

PROCTOR



Queensland
Law Society

March 2018 – Vol.38 No.2

Data breaches: Your iPhone and the damage done
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On the road

Engaging with our profession



High on my list of priorities for 2018 is engaging with our stakeholders, profession and wider community.

We have been meeting with all levels of government – including the Attorney-General, our Government Ministers and also shadow Ministers. These conversations have been an excellent way to not only meet and greet our politicians and influencers, but also to share our agenda for the year.

I have also been fortunate to visit some of our regional areas in February, with visits to Mackay, Rockhampton, Townsville, Gladstone and the Gold Coast. These visits enabled me to touch base with local solicitors and members of the district law associations as well as some of our judiciary members. This connection to regional Queensland is one that the Society is passionate about maintaining.

The first QLS Council meeting of the year was held last month, when our new Council members for 2018/19 met to discuss the strategic direction of the Society, and other key issues for our profession. After this meeting, I joined some of our QLS policy committee chairs in a media training session to look at the best ways to share our stories with our local journalists and news publications.

Another event which was of great worth was our annual Member New Year Celebration at Brisbane's Banco Court. It was a privilege to hear from Queensland's Chief Justice and to be granted her court for the evening. I greatly enjoyed meeting with members of the Brisbane profession and talking about the issues important to them. This event

also gave me the opportunity to share a snapshot of my vision for 2018, which I will elaborate on at the Legal Profession Dinner and Awards this month.

There was also a 'blast from the past' so to speak, with visits to local law school orientations in February by myself and deputy president Bill Potts. Speaking to our next generation of solicitors, we were able to offer some words of wisdom, as well as an explanation of the role of solicitors in their communities and what Queensland Law Society can do to assist them in their career paths. I look forward to meeting with more students later this month at the QLS Legal Careers Expo, and also meeting with some of our early career lawyers and junior barristers at the first Modern Advocate Lecture Series for 2018 on 15 March. This highly anticipated event will feature the Honourable Justice Martin Daubney, president of the Queensland Civil and Administrative Tribunal.

Queensland's legal profession was also pleased to see the fruition of our advocacy on transitioning 17-year-old offenders out of the adult justice system last month. The changes took effect on 12 February, and you will find an article discussing some of these changes further in this month's *Proctor*. Queensland Law Society policy committees and the wider legal profession have called for this change for many years, including mentions in the 2015 Queensland State Election Call to Parties document. Some 27 years after this legislation first came into effect, we have now joined every other state and territory in Australia by abolishing this law and moving 17-year-old offenders back into the youth justice system where they belong.

I would like to thank our advocacy team, policy committees and the wider profession for their work and support of this change. Our policy committees carry out excellent work each and every year, and I thank them for their hard work and dedication. I look forward to seeing the great work they will carry out in 2018, now that Queensland Parliament has commenced sitting again for the year. The next sitting dates are 6-8 March.

I encourage you to keep up to date with all that the Society is doing via this publication, our weekly *QLS Update* electronic newsletter, our website and social media channels. Feel free to also provide feedback to me at any time via the email below.

Ken Taylor

Queensland Law Society president

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In recent years we have worked hard to harness technology to provide a better service to members.

This has included moving QLS membership renewals online, along with the biennial election process.

This year, another significant change has occurred – recordings of QLS professional development events are now available on-demand via the QLS Shop.

While this content has been available on DVD for some time, the efficiencies this change achieves are obvious.

On-demand purchases are available to you instantly; gone are the days of waiting for the DVD to arrive in the mail! With the CPD year ending on 31 March, the professional development content available on-demand in the QLS Shop offers members a convenient and simple way to achieve their CPD point requirements.

Some things haven't changed: the quality of the professional development content available on-demand is the same as what you have been used to on DVD, you can pre-purchase recordings of events you can't attend to watch on-demand at a time and place that is convenient to you, the material available in the QLS Shop is relevant to the current CPD year, and one CPD point can still be accrued for each hour of on-demand content.

With more than 50 on-demand videos to choose from, including livecast recordings, conferences, and workshops we have made the process of accessing recordings on-demand as easy as possible. Simply visit the QLS Shop (qls.com.au/shop), make your selection(s), and exit via the checkout. Once purchased, you will receive an email with a link to the page where the video is available to watch.

For more information, please contact the QLS events team on 07 3842 5806 or email events@qls.com.au.

Results for our econveyancing survey

In November last year we conducted an online survey seeking the views of our members about their experiences with econveyancing.

As the peak body for solicitors in Queensland, QLS needs to understand our membership's views in order to represent their interests. The survey was prompted by discussion at the 2017 Property and Conveyancing Law Conference about econveyancing and the suggestion by a delegate that econveyancing would not be more widely adopted unless it was mandated by government. However, we anticipated that this might not be the view of the wider membership, based on other conversations with members at conferences and through our practice management support team.

We conducted the survey as a formal conversation with members on this issue, so that we could accurately represent your views to government supported by data and evidence gathered directly from you.

Thank you very much to the 175 members who responded with their feedback. We are analysing the results in more detail, but a short snapshot of the results indicate that:

- 77 of the respondents were not registered with PEXA and 98 were registered with PEXA.
- Of those not registered, some of the reasons identified for not registering were concerns about security and risks, lack of familiarity with the process or product, time and cost of changing processes, cost of transactions and exclusions of certain transactions.
- Of those registered, the benefits were generally seen as time savings, costs savings in not attending settlements, no cheques, and simpler and faster registration of documents, and receiving cleared settlement funds.

- Practitioners clearly identified that the wide range of current exclusions in the system is an issue.
- A number of other concerns were also raised by practitioners including:
 - the ongoing increase in compliance obligations on solicitors throughout the conveyancing process
 - the constant transference of risk to the profession
 - lack of a supporting business case for making wholesale changes to current systems
 - potential lack of competition and risk of a price rise in the future
 - trust account obligations and record-keeping changes
- Of the 175 responses, only 58 supported mandating the use of PEXA (noting that 98 respondents were already registered with PEXA). A number of respondents were concerned about granting a monopoly to a commercial organisation and others noted that, given the current restrictions in the system, it was premature to be considering this as an option.

This information will be incredibly helpful for us when speaking with government on this issue. QLS appreciates that our conveyancing practitioners have dealt with a range of significant changes lately as a result of both Commonwealth and State Government initiatives. Thank you once again to those who have helped us by responding; we will keep working to bring your concerns and views to government.

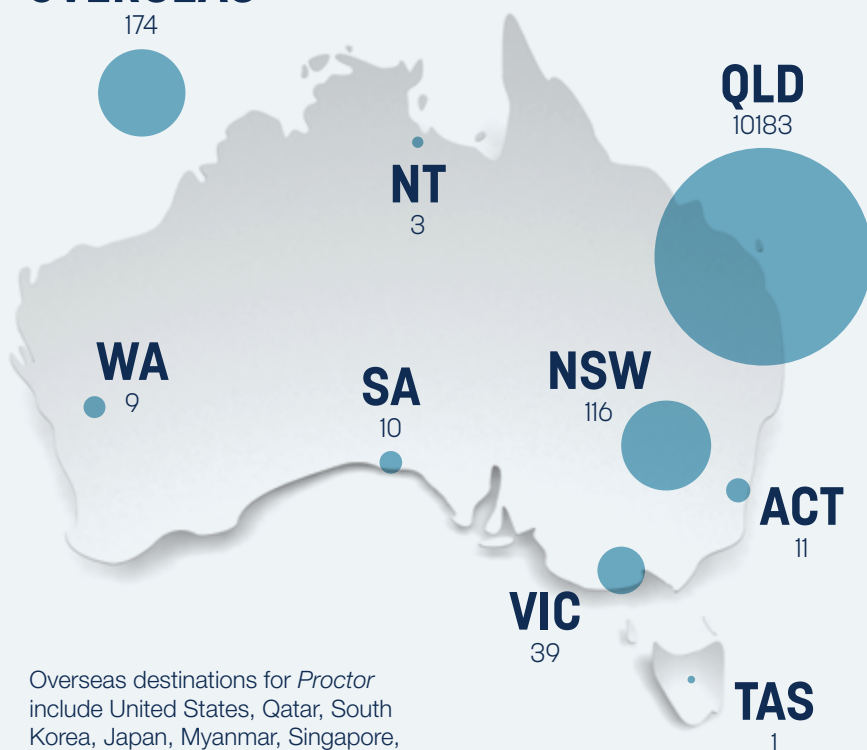
Matt Dunn

Queensland Law Society Acting CEO

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OVERSEAS



Overseas destinations for *Proctor* include United States, Qatar, South Korea, Japan, Myanmar, Singapore, the United Kingdom, Vietnam, Vanuatu and the Russian Federation.



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179 Ann Street Brisbane 4000
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qls.com.au

President: Ken Taylor

Deputy president: Bill Potts

Vice president: Christopher Coyne

Immediate past president: Christine Smyth

Councillors: Michael Brennan, Chloe Kopilovic,
Peter Lyons, Kirsty Mackie, Luke Murphy, Travis Schultz,
Karen Simpson (Attorney-General's nominee),
Kara Thomson, Paul Tully.

Acting chief executive officer: Matthew Dunn

Editor: Melissa Raassina (Acting Editor)
m.raassina@qls.com.au | 07 3842 5849

Design: Alisa Wortley

Art direction: Clint Slogrove

Advertising: advertising@qls.com.au

Display Ads / Classifieds:
advertising@qls.com.au / classified@qls.com.au

Subscriptions: Sally Kirke 07 3842 5875

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

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Paving the way for farmers and mortgagees

The *Farm Business Debt Mediation Act 2017* (Qld) (the Act) will commence on 1 July 2018, bringing with it important changes to how parties resolve disputes regarding farm business debts.

The Act outlines efficient and equitable ways for farmers and mortgagees to attempt to resolve matters, and also prevents lenders from foreclosing on debts before both parties have had the opportunity to participate in mediation.

Mortgagees are not always the major banks and can include any person whom a farmer owes a farm business debt secured by a farm mortgage over farm property. Farm property can include land used for farming business, water allocations or machinery used for farming.

The obligations set out for lenders include:

A mortgagee must not take enforcement action under a farm mortgage unless the legislation does not apply in relation to the farmer or an exemption certificate is in force for the farm mortgage. If a mortgagee intends to take enforcement action under a farm mortgage they must serve a notice of their intention that informs the farmer of their right to request mediation.

Failure to comply with the Act can be considered a summary offence with serious penalties. In addition, if a corporation commits an offence against

a deemed executive liability provision, an executive officer of the corporation is taken to have also committed the offence. These provisions relate specifically to section 12(1) 'Restriction on mortgagee enforcement action' and section 31(2) 'Ensuring heads of agreement is given effect accurately'.

Under the Act, a farmer can instigate mediation, but if they are not in default under the farm mortgage and the mortgagee refused the mediation, there are no consequences. However, if the farmer is in default under the farm mortgage, refusal by the mortgagee may be grounds for the farmer to apply for an enforcement action suspension certificate. This prevents the mortgagee from taking enforcement action under the farm mortgage.

Stay informed with your clients' rights under the new legislation via qrda.qld.gov.au/fbdm. Email contact_fbdm@qrda.qld.gov.au or call 1800 623 846 to speak to the Farm Business Debt Mediation Unit.

Commonwealth Games 2018 court closures

The 2018 Commonwealth Games will affect court and tribunal arrangements on the Gold Coast and in other Queensland centres.

A dedicated web page at qls.com.au/court-changes will reflect up-to-date closures.



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Christian lawyers network at Fiji conference



The inaugural Kingdom International Legal Network (KILN) Conference was hosted by Brisbane firm Corney & Lind Lawyers and Fiji firm Shekinah Law in January in Fiji.

The conference attracted 107 delegates from Fiji, Solomon Islands, Vanuatu, Australia and Kenya, and was opened by Fiji Chief Justice Anthony Gates.

The conference theme, 'Law as Mission; Being Called & Sent', was well received by delegates. Engagement following the conference

included further articles in Fijian newspapers on improvements to current child protection policies, mandatory reporting and calls for better background checks for counsellors.

The KILN network has also established the Lawyers Exchange and Development program (LEAD) through which lawyers from two different firms can exchange places for a specified period. For more information on KILN, visit kiln.online.

Bond law faculty redesigned



Bond University Executive Dean of the Faculty of Law, Professor Nick James and Bond Law Students' Association president Bryan Parsons.

The Gold Coast's Bond University last month completed the largest redevelopment in more than a decade of its Faculty of Law.

Featuring new flexible teaching and collaborative learning spaces, the facilities now include a showcase moot court, which is the third at the university, additional space for Bond's community law clinics, 10 new teaching spaces, a new reception and foyer, an open-plan lounge, student hub and offices for the three main law student associations.

The John and Alison Kearney Law Library has also been remodelled to include independent and group study areas for student interaction. Bond University executive dean of law Professor Nick James said the new facilities would ensure the university continued to deliver the highest quality teaching and learning experience, and prepared students for the demands of a modern legal career.

"The modern lawyer needs to collaborate and network, so we have expanded the spaces available to students to study together, debate what they have learned in class or collaborate on projects so they can further develop these important interpersonal skills," he said.

On the road



QLS president Ken Taylor recently met with members of the judiciary, government representatives, district law associations, local media and members of the profession in Mackay, Rockhampton, Townsville, the Gold Coast and Gladstone. On the agenda were current issues, concerns and ways forward.



Meeting the Elders

In February, QLS hosted a morning tea with Indigenous Elders, QLS Council members, executive leadership team members and managers to acknowledge the 10th anniversary of the National Apology to the Stolen Generation. QLS president Ken Taylor and deputy president Bill Potts spoke to attendees and all enjoyed some First Nations bush tucker afterwards.



Bringing in a new year

Queensland's solicitors joined together last month to welcome in the new work year at Brisbane's Banco Court. Chief Justice Catherine Holmes and 2018 QLS president Ken Taylor addressed attendees, including many members of the judiciary, wider profession, QLS Council and staff.



A close-up photograph of a person's hand holding a white iPhone. The hand is positioned as if about to tap the screen. The background is a light-colored wooden surface. The text is overlaid on the lower half of the image.

Data breaches: Your iPhone and the damage done

*The Privacy Amendment (Notifiable Data Breaches)
Act 2017 (Cth), the application and risk to law firms*



Christine Smyth and **Shane Budden** discuss the impact of new federal privacy legislation and how firms will need to be proactive in their responses.

It's been a long day, finalising that brief was a total punish. Exhausted, all you want to do is head home, but no, you now have a work function to attend.

You take a deep breath, put on the battle jacket and head off. At 11pm you finally make it home, pay the cabbie and in your overtired, dreary state, climb out of the car, onto your doorstep fumbling for your keys, and collapse gratefully into bed.

You wake late the next morning, wondering why your alarm didn't go off – only to realise that it probably did, but you didn't hear it because you left your phone in the back of the cab.

You think to yourself, it's annoying, but it's not that bad, it's a simple matter of reporting it to work and applying for a new phone, right?

Wrong. For the average punter that might be the case, but as a solicitor that lost phone has just thrown you into the maelstrom that is the *Privacy Amendment (Notifiable Data Breaches) Act 2017* which commenced on 22 February 2018.

You haven't just lost a phone, you've lost client data – which may be a notifiable data breach – one that must be reported to any clients affected and the Australian Information Commissioner. Failure to do so can result in crippling fines.

To whom does the scheme apply?

The scheme is implemented via an amendment to the *Privacy Act 1988* (Cth) which inserts a new part: *IIIC—Notification of Eligible Data Breaches*.

The scheme applies to Australian Privacy Principles (APP) entities as defined in the *Privacy Act 1988*, which includes businesses with turnover of \$3 million or more in any financial year since 2001.¹

While many law firms do not have turnover of \$3 million or more, on the commencement of the anti-money laundering legislation, all law firms must comply. In addition, for the purposes of part IIIC, the definition of *entity* includes a person who is a tax file number recipient² meaning that any firm which receives the tax file numbers of clients may be caught by the scheme.³

In practical terms, prudent practitioners will operate as if the scheme applies to them.

What is an eligible data breach?

26WE defines an eligible data breach as being unauthorised access to information, or loss of information, where unauthorised access is likely, where the information involved is such that a reasonable person would conclude that access is likely to result in serious harm to any of the individuals to whom the information relates.

Although the drafting is clumsy, the practical message is simple: law firms holding personal information must take measures to secure that information.

What is serious harm?

Section 26WG considers the question of serious harm, by providing the factors which may be taken into account when deciding the issue. Those factors include the nature of the information, whether or not it is protected by security (for example, a locked iPhone or password-protected USB) and, if so, the likelihood of that security being defeated, and whether or not the information was encrypted (and again, the strength of that encryption).

These factors also include an assessment of the persons who have obtained (or are likely to obtain) the information, and whether or not they are likely to defeat any security/encryption measures.

The nature of the harm can also be taken into account, but this gives little comfort; given the many ways in which personal information can now be used to perpetrate fraud and steal

money and other information, it is difficult to imagine circumstances in which the potential harm could not be defined as 'serious'.

In the lost phone scenario, it is worth noting that the protections on certain phones, such as iPhones and Blackberrys, have historically proven remarkably resistant to compromise, but that may not remain the case.

What action must be taken?

If a law firm becomes aware that there are reasonable grounds to suspect that there may have been an eligible data breach, section 26WH provides that it must expeditiously carry out an assessment as to whether or not that is the case, and must take all reasonable steps to do so within 30 days. If the conclusion reached is that there are reasonable grounds to believe that there has been an eligible data breach, the process in section 26WK must be followed.

In that case, as soon as practicable after the breach/potential breach has been detected, a statement must be prepared – and sent to the Commissioner – which includes the following information:

- the identity and contact details for the firm
- a description of the breach
- the kind of information that is the subject of the breach
- the steps that individuals affected by the breach should take.

As soon as is practicable after the completion of the statement, pursuant to s26WL the firm must (if practicable):

- take reasonable steps to notify the contents of the statement to each of the individuals to whom the relevant information relates, or
- take reasonable steps to notify the contents of the statement to each of the individuals who are at risk from the data breach.

If neither of these actions is practicable, the firm must publish the statement on its website and take reasonable steps to publicise its contents.

Are there exceptions?

There are limited circumstances in which a data breach need not be reported, although practitioners should consider the situation thoroughly before deciding that no further action need be taken; the consequences of misapplying exceptions could be disastrous.

The exception most pertinent to the operation of a law firm is that provided for if remedial action is taken. S26WF (1) provides an exception if access to, or disclosure of, information to which this Act applies, providing the entity:

- takes remedial action
- the action is taken before serious harm is done, and
- the action is taken soon enough that a reasonable person would conclude serious harm was unlikely to occur.

If those criteria are fulfilled, the disclosure is taken never to have been an eligible data breach. In our scenario above, for example, if the lost phone was remotely deleted before

anyone managed to access it, it is likely no breach would have occurred.

Several other exemptions are allowed in the legislation, which are more likely to relate to client breaches than law firm breaches. A detailed consideration of these exceptions is beyond the scope of this article, but in short compass they are as follows:

- *Enforcement related activities:* s26WN provides a general exception if compliance with the reporting provisions of the part would prejudice one or more enforcement-related activities conducted by, or on behalf of, the enforcement body.
- *Inconsistency with secrecy provisions:* s26WP provides a general exception if compliance with the reporting provisions of the part would, to any extent, be inconsistent with a secrecy provision (other than a prescribed secrecy provision).
- *Declaration by Commissioner:* s26WQ gives the Commissioner power to declare that ss26WK and s26WL do not apply to a given breach, or to extend time for compliance with s26WL.
- *My Health Records Act 2012:* s26WD provides an exception if a breach has been, or is required to be, notified under section 75 of the *My Health Records Act 2012*.

What are the consequences of failing to act?

Failure to comply with the new regime will be considered an interference with the privacy of an individual. A law firm which is found to have done this will be liable to significant penalties, including fines of up to \$2.1 million. Such fines would be terminal for many law firms, which underscores the importance of understanding and complying with the reporting regime.

Prudent preventative actions

Few practice risks lend themselves as readily to the mantra 'prevention is better than cure' than the data breach reporting regime, and practitioners must be proactive in addressing this risk. The following suggestions are not a panacea but may assist in reducing the risk of a notifiable breach.

- *Deliberate disclosure:* If a client wishes you to disclose personal information, ensure that consent to do so is informed and in writing.

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- **Staff procedures:** Detailed and robust staff procedures – and training in those procedures – should be implemented around data security, including taking data off-site in storage devices.
- **Remote deletion:** Electronic devices such as phones and laptops should allow remote deletion if lost/stolen.
- **Use of USBs:** If staff are to store client data on USBs and take them off-site, those USBs should be encrypted. In addition, the firm should provide the USBs, keep a register of them – and what data is on them – and have them signed in and out to ensure their whereabouts are always known.
- **Brand electronic devices:** All work devices and property capable of data storage should carry the firm name and contact details, to ensure they can be easily returned if found.
- **Routines/checklists:** Develop and utilise mental checklists to go through when leaving areas such as hotel rooms or boarding lounges (for example, before boarding a plane, check off boarding pass, wallet, home phone, work phone).

As no prevention regime is foolproof, also ensure that you have a data breach response plan in place, and that staff are aware of it.

It is beyond the scope of this article to cover such a plan, but useful assistance can be found in the privacy law section of the Office of the Australian Information Commissioner (OAIC) website at oaic.gov.au.

Conclusion

Data breaches *are not* an IT issue; they are a process and procedure issue, and one which will affect large numbers of law practices.

We stand at a time of fundamental change to the way we do business; the value of client data and private information – and the damage that can flow from disclosure – means that, regardless of size, turnover and resources, law firms will be expected to provide high levels of data security and comply with strict standards in relation to data management.

In the United States, a growth industry in auditing and ranking the cyber-security measures of law firms has sprung up almost overnight, with savvy clients now insisting on a certain rating being achieved before doing business. We can expect a similar system to evolve here. Data security is quite literally an existential issue for law firms.

Not since the implementation of practice management qualifications in the 1980s

have we seen such a seismic shift in the way practices are managed, and no doubt more is on the way.

This scheme, and the anti-money laundering regimes, are the tip of the iceberg, and practitioners can be certain that the bar on what constitutes best practice will be raised in many areas. The time to get on top of these issues is now. And be careful not to throw out filing cabinets before checking that they are empty.

Christine Smyth is immediate past president of Queensland Law Society and partner at Robbins Watson Solicitors. Shane Budden is an ethics solicitor at the QLS Ethics Centre.

Notes

¹ ss6C and 6D *Privacy Act 1988* (Cth).

² s26 WB *Privacy Act 1988* (Cth).

³ s26WE (1)(d) *Privacy Act 1988* (Cth).

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Responding to a bankruptcy notice

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by Scott Seefeld



What is a bankruptcy notice?

A bankruptcy notice is a formal demand for payment of money issued by the Australian Financial Services Authority. The bankruptcy notice may be issued upon the application of a creditor who has obtained a final judgment or order against the debtor for an amount of at least \$5000.

