responsible for the school fees, the tribunal said:

"If this is a contention that actual care should be assessed on nights and all nights should be attributed to the applicant while A is in boarding school, I reject it. This contention does not recognise the importance of certain aspects of care for A, other than those relating to his accommodation, food and clothing, and ignores the level of care provided by [M] during this time. She sees or speaks to A every day during the week while he is at school, is involved in parent-teacher meetings and is listed as one of A's emergency contacts. No major decisions about A's health care, medical treatment or education could be made during this period without reference to [M]."

The court agreed, saying (at [69]) that the tribunal was not bound to determine the percentage of care by reference to s54A(3). The appeal was dismissed with costs.

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).

back to contents

Queensland Law Society

Government Lawyers Conference 2016

Shining a light on the public sector

Friday 26 August
Law Society House, Brisbane

Earlybird closes 29 July
qls.com.au/govlawyersconf

7 CPD

PLE PM&BS PS SL

High Court and Federal Court casenotes

High Court

Advocate's immunity – legal practitioners – negligence – advocate's immunity from suit

In *Attwells v Jackson Lalic Lawyers* [2016] HCA 16 (4 May 2016) the High Court found that advocate's immunity did not extend to negligent advice given by a solicitor that resulted in a settlement and consent orders. Guarantors had guaranteed payment of the liabilities of a company to a bank up to $1.5 million. The company defaulted on its obligations to the bank and owed the bank about $3.4 million. The bank's action was settled on terms that judgment be entered for the bank against the guarantors for the full $3.4 million, not only the $1.5 million limit of their liability. The guarantors could, however, pay a reduced amount ($1.75 million) in discharge of their obligations. The appellants brought proceedings alleging that the settlement followed from negligent advice given by the solicitors. The solicitors sought to rely on the immunity. A majority of the High Court held that the immunity continues to be recognised in Australia, but that it did not extend to the circumstances of this case. The court confirmed its decisions in *Giannarelli v Wraith* (1988) 165 CLR 543 and *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR 1.

The court said that the required connection is between the work and the manner in which the case is conducted (at [5]). To attract the immunity, "advice given out of court must affect the conduct of the case in court and the resolution of the case by that court" (at [6]). The work must contribute to the exercise of judicial power in quelling the controversy between the parties (at [38]). It does not prevent a negligence claim against a lawyer which contributes to a settlement just because there is litigation in the background. It does not cover "advice which does not move the case in court toward a judicial determination" (at [39]). Rather, it covers work with an "intimate connection" to the conduct of the case, affecting an outcome by judicial decision (at [46]).

The court drew a distinction between a *historical* connection (for example, advice precedes determination, so is connected to it) and a *functional* connection (the outcome is directly affected by the advice) (at [49]).

In this case, the immunity did not cover the advice given on settlement and an action in negligence could be brought. The fact that consent orders had been filed with the court did not alter that analysis (at [59]). French CJ, Kiefel, Bell, Gageler and Keane JJ jointly; Nettle J and Gordon J dissenting separately. Appeal from the Court of Appeal (NSW) allowed.

Criminal law – sentencing – manslaughter – *De Simoni* principle – extraneous considerations – totality

In *Nguyen v The Queen* [2016] HCA 17 (4 May 2016) the appellant pleaded guilty to manslaughter and causing grevious bodily harm after a firefight with police that resulted in the death of an officer. If the appellant had known the deceased was a police officer, the offence would have been murder, but that could not be made out. In sentencing, the trial judge found that the case was not in the "worst case" category, contrasting it with a case where the appellant knew the deceased was a police officer. The court held that, by drawing the contrast with the more serious offence, the judge had taken into account an irrelevant consideration. It was not, however, a breach of the principle in *R v De Simoni* (1981) 147 CLR 383 as the Crown had argued. The court also held that the sentence imposed was manifestly inadequate in the cirucmstances of the case. Bell and Keane JJ jointly; Gageler, Nettle and Gordon JJ jointly concurring. Appeal from the Court of Appeal (NSW) dismissed.

Tort – negligence – duty of care – solicitor's duty to client when advising

Badenach v Calvert [2016] HCA 18 (11 May 2016) – see this month's succession law column, page 30.

Workers' compensation – meaning of 'injury' and 'disease' – *Safety, Rehabilitation and Compensation Act 1988* (Cth)

In *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19 (11 May 2016) the High Court considered the meaning of "injury" under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). The respondent claimed to suffer from significant dizziness akin to a kind of "vertigo". The question was whether the dizziness described could be an injury. Under the Act, "injury" included "disease" or other "injuries". The court said that the central element of an "injury" was a physiological change, usually sudden or dramatic in nature (though suddenness is not necessary). The court set out questions for tribunals at [50]-[53]: is there an "ailment" (which would be a "disease")? Or is there an injury, in the sense of a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, arising out of employment? Whether such a change exists is an objective question for evidence, not a subjective enquiry. In the circumstances, the respondent's position was not an "injury". French CJ, Kiefel, Nettle and Gordon JJ jointly; Gageler J seperately concurring. Appeal from the Full Federal Court allowed.

Constitutional law – election of senators

In *Day v Australian Electoral Officer for the State of South Australia* [2016] HCA 20 (13 May 2016) the High Court dismissed a challenge to recent changes to the way voting on Senate ballot papers operates under the *Commonwealth Electoral Act 1918* (Cth), made by the *Commonwealth Electoral Amendment Act 2016* (Cth). The new process had been argued to: involve more than one method of choosing senators, contrary to s9 of the Constitution; contravene the requirement in s7 of the Constitution for senators to be "directly chosen by the people"; infringe a requirement of direct proportional representation; deceive voters and hinder their exercise of a free and informed vote; and prevent the free flow of information and impair freedom of political communication. The court rejected each of these in short compass. French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ jointly. Application in the original jurisdiction dismissed.

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

Federal Court

Administrative law – Migration law – jurisdictional error – denial of procedural fairness – court's duty to unrepresented litigants

In *AMF15 v Minister for Immigration and Border Protection* [2016] FCAFC 68 (20 May 2016) the Full Court set aside the orders of the Federal Circuit Court of Australia (FCCA) which summarily dismissed an application for judicial review of a decision of the then Refugee Review Tribunal on a show cause hearing on the first court date in the FCCA. The Full Court (Flick, Griffiths and Perry JJ) did so on the ground that the applicant was denied procedural fairness.

back to contents

with Andrew Yuile and Dan Star

The applicant was unrepresented before the FCCA. According to the Full Court, the fact that the applicant was unrepresented was a factor which may be taken into account, along with others, in determining whether there has been a denial of procedural fairness. However, the Full Court doubted that this factor alone would ever warrant a finding of procedural unfairness in a hearing of the present kind (at [52]).

The Full Court considered and discussed the authorities relevant to:

1. the duty of judges to ensure a fair trial in cases where a litigant is unrepresented, including in judicial review cases by asylum seekers (at [37]-[42]) and
2. the contraints imposed by procedural fairness upon the power to summarily dismiss a matter at the first court date (at [43]-[44]).

In the circumstances, the Full Court held that the applicant was denied procedural fairness by the FCCA (at [47]). The approach of the Full Court emphasised that the relevant principles require close attention to be given not only to the legislative framework within which the issue arises, but also to the individual circumstances of the particular case. "As such, determining whether there has been a breach of procedural fairness is unlikely in any case to be resolved satisfactorily by an approach which seeks simply to contrast the particular circumstances of one case with another." (at [1]); see also (at [46]).

The Full Court noted that it did not accept the applicant's contentions that he had a right to publicly funded legal representation as an aspect of the requirements of procedural fairness or, alternatively, was entitled to have the proceeding stayed (at [51]).

Consumer protection – meaning of 'unsolicited consumer agreement' in s69 of the Australian Consumer Law

In *Australian Competition and Consumer Commission v A.C.N. 099 814 749 Pty Ltd* [2016] FCA 403 (22 April 2016) the court (Reeves J) considered whether there were contraventions of provisions regulating unsolicited consumer agreements in Part 3-2 of Division 2 of the Australian Consumer Law (ACL) in relation to agreements made in various remote towns and communities in the Northern Territory and Western Australia for the preparation and lodging of tax returns.

The court dismissed the ACCC's application on the basis that the agreements were not "unsolicited consumer agreements" within the meaning of s69 of the ACL. This is the first Federal Court judgment containing detailed consideration of and the approach for the interpretation of the elements in the definition of "unsolicited consumer agreement" in s69(1) of the ACL.

Industrial law – right of entry case under the *Fair Work Act* – whether exercise or purported exercise of state or territory OHS right – observations on orders requiring personal payment of penalties by natural persons without reimbursement by others

In *Bragdon v Directory of the Fair Work Building Industry Inspectorate* [2016] FCAFC 64 (28 April 2016) the Full Court (Buchanan, Reeves and Bromberg JJ) overturned the primary judge's (Flick J) declarations of contravention of right of entry provisions and orders for penalties under the *Fair Work Act 2009* (Cth) (FW Act).

On 6 June 2013, Messrs Bragdon and Kong, organisers for a union based in Queensland, attended a construction site in Sydney and raised safety issues. They walked unaccompanied to where concrete was being poured and directed workers to stop the pour asserting it was unsafe. When requests were then made to produce an entry permit these requests were deflected. Their conduct was disruptive and abusive (at [44]).

Both Bragdon and Kong held an entry permit within the meaning of s512 of the FW Act and under s134 of the *Work and Safety Act 2011* (Qld). However, they did not hold a permit under the *Work Health and Safety Act 2011* (NSW) (NSW WHS Act).

Section 497 of the FW Act provides: "A permit holder must not exercise a State or Territory OHS right unless the permit holder produces his or her entry permit for inspection when requested to do so by the occupier of the premises or an affected employer". The primary judge found that Bragdon and Kong each contravened s497 of the FW Act by refusing to comply with repeated requests to produce their federal entry permit. The primary judge held that the fact that neither Bragdon nor Kong possessed a state entry permit did not preclude a conclusion that each was nevertheless "exercis[ing] a State or Territoty OHS right". The Full Court disagreed and held that the provisions of s497 were not engaged.

As neither Bragdon or Kong held a NSW WHS entry permit under the NSW legislation, neither could exercise a "State of Territory OHS right" (as defined in s494(2) of the FW Act), even though each was a "permit holder" under the FW Act (at [12]-[13], [41] and [44]). The Queensland Act was not relevant in the circumstances of this case.

Section 500 of the FW Act provides: "A permit holder must not exercise a State or Territory OHS right unless the permit holder produces his or her entry permit for inspection when requested to do so by the occupier of the premises or an affected employer." The primary judge made declarations that Bragdon and Kong each contravened s500 of the FW Act. The Full Court set aside those declarations and explained: "In our view, it was not established that Mr Bragdon and Mr Kong were exercising rights under Part 3-4 (ie, a State or Territory OHS right); they clearly were not. Neither, in our respectful view, was it established that they were 'seeking to exercise' rights which they did not have" (at [61]).

Section 503(1) of the FW Act provides that: "A person must not take action: (a) with the intention of giving the impression; or (b) reckless as to whether the impression is given; that the doing of a thing is authorised by this Part if it is not so authorised." The primary judge made declarations that Bragdon and Kong each contravened s503 of the FW Act. The Full Court set aside those declarations on the basis that the declarations were not supported by the primary judge's reasons and the evidence did not establish the necessary intent or a conclusion that Bragdon and Kong were reckless about the impression given (at [75]).

The primary judge had made orders expressly requiring the union officers to pay the penalties imposed on them personally. Jessup J refused to make such an order in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1173. Although it was not necessary to decide, the Full Court saw "considerable force" in the reservations of Jessup J about the practical exercise of such a power preventing payment of penalties by a third party, assuming it to exist (at [88]).

