

# PROCTOR



Queensland  
Law Society

June 2017 – Vol.37 No.5

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# QLS Roadshow

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# Domestic violence: Our work has only just begun

Promising progress, but there is far to go



On 10 September 2014, the Special Taskforce on Domestic and Family Violence in Queensland was established with Dame Quentin Bryce AD CVO as its chair.

Some six months later – on 28 February 2015 – Queensland Premier Annastacia Palaszczuk received the taskforce's report, 'Not Now, Not Ever: Putting an end to domestic and family violence in Queensland'.

Much has happened since then. In respect of the four recommendations directly involving Queensland Law Society, we established a Domestic Violence Working Group which worked closely with stakeholders to develop the *Domestic and Family Violence Best Practice Guidelines*. These were released on 27 July 2016 to provide practitioners with assistance in identifying and dealing with the key legal issues associated with domestic and family violence (DFV).

We have led the implementation of the guidelines, and have provided a range of professional development events for DFV practitioners in this area.

On a broader palette, we saw the introduction of a trial Specialist Domestic and Family Violence Court at Southport and at the end of last month, which was Domestic and Family Violence Prevention Month, we saw the commencement of amendments to the *Domestic and Family Violence Protection Act 2012*, which focuses firmly on the safety of victims. See page 14 of this edition of *Proctor* for a detailed description of the changes.

While much has changed, much remains to be changed – our work has only just begun. Domestic and family violence remains a horrendous blight on our community and it is appalling that, so far this year, some 17 women have lost their lives as a result of violent acts. In 2016, a total of 73 women lost their lives due to violence.

The Our WATCH website,<sup>1</sup> which has been established to drive nationwide change in the

culture, behaviours and power imbalances that lead to violence against women and their children, provides some authoritative statistics:

- On average at least one woman a week is killed by a partner or former partner in Australia.
- One in three Australian women has experienced physical violence since the age of 15.
- One in five Australian women has experienced sexual violence.
- One in four Australian women has experienced physical or sexual violence by an intimate partner.
- Of those women who experience violence, more than half have children in their care.
- Violence against women is not limited to the home or intimate relationships. Every year in Australia over 300,000 women experience violence – often sexual violence – from someone other than a partner.
- Eight out of 10 women aged 18 to 24 were harassed on the street in the past year.
- Aboriginal and Torres Strait Islander women experience both far higher rates and more severe forms of violence compared to other women. Intimate partner violence contributes to more death, disability and illness in women aged 15 to 44 than any other preventable risk factor.
- Domestic or family violence against women is the single largest driver of homelessness for women, a common factor in child protection notifications and results in a police call-out on average once every two minutes across the country.
- The combined health, administration and social welfare costs of violence against women have been estimated to be \$21.7 billion a year, with projections suggesting that if no further action is taken to prevent violence against women, costs will accumulate to \$323.4 billion over a 30-year period from 2014-15 to 2044-45.

As a succession lawyer, elder abuse is something I am very much aware of, and it is an integral subset of DFV. In fact, a rapidly

growing area of concern is the number of older women becoming homeless, often as a consequence of DFV or elder abuse.

Researchers from the School of Arts and Social Sciences at Southern Cross University in Lismore have identified this issue as a 'sleeping giant' that is spread across both metropolitan and regional areas.

World Elder Abuse Awareness Day is on the 15th of this month, and we will be providing links to appropriate resources via [qls.com.au](http://qls.com.au).

## Our Reconciliation Action Plan

Our QLS Reconciliation Action Plan (RAP) has now been conditionally approved by Reconciliation Australia and at the time of writing is awaiting final approval from Council.

We are truly excited by the initiatives we have planned. Through this RAP, we aim to lead the profession in supporting, promoting and improving access for Queensland's Indigenous lawyers.

We are celebrating National Reconciliation Week (27 May-3 June) with a staff morning tea at which Indigenous Lawyers Association of Queensland president Linda Ryle will share her journey in the legal profession and the challenges she has faced as an Indigenous woman.

The next big event in the Indigenous calendar is NAIDOC Week (2-9 July) and in that week we have scheduled 5 July for the official launch of our QLS RAP. On Friday 7 July we are also aiming to show our support with a stall at the Musgrave Park Family Fun Day.

**Christine Smyth**  
Queensland Law Society president

[president@qls.com.au](mailto:president@qls.com.au)  
Twitter: @christineasmyth  
LinkedIn: [linkedin.com/in/christinesmythrobbswatson](https://www.linkedin.com/in/christinesmythrobbswatson)

<sup>1</sup> See [ourwatch.org.au/Understanding-Violence/Facts-and-figures](http://ourwatch.org.au/Understanding-Violence/Facts-and-figures).

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# Ensuring good laws for Queensland

## Call to Parties under way for state poll



### Election time is coming – again – and not just the biennial Queensland Law Society Council elections.

A Queensland state election isn't due until March next year, but given the vagaries of politics it could easily be on the agenda for later this year.

In preparation for the anticipated poll, we are working on a Call to Parties document to highlight the major legal, social justice and democratic issues that are of concern to the legal profession. This will be presented to the major political parties once a poll date is announced, and we would expect the parties to respond by advising on their positions in regard to these issues.

We will disseminate any policy responses from the parties to members for your information.

The Call to Parties document is also of assistance to whichever government may be elected, providing a potential template on which to base a law reform agenda.

We developed what was then called an 'issues paper' for the 2012 state election, highlighting 11 crucial areas requiring reform. These included adequate and sustainable legal assistance for the disadvantaged and better treatment in the criminal justice system for those suffering from mental health issues.

While the former issue is likely to be ongoing into the dim and distant future, progress was made on the latter issue with significant improvement through the *Mental Health Act 2016*.

There were other successes from the 2012 paper, and from other Call to Parties documents prepared on a federal level, but it was our Call to Parties document for the 2015 state election that saw significant change being promoted by the Society.

Among other things, our 'big-ticket' items included reform in the judicial appointments process, a commitment to remove 17-year-old offenders from adult prisons and criminal law reforms, such as the repeal of anti-association legislation and reinstatement of the Murri Court and Queensland Sentencing Advisory Council.

These, and many other items from the 'wish list', have now come to pass.

Of course this doesn't mean our work is done. We are consulting with our policy committees and members to build a new reform agenda, and your contributions are welcome.

The key items this time are likely to include access to justice (which will probably always be on this list) along with other previously canvassed items such as evidence-based policy-making and a comprehensive consultation process for the formation of legislation, along with a call for a judicial commission for Queensland.

However, the content of this document currently remains flexible and, pending final Council approval, we hope that we can again make a difference in ensuring good laws for Queenslanders.

### Delayed judgments service

You don't need me to tell you of the pain that accompanies waiting for a judgment.

It is stressful enough for practitioners, let alone the clients who are simply desperate to have the matter resolved and get on with their lives.

And it is so frustrating to tell clients when they call, often time and time again, that there is nothing to report.

To help alleviate this situation, QLS offers our members a delayed judgments service. If a member advises us of a judgment which appears to have been unduly delayed (or a reserved judgment outstanding for more than three months in the Federal Circuit Court), we follow up with the relevant court to inquire politely whether it is possible to expedite that judgment.

We do appreciate the workload that our judiciary carries, and understand that seeking the delivery of a judgment can be much easier said than done. However, we have had some success with this service, having been able to assist in expediting the delivery of some 34 delayed judgments so far this financial year.

We are currently seeking outcomes for another 53 judgments, of which 14 lie in the Family Court and 13 in the Federal Circuit Court, with the others across various jurisdictions.

If you would like assistance with obtaining a delayed judgment, please email the details to [delayedjudgments@qls.com.au](mailto:delayedjudgments@qls.com.au) or see the quick link to delayed judgments at [qls.com.au](http://qls.com.au) > Knowledge Centre.

**Matt Dunn**

Queensland Law Society Acting CEO

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](http://qls.com.au)

President: Christine Smyth

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Councillors: Michael Brennan, Christopher Coyne,  
Jennifer Hetherington, Chloe Kopilovic, Elizabeth Shearer,  
Kenneth Taylor, Kara Thomson, Paul Tully,  
Karen Simpson (Attorney-General's nominee).

Acting chief executive officer: Matthew Dunn

Editor: John Teerds [j.teerds@qls.com.au](mailto:j.teerds@qls.com.au) | 07 3842 5814

Design: Alisa Wortley

Art direction: Clint Slogrove

Advertising: [advertising@qls.com.au](mailto:advertising@qls.com.au)

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Subscriptions: Hayden De Waal 07 3842 5812

Proctor committee: Adrian Braithwaite, Dr Jennifer Corrin,  
Kylie Downes QC, Steven Grant, Vanessa Leishman,  
Bruce Patane, William Prizeman, Christine Smyth,  
Frances Stewart, Anne Wallace.

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# Public invited to be the judge

A new online tool allows  
Queenslanders to put themselves  
in the shoes of a judge or magistrate  
and find the appropriate sentence  
for an offender.

The Queensland Sentencing Advisory Council (QSAC) has launched an online interactive educational tool to inform the community about the processes involved when members of judiciary sentence offenders.

Attorney-General and Minister for Justice Yvette D'Ath said the Judge for Yourself website, launched last month during Law Week, allowed Queenslanders to hear evidence in three different cases and allocate the appropriate sentence, based on various factors that judges had to consider.

"The cases are based on real cases that have been through the Magistrates, District and Supreme Courts," Ms D'Ath said. "This new resource provides an engaging way for ordinary Queenslanders to gain a better understanding of the way our sentencing processes work."

"The Palaszczuk Government recognises the strong community interest in the criminal justice system and sentencing courts, and this is why we reconstituted the Queensland Sentencing Advisory Council."

QSAC member Dan Rogers said Judge for Yourself showed there was a lot more to sentencing than a headline.

"Sentencing makes our community safer," he said. "It is a rare opportunity to address someone's behaviour and the underlying issues which led to the offences being committed."

The website is aimed at giving the public a better understanding about how the court system works, the roles of key people in the courtroom, and the different sentencing options available, such as fines, good behaviour bonds, parole, suspended sentences and imprisonment.

The Judge for Yourself website is available at [qld.gov.au/judgeforyourself](http://qld.gov.au/judgeforyourself), and the council is also running free live Judge for Yourself community sessions across Queensland this month and next month. See [sentencingcouncil.qld.gov.au](http://sentencingcouncil.qld.gov.au).

# The issues keeping employers awake

Piper Alderman has announced the results of its third Employment Matters survey, 'What's keeping you awake at night?'

The survey invited 2500 HR managers, general managers, COOs, CEOs and legal teams across all industry groups nationally to reflect on their experiences in dealing with employment and safety-related matters over year. The survey also asked for their expectations for the 2017/2018 financial year.

The top three findings were:

- **Business confidence remains steady despite the turbulent political climate of 2016.** 84% of respondent employers reported their headcount would either increase, or stay the same. A strong majority (73%) of employers also anticipated that their employees would receive pay rises in the 2016/17 year, with over a third of employers reporting that employees were likely to enjoy a raise of more than the CPI or minimum Award wage increase.

- **Social media policies are on the rise, but employers face persistent issues with the inappropriate use of social media by employees both during and outside work hours.** 86% of respondent employers reported that they had adopted a social media policy, but a substantial proportion of 37% of employers still had cause to discipline or caution an employee in relation to their use of social media.
- **Performance management is still one of the biggest concerns for employers in 2017.** 80% of employers reported that they were likely to deal with performance management or disciplinary action in the coming year. Along with the ever-present desire for harmonisation of all Australian workplace legislation, a high priority on respondent employers' 'wishlist' for legislative reform was less complexity around the requirements for managing employee work performance.

More information is available at [piperalderman.com.au/publications?article=28421](http://piperalderman.com.au/publications?article=28421).



# Almost half of child porn offenders are children

Children make up almost 50% of the more than 3000 Queenslanders arrested and charged with child pornography offences over the past decade, according to a State Government agency study.

The study also found that, of the 1470 children dealt with by Queensland police in relation to child pornography, more than 45% were young girls and the prevalent type of crimes committed related to 'sexting' explicit material via electronic devices such as mobile phones.

The Queensland Sentencing Advisory Council 'Spotlight' study focused on all of the sentencing outcomes for offences related to producing, possessing and distributing 'child exploitation material' (CEM) between 1 July 2006, and 30 June 2016.

The study found that 3035 offenders were charged with a total of 8198 CEM-related offences and dealt with by the criminal justice system over the 10-year period.

"(Of these) 1470 young offenders were dealt with by Queensland Police Service (QPS) via a caution of conference," a council statement said. "(A total of) 1565 offenders were sentenced in Queensland courts, including 28 young offenders.

"Young people were predominantly diverted by QPS for sexting-based offences."

The phenomenon of sexting was first popularised with the introduction of the mobile phone Short Messaging Service (SMS) and digital sharing functions, and relates to sending, receiving, or forwarding sexually explicit messages, photographs or images.

It may also include the use of a computer or any electronic digital device.

Commonwealth laws dictate that a child under the 17 can be convicted of possessing or distributing child pornography material images or video of themselves or their peers, including those that have been taken or shared consensually.

Under Queensland criminal laws, CEM includes anything that depicts a child under 16 in a sexual context or setting.

"The average age of a (child) dealt with by QPS diversion (rather than the courts) was 14.8 years," the statement said. "Of all the young people diverted by QPS, the vast majority were dealt with via a formal caution (92.9%), with only 7.1% attending a youth justice conference.

"Male offenders comprised 54.8%, while female offenders comprised 45.2%."

– Tony Keim

## Coast firms merge as Sajen Legal

Sunshine Coast law firms Sajen Legal and Ferguson Cannon Lawyers have announced a merger, bringing together almost 50 years of combined practice.

The firms, with offices in Brisbane and Hong Kong, joined forces on 2 May as Sajen Legal with directors Kyle Kimball, Glenn Ferguson AM, Angelo Venardos and Timothy Borham.

"After a combined history of almost 50 years, we've decided that it's time to join forces," Mr Kimball said. "Glenn Ferguson and I worked together as young lawyers and we've maintained a friendship ever since, lasting more than 20 years. It's at last time to do business together rather than in opposition."

Mr Ferguson said that the firm would continue to focus on business law while adding more depth and variety to its services.

Sajen Legal is based at Level 1, 2 Emporio Place, Maroochydore, and retains offices in Brisbane and Hong Kong.

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## Law Week – we love it!

Another great Law Week last month saw high levels of engagement from the profession across a range of events highlighting the role of justice in our community.

The 10th Queensland Legal Walk, in support of LawRight, again drew crowds of practitioners and supporters on 16 May to stride through local centres on a crisp and clear Queensland morning, with the Brisbane walk led by Attorney-General Yvette D'Ath and Chief Justice Catherine Holmes, while in Cairns, QLS president Christine Smyth joined local practitioners.

At QLS, the annual Open Day brought in members for a day of complimentary professional development opportunities covering a range of legal, business and other areas, including practical meditation tips, making a positive difference, the modern legal practitioner, and diversity in the legal profession.

On 17 May, a popular breakfast seminar on leading wellbeing in the legal profession featured Stanwell general counsel Phil Ware and Norton Rose Fulbright director of people & development Rolf Moses. It focused on tackling wellbeing from a supervisor level, assisting attendees to develop their workplace leadership skills and form strategies to support team wellbeing.



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1 and 2. Attendees at the QLS Open Day  
3. Rolf Moses and Phil Ware at the wellbeing breakfast seminar  
4. The Queensland Legal Walk in Brisbane

5. The QLS team at the Queensland Legal Walk  
6. QLS president Christine Smyth at the Queensland Legal Walk in Cairns.



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# 2017 Equity and Diversity Awards



Rounding off a successful QLS Open Day on 17 May, president Christine Smyth presented the annual QLS Equity & Diversity Awards, an initiative of the Equalising Opportunities in the Law Committee.

This year's Large Legal Practice Award was presented to Cooper Grace Ward Lawyers in recognition of its comprehensive and sustainable culture of inclusiveness,

while Miller Harris Lawyers received the Small Legal Practice Award for its demonstrated commitment to the promotion of diversity.

The president of the Indigenous Lawyers Association of Queensland, Linda Ryle, received the inaugural QLS President's Equity Advocate Award to celebrate her lifelong commitment to promoting and fostering diversity within the legal profession.

Above: Miller Harris Lawyers partner Melissa Nielsen (Small Legal Practice Award), Indigenous Lawyers Association of Queensland president Linda Ryle (QLS President's Equity Advocate Award), QLS president Christine Smyth, Cooper Grace Ward people & culture director Neil Baker and CEO Janet Wilson (Large Legal Practice Award).

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# Thoroughly modern advocates

Early career lawyers are big fans of the QLS Modern Advocate Lecture series, with the second 2017 event drawing an enthusiastic crowd on 11 May to hear the former President of the Court of Appeal, the Honourable Margaret McMurdo, deliver an entertaining and informative lecture with practical tips for advocacy both in and out of the courts.



1. Queensland Law Society Ethics Centre director Stafford Shepherd, the Honourable Margaret McMurdo and QLS president Christine Smyth
2. Frances Stewart, Rob Cumming, Jessie Jagger
3. Jacqueline Wootton, Yoshika Robertson, Juliet Walker.



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# Putting justice into perspective

A key component of Queensland Law Society's advocacy role is to engage and educate the community on the way our justice system operates, as **Tony Keim** explains.

## The workings of Queensland's Mental Health Court were thrust into the public spotlight last month with the release of its findings for a North Queensland mother charged with murdering eight children under 15.

The nation reeled in horror when news reports began filtering through that Cairns mother Raina Thaiday, 40, had slain her seven children and a niece at the family's Murray Street home on 19 December 2014.

Police revealed that all eight children – aged between 27 months and 14 – were found stabbed to death and their bodies lay littered about the small suburban home.

While widespread community emotions, concern and disbelief ran high, the complexity of the mother's inexplicable behaviour was compounded by the fact the then-37-year-old had used the murder weapon to inflict injuries on herself, with paramedics finding her at the property with 35 separate knife wounds.

For reasons that became obvious only last month, facts about the story remained unknown for almost 2½ years because of an application by Ms Thaiday's lawyers to Queensland's Mental Health Court for a defence on the grounds of insanity.

Decisions by the Mental Health Court are rarely reported by the media. More often than not it is as a result of the confidential processes of the court, with matters not publicly detailed on law lists under an offender's name. It is also due to the day-to-day court reporting pressures in an environment where print and broadcast news organisations are staffing their court rounds with junior reporters who have limited contact networks or resources.

In recent years some high-profile Mental Health Court cases have slipped past media organisations – with the last major case to attract national coverage occurring almost six years ago.

Again, the confidential workings of the court and prohibitive legislation meant the media could only report basic facts, such as: "A 15-year-old boy has been found mentally unfit to stand trial after he fatally stabbed a 12-year-old schoolmate in the toilets of a Brisbane school in 2010."

At the time of that killing on 15 February that year, all of the details of the attack, including the naming of the victim and commentary about the personality traits of the accused perpetrator, made national headlines and led evening news bulletins for almost a week. However, when Justice Ann Lyons released her findings after a Mental Health Court hearing, all of those details were reduced to a sanitised document, in which the parties' identities were anonymised, touching briefly on the facts of the case and focusing on the state of mind of the assailant and his fitness to stand trial.

The release of Justice Lyons' findings in late October 2011 resulted in an outcry as the public could not comprehend why the juvenile offender would not stand trial and was to be sent to a mental health facility and not a detention centre.

Justice Lyons, in a 25-page decision, found the teenage assailant was clearly of unsound mind at the time of the attack.

Since Justice Lyons' ruling, the Mental Health Court has continued about its business with little fanfare or media attention, until Justice Jean Dalton published her findings in the Thaiday case on 4 May.

Queensland Law Society, in particular president Christine Smyth, moved quickly to address the disconnect and confusion Justice Dalton's reasons were likely to cause the wider community by proactively engaging news media. The motivating features for the strategy, as part of QLS's continued advocacy role to engage and educate the public, was to explain the complexity of the law in cases such as Ms Thaiday's, the reasons for the court's legal obligation, protocols and procedures, and to simplify the legal terminology and features of the case that would ordinarily confound a person without legal training.

Fortunately, Justice Dalton's seven-page ruling made for easy reading – even to the lay person – and explained in simple terms why Ms Thaiday's "defence of insanity under our (Queensland) criminal law is made out" and as such she "was of unsound mind" and unfit for trial.

It was revealed Ms Thaiday had been assessed by five experienced mental health professionals who unanimously agreed the accused murderer was "deprived of the capacity to control herself and the capacity to know that she ought not do the act" of killing the children.

"This matter has proceeded as an uncontested matter ... from the three independent psychiatrists and from my two assisting psychiatrists," Justice Dalton said.

"(They found) Ms Thaiday had a mental illness that deprived her of capacity at the time of the killing (and) is entitled to the defence of unsoundness of mind.

"I will acknowledge what (one senior psychiatrist) said in his advice to me, that in terms of an illness, this is the worst schizophrenia gets, and, of course, one of the most serious results from such an illness – one of the most serious killings that he is aware of."

As a consequence of the finding, Justice Dalton ordered Ms Thaiday be placed under a forensic order that would result in ongoing care and treatment at the secure Brisbane Park Centre for Mental Health.

Understandably all sectors of the media – print, broadcast and online – reported the findings throughout Australia and, as a result, QLS president Christine Smyth responded by holding a press conference and a series of interviews to explain Justice Dalton's decision.

The QLS response was subsequently praised by the majority of reporters who interviewed Ms Smyth. Of particular note were comments of how, until this case, the legal profession had previously been reluctant to discuss what had traditionally been seen as a taboo topic.

Ms Smyth briefed reporters in detail about how the court worked, helped them to understand the reasons behind the decision and orders – in particular why the court's ruling was final (because the 28 days within which to appeal had expired) and why Ms Thaiday would be held and treated in a secure mental health facility until deemed – if ever – fit for release.

She also explained that, should Ms Thaiday ever be released, she would most likely be heavily supervised, monitored and subject to ongoing treatment.

While some sections of the community did voice their anger over Ms Thaiday's avoidance of the criminal law courts, the QLS participation in explaining the process gave more answers to a broad public audience than ever before.

Tony Keim is Queensland Law Society media manager.

# Access to justice: It all comes down to funding

QLS scorecard reveals profession's key concerns

Since 2013, Queensland Law Society (through its Access to Justice and Pro Bono Law Committee) has conducted an annual survey of lawyers to gauge their views about the state of access to justice in Queensland.

In the 2016 Access to Justice Scorecard, lack of funding for legal assistance was yet again a key concern identified by Queensland lawyers.

In April, community legal centres (CLCs) across Australia secured a major commitment by the federal Attorney-General to reverse funding cuts of 30% that were set to commence this month. While this was welcome news, barriers remain for Queenslanders to access the legal help they need, and the justice they deserve.

## Lack of funding for legal help

In every scorecard since 2013, Queensland lawyers have persistently reiterated their concerns about the parlous state of funding for all pillars of the legal assistance sector.<sup>1</sup> The legal profession knows that a well-functioning system requires its frontline agencies to be properly resourced; making services jostle for meagre resources can never adequately deliver justice for vulnerable people.

Last year, Queensland CLCs provided legal help to almost 60,000 people, but an equal number were turned away. People suffer – they lose their children; their livelihoods; their money; their hope.

People like Rachel, a single mother of two whose former partner is abusive and threatens her safety and that of her two sons. While Rachel is trying to formalise the divorce, she is also forced to seek a domestic violence order. Without a community lawyer representing her, Rachel's legal problems would have multiplied.

Or Dave, who started a traineeship after he left school. Dave's boss refused to pay him for the overtime he worked and sacked him when he complained, months before the end of his traineeship. A community lawyer helped Dave negotiate the system to recover his unpaid wages.

Or Arlia, who got help from a community lawyer to escape her violent husband and apply for protection, having arrived in Australia on a spousal visa.

## Funding cuts – no way to run a business

The proposed funding cuts to CLCs were announced in 2013, prior to the introduction of a National Partnership Agreement on Legal Assistance Services that was intended to provide funding certainty until 2020. Instead, this sword of Damocles has undermined efforts to deliver services to Queensland clients.

For months, CLCs have been planning to implement cuts on the ground. CLC staff are leaving for jobs with greater certainty and stability. Entire programs have been wound back or closed, with more vulnerable clients being turning away.

When the Queensland Government announced how the Federal Government's funding reduction would be shared across the state in March<sup>2</sup> more legal programs were placed at risk, including specialist help for Aboriginal mothers on Palm Island; young people leaving state care; people leaving prison without adequate support.