The bankruptcy notice may only be issued if the judgment or order to which it relates has not been stayed and is not more than six years old.¹

Time limit in which to act

In the first instance, it is important to take action within the time fixed for compliance in the bankruptcy notice. Usually this will be 21 days after the notice has been served on the debtor. A failure within this 21-day period to either comply with the bankruptcy notice, apply for an extension of time, or apply to set the notice aside will constitute an act of bankruptcy by the debtor.²

This act of bankruptcy enables the creditor to file a petition with the court for a sequestration order against the debtor. That is, to have the debtor made bankrupt.

What are the debtor's options?

In broad terms, the debtor has three options available to them. First, they may simply pay the creditor the amount of the debt claimed under the bankruptcy notice within the time fixed for compliance. Second, the debtor may make arrangements to the satisfaction of the creditor for the settlement of the debt. For example, agreement may be reached with the creditor for the debt to be paid by instalments. Solicitors can play a key role in negotiating such an agreement, and ensuring the agreement is properly recorded in writing.

A third option is for the debtor to make an application to have the bankruptcy notice set aside. In this case, it may also be necessary to make an application to the court requesting an extension of time. The remainder of this article considers the issue of setting the bankruptcy notice aside and the related question of applying for an extension of time.

There are numerous grounds upon which a bankruptcy notice may be set aside. While not exhaustive, included below are several of the grounds on which such an application may be made.

Proceedings commenced to set aside the underlying judgment or order

A debtor may apply to set aside a bankruptcy notice on the basis that proceedings have been commenced to set aside the judgment or order in respect of which the bankruptcy notice was issued. Such proceedings would include an appeal against the underlying judgment or order.³

A mere intention to commence proceedings will not suffice. Rather, those proceedings must have already been instituted in the relevant court. The affidavit in support of the application to set aside the bankruptcy notice must be attached to a copy of the application to set aside the underlying judgment or order and any other material filed in support.⁴ The supporting affidavit should also state the steps which have been taken to set aside the underlying judgment or order.

The debtor has a counter-claim, set-off or cross demand

A debtor may apply to set aside a bankruptcy notice on the basis that he or she has a counter-claim, set-off or cross demand equal to or exceeding the amount of the underlying judgment or order.⁵ It is also necessary that the counter-claim, set-off or cross demand could not, as a matter of law as it stood at that time, have been litigated in the proceeding in which the creditor's judgment or order was obtained.⁶

The counter-claim, set-off or cross demand must be effective at the time of the application to set aside the bankruptcy notice,⁷ and must be a claim measurable in money.⁸ The claim must be mutual as between the creditor and debtor, and must be due in the same right.⁹

The affidavit in support of the application to set aside the bankruptcy notice must provide full details and the amount of the counter-claim, set-off or cross demand, and explain why it was not raised in the proceedings that resulted in the underlying judgment or order.¹⁰ The court must be satisfied that the debtor is advancing a genuine claim and has a prima facie case with a fair chance of success.¹¹

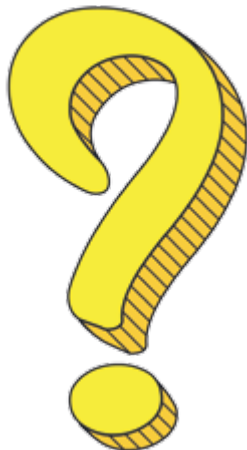
The court is not required to undertake a preliminary trial of the counter-claim, set-off or cross demand,¹² but needs to be satisfied that the claim has sufficient substance such that justice warrants it being first determined rather than forcing the debtor to comply with the bankruptcy notice.¹³

Defect in the bankruptcy notice

Formal errors in a bankruptcy notice do not necessarily result in the notice being invalidated, unless they have caused substantial injustice which cannot be remedied by the court.¹⁴ A bankruptcy notice is invalid if it fails to meet a requirement made essential by the Act, or if it could reasonably mislead a debtor as to what is necessary to comply with the notice. This is so, whether or not the debtor has, in fact, been misled.¹⁵ The following defects in a bankruptcy notice may render it liable to be set aside:

- **Timing issues.** The judgment or order on which the bankruptcy notice is based must not be more than six years old,¹⁶ and the notice must be served within six months of being issued unless time has been extended by the Official Receiver.¹⁷
- **Naming errors.** An error in the name of the debtor or creditor in the bankruptcy notice may cause invalidity. The names in the notice should be the same as those in the underlying judgment or order. However, the mere misdescription of the debtor or creditor will not render the notice invalid unless it could reasonably have misled the debtor.¹⁸

- **Defect in interest calculation.** Where post-judgment interest is claimed as part of the debt, the prescribed form for a bankruptcy notice requires that the basis of calculation, and statutory provision under which the interest is claimed, be set out in the attached schedule.¹⁹ Practitioners should carefully check that interest has been correctly calculated, that the correct statutory provision has been applied and that correct and consistent amounts are recorded in both the schedule and bankruptcy notice itself. If any of these matters are incorrect or could reasonably mislead the debtor, it may provide a basis to set aside the notice.²⁰
- **Attachment of copy of judgment or order.** The prescribed form for a bankruptcy notice requires a copy of the underlying judgment or order to be attached.²¹ A failure to do so may result in the bankruptcy notice being set aside.²²
- **Overstatement of debt.** A bankruptcy notice is not invalid simply because the amount of the debt has been overstated. However, a bankruptcy notice may be invalidated if the amount specified in the notice has been overstated, and the debtor gives notice to the creditor that the validity of the notice is disputed on that ground.²³ The amount which must be correctly stated in the bankruptcy notice is the amount of the judgment debt owing at the date of issue.²⁴



Extension of time

If a debtor applies to the court to set aside a bankruptcy notice, it is important in most instances to also apply for an interim order extending the time for compliance with the notice pending determination of the application.²⁵

The exception to this is an application to set aside the bankruptcy notice on the basis of a counter-claim, set-off or cross demand, in which case there is a deemed extension of time.²⁶ The supporting affidavit should set out relevant factors such as any prejudice to the parties, other impacts if the extension is not

granted, and should cover any undertakings or conditions which may be made.²⁷

Additionally, in an application to set aside the notice on the basis that proceedings have been commenced to set aside the underlying judgment or order, the court will not extend time if it considers those proceedings have not been instituted bona fide, or are not being prosecuted with due diligence.²⁸

Conclusion

The key consideration for practitioners is to ensure that the bankruptcy notice is responded to within the time fixed for compliance. A failure to do so will constitute an act of bankruptcy.

An application to set aside the bankruptcy notice may be because proceedings have been commenced to set aside the judgment, where the debtor has a counter-claim, set-off or cross demand, or due to certain defects in the notice itself. In many cases, it will also be necessary to apply for interim orders extending time for compliance with the notice. It is important that the affidavit in support of the application and extension of time provides fulsome detail in support of the orders sought.

Scott Seefeld is a Brisbane barrister.

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Notes

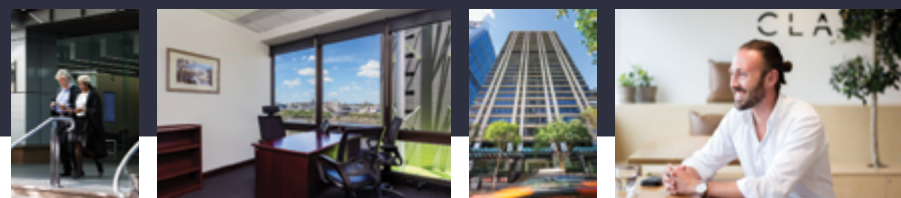
- ¹ Bankruptcy notices are issued pursuant to section 41 of the *Bankruptcy Act 1966*.
- ² Pursuant to section 40(1)(g) of the *Bankruptcy Act 1966*.
- ³ *Liew v JNS Technologies (M) Sdn Bhd* [1999] FCA 1428 at [12].
- ⁴ Rule 3.02(4) of the *Federal Court (Bankruptcy) Rules 2016*.
- ⁵ Sections 40(1)(g) and 41(7) of the *Bankruptcy Act 1966*.
- ⁶ *Re Brink; Ex parte Commercial Banking Co of Sydney Ltd* (1980) 44 FLR 135 at 139. See also *Harding v Deputy Commissioner of Taxation (No.2)* [2008] FCA 1985 at [65].
- ⁷ *Guss v Johnstone* [2000] HCA 26 at [43] & [47], approving the decision of the court below. See also *Re GEB* [1903] 2 KB 340 at 348.
- ⁸ *Re Brink; Ex parte Commercial Banking Co of Sydney Ltd* (1980) 44 FLR 135 at 138. See also *Harding v Deputy Commissioner of Taxation (No.2)* [2008] FCA 1985 at [59] and *Massih v Esber* (2008) 250 ALR 648 at [22]-[24] for examples of claims held not to be measurable in money.
- ⁹ For example, a bankruptcy notice from a creditor in a personal capacity could not be set-off against a claim against that creditor as a member of a partnership, executor or trustee. Nor could joint debts be set off against several debts. See *Stec v Orfanos* [1999] FCA 457 at [24].
- ¹⁰ Rule 3.02(3) of the *Federal Court (Bankruptcy) Rules 2016*.
- ¹¹ *Glew v Harrowell* (2003) 198 ALR 331 at [9].
- ¹² *Re Brink; Ex parte Commercial Banking Co of Sydney Ltd* (1980) 44 FLR 135 at 141.
- ¹³ *Glew v Harrowell* (2003) 198 ALR 331 at [10] to [12].
- ¹⁴ Section 306(1) of the *Bankruptcy Act 1966*. See also *Kyriackou v Shield Mercantile Pty Ltd* (2004) 138 FCR 324 at [37].
- ¹⁵ *Kleinwort Benson Australia Limited v Crowl* (1988) 165 CLR 71 at 79-80.
- ¹⁶ Section 41(3)(c) of the *Bankruptcy Act 1966*.
- ¹⁷ Regulation 4.02A of the *Bankruptcy Regulations 1996*.
- ¹⁸ *Re Crisafulli Ex Parte: National Commercial Banking Corporation of Australia Limited* (1985) 11 FCR 272 at [7]-[8], and *Matheson v Scottish Pacific Business Finance Pty Ltd* [2005] FCA 670 at [10].
- ¹⁹ Note C to the bankruptcy notice form at Schedule 1 of the *Bankruptcy Regulations 1996*. This form is prescribed by regulation 4.02.
- ²⁰ For consideration of when interest and calculation requirements will, or will not, invalidate a bankruptcy notice, see *Bendigo Bank Ltd v Williams* (2000) 98 FCR 377, *Bendigo Bank Ltd v Scerri* [1999] FCA 1215, and *Kleinwort Benson Australia Limited v Crowl* (1988) 165 CLR 71.
- ²¹ See the reference to "attached final judgment/s or final order/s" at amount 1 in the bankruptcy notice form at Schedule 1 of the *Bankruptcy Regulations 1996*. Regulation 4.01(1)(b) provides for certain documents which may be used to evidence the judgment or order.
- ²² *American Express International Inc v Held* (1999) 87 FCR 583 at [14], *Re Scerri* (1998) 82 FCR 146 at 149, and *Curtis v Singtel Optus Pty Ltd* (2014) 225 FCR 458.
- ²³ Section 41(5) of the *Bankruptcy Act 1966*. See *Seovic Civil Engineering Pty Ltd v Groeneveld* (1999) 87 FCR 120 at [36] & [37], *Hussain v King Investment Solutions Pty Ltd* (2006) 153 FCR 428 at [19] & [20], and *Deputy Commissioner of Taxation v Cummins [No.5]* [2008] FCA 794 [33] to [54] for consideration of the requirements of notice under section 41(5).
- ²⁴ *Walsh v Deputy Federal Commissioner of Taxation* (1984) 156 CLR 337 at [5].
- ²⁵ The application to extend time is made pursuant to section section 41(6A) of the *Bankruptcy Act 1966*.
- ²⁶ Section 41(7) of the *Bankruptcy Act 1966*.
- ²⁷ See *McPhee v Glenthams Pty Ltd* [2006] FMCA 1508 at [19] & [20] for a list of factors which may be relevant on an application for an extension of time.
- ²⁸ Section 41(6C) of the *Bankruptcy Act 1966*.

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Cyber and identity fraud – Will you be a victim?

Lawyers are regularly involved in significant transactions for clients and often control substantial sums of their money.

This makes lawyers an attractive target for fraudsters who are now using sophisticated methods to gain access to funds or property.

In recent times Lexon has seen an increase in fraud activity and we are continuing to work closely with the profession to ensure appropriate systems are in place to limit fraud risk. Two developing areas you should be aware of are discussed below:

Cyber fraud

Fraudsters continue to use phishing emails and similar devices to gain access to lawyers' mail and file systems. The methods they adopt are now much more nuanced and include specifically targeted business emails (for example, 'new instructions' with a link to a document) and emails tailored to the interests of the recipient (based on a review of your Facebook, LinkedIn profiles, etc.).

While up-to-date virus scanning software may identify some of these attempts, they do not guarantee system security and can be easily undermined if your staff do not remain vigilant to this very real threat.

We are aware of several instances in which fraudsters have used such methods to gain access to an email system. They have then monitored email traffic on, amongst other things, conveyancing transactions waiting for settlement, and then intercepted incoming settlement account details and substituted their own account details. This has resulted in the redirection of substantial settlement sums.

Because of the level of sophistication involved, Lexon recommends that email settlement requests are not acted upon until they have been verified by calling the relevant party on a recognised number.

Lexon has developed a user-friendly cyber security training program to assist practitioners. It is available for insureds to download free of charge from the Lexon website. The Conveyancing Protocol has also been updated to include new measures to reduce the risk of cyber-attack fund diversions. This is achieved by:

- confirming directly with the client (or other party) by phone call any instructions received electronically regarding the disbursement or receipt of funds exceeding \$10,000, and
- warning clients (and other parties) to contact the practitioner before acting on any ostensible requests received electronically from the practitioner to deposit or pay funds over \$10,000 into an account.

Identity fraud

There has been a recent spate of identity fraud cases involving the transfer of properties by bogus vendors who use this as a means to access settlement funds (often provided by financiers and secured by a mortgage over the property).

Ensuring that appropriate Verification of Identity (VOI) checks are undertaken is critical in conveyancing transactions and provides the greatest protection (not least to the practitioner involved) in the event of a fraud. Practitioners are reminded that transactions conducted in urgent circumstances where all 'standard' verification documentation is not available should be treated with caution. Of course, even where documentation meeting the requirements set out in the *Land Titles Act 1994* is provided, the practitioner must still take reasonable steps to ensure photographs, signatures and other details are in order.

2018/19 renewals and rates

Thank you to all practices that completed their QLS Insurance Renewal Questionnaire. The online process has been very successful and provided useful insights into the current state of the profession which I will report on in a later edition of *Proctor*.

QLS and Lexon are working hard to deliver the best rates possible for 2018/19 consistent with the long-term requirements of the scheme. These rates will be announced by QLS president Ken Taylor shortly.

Top-up insurance

QLS Council has again arranged with Lexon to 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.

This option is available at very competitive rates and practitioners have the choice of increasing cover under the Lexon policy to either \$5 million or \$10 million per claim.

This offering comes with the full backing of Lexon and ensures access to its class-leading claims and risk teams in the event that you require their assistance. Further details will be provided during the renewals process.

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.

Michael Young
CEO

Getting ready for the end of year

Practice changes (mergers, acquisitions, splits and dissolutions)

We find that the end of the financial year is the most active time for practice changes.

These may include 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 seeks to maintain equity in the insurance scheme by ensuring 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 future insurance levies and payment of excesses) which should be borne in mind when considering such changes. Because of these consequences, law practices are strongly encouraged to:

- Be familiar with the policy wording and Indemnity Rule (including Rule 10(6)) and the implications they may have.
- Contact Lexon to discuss your particular circumstances.
- Take independent legal advice when required.
- Consider contractual terms for adjustments/indemnities to provide some recourse in the future.
- Obtain a written authority & direction for Lexon to disclose the claims history and insurance history of any practice which you may be acquiring etc.
Note – this will only reveal existing matters.

Lexon offers law practices what is known as an Acquisition Endorsement, which enables a practice acquiring another practice to limit the impact of new claims that arise out of *closed* matters previously handled by the acquired practice. The Acquisition Endorsement provides the following benefits:

- Such claims are excluded from any future claims loading calculations.
- The applicable excess for such claims will be that of the acquired practice (which will often be lower than would otherwise be the case).
- No deterrent excess will apply irrespective of the circumstances.

Further information on the PLP concept and the Acquisition Endorsement can be found in detailed information sheets available on the Lexon website.



Did you know?

- The Foreign Law exclusion in the policy has been refined to permit practices to be covered for 'pre-approved' foreign law work. This constitutes an expansion of cover compared to the 2016/17 wording.

As business becomes more international, Lexon recognises that retainers from time to time will touch upon matters involving foreign law. The policy response seeks to strike a balance by providing coverage to practices that can demonstrate sufficient experience and skill in these specialised areas, whilst at the same time protecting the insured cohort as a whole from the cost of claims that arise when practices become involved in foreign law matters outside of their competence. If you would like to seek pre-approval, please complete the application form available on our website.

- Lexon is constantly issuing updates to its risk tools to ensure they remain current, assist insured practices to effectively manage their risk, and support the provision of quality legal services. No less than six tool updates were released in December 2017 alone, covering areas as diverse as conveyancing, personal injuries, family and elder law. We encourage practices to regularly check in at the website lexoninsurance.com.au for updates, or subscribe to our email update service which provides you with notice when these updates occur.



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Disability discrimination in the workplace

When choice of jurisdiction matters

By Tim Murray



Australia is number 21 in the Organisation for Economic Co-operation and Development (OECD) in the employment rate of people with a disability.¹

Disability discrimination, or the perception of it, remains a significant issue in the workplace.

Complaints under the *Disability Discrimination Act 1992* (Cth) are the most common type of complaint received by the Australian Human Rights Commission by a significant margin.²

However, potential claimants are not limited to claims under state and federal anti-discrimination legislation. Advisers to claimants and respondents need to be aware of potential industrial claims also, particularly as these other jurisdictions develop their own distinctive approach to issues pertaining to disability. Choice of jurisdiction can matter, substantively as well as procedurally.

This article identifies some of the more recent developments and jurisdictional differences in the approach to disability-related claims across anti-discrimination law and industrial law.

Anti-discrimination legislation

The *Disability Discrimination Act 1992* (Cth) (DDA) and the *Anti-Discrimination Act 1991* (Qld) (ADA) both prohibit direct and indirect discrimination in the work area.

Before moving on to the highly technical area of discrimination, it is worth noting that the DDA also prohibits disability harassment under section 35. The section simply proscribes 'harassment' of current and prospective employees or agents by their employers, principals and co-workers where the harassment is in relation to the person's

disability. An anti-bullying application under Part 6-4B of the *Fair Work Act 2009* (Cth) (FWA) may also be appropriate in such circumstances, depending on whether the aggrieved person desires to remain in the particular employment, or at the particular workplace.

Direct discrimination

As defined at section 5 of the DDA, direct disability discrimination occurs when, because of the aggrieved person's disability, the discriminator treats, or proposes to treat, the person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different. The ADA definition under section 10 is practically the same, although the term 'impairment' is used in the ADA rather than 'disability'.

It is well beyond the scope of this article to unpack each of the elements of this test, or engage in a comprehensive overview of how they have been interpreted.

For the purpose of this article it suffices to note, firstly, that the claimant must establish a **causative** element – that the less favourable treatment was because of (or in the ADA definition 'on the basis of') the claimant's disability.

The claimant is assisted by the extension of the definition of disability in the DDA to behaviour that is a symptom or manifestation of the disability, and to a disability which may not presently exist but either has previously, or may in the future, or is imputed to the person.³ The ADA definition of impairment similarly extends to past or future impairment. Section 8 of the ADA proscribes discrimination based on a characteristic that a person with the disability either usually has or that is usually imputed to a person with the disability, or based on a disability the person is presumed to have.

The claimant is also assisted by the lack of any requirement to prove actual motive or intention to discriminate. So held the High Court interpreting the DDA in *Purvis v New South Wales (Department of Education)* 2003 217 CLR 92 (*Purvis*).⁴ The ADA expressly provides at section 10(3) that the discriminator's motive is irrelevant, and it has further been held that direct discrimination in breach of section 10 can be unintentional or unconscious.⁵

Nonetheless, the burden of proof can be difficult to discharge in cases where there is no overt evidence that the complainant's disability was a reason for the less favourable treatment. Courts and tribunals will be reluctant to infer discrimination when there are other possible explanations for apparently unfair treatment.⁶

Secondly, the claimant must establish a **comparative** element – that the treatment was less favourable, comparing the aggrieved person with a person who does not have the aggrieved person's disability by reference to the *same circumstances*.

The correct approach to the identification of the relevant set of circumstances has proved contentious. In *Purvis* the High Court held that the relevant circumstances could include circumstances connected with the person's disability, including the disturbed behaviours that were acknowledged to be a manifestation of the disability.⁷

The DDA was subsequently amended so that under section 5(2) discrimination on the ground of disability occurs if the discriminator fails to make reasonable adjustment resulting in less favourable treatment, where the circumstances of the comparison are not to be regarded as materially different because of the fact that the aggrieved person requires adjustments. The obligation to make adjustments in the work area is tempered by section 21B which provides an exemption if avoiding the discrimination would impose an unjustifiable hardship on the discriminator.

There has been no similar amendment of the ADA such that following *Purvis*, circumstances that are themselves a manifestation of the disability may be thought to be part of the relevant circumstances, with no concomitant requirement to make adjustments. Section 10(5) deems it irrelevant to the comparison that the aggrieved person requires special services or facilities. In *Purvis* it was held that a similar provision as then appeared in the DDA did not create an obligation to provide such 'accommodation or services' as the person with a disability may require, and a failure to provide them would not necessarily amount to less favourable treatment.⁸

However, in the recent case of *Woodforth v State of Queensland* [2017] QCA 100 (*Woodforth*) the Court of Appeal distinguished the correct approach under the ADA to the

identification of the relevant circumstances of the treatment from the approach in *Purvis*. In the leading judgment, McMurdo JA reasoned that the approach is different because, unlike the DDA, the ADA proscribes discrimination based on a characteristic of the disability (or other attribute). Therefore, when discrimination is claimed on the basis of a characteristic, that characteristic cannot form part of the circumstances of the treatment for the purpose of the comparison.⁹

Indirect discrimination

As defined in section 6 of the DDA, indirect disability discrimination occurs when the aggrieved person is required to comply with a requirement or condition, with which the person cannot comply because of their disability, and which has or is likely to have the effect of disadvantaging persons with the disability.

The ADA definition of indirect discrimination at section 11 is similar but refers to the imposition of a 'term' rather than 'condition or requirement'. The ADA definition may also be more onerous for claimants in requiring that they establish that a "higher proportion of people without the attribute" are able to comply, rather than simply the likely effect of disadvantage.

