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Law Society

March 2016 – Vol.36 No.2

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The human rights question

Are you ready to make a contribution?



We are all human rights lawyers.

Our belief in the dignity and rights of our fellow man is fundamental to the rule of law.

This belief is a tenet of our daily practice, whether we are on the bench, before the bench, or at a desk processing conveyances. We all share a responsibility for human rights in our professional lives.

However, we now face a question: Is it desirable for the State of Queensland to enshrine these rights in a charter or Act; and will their codification better define, protect and preserve these essential freedoms?

Queensland Law Society is committed to providing our Parliament with a fulsome response on this important question, and it is your input that will guide our submission.

With what appears to be strong bipartisan support, the Legislative Assembly has tasked the parliamentary Legal Affairs and Community Safety Committee with examining whether it is appropriate and desirable to legislate for a Human Rights Act in Queensland, other than through a constitutionally entrenched model.

The committee is to report by 30 June, and is seeking submissions addressing its terms of reference by 18 April.

We have formed a QLS Human Rights Working Group, which met for the first time on 1 February. The group, chaired by Dan Rogers, represents an esteemed cross section of the profession, including lawyers from public and private sectors, academics and the Honourable Richard Chesterman AO RFD, who retired from the Queensland Court of Appeal in 2012.

It is central to our role, both as a representative service provider to you, our members, and as a stakeholder engaging with government on an increasingly consultative basis, that we bring the full gamut of our members' opinions in all their diversity to the working group's attention and then formulate these into a submission which presents a cogent portrait of the advantages and disadvantages, as well as a cost-benefit analysis, of enacting state-based human rights.

The great thing about law and lawyers is that even (and indeed, in particular!) the best minds can disagree about fundamental matters. In the end, what is important is that our submission explores both sides of the argument. To some people, a human rights charter may be seen as a lawyers' picnic; others may argue that it takes away from the primacy of parliament in the making of legislation and gives it to unelected judicial figures.

We need your opinions – both for and against – and have assembled a collection of resources, including a copy of the terms of reference, that may assist in your deliberations – see qls.com.au/humanrights.

Various jurisdictions and countries, including other Australian states, Canada and the United Kingdom, have addressed the question of human rights by an Act or charter, with varying degrees of success. It is fortunate that we are in a position to learn from their mistakes.

The working group will put its submission before QLS Council early next month in order to meet the parliamentary committee's mid-April deadline.

We deal with human right every day, and we are all human rights lawyers, though sometimes we may not think of ourselves that way. The discussion on a Human Rights Act is a key debate this year. Please take the opportunity to express your opinion via email to humanrights@qls.com.au.

Letters of the law

Speaking of opinions, I am keen to revive the tradition of spirited debate amongst members through the *Proctor* letters to the editor column.

It is fitting that Queensland Law Society offers a moderated vehicle whereby issues of concern or general interest to the profession can be freely discussed in a collegiate way.

There is also no reason that members should refrain from expressing their views on QLS policies and services, as your feedback is of enormous value in fine-tuning our approach.

Among our 10,000 members there are undoubtedly many differences of opinion on many topics, and an appropriate forum to express your views – and contrary opinions – is long overdue.

For space reasons, shorter letters are requested, and well-reasoned argument will always be preferred. Please email your letters to proctor@qls.com.au.

See you at Symposium

Finally, I invite you to our flagship professional development event, QLS Symposium 2016, at the Brisbane Convention & Exhibition Centre on 18-19 March. This and previous editions of *Proctor* have highlighted the program and some of our exceptional presenters.

As always, it will provide you with learning directly relevant to your area of practice and sessions that will both awaken you to possibilities of growing your career and increase your understanding of the breadth of our profession.

I look forward to seeing you there.

Bill Potts

Queensland Law Society president

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Turning the tide of domestic violence



Domestic violence in various forms has, unfortunately, been with us for a very long time.

However, over decades, it has come to the front of our collective conscience and is now such a prominent issue of concern that we are beginning to see positive change on several fronts.

We are seeing changes at the government level, through inquiries and legislation, policing and the legal system.

We are seeing changes in society, through community initiatives and support mechanisms, and a growing public awareness that domestic violence is no longer acceptable in any form.

We are also seeing the introduction of change in the most fundamental way – how our children are being educated to respect each other and to understand that everyone has the right to live their lives without fear.

Much remains to be done, and it is heartening to see the legal profession – our members – at the forefront of change.

I particularly wish to mention the members of our *Not Now, Not Ever* Working Group, chaired by Deborah Awyzio, who have spent several months in consultation and discussion with stakeholders as they draft best practice guidelines for lawyers working with people who have experienced domestic and family violence.

These best practice guidelines will address recommendation 107 of the *Not Now, Not Ever* Report published last year, and I look forward to advising you of our further progress in the near future.

The ongoing work of the Women's Legal Service (WLS) in providing advice and support to the victims of domestic violence can only be commended. I marvel at the inner strength and resilience of the service's staff and volunteers as they continue to work in this area.

One fundraising initiative hosted by Women Lawyers Association of Queensland and WLS on 20 May is the second Designer Fashion Pop-up. Donations of pre-worn corporate and designer clothing (including accessories) in good condition are sought for this event, and you can now deliver these to QLS or other drop-off locations (see the upcoming events page at wlaq.org.au for details).

As you know, I have also opted to make a personal contribution to the work of the WLS by signing up as a participant in this year's Dancing CEOs event, to be held at Brisbane City Hall on 15 April. As you may have seen on our Facebook page, my dancing career is making slow progress, but win, lose or draw, I am pleased to be able to make a contribution and would humbly ask for your support via my page at Everyday Hero page – give.everydayhero.com/au/amelia-hodge-dancing-ceo-s.

I know that there are others in the profession who are striving to put an end to domestic violence through direct action, fundraising and other activities. Please let me know of your initiatives so that we can make other members of our profession aware of them.

Legal Careers Expo

The Legal Careers Expo this year will be held on Tuesday 8 March at the Brisbane Convention & Exhibition Centre. Today's law students will be able to meet prospective employers face to face, explore the multitude of different ways they can practise law and learn from experts the skills they need to apply for and secure employment.

Several hundred students have already signed up to attend the expo, which features more than 30 exhibitors, including many law firms and educational institutions.

If friends or relatives have come to you asking how they or their student children can build a career in the law, please suggest that they come along to this popular event. You might also suggest that, where applicable,

they have a look at the QLS Legal Graduate Employment and Vacation Clerkship Guidelines available from the Your Legal Career page at qls.com.au.

Symposium

Speaking of big events, 18-19 March sees our QLS Symposium 2016 at the Brisbane Convention & Exhibition Centre. We have already provided a great deal of information (see qls.com.au) and it is pleasing to see that many hundreds of delegates have already registered.

If you are unable to attend, you will of course be able to purchase a Symposium DVD in April, but I would also like to let you know that the opening address by Chief Justice Catherine Holmes, along with the opening plenary, Ripples and Waves, by the inspirational Rabia Siddique, will be available as a live webstream on 18 March.

I am very pleased to advise that Songwoman Maroochy of the Turrbal People has agreed to perform a traditional Welcome to Country at the Symposium. Songwoman Maroochy is a graduate of the Victorian College of Arts in Melbourne and an internationally renowned opera singer. She was the first Australian to perform at the United Nations in New York in honour of the International Year for the World's Indigenous People.

You can register on the Symposium page at qls.com.au.

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Letters to the editor: We invite and encourage our members and others in our professional community to engage in two-way conversation with Queensland Law Society and colleagues through letters to the editor, articles and opinion pieces, and by raising questions and initiating discussions on issues relevant to our profession, Email proctor@qls.com.au.

Advocacy role 'contrary to members' views'

I cannot understand why the powers that be at the Queensland Law Society are still opposing the VLAD legislation, and other legislation giving police the necessary powers to crack down on organised crime, on a targeted basis, even after the High Court has refused to invalidate the legislation.

In any case, our Law Society should not be spending money raised from its members to oppose, or request amendment of, legislation, unless it would be in the interests of avoiding further hardship being placed on its members in running their legal practices.

Quite simply, much of the work carried out by the Advocacy section of the Law Society does nothing to assist its members in the operation of their business as lawyers. Other peak industry groups and public advocacy groups are quite capable of making submissions to governments in relation to matters which come within their charter.

Our Law Society, in taking on this role, is acting against the views of many of its members and many of the members' clients.

**Martin Punch
Bundall**

Advertising proposal 'misconceived'

I wish to respond to the request of Mr Peter Daley for the Queensland Law Society to advertise on behalf of 'no uplift' delay pay practitioners. (Proctor, February 2016, p12)

I have worked for over 20 years as a personal injury lawyer, in small firms and within a large firm, and I suggest Mr Daley's proposal is misconceived.

Some issues for Mr Daley to consider include:

1. Ban on advertising fee basis or encouraging claims

The *Personal Injuries Proceedings Act 2002* prohibits the advertising Mr Daley is proposing.

2. Market competition

Small firms can offer a niche service, and more competitive pricing, than a large firm. They can offer broader services that capture all clients' needs. I believe there are more injury lawyers working outside the big three firms than within.

3. Large firms pro bono work – special work

Mr Daley may not be aware but large firms can and do perform a vital role in effecting law change and representing those who would otherwise have no-one. I will give just two examples:

- a. Christmas Island inquest – the families of victims were denied legal aid, so Shine Lawyers stepped in, funded counsel and our own staff to attend Christmas Island

and the full inquest. Without our involvement the families of victims of this tragedy would not have been heard at all at the inquest.

- b. Fighting to overcome the WorkCover 5% injury threshold – Shine Lawyers took on this hurdle for many clients who had been told by other firms (both big and small) to only call back if they got an assessment over 5%. We battled WorkCover to have clients properly assessed for all of their injuries; we challenged doctor assessments to ensure they complied with GEPI and went to the MAT to represent clients. We have won and lost many of these battles, but without our involvement many clients would have received either a smaller offer or lost their common law entitlement completely.

4. Uplift

Mr Daley seems to cavil with the charging of an uplift. If large firms price themselves out of the market, then they will lose clients. The market is the best tool for setting market prices. There are countless examples of regulators trying to intervene and set artificial price caps, to the detriment of consumers. It would also be wrong to levy all members to advertise for the benefit of few members.

I commend Mr Daley for his services to his clients who cannot afford to pay as the matter progresses.

I respectfully disagree with his proposal for the reasons outlined above.

Peter Matus
Associate, Shine Lawyers

QLS joins national legal assistance campaign

Queensland Law Society has added its voice to a national campaign drawing attention to a crisis in legal aid and legal assistance services around the country.

The Law Council of Australia and state law bodies have rallied together to highlight the consequences of many years of federal funding neglect and cuts which have eroded services to working families in need and those most disadvantaged in Queensland.

In a QLS media release on 1 February, president Bill Potts said that access to justice was a critical issue for our community.

"It is a hallmark of our Australian democracy that governments have always recognised the need to include, support and give equity of opportunity to those who find justice most unattainable," he said.

"The rule of law, if it is to mean anything, must not be locked away behind the bars of financial parsimony.

"The past 20 years have seen successive federal governments cut the Commonwealth's share of legal aid from 50% to 35%. This forces increasing numbers of people to

defend themselves in court, battle well-resourced corporate or government opponents, or face abusive former partners without any legal assistance."

In Queensland it has been reported that community legal centres last year turned away 80,000 people, which is more than the 50,000 helped, due to lack of resources. Those services particularly face a Commonwealth funding fiscal cliff in 2017.

"More needs to be done to make justice accessible to those who need to access it the most, especially on Commonwealth issues such as family law, employment and debt," Mr Potts said.

"Queensland Law Society calls on all federal parliamentarians, in this election year, to state clearly and unequivocally where they stand on this serious issue of social equity."



OAM for Magistrate Braes

Mareeba magistrate and QLS honorary member Thomas Braes was awarded an Order of Australia Medal for service to the community and to the law in the 2016 Australia Day Honours List.

Magistrate Braes has a 34-year legal career and has been with the Mareeba Magistrates Court since 2005. He has also served as president and secretary of both the Lions Club of Mareeba and Mareeba Chamber of Commerce. He is a life member of the Mareeba Heritage Centre, which he helped to establish.



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Fashionable assistance for Women's Legal Service

Donations of corporate and designer clothing (including accessories along with shoes and handbags) are sought for the second Designer Fashion Pop-up to be hosted by the Women Lawyers Association and Women's Legal Service (WLS) in aid of the WLS.

Suburban, Gold Coast and Brisbane CBD locations, including Queensland Law Society at 179 Ann Street, are available as drop-off points for garments that will be available for resale at the pop-up to be held on 20 May at St Andrew's Uniting Church Hall, corner of Creek and Ann Streets, Brisbane.

See wlaq.com.au/events/2016fashionpopup for more details, including addresses for the drop-off locations.



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PI solicitor wins Civil Justice Award

Queensland personal injury solicitor Kerry Splatt was presented with the Australian Lawyers Alliance (ALA) 2016 Queensland Civil Justice Award at the ALA's state conference last month.

Mr Splatt, who is a QLS accredited specialist (personal injuries), has also served on QLS committees for some 12 years.

ALA Queensland president Rod Hodgson said that Mr Splatt was a highly regarded Queensland solicitor and a worthy recipient of the award.

"His robust defence of a healthy, fair and balanced workers' compensation scheme and his principled, ethical position was, and remains, in and of itself inspirational to members of the legal profession," Mr Hodgson said.

Firm appoints youngest female senior leader in 131 years

MacDonnells Law has appointed its youngest female senior leader in 131 years, with commercial lawyer Melissa Sinopoli selected as a practice group leader.

Following an internal recruitment process and staying true to the firm's 'grow our own' policy, the 28-year-old lawyer will take over the reins from partner Luckbir Singh, who has been in the role for eight years.

Melissa will head the firm's statewide, 40-member commercial practice group in Brisbane, Cairns and Townsville.

Melissa said she was thrilled with her new appointment and looked forward to applying her strategic planning skills and commercial acumen to the role.



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Advocacy

Society urges retention of common law rights in insurance scheme

The Queensland Government has committed to the introduction of the National Injury Insurance Scheme (NIIS) by 1 July 2016.

In line with this commitment, an inquiry into a suitable model for the implementation of the NIIS was undertaken by the parliamentary Communities, Disability Services and Domestic and Family Violence Prevention Committee. On 2 December 2015 a public briefing was held on implementation of the scheme, with QLS senior policy advisor Shane Budden attending on behalf of the Society.

With the assistance of the QLS Accident Compensation/Tort Law Committee (and in particular committee chair Michael Garbett), the Society made comprehensive submissions to the inquiry. We advocated strongly for a hybrid scheme, maintaining access to common law rights and allowing catastrophically injured persons to opt in or out of the NIIS.

Our submissions concentrated on the need for catastrophically injured persons to retain choices in the provision of care, including the care providers involved and the location at which the care is to be provided. Our view is that taking away common law rights, and the attendant choices, may lead to the centralisation of services provided by the scheme and the institutionalisation of catastrophically injured persons.

Submissions were also made on how the scheme is to be funded, although unfortunately the actuarial details underpinning Treasury's recommendations were not released by the deadline for submissions, preventing a detailed analysis. An actuarial report commissioned by Treasury was released in late January and we have responded to that report. The report is concerning in that it is based on assumptions that are unsustainable and completely inconsistent with

experience in other jurisdictions. It clearly favours implementing the scheme at the expense of common law rights.

We also strenuously opposed the implementation of any threshold of impairment prior to claimants being allowed access to the scheme; although attractive in some quarters for controlling the scheme's costs, thresholds often disenfranchise claimants greatly in need of access to the scheme – a point we made emphatically in our argument to have the impairment threshold for workers' compensation removed, and one which the current Government accepted unreservedly.

We attended the public hearing for this inquiry last month and advocated strongly on these points; at the time of writing the committee's final report had not been released.

Advocacy in this area will be ongoing, as it would appear that some support for a scheme which removes common law rights exists within government. This approach proved an unmitigated disaster for the New Zealand Accident Compensation Commission, which in 2008 found itself with unfunded liabilities of \$23 billion – a shortfall which was addressed through enormous increases in compulsory contributions and limiting the benefits available to injured persons.

The South Australian WorkCover scheme followed a similar pattern, with the elimination of common law rights leading to unfunded liabilities worth \$1 billion; common law rights in that scheme have now been reintroduced and it currently enjoys a funding ratio of 114% and \$317 million in net assets.

Judicial appointments process

Following Queensland Law Society advocacy via our pre-election Call to Parties document, the Government released a discussion paper on the process for judicial appointments.



Short videos for your wellbeing

As a continued focus on resilience and wellbeing in the legal profession, QLS has released a series of Love Law, Live Life short videos.

The series now features 27 videos, each related to one of five factsheets covering the following topics: Optimal functioning for legal practitioners, overcoming barriers to seeking help, managing perfectionism, managing stress, and a manager's guide to recognising and responding to employee mental health challenges.

For more information, visit qls.com.au/lovelawlivelife.

In response, we made a comprehensive submission advocating strongly for a merit-based approach free from political considerations and prioritising experience, legal expertise and even-handedness in candidates.

The need for this review to consider the establishment of a formal complaints process in respect of the performance of magistrates and judges was also highlighted.

The submission emphasised the need for appropriate consultation with stakeholders such as the Society, the Bar Association of Queensland and the heads of various jurisdictions to ensure that only adequately qualified and experienced candidates are considered.

We also noted that the involvement of laypersons in this process was unlikely to be of any benefit, and supported the drafting of selection criteria, while noting that no such list could be exhaustive. Advertising for expressions of interest was not supported.

Advocacy will continue on this issue, as in our view future appointments must avoid the controversies of the past, which have clearly affected the reputation of the legal profession in general.

Shane Budden is Queensland Law Society senior policy advisor.

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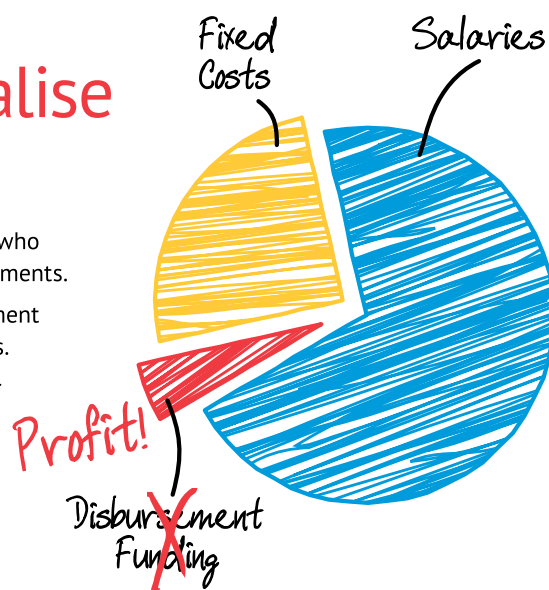
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New Year Profession Drinks

Queensland Law Society members and friends welcomed 2016 and this year's president, Bill Potts, with an informal and convivial function held in the Gallery of the Queen Elizabeth II Courts of Law on 3 February. CEO Amelia Hodge welcomed guests before addresses from Chief Justice Catherine Holmes and Mr Potts.



1. Yaw-Hsien Chow, Matt Dunn, Annette Bradfield
2. Councillor Christopher Coyne, deputy president Christine Smyth
3. Stephanie Brown, Belinda Jeffrey, Michelle Kneebone, Jessie Pomare, Loan Chow, Amy Honan
4. Skye-Leigh Trevanion, Sophie Goossens, Hannah Daley, Jessica Coulthart, Rob Ivesa
5. Councillor Elizabeth Shearer, Danielle Keyes, Peter Schmidt, Councillor Michael Brennan
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DVOs and family law orders

Resolving conflicts in *their* relationship

A domestic violence order (DVO) may sometimes run contrary to a subsequent family law order. **Sarah Christie** explains how this is resolved, and also looks at a magistrate's power to alter a family law order.



This article examines the relationship between domestic violence orders¹ and family law orders.²

It looks at two facets of this relationship; firstly, it examines the situation in which there is an existing DVO and a subsequent family law order is made that is inconsistent with the DVO, and secondly, it sets out a magistrate's power, pursuant to s68R of the *Family Law Act 1975* (Cth) (FLA), to revive, vary, discharge or suspend a family law order.

