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**Law Society**

March 2019 – Vol.39 No.2

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# Mind the gap

## Or is it time to stop 'minding'?

We've all heard the phrase, 'Mind the gap', which entered the general lexicon of society in 1968 when British Rail began to use a recorded announcement to warn passengers of the dangerous gap between some of its trains and the station platforms.

The object was to ensure that people didn't slip into the gap, because gaps are dangerous things; fall down a gap and you could get badly hurt, even die, if things go very wrong. The phrase was chosen by British Rail (and copied around the world) because it was short and to the point. It is hard to imagine in the days of ubiquitous pocket computers, but electronic data storage was expensive back then, so fewer words were used in recorded announcements – the less said the better.

Customers were warned about gaps because it was easy to slip into them, and even if you didn't get badly hurt, getting stuck in one could hold you back and delay your progress; you could miss out on a lot, stuck in a gap. Stuck in a gap is a bad place to be.

If you don't believe me, ask some of Australia's Indigenous people. Many of them have been stuck in a gap since well before 1968, well before we were warned about the dangers of gaps and even though data storage wasn't much of an issue back then, plenty of people still felt the less said the better.

Last year we marked 10 years of 'Closing the Gap', which – no matter how you look at it – can only represent failure. After 10 years you would expect us to be celebrating the anniversary of actually closing the gap, not reporting that the process is still going.

A 10-year review released in 2018 is revealing, and I need only quote the words of the report itself:

"The latest data indicate that three of the seven Closing the Gap targets are on track to be met. The last year in which at least three targets were on track was in 2011."<sup>1</sup>

In other words, at no stage in the last seven years have we been better than three from seven, a 42% success rate. It is hard to think of anywhere that 42% counts as a pass, yet politicians of every stripe have regularly claimed (at least when in government) that the gap is closing and a bright future for Indigenous Australia beckons.

Sadly, it is even worse in Queensland, where the report puts us on track in only one category – a sobering thought given that about 27% of all Indigenous people live here.<sup>2</sup> To add to the problem, the goals set by the Closing the Gap initiative are almost embarrassingly modest.

Simply put, the goals are as follows:

- close the gap in life expectancy by 2031
- halve the gap in child mortality by 2018
- ensure 95% of Aboriginal and Torres Strait Islander four-year-olds are enrolled in early childhood education by 2025
- halve the gap in reading, writing and numeracy by 2018
- halve the gap in year 12 attainment by 2020
- halve the gap in employment by 2018
- close the gap in school attendance by 2018 (this target was added in May 2014).<sup>3</sup>

For those keeping score at home, the one Queensland is getting right is the third point; nationally the other two on track are points two and five. It is very clear that more must be done.

This is where solicitors come in, because our voice on this issue can be particularly poignant. We deal regularly with the results of the failure to close the gap. Whether we deal with families breaking down under the

crushing poverty that results from illiteracy, criminal matters arising from inequality or the aftermath of innocent people being scammed due to a lack of education, we know the cost of the gap.

We have an obligation to make this an issue for politicians, government departments and the general public; to highlight the damage the gap causes and the urgency with which it needs to be snapped shut. The Society will continue to advocate on this issue, and I will continue to advocate on it through every platform I can; I hope that you will too.

In truth, this isn't even the only gap we have to close; there are others, like the gender gap in remuneration – there is even a gap in research grant approval, unsurprisingly heavily in favour of male-lead teams. I've had it with gaps; no more gaps.

It is a bad place to be, stuck in a gap; that's why we are warned to 'Mind the Gap'. Maybe it's time to stop minding the gap, and start mending it. How about it? Let's close the bloody thing once and for all; let's all commit to it, and once again the less said the better.

Mend the Gap.

**Bill Potts**

Queensland Law Society President

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**LinkedIn:** linkedin.com/in/bill-potts-qlspresident

### Notes

<sup>1</sup> 'Closing the Gap', Prime Minister's Report 2018, p8.

<sup>2</sup> 'A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia', Australian Human Rights Commission, [humanrights.gov.au/publications/statistical-overview-aboriginal-and-torres-strait-islander-peoples-australia](http://humanrights.gov.au/publications/statistical-overview-aboriginal-and-torres-strait-islander-peoples-australia).

<sup>3</sup> Australian Indigenous HealthInfoNet, [healthinfonet.ecu.edu.au/learn/health-system/closing-the-gap](http://healthinfonet.ecu.edu.au/learn/health-system/closing-the-gap).



# New year, new details?

If you've moved firms, changed position titles or otherwise,  
now is a great time to update your details.

QLS will contact you in April 2019 to help you renew your practising certificate and QLS membership for 2019/20. To ensure you don't miss any of these important messages, update your details today via **myQLS** or by contacting **QLS's Records & Member Services** team on 1300 367 757 or [records@qls.com.au](mailto:records@qls.com.au).

**LOG ON NOW**

# Women in law

Celebrate the inspirational women lawyers you know



International Women's Day (March 8) is a global day celebrating the social, economic, cultural and political achievements of women.<sup>1</sup>

To mark the occasion, this month's *Proctor* features 'Women in law', an article in which we speak with several women lawyers about their journey through the law.

It is interesting to read the comments from these practitioners – at different stages of their careers and working in different areas of the law – as they talk about the challenges they have faced, the females who have inspired them, and the issues that women in the legal profession still face.

Whether raising a family while maintaining an active and successful career, or breaking through the glass ceiling, these women set examples that all practitioners can look to.

We acknowledge these practitioners and celebrate their achievements, along with those of all the women in our profession.

I would urge you to take the time on International Women's Day to reflect on the inspirational women you know – those who have come before you, those who work beside you, and those who will rise with you in years to come.

## Symposium awaits

After International Women's Day, the big event that we are all looking forward to this month is, of course, QLS Symposium.

Running over Friday and Saturday 15-16 March, this year's program features streams in commercial law (encompassing business law and commercial litigation), criminal law, family law, personal injuries, property law and succession law, along with a two-day core agenda.

I'm particularly looking forward to hearing some of our keynote presenters, including Stephen Scheeler, the former CEO of Facebook (Australia and New Zealand),

who has managed numerous styles of teams, encouraging them to embrace change by being relentlessly curious and not being afraid to break the mould.

He'll share his secrets to great leadership and his learnings on how to think differently, re-invent yourself and prepare for the future in a generation of digital natives and evolving legal technology.

As well, we will hear addresses by the Chief Justice and Attorney-General, and on the Friday night we have the most prestigious night of the Queensland legal profession calendar, the QLS Legal Profession Dinner & Awards.

There are nine QLS Legal Profession Awards:

**QLS President's Medal** – Open to individual solicitors, this award recognises and encourages commitment, contribution and outstanding performance within the Queensland legal profession.

**QLS Agnes McWhinney Award** – Named after Queensland's first admitted female solicitor, this award recognises outstanding professional or community contribution by a woman lawyer.

**QLS Innovation in Law Award** – Open to all law firms or individual solicitors in Queensland, this award recognises excellence in the development and/or application of technology.

**Community Legal Centre (CLC) Member of the Year** – This award is open to all solicitors working or volunteering in a Queensland CLC who have made outstanding contributions to the community by influencing community justice programs or initiatives which benefit the local community.

Another award series, with three awards, used to be called the QLS Equity and Diversity Awards, but has been renamed as the QLS Diversity and Inclusion Awards to better reflect contemporary terminology:

**Equity Advocate Award** – This award recognises individuals or a team from a legal practice who have successfully promoted equity and diversity initiatives within the workplace to generate positive change

or for their activities in the wider profession and/or the community.

The **Large & Medium Legal Practice Award** and **Small Legal Practice Award**: These are awarded to legal practices of 20-plus or 19 or less practitioners that promote sustainable, healthy workplace cultures, engage in inclusive and equitable workplace practices and embrace workplace diversity in a meaningful way.

The QLS Legal Profession Awards also include two First Nations awards, reflecting our commitment to achieving real and positive change in the lives of Australia's First Nations people, in particular those who contribute to justice and the rule of law. **Queensland First Nations Lawyer of the Year Award** – This is presented to an Aboriginal or Torres Strait Islander individual for outstanding achievements in the law and for pursuing justice outcomes in the legal profession for First Nations People in Queensland.

**Queensland First Nations Legal Student of the Year** – This award identifies an Aboriginal or a Torres Strait Islander legal student who displays outstanding commitment to achieving a positive role in the legal community.

## Are you ready for renewals?

With the annual practising certificate and QLS membership renewals period just around the corner, it's a good time to ensure that all of your details are up to date.

Log onto [qls.com.au](http://qls.com.au) and click on the myQLS tab to update your details, including address or firm changes. Keeping your details up to date will help the renewals process go smoothly for all involved.

**Rolf Moses**  
Queensland Law Society CEO

### Note

<sup>1</sup> From [internationalwomensday.com](http://internationalwomensday.com).

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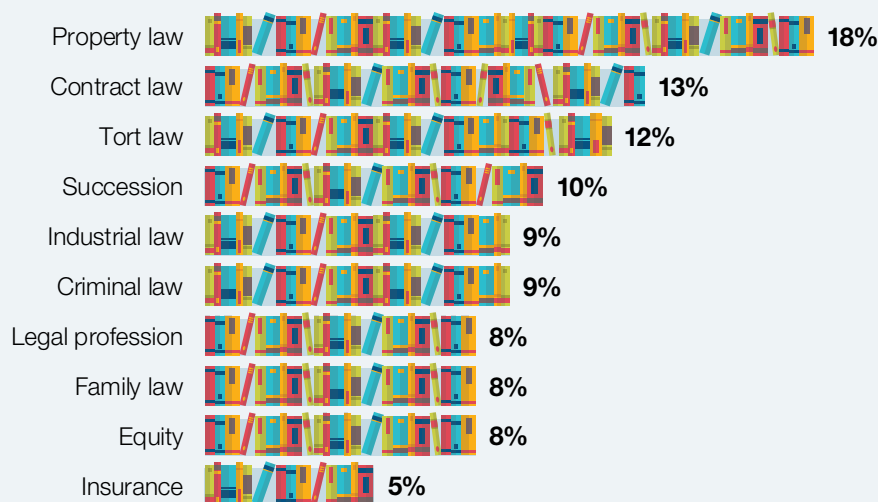
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# Solicitors stand tall as severe weather hits

North Queensland solicitors were battered once again as severe weather and flooding hit last month.

Townsville, in particular, was declared a disaster zone with courts, schools and businesses closing as the deluge continued.

Queensland Law Society received reports from solicitors in the thick of the weather, with members reporting positive attitudes despite the record-breaking rainfall. Members outside of the affected areas have also reached out to offer assistance.

The concern and collegiality shown by solicitors during this time was heart-warming and showed the high-level of compassion that Queensland's legal profession hold for one another. The positivity and resilience that solicitors in North Queensland have shown is also a great testament to their dedication and flexibility under fire.

The Society remained a conduit for information, attempting to feed through relevant information about closures, available assistance and guidance as it came to hand. QLS President Bill Potts urged safety above all to members in the affected areas.

"Thank you to our North Queensland members – including Immediate Past President Ken Taylor – for their assistance in communicating with us," he said.



"Thank you also to the QLS members who have reached out to QLS Ethics and Practice Support Centre to offer their assistance.

"It is pleasing to see such collegiality amongst our profession, and I applaud members for their continued support of one another during times of hardship."

Although many firms had to close their doors, many attempted to remain contactable where possible. With safety being paramount, firms did the right thing by closing their doors to avoid injury.

When facing disaster, QLS provides guidance on what to do if your firm has

been affected by flooding or extreme weather conditions. This can be found in the **QLS Ethics and Practice Support Centre** portal at [qls.com.au](http://qls.com.au). **Law Foundation Queensland** ([qlf.com.au](http://qlf.com.au)) offers information about interest-free loans to assist with recovery, and **Lexon Insurance** ([lexoninsurance.com.au](http://lexoninsurance.com.au)) provides further guidance for those under its insurance scheme.

**LawCare** ([qls.com.au/lawcare](http://qls.com.au/lawcare)) is also a great resource available to members who need assistance with counselling, advice on how to help others, or assistance with developing plans to manage issues and challenges.

## QLS Legal Careers Expo

This month Queensland Law Society will host our annual Legal Careers Expo at the Brisbane Convention & Exhibition Centre.

This event, on 25 March, regularly attracts more than law 500 students, and offers a unique opportunity for organisations to connect with Queensland's next generation of legal professionals.

Students can explore the 35 exhibitors available on the day, including law firms, PLT providers, community legal services, professional associations and recruiters. Attendees will have the opportunity to chat one-on-one with HR professionals and get tailored resume advice to assist them on their career journey.

Visit [qls.com.au/legalcareerexpo](http://qls.com.au/legalcareerexpo) for details on becoming an exhibitor.



## Appointment of receiver for The Legal Elements Pty Ltd, Annerley

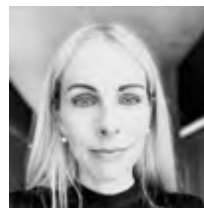
On 1 February 2019, the Council of the Queensland Law Society Incorporated (the Society) passed resolutions to appoint officers of the Society, jointly and severally, as the Receiver for the law practice, The Legal Elements Pty Ltd.

The role of the Receiver is to arrange for the orderly disposition of client files and safe custody documents to clients and to organise the payment of trust money to clients or entitled beneficiaries.

Enquiries should be directed to Sherry Brown or Bill Hourigan, at the Society on 07 3842 5888.

# Corporations Registrar's powers expanded

by Jessica Lambert  
and Joelle Lenz



As at 23 November 2018, the powers of the Corporations Court Applications Registrar (Corporations Registrar) were widened significantly in the Supreme Court.

Practitioners should ensure they are across these amendments, including what can and cannot be heard before the Corporations Registrar.

The Corporations Registrar hears matters arising under the *Corporations Act 2001* (Cth) (Corporations Act), pursuant to Schedule 1A of the *Uniform Civil Procedure Rules 1999* (UCPR).

The Supreme Court Rules Committee has considered these changes and the role of the Registrar against the backdrop of the harmonisation of rules and the desire to bring uniformity and consistency into the hearing of corporations law matters across all state and federal jurisdictions.

Comprised of members of the judiciary and chaired by Justice Douglas, the Supreme Court Rules Committee meets once a month. As well as many other aspects of legislative and procedural processes, the committee considers the recommendations of the Federal Harmonised Corporations Rules Monitoring Committee.

One of the major implications of these latest changes to Schedule 1A and 1B UCPR is the expansion of existing powers, such as:

- powers to make orders in relation to winding up applications
- powers to appoint special managers
- powers to make an order in relation to examinations under ss597(5A) to (17).

All of the above were previously limited to those matters which were not contested. Now the Corporations Registrar can hear a number of contested matters. It should be noted that, when the Registrar or a party consider it appropriate, the matter can still be referred to the Applications Judge (for example, under rule 982 UCPR).

Previously there were occasions when a matter was firstly heard before the Applications Judge before being returned to the Corporations Registrar – for example, an application to extend the time in which a winding up order could be made under s459R Corporations Act. Previously the extension of time application had to be heard by a judge, then the winding up application returned to the Registrar. Now, for the extension of time applications, where special circumstances can be demonstrated and the application is still within time, the Registrar has power to extend the current six-month time frame, and hear the winding up application.

Also noteworthy is the inclusion of Part 1A Insolvency Practice Schedule (Corporations) of the Corporations Act. These changes are significant, as they clarify the processes relating to the changes made to remuneration of liquidators and other external administrators in the Corporations Act amendments.

The full outline of the amendments is beyond the scope of this article, as they include some 77 new powers in addition to the expansion of existing ones. Practitioners are encouraged to consider these changes and what it means for their clients. The changes can be viewed on the Queensland Legislation website, [legislation.qld.gov.au](http://legislation.qld.gov.au). See Schedule 1B of the UCPR.

In relation to procedure, and particularly insolvency applications, which are the most common applications brought before the Registrar, it should be noted that no changes have been made to the service of the originating application and statutory demand, notification to the Australian Securities and Investments Commission, or the advertising requirements. Any departure from the legislative requirements will still necessitate an application to dispense with the requirements.

In all matters, the requirement to provide the Registrar with a written outline of submissions pursuant to Supreme Court Practice Direction 6 of 2004 continues to apply.

The Corporations Registrar continues to hear matters on Mondays and Thursdays, at 9.30am. However, to cater for any additional applications, the list has been opened up so that more matters can be heard on each of those days.

Jessica Lambert is a Senior Legal Officer at Supreme, District and Land Court Services, Corporations Registrar and Secretary of the Supreme Court Rules Committee. Joelle Lenz is a Legal Officer in the Policy Procedure and Legal Team in Reform and Support Services at Queensland Courts.

# QLS: Productivity report proves courts severely under-funded

A damning report revealing Queensland has the largest backlog of criminal court cases in the nation is proof that the justice system is heavily under-funded and in a state of crisis, according to Queensland Law Society.

QLS President Bill Potts said a Productivity Commission report revealing the state was the most clogged in Australia came as no surprise and was the “smoking gun” to support long-held views in the legal profession that more funding was urgently needed.

“Queensland courts are so underfunded that the justice system is in a state of crisis,” Mr Potts said. “I don’t mean that in the derogatory sense. Our judicial officers are at the coalface of a justice system facing ever-increasing caseloads caused as a result of the necessary and proper increase in police numbers and resourcing to help fight crime.

“Our magistrates and judges as a result are being required to work extraordinarily long

hours, under increased stress and pressure to clear an almost insurmountable backlog of criminal cases with fewer resources – such as the courts registry and support staff.”

Mr Potts’ comment follow reports that Queensland’s Magistrates Courts have a backlog of more than 6200 criminal cases – which equates to 16% of the year’s crime caseload – that are more than a year old.

That is compared with just 1.9% in New South Wales and 10.2% in Victoria.

Mr Potts said Queensland courts were far more efficient than the rest of Australia, but remained severely underfunded.

The report found that, across all criminal courts, the State Government spent \$835 to finalise each case, compared with \$1164 in NSW and \$1324 in Victoria.