Dan Star is a barrister 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 of Appeal judgments

1-31 May 2016

with Bruce Godfrey

Civil appeals

Falzon v State of Queensland [2016] QCA 118, 4 May 2016

General Civil Appeal – where the appellant was convicted of one count of unlawfully trafficking in methylamphetamine and two counts of unlawfully producing methylamphetamine – where the Crown case was that the appellant produced and trafficked drugs in collusion with another party – where the respondent filed applications against the appellant and the other party for proceeds assessment orders – where orders were made on the applications that, pursuant to s78 of the *Criminal Proceeds Confiscation Act 2002* (Qld), the appellant and the other party each pay to the respondent the sum of $14,051,238.56, being the apportioned value of the proceeds derived by them from illegal activity, and that the appellant pay the respondent's costs of, and incidental to, the application against him, on the standard basis – where the appellant appealed against the judgment – where it is alleged that the primary judge erred in admitting against the appellant the acts and statements of the other party – where the allegation was focused on challenging the primary judge's decision as to the extent of which the appellant and the other party were engaged in a criminal enterprise – where it is alleged that the evidence did not permit a finding that a particular quantity of hypophosphorous acid was used in the course of a joint enterprise to which the appellant was a party – whether, on the balance of probabilities, the court can infer that the appellant and the other party were engaged in a joint enterprise – where the primary judge found a much more substantial joint enterprise in terms of scale of production, diversity of location, and duration than was submitted by the appellant – where the appellant's complaint is ill-founded – where the complaint overlooks not only that these findings were made, but also that there was evidence which supported them – where this included evidence of "cooks" in which the appellant participated at the two properties in the Ilbilbie area; the four cash drops undertaken by Corey Dangerfield but orchestrated by the appellant; and the regular transporting of consignments of speed by Debra Dangerfield and O'Brien to the appellant – where it was alleged that the primary judge's finding that the evidence of two witnesses was not fabricated or otherwise contrived was against the weight of the evidence – where the identified inconsistencies in the witnesses' evidence was explicable – whether the inconsistencies identified are such as to leave fabrication as the only plausible explanation for them – where the ambit of this ground in seeking to target the totality of each witness' evidence presents a formidable challenge for the appellant – where this is a challenge which his submissions fail to address – where as well, the appellant has not identified any specific factual finding, let alone a series of factual findings, made in reliance on the evidence of either of the Dangerfields which he seeks to demonstrate is contrary to uncontrovertible fact or uncontested testimony in terms of the test affirmed by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* (2003) 214 CLR 118 – where the respondent filed applications against the appellant and where it was alleged that the primary judge's valuation of crime-derived proceeds involved inexact proofs and indirect references – where the primary judge concluded that the 140 litres of hypophosphorous acid was used to produce 200 kilograms of methylamphetamine – where the expert evidence relied on by the respondent before the primary judge was materially unchallenged by the appellant and the other party, stating a production range between 100 and 310 kilograms of methylamphetamine, concluding that it would be reasonable to assume the quantity produced would be 100 kilograms – whether it was open to his Honour to conclude that the quantity of methylamphetamine produced in the circumstances was 200 kilograms – where the market value of methylamphetamine produced by the joint criminal enterprise was calculated on the basis that the 140 litres of hypophosphorous acid was used to produce 200 kilograms of methylamphetamine – where the finding of 200 kilograms was one for which the State of Queensland had submitted at first instance – where the submission was not supported by any reasoning – where the finding was not one that was open to the primary judge – where the only evidence of the actual weight likely to have been produced from it was based on common practice and was 100 kilograms of methylamphetamine – where the finding that was open, and ought, to have been made, was one that was consistent with that evidence – where the appellant's partial success on Ground (c) has the consequence that the market value of the methylamphetamine produced needs to be recalculated to $8,818,400 – where adjusted for the depreciation in the value of money over time, the value at the date of judgment of that amount is $14,051,238.56 which, apportioned equally between the appellant and O'Brien, yields an amount of $7,025,619.28.

Appeal allowed. Set aside Order 1 made on 18 May 2015 and substitute therefor, the following order: "Pursuant to s78 of the *Criminal Proceeds Confiscation Act 2002* (Qld), the first respondent and second respondent must each pay to the State of Queensland the sum of $7,025,619.28, being the apportioned value of the proceeds derived from illegal activity." Otherwise confirm the orders made. No order as to costs.

Bartlett v Contrast Constructions Pty Ltd [2016] QCA 119, 4 May 2016

Application for Extension of Time *Queensland Civil and Administrative Tribunal Act* – where for reasons not attributable to any fault on the part of the applicant, his application for leave to appeal was filed one day late, consequently the applicant requires both an extension of time in which to apply for leave to appeal and for leave to appeal – where the respondent did not oppose the grant of an extension of time within which to apply for leave to appeal with the consequence that at the hearing full argument was heard from both parties on the applicant's grounds for a grant of leave to appeal and those in support of the appeal – where an error of law was made by the member at first instance – where the member of the QCAT Appeal Tribunal dismissed the appeal – whether the nature of the error of law caused an injustice requiring a grant of leave to appeal – where the applicant contracted with a building company – where the applicant claims for contractually prescribed liquidated damages arising from a change to the date of practical completion – where the builder abandoned the works under the contract – where the member gave the following reasons for rejecting Mr Bartlett's claim for liquidated damages: "[81] Mr Bartlett has otherwise failed to act reasonably by issuing the notice to remedy breach some 9 months after the builder abandoned the site. It would not be fair to allow Mr Bartlett's claim for liquidated damages in circumstances where he knew the builder had abandoned the site in late December 2008 and early January 2009…" – where Mr Bartlett sued on the builder's contractual promise to pay him liquidated damages in a specified event, and that event had occurred – where subject only to a possible question whether any extension of time should be granted to the builder in addition to those granted by Mr Bartlett's architect (a question which was agitated in connection with the builder's notice of contention), Mr Bartlett was entitled to recover the agreed liquidated damages as money payable to him under the contract – where because the law concerning mitigation of damages was irrelevant to Mr Bartlett's claim for liquidated damages, the Appeal Tribunal erred in law in accepting the builder's argument that the finding in [81] was open to the member – where even on the assumption that the law concerning liquidated damages was applicable the Appeal Tribunal erred in law for the additional reason that the member's decision was not open on the material available to the Appeal Tribunal – when account is taken of the context and the content of the relevant finding, it sufficiently appears from Mr Bartlett's submissions that he contended that there was no evidence to support the member's finding in [81] of the member's reasons – where in summary, Mr Bartlett's submission to the Appeal Tribunal conveyed that the relevant evidence was to the effect that Mr Bartlett commenced the process of terminating the contract some nine months after he first became aware of the builder's wrongful repudiation of the contract, during which period he and the

back to contents

builder were attempting to resolve their dispute by mediation and negotiation – where the necessary but incorrect assumption that the law about mitigation of damages was potentially applicable in this context makes any analysis artificial, but (adapting the language of the passage quoted in *Pialba Commercial Gardens Pty Ltd v Braxco Pty Ltd* [2011] QCA 148) the present question may be expressed as being whether it was open on the evidence to conclude that a reasonably prudent person in Mr Bartlett's position would have terminated the contract earlier than he did so as to avoid incurring the (supposed) loss reflected in the builder's liability for the accruing liquidated damages – where there are many reasons why this question must be answered in the negative – where on any reasonable view, the mere fact that Mr Bartlett could have terminated the contract many months earlier than he did, thereby substantially reducing the amount of liquidated damages for which the builder was liable, could not conceivably justify a conclusion that Mr Bartlett acted unreasonably in such a way as to deprive him of his entitlement to any liquidated damages particularly in circumstances in which Mr Bartlett commenced the process of termination only shortly after the unsuccessful conclusion of negotiations with the builder to resolve their dispute – where leave to appeal should be granted because Mr Bartlett will suffer a very substantial injustice unless the legal errors in the Appeal Tribunal's decision are corrected – where the builder's argument that leave should be refused because no question of law identified by Mr Bartlett would have ramifications in other cases or raise a matter of general importance is rejected – where unless the decision rejecting Mr Bartlett's third ground of appeal is set aside, that decision might be regarded as authority in the tribunal for the erroneous legal proposition that an owner's contractual entitlement to liquidated damages for a builder's delay in completion under a building contract might be defeated by a finding merely that it was "unreasonable" for the owner to defer terminating the contract after the owner first became aware that it had a right to terminate the contract.

Leave granted. Appeal allowed. Set aside orders 2 and 3 made by the Appeal Tribunal and instead order as follows: (2) Set aside the order made in the tribunal on 5 August 2013 and order instead that Contrast Constructions Pty Ltd is to pay Mr Bartlett the sum of $402,037.17, plus interest on that sum in an amount to be fixed by the court. Written submissions on interest if the parties do not agree. Costs.

Zahedpur v Idameneo (No.123) Pty Ltd [2016] QCA 134, 24 May 2016

General Civil Appeal – where the appellant medical practitioner contracted with the respondent in December 2009 to provide services from the respondent's medical centre for a period of five years – where the relationship between the parties broke down and the appellant left the respondent's medical centre in February 2012 alleging that the respondent had failed to remedy numerous complaints – where the respondent sued the appellant in the Trial Division for breach of contract – where the trial judge found the appellant was in breach of contract – where the appellant contends that the trial judge erred because the respondent was in fact in breach of contract by failing to remedy the complaints raised – where his Honour held, correctly, that none of the alleged breaches could have founded a termination of the contracts by the appellant absent a notice from him to the respondent requiring the breach to be remedied within seven days and that no such notice had been given – where none of the alleged breaches was of a term which was a condition of either contract – where, at trial, the respondent calculated and particularised its losses on the basis of projected income at the respondent's medical centre had the appellant performed the entirety of the five-year period of the contract – where the trial judge awarded damages reflecting the loss of income between the date of the appellant's departure from the medical centre and the recruitment of a replacement medical practitioner at the centre – where the evidence suggested some correlation between the number of doctors at the centre, patient waiting time and the centre's profit, but could not definitively establish the respondent's losses caused by the appellant's departure – where the appellant contends that the trial judge erred in calculating and awarding damages because the respondent had not proved any loss caused by his breach – where it is unable to be accepted that at each and every of its medical centres, by simply engaging another doctor, the respondent is able to increase the level of demand so as to keep that doctor (as well as the other doctors) fully occupied – where the level of demand at a particular centre would be affected by many variables, such as the availability of medical services at other locations in the same area serviced by the respondent's centre – where such a direct correlation between demand and the capacity to supply is inherently unlikely – where nevertheless, it is likely that there was some effect on the respondent's income from the absence of the appellant – where the respondent thereby proved that during the period for which it was awarded damages, it suffered *some* loss, in that the presence of the appellant at the centre, working according to the contracts, would have yielded *some* additional profit – where however, without knowing the extent to which the existing demand at the centre was unsatisfied, or the extent to which an additional doctor would have increased that demand, the profits lost to the respondent could not be fairly quantified – where therefore the respondent did not prove that there would have been a sufficient level of demand for services, above that which was satisfied by the other doctors, to yield the further profits by which the respondent's award was quantified – where it does not follow that the respondent, having suffered a loss, was not entitled to a substantial award of damages – where there was no impediment to the quantification of damages on this basis from the fact that the respondent pleaded and argued a case for damages quantified by lost profits – where the facts relevant to an assessment on the basis of wasted expenditure were before the court because of the related, although distinct, claim for the recovery of effectively the same proportion of the $500,000 on a restitutionary basis – where the reasoning by which damages were assessed appeared to overlook the appellant's argument that his absence from the Springfield centre had made no difference to the respondent's income and profit during a relevant period – where nevertheless the respondent did demonstrate that the appellant's

presence would have made a difference, so that the respondent suffered a loss from his breach of contract – where although its loss of profits could not be fairly quantified, the respondent was entitled to damages assessed by reference to its wasted expenditure, in the absence of evidence proving that this would more than compensate for the appellant's breach – where the respondent was entitled to an award at least as high as that which it received by the judgment – whether the trial judge erred in awarding damages for the appellant's breach.

Appeal dismissed. Costs.