As QLS president Christine Smyth said at this year's QLS Symposium: "Our CLCs are in a state of crisis and are heading toward extinction due to the federal funding fiscal cliff; their future is now at risk. This means that basic justice... is being denied in particular to tens of thousands of people who are disadvantaged in our community each year."<sup>3</sup>

Unexpectedly, the Federal Government announced that the funding would be reinstated following sustained advocacy from a broad alliance of lawyers, churches, unions, opposition/cross-bench/state MPs, universities and community groups, and strong media coverage. Professional associations including QLS played a key role, with the Attorney-General acknowledging that "[t]he legal profession, in aggregate, has been active and influential in engaging with the Government and once again, it is as a result of that engagement that these decisions ... have been made".<sup>4</sup>

## Looking ahead

The decision to reinstate funding to CLCs is welcome, but it only reverses imminent damage and does nothing to future-proof the legal assistance sector from further cutbacks. Nor does it inject any new money into an already overburdened system. The Productivity Commission conservatively estimates that \$200 million a year is needed for legal providers to expand their services. To put this funding need in context, \$200 million is only slightly more than a quarter of what the Commonwealth Government annually spends on external legal services.<sup>5</sup>

## Access to justice and innovation

Sustainable, recurrent funding also helps to drive innovation in the legal assistance sector. The use of technology to reduce costs for parties and to simplify complex court procedures requires an investment in human and technical resources. A number of sentiments expressed in the 2016 Scorecard focused on how much more could be done to embrace innovations in modern technology, especially to assist increasing numbers of self-represented litigants appearing in court.

by Monica Taylor and James Farrell



While innovation is important, it's vital that vulnerable Australians are provided with a safety net when they face legal problems that affect their jobs, homes and families. Current investment is grossly inadequate, and funding must be sustainable to ensure people can get access to legal help when they need it. QLS members recognise the need for adequately funded services, and will continue to advocate for governments to meet growing demand for assistance.

A full copy of the 2016 QLS Access to Justice Scorecard Survey is available at [qls.com.au](http://qls.com.au) > Knowledge centre > Access to justice > Access to Justice Scorecard.

Monica Taylor is the director of the UQ Pro Bono Centre. James Farrell OAM is the director of Community Legal Centres Queensland. Both are members of the QLS Access to Justice and Pro Bono Law Committee.

#### Notes

- <sup>1</sup> The four pillars of legal assistance services in Australia are: Legal Aid Commissions; Community Legal Centres; Aboriginal and Torres Strait Islander Services; Family Violence Prevention Legal Services
- <sup>2</sup> See, for example, statement by Attorney-General Yvette D'Ath, 'Government announces funding for Community Legal Centres', media release, 27 March 2017, [statements.qld.gov.au/Statement/2017/3/27/government-announces-funding-for-community-legal-centres](http://statements.qld.gov.au/Statement/2017/3/27/government-announces-funding-for-community-legal-centres).
- <sup>3</sup> Christine Smyth, 'President's opening address: CLC Funding', speech delivered at the QLS Symposium, Brisbane, 18 March 2017, [qls.com.au/About\\_QLS/Council/Speeches/QLS\\_Symposium\\_2017\\_Day\\_2](http://qls.com.au/About_QLS/Council/Speeches/QLS_Symposium_2017_Day_2).
- <sup>4</sup> Federal Attorney-General George Brandis SC, 'Announcement of funding injection for legal assistance sector', speech delivered at Women's Legal Service, Annerley, 24 April 2017, [attorneygeneral.gov.au/transcripts/Pages/2017/SecondQuarter/Record-Funding-for-Legal-Assistance.aspx](http://attorneygeneral.gov.au/transcripts/Pages/2017/SecondQuarter/Record-Funding-for-Legal-Assistance.aspx).

- <sup>5</sup> In 2015-2016, external legal services expenditure reported by Commonwealth agencies was \$399.89 million: Attorney-General's Department Legal Services Expenditure Report 2015-2016, [ag.gov.au/Publications/Documents/Commonwealth%20Legal%20Services%20Expenditure/Legal-Services-Expenditure-Report-2015-16.pdf](http://ag.gov.au/Publications/Documents/Commonwealth%20Legal%20Services%20Expenditure/Legal-Services-Expenditure-Report-2015-16.pdf).

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# The pendulum swings in favour of DV victims

The changes to the *Domestic and Family Violence Protection Act 2012*

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With the amended *Domestic and Family Violence Protection Act 2012* in effect from 30 May, **Gavin Lai** and **Paula Vallance** discuss the changes practitioners must be aware of.



**The Domestic and Family Violence Protection and Other Legislation Bill 2016<sup>1</sup> (the Bill) was introduced by the Minister for the Prevention of Domestic and Family Violence, Shannon Fentiman,<sup>2</sup> on 16 August 2016.<sup>3</sup>**

It was passed in the Queensland Parliament with amendment on 11 October 2016 and was assented to on 20 October 2016.<sup>4</sup>

The Bill was recently proclaimed by the Governor of Queensland on 6 April 2017 and came into effect on 30 May 2017.<sup>5</sup>

The Bill makes significant amendments to the *Domestic and Family Violence Protection Act 2012*<sup>6</sup> (the Act) which are now in effect.

This article reports on these amendments and the numerous implications for legal practitioners and the parties, including the objectives and practical application of the changes.

## Objectives

The amendments implement the five key recommendations of the Special Taskforce on Domestic and Family Violence in Queensland (the taskforce) in its report, aptly entitled 'Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland'.<sup>7</sup>

The policy objectives of the Bill (and the reasons for them) are:<sup>8</sup>

1. to provide victims of domestic and family violence with access to earlier and more tailored protection
2. to ensure victim safety is at the forefront of the justice response to domestic and family violence
3. to require police to consider how immediate and effective protection can be provided to victims pending a court's consideration of an application for a domestic violence order (DVO)

4. to provide for the automatic mutual recognition of DVOs made in other Australian jurisdictions through the National Domestic Violence Order Scheme (NDVOS)
5. to hold perpetrators of domestic and family violence more accountable and encourage them to change their behaviour.

## The amendments

There are several significant amendments, including:

### Requiring police to consider the provision of immediate protection and expanding the operation of Police Protection Notices (PPNs)

In 2012, the Act was amended to enable police officers to issue PPNs at the same location as the respondent if holding a reasonable belief that a PPN was necessary or desirable to protect the aggrieved from domestic violence, to offer immediate protection to the aggrieved (but not their children, relatives or associates).

Prior to the amendments, a PPN would generally include:

- a. the standard mandatory conditions that the respondent be of good behaviour towards the aggrieved and not commit domestic violence against the aggrieved, and
- b. the option of a 24-hour 'cool down' condition that excluded the respondent from the family home or prevented them from contacting the aggrieved.

The taskforce noted that the limited protection offered by PPNs and restrictions on their use discouraged police officers from using them. It recommended the operation of PPNs to enhance victim safety and perpetrator accountability, while providing efficiencies for the police and the court.

The amendments now significantly broaden the scope of PPNs, allowing them to be made even if *the respondent is not present*.

Further, police now have extended powers to include additional conditions on PPNs, including but not limited to:<sup>9</sup>

- a. an 'ouster' condition for circumstances in which it is necessary or desirable to stop the respondent returning to where the aggrieved lives or to remove the respondent from where the aggrieved lives, even if the aggrieved and the respondent have both lived together
- b. an order that the respondent be prohibited from contacting the aggrieved
- c. the inclusion of the aggrieved's children, relatives or associates on the PPN.

The Bill amends the *Weapons Act 1990*<sup>10</sup> to provide that any weapons licence held by a respondent named in a PPN is suspended for the duration of the PPN – in the same way that licences are suspended when a court issues a temporary protection order (TPO). The respondent will also be required to surrender their weapon in the same way as when a TPO is made. This approach will be adopted for release conditions.

The Bill simplifies the current range of police responses by expanding the role of PPNs, giving police more flexibility to issue and serve notices while preserving current safeguards and court oversight of PPNs. Senior officers will continue to approve the issuing of PPNs and/or the conditions in them, and notices will continue to commence a court application for a DVO.

Police will continue to be prevented from issuing cross-notices or issuing a PPN when a notice has already been issued or a DVO has been made involving the same parties. In these circumstances, police will use existing processes under the Act to provide appropriate protection and in cases where people who are not already a respondent to a notice or order are detained, police will continue to be required to issue release conditions to protect victims until these matters can be considered by a court.



## Expanded power to direct a person to move to and remain at a place

Under Section 134 of the Act, a police officer who intends to issue a PPN, serve an application for a protection order, serve a DVO or explain the conditions in a DVO, can direct a respondent to remain at an appropriate place so the police officer can carry out those activities. It is an offence for the respondent to fail to comply with such a direction.

The Bill expands the current power to allow a police officer to direct a person to move to and remain at another appropriate place so a police officer can serve an application for a protection order, serve a DVO or issue or serve a PPN.

Subsequent refusal by a respondent to comply with these directions may well result in a criminal charge of obstruction of police and/or failure to comply pursuant to the *Police Powers and Responsibilities Act 2000*.

The additional power will assist the police to de-escalate domestic violence situations by separating the parties, enhance opportunities for respondents to understand and explain the documents that are being served on them, and help police to reinforce to the parties the seriousness of the violence that has occurred.

## Grounds for a DVO

Under Section 37(1)(b) of the Act, victims can be protected by a DVO if a court is satisfied that, among other things, the respondent has committed domestic violence against the person.

The current definition of 'domestic violence' in Section 8 of the Act is broad and includes behaviour that is threatening or coercive, or that in any other way is controlling or dominating, causing a person to fear for their safety or wellbeing or that of someone else.

However, the use of the phrase, "has committed domestic violence" can create a misperception that an act of physical violence 'must' occur before victims can obtain a DVO.

The Bill now clarifies that a court can issue DVOs on the basis that victims have been threatened or have a fear that the respondent will commit domestic violence, by inserting a note referring to the definition of domestic violence, more specifically sections 8, 11 and 12 of the Act, into Section 37 of the Act.

## Tailoring conditions in DVOs

All DVOs include standard conditions that the respondent must be of good behaviour towards the aggrieved and any named person, and must not commit domestic violence.<sup>11</sup>

Courts have discretion to impose other conditions that are necessary or desirable in the interests of the aggrieved, any named person (including any child/children) or the respondent.<sup>12</sup>

The amendments to section 57(1) of the Act make it mandatory for the court to specifically consider the making of other conditions for the protection of the aggrieved, or any other person (including any child/children).<sup>13</sup> Previously, the court only had the discretion to impose further orders, whereas the legislation now requires the magistrate to turn their mind to imposing other conditions at the time of making the order.

To achieve consistency with the test for making DVOs and improve victims' ability to obtain 'tailored' protection, the Bill:

- explicitly requires courts to consider imposing additional, more specific conditions in the order, and
- requires courts to consider what other conditions are necessary or desirable to protect the aggrieved or any named person from domestic violence.

## Duration of a protection order

Under Section 97 of the Act, a protection order can last for up to two years, unless courts are satisfied there are "special reasons" for imposing a longer duration.

The taskforce identified that the review of the Act should consider clarifying the circumstances in which a protection order may be extended beyond two years.

The Act broadens the courts' discretion to determine the appropriate length of a protection order and clarifies that the paramount principle in determining the appropriate duration of an order is *the safety, protection and wellbeing of the victim*.

If a court does not specify the duration of a protection order, it will remain in force for a minimum period of five years from when it is made, unless the court is satisfied there are reasons for making an order that lasts for less than five years.

Strict interpretation of the amendments to the Act seem to indicate that the five-year enforcement period came into effect on 30 May 2017, even though a protection order application may have been filed prior to this date. The amendments make it clear that the enforcement period will run from the time that the protection order is made, being either at an interim stage or final hearing.<sup>14</sup>

The Bill provides that when there is a variation application to reduce the length of an order, the court may only make the variation if it considers there are reasons for doing so.

The paramount principle in determining such application will continue to be *the safety, protection and wellbeing of the aggrieved, and any children or named person*.

## Consideration of family law orders

Courts currently have broad discretion to consider family law orders that they are aware of and to consider using their powers under the *Family Law Act 1975*<sup>15</sup> to modify or suspend the order in light of the proposed conditions in a DVO.

The taskforce noted that victims are often faced with DVOs and family law orders that have inconsistent terms dealing with living/care arrangements between parents and children.

The Bill strengthens the current obligation by requiring a court to *always* consider any family law order it is aware of and to *always* consider whether to exercise its powers to resolve any inconsistency between the order and the proposed DVO.

## Respondents' non-compliance with Voluntary Intervention Orders (VIOs)

Courts are able to make VIOs when a respondent agrees to attend an approved intervention program or counselling. Courts can currently consider a respondent's compliance with the order in deciding whether to make a protection order, and must consider it in deciding whether to vary a DVO.

The taskforce identified issues with the operation of VIOs, including that the current provisions enable courts to 'bargain' with, or 'reward' respondents by not making a protection order, or making a shorter-term protection order when they complete a VIO.

The Act addresses this by providing that:

- Courts must consider a respondent's non-compliance with an intervention order when deciding whether to make a protection order or vary a DVO.
- While a court may consider a respondent's compliance with an intervention order, it must not refuse to make a protection order or vary a DVO merely because a respondent has complied.

The Act also changes the name of VIOs to *intervention orders*, with a view to clarifying that once a respondent has agreed to an intervention order being made, they should comply with it in the same way as they should comply with other court orders.

## Information sharing between government and/or non-government agencies and organisations

The Act previously did not enable information to be shared between government agencies and/or non-government organisations that provide domestic and family violence services. Instead, a range of legislation governed the sharing of particular types of information.



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The taskforce identified that this complex overlay of legislative provisions created confusion and uncertainty, and could prevent or delay agencies being able to adequately assess risk and provide services.

The Act provides a framework that enables certain government and non-government service providers to share victim and perpetrator information in certain circumstances for the purpose of assessing risk and managing cases when there is a serious threat to a person's life, health or safety because of domestic violence.

The Act contains a specific principle that sharing information with consent is the *preferred* approach, but it *prioritises* the safety of victims and their families by enabling information sharing to occur *without* consent.

The Act includes specific safeguards to prevent the inappropriate sharing of information and protect people's privacy. These include:

- a. a requirement for the chief executive of the Department of Communities, Child Safety and Disability Services to develop information-sharing guidelines in consultation with the Privacy Commissioner that provide for the secure storage, retention and disposal of information and guidance on which information should be shared, and
- b. penalties of up to two years' imprisonment (or 100 penalty units)<sup>16</sup> for the inappropriate use or disclosure of information.

The Act provides that the provisions will operate in conjunction with the *Information Privacy Act 2009*.<sup>17</sup> This will enable agencies and funded service providers to continue to share information in circumstances in which there are reasonable grounds to believe the disclosure is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of an individual, or to public health, safety or welfare.

## Police referrals to specialist DFV service providers

The taskforce noted that when police attend a domestic violence incident, they are required to obtain consent before referring a victim to support services. Although the taskforce supported this continuing, it noted that referrals without consent should be allowed where the risk is assessed as 'high'.

The Act enables police to share a limited range of information with specialist DFV service providers if there is a domestic violence threat to a victim's life, health or safety, or if the person has committed domestic violence.

## Legal framework for the NDVOS in Queensland

Previously the Act provided that DVOs made anywhere in Australia or in New Zealand were recognised and enforceable in Queensland when an aggrieved manually registered their order with a Queensland Magistrates Court.

The taskforce heard about the difficulties victims faced and the lack of protection for them when they 'flee' to or from Queensland, live in border areas such as Tweed Heads or Coolangatta, or live and work in different states. It supported Queensland's participation in the NDVOS to improve cross-jurisdiction protection for victims.

The Act improves safeguards for victims and streamlines processes by:

- a. removing the manual registration process and providing for the automatic recognition of interstate orders, so victims do not need to engage with a court in their new location
- b. treating the contravention of an interstate DVO as if it were a Queensland DVO
- c. recognising any disqualifications attached to an interstate DVO (for example, to hold a firearm or weapon licence)
- d. allowing for the exchange of information about DVOs between Queensland and interstate courts and police
- e. Increasing penalties for breaching PPNs and release conditions.

Until the *Criminal Law (Domestic Violence) Amendment Act 2015*<sup>18</sup> increased the penalties for breaching court-issued DVOs, the maximum penalty for breaching PPNs and release conditions was consistent with the maximum penalty for breaching DVOs in circumstances in which the respondent did not have any previous aggravating convictions.

The Act restores consistency by increasing the maximum penalty for breaching a PPN or a release condition from two years' imprisonment (or 60 penalty units)<sup>19</sup>, to three years' imprisonment (or 120 penalty units).<sup>20</sup>

## Closing thoughts

It is self-evident that the pendulum has well and truly swung in favour of victims of domestic and family violence.

It is important to remember that the central focus of the Act is on 'victim safety'. Accordingly, it is presumed (and expected by community standards) that the court will proactively adopt this central focus in determining whether a protection order is necessary or desirable in the particular circumstances of each matter.

Finally, it should be noted that the criminal liability that attaches upon a breach of a protection order has not been amended (intentionally or otherwise). Accordingly, it would also be prudent for legal practitioners to advise clients that the sensitive nature and the protective approach of the legislation may mean that harsher penalties may be imposed, despite no change to these sections.

Gavin Lai is the senior managing solicitor and Paula Vallance is a solicitor at Emerson Family Law, Brisbane.

### Notes

- <sup>1</sup> Available at [parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2016/5516T1245.pdf](http://parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2016/5516T1245.pdf).
- <sup>2</sup> Shannon Fentiman MP is the Minister for Communities, Women and Youth, Minister for Child Safety and Minister for the Prevention of Domestic and Family Violence.
- <sup>3</sup> See [parliament.qld.gov.au/documents/tableOffice/BillMaterial/160816/Domestic.pdf](http://parliament.qld.gov.au/documents/tableOffice/BillMaterial/160816/Domestic.pdf) for explanatory speech by the Minister on 16 August 2016.
- <sup>4</sup> Refer to the previous *Proctor* article prepared by Ms Fentiman – December 2016, Vol.36 No.11 (pp24-25) which discusses the reforms introduced through amendments to the *Domestic and Family Violence Protection Act 2012*.
- <sup>5</sup> See [legislation.qld.gov.au/Leg\\_Info/WeeklyNotifs/2017/SLNNotif%20170407.pdf](http://legislation.qld.gov.au/Leg_Info/WeeklyNotifs/2017/SLNNotif%20170407.pdf).
- <sup>6</sup> See : [legislation.qld.gov.au/LEGISLTN/CURRENT/D/DomeFamVPA12.pdf](http://legislation.qld.gov.au/LEGISLTN/CURRENT/D/DomeFamVPA12.pdf).
- <sup>7</sup> See [qld.gov.au/community/getting-support-health-social-issue/dfv-read-report-recommendation/index.html](http://qld.gov.au/community/getting-support-health-social-issue/dfv-read-report-recommendation/index.html) to obtain an electronic copy of the report released by Queensland Premier Anastasia Palaszczuk on 28 February 2015. In particular, see recommendations 78, 90, 99, 112 and 140 of the report.
- <sup>8</sup> See [parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2016/5516T1246.pdf](http://parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2016/5516T1246.pdf) for the explanatory notes.
- <sup>9</sup> Section 106A of the Act provides for an expansion of the previous powers and provides other conditions for PPNs that were previously not specified under the requisite legislation.
- <sup>10</sup> [legislation.qld.gov.au/LEGISLTN/CURRENT/W/WeaponsA90.pdf](http://legislation.qld.gov.au/LEGISLTN/CURRENT/W/WeaponsA90.pdf).
- <sup>11</sup> Section 58 of the Act.
- <sup>12</sup> Section 57(1) of the Act.
- <sup>13</sup> Such other conditions must be necessary and desirable for the protection of the aggrieved and/or any other named person.
- <sup>14</sup> There is an onus on the party seeking a period of less than five years to satisfy the court that there are reasons for doing so. Accordingly, the court would need to be satisfied, on the balance of probabilities, in exercising its discretion in this regard.
- <sup>15</sup> [legislation.qld.gov.au/Details/C2016C00694](http://legislation.qld.gov.au/Details/C2016C00694).
- <sup>16</sup> Equivalent to \$12,190 for 100 penalty units (from 1 July 2016) – see [qld.gov.au/law/crime-and-police/types-of-crime/sentencing-fines-and-penalties-for-offences](http://qld.gov.au/law/crime-and-police/types-of-crime/sentencing-fines-and-penalties-for-offences).
- <sup>17</sup> [legislation.qld.gov.au/LEGISLTN/CURRENT/I/InfoPrivA09.pdf](http://legislation.qld.gov.au/LEGISLTN/CURRENT/I/InfoPrivA09.pdf).
- <sup>18</sup> [legislation.qld.gov.au/Bills/55PDF/2015/CriminalLawwwwDVAmdb15.pdf](http://legislation.qld.gov.au/Bills/55PDF/2015/CriminalLawwwwDVAmdb15.pdf).
- <sup>19</sup> Equivalent to \$7314 for 60 penalty units (from 1 July 2016) – see [qld.gov.au/law/crime-and-police/types-of-crime/sentencing-fines-and-penalties-for-offences](http://qld.gov.au/law/crime-and-police/types-of-crime/sentencing-fines-and-penalties-for-offences).
- <sup>20</sup> Equivalent to \$14,628 for 120 penalty units (from 1 July 2016) – see [qld.gov.au/law/crime-and-police/types-of-crime/sentencing-fines-and-penalties-for-offences](http://qld.gov.au/law/crime-and-police/types-of-crime/sentencing-fines-and-penalties-for-offences).





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# Turbines tussle may test free trade agreement

Exploring domestic and international options for settlement



The New South Wales Court of Appeal has dismissed an appeal by Power Rental Op Co Australia (OpCo) against a decision by the New South Wales Supreme Court which held that the interest in millions of dollars' worth of wind turbines vested in Forge Group Power Pty Ltd (Forge) upon it entering administration due to the operation of the *Personal Property Securities Act 2009* (Cth) (PPSA).<sup>1</sup>

This article considers what steps are now available to OpCo or its parent company, APR Energy PLS (APR), including pathways to investor-state arbitration against the Commonwealth of Australia.

## Background

Forge entered into an agreement to lease four mobile gas turbines from General Electric International Inc. (GE) for a fixed-term period. In October 2013, APR bought the business that leased the turbines to Forge. As a consequence, the lease and title of the turbines were subsequently assigned to the two US subsidiaries of APR, OpCo and Power Rental Asset Co Two LLC.

The turbines were subject to a lease when Forge went into voluntary administration in March 2014. At first instance, the court found that the lease for the turbines was a PPS lease under section 13 of the PPSA, which gave rise to a security interest to GE.

Accordingly, Justice Hammerschlag held that because APR had failed to register its security interest under the Personal Property Securities Register (PPSR) the interest in the turbines automatically vested in Forge immediately prior to it entering into voluntary administration.



A recent decision by the NSW Court of Appeal leaves United States interests considering their options for a leasing deal gone wrong.

Report by **Erika Williams**.



The recent judgment provided by the Court of Appeal dismissed OpCo's appeal on Justice Hammerschlag's decision and found that:

- a. The definition of 'fixtures' under s10 of the PPSA imported its common law meaning, namely that fixtures are tangible property affixed to the land. The reusable nature of the turbines directed the court to conclude that the turbines could not be deemed as fixtures for the purposes of the PPSA.
- b. The turbines were installed with the intention of removing them after two years. Therefore the primary judge was correct in concluding that the turbines were not fixtures due to the 'temporary nature' of the affixation as per the purposes of the PPSA and its associated common law concepts.

## What are APR's options?

### Domestic avenues

APR, or related entity OpCo, has applied to the High Court of Australia for special leave to appeal the Court of Appeal decision. The *Judiciary Act 1903* (Cth) sets out the matters the High Court may take into account when considering whether it will grant special leave to appeal.

These matters include whether the proceedings involve a question of law or are a matter of public importance. Other proceedings that may be granted special leave to appeal include when the High Court is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law and when the interests of justice require the consideration of the High Court.

If special leave to appeal is granted, APR or OpCo will then be able to proceed to have the substance of the appeal heard in the High Court of Australia, Australia's highest court.

If APR is unsuccessful in the High Court, it will have exhausted its legal avenues in the Australian legal system.

### International avenues

APR has reportedly brought an action against the Commonwealth of Australia, seeking to rely on the most favoured nation clause in the Australia-United States free trade agreement (AUSFTA) to import the ISDS mechanism from the Australia-Hong Kong bilateral investment treaty (BIT). The Australia-Hong Kong BIT was relied on by Philip Morris Asia Limited (Hong Kong) to bring an action against the Australian Government in respect of Australia's introduction of legislation mandating the plain packaging of tobacco products. This action failed following a preliminary hearing when the tribunal determined that it did not have jurisdiction to hear the claim, as it held that Philip Morris's restructure was for the principle, if not the sole, purpose of gaining protection under the BIT.