Under both definitions, the imposition of a term, condition or requirement is not discrimination if it is reasonable. The burden of proving reasonableness rests on the respondent under both Acts.¹⁰

As for direct discrimination, the DDA definition also effectively imposes an obligation to make reasonable adjustments, by deeming the failure to make adjustments to be discrimination if the person with a disability would be able to comply if adjustments were made.¹¹

While the ADA does not expressly require reasonable adjustments, the test of whether the term is reasonable requires similar considerations including the cost of alternative terms and the financial circumstances of the person imposing the term.¹²

There is the further advantage for claimants under both Acts in that an indirect discrimination claim requires no proof with respect to the discriminator's knowledge or reasons (except as might be adduced by the respondent to prove the term or requirement is reasonable).

General protections claims

National system employees may pursue a claim under the 'general protections' scheme of the FWA. Section 351 prohibits adverse action being taken by an employer against an employee because of a physical or mental disability. State system employees may also pursue a claim of adverse action because of impairment under section 295 of the *Industrial Relations Act 2016* (Qld) (IRA).

The obvious advantage for claimants in pursuing such a claim is the so-called 'reverse onus of proof'. It is presumed in an adverse action claim that the adverse action was taken because of the reason alleged unless the respondent proves otherwise¹³.

The downside for claimants is that no inquiry into the 'unconscious reasons' of the decision maker is permitted. Such an approach was emphatically rejected by the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, when Heydon J opined that any search for unconscious reasons would "create an impossible burden on employers".¹⁴ This reasoning is in contrast with the acceptance by the courts that direct discrimination may be unconscious or unintentional¹⁵.

In other respects the scope of the protection under section 351 is not settled. 'Disability' is not defined in the FWA and may or may not include the characteristics or manifestation of the disability. One court has decided, in accordance with the dictionary definition, that 'disability' means a "particular physical or mental weakness or incapacity" but not its "practical consequences".¹⁶ Other courts have decided that 'disability' extends to the "manifestations of the underlying condition".¹⁷

It is well established that the claimant must establish the factual circumstance that is alleged to be the reason for the adverse action.¹⁸ That the disability must therefore be actual, not merely imputed or perceived, at least seems clear.¹⁹ Whether this extends to an actual disability that a person no longer has, or may have in the future, is less clear.

Section 342 of the FWA defines adverse action to include when an employer discriminates between the employee and other employees of the employer.²⁰ Whether this form of adverse action includes indirect discrimination is also not settled. Courts have tended to construe 'discriminates between' as requiring an intention to discriminate, whether directly or by imposition of a 'facially neutral term'.²¹ In *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27 Mortimer J opined that it "would be a significant omission from the protections otherwise intended to be offered by s351, read with s342, if indirect discrimination were not covered".²²

Inherent requirements

Under section 351(2)(b) of the FWA, adverse action because of disability is not unlawful if the action is taken *because of* the inherent requirements of the particular position concerned.²³ The DDA also contains an 'inherent requirements' exemption which is also alike with the exemption in the ADA of 'genuine occupational requirements'.²⁴

However, in *Shizas v Commissioner of Police* [2017] FCA 61 the court adopted an interpretation of the exemption in the FWA which is clearly different from the way the exemption operates in anti-discrimination law.

Mr Shizas' application to join the Australian Federal Police was rejected on medical grounds. He succeeded in establishing that this was adverse action because of a mental or physical disability, namely ankylosing spondylitis.

Katzman J also accepted that the medical evidence established that Mr Shizas was capable of meeting the inherent requirements of the position, but held that under section 351(2)(b) the question was whether adverse action was taken *because* of the inherent requirements.

Section 21A of the *Disability Discrimination Act 1992* (Cth) is concerned with whether the disability would in fact preclude the aggrieved person from performing the inherent requirements of the position. Paragraph 351(2)(b) of the FWA is not. It is concerned with the reasons of the person who took the action.²⁵

The inherent requirements themselves remain to be determined as a matter of fact according to the principles established in *Qantas v Christie* (1998) 193 CLR 280 (Christie).²⁶ However, whether the claimant

actually meets them is relevant only to the extent that this may support an inference that the decision maker did not genuinely take the action because of the inherent requirements.²⁷

The Commissioner ultimately succeeded in establishing that the decision not to employ Mr Shizas was taken because of the inherent requirements of the position. While the assistant commissioner who made the decision may have misunderstood the medical advice and laboured under the "erroneous preconception that ankylosing spondylitis meant a 'weak back'," this was dismissed by Katzman J as relevant only to the merits of the decision.²⁸ Her Honour also rejected the suggestion that the assistant Commissioner relied on a stereotype, being satisfied that the assistant commissioner actually considered Mr Shizas's suitability and genuinely believed that he did not meet the inherent requirements.

While holding the quality or merits of the decision irrelevant, Katzman J did acknowledge that a decision "made predominantly because of prejudice or ignorance may well not be a decision made because of the inherent requirements of the particular position".²⁹

Unfair dismissal

Two recent decisions of the Fair Work Commission illustrate how concepts and principles can be imported from anti-discrimination law to deal with unfair dismissal cases involving medical capacity issues.

In *Lion Dairy and Drinks Milk Limited* [2016] FWCFB the Full Bench, informed by the High Court's decision in *Christie*, set out a list of principles relevant to whether there is a valid reason for dismissal including:

- ...In capacity cases the employer is usually required to have regard to an expert opinion or opinions – not to make an independent assessment of what is essentially a medical question...
- ...In cases where the reason for dismissal relates to capacity, the Commission should have regard to the medical opinions at the time of the decision to dismiss...
- It is appropriate to have regard to medical assessment in relation to the capacity to perform the full duties of the position.
- It is also appropriate to have regard to whether reasonable adjustments may be made to a person's role in order to accommodate any current or future incapacity. However, such consideration of what may be reasonable adjustments will be within the context of the substantive

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position or role, not as it may be modified or restricted in order to accommodate the employee's injury...

- A decision based on the existence of a medical opinion that an employee cannot perform the inherent requirements of a job is suggestive of a valid reason because such a decision is 'sound, defensible and well founded'.³⁰

These principles were applied in *Nelitha Vather v Serco Pty Ltd T/A Serco* [2016] FWC 5983. In that case the Commission determined that there was a valid reason despite the existence of contradictory medical reports and the applicant's objection to some of the matters in the report relied on by the employer.³¹

The Commission's reasons illustrate the importance in unfair dismissal cases of the fairness and reasonableness of the process leading to the dismissal, including that the employer's medical examiner was "objectively briefed" about the inherent requirements of the position. Possibly reflecting the evidence that was led, the capacity of the employer to modify the employee's duties and the reasonableness of its refusal to accommodate were barely discussed. In finding for the employer, the Commission reasoned that the fact that "other courses of action [besides dismissal] were open did

not detract from the extent to which there was a valid reason".³²

Conclusion

This article has considered some of the jurisdictional differences in the approach to disability related claims. The practical import of those differences will depend on

the particular case. In many cases other considerations such as preference of forum, costs and delay will be as, if not more important, to choice of jurisdiction.

Tim Murray is a solicitor at Caxton Legal Centre Inc. and a member of the QLS Industrial Law Committee.

Notes

- ¹ theconversation.com/three-charts-on-disability-discrimination-in-the-workplace-85183.
- ² 'Annual Report 2015-2016' (2016), Australian Human Rights Commission, humanrights.gov.au/our-work/commission-general/publications/annual-report-2015-2016.pdf.
- ³ s4 DDA.
- ⁴ Gummow, Hayne and Heydon JJ, [236].
- ⁵ *Virgin Blue Airlines Pty Ltd v Hopper & Ors* [2007] QSC 075 (Moynihan J), [133]-[146].
- ⁶ For example, 'unspecified personal feelings'. See *Walker v Heathcote Health* [2017] VCAT 171, [39].
- ⁷ Gummow, Hayne and Heydon JJ, [224].
- ⁸ *Ibid*, [158].
- ⁹ *Woodforth*, [53].
- ¹⁰ s6(4) DDA; s205 ADA.
- ¹¹ s6(2) DDA.
- ¹² s11(2) ADA.
- ¹³ s361 FWA; s306 IRA.
- ¹⁴ 546.
- ¹⁵ Above n5.
- ¹⁶ *Hodkinson v Commonwealth* (2011) 248 FLR 409, [146].

- ¹⁷ *Stephens v Australian Postal Corporation* (2011) 207 IR 405, [86]-[90]; *RailPro Services Pty Ltd v Flavel* [2015] FCA 504, [124].
- ¹⁸ *Tattsbet Limited v Morrow* [2015] FCAFC 62, [119].
- ¹⁹ *RailPro Services Pty Ltd v Flavel* [2015] FCA 504 [112].
- ²⁰ See also s282 IRA.
- ²¹ *Hodkinson v Commonwealth* (2011) 248 FLR 409, [176]-[178]; *Ramos v Good Samaritan Industries (No.2)* [2011] FMCA 341, [62]; *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178, [102].
- ²² [155].
- ²³ See also s295(2)(b) IRA.
- ²⁴ s21A DDA; s25 ADA.
- ²⁵ [164].
- ²⁶ [1] (Brennan CJ), [33]-[37] (Gaudron J), [86] (McHugh J).
- ²⁷ [152].
- ²⁸ [183].
- ²⁹ [184].
- ³⁰ [25].
- ³¹ [33]-[34].
- ³² [40].

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'Chain of responsibility' reforms

A vehicle for change in road transport safety

Major changes to road transport 'chain of responsibility' laws are set to commence across all Australian states and territories (other than Western Australia and the Northern Territory) in mid-2018.

The changes will impose a new 'primary duty' on all parties in the chain of responsibility to ensure, so far as is reasonably practicable, the safety of their road transport activities. The changes will affect all Australian businesses that make use of heavy transport services.

Australia's road transport industry

Transport and logistics are integral to the effective operation of nearly all Australian industries. Australia is one of the world's largest transport and logistics nations in terms of tonnes carried and kilometres travelled. About 700 billion tonne-kilometres of goods are moved across the country each year.¹ It is estimated that a 1% improvement in the efficiency of the transport and logistics industry generates \$2 billion of gains to the economy each year.²

Road transport currently dominates the Australian market for non-bulk freight due to its advantages in price, speed, convenience and reliability, with industry analysts predicting 75% growth in road transport over the next 20 years.³

However, the road transport industry has a reputation for high rates of serious health and safety incidents (nearly twice the average across all industries).⁴ Safe Work Australia reported 535 worker fatalities in the road transport industry between 2003 and 2015, accounting for 17% of all work-related deaths in Australia during that period.⁵

The case for change

The *Heavy Vehicle National Law* (HVNL) regulates the use of heavy vehicles (vehicles with a gross vehicle mass (GVM) or aggregate trailer mass (ATM) of more than 4.5 tonnes) on roads in all states and territories except Western Australia and the Northern Territory. The current regime deems parties in the 'chain' to be responsible for a series of on-road offences such as breaches of vehicles' mass, dimension and loading requirements and breaches by drivers of speed and fatigue requirements.

In response to safety concerns, the new regime will go further. It will no longer be necessary for a road offence to be committed before a party in the chain is liable under the HVNL. Instead, a party may be prosecuted because it does not have in place practices and procedures that ensure the safety of transport activities, directly or indirectly related to its operations.

The primary aims of the reforms are to improve the safety of road transport and to promote pre-emptive risk management so that the HVNL better aligns with other national safety legislation, such as the *Model Work Health and Safety Act 2011* (WHS Act) and the *Rail Safety National Law*. The amendments were passed by parliament in December 2016 and are expected to commence by proclamation in mid-2018.⁶

Who will be affected by the reforms?

Broadly, the 'chain of responsibility' includes those parties who have control or influence over the transport of goods. The reach of the new regime extends beyond those parties directly involved in providing transport services. Under the reforms, the parties in the 'chain of responsibility' are:

- a driver's employer
- a prime contractor, if a driver is self-employed
- a vehicle operator
- a scheduler of a vehicle
- a consignor and consignee of goods in a vehicle
- a packer of goods in a vehicle
- a loading manager
- a loader
- an unloader.

All Australian businesses that make use of heavy vehicles to send or receive goods, whether directly or indirectly, are potentially consignors and consignees and therefore part of the chain of responsibility. This means that the primary duty extends to off-road parties including large corporations and small businesses across domestic and international industries such as agriculture, construction, wholesale and retail.

What are the primary duties?

Under the reforms, all parties in the chain of responsibility will have a non-transferable duty to ensure, so far as is reasonably practicable, the safety of their transport activities related to a heavy vehicle (new section 26C). 'Transport activities' are broadly defined to comprise activities "associated with the use of a heavy vehicle on the road" including off-road business practices and decision-making (amended section 5).

All parties in the chain are also required to ensure, so far as is reasonably practicable, their conduct does not directly or indirectly cause or encourage a driver or another party in the chain to contravene the HVNL.

'So far as is reasonably practicable'

The 'so far as is reasonably practicable' test reflects the terminology used in the WHS Act and other Australian safety legislation. The HVNL reforms provide that the following factors are relevant to an assessment of what is 'reasonably practicable':

- the probability of a safety risk or damage to road infrastructure
- the level of harm that could result from the risk or damage
- what the party knows or ought to know about the risk or damage, and about the ways of minimising the risk or damage
- the availability of ways to minimise the risk or damage, and
- whether the cost of avoiding the harm is disproportionate to the likelihood of risk or damage (amended section 5).

by Gillian Bristow and Emily Ng



The failure to ensure safety 'so far as is reasonably practicable' can have devastating consequences. The test was recently applied in a Victorian workplace health and safety case in which Toll Transport was charged with failing to provide, so far as was reasonably practicable, a safe system of work.⁷

In that case, an employee whose vision was almost completely obscured by the load he was transporting fatally injured another employee when the trailer he was manoeuvring struck the other employee. The court held that the risk of vehicles and crew colliding was "readily foreseeable" and that Toll Transport's system of work was "hopelessly inadequate and vague". Cannon J concluded that a substantial fine of \$1,000,000 was necessary to reflect the gravity of Toll Transport's breach and to deter other parties from failing to do their "utmost" to ensure safety.

How does the primary duty apply to off-road parties?

Current laws impose liability upon chain of responsibility parties for on-road offences such as breaches of mass, dimension, speed, fatigue and loading requirements. The reforms extend this liability to include off-road breaches such as failure to implement procedures that ensure the safety of transport activities.

Parties using road transport to send and receive goods must ensure that:

- the loads they require to be transported are appropriately secured and do not breach vehicle mass or dimension limits, and
- delivery requirements do not cause or encourage breaches by requiring drivers to breach speed limits, driving hour limits or driver rest requirements (new section 26E).

For example, a business's delay in making goods available for transport that compels a driver to breach speed or rest limits to meet a delivery deadline may constitute a breach of primary duty by both the driver's employer and the business.

Directors' due diligence obligation

The HVNL reforms will also impose a positive obligation on business executives (defined as "any person concerned in or taking part in management of the business") to exercise due diligence to ensure the business complies with its primary duty (new section 26D). For certain prescribed offences, such as tampering with speed limiters, if a corporation commits the offence, the executive officer will also be found to have committed the offence if they did not exercise reasonable diligence to prevent such conduct.

How will the primary duties be enforced?

The HVNL reforms will give enforcement authorities power to require a person to provide information for the monitoring or enforcement of a primary duty (new section 570A). They also allow for the use of voluntary enforceable undertakings as an alternative to prosecution, whereby parties agree to be bound to take specific steps to ensure compliance (new part 10.1A).

What are the penalties for breach?

Failure to discharge the primary duty can attract significant pecuniary penalties and a jail sentence. The penalties under the HVNL reforms are divided into three categories:

- Category 1: a reckless breach creating risk of death or serious injury attracts a maximum penalty of \$300,000 or five years' imprisonment for individuals (or both), or \$3 million for corporations.
- Category 2: a breach of duty creating risk of death or serious injury (without recklessness) carries a maximum penalty of \$150,000 for individuals and \$1,500,000 for corporations.
- Category 3: any other breach attracts a maximum penalty of \$50,000 for individuals and \$500,000 for corporations.

How should parties in the chain prepare for the changes?

Parties in the chain of responsibility need to take proactive steps to prepare for the reforms, anticipated to commence in mid-2018. These steps may include:

- identifying and considering the risks associated with their business and ways of removing or minimising those risks
- properly documenting policies and procedures to manage identified risks
- implementing measures and conducting audits to ensure that policies and practices are followed
- consulting with other parties in their supply chain to identify and manage risks
- documenting contractual responsibilities with other parties in their supply chain.

Gillian Bristow is special counsel and Emily Ng is a solicitor with Cooper Grace Ward Lawyers.

Notes

¹ Ferrier Hodgson and Azurium, *Transport 2050: Look out! Here comes the future* (4 May 2017), ferrierhodgson.com.au/media-and-publications/publications/-/media/7e398fd069ca4ba8a8fe9fc1f260a802.ashx.

² Australian Logistics Council and ACIL Allen Consulting, *The Economic Significance of the Australian Logistics Industry*, Australian Logistics Council, austlogistics.com.au/wp-content/uploads/2014/07/Economic-Significance-of-the-Australian-Logistics-Industry-FINAL.pdf.

³ Ferrier Hodgson and Azurium, above n1.

⁴ Ibid.

⁵ Safe Work Australia, *Work-Related Traumatic Injury Fatalities, Australia* (October 2016), safeworkaustralia.gov.au/system/files/documents/1702/work-related-traumatic-injury-fatalities.pdf.

⁶ The Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 was passed by Queensland Parliament (as the host jurisdiction for the Heavy Vehicle National Law) on 1 December 2016. The reforms will automatically roll out to other participating jurisdictions by way of each state and territory applying the uniform law.

⁷ *DPP v Toll Transport Pty Ltd* [2016] VCC 1975.

High Court gives green light

New enterprises can circumvent greenfields process

A recent High Court decision has clarified the meaning of ‘coverage’ under the *Fair Work Act 2009* (Cth) (FWA) and confirmed the ability of new enterprises to create valid enterprise agreements (EAs) with existing employees.

Businesses can now circumvent negotiations with unions and limit the number of voting employees.

In *ALDI Pty Ltd v Shop Distributive & Allied Employees Association & Anor* (ALDI decision),¹ the High Court unanimously overturned the Full Federal Court’s interpretation of the term ‘coverage’ and held that ALDI was able to request that its existing employees vote for a new EA in a region that had not yet finished construction, nor started trading, but for which they had already accepted offers of employment.

More generally, the High Court was asked to decide whether existing employees of a business being transferred over to a new enterprise were genuinely ‘covered’ by a proposed EA for that enterprise and could vote on it (the coverage issue). The decision confirmed that EAs for new enterprises bargained with existing employees who have not yet commenced working for the new enterprise, need not negotiate using the ‘greenfields’ process.

Legal context

The FWA outlines the processes by which EAs are validly made and varied. Normally EAs are re-negotiated with existing employees who are covered by the EA or their bargaining representatives. However, when creating a new enterprise, a greenfields EA must be negotiated with the relevant employee organisation/s if the persons who will be necessary for the normal conduct of the enterprise are not yet employed.²

It is usually clear whether or not an EA needs to be negotiated using the regular process or the greenfields process. This normally depends on whether or not the enterprise is an existing one or a new one. When an existing business is expanding into new regions, it is generally considered a ‘new enterprise’ and triggers the greenfields process. However, ambiguity arose in the *ALDI* decision as the existing business was proposing to staff the new enterprise (in part

or in whole) with existing employees from other locations, and intended to bargain with those employees rather than the relevant employee organisation/s under the greenfields process.

Facts and litigious history

ALDI operates across a number of Australian states, with each state covered by a different EA. In 2015, ALDI was in the process of expanding its operations in South Australia (SA) and sought expressions of interest from its employees in other states to work in the new SA region (Regency Park). A number of existing ALDI employees – 17 of them – received and accepted a written offer to work in Regency Park when it opened.

Before Regency Park commenced operations, ALDI began bargaining with existing employees to create a new EA for SA. ALDI then requested the 17 employees to vote to approve the new EA, with the majority voting in favour before it was approved by the Fair Work Commission (FWC). No unions were involved in either the negotiation or voting process.

Following the decision, the Shop, Distributive & Allied Employees Association (SDA) and the Transport Workers’ Union (TWU) appealed to the Full Bench of the FWC. Their argument was that the new EA had been improperly made and should instead have been negotiated with them using the greenfields process under s172(2)(b) of the FWA. As ALDI was creating a new enterprise, they submitted that it was irrelevant that the future Regency Park staff were already existing ALDI employees in other regions and that, for the purposes of the FWA, ALDI had not yet employed any employees in the new enterprise who would be necessary for its normal conduct. The Full Bench of the FWC disagreed with the unions and dismissed the appeal.

The SDA then filed an appeal in the Federal Court. The Full Federal Court subsequently granted the relief sought, having found that the Full Bench had incorrectly decided the case and that the existing employees could not be covered by the new EA until it was in operation. As a consequence, the new EA could not have been genuinely agreed to by employees covered by it, as required by the FWA.³

The coverage issue

The High Court defined the coverage issue as being whether the FWC “could approve an EA for a new enterprise made with existing employees of the employer who

have agreed to work, but are not at that time actually working, as employees in the new enterprise”.⁴

The Full High Court considered the different approaches taken by the Full Bench and the Full Federal Court. The Full Bench relied on s172 of the FWA in reaching its decision. Section 172 regulates the making of an EA, specifically distinguishing between the requirements of a non-greenfields and a greenfields EA. The Federal Court, however, focused on a construction of s186(2)(a) of the FWA, which seemed to prevent the approval of the new EA on the basis that it had not been “genuinely agreed to by employees covered by the agreement”.

The High Court sought to resolve these two approaches, stating that the “material provisions of the [FWA] must be understood, if possible, as parts of a coherent whole”.⁵ It analysed the language of the two provisions more broadly and read them in line with part 24 of the FWA as a whole. Specifically, the court found that s172 does not contemplate that an EA must exclusively be a greenfields EA simply because it relates to a new enterprise.⁶ The High Court also found that the term ‘employed’ should not be narrowly read to mean only employed in the new enterprise.⁷

Other provisions of the FWA also make clear that an employee can be covered by more than one agreement at the same time. This is clarified by the distinction between the terms ‘cover’ and ‘applies’ —the former meaning that an agreement covers the person’s job title or role as part of the agreement and the latter meaning that an agreement applies to the person in the sense that it is currently in operation and enforceable under the law.⁸ After having reconciled the other provisions of the FWA with the submissions before it, the High Court accepted ALDI’s construction of the coverage issue.