“The Supreme and District Courts deliver judgments at a far cheaper rate per case than they do in any other state in Australia and they do so because they work extraordinarily hard and efficiently,” he said.

“But the human mind and the human body can only be stretched so far and the much-needed resources QLS is calling for is an investment in what is social infrastructure. Our courts are the glue that holds society together. Whilst they may be criticised by many people who disagree with some decisions in some cases, the judiciary and the courts need to be supported, trusted and resourced properly.”


Mr Potts said the current State Government had been extremely generous in funding the courts, but needed to find more resources to ensure justice was “no longer delayed nor denied” in Queensland.

“Simply put, the courts need more funding and like Oliver Twist we are asking: ‘Please sir, please madam Premier Anastacia Palaszczuk, can we have some more?’.”

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# QLS seeks changes to QCAT Bill

by Pip Harvey Ross



In September last year Attorney-General Yvette D'Ath tabled a report reviewing the operation of the Queensland Civil and Administrative Tribunal (QCAT) over the last nine years.

'The Review of the *Queensland Civil and Administrative Tribunal Act 2009*' (QCAT Act report) made several recommendations to improve the efficiency of tribunal proceedings, but also indicated that limited legislative amendment would be required.

The Queensland Civil Administrative Tribunal and Other Legislation Amendment Bill 2018 was introduced to implement the recommendations of the QCAT Act Report and also recommendations from the 'Lemon Laws – An inquiry into consumer protections and remedies for buyers of new motor vehicles' report (Lemon Laws Inquiry report).

The QCAT Act report found there was a need to clarify QCAT's jurisdiction in tenancy matters based on a perceived inconsistency between section 13(4) of the QCAT Act and the operation of section 516 in the *Residential Tenancies and Rooming and Accommodation Act 2008*. The Bill seeks to clarify the jurisdiction of QCAT to hear tenancy matters up to \$25,000.

The Lemon Laws Inquiry report recommended that the QCAT jurisdictional limit of \$25,000 for matters involving new motor vehicles with major defects be changed. Government members of the committee of inquiry recommended that the jurisdictional limit be removed, while

non-government committee members recommended that the limit be increased to \$40,000.

The Bill will action the Government's commitment to lift the jurisdictional limit for disputes made under Australian Consumer Law (ACL) consumer guarantees for the supply of goods that are vehicles costing up to \$100,000.

In response to the Bill, Queensland Law Society raised significant concern regarding the inability of solicitors to appear in the tribunal as of right. QLS considers legal representation as of right would assist the tribunal in dealing with matters that come before it and promote access to justice for Queenslanders. As the Bill seeks to raise the jurisdictional limit of QCAT to \$100,000, QLS considers that such a significant sum of money justifies the need for legal representation in QCAT.

QLS was supportive of the reforms aimed at facilitating increased engagement in alternative dispute resolution when appropriate. However, QLS suggested that guidance should be provided on the types of matters appropriate for conciliation. This could include the consideration of matters in which there is any obvious power imbalance between the parties.

QLS also raised an issue often faced by members in respect of relatively minor motor accidents between an insured party and an uninsured party when it is not clear who is at fault. Uninsured parties will often be pursued by debt collectors following such an incident with the collector commencing a proceeding in the Magistrates Court if they are unable to claim the debt.

This means that, often, the best advice for an uninsured party is not to fight a claim even when they believe that they were not at fault. The QCAT Act creates a 'cost-free' process for resolving disputes about property damage after a minor motor vehicle accident, however, the experience of QLS members is that debt collectors are unlikely to use this process because they are not able to recover legal costs.

Uninsured parties cannot, however, bring a pre-emptive claim in QCAT to avoid Magistrates Court proceedings as the process is available only to the party seeking the payment and not to a party seeking to avoid a payment. QLS has suggested that parties to minor motor vehicle claims should be entitled to bring pre-emptive proceedings in QCAT to avoid the costs associated with disputing fault in the Magistrates Court.

QLS also reiterated previous concerns that no additional training or resources have been provided to QCAT despite the additional legislation nominating the tribunal as the body to hear and determine disputes. QLS sought a response from the Government to address the concern that, without adequate resourcing, QCAT will be unable to adequately deal with its new jurisdiction.

QLS President Bill Potts, representative of the QLS Competition and Consumer Law Committee Anthony Haly and QLS Policy Solicitor Kerryn Sampson appeared at the public hearing on the Bill on 29 January to discuss the QLS submission in more detail.

Pip Harvey Ross is a QLS legal policy clerk. This article was prepared under the supervision of solicitors on the QLS Legal Policy Team.

## Appointment of receiver for Stenton & Moore Solicitors, Mudgeeraba

On 7 February 2019, the Council of the Queensland Law Society Incorporated (the Society) passed resolutions to appoint officers of the Society, jointly and severally, as the Receiver for the law practice, Stenton & Moore Solicitors.

The role of the Receiver is to arrange for the orderly disposition of client files and safe custody documents to clients and to organise the payment of trust money to clients or entitled beneficiaries.

Enquiries should be directed to Sherry Brown or Bill Hourigan, at the Society on 07 3842 5888.





## A welcomed return

2019 QLS President Bill Potts was welcomed to his second presidential term at New Year Profession Drinks functions held at the Banco Court in Brisbane on 7 February and at the Southport Yacht Club on the Gold Coast on 13 February.

In Brisbane, Bill said that during his 2016 presidency he spent significant time defending the judiciary and magistracy from unfair and uninformed criticism.

"It seems I will be doing that a bit in 2019 as well – and while I will admit that age has mellowed me in some ways, that isn't one of them," he said. "Lawyers, as officers of the court, are sworn to respect the rule of law and that means supporting our excellent, fair-minded, overworked and under-appreciated judges, magistrates and tribunal members."



# WOMEN IN LAW

## MAKING THE RIGHT MOVES



Queensland's legal landscape is changing in numerous and diverse ways.

The latest figures<sup>1</sup> show that the largest number of female solicitors in any career group are those with five years' or less post-admission experience. Also, Queensland Law Society membership is nearly at gender parity, with 49.6% female members.

Many eagerly await the day when the scales tip and women outnumber males in the solicitors' branch of the profession for the first time.

In 1915 we had one female solicitor, Agnes McWhinney; now in 2019 we have more than 5000. As International Women's Day – March 8 – draws near, it is time to reflect on the influential women forging their personal and professional journeys in the law.

Every solicitor – male or female – has their own path to follow and their own circle of influence and inspiration.



by Melissa Raassina

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<sup>1</sup> Queensland Law Society Inc. (2018). *Queensland Law Society Annual Report 2017-18*. P.12.





## GRACE VAN BAARLE

is a solicitor and the Manager of the QLS Ethics and Practice

Centre. She has been with the Society since 2007 and previously worked in private practice with large law firms in Brisbane and in Bristol in the United Kingdom following her admission in 1989.

Throughout her career, Grace has seen the profession change and grow, and had the chance to raise a family while staying in her chosen profession. When asked how she has managed to balance her work life and personal life, Grace said she was fortunate to separate the two by managing the expectations of those around her.

"I appreciate that this is more difficult as a younger person...however, through experience and perspective, it does become easier to assert yourself with regard to ensuring that you are not consumed with your work."

She said that balancing personal and professional lives was easier with a supportive personal network and physical and emotional wellness.

When asked what had changed most since her admission almost three decades ago, Grace listed two main areas of change – the rise of 24/7 communication (and the subsequent change in client expectations), and the view that working mothers are required to return quickly to practice.

"The opportunity to take some time to consider a query and response is more difficult with the speed and type of communication that is now available," she said.

"And the expectation that a female practitioner, should she wish to have a family, will return to work quite quickly if she wants to maintain her career.

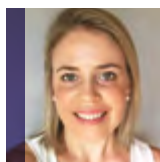
"This is not new, but the sheer number of law graduates attempting to enter the profession has impacted on how long one can step away from the profession."

Grace noted that there were also more part-time and job-sharing positions available in the new professional world, and that she has personally felt supported as a lawyer and mother.

What advice would Grace give to younger females being admitted?

"Build your skill set both professionally (your reputation) and technically. Learn to communicate effectively – do not be afraid to pick up the telephone and speak to your colleague or client on a matter.

"I am also a great believer in physical exercise and a short commute to work as one of the keys to happiness."



## GREER DAVIES

is Legal Counsel with Vinci Energies Asia Pacific and former

Chair of the QLS Early Career Lawyers Committee. She was a late starter in the legal profession, having completed an education degree before studying law. After spending some time in succession law, she gave birth to her first child and took up an in-house role with a commercial focus.

Greer said she had seen a great deal of change since her admission in 2012, particularly with more female practitioners joining the profession.

"There has been a greater number of females appointed to more senior roles within firms and in the industry," she said.

"Whilst it isn't the sole reason, I expect this increase is a product of firms offering more flexible working options."

Greer said that the shift to flexible arrangements was extremely positive for both males and females, but there was more visibility of females in the profession due to the platforms promoting and supporting women.



## CHRISTINE SMYTH

is a well-known name in the Queensland legal profession, as a leading

succession lawyer for more than 20 years, 2017 QLS President, Gold Coast firm partner turned consultant, published writer and Executive Member of the Law Council of Australia's Legal Practice Section.

Christine has raised a family and maintained an impressive career, and I asked her how she has managed to balance both worlds and still succeed.

"My career was built at a time before the concept of 'work-life balance' emerged," she said. "So for me, it has always been a process of work/life integration."

Christine said that "careers are like life" and credits being adroit, flexible and adaptable as key skills – although they're not easy and sometimes seemingly impossible, especially in a profession at a time which dictates that lawyers fit within a narrow identity and follow a well-worn path if they want any of the traditional markers of recognition and success.

"It is a matter of how you define and measure your own sense of success and not allowing others to define it for you or confine you to

"I have witnessed women really supporting each other in the profession, not only in their work, but also with their general development, and in areas such as study and home life," she said.

Greer noted that keeping up to date was important – although a big task with the rate of legislative change and new decisions increasing, but that social media played a part in flagging stories to follow up at a later date.

"Attending events, both CPD and networking, is also a great way to stay current with the law and colleagues, as well as to make new contacts."

Greer said she saw International Women's Day as an opportunity to acknowledge and celebrate the achievements of women both in the legal profession and outside of it.

"There are always many events which profile a selection of women's personal journeys of achievement – these stories are so important.

"They visibly demonstrate to all women that achievement is possible in many different settings and they provide a spark of inspiration for women to 'keep going' at whatever it is they are working towards."

Greer cautions that it's critical to remember that fame or notoriety are not the only measures of achievement, with many women silently achieving great things on a daily, weekly and monthly basis.

theirs," Christine said. "Critical to that, is to own your identity, be absolutely true to yourself."

With a history of leadership in the law, Christine discussed what she would change in the current Queensland legal profession.

"I would like to see the ideal of diversity and inclusion transition from laudable aim and mere rhetoric to measurable and sustainable action, to a point that it is no longer spoken of as a fanciful goal, instead it is simply a part of the fabric of who we are as a profession."

Her hope is that barriers will be broken down and removed, replaced with truth and value, and individuals will be recognised and rewarded for having real skills and actual abilities, not simply for being part of a select group.

Christine said that International Women's Day was a time for women to celebrate and support each other, and to remind all women that they stand as equals.

"It is an important opportunity to demonstrate that women are not a homogenous group, readily labelled and packaged. "It enables us to showcase how different we are, while bonding over our similarities.

"We get to celebrate our messy, complicated humanity and to be proud, that regardless of what shape, size, colour, and conviction we come in, we are all seeking the same thing – to be valued."



## REBECCA FOGERTY

is one of only a handful of females who have received Specialist

Accreditation from QLS in criminal law, and a founding partner of Jasper Fogerty lawyers. She is Deputy Chair of the QLS Criminal Law Committee, sat on the 2019 QLS Accredited Specialist (Criminal Law) Committee and has been published across multiple platforms.

Admitted in 2009, Rebecca has a passion for criminal law and cannot imagine herself in 10 years' time not working in the space. She said that it was a "privilege to be able to help people and in some small way serve the cause of justice".

Rebecca said there were still challenges in the profession that females must confront into the future.

"Women may comprise the majority of law graduates, but they often struggle to return to work after having children and are underrepresented at the senior and leadership level," she said. "I would hope that in 10 years' time, the vast majority of law firms will have embraced genuine flexible work arrangements as the norm for parents."

"I would also love to see more women joining the Bar or becoming partners or owners of law firms. The legal workforce is changing; there are more choices now than ever, and more and diverse role models for early female practitioners."

As one of the small number of females accredited in criminal law, Rebecca said that she undertook the course as a new challenge in her professional career. She said the program was challenging and she appreciated the opportunity to develop her skills and knowledge.

"It required an enormous amount of time and hard work, but it was nonetheless an extremely worthwhile and rewarding experience."

Rebecca has some sage words for young women entering the legal profession:

"In a nutshell, be honest, authentic, and listen to others. Listening – to your clients, senior colleagues and mentors – is a vital skill."

"Many female lawyers experience 'imposter syndrome' and question the validity of their accomplishments."

"Don't be afraid to speak up and contribute, whether within your law firm and/or the wider profession. Always keep your word."



## NOELA L'ESTRANGE

is closely associated with QLS, women in the law and the Queensland

legal profession, having been admitted in 1976 and leading the way in many areas over her career – including commencing the International Women's Day Great Debate more than 20 years ago. Despite her many career opportunities and her long legacy, she has never strayed from the legal profession.

Noela is an inspirational female leader in the profession, having also been the first female Chief Executive Officer at Queensland Law Society. When asked who inspired her, Noela shared her professional inspiration – former Governor of Queensland Leneen Forde – and told the story of her mother – who was widowed at 44 with four children in tow.

"It is from my parents that I received my social equity conscience, which I have tried to apply through the various stages of my life. At 95 this year, she still pushes us!"

"In my professional life, I was inspired during my articles by Leneen Forde, who was a partner in the firm. She was also widowed early and returned to university to gain a law degree and admission."

Noela said that International Women's Day had always meant a lot to her, and she appreciated the opportunity it provided to publicly acknowledge and recognise women's contributions across all areas of society.

"We take for granted many things that had to be fought for – the right to vote, to education,

to own property, to be treated equally before the law," she said.

She said the traditional colours of purple, green and white came from the British suffragists: purple for dignity, green for growth and white for clarity of thought.

"This is still very relevant to women in their endeavours today."

As a practitioner admitted during a time when not many women were admitted at each sitting – between 1971-1980 only 10.9% of those admitted were women (147 out of 1344)<sup>2</sup> – Noela has seen many changes in the profession over the last 40 years.

"I was the only woman admitted in my sitting, and there were only a handful of women at The University of Queensland's Law School in the early '70s. Despite the numbers of graduates, statistics show that women are still not making it through to partner rank as might be expected, so there's still work to do."

Noela was instrumental in setting up the Women Lawyers Association of Queensland 40 years ago. Back then, she never dreamed she would see women in such high positions across the state.

"I didn't dream that in my lifetime I would see female lawyers as Premier, Attorney-General, Supreme Court Chief Justice and Senior Judge Administrator, Deputy Chief Magistrate and High Court Chief Justice all at the same time."

<sup>2</sup> Gregory, H. (1991). *The Queensland Law Society Inc: 1928-1988*. Australia, P.150.

These stories provide a snapshot of the women lawyers leading the profession across Queensland. There are countless women working tirelessly day-in, day-out to create a better future for the younger generations in the legal profession.

Take the time this year on International Women's Day to reflect upon those inspirational women who have come before you, those who are working alongside you, and those who will rise with you in years to come.

## INTERNATIONAL WOMEN'S DAY

International Women's Day is celebrated annually on March 8 and is not country, group or organisation-specific. The 2019 theme is 'Balance for better'. More information can be found at [internationalwomensday.com](http://internationalwomensday.com).





## LOUISE PENNISI

has been a solicitor since 2006, and is the youngest appointment

as Corporate Secretary in the history of Queensland Law Society. She is also the Manager of Corporate Governance and the Reconciliation Action Plan, and has worked in private practice, governance and policy law reform throughout her career.

Louise became a solicitor because she has always had an interest in law.

"My decision to study law at university was a mixture of personal and altruistic reasons, and my choice to be admitted as a solicitor in the Supreme Court of Queensland was guided by my moral compass to work in a profession where I could directly help people and without having to apply bandages and stitches," she said, explaining that she hails from a family of doctors.

Her appointment as the youngest QLS Corporate Secretary and her two-year term as Vice President of the Australian Breastfeeding Association are on her list of biggest professional achievements, as is having her first and only daughter.

"There are a lot of skills and magic tricks I've developed over the years, but they all pale in comparison to my biggest personal achievement, my sweet-hearted daughter.

"Professionally, it has been put to me that I am the youngest solicitor to be appointed to the role of Corporate Secretary of the Society in its 90-year history.

"Interestingly Beryl (Donkin) and I were roughly the same age when appointed to the statutory position."

As Louise's career has spanned private practice, law reform and governance, I asked what she would change about the Queensland legal profession. Her answer focused on the great pro bono work that solicitors carry out.

"The foundation of our legal profession is the rule of law – which I hope continues in perpetuity," she said. "In upholding that solid foundation, there is a significant amount of pro bono, voluntary work and mentoring that takes place in the Queensland legal profession that goes unrecognised.

"If I could change one thing, it would be to broaden external perceptions and to ensure there is positive recognition for the good work done by our Queensland legal profession. One big change I'd like to see in my lifetime: more solicitors on the (higher) bench."



## GENEVIEVE DEE

is a partner in the family law team at Cooper Grace Ward,

a management committee member for Women's Legal Service Queensland and a QLS Accredited Specialist in family law. She is also a mum to three-year-old twin boys, and stepmother to two busy children.

Genevieve stays ahead in her career by being at the forefront of legal knowledge and skills, while also providing for the needs of her family and having fun along the way.

"I invest in my expertise in the usual ways – reading case updates, articles, journals, attending legal conferences," she said "But I also carve out time for my family and extra-curricular activities, so I stay somewhat balanced. For me, work isn't always the most important thing in my life."

One of the best ways she stays ahead is by surrounding herself with practitioners from a range of practice areas.