The Australian Attorney-General's Department has disputed that APR has any right to bring a claim against Australia and has stated that APR "cannot rely on other agreements in order to create jurisdiction". Australia should follow a similar course to how it conducted the Philip Morris case and apply for a bifurcation of the proceedings to have the question of jurisdiction determined at a preliminary hearing.

If a tribunal finds that it does not have jurisdiction to hear the dispute because APR cannot import the investor-state dispute settlement (ISDS) provisions of the Australia-Hong Kong BIT, then it will be another victory for the Commonwealth. It should be noted, however, that the Philip Morris arbitration took more than four years for the award on jurisdiction to be made, so it may be some time before we know the outcome of any preliminary hearing in the APR arbitration.

APR would be wise to continue simultaneously pursuing procedural steps available to it to bring an action against Australia under the investment chapter of the AUSFTA. The investment chapter of the AUSFTA is Chapter 11. Article 11.16 of the AUSFTA provides:

"Article 11.16: Consultations on Investor-State Dispute Settlement

1. If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.
2. For greater certainty, nothing in this Article prevents a Party from raising any matter arising under this Chapter pursuant to the procedures set out in Chapter 21 (Institutional Arrangements and Dispute Settlement). Nor does anything in this Article prevent an investor of a Party from submitting to arbitration a claim against the other Party to the extent permitted under that Party's law."

There are three separate elements in this provision that need to be considered.

1. consultations on developing procedures for investor-state dispute settlement
2. raising the matter pursuant to the procedures set out in Chapter 21
3. submitting a claim to arbitration to the extent permitted under that party's law.

Upon considering the three elements outlined above, it will become evident why APR is reportedly campaigning the US Government to take action on its behalf. The following analysis is based on the present situation whereby the US would be the party seeking to negotiate the resolution of a dispute arising in respect of Australia. If an Australian investor in the US found itself aggrieved by actions of the US Government, the same procedures would apply in reverse.

### 1. Consultations on developing procedure for investor-state dispute settlement

The important distinction between paragraphs 1 and 2 of article 11.16 is that paragraph 1 contemplates a mechanism by which an *investor* of the US may be able to submit an investment claim to arbitration against Australia. Paragraph 2 on the other hand contemplates options available on a state-to-state level.

It is not, however, a straightforward process and it is apparent that APR cannot commence any action against Australia without US Government intervention.

Firstly, the US Government would need to consider there is a change in circumstances affecting the settlement of investment disputes *and* in light of such change an investor-state arbitration mechanism should be discussed at the state-to-state level. The guide to the AUSFTA published by the Department of Foreign Affairs and Trade (DFAT) elaborates by stating the “change in circumstances” relates to the parties’ economic and legal environments. Obviously the political environment has recently changed; Trump is now President and the Trump-Turnbull dynamic is reportedly strained. It is probably a stretch to argue that this change in political dynamics constitutes a change in the parties’ economic and legal environments sufficient to affect the settlement of investment disputes *and* that the state parties should consequently consider allowing investor-state arbitration.

APR would have difficulty arguing that the ‘expropriation’ of its turbines arises from a change of circumstances in Australia’s legal environment since it contracted with Forge. The PPSA came into effect in January 2012 which was about 12 months before Forge and GE entered into the lease for the turbines. Accordingly, APR’s loss of its security interest in the turbines did not arise from a supervening government act, rather, it is a consequence of GE’s, and subsequently APR’s, failure to comply with legislation in force at the time of contract.

In any event, even if the US Government could argue that a change in circumstances has occurred, all it would be able to do under paragraph 1 of article 11.16 is request consultations with Australia regarding the “development of procedures that may be appropriate”. Even then, there is no requirement in the provision for the parties to reach any definite agreement.

The language of the provision is rather non-mandatory and does not require any particular action by Australia, even if the US requested consultation. Accordingly, unless Australia agreed to engage with the US, paragraph 1 of article 11.16 is not likely to assist APR in bringing an investor-state arbitration against Australia.

### 2. Raising the matter pursuant to the procedures set out in Chapter 21

Paragraph 2 of article 11.16 makes it clear that a request for consultations on investor-state dispute settlement under paragraph 1 of the article does not preclude the US Government from raising the matter under Chapter 21 of the AUSFTA, which relates to institutional arrangements and dispute settlement between the state parties. For APR to obtain any assistance under Chapter 21, it would need the US Government to take action on its behalf.

The DFAT guide states that Chapter 21 “establishes a fair, transparent, timely and effective procedure for settling disputes” under the AUSFTA. Importantly, the guide clearly distinguishes Chapter 21 as a mechanism *not* available for investors to bring an action against Australia but rather a mechanism for the resolution of disputes on the state-to-state level.

Relevantly, Chapter 21 applies to resolve a dispute regarding the interpretation or application of the AUSFTA or where the US considers that Australia has a measure that is inconsistent with its obligations or has failed to carry out its obligations under the AUSFTA.

The stages of dispute settlement under Chapter 21 involve:

- a. The US Government may request consultations to which Australia is expected to reply and enter into in good faith.
- b. If consultations fail to resolve the matter, the dispute may be referred by either party to the AUSFTA Joint Committee which will endeavour to resolve the matter.
- c. If the joint committee fails to resolve the matter, the US may refer the matter to a dispute settlement panel which will prepare and present a report containing its findings and determinations.

If a breach of the AUSFTA is identified in the panel’s report, Chapter 21 provides a range of solutions, including requiring Australia to correct the breach or provide trade compensation to the US. If a breach cannot be rectified, Australia may be required to pay a monetary assessment which can be paid into a joint fund to be spent on initiatives which facilitate trade between the two countries. Failure to pay a monetary assessment may result in the suspension of AUSFTA benefits ordinarily conferred on Australia.

As mentioned above, the protections in Chapter 21 would only be of use to APR if it is successful in lobbying the US Government to take action on its behalf.

### 3. Submitting a claim to arbitration to the extent permitted under that Party’s law

Finally, paragraph 2 of article 11.16 also clarifies that nothing in the article precludes a US investor from submitting an arbitration claim against Australia to the extent permitted under Australian law.

The relevant law is the *International Arbitration Act 1974* (Cth) (IAA). Section 32 of the IAA provides that Chapters II to VII of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States have the force of law in Australia.

Chapter II of the convention sets out the jurisdiction of the International Centre for Settlement of Investment Disputes (ICSID), which is established by the convention. Article 25 provides that the ICSID shall have jurisdiction over any legal dispute arising out of an investment between a contracting state and a national of another contracting state, in this case between Australia and a national of the US. However, in order for the ICSID to have jurisdiction over the disputed matter, the parties to the dispute must consent in writing to submit the dispute to the ICSID.

In effect, APR is not precluded from having its dispute determined by the ICSID; however it would need Australia’s consent in order to do so.

### Blocked at every turn?

It seems that APR is attempting to import the ISDS mechanism from the Australia-Hong Kong BIT and ignore the fact that there is no such mechanism in the AUSFTA, as it is clear from the above analysis that direct avenues to bring an action against the Commonwealth of Australia are limited and the assistance of the US Government or the consent of the Australian Government appears to be necessary to enliven any dispute resolution mechanism under the AUSFTA. Given the current political climate, the likelihood of the states collaborating to allow APR to bring an investor-state claim against Australia is probably low.

In the meantime, Australia should move quickly to have the arbitration bifurcated so that the preliminary question of jurisdiction can be determined early, and hopefully nip this claim in the bud.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee. Erika Williams is a senior associate at McCullough Robertson and a member of the committee.

#### Note

- <sup>1</sup> *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed)* [2017] NSWCA 8.

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Rates have now reduced in each of the last three years. Lexon's chairman during this key period, Glenn Ferguson AM, sees this as a validation of the company's strategic direction. Following the announcement of the new rates he said: "The Board has focused on providing tangible benefits to the profession and has a long-term commitment to delivering an exceptional insurance product at the best possible price. We could not do that without the profession actively embracing Lexon's risk management message nor without the continuing support of the QLS Council."

With rates now at their lowest levels since the introduction of the current levy model in 2007/8, the reduced cost of doing business should assist all insured practices in this challenging business environment. Of course, the current low levels of claims also improve consumer confidence in the profession and reduce the overall emotional toll on practitioners from claim events.

The long-term exceptional claims performance in the criminal law area will also be recognised in 2017/18 with a further 20% base levy discount applying to any insured practice which derives at least 90% of its GFI from that area.

After the successful launch of our top-up product last year, Lexon and QLS are again offering QLS members the additional comfort of professional indemnity cover beyond the existing \$2 million per claim provided to all insured practitioners. This option is available

at very competitive rates with practitioners having the choice of increasing cover to either \$5 million or \$10 million per claim. Pricing was provided in your renewal pack sent by QLS. If you are interested in either of these options, please contact the Lexon team.

### Areas of law practised in Queensland

The graphic below depicts the comparative size of the areas of law (by GFI) practised by Lexon insureds over the period 2013 to 2016.

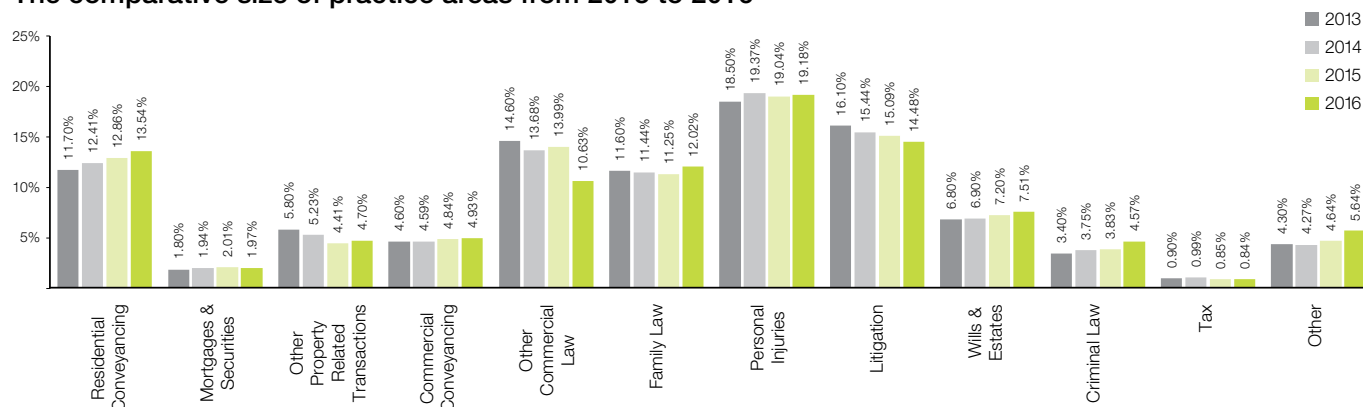
Personal injuries work remains the largest area of activity – consistently at or about 19%. Some interesting trends are starting to emerge in other areas, such as residential conveyancing, which has been growing strongly year on year. Wills and estates also continues to grow – a trend we do not expect to change in the medium term. The proportionate decline in litigation and other commercial law (that is, corporate, sale and purchase of business, insolvency and trusts) since 2013 perhaps reflects the current sedate business environment.

I am always interested in receiving feedback, so if you have any issues or concerns, please feel free to drop me a line at [michael.young@lexoninsurance.com.au](mailto:michael.young@lexoninsurance.com.au).

Michael Young  
CEO

<sup>1</sup> Base levy rates have been reduced by 20% for each of Bands 2 through 9.

### The comparative size of practice areas from 2013 to 2016



# Top-up insurance now available!

QLS Council has arranged with Lexon to again make top-up insurance available to QLS members who would like the additional comfort of professional indemnity cover beyond the existing \$2 million per claim provided to all insured practitioners.

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## Getting ready for the end of year – practice changes (mergers, acquisitions, splits and dissolutions)

The end of the financial year is the most active time for practice changes including purchases, mergers, amalgamations, takeovers, transfers, splits of partnership, entity transitions (for example, firm to ILP), principals (or former principals) leaving or joining, dissolutions, or the recommencement of a former practice.

Given this, it is an opportune time to remind practitioners that as part of their due diligence prior to undertaking such changes they should consider the potential impact of the prior law practice (PLP) rule which ensures a practice (and its relevant successor) retains responsibility for the insurance consequences of a claim made against it.

There are potentially significant financial consequences (in terms of levies and excesses) which should be borne in mind when considering such changes. Law practices are strongly encouraged to understand the options available to manage these consequences. Details can be found in Buying & Selling and Acquisition Endorsement information sheets available on the Lexon website.



## Vale Russ Neville



Russell John ('Russ') Neville joined the Lexon board on 1 February 2006 and served the profession as a director until retiring due to ill health on 31 December 2016. Sadly, Russ passed away on 6 April 2017.

Russ was a leading insurance broker in Queensland and brought more than 40 years' insurance experience to Lexon via his work in the corporate sector where he placed complex insurance programs into the insurance markets of London, Europe and the United States, including those of captive insurers which he either established or managed.

His broking experience extended into the professional and medical indemnity fields. During his career Russ established several successful broking practices and for some years was managing principal of Marsh (Qld) Pty Ltd.

During his time at Lexon Russ served on the Underwriting & Risk Committee, the Audit & Investment Committee and the Legal Panel Committee. He was a strong advocate for safeguarding both the independence and capitalisation of Lexon. As can be seen from Lexon's current strong position, Russ was successful on both fronts.

Lexon extends its sympathies to his wife Wendy, daughters Vanessa, Georgina and Bronte, and his extended family.



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# Ethereum: More than 'the new Bitcoin'



“[Blockchain] is to Bitcoin what the internet is to email. A big electronic system, on top of which you can build applications. Currency is just one.” – *Sally Davies, Financial Times technology reporter*

Off the back of a highly successful 2016 for Bitcoin, Japan has recently recognised it as a legal method of payment.

Some 4500 Japanese stores already accept Bitcoin, with a further 700,000 outlets using other modes of digital payments. This is part of a growing legal recognition of blockchain technology.

In the United States, the state of Delaware has announced amendments to its Delaware General Corporate Law which would recognise ‘distributed ledger shares’ as a legitimate method of managing company stock. This could enable shares to be bought, held, and sold entirely via blockchain.<sup>1</sup>

A Bill was recently passed by the Arizona House of Representatives to recognise signatures and records secured through blockchain technology under that state’s law on electronic transactions. The Bill, HB 2417,

also ensures that smart contracts cannot be denied legal effect simply because of their status as smart contracts.<sup>2</sup>

However, the public perception of blockchain, a complex and multifaceted tool, is still dominated by Bitcoin. This parallels its predecessor in technological innovation, the internet, as Sally Davies suggests in the quotation above.

The *Harvard Business Review* has described email as the ‘killer app’ of the internet – even though the internet has many uses, it was email that brought people to it. Similarly, the *Harvard Business Review* suggests that Bitcoin is the ‘killer app’ of blockchain, which is the technology used to track ownership of digital currency.<sup>3</sup>

## New kid on the blockchain

However, Bitcoin isn’t alone. Rival blockchain technology Ethereum, which is fuelled by the Ether digital asset, grew by more than 300% in March 2017 and prompted Blockgeeks CEO Ameer Rosic to ask whether it was the ‘the new Bitcoin’, even though in reality it is capable of so much more.<sup>4</sup>

Rather than merely tracking ownership of currency, Ethereum can be used to pay for transaction fees and services on the Ethereum network, and, unlike Bitcoin, includes the

addition of a smart contract (Ether). The smart contract allows Ethereum to be traded only if certain conditions, say, a defined period of time or execution by all parties, are met.

In its most basic form, Bitcoin has limited functionality – to provide for a peer-to-peer electronic currency system which can store and transfer value without the need for a bank or other third party.

Bitcoin has significantly disrupted the finance sector and will continue to. In the legal sector, Ethereum is shaping up to be the key disruptor. Ethereum is based on the same principles as Bitcoin, but allows developers to build multiple applications on the one platform, as opposed to creating a new blockchain for each new functionality.

## Practical implications and opportunities of Ethereum

The direct impact Ethereum will have on day-to-day legal practice is the introduction of ‘smart contracts’. This allows for the platform to store a set of rules based on an ‘if:then’ code – that is, if X then Y – as opposed to merely storing transactions. Smart contracts essentially will be able to self-execute and enforce the management, performance, and payment of that contract.



The advent of Bitcoin was just the start of something big. Now Ethereum takes this technological advance to the next level. **Kate Timmerman** and **Molly Thomas** from The Legal Forecast explain.



For example, a property sale can be conducted by Ethereum, which can directly arrange for payment, stamping, lodgement with the titles registry (including transfer of ownership) and compliance with all regulatory requirements. While real estate is likely to be significantly impacted due to the high number of regulatory bodies involved, the Ethereum network is already being used to develop applications for finance and insurance services.

Ethereum is a more viable solution than the present, decentralised databases currently utilised as it enjoys the benefits of blockchain – document security, 24/7 operational time and the inability for one party to tamper with documentation (as there is no ‘middle man’). It can essentially be used as a more high-tech escrow, capable of being the necessary step in a transaction to prevent abuse by any one party.

However, any application created is the product of coding. As such, the underlying code is subject to potential human error or corruption, which could allow for abuse of the application. The risk of an Ethereum issue is that there is potential for ‘money’ to disappear without any tracing mechanism. Ultimately, the parties would then need to rely on the terms of the contract to enforce the agreement. The current technology also fails to allow for rescission, modification or

unprecedented legal issues arising from the terms of the contract.

While Ethereum provides a platform for a more commercial and reliable system, we do not propose that it will replace lawyers. Rather, we suggest that lawyers who can code, and merge code and contractual intricacies, will be highly sought after.

### Our future with Ethereum

While JP Morgan, Microsoft and other major businesses have already begun paving the way, we predict that within three years Ethereum will be widely utilised in both the private and public sectors. The crux of Ethereum is that it is more sophisticated than any cryptocurrency available and the applications being developed could easily replace applications we use on a daily basis – such as Uber, Spotify and online banking.

The future of Ethereum will see it able to replace more rudimentary legal operations such as conveyancing, intellectual property and governance, as it is significantly more reliable and comprehensive than any other software available.

Early adopters of Ethereum not only will have first-mover advantage and the benefit of being able to set the rules in this new sector;

they’ll also be able to buy cheap Ether and watch their investment pay off.

Welcome to the 21st Century goldrush.

Kate Timmerman is the professional focal point and Molly Thomas is the student focal point of The Legal Forecast. Special thanks to Michael Bidwell of The Legal Forecast for technical advice and editing. The Legal Forecast ([thelegalforecast.com](http://thelegalforecast.com)) aims to advance legal practice through technology and innovation. TLF is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

#### Notes

- <sup>1</sup> Matthew J O’Toole and Michael K Reilly, ‘The First Block in the Chain: Proposed Amendments to the DGCL Pave the Way for Distributed Ledgers and Beyond’, *Harvard Law School Forum on Corporate Governance and Financial Regulation* (online), 16 March 2017, [corpgov.law.harvard.edu/2017/03/16/the-first-block-in-the-chain-proposed-amendments-to-the-dgcl-pave-the-way-for-distributed-ledgers-and-beyond](http://corpgov.law.harvard.edu/2017/03/16/the-first-block-in-the-chain-proposed-amendments-to-the-dgcl-pave-the-way-for-distributed-ledgers-and-beyond).
- <sup>2</sup> HB 2417, Arizona HR, 53<sup>rd</sup> Legislature (2017).
- <sup>3</sup> Joichi Ito, Neha Narula and Robleh Ali, ‘The Blockchain Will Do to the Financial System What the Internet Did to Media’, *Harvard Business Review* (online), 8 March 2017, [hbr.org/2017/03/the-blockchain-will-do-to-banks-and-law-firms-what-the-internet-did-to-media](http://hbr.org/2017/03/the-blockchain-will-do-to-banks-and-law-firms-what-the-internet-did-to-media).
- <sup>4</sup> Ameer Rosic, ‘Is Ethereum The New Bitcoin?’, *The Huffington Post* (online), 29 March 2017, [huffingtonpost.com/entry/is-ethereum-the-new-bitcoin\\_us\\_58dba315e4b07f61a2bb8a18](http://huffingtonpost.com/entry/is-ethereum-the-new-bitcoin_us_58dba315e4b07f61a2bb8a18).

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# Witness preparation

This article addresses the preparation of a witness prior to a hearing. Such preparation is usually done with counsel briefed in the case. However, litigation solicitors should be familiar with the process of witness preparation because counsel may not always be available to undertake it.

## Before meeting the witness

Witness preparation should be done face to face by someone who has court experience as the witness is likely to have questions about the process.

Before meeting the witness, assemble the documents needed for the meeting such as witness statements or affidavits (including affidavits of the other side's witnesses) and other documents relevant to the witness. The witness should also be asked to bring their own copy of their witness statement or affidavits as they may wish to highlight parts of the document or make notes during the meeting onto the statement or affidavit.

After assembling the relevant documents, you should prepare a list of questions for the witness if they are giving oral evidence in chief. You should also compile the proposed exhibits to be tendered through the witness in the order in which they will be tendered.

In addition, try to anticipate how the witness' evidence will be challenged under cross-examination by preparing a list of questions that you would ask if you were the cross-examiner.

## Meeting the witness

You should meet with the witness well in advance of the hearing. It may be necessary to meet more than once, especially if the evidence addresses a number of events over many years.

Early witness preparation will enable any problems to be identified and addressed in time for the hearing. For example, if the witness can no longer give favourable evidence about one aspect of the case, another witness may be able to be identified to give that evidence.

Before commencing to discuss the evidence with the witness, talk generally with the witness about what the experience will be like for them at the hearing if they have not given evidence before. The witness should be told what to wear, what to bring (and not bring), the dates and times they are required to attend, where they will meet you and the location of the court.

The witness should be told about the court layout, the court personnel and the court process generally. The witness should also be told about the court process as it applies to him or her – that is, what will or could happen once they enter the witness box. This requires a discussion of the manner in which evidence in chief will be adduced (oral or affidavit), objections to evidence, judge's questions, cross-examination and re-examination. The sequence of events should also be discussed.

## Examination in Chief

If the witness will give oral evidence in chief, ask the questions in your prepared list and have the witness answer them as if they were giving evidence. You should also present the proposed exhibits to the witness as you would if they were in court and ask the witness the questions about the documents that you wish to ask. In the course of this rehearsal, the answers given by the witness may cause you to add or remove questions from the list, and may also cause you to change the order of the questions.

If the witness will give evidence in chief by affidavit, go through the evidence in the affidavit with the witness, including all exhibits, and discuss it with them in detail. This will assist the witness to refresh their recollection of the evidence in the affidavit. You should also ask them to identify any corrections or additions which they wish to make.

## Objections to evidence

You should explain to the witness that objections may be taken to questions asked of them and that they should refrain from answering until the objection has been ruled upon.

You should also explain that objection may be taken to an answer which they are giving to a question and, in that event, they should stop talking and wait for the objection to be ruled upon before continuing with the answer.

You should inform the witness that the judge may ask them to leave the courtroom while submissions are made about objections taken.

## Questions from judge

You should explain to the witness that the judge can ask questions of the witness at any time and that, if this occurs, the witness should follow the same principles as set out below when answering questions asked by counsel. You should also explain to the witness how to address the judge.

## Cross-examination

You should discuss with the witness the purpose of cross-examination and the ways in which cross-examination can be conducted.

It is critical that you explain to the witness what they must do when being cross-examined, namely:

- Only answer a question which they heard and understood – if not, they must seek clarification.
- Say 'I do not know' if they do not know the answer, rather than guessing or speculating or giving the answer which they think they are supposed to give.
- Give the truthful answer if they know it to the question being asked and then stop talking. In other words, do not answer the question which has been asked and then the next question or questions which the witness assumes or believes must be coming next.
- Do not answer the question they wish they had been asked or which they expected to be asked.
- Take each question one at a time without trying to understand why it is relevant to the case or where it is leading.
- Do not make speeches or argue with the barrister or ask questions of the barrister.
- If no successful objection is taken to the question, the witness must answer the question.
- Admit to an error if the witness accepts that one has been made.

After explaining the process, go through your prepared cross-examination questions with the witness so that they can consider what their answer would be if they are asked that question at the hearing and you know what the witness will say in response to such

Kylie Downes QC



questions. This also enables the witness to become familiar with the experience of being cross-examined in a friendly setting.

As part of the mock cross-examination, you may become aware of weaknesses in the witness' evidence. Following (or perhaps as part of) the witness conference, you will then have to consider how such weaknesses can be overcome, if at all.

Finally, it is important that you discuss the factual issues which have been raised in the case and any affidavit evidence filed by other parties which contradicts the witness' evidence. This enables the witness to gain an understanding of the general topics which may be the subject of cross-examination.