Where the law stands now

Interestingly, obiter⁹ in the High Court’s judgment seems to suggest that when a business is proposing to transfer existing employees to staff a new enterprise, the **only** valid way to do so is by a non-greenfields EA.¹⁰ This position would be a significant departure from existing practices and would require businesses to obtain approval of a new EA before entering into negotiations with existing employees. In practical terms, this may lead to a longer and more onerous

Matthew Giles and **Andrew Ross** look at how *ALDI Pty Ltd v Shop Distributive & Allied Employees Association & Anor* has reconsidered the law on enterprise agreements for new enterprises.



bargaining process, as employers must comply with all of the time-specific notification and voting requirements required before a non-greenfields EA can be approved.

The High Court also made note that a non-greenfields EA can be made with two or more employees, such that “a small group of employees may be able to fix the terms and conditions of employment for all the employees who may be employed in the enterprise in the future”,¹¹ and that “[i]t does not matter that the agreement may, in due course, come to apply to many more employees”.¹²

This is a space to watch for legislative reform, given that employers will now be able to negotiate with only a select few existing employees to create a new EA, circumventing negotiations with unions under the greenfields process and limiting the number of employees that are eligible to vote.

Labor’s Shadow Minister for Employment and Workplace Relations, Brendan O’Connor,

has already pledged that “Labor will legislate to make clear that the workers who vote on an [enterprise] agreement must be representative of the workers who may ultimately be covered by the agreement” and that “Labor will also change the law so that workers and their unions can apply to the

Fair Work Commission to re-negotiate sham enterprise agreements”.¹³

Matthew Giles is a lawyer and Andrew Ross is a senior associate at Sparke Helmore Lawyers. The authors gratefully acknowledge the assistance of Edwina Sully in the preparation of this article.

Notes

¹ [2017] HCA 53.

² s172(2)(b)(ii) of the FW Act. Note: as per s12 of the FW Act, ‘enterprise’ will include new businesses, activities, projects or undertakings.

³ Under s186(2)(a) of the FW Act.

⁴ At [1] in *ALDI*.

⁵ Citing *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].

⁶ At [22] in *ALDI*.

⁷ At [24] in *ALDI*.

⁸ See ss52 and 53 of the FW Act.

⁹ At [84] in *ALDI*.

¹⁰ At [81] in the *ALDI* decision references how s207(4) of the FW Act “utilises the present perfect tense ‘have been’ to reflect the circumstance that greenfields agreements may only be made where no employees were employed at the time the agreement was made”.

¹¹ At [81] in *ALDI*.

¹² At [82] in *ALDI*.

¹³ “Shorten Government would outlaw ‘sham’ enterprise deals”, *Workplace Express*, 18 October 2017, workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=56163&utm_source=instagram&utm_medium=email&utm_campaign=subscriber+email&utm_content=read+more&utm_term=Shorten%20Government%20would%20outlaw%20%22sham%22%20enterprise%20deals.

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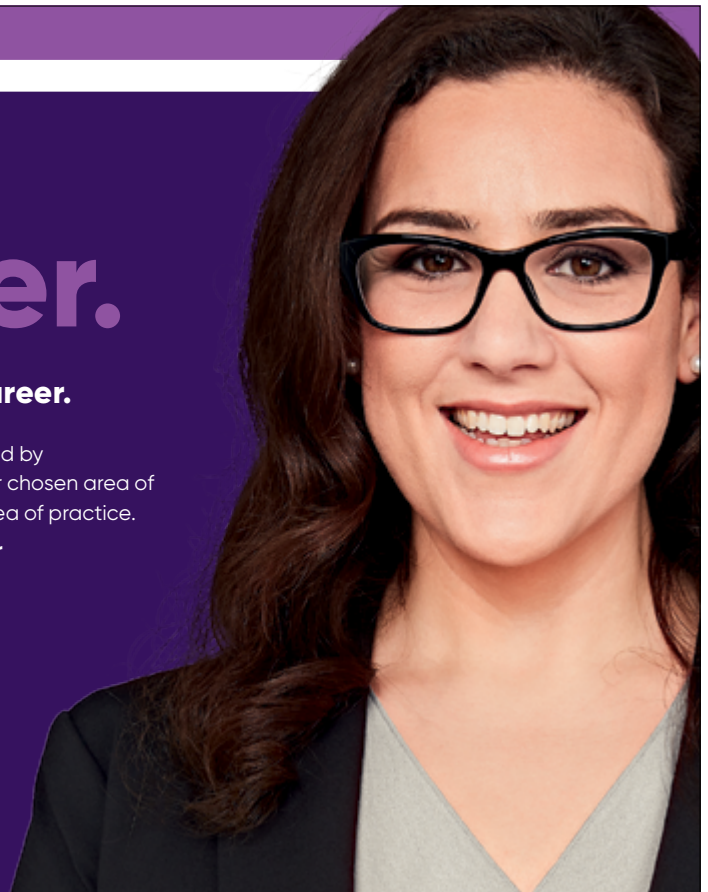
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Hard at work for members

QLS policy committees and the advocacy team have hit the ground running in 2018, with work commencing and continuing across many areas of law. Acting principal policy solicitor **Wendy Devine** and policy solicitor **Natalie De Campo** provide this month's update.



Family law update

The QLS Family Law Committee is preparing for a busy 2018, following last year's announcement that the Australian Law Reform Commission (ALRC) will conduct the first comprehensive review of the family law system since the commencement of the *Family Law Act 1975*.

The committee expects to work with a number of stakeholders, including the Law Council of Australia (LCA) Family Law Section, in relation to this review.

In addition to preparing for the ALRC review process, the committee has recently contributed to the submission made by the LCA on two Bills introduced by the Federal Government in late 2017:

- the Family Law Amendment (Parenting Management Hearings) Bill 2017, and
- Family Law Amendment (Family Violence and Other Measures) Bill 2017.

The first Bill proposes the establishment of a Parenting Management Hearings Panel that would provide an alternative process for resolving parenting disputes. While QLS supports measures that allow parenting matters to be resolved in a timely and cost-effective way – particularly given the enormous pressure currently on the family law system – we have expressed serious concerns about this Bill, including a proposal that parties may only be legally represented with leave of the panel.

Legal practitioners play an important role in resolving family law matters and help to ensure that vulnerable and disadvantaged litigants understand their legal rights. The proposed inquisitorial model represents a significant departure from the established position under law, and introduces additional complexity in a context in which fragmentation and complexity is one of the greatest challenges for litigants navigating the system.

QLS submitted that the introduction of parenting management hearings appears premature in the context of the forthcoming ALRC inquiry. The recommendations that result from the ALRC inquiry will be supported by expert advice and developed following thorough consultation and research. Parenting management hearings should instead be considered as part of this inquiry.

The second Bill aims to enhance the capacity of the family law system to provide effective outcomes for people who have experienced family violence. In particular, it aims to reduce the need for families to interact with multiple courts across the federal and state or territory jurisdictions. QLS has acknowledged the difficulty litigants may experience navigating multiple courts in matters involving family violence, and expressed support for the objectives of the proposal.

However, our submission stressed the need for additional judicial officer training in state and territory courts, given the highly specialised nature of family law. It is unclear under the proposal whether the vital support services currently provided in the Family Court, including family consultants, would be available to litigants in state and territory courts.

We submitted that appropriate resourcing for state and territory courts would be critical to achieving the policy objectives of the Bill and strongly supported an amendment to remove the need for parties to revert to the family law courts within 21 days to continue an order variation. We suggested that a 60-day time frame would be more appropriate to accommodate matters in which Legal Aid may be required, as well as to maintain consistency between any family violence orders and family law orders.

The QLS Family Law Committee will continue to work with significant stakeholders in this area to respond to proposed legislative amendments presented by the Federal Government.

Proposed electoral funding reform

QLS has raised significant concerns in our submission to the Joint Standing Committee on Electoral Matters in relation to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth), introduced in the last sitting of Parliament in 2017.

We recommended that the Bill not be progressed in its current form, and called for further comprehensive consultation on the Bill, including the opportunity to consider a detailed regulatory impact statement.

Our particular concerns were:

- The constitutionality of the proposed legislation, given the effect on the implied freedom of political communication.
- The red tape consequences for charities and not-for-profits.
- The need for exemptions to be provided for when:
 - organisations, particularly professional membership organisations such as QLS, are already subject to robust financial accountability and disclosure regimes
 - a legal practitioner engages in conduct within the scope of legal practice regulated by the *Legal Profession Act 2007* (Qld) and similar regulatory legislation in other states.
- The existing regulatory burdens already imposed on charities in Australia with respect to the level of advocacy that they can undertake and the need to exclude charities from the operation of the Bill.
- The extraordinarily wide application of the registration framework, triggered by advocacy by a not-for-profit organisation on any issue that “is, or is likely to be, before electors in an election” as prescribed in the proposed definition of ‘political purpose’.
- The lack of clarity on how to calculate ‘political expenditure’.
- The need for an exclusion from the definition of ‘political purpose’ for responding to and participating in government consultation processes.
- The scope of the new section 302J offence (forming bodies corporate for the purposes of avoiding restrictions in this division) with respect to professional advisors.

The joint standing committee had received 143 submissions at the time of writing. Submissions, including the QLS submission, are available on the committee's website at aph.gov.au.

Wendy Devine is the acting principal policy solicitor at Queensland Law Society. Natalie De Campo is a policy solicitor at Queensland Law Society. They gratefully acknowledge the assistance of acting advocacy manager Binari De Saram and legal assistant Pip Harvey-Ross in compiling this article.

Third-party instructions

by Stafford Shepherd



On occasion we receive instructions from a third party (a relative, friend or interposed advisor). The question then arises: Can we act for the client on the instructions from a third party?

The answer is that we must be extremely careful in evaluating whether this is something we should do. We must keep in mind the following:

- Rule 8 *Australian Solicitors Conduct Rules 2012* (ASCR) provides that we must follow a client's lawful, proper and competent instructions, and
- Rule 7.1 ASCR provides that we must provide clear and timely advice to assist the client to understand relevant legal issues and to make informed choices about action to be taken.

It is always preferable to develop a personal rapport with the client and meet with them if at all possible, face to face. We should be cautious about accepting instructions from someone we do not know. Verification of identity is critical.

When instructions are coming from a third party we must be clear as to who the client is. If it is not the third party, then we should ensure we meet with the client to obtain instructions directly.

It is advisable to see the client alone to ensure there is no external influences on the client, particularly when the initial instructions from the third party benefit or favour the third party.

Client instructions should always be confirmed in writing.

A client may expressly authorise a third party to instruct on their behalf. Such authority should be in writing and freely given. Preferably, it should be in a power of attorney.

Be clear who the client is. This should be clearly stated in your retainer or costs agreement.

We owe a duty of confidentiality to the client (Rule 9 ASCR). We must have the client's consent to disclose information to a third party (Rule 9.2.1 ASCR – preferably, the consent should be express and in writing). Remember the client is fully entitled to limit what is disclosed to others.

It may be necessary when dealing with a third party to:

- confirm that we act for the client and are not acting or advising them
- inform a third party they should consult with their own solicitor
- advise that we act in the best interests of the client and act in those interests alone (subject to our duty to the court and the administration of justice)
- control the way in which a third party communicates with us to avoid potential conflicts of duty arising
- scope carefully the work to be done and who is responsible for the fees and costs.

It is important to reflect (particularly when a third party is an interposed advisor) if this is a matter or transaction we should be acting in. When in doubt, don't. Remember, there may be exposure to damages or compensation for failing to act in accordance with the instructions of the client.

On 1 July 2012 the *Australian Solicitors Conduct Rules 2012* (ASCR) commenced in Queensland. During 2016 and 2017 the Law Council of Australia's (LCA) Professional Ethics Committee undertook a review of the ASCR. The LCA has released a consultation paper entitled 'Review of the Australian Solicitors' Conduct Rules'. The review paper can be found on the QLS Ethics Centre website.

The QLS Ethics Centre on behalf of the Ethics Committee and the Queensland Law Society invite members and interested parties to provide submissions with respect to the consultation paper by 31 May 2018. Submissions may be lodged at ethics@qls.com.au.

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

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Gifts, grannies and the GAA

The demographic of the Australian population is changing – lifespans are increasing, and with this there is an increase in the proportion of the population called ‘aged’.¹

Of those between 80 and 84 years old, 12% have some form of dementia. For those over 94, this figure is 40%.²

These demographic features drive the ever-growing need for members of our aging population to have a substituted decision maker to assist them in managing their affairs as their capacity declines.

This cohort holds significant wealth and the statistics demonstrate they are dangerously exposed to the unscrupulous, with estimates putting the annual cost of elder financial abuse in Queensland at a minimum of \$1.8 billion.³

Aligned with such figures, the Public Trustee of Queensland reports that enduring powers of attorney (EPAs) are the main source of reported financial abuse of older people.⁴ The Public Trustee is typically appointed as a financial administrator if a suitable alternative is not available. Relevantly, a significant distinction between the holder of an EPA and a financial administrator is that the person holding an EPA is not required to undergo any scrutiny prior to accepting appointment, whereas a prospective financial administrator is subject to a great deal of scrutiny and oversight by the Queensland Civil and Administrative Tribunal (QCAT) as to their suitability and financial management skills.

A protective mechanism within the legislative scheme is to prevent conflict and gifting transactions without authority, unless it is naturally and reasonably a gift that the adult might make.⁵ The typical examples are birthday and Christmas presents. The question, however, sometimes arises whether it is proper for an attorney/financial administrator to make large gifts on behalf of their principal when that was their custom.



When a gift is deserved, it is not a gift but a payment.”

– Gene Wolfe, *Shadow & Claw*

A recent QCAT decision examined this scenario – FK [2017] QCAT 469 (FK), delivered on 18 December 2017.

FK involved an application under the *Guardianship and Administration Act 2000* (Qld) (GAA) by the then recently appointed financial administrator GJ of FK, who was 94 at the time an order was sought for the tribunal to approve financial gifts to numerous relatives of FK.

The extent of the proposed gifts was significant. They were worth a total of \$112,000 and included “Christmas gifting to 23 family members and a family friend totalling \$67,000” as well as “birthday gifts to 48 family members and 1 friend totalling \$45,500”.⁶

The administrator, GJ, was one of those family members to receive the gifts.

The decision traces the mechanics of the steps the administrator was required to undertake and the evidence necessary to satisfy the tribunal that the proposed gifts were ones that ought to be approved.

The decision addresses the provisions of the GAA relating to the powers exercised by the decision maker, and their responsibilities including the duty to avoid conflict transactions unless authorised.⁷

These were succinctly summarised at paragraph [27]:

“The Administrator is required by principle 11 of the General Principles to act in a way that is appropriate to FK’s circumstances. The Administrator is required to act with honesty and with reasonable diligence in relation to the adult’s affairs. The Administrator is required to avoid conflicts of interest.

“The Act in section 54 deals specifically with the situation of gifts. The section provides that unless the Tribunal orders otherwise, an Administrator for an adult may give away the adults property only if:

- a) the gift is
 - i) a gift of the nature of the adult would make when the adult had capacity
 - ii) a gift of the nature that the adult might reasonably be expected to make
- b) the gifts value is not more than what is reasonable having regard to the circumstances and, in particular, the adult’s financial circumstances.”

The question for determination was whether financial gifts totalling \$112,000 satisfied this criteria. Of notable relevance was that FK “is a person of considerable financial means who was in the practice of giving monetary gifts to children, grandchildren and others at Christmas, birthdays and other special occasions”.⁸

In approving the gifts, the decision pays particular attention to the evidence of FK’s long-standing accountant of 15 years.⁹

Noting that “[t]he circumstances of this matter are unique and unusual”,¹⁰ the tribunal ultimately found “that the gift-giving program can be undertaken without unreasonably compromising FK’s financial position. Her interests are being protected but her wishes are also being served.”¹¹ It should also be noted that the approval was confined to “the 2017-2018 period”.¹²

While an unusual decision, it demonstrates that not all financial exchanges between incapacitated adults and their family members are laced with menace, deprivation and dishonesty.

In addition, I refer you to the equally unusual matter of *CMB, Re* [2004] QGAAT 20, where in a split decision, the majority tribunal approved the sale of the incapacitated adult’s family home and distribution of the proceeds to her children. This represented 70% of her assets.¹³ The split nature of that decision is particularly instructive to practitioners in illustrating the differing approaches to interpreting the legislation.



with Christine Smyth

Having regard to these decisions and the level of oversight a financial administrator is subject to, it raises the question of whether the level of abuse in the case of EPAs could be reduced if a similar approach to suitability and reporting factors was applied before a person is appointed as an attorney. The cases are clear that these situations turn on their own facts and a prudent substituted decision maker will seek QCAT sanction before making gifts on behalf of the principal or entering into conflict transactions.

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

Notes

¹ Australian Bureau of Statistics media release, 4 September 2008 – one in four Australians will be 65 or older by 2056 – up from one in 10 in 2007.

² Australian Health Ministers Conference, National Framework for Action on Dementia 2006-2010 at 2, North Sydney, May 2006.

³ Queensland Elder Abuse Prevention Unit, 'Cost of Elder Abuse: Who Pays and How Much' (June 2009), 3.

⁴ Public Trustee Queensland is quoted in the House of Representatives Standing Committee on Legal and Constitutional Affairs – Older People and the Law, AGPS 2007, at 80-81.

⁵ Sections 66 and 73 *Powers of Attorney Act 1998* and sections 35 and 37 *Guardianship and Administration Act 2000* (Qld) (GAA).

⁶ At[8].

⁷ See sections 35 and 37 of the GAA; see also corresponding provisions in the *Powers of Attorney Act 1988* (Qld), sections 66 and 73.

⁸ At [2].

⁹ At [18-21].

¹⁰ At [28].

¹¹ At [43].

¹² At [42].

¹³ At [50].

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Full Court confirms order allowing ADF mother to relocate

Children – mother allowed to relocate to wherever posted in her employment with the Australian Defence Force

In *Wendland* [2017] FamCAFC 244 (21 November 2017) the Full Court (Ainslie-Wallace, Ryan & Aldridge JJ) dismissed the father's appeal against Judge Vasta's order that permitted the mother (who had worked for the Australian Defence Force for 18 years since she was 20) to relocate their child (4) to wherever she was posted. The child lived with her in Town H in Queensland, spending time with the father each week and "it was not known if, when or where the mother might be posted". The father argued that "until the location of any posting was known informed decisions could not be made as to ... the child's best interests" ([5]). By the time of the appeal, however, the mother had been posted to another state.

The Full Court said (from [10]):

"... [During the relationship] [t]he child was placed in on-base day care where the mother was working and the paternal grandmother also took care of the child. The father continued to work full time.

[11] The primary judge found that ... the parties planned to move as a family in the event the mother was required to work elsewhere. (...)

[29] ... [H]is Honour ... clearly [took] into account ... the ... report writer[s] ... opinion that a relocation would diminish the relationship between the child and the father and paternal grandmother. (...)

[33] It was submitted that the order ... erroneously gave the mother a 'blank cheque' as to the child's future (...)

[35] The ... judge ... correctly noted ... that the mother is likely to be subject to further postings. (...) [and] was of the view that the order he made was supported by s60CC(3)(l) [an order least likely to lead to further proceedings] ... This course was ... open on the evidence. (...)

[41] ... [T]he ... judge was not obliged to accept the opinion of the ... report writer. ... It is for ... [him] to determine the weight to be given to it: see *Muldoon & Carlyle* [2012] FamCAFC 135 ... at [105] (...)

[57] [T]he ... judge found that the order proposed ... permitted the child to spend time with the father in a manner [air travel] that was reasonably practicable and could be afforded. ... [T]his finding was open on the evidence. (...)

[73] (...) [W]eight was given to the ... report writer's opinion, but ... also ... to the mother's freedom to pursue her career and to live where she wished and ... the effect on the child if the mother were forced to abandon her career and remain living in Town H. Significant weight too was given to the finding that in the event of a relocation the child would still maintain a meaningful relationship with the father, albeit one of a different nature."

Property – husband brought 96.5% of \$2m pool into short childless marriage – assessment of 60:40 set aside by Full Court

In *Anson & Meek* [2017] FamCAFC 257 (7 December 2017) the Full Court (Murphy, Aldridge & Cleary JJ) allowed the husband's appeal against Judge Hughes's property order in the case of a childless couple who were married for five years. The wife left her job as a CEO at \$180,000 pa to live with the husband in Asia before the couple returned to Melbourne. The wife had undergone failed IVF treatment. Before cohabitation the husband owned 96.5% of the parties' property, including a farm worth \$1.86m at trial. Total assets in Australia were valued at about \$2m. His pre-marital assets in "Country T" (\$1.76m) were placed in a separate pool and considered as to s75(2) only. Judge Hughes assessed contributions as to the \$2m pool as 80:20 in favour of the husband, adjusted by 20% for the wife under s75(2).

Murphy J (with whom Aldridge and Cleary JJ agreed) said ([30]) that the trial judge erred in finding that contributions were equal during the marriage, in that part of the wife's stressful IVF was pre-cohabitation ([31]) as was her non-financial contribution to the acquisition of the farm by providing advice as to its purchase ([32]); the husband's financial contributions pre- and post-separation were "overwhelming" ([36]) and the post-separation increase in the farm's value represented 30% of the cohabitation period ([48]). It was also held

that her Honour's finding as to the duration and quantification of the wife's impaired future earning capacity was flawed ([53]-[82]). The case was remitted for rehearing by another judge.

Children – Full Court allows mother to relocate for two to four years overseas where partner posted

In *Boyle & Zahur and Anor (No.2)* [2017] FamCAFC 263 (14 December 2017) the Full Court (Thackray, Murphy & Carew JJ) allowed the mother's appeal against Justice Gill's dismissal of her application to relocate overseas with the parties' two daughters (12 and 11) for the duration of the posting of her partner, a government agency employee, to Country "H" for two to four years. The children, who lived with the mother, spent alternate Friday, Saturday and Wednesday nights with the father under a consent order. In remitting the case for rehearing the Full Court said (from [91]):

"There ... is no issue that the children should have a relationship with their father. There ... is no issue that the children love their father and want a relationship with him and ... that they would miss their father if they moved to Country H. Equally, there ... is no issue that the reduction in face to face time with their father (noting, again, that the proposed move was temporary) was not ideal. These matters are the axioms upon which the vast majority of so-called 'relocation cases' proceed. Yet, the task is to fashion orders which best meet the best interests of the children by reference to the proposals of the parties or those fashioned by the Court (subject to procedural fairness ...) by reference to 'the reality of the situation'.

[92] As a consequence, orders that contemplate a continuation of the existing orders which thwart the legitimate desire of the mother and are contrary to the wishes of relatively mature children, involves a conclusion that those orders are more in the best interests of the children than other available alternatives.

[93] A central inescapable fact in this case is that parental hostility and conflict to which the children were exposed and the impact upon the children ... arose during the currency



with Robert Glade-Wright

of the existing orders which his Honour's judgment and orders would see continued."

Costs – professional conduct – court refers solicitors to Legal Services Commissioner of NSW for investigation

In *Simic & Norton* [2017] FamCA 1007 (11 December 2017) Benjamin J referred to the high level of costs charged by solicitors and the "culture of bitter, adversarial and highly aggressive family law litigation" in the Sydney registry of the Family Court ([2]). In this case the trial took seven days. While parenting and property issues settled during the hearing, the child support case could not be determined "as no notice had been provided to the child support registrar" ([5]).