The biggest issue Genevieve flagged for female solicitors in Queensland is the lack of effective flexible work arrangements, which she said impacted negatively on women being able to participate in leadership and management positions "despite the enormous contribution they could make".



## CASSIE LANG

is a senior solicitor of Marawah Law, Vice President of

the Indigenous Lawyers Association of Queensland and hails from the Bundjalung people in Southern Queensland/Northern New South Wales. She has represented native title groups and organisations in remote regions of Queensland for more than 10 years.

Cassie has drawn inspiration throughout her personal and professional lives from strong women she has encountered.

"My biggest inspiration is the strong women in my life who have consistently asked 'why' and said, 'why not'," she said.

"They each encourage and challenge me to be better and to appreciate the small things I can do to make a positive change in someone else's life."

From the perspective of a practitioner working in remote regions, I asked Cassie what she would change in the Queensland legal

"We know diversity in decision-making leads to more inclusive outcomes and better workplaces. Despite this, we haven't universally committed to ensuring that women who work flexible or part-time hours still have opportunities to advance their careers. Not being able to work an 80-hour work week doesn't mean your contributions to your firm, clients and the profession are less valuable than those who can."

Genevieve conceded that some firms do this remarkably well, but noted that everyone could do better.

When asked who her biggest inspiration was, Genevieve said that she was inspired by people who had a determination to make things happen, providing some examples of such deeds.

"I was overwhelmed by Nadia Murad's story of surviving capture by Islamic State. It's inspiring that someone who has faced such horror can find the courage to escape and become a voice for vulnerable people around the world.

"I'm learning more about Associate Justice Ruth Bader-Ginsburg of the US Supreme Court. She is a tireless advocate for gender equality and women's rights, not to mention she now has her own Lego figurine!

"Locally, the boundless energy of Ann-Maree David of the College of Law inspires me. She works tirelessly to raise awareness of gender equality issues."

profession. Her answer focused on flexible working conditions in the modern age.

"The work that we do at Marawah requires us to travel and work in remote parts of Queensland. We are set up so that we can work anywhere. It could be the airport, home or in the office.

"This type of flexibility enables lawyers to work and deal with general life stuff at the same time. Sometimes you need a day at home or out of the office just to focus without the interruptions from other colleagues."

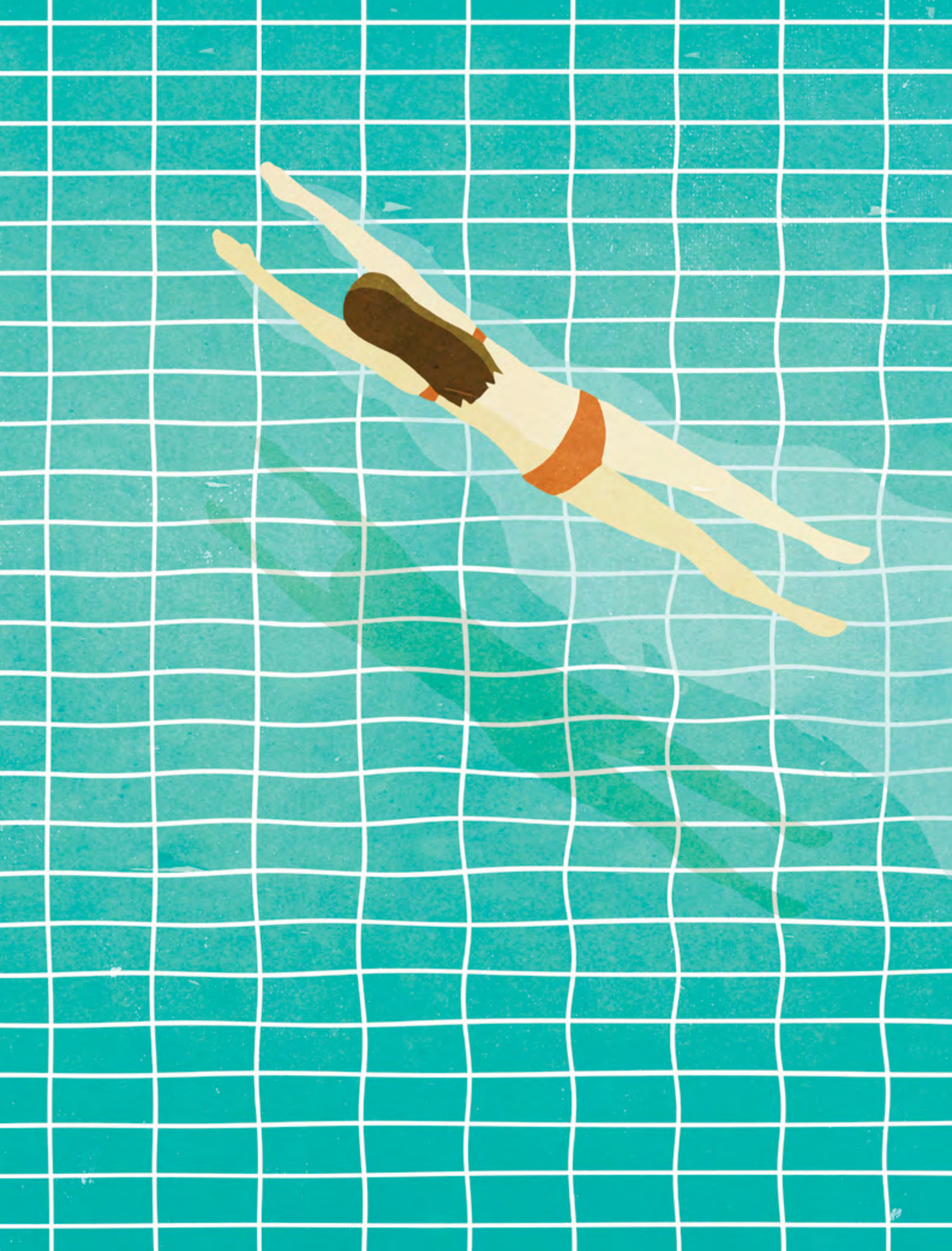
What would Cassie say to young females entering the legal profession?

She said that it was important to understand not only who you are, but what is important to you.

"As a lawyer, sometimes you can come across a situation that doesn't align with your values. It will be difficult and will challenge you.

"It is in these times that you need to reflect on who you are and why you are on this path. Surround yourself with a good support network. You will rely on them for different things at different times of your career. And do not be afraid to ask for help."







# A MEASURE OF RESPONSIBILITY

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Which acts of negligence  
may cross the line?







There is a dividing line between acts that may be negligent but not amount to unsatisfactory professional conduct or professional misconduct. Acting Legal Services Commissioner **Robert Brittan** explains where this line is likely to fall.

## “The standard you walk past is the standard you accept.”

In 2013, Chief of the Australian Army Lieutenant General David Morrison used these words in an address at an International Women's Day Conference to send a message regarding “unacceptable behaviour” within the Australian Army.

At the time, the Army was in the midst of an investigation into bullying and harassment in the military and Lt Gen Morrison had addressed the media earlier that day about this ongoing investigation into a group of officers whose conduct, if proven, would have brought the Australian Army into disrepute.

His comments were directed at those in the military who by their rank hold a role of leadership, but the essence of his words when considered, at their core, mean that every time we accept the status quo of poor behaviour, we are endorsing it.

As the regulator, one of the core responsibilities of the Legal Services Commission and the main purpose of the *Legal Profession Act 2007* (LPA) is “to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally”.<sup>1</sup>

The Act establishes a system for dealing with complaints about the conduct of legal practitioners. The system:

- a. provides for the discipline of the legal profession
- b. promotes and enforces the professional standards, competence and honesty of the legal profession
- c. provides a means of redress for complaints about lawyers
- d. otherwise protects members of the public from unlawful operators.

The commission's strategy for promoting standards of conduct in the delivery of legal services commences with receiving and dealing with complaints about the conduct of lawyers and the commission holds practitioners to account when their conduct falls short of expected standards.

It is those expected standards that underline this discussion of unsatisfactory professional conduct, professional misconduct and common law negligence.

## Negligence

The commission commonly receives complaints about a practitioner's negligence in the handling of a matter.

Lawyers have a duty to provide professional services with reasonable skill and care. They owe their clients a duty of care. Negligence is the failure to exercise the degree of care considered reasonable in the circumstances, but the mere fact that a lawyer fails to achieve what a client hoped to achieve with the lawyer's advice and assistance does not, of itself, mean that the lawyer was negligent.

However, a lawyer who fails to provide legal services to the client with reasonable care and skill and when that failure then leads to the client suffering financial or other loss, then that lawyer may well have breached their duty of care.

To give these statements some perspective, a lawyer who inadvertently puts the wrong description of a property on a contract of sale will have caused less damage to a client than a lawyer who fails to file required forms with a court or tribunal and that failure leads to the client's case being struck out.

Should a practitioner breach that duty of care, it may amount to negligence and the client may be entitled to compensation for their loss, but it must be remembered that negligence is a civil action and it is up to a court to decide if a lawyer has breached their duty of care and whether the client is entitled to compensation in the circumstances.

Complaints that allege negligence very often raise complex and contentious questions of both fact and opinion, and there is a likelihood that even after an exhaustive investigation there may not be a sufficiency of evidence to be satisfied that there is a reasonable likelihood of a disciplinary tribunal finding that the lawyer's conduct amounts to unsatisfactory professional conduct or professional misconduct.

As a general rule, complex and contentious questions of fact and opinion are to be properly decided by a court of law. Once those issues have been heard and determined, then

the commission is better positioned to deal with any disciplinary issues that may have arisen.

At the commission, we encourage complainants in these situations to seek their own independent legal advice about their options and prospects for pursuing such a negligence claim in the courts, if that is what they wish to do.

## Competence and diligence

The commission's jurisdiction under the LPA is to consider matters where the conduct in question is capable of amounting to “unsatisfactory professional conduct” or “professional misconduct” as defined by the LPA.

Section 418 of the Act relevantly defines unsatisfactory professional conduct as:

“Unsatisfactory professional conduct includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.”

Section 419 of the Act relevantly defines the meaning of professional misconduct as:

- “(1) Professional misconduct includes—
- (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
  - (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.”

The commission will not make a discipline application to a disciplinary body unless it is satisfied that the evidence after investigation establishes both that there is a reasonable likelihood of a finding by the disciplinary body of unsatisfactory professional conduct or professional misconduct, and that it is in the public interest to make a discipline application.

It should be kept in mind that the standard of “competence and diligence” prescribed by the LPA is a minimal standard; it does



not purport to be comprehensive. Not every mistake by a lawyer will result in a disciplinary application to a disciplinary body. It is based on a failure by a lawyer to meet the minimal standard; not a failure to achieve an 'ideal' outcome for the client or to provide them with 'perfect' advice.

In a practical sense, lawyers must use their best endeavours to complete any professional work competently, diligently and as promptly as reasonably possible.<sup>2</sup> If it becomes apparent that this cannot be done within a reasonable time, then the client should be informed immediately.

"Competence and diligence" covers a range of conduct matters and largely depends on one's perspective. So what legal practitioners consider to amount to competence and diligence on their part will not necessarily be the same view held by a client or indeed by another legal practitioner.

As a result, whether a practitioner acts with competence and diligence is generally looked at in broad terms. These include:

- Is the practitioner sufficiently knowledgeable about the specific area of law?
- Does the practitioner carry out the technical aspects of the legal practice required with skill?
- Does the practitioner manage the legal practice required efficiently?
- Does the practitioner identify issues beyond his competence and bring them to the attention of the client?
- Does the practitioner properly prepare and carry out the necessary tasks required in the matter?
- Is the practitioner capable both intellectually/emotionally and physically?

When a practitioner's competence and diligence is being considered, these terms will offer some guidance as to the extent to which the practitioner may have failed to maintain a minimum standard.

## Case authorities

The issue of what amounts to "unsatisfactory professional conduct" involving a lack of competence and diligence has been considered by the Queensland Civil and Administrative Tribunal (QCAT) and its predecessors on several occasions.

A useful starting point is the decision in *Legal Services Commissioner v McClelland* (2006) LPT 13, in which the lawyer in question had failed to provide, in several conveyancing transactions, a certificate required by the relevant property legislation to be provided to purchaser client. He had failed to provide the requisite certificate on 16 separate occasions.

The respondent lawyer had argued before the tribunal that it did not amount to a lack of competence and diligence because he

had misread the legislation. However, when finding that the conduct in question amounted to "unprofessional conduct" (which was the applicable categorisation at the time), the tribunal said:<sup>3</sup>

"The Tribunal accepts the submission advanced by the applicant that this breach is properly characterised as one going to competence and diligence, amounting to unprofessional conduct. It was based on a misreading of the legislation, and Mr Cronin submitted it did not even reach the level of unprofessional conduct. But the respondent's approach bespoke a 'failure to maintain reasonable standards of competence or diligence' (s3B(1)(c) *Queensland Law Society Act*), which put it into that category. A practitioner must have the wit carefully to read and comprehend a provision like this, designed for the protection of clients in an area in which he substantially practices. The 'failure' referred to in s3B(1)(c) would not embrace all cases of error, but this is substantial enough to fall within its ambit."

The matter was further considered in *Legal Services Commissioner v Bone* (2013) QCAT 550 where reference to an "error" being "substantial enough" was picked up and the tribunal said:<sup>4</sup>

"Both ss418 and 420 of the LPA contain flexible tests, such that not every error which a practitioner may make will constitute unsatisfactory professional conduct. Decided cases suggest, rather, that a finding of that kind will usually involve repeated errors or a significant departure from accepted standards of competence."

In that case, a technical breach of a professional rule, which required notice of a charging clause in a will to be provided in writing (where the substance of the rule had effectively been carried out)<sup>5</sup> was found not to amount to "unsatisfactory professional conduct" because the tribunal was not persuaded that it was conduct "at the level, or with the requisite degree of seriousness or substance, to which s418 is directed".<sup>6</sup>

The definitive test is that set out in the statute, in section 418 of the LPA.

In *Legal Services Commissioner v Slipper* (2008) LPT 8, the lawyer had failed to lodge a notice of change of address for service with the court and his failure to do so resulted in the client losing a hearing date and being ordered to pay costs.

In that case, although the conduct of the respondent was conceded to be an isolated incident, it was nevertheless recognised that the respondent's client had been denied the opportunity to test the worth of her application and there were consequences to the client who was ordered to pay the respondent husband's costs.

This was considered to be a lack of competence and diligence sufficient to amount to "unsatisfactory professional conduct". So although very few acts of negligence tend to amount to unsatisfactory professional conduct or professional misconduct, a single act of neglect is capable of amounting to unsatisfactory professional conduct, but it is evident from the authorities that it would have to be serious.

As the tribunal observed in *Legal Services Commissioner v Laylee and Another* [2016] QCAT 237:<sup>7</sup>

"If every negligent act or error made by a practitioner were to be categorised as unsatisfactory professional conduct, disciplinary prosecutions would follow every claim against a legal practitioner for professional negligence, for which every practitioner must be insured."

The tribunal felt that there needed to be an "appreciable departure" from the standard for the conduct to amount unsatisfactory professional conduct.

"An isolated instance, not involving unethical conduct, and more in the nature of conduct which might give rise to an assertion of negligence, is less likely to amount to unsatisfactory professional conduct. Serious or repeated instances, are more likely to amount to unsatisfactory professional conduct or professional misconduct."<sup>8</sup>

Therefore, to be clear, the falling short required by section 418 of the Act must be substantial and very obvious.

Interestingly, in that matter, which involved the lodgement of a caveat on the assumption of a written loan agreement that did not exist, the tribunal was not satisfied there had been a substantial error, preferring to view the respondent's conduct as being more in the nature of a "mere slip" rather than the "very stark misapprehension of instructions" that the commission had argued for.

Justice Carmody took the view that the difference between unprofessional conduct and professional misconduct was "one of degree" in *Legal Services Commissioner v Mould* (2015) QCAT 440, in which he cited the observations made by Kirby P (as he then was) in *Pillai v Messiter (No.2)*<sup>9</sup> regarding the conduct of medical practitioners and emphasised that in light of the potential consequences for the practitioner, such a finding should only be made where necessary to protect the public from:

"Delinquents and wrongdoers...(or) seriously incompetent professional people who are ignorant of basis rules or indifferent as to rudimentary professional requirements."

Ultimately, whether or not a practitioner's conduct is sufficient to amount to unsatisfactory professional conduct will be determined based on the facts of each individual case.

## A recent Court of Appeal decision

Last year the Court of Appeal had cause to consider a solicitor's conduct against the standards prescribed in section 418 in the matter of *Legal Services Commissioner v Sheehy* (2018) QCA 151, in which the commission appealed a QCAT decision to dismiss a disciplinary application against a legal practitioner for her conduct of a conveyancing matter.

In brief, the respondent acted for the wife in a contract for the sale of land that was being sold pursuant to court orders made in a matrimonial dispute. The other seller was the former husband, who had his own legal representation. The buyer ran into difficulties and the nominated settlement date was extended by agreement between the husband and the wife, as the sellers. However, when the purchaser still could not settle on the revised nominated date, things became less clear between the husband and the wife. Whilst the wife wanted to proceed, the husband wanted to terminate the contract.

The commission alleged that the respondent solicitor, by instructing, receiving and accepting the balance of the proceeds into her trust account, had engaged in unsatisfactory professional conduct by completing the contract for sale of the land when she knew or ought to have known that the joint owner (the husband) was against it and had not authorised the settlement.

There was a long established principle, in the High Court decision of *Lion White Lead Ltd v Rogers*<sup>10</sup> that the respondent would or should have known that where one party purports to terminate the contract then settlement could not proceed without the consent of all parties.

The facts of the matter were that this was an acrimonious situation, where the land was being sold as part of a matrimonial property dispute. It was the only asset held by the parties that could be sold to pay out the mortgage and there would be no residue for the parties to share. So this sale was a necessity, which the parties had little choice about.

The respondent took the view that she had done nothing that could be considered to be "professionally blameworthy" and that if there had been a lapse in her judgment it was insufficient to warrant disciplinary action or sanction.