### Re-examination

The next step is to discuss the purpose of re-examination. As part of this, you should explain that the witness should not be

alarmed if they are not asked any questions in re-examination but that, if they are, it does not mean that they have done badly under cross-examination.

You should then explain to the witness what it means to be excused by the court.

### Just prior to hearing

In the period of time shortly before the hearing (some one or two weeks), all witness should be asked to read and become very familiar with their witness statements and associated documents or affidavits, including exhibits. The witnesses should be informed that they can contact you with any concerns or queries about their evidence or about the case. It is better to be informed about any issue as soon as an issue arises rather than attempting to address an issue on the morning of the hearing.

### On day of hearing

On the day of the hearing and before it commences, you should meet again with the witness and any counsel and, in summary form, discuss the process of being a witness and how they should approach it by reference to the matters discussed at previous witness conferences. The witness should also be shown the court before the proceedings commence so that the witness has some familiarity with the layout prior to being called.

After this, take steps to ensure that the witness is comfortable outside of the court and can be located when they are called to give evidence.

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

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# A different view of complaint evidence

*R v MCJ [2017] QCA 11*

A recent Court of Appeal matter suggests that out-of-court statements may be admissible under s93A of the *Evidence Act* in certain instances. Report by Michael O'Brien.

## *The Queen v MCJ [2017] QCA 11* may have implications for the use of certain out-of-court statements made by child complainants in sexual offence cases.

In *MCJ*, the accused was convicted of sexual offences involving a child under 12. The offending conduct was alleged to have been committed over some years but ceased after the complainant child attended a sex education session at her school. The complainant then wrote a note to the accused making reference to the misconduct and taped that note to the accused's computer. It read:

"Hey Uncle [A]  
i love you but i don't think we should do  
the things we do any more because I have  
committed my Body to my boyfriend [JM]  
From [B]."

However, the note was discovered by the wife of the accused before he returned home. This led to the complainant being confronted by her mother and ultimately to the disclosure of the offending.

The note was tendered as an exhibit at trial, and it was submitted by the prosecutor that it was circumstantial evidence pointing towards the existence of a relationship between the appellant and the complainant.

## The appeal

Much of the argument on appeal turned on the adequacy of the directions given by the trial judge in addressing the requirements of the decisions of the High Court in *Robinson v The Queen*<sup>1</sup> and *Longman v The Queen*.<sup>2</sup> However the court was also required to consider the admissibility of the note written by the complainant, as it was argued that the trial judge erred in directing the jury that the note could be used in proof of the relationship between the appellant and complainant.

## Admissibility

Plainly, the note was not admissible as preliminary complaint evidence pursuant to s4A of the *Criminal Law (Sexual Offenders) Act 1978*.<sup>3</sup> The note was directed to the accused and not to some other person. It could not be admitted as a confessional statement, as there was no suggestion that its contents had been in anyway adopted by the accused. On one view, at least, it remained no more than an inadmissible self-serving out-of-court statement made by the complainant.

In *MCJ*, the trial judge directed the jury that the note was not "direct proof of anything" that had happened, but could be used as evidence "implying the existence of a relationship by its tenor". The Court of Appeal took a different approach and held the document to be admissible under s93A of the *Evidence Act 1997*.<sup>4</sup>

That section has application in the case of children or persons with an impairment of mind and provides, relevantly, that in any proceeding in which direct oral evidence of a fact would be admissible, any statement tending to establish that fact contained in a document shall be admissible as evidence of that fact if the maker of the statement is available to give evidence. The term 'statement' is defined to include any representation of fact, whether made in words or otherwise, and whether made by a person, computer or otherwise.<sup>5</sup>

Traditionally, s93A statements, which are admissible as evidence of the truth of their contents, have been thought of as statements provided to the police when interviewing a complainant. An allegation in a letter or email to a friend or relative, for example, might be admissible as evidence of a preliminary complaint, but it has not previously been thought of as being admissible as a s93A statement.

Unlike s93A statements, preliminary complaint statements are admissible only in relation to the complainant's credibility. They are not admissible as proof of the truth of what has been said. In holding the note to be admissible under s93A, the court held, at [86], that the complainant was a child at the time she made it and she was called

as a witness.<sup>6</sup> Her statement was therefore admissible under that section if it tended to establish a fact of which direct oral evidence would have been admissible.

If it was so admissible, then the effect of s93A, in a statutory exception to the hearsay rule, was that the statement was evidence of the facts that the statement tended to establish. The Court of Appeal held that, when considering the context of the note, it could be reasonably inferred to be a reference to repeated sexual behaviour, which had been occurring between the appellant and the complainant.

## Discussion

Although the conviction was quashed because of a failure to give adequate directions as to the precise manner in which the content of the note could be used, the Court of Appeal ruling in *R v MCJ* gives rise to an interesting discussion as to whether there may now be scope for certain statements given by complainants to be admissible pursuant to s93A of the *Evidence Act*.

Given the decision by the Court of Appeal, such statements may now be admitted as 'proof of truth of their contents', whereas previously they have been regarded as admissible only as 'preliminary complaint' evidence relevant to the credibility of the complainant.

It is suggested that this decision may significantly open up the use which may be made of certain out-of-court statements given by complainants in sexual offence cases.

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee's Proctor working group is chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and William Prizeman (william.prizeman@legallaid.qld.gov.au). Michael O'Brien is a solicitor at Fisher Dore Lawyers.

## Notes

<sup>1</sup> *Robinson v The Queen* [1999] 197 CLR 162.

<sup>2</sup> *Longman v The Queen* [1989] 168 CLR 79.

<sup>3</sup> *Criminal Law (Sexual Offenders) Act 1978*.

<sup>4</sup> *Evidence Act 1997*.

<sup>5</sup> *Evidence Act 1977* Schedule 3.


<sup>6</sup> *R v MCJ* [2017] QCA 11 [86].

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## New exhibition on our legal system

Visit our new semi-permanent exhibition in the Sir Harry Gibbs Legal Heritage Centre.

This exhibition is aimed at school students and community members interested in expanding their knowledge of some significant developments that have shaped the law in Queensland. It has been designed to allow visitors to engage with and critically examine key concepts underpinning our modern legal system.

One part uses a variety of historical and contemporary materials to explore the development of the *Criminal Code 1899* (Qld), written by Sir Samuel Griffith in 1897. Although it is now more than 120 years since it was first drafted, it remains the key source of criminal law in Queensland, largely due to its ability to evolve in response to changing social conditions.

The exhibition also examines the rule of law, a key principle that underpins the common law system inherited from England and declares that "nobody is above the law".

Visitors are also invited to understand and celebrate Queensland's connection to distinguished English judge Lord Atkin and the enduring legacy of his landmark decision in *Donoghue v Stevenson* (1932), both in Queensland and around the world.

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See [legalheritage.sclqld.org.au/exhibitions](http://legalheritage.sclqld.org.au/exhibitions).

## Law Week Justice Journey

The library was pleased to host a third-year law student in April as part of the Department of Justice and Attorney-General's (DJAG) annual Law Week Justice Journeys work experience program.

Roberto joined us from the University of Queensland for two days to gain an insight into the role of the library in serving the judiciary and legal profession in the administration of justice in Queensland.

After a tour of the library, Roberto had an opportunity to job-shadow staff across a number of our key service areas including the library collection and catalogue, legal research and reference enquiries, case law publishing and the Queensland Sentencing Information Service, and the legal heritage and education programs. During his time with us Roberto received exclusive insight into the work undertaken behind the scenes to bring our new exhibition in the Sir Harry Gibbs Legal Heritage Centre to fruition.

Check out Roberto's Justice Journey story at [justice.qld.gov.au/corporate/events-seminars/law-week/justice-journeys](http://justice.qld.gov.au/corporate/events-seminars/law-week/justice-journeys).

We highly value these opportunities to build connections with law students and assist future legal professionals in finding their career paths – our thanks go to DJAG for enabling this. We wish Roberto all the best in his future legal career.

## Upcoming lectures

### Selden Society lecture two

Join us for lecture two of the Selden Society 2017 lecture program –  
**'Leading cases of the common law: McKenzie v McKenzie [1971] P 33'**  
*presented by Ian Hanger QC.*

5.15 for 5.30pm, Thursday 22 June  
Banco Court,  
Queen Elizabeth II Courts of Law  
Level 3, 415 George Street, Brisbane

Register online by 15 June.  
Visit [legalheritage.sclqld.org.au/lecture-two-mckenzie-v-mckenzie-1971-p-33](http://legalheritage.sclqld.org.au/lecture-two-mckenzie-v-mckenzie-1971-p-33) for details.

### Current Legal Issues (CLI) seminar

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

4.45 for 5pm, Thursday 27 July  
Banco Court,  
Queen Elizabeth II Courts of Law  
Level 3, 415 George Street, Brisbane

Visit [law.uq.edu.au/current-legal-issues-seminars](http://law.uq.edu.au/current-legal-issues-seminars) for details and to register.

The CLI seminar series is a collaboration between the University of Queensland's TC Beirne School of Law, the Bar Association of Queensland, the Queensland University of Technology Faculty of Law and Supreme Court Library Queensland.

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# Are we really disrupted?

## Survey uncovers our digital mindset

### New findings from a study of Queensland lawyers and their digital communication habits suggest that digital technologies are not as disruptive as previously thought

The perception that lawyers are opposed to advances in information technologies is quite ironic, as law is and always has been an information-based profession. The bound court reports and loose-leaf legislation services from last century might seem very different from accessing AustLII or the new Queensland Legislation site, but in essence both paper and digital forms allow for the storage, organisation and retrieval of information.

How computers, and more recently digital technologies, are changing and will change the legal profession and legal practice has been a concern for 40 years. In 1981 Justice Michael Kirby, then chair of the Law Reform Commission of Australia, wrote that “[l]awyers must address, more urgently than they have been doing, the implications of the computer for their discipline”.<sup>1</sup>

Past studies point to several reasons why the legal profession may be resistant to technologically-driven change, including fear of being made redundant by sophisticated technologies and derision towards the automation of legal tasks.<sup>2</sup> However, these studies are largely outdated and are often focused on the introduction of first-generation digital technologies into workplaces, rather than their effect on individual lawyers as these technologies become accepted and incorporated into professional practice.

The reality is that individual Queensland lawyers have been adopting and using computers and digital technologies for many years. Indeed, the generation of lawyers that entered the profession after 2000 would not have experienced legal practice without online repositories, email and mobile phones.

In the 31 August 2016 issue of the *QLS Update*, an online survey was distributed in order to better understand how lawyers in our current digital age are experiencing the use and effect of digital technologies. The survey was undertaken in conjunction with Queensland Law Society and Griffith Law School. The survey was a voluntary sample of Queensland lawyers and 51 complete responses were recorded. The survey questions explored topics including digital communication use, productivity and satisfaction related to digital communications, and the impact digital communications have on professional practice and quality of life.

Overall, the survey results indicated that lawyers’ perceptions of digital technologies have changed since Justice Kirby wrote about the need for lawyers to address the “implications of the computer”. In particular, the results indicated that Queensland lawyers regard digital technologies as having a positive effect on productivity and professional practice. However, Queensland lawyers also regard face-to-face communication as positively affecting productivity and satisfaction to a greater extent than interaction mediated by digital technologies.

### No significant generation gap in technological capabilities

One of the more surprising findings from the survey was that the respondents recorded that digital technology had increased their productivity and professional practice rather than hindering it. This finding was regardless of the age or years since admission of the respondent, as there was no significant difference in responses between respondents aged 35 and under compared to respondents aged 36 and over. This is in contrast to earlier research that suggested there was a generational difference between the pre- and post-2000 admitted practitioners in working styles, inappropriate use of technology at work, and familiarity with using digital technologies.

### Current digital technology use positively affects professional practice over quality of life

On average, respondents indicated that while digital technologies have improved their professional practice, the same technologies have neither improved nor have been detrimental to their quality of life.

Three strong themes emerged as to why respondents found digital technologies to positively affect productivity and professional practice:

1. speed and connectivity
2. flexibility and convenience
3. digital technologies being conducive to legal work.

However, the same positive factors of digital technologies for productivity and professional practice also have negative aspects when considering respondent satisfaction and quality of life. Respondents indicated that the speed and connectivity of digital technologies creates unrealistic expectations in the workplace, and the flexibility of working out of office intrudes into a practitioner’s personal life.

### Legal workplaces and digital technologies

Although respondents agreed that their workplaces are encouraging the use of digital mediums, respondents also indicated that legal workplaces are not using the full potential of digital technologies.

The support and improvements to digital technologies in law firms are largely focused on efficiencies, processes and productivities. This includes the recording of billable hours, which are a known source of stress for modern lawyers. Additionally, in the current business-oriented law firm culture, there are often negative stigmas associated with accessing the available tools and capabilities offered by the digital such as part-time work or seeking online support around mental health.

Practitioners who responded to a survey request in *QLS Update* last year may like to know the results. **Annie Shum** and **Kieran Tranter** have the details.



There is huge potential to explore how the profession as a whole can increase lawyer satisfaction and quality of life through better facilitation and acceptance of the digital benefits of speed, connectivity, flexibility and convenience. Since there is evidence that reduced work dissatisfaction increases employee productivity, proactive legal workplaces may see the increase of productivity in their employees in the future.

It is also important for legal workplaces to not be completely swept up in the digital. The survey found that lawyers still regard face-to-face communication as more positive for productivity and satisfaction than digital communications. The average response was that digital communications had a 'neutral' to 'somewhat positive' effect on both productivity and satisfaction, while face-to-face communications had a 'somewhat positive' to a 'positive' effect on both productivity and satisfaction.

Effective communication is complex, which is why legal workplaces should encourage the most appropriate mix of digital and interpersonal interactions based on each unique situation. One respondent captured what many professionals know:

"Sometimes it is more productive to send a quick email. At other times, long written email exchanges are more time consuming and less productive than having a short conversation, whether in person or over the phone."

### Conclusion

The study shows that lawyers themselves are not as opposed to digital technologies as previously thought. The survey was only a preliminary study and it shows the need for more in-depth investigation of the relationship between lawyers, digital technology and satisfaction. In particular further studies should focus on how the legal profession

and individual law firms can further innovate with digital technologies to not just achieve productivity gains, but also enhance lawyer satisfaction and quality of life. As digital technologies develop, the legal profession should continue to consider the best way to integrate these tools within existing practices.

Annie Shum is a law graduate at Mills Oakley. This research formed the basis of her successful completion of the thesis requirement for her first-class honours LLB degree that was awarded in 2016. Dr Kieran Tranter is an associate professor at Griffith Law School and the Law Futures Centre at Griffith University.

### Notes

<sup>1</sup> Michael Kirby, 'The Computer, the Individual and the Law', 21st Australian Legal Convention, Hobart 7 July 1981.

<sup>2</sup> Richard Susskind, *Tomorrow's Lawyers: An Introduction to your Future* (Oxford University Press, 2013).

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# Imprecise evidence of violence 'not inadmissible'

with Robert Glade-Wright



**Property – Kennon** – wife's evidence of family violence should not have been excluded for imprecision – weight to be given to it was another matter

In *Britt* [2017] FamCAFC 27 (27 February 2017) the Full Court (May, Aldridge & Cronin JJ) allowed the wife's appeal against Judge Terry's property order. Arguing *Kennon* [1997] FamCA 27, the wife's case was that the trial judge failed properly to take into account her evidence that her contributions towards the property and welfare of the family were made more onerous by the husband's physical violence and coercive and controlling behaviour. The Full Court said (at [25]):

"The primary judge ... rejected parts of the appellant's evidence as to family violence, essentially on the basis that the evidence was not in 'proper form'. The primary judge considered that the evidence consisted of conclusions, was 'just too general' and lacked particularity. In particular, her Honour was critical of ... 'regularly', 'routinely', 'repeatedly' and 'often'. This was because these words lacked specificity and were too general. Her Honour was of the view that such evidence gave no indication as to 'whether [the family violence] happened once a week or once a decade'. Further, scattered throughout the transcript are statements ... by the ... judge ... that the evidence was not relevant to the issues before the court."

Excluded evidence comprised statements that the husband "dominated [her] throughout the relationship"; was "violent and aggressive"; "regularly forced her" to have sex; "regularly left" her "alone on the property for days at a time" and would return intoxicated and "always aggressive and violent"; and that she "often intervened when he attempted to hurt the children physically, usually with the result that" she "was assaulted physically".

The Full Court said ([31]) that "evidence that is probative, even slightly probative, is admissible because it could rationally affect the determination of an issue. For it to be inadmissible it must lack any probative value" and ([41]) that "none of the [excluded] evidence ... should have been excluded on the basis that it had no probative value at all, simply because it was expressed as a conclusion". Remitting the case for re-hearing, the court said ([50]):

"The statements made by the primary judge, to the effect that the evidence was too general and was a conclusion, confuse admissibility with weight. ... [A]ny generality went to the ultimate weight to be given to the evidence and not to whether it should be admitted or not."

**Children – interim hearing – father failed to prove risk of harm posed by mother's recently imprisoned new partner**

In *Lang & Partington* [2017] FamCAFC 40 (16 March 2017) Aldridge J, sitting in the appeals jurisdiction of the Family Court, dismissed with costs the father's appeal against Judge Newbrun's refusal to grant his application for an injunction restraining the mother from bringing the parties' seven-year-old child into contact with her new partner ('Mr V'). The father argued that Mr V (recently imprisoned on drugs and firearms offences) posed an unacceptable risk of harm.

The court below heard ([12]) that Mr V said that "he pleaded guilty to ... possession of ... heroin belonging to a woman ... [but] he lied to the police that he was a heroin user to protect [her]"; that he was also convicted of supplying firearms and sentenced to six years' imprisonment; was "seeing a psychologist whilst incarcerated to discuss his anxiety" and "prescribed medication [but] stopped taking it about 18 months before his release"; attended rehabilitative programs; met the mother during job placement in 2013 and was released in 2014. He saw a counsellor, began work as a driver and was promoted. His children were returned to his care and in 2015 the mother moved in with him.

Aldridge J said ([31]) that the father bore the burden of proving that the child was at risk, concluding ([35]-[36]):

"... [T]he difficulty ... is that the evidence of the [adult] daughter does not establish that the ... judge was in error in finding that there was no unacceptable risk of harm ... Taken at its highest, her evidence was that:

She had seen her mother and Mr V drink a bottle of whisky and that he became 'argumentative and snappy' and that he was 'getting very close to my face while speaking'.

Mr V on one other occasion became 'irate and aggressive' and that an argument between Mr V and the mother 'was loud

and I thought it necessary to take his children away so they did not witness the incident'.

Even if this evidence was given full weight it is difficult to see that it establishes that Mr V poses an unacceptable risk of harm to the child."

**Property – subpoenaed law firm's application for order that applicant wife provide a confidentiality undertaking dismissed**

In *Willis & Willis and Ors* [2017] FamCA 183 (24 March 2017) Carew J heard interlocutory arguments relating to the wife's s79A application (in which she alleged a miscarriage of justice due to the husband's failure to disclose). The wife issued a subpoena for production by "D Lawyers" who opposed it until she had provided "a written undertaking ... guaranteeing its continued confidentiality other than for the purposes of these proceedings" ([10]). She also sought an order that the husband provide further and better particulars of his pleadings (which the parties had been directed to file).

As to the former, Carew J said ([11]-[13]) that it was "not in contention that the applicant is bound by an implied undertaking as described by the High Court in *Hearne v Street* [[2008] HCA 36]" and "by s121 [FLA]" and "is also restrained in her use of the document by Rule 13.07A of the *Family Law Rules*", concluding ([15]-[16]) that "given the consequences that would befall the applicant were she to breach those protections it is not ... clear why [she] should be required to sign an undertaking". In the absence of any authority in support the request was dismissed.

The court upheld one of the wife's requests for particulars but rejected her other requests, saying ([18]):

"The purpose of pleadings is to settle the issues in dispute to enable each party to know the case they have to meet at trial and to ensure that neither party is caught by surprise. The material facts relied upon are required to be pleaded but not the evidence as to how those facts will be proved ..."

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](http://thefamilylawbook.com.au)). He is assisted by Queensland lawyer Craig Nicol, who is a QLS accredited specialist (family law).

# Helping our client decide

by Stafford Shepherd



Two of the fundamental duties we need to discharge when we act for a client are to “act in the best interests of a client” and to “deliver legal services competently, diligently and as promptly as reasonably possible”.<sup>1</sup>

These duties complement the obligation to “provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices...”<sup>2</sup>

These rules ensure we provide “wise and effective counsel”.<sup>3</sup> The responsibilities cast upon us by these rules are heightened when our clients are vulnerable due to impecuniousness, lack of education, language barriers and a simple lack of understanding of the law and justice system.

A client will need a clear understanding of the issues before considering whether to

**We should always aspire to provide practical wisdom.**

initiate or defend legal actions. Rule 7.2 of the *Australian Solicitors Conduct Rules 2012* (ASCR) requires that we inform the client about alternative dispute resolution.

On many occasions, negotiation, conciliation or mediation could be a better course of action rather than the client becoming involved in litigation. To make an informed choice as to whether an action should be commenced or defended, we should talk to our clients about the following:

- alternatives to litigation
- the costs of litigation and the risks of a claim being lost or an unsuccessful defence

- fees and disbursements likely to be incurred
- the obligations that litigation create – in particular, a client’s obligation to disclose adverse documents
- the process of calling evidence and being cross-examined
- the public nature of litigation and any potential for media interest.

Our clients need our assistance to evaluate the risks and to clarify relevant issues.

The above matters are only a short list of issues to consider. It is important to remember that the ASCR creates minimal standards for us to observe. We should always aspire to provide practical wisdom.

Stafford Shepherd is director of the QLS Ethics Centre.

## Notes

<sup>1</sup> *Australian Solicitors Conduct Rules 2012* (ASCR), Rule 4.1.1 and 4.1.3.

<sup>2</sup> Rule 7.1 ASCR.

<sup>3</sup> *Law Society of Singapore v Tan Phuy Khiang* [2004] SGHC 83, [99].



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# Silence not necessarily golden

## Can workers claim a privilege against self-incrimination?

**The common law privilege against self-incrimination is a well-established legal principle, long recognised by Australian courts as an essential protection.**

To invoke the privilege, a person must have a “real and appreciable danger of conviction (or penalty)”.<sup>1</sup>

Unless excluded by statute, it acts to safeguard individuals from answering questions that may incriminate the entity they own or work for and/or themselves as well as from producing incriminating evidence.<sup>2</sup>

The underlying reason for this privilege is that it is morally unjust to compel a person to expose themselves to punishment or to forfeit a right. The privilege also helps to uphold the presumption that a person is innocent until proven guilty.

The most common applications of the principle are to avoid criminal or civil penalties. However, its application can become murky in the realm of workplace investigations or disciplinary proceedings, in which the individual is unlikely to be immediately subject to conviction or penalty.

In the decision of *Grant v BHP Coal Pty Ltd* [2017] FCAFC 42 (*Grant*), the Full Bench of the Federal Court of Australia recently indicated some relevant factors to determine whether a claim of privilege has merit in the context of a workplace disciplinary process.

### What were the circumstances?

The appellant, Mr Grant, started his employment with BHP, the respondent, as a boilermaker at a mine in central Queensland in 2003. In 2011, while working at the mine, Mr Grant injured his shoulder for the first time and subsequently reinjured it in 2012 when he was mowing the lawn at his home. As a result, the appellant required stabilisation surgery.

Mr Grant was on extended sick leave from July to September 2012, during which time he did not communicate frequently with his employer other than to provide a series of medical certificates. In April 2013, he produced a medical certificate stating he

was fit to recommence work. However, his supervisor required a medical assessment before allowing him to return to his duties.

Despite being advised that failing to attend the assessment could have consequences for his employment, Mr Grant refused to attend and so he was barred from entering the worksite. He did attend a directed workplace meeting to investigate why he would not undertake a medical assessment, but refused to answer any questions that weren't first provided to him in writing.

Importantly, Mr Grant did not specify at the time that his refusal was on the basis of a claim of privilege. Subsequently, Mr Grant was given a show-cause notice to which he responded before his employment was terminated in May 2013.

### Lengthy litigation

The matter has a lengthy litigation history. Mr Grant first applied to the Fair Work Commission (FWC) for unfair dismissal remedies under s394(1) of the *Fair Work Act 2009* (Cth), with the FWC determining that Mr Grant's dismissal by BHP was not “harsh, unjust or unreasonable”.

Mr Grant appealed to the Full Bench of the FWC, which upheld the decision at first instance. In this first appeal, Mr Grant raised the argument that he was not obliged to obey an instruction to answer questions at the meeting he attended because he was exercising his privilege against self-incrimination. The Full Bench rejected this submission.