State of Queensland v O'Keefe [2016] QCA 135, 31 May 2016

Application for Leave s118 DCA (Civil) – where a police officer in the internal investigations branch published a briefing note to a superior officer alleging misconduct by the respondent in connection with the investigation of a traffic accident – where the respondent was stood down from duty on the same date the briefing note was published and about 10 months later was charged with the criminal offence of misconduct and suspended from duty without remuneration – where the respondent become aware of the briefing note when suspended from duty and about 11 months later received notice from the prosecution that an indictment would not be presented – where the respondent applied to extend the limitation period for commencing a defamation proceeding in respect of the briefing note – where during the limitation period of one year the respondent was addressing the criminal proceeding related to the alleged misconduct and his suspension without remuneration – where an extension of time to commence proceedings for defamation was granted – whether the primary judge erred in considering circumstances arising after the limitation period's expiration in deciding whether the test under s32AA *Limitation of Actions Act 1974* (Qld) was satisfied – where the nature of the test which must be applied by the court under s32A of the Act was considered in *Noonan v MacLennan* [2010] 2 Qd R 537 – where Keane JA noted at [15] that s32A(2) of the Act "proceeds on the assumption that there may be circumstances where it will not be reasonable for a plaintiff to commence an action to vindicate his or her legal rights in accordance with the time limits provided by law" and that "only in relatively unusual circumstances will a court be satisfied that it is not reasonable to seek to vindicate one's rights in accordance with the law" – where it is apparent from the reasons that the primary judge's conclusion was substantially influenced by the fact that Mr O'Keefe's solicitor did not receive the full brief of evidence relating to the criminal charge until 28 August 2014 (after the limitation period had expired) and it was at that time the solicitor changed his view about the application of the defence of qualified privilege – where the primary judge considered the position adopted by Mr O'Keefe's solicitors during the limitation period in the light of what was disclosed after the expiry of the limitation period in the full brief of evidence, when the focus should have been on the circumstances that applied during the limitation period, in order to evaluate whether it was not reasonable for Mr O'Keefe to have commenced the claim for defamation within that one-year period – where the primary judge therefore made an error of law by not applying the objective test under s32A(2) of the Act to the circumstances that applied to Mr O'Keefe within the limitation period – whether it was not reasonable in the circumstances for the respondent to have commenced the action within one year of publication – where this fundamental error of law makes it an appropriate case for leave to appeal to be granted under s118(3) of the *District Court of Queensland Act 1967* (Qld), as the limitation period could be extended only if Mr O'Keefe satisfied the objective test mandated under s32A(2) of the Act – where in Mr O'Keefe's case, however, he was not only faced during the one-year limitation period with the criminal charge, but also with the additional pressure of the suspension from his duties as a police officer without remuneration – where there was sufficient overlap between the criminal charge against Mr O'Keefe and the alleged defamatory statements in the briefing note that made it objectively justifiable for Mr O'Keefe to focus his attention on the criminal charge in conjunction with responding to his suspension from the Queensland Police Service, rather than any civil claim for defamation – where even giving weight to the policy reason that underpins the limitation period of one year, Mr O'Keefe has discharged the onus he bears to show it was not reasonable due to the criminal charge arising out of the same factual matrix that resulted in the alleged defamatory statements in addition to his suspension for him to have commenced the proceeding for defamation before the expiry of the limitation period – where it would not have been reasonable for Mr O'Keefe to pre-empt the outcome of the criminal proceeding by prematurely commencing the civil proceeding for the defamation claim involving much the same allegations.

Application for leave to appeal granted. Appeal dismissed. Costs.

Criminal appeals

R v Maksoud [2016] QCA 115, 4 May 2016

Sentence Application – where the applicant pleaded guilty to unlawful trafficking in, and possessing, the dangerous drug methylamphetamine, and possessing phones used in connection with drug trafficking – where the applicant was sentenced to 10 years' imprisonment with a serious violent offence declaration for the trafficking offence, two years' imprisonment for the possession of the phones, and five years' imprisonment and the issuance of a drug offence certificate for the possession offence – where the applicant filed an application for leave to appeal against sentence, alleging that the sentence is manifestly excessive – where it is

alleged that: (1) insufficient allowance was made for the applicant's youth; (2) no allowance was made for the 376 days of pre-sentence custody; and (3) it is of no relevance to the applicant's sentence that a co-offender is required to serve at least 80% cent of his sentence – where the sentencing judge was not referred to the applicant's pre-sentence custody as a relevant consideration in sentencing – where an otherwise just sentence should not be harshened in order to achieve perceived parity or comity with the term of imprisonment of a co-offender – where Thompson was involved in the daily business of sourcing and distributing methylamphetamine – where the applicant was involved in sourcing and supplying drugs and collecting money for Thompson – where the Schedule of Facts describes the applicant as acting in the role of Thompson's "business partner" – where this description is arguably inappropriate insofar as it implies that the applicant and Thompson shared the profits of the network's criminal enterprise – where, however, it is accurate insofar as it implies a close working relationship between the applicant and Thompson which exceeded that of an ordinary employee – where the facts suggest, as the respondent submits, that the applicant occupied a position "higher up the chain" than McGinniss, a co-offender – where it accurately reflects the applicant's closer working relationship with Thompson but lacks acknowledgement of the fact that Thompson evidently took advantage of the applicant's naivety in having him work as his "run around boy" – where at some point, the applicant severed his connection to Thompson and began trafficking on his own account – where the applicant's submission is accepted that no allowance was made for the custody in sentencing him – where the matter was not at all referred to by defence counsel and, regrettably, his Honour was not referred either to *R v Fabre* [2008] QCA 386 or the cases mentioned in it – where the error was one of principle – where it infected the sentence imposed – where it follows the application for leave to appeal should be granted; the appeal should be allowed; and the applicant should be sentenced afresh unless this court concludes "in the separate and independent exercise of its discretion" that no different sentence should be passed – where of the cases cited by counsel for comparative purposes the circumstances in *R v Sharkey; ex parte Attorney-General (Qld)* [2009] QCA 118 most closely resemble those in the applicant's case – where both were youthful offenders; they were drug users; the applicant was 18 and 19 years old and Sharkey was 20 years old at the time of the bulk of their respective offending; and both were involved in large-scale offending – whereas Sharkey had undertaken a detoxification program, the applicant has demonstrated a willingness to undergo a drug rehabilitation course; however, circumstances beyond his control have not permitted him to participate in it – where the sentencing remarks indicate that parity with McGinniss's sentence played a highly influential role in setting the applicant's sentence – where specifically the notion is rejected that an otherwise just sentence for the applicant's offending should be harshened in order to achieve a perceived parity or comity with the term of imprisonment that McGinniss must serve on account of the mandatory serious violent offence declaration in his case where in any event, there are disparities between the applicant's circumstances and those of McGinniss which need to be borne in mind – where given the applicant's youth and that his offending did not involve any infliction of violence by him, there is no reason for making a serious violent offence declaration.

Leave to appeal granted. Appeal allowed. Substitute for the sentence on Count 1 on Indictment 609 of 2014, a sentence of nine years' imprisonment with a parole eligibility date fixed at 13 February 2019. Set aside the serious violent offence declaration made at first instance. The sentences imposed at first instance on both indictments are otherwise confirmed.

Miller v Senior Constable Suzanne Newton [2016] QCA 116, 4 May 2016

Application for Leave s 118 DCA (Criminal) – where the applicant was convicted on appeal to the District Court of failing to comply with his reporting obligations as a reportable offender under s58(1) of the *Child Protection (Offender Reporting) Act 2004* (Qld) – where the offences were committed in New South Wales – where the applicant resided in Queensland – where the Queensland Act defined a "reportable offender" as including a "New South Wales reportable offender" – where the expression corresponding to "reportable offender" in the *Child Protection (Offenders Registration) Act 2000* (NSW) was "registrable person" – where s77 of the Queensland Act provided that a certificate certifying as to details contained in the Queensland Register was evidence of those details and made a certificate given under s21A of the New South Wales Act evidence of the facts stated in it – whether a certificate made under s21A of the New South Wales Act stated facts which could be relied on to make out the charge – whether a certificate tendered under s77 of the Queensland Act contained sufficient detail to prove the offences – where the District Court judge did err as to the evidentiary effect of the certificate given under s21A of the New South Wales Act – where for the purposes of any proceedings in New South Wales, a certificate signed by an officer authorised under the section containing particulars such as that in the certificate here – that the applicant was a registrable person, had been sentenced and imprisoned in respect of registrable offences and had been released from custody in September 2003 – would constitute evidence of those particulars in the absence of evidence to the contrary – where that was not true for proceedings in Queensland – where the certificate would provide some evidence under the New South Wales Act that the applicant was required to report to a corresponding registrar (given his registrable status and his release

from custody) – where it would thus answer the description in s77(3); that made it evidence, not of the particulars certified, but of the facts stated in it – where the only fact stated in the certificate is that the Register of Offenders contained those particulars; but that did not make the particulars (as opposed to the fact that they were contained in the register) evidence – where nonetheless leave to appeal must be refused against the convictions, because the certificates given under the Queensland Act were sufficient, in combination with the admissions made, to prove the case against the applicant – where the details taken from the register included that the applicant was a "reportable offender"; had a reporting period of 15 years; had provided an initial report on 17 November 2005 and was not shown to have made any annual report or report in respect of overseas travel – where the certificate then became evidence of those details, which were sufficient to prove the charges and make findings of guilt inevitable – where the District Court judge's decision, despite her Honour's reliance on the wrong certificate, entailed no substantial injustice to the applicant; the same outcome would have been reached by reference to the information in the Queensland certificates.

Application for leave to appeal against conviction refused.

R v Pickering [2016] QCA 124, 6 May 2016

Appeal against Conviction – where a jury found the appellant guilty of manslaughter – where the appellant killed the deceased while allegedly trying to avoid him – where the trial judge left ss23(1)(b), 271, 272(1), 24 and 284 of the *Criminal Code* (Qld) for the jury to consider – where the trial judge did not leave s31(1)(c) of the *Criminal Code* to the jury to consider – where the appellant alleged that the absence of any instruction to the jury about s31(1)(c) occasioned a miscarriage of justice – where the jury's verdict rejected self-defence under s271(1) – where the appellant alleged it did not follow from the verdict that the jury would inevitably have rejected an application of s31(1)(c) – whether there was a necessary inconsistency between a conclusion that s271(1) was excluded but s31(1)(c) applied – whether it was 'reasonably possible' that the failure to direct the jury on s31(1)(c) may have affected the verdict – whether the failure to direct the jury on the application of s31(1)(c) occasioned a miscarriage of justice – where there is no necessary inconsistency between a conclusion, with reference to s31(1)(c), that the prosecution did not prove beyond reasonable doubt that the appellant's conduct was not reasonably necessary to resist violence threatened by the deceased and a conclusion that s271(1) was excluded on the ground that the force used by the appellant in stabbing the deceased was likely to cause death or grievous bodily harm – where the trial judge did not direct the jury that the prosecution could exclude s271(1) *only* by persuading the jury beyond a reasonable doubt that the deceased did not assault the appellant and that the appellant did not have an honest and reasonable mistake of fact about that, or that it was a provoked assault – where in these circumstances it cannot be assumed that the jury did not exclude s271(1) on the (unsurprising) ground that the force used by the appellant was intended or was likely to cause death or grievous bodily harm – where it follows that the jury's verdict does not establish either that the deceased did not assault the appellant (so that the deceased did not threaten violence to the appellant for the purposes of s31(1)(c)) or that the appellant provoked any assault by the deceased (so that any assault by the deceased was not unlawful for the purposes of s31(1)(c)) – where on the record of the trial there is a reasonable possibility that the trial judge's failure to direct the jury about s31(1)(c) may have affected the verdict – where the ground on which the respondent argued that there was no miscarriage of justice in terms of s668E(1) of the *Criminal Code* has not been made out – where it cannot be concluded that no "substantial miscarriage of justice has actually occurred" for the purposes of the provision in s668E(1A) – where there was a miscarriage of justice if s31(2) did not exclude any application of s31(1)(c) – where s31(1)(c) nevertheless might protect against liability for an offence of murder, manslaughter or unlawfully doing grievous bodily harm unless s31(2) excludes that protection – where the application of the exception in s31(2) would provide results which seem consistent with the legislative purpose underlying s271 but the appellant's construction would produce the opposite result – where the numbering and punctuation of s31 in the current reprint accurately reflects the decision in *R v Fietkau* [1995] 1 Qd R 667 that the exception in s31(2) applies to s31(1)(c) – where the remaining question is whether s31(2) did not exclude the application of s31(1)(c) in this case because the offence of which the appellant was convicted, manslaughter, is not one of the offences mentioned in s31(2) – where the issue turns on the meaning of the phrase in s31(2) "act … which would constitute … an offence … of which grievous bodily harm to the person of another is an element" – where the critical question in this case concerns the content to be given to the words "would constitute" – where the provision should be construed "according to its natural meaning and without any presumption that it was intended to do no more than to re-state the existing law…": *R v LK* (2010) 241 CLR 177 – where, so far as is relevant in the present case, the criterion of operation of the exception in s31(2) is a specified quality of the act or omission referred to in s31(1): if the act or omission "would constitute" an offence described in s31(2), then protection for that "act or omission" is excluded – where the expression "would constitute" does not require the frame of reference to be confined to the offence charged – where it may be the better construction of s31(2), and it is at least a reasonably open construction, that, whatever offence is charged, the question is whether or not the act or omission for which the accused seeks protection in relation to the offence charged constitutes one of the offences described in s31(2) – where applying the conclusion that the correct construction of s31(2) excludes any protection which otherwise might