Family law order inconsistent with an existing DVO

The relevant Queensland domestic violence legislation is the *Domestic and Family Violence Protection Act 2012* (DFVPA), the aim of which is to maximise the safety and protection of people in relevant relationships who fear or experience domestic violence.

For a Magistrates Court to make a protection order under s37 DFVPA, it must be satisfied of the following three elements on a balance of probabilities:³

- A relevant relationship exists between the aggrieved and the respondent.
- The respondent has committed domestic violence against the aggrieved.
- The protection order is necessary or desirable to protect the aggrieved from domestic violence.

A court may make a temporary protection order if it is satisfied that (a) a relevant relationship exists between the aggrieved and the respondent; and (b) the respondent has committed domestic violence against the aggrieved.⁴

If the court determines that a DVO is to be made, the order *must* include a condition that the respondent is of good behaviour towards the aggrieved and does not commit domestic violence against the aggrieved.⁵ A court *may* impose any other condition it considers (a) necessary in the circumstances and (b) desirable in the interests of the aggrieved.⁶

For example, a court may make an order prohibiting the respondent from approaching or attempting to approach the aggrieved or a named person.⁷ Therefore, it is possible that a DVO that names a child as a protected person and prohibits the respondent from approaching a named person, may conflict with a family law order providing for contact between the respondent and the child.

Inconsistencies between a DVO and a family law order may be resolved by reference to Division 11 FLA. Section 68N FLA sets out the purposes of Division 11 as being to resolve inconsistencies between family violence orders⁸ and orders made under Part VII FLA, to ensure that orders do not expose people to family violence and to achieve the objects and principles in s60B FLA.

Section 68Q FLA confirms that, to the extent of any inconsistency with orders made under Part VII of the FLA, the family violence order is invalid. In reality, a DVO that names a child as a protected person and prohibits the respondent from approaching or contacting a named person usually

includes the proviso "except for the purpose of having contact with children as set out in a written agreement between the parties or as permitted by an order made under the *Family Law Act*".

If the Family Court or Federal Circuit Court makes an order for a child to spend time with a person, and that order is inconsistent with a DVO, a number of obligations are imposed on the court.⁹ The court *must* specify that the order is inconsistent with the existing family violence order and give a detailed explanation of how the contact that it provides for is to take place.

It must also explain to all parties (family law proceedings and domestic violence proceedings), in a language those persons are likely to understand, the purpose of the order, the obligations created by the order, the consequences of failing to comply with the order, the court's reasons for making the order and the circumstances in which a person may apply for a variation or revocation of the order.¹⁰

The court making the order must provide a copy of the order as soon as practicable after making it (but no later than 14 days after making it) to all relevant people including: the registrar of the court that made the family violence order, the Commissioner of the Queensland Police Service and a child welfare officer.¹¹ If the court when making the order fails to comply with this section, the validity of the order is not affected.¹²



Magistrate's power to revive, vary, discharge or suspend a family law order

In Magistrates Court proceedings to make or vary a family violence order on a *final basis*, a magistrate may revive, vary, discharge or suspend a parenting order provided that they also make or vary a family violence order and the court has before it material that was not before the court that made the order.¹³ In exercising its power, the court must have regard to the purpose of Division 11 and whether spending time with both parents is in the best interests of the child.¹⁴

When a magistrate makes a *temporary protection order* and also revives, varies or suspends a parenting order under s68R FLA, any variation to the parenting order will cease to have effect at the time the temporary protection order stops being in force or after 21 days, whichever is the earlier.¹⁵

The relevant section in the DFVPA is s78 which provides that, before deciding to make or vary a domestic violence order the court *must* have regard to any family law order of which the court has been informed. Sub-section 78(1)(b) DFVPA allows the court to consider the power that the court has, pursuant to s68R FLA, to revive, vary, discharge or suspend a family law order.

A court considering whether to exercise this power must give parties to the proceedings an opportunity to present evidence and prepare submissions. However, the court must not diminish the standard of protection provided by a domestic violence order for the purpose of facilitating consistency between the domestic violence and family law orders.¹⁶

Conclusion

The nature of domestic violence proceedings, that is, closed court and limited cases published, make it difficult to analyse the frequency that s78 DFVPA and s68R FLA are utilised. It is nonetheless important for practitioners to be aware that the power exists and to invoke it if the circumstances call for it, because it offers a mechanism to protect a child from associated domestic violence or being exposed to domestic violence.

Sarah Christie is a Brisbane barrister.

Notes

- ¹ A 'domestic violence order' is defined in s23(a) of the *Domestic and Family Violence Protection Act 2012* (Qld) and means (a) a protection order; or (b) a temporary protection order.
- ² A 'family law order' is defined in s76 of the *Domestic and Family Violence Protection Act 2012* (Qld) and means either of the following that relates to a child of a respondent or an aggrieved: (a) an order, injunction, undertaking, plan or recognisance mentioned in the *Family Law Act 1975* (Cth) section 68R; (b) an order, injunction, undertaking, plan or recognisance mentioned in the *Family Court Act 1997* (WA), section 176.
- ³ S145(2) *Domestic and Family Violence Protection Act 2012* (Qld).
- ⁴ S45(1) *Domestic and Family Violence Protection Act 2012* (Qld).
- ⁵ *Domestic and Family Violence Protection Act 2012* (Qld) s56.
- ⁶ *Domestic and Family Violence Protection Act 2012* (Qld) s57.
- ⁷ *Domestic and Family Violence Protection Act 2012* (Qld) s58(c).
- ⁸ A 'family violence order' is defined in s4 of the FLA and means "an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence".
- ⁹ *Family Law Act 1975* (Cth) s68P.
- ¹⁰ *Family Law Act 1975* (Cth) s68P(2).
- ¹¹ *Family Law Act 1975* (Cth) s68P(3).
- ¹² *Family Law Act 1975* (Cth) s68P(4).
- ¹³ *Family Law Act 1975* (Cth) s68R.
- ¹⁴ *Family Law Act 1975* (Cth) s68R(5). See also s68S, which sets out the application of the FLA and *Family Law Rules 2004* when exercising s68R power.
- ¹⁵ *Family Law Act 1975* (Cth) s68T.
- ¹⁶ *Domestic and Family Violence Protection Act 2012* (Qld) s78(2).



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An alternative approach to employee equity interests?

Scheme changes for start-ups may benefit SMEs

The tax liabilities inherent in issuing key employees with equity interest in a growing business may be mitigated by an alternative approach, says **Domenic Festa**.



A growing business will often identify one or more key employees who are considered instrumental in driving the business.

In order to retain and provide incentives to these employees, the founder may wish to provide an equity interest in the business. A significant issue in this is to provide the equity in a tax-effective manner.

The tax 'wish list' of the founder for the issue of the equity interest will usually include:

- It can be issued to a restricted number of employees.
- There is no tax on the issue of the equity interest.
- The taxing event for the issue of the equity interest is deferred until realisation.
- Capital growth from the time of issue of the equity interest is taxed under the CGT regime.

Employee share scheme provisions – current law

When faced with this issue, the usual starting point is the specific provisions for employee share schemes (ESS) in Division 83A of the *Income Tax Assessment Act 1997* (Cth). These provisions were initially introduced as an anti-avoidance provision to overcome planning arrangements that caused the issue of such an interest not being included in assessable income.

The main thrust of these provisions is to include in assessable income the discount to market value of the issue price of the interest (shares or options).

Example:

Jim is the founder of Start-Up Pty Ltd, a company that has been in existence and trading for two years in the IT industry (the same principles apply for businesses in other industries – retail, manufacturing, distribution, professional services, biotechnology).

The business has a current market value of \$2 million. Jim has identified Peter as a key employee who has been instrumental in doubling the markets of the business in the last six months. Jim would like to issue a 10% equity interest in the business to Peter.

His preference is to issue this equity for no consideration. He anticipates the business will be worth in excess of \$6 million in five years' time and sees the issue of equity as a mechanism to retain Peter in the business.

In this case, a 10% interest has a value of \$200,000 with a preferred issue price of nil or \$1. ESS operates to include the discount (\$200,000) in Peter's assessable income at the time of issue of the interest. This is the case, whether the interest is issued directly to Peter or to an associate.

It might be considered that a means of overcoming this issue would be to issue options with an exercise price equal to the current market value. In the example

above, the benefit to Peter is that the value of the option would grow with the value of the business. When the business grows to a value of \$600,000, the option (which is subject to an exercise price payment of \$200,000) would have a value of \$400,000.

ESS apply complicated valuation methods for options which have the effect that an option issued with an exercise price equal to current market value but not payable for a number of years is considered to be issued at a discount.

In either case, the tax result is unsatisfactory to an SME. The issue of the interest triggers a tax liability payable by the key employee for the year of issue.

Limited concessions

Some advisers look at ESS as a means of providing a tax advantage. The reality is there are limited concessions provided by ESS. They are limited to:

1. a discount of \$1000 being excluded from assessable income
2. deferral of the taxing event.

In addition, concessions are only available when the scheme is offered to at least 75% of permanent employees (referred to as the broad availability condition). This is a condition that is unsatisfactory to SMEs looking to benefit key employees (who are the minority in number).

Alternatives to overcome the current law

ESS only apply when the equity interest is issued at a discount. An equity interest issued for market value is excluded from the operation of ESS.

In that context, options to overcome the operation of ESS are:

1. Issue of shares at market value, combined with a suitable funding arrangement. The funding arrangement must address other tax issues, including Division 7A and FBT.
2. Premium-priced options drafted in such a manner that there is considered to be no discount on the issue of the option. The advantage is the employee will receive the benefit of capital growth above the premium.

Changes for start-ups

On 14 October 2014, the Government announced changes to ESS to benefit start-ups. The announcement included:

"The Government will reform the tax treatment of Employee Share Schemes to bolster entrepreneurship in Australia and support innovative start-up companies.

"Employee Share Schemes give employees a financial share of the company's potential success. As such, they help start-up companies to attract and retain high-quality staff."

The *Tax and Superannuation Laws Amendment (Employee Share Schemes) Act 2015* gives effect to the announcement, providing the following concessions to start ups:

1. Discounts on the issue of shares will not be included in assessable income if the discount is less than 15%. In the example above, the discount will not be included in assessable income if the equity interest of \$200,000 is issued at a price of \$170,000.
2. An issue of options at an exercise price equal to current market value will not be subject to ESS.
3. Where the issue of the interest satisfies the concessions for start-ups, there is no tax under ESS on issue of the interest and gains on realisation are taxed under the CGT regime.

The broad availability condition appears to be an obstacle to the utility of ESS for start-ups and SMEs. The philosophy behind the broad availability condition is outlined in the Explanatory Memorandum for the start-ups concession at paragraph 1.59 as follows:

"... this acts as an integrity rule that prevents employees from misapplying the concession in order to buy a business or indirectly access company profits through the ESS rules."

It is suggested that these concerns are dealt with by the restriction that concessions under ESS require the interest acquired to not exceed 10%.

Importantly, the start-ups concession for shares is subject to the broad availability condition, which is unlikely to be satisfactory for most start-ups. However, the concession for options is not subject to this broad availability condition and therefore provides opportunities to allow the issue of equity in a manner that allows the key employee to benefit from future capital growth.

With the exception of the broad availability condition applying to the issue of shares, the start-ups concession satisfies the objectives of the founder set out at the beginning of this article.

Other conditions

While the provisions are stated to be for start-ups, the conditions are not so restrictive. The other key conditions are:

1. The company, any holding company and any subsidiary of the group must not be listed on a stock exchange.
2. Each of the companies in the group has to have been existence for less than 10 years.
3. Aggregated turnover does not exceed \$50 million.
4. ESS relates to ordinary shares.
5. There is a minimum holding period requirement of three years or the cessation of employment.
6. Issue of equity interest of less than 10% interest.

Many SMEs that have been in existence for less than 10 years will be able to satisfy these conditions.

Partly paid shares

Some consider the use of partly paid shares as a means of addressing the ESS taxation issue.

Taking the facts set out in the example above, an outline of the terms of issue of the partly paid shares that has been suggested is – issue price of \$200,000; \$1 payable on issue; the balance payable out of the whole or part of the dividends declared on the partly paid shares; entitled to dividends in proportion to number of shares held (rather than the standard under most constitutions – in proportion to the amount paid up on such shares).


The argument is the market value of fully paid shares is \$200,000, the obligation of the employee is to pay \$200,000 (\$1 upon issue and the balance out of dividends declared), and therefore the employee is paying market value for the shares.

The analysis suggests the market value of the partly paid shares on issue is \$1, because there is an obligation to pay a further \$199,999 in respect of shares that have a fully paid value of \$200,000.

The above technical analysis appears flawed. The key question is: What is the market value of the interest issued? Utilising the basic definition of market value (the price agreed between a willing but not anxious buyer and a willing but not anxious seller), and assuming the company pays dividends at the rate of 10%, partly paid shares with an amount payable on issue of \$1 and an entitlement to dividends of \$20,000 per annum are considered to have a market value well above the amount of \$1 payable on issue.

Key points

- ESS causes adverse tax consequences for the issue of equity to key employees.
- Concessions in ESS generally require that they be offered to at least 75% of permanent employees. This is not suitable to most SMEs.
- To overcome these adverse tax consequences, it is necessary to implement the equity issue in a manner that falls outside ESS.
- The proposed concessions for start-ups provide an opportunity to overcome these concerns in respect of the issue of options.



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A world-class risk program for the Queensland profession

Lexon has always strived to provide you with the best insurance product possible. These efforts have now received international recognition with our Risk Counsel, David Durham, recently being awarded the title of 2015 Risk Management Institution of Australasia (RMIA) Risk Manager of the Year.

RMIA is the peak professional institution and industry association for risk managers in the Asia-Pacific region. The award would not have been possible without the support received from Queensland Law Society and the significant commitment you, the Queensland profession, have made over the last nine years to embed world-class risk strategies into your work processes. We would also like to thank all those who have assisted Lexon in developing our risk program.

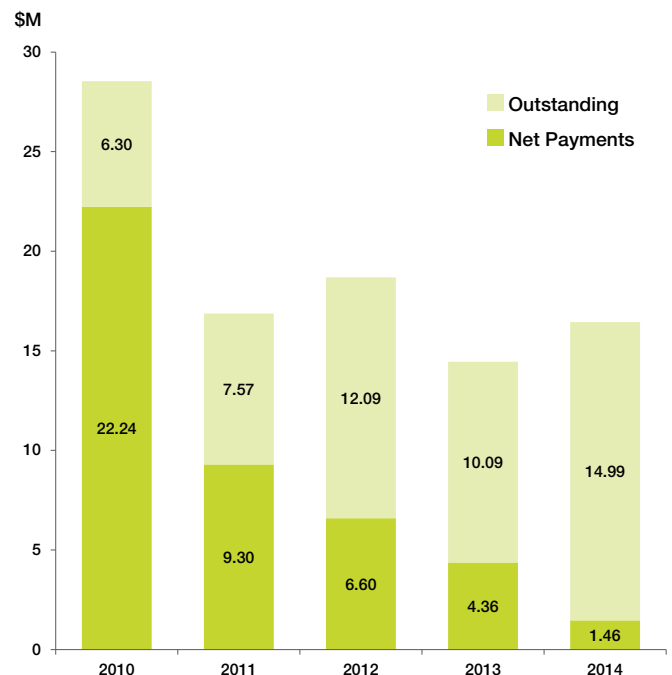
Lexon's resolve to stay at the cutting edge of risk management will continue throughout 2016 as we develop additional tools to help minimise the risk of errors that may lead to a claim. That a world-class risk program like this can be delivered at no additional cost to insured practitioners reflects the benefit of an insurance scheme which exists solely to safeguard you against professional liability risks.

Cost of claims

In the October 2015 edition of *Proctor* I provided a detailed breakdown of the proportion of claims Lexon receives by area of law. To further your understanding of the profession's claims experience; I have set out in the graphic (right) the expected value of claims against the scheme for the five insurance years up to 2014/15 (as at 30 June 2015). The dark green portion of each bar represents amounts already paid by Lexon for each of those years and the lighter green reflects the expected future payments.

The total is collectively known as the 'central estimate' and is obtained via sophisticated modelling undertaken by Lexon in conjunction with Finity Consulting Pty Ltd, a leading insurance actuary. These estimates form a key input into calculations of the capital needs (and hence the levy rates) for the scheme going forward.

The average central estimate for these five years now sits at \$19m. In relative terms this represents a strong performance by the scheme which we hope to replicate going forward. Of course, if economic conditions decline we could see the claims cost adversely impacted, which is why our partnership with you to manage risk remains so important.



2016/17 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*.

Last year saw a 10% reduction in base levy rates. With the continuing improved claims performance of the scheme, QLS and Lexon are working hard to deliver the best rates possible for 2016/17 consistent with the long-term requirements of the scheme. These rates will be announced by QLS president Bill Potts shortly.

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 including purchases, mergers, amalgamations, takeovers, transfers, splits of partnership, entity transitions (for example, firm to ILP), principals (or former principals) leaving or joining, dissolutions or the recommencement of a former practice.

Given this, it is an opportune time to remind practitioners that as part of their due diligence prior to undertaking such changes they should consider the potential impact of the prior law practice (PLP) rule which 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 where required.
- Consider contractual terms for adjustments/ indemnities to provide some recourse in the future.
- Obtain a written authority and 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.

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



Did you know?

- Lexon set up Lexon Legal to provide legal counsel at the earliest stages of appropriate matters with a view to either completely avoiding claims or mitigating their effect. This flexibility to offer effective legal advice at the earliest possible juncture is something we expect will provide additional comfort for our insureds. Lexon Legal's principal, Chris Coyne, is available to provide early intervention assistance to practitioners free of charge when they are concerned a claim event may have occurred. Chris can be contacted via our claims team or direct at Chris.Coyne@lexonlegal.com.au.
- Over 90% of practices insured in Queensland have one or two principals. Managing risk and providing claims support for such a large number of small practices led to Lexon developing its unique risk workshop model. At the same time, the remaining 10% of practices employ nearly 50% of all practitioners and this means Lexon also delivers bespoke claims and risk management solutions to meet their particular requirements. Ensuring that we adequately cater to the needs of all practices, irrespective of size or location is an exciting challenge which drives our continual innovation.



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Five fine Acts

A celebration of Queensland
Women's Week 2016

This month heralds the Queensland Government's inaugural Queensland Women's Week.

From 7 to 13 March, Queensland will celebrate the achievements of women in business, leadership and government.¹

Many of these advancements have taken place as a result of Queensland law reform. It is therefore an opportune time to reflect on the advocacy and the legislation that have endorsed the rights of women, thereby improving Queensland society as a whole.

1. The *Married Women's Property Act 1890 (Qld)*

It could be said that legal identity is the heart of every jurisdiction. In Queensland it is considered as a fundamental legislative principle, implicitly recognising that the rights and liberties of people are paramount.² During the 1850s and 1860s women's groups in England strongly advocated for married women to be recognised as having

a separate legal identity from their husbands.³ This began to take shape in England during the 1870s with the introduction of the *Married Women's Property Act 1870* (33 & 34 Vict. c93) and then the *Married Women's Property Act 1882* (45 & 46 Vict. c75).⁴

These Acts overturned the common law doctrine of coverture, thus expanding the proprietary and legal rights of married English women.⁵ They were also supported in Queensland and in 1890 the Queensland Parliament, led by Sir Samuel Griffith, introduced the *Married Women's Property Act 1890 (Qld)*.⁶

This was monumental, as at that time it was an all-male parliament and Queensland women's suffrage was 15 years away.⁷ The Act commenced on 1 January 1891 and "allowed married Queensland women to both acquire and dispose of property and other investments independent of their husbands. Under the Act, women who acquired property and/or investments prior to a marriage were entitled to retain sole ownership of that property after marriage and to administer and execute upon it."⁸ This development paved the way

for legislative advancements in succession and family law, particularly with respect to the devolution of property on divorce and death.

2. *Testator's Family Maintenance Act 1914 (Qld)*

Prior to 1914, a spouse or a child of a deceased testator could not apply to the Queensland courts for maintenance in the event the deceased testator did not provide for them in the will. This meant that many widows⁹ and children were left homeless, poor or destitute on the death of their spouse, which in most cases was the deceased husband.¹⁰

In 1914 Queensland was the third Australian state (and the fourth common law jurisdiction after New Zealand, Tasmania and Victoria)¹¹ to pass legislation to make provision for widows, widowers and children. It meant that this special class of people could apply to the court for maintenance and that the testator could not specifically exclude them from his or her estate.