An originating application to the Federal Court was made seeking writs of certiorari and mandamus.<sup>3</sup> Justice Collier declined the appeal orders and confirmed that the privilege against self-incrimination did not apply to the meeting. Her Honour said Mr Grant was unreasonably delaying the meeting by refusing to answer questions.

Mr Grant then appealed to the Full Bench of the Federal Court of Australia. Among other things, Mr Grant again submitted that he could not be dismissed for relying on his privilege against self-incrimination at the meeting. BHP countered that there is no privilege in the context of the workplace, as there was no real and appreciable safety risk

likely to be revealed in Mr Grant's answers. Critically, Mr Grant also failed to inform BHP before refusing the meeting that he was relying on the privilege.

Mr Grant's appeal to the Full Court was dismissed. However, the Full Bench did not conclusively rule on the issue of self-incrimination due to a “vacuum of facts”.<sup>4</sup> Importantly, the decision provides salient commentary on two key points—the legal context of a workplace investigation or disciplinary proceeding, and the necessary circumstances for the privilege to apply.

### Importance of the legal context

The legal context in which the employer is conducting the investigation or disciplinary proceeding is important as it may prevent the privilege from applying. For this reason, the specific statutory scheme in which the industry operates, the relevant enterprise bargaining agreement, award and the terms of the employment contract should be considered.

In *Grant*, the safety obligations imposed on the Queensland mining industry to protect the health and safety of workers were critical.<sup>5</sup> Mr Grant argued that by answering questions at the meeting he would have been exposed to admitting a criminal offence, namely his failure to comply with instructions given by the mine's senior executive for the safety and health of persons,<sup>6</sup> a potential offence under s34 of the *Coal Mining Safety and Health Act 2011* (Qld).<sup>7</sup>

The employer argued that it had the power to direct Mr Grant to attend and explain his conduct to discharge the employer's safety obligations, and also because Mr Grant's employment contract contained the same obligation.

The court was seemingly not convinced by Mr Grant's argument, commenting that the purpose of investigative workplace meetings is usually to provide the individual with an opportunity to justify their conduct, rather than to admit or deny facts that could lead to an offence being established.<sup>8</sup>

Mr Grant cited the decision of *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141 (*Hartmann*) to the court to support his claim of privilege, where it was found that a claim of privilege could protect an



**Andrew Ross and Laura Regan** look at claiming the privilege against self-incrimination in the context of workplace disciplinary action.



employee from the “penalty” of termination. The Full Court noted the importance of the legal context of *Hartmann*, distinguishing it from this case on the basis that *Hartmann* concerned evidence given in a royal commission and a series of penalties under a specific statutory police disciplinary regime.<sup>9</sup>

Because of other findings, the Full Court was not required to definitively decide on how the legal context affected Mr Grant’s claim of privilege. Nevertheless, the legal context could significantly impact whether or not privilege applies in future decisions.

### General considerations

Privilege may not be validly claimed when the so-called privileged information has already been provided and there is accordingly no increase in jeopardy.<sup>10</sup> It should also be noted that a claimant must identify and disclose that they are invoking the privilege at the time the issue arises.<sup>11</sup>

Whether the individual is claiming privilege against self-incrimination in an employment context or not, there must still be a real and appreciable risk of incrimination as well as a bona-fide apprehension of that consequence on reasonable grounds.<sup>12</sup>

Withholding and disclosing information inconsistently perhaps reflected unfavourably on Mr Grant’s case – he voluntarily provided his excuse for non-attendance to the FWC without the alleged fear of self-incrimination he felt at the meeting.

### Self-incrimination in the workplace?

This decision leaves the door somewhat open for the right to privilege from self-incrimination to be invoked in an employment context.<sup>13</sup> The court rejected BHP’s assertion that privilege was not applicable in the sphere of employment, saying “that proposition is too wide”.<sup>14</sup> Indeed, the judges referred to instances in which privilege had been relied upon, including by a police officer in an employment investigation.<sup>15</sup>

This case highlights that circumstances may give rise to a successful workplace claim of privilege. For example, privilege could be enlivened when employees refuse to answer employers’ questions concerning their external

behaviour that could lead to, or has already led to, charges being laid against them. This will not prevent an employer from conducting an internal investigation that may adversely impact the worker’s employment, though it may protect an employee adding to the evidence against them on an external charge.

Although *Grant* is not authority on the issue, the decision strongly indicates that the legal context in which the investigation or disciplinary proceeding is taking place is crucial to determining if and how privilege may apply (if at all). It also indicates the circumstances required for invoking privilege.

Generally, it would be difficult for an employee to validly invoke privilege but, as always, careful management of disciplinary investigations and processes, together with legal advice, will mitigate risk.

Andrew Ross and Laura Regan are senior associates at Sparke Helmore Lawyers. The authors gratefully acknowledge the assistance of law clerk Edwina Sully in the preparation of this article.

#### Notes

<sup>1</sup> *Sorby v The Commonwealth* (1983) 152 CLR 281 at 294; *Accident Insurance Mutual Holdings v McFadden* (1993) 31 NSWLR 412 at 421-422.

<sup>2</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335.

<sup>3</sup> Proceedings instituted under s39B of the *Judiciary Act 1903* (Cth).

<sup>4</sup> *Grant v BHP Coal Pty Ltd* [2017] FCAFC 42 at [110].

<sup>5</sup> *Coal Mining Safety and Health Act 2011* (Qld).

<sup>6</sup> Section 39(2)(d) of the *Coal Mining Safety and Health Act 2011* (Qld).

<sup>7</sup> Sections 34 of the *Coal Mining Safety and Health Act 2011* (Qld).

<sup>8</sup> *Grant v BHP Coal Pty Ltd* [2017] FCAFC 42 at [110].

<sup>9</sup> *Grant v BHP Coal Pty Ltd* (No.2) [2015] FCA 1374.

<sup>10</sup> *Grant v BHP Coal Pty Ltd* [2017] FCAFC 42 at [109], citing *Gemmell v Le Roi Homestyle Cookies Pty Ltd (in liq)* [2014] VSCA 182 at [87] and *Microsoft Corporation v CX Computer Pty Ltd* (2002) 116 FCR 372 at [41].

<sup>11</sup> *Ibid* at [111], citing Heydon JD, *Cross on Evidence* (Lexis Nexis) at [25100]; *Re Trade practices Commissioner v Arnotts Limited* [1989] FCA 256 at [6].

<sup>12</sup> *Ibid* at [109], citing *Re Australian Property Holdings (in liq) No.2* (2012) 93 ACSR 130, [115] and *Anderson v Australian Securities and Investments Commission* [2012] QCA 301 at [22].

<sup>13</sup> Some public sector employment statutes will specifically override the privilege.

<sup>14</sup> *Grant v BHP Coal Pty Ltd* [2017] FCAFC 42 at [108].

<sup>15</sup> *Police Service Board v Morris* (1985) 156 CLR 397 at 403, 408 and 411.

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# Assessing the liability of international arbitrators

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Title: *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses*

Author: Barbara Alicja Warwas

Publisher: TMC Asser Press Springer 2017

ISBN: 978-94-6265-110-4

Format: hardback/388 pages

RRP: \$115 (Amazon)

Will *caveat emptor* warnings be given in future for arbitral institutions' dispute resolution services? Will lawyers add a new field of expertise to their wares called 'arbitral institution liability'?

*The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses*, by Alicja Warwas, may foretell these prospects.

Warwas' main thesis is that arbitral institutions are liable for their services to party users, and that this liability is desirable. Why? Reasons include the public roles said to be played by private arbitral institutions; their lack of accountability for their increasing powers to appoint arbitrators; protracted, confusing and more expensive arbitrations; concerns about the staffing and non-transparent networks of people who allegedly run arbitral institutions; and, the multi-faceted functions of arbitral institutions which transcend private interests into public territory.

These issues conjoin with clarion calls about the ethics (or lack thereof) of international arbitration's players, including arbitral institutions. As arbitral institutions' birth rates explode globally, Warwas contends that the regulation of their accountability and liability to party users is inadequate, due to convoluted contractual obligations.

The book contains a breathtaking level of detail on the salient rules and operations of at least four of the world's leading arbitral institutions. The analysis considers three dimensions of arbitral institutions' functions – legal, societal and economic – contending that arbitral institutions are powerful players with new substantive and procedural powers in and beyond international arbitration itself.

According to Warwas, arbitral institutions do not just manage arbitrations; they are said to design international arbitration proceedings so they can "play with the mandate and discretion of institutional arbitrators and with core principles ... such as party autonomy" (5).

Warwas thus examines how arbitral institutions can be held accountable for their power and be made liable for poor performance of their contractual obligations to party users (191), concluding with a discussion of proposed models for arbitral institutions' liability, such as new liability clauses and public support.

This reviewer suggests that this book is a portent of an inevitable calamity facing international arbitration (including public investor-state treaty arbitration). When a dispute resolution system becomes the source of disputes itself, this surely manifests a crisis.

Warwas' book also potentially raises broader questions, including whether international arbitration is infected with 'rentier-capitalism', such that wealthy multi-national elites represented by major law firms of certain jurisdictions now effectively use (or abuse) the system for rent-seeking extraction – via global disputes (see Guy Standing, *The Corruption of Capitalism*, Biteback Publishing 2016).

Some consider arbitral institutions to have successfully offered efficient and ethical commercial dispute resolution services for decades, if not centuries. Giving multi-national elites and their law firms new opportunities to sue arbitral institutions suggests the possible existence of other agendas that require closer scrutiny.

Warwas' book thus perhaps needs to be read cautiously alongside other books on arbitral institutions (for example, Remy Gerbay's *The Function of Arbitral Institutions*, Kluwer 2016). Warwas' thesis may also need to be verified with empirical research on the actual standards of arbitral institutions' services, conducted by those who are independent of international arbitration.

– Magdalene D'Silva

Magdalene D'Silva is a university associate at the Faculty of Law, University of Tasmania.

# Conveyancing, one step at a time

**Title:** *Step by Step Guide to Operating A Successful Conveyancing/Legal Practice*  
**Author:** Garth Brown  
**Publisher:** Brown and Brown Conveyances  
**Format:** paperback and eBook/80pp  
**RRP:** \$150 (available online)

*The Step by Step Guide to Operating a Successful Conveyancing/Legal Practice* is provided primarily as an eBook resource and is written for those who aspire to set up and operate their own conveyancing practice.

The author of the book, Garth Brown, operates a successful conveyancing firm in Sydney. In writing this guide, the author has drawn on his own experience of taking a conveyancing practice from start-up to success.

The book consists primarily of a '12-step guide' designed to provide the reader with ideas for developing a successful business and an insight into the practice of conveyancing.

That being said, much of the book is geared towards the 'business' of successful conveyancing practice and the remainder is dedicated to the author's lessons and tips in respect of operating a small business.

On the business of conveyancing, the '12-step guide' provides useful information covering:

- how to market your business effectively, including via social media, and
- how to employ technology to streamline your business.

In respect of the practice of conveyancing, the '12-step guide' sets out a number of matters that a practitioner should consider in conducting a conveyance, including reviewing the contents and terms of a purchase contract, record keeping and the charging of professional fees.

In this respect, while the '12-step guide' is instructive, it must be kept in mind that the

practice advice provided by the author is generic. As such, Queensland practitioners who are conducting a conveyance should adhere to the matters set out in the Lexon Conveyancing Protocol.

Further, as the book is written based on New South Wales conveyancing regulations, those looking to operate a conveyancing practice in Queensland should familiarise themselves with the legal requirements of doing so.

What benefit will practitioners gain from this book? The book would be of most benefit to those looking to a career as a conveyancing solicitor or for existing solicitors who wish to commence a conveyancing practice on their own. The book is very easy to read and appears to be intended as a continual reference guide for conveyancers and conveyancers-to-be, rather than a one-time read.

– Alistair Tindall

This review appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group. Alistair Tindall is a solicitor with Robinson Locke Litigation Lawyers.

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# High Court and Federal Court casenotes

## High Court

### Contract law – construction of contracts – commercial purposes and commercial sense

In *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12 (29 March 2017) the appellant lessor had attempted to sell to the respondent lessee a parcel of land. The sale fell through due to planning restrictions. Instead, the parties decided to enter into a 99-year lease. The rent was paid up front, in the same amount as the intended sale price. In dispute was a clause requiring the lessee to “pay all rates taxes assessments and outgoings whatsoever which during the said term shall be payable by the tenant in respect of the said premises”. Also important was a clause acknowledging that it had been the intention of the parties to have transferred ownership of the land. The appellant sought a declaration that the respondent was required to pay all imposts relating to the land. The respondent argued that it was obliged to pay only those imposts levied on it in its capacity as the tenant, with the lessor to pay the balance as the owner of the land. The judge at first instance made the declaration; the Court of Appeal, by majority, reversed that decision. The High Court acknowledged that the clause was poorly drafted and could be read as supporting either position. That ambiguity allowed for consideration of words struck out of the contract. Ultimately, the key question was which construction made (more) commercial sense. That required consideration of what the reasonable businessman would have understood the contract clauses to mean. The court held that, in the circumstances, the lease was intended to be as close to a sale as possible. As such, it made no commercial sense for the lessor to remain liable for payments of rates, taxes and other such outgoings. The respondent lessee was therefore required to pay all imposts, as if it was the owner of the land. Kiefel, Bell, and Gordon JJ jointly; Gageler J separately concurring; Nettle J dissenting. Appeal from the Court of Appeal (Vic.) allowed.

### Advocates’ immunity – tort – negligence – legal practitioners – advocates’ immunity from suit

In *Kendirjian v Lepore* [2017] HCA 13 (29 March 2017) the High Court affirmed its recent decision in *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 331 ALR 1 (*Attwells*) in respect of advocates’ immunity and advice regarding compromise of litigation. The appellant brought proceedings relating to an injury arising from a car accident. An offer of compromise was made by the driver of \$600,000 plus costs. The offer was rejected. At trial, the appellant was awarded \$308,435.75 plus costs. The appellant sued his solicitor and barrister for negligently advising him that the offer

was too low (without telling him the amount) and for rejecting the offer without express instructions from him. The respondents both pleaded substantive defences, but also sought summary judgment on the basis of advocates’ immunity. That application succeeded at first instance and on appeal, pre-*Attwells*. After *Attwells*, consent orders were made allowing an appeal to the High Court in respect of the first respondent. The second respondent argued that *Attwells* could be distinguished or should be set aside. The High Court unanimously rejected both arguments. *Attwells* stated that advocates’ immunity exists, but only for work done in court or work done out of court that “leads to a decision affecting the conduct of a case in court” or, put another way, work “intimately connected with” work in a court. Advice regarding compromises (for or against) is not sufficiently connected with work in court to attract the immunity. Such advice does not attach to exercises of judicial power quelling controversies and cannot lead to a collateral attack on an exercise of judicial power. There is no functional connection between the advocate’s work and the determination of the case. Accordingly, no immunity applied to the allegedly negligent advice of the respondents in this case. Further, there was no reason to reopen *Attwells*. Edelman J; Kiefel CJ, Bell J, Gageler J, Keane J, Nettle J and Gordon J each concurring separately. Appeal from the Court of Appeal (NSW) allowed.

### Constitutional law – parliamentary elections – pecuniary interests – capability of being chosen as a Senator

In *Re Day* [No.2] [2017] HCA 14 (5 April 2017) the High Court held that Senator Robert Day was incapable of being chosen or sitting as a senator of the Commonwealth Parliament because of s44(v) of the Constitution, and that Senator Day’s seat is to be filled by a special count of ballot papers. Section 44(v) provides that a person shall be incapable of being chosen or sitting as a Senator if they have “any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth”, subject to an exception for shareholders of companies with more than 25 members. The pecuniary interest at issue arose from a lease entered into by the Commonwealth for Mr Day’s electoral office. The property leased was owned by Fullarton Investments, as trustee for the Fullarton Road Trust. The Day Family Trust was a beneficiary of the Fullarton Road Trust. Mr Day was a beneficiary of the Day Family Trust and had been (before his election) the sole director and shareholder of the trustee of the Day Family Trust. In addition, Fullarton Investments directed that the Commonwealth pay the rent for the lease to an account in the name of “Fullarton Nominees”,

a business name owned by Mr Day. Mr Day was, in reality, the holder of that bank account. Mr Day was also a guarantor of a related loan facility. Mr Day argued, by reference to a decision of Barwick CJ in *In re Webster* (1975) 132 CLR 270, that the purpose of s44(v) was narrow – to prevent agreements between members of Parliament and the Crown, to secure the freedom and independence of the Crown. The Attorney-General for the Commonwealth argued for a broader purpose, including preventing parliamentarians taking advantage of their position to obtain financial advantage and to prevent conflicts of interest. The court held that *Webster* should not be followed. The purpose was broader than merely agreements with the Crown. That followed from the language of the provision as well as from the history of the drafting and comparing historical antecedents. The purpose of s44(v) is to prevent members from benefiting from agreements with the Commonwealth and to prevent conflicts of interest, as well as preventing the possibility of the Commonwealth exerting undue influence over members of Parliament. The court held that, by receiving the rent, Mr Day had an expectation of a pecuniary interest amounting to an indirect benefit within s44(v). It was also possible that his other interests would suffice. Consequently, he was not eligible to be chosen or to sit as a Senator at least from 26 February 2016 (when Fullarton Investments gave its direction about the rent). To fill the vacancy, the court held that a special count of the ballot papers should be undertaken. Kiefel CJ, Bell and Edelman JJ jointly; Gageler J and Keane J separately concurring; Nettle and Gordon JJ jointly concurring. Answers to questions referred to the Court of Disputed Returns given.

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

## Federal Court

### Industrial law – whether authority under legislation or contract to direct employee to attend medical examination – principle of legality – privilege against self-incrimination to the sphere of employment

*Grant v BHP Coal Pty Ltd* [2017] FCAFC 42 (10 March 2017) was an appeal from a decision of the primary judge dismissing challenges to decisions of the Fair Work Commission (FWC). The proceedings in the FWC concerned whether the employee was unfairly dismissed from his employment with BHP Coal Pty Ltd. Both a commissioner and the Full Bench of the FWC rejected the employee’s claim and the primary

with Andrew Yuile and Dan Star SC



judge found that the employee had not established that they had committed error in doing so.

The employee, who was a boilermaker, injured his shoulder at and outside work and was given extended sick leave. Following being certified by his general practitioner as being fit to return to normal duties, he was directed by a representative of his employer to attend a medical appointment. The employee was dissatisfied with the requirement to attend the medical appointment. He was directed to attend the doctor's appointment and informed that failure to do so would be considered a failure to comply with a reasonable direction and, in a further message, would result in disciplinary action. Subsequently the employee was provided with a notice requiring him to show cause why his employment should not be terminated based on his refusal to attend two medical appointments and his refusal to participate in an interview with the employer's representative. Ultimately, the employee's employment was terminated for those reasons.

The employee argued in his appeal to the Full Court that the primary judge erred in failing to find that the decisions of the FWC were affected by jurisdictional error or error on the face of the record because the FWC at [63]:

1. misconstrued s39(1)(c) of the *Coal Mining Safety and Health Act 1999* (Qld) (CMSH Act) as authorising an employer to direct an employee to attend and undergo a medical examination
2. failed to consider the employee's argument that the language of s39(1)(c) was not sufficiently clear and unambiguous to abrogate an employee's fundamental right not to be subjected to a medical examination
3. erred in finding that privilege against self-incrimination did not apply to the interview with the employer's representative.

The Full Court (Dowsett, Barker and Rangiah JJ) dismissed the appeal. The employee's construction of relevant provisions of the CMSH Act was rejected (at [74]-[85]). Further, the principle of legality (explained at [87]-[88]) did not assist the employee and at [90]: "We are satisfied that there is a legislative intention underlying ss39(1)(c) and (2) (d) of the CMSH Act to curtail the right to personal liberty to the extent that coal mine workers (and others described in those provisions) may be required to attend medical examinations if the circumstances set out in those provisions are met."

It was unnecessary for the Full Court to decide the potentially complex issue of the legality of a requirement by an employer that an employee undergo a medical examination against his or her will in the absence of legislative authority to do so (at [93]-[96]).

The Full Court held it to be well established that the privilege against self-incrimination is capable of applying to questions asked of an employee by an employer and hence can extend to a workplace interview (at [108]). In accordance with previous authorities the Full Court at [109] stated that "[t]he claimant must show that there is a real and appreciable risk of criminal prosecution if he or she answers, and that he or she has a bona-fide apprehension of that consequence on reasonable grounds" in order to invoke the privilege. However "real and appreciable risk does not exist if a witness' prior statements have already exposed the witness to a risk of prosecution where giving answers will not lead to any increase in jeopardy to which the witness is already exposed".

In the present case, the employee did not make a claim of privilege against self-incrimination at the interview and he merely declined to answer questions unless they were put in writing (at [111]).

In any event, the Full Court held that since the employee did not attempt to demonstrate any error in the decision of the Full Bench of the FWC to decline to consider the argument regarding the privilege against self-incrimination, any error attending the Full Bench's view that privilege did not apply was immaterial (at [112]).

**Consumer law – non-party redress orders under s239 of the Australian Consumer Law – whether an interest under a discretionary trust was property for the purposes of s239 of the Australian Consumer Law**

In *Swishette Pty Ltd v Australian Competition and Consumer Commission* [2017] FCAFC 45 (15 March 2017) the Full Court (Middleton, Foster and Davies JJ) allowed an appeal and set aside certain orders made pursuant to s239 of the Australian Consumer Law (ACL), which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

Section 239 of the ACL is a remedial provision empowering the court on application by the regulator, the Australian Competition and Consumer Commission (ACCC), to make orders against the person who engaged in the contravening conduct, or a person involved in that conduct to redress the loss or damage suffered by affected consumers who are not parties to the proceeding, without the need for those persons to be joined as parties (non-party consumers).

The primary judge made orders, based on admissions of the respondents, that there were contraventions of various consumer protection provisions of the ACL. The orders made included a non-party redress order under s239 of the ACL against the respondents. In addition, the primary judge made a further order under s239 of the ACL for Mr Laski (one of the respondents) to give a direction on behalf of "his companies",

Swishette Pty Ltd (Swishette) and Letore Pty Ltd (Letore), to the ACCC in relation to the application of the proceeds of sale of a property owned by Swishette which was held in a trust by the ACCC's solicitors pursuant to a freezing order (Order 10) (at [4]-[5]). The background to Order 10 was that Mr Laski was the sole director and the controller of both Swishette and Letore. Swishette's principal activity was to act as trustee of a discretionary trust (the trust), of which Mr Laski and Letore were both beneficiaries, but not the only beneficiaries. Mr Laski was also the appointor of the trust. The primary judge held that trust property in the trust was to be regarded as the "property" of Mr Laski and Order 10 could be made even though Mr Laski, as beneficiary of the trust, did not have a legal or beneficial interest in that property (at [10]-[12]).

The Full Court accepted Letore's and Swishette's submission that the primary judge did not have the power under s239 of the ACL to make Order 10 (at [16]). In relation to judgments relied upon by the primary judge, the Full Court said at [21]: "Whilst *Carey (No.6)* [(2006) 153 FCR 509] is authority that an object of a discretionary trust may have a 'property' interest for the purpose of s1323 of the *Corporations Act*, the decision turned on the defined sense of the word 'property' appearing in that section. So too, whilst there are decisions in the family law jurisdiction which have held that orders can be made under s79 of the *Family Law Act* in respect of trust property held on the terms of a discretionary trust, those cases have also turned on the defined sense of the word 'property' appearing in s79. Section 239 is cast in different terms, though, to s1323 of the *Corporations Act* and s79 of the *Family Law Act*. The word 'property' does not appear in s239, nor is there a defined meaning of that word for the purposes of Sub-Division B of Division 4 of Part 5-2 of the Australian Consumer Law in which s239 is contained."

The Full Court stated at [26] that "[o]bjects of a discretionary trust have no beneficial interest in the property of the trust and their only interest is characterised as a mere expectancy coupled with a right to due administration of the trust". Accordingly, the Full Court concluded that Order 10 went beyond the scope of s239(1) by requiring third parties to apply trust property in which Mr Laski has no legal or beneficial interest to the repayment of client moneys, and the primary judge fell into error in concluding that she had the power to make such an order (at [28]).

Dan Star SC is a barrister at the Victorian Bar and invites comments or enquiries on 03 9225 8757 or email [danstar@vicbar.com.au](mailto:danstar@vicbar.com.au). The full version of these judgments can be found at [austlii.edu.au](http://austlii.edu.au).