have been conferred on the appellant by s31(1)(c) – where the relevant "act" in s31(1)(c) for which the appellant seeks protection in relation to the charged offence of manslaughter is the appellant's act of stabbing the deceased in the way that he did – where s320 of the *Criminal Code* provides that a "person who unlawfully does grievous bodily harm to another is guilty of a crime…" – where the guilty verdict was inconsistent with that act having been done in self-defence, accidentally, or under an operative mistake of fact – where accordingly, in terms of s31(2), the appellant's act of stabbing the deceased in the way that he did was an act that would constitute the offence of unlawfully doing grievous bodily harm because that act, in conjunction with the appellant's state of mind and the grievous bodily harm the act caused to the deceased, would entail criminal responsibility for that offence – where the conclusion that any protection under s31(1)(c) was therefore excluded is not falsified by the circumstances that the deceased subsequently died from the grievous bodily harm he suffered as a result of the appellant's act of stabbing the deceased and the appellant was charged with murder and convicted of manslaughter.

Appeal dismissed.

R v Schenk; Ex parte Attorney-General (Qld)
[2016] QCA 131, 13 May 2016

Sentence Appeal by Attorney-General (Qld) – where the respondent pleaded guilty to facilitating the procurement of a person whom he believed to be under the age of 16 with intent to engage in a sexual act – where the person was in fact a specialist police officer who posed as a 14 year old girl – where the charge was dealt with summarily at the Magistrates Court at Ipswich – where the respondent was sentenced to four months' imprisonment wholly suspended for an operational period of 18 months – where the Attorney-General of Queensland exercised the right given by s669A(1)(b) of the *Criminal Code* (Qld) to appeal to the Court of Appeal, alleging: (1) the sentencing magistrate failed to apply properly the requirements of s9 of the *Penalties and Sentences Act 1992* (Qld) (P&S Act); and (2) the sentence imposed is manifestly inadequate as to both head sentence and suspension in the sense referred to in the last category of discretionary error described in *House v The King* (1936) 55 CLR 499 – where no reference was made for the need for exceptional circumstances if an actual term of imprisonment was not to be imposed by way of sentence – whether the sentencing magistrate failed to have proper regard to s9 – where it is quite clear from a consideration of the transcript of the submissions at sentence that the sentencing magistrate did not have regard for s9(4) – where the prosecutor did not expressly refer to that section or to its provisions – where she did make the observation that "obviously, in offences such as this the principle that imprisonment is a sentence of last resort does not apply" – where that observation was unhelpful – where insofar as it may have implied that there were other offences to which such a principle applied, it was wrong because a principle to that effect, which had been enacted as s9(2)(a)(i) in the P&S Act, had been repealed in 2014 – where moreover, the observation served to firm in the sentencing magistrate's mind that the applicable version of the P&S Act was one that contained such a principle in s9(2) – where so much is revealed by her Honour's enquiry of the respondent's solicitor whether he accepted that s9(2) did not apply, to which the solicitor replied in the affirmative – where the failure of the sentencing magistrate to have regard to the provisions of s9(4) was an error of law – where consistently with the decision of the High Court in *Kentwell v The Queen* (2014) 252 CLR 601, the jurisdiction of this court to vary the sentence and impose such sentence as to it seems proper is enlivened on that account – where the respondent's circumstances are unique in that when he was sentenced, the sentencing magistrate was not referred to, and did not have regard for, an important provision of the applicable statutory regime – where had that provision been heeded, the respondent might have been sentenced to actual time in prison – where beyond that, he has had to live with the uncertainty of a pending appeal in which the appellant presses for a term of actual imprisonment – where since being sentenced, the respondent has complied with the reporting conditions attached to his sentence – where he attained a Certificate III in Hospitality; he has obtained placements through the Work for the Dole program; and he has undertaken labouring work – where his unchallenged evidence is that since being sentenced, he has not used illicit drugs and has consumed alcohol in moderation – where these factors characterise the respondent's circumstances as exceptional – where these factors are apt to constitute exceptional circumstances within the meaning of s9(4) as would dispense with the requirement that an actual term of imprisonment be served by the respondent – whether, if appealable error is located, any reason why the residual discretion not to interfere with the sentence is negated – where the submission made for the appellant that, absent exceptional circumstances, the actual term of imprisonment mandated by s9(4) is a powerful consideration against exercise of the discretion not to interfere is accepted – where although this respondent is neither youthful nor psychologically vulnerable, he has responsibly complied with his reporting conditions, abstained from illicit drugs and pursued avenues of employment in the period since he was sentenced – where it is cautioned that because it was unnecessary here to consider whether the sentence at first instance was manifestly inadequate having regard to the circumstances then to be considered by the sentencing magistrate, the outcome of this appeal ought not be taken as implicitly signalling that, in the opinion of this court, the sentence imposed at first instance was not manifestly inadequate.

Appeal dismissed.

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

Getting paid: Start with file opening

A practical plan to improve cash flow and client relations

Many firms bemoan the difficulties with slow, combative, and non-payers. And so they should, when it typically takes around $150,000 of additional billing to replace one $50,000 write-off.

However, the fact is that most payment problems are self-inflicted. This article looks at causes of non-payment and the pathways to improvement. On balance, the news is positive – because the problem is largely controllable, if partners have both the will and discipline to do something about it:

In a former incarnation, I had a reasonably large business in the building and construction industry.

Like most industries, we had our share of truisms – but the one that stood out above all others was 'a job that starts bad finishes bad'. There was the occasional exception, but not many.

My experience tells me that the situation isn't much different in law firms. However, this fact isn't appreciated as starkly as it ought to be. So what do I mean? Well, firms too often look at difficult payers in isolation instead of seeing payment for their work as simply one step at the very end of quite a long chain.

More often than not, payment problems are merely symptoms of poorly opened files and poorly managed retainers. In fact, my firm is now of the view that in the vast majority of cases, problem payers and retainer disputes are more likely to be caused by the legal firm than by the offending clients. How can this be? Well consider these situations:

1. Client never had the money to start with (for example, poorly qualified or advised litigation clients).
2. Escalation not managed within client's capacity to pay.
3. Retainer, scope of works, agreement, fees expectations not properly established up front.
4. Clear terms of payment and consequences of non-payment not established.
5. Clients not conditioned to pay regularly (money in trust).
6. Over-reliance on documentation (which people don't read) as a substitute for talking straight.
7. Authors not trained in talking confidently about money.
8. No clear file-opening policies and procedures.
9. No system for monitoring compliance with file-opening policy.
10. Clients not kept informed of progress (why should I pay?).
11. Poor WIP recording leading to inaccurate billing (account disputes).
12. Inaccurate billing damaging client trust.
13. Lethargic billing practices reducing the client's sense of obligation to pay.
14. Disorganised, slow and indecisive collection habits.
15. An unforeseen change in the client's circumstances.
16. Sheer client opportunism.

The two that you don't have much control over are obviously 15 and 16. You can't really do much about those… but you can try to minimise the fallout when they occasionally happen by attending to items 1 to 14 diligently.

So when you read through this list, it should become clearer that just putting more vigour into your debt collection processes isn't going to solve your payment and cashflow problems. It should help – but it is really curative medicine as opposed to preventative medicine.

When we go through this list with law firm clients, a not uncommon reaction is "surely you're overcomplicating it – I mean, how have we got the time to go into all of that stuff?" Our answer is simple – if you want drama-free client relationships and the profit and regular draws that you think you're entitled to, you can't afford not to.

For firms with poor existing habits, making the important changes doesn't come easily. It requires both discipline and commitment to see things through… qualities that sometimes are in short supply.

Some of the more sophisticated firms are very good at managing this total process, and this doesn't just mean tier 1 and 2 firms. Some firms are good at managing parts of the process, but weak at other parts – for example, they might have good documentation, but authors poorly trained in talking about money and weak compliance systems. Others are not very organised at all. It seems more a matter of good fortune than good management that some do not have really serious debtor and insurance claims problems.

So what can you do so that your firm reaches a high standard? In our experience, it is one of those areas where the whole is significantly greater than the sum of the parts – that is, you can't afford to have any weak links.

Some messages are worth repeating. This popular article by **Peter Lynch** appeared in the April 2006 edition of *Proctor*, but the message in this updated version is as relevant now as it was 10 years ago.

The five key areas you need to deal with are:

Step 1: Clear matter acceptance policies and standards, and a willingness to apply them seriously and consistently

Having clear policies is important. It saves time. Authors know what they can and can't do. They know what needs to be referred and what doesn't. Clients get consistent signals. Policies can be tailored to vary between areas of law where the commercial circumstances differ (for example, high-intensity commercial litigation versus conveyancing). Getting the right policies is as much an art as it is a science – too stringent and you lose business; too loose and you won't be paid.

The critical thing is not to see the objective here as 'production of a manual' but to establish some foundations on which to change the way people do things.

Step 2: An electronic system that helps you manage compliance without being admin for its own sake

When we go into firms and ask about their file opening, they regularly say, "yes, we always have a client agreement and we always ask for money in trust, and we don't start the work until those things are settled (and so on)". Yet when we go through a selection of the files, we see evidence of *intentions* to do these things, but mixed evidence of them actually happening.

Client agreements are sent out, but not followed up. The agreed $$ retainer wasn't asked for because "the client was a special case" (and subsequent files reveal myriads of special cases). The author simply started the work without the file opening matters being settled because "the client said it was urgent" (In which case, we would argue, you have the perfect opportunity to demand compliance).

So you need to build your file-opening procedures into your practice management system, preferably with workflow steps, and a regular reporting system that enables the practice manager or managing partner to track and manage who is playing the game and who isn't (partners, staff and clients).

Building a system like this involves a once-only investment of some time and money, but without it, the task of monitoring compliance simply becomes to manually cumbersome and the firm will quickly lose interest in doing things correctly.

Step 3: Author training so they have the skills to talk confidently about money and the firm's terms of doing business

We can't overemphasise this. So many lawyers either haven't been trained in this area, or assume they have the requisite skills but simply don't. There is absolutely no substitute for positive straight-talking, face-to-face agreement on terms and payment conditions sealed with a handshake. There are ways to do it well, and ways to do it poorly. Done well, you can legitimise almost any follow-up action, including requests for trust money top-ups and chasing of unpaid accounts.

Your written agreement should be nothing more than a legal backstop for the agreement you have reached personally.

Step 4: Some special provisions that quarantine existing good clients from sudden changes in trading terms

The beauty of a full makeover of your client and matter acceptance procedures is that it gives you an opportunity to refocus on your special clients, your difficult ones and all those in between. Generally, it is unwise to simply slam brand new terms of business on important long-standing clients who may have a history of paying reliably and without fuss, but perhaps not with the new stringency that you are considering. Therefore, a quarantined client list makes sense. But make sure you have very stringent guidelines about getting on the list, or in no time at all, weak partners will simply claim that all their new and existing clients are special cases.

At the other end, you may choose to quite openly tell your more difficult clients about your new terms of trade and enforce them rigorously, so that they either become less difficult clients or leave the firm – either being a good outcome.

Step 5: Character and discipline from the partners so that they lead by example and don't just 'talk the talk'

As always, this is where the whole process starts and finishes. You can have the best policies, procedures, compliance systems and training in the world, but if the partners do not champion the system (or at least comply) themselves, then how is any of it believable to other people who are being asked to comply?