The court said (from [3]):

"... [T]he consequences of obscenely high legal costs are destructive of the emotional, social and financial wellbeing of the parties and their children. It must stop. (...)

[13] These parties will have spent about \$860,000 in legal costs ...

[14] ... [which is] ... outrageous ... for ordinary people involved in family law proceedings.

[15] ... [S]olicitor correspondence was ... part of the five hundred pages of exhibits to the father's affidavit. (...)

[17] Some of those letters were inflammatory and reflected the anger of the parties ... The letters were at times accusatory. They were often verbose and ... unnecessary tit for tat commentary. Some ... served little or no forensic purposes. (...)

[19] Solicitors are not employed to act as 'postman' to vent the anger and vitriol of their clients.

[20] ... [As] legal practitioners ... they must ensure that ... communication is necessary, balanced, considered and relevant.

[21] Parties ... can often be distressed, anxious, angry, upset and emotional. Many have little experience in court process and this may be their ... only interaction with the ... legal system. They are generally unsophisticated litigants ... and rely on the ... fair, reasonable, competent ... professional services by their legal representatives.

[22] ... I am concerned that a fair, reasonable, competent and ... professional service may

not have been adopted by ... the solicitors ... for these parties. (...)

[25] ... All judges have seen instances where the financial circumstances of the parties have been emasculated or wholly lost by the impact of legal costs. (...)

[29] The children of these parties depend upon the income and assets of their parents to support them. Yet ... the costs of the proceedings have taken a terrible toll on the wealth of the parties and consequently their ability to support and provide for their children."

Both solicitors were referred to the Legal Services Commissioner of NSW for investigation as to whether their fees and approach constituted professional misconduct.

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

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Legalpreneur: a new breed of lawyer

by Laura Spalding, The Legal Forecast



The legal industry is ripe for change. Last year we saw law firms, courts and practitioners embracing the concept of technology transforming law for the better, as consumers began to recognise this as an opportunity to obtain more cost-efficient legal services.

These are exciting times, but the question now is one of practicality; how can we really harness technology to benefit our practice today?

Enter the legal technology entrepreneur we shall coin the 'legalpreneur'. If I were to see this term in my trusty Australian Law Dictionary, I imagine it would be defined like this:

Legalpreneur: *noun* An agent of change in law through technology.

As law futurist Professor Richard Susskind forecasts, the legal profession will face more disruption in the next two decades than it has seen in the past two centuries. Legalpreneurs are riding this momentum and contributing to some of our biggest strides towards revolutionising legal services as we know them.

Who are legalpreneurs, what inspires their success and what do they bring to this new legal age?

Changing hats

It's not surprising that the world's most successful legalpreneurs were previously lawyers. This trend can be attributed primarily to the drive to solve problems caused by shortcomings in efficiency and access to justice encountered in their own legal careers, and perhaps a growing realisation that lawyers no longer have a monopoly on the provision of legal services and should seek to evolve their craft or risk being left behind.

The legal tech market is estimated to be worth \$16 billion.¹ Legalpreneurs are using their experiences to tackle problems associated with time-keeping (such as Ping, software that aims to automate time entry processes) or transaction management (made easier by Doxly, a cloud-enabled centralised data room encompassing workflow, management and communication for complex transactions) and of course the most mundane of tasks associated with due diligence and contract

review (automated by Kira Systems, which identifies, extracts and analyses contract data).

Before you stop reading and start working on your next big legal tech company, consider that most lawyers aren't programmed to make great entrepreneurs. Apart from being problem solvers, the mindset of a legal practitioner is not typically conducive to entrepreneurship.

As LawGeex founder and former commercial lawyer Noory Bechor discovered, a huge mental shift is required to view legal services in an innovative light. Lawyers are inherently perfectionists, highly risk adverse, precedent focused, confidential and need to be in control.

These are essential lawyer traits possessed by even our newest generation of practitioners. However, they can also serve as the biggest barriers to collaboration, diversity and value-adding – the essential traits of the legalpreneur, and perhaps the keystones of a new era of legal practitioners.

Dipping a toe in the world of technology

Of course, lawyers have the inside knowledge when it comes to problems with legal services, but most are missing one crucial element in finding the solution – an understanding of technology. Obviously, artificial intelligence, Blockchain and coding do not feature in the repertoire of most practitioners, but even those considered the most basic of tech proficiencies, like fluent use of Microsoft programs, are lacking.

Legalpreneurship has inspired a change in the future of legal education as lawyers begin to upskill themselves in technology and universities diversify course offerings accordingly. The University of Melbourne offers an elective in which students design, build and release an app providing a myriad of legal services to its users.

As technology begins to better facilitate access to justice, skills such as these are invaluable for lawyers. The Australian National University and University of South Australia also acknowledge the intersection between law and technology with their Information Technology Law and Cyber Law electives.

This change in skillset is not limited to millennials. Jane Hogan, a senior practitioner with more than 20 years' experience, has recently learnt to code, a skill she says not only improved her digital literacy but birthed an understanding of 'programmatic logic',

which enables her to view the law and legal practice in a new light.²

Technology is integral to legalpreneurship and those with the know-how in this area are pursuing this unique opportunity to capitalise on the legal tech market.

Collaboration in the legal marketplace

As legal services become more value driven, legalpreneurs contribute a new supply chain to the marketplace whereby many tasks once performed solely by the lawyer are now more efficiently delivered by a myriad of resources both human and machine.³

Thus, collaboration is essential to legalpreneurship. An entrepreneurial mindset and an understanding of technology complement lawyers' ability to collaborate with professionals outside of the legal realm to create and develop new solutions in the provision of legal services.

So how can we really harness new technology to benefit our practice today? By embracing and encouraging the rise in legalpreneurship and by ourselves becoming agents of change in law through technology. Lawyers must transform their pessimism about technology into cautious optimism, upskill themselves on basic tech skills, learn about emerging technologies, and become open to collaboration with those in business and technology.

Laura Spalding is Queensland president of The Legal Forecast and a lawyer at Piper Alderman. Special thanks to Michael Bidwell and Benjamin Teng of The Legal Forecast for technical advice and editing. The Legal Forecast (TLF) (thelegalforecast.com) aims to advance legal practice through technology and innovation. TLF is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

Notes

¹ Kirk Mahoney, Catalyst Investors 'Legal Tech Market Overview', published 29 November 2017.

² Jane Hogan, 'Lawyers Learning to Code? To Do or Not to Do, That is the Question'. Centre for Legal Innovation, cli.collaw.com/latest-on-legal-innovation/2017/08/16/should-lawyers-learn-to-code, 16 August 2017.

³ Mark A. Cohen 'Why the Legal Industry Must Embrace Diversity, Technology and Collaboration'. Legal Mosaic, legalmosaic.com/2017/08/24/why-the-legal-industry-must-embrace-diversity-technology-and-collaboration, 24 August 2017.

A new day for 17-year-old offenders

Queensland youth justice now in national step

by Melissa Raassina



Amendments to Queensland's youth justice laws have come into effect, treating 17-year-old offenders as children rather than adults.

A law that was put in place over 27 years ago and since abandoned by all other Australian states and territories has now been overturned.

Advocacy

Queensland Law Society, policy committees and the wider legal profession have called for this change for many years, including mention in the 2015 Queensland State Election Call to Parties Document. At that time, the Labor Party (Opposition) had committed to looking at the issue closely. Once in government, the party addressed the laws, ultimately dispatching them in 2016.

In September 2017, the State Government announced the commencement of removal of 17-year-old offenders from the adult criminal justice system. At the time, the Society remarked that juvenile offenders would have a greater chance to rehabilitate in the youth justice system, rather than being exposed to hardened criminals in the adult justice system.

The regulation

The amendment sees 17-year-old offenders treated by the courts as juveniles, rather than being processed through the adult justice system. The changes took effect on 12 February 2018, and were applauded by many in the legal profession, bringing Queensland into line with all other Australian jurisdictions and also the United Nations Convention on the Rights of the Child.¹

The passing of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act* in 2016 amended the age that a person could be charged as an adult from 17 to 18 years of age.² This change was stated to be a part of the Queensland Government's commitment to breaking the cycle of youth offending.

Under the Act, children aged 17 can access the same support and services that

children 16 and under can access. This includes access to legal advice, separate conditions for watch-houses, access to a support person when interviewed by police, and other age and developmentally-appropriate interventions.

Also commencing on 12 February was the transitional regulation supporting the Act.³ This regulation transitions 17 year olds currently in the adult justice system into youth justice. These changes include:

- All 17-year-old offenders on community-based orders transferring to youth justice supervision
- All 17-year-old offenders in adult custody being eligible for transfer to a youth detention centre if it is in the child's best interest and safe to do so.

The regulation also transfers court proceedings to the youth justice system:

- if it is the first time the matter is before the court
- following the completion of a hearing (where the hearing has been part-heard)
- where a community-based order is breached.

In 2017, Queensland also introduced supervised bail accommodation.⁴ The aim of this was to help children on bail make positive changes and, as a result, to see the number of young people in detention on remand decrease. With the national average of children on remand at 57%, and Queensland at 80%, this is a much-needed initiative.

The first two services opened in Townsville in December 2017 and January 2018, with more set to open across Queensland. The children who stay at these services will be under supervision 24 hours a day, seven days a week, be involved in activities to assist them in building better futures, and be kept in small numbers. They will be required to abide by strict conditions such as curfews and bail conditions.

The reforms also include:

- changes to Queensland detention centres
- recruitment of new frontline staff for courts and Youth Justice Service Centres

- more resources for courts and prosecutors to ensure timely processes
- provision of after-hours legal services to young people and increased funding for Legal Aid Queensland.

Changes to detention centres will include 83 accepted recommendations from the Independent Review of Youth Detention,⁵ provided to the Queensland Attorney-General and Minister for Justice in December of 2016. Court resourcing will include two more full-time equivalent magistrates.

Where to from here?

Changes to youth justice in Queensland have been met with positive response from the legal profession and community, with many more changes on the horizon as part of the youth justice amendments and transitional regulation. Practitioners can keep up to date with the changes via the Queensland Department of Justice's website, justice.qld.gov.au.

The QLS Facebook page also showcases a 'Facebook Live' video where Damian Bartholomew, deputy chair of the QLS Children's Law Committee, discusses the changes in more detail. [facebook.com/qldlawsociety](https://www.facebook.com/qldlawsociety)

Melissa Raassina is acting *Proctor* editor and media and public relations advisor at Queensland Law Society.

Notes

¹ UN Convention on the Rights of the Child, unicef.org.au/Upload/UNICEF/Media/Our%20work/childfriendlycrrc.pdf.

² *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016*, legislation.qld.gov.au/LEGISLTN/ACTS/2016/16AC058.pdf.

³ *Youth Justice (Transitional) Regulation 2018*, legislation.qld.gov.au/view/html/asmade/sl-2018-0003.

⁴ Department of Justice, Queensland Government (2017). Inclusion of 17-year-olds in the youth justice system, justice.qld.gov.au/corporate/business-areas/youth-justice/inclusion-of-17-year-old-persons.

⁵ Review of Youth Detention Centres Report (2017), youthdetentionreview.qld.gov.au/review-of-youth-detention-centres-report-updated-28-June-2017.pdf.

Commencing voidable transaction proceedings

Applying for an extension

A liquidator generally has three years in which to commence proceedings to set aside a voidable transaction.¹ That period may be extended on application to the court.

This article is directed at the procedural requirements for making such an application and the matters which the court will consider in determining the application.

Extending time to apply

Section 588FF(3) of the *Corporations Act 2001* (Cth) (the Act) provides that an application seeking to set aside a voidable transaction may only be made:

- “(a) during the period beginning on the relation-back day and ending:
 - (i) 3 years after the relation-back day; or
 - (ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;whichever is the later; or
- (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period.”

The determination of the “relation-back day” will vary depending on the nature of the liquidation and the steps leading to the liquidation of the company. It requires an analysis of when the winding-up of the company is taken to begin under Division 1A of Part 5.6A of the Act.

In calculating the period “after” the relation-back day, the relation-back day itself is excluded.² Therefore, if the relation-back day is 16 March 2015, the date three years after that day is 16 March 2018.

An application to extend time under s588FF(3) must be made during the period specified in paragraph (a) of s588FF(3) (the paragraph (a) period). The application need only be filed within that period; an order made outside of the paragraph (a) period pursuant to an application made within that period will still validly extend time.³ However, it is prudent to make the application well prior to the expiry of the paragraph (a) period to allow for any corrective action should it later be discovered to be defective in some way.

The court has no power to extend time under s588FF(3) when the application is made outside of the paragraph (a) period.⁴ Section 588FF(3) “covers the field” such that rules of procedure of the court cannot supplement or vary the period in which an application for an extension of time may be made.⁵

Procedural requirements for an application to extend time

An application under s588FF(3) must be made to a “Court” as defined in the Act.⁶ That is, only the Federal Court, a Supreme Court or the Family Court of Australia may make an order extending time under s588FF(3).

As set out below, the supporting affidavit material should identify the parties to, and the transactions said to be, the voidable transactions in respect of which the extension of time is sought.⁷ Given that the parties to those transactions will be affected by the extension of time order sought, the application must name as respondents, and be served on, those parties.⁸ This would usually be a creditor but may also include a director.

There may be circumstances where a liquidator is unable, during the paragraph (a) period, to identify the potential defendants to possible voidable transactions. In those limited circumstances, the court may make a ‘shelf’ or ‘blanket’ order extending time, notwithstanding that particular proposed defendants or transactions to be impugned cannot be identified.⁹

To support this, the liquidator will need to explain why they have been unable to identify the potential defendants or transactions as at the date of the application, including identifying the steps taken to date to identify the potential defendants and transactions.

If a ‘shelf’ order is granted ex parte (or without notice to all potential defendants), there is a risk that the court may later set aside the order on the application of a defendant once the s588FF proceeding is commenced and served.¹⁰ This risk is particularly acute where the liquidator has delayed making enquiries, or has not made proper enquiries, prior to making the application.¹¹

Affidavit material in support of application

The application should be supported by affidavit material deposing to the following matters:

- (i) the background to the liquidation and the steps taken by the liquidator to date
- (ii) the transactions which are the subject of the voidable transaction (to the extent that they can be identified and, if they cannot be identified, the explanation for this)
- (iii) the parties to those transactions (to the extent that they can be identified and, if they cannot be identified, the explanation for this)
- (iv) any other persons who may be affected by the extension of time
- (v) that all persons who may be affected by the extension of time have been served with the application and supporting affidavit material
- (vi) the reasons for the delay in commencing the s588FF proceedings, and
- (vii) the duration of the extension sought and the reasons why that length of time is sought including identification of the steps proposed to be undertaken during that period (for example, the nature of the further investigations to be undertaken).

By Kylie Downes QC and Bruce Wacker



The affidavit should exhibit the records of the company, correspondence between the company and the proposed defendant(s), and other documents which will assist in establishing the merits of the proposed proceedings (when that is a relevant consideration).

Principles to be considered by the court

In considering an application to extend the paragraph (a) period, the court will consider what is “fair and just in all of the circumstances”.¹²

If the supporting affidavit material does not address the matters identified above, or affected parties have not been served with or notified of the application, this will tell against an order being made.

Where the potential defendants and proposed impugned transactions have been identified in the affidavit material, the relevant factors to be considered in determining whether it is fair and just to grant the extension are:¹³

- (b) the explanation for the delay in bringing the s588FF proceedings
- (c) the merits of the proposed proceedings, and
- (d) the question of prejudice arising from the grant of the extension.

Delay

Legitimate delays may be caused by the complexity of the affairs of the company,¹⁴ the state of the company's financial records and time taken to review them,¹⁵ the lack of assets in the company and hence lack of financial resources to fund an investigation, delays in obtaining funding,¹⁶ other proceedings that have already been brought on and that the liquidator was holding a s596A examination for the purpose of obtaining further evidence.¹⁷ The liquidator must show that there has not been an absence of diligence on his or her part in commencing the proceedings.¹⁸

Merits

The merits of a claim will weigh more heavily as a factor where the extension of time is sought in order to *bring* a claim which has been identified as compared with a situation where the extension is sought in order to *investigate* and consider a claim.¹⁹ In the latter case, a preliminary inquiry into the merits of the proposed proceedings may not always be necessary. However, the explanation for the delay in investigating and considering the claim becomes the more prominent consideration.

Prejudice

The mere fact that a defendant may have to repay moneys received in a voidable transaction is not prejudicial.²⁰ But the loss or destruction of evidence following a substantial delay by the liquidator may be.²¹ It may be oppressive to prospective defendants to allow an action to be brought long after the circumstances that gave rise to it have passed.²² In the absence of specific prejudice arising from the delay, there is presumptive prejudice from the delay, such as deterioration in the memory of witnesses.²³

Ultimately, the liquidator bears the onus of showing why it is fair and just that the power to extend the paragraph (a) period should be exercised in the liquidator's favour.

Notes

- ¹ The classes of “voidable transactions” are set out in s588FE of the Act: they are unfair preferences, uncommercial transactions, insolvent transactions, unfair loans to a company, and unreasonable director-related transactions.
- ² *Re Weston Application; Employers Mutual Indemnity (Workers Compensation) Ltd v Omni Corporation Pty Ltd* (2009) 255 ALR 362, [2009] NSWSC 264.
- ³ *McGrath & Ors v National Indemnity Company* 182 FLR 309; [2004] NSWSC 391 at [17].
- ⁴ *Grant Samuel Corporate Finance Pty Ltd v Fletcher & Ors* (2015) 254 CLR 477.
- ⁵ *Grant Samuel Corporate Finance Pty Ltd v Fletcher & Ors* (2015) 254 CLR 477 at 487 [23].
- ⁶ Section 58AA of the Act.
- ⁷ *Greig v Stramit Corporation Pty Ltd* [2004] 2 Qd R 17 at 43 [111] (per Jerrard JA) and 50 [141] (per Fryberg J).
- ⁸ See, for example, *Uniform Civil Procedure Rules* 1999, r26(2).
- ⁹ *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher* (2015) 254 CLR 489; *BP Australia Ltd v Brown* (2003) 58 NSWLR 322 (*BP v Brown*) at 354 [170]; see also *Shepard v HP Industrial Pty Ltd* [2018] QSC 10 at [1].
- ¹⁰ *Williams (as liquidator of Willahra Pty Ltd (in liq)) v Kim Management Pty Ltd* [2013] 1 Qd R 387.
- ¹¹ *Francis v Bratovich* [2008] WASC 242 at [13] and [21].
- ¹² *BP v Brown* at 357 [187].
- ¹³ *New Cap Reinsurance Corp v Reasegueros Alianza SA* (2004) 186 FLR 175, [2004] NSWSC 787 at [52]; *Re Clarecastle Pty Ltd (in liq)* (2011) 85 ACSR 260, [2011] NSWSC 857 at [19]–[22].
- ¹⁴ *Taylor v Woden Constructions Pty Ltd* [1998] FCA 1228.
- ¹⁵ *McGrath & Ors re HIH Insurance Ltd (In Liq)* [2004] 205 ALR 643 at [15].
- ¹⁶ *BP v Brown; Gordon v Tolcher* (2006) 231 CLR 334.
- ¹⁷ *Re Valhalla Labour Hire Pty Ltd (in liq)* [2011] FCA 706.
- ¹⁸ *Itek Graphics Pty Ltd v Elliott* (2002) 54 NSWLR 207 at 224 [89].
- ¹⁹ *McCann v Mawson Restructures and Workouts Pty Ltd* [2016] FCA 1152 at [58]; *Green v Chiswell Furniture Pty Ltd (in liq)* [1999] NSWSC 608 at [15].
- ²⁰ *BP v Brown* at 358 [188].
- ²¹ *Walker v CBA Corporate Services (NSW) Pty Ltd* (2012) 88 ACSR 153 at 165, [2012] FCA 328 at [69].
- ²² *Re Charben Haulage Pty Ltd (in liq)* [2009] FCA 1039 at [23].
- ²³ *Re Clarecastle Pty Ltd (in liq)* (2011) 85 ACSR 260, [2011] NSWSC 857 at [218].

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

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High Court and Federal Court casenotes

with Andrew Yuile
and Dan Star QC



High Court

Industrial relations law – statutory interpretation – *Fair Work Act 2009* (Cth) – entitlement to represent industrial interests

In *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55 (13 December 2017) the High Court considered whether an industrial association was entitled to “represent the industrial interests of” a person if the person was eligible for membership of the association but was not actually a member. The respondent was an industrial association registered as an organisation of employees under the *Fair Work (Registered Organisations) Act 2009* (Cth). It alleged that a letter sent by the appellant contravened civil penalty provisions of the *Fair Work Act*. However, not every person to whom the letter was sent was a member of the association. The appellant argued that the respondent lacked standing to bring the action because it was not “entitled to represent the industrial interests” of the persons who had received the letter, within the meaning of s540(6)(b)(ii) of the *Fair Work Act 2009* (Cth). The High Court held that, properly construed, that section encompassed persons eligible for membership under the association’s eligibility rules even if those persons were not actually members. That followed especially from the statutory purpose, the context of the phrase in the *Fair Work Act*, and the historical context to the provision. Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Full Federal Court dismissed.

Industrial law – approval of enterprise agreements – the ‘better off overall test’

ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association [2017] HCA 53 (6 December 2017) concerned approval by the Fair Work Commission (the commission) of an enterprise agreement for a new enterprise with existing employees and the commission’s consideration of the ‘better off overall test’ (BOOT). ALDI planned to open a new store. Fifteen existing employees from other stores accepted an offer to work at the new store. After a bargaining and voting process, a new enterprise agreement was made under s172(a) of the *Fair Work Act 2009* (Cth) to cover the new store. ALDI applied to the commission for approval of that agreement. At the time of the vote, the new store was still being built. The respondent appealed to the Full Bench of the commission alleging that the new agreement should have been a ‘greenfields’ agreement under s172(2)(b) because the new store was a new enterprise and none of the people required for the new enterprise had been employed by that enterprise. The respondent also argued that the agreement did not pass the BOOT. The commission rejected both arguments. On appeal, the Full Federal Court held that it was not open to the commission to approve the agreement

because it had not been “genuinely agreed to by the employees covered by the agreement”, under s186(2)(a). That followed because no employee was working under the agreement and thus could not be “covered” by it. The court also upheld the BOOT argument. The High Court unanimously overturned the first argument, but upheld the second. The court held that it is implicit in ss172(2) and (4) that agreements can be made with employees employed by the company but not employed in a new enterprise. Such agreements would need to be made under s172(2)(a). The Act also distinguishes between coverage and application. Sections 52 and 53 allow for an agreement, once made, to ‘cover’ employees not yet working, though the agreement will not ‘apply to’ them until they begin working under it. On the BOOT issue, the court held that the commission was required to conduct an evaluative assessment after considering the relevant award and the proposed agreement. The commission erred by failing to conduct that comparison and by instead considering only a limited provision in the agreement, granting to employees a right to payment of any shortfall between the award and the agreement. Equalisation, in this sense, was not the same as ‘better off overall’. Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Full Federal Court allowed in part.