# Court of Appeal judgments

1-30 April 2017

with Bruce Godfrey



## Civil appeals

*Nationwide News Pty Ltd v Weatherup*  
[2017] QCA 70, 21 April 2017

General Civil Appeal – where a jury found that the appellant defamed the respondent in an article which imputed firstly that “he is a person habitually intoxicated” and secondly; “his habitual intoxication was sufficient to incur the wrath of judges, thereby causing his being obliged to leave the employment of the *Townsville Bulletin*” – where the jury rejected the appellant’s defences that each of these imputations was substantially true and of contextual truth – where damages were subsequently assessed by the trial judge in the amount of \$100,000, interest was assessed at \$7479.88 and the appellant was ordered to pay costs on the indemnity basis – where the principles by which an appeal court will overturn jury findings were stated by members of the High Court in *John Fairfax Publications Pty Ltd v Rivkin* (2003) 77 ALJR 1657 – where the appellant must establish that the finding was one that no reasonable jury, properly directed, could make – where an ordinary, reasonable reader might have inferred that the respondent was given the nickname Malcolm “always under the weather up” because he was habitually intoxicated, for example, because he routinely or habitually drank to excess after work – where this ground of appeal was not established – where in relation to the second imputation, the words complained of were imprecise and capable of being read as suggesting that he left his employment with the *Townsville Bulletin* because he incurred the wrath of judges, and that he incurred the wrath of judges because of his habitual intoxication – where the article did not state or necessarily imply that the respondent attended his work while intoxicated or that his habitual intoxication affected his work performance – where his habitual intoxication may have manifested itself outside work hours, including in public places where it came to the attention of judges and incurred their wrath – where the second ground of appeal is not established – where in relation to the first imputation, the ultimate issue for the jury, after assessing the evidence of each witness and the evidence as a whole, was whether the respondent had proven that the imputation that the respondent “is a person habitually intoxicated” was

substantially true – where it was open to the jury to conclude that the witnesses called by the appellant did not prove that the plaintiff was “habitually intoxicated”, and that the witnesses called by the respondent disproved this – where the appellant had the onus of proving that the respondent was habitually intoxicated – where a properly instructed jury could reasonably conclude, based on its assessment of the evidence, that the appellant had not discharged its onus of proof – where the third ground of appeal is not established – where the jury found that the contextual imputation that the respondent “in a fit of anger, committed the crime of wilful damage by kicking the door of a car belonging to his neighbour” was substantially true – where this finding was never in doubt because the respondent in his evidence frankly admitted those facts, as well as the fact that he was charged with wilful damage, pleaded guilty and was placed on a good behaviour bond for a period of six months, with a recognisance of \$500 and no conviction recorded – where in the light of the evidence, the jury’s conclusion that contextual imputation (b) “the [respondent] was charged with the crime of wilful damage and, having pleaded guilty to the charge, was punished by being placed on a good behaviour bond for a period of six months and a recognisance of \$500” was not substantially true is unreasonable – where the respondent does not seek to sustain the jury’s finding in relation to contextual imputation (b) – where the fourth ground of appeal is therefore established – where the appellant has not established that the jury’s finding in relation to the “no further harm” issue should be set aside – where the circumstances in which the jury concluded that further harm was done to the respondent’s reputation by the imputations upon which he succeeded, the appellant is not entitled to an order that the jury’s finding be set aside and replaced by a finding that no further harm was done to the respondent’s reputation – where the substituted finding that contextual imputation 5(b) was substantially true does not entitle the appellant to judgment – where the trial judge found that the appellant unreasonably failed to accept the respondent’s settlement offer, that s40(2)(a) of the *Defamation Act 2005* (Qld) was thereby engaged and that he was required by that section to order the respondent’s costs of and incidental to

the proceeding to be assessed on an indemnity basis – where the trial judge then considered whether the indemnity costs should be assessed in accordance with either the District Court or the Magistrates Court scales, and declined to so order – where the appellant complains that that the trial judge failed to order, pursuant to r697(2) of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), that indemnity costs be assessed as if the proceeding had been commenced in the Magistrates Court – where the respondent’s claim was unlike a cause of action for a debt or a claim for economic loss in which success is measured essentially in monetary terms – where the vindication which the respondent obtained by virtue of the jury’s verdict means that his success should not be measured simply by reference to the size of the monetary award subsequently assessed by the judge – where the defamation was a serious one – where in all the circumstances it is appropriate to exercise the discretion recognised in r697(2) UCPR – where there is no contest to the trial judge’s observation that it would not have taken any great management to have a District Court judge who was not resident in Townsville preside at a jury trial – where given the statutory cap on general damages, even with an award of aggravated damages, any damages award was very unlikely to exceed the jurisdiction of the District Court – where the legal issues to be decided by the trial judge were not so complex as to necessitate a trial in the Supreme Court – where in the circumstances, the most appropriate order is for costs to be assessed on an indemnity basis by having regard to the District Court scale and the other matters stated in r703 UCPR – where the parties accepted that the costs of the appeal in relation to liability should follow the event – where as to the costs of the appeal on costs, the starting point is that the costs of the appeal should follow the event – where the appeal against costs, as filed on 22 December 2016, was incompetent because leave of the trial judge was not obtained until 21 March 2017 – where the appeal against costs generated additional costs – where in all the circumstances, and given the limited success which the appellant has achieved in respect of the appeal against the costs order, the most appropriate order for costs in relation to the costs appeal is that there be no order as to costs.



Orders: In Appeal No.5059 of 2016 (Defamation appeal), appeal allowed in part, the jury's finding that contextual imputation 5(b) as pleaded in paragraph 12(a)(ii) of the further amended defence was not substantially true be set aside and replaced by a finding that the imputation was substantially true, the appeal is otherwise dismissed, the appellant pay the respondent's costs of and incidental to the appeal. In Appeal No.1349 of 2016 (Costs of the appeal on costs), appeal allowed, Order 2 of the orders made on 12 December 2016 be set aside and in lieu thereof it be ordered that the defendant pay the plaintiff's costs of and incidental to the proceeding, including reserved costs, such costs to be assessed on an indemnity basis, and having regard to the matters stated in r703 of the UCPR, including the scale of fees prescribed for the District Court, there be no order as to the costs of the appeal.

***Moreton Bay Regional Council v Caseldan Pty Ltd* [2017] QCA 72, 24 April 2017**

Appeal from the Land Appeal Court – where the applicant compulsorily acquired land from the respondent “for recreation ground purposes” – where the Land Court ordered the value of the resumed land be assessed for compensation purposes at \$1.8 million – where the Land Appeal Court allowed the respondent's appeal and determined the value of the resumed land to be \$4.1 million – where the applicant seeks reinstatement of the assessment ordered by the Land Court of \$1.8 million – where the resumed land was surrounded by land owned by the applicant within a sports and recreation zone – where the applicant made a material change of use application to itself in relation to this land for development purposes – where the

application included the construction of an internal road which would provide access to the resumed land – where the Land Appeal Court found that the Land Court member erred in holding the concurrence agency could not impose an access condition on the applicant's development application under the *Sustainable Planning Act 2009* (Qld) (SPA) – where the Land Appeal Court adopted by analogy the decision in *Intrapac Parkridge Pty Ltd v Logan City Council* [2015] QPELR 49 (*Intrapac*) – where the applicant contends that the decision in *Intrapac* would suggest to a prudent purchaser that the prospect of an access condition being imposed on the applicant was ‘highly unlikely’ – where that was because it was not supported by a road designated on the planning scheme in the 2006 Plan and was not supported by a necessity to develop land in accordance with applicable planning documents – where the applicant contends that the facts in *Intrapac* are materially different to the current matter – where the applicant contends that the Land Appeal Court thereby erred in reaching a view of what a hypothetical purchaser would think – whether the Land Appeal Court erred in adopting *Intrapac* by analogy – whether the alleged error amounts to an error of law – where this ground is not concerned with the interpretation, articulation or application of statutory law or legal principle by the Land Appeal Court – where central to it is the contention that the court failed to recognise that certain factual circumstances, upon which the decision in *Intrapac* depended, were not present in the case before it, with such a failure having the character of error of fact, and not of law – where as such, it cannot ground an appeal to this court – where the criticism is of dubious merit – where

the Land Appeal Court did acknowledge that there were plainly factual differences between *Intrapac* and the circumstances relevant to the development of the South Pine Sporting Complex (SPSC) – where as to the differences highlighted for the council, while it may be accepted that there is no road on the planning scheme here comparable with the new major road in that case, Division 2 of the 2006 Plan does contain comparable provisions for the orderly and efficient development of transport infrastructure as part of overall outcomes for the urban locality in question – where the resumed land was surrounded by land owned by the applicant within a Sports and Recreation Zone – where the applicant made a material change of use application to itself in relation to this land for development purposes – where the proposed use conflicted with the applicable planning scheme – where s326 SPA requires an assessment manager's decision not to conflict with the applicable planning scheme unless there are sufficient grounds to justify departure – where the applicant contends the Land Appeal Court had regard to the zoning of land in contemplating the application's prospect of success – where the definition of ‘grounds’ in Schedule 3 SPA does not include the zoning of land – whether the Land Appeal Court incorrectly interpreted the SPA provisions as allowing an assessment manager to take zoning into account – whether the Land Appeal Court erred in envisaging that a hypothetical purchaser would have regard to zoning as an obstacle to obtaining approval – whether the alleged errors amounted to errors of law – where the conclusion expressed on this point is a conclusion with respect to a matter of fact, namely, the weight that a hypothetical purchaser would give to the

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current zoning in carrying out the balancing exercise to which reference has been made – where if error were made in arriving at that conclusion, it would be one of fact and not one of law, with such an error not founding a viable ground of appeal to this court – where evidence of nine unaccepted offers for the resumed land was adduced before the Land Court member – where the Land Court member placed no weight on the offers because five were conditional, three were not regarded as genuine (the Comiskey offers) and one was aged (the Flaskas offer) – where the Land Appeal Court disagreed with the member’s conclusion as to the genuineness of the Comiskey offers – where the Land Appeal Court did not adopt the evidence of either of the two valuers’ respective valuations – where the Land Appeal Court’s final valuation reflected the Comiskey offers, the Flaskas offer and one of the conditional offers – whether the Land Appeal Court adopted a valuation methodology based on the unaccepted offers – whether the Land Appeal Court erred in having regard to verbal offers – whether the Land Appeal Court erred in having regard to conditional offers – whether the Land Appeal Court erred in incorrectly characterising a conditional offer as an unconditional offer (the Flaskas offer) – whether the incorrect characterisation vitiated the valuation of the Land Appeal Court – where the methodology employed by the Land Appeal Court to arrive at the figure of \$4.1 million did not involve reliance upon offers: it was comparative sales-based, subject to adjustment for differences – where reference to the Flaskas offer was made after the value had been determined and then only in the most limited way, the Land Appeal Court noting that it would seem that the market value of the resumed land at the resumption date would have to be higher than that offer – where the Flaskas offer did not cause the Land Appeal Court to review and then adjust the value that it had determined in order to accommodate that offer in some way or other – where that error, however, would not justify setting aside the Land Appeal Court’s determination of value.

Application for leave to appeal refused.  
Costs.

**KMB v Legal Practitioners Admissions  
Board (Queensland) [2017] QCA 76,  
28 April 2017**

General Civil Appeal – where the appellant seeks a declaration that certain matters will not affect the Legal Practitioners Admissions Board (LPAB) assessment as to whether he is a fit and proper person for admission – where the appellant had previously plead guilty to two counts of unlawful sodomy and two counts of indecent treatment of a child under 16 – whether the appellant’s prior offences

adversely affect an assessment as to whether he is a fit and proper person for admission – where the appellant sought out psychological counselling almost immediately after he was charged and continued with his therapy for almost a year thereafter – where the appellant was also seen by Dr Grant, a consultant forensic psychiatrist, who provided a report for the purposes of the appellant’s application to the LPAB – where Dr Grant was of the opinion that the appellant was “very remorseful about his offending” – where Dr Grant was of the opinion that the appellant had “demonstrated strong commitment to work, career and community activities, particularly over the last eight years, and is strongly focused on living a productive and successful life, hopefully as a lawyer” – where it is 10 years since the offences were committed – where he completed a Bachelor of Music degree at Griffith University, Queensland Conservatorium, and a Master of Music Studies from the same university – where he has now completed the degree of Bachelor of Laws at Queensland University of Technology with first class honours – where his grade point average for his Master of Music Studies was over six, and his grade point average in his Bachelor of Laws studies was greater than six – where he has worked extensively both on a paid and on a pro bono basis as a professional musician at a very high level – where he has worked as a paralegal at a large Brisbane solicitors’ firm and as an assistant to a practising barrister – where both in his affidavit evidence and in his oral testimony he has not sought to minimise the character of the conduct in which he engaged or to forego responsibility for it – where he has shown a thorough insight into his behaviour in his early twenties and exhibits a mature understanding about the significance to him and to his life of that behaviour – where the evidence shows that in the years since the offences were committed, the appellant has matured considerably – where he has changed from a confused young man to a mature adult who has demonstrated proficiency in his studies as a musician and as a budding lawyer – where, certainly at the present date, 10 years after the relevant conduct, there is no basis upon which either the conduct which constituted the offences or the fact of his guilt of a criminal offence should affect a judgment that the appellant is a fit and proper person to be admitted to the legal profession.

Appeal allowed. Decision of the LPAB be set aside. Declare that the matters contained in the applicant’s application to the LPAB do not, without more, adversely affect an assessment as to whether the appellant is a fit and proper person to be admitted to the legal profession under the *Legal Profession Act 2007* (Qld).

**Queensland Building and Construction Commission v Turcinovic [2017] QCA 77, 28 April 2017**

General Civil Appeal – where an application by the appellant for summary judgment was refused by a District Court judge – where the claim and statement of claim as originally filed, the appellant sought recovery from the respondent of \$214,464.55 under s71(1) of the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCCA) – where the respondent carried out residential construction work – where there was a policy of insurance – where in the proceedings the appellant sought to recover from the respondent \$214,464.55 being payments made by it in respect of the claims as payments on a claim under the insurance within section 71(1) of the Act – where in his amended defence the defendant pleaded in respect of the claimed amounts, that the costs claimed were “so unreasonable so as to make the monies paid out not a payment on a claim under the insurance scheme” – where the review of the decisions in this court referred to by her Honour below, and the parties before us since the decision of *Mahony v Queensland Building Services Authority* [2013] QCA 323, confirm that *Mahony* remains an authoritative statement of the law and of the liability of a building contractor to pay to the commission the amount of any payment made “on a claim under the... scheme” under s71(1) QBCCA – where in the circumstances of this matter, s71AC of the QBCCA controlled the tendering of rectification work – where the evidence before her Honour was that tenders were obtained in respect of the rectification work for each of the six properties – where the evident purpose and intent of s71(1) in the statutory context identified by Gotterson JA in *Mahony* is that the recovery of the debt authorised by the section is not to become bedevilled by the factual convolutions that can emerge in actions in courts, tribunals or arbitrations for recovery of reasonable and necessary costs of defective work – where the Act contains provisions which the Parliament determined are appropriate to establish a scheme that balances the interests of homeowners and building contractors, and provides for debt recovery after the claim process established by Parliament has culminated in a payment – where her Honour erred in not properly giving effect to s71(1) of the Act as that section should be understood – where the appellant’s submission is accepted that the respondent has “no real prospect of defending” the appellant’s claim nor has it been demonstrated that there is any need for a trial and there should be judgment for the appellant.

Appeal allowed. Orders below set aside and in lieu it be ordered that there be judgment for the appellant against the

defendant in the sum of \$214,464.55 together with interest. Costs.

## Criminal appeals

### *R v MCK* [2017] QCA 56, 7 April 2017

Appeal against Conviction & Sentence – where the appellant was convicted on his plea of guilty to one count of maintaining an unlawful sexual relationship with a girl under 16 years (W), with an aggravating circumstance – where the appellant now denies his guilt – where the appellant maintains his guilty plea was not freely entered but was induced by wrong legal advice from his barrister and from a clerk represented to him as a lawyer – where the appellant asserts counsel did not take proper instructions from him – where the appellant asserts that he was unaware of the nature of the charge to which he pleaded guilty and the allegations on which it was based – whether a miscarriage of justice has occurred – where the major difficulty in finding the facts in this case is that there were compelling reasons for doubting the veracity of all three witnesses who gave oral evidence: the appellant, Mr Rosser (his former barrister) and Mr Reichman (the latter’s clerk) – where the appellant’s insistence that he had not contemplated the possibility of imprisonment is difficult to reconcile with his claim of having questioned Reichman about whether the latter was sure he would not go to jail – where his police record of interview was not among the documents before the court; presumably its absence reflects one of many lapses in Mr Rosser’s filing system – where, nonetheless, it is impossible to believe that the appellant was not asked questions based on W’s extensive statement setting out her allegations against him – indeed, he admitted as much – or that the allegations failed to make any impression on him – where nor is it plausible that having been charged with seven counts of carnal knowledge, six of indecent treatment and, most significantly, one of rape, he would placidly have proceeded through committal without enquiring what they might have been about – where regrettably, however, it is not accepted Mr Rosser as an unfailing witness of truth either – where for present purposes, no more will be said that Mr Rosser’s attempts to explain and justify his statements in his advertising of his two “Services” were not credible – where in addition, his denial of the suggestion by the appellant’s counsel that he had left it to the morning of the sentence to take the appellant’s antecedents, and his assertion that he was merely formalising what was to be said, also sat badly with his later concession that he took information about the details of the appellant’s background at the last minute in order to have it “up to date” – where Mr Reichman agreed, under

cross-examination, that he was convicted in August 2014 of two offences: the first, of engaging in legal practice when he was not admitted as a legal practitioner, over about five months at the beginning of 2013, and the second, of representing that he was entitled to engage in legal practice, over a period of about a year, ending in February 2014 – where after he was fined for those offences, he was convicted of a further set of offences occurring between September 2013 and 21 January 2015, of engaging in legal practice while not a legal practitioner; these offences related to his attending police interviews with clients of Mr Rosser’s – where remarkably he also he also admitted to conducting a summary trial in a Magistrates Court at Leeton in New South Wales in relation to another client of Mr Rosser’s in October 2012, before he had even received his law degree – where notwithstanding Mr Reichman’s discreditable history, particularly of deceiving courts by representing that he was a legal practitioner, he was the only one of the three witnesses giving oral evidence here whose answers appeared to be frank – where there was, at least, nothing he said that defied belief – where the question, then, is whether the appellant understood what was entailed in the count of maintaining an unlawful relationship to which he pleaded guilty – where the existence of one of Rosser’s very few file notes, recording the signing of the schedule of facts immediately before the details of the sentence imposed, also gives some contemporaneous support for his evidence that it was he who obtained the appellant’s signature on the document – where it is not accepted that the appellant failed to appreciate the nature of the charge of maintaining an unlawful sexual relationship to which he pleaded guilty – where it is more probable that he was prepared to accept responsibility for the allegations made against him in connection with the maintaining charge, once the more damaging allegations of rape and sodomy had been withdrawn, in the hope that he might (not would) escape a custodial sentence – where not having contemplated (not surprisingly) the sentence of almost 10 years imposed on him, he now regrets his decision – where the appellant was sentenced to nine years and 11 months’ imprisonment with parole eligibility after three years and four months – whether the sentence was manifestly excessive – where counsel for the respondent very properly conceded that the sentence of nine years and 11 months’ imprisonment was manifestly excessive; it was “unreasonable or plainly unjust” – where it is difficult to understand how the sentencing judge arrived at the sentence; it was certainly not the result of anything submitted by the prosecutor – where counsel for the respondent also conceded that the



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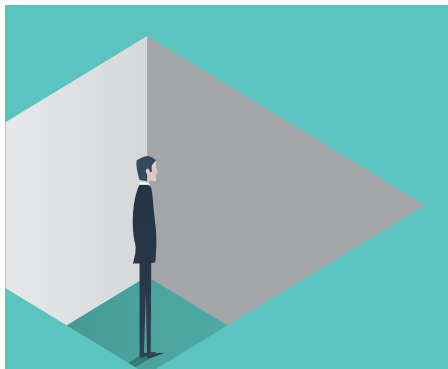
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sentencing judge fell into error in finding the appellant “entirely responsible” for W’s present psychological state, when it was clear that she had been the victim of protracted sexual abuse as a child – where counsel for the respondent made helpful submissions, acknowledging a number of significant aspects of the case: that while the relationship was inappropriate, there was nothing to suggest that it was other than a result of mutual affection; that it entailed no breach of trust, because the appellant was not in any position of responsibility for W; that there was no power imbalance in their relationship or manipulation, often a feature of offending of the type; that the appellant was himself a young man of 21 when the relationship began; and that he had a relatively minor criminal history.

Appeal against conviction dismissed. Application for leave to appeal against sentence granted. Appeal allowed. Set aside the sentence imposed at first instance. Substitute a sentence of four years’ imprisonment suspended after 12 months for an operational period of five years. Declare that the appellant has served a period of 365 days between 8 April 2016 and 7 April 2017 of that sentence.

*R v SCR* [2017] QCA 60, Orders delivered ex tempore 15 March 2017; Reasons delivered 11 April 2017

Sentence Application – where the child applicant pleaded guilty to a substantial number of offences and was sentenced to serve concurrent terms of detention for three years and six months – where s272(2) *Youth Justice Act 1992* (Qld) (YJA) allows for release after the young offender serves 70% of the detention term – where, in special circumstances that term may be reduced to between 50% and 70% – where the applicant had a prejudicial upbringing and is institutionalised due to a history of petty crime – where the applicant assisted and cooperated with authorities – where the respondent concedes that an error was made by the sentencing judge when the sentencing judge failed to consider those matters as special circumstances – where on the application before this court the factors which the Crown said were relevant as special circumstances were: (a) the fact that Mr SCR has been institutionalised at a very young age, warranting his release at something less than 70%; and (b) Mr SCR’s cooperation with law enforcement, in that he made admissions to many of the offences committed while in the community, and nominated his co-offenders; balanced against that is the fact that there was no cooperation in relation to the offences which occurred in the detention centre – where with respect, we consider that the Crown’s concession is properly and fairly made, at least as to the second factor – where for the purposes of the resolution of the application it is only necessary to

refer to that factor – where reference was made by the prosecutor to the admissions made by Mr SCR to police, as to his being the driver of vehicles on most of the occasions when houses were broken into and vehicles stolen – where however, the true nature of those admissions and cooperation is, as reflected in the Crown’s outline on this application, that he not only admitted his own conduct, but nominated his co-offenders – where here the crime might have been known, in the sense that someone knew their car had been stolen, and police found it, but the police did not know who the offender was until Mr SCR’s admission came – where likewise, police did not know the names of the co-offenders until the admission was made – where that form of cooperation would otherwise attract special leniency, and our view constitutes “special circumstances” for the purposes of s227(2) of the YJA – where that would warrant some reduction from the 70% default position, it would not warrant a reduction below 60% because of countervailing factors – where that is the position adopted by the Crown and counsel for Mr SCR.

Application for leave to appeal against sentence is allowed. The sentence imposed in the Childrens Court is varied by setting aside the order that the applicant is required to serve 70% of the sentence of detention and instead ordering that the applicant is to be released from detention on a supervised release order after serving 60% of the period of detention. Otherwise the orders of the Childrens Court are confirmed.

*R v Iese* [2017] QCA 68, Orders delivered ex tempore 15 March 2017, Reasons delivered 21 April 2017

Sentence Application – where the applicant pleaded guilty to unlawfully doing grievous bodily harm and was sentenced to 18 months’ imprisonment to be suspended after serving four months for an operational period of two years – where there was evidence before the sentencing judge of goading conduct by the complainant – where the prosecutor described the applicant’s conduct as “largely unprovoked” but did not otherwise challenge the evidence – where the applicant did not rely upon the defence of provocation but claims the complainant’s behaviour was a material consideration in formulating the sentence – where the sentencing judge described the offence as “unprovoked” – whether the sentencing judge failed to take the complainant’s conduct into account – where in the course of argument, counsel agreed that these grounds of appeal were to be understood as contending that the sentencing judge had erred in exercising the sentencing discretion in a *House v The King* (1936) 55 CLR 499 sense by failing to take into account a material consideration, namely, that in

assaulting the complainant, the applicant had responded to goading conduct on the former's part – where the description of the conduct of the complainant as depicted on the CCTV footage paints a picture of some aggression on his part towards the applicant – where he put down his beer and then took a number of steps very quickly towards the applicant – where such was the manner of his approach that one of his companions tried to push the complainant from his course – where notwithstanding, he managed to invade the applicant's personal space – where that the applicant had been approached in this manner was a consideration relevant to the criminality of his conduct, and was a consideration that ought appropriately to have been taken into account in formulating his sentence – where it is not clear whether his Honour's description of the offence as "unprovoked" was meant in a narrower sense of provocation as defined in s268 *Criminal Code* (Qld) or in a wider sense as would include goading conduct falling outside the definition – where either way, his Honour erred – where if he used the word in the narrower sense, he must not have turned his mind to whether the applicant was goaded into reacting as he did and thereby failed to take that into account – where if he used it in the wider sense, then his finding not only contradicts the only material that was before him on the topic but also reveals that he failed to take the relevant consideration into account – where it is not in dispute that the sentence of 18 months' imprisonment is appropriate – where the real issue for this court is whether the applicant ought to be required to serve any more of it than the 12 days he has now served – where there are aspects to the applicant's conduct and personal circumstances which are out of the ordinary – where the high degree of remorse reflected in the letter of apology and offer of compensation and the applicant's conduct in returning to the tavern to give his details, illustrate that – where those factors and the applicant's minimal criminal record indicate that the likelihood of his re-offending is very low – where due recognition ought also be given to the complainant's goading conduct which immediately preceded the assault upon him.