The question that became crucial was whether the contract could have been terminated at the election of one, but not both, of the sellers.

At hearing, the commission had relied on the report of an independent expert,

Mr Purcell, who had analysed the transaction and concluded that, measured against the standards of the hypothetical "qualified competent and careful" lawyer, such a lawyer would have known or ascertained that:

- Further variation of the contract required the assent of the parties including the husband.
- The husband was entitled to terminate the contract and the wife was not entitled to insist that settlement occur without his consent.
- The respondent had no authority to accept the purchase monies or direct that they be paid into her trust account.

The lawyer would also have advised the wife that, whether or not the contract had been terminated validly, the wife could not take it upon herself to vary the contract by a further extension of time.

Although the tribunal indicated that it felt "greatly assisted" by what Mr Purcell had prepared to show the professional standard of competence and the reasonable expectations of the public, the tribunal considered that "in the end, the application of the test is a facts sensitive question of law and cannot be delegated to an expert".

The tribunal judge was not satisfied that the facts were capable of supporting the commission's allegation that the respondent had acted in breach of her professional obligations or standards and expressed the view that:<sup>11</sup>

"Practitioners are defined by the legality and ethical (not moral) virtue of the choices they reasonably make in the hurly-burly of professional life. They are allowed to make reasonable contestable or contentious even questionable decisions without their conduct being branded unprofessional or substandard. They are accountable for their actions or failures in performing professional roles according to reasonably acceptable and achievable (not arbitrary or impossible) standards of behaviour.

"Tested objectively and measured against the statutory standard, the practitioner did not act illegally, unprofessionally, unethically, or in breach of any duty to the husband, another practitioner, the profession or the public...

"Nothing she did or failed to do is indicative of a misunderstanding or misapplication of 'the precepts of honest and fair dealing'<sup>12</sup> in relation to the public interest or demands of practical justice."

On appeal, the Court of Appeal disagreed with the tribunal judge's comments, noting that the term "unsatisfactory professional conduct" is defined by section 418 of the LPA but that the tribunal judge had not referred to that section and "it fairly appears that he did not apply that definition in his analysis of the respondent's conduct".

The court also disagreed with the tribunal judge's reference to *Kennedy v Council of the Incorporated Law Institute of New*

*South Wales* (where Rich J had described the conduct of a solicitor as sufficiently serious to warrant his name being removed from the roll) taking the view that that case was not relevant to the assessment of the respondent's conduct against the standards prescribed by section 418.

The Court of Appeal took the view that the judge had proceeded on an "incorrect analysis of the transaction and without reference to the question which was effectively defined by s418".<sup>13</sup>

The commission maintained the same argument on appeal, namely that, based on the evidence of Mr Purcell, the respondent had gone ahead without any consideration of the legal position between the parties, which would be expected of a reasonably competent legal practitioner.

It was noted that the respondent solicitor had done nothing to consider the entitlement of the husband to terminate the contract; she had conducted no research and had apparently not encountered the problem previously; even so, she sought no advice from another practitioner. Instead she simply proceeded in the belief that the interests of her own client would be best served by doing so.

In the court's decision delivered on 29 June 2018, McMurdo JA (with whom Philippides JA and Douglas J agreed) concluded that:<sup>14</sup>

"In my view, a reasonably competent legal practitioner would have known or ascertained that she was not entitled to take steps to complete the contract over the objection of





[the husband], which she did by calling upon the buyer to settle by paying the price to her trust account and by necessary implication from that conduct (if not expressly) released the buyer's solicitor from his undertaking which had been given for the benefit of both [the husband and the wife]. By her conduct, she effectively induced the buyer's solicitor in breach of his undertaking to hold the transfer documents on behalf of both sellers. Her conduct fell short of the standard of competence and diligence to be expected of a reasonably competent legal practitioner."

The circumstances that have been outlined in all these case authorities suggest that there needs to be substantial and/or consistent failure to reach or maintain a reasonable standard of competence and diligence in order to attract sanction for unsatisfactory professional conduct.

## Professional misconduct

The commission takes the view that being an effective regulator depends in part on how well we use our disciplinary and enforcement powers.

The commission's strategy focuses on ensuring that, when disciplinary or enforcement action is needed, our actions are fair, proportionate and consistent. It is a role that the commission takes seriously and, when considered appropriate, the commission will not shy away from challenging decisions and testing the law.

In the last year, we have successfully appealed three QCAT decisions, one being the case of

*Sheehy*. Another that I would like to highlight is the findings of the Court of Appeal in the matter of *Attorney-General of the State of Queensland v LSC & Anor; LSC v Shand* (2018) QCA 66 (*Shand*) and the comments<sup>15</sup> made by the court regarding the fitness of those on the court's Roll of Practitioners:

"The community needs to have confidence that only fit and proper persons are able to practise as lawyers and if that standing, and thereby that confidence, is diminished, the effectiveness of the legal profession, in the service of clients, the courts and the public is prejudiced. The Court's Roll of Practitioners is an endorsement of the fitness of those who are enrolled."

The events in *Shand* are notorious but in summary, in 2002 the respondent made a corrupt payment to a Minister of the Crown and in doing so committed a crime. After a District Court trial in 2011, the respondent was convicted and sentenced to a period of imprisonment.<sup>16</sup> The commission applied for a disciplinary order against the respondent and even he conceded before the tribunal that his criminal conduct amounted to professional misconduct.

The tribunal, although finding that he had engaged in professional misconduct, considered an order that the respondent not be granted a local practising certificate before the expiry of a period of five years would be sufficient. The commission and the Attorney-General took a different view and appealed, contending that the tribunal had erred in not recommending that the respondent's name be struck from the roll of practitioners.

The tribunal's reasoning appeared to have been that, although the respondent was "currently unfit to practice" (meaning at the time of the disciplinary hearing), the respondent was not then "permanently unfit to practice". So the tribunal was of the view that the respondent was then unfit, but it was not probable that he would remain so.

The purpose of disciplinary proceedings has long been seen not to punish errant practitioners but to protect the public and to maintain confidence in the profession in the estimation of the public.<sup>17</sup>

Although in *Shand* the respondent had disavowed any intention to engage in legal practice, that was not the end of the matter. The Court of Appeal considered the test of probable permanent unfitness to be:

"...as the Attorney-General submits, a way of identifying that the character of the practitioner is so *indelibly marked by the misconduct* that he cannot be regarded as a fit and proper person to be upon the Roll."<sup>18</sup> [*emphasis added*]

McMurdo JJA said further at [60]:

"It is difficult to imagine that a mature person having studied and practised the law, could

have failed to underestimate the seriousness of an offence of corruption involving a Minister of the Crown. It was an isolated offence, but nevertheless an unfitness to practise law was plainly demonstrated by this offence when it was committed in 2002."

Effectively, the character of the respondent was considered to have been revealed by the offence itself and some persuasive evidence would be required if the respondent wanted to argue that the position was now different.

The commission takes some comfort in the court's ruling in *Shand* (notwithstanding mental illness issues or other addictions) that the probable unfitness of the practitioner can be gauged by identifying that the character of the practitioner can be so indelibly marked by the misconduct itself and the seriousness of the offending, that they should not remain on the roll.

## Conclusion

Clients have the right to expect a minimum standard of competence from a solicitor who is deemed to be a fit and proper person.

At a minimum, practitioners need to maintain a basic knowledge of the law and keep in touch with developments in their area of practice and ignorance of the law remains no excuse for changing requirements of practice or ethical standards.

It is hoped that these types of discussions and analysis about unsatisfactory professional conduct, professional misconduct and negligence and the standards that members of the public are entitled to expect of a legal practitioner will assist in better understanding the types of conduct that might qualify for investigation.

### Notes

<sup>1</sup> LPA Part 1.1.3(a).

<sup>2</sup> Rule 4.1.3 Australian Solicitors Conduct Rules (ASCR).

<sup>3</sup> *Legal Services Commissioner v McClelland* (2006) LPT 13 at [27].

<sup>4</sup> [2013] QCAT 550 at [65].

<sup>5</sup> The disclosure requirement of rule 10 ASCR had been made orally to the client and apparently understood rather than specifically being "in writing" and "before the client signs the will".

<sup>6</sup> (2013) QCAT 550 at [67].

<sup>7</sup> At [40].

<sup>8</sup> At [44].

<sup>9</sup> (1989) 16 NSWLR 197.

<sup>10</sup> (1918) 25 CLR 533.

<sup>11</sup> (2017) QCAT 276 at [45]–[46] and [48].

<sup>12</sup> *Kennedy v Council of Incorporated Law Institute* (1939) ALJ 563.

<sup>13</sup> *LSC v Sheehy* (2018) QCA 151 at [44].

<sup>14</sup> *Ibid* at [51].

<sup>15</sup> (2018) QCA 66 *McMurdo JJA* at 17 [55].

<sup>16</sup> To a term of 15 months' imprisonment, suspended after four months.

<sup>17</sup> *Baker v LSC* (2006) QCA 145.

<sup>18</sup> *Shand* at [57].





## Working together to control the cost of claims

The cost of claims remains the single most important input to the cost of insurance for the profession. This is why our partnership with you to manage risk remains Lexon's central focus.

To further your understanding of the profession's claims experience; I have set out in the graphic below the expected value of claims against the scheme for the five insurance years up to 2017/18 (as at 31 December 2018). 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.

While 2017/18 is expected to be a somewhat higher claims value year than other recent years, the average central estimate for the last five years nonetheless now sits at \$15.5m. In relative terms, this represents an extremely 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.

### Lexon cyberfraud initiatives – working with you to stop the fraudsters

Lawyers are regularly involved in significant transactions for clients and often control substantial sums of their money. This makes lawyers an attractive target for fraudsters who are now using sophisticated methods to gain access to funds or property.

To help you combat this threat, Lexon has announced a significant new cyberfraud initiative with the appointment of a leading cybersecurity expert to provide on-the-ground assistance to insured practices. Cyber-risk consultant Cameron McCollum, a former Australian Army Intelligence Officer, joined Lexon late last year and brings extensive experience in threat evaluation and assessment. In an expansion of our existing program, Cameron will undertake 'cyber-risk visits' to individual practices without charge, as well as providing helpful insights on a broader level.

Lexon is also introducing a bespoke cyber-education program as part of the insurance company's ongoing commitment to help practices limit their exposure to cyber-risks. The cyber-education initiative, which will be available to all insured practices without charge, is an interactive program which addresses in a practical way the risks that practitioners face and provides workable solutions to minimise exposure.

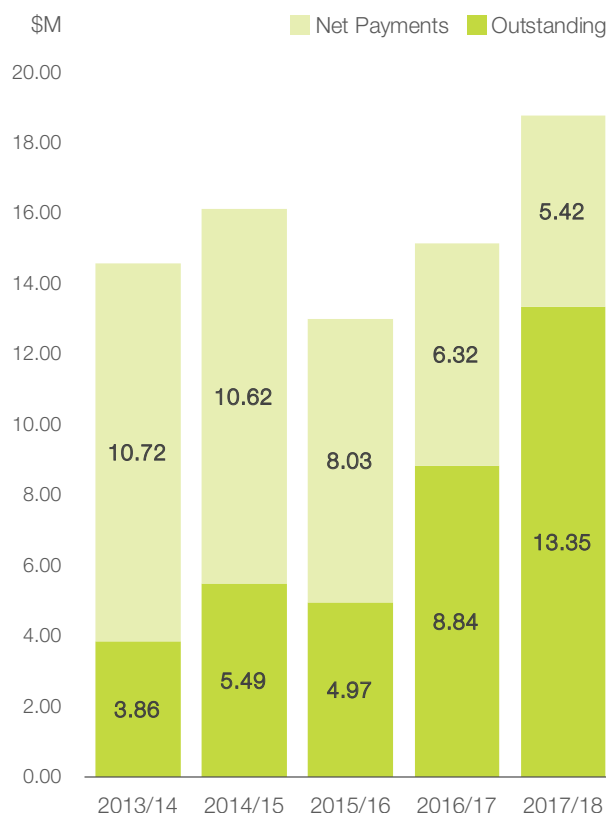
### 2019/20 renewals and rates

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

QLS and Lexon are working hard to deliver the best rates possible for 2019/20 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](mailto:michael.young@lexoninsurance.com.au).

Michael Young  
CEO





# Getting ready for the end of year

## Practice changes (mergers, acquisitions, splits and dissolutions)

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

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

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

There are potentially significant financial consequences (in terms of future insurance levies and payment of excesses) which should be borne in mind when considering such changes. Because of these consequences, law practices are strongly encouraged to:

- Be familiar with the policy wording and Indemnity Rule (including Rule 10(6)) and the implications they may have.
- Contact Lexon to discuss your particular circumstances.
- Take independent legal advice when required.
- Consider contractual terms for adjustments/indemnities to provide some recourse in the future.
- Obtain a written authority 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 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?

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

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

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

- The Foreign Law exclusion in the policy has been refined to permit practices to be covered for 'pre-approved' foreign law work.

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



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# Mediating in 'the satisfaction triangle'

Addressing clients' substantive, procedural and psychological needs



Realistically, we know that our clients will not always be happy at the conclusion of their mediations.

We hope to achieve some level of compromise that will settle their disputes and save them unnecessary legal and emotional costs. We talk to them about outcomes they can 'live with', and about how accepting less than they may achieve from a judicial decision may be preferable due to the high costs of litigation and often lengthy waiting times for trials.

However, if we examine the mediation literature, there are some key strategies we can use to assist our clients to feel more satisfied with the mediation process.

## What is mediation?

At a basic level, mediation is a structured negotiation process in which an independent person, the mediator, facilitates the discussions and negotiations with the goal of settling the dispute and reaching agreement.

A common structure used in practice is a 'shuttle', where the mediator may commence with all participants in the room but will quickly separate the parties and their lawyers into separate rooms. The lawyers may at the outset state what their clients' legal positions are and then the negotiations commence from that point with the mediator assisting to find some sort of compromise.

In this model, the mediator may provide advice about the likely range of outcomes that a court may award. This is termed an 'evaluative mediation'.<sup>1</sup> It is particularly used to break deadlocks and the mediator will encourage the parties to settle within the anticipated range of outcomes.

Another model is 'facilitative mediation' in which the mediator is the facilitator of discussions between the parties and their lawyers, but does not give views about appropriate settlement outcomes.<sup>2</sup>

'The satisfaction triangle' can assist mediators to help clients address their substantive, procedural and psychological needs.

**Donna Cooper** explains how this may increase their level of satisfaction with the process.



At the outset the parties may themselves make the opening statements and the mediator may then work out some common issues for discussion, often called an 'agenda'. The mediator may commence with all participants in the room and keep them in the same room until the issues have been explored and then may break to have private meetings with parties and their lawyers.

The mediator can use the legal representatives, when needed, to inform the parties what the anticipated range of outcomes may be if the case proceeds to a court hearing.

There are also what are called 'hybrid' processes in which mediators may use a combination of the above models.

### Satisfying underlying needs and interests

In terms of the mediation theory, Moore has argued that settlement in negotiations is more likely to be achieved when our clients have their underlying needs and interests satisfied.<sup>3</sup> Maslow's 'Hierarchy of Needs' is a motivational theory in psychology which provides a tiered model of human needs that can assist in unpacking what may really be driving our clients in legal disputes.<sup>4</sup>

At the most fundamental level, 'needs' include our basic physiological requirements for survival, such as air, food, shelter, and safety and security.

At the next level, we have needs to ensure our psychological health, described in terms of 'love and belongingness', such as our need for intimate relationships, family and friends. For family law clients, their separation may have impacted on their psychological health and their feelings of security and belonging as their family unit has been fractured. Often their need to maintain a meaningful role as a parent will be a driving force in negotiations. For some clients it will be really important to keep their family home to retain some stability and security for themselves and their children.

Another element of our psychological needs is having self-esteem in our personal and working lives, for example, feeling that we are capable in our job and have a good reputation in our chosen trade or profession. These needs often impact on workplace disputes, as employees often need to feel valued in their workplace and in commercial disputes in terms of the maintenance of professional reputations.

In contrast, 'interests' are more specific to the dispute in question and are, "desires, concerns, or wishes that people in dispute want to have addressed or satisfied".<sup>5</sup> For example, in a building dispute the builder may be seeking that the sub-contractor who has performed a job return to the site and perform further work to raise the standard of workmanship.

The builder's interests may be in raising the quality of the work performed and ensuring that the building is safe and compliant with the relevant standards. His underlying needs may be to feel that he has done a good job and maintained the reputation of his building company so that he can continue to produce income and ensure good customer relations.

### The client satisfaction triangle

Moore has further argued that clients will be more inclined to settle in mediation if their needs and interests in the following three broad categories have been addressed and satisfied:

1. Substantive: satisfaction with the outcome
2. Procedural: satisfaction with the process
3. Psychological and relationship: satisfaction with how the client has been treated and whether they feel they were listened to.

Moore has combined these three categories into what he terms "the client satisfaction triangle"<sup>6</sup> and we will now look at how we assist our clients to be satisfied in these three key areas.

### Substantive needs and interests

The first category, substantive needs and interests, refers to, "tangible outcomes or benefits that a party wants to have satisfied, received or be exchanged as a result of negotiations".<sup>7</sup> This involves having discussions with our clients and drilling down to what they are really wanting to achieve out of their mediations and what their negotiating bottom lines may be.

It can help if we talk to our clients not just about *what* they want but *why* they want it. Often clients will be seeking monetary compensation, but there will often be underlying needs and interests that they would really like addressed. Some questions to ask our clients are, 'what is it that's really important to you?' and, 'what are you really needing out of this mediation to be able to move on with your life?'

For example, if we are acting for an employee in a workplace dispute with their manager we would be asking our client about what they are really wanting to achieve. Do they feel that they can keep working in the same company; if so, do they feel they can keep working with this particular manager in the future, or will they be seeking a transfer to another area?

The employee may be upset with the way in which he has been treated by his manager, however what he may really want to achieve is to have his concerns listened to, have his manager acknowledge that he values his work and to have a more structured working environment in future in which the manager makes regular time for meetings and communicates more appropriately and effectively.