Industrial law – protected industrial action – contravention of orders that apply – action with intent to coerce

In *Esso Australia Pty Ltd v The Australian Workers’ Union* [2017] HCA 54 (6 December 2017) the High Court considered two appeals concerning the requirements of protected industrial action and action with intent to coerce under the *Fair Work Act 2009* (Cth). The Australian Workers’ Union (AWU) organised industrial action during a negotiation with Esso in 2015. The AWU claimed the action was “protected industrial action” under the Act. Esso obtained an order from the Fair Work Commission requiring the AWU to stop organising certain action between certain dates. The AWU continued to organise the action. Esso sought from the Federal Court declarations that the AWU had contravened an order applying to it and that related to the industrial action, with the consequence that after the order was made the AWU could not meet s415(5) of the Act. That section is a prerequisite for “protected industrial action”. Esso appealed on this point (the first appeal). The issue was the scope of the order said to be contravened and whether it mattered that the order later ceased. The High Court held by majority that s415(5) includes any breach of a relevant order, including past contraventions. It is not limited to orders that are in existence or may still be complied with at the time of the proposed protected industrial action. The second appeal, by AWU, concerned an allegation by Esso that the AWU had organised action with intent to coerce

Esso to enter into an agreement on less favourable terms, in contravention of s343 or s348 of the Act. In this appeal, the issue was whether the sections required AWU to have intended their action to be unlawful, illegitimate or unconscionable. The High Court held unanimously that knowledge or intent of that kind is not required. A contravention of s343 or s348 is constituted of organising, taking or threatening action against another person with intent to negate that person’s choice. Kiefel CJ, Keane, Nettle and Edelman JJ jointly; Gageler J separately dissenting in the first appeal and concurring in the second. Esso’s appeal allowed; AWU’s appeal dismissed (Full Federal Court).

Administrative law – appeal from Supreme Court of Nauru – migration

In *DWN042 v The Republic of Nauru* [2017] HCA 56 (13 December 2017) the High Court held that the Nauru Supreme Court failed to accord the appellant procedural fairness. The appellant sought refugee status in Nauru after being transferred there under regional processing arrangements. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru and the Refugee Status Tribunal (RST) on review. On appeal to the Supreme Court, the appellant raised four grounds. At the hearing of the appeal, the Supreme Court struck out grounds 1 and 2. Argument continued on the remaining grounds. The Supreme Court later gave reasons for the strike out, which both parties agreed were plainly wrong. The appellant sought leave to appeal from the strike out to the High Court. Leave was refused following assurances from the respondent and because of the interlocutory nature of the application. Amid negotiations about a motion to reopen, the court informed the parties that the judgment on grounds 3 and 4 would be delivered the next day. Later the same day, the appellant filed a motion to reinstate grounds 1 and 2, and to reopen the appeal to further amend the grounds. The Supreme Court gave judgment without hearing the motion. The motion was not mentioned in the judgment. The appellant appealed to the High Court on five grounds. The court unanimously upheld the first, holding that the Supreme Court erred by not considering the motion. The remaining grounds were dismissed. Those argued that the appellant’s detention was unconstitutional; that the Supreme Court had erred by not finding that the RST had erred by failing to consider part of the appellant’s claim; and that the Supreme Court had erred by not finding that the RST had erred by relying on an unsigned, unsworn document. The decision was quashed and sent back to the Supreme Court for reconsideration. Keane, Nettle and Edelman JJ jointly. Appeal from the Supreme Court (Nauru) allowed.

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

Federal Court

Bankruptcy – practice and procedure – duties of represented parties and their lawyers in proceedings against litigants in person

In *Kimber v The Owner Strata Plan No.48216* [2017] FCAFC 226 (22 December 2017) the Full Court allowed an appeal against the primary judge's summary dismissal of an application for review of a decision of the registrar not to set aside bankruptcy notice. The successful ground of appeal that was the subject of leave to the Full Court was that the primary judge erred in failing to consider whether the appellant had reasonable prospects of success in claiming that a bankruptcy notice was invalid having regard to s41(5) of the *Bankruptcy Act 1966* (Cth).

The material of the appellant litigant in person was generally deficient in form throughout the litigation process. The Full Court (Logan, Kerr and Farrell JJ) stated at [60]: "The review application and the 30 May 2016 Affidavit are difficult documents. They do not comply with the Rules, they are repetitive and they contain complaints about Court staff and members of the executive committee of the Owners Corporation, the strata managers and Grace Lawyers which are personal and some are plainly scandalous. Her oral and written submissions are no less challenging. The exact nature of many of Ms Kimber's complaints is hard to establish. Many of the matters she raises are either outside the scope of the Court's jurisdiction on an application to set aside a bankruptcy notice ... or misconceived ... She has plainly struggled as a litigant in person, both with accepting the limits of the Court's jurisdiction and the disciplines imposed by the FCA Act and the Rules designed to ensure fairness to all parties."

The primary judge did not identify the question of whether a ground based on s41(5) of the *Bankruptcy Act* had any reasonable prospect of success even though there was an explicit reference to s41(5) in some of the appellant's material (at [64]). There was no evidence that the primary judge understood that the appellant relied on s41(5) to claim that the bankruptcy notice was invalidated (at [68]). The Full Court rejected the appellant's submissions that the primary judge should have identified her claim from her voluminous material (at [69]).

However, the Full Court held that when a represented litigant brings an application for summary dismissal of an application made by a litigant in person, it is the duty of the applicant party to assist the court to understand the claims made by the litigant in person and what might be the evidence called in aid of those claims (at [70]). Logan, Kerr and Farrell JJ stated at [73]: "In our view, the proper observance of the represented party's duty to the Court encompasses telling the Court what may be the weaknesses of their summary judgment or summary dismissal application as well as making the case for it. To use an old expression, if summary judgment is claimed, it must be a 'clean kill'. Otherwise, justice demands that the issues raised by the litigant in person's application be tried."

The Full Court noted that the whole focus of the owners corporation's submissions to the primary judge was on matters of form and compliance with the Rules, not to the substance of the

appellant's claims (at [74]). The Full Court held that it was for the owners corporation to make the primary judge aware of the s41(5) issue and the relevance of the materials in the appellant's material which bear on it (at [75]). In the view of the Full Court, the legal representatives for the owners corporation were in a position to understand the nature of appellant's claims concerning the s41(5) issue stating at [80]: "... the Owners Corporation and its solicitors have not satisfied that duty to the Court imposed by s37N of the FCA Act. The failure to identify a ground based on s41(5) raised by Ms Kimber and therefore to consider whether it has reasonable prospects of success is an error not of the primary judge's making but that failure is nonetheless an error which vitiates her Honour's decision. If only in relation to the s41(5) ground, a triable issue existed. Justice demands that the appeal be allowed."

Consumer law – whether comparative advertising campaign is misleading or deceptive or likely to mislead or deceive

In *GlaxoSmithKline Australia Pty Ltd v Reckitt Benckiser (Australia) Pty Limited (No.2)* [2018] FCA 1 (8 January 2018) the court determined a business' claim that by a comparative advertising campaign a competitor engaged in misleading and deceptive conduct in contravention of s18 of the Australian Consumer Law (ACL) and made false representations in contravention of s29(1)(a) and (g) of the ACL.

The applicants (together, Glaxo) were the marketers and sellers of a suite of over-the-counter (OTC) pain-relief medications under the product name 'Panadol'. The active ingredient in all Panadol products is paracetamol. The respondent (Reckitt) also marketed and sold a brand of OTC pain-relief medication under the product name 'Nurofen'. The active ingredient common to all Nurofen products is ibuprofen. In August 2015, Reckitt commenced a comparative advertising campaign in which it compared Nurofen and ibuprofen with Panadol and paracetamol.

The court determined by way of separate questions whether there had been any contravention of the ACL by the advertising campaign and the nature and form of any relief. A key question was whether Reckitt engaged in conduct which was misleading or deceptive or likely to mislead or deceive or made false representations by its comparative advertising campaign in which it claimed that Nurofen provided faster and more effective relief from the pain caused by common headaches than Panadol (at [36]; cf [133]-[135]).

The applicable legal principles were not in dispute (at [46]-[55]). Of significance, the court accepted Reckitt's submission that when claims are made of a scientific nature, proof that there is no scientific foundation or no adequate scientific foundation for those claims may be sufficient to establish that the claims are misleading (at [49]). This was relevant in the present case where the circumstances were:

- Only one clinical trial suggested that Nurofen did provide faster and more effective pain relief for common headaches than Panadol.
- Two other studies conducted subsequently did not replicate the results of the one positive clinical trial.
- The authors of three meta-analyses concluded that no authoritative comparison was possible in the present state of scientific knowledge.

After considering the relevant science (see from [144]), the court (Foster J) concluded that it was misleading or deceptive or likely to mislead or deceive consumers in Australia for Reckitt to claim that ibuprofen (Nurofen) provided faster and more effective relief from pain caused by common headaches including TTH than paracetamol (Panadol) (at [207]). The court proposed to grant declaratory and injunctive relief (at [210]). Glaxo had previously abandoned any claim for corrective advertising (at [7] and [211]).

Industrial law – the effect of declarations on defaulting and non-defaulting respondents – course of conduct principle and s557 of the *Fair Work Act 2009* (Cth)

In *Fair Work Ombudsman v Lohr* [2018] FCA 5 (12 January 2018) the court allowed the regulator's appeal from the Federal Circuit Court (FCC). The case of the regulator (FWO) was that certain companies in the security industry had paid employees at a flat rate of pay, without regard to their entitlements under the *Security Services Industry Award 2010* (Cth), being a modern award under Part 2-3 of the *Fair Work Act 2009* (Cth) (FW Act), with the consequence that the employees were underpaid (mostly casual loadings, allowances, penalty rates and overtime). The underpayments were alleged to constitute contraventions of the civil penalty provisions in the FW Act requiring compliance with those award terms. Mr Lohr was alleged to be involved in, and thereby to have committed, the same contraventions.

The FCC made declarations in relation to contraventions by the corporate employer who did not file a defence (at [4]). An issue arose in the FCC as to whether a default judgment entered against one or more respondent was binding on a respondent who was not in default (at [8]). On appeal, the court (Bromwich J) held that the FCC erred in treating declarations made in the proceedings as a consequence of default by a respondent by non-compliance with orders, as not being binding on a non-defaulting respondent, by reason of the terms of r13.03A(2) and 13.03B(2)(c) of the *Federal Circuit Court Rules 2001* (Cth) (at [19]-[24]).

Further, Bromwich J held that the FCC erred in treating 12 (which on appeal the FWO regarded should be nine) classes of contraventions, which had already been "grouped" by the operation of s557 of the FW Act by reference to separate award requirements, as a single contravention with a single maximum penalty (at [25]-[34]). The matter was remitted to the primary judge to determine the appropriate penalty in accordance with the court's reasons.

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

Court of Appeal judgments

1 to 31 December 2017

with Bruce Godfrey



Civil appeals

Wiggins Island Coal Export Terminal Pty Limited v Civil Mining & Construction Pty Ltd [2017] QCA 296, 4 December 2017

General Civil Appeal – where a dispute arose in which the respondent (CMC) claimed amounts totalling about \$14.5 million and the appellant (WICET) counterclaimed amounts totalling about \$12.5 million – where the case was tried over 36 days and resulted in a judgment running to more than 300 pages (the May reasons) – where one of the respondent's claims was for costs associated with delays, caused by the appellant, in reaching practical completion under a contract (the delay claim) – where the respondent had sought a particular method of calculation of the delay claim but, in closing submissions, sought to advance a new method of calculation, but did not seek leave to re-open its case – where the appellant did not object to the new argument but submitted that if that new method was accepted, certain modifications should be made to the method – where the trial judge accepted the new method with the modifications urged by the appellants – where the final orders could not be pronounced without further submissions on how those modifications could be made – where the May reasons required further submissions on the recalculation of an exhibit in accordance with the appellant's modifications – where the result of that recalculation was agreed between the parties but there followed extensive written and oral submissions from the respondent, urging a different method of calculation, in the course of which the respondent applied to re-open its case – where, in a reserved judgment, the respondent was given leave to re-open – where the appellant appealed the decision to give leave to re-open – where no order was made in this case for the determination of any issue ahead of other issues – where the trial proceeded in the usual way, with the parties expected to adduce all of the evidence upon which they might wish to rely, before they made final submissions and the judgment was reserved – where CMC's case, as presented to the judge after the May reasons, departs from the common ground of the overheads spreadsheet – where this document contained, amongst other things, details of resources employed by CMC which might have contributed to its on-site overheads – where in its written submissions dated 5 July 2017, WICET did agree that there were some omissions from the spreadsheet – where it conceded that there were particular instances where contemporaneous documents (that is, timesheets, daily costing sheets or meeting minutes) recorded a person working on-site on a particular day, but where that resource has not been included in the spreadsheet – where these were simply adjustments to correct clerical errors in the spreadsheet – where by conceding them, WICET did not agree to a different meaning to

be given to the expression "on-site overheads", than that from which the spreadsheet had been prepared – where it is the adoption of a different concept of on-site overheads that would require further evidence – where as WICET submits (as it did to his Honour), it would be necessary to explore the facts and circumstances of resources which were employed off-site, such as what was done by an employee on any day when he or she was working elsewhere – where the judge recognised that this was a departure from CMC's pleaded case, but reasoned that because WICET had agreed to CMC departing from its pleaded case, when it argued at the end of the trial to be compensated for this period of 208 days, WICET could not now complain of another departure from the pleading – where that was an error – where it is true that WICET did not object to that first departure from CMC's pleaded case, but by doing so, it did not agree that, thereafter, CMC could raise any new case, whatever its content and at any stage, even after the judge had published his reasons for judgment – where the case which WICET agreed to meet at the end of the trial was an argument about the proper interpretation of the contract – where CMC then assured the judge, it involved no further evidence – where this new case requires further evidence, which is why CMC, having been allowed by the judge to re-open, now strongly resists this appeal – where the judge further erred in not recognising the importance of the stage which the litigation had reached – where this was not an application to re-open made during the trial – where the trial had concluded and the judge had given extensive reasons for judgment, in which he had made findings which were not provisional, but conclusive – where the long-established and proper course of a trial by a judge of a civil claim is a process which serves many purposes, including the provision of procedural fairness, the efficient use of the resources of the court as well as those of the parties, and the achievement of certainty and finality – where on the findings in the May reasons, the award for the delay claim was able to be assessed from the existing evidence – where in this case, the application was made after the publication of the judge's findings and conclusions, which were not simply indications of a possible outcome – where CMC has now asked the judge to depart from the reasoning by which he had resolved what seemed to have been all of the arguments relevant to this claim – where CMC did so without being able to suggest that the judge had made some mistake in the May reasons, or that he had expressed findings and conclusions which could not have come from the respective arguments at the trial – where lateness of this step by CMC could not be satisfactorily explained – where instead, the evident explanation is that the amount which would be allowed for the delay claim, on the case which it advanced at the trial, is simply not to its liking – where the course of this litigation, if the order stands, would be uncertain in its scope, but

inevitably productive of substantial delay and costs – where in all the circumstances, the justice of the case did not favour the grant of leave to re-open.

Appeal allowed. Set aside the order granting leave to the respondent to re-open its case. Set aside the order made on 6 October 2017 that the costs be reserved. Costs.

CFI Rentals Pty Ltd v Roussos & Anor [2017] QCA 308, 15 December 2017

General Civil Appeal – where the appellant and the first respondent entered into a guarantee in relation to a lease and an associated loan agreement – where the first and second respondents were joint tenants and tenants in common over two parcels of land – where the appellant alleged that the first respondent was in default and sought a declaration that it held an equitable charge over the first respondent's interest in the land – where the primary judge found that it was a necessary precondition for the creation of an equitable charge that a demand had been made – where the primary judge found that no demand had been made – where his Honour ordered that the appellant's proceeding in its entirety be dismissed, although the respondents had submitted only that the case should go to trial in the usual way – where the respondents had not sought an order dismissing the originating application – whether there was a denial of procedural fairness – where on the hearing of the appeal, the respondents correctly accepted that the primary judge had erred in construing the guarantee as requiring that a demand be made before an equitable charge was created pursuant to cl.7 – where the terms of cl.1, as the appellant argued, admitted no ambiguity and secured all payments pursuant to the lease at the time for making the payments – where accordingly, on its terms, no demand is required by the appellant prior to the first respondent incurring liability – where consequently, the order for the dismissal of the appellant's proceeding should not have been made, at least because it was based upon that incorrect construction of the guarantee – where further, the order ought not to have been made because the respondents had not sought such an order for the summary dismissal of the entire proceeding and the appellant had had no occasion to address the judge about why such an order should not be made – where the respondents contended that circumstances arose following the making of orders by the primary judge which justified the dismissal of the originating application – where the first respondent sought leave to adduce affidavit evidence that he had been served with New South Wales District Court proceedings in the name of a different company but which related to the guarantee (Thorn Australia Pty Ltd) – where those proceedings were discontinued within weeks after service – where the parties assumed that the guarantee and loan agreement were entered into with the actual authority of that other company as an undisclosed

principal – whether the commencement of the other proceedings by the company to enforce its rights as an undisclosed principal amounted to an election that permanently brought to an end the rights of the appellant to prosecute its appeal – where the only prejudice asserted was that they were faced with both proceedings – where any such prejudice had disappeared by the time the matter came before the court, when there was no extant claim and no reasons to fear the revival of any claim by Thorn against the respondents – where there was nothing to justify a conclusion that there was any abuse of process that might justify a judicial remedy.

Appeal allowed. Orders made on 17 May 2017 are set aside. The costs of the hearing below are reserved. The respondents are to pay the appellant's costs of the appeal. Respondents are granted a certificate under the *Appeal Costs Fund Act 1974* (Qld) confined to the costs payable by the respondents to the appellant as the costs of the appeal.

***IW & CA Price Constructions Pty Ltd v Australian Building Insurance Services Pty Ltd & Anor* [2017] QCA 313, 19 December 2017**

General Civil Appeal – where the appellant and the first respondent entered into a business sale contract whereby the first respondent purchased the appellant's business – where Mr Ian Price was the principal director of the appellant – where the terms of contract included in the sale the business' goodwill, fixtures, plant and equipment, stock in trade and work in progress (WIP) – where only \$50,000 of the \$600,000 purchase price was paid to the appellant – where the appellant received in excess of \$380,000 in respect of WIP which it did not remit to the first respondent – where the respondents contend the appellant, by the conduct of its principal director, breached implied obligations under the contract by making false representations to a major client of the business (CGU) – where the respondents submit CGU allocated repair contracts away from the business as a result of this breach – where CGU began reallocating repair work to the first respondent after several months – where the first respondent claims lost profits for this period and lost goodwill – where the trial judge awarded damages for lost profits and lost goodwill – where underlying the award of damages was the finding challenged by the appellant, that the goodwill of the business "was inevitably damaged" – where it is understood her Honour to have meant that the resultant damage to goodwill was permanent – where her Honour found that the first respondent had sustained a recoverable diminution in goodwill which she assessed at \$95,000 – whether the trial judge erred in finding the goodwill of the business "was inevitably damaged" – where the appellant's submission is accepted that there is an absence of evidence that Mr Price's pleaded conduct caused a diminution of the value of the goodwill of the business beyond that date and into the long term – where to the extent that goodwill may have been impaired temporarily while work was allocated away from the first respondent, the loss is to be recompensed by an award of damages for loss of profit sustained during that time – where apart from the dearth of relevant fact in the first respondent's evidence-in-chief, no evidence was adduced by the respondents from other insurers or, for that matter, competitor repairers, to the effect that the first respondent's reputation as

a supplier of repair services had been impaired in the long term by the temporary allocation of repair work away from the first respondent, or at all – where there was an insufficient evidentiary basis to allow the primary judge to have made a finding of loss of goodwill for which the appellant is legally obliged to recompense the first respondent by way of damages for breach of contract – where the trial judge made findings that conduct by Mr Price caused CGU to direct work away from the first respondent – where her Honour found that such conduct was in breach of contract – where the findings by the primary judge with respect to the escalation of the dispute and Mr Price's conduct in badgering CGU with unjustified claims for payment for WIP and in unjustifiably accusing the respondents of breach of contract, were well supported by the evidence – where her Honour's further finding that they, together with the commencement of the litigation, combined to manoeuvre CGU to a position where it decided to direct repair work away from the first respondent, at least until the disputes between the appellant and respondents were resolved, was equally supported by the evidence – where in summary, the appellant has not succeeded in its challenge to the findings of the primary judge with respect to factual causation – where it is quite clear that is must have been within the reasonable contemplation of the parties at the time of contract that were Mr Price, for the appellant, to disparage the first respondent to CGU in the badgering way that her Honour found that he did, then CGU might well direct work away from the first respondent, at least until it had been informed that disputation between the appellant and the first respondent had come to an end – where the first respondent claimed damages for lost profits – where the second respondent gave evidence as to the number of contracts and average price for each such contract the first respondent would have received from CGU in the relevant period – where there a sufficient evidentiary basis for a finding that loss of profits was proved at \$598,675 – where there was the first respondent's evidence as to the number of contracts lost and an average contract price for them and there was the chartered accountant, Mr Ponsonby's evidence as to the percentage rate for cost of sales – where none of that evidence was discredited in the cross-examination – where the business sale agreement included a clause providing for the assignment of a telephone finance lease agreement – where the appellant claims damages by way of indemnity from the first respondent for payments made by it under the lease agreement after the contract completion date – where the principal director of the appellant gave evidence that to his knowledge the appellant was continuing to make payments under the lease – where no invoices, payment receipts or other documentary evidence of payment was tendered – where in circumstances where the oral evidence of payment was less than convincing, an unfavourable finding with respect to Mr Price's reliability had been made, and no corroborating documentary evidence of any payments was tendered, it is quite unpersuasive that her Honour was bound to find on the balance of probabilities that the payments had, in fact, been made.

Appeal allowed. Vary the orders under appeal by deleting Order 2(c) (the award of \$95,000 together with interest). Orders 1 and 2 are otherwise affirmed. Submissions invited on costs.