Leave to appeal granted. Appeal allowed. Sentence imposed on 17 October 2016 be set aside. The applicant is sentenced to 18 months' imprisonment to be suspended after serving 12 days for an operational period of two years. It is declared that the applicant has served 12 days' imprisonment under the sentence from 17 October 2016 to 28 October 2016.

**R v Knox [2017] QCA 74, 28 April 2017**

Sentence Application – where the applicant pleaded guilty to one count of robbery in company with personal violence, one count of armed robbery in company, one

count of receiving stolen property with a circumstance of aggravation and one count of robbery in company – where separate sentences were imposed in respect of each of the offences, to be served concurrently – where a five-year head sentence was imposed on both co-offenders (the applicant and Lowe) in respect of the armed robbery in company – where the applicant submitted the primary judge failed to account for his lesser role in the offending – whether the sentencing judge erred in sentencing both co-offenders to the same head sentence – where there are a number of factors which suggest that the applicant's offending, while serious, was not quite as serious as that of Lowe – where in none of the offences which they committed together could the applicant's actions have been said to have been more violent or serious than that of Lowe and indeed, if the unchallenged submission as to their respective roles made to the sentencing judge were to be accepted, the contrary is the case – where it is true that both were young and had deprived backgrounds and both had prior contact with the criminal justice system – where there were a number of differences in their prior criminal history which were not correctly referred to by the sentencing judge – where in all of the circumstances, taking into account the five years' imprisonment imposed upon Lowe, which was conceded to be an appropriate sentence, and taking into account all the offending committed by the applicant and his youth and criminal history, the appropriate sentence to be imposed on the applicant is four years' imprisonment.

Leave to appeal granted. Appeal allowed. The sentence imposed on count 2 on the indictment is set aside only to the extent that he be sentenced on count 2 to four years' imprisonment to be eligible for parole immediately, that is after having served one-third of his sentence, 16 months.

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 [scqlld.org.au/caselaw/QCA](http://scqlld.org.au/caselaw/QCA). For detailed information, please consult the reasons for judgment.

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# New QLS members

Queensland Law Society welcomes the following new members who joined between 11 April and 12 May 2017

**Lauren Babare**, Hynes Legal  
**Gabrielle Baker**, Hartley Healy  
**Christopher Barron**, Collas Moro Ross  
**Danielle Barry**, Clayton Utz  
**Ellie Bassingthwaighte**, CRH Law  
**Anna Battams**, HopgoodGanim  
**Sarah Beattie**, Howard Legal Group Pty Ltd  
**Heathcliff Berghofer**, O'Keefe Mahoney Bennett  
**Caroline Bicheno**, Australian Federal Police  
**Borhan Borhani**, Sparke Helmore  
**Benjamin Bourke**, Norton Rose Fulbright  
**Samantha Breach**, Bosscher Lawyers  
**Morgan Brennan**, Allens  
**Michelle Brereton**, Reaston Drummond Law  
**Thomas Browning**, Alexander Law  
**Mark Budd**, B & G Law Pty Ltd  
**Benjamin Cameron**, TEC Legal Pty Ltd  
**Katherine Campbell**, Charltons Lawyers  
**Claire Campbell**, Sparke Helmore  
**Liam Cannon**, Mills Oakley  
**Michelle Chadburn**, NB Lawyers  
**Nicholas Chang**, Asahi Legal Practice  
**Hsuan Chen**, Lacy Lawyers  
**Andrew Clark**, Moulis Legal  
**Simon Cobb**, Peabody Energy Australia Pty Ltd  
**Catherine Coleman**, MYG Legal  
**Thomas Courtenay**, Gadens Lawyers – Brisbane  
**Courtney Craig**, Morgan Conley Solicitors  
**Taina Crisp**, non-practising firm  
**John Cronin**, Anumis Legal  
**Morgann Crothers**, Estate First Lawyers  
**Andrew Dahlsen**, non-practising firm  
**Jessica Dale**, HopgoodGanim  
**Haleema Deen**, MacDonnells Law  
**Uditi Desai**, Peter G. Williams & Associates  
**Patrick Dooley**, Dooley Solicitors  
**Kristy Doyle**, Evans Lawyers  
**Andrew du Boulay**, Brain Trust International Law Firm  
**Raymond Everest**, Carvosso & Winship  
**Brodie Farley**, non-practising firm  
**David Fisher**, Carter Newell Lawyers  
**Zoe Ford**, Parker Simmonds Solicitors & Lawyers Pty Ltd  
**Elise Fordham**, Pullos Lawyers Pty Ltd  
**Whitley Foreman**, DCL & Associates Pty Ltd  
**Anthony Freese**, Jensen McConaghy Lawyers  
**Sheryl Gabutero**, Trinity York  
**Donald Gassner**, South Geldard Lawyers  
**Callum Gibson**, Corney & Lind  
**Anna Gornall**, Avant Law Pty Ltd  
**Henry Hall**, McInnes Wilson Lawyers  
**Bronwyn Hammond**, Norton Rose Fulbright

**Corey Harrison**, Cornerstone Law Offices Pty Ltd  
**Claire Hart**, McCullough Robertson  
**Janette Hewson**, Peabody Energy Australia Pty Ltd  
**Vinh Ho**, McCarthy Durie Lawyers  
**Marlies Hobbs**, MacDonnells Law  
**Michael Hobson**, Hobson Legal  
**Kellie Hopkins**, Mackey Wales Law  
**Charlotte Hoskin**, Brisbane City Council  
**James Hughes**, Cleary Hoare Solicitors  
**Monica Jaynes**, Sparke Helmore  
**Courtney Jenkins**, Shine Lawyers  
**Olivia Jennar-Bryant**, Jones Mitchell Lawyers  
**Amanda Johnstone**, Harrigan Lawyers  
**Lauren Joseph**, McKays  
**Ben Kettle**, Great Barrier Reef Marine Park Authority  
**Leeanne Klan**, Calibre Group Limited  
**Levanna Lam**, Littles Lawyers  
**John Lamont**, non-practising firm  
**Lescha Lawson**, James Cook University – Legal & Compliance Services Unit  
**Frances Learmonth**, non-practising firm  
**Naomi Lewis**, Lewis & Trovas  
**Karen Litherland**, King & Wood Mallesons  
**Susan Little**, Maurice Blackburn Pty Ltd  
**Anna Lloyd**, Crime and Corruption Commission  
**Jean-Martin Louw**, GRT Lawyers  
**Kirsten MacGregor**, Steindl Bradley & Associates  
**Kirsty Mackinnon**, See Well Law Pty Ltd  
**Naomi Mason**, MBA Lawyers  
**Katrina Mawer**, McInnes Wilson Lawyers  
**Phoebe Mayson**, Craven Lawyers  
**Matthew McCleery**, JLF Corporation  
**Brooke McDonald**, Bank of Queensland Limited  
**Rowan McDonald**, Maurice Blackburn Pty Ltd  
**Nicole McElDowney**, Payne Butler Lang  
**Constance McLaran**, Cooke & Hutchinson  
**Jovana Milosavljev**, S K Lawyers  
**George Moenoa-Williams**, BT Lawyers  
**Katelyn Nunan**, McMahon Clarke  
**Hayley O'Loughlin**, HopgoodGanim  
**Petra O'Meara**, Department of Natural Resources and Mines  
**Christine O'Neill**, Department of Infrastructure, Local Government and Planning  
**Michelle Paskins**, Crane Paskins Law  
**Allanah Patron**, Brooke Winter Solicitors & Advisers  
**Peter Penklis**, DL Legal  
**Peta Preston**, Preston and Associates  
**Shufei Qu**, Minter Ellison  
**Boris Radmilovic**, Crouch & Lyndon Pty Ltd  
**Caitlin Roberts**, Macrossan & Amiet  
**Penny Robinson**, Minter Ellison

**Nicholas Robson**, Olsen Lawyers  
**Edwina Rowan**, Charltons Lawyers  
**Peter Sams**, McBride Legal  
**Caitlyn Selwood**, McInnes Wilson Lawyers  
**Jean Siganto**, Ringrose Siganto  
**Edward Stewart**, IHC Legal  
**Hao Su**, Short Punch & Greatorix  
**Gemma Sweeney**, McInnes Wilson Lawyers  
**San-Joe Tan**, Tucker & Cowen Solicitors  
**Hayley Tarr**, Minter Ellison – Gold Coast  
**Christopher Taylor**, Emanate Legal  
**Daniel Thambar**, Clayton Utz  
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**Candace Watkins**, Parry Coates Family Law  
**Scott White**, non-practising firm  
**Greta Wilson**, Lynch Law



# Career moves



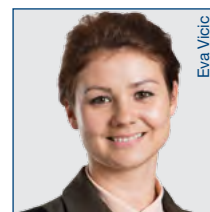
Rachel Pie



Nicola Young Berryman



Kelly Streeter



Eva Vivic



Claire Hart



Jade Osman



Kirsty Mackinnon



Sally Southwood



Tania Smith



Deborah Vella



Brent Weston

## Colin Biggers & Paisley

Colin Biggers & Paisley has announced the appointment of special counsel **Rachel Pie** to the construction and engineering team in its Brisbane office. Rachel has more than 20 years' experience in front-end construction and major projects, working on significant projects across the rail and transportation, energy and mining, building and construction, and infrastructure sectors.

## DibbsBarker

DibbsBarker has welcomed senior associate **Nicola Young Berryman** to the firm's real estate and construction team. Nicola has experience advising institutional investors, property developers, real estate investment trusts and corporates on the acquisition and disposal of commercial office buildings, industrial facilities and development sites. She also advises on property development projects, commercial and retail leasing.

## Family Law Group Solicitors

**Kelly Streeter** has been appointed as a senior associate at Family Law Group Solicitors. Kelly is primarily involved in negotiating and litigating parenting disputes, with a particular focus on complex parenting matters and property settlements. Kelly also has significant experience in domestic violence matters.

## McCullough Robertson

McCullough Robertson has strengthened its national real estate practice with appointments in its Sydney and Brisbane offices.

Special counsel **Eva Vivic** joins the Sydney office and has more than a decade of experience acting for clients in property development, property sales and acquisitions, and commercial and retail leasing transactions.

In Brisbane, **Claire Hart** and **Jade Osman** have been appointed to the group as senior associates. Claire has experience across leasing, commercial and industrial acquisitions, while Jade is experienced across a range of property matters including retirement villages.

## See Well Law

See Well Law has announced the appointment of **Kirsty Mackinnon** as a senior associate to lead the firm's litigation team from its Marcoola office. Kirsty has more than 14 years' experience in civil legal matters, practising exclusively on the Sunshine Coast with a focus on commercial, construction, estate and family law disputes.

## Stone Group Lawyers

Stone Group Lawyers has announced the appointment of **Sally Southwood** as a senior associate in its new family law division and **Tania Smith** as an associate in the litigation division.

Sally is a QLS accredited specialist in family law and has practised solely in that area for more than 19 years. Tania has experience in all areas of litigation with a special focus on insolvency.

## Support Legal

**Deborah Vella** has founded Support Legal to enable her to continue her passion for legal practice as well as support her young family. She describes it as her vision of what professional working parents can achieve within a supportive business environment. Practising in the Northern Territory and Queensland, Support Legal aims to provide legal services remotely or in person, primarily in property and commercial law. See [supportlegal.com.au](http://supportlegal.com.au).

## Tucker & Cowen Solicitors

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

*Proctor career moves:* For inclusion in this section, please email details and a photo to [proctor@qls.com.au](mailto: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.

# Practical, personal guidance for members

## The QLS Senior Counsellor experience

QLS Senior Counsellors provide confidential guidance to practitioners on professional or ethical issues.

The service has been operating for more than 40 years and today there are 49 highly experienced practitioners across Queensland who can assist with professional or ethical issues and career advice.

This month, we profile three QLS Senior Counsellors who practise in Central Queensland – Vicki Jackson (Rockhampton), Bernadette Le Grand (Gladstone) and Chris Trevor (Gladstone).

### Vicki Jackson

Vicki has been a QLS accredited specialist (family law) since 1997 and is a nationally accredited mediator.

#### What motivated you to become a QLS Senior Counsellor?

As a young solicitor in Rockhampton, I enjoyed a collegiate relationship and thought nothing of ringing a more senior practitioner as a sounding board, whether for an ethical question or a matter of law. When approached to be a QLS Senior Counsellor, I therefore felt a responsibility to say 'yes'.

#### What is the best part about being a QLS Senior Counsellor?

I am always humbled that another practitioner has not only the confidence to approach me but, in addition, it is rewarding to be able to ease another person's burden even if it is only to say 'I agree with your approach' to a particular issue.

#### What do you like to do during your time off?

Pre-2014, I would have said preparing for and competing mostly in agricultural shows and equestrian competitions with my show horse. Since my retirement from active competition, I now spend time that is more leisurely with my horses and of course my husband Ion and daughter Anna, both of whom share my passion for animals. Travel is also on the agenda.

#### What is your favourite area of practice?

Succession and family law, as they enable me to try to make a difference to people when they feel most vulnerable and alone. With my background, I also enjoy agribusiness and rural property transactions, particularly the complex litigation founded in equity, which often flows out of family farms.

#### Can you provide an overview on your general experience as a QLS Senior Counsellor?

For me, it is giving back to a profession that has been part of my life for 40 years. I particularly enjoy interaction with young people and enjoy engaging with them about the challenges and pressures that they face.

#### If you could give one piece of advice to a solicitor just starting their career, what would it be?

Work diligently while remaining objective to a client's problem or transaction. Do the best you can for them, but sometimes you cannot achieve the impossible. Remember to not make other people's problems your problem, and practise 'turning off' as you leave the office.

#### What do you like about your region?

Loyalty and trust of rural clients as well as the Rockhampton lifestyle. I am able to enjoy looking out each morning at my stables and my husband's stud cattle, yet I only have a 20-minute drive to my office; a half hour to the beach and a one-hour flight to Brisbane. How is that for versatility?

### Bernadette Le Grand

Bernadette is a nationally accredited mediator, registered family dispute resolution practitioner and conflict management coach.

#### What motivated you to become a QLS Senior Counsellor?

I was asked by past QLS president Michael [Fitzgerald] and I see it as a further opportunity to provide support to practitioners in the regions who are doing it tough.

#### What is the best part about being a QLS Senior Counsellor?

Being able to help people.

#### What do you like to do during your time off?

I enjoy spending time with my family, jet-skiing, travelling and reading.

#### What is your favourite area of practice?

Mediation.

#### Can you provide an overview on your general experience as a QLS Senior Counsellor?

It has been very brief so far, but I have met a number of the other QLS Senior Counsellors and I think Queensland solicitors are well served by their counsellors and the QLS Ethics Centre. I encourage everybody to make use of these resources that are available to them.

#### If you could give one piece of advice to a solicitor just starting their career, what would it be?

I suppose 'Don't do it!' would not be an appropriate answer! Probably that law can be a very tough and demanding profession, particularly in the regions, and it is important that you look after your mental health. Remember we are a profession, and although sometimes our work is adversarial, we can still be courteous and support each other. You are not alone, take advantage of the services offered by QLS like LawCare, the QLS Ethics Centre and the QLS Senior Counsellors.

#### What do you like about your region?

The friendly people, the harbour, marina parklands, the islands, Lake Awoonga, the beaches and the weather.

## Chris Trevor

Chris has extensive experience and provides legal advice in the areas of personal injury, family law, wills and estates, criminal law and conveyancing.

### What motivated you to become a QLS Senior Counsellor?

The motivation to become a QLS Senior Counsellor was to give something back to a profession that has been so good to me for over 30 years. To help others in times of uncertainty and stress. I know how a listening ear and friendly advice can be so helpful at times during your career.

### What is the best part about being a QLS Senior Counsellor?

The best part of being a QLS Senior Counsellor is being able to help. Often the problems are not complex and require simple reassurance that a practitioner is on the right path.

### What do you like to do during your time off?

I have very little time off. As well as owning an all-female legal practice (the glass ceiling crashed to the ground some years ago in my firm and I have never looked back), I am also the deputy mayor of the Gladstone Regional Council, having previously been the first federal Member for Flynn. I now live in a house on a sand dune 80 metres from the Pacific Ocean at Agnes Water, so when I do get a break it's fishing, swimming and surfing with the kids and grandkids.

### What is your favourite area of practice?

I have never had a favourite area of practice. I have practised in criminal law, family law, wills and estates, personal injury law and conveyancing.

### Can you provide an overview on your general experience as a QLS Senior Counsellor?

We don't get a lot of calls in 'the bush' but when we do it's often a minor ethical issue or general practice enquiry. Conflicts are often a problem in the region because everybody knows everybody.

### If you could give one piece of advice to a solicitor just starting their career, what would it be?

Never be afraid to ask. There is no such thing as a dumb question.

Never lie – always tell the truth.

Be humble and never get carried away with your own importance.

### What do you like about your region?

The Gladstone region has an enormous amount of lifestyle and opportunity. It is a great place to live, work, rest and play. It is an incredibly friendly region, culturally diverse with a positive 'we can do it' attitude. We are blessed with wonderful beaches, national parks and sporting facilities, as well as being recognised as the port city to the world and the industrial capital of Australia.

To learn more about QLS Senior Counsellors, see [qls.com.au](http://qls.com.au) > QLS Ethics Centre > QLS Senior Counsellors. Contact details for QLS Senior Counsellors are listed at the back of each edition of Proctor.

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## 09 Gold Coast Symposium 2017

8.30am-5.35pm | 7 CPD

Surfers Paradise Marriott Resort & Spa

Hear from a mixture of local Gold Coast, Brisbane and QLS experts on significant developments across areas of practice including property, family, commercial, and succession, and how you can prepare for the challenges and opportunities they bring. Topics include how technology is affecting rights to privacy, the progress and future of the trial Southport Specialist Court, and the commercial realities of the new shared economy.

PLE PM&BS PS SL

## 14 Practice Management Course Online Information Session

6-7pm

Online | DVD available

A complimentary event for practitioners interested in undertaking the QLS Practice Management Course. The session will include an overview of the course structure, applications, study requirements and assessment items.

## 15 Webinar: Introduction to Drafting Titles Office Documents

12.30-1.30pm | 1 CPD

Online | DVD available

Do you want to correctly complete standard Land Titles Office documents the 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 an expert Titles Office consultant, this webinar has been designed for legal support staff.

PS

## 16 Masterclass: The Golden Rules of Negotiation

8.30am-12.30pm | 3.5 CPD

Law Society House, Brisbane

Queensland Law Society is thrilled to welcome back one of Australia's best alternative dispute resolution lawyers and best-known teachers in negotiation skills, conflict management and ADR, Michael Klug AM. Michael will explore the core theory and practice of negotiation, including primary approaches to negotiation, characteristics of effective negotiators, and negotiation strategies and tactics.

PS

## 19 Introduction to Family Law

19-20 | 8.30am-4.15pm | 10 CPD

Law Society House, Brisbane

Aimed at junior legal staff with less than three years' experience, this introductory course develops delegates' knowledge and skills, offering an overview of family law and practical guidance on processes and tasks associated with the most common family law matters.

PS SL

## 22 In-House Counsel Webinar: Demonstrating Value

12.30-1.30pm | 1 CPD

Online | DVD available

Do you want to ensure you are consistently delivering value to the business? This webinar is targeted at in-house counsel wishing to gain practical hints and tips on how to demonstrate value to internal clients, senior executives and the board.

PS

## 23 Essentials: Criminal Law Advocacy

8.30am-12pm | 3 CPD

Law Society House, Brisbane

Targeted at junior criminal lawyers and those seeking a refresher on criminal law basics, this Essentials session will identify and develop the skills you need to be a better solicitor advocate, so you not only survive but thrive on your feet! This will include a consideration of how to use the rules of evidence to empower you in your important role as solicitor advocate.

PS SL

## Save the date

5 July Webinar: Can I Vary Parenting Orders?

5 July Live Webstream: Communicating with Indigenous Queenslanders

5 July Live Webstream: RAP Launch

7 July QLS Essentials Conference 2017

11 July Webinar: Introduction to Legal Research

13-14, 21 July Practice Management Course – Medium and Large Practice Focus

13-15 July QLS & FLPA Family Law Residential 2017

20 July Masterclass: Contract Law

25 July Essentials: Intellectual Property

27 July In Focus Webinar: New Planning Laws

Earlybird prices and registration available at

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# Discover new horizons



## QLS Essentials Conference 2017

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# Extracting value from the first hour

A practice idea that might make a big difference



I think I'm OK at the whole productivity/behaviour game. But just recently a client spoke to me so passionately about value lost at early morning log-on that I thought I'd pass the story on.

It goes like this...

The lawyer arrives, logs on and opens Outlook. He starts scanning his email inbox. In the process he makes running judgments – what's new, what's interesting, what's a problem child, what's urgent, and so on.

He might start a list of the day's priorities (although doing this just on the strength of your inbox isn't a great idea). Having an inquiring mind, he may well open an attachment/document here and there for a preliminary read. But because it is all part of a kind of early morning overview, no matters are opened and no time is charged.

Depending on whether coffee is involved, this can take a half to 1½ hours. This represents straight up lost value for the firm. And let's be clinical, capturing value is what pays the bills...

So why should the time be charged (excluding getting the coffee)? Firstly, because the reading and thinking processes are legitimately chargeable. Secondly, because with all practices constantly trying to boost/hold their returns by driving productivity up, most people can't afford to unconsciously drop a lazy hour at the start of the day. And thirdly, by just working a bit smarter, the extra value can be captured *without doing any extra work*. That's right, you're doing the work anyway, so why not charge for it?

So what can you do? Well, at the start of the day, you should already have a general priority list that you brought forward from yesterday. But within that, allow an initial hour (or more) of *clear-the-decks* time, when you just get an array of productive work done like a machine.

Glance at your inbox. *Don't* over-plan. Open time-recording in your practice system. Open one of the emails. Enter the matter number. Attend to such reading, thinking, drafting, corresponding, telephoning, file noting as required. Finish the attendance. Close the time entry. Open the next email. Start again.

You see that by following this approach, you omit the uncharged initial overview.

You don't burn an hour of time – only to have to revisit the matters and actually do the work later on. Not only that, but most experienced practitioners will tell you that if you go hard on basic attendances on five or six matters in this first hour, you will in all likelihood realise 10 to 15 units based on typical charging scales.

Sure – have an initial glance at your incoming mail overall – but take less than a couple of minutes. And if you had planned on working on particular matters later on, then *do just that...* resist the urge to trawl around in them just because they are in the inbox.

How we manage time around our inboxes and other extraneous distractions is probably the biggest ongoing issue in productivity. So if you supervise others, have a think about the above and perhaps raise it in a discussion guided by the principles in an earlier article from this series (*Proctor* October 2013, page 47, also available at [dcilyncon.com.au/performance-coaching-recent-and-concrete-examples](http://dcilyncon.com.au/performance-coaching-recent-and-concrete-examples)).

I hope this helps. It's all based around the goal of getting more value out the door without working any longer hours.

**Dr Peter Lynch**  
[p.lynnch@dcilyncon.com.au](mailto:p.lynnch@dcilyncon.com.au)

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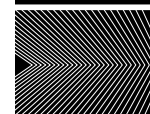
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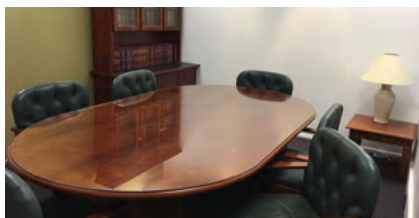
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# The hills are alive... with the taste of winemaking

with Matthew Dunn



## A recent visit to the alpine countries of Switzerland and Austria revealed a come-from-behind success story of cool-climate wines.

There is a new song in central Europe and new fine wines to be discovered.