As Queensland prepares to celebrate its first Women's Week, Louise Pennisi revisits the legislation that was critical in enshrining and enhancing the status of women in today's society.

Thus the legislative recognition that a testator has a "moral obligation" to provide for wives, husbands and certain people on his or her death was born. This centenarian clause has been widened to include expanded definitions of 'spouse' and 'children', and continues to be the very fabric of Queensland succession law today.¹²

3. Family Law Act 1975 (Cth)

Up until 1975, there were 14 grounds of divorce.¹³ If a spouse wished to divorce, he or she had to establish s28 of the *Matrimonial Causes Act 1959* (Cth). Some of these grounds were that the spouse:

- committed adultery
- wilfully deserted the petitioner for a period for not less than two years
- wilfully and persistently refused to consummate the marriage
- during a period of no less than one year, was habitually guilty of cruelty to the petitioner.¹⁴

This fault-based system meant that the person seeking a divorce required evidence to prove that the other party was at fault. This was done by utilising private investigators and producing photographs, receipts and statements from witnesses.¹⁵ These applications were routinely published in newspapers,¹⁶ with the parties being afforded no privacy in what was a very difficult and tumultuous time.

On 4 December 1973, then Commonwealth Attorney-General Lionel Murphy introduced the *Family Law Bill 1973* in the Senate,¹⁷ with his intention "to move beyond 'a carry over of the old ecclesiastical garbage', suggesting that under the *Matrimonial Causes Act 1959* (Cth), Australia's divorce laws at the time, had become 'a sick joke which few people any longer find funny'."¹⁸

The Commonwealth Parliament, with then Prime Minister Gough Whitlam, passed the revolutionary *Family Law Act 1975* (Cth). The Act brought about 'no fault divorce', abolishing the prior 14 grounds and establishing only one ground, that the marriage relationship had irretrievably broken down and that there was no prospect of co-habitation.¹⁹

Interestingly, the year it was enacted, the crude divorce rate rose by 255% to 4.6 divorces per 1000 people, but as of 2008 had declined to 2.2 divorces per 1000 people.²⁰ Importantly, parties to family law proceedings are now afforded with privacy, with the best interests of the child legislatively recognised as paramount.²¹

4. The Succession and Gift Duties Abolition Act 1976 (Qld)

Shortly after the enactment of the *Family Law Act 1975*, then Queensland Premier Joh Bjelke-Peterson considered farmers' concerns that the imposition of succession duty (commonly known as 'death duty') had a negative impact on family farms,²² which in turn had a significant impact on widows. Many complained that death duty was in effect a double tax, with duty being paid to both Australia and the United Kingdom.²³

This came to an end on 1 January 1977 when Queensland became the first Australian state to abolish death duty, following the enactment of the *Succession and Gift Duties Abolition Act 1976* (Qld).²⁴ The abolition had an instrumental economic effect on Queensland with its population growth growing 0.2% higher between 1977 and 1980.²⁵

The subtropical Queensland climate and the abolition of death duty saw many flock to Queensland, with the Tasmanian Government reporting in 1977 that \$11 million in capital was transferred from Tasmania to Queensland.²⁶ Queensland was the trailblazer in abolishing death duty, with other Australian states following suit.²⁷

5. Succession Act 1981 (Qld) – the 2006 amendments

Although the *Succession Act 1981* (Qld) was enacted in the early 1980s, it is the 2006 amendments, some 25 years later, that are particularly noteworthy.

While focusing on estate planning rather than gender issues specifically, the amendments were driven by then Attorney-General Linda Lavarch and were introduced into the Queensland Parliament on 23 August 2005, following consultation and advocacy by Queensland Law Society.²⁸ The Bill

implemented the recommendations of the National Committee for Uniform Succession Laws regarding the law of wills,²⁹ which included the following amendments:

- court authorised wills for minors
- allowing a will to be made in contemplation of marriage
- new rules about beneficiaries signing wills
- increasing the class of persons who may see a will on death.³⁰

But most importantly the Bill enshrined a significant equitable principle – that intent trumps form. This rare legislative gem, finding its heart in equity, recognised that strict compliance of the form of a will was not the be-all and end-all for a will to be valid.

Now section 18 of the *Succession Act 1981* (Qld) provides that the court may dispense with execution requirements for a will. As a result, in the last 10 years there has been an increase in the number of informal wills which Queensland courts have admitted to probate.³¹

Reflecting the technological advancement of our digital age, Justice Peter Lyons found in *Re: Yu*³² that a document made on an iPhone set out the testamentary intentions of the deceased and that the deceased intended the document to form his will.³³

The document was subsequently admitted to probate.³⁴ As technology continues to evolve and occupy aspects of our time-poor personal and working lives, it is predicted that the number of informal wills being admitted to probate will increase.

Conclusion

In summary these Acts showcase 125 years of our evolving society and pave the way to recognise women's rights, from property ownership to marriage to divorce, death and taxes. The Acts have stood the test of time and have improved Queensland society by recognising a person's legal identity, regardless of gender, as well as ensuring that equality and fairness are afforded at significant stages of a person's life.

They also represent the importance of democracy and continuing the drive to advocate for good laws and to ensure that legislation has sufficient regard to the rights and liberties of all individuals. As the future generation, we are the beneficiaries of these enduring legacies.

Louise Pennisi is a Queensland Law Society policy solicitor.

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Smyth, succession & success

Queensland Law Society deputy president Christine Smyth



Queensland Law Society deputy president Christine Smyth, who will step into the presidency in 2017, talks to **John Teerds** about her role and perspective on today's profession.



What do you value most about being a lawyer?

From a young age I've yearned to be someone who makes a difference. And from a young age I saw law as a way of doing that. The principle of the rule of law, as applying to all people, very much appeals to my essential egalitarian character.

I want to make a difference, and I believe that it does not matter who you are, where you were born, or where you went to school; it is up to you, the individual, to identify where you want to go and what you want to achieve and give it the Nike treatment – just do it!

Don't accept barriers or labels!

Of course achieving your goals is never done in a vacuum. Achievements and success have many parents. I very much believe in supporting and fostering others to achieve their best, because success breeds success.

One of the things I value about the profession of law, particularly the Queensland profession, is its collegiate nature. It is extraordinary what members of our profession do and give on a daily basis without seeking recognition, though so greatly deserved. One of my aims is to celebrate what we do as a profession and its benefits to society at large.

Has succession law always been your focus, and why did you choose to specialise in it?

My early practice was quite general, working in commercial, property, litigation and family law, gaining a broad range of experience in the process. After many years of general practice I began practising in succession law, and was immediately drawn to it.

It was a natural fit. I thrive on its technical complexity and the challenge of assisting clients in navigating the path between commerciality and human relationships. It is an area of law so directly connected to families and the realisation of their dreams, that I feel a strong bond with my clients.

What do you see as the most needed changes in succession law?

I consider the implementation of the recommended changes to the *Trusts Act* and legislative change to bring about certainty with respect to ademption of gifts in wills, as requiring immediate attention.

What changes in the Queensland legal profession would you most like to see?

I don't believe in change for the sake of change. Change must be intelligent, considered and relevant. Unless it is established that change is necessary to achieve improvements, it is nothing more than a disruptive buzz.

The greatest challenge is for us to continue to represent clients without fear or favour of the agendas of groups that might otherwise seek to set the agenda for what is a well-developed and honourable profession.

I consider that the digital world is not a separate thing, it is a modern tool. It creates tremendous opportunity for us to represent our clients and advance our profession. Now practitioners from sole practices in remote communities to top-tier firms in CBD locales can contribute to the profession and represent clients from all over the world, and stand side by side in that representation.

Queensland is a leader in this, simply due to the fact that we have the largest proportion of regional practitioners who embrace technology to provide state-of-the-art services to their clients. That alone forces change, to the betterment of all.

What are your thoughts on the level of female representation in the profession?

I am impressed by our female practitioners. They stand on their own. I am cautiously optimistic about the level of female representation in our profession, though much more needs to be done in balancing participation once in established careers.

It's not about numbers alone, because the tide has in fact changed with respect to the number of females graduates. There is an increasing surge of female practitioners coming through and operating at the highest level, based on merit. For example, see the number of female accredited specialists in the most recent QLS specialist accreditation program. By sheer dint of numbers, this type of high-level achievement cannot but flow through to positions such as principals of law firms, senior management and board roles to judicial appointments.

What do you see as your key duties as QLS deputy president?

My role this year is to support the president and prepare myself for my role as president next year. I will do this by focusing on our collective objective of advocating for and on behalf of the profession, to foster balance in the personal, financial and professional aspects of legal practice. Key to building and strengthening the reputation of our legal profession is championing the great work of Queensland solicitors – whose integrity deserves celebration.

I will strive to meaningfully advance our members' interests through advocacy, policy, professional standards and innovation while respecting and supporting tradition, diversity and inclusivity.

John Teerds is the editor of *Proctor*.

Termination gets personal

Employee circumstances can make dismissal unfair



Terminating an employee can easily turn into a legal minefield for employers if they don't exercise their power to do so in a lawful, just and reasonable manner.

In exercising this power, employers must consider the employee's personal circumstances and identify whether they are so extraordinary that termination would be considered unfair in line with the *Fair Work Act 2009* (Cth) (the FW Act).

In *Dennis Sipple v Coal & Allied Mining Services Pty Ltd T/A Mount Thorley Warkworth Operations* [2015] FWC 1080 (*Dennis Sipple v Mount Thorley*), the full bench of the Fair Work Commission (FWC) found that the employee's personal circumstances, such as his age, literacy and injury, were not so extraordinary to prove the dismissal was unfair, that is, harsh, unjust or unreasonable.

This decision provides an example for employers on how to exercise reasonable

management action in a way that takes into account an employee's personal circumstances.

When is dismissal harsh, unjust or unreasonable?

Section 394 of the FW Act allows employees who believe they have been sacked unfairly to apply to the FWC for an unfair dismissal remedy.

In considering whether the dismissal was harsh, unjust or unreasonable, the FW Act provides a number of relevant factors for consideration in s387, including:

- whether there was a valid reason for the dismissal related to the person's capacity or conduct
- any other matters that the FWC considers relevant.

Dennis Sipple v Mount Thorley

Mr Sipple was employed by Mount Thorley Warkworth Operations (Mount Thorley) for 27 years as a pit service operator and it was an inherent requirement that he be

a 'multi-skilled' operator, capable of operating various heavy machinery and equipment.

In 2002, Mr Sipple underwent surgery on his back for a non-work related medical ailment, with complications from the surgery causing ongoing problems. Following medical advice and in anticipation of Mr Sipple's return to work, Mount Thorley made reasonable alterations to Mr Sipple's duties by allowing him to work solely in a service cart on his return, which he continued doing for the next eight years.

Following a restructure of Mount Thorley in 2010, the position of pit service operator garnered additional heavy machinery responsibilities, including the operation of a haul truck, grader and other heavy equipment. While completing mandatory training for these additional duties, Mr Sipple aggravated his existing back injury.

As a result, Mr Sipple underwent an independent medical examination, which concluded that he was only capable of operating a service cart and was otherwise permanently unfit for the role of pit service operator.

Andrew Ross explains why an employer must consider an employee's personal circumstances when considering termination.



Based on this finding, and following a show cause process, Mount Thorley dismissed Mr Sipple. Mr Sipple then applied to the FWC for an unfair dismissal remedy, alleging that the medical evidence demonstrated he was fit for his duties as a service cart operator and that the dismissal was therefore harsh, unjust or unreasonable.

Key issues

The key issues for determination before the FWC were:

- Was it unfair for Mount Thorley to dismiss Mr Sipple for his inability to perform the inherent requirements of a pit service operator?
- Was it unfair for Mount Thorley to dismiss Mr Sipple for this inability, bearing in mind he was fit to perform the inherent requirements of the position, as it was, before the restructure?

First instance

At first instance, the FWC upheld the dismissal as fair. Commissioner Stanton followed the decision of *J Boag and Son Brewing Pty Ltd v Allan John Button* [2010] FWA 4022, which states that when an employer is assessing whether an employee suffering from an injury can perform the inherent duties of their role, the employer is not obligated to create a new position that the injured worker is capable of performing. As a result, Commissioner Stanton found that because Mr Sipple was unable to fulfil the essential duties of a pit service operator and was retained on suitable duties for a period of eight years, he had received a "fair go all round".

Dismissal upheld upon appeal

Mr Sipple then appealed to the full bench of the FWC¹ on the basis that Commissioner Stanton did not properly consider all relevant matters, in particular, Mr Sipple's personal circumstances when he was dismissed. Counsel for Mr Sipple submitted the decision should be made in light of the fact:

- he was 57 years old
- he had worked with Mount Thorley for 27 years
- he was fit to drive a service cart and had done so for a number of years

- his injury, age and low level of literacy would make it difficult to find new employment
- he had family commitments.

In a split decision, the majority upheld the dismissal as fair. In considering all other relevant matters, the FWC found that Mr Sipple's personal circumstances were not so extraordinary as to make his dismissal harsh, unjust or unreasonable.

You should be aware in this case that the unfair dismissal provisions of the FW Act will always be applied closely and that a relatively minor factual difference or any other alleged flaws in the employer's decision-making process could have led to the FWC reaching a different conclusion.

What does this mean for employers and employees?

To ensure that any action to be taken against an employee is lawful, just and reasonable, employers should:

- Evaluate the employee's circumstances (such as existing illnesses or injuries, age, family situation and job prospects) and consider whether they are extraordinary to the situation at hand.
- Confirm that all reasonable alterations have been made to accommodate the employee, unless they can no longer perform the inherent requirements of their position.

Both employer and employee should take careful and informed legal advice.

Employers who fail to establish that they have exercised reasonable management action expose themselves to possible claims of bullying, adverse action,² discrimination³ or workers' compensation.

Andrew Ross is a senior associate at Sparke Helmore Lawyers. The assistance of Emily Smith in preparing this article is gratefully acknowledged.

Notes

¹ [2015] FWCFB 5728.

² *Fair Work Act 2009* (Cth) ss340-342.

³ *Fair Work Act 2009* (Cth) s351.

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Material facts and particulars, distinguished

The purpose and function of material facts and pleadings

A party's pleadings must set out all material facts that the party will seek to establish at trial.

Material facts are distinguishable from particulars. The purpose and effect of pleading a material fact is to put the relevant allegation before the court for determination. The purpose and effect of a particular is to bring focus to a pleaded fact that would otherwise be too general, or to which the opposite party may otherwise have difficulty responding.

The distinction is important, because a particular cannot fill 'gaps' in the pleadings. If you wrongly characterise an allegation as a particular rather than plead it as a material fact, then your pleadings will be incomplete to the extent that they rely on that allegation. If the relevant matter is essential to establishing your case, then you will be at risk of summary judgment or a strike-out application.

On the other hand, if you wrongly plead a matter as a material fact when in substance it should be the subject of particulars, then a court may strike it out.

The test for a material fact

A good commonsense test as to whether a given statement is properly characterised as a material fact rather than a particular is to ask whether the cause of action or defence is complete without it. In other words, if you successfully proved each and every other factual allegation in the pleading, would you nevertheless have failed to set out some important matter that you needed to establish at trial? If the answer is 'yes', then the allegation is likely a material fact.

Material facts a party must plead, and those a party need not plead – general principles

A party must plead all material facts for which it bears the onus of proof. It must plead these facts even if they are known to the opposite party already. This requirement exists so that the opposite party can appreciate the case against it.

Among other things that a party must plead, it must plead any facts needed to establish

the capacity of the parties to sue and be sued (such as their status as a corporation).

Where a party does not carry the onus of proving a particular fact, then (subject to any contrary rule) it does not need to plead that fact. The same principle applies when a particular matter is presumed in the party's favour. The onus is then on the opposite party to plead that the presumed state of affairs does not in fact exist.

Under general principles, and also the specific provisions of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) (rule 153) and the *Federal Court Rules 2011* (Cth) (FCR) (rule 16.05(1)), the satisfaction of a condition precedent is assumed in a party's favour, and does not need to be pleaded.

If a matter would take a party by surprise, it should be pleaded irrespective of any of the matters above. In Queensland, this requirement is formalised in rules 149(1)(c), 151(2)(a) and 155(4) of the UCPR. The FCR contains a similar provision in rule 16.03(2). A general principle operates to the same effect in other jurisdictions as well, notwithstanding the absence of comparable provisions.

A party who is excluded from pleading a given fact must nevertheless plead that fact if the opposite party expressly puts the fact into dispute.

All of the matters above, and those that now follow (except where specified), are to be pleaded as facts, not particulars.

Material facts a party must plead – Queensland

The UCPR sets out a number of matters that a party must expressly plead. Some of these are caught by rule 149 of the UCPR, though most are set out in rule 150(1).

Aside from matters that would unavoidably be pleaded in the natural order of things, the most important of these is probably the requirement to plead each of the relevant types of damage alleged, performance, and state of mind (including knowledge or notice). Not only must the party plead these matters, it must plead (as a material fact) the circumstances that it contends support an inference of these matters; the latter is particularly important in the case of state of mind (rule 150(2)). Subject to setting out

the basis for any inference, the requirement to plead the relevant material fact will be satisfied by a concise statement to the relevant effect. The specifics of (for example) performance can be set out by way of particulars (and should be, pursuant to rule 157(c)).

Rule 150(3) sets out matters that a party must plead in support of a claim for a debt or liquidated damages. The rule clarifies which of these matters may be given as particulars; the other matters should be pleaded as material facts.

Rule 155(1) requires that "the pleading must state the nature and amount of the damages claimed"; these should be pleaded as material facts. Rule 155(2) sets out further details that are to be given as particulars.

Material facts a party must plead – Federal Court

Rule 16.08 of the FCR sets out the matters that a party must expressly plead as material facts in the Federal Court. These largely reflect the general principles set out above, and do not contain the specificity of their UCPR counterparts.

Division 16.4, in setting out the requirement for particulars in support of certain material facts, nevertheless embodies an expectation that the material facts in question will be pleaded: for example, rule 16.44(2) implies that a party must plead its entitlement to exemplary damages as a material fact, with the details giving rise to this entitlement to be given as particulars.

Particulars

The function of particulars is to narrow or clarify a given material fact, not to create separate allegations. The converse of the commonsense test for material facts above applies: if proving all of the other statements in the pleading would establish a party's case in full without the inclusion of a relevant statement, then that statement is a particular rather than a material fact.

Under the UCPR, the overriding position (per rule 157) is that a party must provide such particulars as are necessary to define the issues, prevent surprise at trial, enable the opposite party to plead, and support the various matters that the party must plead pursuant to rule 150.

Understanding the difference between material facts and particulars is crucial for all litigators. Report by

Kylie Downes QC and **Kurt Stoyale**.



Note that the matters in rule 150, including the matters giving rise to an inference (rule 150(2)), must still be pleaded as material facts.

A party must also provide particulars in support of its damages claim (rule 155(2)), any payment that it has made occasioning loss (rule 158) and certain matters connected with interest (rule 159). The provisions should be read closely, as they require certain matters to be pleaded as material facts.

Under the FCR, there is a general requirement (rule 16.41) to provide “necessary particulars”. The party must also give particulars of “the facts on which [it] relies” to prove misrepresentation or condition of mind. It must also particularise the facts supporting a conclusion that a party ought to have known something (rule 16.43(2)).¹

The format of particulars, whether they are incorporated into the body of the pleadings or delivered separately, should reflect their intent to clarify (and be consistent with any relevant court order, of course). They may be voluminous when that is necessary, but in other cases it may be better for them to be succinct, especially where they serve to narrow a broad material fact.

Where evidence fits in

Evidence is distinct from material facts; material facts are allegations, and the evidence is what proves the allegation. Evidence is also conceptually distinct from particulars – but here there is some crossover. A matter that focuses a pleading may also contain or reveal the information that a party seeks to rely on to prove the relevant material fact.

This state of affairs does not entitle a party to refuse to provide the information in question in response to a request for particulars. It is valid to refuse when the information is mere evidence. It is not valid to refuse when the information is a genuine particular that happens to also constitute or reveal evidence.

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

Note

¹ The latter is effectively analogous to the requirement in rules 150(1)(k) and 150(2) of the UCPR that a party must plead to circumstances from which a state of mind can be inferred.