## Procedural needs and interests

The second category, procedural needs and interests, involves our client's preferences "regarding the process by which problem solving, negotiations or dispute resolution occurs, and ways agreements are reached or implemented".<sup>8</sup> In essence, this refers to whether, at the conclusion of the mediation process, our client perceives it to have been a fair and suitable process.

In terms of client satisfaction, we need to choose the most appropriate mediation model to fit our client and the dispute. There are a number of models of mediation, ranging from facilitative mediation, in which the mediator assists clients to come to their own decisions, to evaluative mediation in which the mediator will provide robust views on appropriate settlement ranges.

Lawyers who have completed mediation training will understand the range of mediation models available and will be best placed to choose the most suitable option. They will also be able to effectively prepare their clients to participate in the process, as they understand the stages and what each one is seeking to achieve.<sup>9</sup>

The choice of mediator is also crucial. We need to consider what type of mediator will suit our client and the issues in dispute, and what knowledge and experience we require. We also need to canvas what our client will feel more comfortable with in terms of gender, a male or female mediator, or a combination of co-mediators, and whether a particular age of mediator would be more appropriate. We also should ensure the cost of the mediator suits the issues in dispute and our client's financial circumstances, because there is a range of mediators available with different price points.

We need to examine the qualifications of our mediators. Whether they are a solicitor, barrister or from another professional background, if they are nationally accredited we can be assured that they have been comprehensively trained in compliance with the National Mediation Standards and have developed high-level skills in negotiation and conflict resolution.

Nationally accredited mediators have completed 38 hours of training and passed a rigorous skills assessment in which they have conducted a mock mediation and been assessed as competent in facilitating the mediation process and in demonstrating a range of conflict resolution skills.<sup>10</sup>

After passing the mediator skills assessment, they apply to an accrediting body such as Queensland Law Society, Bar Association of Queensland, the Resolution Institute or the Australian Mediation Association to become nationally accredited. To have their accreditation accepted, they need to fulfil

certain good character requirements and must hold suitable professional indemnity insurance.

Once accredited, such mediators are bound by a code of ethical standards and have a complaints mechanism. They must also complete a minimum of 25 hours of continuing professional development every two years.<sup>11</sup> Consequently, using a nationally accredited mediator provides you with a certain measure of quality control.

## Psychological needs and interests

The third category, psychological interests, refers to our clients perceiving that they have been respected and heard, and had their feelings and experiences acknowledged.<sup>12</sup> For some clients it will be important to sit across the table from the other party, have the chance to tell their story in their own words and to feel listened to. For other clients they may feel more comfortable if their lawyers speak for them.

Other people will prefer the mediation to be conducted in separate rooms, particularly if they feel threatened or intimidated by the other party. In a shuttle process, both the mediator and client's lawyer will need to spend more time listening to the client and acknowledging their concerns so that they feel heard in the process.

Some relevant considerations here are whether the client needs to have an ongoing relationship with the other party and, if so, whether it will assist if both parties and their lawyers have the opportunity to hear each other's perspectives. For people who need to have an ongoing relationship, whether they are the parents of children or people who have an ongoing business relationship, their ability to understand each other's perspectives and be able to communicate in the future will be important. For these parties a mediation in which the parties and their lawyers spend some time in the same room, sharing perspectives may provide benefits for their future relationship.

For example, in a workplace dispute it may be important for a client to feel that the manager or colleague they are in dispute with has at least listened to their concerns. It is not necessary that they agree with everything the client says, but if they can listen respectfully and provide some acknowledgements, this can assist in having constructive discussions.

In some cases, it may be appropriate for a manager to acknowledge that the employee is a valued staff member, but there may be particular aspects of their work behaviour that need to change so that the workplace can function more efficiently.

In family law parenting disputes, parents need to have ongoing co-parenting relationships.

If they are able to listen to each other and, although they may have differences, acknowledge the importance of their children's relationship with the other parent, this can provide a starting point for respectful dialogue.

## Conclusion

Moore's client satisfaction triangle provides us with a simple framework for our mediations. If we take the different needs of our clients into account, including their psychological needs and interests to feel respected and heard, and we ensure that the particular mediator and mediation model suits the issues and the needs of our clients, we can increase the level of client satisfaction.

We can also provide some quality assurance by using nationally accredited mediators who have completed comprehensive training and been assessed as competent to facilitate the mediation process.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee. Donna Cooper (d.cooper@qut.edu.au) is a Senior Lecturer in the Queensland University of Technology Law Faculty, a practising family and workplace mediator, and a member of the committee. She coordinates the QUT Professional Mediation Program that delivers mediation courses complying with the national mediator accreditation requirements. Donna also conducts short-course training in negotiation, mediation and in how lawyers can effectively represent clients in mediation and conciliation processes.

### Notes

<sup>1</sup> S. Hardy and O. Rundle, *Mediation for Lawyers*, CCH, 2010, 57-62.

<sup>2</sup> S. Hardy and O. Rundle, *Mediation for Lawyers*, CCH, 2010, 58-60.

<sup>3</sup> Christopher W. Moore, *The mediation process: practical strategies for resolving conflict*, 4th ed., Jossey Bass, 2014, 128.

<sup>4</sup> A.H. Maslow, *Motivation and Personality*, 2nd ed., Harper and Row, 1970.

<sup>5</sup> Above, n3.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> A good general resource is S. Hardy and O. Rundle, *Mediation for Lawyers*, CCH, 2010. For a resource on representing clients effectively in mediation see D. Cooper, 'Representing clients from courtroom to mediation settings, switching hats between adversarial advocacy and dispute resolution advocacy' (2004) 25(3) *Australasian Journal of Dispute Resolution* 150.

<sup>10</sup> Mediator Standards Board, National Mediation Accreditation System, Approval Standards at [msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf](http://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf).

<sup>11</sup> Mediator Standards Board, National Mediation Accreditation System, Practice Standards at [msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf](http://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf).

<sup>12</sup> Christopher W. Moore, *The mediation process: practical strategies for resolving conflict*, 4th ed., Jossey Bass, 2014, 129.

# Tighter tax exemptions

## ‘Charitable institutions’ take note

by Samantha Lennox



**The Revenue and Other Legislation Authority Amendment Bill 2018 (Qld) was passed by the Queensland Parliament on 30 October 2018.**

It amends various pieces of Queensland legislation, including the *Taxation Administration Act 2001* (TAA). Queensland organisations may apply for registration under Part 11A (Registration of Charitable Institutions) of the TAA in order to be eligible for exemptions from various state taxes and duties that would otherwise be payable under the *Duties Act 2001*, *Land Tax Act 2010* and the *Payroll Tax Act 1971* including transfer duty, land tax and payroll tax.

In order to be eligible for registration as a ‘charitable institution’, the constitution or other governing document of the institution<sup>1</sup> must contain provisions regarding:

1. its income and property being used solely for promoting its objects
2. no part of its income or property being distributed, paid or transferred by way of bonus, dividend or other similar payment to members
3. upon dissolution, its assets must be transferred to another institution that is eligible for registration under this Part or that otherwise has charitable objects or promotes the public good.<sup>2</sup>

In 2015, the Queensland Supreme Court decided<sup>3</sup> that the TAA did not require that these provisions be expressly stated (and therefore they could be implied). The Act reverses this decision such that these provisions must now be expressly stated in constitutions and governing documents.

Prior to the passage of the Bill, Queensland Law Society (QLS) (with the assistance of its Not For Profit Committee) raised concerns that included:

1. The transitional period of six months outlined in the Bill was insufficient for charitable institutions to amend their governing documents.
2. Some trusts might require judicial approval to amend their governing documents.
3. Some trusts do not have members and therefore their governing documents will not contain a provision prohibiting distributions to members.

4. Some charitable institutions have other charitable institutions as their members and therefore distributions to members should not be prohibited in those circumstances.
5. Many Queensland charities would incur legal costs to ensure their constitutions and governing documents contained the exact wording required by Section 149(5).

Despite the concerns of QLS, the Bill was passed on 30 October 2018 without amendment to this provision.

At the time the Bill was passed, the Queensland Deputy Premier and Treasurer referenced the concerns of QLS and in consideration of those concerns the transitional period has now been extended from six months to two years to allow all charities additional time to amend their constitutions. As well, a number of public rulings have been issued by the Commissioner of State Revenue.

In correspondence to QLS, the Deputy Premier and Treasurer also confirmed that the Office of State Revenue (OSR) will work with affected institutions to assist them to meet the requirements imposed by the amendments. In addition, all registered charitable institutions will be contacted to notify them of the changes and updated information will be published on OSR’s website. Concern number four from the QLS submission described above (that is, when charities have other charities as their members and wish to make distributions to those members) has not been addressed and will be considered separately by the OSR.

### Public rulings

The following tax rulings have been released:

- Public Ruling TAA149C.1.1 Registration of charitable institutions — restrictions that must be included in an institution’s constitution: [treasury.qld.gov.au/resource/taa149c-1](https://treasury.qld.gov.au/resource/taa149c-1).

This ruling confirms that, to qualify for registration as a charitable institution, an institution’s constitution need not contain the exact words in section 149(C)(5) of the TAA. It is sufficient for an institution’s constitution to contain similar words that have the same effect. It also confirms that the Australian Charities and Not-for-Profits Commission template rules for a charitable unincorporated association would satisfy this section.

- Public Ruling TAA149H.1.1 Registration of charitable institutions — notice of ceased entitlement: [treasury.qld.gov.au/resource/taa149h-1](https://treasury.qld.gov.au/resource/taa149h-1).

Under section 149(H) of the TAA, a charitable institution that ceases to be entitled to be registered under section 149(C) must give written notice to the Commissioner of State Revenue within 28 days. Failure to give notice is an offence under section 120 of the TAA. This ruling confirms that the Commissioner will not take action against an institution that fails to notify OSR that it has ceased to be entitled to be registered after the transitional period, where it has not obtained a tax benefit.

- Public Ruling TAA149C.2.1 Registration of charitable institutions — charitable trusts: [treasury.qld.gov.au/resource/taa149c-2](https://treasury.qld.gov.au/resource/taa149c-2).

This ruling confirms that charitable trusts that do not have members will not be refused registration solely because their constitutions do not expressly prohibit distributions to members.

### Conclusion

The extended transition period and public rulings by the Commissioner of State Revenue provide some comfort to charitable institutions in Queensland. However, the public rulings do not prevent the court from reaching a different interpretation of the legislation to that taken by the Commissioner.

QLS members with Queensland charities as clients may be called upon to review their clients’ constitutions if they are concerned about the possibility of losing their state tax exemptions. Care should also be taken with drafting charitable trust provisions if such trusts wish to apply for state tax exemptions.

This article appears courtesy of the Queensland Law Society Not For Profit Committee. Samantha Lennox is General Counsel and Company Secretary of Cancer Council Queensland and a member of the committee. The author acknowledges the assistance of Paxton Hall Lawyers in providing sections of the text.

#### Notes

<sup>1</sup> Religious institutions and universities are exempt from these requirements.

<sup>2</sup> See Section 149(C)(5) of the TAA.

<sup>3</sup> *Queensland Chamber of Commerce and Industry v Commissioner of State Revenue* [2015] QSC 77.

# Personal pressures – professional peril

by Stafford Shepherd



On occasion, we are faced with personal pressures which may intrude into our professional lives.

Three decisions from the Queensland Civil and Administrative Tribunal identify the way in which personal problems can impact on us.

In *Legal Services Commissioner v Lim*,<sup>1</sup> a young solicitor knowingly swore a false affidavit in a civil action. The solicitor was working long hours and was under considerable pressure. The untruthfulness of the statements sworn were apparent from the contents of the affidavit itself.

The tribunal was satisfied that the conduct fell short of the proper professional standards required of a solicitor where the solicitor had failed in the duty of candour and integrity owed to the court and to the administration of justice. The tribunal fined the solicitor \$7000.

It should be noted that breaches of the duty of candour will normally be characterised as professional misconduct (the more serious of the categories of misconduct) and could lead to a solicitor's name being removed from the roll.

In *Legal Services Commissioner v Busch*,<sup>2</sup> the solicitor on leaving her employment was furnished with a reference. The reference referred to certain matters concerning the practitioner's work performance which the

solicitor had thought resolved with her former employer. The solicitor created a document identical to the original reference but omitted certain passages. She submitted the altered reference to prospective employers.

This conduct involved actual dishonesty and was held to be professional misconduct. The solicitor acknowledged her actions were dishonest. The solicitor was publicly reprimanded.

In *Legal Services Commissioner v Lindley*,<sup>3</sup> the solicitor faced two charges. Both involved actions in which the solicitor personally profited from work done in the course of his employment by taking a fee which should have been rendered and paid to his employer. The solicitor had created a false tax invoice and arranged for the monies to be deposited to his own account.

Both charges were characterised as professional misconduct. The offences involved dishonesty for personal gain. The solicitor was fined \$7000, publicly reprimanded and ordered to compensate his former employer.

Each of these decisions involved relatively young solicitors. Two of them involved acts of dishonesty, one concerned knowingly misleading a court. All the practitioners were faced with personal pressures such as:

- working long hours with little direction or supervision
- finding new employment in a very tight job market
- financial stress.

- finding new employment in a very tight job market
- financial stress.

Personal pressure is hard to deal with. Having a supportive personal network is important, and ensure you have a part of your life that is quite separate to your professional life to enable you to decompress (physical exercise is useful).

Learn to communicate your concerns respectfully if there are pressures mounting within your professional space, and do not ignore the difficult matters as it is easy for such issues to escalate as time pressures mount.

LawCare is a member assistance program which provides free, confidential counselling services to you and your immediate family. It is important that, if you identify with any of the problems seen in the above cases, you seek help before your personal conduct becomes a professional wrong. LawCare counsellors can provide practical advice to assist you.

For more information about LawCare, call 1800 177 743.

## Notes

<sup>1</sup> [2011] QCAT 291.

<sup>2</sup> [2011] QCAT 165.

<sup>3</sup> [2012] QCAT 673.

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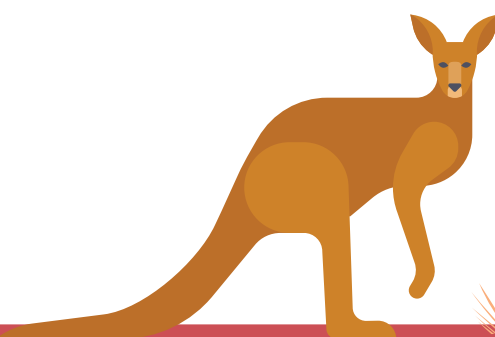
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# Claiming a set-off

It is not uncommon for a defendant to dispute a claim because they consider the plaintiff in fact owes them money.

Alternatively, they consider that the plaintiff is the one who has breached the contract and it is the defendant who is in fact entitled to damages.

It is equally common for a plaintiff's claim to be defended on the basis that the defendant has a competing claim which they claim they are able to set-off.

In that case, it is necessary to determine whether in fact the defendant's claim is a true set-off giving rise to a defence to the plaintiff's claim or whether it is a counterclaim only. That is because, if the defendant's alleged debt or claim is not truly one in the nature of a set-off, then, even if it is a proper counterclaim, and irrespective of how it is pleaded, it will not relieve the defendant from the obligation to pay the debt claimed by the plaintiff.

In that instance, a pleaded set-off will not preclude the plaintiff from obtaining summary judgment on its claim.<sup>1</sup>

## Set-off or counterclaim?

Rule 173 of the *Uniform Civil Procedure Rules 1999* (Qld) provides that a defendant may rely on a set-off as a defence to all or part of a claim made by the plaintiff, whether or not that amount is also included as a counterclaim.

As to that, a set-off is a defence in the sense that, although the defendant pleads the set-off amount in answer to the plaintiff's claim, the defendant can recover nothing against the plaintiff (unless the provisions of rule 173(2) apply). Conversely, a counterclaim is an independent cross-claim by which the defendant can be awarded the claimed amount either independently or, as a practical matter, an amount which may be off set against any amount the plaintiff is awarded against the defendant in the proceeding.

What is a set-off is a matter of law<sup>2</sup> and not all counterclaims are in the nature of a set-off.

## Legal or equitable set-off

A set-off may be either legal or equitable (leaving aside the context of personal or corporate insolvency, in which set-off has its own separate and distinct application and interpretation). In *Clambake Pty Ltd v*

*Tipperary Projects Pty Ltd* [2009] WASC 52, Heenan J at [152] noted the fundamental distinction between a legal set-off and an equitable set-off as follows:

"A set-off at law under the statutes of set-off is simply procedural and does not take effect until judgment in the action in which the set-off is claimed... By contrast a substantive equitable set-off will not provide merely a procedural defence. Being a substantive defence, an equitable set-off can provide immediate justification for refusal to pay the debt otherwise due."

Further, in *Walker v Secretary, Department of Social Security* (1995) 36 ALD 513 at 524, Drummond J noted:

"Legal and equitable set-offs differ in that while only debts or liquidated demands can be set-off at law, any money claims, liquidated or unliquidated, can be the subject of equitable set-off."

When ascertaining whether a defence of set-off is available, it is necessary to identify the nature of the set-off claimed.

### Legal set-off

A statutory basis for a legal set-off is found in section 20 of the *Civil Proceedings Act 2011* (Qld) which provides:

1. If there are mutual debts between a plaintiff and a defendant in a proceeding, the defendant may, by way of defence, set-off against the plaintiff's claim any debt owed by the plaintiff to the defendant that was due and payable at the time the defence of set-off was filed.
2. For subsection (1), it does not matter whether the mutual debts are different in nature.

Accordingly, to be a legal set-off there must be a debt, which is mutual, and which was due and payable at the time that the defence was filed.

A debt is defined in section 20 of the *Civil Proceedings Act 2011* (Qld) as a liquidated claim. As to that, if a claim by a defendant is for unliquidated damages and compensation of an unspecified amount, it is not a 'liquidated claim'<sup>3</sup> so at law cannot be set off against a debt. Even if a defendant attempts to quantify relief of that nature, it does not change its character as unliquidated.<sup>4</sup>

Dixon J in *McDonnell & East v McGregor* (1936) 56 CLR 50 at 62 noted:<sup>5</sup>

"... a liquidated cross-demand cannot be pleaded as an answer in whole or in part to a cause of action sounding in unliquidated damages or vice-versa. Such cross-demands must be pleaded by way of counterclaim, not set-off."