This is why quite early in these assignments, we deal with partner commitment up front, and if there is any significant doubt about that, we simply suggest that the firm spend its money on an alternative improvement project.

Readers will see that I have written a paper about getting paid without even talking about debt collection. This isn't to say debt collection is unimportant – but merely that it is just one very late step in a long chain which is significantly influenced by the quality of the preceding steps.

By working through steps 1 to 5 in a structured way, you will be amazed at the improvement in your firm's cashflow and your client relations… but don't expect it to be a project that will be completed in a day. As always, there is an amount of pain before the gain.

Dr Peter Lynch is principal of dci lyncon. Note that this article only deals with commercial issues, and does not consider negligence issues that also potentially accompany poor retainer management, nor the specific terms and conditions of client agreements.

back to contents

This month ...

Webinar: New Withholding Tax Regime for Australian Property

TUE 5 JUL

Online | 12.30-1.30pm

Are you aware of the new obligations imposed on buyers under the *Tax and Superannuation Laws Amendment (2015 Measures No.6) Act 2016* that comes into effect on 1 July 2016? While targeted at disposals by foreign residents, the Act introduces a requirement for all buyers of Australian real estate valued at $2m or over to retain 10% of the purchase price and pay this amount as withholding tax to the Australian Tax Office. This is unless the seller produces an ATO clearance certificate or a variation notice prior to settlement.

Join us for this one hour webinar to ensure that you understand what the new law will mean for both buyers and sellers of Australian property including:

- what changes will be made to the REIQ/QLS Contract
- how to make the payment to the ATO
- how to obtain a clearance certificate or variation notice when acting for a seller.

SL

1 CPD POINT

Support Staff Webinar: Drafting Titles Office Documents

WED 6 JUL

Online | 12.30-1.30pm

Do you want to correctly complete standard Land Titles Office documents first time, every time? Do you want to know how to reduce the risk of receiving a requisition notice and incurring additional fees?

Presented by a senior representative of the Land Titles Office, this webinar has been designed for legal support staff to assist you to correctly draft these important documents.

PS

1 CPD POINT

In Focus: New Mental Health Act

WED 13 JUL

Law Society House, Brisbane | 12.30-2pm

The *Mental Health Act 2016* was passed by Parliament in February 2016 with an anticipated commencement date of November 2016. This legislation will bring significant change to the provision of involuntary mental health treatment to Queenslanders. Join us to receive an overview of the new Act, the new approach and important implications for your practice.

SL

1.5 CPD POINTS

Webinar: Corporate veil – lessons for directors & creditors

THU 14 JUL

Online | 12.30-1.30pm

Recent high-profile cases in Australia have refocused attention on the operation of the 'corporate veil' deriving from the separate legal entity doctrine. This webinar will provide a valuable opportunity to refresh your understanding of the scope of this important legal doctrine. Our experienced presenters will provide insights into: historical development and importance of the separate legal entity doctrine, recent abuses of the corporate veil, when it is appropriate to pierce the veil, overseas comparisons and law reform options.

PS SL

1 CPD POINT

Early Career Lawyers Conference 2016

FRI 15 JUL

Law Society House, Brisbane | 8.30am-5pm

The Early Career Lawyers Conference is a one day event especially designed for junior solicitors, offering practical advice and tips for building a successful and lasting career in the legal profession.

2016 topics include:

- benefits of plain language and effective structuring of documents
- building an authentic personal brand that powers your career
- new time management strategies to take control of your inbox
- substantive law Q&A session with experts in the field
- fundamentals of ethical practice
- golden rules of negotiation.

PLE PM&BS PS SL

7 CPD POINTS

Practice Management Course – Medium and Large Practice Focus

THU-SAT 21 TO 23 JUL

Law Society House, Brisbane | 8.30am

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

Our PMC features: practical learning with experts; tailored workshops; interaction, discussion and implementation; leadership profiling and superior support.

PLE PM&BS PS

10 CPD POINTS

back to contents

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

QLS and FLPA Family Law Residential 2016

Sheraton Grand Mirage Resort, Gold Coast
5-7pm (Thu), 9am-4.30pm (Fri), 9.30am-4.30pm (Sat)

The QLS and FLPA Family Law Residential continues to be the premier professional development event for family lawyers and other interested professionals in Australia. As in previous years, the program features three concurrent streams for you to choose from over two consecutive days:

- children and parenting matters
- property-related considerations
- essential skills in day-to-day family law practice.

This is your opportunity to network with colleagues while hearing from experts, including judicial officers, senior legal practitioners, academics and social scientists.

PLE PM&BS PS SL

10 CPD POINTS

THU-SAT
21
TO
23
JUL

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

Save the date

North Queensland Intensive	11 August
Government Lawyers Conference	26 August
Property Law Conference	8-9 September
Criminal Law Conference	16 September
Personal Injuries Conference	21 October
Succession and Elder Law Residential	4-5 November
Conveyancing Conference	25 November

Can't attend an event?

Purchase the DVD

Look for this icon. Earlybird prices apply.

Queensland Law Society | flpa

QLS and FLPA Family Law Residential 2016

What to do when the system breaks down

21-23 July
Sheraton Grand Mirage Resort, Gold Coast

Registration closes 19 July
qls.com.au/family-conf

10 CPD

PLE PM&BS PS SL

Major sponsor

svpartners
specialist accountants & advisors


Sian Cullen


Fiona Austin


Carlos Gouveia


Quentin Owen


Sabina Langenhan


Gordon Perkins


Sharon O'Toole


Edward Pene

Career moves

Brisbane Family Law Centre

Brisbane Family Law Centre has welcomed **Sian Cullen** as a senior solicitor. Sian has recently returned from the United Kingdom where she practised in family law and child protection for the last five years. She has previously practised in family law in Brisbane since her admission in 2007.

Clyde & Co.

Clyde & Co. has announced the appointment of special counsel **Fiona Austin** to its Brisbane office. Fiona focuses on workplace relations and has extensive experience in workplace health and safety across the Asia-Pacific region. Her expertise spans health, safety, security and environment law, workplace relations, privacy, integrity and corruption, and she has been retained by a significant number of major corporations in the energy and resources, transport, hospitality and education sectors.

Colin Biggers & Paisley

Carlos Gouveia has joined Colin Biggers & Paisley's corporate and commercial team as a special counsel. Carlos brings a wealth of experience in major projects, construction, finance, and mergers and acquisitions. As a qualified chartered accountant, Carlos is also able to provide advice on tax law, including income tax, capital gains tax, goods and services tax, stamp duty, fringe benefits tax and tax reform.

Gilchrist Connell

Insurance law firm Gilchrist Connell has announced that principal **Quentin Owen**, special counsel **Leah Vida** and associate **Stephanie Renda** have joined the firm. Quentin has more than 35 years' experience as a solicitor and barrister acting in complex and catastrophic personal injury claims, conducting prosecutions for the Motor Accident Insurance Commission, and investigating and defending claims involving arson and fraudulent activities.

Leah and Stephanie have both worked exclusively for major insurers and self-insurers since admission and have gained extensive experience in the defence of compulsory third party claims and legal liability claims.

Michael Lynch Family Lawyers

Michael Lynch Family Lawyers has announced the appointment of **Tarah Tosh** to its team of family lawyers. Tarah is a QLS accredited specialist (family law) with extensive experience in the full range of property and child-related family law matters. She has previously worked in family law firms in Brisbane and practised as a solicitor in the United Kingdom.

Mullins Lawyers

Mullins Lawyers has announced the appointment of four senior lawyers, including new property partner **Bruce McGregor**, corporate law consultant **Sabina Langenhan**, banking and finance special counsel **Gordon Perkins**, and property special counsel **Sharon O'Toole**.

Bruce and Sharon join Mullins from previous positions at Macpherson Kelley, where they worked closely together on leasing and franchising matters. Bruce has extensive experience preparing lease documentation for large Queensland shopping centres, including due diligence and redevelopment requirements.

In addition to her property law experience, Sharon has also been actively involved with native title and Aboriginal cultural heritage, and is highly experienced in negotiating with traditional owner groups and with the application of the *Native Title Act*.

Gordon has practised as a banking and finance lawyer for 10 years, and has previously worked for the Australian Prudential Regulation Authority and Westpac. He focuses on retail and commercial credit (including construction finance), structured finance (superannuation fund loans), and creating and maintaining suites of precedent documents (including loan and security documents).

German-born Sabina has more than 15 years' legal experience and has a primary focus on delivering corporate legal services to German and European markets.

NB Lawyers

NB Lawyers has welcomed **Edward Pene** as a lawyer in the commercial law and property law team. Edward previously owned and operated a small commercial and property law practice, and focuses on providing high-level commercial and property advice to clients.


Leah Vida


Stephanie Renda


Tarah Tosh


Bruce McGregor


Rebecca Parry


Daniel Coates


Thomas Ashton


Sara McRostie


Temika Boehm


Ingrid Lehmann


Rhiannon Saunders


Sarah Lally

Parry Coates Family Law

Rebecca Parry and **Daniel Coates** have joined to create Parry Coates Family Law. Rebecca has practised exclusively in family law since 1999, and Daniel has a wealth of experience from practising in both private practice and in-house at Legal Aid Queensland. Both Rebecca and Daniel are family dispute resolution practitioners and nationally accredited mediators.

Robbins Watson

Thomas Ashton has joined Robbins Watson in its inheritance law division. Thomas has practised exclusively in wills and estates since admission.

Sparke Helmore Lawyers

Sparke Helmore Lawyers has welcomed **Sara McRostie** as a partner in its workplace group in Brisbane. Sara focuses on industrial relations and employment law, and works closely with government agencies, particularly in the Queensland public sector, as well as corporate clients. Sara provides support to employers on day-to-day workplace issues.

Stewart Family Law

Stewart Family Law has announced the promotion of **Temika Boehm** to associate. Temika has practised exclusively in family law since her admission in 2012. Her experience includes complex property settlements, parenting disputes, domestic violence and child protection matters.

Thynne + Macartney

Thynne + Macartney has welcomed **Ingrid Lehmann** as an associate in the professional risks group. Ingrid has more than six years' experience in defence work with professionals and general commercial dispute resolution. She focuses on professional indemnity/professional risks claims across various market sectors and risk categories, including directors and officers and association liability, and a variety of claim risks across diverse professional groups.

WGC Lawyers

WGC has announced the promotion of **Rhiannon Saunders** to senior associate and welcomed **Sarah Lally** as a senior associate.

Since joining WGC in 2009, Rhiannon has strengthened her expertise in her chosen practice areas, with a particular interest in debt recovery, governance and risk management, and insolvency.

Sarah joins the firm after gaining extensive commercial legal experience in Brisbane and more recently as in-house counsel in Sydney. She has acted for property developers, body corporate managers, small businesses, self-managed super funds and other corporate entities, and has a particular interest in structuring and investments.

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

New QLS members

Queensland Law Society welcomes the following new members, who joined between 28 April and 6 June 2016.

Ashley Blackburn, Tucker & Cowen Solicitors
Zack McKay, Finemore Walters & Story
Richard Soong, MSA National Pty Ltd
Seamus Monaghan, King & Company
Thomas O'Shea, Dowd and Company
Chantal Hill, Bruce Legal
Brittany Biron, JHK Legal Australia Pty Ltd
Katherine Prince, Norton Rose Fulbright
Fiona Ellis, Cooke & Hutchinson
Robert Harvey, Grasso Searles Romano
Ella Bennett, KCH Lawyers
Julie Mason, Williams Family Law & Self Rep Centre
Mikayla Kuhne, Corrs Chambers Westgarth
John Woosnam, Brisbane City Legal Practice
Chelsea Saldumbide, Anderson Fredericks Turner Pty Ltd
Carmel McMahon, Enyo Lawyers
Nathalie Landaverde, Queensland Law Practice Pty Ltd
Peter Fenton, non-practising firm
David Wilkinson, Ashbrooke Law Pty Ltd
Luke O'Connor, Maurice Blackburn Pty Ltd
Kelly Morrow, Maurice Blackburn Pty Ltd
Susan Merrotsy, Bennett Carroll
Rajan Lashand, R Sabdia & Associates
Joshua Robson, McBride Legal
Emma Gillespie, LGM Family Law
Tessa Calver-James, JLF Corporation

back to contents

Free legal advice

For members when it's most needed

Queensland Law Society provides access to a free legal advice service for its members.