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A sensible approach to research

Let the 'five Ws' be your guide

Keep 'who, what, when, where and why' in mind the next time you tackle a research assignment, and it may bring better results with less pain, says **Justine Gerrey**.



When embarking on a new research project, whether in a familiar area of practice or not, it is too easy to become lost in a labyrinthine exploration of the history of statute and common law until all semblance of the original purpose is lost.

Would-be researchers should never forget the (perhaps overly) basic principles of the 'five Ws' – who, what, when, where and why.

Who

Always remember your audience. A client will not want a comprehensive review of the history of your topic, whereas this may be useful when preparing a memorandum to a supervising solicitor.

Your preliminary research, findings, further questions and general information-gathering is an important scaffold, but beware of over-informing your intended recipient. It is important to retain the notes and background material, but they may need to remain separate from your final research outcome.

After conducting research, it is equally important to ensure that research is concisely summarised for the beneficiary; it is not always necessary to recite the workings of the research itself when reporting the outcome.

What

Define the problem; and this is easier said than done. You should keep the original research question in mind at all times, but also consider the purpose behind the question – what is the research really meant to provide?

If, for example, the research is preparatory to a comprehensive letter of advice to a client, you need to ensure you examine the scope of your instructions. If the research is to brief counsel for further advice, you should ensure you state your assumptions. There may be an assumed 'fact' which might seem so obvious that you see no need to mention it, but unless

it is equally obvious to the beneficiary of your research, an unstated premise could inadvertently misdirect or confuse you during research, or the beneficiary during review.

This is also the case when physically conducting the research. Make note of the parameters and keywords you use when conducting online searches. Are there any terms you are missing, or any terms that narrow your research too far? When conducting an online search and confronted by hundreds of possible results, it is common to narrow the search parameters to filter out extraneous material. You must remain aware, however, of the danger of overly narrowing your focus – remember the original question, not just the particular tangent you may be on at that moment.

When

Time management is critical when conducting research. It serves no purpose to get lost down the proverbial 'rabbit-hole' of an archaic argument that is of no practical use to your 'who'. It is also important to consider the budget before embarking on significant research – how much is this research 'worth'?

It is usually of benefit to clarify, prior to undertaking the research, how much billable time should and can be allocated to the task. As an early career lawyer, if you are unsure it is best to discuss this with your supervising solicitor.

Another 'when' factor is ensuring your research is period-appropriate. An action commenced in say 2003 may have come under legislation which has since been amended, or may have occurred prior to a prominent case decision. With a longstanding topic, it can be useful to construct a timeline of your research reference points, to ensure that you are examining the correct sources as they stood at the relevant time.

Where

Always retain your sources. The best research need only be conducted once, if properly referenced. Make a note of the Act

or regulation, the section or rule, the case or practice direction. It may be useful to ensure a copy of at least the more heavily referenced material is kept on file, in case further reference is needed.

For new lawyers, it is common to forget that there are also offline resources available. Do not be afraid to talk to your colleagues, supervising solicitor or even counsel (depending on your relationship with them). It is often the case that senior solicitors have 'been there, done that' and may have tips of their own to help you refocus your efforts.

Why

Always remember the 'endgame'. What purpose is this research meant to serve for you, as opposed to your 'who'? Is this preliminary research, for example to confirm a jurisdictional issue, or is it more comprehensive research for the foundation of a legal argument to be put forward?

Also, it may be advantageous to note research that may not support your basic premise, or that could require further examination. Quite often the original purpose of research changes or expands as a matter progresses, and issues that may have seemed irrelevant in the initial stages might be lost in assumptions related to the scope of the original research.

Conclusion

Of course there are no hard and fast rules when it comes to research, legal or otherwise, and each person should adopt or adapt whatever best complements their existing research technique.

Each of the 'five Ws' will have Venn-like overlap, but if the general principles behind each prompt are retained, they will assist in ensuring you make the most of your research.

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee's Proctor working group is chaired by Greer Oliver (GDavies@mcw.com.au) and Hayley Schindler (h.schindler@hopgoodganim.com.au). Justine Gerrey is a lawyer at Bottoms English Lawyers in Cairns.

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Same-sex marriage – discrimination by death

‘...in diversity there is beauty and there is strength’¹

with Christine Smyth



Queensland Law Society has a commitment to the principles and practice of equity and diversity in the Queensland legal profession.²

So it was with some interest I noted the controversy³ surrounding the inability of the South Australian Registry of Births Deaths and Marriages to register deceased man David Bulmer-Rizzi as married on his death certificate. The reported reason for this was that South Australia does not recognise overseas same-sex marriages.

Could something similar happen in Queensland? On 3 December 2015 the State Government introduced sweeping amendments to restore the provisions of the *Relationships Act 2011* (Qld). These were passed as the *Relationships (Civil Partnerships) and Other Acts Amendment Act 2015*.⁴

That Act provides for the legal recognition of relationships of adults, regardless of gender. It sets out the process by which this can occur in Queensland. If registered under this Act, those unions are registered as being in a civil partnership, or if registered under its predecessor, such unions are registered as a civil partnership.

However, the question remains. In Queensland can the same-sex spouse of a deceased person who was married overseas be registered on a death certificate as married to the deceased person?

Schedule 1, Part 3 of the *Births Deaths and Marriages Registration Regulation 2015* states that the death certificate must include details of whether:

- the deceased was ever married, and
- if the deceased was ever in a registered relationship.

In the *Relationships Act 2011* (Qld), s33(1) states: “A regulation may provide that a relationship under a corresponding law is taken to be registered as a registered relationship under this Act.”

S33(2) defines a corresponding law to mean “a law of another state or country prescribed under a regulation to be a corresponding law for this Act”.[emphasis added]

Pursuant to the *Relationships Regulation 2012* (Qld):

“S4(1) For the Act, section 33(2), definition *corresponding law*, the following laws are prescribed—

- (a) *Relationships Register Act 2010* (NSW);
- (b) *Relationships Act 2008* (Vic.);
- (c) *Relationships Act 2003* (Tas.);
- (d) *Civil Partnerships Act 2008* (ACT).

(2) For the Act, section 33(1),

each of the following relationships is taken to be registered as a registered relationship under the Act—

- (a) a registered relationship under the *Relationships Register Act 2010* (NSW);
- (b) a registered domestic relationship under the *Relationships Act 2008* (Vic);
- (c) a significant relationship for which a deed of relationship is registered under the *Relationships Act 2003* (Tas.);
- (d) a relationship registered as a civil partnership under the *Civil Partnerships Act 2008* (ACT).”

Accordingly, the *Relationships Act 2011* (Qld) recognises civil unions registered in NSW, Victoria, Tasmania and the ACT, however there are currently no regulations recognising civil unions entered into in another country. This said, a civil union is different to a marriage.

While the *Relationships Act 2011* (Qld) provides for the recognition of a corresponding law of another country, it is doubtful that a regulation under this Act can include same-sex marriage. This is because The *Marriage Act 1961* (Cth) governs marriage in Australia, and s8 extends the application of this Act to marriages solemnised outside of Australia. Part VA of the Act deals with recognition of foreign marriages. Notably section 88EA specifically states that:

“A union solemnised in a foreign country between:

- (a) a man and another man; or
- (b) a woman and another woman;

must not be recognised as a marriage in Australia.”

So while the South Australian Government is reported to being committed to changing its

laws to remove discrimination in various pieces of the state's legislation, such changes will be of limited utility with respect to the registration of same-sex marriage when the federal legislation does not permit such registration.

As it stands, in Queensland an overseas same-sex marriage cannot be registered on the death certificate.

The relevance of registration for succession law purposes was highlighted in the decision of *A & B v C* [2014] QSC 111 in which the court noted that the Register of Births Deaths and Marriages is for “statistical and evidential information mainly for the purposes of succession law. It is not a register of genetic material.”

Will – wherefore art thou?

Practitioners are reminded that Queensland Law Society holds thousands of wills and other documents, such as powers of attorney, for clients of former law practices placed in receivership.

It may assist your client, whether you are acting in a probate application, a claim against an estate, estate planning advice or power of attorney dispute, to ask QLS if it may hold documents of relevance to your matter. Please contact Sherry Brown or Glenn Forster at the Society on 07 3842 5888.

Christine Smyth is deputy president of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, *Proctor* editorial committee, STEP and an Associate member of the Tax Institute. Christine recently retired from her position as a member of the QLS Succession Law Committee, but remains as a guest. She acknowledges with thanks the assistance of QLS policy officer Louise Pennisi in the preparation of this column, particularly in researching the registration of marriages on death certificates.

Notes

¹ Maya Angelou.

² qls.com.au > For the profession > Practice support > Resources > Equity, diversity & flexibility.

³ abc.net.au/news/2016-01-21/bulmer-rizzi-death-certificate-recognise-same-sex-marriage/7105612.

⁴ It was introduced on 17 September 2015 with a summary contained in *Legislation Update* No.34 of 2015, dated 23 September 2015, at page 7.

s75(2) 'merry-go-round' makes up for land transfers

with Robert Glade-Wright



Property – transfers of land by husband's father – assessment of contributions

In *Bagby* [2015] FamCAFC 209 (6 November 2015) the Full Court (Bryant CJ, May & Thackray JJ) dismissed the husband's appeal from a property order made by Magistrate Moroni of the Magistrates Court of WA. The asset pool mainly comprised 'Property A' (\$610,000) transferred by the husband's father to the parties jointly and 'Property B' (\$1.95m) transferred by him to the husband as trustee of a trust for the children's benefit. The magistrate adopted an asset-by-asset approach, assessing the parties' contributions to Property A as equal ([47]) and the wife's interest in Property B at 30%. No s75(2) adjustment was made despite the wife being a Centrelink pensioner.

On appeal the husband argued that the order was unjust, the outcome being more than the wife had applied for or "outside the range". Thackray J (with whom Bryant CJ agreed) disagreed, saying that the husband's counsel "conceded that it was open to the magistrate to award the wife more than she sought" ([127]), concluding ([164]-[166]):

"It should also be noted that his Honour found that the majority of the s 75(2) factors favoured the wife but decided not to make any adjustment in her favour on account of that fact 'mainly because of the reasonably substantial size of the asset pool under consideration and to the practical results of the Court's determinations on the subject of contributions' ... (...) In effect, the magistrate was saying that whatever the wife might have lost on the contributions' swings, she would have made up on the s 75(2) merry-go-round. Given the length of the marriage [25 years] and the parties' ages, health and employment prospects, I consider that view was well open to his Honour."

Property – declaration that property husband transferred to new wife was held on trust – business valuation impossible due to his 'dishonest' dealings

In *Lynch & Kershaw & Ors* [2015] FCCA 2712 (13 October 2015) a business valuer "declared himself unable to arrive at a value ... because the husband failed to provide all the information requested of him and ... the

records he did provide were unreliable" ([4]). The husband had also transferred \$100,000 from the business to the second respondent, his new wife (Ms [K]), after separation which was used to buy 'Property F' (later sold and the proceeds used to buy 'Property J2' registered in Ms [K]'s name). The wife sought a declaration under s78(1) FLA that Property J2 was held on trust for the parties.

Judge Terry found ([197]) that "[a]lmost immediately after separation the husband with the assistance of Ms [K] embarked on a deliberate scheme to remove money from the businesses and acquire properties which he hoped could be put beyond the reach of the wife". Upon finding ([196]-[207]) that all purchase moneys had been provided by the husband, that he treated Property F as his own property and that it was he, not Ms [K], who made the mortgage payments on both properties, the court declared that Property J2 was beneficially owned by the husband under a resulting trust and should be included in the pool. The court said ([190]) that it was "impossible ... to come to a firm conclusion about what has gone missing from the companies since separation". As to the order made, the court said ([285]-[286]):

"If the businesses are worth \$310,000 as the husband asserts and nothing else is missing then he is receiving about 38% of the asset pool when an amount slightly over 50% might otherwise have been ordered in light of his inheritance and the age difference between himself and the wife. If the businesses are worth \$645,425 as the wife asserts and nothing else is missing then he is receiving 53.5% of the asset pool which is within a range of just and equitable outcomes."

Children – father took child from mother for 'respite', disappearing with paternal grandmother and child for five years

In *McLeod & Needham & Anor* [2015] FCCA 2808 (1 October 2015) Judge Terry heard a case between mother and paternal grandmother of an 8-year-old child (X). The parents began living together when the mother was 17 and the father 20, the mother deposing to violent and coercive conduct by the father ([6]). The case did not relate to their older child (Y). The father did not take part in the

proceedings except to appear in person on the first day of the hearing to say that he supported his mother. It was found ([10]-[15]) that the mother was unhappy in her relationship, did not cope well after X was born, that when X was three or four months old the father took X with the mother's agreement to give her some "respite" but instead (in conjunction with the paternal grandmother who at trial claimed the mother had given the child up) "stole X away" to Queensland, remaining out of touch with the mother for the next five years. In that time the mother "struggl[ed] with alcohol abuse and began using cannabis" and, "struggling with her own issues", "did not make very strenuous efforts" to find the child ([21]).

The court found, however, that "gradually over time the mother got her life back on track. She sought assistance for her depression and anxiety, she obtained a job and in due course she bought a house ... subject to a mortgage and re-partnered with Mr C" ([23]). She began parenting proceedings and to spend time with X after hearing from Child Support that the father was in jail ([24]). X expressed a wish "to stay with the paternal grandmother [who] ... needed her because the paternal grandfather had died", the report writer's view being that the child "had been coached to say that" ([94]-[95]). The court declined to place weight on the child's views as she had had "insufficient experience of the alternative offered by the mother" ([100]). Upon ordering that the child live with the mother and that the grandmother have supervised time for the next 12 months, the court said ([210]-[211]):

"There is a very high risk that if X remains with the paternal family her relationship with her mother will fail to thrive due to the antagonism the paternal family feel for the mother and the mistaken beliefs they hold about her which could in turn lead to a failure to take X to changeovers and a failure to facilitate telephone communication. My major concern is that nobody in the [paternal] family is capable of protecting X from exposure to the father's drinking, drug use and violence. (...)"

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

Kevin Gary Kitchener

14 July 1947 – 18 January 2015

Hail and farewell, or goodbye. By either term, the passing of Kevin Kitchener (or 'KK' as he was often called) is an event which causes one to pause for so many reasons.

Father, lawyer, husband, business partner, golfer, raconteur and most of all friend – a man for all seasons, as Robert Bolt would say.

Kevin Kitchener was born in Sydney, New South Wales. Kevin's grandfather migrated from India to Australia. As Kevin would say, he had an un-pronounceable name and so the immigration officials named him 'Kitchener', after Lord Kitchener.

Kevin's grandfather married an Aboriginal woman and their son, Kevin's father, went on to marry a Scottish woman. Kevin was one of three brothers. While he often described a hard upbringing, he did not complain, choosing as always to look to the achievements he had attained, rather than the journey that got him there. These things shaped and formed Kevin with a strong sense of equality and of compassion.

Kevin achieved his high school certificate from the Granville College of TAFE and went on to study law part-time at the University of New South Wales, graduating in 1988 with his LLB.

Whilst educating himself and studying for his law degree, Kevin worked in many occupations, most notably as a barman and cellarman. Kevin also spent five years as a shop steward for the Federated Rubber and Allied Workers Union and was a member of the executive committee for most of that period.

But it was during his university years that Kevin obtained positions, first as a trainee conciliation officer and then 18 months later as an acting senior conciliation officer with the National Employment Services Association (NESA). During his employment with the Anti-Discrimination Board, Kevin's interests in an even playing field and the rights of the less privileged germinated.

In 1989 Kevin was appointed head of the Aboriginal Issue Unit in the Royal Commission into Aboriginal Deaths in Custody. Here he dedicated his time liaising with Aboriginal communities, explaining to them the roles and responsibilities of the Royal Commission. He travelled throughout New South Wales



and Tasmania, meeting with Aboriginal communities to discuss their concerns in relation to deaths in custody.

Following the attainment of his LLB, Kevin was called to the New South Wales private Bar. He was one of the first Aboriginal barristers at the New South Wales Bar, being admitted on 4 August 1989. He commenced practice as a barrister on 2 October 1990, quickly developing a broad practice in all major courts and tribunals. He also undertook lecturing duties at Sydney universities and colleges where he lectured on Aborigines and the law, the criminal justice system and contemporary society.

Over the coming years Kevin travelled widely and worked in New South Wales, Western Australia, Northern Territory and Queensland. He was admitted to the Supreme Court in Queensland as a solicitor in 1994. In February 2003, Kevin found himself working for the Aboriginal and Torres Strait Islander Legal Service (ATSILS) in Townsville as a senior solicitor working tirelessly in criminal law.

In July 2007, Kevin was invited to become a partner of Stevenson & McNamara Lawyers in Townsville. He quickly acquired a practice in family law and civil litigation, as well as maintaining his interest and involvement in criminal law and child protection matters. Despite his flourishing practice, his typing skills, however, never quite seemed to flourish as well!

Kevin moved around Australia, but this proved a great source for his understanding of men, women and children from across all communities and all walks of life, giving him what is often called the human touch. He spoke and wrote fluent French and had a great love of the arts. But in truth his real passion was golf. He had two great vices, cigarettes and a stubbornness when it came to his own health.

Kevin ceased practising law at the end of April 2014 after being diagnosed with lymphatic cancer. He returned to Sydney to family and for treatment. Following a period of chemotherapy Kevin appeared to be on the mend, but after tumours were observed in a brain scan he went under the knife, surviving the surgery but passing several weeks later on 18 January 2015.

Kevin Kitchener is survived by his partner Judy, his former wife Pauline, his children Sean, Matthew and Kirsty, and his grandchildren. His sphere of influence can be seen by the vale tributes paid by the Anti-Discrimination Board of New South Wales and the New South Wales Bar Association. He leaves behind friends, work colleagues and grateful clients. Above all, he is missed.

Darin Honchin

Darin Honchin is a Townsville barrister.

Loyalty means we sometimes say 'no'

by Stafford Shepherd



One of our most important obligations is to serve the best interests of our client¹ – in essence, loyalty.

This obligation is subject to our first duty to the court and the administration of justice.² The duty of loyalty is a burden of selflessness that we voluntarily assume when we accept instructions to act for a client. It requires that we ensure that we retain confidences that a client reposes in us, as well as avoiding personal interest conflicts.

Serving the client's best interests requires that we not compromise our integrity and professional independence. This requires that we do not use our position to secure to ourselves or a law firm which employs us, benefits in excess of fair remuneration.³

It is all about us as individuals regulating our self-interest. We must be mindful of the balance of power that exists between us and the client, the client and the firm, and the firm and third parties.

On limited occasions in assessing this balance of power, it may mean that we say no if the course of conduct being suggested does not serve the best interest of the client who has entrusted us with responsibility of

representing them. Saying no is hard, but it is the burden we accept by the oath we have taken.

Serving the best interest of the client is serving the administration of justice. As officers of the court, we are expected to act responsibly and to deliver the practical wisdom our clients need to understand the legal issues and make informed decisions as to how they should proceed. We deliver practical wisdom by being honourable, loyal and trustworthy. Our duty of loyalty has been described as being "unequalled elsewhere in the law".⁴

Michele DeStefano⁵ has used the analogy of too many cooks in the kitchen when referring to the competing interests that may arise when law is practised through corporations. Incorporated legal practices have unique difficulties due to the differentiation between ownership and management.

The underlying philosophy behind our conduct rules makes no differentiation as to whether we are sole practitioners, partners, employed solicitors, or legal practice directors. We are all bound by the same ethical constraints – serving the best interests of our client subject only to our duty to the court and the administration of justice.

Integrity and professional independence underpin those fundamental duties referred to above. It is right for us to say no when internal or external influences are attempting

to remove those underpinnings. Our values can be encapsulated in three words – fidelity, service and courage. Courage is maintaining our integrity and professional independence. As the United States Marine Corps values say – It is doing the right thing, for the right reason, in the right way.

I was privileged to move the admission of a colleague recently. The Chief Justice in her welcome to the new officers of the court reminded the profession that we:⁶

"... are... subject to high professional standards of competence and ethics. You are members of a profession which has a long and proud history of integrity and independence."

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

Notes

¹ Rule 4.1.1 *Australian Solicitors Conduct Rules 2012* (ASCR).

² Rule 3.1 ASCR.

³ Rule 12.2 ASCR.