Mutuality refers to the parties, not the debt, and a debt is mutual if the plaintiff and the defendant, in the same right, owe each other a debt.<sup>6</sup>

As the debt must be due and payable at the time the defence was filed, a future or contingent debt will not support a legal set-off.<sup>7</sup>

### Equitable set-off

When there is no legal set-off available, an equitable set-off may exist if the transactions are mutual and the equity is of a nature that it impeaches the plaintiff's title to demand payment.<sup>8</sup> That is, there must be sufficient connection between the plaintiff's claim and the defendant's claim such that it is unfair for the plaintiff to insist on payment without taking account of the defendant's claim.<sup>9</sup>

For an equitable set-off, the party seeking the benefit must show some equitable ground for protection against the plaintiff's claim.<sup>10</sup> It is not necessary that there be mutuality and an equitable set-off may apply to both liquidated and unliquidated claims.

In *Forsyth v Gibbs* [2009] 1 Qd R 403 at [10], Keane JA stated:

"It is important to emphasise that the availability of an equitable set-off between cross-claims does not depend upon an unfettered discretionary assessment of whether it would be 'unfair' in a general sense for a plaintiff to insist on payment of the debt owed to it while the cross-claim remains unpaid. It is essential that there be such a connection between the claim and cross-claim that the cross-claim can be said to impeach the claim so as to make it unfair for the claim to be allowed without taking account of the cross-claim."

Because equitable set-off relies on an assessment of facts which would establish a 'sufficient connection' or 'unfairness', each case is likely to turn on its own facts and the availability or otherwise of an equitable set-off may be difficult to discern.

For example, if a plaintiff sues for monies owed pursuant to a deed, and the defendant sues for damages related to water damage to premises under a lease that occurred later in time, the claims would unlikely to be able to be set-off in equity because both the source

Kylie Downes QC and Kirsty Gothard examine the circumstances in which a set-off can be claimed in civil proceedings in Queensland's state courts.



of the obligation to pay and the timing of the indebtedness are different.<sup>11</sup>

However, a claim for losses suffered by reason of misleading and deceptive conduct inducing a defendant's entry into a contract may be set-off in equity against a claim for monies due and payable under that contract.<sup>12</sup>

## Conclusion

The existence of a claim by a defendant against a plaintiff does not, of itself, give rise to a set-off.

In order for a set-off to be available to a defendant and effective to resist a summary judgment application on the plaintiff's claim, it is necessary that it be a true set-off, either legal or equitable.

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

### Notes

<sup>1</sup> See at *Forsyth v Gibbs* [2009] 1 Qd R 403 per Keane JA (with whom McMurdo P and Fraser JA agreed) at [13]–[17].

<sup>2</sup> *Meredith v Eggins* [2005] QDC 026 per CF Wall QC.

<sup>3</sup> See *Spain v Union Steamship Co of New Zealand Ltd* (1923) 32 CLR 138 per Knox CJ and Starke J at 142, *Rothwells Limited v Nommack (No. 100) Pty Ltd* [1990] 2 Qd R 85 per McPherson J at 86 and the discussion of Young J in *Vimblue Pty Ltd v Towel* [2009] NSWSC 494 at [14]–[17].

<sup>4</sup> *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* (2008) 19 VR 358 at 385–386 citing *Abbey Panel & Sheet Metal Co Ltd v Barson Products* [1948] 1 KB 493 at 498.

<sup>5</sup> Cited with approval in *Juniper v Roberts* [2007] QSC 379 per by Douglas J at [19].

<sup>6</sup> See *Harris v First Star Marine Pty Ltd* [2006] WADC 53 per Crisford DCJ at [23]; *Harbeck v Vasse Dozer Hire* [2009] WADC 48 per Principal Registrar Gethering at [34]–[37]; *Vegas Enterprises Pty Ltd v Runsley* [2017] FCA 35 per Barker J at [23].

<sup>7</sup> *Demandem Holdings Pty Ltd v Christou* [2011] FMCA 489.

<sup>8</sup> *Forsyth v Gibbs* [2009] 1 Qd R 403 per Keane JA at [9] to [10], [2008] QCA 103; *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105 per White JA at [34].

<sup>9</sup> *Forsyth v Gibbs* [2009] 1 Qd R 403 per Keane JA at [10], [2008] QCA 103.

<sup>10</sup> *Hammersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liquidation) (Receivers and Managers Appointed)* [2018] WASCA 163.

<sup>11</sup> *Blacksheep Productions Pty Ltd v Waks* [2008] NSWSC 488.

<sup>12</sup> See for example *IRM Pacific Pty Ltd v Nudgegrove Pty Ltd* [2008] QSC 195 per McMeekin J at [18]–[19].

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# A letter to newly admitted lawyers

First of all, congratulations! You have survived many years (or was it many lifetimes?) of law school, completed your practical legal training and endured the thrilling spectacle of admission.

You can now throw caution to the wind and safely declare that you're a lawyer.

Regardless of whether you are working in a firm, in-house, in government, with a pro bono organisation or in any number of other worthwhile pursuits, you will find that a new mantle of responsibility has settled upon your shoulders.

We have reflected on the sum of our early years as lawyers with the goal of distilling some pointers in Q&A form. We hope it is of some assistance to you.

## Help! My boss has asked me to witness/certify a document so urgently she/he needs it yesterday!

Your practising certificate grants you two new superpowers: the ability to witness and certify documents. We don't mean to alarm you, but there are a number of requirements and the consequences of failing to comply can be a touch dire. But don't fret! There's no need for frantic, last-minute googling because we have set out the key requirements below.<sup>1</sup>

### Witnessing

Before witnessing an affidavit or a statutory declaration, you should satisfy yourself as to the identity of the deponent/declarant and ensure that they are aware that making a false statement is a crime.<sup>2</sup> You should also give the person some time to review the document (and any attachments) and to satisfy themselves that it is correct and complete.

If witnessing an affidavit, you will then need to administer either an oath or affirmation (depending on the person's preference in line with what is stated in the document) in the following terms:

Oath	Affirmation
(deponent to hold a Bible) <b>Q:</b> Do you swear that the contents of this affidavit are true and correct, so help you God?	<b>Q:</b> Do you solemnly, sincerely and truly affirm and declare that the contents of this affidavit are true and correct?
<b>A:</b> So help me God.	<b>A:</b> I do.

A statutory declaration will have the relevant declaration included in the text of the document,<sup>3</sup> so you don't need to say anything in particular prior to witnessing it.

Once the person has signed the document, you will then need to sign it and print your name, state that you're a solicitor (and therefore authorised to witness the document)<sup>4</sup> and provide your address.<sup>5</sup> If the document is an affidavit you will also need to sign each page (excluding the exhibits) and each certificate of exhibit.

NB: There are circumstances in which you must refuse to witness a document, such as if you know that it contains false information, if you have concerns about the capacity of the person, or if you did not actually witness them signing it.

### Certifying

Before certifying a document, you need to review the original document against the copy to ensure that the copy is identical. You then need to make the following statement on the first page of the copy:

"I have sighted the original document and certify this to be a true copy of the original."

You must then sign and date the statement, print your full name and state that you are a solicitor. If you will be certifying multiple documents, you may wish to have a stamp made that satisfies these requirements.

It is important to also be aware that specific requirements apply to certain documents, such as enduring powers of attorney, powers of attorney, advance health directives and some documents under the *Land Titles Act 1994* (Qld).<sup>6</sup>

## What on earth is a 'personal brand' and where can I get one?

Now that we have a couple of practicalities out of the way, we turn to 'soft skills', which become more and more important as you progress.

We have no doubt that you have heard about the importance of crafting and implementing a personal brand. The official start of your legal career is the perfect time to reflect on your values, strengths and weaknesses, and decide what you would like to be known for and how you would like people to feel when they interact with you.

In our line of work, excellence is expected – what will set you apart? Once you have formed a view, ensure your actions, work and online profiles are consistent with your personal brand.

## I thought a network was a wi-fi connection?

As you work to develop your personal brand, you will begin to expand your network, too. This will eventually be one of your greatest assets in the law. Your network may begin with family, friends and colleagues, and build from there. A surefire way to quickly expand your network is to join an association or committee within the profession or in an industry that is of interest to you.

We also encourage you to link up with mentors, whether formally or informally. Mentors can be an important part of your network and a fantastic resource as you progress through your career. Luckily, the profession is overflowing with experienced practitioners who want younger lawyers to succeed and are willing to be extremely generous with their time.

From Sarah Cahill and  
Nadine Eccleston of MinterEllison



We have found that being a good mentee can be a tricky business. The key is to be proactive. You will need to drive the relationship by scheduling catchups and knowing what you want to discuss, while remaining open to feedback. Finally, remember to return the favour as you become more senior.

### A career AND a life – fact or fiction?

In a letter to newly admitted lawyers, it would be rude not to mention work/life balance. There's no point beating around the bush; a career in law is not easy. Of course, you already know that. You probably entered into the law because you like a challenge. However, if the challenge becomes too much and you have insufficient resources to draw upon, you might start to experience stress and even eventually burn out.

The key to combatting this is resilience, which is essentially your ability to bounce back. In the context of your career, resilience could mean your ability to recover from a mistake in an advice, a misstep in court proceedings or a harsh word from a senior colleague or judge.

You can think of resilience as an immune system for your mental health, which acts as a protective barrier to unhelpful attitudes, behaviours and coping mechanisms.

As with most things, resilience is part nature and part nurture. To build your resilience (and improve your work/life balance in the process) focus on developing and maintaining the wide variety of personal resources and strategies available to you.

Your personal resources include a balanced diet, regular exercise, sufficient sleep, recreational activities, financial health and relationships. Make these a priority through commitment and planning, and help your support system (family, friends and colleagues) to build their resilience too. Our tip: Try exercising in the morning, before your day has a chance to get out of control!

Making a plan to prioritise what is important to you and building and maintaining your resilience now, in the beginning, will help set you up for a healthy and sustainable career.

### Will I ever feel like I know what I'm doing?

Perhaps not, and probably not for a while... if you do, please let us know your secret! In the meantime, take pride in your process and know that you have all the skills and resources you need to figure out what to do every time something new pops up. We hope you find our tips useful and we wish you all the best in your brand-new career.

#### Notes

- <sup>1</sup> These are limited to Queensland requirements.
- <sup>2</sup> *Criminal Code Act 1899* (Qld), Schedule 1, ss193 and 194.
- <sup>3</sup> *Oaths Act 1867* (Qld), s14. The declaration for Queensland statutory declarations is: "I, A.B., do solemnly and sincerely declare that [let the person declare the facts] and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the *Oaths Act 1867*."
- <sup>4</sup> *Oaths Act 1867* (Qld) s13; *Evidence Act 1995* (Cth), s186.
- <sup>5</sup> This can be the address of your employer if you are witnessing the document in the course of your employment.
- <sup>6</sup> *Powers of Attorney Act 1998* (Qld), s45; *Land Titles Act 1994* (Qld), for example, s165.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and Adam Moschella (Adam.Moschella@justice.qld.gov.au). Sarah Cahill is an associate and Nadine Eccleston is a lawyer at MinterEllison.

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# Court errs by staying contravention application

with Robert  
Glade-Wright



## Children – court erred by staying mother's contravention application pending her compliance with previous costs order

In *Dautry & Wemple* [2018] FamCAFC 237 (3 December 2018) Austin J (sitting in the appellate jurisdiction of the Family Court of Australia) heard the mother's appeal against the Federal Circuit Court's dismissal of her application to vary a parenting order and an order staying her contravention application against the father until she paid \$6500 payable under a costs order made following her failed appeal against the parenting order.

Austin J dismissed the first ground of appeal but allowed the second, saying (from [29]):

"The primary judge did not purport to make the stay order in reliance upon s102QB(2) of the Act or r13.10 of the *Federal Circuit Court Rules 2001* (Cth), since the father did not contend the mother's contravention application was frivolous, vexatious, or an abuse of process.

[30] The order made by the primary judge to stay the prosecution of the contravention application was purportedly premised on both the principles discussed by the Full Court in *Fahmi & Fahmi* [1995] FamCA 106... (*Fahmi*) and the application of s69F of the Act. (...)

[35] For the *Fahmi* principle to apply so as to deny an applicant an audience before the court, the applicant's contempt must occur in the same cause or proceedings then pending before the court (...)

[36] In this case, the mother's alleged contempt related to her failure to satisfy a costs order made in the course of her failed appeal against interim orders... in the proceedings which were concluded with final orders in December 2014. Accordingly, her contempt... was not of orders made in these proceedings, which were not instituted until November 2017."

Austin J added ([40]-[42]) that s69F on which the father also relied "is intended to invest the court with broad discretion as to whether an application under Part VII... filed by an applicant who has failed to comply with a past order... is entertained", but that "when the discretion under s69F... is enlivened, its exercise is motivated by the same type of considerations discussed in *Fahmi*... and depends upon the balance which must be struck between the applicant's right to procedural justice and countervailing public policy...". It was held that the reasons given for the stay were inadequate.

## Property – Full Court dismisses appeal against order that wife pay 10% of husband's \$2 million tax debt

In *James & Snipper and Anor* [2018] FamCAFC 235 (3 December 2018) the Full Court (Ainslie-Wallace, Aldridge & Austin JJ) dismissed an appeal by the Australian Taxation Office and the husband against Watts J's order that the wife pay \$200,000 of the husband's \$2 million tax debt as opposed to the \$600,000 the ATO sought and the \$1 million the husband sought.

Watts J assessed contributions as 80:20 in favour of the wife (where for 27 years she had contributed as homemaker and primary carer of the parties' children and received \$2.5 million in gifts from her parents) and made a 15% adjustment for her under s75(2). Her outcome was 95% of a \$1.28 million pool calculated by excluding the parties' tax debts (the wife also owing \$113,161). Her entitlement was then reduced by \$200,000 which Watts J ordered her to pay towards the husband's tax debt, such that she retained 71% of a pool that would otherwise have been in net deficit had the tax debts been deducted.

Both the ATO and the husband appealed, the husband arguing that the inclusion of his tax debts would put the net pool in deficit by \$842,237.

Austin J in separate reasons said ([145]) that "[i]t should not be overlooked that the wife bore no liability... for any part of the husband's tax debt", adding ([146]):

"The trial judge took into account the money wasted by the husband on gambling... [and that] he only had the money to gamble so irresponsibly because he failed to pay his tax. The husband's failure to pay tax also enabled the spouses to enjoy a handsome lifestyle and, even after separation, the husband still helped support the wife. The trial judge found she received 'substantial benefit' from the husband's post-separation earnings and so the Commissioner's submission she had to take 'the good with the bad' was accepted as correct..."

## Property – Mr Gadzen wins appeal against leave to proceed granted to Ms Simkin seven years out of time – no hardship to an applicant with an uncommercial claim

In *Gadzen & Simkin* [2018] FamCAFC 218 (16 November 2018) the Full Court (Murphy, Aldridge & Kent JJ) allowed Mr Gadzen's

appeal against leave granted to his former de facto partner by Judge Cassidy to apply for property orders seven years out of time. The parties' childless relationship lasted eight years. While the respondent's initial contributions were \$83,000 (mostly superannuation) the appellant's initial contribution was \$4.75 million. The parties had entered into a non-binding agreement during their relationship which the appellant had implemented in part by buying the respondent a property and paying mortgage payments in respect of it.

Judge Cassidy found that the wife would suffer hardship if she were not granted leave, having regard to her financial circumstances. The appellant appealed, arguing that the respondent could not have a prima facie case worth pursuing once the likely costs of her claim were considered and that the court had failed to consider those costs.

The Full Court agreed, saying ([3]):

"(...) [I]t is fundamental to [a determination of hardship]... that consideration is given to whether an applicant for leave demonstrates a prima facie or arguable case of substance having regard to all the circumstances of the case, taking into account the likely cost to be incurred by the applicant in pursuing the claim. Here... the trial judge did not undertake that consideration. ..."

Re-exercising the discretion, the Full Court found that the wife had failed to establish hardship and dismissed her application, saying ([59]):

"...[The respondent] has received \$467,121 in post-separation benefits (including the superannuation contribution of \$100,621 made [by the appellant] in 2007). ... She holds net property... worth \$134,600. ... She estimates that she will expend approximately \$150,000 pursuing her claim. We are unable to see how... [her] potential claim... could conceivably approach, let alone exceed, that which she holds together with that which she has received."

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



# Foraging further for fewer funds

with Christine Smyth



Australia is increasingly accused of having a 'blame and claim culture', with some asserting that it is probably second only to the United States when it comes to our penchant for litigation.<sup>1</sup>

Following this theme, it seems succession law is a fresh field for those foraging for fortune.

*Mason v Shepherd & Bell* [2018] QDC 278 (*Mason*) is an example of how a relatively simple and low-value claim for further provision can morph into an expensive and unnecessary contested litigation. It is one of a number of cases that give us pause for consideration as to how far the pendulum has swung in further provision applications.

The testator died on 2 April 2017 survived by her four children, leaving a will dated 21 June 2002. Apart from a few minor specific bequests, the bulk of the estate fell into the residue to be distributed equally among her four adult children. The net value of the estate was a mere \$226,200.<sup>2</sup>

The applicant filed her application for further provision from the estate. Aside from her quarter share in the small estate, she did not specify what amount would be satisfactory provision. The affidavits of the respondents set out the circumstances of each of the remaining beneficiaries. They contended that each of their circumstances were similar to the applicant, save that the applicant did not have superannuation, and this was ultimately acknowledged by the applicant.

Prior to the hearing, the applicant's solicitor wrote to the respondents indicating that his client was willing to resolve the matter on the basis that she receive \$30,000 from the estate, in addition to her existing entitlement. A deed of agreement was drawn up to give effect thereto. It was at this point the matter took a problematic turn. The applicant signed the deed of agreement, but added some of her own commentary:

"I am signing this under duress. I have been bullied and treated unfairly. My siblings are stealing from me."<sup>3</sup>

Understandably, the agreement was not accepted by the respondents and they proceeded directly to a hearing for final determination.