Solicitors who have received an official notification requesting that they provide information to either the Legal Services Commission or Queensland Law Society as the result of a complaint investigation or trust account matter, can utilise this service.

This initiative allows members under investigation to seek expert advice for up to six hours from an experienced solicitor with extensive knowledge of professional standards issues.

The Society has appointed seven experienced solicitors – Ben Cohen of Bartley Cohen, Glen Cranny of Gilshenan & Luton Legal Practice, Rachel Drew of TressCox, Rob Franklin of Potts Lawyers, Ian Hughes of HopgoodGanim Lawyers, Paul McCowan of McInnes Wilson Lawyers and Nola Pearce of Carter Newell Lawyers.

Fees will be paid by the Society for six hours of the panel member's time. The members of the Free Legal Advice Panel will be retained by the practitioner seeking the advice and usual privileges and duties of confidentiality to the retaining practitioner apply.

The free legal advice is confidential and external to the Society.

This initiative reflects the Society's continuing commitment to focus on member services. The aim of this service is to assist solicitors to address the issue in a timely manner instead of ignoring or deferring the initial request for information which then results in the matter escalating. On most occasions, a prompt well considered response resolves the issue, thus saving time and stress for all parties involved in the complaint investigation process.

The service has the support of the Legal Services Commissioner, Paul Clauson, who acknowledges the importance of timely well considered advice in resolving issues that might otherwise escalate.

Lexon has extended its cover to provide, in such circumstances, further services from panel solicitors to the sum of $10,000. This cover is triggered after the expiry of the six hours free legal advice paid for by the Society. Further details of that cover should be obtained from the panel solicitors when required.

The contact phone numbers and email addresses for the members of the Free Legal Advice Panel are available at **qls.com.au** > For the profession > Practice support > Direct support > Free Legal Advice Panel.

Accountancy

Agency work

Agency work continued

NOTE: CLASSIFIED ADVERTISEMENTS

Unless specifically stated, products and services advertised or otherwise appearing in Proctor are not endorsed by Queensland Law Society.

Agency work continued

IPGATEWAY®
THINK IT. OWN IT. PROTECT IT.

For referral of intellectual property matters, including protection, prosecution, enforcement, licensing & infringement matters relating to:

- Patents, Copyright, Trade Marks, Designs & confidential information; and
- IP Australia searches, notices, applications, registrations, renewal & oppositions

P: 07 3808 3566 E: mail@ipgateway.com.au

Adams Wilson Lawyers

SYDNEY & GOLD COAST AGENCY WORK

Sydney Office:
Level 14, 100 William St, Sydney
Ph: 02 9358 5822
Fax: 02 9358 5866

Gold Coast Office:
Level 4, 58 Riverwalk Ave, Robina
Ph: 07 5593 0277
Fax: 07 5580 9446

All types of agency work accepted
- CBD Court appearances
- Mentions
- Filing

Quotes provided. Referrals welcome.

Email: info@adamswilson.com.au

McL McLaughlins LAWYERS

GOLD COAST AGENTS –
We accept all types of civil and family law agency work in the Gold Coast/Southport district.
Conference rooms and facilities available.
Cnr Hicks and Davenport Streets,
PO Box 2067, Southport, Qld, 4215,
Tel: 07 5591 5099, Fax: 07 5591 5918,
Email: mcl@mclaughlins.com.au.

Kroesen and Co. Lawyers

BEAUDESERT – AGENCY WORK
Kroesen & Co. Lawyers
Tel: (07) 5541 1776
Fax: (07) 5571 2749
All types of agency work and filing accepted.

Agency work continued

bdglegal

GOLD COAST AGENCY WORK

Level 15 Corporate Centre One,
2 Corporate Court, Bundall, Q 4217
Tel: 07 5529 1976
Email: info@bdglegal.com.au
Website: www.bdglegal.com.au

We accept all types of civil and criminal agency work, including:

- Southport Court appearances – Magistrates & District Courts
- Filing / Lodgments
- Mediation (Nationally Accredited Mediator)
- Conveyancing Settlements

Estimates provided. Referrals welcome.

AGENT Faraday Law BRISBANE

Penelope Stevens
Family Law Accredited Specialist
PO Box 403
Cannon Hill 4170
0448856730 or enquiries@faradaylaw.com.au

Forensic services

Baxter Consulting Engineers
Forensic Engineer

- Expert Witness
- Expert Report
- Expert Conference

Over 20 years engineering and construction experience. Commercially reasonable rates.
Contact Tim Baxter on mobile 0419 776 766
B.Eng (Civil) MIEAust CPEng RPEQ NER
Email: tim@baxcon.com.au
Web: www.baxcon.com.au

For rent or lease

POINT LOOKOUT BEACH RESORT:
Very comfortable fully furnished one bedroom apartment with a children's Loft and 2 daybeds.
Ocean views and pool. Linen provided.
Whale watch from balcony June to October.
Weekend or holiday bookings.
Ph: (07) 3415 3949
www.discoverstradbroke.com.au

POINT LOOKOUT – NTH STRADBROKE
4 bedroom family holiday house.
Great ocean views and easy walking distance to beaches.
Ph: 07- 3870 9694 or 0409 709 694

Casuarina Beach - Modern Beach House
New architect designed holiday beach house available for rent. 4 bedrooms + 3 bathrooms right on the beach and within walking distance of Salt at Kingscliff and Cabarita Beach. Huge private deck facing the ocean with BBQ.
Phone: 0419 707 327

COMMERCIAL OFFICE SPACE
46m² to 138m² – including car spaces for lease
Available at Northpoint, North Quay.
Close proximity to new Law Courts.
Also, for sale a 46m² Commercial Office Unit.
Please direct enquiries to Don on 3008 4434.

OFFICE TO RENT
Brisbane CBD office available for lease.
190m² of attractive open plan with natural light.
Whole floor with direct street access.
Ph 0411 490 411

For sale

LIFE-STYLE LEGAL PRACTICE
If there is such a thing we believe we have created it.Tony and Rosemary Lee offer for sale their unique Legal Practice at beautiful
Mission Beach in
Tropical North Queensland.
Accommodation onsite available
Registered boat mooring
Please direct enquiries to
admin@leeandco.com.au
or phone (07) 4068 8100

FAMILY LAW PRACTICE FOR SALE
SOLE FAMILY LAW PRACTITIONER
CONSIDERING RETIREMENT
SEEKING TO SELL MACKAY PRACTICE
PRACTICE SUITS ANOTHER ICL/SEP REP
CONTACT GREG ON PHONE 07 4944 1866

NOTE: CLASSIFIED ADVERTISEMENTS

Unless specifically stated, products and services advertised or otherwise appearing in Proctor are not endorsed by Queensland Law Society.

back to contents

For sale continued

Job vacancies

bestwilsonbuckley FAMILY LAW

Senior Solicitor – Toowoomba office

A tree change isn't for everyone; however, we have an opportunity for a talented and motivated experienced family lawyer that wants to be part of a bustling and energetic family law firm in Toowoomba in a key, senior, autonomous role.

We are a growing firm with offices in both Toowoomba and Brisbane. Doyle's Guide recently named BWB as the leading Family Law firm in the Toowoomba and Darling Downs' region and our Toowoomba based Legal Partners as the only Preeminent Family Lawyers in the region.

As a talented, empathetic and passionate family law practitioner you will be able to deal with the full range of family law matters.

You are an enthusiastic, warm, well presented family lawyer whose presence and technical skills instantly build rapport and a sense of reassurance and confidence for clients from the outset.

You're capable of delegating to, and mentoring, more junior members of staff respectfully to build the team, and keep the BWB pipeline of future legal professionals and splendid support staff burning brightly.

This position is a full-time role in our Toowoomba office, with regular travel to Brisbane for Court appearances (licence and own transport essential).

Remuneration and relocation packages are negotiable.

For further information or to apply for this role (cover letter and resume) please email jen@bwbfl.com.au

Part time Solicitor Position

Location: Currumbin Gold Coast
Experience: General Commercial Law – Estate and Trust Planning
Experienced Solicitor required approx. 1 day per week for general commercial and trust legal work. At certain times the position may require the flexibility to work more than one day per week. Would ideally suit senior semi-retired practitioner.

Please direct enquiries to stephen.train@neumann.com.au

NOTE TO PERSONAL INJURY ADVERTISERS

The Queensland Law Society advises that it can not accept any advertisements which appear to be prohibited by the *Personal Injuries Proceedings Act 2002*. All advertisements in Proctor relating to personal injury practices must not include any statements that may reasonably be thought to be intended or likely to encourage or induce a person to make a personal injuries claim, or use the services of a particular practitioner or a named law practice in making a personal injuries claim.

Job vacancies continued

FAMILY LAW SOLICITOR

An opportunity exists for a motivated solicitor to join our experienced family law team led by a partner with specialist accreditation.

This is a genuine opportunity to work exclusively in family law, dealing with a variety of practical family law matters including property settlements, parenting arrangements, child support and domestic violence.

The ideal applicant will have at least 2 years post admission experience, preferably in Queensland, predominantly in family law. However, applicants with less experience but a passion for family law and a desire to practice exclusively in that area are encouraged to apply.

Our firm is one of the largest in central Queensland, practicing in all areas of the law. We provide CPD and are supportive of staff wishing to undertake further study to assist career development (a master of laws or specialist accreditation).

An attractive salary package is available depending upon the applicant's experience and performance making this a genuine opportunity for a solicitor with career ambitions to achieve monetary rewards, internal promotion and professional recognition.

Please direct enquiries to James Bailey on

(07) 4963 2000 or by confidential email to Recruitment@wallaw.com.au.

Written applications may be forwarded to:
Managing Partner

SR Wallace & Wallace

PO Box 733

Mackay Qld 4740

SR WALLACE & WALLACE LAWYERS
"Our People – Your Solution"

Legal services

Legal services continued

PORTA LAWYERS
Introduces our
Australian Registered Italian Lawyer
Full services in ALL areas of Italian Law

Fabrizio Fiorino
fabrizio@portalawyers.com.au
Phone: (07) 3265 3888

Associate Services
Legal Costing – Queensland

Providing legal cost solutions - the competitive alternative

Short form assessments | Objections
Cost Statements | Itemised Bills
Court Appointed Assessments

Luke Randell LLB, BSc | Solicitor & Court Appointed Cost Assessor
Admitted 2001

(07) 3256 9270 | 0411 468 523
www.associateservices.com.au
associateservices1@gmail.com

Pentons
The Experts

Operating since the 1980's we conduct body corporate searches for preparation disclosure statements and body corporate records reports on the Gold Coast, Tweed Heads and Brisbane. We also provide other legal services. For all your body corporate search requirements, phone us today on **07 5532 3599** and let our friendly staff help you.

Locum tenens

ROSS McLEOD
Willing to travel anywhere in Qld.
Admitted 30 years with many years as Principal
Ph 0409 772 314
ross@locumlawyerqld.com.au
www.locumlawyerqld.com.au

NOTE: CLASSIFIED ADVERTISEMENTS

Unless specifically stated, products and services advertised or otherwise appearing in Proctor are not endorsed by Queensland Law Society.

Locum tenens continued

Greg Clair
Locum available for work throughout Queensland. Highly experienced in personal injuries matters. Available as ad hoc consultant.
Call 3257 0346 or 0415 735 228
E-mail gregclair@bigpond.com

Bruce Sockhill
Experienced Commercial Lawyer
Admitted 1986 available for
locums south east Queensland
Many years as principal
Phone: 0425 327 513
Email: Itseasy001@gmail.com

TOM BENCE experienced Solicitor (admitted 1975) available for locums anywhere in Queensland. Many years' experience as principal.
Phone 0407 773 632
Email: tombence@bigpond.com

Mediation

KARL MANNING
LL.B Nationally Accredited Mediator.
Mediation and facilitation services across all areas of law.
Excellent mediation venue and facilities available.
Prepared to travel.
Contact: Karl Manning 07 3181 5745
Email: info@manningconsultants.com.au

COMMERCIAL MEDIATION - EXPERT DETERMINATION - ARBITRATION
Stephen E. Jones
MCIArb (London) Prof. Cert. Arb. (Adel.)
All commercial (e.g. contractual, property, partnership) disputes resolved, quickly and in plain English.
stephen@stephenejones.com
Phone: 0422 018 247

MEDIATION AND FACILITATION
Tom Stodulka
Nationally Accredited Meditator and FDRP
Tom has mediated over 3000 disputes and has 20 years' experience as a mediator and facilitator. He is one of Australia's best known mediators and can make a difference to clients even in the most difficult of situations.
0418 562 586; stodulka@bigpond.com
www.tomstodulka.com

STEVEN JONES LLM

Nationally Accredited Mediator, Family Dispute Resolution Practitioner and Barrister.