⁴ See *Moffat v Wetstein* (1996) 135 DLR (4th) 298, 315.

⁵ *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?* 80 Fordham L. Rev. 2791 2011-2012.

⁶ Chief Justice of Queensland Catherine Holmes, address at the admission ceremony, session 4, 8 February 2016.



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Signing of the times

What about contracts and deeds?

‘Electronic signatures’ can include a scanned image of a signature inserted into a document, a typed name or a digital signature created using public key infrastructure, or a combination of these.

There are several cloud-based electronic signing services available. Some use typed signatures. For example, the service may allow you to upload a document to an electronic signing website, then email a person a website link to the document for them to sign.

When they click the link they are taken to a website page with the document. It contains a line and an ‘x’ for them to sign, but on the line is a box which states ‘click to sign’. The person can type their name and choose a variety of fonts with appearances similar to handwriting.

They can then click ‘apply’ and their name appears in that font on the signature line. If the person needs to sign in other places, they can click in the other places in the document to insert the same signature.

Public key infrastructure is a more secure form of signing. When you sign a document using a digital signature, you cryptographically sign the document with your private encryption key which you keep secret. In practice, you might insert a USB key containing your private key and enter a PIN to run the encryption.

The recipient decrypts the signature with a corresponding public key and checks with the key certification authority that the key has not been revoked. If you lose your key, you tell the key certification authority so it can revoke the key and can tell people that the key has been revoked.

Legal requirements for signatures

There is no requirement under the common law for a contract to be in writing and signed. You can make most contracts through a spoken agreement. However, it’s prudent to ensure that contracts are in writing to confirm what has been agreed and that they are signed to confirm that parties are bound.

Legislation requires certain contracts to be in writing and signed. The most well-known is the Statute of Frauds legislation that requires writing for guarantees and dispositions of land signed by the guarantor or seller, in sections 56 and 59 of the *Property Law Act 1974*.

What satisfies a statutory requirement for writing and a signature is a matter of statutory interpretation.

‘Writing’ is defined in schedule 1 of the *Acts Interpretation Act 1954* to include any mode of representing or reproducing words in a visible form. An email or a document in some other electronic format, such as a PDF file, can satisfy the requirements for writing in a Queensland Act, subject to any contrary intention appearing in the Act.¹

‘Sign’ has been held to mean “affixing in some way, whether by writing with pen or pencil or by otherwise impressing upon a document, one’s name or ‘signature’ so as personally to authenticate the document”.² Affixing a rubber stamp can be sufficient. A name typed in an email can also be sufficient.³

Doubt about whether an electronic signature is effective can also be removed by electronic transactions legislation. Section 14(1) of the *Electronic Transactions (Queensland) Act 2001* provides:

14 Requirement for signature

- (1) If, under a State law, a person’s signature is required, the requirement is taken to have been met for an electronic communication if—
 - (a) a method is used to identify the person and to indicate the person’s intention in relation to the information communicated; and
 - (b) the method used was either—
 - (i) as reliable as appropriate for the purposes for which the electronic communication was generated or communicated, having regard to all the circumstances, including any relevant agreement; or
 - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
 - (c) the person to whom the signature is required to be given consents to the requirement being met by using the method mentioned in paragraph (a).

In *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119,⁴ an email was held to meet the requirement for writing signed by a seller in s59 of the *Property Law Act*. Martin J indicated that the requirement in s14(1)(b) was met because the person signing could

be identified and their intention could be established by evidence made up of various conversations before the email was sent together with an admission in the pleadings about who sent the email.

Signing by companies

Under s127(1) of the *Corporations Act 2001* (Cth), a company may execute a document by having two directors or a director and secretary of the company sign the document.⁵ Under s129(5) of the *Corporations Act*, a person can assume that a document has been duly executed if it appears to be executed in accordance with s127(1).

The definition of ‘document’ in s2B of the *Acts Interpretation Act 1901* (Cth) includes anything from which writings can be reproduced. A document can therefore include a computer system which can display the document. ‘Sign’ is not defined in the *Corporations Act*. It is seems likely that it would include an electronic signature but there do not appear to be any cases on the issue.

The provisions of the *Electronic Transactions Act 1999* (Cth) about electronic signatures do not apply to the *Corporations Act*.⁶ It is therefore not possible to rely on the *Electronic Transactions Act* to deem that the requirement for a signature under s127(1) of the *Corporations Act* has been met.

A company can execute a contract through an agent. Section 136 of the *Corporations Act* provides that a company’s power to make a contract may be exercised by an individual acting with the company’s express or implied authority. The *Corporations Act* does not say how the agent must make the contract or that they can sign electronically.

For significant contracts, parties often insist on signing under s127(1) so that it is possible to rely on the assumption in s127(5) and insist on the cautious approach of printing the document and signing it manually.

Witnessing of contracts

There is no requirement under the common law for contracts to be witnessed. It is not unusual for the parties to a contract to provide for signatures to be witnessed however, because it might help resist any potential claims by a party signing that it was fraudulently signed by someone else. There are practical issues to overcome if electronic witnessing is to be as effective for this purpose as manual witnessing.



A range of electronic signing tools are now available, but can contracts and deeds be signed electronically? **Chris Maxwell** offers an overview.

Deeds

At common law, a deed was required to be written on paper, parchment or vellum and had to be sealed by the parties executing the document, and had to be delivered.⁷ Some of these requirements have been modified by statute.⁸ However, the requirement for paper, parchment or vellum has not changed. Additionally, the *Electronic Transactions (Queensland) Act* does not apply to witnessing requirements.⁹ It appears that a deed must be a signed and witnessed paper document.¹⁰

Can a contract or deed be signed electronically? For contracts the answer is often 'yes'. For deeds the answer is most likely 'no'.

This article appears courtesy of the Queensland Law Society Government Lawyers Committee. Chris Maxwell is a special counsel at Crown Law and a member of the committee.

Notes

¹ Section 4 of the *Acts Interpretation Act 1954*.

² *Goodman v J Eban Ltd* [1954] 1 QB 550 at 557 in relation to the requirement for a letter to be signed under s65(2) of the *Solicitors Act 1932* (UK) (repealed).

³ *Stuart v Hishon* [2013] NSWSC 766 in relation to confirmation of a debt required to be signed under s54(4) of the *Limitation Act 1969* (NSW).

⁴ See Melinda Pugh's legal update for more information about this case: crownlaw.qld.gov.au/resources/publications/a-good-reason-to-think-before-you-hit-send.

⁵ Or the sole director and secretary can sign for a proprietary company with a sole director who is also the sole company secretary.

⁶ Section 7A(2) of the *Electronic Transactions Act 1999* (Cth) and s4 and item 30 of schedule 1 of the *Electronic Transactions Regulation 2000* (Cth). While item 30 refers to the "Corporations Law", that is taken to include the *Corporations Act 2001* (Cth) under s10(b) of the *Acts Interpretation Act 1901* (Cth).

⁷ Seddon N, *Seddon on Deeds*, The Federation Press, 2015 at paragraph [2.2]. *Goddard's Case* (1584) 2 Co Rep 4b, 5a; 76 ER 396.

⁸ For example, s45 of the *Property Law Act 1974* modifies requirements about sealing documents.

⁹ Section 7A(1) and item 6 of schedule 1 of the *Electronic Transactions (Queensland) Act 2001*.

¹⁰ Seddon N, *Seddon on Deeds*, The Federation Press, 2015 at paragraph [2.28].

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Law Foundation Queensland

No variance for filed orders

Hayes v Westpac Banking Corporation [2015] QCA 260

UCPR r667 – setting aside judgments – whether time may be extended under UCPR r7 after order has been filed

In *Hayes v Westpac Banking Corporation* [2015] QCA 260 the Queensland Court of Appeal examined the relationship between rules 7 (extending and shortening time) and 667 (setting aside) of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), and held that r667(1) does not enable the court to set aside or vary an order after the order has been filed.

The court found that, to the extent that this conclusion was contrary to the decision in *McIntosh v Linke Nominees Pty Ltd* [2010] 1 Qd R 152 (*McIntosh*), the decision in *McIntosh* was wrong and should not be followed.

Background

The first respondent, Westpac Banking Corporation (Westpac) sued the appellant on a guarantee he had given in favour of Westpac. The appellant counterclaimed against Westpac and also against the second respondent, Balmain NB Commercial Mortgages Limited (Balmain), who was his finance broker. The appellant was appearing for himself in defending Westpac's claim and prosecuting the counterclaim with the assistance of a non-lawyer, Mr Freeman.

The trial in the matter had commenced in December 2013 but was adjourned on several occasions. When the matter came on for further hearing on 3 November 2014 the appellant did not attend court, but Mr Freeman on his behalf applied for an adjournment.

The trial judge refused to grant an adjournment, concluding that the medical evidence provided did not demonstrate an adjournment was required. His Honour then gave judgment for Westpac, both on its claim and the appellant's counterclaim against it, and for Balmain on the appellant's counterclaim against Balmain. The order giving effect to the judgment was filed on 20 November 2014. The appellant did not appeal against any of the orders made on 3 November.

The appellant, by application filed on 4 February 2015, sought an order under r667(1)(b) or r667(2)(a) of the UCPR to set aside the judgment. On 24 February 2015 the primary judge dismissed the application with costs.

The primary judge rejected the application to the extent that it was made under r667(2)(a) of the UCPR on the basis that, as Mr Freeman had been given leave to appear on behalf of the appellant at the trial, it could not be said the judgment on 3 November 2014 was given in the absence of the appellant.

In relation to r667(1)(b) of the UCPR, it was noted that the judgment was formally taken out more than seven days after it was pronounced on 3 November 2014, but before the application to set aside the judgment. The primary judge also noted that, even accepting that the decision in *McIntosh* permitted the enlargement of time in r667(1)(b), this would still leave the earlier event as the formal taking out of the judgment, so that the subrule would not apply. The primary judge viewed this circumstance as one that was available for argument in *McIntosh*, but as one which was apparently not raised by the parties. Accordingly the primary judge did not regard *McIntosh* as deciding the point.

In the event that approach was wrong, the primary judge went on to consider the merits of the application, and concluded that the judgments should not be set aside on discretionary grounds. The primary judge noted in particular that r667 should not be used to circumvent the normal appeal process in relation to the decision by the trial judge to refuse an adjournment or to give the judgment.

The appellant appealed against those orders the Court of Appeal.

Issues

The issues raised by the appeal were:

1. Did the primary judge err in law in not following the ratio decidendi of the decision of the Court of Appeal in *McIntosh* in respect of extending time under r7 of the UCPR?
2. Did the primary judge err in refusing the application on discretionary grounds?

Legislation

Pursuant to r7(1) of the UCPR: "The court may, at any time, extend a time set under these rules or by order."

Rule 667 of the UCPR provides, so far as is relevant:

667 Setting aside

The court may vary or set aside an order before the earlier of the following—

- (a) the filing of the order;
- (b) the end of 7 days after the making of the order.

The court may set aside an order at any time if—

the order was made in the absence of a party; or

...

Analysis

The lead judgment was delivered by Mullins J.

Her Honour considered the decision in *McIntosh* in order to determine what it decided. In that case the respondents to an appeal applied to vary a costs order made against them as one of the orders made in the appeal. The application was made after the order was filed. The application was opposed by the appellant on the basis that the court did not have power under r7(1) of the UCPR to extend time, because the general power to extend time by that rule was excluded by the specific provisions of r667.

The Court of Appeal in that case described r7 as a remedial provision in aid of the purpose expressed in r5 of facilitating the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. It concluded that the rule permitted a court to extend the seven-day period prescribed by r667(1)(b), and found it was appropriate in the circumstances of that case to extend the time under r667(1) and to vary the costs order.



A recent Court of Appeal decision runs contrary to the precedent that a court may vary or set aside an order after it has been filed. Report by **Sheryl Jackson**.

Mullins J observed that the focus of the application of r7 in *McIntosh* was on the time period under r667(1)(b). Her Honour said (at 30):

“As observed by the primary judge, it does not appear to have been argued in *McIntosh* that r 667(1) refers expressly to a time limit determined by reference to two events, being ‘before the earlier of ... the filing of the order [and] the end of 7 days after the making of the order’. It is implicit by the order that was made in *McIntosh*, however, that the court not only extended the period of seven days referred to in r 667(1)(b), but modified (without express explanation) the effect of the filed order being the earlier of the two events referred to in r 667(1).”

It was noted that, as in *McIntosh*, the application under r667(1) was made subsequent to the filing of the relevant order so that prima facie, the decision in *McIntosh* applied to permit reliance on r7(1) to extend the time for filing the application. Mullins J then considered whether the decision in *McIntosh* should be followed.

Her Honour emphasised that the timing required of an application made under r667(1) was “before the earlier of” the two events specified in paragraphs (a) and (b), and

stated that this was not itself a time period as contemplated by r7. If the order has been filed, then the timing of any application is determined by whether it occurred before the filing of the order. In her Honour’s view it is only the specified event in r667(1)(b) which is calculated by reference to a time period, and that seven-day period is amenable to the application of r7, provided the relevant order has not been filed. Her Honour said (at [35]):

“If the order has been filed, there is no longer any room for the operation of r 667(1)(b), as extending the period of seven days in r 667(1)(b) could never change the fact that the filing of the order would continue to be earlier than any extended date under r 667(1)(b). Rule 7 does not empower the court to deem an event that has occurred (such as the filing of the relevant order) as not having occurred for the purpose of considering the application under r 667(1).”

The court concluded that, to the extent that *McIntosh* appeared to be authority for applying r7 to extend the time period for making the application to vary or set aside an order after the order was filed, it was wrong and should not be followed. Accordingly, the appellant was too late in applying to set aside the judgments given against him on 3 November.

In light of this conclusion, it was not necessary for the court to address the arguments put for the appellant in relation to the merits of the application to set aside the orders.

The appeal was dismissed, with costs.

Comment

As was noted in the lead judgment, the decision leaves room for the operation of r667(1) in a case where the application to vary or set aside the order is made before the relevant order has been filed, or when any application under r7 to extend the time period under r667(1)(b) is made before the relevant order has been filed.

It is also clear that in each of the discrete circumstances identified in r667(2) the court may exercise the power to set aside an order at any time.

Sheryl Jackson is an adjunct associate professor at the QUT School of Law. The Queensland Law Society Litigation Rules Committee welcomes contributions from members. Email details or a copy of decisions of general importance to s.jackson@qut.edu.au. The committee is interested in decisions from all jurisdictions, especially the District Court and Supreme Court.



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High Court and Federal Court casenotes

High Court

Criminal law – sentencing for federal offences – consistency of sentencing – use of statistics in sentencing

In *The Queen v Pham* [2015] HCA 39 (4 November 2015) the High Court held that a court sentencing a person for a federal offence must have regard to current sentencing practices across Australia. It is an error to prefer the sentencing practices in the particular state. Intermediate appellate courts should have regard to the decisions of other appellate courts in comparable cases as illustrations of possible sentences unless there are compelling reasons not to do so. Further, the use of statistics in sentencing was of limited use and it was an error to treat the weight of a drug being trafficked as the chief or controlling factor in sentencing without full regard to the individual circumstances of the offender. French CJ, Keane and Nettle JJ jointly; Bell and Gageler JJ jointly (agreeing as to sentencing practices; concurring for separate reasons as to statistics and sentencing factors). Appeal from Court of Appeal (Vic.) allowed.

Administrative law – procedural fairness – ‘legitimate expectation’ – change in decision-maker without notice to the applicant

In *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) the respondent had been interviewed by a reviewer who was unable to finish the matter and give a decision. A second reviewer did not interview the respondent and did not inform him of the change. The High Court held that, in the circumstances, the failure to inform the respondent and to give him a chance to be heard on the procedure that should follow the change of decision-maker was unfair and a breach of procedural fairness. The court also confirmed that the concept of ‘legitimate expectation’ is unnecessary and unhelpful. Kiefel, Bell and Keane JJ jointly; Gageler and Gordon JJ jointly concurring. Appeal from Full Federal Court dismissed.

Constitutional law – penal or punitive detention – separation of powers in the territories – *Kable* principle

In *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41 (11 November 2015) the High Court held to be valid a territory provision allowing police officers to arrest and detain a person without warrant for up to four hours (or longer if the person is intoxicated) on the basis of an infringement notice offence. The plurality (French CJ, Kiefel and Bell JJ jointly; Nettle and Gordon JJ jointly concurring) construed the four-hour limit as operating only as an outer limit on the general requirement to, as soon as practicable, release a person arrested, grant them bail or bring them before a justice or a court. So

construed, the detention fulfilled a non-punitive purpose (referring to *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1). It was therefore not necessary to consider whether the separation of powers applies to territory legislatures. The plurality also held that the provision did not infringe the *Kable* principle. Keane J held the provision to be valid on the basis that territory legislatures are not subject to the separation of powers and did not infringe *Kable*. Gageler J dissented on the construction of the section and held it to infringe *Kable*. His Honour also held that territory legislatures are not subject to the separation of powers. Answers to special case given.

Foreign state immunity – immunity from jurisdiction – registration of foreign judgments – ‘commercial transaction’ – service of registered foreign judgments – immunity from execution – ‘commercial property’

In *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43 (2 December 2015) the High Court held that proceedings to register a foreign judgment under the *Foreign Judgments Act 1991* (Cth) would be “concerned with” a “commercial transaction” and thus exempt from foreign state immunity under the *Foreign States Immunities Act 1985* (Cth) (FSI Act) if the subject matter of the underlying overseas judgment was commercial (that is, registration proceedings were not separate and independent). The court also held that applicants for registration were not required to follow procedures for service under the FSI Act. In relation to execution of the registered judgment, the court held that determining whether a state’s property was in use for a commercial purpose (meaning immunity from execution did not apply) required consideration of the form of the use, the objective reasons why the property is in use, and the particular circumstance of the state. French CJ and Kiefel J jointly; Gageler J agreeing (but dissenting on the service point); Nettle and Gordon JJ jointly concurring. Orders of Court of Appeal (NSW) varied, appeal otherwise dismissed.

Immunities of international organisations – immunity from taxation – pensions, salaries and emoluments – treaty interpretation

In *Macoun v Commissioner of Taxation* [2015] HCA 44 (2 December 2015) the High Court held that the *International Organisations (Privileges and Immunities) Act 1963* (Cth) did not confer immunity from taxation on a pension paid by the International Bank for Reconstruction and Development (part of the World Bank) to a former official. The salary of an official holding a current office is exempt from tax under the Act, but the pension of a former official is not. Such a pension was not part of the salaries and emoluments paid to the official. Further,

that interpretation of the Act is consistent with Australia’s international obligations under the *Convention on the Privileges and Immunities of the Specialized Agencies*. French CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from Full Federal Court dismissed.

Employment law – sham employment arrangements – misrepresentations of employment relationships – independent contractors and employees

In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45 (2 December 2015) the High Court held that s357 of the *Fair Work Act 2009* (Cth) prohibits an employer from misrepresenting to an employee that they are engaged as an independent contractor under a contract for services with a third party. The court held that the section is not limited to misrepresentations that the relevant contract for services is with the employer, but extends to any misrepresentation that the person is engaged as an independent contractor and not an employee. French CJ, Kiefel, Bell, Gageler and Nettle JJ jointly. Appeal from Full Federal Court allowed.

Civil penalties – agreed penalties – roles of parties and courts in setting civil penalties – whether court prevented from receiving submissions as to appropriate penalty amounts

In *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 (9 December 2015) the High Court held that a court deciding an application for civil penalties is not prevented from receiving submissions from the parties on the amount of an appropriate pecuniary penalty, including where the parties are agreed as to that amount. The court’s decision in *Barbaro v The Queen* (2014) 253 CLR 58, which limited the submissions a prosecutor could make about the available range of criminal sentences, was held not to apply in civil penalty proceedings. If the court is persuaded of the accuracy of facts agreed by the parties and that the penalty proposed by the parties is appropriate in the circumstances, it is desirable for the court to accept the parties’ proposal. French CJ, Kiefel, Bell, Nettle and Gordon JJ jointly; Gageler J and Keane J separately concurring. Appeal from Full Federal Court allowed.