The Alps are majestic, imperial, breathtaking like no other, and form the backbone of these two countries. However, for many years the protection of the mountains, cold climates, over-cropping and a fashion for sweetness before quality has led to cameo quantities of wine best left in the hills.

Things have changed. Today both Switzerland and Austria have vibrant wine cultures and are chasing down quality product that deserves to be far more widely exported than it is.

The turning point on the road to winemaking Damascus, in Austria at least, was the so-called anti-freeze scandal of the mid-'80s. Some unscrupulous figures had been adding sugar illegally to thin, under-ripe Austrian wine to sell it on the German market.

This fraud was easily detectable, so the fraudsters cleverly added diethylene glycol

to the wine to mask the addition of sugar and beat the testers. The press broke the news but confused the additive used with the similarly named ethylene glycol (anti-freeze) and both a poisoning scandal and fraud was born. A good story ran its course and shame was visited on central European wine.

The good thing about the scandal was that it acted as a clarion call and the industry was reassessed, over-production addressed, and there followed an acceptance that quality needed to be raised. Sweet wines of yore gave way to new *trocken*, or dry wines.

The most famous Austrian wine to make the long crossing to the Antipodes is the gruner veltliner, a unique white wine described as pure, mineral and capable of long aging. It is often grown with riesling as a stablemate along terraces on very steep slopes in the better places, such as Wachau.

The virtues of the whites of Austria are well known, but a recent visit revealed a vibrant and engaging red wine culture and some very handsome examples of a variety they call blaufrankisch – with body and fruit reminiscent of a cooler climate Australian shiraz.

The better regions for the blaufrankisch appeared to be the easterly Burgenland. Sadly, it seems that little of this gem is imported into Australia. This is a pity, as once 'discovered' it could be a big thing. It seems only one Australian winery, Handorf Hill in the Adelaide Hills, is making a wine with this variety. Stay tuned as I warrant there will be more in this space.

Swiss wine has for very many years been made by the Swiss for the Swiss, and precious little has escaped their borders for the pleasure of the rest of the world, and even less has made it to our shores. This is unfortunate as there are strong links between Australian winemaking and the Swiss – the wine industry in Victoria was largely founded by Swiss winemakers drawn to the new southern land as connections of first Governor La Trobe's Swiss wife.

As in Austria, the Swiss are now ramping up their wines and investing in pinot noir as the red wine de jour. After sampling some of these, we can expect the cool-climate, German-speaking regions to bring us smooth and beguiling offerings – if only some kindly soul can get them to Queensland!

## The tasting Three wines were examined in the spirit of international relations.



The first was the Swiss **Weinbau Ottiger Luzern AOC Pinot Noir 2016**, which was the colour of red currants and had a nose of summer raspberry and cherry. The palate was akin to a Tasmanian pinot in weight with a heady mix of blackberry, raspberry and cherry with a little forest floor notes. A delightful example.



The second was the Austrian **Domäne Wachau Terrassen Federspiel Riesling 2015**, which was pale yellow parchment in colour and was a mix of fresh lime and granite mineral on the nose. The palate was medium in body with a pleasing mineral base on a trill of sweet fruit flavours which cut back to dryness as the acid came in from the mid palate to the end.



The last was the Austrian **Nigl Gartling Gruner Veltliner 2013**, which was a very vibrant yellow lemon straw colour with a nose somewhat akin to an oak chardonnay. The palate had a little spritz on the tongue and then came on strong with gooseberry, herbs and a dry almost lemon finish. The flavours drew comparisons with sauvignon blanc, chardonnay and riesling in different parts of the journey. Most intriguing.

**Verdict:** The most regarded of the package was the pinot, with a strong line and length, and some significant promise for more good things to come in reds from central Europe.

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

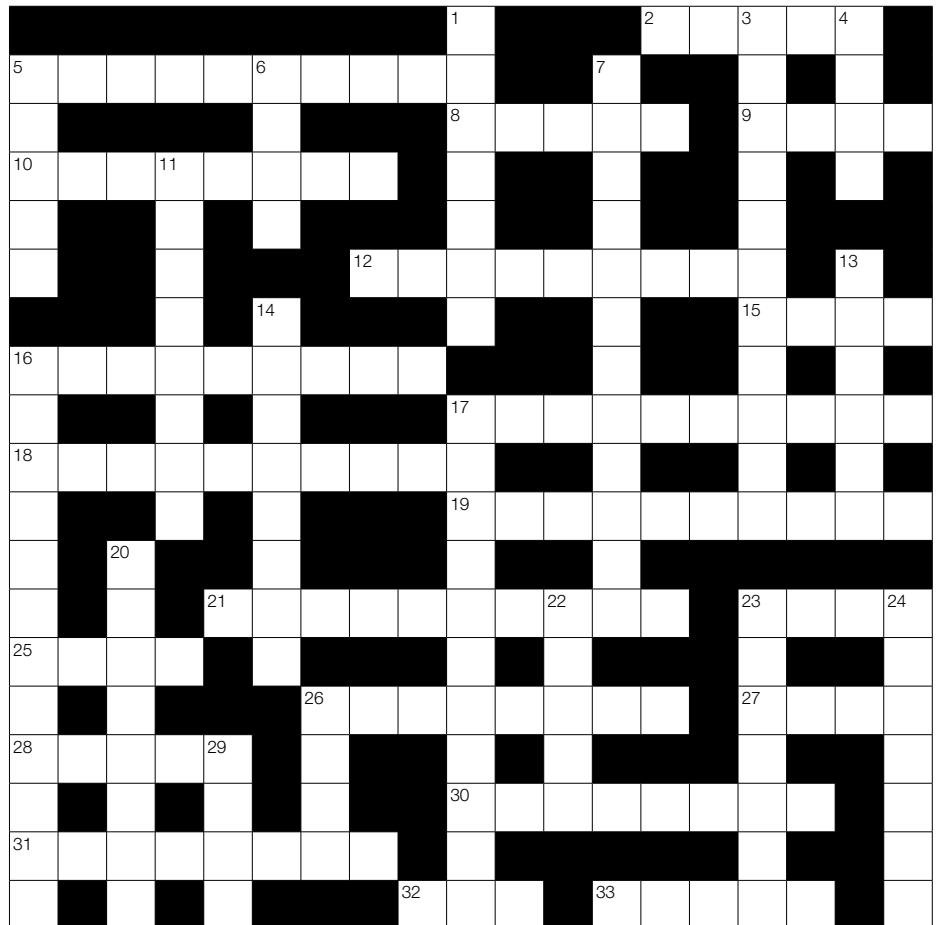
# Mould's maze

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



## Across

- 2 In a ..... legal profession there is no division between barristers and solicitors. (5)
- 5 Rule of private international law limiting jurisdiction in respect of actions relating to possession, title and damages for trespass to foreign land. (10)
- 8 A life estate to which a wife is entitled upon the death of her husband. (5)
- 9 Touting at the scene of an accident is proscribed by this legislation. (abbr.) (4)
- 10 Governor of Queensland, former Chief Justice of the Supreme Court of Queensland, Queen's Counsel and Churchie alumnus. (8)
- 12 The Australian Consumer Law now provides for a ..... that goods supplied to a consumer in trade or commerce (except by auction) are to be of "acceptable quality". (9)
- 15 A person who takes the job of another during a strike. (4)
- 16 Depraved, villainous or base. (9)
- 17 Incorporeal. (10)
- 18 A finalising act of a contractual party when restitutio in integrum is possible. (10)
- 19 Principle which allows a typographical error to be corrected by clear parol evidence, ..... error. (10)
- 21 Process involving the defence agreeing with the prosecution to enter a guilty plea provided other charges are withdrawn, plea ..... (10)
- 23 Hire. (4)
- 25 Hans Kelsen's pure theory of law involves the hypothesis that every legal system has a Grund.... (German) beneath which there is a hierarchy of legal .....s. (4)
- 26 A paragraph of Section 51 of the Constitution; an archaic public judicial assembly. (Latin) (8)
- 27 A person will be ineligible for a special hardship order if their driver's licence has been suspended or disqualified within the last .... years. (4)
- 28 Depasture and feed livestock for reward. (5)
- 30 A contract that is unenforceable due to its indefiniteness or lack of mutuality. (8)
- 31 Lessor. (8)
- 32 Common surname of a Toowoomba magistrate, barristers John, Stephen and Gregory and solicitors Peter, Ing, Bartholomew and Constance. (3)
- 33 Set aside, as in a conviction or subpoena. (5)



## Down

- 1 Commonwealth. (7)
- 3 A gag or ..... order is made to restrict the publication of sensitive court proceedings. (11)
- 4 New statutory officer (currently Nigel Miller), and applicant for all non-urgent child protection matters in Queensland, since 1 July 2016. (Abbr.) (4)
- 5 The Crown is supposed to be a ..... litigant. (5)
- 6 Section 95 of the *Evidence Act* (Qld) provides an exception to the ".... evidence" rule. (4)
- 7 Purpose of sentencing involving the communication of society's condemnation of an offender's conduct. (12)
- 11 A term may be implied in a contract when necessary to give it business ..... (8)
- 13 A guest who pays for secure hotel car parking. (6)
- 14 Jurisdiction over the parties in a case, as opposed to the subject matter, in ..... (Latin) (8)
- 16 Adjective previously used in the *Fair Trading Act* (Qld) to describe the required quality of goods sold. (12)
- 17 The High Court in *Markarian v The Queen* cemented the ..... synthesis approach to sentencing and repudiated the mathematical approach. (11)
- 20 The land over which an easement is exercised, ..... tenement. (8)
- 22 Information of political or military value. (5)
- 23 Beneficial changes to a practice or institution. (7)
- 24 Offence involving killing the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister. (7)
- 26 Officially pronounced guilt. (4)
- 29 Charge payable to use a road or bridge. (4)

Solution on page 64



# The eyes had it

## My dim view of optometrists

by Shane Budden



### I am, officially, old.

No, don't be fooled by that incredibly youthful-looking photo accompanying this column; recent events have confirmed it.

I mean, sure, even I had noticed that I'd begun to look less like Hugh Jackman and more like George Clooney, but that wasn't really enough to make me feel old; it was, however, enough to convince me that I needed glasses, and that means I am officially old.

Now, before all you people who have worn glasses from a young age write to the editor suggesting that I be subjected to comical and largely physiologically impossible punishments, let me explain.

You see, experienced glasses-wearers know how to choose glasses and how to wear them; in short, you experienced people can make them look good. When I put on my glasses, however, I resemble an intellectually unremarkable person who has visited a costume shop and made a poor choice – think Buddy Holly if he had lived, but without the musical talent.

The only comfort I can take is that despite being very talented and having millions of dollars to his name, Bono still looks like an utter pillock with his glasses on (although this may in part be due to the fact that he is surrounded by the thickest layer of smug known to modern science).

I only need my glasses for reading, which ironically is worse because I am constantly being reminded of the fact that I need glasses, and let's face it, that is a constant reminder of the aging process.

In other words, Clark Kent doesn't put his glasses on to become Superman. To be honest though, I don't know why Clark bothered with the glasses at all, because anyone who can't pick out a super-powered alien simply because he puts on a pair of glasses is not exactly in Stephen Hawking territory, intelligence-wise, and wouldn't work out Clark Kent was Superman if he had it tattooed across his forehead.

I mean, we know Clark has been a reporter for well over 50 years and nobody in his city has picked up that he has never filed a single story (NB: This conclusion does not apply to the people who worked with Superman when he was played by George Reeves in the old black-and-white TV show, as George had more of a, shall we say, 'journalist's'

physique, assuming the journalist had been covering a fried food festival).

I digress, however, as there was another downside to glasses that I hadn't considered, and that is because for almost 50 years I haven't needed them; I had never been to an optometrist in my life before. That means that I have never had any of the eye tests that most people have over time, allowing my optometrist to give them to me pretty much all at once (I suspect she also booked a week in Hawaii as well, because the tests are not free).

I thought I might be reading letters off a sheet the way you used to have to when you renewed your driver's licence (this is no longer required, presumably because the government feels that being able to see is no longer a prerequisite for getting issued with a driver's licence; and this is no doubt due to the fact that three out of every four drivers are Facebooking rather than watching the road these days, and whether or not they can see has no effect whatsoever on the likelihood that they will have an accident). However, it seems the optometrists' club has realised that you cannot charge the cost of a new BMW for saying 'please read this' and so have developed more complex – by which I mean painful – tests.

I say they developed them, but I suspect what they did was ask WikiLeaks what the Americans did to people in Guantanamo Bay and simply copy that. It started with them telling me to turn up early so that they could put stuff in my eyes which dilated my pupils so that they (my pupils, not the optometrists) could not close to prevent too much light getting in.

Literally billions of years of evolution have given us this wonderful ability to prevent too much light getting in and damaging our eyes, but it turns out optometrists want no truck with eye protection. I was also told not to drive because the drops would make my vision blurry (optometrists cling to the outmoded view that the ability to see is an advantage when driving) and that was indeed correct. In fact, when I finally wobbled off into the testing room I spent two minutes talking to what turned out to be an indoor plant before the optometrist arrived; had I been driving, I wouldn't have been able to 'friend' anyone smaller than Clive Palmer.

You may recall being told, as a child, not to stare at an eclipse; well, my optometrist spent the rest of the session showing me why. She shone powerful lights into my eyes, directing me to look at them from time to time; I expected to hear a German-accented voice ask me what the attack plans were.

This continued for some time, during which I am certain I blurted out my name, rank and serial number, and possibly the location of the secret ammo dump. Although at the time the tests seemed pointless, on reflection I can see they served a real purpose: they made sure that, if I didn't need glasses before I walked in, I certainly did when I walked out. It is clearly rainmaking, sort of like a PI lawyer running someone over and then slipping a business card into the victim's pocket. (*Editor's note to naive young lawyers: Do NOT do this!*)

Eventually my optometrist finished what she was doing (using lasers to tattoo 'Optometrists tell cornea jokes!' on the back of my retina is my guess) and let me bump my way to the waiting room, where my family was indeed waiting (it is a well-named room).

Despite my blurred and light-dazzled eyes, I was able to navigate to them by following the sound of my son asking the receptionist if he could connect to their wi-fi, which is a question he asks any time he is in a structure more technically advanced than a tent. My wife then drove me home where I was able, I believe by using the force, to pour and consume a couple of glasses of red wine.

The next day I could see again, and the good news is that test revealed there is nothing odd on my retina, as long as you don't count optometrist-flavoured graffiti.

I look forward to my next visit to the optometrist, as soon as I decide which one of my major organs I can live without in order to afford it, or if I can't find a buyer I will simply achieve the same result by poking myself in the eye with a sharp stick (and now you know where that saying comes from).

## 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:** 2 Fused, 5 Mozambique, 8 Dower, 9 Pipa, 10 Dejersey, 12 Guarantee, 15 Scab, 16 Miscreant, 17 Intangible, 18 Rescission, 19 Scriveners, 21 Bargaining, 23 Rent, 25 Norm, 26 Placitum, 27 Five, 28 Agist, 30 Illusory, 31 Landlady, 32 Lee, 33 Quash.

**Down:** 1 Federal, 3 Suppression, 4 Dcpl, 5 Model, 6 Best, 7 Denunciation, 11 Efficacy, 13 Bailor, 14 Personam, 16 Merchantable, 17 Instinctive, 20 Servient, 22 Intel, 23 Reforms, 24 Treason, 26 Pled, 29 Toll.

## 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

Fisher Dore Lawyers, Suite 2, Level 2/2 Barolin Street

p 07 4151 5905 f 07 4151 5860

### Mr Rian Dwyer

rian@fisherdore.com.au

### Central Queensland Law Association

Legal Aid Queensland, Rockhampton

CQLA mail: PO Box 733, Rockhampton Q 4700

p 07 3917 6708

stephanie.nicholas@legalaid.qld.gov.au

### Ms Stephanie Nicholas

### Downs & South-West Law Association

Clewett Lawyers

DLA address: PO Box 924 Toowoomba Qld 4350

p 07 4639 0357

### Ms Catherine Cheek

ccheek@clewett.com.au

### Far North Queensland Law Association

Wuchoppern Health

13 Moignard Street Manooora Qld 4870

p 07 4034 1280

### Mr Spencer Browne

sbrowne@wuchoppern.com

### Fraser Coast Law Association

BDB Lawyers, PO Box 5014 Hervey Bay Qld 4655

p 07 4125 1611 f 07 4125 6915

### Ms Rebecca Pezzutti

rpezzutti@bdblawyers.com.au

### Gladstone Law Association

Mediation Plus

PO Box 5505 Gladstone Qld 4680

m 0407 129 611

### Ms Bernadette Le Grand

blegrand@mediationplus.com.au

### Gold Coast Law Association

Maurice Blackburn Lawyers,

Lvl 3, 35-39 Scarborough Street Southport Qld 4215

p 07 5561 1300 f 07 5571 2733

### Ms Anna Morgan

### Gympie Law Association

Law Essentials, PO Box 1433 Gympie Qld 4570

p 07 5480 5666 f 07 5480 5677

### Ms Kate Roberts

kate@lawessentials.net.au

### Ipswich & District Law Association

Fallu McMillan Lawyers, PO Box 30 Ipswich Qld 4305

p 07 3281 4999 f 07 3281 1626

### Mr Justin Thomas

justin@daleandfallu.com.au

### Logan and Scenic Rim Law Association

Bennett & Philp Lawyers, GPO Box 463, Brisbane Q 4001

p 07 3001 2960

### Ms Michele Davis

md@micheledavis.com.au

### Mackay District Law Association

Macrossan and Amiet Solicitors,

55 Gordon Street, Mackay 4740

p 07 4944 2000

### Ms Danielle Fitzgerald

dftzgerald@macamiet.com.au

### Moreton Bay Law Association

Family Law Group Solicitors,

PO Box 1124 Morayfield Qld 4506

p 07 5499 2900 f 07 5495 4483

### Ms Hayley Cunningham

hayley@familylawgroup.com.au

### North Brisbane Lawyers' Association

Michael Coe, PO Box 3255 Stafford DC Qld 4053

p 07 3857 8682 f 07 3857 7076

### Mr Michael Coe

mcoe@tpg.com.au

### North Queensland Law Association

Cohen Legal, PO Box 959 Townsville Qld 4810

p 07 4721 0264

### Ms Samantha Cohen

sam.cohen@cohenlegal.com.au

### North West Law Association

LA Evans Solicitor, PO Box 311 Mount Isa Qld 4825

p 07 4743 2866 f 07 4743 2076

### Ms Jennifer Jones

jjones@laevans.com.au

### South Burnett Law Association

Kelly & Frecklington Solicitors

44 King Street Kingaroy Qld 4610

p 07 4162 2599 f 07 4162 4472

### Ms Caroline Cavanagh

caroline@kfsolicitors.com.au

### Sunshine Coast Law Association

Pippa Colman & Associates,

PO Box 5200 Maroochydhore Qld 4558

p 07 5458 9000 f 07 5458 9010

### Ms Pippa Colman

pippa@pippacolman.com

### Southern District Law Association

Mitchells Solicitors & Business Advisors,

PO Box 95 Moorooka Qld 4105

p 07 3373 3633 f 07 3426 5151

### Mr Bryan Mitchell

bmitchell@mitchellsol.com.au

### Townsville District Law Association

Cohen Legal, PO Box 959 Townsville Qld 4810

p 07 4721 0264

### Ms Samantha Cohen

sam.cohen@cohenlegal.com.au

## Interest rates

For up-to-date information and more historical rates see the QLS website [qls.com.au](http://qls.com.au) under 'For the Profession' and 'Resources for Practitioners'

Rate	Effective	Rate %
Standard default contract rate	3 October 2016	9.25
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 January 2017 to 30 June 2017	7.50
Federal Court – Interest on judgment debt for half year	1 January 2017 to 30 June 2017	7.50
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 January 2017 to 30 June 2017	5.50
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 January 2017 to 30 June 2017	7.50
Court suitors rate for quarter year	1 April 2017 to 30 June 2017	0.80
Cash rate target	from 2 November 2016	1.50
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2017	7.50

## Historical standard default contract rate %

June 2016	July 2016	Aug 2016	Sep 2016	Oct 2016	Nov 2016	Dec 2016	Jan 2017	Feb 2017	Mar 2017	Apr 2017	May 2017
9.60	9.35	9.35	9.35	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.25

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

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<b>Brisbane</b>	James Byrne	07 3001 2999
	Suzanne Cleary	07 3259 7000
	Glen Cranney	07 3361 0222
	Peter Eardley	07 3238 8700
	Peter Jolly	07 3231 8888
	Peter Kenny	07 3231 8888
	Bill Loughnan	07 3231 8888
	Dr Jeff Mann	0434 603 422
	Justin McDonnell	07 3244 8000
	Wendy Miller	07 3837 5500
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	Ross Lee	07 5518 7777
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<b>Toowoomba</b>	Stephen Rees	07 4632 8484
	Thomas Sullivan	07 4632 9822
	Kathryn Walker	07 4632 7555
<b>Chinchilla</b>	Michele Sheehan	07 4662 8066
<b>Caboolture</b>	Kurt Fowler	07 5499 3344
<b>Sunshine Coast</b>	Pippa Colman	07 5458 9000
	Michael Beirne	07 5479 1500
	Glenn Ferguson	07 5443 6600
<b>Nambour</b>	Mark Bray	07 5441 1400
<b>Bundaberg</b>	Anthony Ryan	07 4132 8900
<b>Gladstone</b>	Bernadette Le Grand	0407129611
	Chris Trevor	07 4972 8766
<b>Rockhampton</b>	Vicki Jackson	07 4936 9100
	Paula Phelan	07 4927 6333
<b>Mackay</b>	John Taylor	07 4957 2944
<b>Cannonvale</b>	John Ryan	07 4948 7000
<b>Townsville</b>	Chris Bowrey	07 4760 0100
	Peter Elliott	07 4772 3655
	Lucia Taylor	07 4721 3499
<b>Cairns</b>	Russell Beer	07 4030 0600
	Anne English	07 4091 5388
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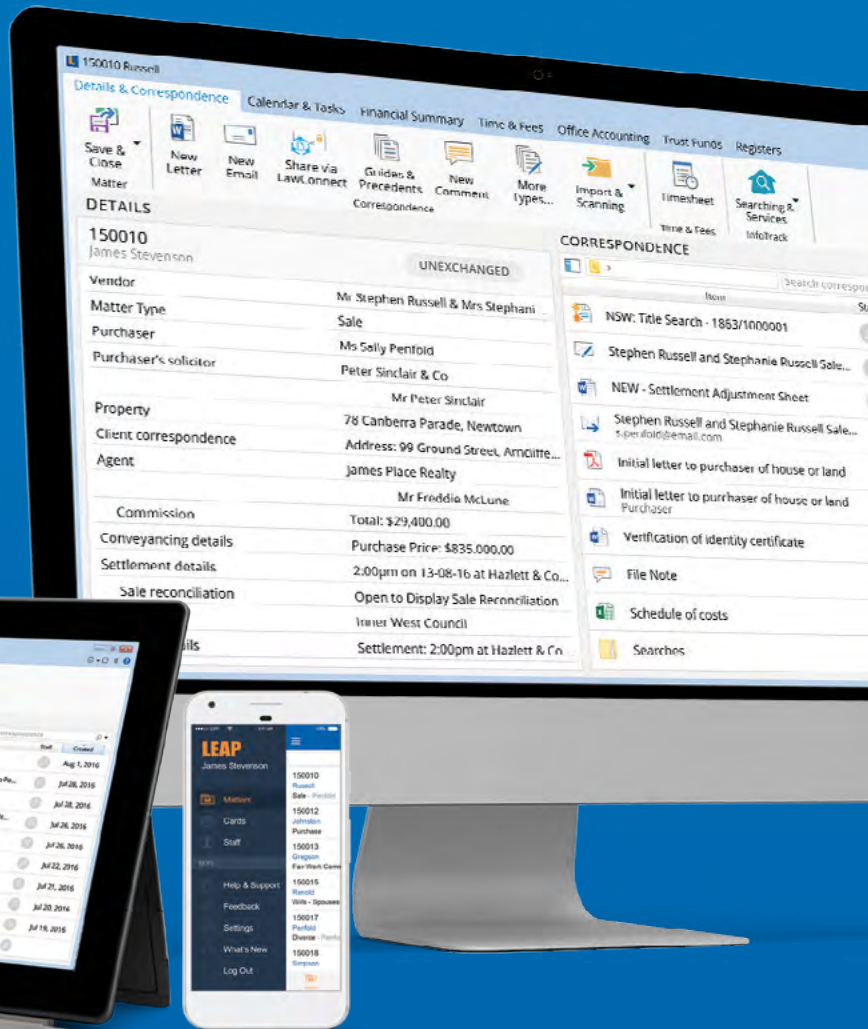


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