“

It is no use to blame the looking glass if your face is awry.”

— Nikolai Gogol, *The Inspector General* (1836)

Readers may recall the decision of *Charlesworth*,<sup>4</sup> in which Porter QC DCJ discussed the discretion of the court to hear a matter without it being referred to a mediation and the circumstances where that might be suitable. In *Mason*, the applicant claimed that she did not give authority to her solicitor to reach the agreement. She also now claimed she ought to receive the entire estate and that she ought to be granted the opportunity to detail the level of care she claimed she provided to the deceased in support of her position, with that, she insisted the matter be referred for mediation. Despite her protestations, the court did not refer the matter to mediation, instead proceeding to determine final orders. In doing so the focus of the court was on the circumstances of the deed of agreement.

The applicant claimed that she did not authorise her solicitor to reach the agreement and that she only signed the deed of agreement "as a result of pressure applied to her by her solicitor".<sup>5</sup>

The court noted the correspondence clearly demonstrated the solicitor at least believed he had her authority. The respondents argued that they were entitled to rely on the ostensible authority of the solicitor in reaching the agreement. Accordingly, they were entitled to rely upon and enforce it.

The court agreed and found that "[T]he fact of the applicant signing the deed, albeit at the same time registering her protest, seems to me to confirm the solicitor had authority to make the agreement. However, what is incontrovertible is that the respondents were entitled to conclude a valid agreement was reached."<sup>6</sup>

In reaching its conclusion as to enforcing the agreement the court relied on the principle of *Harvey v Phillips* (1956) 95 CLR 23, affirmed by Fraser JA in *Braodbert v Medical Board of Queensland* [2010] QCA 352 citing *Harvey v Phillips*: "The power to decline to enforce a

compromise does not arise where the party who seeks to impeach the compromise expressly authorized a compromise, even if that authority was given after considerable equivocation and under pressure. That is so, provided there is no ground sufficient to render the compromise void or voidable, or to entitle the client to equitable relief."

Accordingly, the court concluded an agreement as to the amount of \$30,000 was in fact reached and proceeded to determine the application having regard to the principles in *Singer v Berhouse* (1994) 181 CLR 201. In so doing the court particularly noted that "Agreement between the parties, as to an outcome, should be respected by the court in making a determination".<sup>7</sup> With that the court ordered further provision for the applicant of \$30,000. However, she was ordered to bear her own costs of the proceedings.

The decision provides insight into the length which some clients will go to press their claims for further and better provision from the estate. In this case the client pressed her position to her detriment, whilst simultaneously impugning the reputation of her legal advisers.

In the financial year 2017-2018 Lexon Insurance claims cost in wills and estates doubled on the years 2003-2017.<sup>8</sup> This is despite the existence and use of numerous Lexon wills and estate checklists, all designed to reduce claims. Perhaps, notwithstanding the extent to which we as professionals go to reduce litigation, some matters are redolent with the inevitability of it.

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## Notes

<sup>1</sup> Among them American management liability specialist Kevin LaCroix, speaking at the Australian Professional Indemnity Group's conference in Sydney, 2016.

<sup>2</sup> *Mason* at [1]-[3].

<sup>3</sup> At [8].

<sup>4</sup> *Charlesworth v Griffiths & Anor* [2018] QDC 115.

<sup>5</sup> At [9].

<sup>6</sup> At [16].

<sup>7</sup> [20].

<sup>8</sup> Page 22 *Proctor* September 2018.

# Court of Appeal judgments

1-31 December 2018

with Bruce Godfrey



## Civil appeals

*Toodayan & Anor v Anti-Discrimination Commissioner Queensland* [2018] QCA 349, 14 December 2018

General Civil Appeal – where the appellants worked as interns at the Princess Alexandra Hospital – where the appellants made complaints to the respondent alleging discrimination arising out of a police investigation and the related conduct of hospital staff – where a delegate of the respondent rejected the complaints on the basis that they were misconceived or lacking in substance under s139(b) of the *Anti-Discrimination Act 1991* (Qld) (ADA) – where an application for judicial review was dismissed – whether the primary judge erred by failing to find that the delegate applied the wrong test when rejecting the complaint under s139(b) of the ADA – whether the primary judge erred by finding that the evidence before the delegate did not establish a contravention of the ADA – where the only power to reject or lapse a complaint because it is frivolous, trivial, vexatious, misconceived or lacking in substance arises under ss139 and 168 – where often, a conclusion of discrimination will only arise as a matter of inference – where in the absence of direct proof, the Anti-Discrimination Commissioner will need to consider whether the details provided in and with the complaint are indicative of circumstances that, if ultimately proved, are capable of supporting such an inference – where however, more than one inference is reasonably open on the indicated circumstances, it is not for the commissioner when forming an opinion under s139 to decide which inference is more probable; that is a matter within the exclusive province of the tribunal – where plainly it is no part of the commissioner's functions under the ADA to decide the complaint, but that appears to be what the delegate did in this case – where it is apparent that the delegate approached the task under s139(b) as though the detail contained in, with and subsequent to the complaint was comprehensive of the matters relied on by the appellants to support an inference of discrimination – where that was not only the wrong approach in circumstances where the appellants had expressly advised the commission that they had made requests for potentially relevant material from the hospital that were still outstanding, but also because s139(b) requires no more of a complainant than to provide reasonably sufficient details to indicate a contravention – where the correct approach should have been to reach an opinion as to whether the details were indicative of a contravention that was not, relevantly, lacking in substance – where furthermore, although it was accepted that the details provided by the appellants were sufficient to support an inference of discrimination, the delegate erroneously embarked on an evaluation of the available competing inferences – one that

would support the contravention about which the appellants complained and one that would not – before deciding that the former was only a “mere possibility” and that the latter was not only the preferred inference but that it provided the explanation for why a counter-terrorism investigation was initiated – where it follows that the appellants’ contention before the primary judge that the delegate applied the wrong test when rejecting their complaint must be accepted as correct – where it is not however entirely correct to contend, as the appellants did in this court, that his Honour failed to make such a finding – where to the contrary, by the submissions that were then made, his Honour was drawn into an inquiry as to whether there was an incurable defect in the evidence that might be gathered to support the finding of facts on which an inference of discrimination could be based whilst, at the same time, being prepared to assume that “the extremely high standard” advanced by the appellants was to be applied – where as it was, his Honour was right to hold that the statutory test was not to be glossed in the ways then contended on behalf of the appellants (because s139(b) means what it says) but, unfortunately, the court’s attention was not directed to all of the evidence that was before the commission to support an inference of discrimination, and certainly not in the thorough way in which that was done in this court.

Appeal allowed. The decision of the delegate rejecting the appellants’ complaint is set aside. No order as to costs.

*King & Ors v Australian Securities and Investments Commission* [2018] QCA 352, 18 December 2018

General Civil Appeals – where the Australian Securities and Investments Commission (ASIC) commenced a civil penalty case against MFS Investment Management Ltd (MFSIM) and various directors, officers and employees of the MFS Group of companies – where the proceedings against MFSIM were resolved by consent but the trial proceeded against each of Mr King, Mr White, Mr Hutchings, Mr Anderson and Ms Watts – where the primary judge found that MFSIM, the responsible entity for the Premium Income Fund (PIF), caused payments of \$130 million and \$17.5 million to be made from PIF’s funds for no purpose or benefit of PIF; the payments were made for the purposes of other entities within the MFS Group; and there were no transactions which made the \$130 million (to the extent of \$103 million) and the \$17.5 million proper payments from PIF’s funds – where the primary judge found that, in respect of the \$130 million payment, each of Mr King, Mr White and Mr Anderson contravened the *Corporations Act 2001* (Cth) (the Act) by breaching his duties as an officer of MFSIM and being involved in MFSIM’s contraventions – where the primary judge found that, in respect of the \$17.5 million payment, each of Mr White, Mr

Hutchings and Mr Anderson was involved in the \$17.5 million payment, contravened the Act by breaching his duties as an officer of MFSIM and being involved in MFSIM’s contraventions – where the primary judge found that each of Mr White, Mr Anderson, Mr Hutchings and Ms Watts was involved in the preparation and use of false documents purporting to justify the payments as payments for the benefit of PIF, in breach of the Act – where each of the other appellants appeal against those findings on a number of grounds – where ASIC cross-appealed in relation to the appeals by Mr Anderson, Mr White and Mr King – where ASIC submits that the vast amount of contemporaneous documentation was a sound evidentiary basis for the case alleged by it – whether the primary judge erred in finding that Ms Watts, Mr White, Mr Hutchings and Mr King contravened the Act – where each of the individual defendants appealed against the judgment, on grounds which challenged many of the trial judge’s conclusions on legal and factual questions – where each contended that he or she should not have been found to have contravened the Act in any way – where prior to the hearing in the Court of Appeal, Mr Anderson agreed with ASIC that his appeal should be dismissed with costs – where by this judgment, the appeals by Mr White, Mr Hutchings and Ms Watts have been dismissed, and the appeal by Mr King has been allowed but only in one respect – where in Mr King’s case, this court has reached a different conclusion than the trial judge on the legal question of the proper interpretation of the definition of ‘officer’ in s9 of the Act, and has followed the judgment of the Full Court of the Federal Court in *Grimaldi v Chameleon Mining NL (No.2)* (2012) 200 FCR 296 – where this court should follow *Grimaldi* unless it is persuaded that the judgment, in the relevant respects, is plainly wrong – where in our view the reasoning in *Grimaldi* is persuasive and we agree with it – where paragraph (b) of the definition cannot be applied literally, for otherwise a person who is, on any realistic view, unrelated to the management of a corporation could be subjected to the burdens of the provisions of the Act with respect to officers – where the constraint (according to *Grimaldi*) upon a literal interpretation avoids consequences of that kind – where it is a constraint which is suggested by several provisions of the Act which apply to officers – where s180(1) requires an officer of a corporation to exercise his or her powers and discharge his or her duties with a care and diligence that a reasonable person would exercise if he or she “occupied the office held by, and have the same responsibilities within the corporation as, the director or officer”. – where s182 provides that a director, secretary, other officer or employee of the corporation must not improperly use their position in certain ways – where s601FD(1)(e) refers to a person’s “position as an officer” – where in our conclusion it was necessary for ASIC to prove that

Mr King acted in an “office” of MFSIM – where the primary judge made no finding as to whether ASIC had proved that fact – where the findings which his Honour made did not, of themselves, support his conclusion that Mr King was an officer of the company – where the issue for this court is whether the evidence proved that he was an officer, according to what we have concluded was the correct interpretation of that term – where the question is whether ASIC proved that Mr King was an officer upon the basis which ASIC had pleaded, namely that Mr King had the capacity to affect significantly the corporation’s financial standing – where on our review of the evidence, we are not persuaded that ASIC proved that Mr King had the capacity to affect significantly the financial standing of MFSIM on the basis particularised by it – where further, any capacity which he did have to affect that matter was one which derived from his position of CEO of the MFS Group and was exercised by him in that role, rather than from acting in an office or position within MFSIM – where we accept that Mr King’s influence over Mr White and some others within MFSIM was substantial; but MFSIM had a board of directors, the majority of which was independent, and Mr King’s influence may not have given him a capacity to significantly affect the company’s financial standing – where consequently, Mr King’s challenge to the conclusion that he was an officer succeeds – where he should not have been held to have contravened the duties prescribed by s601FD – where should it matter, it should be clear from our findings about the s79 case against Mr King that had we concluded that he was an officer of MFSIM, we would have concluded that he breached his duties under that provision – where Mr King’s appeal will be therefore allowed, to the extent that declarations were made against him as an officer – where in our view it is also necessary to vary the declarations which were made about his involvement in the contraventions by MFSIM – where the reason is that in each case, it was declared that Mr King was knowingly concerned in MFSIM’s contravention by “permitting” MFSIM to make the draw-down or payment – where in our view, the characterisation of Mr King’s involvement as granting *permission* for the payment is too limited a description of his conduct, and the declarations against Mr King should be amended accordingly – where consequently, Mr King’s contraventions were limited to his being knowingly concerned in the company’s contraventions by the misapplication of \$130 million of PIF’s money – where at its core, the case for each appellant was that he or she had not acted dishonestly in respect of the payment or payments or the creation of false documents – where it was argued that at the time that the payments were made, he assumed that there was some agreed benefit to PIF which was then in place, or expected that such a benefit would be put in place – where the trial judge held that the appellants who were involved in one or more of the payments knew that at the time the payment was being made, there was no agreed or identified benefit to PIF for the use of its money and that the appellant’s conduct was thereby dishonest – where similarly, the trial judge held that each of the appellants who was involved in the creation and use of false documents knew that they misrepresented that there had been transactions for the benefit of PIF which were in place at the time that its money had been used –

where in essence, by this judgment, the Court of Appeal has upheld those findings.

All appeals dismissed with costs, except for a variation in relation to the orders involving Mr King with submissions on costs. (Brief)

***Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd* [2018] QCA 353, 18 December 2018**

General Civil Appeal – where the appellant, Garmin Australasia Pty Ltd, was the plaintiff in an action for the price of goods brought against the respondent, B & K Holdings (Qld) Pty Ltd – where the appellant appeals against the primary judge’s dismissal of its application for summary judgment of its claim for the price of goods delivered to the respondent under a contract of sale – where, in the alternative, it appeals against the primary judge’s refusal to strike-out parts of the defence – where the primary judge refused summary judgement and the strike-out because it was to be inferred that there must have been further, undisclosed agreements between the parties – whether the inference was correctly drawn – where Garmin pleaded that the parties’ agreement allowed alternative forms of payment term (payment within 45 days, under, or in advance, under the Domestic Dealer Agreement) but it did not plead any obligation to pay in advance in respect of the transactions in question, whether as its primary or alternative case – where having set out the alternative payment terms, it did not descend to any identification of which term actually governed the relevant transactions, but by pleading a failure to pay on the due dates for payment and by particularising those dates as falling 45 days after the order date, it placed its reliance on the 2017 Authorised Dealer Program – where that was the document which B & K Holdings pleaded did not form part of the parties’ agreement – where B & K Holdings did not by its defence concede that payment was required in advance; rather, it pointed out that the statement of claim did not identify all the payment options, which included scope for other credit agreements than the 45 days prescribed in the 2017 Authorised Dealer Program – where Garmin is correct (and B & K Holdings did not contend otherwise) in saying that the primary judge erred in drawing the inference that there must have been some further agreement under which the goods were supplied, which required disclosure and amendment of the statement of claim – where her Honour seems to have drawn that inference because the goods were delivered after 1 June 2017, the termination date agreed in the May 2016 deed – where the agreement between the parties had not come to an end when B & K Holdings placed its orders, and in any event, cl.7.3(j), which was expressly agreed to survive termination, provided that any sales thereafter would be subject to the terms and conditions of the Domestic Dealer Agreement – where Garmin was entitled, therefore, to rely, as it did, on the payment provision contained in the 2017 Authorised Dealer Program, which on its case formed part of its agreement with B & K Holdings – whether the appellant was entitled to bring an action for the price or was limited to an action for damages for breach of contract – whether an action for the price was available under 51(2) of the *Sale of Goods Act 1923* (NSW) – whether the contract impliedly permitted an action for the price – whether there was a serious issue as to

whether the price was recoverable, requiring a trial – where it is construed that clause 3.6 of the Domestic Dealer Agreement, which permitted B & K Holdings to sell the goods delivered by Garmin, although they were not yet paid for, as contemplating the passing of title direct to the ultimate purchaser – where in *Puma Australia Pty Ltd v Sportsman’s Australia Ltd (No.2)* [1994] 2 Qd R 159, the parties proceeded on that basis in respect of a similar clause, an approach which met with no disapproval from the court, and was specifically adopted by Williams J – where although this contract contemplated the possibility that title would never pass to the buyer (in the event of on-sales prior to payment), because it was an agreement to transfer the property in the goods in the future, conditional on payment before on-sale, it was an agreement to sell, and thus a contract of sale of goods – where that conclusion seems to be consistent with a proper construction of both the *Sale of Goods Act* definitions and the contract itself – where commercial reality militates against the alternative, of construing agreements containing such terms as not within the *Sale of Goods Act*, and thus rendering the entire machinery of the legislation inapplicable to all transactions under agreements containing such terms – where proceeding then on the basis that s51(2) of the NSW Act applied, Garmin’s argument was that the obligation to pay was fixed irrespective of delivery, whether the relevant provision was for payment in advance or within 45 days of invoice – where, however, the payment terms of the 2017 Authorised Dealer Program related payment to delivery, by providing for the issue of invoices at the time of shipment, and also by linking the amount to be paid (whether a discount was available) to the timing of payment in relation to the delivery date (whether payment was made within 20 days of delivery) – where the price was not “payable on a day certain irrespective of delivery” – where Garmin is unable to bring itself within s51(2) – where no express term of the contract in this case provided for recovery of the price in advance of property passing; the question is whether the agreement for payment before the passing of property impliedly did so – where Garmin sold pursuant to a term which, by linking payment to the delivery date, made it plain that it would first perform the contract to the extent of physical delivery, albeit without passing property – where the retention of title clause required B & K Holdings to hold the proceeds of any sale of goods in trust for Garmin and to account to the latter for the proceeds – where that gives rise to an obvious question as to whether a term should be implied entitling Garmin to recover the price of goods, when it had an express right to require B & K Holdings to account for the proceeds of their sale – where at the least, the question may require a consideration of the *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 criteria, particularly the business efficacy of such an agreement; and in turn, may necessitate consideration of extrinsic evidence of the surrounding circumstances in order to ascertain the commercial purpose of the contract – where for those reasons, it could not be said that there was no need for a trial of this action – where summary judgment ought not be granted – where the appellant appeals against the primary judge’s refusal to strike out parts of the defence in its action for the price of



goods delivered to the respondent – where the respondent pleaded in the defence that by the terms of the parties' agreement, it held as a bailee unsold goods to which the appellant had a right of immediate possession, giving it a right of set-off in respect of their value – where the respondent did not seek to support the defence on appeal – whether the defence was tenable – whether the defence should have been struck out – where B & K Holdings did not, on appeal, attempt to maintain what was described as its bailment defence: its pleading that because Garmin was entitled as bailor to re-take the goods it was obliged to do so, thus giving B & K Holdings the right to claim a set-off – where that implicit concession was correctly made – where the defence was untenable; it rested on the mistaken premise that *Puma* was authority for the proposition that a seller with the benefit of a retention of title clause creating a bailment in the buyer was obliged, as opposed to entitled, to re-take possession of unsold goods – where the argument overlooked the fact that *Puma*, the seller in that case, had actually sought the return of the relevant goods, thereby asserting its right to re-take possession of them – where the pleading of the right of set-off contained in the relevant paragraphs of the defence should have been struck out, and the trial judge erred in not making that order.