Taxation – income tax – obligations of agents and trustees to retain monies to pay tax

In *Commissioner of Taxation v Australian Building Systems Pty Ltd (In Liq)* [2015] HCA 48 (10 December 2015) the High Court held that s254(1)(d) of the *Income Tax Assessment Act 1936* (Cth) does not require an agent or trustee to retain, from time to time, out of money coming to them in their representative capacity, sufficient money as to be able to pay tax that will become due in respect of the taxpayer’s income, profits

with Andrew Yuile and Dan Star



or gains. Rather, the obligation to retain money only arises after the making of an assessment (or deemed assessment). French CJ and Kiefel J jointly; Gageler J concurring; Keane and Gordon JJ separately dissenting. However, the court unanimously overturned holdings of the Full Court, that (i) s254 imposes a liability to pay tax not on liquidators, but only on the taxpayer and (ii) s254 is merely a collecting provision and does not itself impose a liability to pay tax. Appeal from Full Federal Court dismissed.

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

Federal Court

Contempt of court – civil contempt – construction of injunction at a contempt hearing – whether terms of the injunction clear and unambiguous

In *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 1441 (17 December 2015), the sixth and seventh respondents (together, NRM) were found guilty of contempt of court. At an earlier trial, various respondents including NRM were found to have engaged in unconscionable conduct in the marketing and sale of medical treatments for premature ejaculation and erectile dysfunction in contravention of s51AB of the then *Trade Practices Act 1974* (Cth) (see [2015] FCA 368). The relief that North J granted at that time included injunctions restraining NRM from making certain statements or representations to, relevantly, any “prospective patient” as to, among other things, (i) the “efficacy” of certain treatments and (ii) the “efficacy” of any medications or medical services offered. The ACCC alleged that, by a series of radio and television advertisements and statements on a website, NRM breached the injunction. This being a case of civil contempt, the elements that the ACCC had to prove included that the terms of the injunction were clear, unambiguous and capable of compliance. NRM argued against a finding of contempt on the basis that parts of the injunctions (such as the words “prospective patient” and the word “efficacy”) were not clear and unambiguous. NRM also disputed that the alleged statements contravened the injunction. Moshinsky J rejected NRM’s contentions and made declarations of contempt.

Industrial law – penalty to be paid personally by natural person contravenor?

Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No.2) [2015] FCA 1462 (22 December 2015) is the ‘penalty’ judgment following an earlier judgment ([2015] FCA 1125) in which the CFMEU and an officer of the union were

found to have contravened ss355 and 346 of the *Fair Work Act 2009* (Cth).

In determining the appropriate penalties, Jessup J set out and considered the union’s long and serious record of previous contraventions of industrial legislation.

The regulator sought an order expressly requiring the union officer to pay the penalties imposed on him personally, as was done by Flick J in *Director of the Fair Work Building Industry Inspectorate v Bragdon (No.2)* [2015] FCA 998. Jessup J refused to make such an order for the reasons in his Honour’s judgment in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCA 1173.

Editor’s note: The judgment of Flick J in *Bragdon* referred to above is the subject of an appeal to the Full Court which, at the time of writing, was listed to be heard on 8 February 2016 (proceeding NSD1183/2015).

Migration – no opportunity given to child to comment on the assessor’s adverse view of her adult half brother’s credibility

In *AZAEF v Minister for Immigration and Border Protection* [2016] FCAFC 3 (18 January 2016) the Full Court, by majority, overturned a decision of the Federal Circuit Court of Australia (FCCA) on procedural fairness grounds. The appellant was an infant child (six years old) when she and her half-brother (nearly 19 years old) applied for protection visas. The Minister’s delegate was not satisfied that they were persons to whom Australia owed protection obligations. There was a referral to an independent protection assessor (IP assessor) under the Protections Obligations Determination Framework. The IP assessor’s disbelief of the half-brother’s evidence was central to his decision to reject the appellant’s claims. The appellant and her half-brother’s application for judicial review was rejected by the FCCA. On appeal, Griffiths J and White J (Besanko J dissenting) held there was a denial of procedural fairness to the appellant because the IP assessor failed to provide her (or, alternatively, given her young age, her guardian and/or migration agent) with an opportunity to comment on the fact that the assessor disbelieved most of her half-brother’s evidence (at [74] and [116]–[118]). It was important to the majority’s decision that the appellant and her half-brother had some separate claims for protection (at [79], [107] and [120]–[121]).

Practice and procedure – inadequate explanation for delay for substantive pleading amendment – leave to amend statement of claim refused

In *Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu (a firm)* [2016] FCAFC 2 (15 January 2016) Gilmour, Perram & Beach JJ

unanimously dismissed an appeal refusing leave to amend statements of claim. There were four related commercial proceedings arising out of the financial failure of Tamaya. Each proceeding was commenced shortly before (and, in one case, shortly after) the expiration of the applicable six-year limitation periods. On 31 July 2015, the liquidators sought to make substantial and complicated amendments to the pleadings including new allegations. The trial was relisted from October 2015 to May 2016, but there would still not be sufficient time to complete the trial in the six weeks allocated to it if the amendments were granted. The winding up had been in train for many years and there had been two rounds of public examinations. The primary judge refused leave for the amendments. The Full Court held as follows:

(1) The primary judge did not make any *House v R* errors in the exercise of her discretion to refuse leave to amend. There was one respect in which the primary judge incorrectly observed that Tamaya had not explained how the amendments would have any particular value to Tamaya’s case. As it was plain that the primary judge took the significance of the amendments into account, that error was one of labelling and had no material consequence.

(2) The primary judge did not fail to accord procedural fairness by making findings that were not sought by the respondents or raised by her Honour during the hearing.

In considering numerous grounds of appeal, the Full Court addressed the principles and evidence relevant to whether delay by the party seeking the pleading amendment had been adequately explained. The court rejected the appellant’s submission that *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 requires the explanation for any delay to be confined to facts and circumstances which have arisen only after the institution of the proceedings. The Full Court said at [136] “... But it would be quite artificial to exclude, in every case, evidence of facts and circumstances pre-dating the commencement of proceedings. Of course, the delay can only be after the commencement of proceedings. However, we see no reason in principle why that delay cannot be considered in light of the history of the proceeding, both before and after its inception. Such consideration may, and in this case does, bear both qualitatively and quantitatively upon the delay involved and, therefore, upon its degree of seriousness...”

Dan Star is a Victorian barrister, phone 03 9225 8757, email danstar@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au. Numbers in square brackets refer to a paragraph number in the judgment.

Recipe for resilience

Symposium session focuses on challenges of change

Working as a lawyer is a wonderful experience, but it can also be challenging.

Besides your own expectations and ethics, there are many external aspects of your profession that require attention, including the expectations of your clients, cases to investigate and industry regulations, as well as the evolution of technology.

You can start the day feeling energised and focused, with your three most important tasks ready to go. Then the phone rings, you get interrupted by colleagues, and the internet fails. By the end of the day, two out of those three most important tasks still need to be completed, and this can leave you feeling defeated.

Within all of this there is one constant – change. In fact, change is one of the few certainties in work and life.

So, how do you learn to juggle everything that comes your way with working in professional practice, including your roles and responsibilities, effectively and efficiently while managing change? You need to learn and master a range of skills that continue to enhance your resilience.

What is resilience?

The idea of resilience has been used to describe individuals who are able to deal constructively and persist in the face of challenge and change. Resilience involves the mental (thoughts), emotional (feelings), social (relationships), spiritual, environmental, physical and occupational health of individuals.

According to Bonnie Benard,¹ “... personal resilience strengths are the individual characteristics associated with healthy development and life success”, and these personal strengths do not cause resilience, but are the positive developmental outcomes that demonstrate that these innate individual characteristics are engaged.

The four categories of *personal resilience* strengths are:

1. *social competence* (communication skills, being responsive to others, having empathy and caring for others, forgiveness and compassion)
2. *problem-solving* (planning, flexibility, help-seeking, critical and creative thinking)
3. *autonomy* (a secure sense of identity, self-worth, initiative ability to cope, sense of humour)
4. *sense of purpose* (hope for future, personal goals and values, sense of faith, connectedness with others).²

Organisational factors for healthy workplaces

The majority of lawyers work within an organisation. Research has recognised that such environments can be stressful³ and lawyers are at risk of suffering from psychological distress and illness.⁴

Therefore, it is also important to take into consideration organisational factors when building resilience. The Tristan Jepson Memorial Foundation has developed guidelines⁵ to promote psychologically healthy legal workplaces and assist legal organisations fulfil each of the psychosocial factors, which help build psychological health. These factors are:

1. *organisational culture* – a work environment characterised by trust, honesty and fairness
2. *psychological and social support* – a work environment in which co-workers and supervisors are supportive of employees' psychological and mental health concerns, and respond appropriately as needed
3. *clear leadership and expectations* – a work environment in which there is effective leadership and support that helps employees know what they need to do, how their work contributes to the organisation, and whether there are impending changes
4. *civility and respect* – a work environment in which employees are respectful and considerate in their interactions with one another, as well as with customers, clients and the public

5. *psychological competencies and requirements* – a work environment in which there is a good fit between employees' interpersonal and emotional competencies, and the requirements of the position they hold
6. *growth and development* – a work environment in which employees receive encouragement and support in the development of their interpersonal, emotional and job skills
7. *recognition and reward* – a work environment in which there is appropriate acknowledgement and appreciation of employees' efforts in a fair and timely manner
8. *good involvement and influence by staff* – a work environment in which employees are included in discussions about how their work is done and how important decisions are made
9. *workload management* – a work environment in which tasks and responsibilities can be accomplished successfully within the time available
10. *engagement* – a work environment in which employees feel connected to their work and are motivated to do their job well
11. *balance* – a work environment in which there is recognition of the need for balance between the demands of work, family and personal life
12. *psychological protection* – a work environment in which management takes appropriate action to protect employees' psychological safety
13. *protection of physical safety* – a work environment in which management takes appropriate action to protect the physical safety of employees.

Developing your personal and professional resilience to handle the challenges of constant change is critical to your successful career. **Jane Taylor** will coach Symposium 2016 delegates on how this can be achieved.



Tips for building personal resilience

These three tips can help to build resilience and effectively adapt to change:

1. *Develop self-compassion:* "Self-compassion entails three core components. First, it requires self-kindness, that we be gentle and understanding with ourselves rather than harshly critical and judgmental. Second, it requires recognition of our common humanity, feeling connected with others in the experience of life rather than feeling isolated and alienated by our suffering. Third, it requires mindfulness – that we hold our experience in balanced awareness, rather than ignoring our pain or exaggerating it. We must achieve and combine these three essential elements in order to be truly self-compassionate." – *Dr Kristen Neff*.⁶
2. *Choose wisely:*⁷ Many people have been quoted over the years as saying where you are today is the sum total of the choices you have made up until now. So it is important to choose wisely and check-in with how those choices feel to you.⁸ Do you really want to skip your workout this afternoon? How is it going to make you feel? Is it really going to make you happy and take you closer to living in alignment with what you want in your career and life? Or will it take you further away? Remember there is always a choice. Psychiatrist Viktor Frankl said: "Between stimulus and response there is a space. In that space is our power to choose our response. In our response lies our growth and our freedom."⁹

3. *Cultivate personal effectiveness and self-management:* Personal effectiveness means making use of all the resources (both personal and professional) you have at your disposal (that is, your talents, strengths, skills, energy and time) to enable you to master your life and achieve both work and life goals.

How you manage yourself – self-management – impacts on your personal effectiveness. According to the Collaborative Academic, Social and Emotional Learning (CASEL),¹⁰ self-management is "... the ability to regulate one's emotions, thoughts, and behaviours effectively in different situations". This includes:

- managing stress
- controlling impulses
- motivating oneself and being responsible
- being personally accountable and setting and working toward achieving personal and professional goals.

I hope this article has created awareness on how you can develop resilience while experiencing change!

Remember:

"Knowledge is a process of piling up facts; wisdom lies in their simplification."
– *Martin H Fischer*.¹¹

"The art of being wise is the art of knowing what to overlook."
– *William James*.¹²

Notes

¹ Benard B (2004). *Resiliency – What have we Learned*, San Francisco, CA: WestEd.

² Ibid.

³ Shain M, Arnold I, Germann K (2012). *The Road to Psychological Safety: Legal, Scientific, and Social Foundations for a Canadian national Standard on Psychological Safety in the Workplace*. Bulletin of Science, Technology & Society, 32 (2) 142-162, SAGE Publications.

⁴ Kelk N, Luscombe G, Medlow S, Hickie I (2009). *Courting the blues: Attitudes towards depression in Australian law students and lawyers*. Sydney: Brain & Mind Research Institute.

⁵ TJMF Psychological Wellbeing: Best Practice Guidelines for the Legal Profession, accessed July 25, 2015 – tjmf.org.au/raise-the-standard/the-guidelines-at-a-glance/.

⁶ Neff K (2011). *Self-Compassion: The Proven Power of Being Kind to Yourself*. New York, US: HarperCollins Publishers.

⁷ habitsforwellbeing.com/the-choices-we-make.

⁸ habitsforwellbeing.com/your-feelings-matter-are-you-taking-notice-of-yours.

⁹ Viktor Frankl (1905-1997), *Man's Search For Meaning* (1946).

¹⁰ Social and Emotional Learning Core Competencies (CASEL), accessed June 12, 2015 – casel.org/social-and-emotional-learning/core-competencies.

¹¹ As quoted in *Encore: A Continuing Anthology* (March 1945) edited by Smith Dent, 'Fischerisms' p309.

¹² William James, *The Principles of Psychology* Vol.1 (1890).

Symposium session:

Building personal and professional resilience during times of change

Change is one of the few certainties in life. How we cope or deal with change is less certain. In this experiential presentation – a morning session in the Core CPD stream on Friday 18 March – Jane Taylor will share:

- the context of personal and professional change
- the different types of change we can experience
- the concept of resilience and what it means
- strategies to build resilience and deal effectively with change
- your next step...

Jane Taylor is a coach, mentor and speaker who lives on the Gold Coast. She is the founder and director of Habits for Wellbeing and is passionate about supporting people to "wholeheartedly living your greatness... one habit at a time" through coaching, retreats and speaking. See habitsforwellbeing.com.



Queensland
Law Society

Symposium

This month ...

Core CPD Workshop: Outsourcing

Law Society House, Brisbane | 8.30am-12.30pm

Outsourcing is the hot topic of 2016. How does it work? Who's doing it? What are the benefits for clients? What are the risks? Where do you start?

As outsourcing increases in popularity and the pressure on practices to reduce costs increases, you need to know how to use it to your advantage. This practical session will provide insights from practice principals who are outsourcing legal services, and guide you through the practice and risk management of outsourcing.



3.5 CPD POINTS

WED
2
MAR

Practice Management Course – Medium and Large Practice Focus

Law Society House, Brisbane | 8.30am-4.45pm

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

The QLS PMC features:

- practical learning with experts
- tailored workshops supported by comprehensive study material
- interaction, discussion and implementation
- leadership profiling
- superior support.



10 CPD POINTS

THU-SAT
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MAR

Regional: Gladstone Intensive

Oaks Grand, Gladstone | 8.30am-5pm

Register for the 2016 Gladstone Intensive to receive updates in substantive law, develop your essential skills, and interact with experienced presenters and local colleagues. This one-day event is the perfect opportunity for regional practitioners to learn from the experts without the need to travel far from home.

Already have your 10 CPD points? Set yourself up for the following CPD year! CPD points gained by attending the 2016 Gladstone Intensive can be claimed in either the 2015/16 or 2016/17 CPD year. Full-day or half-day registrations are available.



7 CPD POINTS

THU
10
MAR

Masterclass: Contract Law

Law Society House, Brisbane | 8.20am-12.30pm

How up to date are you with the latest in contract law? Presented by Jeffrey Goldberger, an expert in contract law and one of our most highly rated presenters, this advanced workshop is aimed at practitioners with more than five years' experience. It will assist you to keep abreast of the latest developments in contract law and develop your technical skills to enable you to provide more effective solutions for your clients. This practical, interactive workshop will provide:

- an overview of recent key developments in contract law
- law and drafting tips for indemnities
- exclusion clauses and financial caps: drafting clauses, including carve-outs.



3.5 CPD POINTS

FRI
11
MAR

QLS Symposium 2016

Brisbane Convention & Exhibition Centre
8.30am-5pm, 8.30am-3pm

QLS Symposium 2016 provides the perfect opportunity for you to connect with your professional peers and update your legal knowledge and practical skills. With five concurrent streams covering seven practice areas, QLS Symposium 2016 is a must for the generalist practitioner.

Select your personalised program from a range of sessions which highlight the changes in the legal and business landscape affecting the legal profession. Update your professional and management knowledge in workshops focused on core CPD topics. Reconnect with colleagues and expand your networks during breaks and at the hospitality events programmed during Symposium.

Invest in developing your professional expertise and in your firm's future success. Experience QLS Symposium 2016!



The Friday 18 March keynote address will also be available via web stream for those who can't attend in person.

10 CPD POINTS

FRI-SAT
18
TO
19
MAR

Can't attend an event?

Purchase the DVD

Look for this icon. Earlybird prices apply.



Core CPD Workshop: Nobody Told Me There'd Be Days Like These

Law Society House, Brisbane | 8.30am-12pm

Showcased for the first time in Australia in March 2016, award-winning presenters Chris Osborn and Michael Kahn of *ReelTime CLE* bring you mandatory CPD with a twist, leveraging the power of the movies to provide critical content, a valuable experience and even enjoyment! As part of the Australian 'Professionalism at the Movies' tour, join us for an innovative program covering all three mandatory core areas.

This workshop will provide a powerful and entertaining forum to examine the intersection of ethics, good practice and mental health, and to reflect on practical ways to avoid professional and personal problems.



3 CPD POINTS

TUE
22
MAR

Masterclass: PPSA – a focus on small business

Law Society House, Brisbane | 9am-12.15pm

Now that the *Personal Property Securities Act 2009* (Cth) (PPSA) has come of age and been subject to its first review, we can see the PPSA interacts with many areas of legal practice. In this Masterclass, a lawyer, credit manager and accountant will examine the interaction of the PPSA regime from the perspective of a small-to-medium enterprise (SME). Our presenters will lead discussion on a range of topics relevant to SMEs and provide practical legal and risk management tips for those advising and managing SMEs. An update on the amendments to the PPSA will also be provided.



3 CPD POINTS

WED
23
MAR

Core CPD Webinar: Trust Accounting

Online | 12.30-1.30pm

With more than 20 years' experience in trust accounting investigations, Queensland Law Society's Bill Hourigan will share his insights, providing you with practical guidance on the top issues he sees in the management, or mismanagement, of trust accounts.



1 CPD POINT

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Franki Ganter



John Patterson



Thomas Byrne



Peter Anderson

Career moves

Allens

Franki Ganter has joined Allens as a partner. Franki is an M&A specialist with experience across government privatisations, health and aged care, and agribusiness. She began her career at Allens in 1997 as an articled clerk.

Best Wilson Buckley Family Law

John Patterson has joined Best Wilson Buckley Family Law as a junior solicitor in the Brisbane office. John was admitted in 2014, and previously worked in a large commercial firm in energy and resources, workplace relations and commercial litigation.

Carter Newell

Carter Newell has welcomed a new partner and announced four elevations.

Partner Karen Brown advises private and public sector clients in the commercial property industry on a broad range of property-related matters. She has extensive experience in all aspects of commercial property transactions for significant commercial, industrial and rural properties, including the sale and acquisition of development sites, CBD office buildings, shopping centres, retirement villages and hotels.

Another commercial property team member, Jayne Attack, has been promoted to senior associate. Jayne has more than nine years' experience acting in the sale and purchase of commercial buildings, due diligence, in negotiating sale and acquisition contracts, and acting for both landlord and tenant in lease drafting and negotiations.

Associate Sadia Stathis has extensive general and aviation insurance experience, including conducting the defence of property damage and personal injury claims including public liability claims, WorkCover claims and product liability claims.

Associate Grant Thomas, a member of the property and injury liability team, practises across a range of public and product liability claims for insurers, focusing on personal injury, product liability and property damage claims on behalf of insurers across Australia.

Associate Thomas Byrne, who practises in the financial lines insurance team, is based in the Sydney office and has experience that includes providing policy coverage advice for insurers and commercial clients, in addition to advising on and defending complex high-value claims in directors and officers liability insurance, industrial special risks, property, professional indemnity, construction, marine and financial sectors.

Corrs Chamber Westgarth

Corrs Chambers Westgarth has appointed Peter Anderson as special counsel in its national financial services team. Peter will advise domestic and offshore clients on regulatory banking and payment systems. His experience ranges from regulatory banking and securitisation to financial services reform and e-commerce.