Mediation of commercial, family and workplace disputes. Well appointed CBD location, but willing to travel.

Phone: 0411 236 611
steven.jones@qldbar.asn.au

Missing wills

MISSING WILLS

Queensland Law Society holds wills and other documents for clients of former law practices placed in receivership. Enquiries about missing wills and other documents should be directed to Sherry Brown or Glenn Forster at the Society on (07) 3842 5888.

Would any person holding or knowing the whereabouts of a Will of the late **JASON PAUL DULEY** late of Vautin Way, Eagleby, Queensland who died on the 05 December 2015 please contact The Public Trust, New Zealand, Private Bag 17906, Greenlane, Auckland 1546, New Zealand (or e-mail: rebecca.woolacott@publictrust.co.nz) PUBLIC TRUST, NEW ZEALAND

Would any person or firm holding or knowing the whereabouts of any Will of the late **WILLIAM EDWARD ROW**, late of Unit 17, 31 Vespa Crescent, Surfers Paradise, Queensland, who died 4 March 2016, aged 69 years, please contact Heidi Broderick of McCullough Robertson Lawyers on 3233 8629 or email hbroderick@mccullough.com.au.

Wanted to buy

Purchasing Personal Injuries files
Jonathan C. Whiting and Associates are prepared to purchase your files in the areas of:

- Motor Vehicle Accidents
- WorkCover claims
- Public Liability claims

Contact Jonathan Whiting on
07-3210 0373 or 0411-856798

JW JONATHAN C WHITING & ASSOCIATES LAWYERS

07 3842 5921
advertising@qls.com.au

NOTE TO PERSONAL INJURY ADVERTISERS

The Queensland Law Society advises that it can not accept any advertisements which appear to be prohibited by the *Personal Injuries Proceedings Act 2002*. All advertisements in Proctor relating to personal injury practices must not include any statements that may reasonably be thought to be intended or likely to encourage or induce a person to make a personal injuries claim, or use the services of a particular practitioner or a named law practice in making a personal injuries claim.

back to contents

Shiraz, but not as we know it

with Matthew Dunn

Keep an eye out for shiraz viognier, a new take on the old faithful shiraz.

It is a more than a blend of different varieties, rather a marriage which enhances both and creates something new.

Shiraz viognier is a curious beast. Blending different grapes is not unheard of, but it is the fact that shiraz is a red grape mixed with the white grape viognier which makes things a bit more interesting. To be true to the style, the two components should be cofermeted to allow the best features of each to come through.

The heady mix of firm red and bracing white is possibly as old as time, coming from the famed Côte-Rôtie or 'roasted slope' on the river Rhone in France. The Côte-Rôtie is a suntrap section of perilously steep hillside on the northern Rhone river valley, upstream from the famous Hermitage (the spiritual home of shiraz and crusading knight-hermits).

The steepness of the roasted slope means the vines are grown on terraces and the grapes must be harvested by hand. Somewhat romantically for onlookers but less so for labourers, the grapes are carried away in medieval-style backpack baskets.

The Côte-Rôtie is also potentially the oldest site of winemaking in France, going back to Roman times when the Gaulish tribe, the Allobroges, proudly first stomped the grapes. The Côte-Rôtie of today is a highly priced and sought after mix of sundrenched southern French syrah and up to 20% viognier.

Shiraz is a grape we know only too well. Viognier is a relative unknown, which is a pity as it has the potential to make full-flavoured bracing white wine. Some years ago Yalumba gave raising the profile of viognier a red-hot go which sadly came to little good, given the penchant for grassy syrup from over the pond. But now that people have discovered pinot gris, perhaps the time for varietal viognier may come too.

The magical marriage of shiraz and viognier is designed to enhance the best elements of both – viognier provides perfume on the nose and moderates the brutish tendencies of shiraz – producing a big but more elegant flavour in the wine.

In Australia, the style has crept in slowly and has tended to focus on more shiraz and around 7% to 10% viognier. Initially thought to be a cover-up for bad shiraz, the style of shiraz viognier has proved itself in new districts such as the Canberra region.

Dr John Kirk, the founder of Clonakilla in the Canberra district, is widely acknowledged as the antipodean father of shiraz viognier and his son, current winemaker Tim Kirk, is acknowledged as one of the best wranglers of these two varieties in the country. Certainly Clonakilla is renowned as the most consistently excellent maker of shiraz viognier out of the very high standard stable of the style in the Canberra region. Excellence can be found in the Yarra Valley too, with Yerring Station and Yarra Yerring both contributing to the development of finer focused wines.

Shiraz viognier is not limited to cool climate regions however, with McLaren Vale exploring its own weighty expression of the style.

Ultimately, shiraz viognier is a new take on an old favourite and the perfect way to make use of the cooler winter evenings.

The tasting

Four wines were sampled to investigate the style.

The first was the **Clonakilla 2014 Canberra District Viognier**, which was the palest of all possible straw colour. The nose was crisp with citrus and lime, and the palate was viscous and weighty in the mouth but tangy with crisp citrus acid and a touch of stony granite strength.

The last was the out-of-the-box option of the **Henschke Henry's Seven Barossa Red 2014**, being a mix of four varieties featuring shiraz and viognier. The colour was light purple and the nose warmed spice and white pepper along with red currants. The palate was a warm cascade of aniseed and black pepper out of green oaks onto a bed of ripe plummy fruits.

The second was **d'Arenberg The Laughing Magpie McLaren Value 2011 Shiraz Viognier**, which was all inky red-black. The nose was a sweetness of dark fruit and peppery notes, while the palate was full-blooded meaty shiraz with deep and rich red berry almost jammy fruit on a firm layer of nearly astringent tannins. The viognier added finesse to the nose and will emerge well as the monster sleeps.

The third was **Tallagandra Hill Canberra District 2007 Shiraz Viognier**, which was brick red in colour and the most intriguing nose of earth, white pepper, oak and plums hanging together like a spiced trellis in a walled garden. The palate was the round and warm flavours of old cigar box in which the earthy notes and warm red fruits mix on a bed of carefully wrapped tannins.

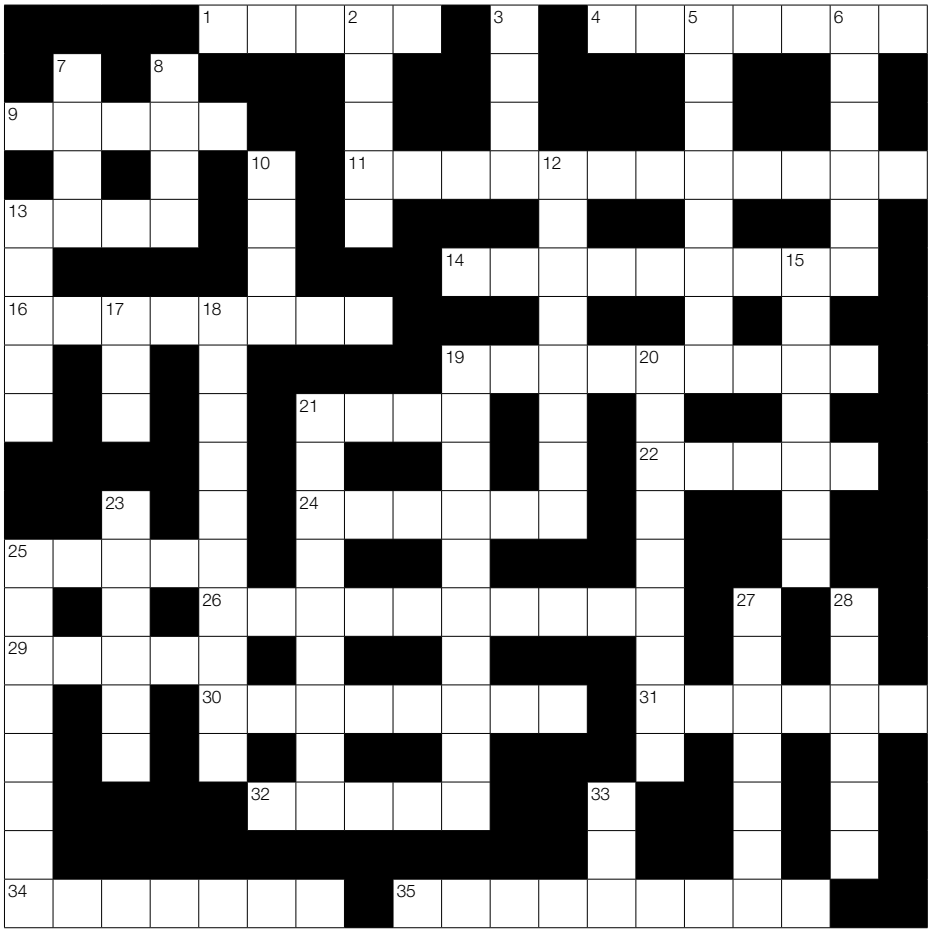
Verdict: The wines all showed style and flair, but the preferred option was the Tallagandra Hill's graceful charms.

Matthew Dunn is Queensland Law Society government relations principal advisor.

back to contents

Mould's maze

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



Across

1 A barrister who provides another barrister with a brief is said to '.....' it. (jargon) (5)

4 Judicially refuse orders sought in an application. (7)

9 Convicted murderer of Daniel Morcombe, Brett ..... . (5)

11 Using a citator to discover the history of a case or statute. (12)

13 An appeal that disregards the trial court's rulings, de .... . (4)

14 The doctrine that obsolete laws are invalid and unenforceable. (9)

16 The process of applying rules of different countries on the basis of the precise issue involved. (8)

19 The theory that the simplest explanation of an event will be the preferred explanation. (9)

21 Lease. (4)

22 A brief seeking advice for which the work is performed by one barrister but published under the name of another barrister. (5)

24 A ..... company owns enough shares in another company to control it. (6)

25 Pasture another's livestock. (5)

26 Police inducing a person to commit an offence they would otherwise not have committed. (10)

29 Court usher. (Scottish) (5)

30 An ..... contract depends on an uncertain event, for example, insurance. (8)

31 Remedies sought at the end of a pleading, prayer for ..... . (6)

32 Principle of appellate law that upholds a trial decision but for different reasoning, ... Coachman doctrine. (5)

34 Provision of a statute that makes exception to a general rule, safe ..... . (7)

35 Common law offence against a person who has been robbed and takes back the goods or receives other amends upon an agreement not to prosecute the robber. (9)

Down

2 Suit where one of the parties is a group of people represented collectively by a member of that group, ... action. (5)

3 Legal accounting software. (4)

5 An opinion delivered by a court in which each judge prepares their own judgment. (Latin) (8)

6 Actions taken by a judge without application or request from the parties, *Sua* ..... . (Latin) (6)

7 Overall, in .... . (Latin) (4)

8 "It's the Constitution, it's ...., it's justice, it's law, it's the vibe." (4)

10 Injunction that restrains threatened or imminent acts, ... *timet*. (Latin) (4)

12 Summary of a case. (8)

13 An agreement that is unenforceable for lack of consideration, ... *pactum*. (Latin) (5)

15 The process of communicating with customers to ensure collection of accounts receivable. (7)

17 Partial payment made on a plaintiff's claim, usually to avoid more extreme legal problems, ... *tanto*. (Latin) (3)

18 Property that is promised as security for the satisfaction of a debt. (10)

19 *Jus cogens*, ... norm. (10)

20 Debt agreement or, archaically, a contract of apprenticeship. (9)

21 Thus, ex ..... . (Latin) (9)

23 Coroner in Scotland, ... procurator. (6)

25 Reprimand. (8)

27 Restitutionary cause of action to recover the value of goods sold, quantum ..... . (7)

28 *Cuius est solum, eius est usque ad ..... et ad inferos* means 'Whoever's is the soil, it is theirs all the way to Heaven, and all the way to Hell'. (Latin) (6)

33 Eponymous Queensland regulatory provision mandating disclosure of medical conditions likely to affect a person's ability to drive a motor vehicle, ...'s Law. (3)

Solution on page 64

back to contents

Welcome Ross!