***Chardon v Bradley* [2017] QCA 314, 19 December 2017**

Application for Leave s118 DCA (Civil) – where the appellant was convicted of six sexual offences against the respondent – where two other counts of indecent treatment of a child were the subject of a *nolle prosequi* – where the offending was historical – where the respondent subsequently commenced civil proceedings claiming damages for intentional and unlawful assault and trespass to her person – where the defendant admitted his convictions but denied that the acts were intentional or unlawful and denied parts of the statement of claim and intended to raise a positive defence case – where the appellant claimed the privilege against self-incrimination and sought to be relieved from the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) – where the appellant's counsel submitted that in order to raise a positive case, the pleading may raise material facts about the appellant's involvement with an underage girl – where the appellant's case was that to do so would raise the real prospect of incrimination – where the primary judge dismissed the appellant's application – whether a positive case could be pleaded in compliance with the UCPR without a risk of self-incrimination – where the submissions on behalf of the appellant make it clear that the positive case which he wishes to plead, is concerned with his relationship with the respondent before she was 16 years old – where the risk to which the appellant points has at least two limbs – where first is that counts 3 and 5, both of which were indecent treatment of a child under 16, were the subject of a *nolle prosequi* at the trial – where the decision of this court on the appellant's conviction appeal reveals, the respondent did not give evidence in the terms particularised for those counts, and the prosecution consequently withdrew them – where the contention is that there is a remaining exposure of criminal prosecution on those counts if the appellant goes into details about his relationship with the respondent prior to her being 16 – where the second is more broad, being that as he was convicted of sexual offences in respect to the respondent who was then under 16, if he goes into details about his relationship with her at that age, that could lead to a train of inquiry, resulting in the potential to exposing him to prosecution – where the risk to which the appellant is exposed, if he pleads beyond the fact that the acts constituting the convicted offences never occurred, is such that it cannot be called tenuous or remote – where it is well established that pleading rules must give way to privilege, whether it be penalty privilege or privilege against self-incrimination: *Anderson v Australian Securities and Investments Commission* [2013] 2 Qd R 401 – where the primary judge fell into error by confining the possible prejudice when her Honour concluded that there was no real explanation as to why a positive case could not be pleaded, and confined the risk of self-incrimination to the response to the six pleaded offences – where the risk is broader than that – where the risk here is not tenuous, illusory or so improbable as to be virtually without substance – where paragraph 3A of the proposed pleading needs to be amended to plead the explanation for the denial as being that the incidents alleged in paragraphs 5.1 to 5.6 did not occur – where the time at which the positive case is eventually revealed must not subject the respondent to unfairness – where this is not a case where the decision as to whether a positive case will be mounted will be deferred until a later time

– where the only thing preventing the appellant from revealing the nature of the positive case in the pleading is the question of the privilege against self-incrimination – where however, for so long as the appellant is relieved from pleading the positive case, he is also relieved from other obligations that follow from pleading, such as disclosure.

1. Applicant be granted leave to appeal. 2. The orders made on 20 June 2017 be set aside. 3. Where the appellant be directed to file and serve an amended defence that complies with the pleading requirements under the *Uniform Civil Procedure Rules 1999* (Qld) within 28 days, subject to orders 4 and 5 below. 4. In respect of paragraphs 3 and 5 of the Statement of Claim, the appellant be relieved from the pleading requirements under the UCPR to the extent that the appellant: (a) state with respect to each allegation of fact whether the allegation is admitted, not admitted or denied; (b) gives notice of the appellant's intention to rely upon any relevant statutory defence or ground of dispensation; and (c) is otherwise relieved from complying with UCPR rules 149(1)(b), 149(1)(c), 150, 157, 165 and 166. 5. That paragraph 3A of the proposed amended defence include a direct explanation for the belief that the allegation in paragraphs 5.1 to 5.6 of the Statement of Claim are, by including the words "on the basis that the incidents alleged in paragraphs 5.1 to 5.6 did not occur". 6. Costs.

Crime and Corruption Commission v Deputy Commissioner Barnett & Anor [2017] QCA 320, 22 December 2017

Reference under s118(1) *Queensland Civil and Administrative Tribunal Act* – where the first respondent imposed a sanction of dismissal upon the second respondent for misconduct pursuant to the *Police Service (Discipline) Regulations 1990* (Qld) (the regulations) – where the first respondent further ordered the sanction of dismissal be suspended provided that some four conditions were thereafter met – where reg.12 grants a power to a prescribed officer to suspend a disciplinary sanction made under the regulations subject to the disciplined officer agreeing to undertake certain conditions – where compliance with the conditions of suspension under reg.12 rescinds the disciplinary sanction from the officer's record – where the conditions imposed by the first respondent were inconsistent with reg.12 – where the first respondent relied on the power under reg.5 to discipline in a manner that "appears to... be warranted" – whether reg.5 authorises the commissioner or a deputy commissioner to conditionally suspend an officer's dismissal without regard to reg.12 – where s7.4 of the *Police Service Administration Act 1990* (Qld) is a provision which does not, by itself, enact a comprehensive framework for disciplinary action – where it envisages the making of regulations which are to provide substantial features of the framework – where notable amongst them are the authorisation of different classes of prescribed officers to undertake disciplinary action according to the circumstances of the case and the prescription of grounds for disciplinary action – where s7.4 also contemplates that there is to be available to prescribed officers a range of disciplines which they may impose as they consider the circumstances warrant – where the availability to the commissioner, in particular, of an inherently flexible range of disciplines aligns with the commissioner's broad responsibility for the efficient and proper administration,

management and functioning of the police service in accordance with law – where reg.12 applies where a prescribed officer imposes a "disciplinary sanction" under the regulations – where that term is not defined – where however, it is used in reg.10 which is linked to regs 6, 7 and 8, but not reg.5 – where it is because of this linkage that reg.12 is best understood as providing a power to suspend the effect of a disciplinary sanction to the classes of prescribed officer to which regs 6, 7 and 8 respectively apply – were the power of the commissioner or a deputy commissioner to suspend the operation of the discipline limited to one conferred by reg.12, then the commissioner or a deputy commissioner would be unable to suspend a preferred discipline which, having regard to the seriousness of the misconduct in a given case, the commissioner or the deputy commissioner concerned considers ought not have the benefit of rescission and being taken as if had never been imposed – where the range of disciplines available to the commissioner or a deputy commissioner is, in the first place, conferred by s7.4 of the Act – where it is not conferred by reg.5 alone. The question referred by the president of the Queensland Civil and Administrative Tribunal to this court for its determination, namely: Upon the proper construction of section 7.4(3) of the *Police Service Administration Act 1990* and regulation 5 of the *Police Service (Discipline) Regulations 1990*, was it within the First Respondent's power to suspend a sanction of dismissal imposed on the Second Respondent subject to the conditions specified in the First Respondent's order made on 21 December 2015? is answered: Yes. Appellant to pay the second respondent's costs of and incidental to the reference on the standard basis.

Criminal appeals

R v Richards [2017] QCA 299, 8 December 2017

Appeal against Conviction – where the appellant was found guilty by a jury of carrying on the business of unlawfully trafficking in a dangerous drug, unlawful possession of a dangerous drug with the circumstance of aggravation that the quantity of the dangerous drug exceeded two grams, and possessing a vehicle he had used in connection with the commission of a crime – where the conduct alleged to constitute the offence was the appellant aiding Mr Moran to carry on his business of trafficking – where the appellant contended that, in the absence of any direct evidence of any conversation or conduct evidencing knowledge by the appellant of any intention of Mr Moran to repeat the transaction or follow it by any further conduct relating to the drug, the jury could not exclude the reasonable hypothesis consistent with the appellant's innocence of count 1 that, to the knowledge of the appellant, Moran acted only as a one-off courier – where the evidence did not allow the jury safely to draw an inference that the appellant assisted in the transport of the drug with knowledge that Moran did or intended to do anything amounting to any degree of continuity in that sense – where furthermore, whilst McPherson J referred to authority for the proposition that 'trafficking' in a context of the present kind meant "knowingly engaging in the movement of drugs from source to ultimate user", ordinarily in the context of a commercial enterprise, it is a different question whether the activities established by the evidence

amount to "carrying on the business" of trafficking: *R v Elhousseini* [1988] 2 Qd R 442 – where proof of the carrying on of a business requires something more than proof merely that the person participated in one transportation of drug – where taken as a whole, the evidence in the Crown case was incapable of excluding the reasonable hypothesis that, to the knowledge of the appellant, Moran's role was confined to the transportation of the drug from Sydney to Townsville – where the respondent did not contest the proposition that acceptance of ground 2 would require the verdict of guilty on count 1, and consequentially also the verdict of guilty on count 3, to be set aside and verdicts of acquittal to be entered instead – where there were jointly admitted facts – where one of those facts was that the other person was convicted by his own plea of guilty of one count of trafficking in methylamphetamine – where during the hearing the respondent acknowledged that evidence of a conviction of a person of an offence is not proof in a subsequent criminal proceeding against a different person – where defence counsel had sought a direction to this effect – where defence counsel had sought the appropriate direction before the trial judge summed up to the jury, the prosecutor did not oppose that direction, the trial judge indicated that the direction would be given, and the direction actually given was both diametrically opposed to that which should have been given and directly inconsistent with defence counsel's submission that the prosecution had not proved that Moran had carried on the business of drug trafficking – where the appellant appealed his conviction on count 1 but did not appeal the convictions on counts 2 and 3 – where the appellant did not seek leave to appeal his sentence – where the appellant was sentenced to 4½ years' imprisonment on count 1 but no sentence was imposed upon counts 2 and 3 – where the appellant will be left with no penalty for counts 2 and 3 if the conviction on count 1 is set aside – where after the hearing of the appeal, a directions hearing was convened to seek further submissions about whether the court would have power to resentence the appellant on count 2 if the convictions on counts 1 and 3 were set aside – where this is the first occasion in Australia, of which we are aware, in which the operation of the section has to be considered in which there has been a successful appeal against conviction in a case in which there were other counts, properly joined on the same indictment, which have not themselves been the subject of appeal against conviction or sentence – where s668F(1) *Criminal Code* (Qld) is part of a set of provisions contained in a section of the Act enacted for the evident purpose of accommodating some of the possible consequences of a successful appeal by a convicted person – where s668F(2) creates a jurisdiction under which the Court of Appeal may convict an appellant of an offence of which, in the court's view, the jury might have convicted – where the section does not require any formal application to be made by anyone although, obviously, the power would not be invoked unless either the prosecution raised the point on notice or the court itself gave the appellant notice of its potential applicability – where the significant point is that the engagement of the section is not premised upon any election by an appellant and a decision is based upon material in the court's hands – where in the same way, s668F(3) empowers the court to act upon its conclusion that a trial court has

misapprehended the legal effect of a special verdict – where s668F(1) aims at a similar set of problems, but in respect of sentences rather than convictions – where the section does not in its terms provide that those other convictions or sentences must themselves have been agitated by way of appeal – where the requirement that the court ‘considers’ that the appellant has been ‘properly convicted’ is automatically satisfied in the result either by the dismissal of a convicted person’s appeal against a relevant conviction, if there was one, or by the appellant’s decision not to challenge it – where the court will be in a position to determine the propriety and legality of the remaining sentences in the way it always does – with the assistance of the parties by reference to the evidence at trial or sentence that will be before the Court of Appeal – where that material before the court will of necessity relate to both the sentence on the conviction that has been set aside and the sentence on any convictions that remain, for all the convictions had been in respect of counts on the same indictment dealt with together, or at least on the same indictment even if the trials under it had been conducted separately – where a requirement for there to be an extant, unsuccessful, appeal against conviction or sentence would add nothing to the record in such a case nor to the court’s ability to determine whether the discretion should be exercised and how it should be exercised – where this construction avoids the consequences that would follow in the many instances in which a sentencing judge in Queensland imposes a single sentence on one conviction and none on any others if a just outcome for both parties on appeal depends upon a convicted person’s (perhaps tactical) election to appeal or not to appeal – where it also accords primacy to a record of a conviction – where the appellant was convicted on one count of trafficking in a dangerous drug, another count of unlawful possession of a dangerous drug with a circumstance of aggravation and a count of possession of a vehicle used in connection with the commission of a crime: a common trilogy of charges – where the result of the appellant’s success on his appeal leaves standing his conviction on count 2, against which, having regard to some of the dicta in the authorities, he understandably chose neither to appeal his conviction nor his sentence – where if s668F(1) is inapplicable, the result would be that the appellant would suffer no punishment for the commission of that other serious offence – where in our opinion the section was enacted to address this very mischief – where the parties made submissions about the sentence that should be imposed on count 2 if, as we would hold, the court has and should exercise jurisdiction to re-sentence upon that count – where the term of 4½ years’ imprisonment imposed by the trial judge for the trafficking offence charged in count 1 falls away in consequence of the conviction on that count being set aside – where the trial judge was persuaded that although the appellant had pleaded not guilty, because of reasons of parity and factors to do with the appellant’s overall character, justice would be served if the appellant were required to serve less than one half of the term of imprisonment imposed – where adopting an analogous approach, in all of the circumstances the just sentence for the possession offence is four years’ imprisonment, suspended after 20 months for an operational period of four years.

Appeal allowed. Set aside the convictions on counts 1 and 3 and quash the sentences on those counts. Enter verdicts and judgments of acquittals on those counts. Quash the sentence on count 2 and substitute a sentence of imprisonment for four years. Order that the term of imprisonment on count 2 be suspended after serving a period of 20 months’ imprisonment, and the appellant must not commit another offence punishable by imprisonment within a period of four years if he is to avoid being dealt with for the suspended term of imprisonment.

R v Faulkner [2017] QCA 301, 8 December 2017

Appeal against Conviction & Sentence – where in the course of an altercation between himself and the complainant, Mr Faulkner (the appellant), a security guard at a hotel, punched the complainant and broke his jaw – where the appellant was convicted after trial of one count of grievous bodily harm – where the appellant was sentenced to two years and six months’ imprisonment, suspended after 12 months, with an operational period of three years – where the offence was captured on CCTV footage – where the footage shows a series of interactions between the appellant and complainant spanning some minutes – where the jury inquired as to the point in time at which self-defence must be proven – where the trial judge told the jury that “whether the basis of the self-defence could arise at the beginning of the engagement between these people at the reception, ultimately, the facts are a matter for you” – where that told the jury that it was up to them to decide if that was the start point for consideration – where having reminded the jury of the time that elapsed between the events at the reception and the punch, his Honour commenced the next part of his response by saying “in terms of your note and the way in which the law is framed” – where those words would have highlighted to the jury that what was to follow was a direction about the law, responding to their note – where what did follow was the trial judge telling them that it was a “difficult logical proposition” to say that the punch could be a reasonably necessary response to whatever happened two minutes earlier, that is, at the reception desk – where that ended with his Honour saying: “Generally, there has to be an immediate connection for it to be self-defence, it seems, as a matter of logic” – where in the context of what was said before that would have been understood by the jury as a direction to them – where the trial judge told the jury that when they were assessing “the level of physical menace which you think the complainant was actually presenting”, the video showed the complainant with his hands by his sides, and the question for them was: “was it then reasonable for the defendant to act as he did, causing the defendant’s jaw to be broken and that action being capable of being seen as being in reasonable self-defence?” – where that last passage emphasised the direction that there had to be an immediate connection for it to be self-defence, and conflated two different issues, one being the force used in response, and the second, the outcome, that is, a broken jaw – where there can be little doubt that the jury would have understood that as a direction – where considered in full, the direction to the jury would have been understood by them as confining their consideration of the self-defence issue to the period immediately before the punch, and not extending back to take into account the events at

the reception desk – where the practical outcome was that the defence case, that the events from the reception desk were relevant to the issue of self-defence, was not properly left to the jury.

Appeal allowed. Conviction entered on 14 June 2017 and the orders made on 16 June 2017 are set aside. A new trial is ordered.

R v Dittman; Ex parte Director of Public Prosecutions (Cth) [2017] QCA 302, 8 December 2017

Sentence Appeal by Director of Public Prosecutions (Cth) – where the respondent was sentenced to concurrent terms of imprisonment in respect of offences relating to the possession and making available of child pornography material – where the most serious count involved 103 occasions, on 97 separate dates, on which the respondent made child pornography material available to two or more persons concurrently (the aggravated count) – where, at the time of sentence, the respondent had already begun to serve a sentence for an unrelated offence of maintaining a sexual relationship with a child, for which he had been sentenced to a three-year term, suspended after 12 months (the maintaining sentence) – where the respondent was sentenced to four years’ imprisonment in relation to the aggravated count, with a non-parole period of 12 months, but that sentence was ordered to commence only upon the expiry of the suspended portion of the maintaining sentence – where the only ground of appeal is that the sentences are manifestly inadequate – where the respondent was aged 28 to 30 years at the time of the offences and 32 when sentenced – where the respondent made timely pleas of guilty and demonstrated remorse and shame for his actions – where the sentences imposed were light in comparison with each of the comparable cases – whether the lightness of the sentence could be explained by the application of the totality principle – where the one court is sentencing for several offences, it is necessary for the sentencing court to “look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.” – where, in the present case, it is not said that there is any evident error by the judge in his sentencing reasons, including in respect of the totality principle – where the judge did not extensively discuss the conduct involved in the earlier offence – where his Honour did say that he had considered “the overall criminality of what has been done”, having had the benefit of the sentencing remarks from the District Court – where the sentence in this case is one with which many judges would not agree, but that is not the present question.

The appeal is dismissed.

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

In March...

● Brisbane ● Livecast ● Regional

Practical Legal Ethics 

Practice Management & Business Skills 

Professional Skills 

Substantive Law 

2 Core (all): Illumination of bias

8.30am-12pm | 3 CPD

Law Society House, Brisbane

Award-winning presenters Chris Osborn and Michael Kahn return to present an entertaining twist on core CPD training. Using the power of movies, they will explore why it is critical for organisations to identify and mitigate the effects of implicit bias, and the practical strategies to create a more inclusive and profitable workplace.

PLE  PM&BS  PS 

8 International Women's Day 2018

5.15-7.30pm | 1 CPD

Law Society House, Brisbane

This stimulating discussion featuring esteemed panellists will share insights and stories about their own experiences working in the legal profession, reflect on the contributions of women more broadly, and encourage the upcoming generation of female leaders. Be quick – spaces are limited!

PS 

9 QLS Symposium 2018

9-10 | Day 1: 8.30am-5.05pm;
Day 2: 8.30am-3.20pm | 10 CPD

Brisbane Convention & Exhibition Centre

Attend the premier event for Queensland's legal profession and gain insights from leading experts. QLS Symposium's program features six substantive law streams, plus a two-day core agenda that provides you with ample choice across a range of practice areas to secure your 10 CPD points. Hear from leading experts as they discuss planning for, embracing and thriving in the complexity of legal practice.

PLE  PM&BS  PS  SL 

9 QLS Legal Profession Dinner and Awards 2018

6.30pm-late

Brisbane Convention & Exhibition Centre

Take your place at the most prestigious night on the 2018 Queensland legal calendar. Following the first day of QLS Symposium 2018, this gala event officially welcomes 2018 QLS president Ken Taylor, and celebrates outstanding contributions to the Queensland legal profession. This relaxed evening is also the perfect opportunity to network with fellow members of the profession.

13 Titles Registry update – what's new?

12.30-2pm | 1.5 CPD

Livecast

Representatives from the Titles Registry explain recent changes to the Titles Registry process, specifically about the new Queensland priority notice introduced this year and other changes that affect your property operating practices.

PS  SL 

15 Modern Advocate Lecture Series: 2018, lecture one

6-7.30pm | 0.5 CPD

Law Society House, Brisbane

Featuring eminent members of the judiciary, each presentation in our highly regarded Modern Advocate Lecture Series deals with practical advocacy relevant to the junior ranks of the profession. Queensland Civil and Administrative Tribunal president Justice Martin Daubney will deliver the first presentation of 2018 on 'Advocacy in Applications'. Networking drinks and canapés will follow the presentation.

PLE 

22 Practice Management Course: Medium and large practice focus

22-24 | 8.30am-5pm | 10 CPD

Law Society House, Brisbane

Climb the legal career ladder by completing the premier Practice Management Course with QLS. As the peak representative body for solicitors in Queensland, we are uniquely positioned to understand the benchmarks of success for the profession. Designed by a team of experts, the course provides the most authoritative source of guidance and professional development in relation to trust accounting, ethics and risk management.

PLE  PM&BS  PS  SL 

27 Roma workshop

8.15am-5pm, networking drinks 5-6pm | 7 CPD

Roma Explorers Inn, Roma

The Roma workshop is designed to engage QLS members in their region, as we bring professional development and practice support to you. The Roma workshop is tailored to address any particular local issues and includes a case law update, bite-sized sessions on substantive law updates and sessions on ethics, trust accounting, wellbeing and risk management. We close the day with a roundtable discussion, allowing members to engage with presenters, QLS in-house experts and local representatives on matters specific to rural practitioners.

PLE  PM&BS  PS  SL 

29 Family law settlements: Military superannuation masterclass

12.30-1.30pm | 1 CPD

Livecast

This masterclass has been specifically developed on the direction of QLS's Family Law Committee to address the complex issue of splitting ADF superannuation in family law property settlements. Join us for a practical tour through the complex formulas and processes with leading industry expert Peter J Baston. Peter brings his wealth of experience, most notably his 30 years at the bar, his past title as navy commander, and his role as Head of Panel (Qld) with the Naval Reserve Legal Service.

SL 

Earlybird prices and registration available at

 qls.com.au/events



Nikolina Palasrinne



Kate Clark



Michael Morris



Anton A. Richardson



Stephanie Murray



Catherine King



James Deegan



Natalie Silvester



Gemma Abbey



Craig Smith

Career moves

Adams Wilson Lawyers

Adams Wilson Lawyers has announced the promotion of **Nikolina Palasrinne** to partner.

Nikolina, who began with the firm in 2011 as a graduate in the employment and industrial relations team, now practises in employment, education, discrimination and administrative law, as well as in civil litigation.

Clark & Associates Mediation Services

Kate Clark has established Clark & Associates Mediation Services Pty Ltd and operates the practice as legal director. Drawing on over eight years of private practice, Kate provides mediation services in areas of restorative justice, property settlement, workplace, child safety, neighbours and small claims.

Hillhouse Burrough McKeown Lawyers

Hillhouse Burrough McKeown Lawyers has announced the promotion of **Michael Morris** to associate. Michael, who joined the firm in 2010 and was admitted in 2013, works across a broad range of commercial practice areas and has a growing agribusiness practice.

MBA Lawyers

MBA Lawyers has announced the establishment of a new family law department and the appointment of **Anton A. Richardson** as a partner to lead the department. Anton has practised exclusively in family law in Australia since 2004 (having previously practised in Ireland), with a focus on complex and high-worth property matters.

Stephanie Murray, a QLS accredited specialist in family law, has been appointed as senior associate. Stephanie specialises in property, parenting and domestic violence matters for both de facto and matrimonial relationships.

Mullins Lawyers

Mullins Lawyers has announced three promotions to associate – insurance lawyer **Catherine King**, property/planning and environment lawyer **James Deegan**, and wills and estates lawyer **Natalie Silvester**.

Catherine focuses on workers' compensation claims and has also acted for clients in the areas of compulsory third party (motor vehicle), superannuation and public liability.

James, who joined Mullins Lawyers in 2015, has acted for clients in both front and back-end town planning matters and in a range of property transactions, while Natalie advises clients in all areas of wills and estates, including estate planning, administration and litigation.