HBA Legal

Chris Murphy has been appointed to establish HBA Legal's first Brisbane office. Chris has a background in public liability, workers' compensation and professional indemnity litigation as well as practice management experience. He was previously a partner at BT Lawyers.

MacDonnells Law

MacDonnells Law has promoted legal staff in its Cairns and Brisbane offices.

Kate Black has been promoted to senior associate in the Brisbane office, following two years as an associate. Kate has achieved seven reported precedent cases in family law and adoption in her six years post-admission. She has experience in family law, adoption and defence superannuation.

Lisa Jensz has been promoted to associate in the Cairns office. Lisa has experience in insurance, workplace health and safety, litigation and debt recovery, with a focus on compensation claims for individuals.



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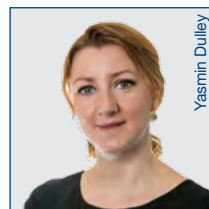
Robert Cunningham



Tim McKee OAM



Melissa Coleman



Yasmin Dulley

Nexus Law Group

Nexus Law Group has appointed **James Ford** as consulting principal. James specialises in property and commercial law, and has worked for established boutique property, finance and commercial law firms. He is also a volunteer with Caxton Legal Centre.

Paxton-Hall Lawyers

Robert Cunningham has been appointed special counsel at Paxton-Hall Lawyers. He has more than 30 years' experience in corporate and commercial law, banking and finance, and property law. Robert is also an academic and professional fellow of St John's College at the University of Queensland.

Pickerings Group of Companies

Pickerings Group of Companies has appointed **Tim McKee OAM** as general counsel. Previously, Tim was a partner at Roberts Nehmer McKee for 30 years, and has experience in franchising, agribusiness, commercial property, small business, and personal and business succession planning.

Rose Litigation Lawyers

Melissa Coleman has been promoted to senior associate at Rose Litigation Lawyers. Melissa commenced with the firm in mid-2015 and has experience in commercial litigation. She practises exclusively in commercial litigation, dispute resolution and insolvency.

Stewart Family Law

Yasmin Dulley has joined Stewart Family Law as a solicitor. Yasmin has practised as a family lawyer since 2012, and focuses on assisting clients in family disputes. She also has experience in property settlements, financial agreements and children's issues.

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

New QLS members

Queensland Law Society welcomes the following new members,
who joined between 11 January and 10 February 2016.

Scott Pratt, non-practising firm
Jamal El-Assaad, Murray Bucknall Legal Pty Ltd
Kate Edwards, Kelly Lawyers
Annakama Chrysston, Moloney MacCallum Lawyers
Violet Atkinson, Cronin Litigation Lawyers
David Baldwin, HopgoodGanim
Katelyn Rennick, Corrs Chambers Westgarth
Matthew Robinson, Redmond + Redmond
Justin Foster, Stretten Masons Lawyers
Emily Pascoe, Hartwell Lawyers
Michelle Kneebone, Hynes Legal
Samuel Richards, Ashurst Australia
Zak Worrall, Ashurst Australia
Dea Fairbairn, Minter Ellison
Michael Chang, McDonald Leong Lawyers
James Bridge, Certus Legal Group
Katie Simpson, One QSuper Pty Ltd
Grace Carstensen, Ashurst Australia
Alexander Hickson, Shine Lawyers
Nathan Lindsay, Ashurst Australia
Jennifer Stirling, Worcester & Co.
Alex Buck, MacDonnells Law
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Shellena Chen, Ashurst Australia
Tristan Shepherd, Ashurst Australia
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Alesia Shard, Connor O'Meara
Jennifer Wilson, Australian Executor Trustees Ltd
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Janette Hewson, Peabody Energy Australia Pty Ltd
Joel Moss, non-practising firm
Ruth Nean, MBA Lawyers
Ryan Anderson, Moray & Agnew

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Molly Mahlouzarides, Rennick Lawyers Pty Ltd
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Evan Mijo, Milton Graham Lawyers
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Alexander Hawkins, de Groot's Wills & Estate Lawyers
Jessica Yates, Payne Butler Lang
Alana Martens, Maurice Blackburn Pty Ltd
Bronwyn Jury, Clayton Utz
Elysia Panter, K&L Gates
Sarah Phillips, Santos Limited
Brendan Lloyd, Suncorp Group Limited
Melinda Costello, The Law Shack
Priscilla Lu, Morgan Conley Solicitors
Olivia Christensen, GRT Lawyers
Leah Creed, Avant Law Pty Ltd
Bernard Edmond, GoldLinQ Pty Ltd
Caitlin Waldron, Holding Redlich
Emma Fleming, Gadens Lawyers - Brisbane
Stephanie Flower, Holding Redlich
Joshua McDiarmid, Williams Graham Carman
Chloe Houghton, Steindls
Grace Hurley, Holding Redlich
Sebastian Koppel, non-practising firm
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Christopher Andary, Sciacca's Family Lawyers Pty Ltd
Emily Lucas, Commercial Insurance Claims – Suncorp Legal Serv
Amber Campbell, FIIG Securities
Dusty Meadows, Minter Ellison
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Cassandra Grayson, Maurice Blackburn Pty Ltd
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Jonathan Walsh

Maurice Blackburn Lawyers



Current position?

A senior associate and Queensland practice group leader for dust diseases at Maurice Blackburn Lawyers.

Career path?

I joined Maurice Blackburn as a paralegal in 2003 and was admitted to practice in 2005. From 2007 to 2011, I worked at Ashurst (then Blake Dawson) and AMP as in-house counsel before returning to Maurice Blackburn in 2011.

Why did you decide to practise law?

I got into law because I wanted to fundamentally help people, especially those who most needed someone to stand up for them. As a junior lawyer I wanted to experience some different ways of achieving this goal and through those diverse experiences, I came to truly understand what motivated me and what my passion was with the law.

What's your most memorable moment in the law?

All of my clients and their cases are unique, but two stand out so far. The first is successfully acting for a husband and wife who were diagnosed respectively with asbestos-caused lung cancer and mesothelioma. The husband developed lung cancer from exposures at work and the wife developed mesothelioma from washing his work clothes. In what were truly tragic circumstances of the brutal impact of asbestos disease in one household, there emerged two of the most stoic, resolute and awe-inspiring individuals that I am ever likely to meet.



The second is successfully acting for a world-renowned mountaineer and author who developed mesothelioma. During the first conference the client instructed that he had absolutely no idea how he was exposed to asbestos, but through meticulous forensic investigation and hundreds of hours of hard work, we were able to establish his exposure when he was a child, helping his father build fibro cubby-houses and reptile enclosures at the family home and bring a case against the product manufacturer.

What is the most useful piece of advice you've received?

Always find the lessons every day in what you do, to get better as a lawyer and as a person.

Are you an accredited specialist? If so, how do you think accreditation has benefited your career?

Yes. I believe the benefit lies in being able to distinguish myself as a lawyer with a particular skill set and providing the self-confidence to know my skills are developing in the right way.

What motivates you to continue your legal practice?

My clients and getting results for them.

What is the greatest joy in your work?

Being able to help people in need and deliver them results, and working with my amazing colleagues.

What would you like to be doing in 10 years' time?

A decade from now I hope I am continuing to represent those in need.

What legal issues are you most concerned about?

The continued exposures to asbestos and other toxic dusts which occur every day at home and how the law will evolve and respond to those who develop injury as a result.

What activities unrelated to work do you enjoy?

Family, martial arts and fishing. I am a 5th dan black belt in tae kwon do and hapkido.

How do you manage your work/life balance?

A liberal dose of each of those things mentioned above!

Proctor career spotlight: If you are a lawyer with a story to tell and would like to be featured in Career spotlight, send an email to proctor@qils.com.au.

Change the game, or miss your turn

Are you ready for the new era of legal practice?



There is no doubt that the legal industry is facing unprecedented and rapid change.

A new era of practice, enabled by technology and globalisation, will irreversibly impact legal service delivery and business models.

However, many firms are in a state of inertia, too focused on the day-to-day humdrum to see the advancing peril which will significantly impact those not prepared to meet the future head on.

While the changes in our industry will not be heralded with a 'big bang', they will nevertheless be characterised by a not-so-slow creep that will affect the undiscerning practitioner in the following ways:

- continual decline in overall net profitability
- decreasing profit margins on traditional legal products
- gradual loss of clients to more sophisticated competitors
- widening of competitors, no longer limited by geographic location
- continual downward pressure on fees
- loss of key staff to more sophisticated and flexible offerings.

Like any change, there will be three types of industry players:

- 1. The game changers** – These are the firms which are reading the warning signs and have gone out to meet the new era head on. You already know which firms these are. They are the ones you read about virtualising, outsourcing, creating new legal products, introducing fixed fees, going paperless, developing workflows and new ways of interacting with their clients. There will be more game changers over time and there is an abundance of opportunity for them. These firms have the greatest chance of success and longevity.

To prosper in a period of unprecedented change, law firms will need to create an entrepreneurial vision and implement it step by step, says **Margaret Fitzsimons**.



2. The late bloomers – These firms will eventually see the light and adapt to the new era. They will follow the game changers and mimic the advances they make. They will be survivors, albeit a little bruised around the edges.

3. The diehard traditionalists – These firms will sit back and let their future be dominated by others. Unfortunately there is not much that can be done to help our traditionalists. Their practices will decline as the new era of legal practice gathers pace.

Which type of industry player will your firm be? The answer to this lies in the skillset of your leader – whether or not your leader is an influential visionary prepared to drive change. If your firm is being led by a traditionalist, it is likely that there will be tough times ahead, as considerable foresight and a willingness to try new ways of delivering legal services is becoming a prerequisite for continued success.

If, indeed, you are lucky enough to have an influential visionary in your midst, then you are in a great position to be a game changer, but to be successful you will also need to use two critical business tools – strategy and project management.

The vast majority of legal firms do not have 'active' business strategies. It is of no use having the strategy safely tucked into the managing partner's bottom drawer, never to see the light of day.

Strategy is often confused with technology purchase or development, but in actual terms technology is merely an enabler for the overall goals of the business. The trick to strategy is to create a vision of what is possible by daring to be different, gaining a competitive edge or challenging the status quo. The strategy should then clearly state how you will achieve your vision.

Good strategies will consider the following aspects:

Services that will be provided

Game-changing firms will consider social, political and economic trends, developing new innovative services in turn. They will ensure that they are only offering services that are profitable and that there is a clear need in the marketplace for these.

How services will be provided

Legal service provision is heading toward highly automated, virtualised workflows. Consumers of legal services are becoming more discerning and demanding. As the industry becomes more sophisticated, so too will the level of choice offered to consumers.

How clients will be communicated with

The traditional model of clients and lawyers phoning each other and meeting at the lawyer's expensive offices is being threatened. Tech-savvy consumers want immediate answers to their questions, on a 24/7 basis, and via their device of choice.

What people resources are needed and how they are engaged

Will you join the trend of legal process outsourcing, either overseas or in Australia, or will you drive your own bus? Futurists predict that workplaces of the future will need to be flexible and agile – full-time workers will not dominate the workforce.

Where people work

Will you continue to commit to expensive fitouts in premium locations, or will your people work remotely or on client premises?

When people work

Will you require your workforce to do the old-style nine to five, or will you give them flexibility as to when they work, but based on service standard levels?

How services are delivered

Will you continue with paper files, silo-driven manual work, or will you invest in workflow systems and standardised business processes to ensure that you deliver high-quality services at least cost?

Ensuring services are cost-effective

Cost-effectiveness is about delivering the right service for the lowest cost. The most significant costs in a legal firm tend to be tenancy and people. Game changers don't have expensive offices and they use low-cost labour alternatives, for example, outsourcing or leverage. Over time this will mean that disruptors will place significant downward pressure on legal fees.

Billing legal services

Will you join the industry trend and convert to fixed fees? Will you do away with timesheets? If so, how will you judge fee earner and product profitability?

Branding your firm

What type of firm will you be – traditional, tech-savvy, lifestyle-oriented, premium, specialist or low-cost?

Selling your services

Who will you sell to? What demographic will you market to, how you will market and what geographic areas will you market to? Virtualisation and improvements in digital communication mean that you can widen your marketing, but it also means that you will have many new competitors to contend with.

Once you have formalised your strategy, make sure that you actually implement it. Some firms pay considerable amounts of money for consultants to develop strategies for them, but no one in the firm takes responsibility for driving the implementation of the strategy.

To be successful, strategies need to be broken down into a series of projects. Then the projects need to be prioritised and delegated to a responsible project manager. The board should ensure that there are clear deadlines and measurable key performance indicators in place for each project, reviewing the progress of the projects at board meetings. A board sponsor should also be appointed to champion each project at board level.

Being a game changer means creating an entrepreneurial vision and then systematically building the vision, step by step. In short, it is tedious work, but very worthwhile for those willing to take the plunge.

Margaret Fitzsimons is the owner of Trans4mation Pty Ltd, a Brisbane-based specialist law firm management consultancy.

Are you over-managed?

A practice idea that might make a big difference



Have you possibly crossed the line to bureaucracy gone mad?

In my travels, I come across marked differences in the 'investment' that firms make in back-office support. And while acknowledging the profession's constant benchmarking, I have always marvelled at these differences.

As is usual, a trade-off is involved. Generally, money spent on back-office people reduces distributable profit. That said, an appropriate level helps a firm stay under control, while freeing up professional staff for legal work and client development.

So we face the classic Goldilocks quandary – what level is *just right*?

Here are some smaller firm examples in order of profitability (secretaries and admin assistants tied to a particular practice group are excluded):

- A leading regional firm turning over around \$10m with an office manager, clerical offsider and receptionist – IT is outsourced, while marketing is mainly handled organically in teams, and HR is very uncomplicated.

- A specialist firm turning over \$3m with three job-sharing support staff and a junior (they also attend to all the producer support).
- A boutique business firm turning over around \$6m with one office manager, a marketing co-ordinator and a receptionist – IT and debt collection are outsourced.
- A specialist firm turning over \$4m with 10 dedicated back-office roles including a CEO, office manager, HR manager and so on... with very little outsourced.

How do these firms differ? The first firm is extremely profitable. The last one is barely so – in spite of a strong brand image.

In my experience, the persistently distinguishing factors are quality of leadership and clarity of purpose.

When a firm is led clearly, strongly and consistently, then so many other things just naturally fall into line. People understand the behaviours which are always acceptable and never acceptable. There are fewer questions to ask and fewer special cases needing resolution. When the rules and values are clear, then people management becomes much simpler... as does dealing

with clients, billing, collecting and most things to do with performance.

The second condition involves firms overinvesting in managing rather than in leading. That is, they somehow think there is a structural solution to everything and over time their firms look more like self-strangling bureaucracies than vibrant, market-focused workplaces.

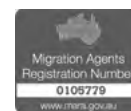
Just as Peter Ellender said in the February edition of *Proctor*, the substantive difference is culture. Positive culture is the analogue of quality leadership and clarity of purpose. And one of the huge bonuses that comes with this is a capacity to force down overall costs significantly. And lower costs mean higher profits.

So next time you think you need to beef up your back office, query whether you really do – or ask if you could get the desired outcome simply through greater clarity of purpose and more consistent leadership.

Dr Peter Lynch
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Any person or firm holding or knowing the whereabouts of any original will of **Christopher John Bellamy Snr** late of 45/29 Nautilus St, Port Douglas who died on 9 December 2015, please contact Chris Bellamy Jnr on 0400706337 or cjbellamy@live.com.au

Would any person or firm holding or knowing the whereabouts of the original Will dated 20 January 1965 or any other Will of **BERYL MARGARET STEPHENS** late of 22 Gail Street, Kedron, Queensland who died on 3 November 2014, please contact Kate Do of the Office of the Official Solicitor to The Public Trustee of Queensland, GPO Box 1449, BRISBANE QLD 4001, Tel: (07) 3213 9350, Fax: (07) 3213 9486, Email: Kate.Do@pt.qld.gov.au within 14 days from the date of this notice.

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Book review

by Steven Jones

Title: *Administrative Justice and Its Availability*
Author: Justice Debra Mortimer (ed.)
Publisher: The Federation Press
ISBN: 9781760020279
Format: Hardback/208pp
RRP: \$145

Administrative Justice and Its Availability is an edited collection of the papers presented at an August 2014 conference held jointly by the Federal Court of Australia and the Law Council of Australia.

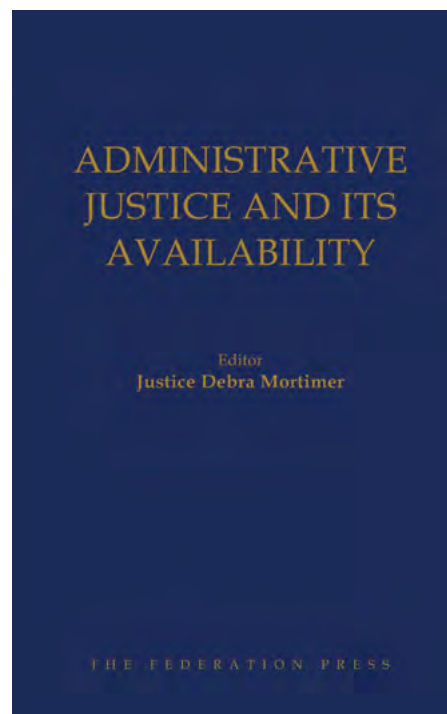
The nine individual papers have been converted into essays and primarily focus on administrative review at the federal level. The papers are well written and supplemented by four reports on expert panel sessions conducted at the conference, and afford further commentary.

Of the nine papers, three examine the use of rationality and reasonableness as grounds for review following the High Court of Australia's decision in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 and the decision of the Full Court of the Federal Court of Australia in *Minister for Immigration and Border Protection v Singh* (2014) 308 ALR 280.

The paper by the Honourable William Gummow AC, and the subsequent comments provided by Justin Gleeson SC and Kristen Walker QC afford thoughtful observations. Ms Walker expands on the distinction between a power and discretion, and considers how proportionality might interact with unreasonableness.

Another three essays review the current approach to the difficulty surrounding the identification of what is meant by 'jurisdictional error' and what is non-jurisdictional error. This paper, by Professor Margaret Allars SC, affords an informative understanding of the two leading cases on this vexing point: *Craig v South Australia* (1995) 184 CLR 163 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

A brief paper by Melinda Richards SC on accessibility to administrative review provides an insightful retelling of her experiences before the Victorian Civil and Administrative Tribunal as a self-represented litigant. Self-represented litigants are an increasing



challenge for both courts and tribunals, which are obliged to afford assistance to them to ensure a fair hearing. Ms Richards makes several practical and thought-provoking recommendations worthy of consideration.

The paper providing a comparative analysis of future challenges in administrative review in South Africa, Canada and Australia by Justice Dennis Davis of the Western Cape High Court of South Africa is supplemented by an eminent panel discussion expanding the analysis to include reflections and observations on the Taiwanese system by Professor Jiunn-rong Yeh.

This slim volume contains a collection of views of some of Australia's leading practitioners in administrative law. It is a must-read for those who want to know more on this increasingly relevant area of law.

Steven Jones is a Brisbane barrister and mediator.

The tall tale of shiraz

with Matthew Dunn



Shiraz is ubiquitous in Australia and celebrated internationally as a full-throttle red wine.

What is surprising is that the story behind it is so little known, especially when it is such a ripping yarn.

There are actually two kinds of shiraz wine, both connected by one legend. One is the red grape variety and the other is the wine of the ancient city of Shiraz in Persia.

The Persian Shiraz, in the region of Fars, has a 4000-year history and was a major producer of some of the most celebrated wines in the world up to the mid-20th Century. Our legend says the shiraz vine started there and waited for a young Crusader, Henri Gaspard de Sterimberg, returning from his pilgrimage to bring the vine from Shiraz to the celebrated hills of the peaceful river Rhone in southern France.

Sterimberg has been celebrated for centuries in southern France. The young knight, wounded, exhausted and disgusted at his participation in the Crusade, returns to France seeking to retire from the world and dedicate his life to higher pursuits – God and making wine.

He petitions Blanche de Castille, the Queen regent. She is so taken by his piety that she

takes pity and provides him a hilltop near the present-day town of Tain to become a hermit. The knight takes to hill and, in transports of joyous revelation, builds a chapel at the top dedicated to Saint Christopher and plants his precious vine.