Can you lend a hand with the painting?

by Shane Budden

When I came to work at QLS, there was some consideration of whether or not this column should continue, largely due to the fact that perhaps making fun of all things legal didn't suit with the Society's main mission.

The decision was made that it could continue as long as I avoided legal topics.

This was a great relief to me, as I can't recall the last time this column had anything remotely resembling a legal flavour, unless you count the constant threat of defamation proceedings due to the fact that my research efforts have all the integrity of Donald Trump writing his own Wikipedia entry.

I was actually concerned that I would have to bring a greater legal focus to the column, which would have meant going off and learning something about the law; happily that hasn't been necessary.

Today, however, I am going to look at a legal issue – specifically, the fact that the world's first artificial lawyer has recently commenced work. His name (of course it is a male, just in case he bills enough to make partner) is 'Ross', which according to Wikipedia is a Russian martial arts system, so you might not want to mess with Ross at a callover.

Ross is described as having been 'hired', although that makes one wonder what the selection process was, given that Ross is based on the Watson computer that won the American game show *Jeopardy!* – a game in which the host gives you the answers, so it really doesn't seem that big a deal. I suspect he simply rolled up and challenged the interviewers to a game of Trivial Pursuit.

I can see Ross having many applications, mostly as an excuse for adjournments and extensions of time ("Sorry, your honour, I will require an adjournment as my lawyer crashed while installing updates and has reverted to T-1000 factory settings…"). It also means that Ross may well become the first lawyer to forget the password to himself. Still, I am sure that if Ross works hard – and no jealous co-worker unplugs him – he will establish a solid practice and save up enough money to marry Siri, buy a nice little piece of Minecraft real estate and start raising the AI kids, who will eventually become Skynet and take over the world.

What I don't really get is the need for Ross, given that we already have enough law graduates to colonise a decent-sized planet, as well as any number of lawyers who could justifiably be described as artificially intelligent and are trying to take over the world, albeit most of them live in America.

In short, Ross is just another piece of software that we really didn't need, or at least I didn't. There are already stacks of people who can beat me at *Jeopardy!* and chess, which seems to be the main activity undertaken by AI, and what I don't know about bankruptcy (Ross is apparently a bankruptcy lawyer) could fill an oil tanker.

I would personally prefer some of this new technology to address real problems that real people care about, like moving house. Moving house is one of those things that nature has evolved so we can indeed combat things like global warming, in that it is generally sufficiently unpleasant that people say to hell with it and decide to stay where they are, thus using less petrol and reducing CO_2 emissions.

One of the reasons it is so unpleasant is – as I mentioned last column – that all the people who have agreed to help you move suddenly have an excuse, even if that excuse appears to have a somewhat indifferent relationship with the truth ("Can't help you this weekend, I have been short-listed for the voyage to Mars, plus I think I am coming down with Ebola.")

The first time you moved, your possessions consisted of two pairs of jeans, a frying pan, a football and three bottles of scotch you got for your 18th birthday, but once you obtain sufficient wealth to actually own furniture, moving becomes problematic. You need friends to assist, and will often bribe them with offers to put on a carton of beer – and here's a top tip: do not allow your friends access to the beer before or during the move. If you do, you may find them less than enthusiastic when moving your furniture; also, they will think it hilarious to somehow wedge your couch into the shower cubicle in such a way that it will not come out without major modifications which ultimately render it, in a strict technical sense, an ex-couch.

So an app that could help you move house would be great, and if Ross was capable of doing that I would be a big supporter. In fact, I think Ross' designers have missed the boat here, as Ross will have to start as a junior lawyer and the tasks junior lawyers do often bear more resemblance to moving house than legal work. I can't see Ross being much use in the sorts of things law firms really want from junior lawyers, such as painting the senior partner's holiday home, collecting embarrassing medications from the chemist and defending the middle of the ruck in the touch football team; he will be awesome at the trivia night though.

In any event, I suspect Ross is here to stay, and Richard Susskind will be happy, at least until Ross auto-generates his first book on the future of the law. If you currently have a practice in bankruptcy – or, indeed, *Jeopardy!* – you may wish to consider hiring Ross. However, if he starts asking you if you have seen a boy named John Connor, you might want to ring tech support.

Queensland Law Society

Contacts

Queensland Law Society
1300 367 757

Ethics Centre
07 3842 5843

LawCare
1800 177 743

Lexon
07 3007 1266

Room bookings
07 3842 5962

Crossword solution from page 62

Across: 1 Flick, **4** Dismiss, **9** Cowan, **11** Shepardizing, **13** Novo, **14** Desuetude, **16** Depecage, **19** Parsimony, **21** Hire, **22** Devil, **24** Parent, **25** Agist, **26** Entrapment, **29** Macer, **30** Aleatory, **31** Relief, **32** Tipsy, **34** Harbour, **35** Theftbote.

Down: 2 Class, **3** Leap, **5** Seriatim, **6** Sponte, **7** Toto, **8** Mabo, **10** Quia, **12** Abstract, **13** Nudum, **15** Dunning, **17** Pro, **18** Collateral, **19** Peremptory, **20** Indenture, **21** Hypothesi, **23** Fiscal, **25** Admonish, **27** Valebat, **28** Coelum, **33** Jet.

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 2016	9.35
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 January 2016 to 30 June 2016	8.00
Federal Court – Interest on judgment debt for half year	1 January 2016 to 30 June 2016	8.00
Supreme Court, District Court and Magistrates Court – Interest on default judgments before a registrar	1 January 2016 to 30 June 2016	6.00
Supreme Court, District Court and Magistrates Court – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 January 2016 to 30 June 2016	8.00
Court Suitors Rate for quarter year	To 1 July 2016	1.28
Cash Rate Target	from 4 May 2016	1.75
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2016	8.00

Historical standard default contract rate %

Jun 2015	Jul 2015	Aug 2015	Sep 2015	Oct 2015	Nov 2015	Dec 2015	Feb 2016	Mar 2016	Apr 2016	May 2016	June 2016
9.55	9.55/9.45	9.45	9.45	9.45	9.45	9.45	9.45	9.45/9.55	9.55	9.55/9.60	9.60

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.

QLS Senior Counsellors

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

Brisbane 4000	James Byrne	07 3001 2999
	Suzanne Cleary	07 3259 7000
	Glen Cranny	07 3361 0222
	Peter Eardley	07 3238 8700
	Peter Jolly	07 3231 8888
	Peter Kenny	07 3231 8888
	Bill Loughnan	07 3231 8888
	Justin McDonnell	07 3244 8000
	Wendy Miller	07 3837 5500
	Thomas Nulty	07 3246 4000
	Terence O'Gorman AM	07 3034 0000
	Ross Perrett	07 3292 7000
	Bill Purcell	07 3198 4820
	Elizabeth Shearer	07 3236 3233
	Dr Matthew Turnour	07 3837 3600
	Gregory Vickery AO	07 3414 2888
	Phillip Ware	07 3228 4333
Redcliffe 4020	Gary Hutchinson	07 3284 9433
Toowong 4066	Martin Conroy	07 3371 2666
South Brisbane 4101	George Fox	07 3160 7779
Mount Gravatt 4122	John Nagel	07 3349 9311
Southport 4215	Warwick Jones	07 5591 5333
	Ross Lee	07 5518 7777
	Andrew Moloney	07 5532 0066
	Bill Potts	07 5532 3133
Toowoomba 4350	Stephen Rees	07 4632 8484
	Thomas Sullivan	07 4632 9822
	Kathryn Walker	07 4632 7555
Chinchilla 4413	Michele Sheehan	07 4662 8066
Caboolture 4510	Kurt Fowler	07 5499 3344
Sunshine Coast 4558	Pippa Colman	07 5458 9000
Maroochydore 4558	Michael Beirne	07 5479 1500
	Glenn Ferguson	07 5443 6600
Nambour 4560	Mark Bray	07 5441 1400
Bundaberg 4670	Anthony Ryan	07 4132 8900
Gladstone 4680	Bernadette Le Grand	0407129611
	Chris Trevor	07 4972 8766
Rockhampton 4700	Vicki Jackson	07 4936 9100
	Paula Phelan	07 4927 6333
Mackay 4740	John Taylor	07 4957 2944
Cannonvale 4802	John Ryan	07 4948 7000
Townsville 4810	Chris Bowrey	07 4760 0100
	Peter Elliott	07 4772 3655
	Lucia Taylor	07 4721 3499
Cairns 4870	Russell Beer	07 4030 0600
	Anne English	07 4091 5388
	Jim Reaston	07 4031 1044
	Garth Smith	07 4051 5611
Mareeba 4880	Peter Apel	07 4092 2522

DLA presidents

District Law Associations (DLAs) are essential to regional development of the legal profession. Please contact your relevant DLA President with any queries you have or for information on local activities and how you can help raise the profile of the profession and build your business.

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

Central Queensland Law Association — **Mr Josh Fox**
Foxlaw, PO Box 1276 Rockhampton 4700
p 07 4927 8374 josh@foxlaw.com.au

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

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

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

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

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

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

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

Logan and Scenic Rim Law Association — **Ms Michele Davis**
p 0407 052 097 md@micheledavis.com.au

Mackay District Law Association — **Ms Danielle Fitzgerald**
Macrossan and Amiet Solicitors,
55 Gordon Street, Mackay 4740
p 07 4944 2000 dfitzgerald@macamiet.com.au

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

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

North Queensland Law Association — **Ms Kristy Dobson**
McKays Solicitors, PO Box 37 Mackay Qld 4740
p 07 4963 0888 f 07 4963 0889 kdobson@mckayslaw.com

North West Law Association — **Ms Jennifer Jones**
LA Evans Solicitor, PO Box 311 Mount Isa Qld 4825
p 07 4743 2866 f 07 4743 2076 jjones@laevans.com.au

South Burnett Law Association — **Ms Caroline Cavanagh**
Kelly & Frecklington Solicitors
44 King Street Kingaroy Qld 4610
p 07 4162 2599 f 07 4162 4472 caroline@kfsolicitors.com.au

Sunshine Coast Law Association — **Mr Trent Wakerley**
Kruger Law, PO Box 1032 Maroochydore Qld 4558
p 07 5443 9600 f 07 5443 8381 trent@krugerlaw.com.au

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

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

back to contents

Queensland Law Society

Practice Management Course 2016

Are you looking to advance your career?

Practical learning with experts – access to the premier authorities on trust accounting, ethics and risk management, and practical guidance on your personal practice challenges.

Tailored workshops – genuinely tailored, unique content, facilitators with specific expertise or practical experience.

Interaction, discussion and implementation – focus on your practice priorities within a challenging and stimulating environment. Where do you see your future in practice? We'll help you get there.

Leadership profiling – helping you understand your personal leadership style and how to communicate more effectively with others.

Superior support – before, throughout and after the course. Our alumni group and practice management consultants will help you apply and reinforce your learning along your practice path.

2016 Course Dates:

Sole practitioner and small practice focus	
September	1-2 and 9
November	10-12

Medium and large practice focus	
July	21-23
October	13-14 and 21

Your path to practice success

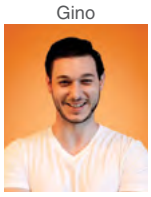
qls.com.au/pmc

PLE PM&BS PS 10 CPD

LEAP™

World class software supported locally

We help small law firms because they help people


Gino


Umair


Salime


Nick


Isabella


Jake


Zak


Farhana


Nathan


Ben


Charin


Hameeda


Leah


Peter


Dheeraj


Ian


Ali


Phi-Long


Rory


Diana T.


Freddy


Arvid


Joseph


Vanessa


Randa


Paul


Gavin


Tim


Diana A.

1300 886 243 | sales@leap.com.au | www.leap.com.au