O'Reilly Workplace Law

Gemma Abbey has joined O'Reilly Workplace Law as a senior lawyer.

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Craig Smith has joined O'Shea & Associates as a partner leading the firm's property law division. Craig has practised for more than 35 years and has wide expertise in property law, including property developments, acquisitions and disposals throughout Australia.

New members

1 January 2018
and 29 January 2018

Queensland Law Society welcomes new members who joined between 1 January to 29 January 2018. The full list of new members can be found on the QLS website at qls.com.au/newmembers.

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

Three keys to attracting the best legal talent

by Jamie Cunningham



In today's marketplace, attracting great talent is increasingly competitive. As with all professional service industries, having the right people on your team can make or break your firm or practice.

The people in your business either help or diminish your competitive advantage. They determine your customers experience, the quality of your company's work, and perhaps most importantly for you, the enjoyment of being a firm or practice leader and owner.

So how do you attract great people? Below are the three critical 'must-have' elements to make you stand out from the crowd.

1. **Be attractive** – I'm not talking about you, but your firm or practice. It needs to have the qualities that make it attractive to top talent. Those qualities can be boiled down to three things:
 - a. A compelling vision – your firm or practice must have direction and ambition. Great people are attracted to companies that are going somewhere, that aspire to be significantly more than they are today. When you can express a clear vision with heart and enthusiasm, it is positively infectious.
 - b. A strong, vibrant and healthy culture – your culture is the DNA of your company. It is *the* most significant influence on the mental health of you and your team at work. Your culture can attract or repel applicants – people can smell it – it's not something you can fake. It must be real and palpable.

- c. Growth and opportunity – great people thrive on a challenge and becoming better. They value mentors, training, advancement. This does not have to mean eventually becoming owners in your firm or practice (although it might), it just means there needs to be somewhere to grow. This will vary depending on the position you are hiring for, but the principle stands – great people are motivated by personal growth.
2. **Have a process that differentiates** – most companies follow the same 1,2,3 of hiring. All their ads look the same, their processes are the same, the interview questions and style are the same. If you are following standard practices, this subconsciously tells the applicants that there is nothing different about your company.
 Instead, break out of the mould and write an ad from your heart. Design a hiring process that embodies your culture and gives someone a taste of the great opportunity you are offering them. Your process must appeal to the emotions of your dream applicants.
3. **Always be hiring** – Because attracting and developing great people is such a critical part of building a great firm or practice, it is something to always have on your radar. You just never know when the timing will be right, when people's situation changes and they are ready to make a move. If you are in a position where you are courting more candidates than you need with no urgency to bring them on board, you'll be in the driver's seat and always have options when the need arises.

4. **Courting potential applicants requires an investment of time** – and given the critical nature of having the right people on the team, it is time worth investing. If you are thinking about hiring only when you need someone, while at times unavoidable, more often than not this results in less than ideal results because you are rushed and under pressure. Where you put your focus is a reflection on what you think is important. And the talent pool senses that. It's like going to the bank only when you really need a loan; they can sense the desperation and it is not attractive. While if you ask for a line of credit when you don't need it, it is usually much smoother sailing.

Despite constantly hearing from firm and practice owners that "it's so hard to find good people", evidence shows great people are out there. You just need to put the building blocks in place to help them select you. And what can be more rewarding than knowing you have what it takes to attract and retain top talent.

Best of success.

Jamie Cunningham is a business coach and the founder of SalesUp!

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has relocated to Floor 8, 61 Mary Street, Brisbane QLD 4001. The Department's telephone (3066 7014) and facsimile (3066 7022) details remain unchanged. Please note the effect of the Crown Proceedings Act 1980 (Qld) remains unchanged with respect to documents required to be served on the Crown for the purposes of or in connection with a proceeding by or against the Crown.



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Dining in Daylesford: Worth its Sault

by Dominique Mayo



A visit to Daylesford in Victoria took me to Sault Estate – a 50.5-hectare estate with a stone homestead and thousands of lavender bushes, so named after a town in Vacluse in the Provence-Alpes-Cote d'Azur region of south-eastern France.

The onsite restaurant, Sault Restaurant, offers both seasonal tasting and à la carte menus, and seeks wherever possible to source its ingredients from local organic farms or its own kitchen gardens.

For the first course of the evening, I selected the grilled octopus, confit potatoes, squid ink aioli, edamame and paprika oil (*top right*).

As I delicately popped a potato confit with squid ink aioli into my mouth, the magic started offsetting the chargrilled flavoured octopus perfectly. Despite the tubular aesthetic of the octopus, it was by no means chewy as one might have anticipated. The octopus was, in a word, delicious. Whilst I did not enjoy 'the dance' with the edamame beans, as they refused to cooperate with my fork play, the dish was a definite winner, and original at that.

As I delighted in this first dish, humming along to the melodies of French artists – think Edith Piaf – and allowing my locally sourced shiraz to aerate, I drank in the simply divine view before me as the sun set and delicate fairy lights emerged draped over the restaurant balcony. There was a dark wood chapel and perfectly manicured lawns lined with all varieties of trees alongside the dam. To my left was a sweeping view of lavender as far as the eye could see.

Next up was the lamb two ways: lamb shoulder slow-cooked for 48 hours and lamb loin atop asparagus with a dollop of sour cream (*lower right*).

Whilst the offering of meats cooked in more than one manner is on trend, in my view it has the tendency to have the opposite effect to that intended – to showcase the meat. Invariably, the diner will favour one form over the other which, in turn, will affect the diner's overall impression of the dish.

I digress. The sour cream was, in my view, a necessary companion to the slow-cooked meat which validated its position on the plate despite appearing an odd ingredient at first blush. The lovely bulbous asparagus was nicely cooked in a no-fuss manner, showcasing its old-fashioned goodness. The loin was cooked



perfectly, with a lovely crusty exterior, so I didn't dare place any sour cream on the loin as that would have been totally misplaced! Ultimately, this was a dish with slight bipolar tendencies but tasty all the same.

For the third and final course of the evening, I opted for the Sablé Breton, lemon curd, barbecued pineapple, sorbet and pink peppercorn meringue.

The meringue was presented in a grissini-like fashion with dusted pink peppercorns positioned at random, and the sablé biscuit formed only the base of the dessert. There was a certain fierceness to this dessert – the result of the mélange of the lemon curd and the barbecued pineapple. There was seemingly no respite between mouthfuls of lemon curd and pineapple, in alternation, and I grew concerned the consequence of this would be my inability to finish the dish. Whilst the lemon curd was true to self, the acidity of the dish was, ultimately, more than I could bear.

As I departed the restaurant, I determined that on my next visit I would opt for the signature dessert, the chocolate délice with raspberries, raspberry sorbet and a pistachio and raspberry macaron.

Dominique Mayo is a senior lawyer at Clayton Utz.

Cheap Tuesday can be every day

with Matthew Dunn



Not all expensive wine is good wine, and not all competitively priced wine is rubbish.

Now is a good time to keep this in mind, as the chances are that the heady excesses of the holiday season have seen our 'champagne budget' reduced to something far less inspiring.

It's a shame that liquor merchants can't follow the retail food outlets that offer 'cheap Tuesday' bargains, but all is not lost.

While the 'big brand' wines retain mid to high positioning in terms of quality and price, many stockists now sell 'own brand' wines which are high on value and low on price.

Recently, the most notable was the ALDI wine that broke the internet. News travelled fast that the \$6.99 ALDI One Road South Australia and Heathcote Shiraz 2016 had won a gold medal at the Great Australian Shiraz Challenge (a fine wine show chaired by Alister Purbrick of Chateau Tahbilk fame).

While the internet and news media had trouble deciphering what that win actually

meant, sometimes saying it was top prize or that the ALDI wine won the show – the truth was not quite so golden, but still very impressive for a wine at that price point.

As it happened in the 2017 competition, there were 386 entries with 44 gold medals awarded, 73 silver and 164 bronze awards. While not alone in its success, it is worth reflecting that the \$6.99 wine not only took a gold medal but was competing in a field of wines where the "average recommended retail price of all entries was \$54".¹

Sadly, due to Queensland's anachronistic liquor licensing laws, enthusiasts will need to venture to New South Wales to stock up.

While the ALDI wines have had some show successes, all the major outlets have their 'own brand' wines and generally the quality is good for the money.

Wine Experience in Rosalie in Brisbane is notable for having led the quality 'own brand' selection for nearly 15 years selling what it terms 'quality cleanskins'. This same approach now underpins many wine and beer lines sold through the various major supermarket-owned vendors.

Another good place to fill the table on 'cheap Tuesdays' is wine from the various online vendors or auction sites. Of them all, the best bargains are still available from Grays Wine auctions (grayswine.com). Stalwarts like Pirramimma Eight Carat Australian sparkling wine still regularly go for \$64 a case of 12 (plus premium plus delivery), making it land at your doorstep for the incomparable \$7.20 a bottle. This compares very favourably with the \$16 RRP.

On the subject of sparkling, 'cheap Tuesday' needs fizz and some enterprising souls have come up with enterprising suggestions to lift the mood. However, try these at your own risk!

Fill a fridge built-in water dispenser with sparkling wine and enjoy chilled fizz from the tap on the front of the fridge door!

Chill a cheap white wine down low and then carbonate in a SodaStream to produce your own fizz (slowly or the bottle may explode).

The tasting Two examples of cheap and cheerful were examined for the betterment of society.



The first was the ALDI One Road South Australia and Heathcote Shiraz 2016, which was an impenetrable purple black colour. The nose was distinct white pepper and black juicy currants. The palate was soft and ripe with red berry fruits and a tannic red currant tang. It was ideal approachable full-style red wine.



The second was the Chalkboard 2014 Barossa Valley SA Shiraz, which was deep dark ruby black in colour and had a nose of plums and restrained red fruits. The palate was ripe red damson plum and a distinct vein of vanilla and cigar box on the mid palate, which was very pleasing for the price point of ten dollars.

Verdict: The ALDI offering was an award winner and had an edge of sophistication over the Chalkboard, but the purity of the vanilla in that wine was quite remarkable for its price point.

Matt Dunn is acting chief executive officer and government relations advisor at Queensland Law Society.

Mould's maze

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

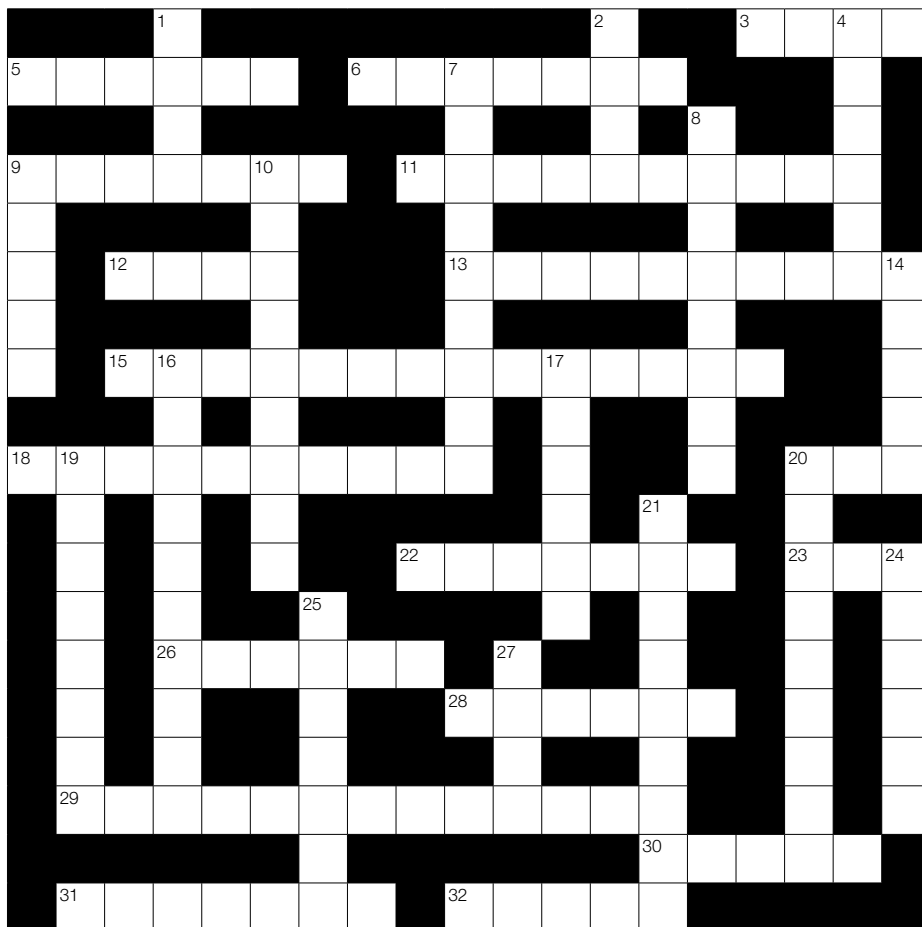


Across

- 3 High Court decision which by majority held that failure to provide an opportunity to respond to prejudicial material made to a decision maker was a failure to afford procedural fairness, v *West*. (4)
- 5 Former lawyer turned host of *Deal or No Deal* and *The Chase Australia*, Andrew (6)
- 6 Attributed vicariously; meant, as in a defamatory allegation. (6)
- 9 An order granting to apply enables further orders to be made which are necessary to implement and give effect to the principal relief granted. (7)
- 11 The legal presumption which provides that public and official acts have been properly performed and that public officers have been properly appointed. (10)
- 12 The name of English backpacker Peter Falconio's girlfriend who escaped his killer, Joanna (4)
- 13 A custom, especially one having legal force. (10)
- 15 The primary purpose of probation and parole. (14)
- 18 Cases of precedential value. (10)
- 20 Criminal informant. (slang) (3)
- 22 Supervised parental time often occurs at a centre. (7)
- 23 Mokbel's nickname, '... Tony'. (3)
- 26 Part or share, generally half, usually applied to real estate title holdings. (6)
- 28 Tom Cruise played Lt Dan in *A Few Good Men*. (6)
- 29 Reasoning leading to valid solutions, coined initially in relation to Detective Sherlock Holmes. (13)
- 30 Care for and feed animals for payment. (4)
- 31 A definite fractional share, usually applied when dividing and distributing a deceased estate or trust assets. (7)
- 32 Sir Garfield Barwick replaced Sir Owen as Chief Justice of the High Court. (5)

Down

- 1 A line indicating a boundary; dispense justice, especially harsh punishment. (4)
- 2 Former Brisbane Family Court judge. (4)
- 4 Rumpole's wife Hilda was often referred to as 'She Who Must be'. (6)
- 7 Stipulate, as a rule. (9)



- 8 Fee simple. (8)
- 9 Written defamation. (5)
- 10 Female author of a will. (9)
- 14 The number of chapters of the Australian Constitution. (5)
- 16 A Form 2A under the *Uniform Civil Procedure Rules* is the approved form for an claim. (10)
- 17 The 'Postcard Bandit', Brenden James (6)
- 19 "Three lawyers tongues, turn'd inside out, Wi' lies seam'd like a beggar's clout" is a line from Robert Burns' poem, *Tam* (8)
- 20 John Wood played a magistrate in Rules. (9)
- 21 Barton, O'Connor, Isaacs, Higgins, Latham, Barwick, Murphy and were all both justices of the High Court and members of the Australian Parliament during their careers. (9)
- 24 A court must not order a grant of intestacy within days after death unless urgent circumstances justify doing so. (6)
- 25 Caught in the act of committing an offence, in flagrante (Latin) (7)
- 27 A jury is a tribunal of (4)

Solution on page 56

Opinions sprout at an early age

So, could vegetarianism really be genetic?

by Shane Budden



Somewhere along the line, while I was apparently not watching, my children began to develop opinions about things.

I wasn't particularly prepared for this as, in my recollection back when I was a kid not long after the solar system formed from a whirling cloud of dust, children didn't have opinions on things. Or, to be more accurate, we had opinions but they weren't especially useful as they didn't have the slightest effect on what happened to us.

For example, my brother and I were quite firmly of the opinion that Brussels sprouts were not food. In fact, we held the suspicion that they may well have been droppings of some strange and repugnant animal of the Australian Outback, which should have become extinct long ago but hadn't because Indigenous Australians were far too clever to eat anything that tasted so despicable (at least going by the taste of its droppings).

Indeed, it did cross our minds that the first settlers had asked the Indigenous people if you could eat Brussels sprouts, and the Indigenous people had managed to keep a straight face long enough to say, "sure mate, eat them and they keep bunyips away!" and had been wetting their pants laughing about it ever since.

These strongly held and persuasively argued opinions, backed up by the fact that Brussels sprouts have the same overall look, feel and taste of a squash ball dunked in green paint, did not result in us avoiding the consumption of Brussels sprouts.

My dad was of the view that we ate whatever mum put on the plate, and that meant we ended up eating bags of them. I am not sure it was particularly cost-effective for mum and dad though, because our method for consuming them involved adding about a third of a litre of tomato sauce per sprout (this replaced the previous method – rolling them under the couch we were hiding behind while watching *Dr Who* – which was discovered far sooner than we had anticipated).

Anyway, my kids have opinions on things (including food) and ignoring them has proven much harder than my dad made it look. This means that there is now occasionally an argument in our kitchen focused around what we should eat, similar to the way there is occasionally an argument in parliament about whether or not politicians are, technically, citizens of this country (which is Australia, in case you were wondering).

I find the argument about citizenship odd, because it should be pretty easy to determine whether or not you are Australian, by the way you answer these two questions: Is it ever OK for England to win the Ashes? Should the AFL be able to force Australian cricket grounds to use drop-in wickets so that AFL players do not break a nail while doing each other's hair, which as far as I can tell is what they do during the game?

The correct answer to both of these questions is obviously no, because:

- Alistair Cook got a double-century on a drop-in wicket in Melbourne, and I think we can all agree that Poms scoring double-centuries is a bad thing – maybe not as bad as global warming, but certainly on a par with having to listen to Bono talk about global warming – and should not be allowed, and
- England having the Ashes is like NSW holding the State of Origin shield – an offence against nature similar to the sort of imbalance in The Force that led to the rise of evil creatures in the Star Wars universe such as Darth Vader, Snoke and Jar Jar Binks.

Thus, as long as you answer both of those questions in the negative, you are an Aussie – citizenship issue solved and without the need for constitutional amendment (you're welcome).

Anyway, I digress (and at a post-grad level!) and return to the arguments about food. These have been exacerbated of late by the fact that my daughter has become a vegetarian. At the outset (he says, halfway through the column) I should say that I have nothing against vegetarianism, and my brother and father are both vegetarian, which means this defect – er, propensity – could be genetic.

It may be that some people possess a gene variant which allows them to resist bacon, because otherwise being vegetarian would be torture. In fact, I suspect that most vegetarians spend a good 70% of their waking hours suppressing bacon cravings. We may never know how much vegetarian violence is due to bacon rage, but apropos of nothing I note that Hitler was a vegetarian (NB: 'apropos of nothing' is how articulate, self-respecting people say "just sayin'").

(Note to vegetarians enraged by reading this: Put down the potato peeler you carved from a piece of old growth deadfall using a knife made from recycled plastic bottles. I am aware of the existence of bacon substitutes like 'not bacon' but as you well know it is made by pummelling Brussels sprouts until they lose their colour, and if it was edible and tasted anything like bacon you wouldn't have picked up the peeler in the first place.)

This would not be so bad, except my son takes the position that, had the flying spaghetti monster wanted us to eat vegetables, she would have made them taste like meat. This means that dinner time can resemble question time in parliament, except that my children are intelligent, articulate and capable of stringing words together to make sentences and coherent arguments. On the plus side, I now understand why my parents allowed the sauce option.

(Note to people who are already writing letters to the editor pointing out that I am an idiot because Brussels sprouts were introduced to Australia by Europeans: I know that, but my primary school self didn't. So if you want to write letters telling me I am stupid, write them to the 1977 me; while you are at it, tell me to invest in Microsoft and remind me to tighten the handlebars on my BMX before every ride. Long story, but it goes some way to explaining my photo above.)

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Crossword solution

From page 54

Across: 3 Kioa, 5 O'Keefe, 6 Imputed, 9 Liberty, 11 Regularity, 12 Lees, 13 Consuetude, 15 Rehabilitation, 18 Comparable, 20 Rat, 22 Contact, 23 Fat, 26 Moiety, 28 Kaffee, 29 Ratiocination, 30 Ears, 31 Aliquot, 32 Dixon.

Down: 1 Mere, 2 Bell, 4 Obeyed, 7 Prescribe, 8 Freehold, 9 Libel, 10 Testatrix, 14 Eight, 16 Employment, 17 Abbott, 19 O'Shanter, 20 Rafferty's, 21 McTiernan, 24 Thirty, 25 Delicto, 27 Fact.

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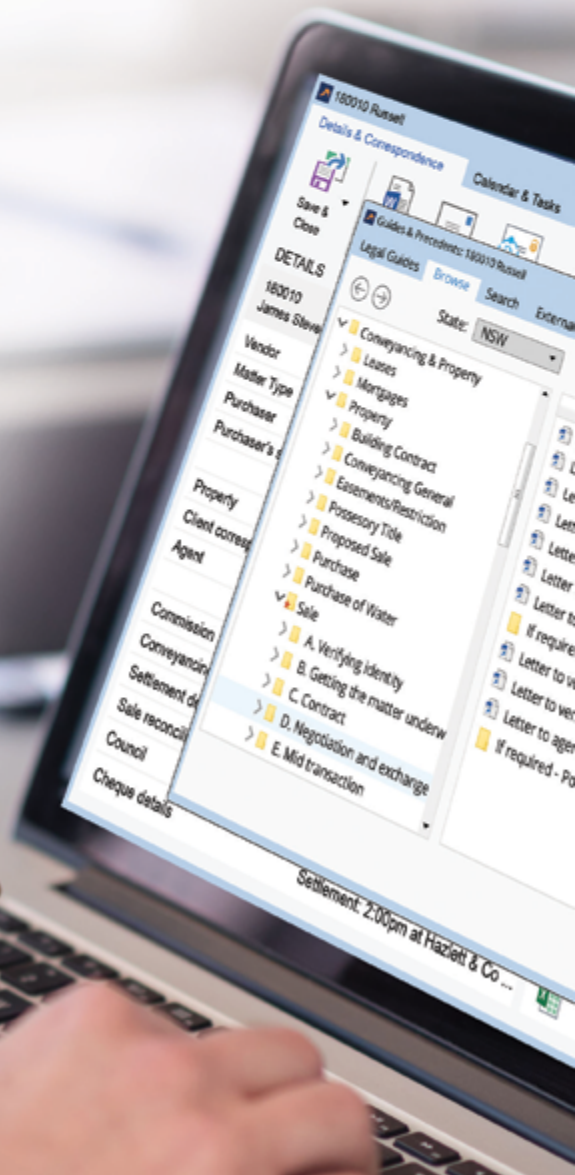




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