He makes wine and it is good – red and strong. It and the hill become known simply as Hermitage. There it all stands to this day, the hill, la Chappelle and the vine they then called scyras after its long-lost home far away.

In the early part of the 19th Century, an enterprising Scotsman called James Busby, with a big career in front of him, went wandering the great vineyards of Europe collecting vine cuttings to ship to Australia in order to start a wine industry in the new colony. He came upon Hermitage and thought the local red was very good, shipping it to Sydney wrapped in sand and wet hessian.

In the 1834 book of his journey, Busby noted that the exacting 1826 French text, *Oenologie Francaise*, called the grape scyras, based on local folklore that the plant was brought from Shiraz in Persia by one of the hermits of the mountain.

The scyras vine flourished in the new colony and was planted out in the Hunter Valley, also being sent to South Australia to start the great vine gardens of the Barossa.

On Saturday 24 February 1844, the *Sydney Morning Chronicle* carried an extract of the wine book of notable British journalist and wine buff Cyrus Redding, in which he told the colony that Hermitage was “produced from the Scyras, or Shiraz grape, supposed to have been originally Persian, the grape of Shiraz being the finest in the world”.

From then on, shiraz had a name and a heritage in Australia.

Sadly, as with all good legends, only some of it is true. DNA testing has proved that the scyras grape is not from Shiraz; it is descended from a crossing of two indigenous French vines, the dureza and mondeuse blanche.

While Henri Gaspard de Sterimberg was a hermit and did start it all, he fought in the Albigensian crusade in south-west France against the Cathars and never went to Persia. This and other legends of scyras coming from Syracuse in Sicily are equally unfounded, but make for a ripping yarn to share with friends next time you open a humble shiraz. Why the French call shiraz ‘syrah’ is a story for another day.

The tasting

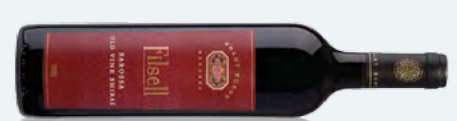
Three examples of mighty reds were tested to confirm the legends.



The first was the M. Chapoutier Crozes-Hermitage 2012 from the region of the famous hill. It was cherry dark with a nose of white pepper and a hint of blackcurrant after opening up in the air. The palate, much lighter than an Australian shiraz, was of mixed red berry fruits and subtle herb, well suited to hard cheese and fresh bread.



The second was the Feudo Principi di Butera Nero D'Avola 2013, the great red of Sicily and one of the legendary cousins of shiraz. It was inky purple in colour and had a nose of raspberry and fruit of the forest, without a trace of forest floor. The palate was an approachable Italian red of soft round-edge fruit, giving pleasure up front and a little tannin in the back, but not enough to trouble the antipasti.



The last was the Grant Burge Filsell 2013 Barossa Old Vine Shiraz, which was ink black in colour and a fruit tour-de-force of a wine. The nose was green leaves, pepper, blackcurrant and a hint of mocha. The palate was full-throttle dry tannins layering upon mocha and chocolate, menthol and cigar-box finings.

Verdict: Three very different wines, with the crowd split between the French and the Australian shiraz for very different reasons. Best in show was the Filsell, but it needed five more years, at least.

Matthew Dunn is Queensland Law Society government relations principal advisor.

Mould's maze

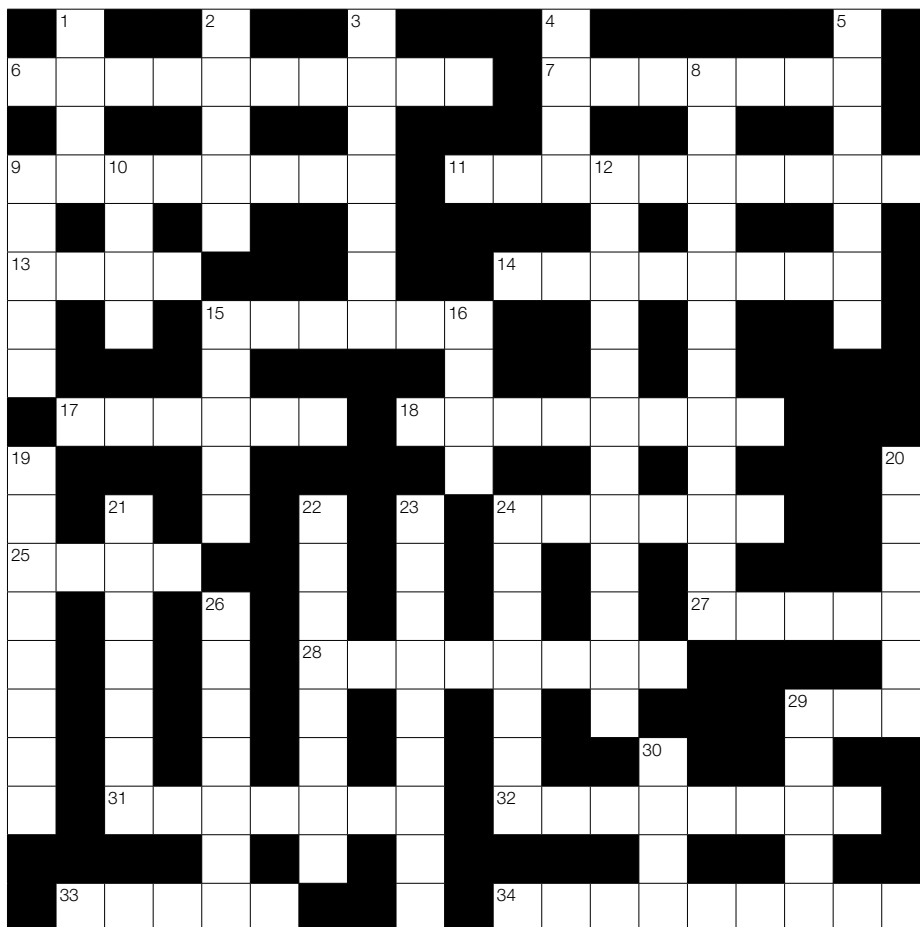
By John-Paul Mould, barrister
jpmould.com.au

Across

- 6 Species of informal offer of settlement made by letter marked "without prejudice, except in relation to costs". (10)
- 7 Deductive, relating to or derived by reasoning from self-evident propositions (*Latin, two words*) (7)
- 9 A financial does not form part of the asset pool available for division in determining a matrimonial or de facto property settlement. (8)
- 11 Abrogation of a contract, effective from its inception. (10)
- 13 The tradition of a being 'read' three times in Parliament dates back to times before printing was available and some politicians were illiterate. (4)
- 14 The etymology of is Roman from the word 'contrahare', which means 'to draw together'. (8)
- 15 High Court authority for a 'lies direction'. (6)
- 17 A bona fide purchaser for value without will, in respect to a sale of chattels, take good title despite competing claims of other parties. (6)
- 18 A dissenting judge writes a judgment. (8)
- 24 Funds held by a third party on behalf of transacting parties. (6)
- 25 Recent appointment to the Queensland Supreme Court trial division, Justice John SC. (4)
- 27 Voluble or extravagant speech. (5)
- 28 Section 31 of the *Limitation of Actions Act* allows for an extension of time for a cause of action when there is a material fact of a nature not within the knowledge of the applicant which arises after the expiry of the applicable time limit. (8)
- 29 Head of damages recoverable by a plaintiff in a personal injuries action representing additional income tax paid for refundable workers' compensation receipts, ... *v Wood*. (3)
- 31 A trust can be created during the life of the by declaration or transfer. (7)
- 32 Essential, as in a term of a contract. (8)
- 33 Offence more serious than a misdemeanour. (5)
- 34 A term of imprisonment for which actual custody is not served. (9)

Down

- 1 Eminent family law counsel, Graeme QC. (4)
- 2 To prove falsity or refute application of a principle. (5)
- 3 Clause exempting contracting parties from fulfilling their obligations for causes that could not be anticipated and/or are beyond their control, force (*French*) (7)



- 4 Raised platform for a lectern or seats of honour. (*French*) (4)
- 5 Quick and clever retort. (*French*) (7)
- 8 Section 305 of the *Legal Profession Act* provides that can first come from a client by any form of communication. (12)
- 9 Recently retired Queensland District Court judge, Philip QC. (5)
- 10 Senior counsel. (4)
- 12 Judicially imposed trust to remedy an unconscionable insistence on legal title. (12)
- 15 High Court decision regarding an acrobat who suffered injuries in a performance, *v Wirth Brothers Pty Ltd*. (5)
- 16 Unpaid parental leave can be found under the *Work Act 2009* (Cth). (4)
- 19 The Hague Convention was drafted to ensure the prompt return of children who have been abducted from their country of residence. (8)
- 20 Marked by or using excessive words. (6)
- 21 Perfect a draft document. (7)
- 22 A contract that can be affirmed or rejected at the option of one of the parties. (8)
- 23 For there to be a prima facie case the prosecution must its burden of proof in respect to the elements of the charge before the court. (9)
- 24 The 'birds of the same feather' principle of statutory interpretation, *generis*. (*Latin*) (7)
- 26 The warning a civil celebrant pronounces at a wedding under Section 46 of the *Marriage Act* (Cth) is known as the (*Latin*) (7)
- 29 An exception to the doctrine of indefeasibility. (5)
- 30 Part-time secretary. (4)

Solution on page 64

A tale of puppy love

Really!

by Shane Budden



If I had to sum up my 2016 so far in four words, those words would be: we have a puppy.

Anyone who has had the joy of raising a puppy will understand that those four words contain many stories, involving fun, laughter, the destruction of shoes and more dog droppings than anyone could possibly expect to be produced by an animal weighing three kilograms.

We got a puppy because my daughter has wanted one since she was about six when, seemingly overnight, princesses – who almost never relieve themselves on the carpet – became totally uncool and were replaced by puppies in my daughter's pantheon.

I believe her interest was spiked by many of the books we read to her at bedtime, which involved cute puppies who had great adventures and could often talk to their owners and other dogs; none of those stories covered house-training, shedding or a tendency to consume things not normally considered food in the natural world, such as rocks and Lego.

For a while the fascination with a puppy was great, because it gave us many opportunities to engage in Behaviour Bribery, such as: "Well, if you can't keep your room clean you aren't responsible enough to have a puppy." This would have worked on my son, who would be quite happy if no-one ever directly observed the floor of his room again, and who would probably forgo any number of things rather than clean up his room. My daughter, however,

is quite responsible and eventually complied with all our demands, meaning that we were forced to get her a puppy.

Getting a puppy is a much more laborious process than it was when I was a kid. Back then, people would regularly offer puppies for free, because lax dog laws and the fact that very few dogs had access to birth control produced an almost constant supply of puppies. These days, there is apparently a puppy shortage because many dogs are de-sexed following a push by the RSPCA, which is also – now here is a coincidence – in the business of selling puppies.

In fact, that is how we came to get our puppy – through an RSPCA pop-up puppy sale (to be clear, the puppies themselves do not pop up) at the Brisbane Convention & Exhibition Centre. My wife and I decided that we would get there early and arrive before the sale started, along with roughly the population of India who had apparently all had the same idea.

We then wandered up and down the aisles looking for just the right puppy – we envisaged a medium-sized dog, that would get about a foot high and have received a certain amount of training to the point where its overall ability to interact with people was something similar to that possessed by Scooby Doo. The dog my daughter fell in love with has feet the size of frying pans and shows every sign of growing into what your top dog scientists refer to as "a horse"; also, he cannot, technically, speak English.

The worst thing about finding a dog, however, was that it meant we had to go through the registration process

whereby the RSPCA staff take your details by chiselling them in to a stone tablet, at least going by the time it took.

We stood in line with hundreds of other people for an hour and a half while our new dog was somewhere being processed, perhaps being handed back the belongings he had when he came in as they do when inmates leave prison, at least in American movies ("Here you go, sir, one decomposed possum leg, one doll's head, a stick...").

Our kids reacted to this wait with the same overall patience they would have shown listening to Angela Merkel recite Pi to a thousand digits. Eventually we got to the head of the queue, handed over our licences, tax file number, DNA and whatever else they wanted – the reward for which was to go and stand in another line and hand over \$500; there was then another line, and finally we had our dog.

We are now dealing with all the fun of having a puppy, including the fact that they treat everything on the floor as food, comforted by the knowledge that if it turns out they were wrong the object can be safely returned to the world via one end or the other, usually when they are standing on a valuable rug or an expensive shirt pulled down from the clothesline.

Of course, we love our puppy and the joy he brings to our children, which is exceeded only by the speed with which they vanish when there are dog droppings to be cleaned up. As responsible parents, we warned our daughter that if she got a dog she would have to clean up after him, bathe him etc, which will make any veteran parents reading laugh hard enough to pop an intercostal joint, because such promises from children last as long as your average Hollywood marriage.

In truth, although the pop-up puppy sale had plenty of frustrating moments, we love our puppy and are thankful to the RSPCA for rescuing him and for all the good work it does; if you are looking for a dog I recommend going to the RSPCA, especially as the price includes de-sexing (of the dog, not you) and a free initial check up with the vet.

Now if you will excuse me, I will have to end and grab the puppy, who is attempting to chew through the power cord on the compu



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Crossword solution from page 62

Across: 6 Calderbank, 7 Apriori, 9 Resource, 11 Rescission, 13 Bill, 14 Contract, 15 Zoneff, 17 Notice, 18 Minority, 24 Escrow, 25 Bond, 27 Spiel, 28 Decisive, 29 Fox, 31 Settlor, 32 Material, 33 Crime, 34 Suspended.

Down: 1 Page, 2 Rebut, 3 Majeure, 4 Dais, 5 Riposte, 8 Instructions, 9 Robin, 10 Silk, 12 Constructive, 15 Zuijs, 16 Fair, 19 Habitual, 20 Prolix, 21 Engross, 22 Voidable, 23 Discharge, 24 Ejusdem, 26 Monitum, 29 Fraud, 30 Temp.

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| Supreme, District and Magistrates Courts – Interest on default judgments before a registrar | 1 January 2016 to 30 June 2016 | 6.00 |
| Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion) | 1 January 2016 to 30 June 2016 | 8.00 |
| Court suitors rate for quarter year | to 31 March 2016 | 1.34 |
| Cash rate target | from 3 Feb. 2016 | 2.00 |
| Unpaid legal costs – maximum prescribed interest rate | from 1 Jan 2016 | 8.00 |

Historical standard default contract rate %

| Feb 2015* | Mar 2015* | Apr 2015 | May 2015 | Jun 2015 | Jul 2015 | Aug 2015 | Sep 2015 | Oct 2015 | Nov 2015 | Dec 2015 | Feb 2016 |
|-----------|-----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|
| 9.8 | 9.8 | 9.8 | 9.7 | 9.7 | 9.55 | 9.45 | 9.45 | 9.45 | 9.45 | 9.45 | 9.45 |

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

*Note: The rate printed in the February and March 2015 editions of Proctor was not shown as updated due to production deadlines.

QLS senior counsellors

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

| | | |
|----------------------------|---------------------|--------------|
| Brisbane 4000 | James Byrne | 07 3001 2999 |
| | Glen Cranny | 07 3361 0222 |
| | Peter Eardley | 07 3316 2300 |
| | Peter Jolly | 07 3231 8888 |
| | Peter Kenny | 07 3231 8888 |
| | Bill Loughnan | 07 3231 8888 |
| | Justin McDonnell | 07 3244 8000 |
| | Wendy Miller | 07 3837 5500 |
| | Thomas Nulty | 07 3246 4000 |
| | Terence O'Gorman AM | 07 3034 0000 |
| | Ross Perrett | 07 3292 7000 |
| | Bill Purcell | 07 3218 4900 |
| | Elizabeth Shearer | 07 3236 3233 |
| | Dr Matthew Turnour | 07 3837 3600 |
| | Gregory Vickery AO | 07 3414 2888 |
| | Phillip Ware | 07 3228 4333 |
| Redcliffe 4020 | Gary Hutchinson | 07 3284 9433 |
| Toowong 4066 | Martin Conroy | 07 3371 2666 |
| South Brisbane 4101 | George Fox | 07 3160 7779 |
| Mount Gravatt 4122 | John Nagel | 07 3349 9311 |
| Southport 4215 | Warwick Jones | 07 5591 5333 |
| | Ross Lee | 07 5518 7777 |
| | Andrew Moloney | 07 5532 0066 |
| | Bill Potts | 07 5532 3133 |

| | | |
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| Bundaberg 4670 | Anthony Ryan | 07 4132 8900 |
| Toowoomba 4350 | Stephen Rees | 07 4632 8484 |
| | Thomas Sullivan | 07 4632 9822 |
| | Kathryn Walker | 07 4632 7555 |
| Maroochydore 4558 | Glenn Ferguson | 07 5443 6600 |
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| Nambour 4560 | Mark Bray | 07 5441 1400 |
| Gladstone 4680 | Chris Trevor | 07 4972 8766 |
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| Mareeba 4880 | Peter Apel | 07 4092 2522 |
| Caboolture 4510 | Kurt Fowler | 07 5499 3344 |
| Cannonvale 4802 | John Ryan | 07 4948 7000 |
| Townsville 4810 | Peter Elliott | 07 4772 3655 |
| | Chris Bowrey | 07 4760 0100 |
| Cairns 4870 | Russell Beer | 07 4030 0600 |
| | Anne English | 07 4091 5388 |
| | Jim Reaston | 07 4031 7133 |
| | Garth Smith | 07 4051 5611 |



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Financial Statement

FORM 13 Family Law Rules ~ RULE 13.05

Please type or print clearly and mark [X] all boxes that apply. Attach extra pages if you need more space to answer any questions.

Filed in:

- ☒ Family Court of Australia
☐ Family Court of Western Australia
☐ Federal Circuit Court of Australia
☐ Other (specify)

Filed on behalf of:
Full name: STAT DEP

MARK [X] IN THE BOX THAT APPLIES TO YOU

- ☐ Husband/father
☐ Wife/mother
☒ Other (specify) STAT DEP

This form is to be used by a party to financial enforcement.

Part A About you

1 What is your family name as us

Client ID Jones
File Number 0044612
Filed at Brisbane
Filed on 12/06/2015

Time Recording

Timesheet

| File | Edit | View | Tools | Help |
|-------------|--------------------------|-------------------------------|----------------|----------|
| Judy Evelyn | Tim Murphy | John Stevens | Incomplete (5) | |
| New | 01 April | Start/Stop Timer | Open Matter... | |
| Matter No. | Client | Billing Description | Units | Elapsed |
| 120010 | Falcon Building Suppl... | Contract Amendments | 6 | 00:33:20 |
| 120019 | Mr Paul Cummings | Letter to Defendants Solic... | 3 | 00:18:27 |
| 120018 | Mr Dan | | | |
| 120034 | Mr Pat | | | |
| 120007 | Mr Pau | | | |
| 120055 | Mr Mich | | | |
| 120022 | Mr Tom | | | |
| 120043 | Miss Sa | | | |
| 120062 | Miss A | | | |
| 120444 | Mr R B | | | |

Accounting

Pre Billing Guide

| Aged Unbilled | Total | Current | >30 days | >60 days | >90 days |
|----------------------|-------------------|-------------------|----------|----------|----------|
| Fees (WIP) | \$3,940.00 | \$3,940.00 | - | - | - |
| Disbursements | \$4,606.66 | \$4,606.66 | - | - | - |
| Anticipated Payments | \$3,333.33 | \$3,333.33 | - | - | - |
| Cost Recoveries | \$440.00 | \$440.00 | - | - | - |
| Journals | - | - | - | - | - |
| Payments | \$833.33 | \$833.33 | - | - | - |
| | \$8,546.66 | \$8,546.66 | | | |

| Time/Fees By Staff | Unbilled | | | | Billed | | | |
|--------------------|----------|------------|------------|-----------|----------|------------|------------|-----------|
| | Hours | Hours amt | Fee amt | Total amt | Hours | Hours amt | Fee amt | Total amt |
| 0.00 | - | - | - | - | 8.57 | \$570.00 | - | \$570.00 |
| 0.70 | \$440.00 | \$3,500.00 | \$3,940.00 | 0.00 | - | \$3,400.00 | \$3,400.00 | |
| 0.70 | \$440.00 | \$3,500.00 | \$3,940.00 | 8.57 | \$570.00 | \$3,400.00 | \$3,970.00 | |