Appeal allowed in part. Paragraphs 6(b) – (e) of the Second Further Amended Defence are struck out. Written submissions on costs.

*Oaks Hotels & Resorts Limited v Knauer & Ors* [2018] QCA 359, 21 December 2018

Application for Leave *Queensland Civil and Administrative Tribunal Act 2009* (Qld) – where the first respondent was employed by the second respondent, a wholly owned subsidiary of the applicant – where the director and chief executive officer of the applicant arranged for the first respondent to reside free of charge with the third respondent in a two-bedroom unit the third respondent occupied at another property which was provided by, and operated by, the applicant – where the third respondent was employed by the applicant as a night caretaker – where the first respondent awoke to find the third respondent naked in her bedroom and the third respondent then indecently assaulted her – where a member of QCAT held that the applicant was vicariously liable to the first respondent for a contravention of the *Anti-Discrimination Act 1991* (Qld) (ADA) by the third respondent and ordered the applicant and the third respondent to pay the first respondent compensation for loss and damage caused to her by that contravention – where the Appeal Tribunal dismissed the applicant's appeal – whether the tribunal misapplied the meaning of the words "in the course of work" – where the issue concerns the meaning of the words "in the course of work" in s133(1) of the ADA, which renders a person and the person's worker or agent jointly and severally civilly liable if the worker or agent contravenes the Act "in the course of work or while acting as agent" – where "agent" is defined to mean "a person who has actual, implied or ostensible authority to act on behalf of another" – where "work" is defined to include work described in nine paragraphs – where in this case the relevant paragraph is (b), "work under a contract for services" – where the applicant's draft notice of appeal from the appeal tribunal's decision contains 12 grounds, but the applicant's central contention is stated in ground 1:

the appeal tribunal erred in law in finding that the contravening conduct of the third respondent occurred in the course of work within the meaning of s133(1) of the ADA – where s117 of the ADA provides that one of that Act's purposes is to promote equality of opportunity for everyone by protecting them from sexual harassment, and amongst the ways in which that purpose is to be achieved is the prohibition of sexual harassment – where the particular statutory purpose underlying s133 is expressed in s132 – where it is "to promote equality of opportunity for everyone by making a person liable for certain acts of the person's workers or agents", such purpose being achieved "by making a person civilly liable for a contravention of the Act by the person's workers or agents" – when that is understood in the context of the defence in s133(2) for a respondent who proves on the balance of probabilities that the respondent took reasonable steps to prevent the worker or agent contravening the Act, it can be seen that the policy underlying s133 comprehends persons described in s133(1) taking positive steps to eliminate sexual harassment by those who work for them – where the reasoning in *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 supports the view that the word "work" in the limiting requirement in s133(1) that vicarious liability for a contravention by a person's worker is imposed only if the contravention occurs "in the course of work" should not be given the narrow construction advocated by the applicant – where accordingly, the construction of "work" propounded by the applicant should be rejected – where that word comprehends the more general meaning "employment" or "job" – where it is added that it should not be assumed that the applicant would escape liability in this case even if the narrower construction were adopted – whether the third respondent was awake or asleep, by being in his unit in the hotel he was fulfilling his contractual obligation to be in or near the hotel; and his obligation to be vigilant for situations that could cause a safety risk (to take the most obvious example) was as much a part of his work under the contract for services as was his obligation to respond to calls – where it is inappropriate to construe the ADA by analogy with common law principles about the vicarious liability of an employer for the negligent or intentional criminal acts of an employee – where one reason why that is so is that the Act was enacted in circumstances in which there was considerable uncertainty about the content of those principles – where more fundamentally, and consistently with the statutory purposes expressed in the Act, the expression "in the course of work" in s133(1) appears in a context in which "work" is not confined to an employee's work for an employer – where applying the construction endorsed by Deane J in *The Commonwealth v Lyons* (1979) 24 ALR 300, the tribunal member cannot be said to have erred in law in finding that the third respondent's contravention occurred in the course of work in circumstances in which he contravened the Act during his defined hours of work, he was then obliged to fulfil the contractual obligations (including the obligations to be on-call and vigilant for safety risks) which constituted his work under the contract for services, and he was then in fact fulfilling at least his contractual obligation to remain in or near the hotel by being in the unit supplied to him by the applicant under the contract for services.

Grant leave to appeal limited to ground 1 in the draft notice of appeal. Dismiss the appeal. Costs.

## Criminal appeals

*R v Oliver* [2018] QCA 348, Date of Orders: 30 November 2018; Date of Publication of Reasons: 14 December 2018

Sentence Application – where the applicant pleaded guilty to one count of unlawful stalking with a circumstance of aggravation, namely, that he intentionally threatened the use of violence against the complainant – where the applicant was sentenced to 18 months' imprisonment, to be suspended after three months – where the sentencing judge applied s9(3) of the *Penalties and Sentences Act 1992* (Qld) (PSA) and therefore did not apply s9(2)(a) of the (PSA) – where s9(2A) of the PSA excludes the operation of s9(2)(a) where an offence "involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person" or "resulted in physical harm to another person" – whether an intentional threat of violence does not fall within the categories of case stipulated under s9(2A) of the PSA, such that it was erroneous for the sentencing judge to apply s9(3) of the PSA in sentencing the applicant – where not only did the applicant cooperate with police but he also pleaded guilty at committal and was committed for sentence – where the police had released him on bail after he had been charged on 22 December 2016 and he remained on bail until he surrendered himself for sentence on 14 November 2018 – where during that period of almost two years the applicant addressed his offending behaviour – where it was not challenged that over the course of the preceding two years the applicant has turned his life around and has, despite offending, retained the confidence of his work colleagues, his friends and his family – where it is the demonstrated willingness of the offender to use violence, shown by its actual use or by the offender's endeavours to see that it was inflicted, that invokes the need for a sentencing judge to consider, for example, the risk of physical harm to any members of the community if a custodial sentence were not imposed – where similarly, it is the actual use or the impending use of actual violence that explains the requirement for a sentencing judge to consider "the nature or the extent of the violence used or intended to be used in the commission of the offence" – where it might be thought a bare threat to use violence unaccompanied by any actions to suggest an imminent use of violence does not easily give rise to "the risk of physical harm" or a "need to protect" or a consideration of "the nature or extent of violence intended to be used" – where that is because many threats are empty threats – where making a threat to use violence may not connote any intention at all actually to do violence – where in some circumstances, a threat may be accompanied by actions so that the threat and the actions together may be regarded as violence although no touching has occurred – where the agreed facts revealed that said threats constituted threats to do violence to the complainant – where none of them were made under circumstances in which it appeared that the threatened violence would be, or could be, inflicted suddenly – where s359E of the *Criminal Code* creates the offence and prescribes the punishment – where s359E provides that the maximum penalty for the offence is increased from five years' imprisonment to

seven years' imprisonment if the offender "uses or intentionally threatens to use violence against anyone" – where that circumstance of aggravation was alleged against the applicant – where the provision expressly ensures that not only will the use of violence as an incident of stalking aggravate the offence, but that a mere threat will do so as well – where s9(2A) cannot be construed so that an offender who commits an offence while making threats to use violence, in some unstated way and at some unstated time, is to be regarded as committing an offence that "involved the use of violence against another person" – where the ordinary and natural meaning of the words does not, in any sense, bear such a connotation – where s359E ensures that, as a circumstance of aggravation of the offence of stalking, that does not matter – where however, in s9(2A) the express expansion of the operation of the section beyond those offences in which violence is "used" to those offences in which violence may not have been used but in which the offender has been shown to be demonstrably committed to its use because he or she had actually attempted to use it, has actively sought by counselling or procuring another to use it or has conspired with others to use it, shows that a bare threat to use violence such as occurred in this case, is not included in the category of offences to which the more severe regime applies – where for that reason, the applicant fell to be sentenced in accordance with the principles stated in s9(2) – where unfortunately at the sentence hearing it was common ground between the parties, and the sentencing judge naturally accepted, the contrary position – where


as a result, his Honour sentenced the applicant according to the principles of sentencing stated in s9(3) rather than s9(2) – where the sentence must be set aside and this court must sentence the applicant afresh – where it was common ground between the parties below that a head sentence in the order of 18 months' imprisonment was appropriate – where no purpose whatsoever can be seen in requiring a person like this to serve any period of imprisonment – where indeed, that is why the prosecutor below correctly submitted that a suspended sentence was within the appropriate sentencing range – where personal deterrence is simply not a factor in this case.

Leave to appeal granted. Allow the appeal. Set aside the sentence imposed on count 1. In lieu thereof the appellant is sentenced to a term of imprisonment for a period of 18 months, the term of imprisonment is suspended forthwith and the appellant must not commit another offence punishable by imprisonment within a period of three years if the appellant is to avoid being dealt with for the suspended term of imprisonment.

*R v Renata; Ex parte Attorney-General (Qld)*  
[2018] QCA 356, 18 December 2018


Sentence Appeal by Attorney-General (Qld) – where the respondent pleaded guilty to one count of unlawful striking causing death – where the respondent delivered an unprovoked and very forceful blow to the deceased's jaw with a clenched first – where the deceased had his arms by his side – where the blow was delivered from out of the deceased's sight – where the respondent was sentenced to seven years'

imprisonment – where it was ordered, pursuant to s314A(5) of the *Criminal Code* (Qld), that the respondent must not be released until he has served 80% of that term – whether the respondent's sentence is manifestly inadequate – where the enactment of s314A reflects a legislative acknowledgement of the now notorious fact that a single strike to the head or neck can be fatal and that appropriate criminal responsibility should attach to it – where on the face of it, it might have been thought that the provision in s314A(5) requiring that the lesser of 80% of the sentence imposed and 15 years be served, indicates that a different sentencing regime, independent of that for manslaughter, is to be established by courts for a s314A offence – where this is not so for several reasons – where in the first place, the provisions of s314A(6), particularly those relating to an intensive correction order and suspension of a term of imprisonment, suggests that a wide sentencing regime similar to that for manslaughter is to prevail – where secondly, the same maximum penalty applies for a s314A offence as for manslaughter – where thirdly, no minimum penalty has been enacted for a s314A offence – where lastly, the requirement in s314A(5), by its own operation, imposes an indispensable measure of severity that does not apply to sentences for manslaughter – where it is unlikely, in the absence of an express indication to that effect, that a new and different penalties regime was envisaged for an offence against s314A that would compound the severity – where it follows that sentences for manslaughter have, and are intended to have, a relevance for sentencing under



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s314A – where at the risk of stating the obvious, it is only manslaughter cases that are factually similar to the s314A offence at hand that could have a potential relevance in this regard – where a second significant qualification arises from the enactment of the separate s314A offence – where that legislative step reflects an increasing public consciousness of, and concern about, deaths caused by blows to the head or neck – where such consciousness and concern ought themselves be reflected in sentencing for s314A offences – where that consideration necessarily limits the assistance that may be derived from manslaughter sentences which were imposed at a time before the increased public consciousness and concern became manifest – where for these reasons, it is considered as a matter of principle, subject to these two qualifications, a sentencing judge may have regard to sentences imposed for manslaughter and may seek to derive from them a starting point for sentencing for a s314A offence – where it is considered that a starting point of 8½ years' imprisonment was too low – where the adoption of it has resulted in a sentence which is manifestly inadequate – where the respondent was a member of a group of four individuals who set about intimidating passers-by – where they attempted to engage the deceased and his friend, P – where the respondent delivered a very forceful blow to the deceased's jaw with a clenched fist – where the blow was entirely unprovoked – where the deceased had his arms by his side – where he had said nothing to the respondent or his associates – where moreover, the blow was delivered from out of the deceased's sight – where the deceased had no opportunity to defend himself – where it is no understatement to say that this is a chilling example of the cowardly, vicious conduct that s314A was intended to address – where having regard to precedent and allowing for the qualifications, a sentence of the order 11 to 12 years' imprisonment is an appropriate starting point for the reprehensible offending in this case – where making allowance for the respondent's youth, his plea of guilty and the fact that he spent time in maximum security, the sentence imposed is one of nine years and six months imprisonment.

Allow the appeal. Set aside the sentence imposed at first instance and in lieu thereof, order that the respondent be imprisoned for a term of nine years and six months. Further order that the respondent must not be released from imprisonment until he has served 80% of this term. Declaration that pre-sentence custody is time served under this sentence.

*R v O'Dempsey* [2018] QCA 364,  
21 December 2018

Appeal against Conviction – where the appellant was convicted of one count of deprivation of liberty and three counts of murder – where the three deceased were a mother, Barbara McCulkin, and her two young daughters – where the offences the subject of the indictment were alleged to have occurred in January 1974 – where the Crown case was that the appellant's co-accused, Dubois, was worried that the deceased mother had been talking to people about the co-accused's involvement in an arson incident and that the co-offender was worried that this may have resulted in him being implicated in a separate arson incident which resulted in the deaths of 15 people – where the Crown case was that the appellant, as a good friend of the co-accused,

was willing to help murder the deceased mother and her two children in order to silence the mother – where the appellant submits that the trial judge erred in admitting evidence of the appellant's co-accused's motive to kill the deceased mother – whether the decision of the trial judge to admit evidence relating to motive involved an error of law, resulted in a miscarriage of justice or was not subject to appropriate directions to the jury – where the parties did not identify the objectionable evidence in their written outlines – where at the court's direction, a written schedule of the relevant evidence was submitted – where it was not for a trial judge to determine whether the jury will or ought to accept evidence or inferences that the prosecution invites a jury to draw from the evidence – where once there is evidence capable of supporting the inference contended for by the prosecution, and provided the inference is relevant to the issues the jury has to determine, then the evidence must be admitted unless there is some reason to exclude it – where the appellant now raises an argument that was not raised before Applegarth J – where he submits that Applegarth J ought to have exercised his discretion to exclude the evidence because its prejudicial effect outweighed its probative value – where because no such submission was made to Applegarth J, his Honour did not consider whether or not to exercise his discretion to exclude evidence that was, otherwise, relevant and admissible – where it is too often forgotten in appeals in criminal cases that the right of appeal under the *Criminal Code* (Qld) is not one that permits a general inquiry into the conduct of a trial in order to find some aspect of the conduct of the trial that, even in hindsight, might be judged to involve an error – where s668D of the Code provides that a person convicted on indictment may appeal to the court on any ground that involves a question of law alone – where with leave of the court, such a person may appeal on a ground that involves a question of fact alone, or a question of mixed law or on any other ground which appears to the court to be a sufficient ground of appeal – where the requirement for leave to appeal against conviction has never been enforced in Queensland, at least in modern times, and all appeals against conviction are treated as appeals as of right – where in this case, the appellant argued below that the evidence of motive was inadmissible because it was “weak” – where that argument was rightly rejected – where the evidence was relevant and admissible unless there was some basis upon which to exclude it despite its relevance – where the arguments about the prejudicial effect of the evidence and the failure of Applegarth J to give the postulated direction were not raised below – where there is no “wrong decision” to which the appellant can point – where the appellant has not demonstrated that there has been any miscarriage of justice occasioned by the admission of the disputed evidence or by his Honour's omission to give the proposed direction – where Dubois' and the appellant's respective motives to commit murder were, in truth, inferences that might be drawn from evidence that was otherwise relevant and admissible about the circumstances surrounding the disappearance of the McCulkins – where the appellant complains that “[t]his body of prejudicial evidence required substantial directions against misuse” – where the evidence about the criminal character of some of these people, as well as the appellant himself, was capable of being misused by the jury and so it

was, in that sense, prejudicial, but his Honour gave an appropriate direction – where although his Honour furnished the parties with a draft of his proposed summing up, as is not uncommon in Queensland criminal trials, and although there was argument even during the lengthy summing up about various parts of it, the appellant sought no redirection concerning this particular direction – where that is understandable because it is impeccable – where the trial judge admitted evidence, in the form of written statements and a transcript, of the dead husband/father, Billy McCulkin, of the three deceased pursuant to s93B of the *Evidence Act 1977* (Qld) – where the appellant submits that this evidence should not have been admitted – where the appellant submits that the trial judge failed to assess and apply s93B of the *Evidence Act 1977* (Qld) to the reliability of each representation – where the written statements were given over two weeks after the disappearance of the three deceased and so, the appellant submits, could not have satisfied the requirement that they were “made when or shortly after the asserted fact happened” – where the appellant submits that the context of the making of the statements, being while the witness assisted police in locating his family, was not a reasonable basis upon which to conclude the statements were reliable – whether the trial judge erred in admitting the written statements and transcript into evidence – where the task imposed by s93B is, therefore, one that requires the trial judge to make a finding of fact upon which the admissibility of the evidence depends – where in this case, the issue for the judge was whether he was satisfied that each representation was made in circumstances making it highly probable that the representation was reliable – where the relevant statements were identified by his Honour by reference to the facts sought to be proved – where his Honour then considered the particular circumstances that bore upon some, but not all, of the statements, namely certain inconsistencies, the evidence of the ex-wife and the content of the running sheets – where his Honour then considered the circumstances that bore upon all the statements made in common – where this was in accordance with the requirements of the section and the requirements of authority – where his Honour made no error – where the appellant submits that the trial judge failed to properly direct the jury as to the effect of delay on the reliability of the evidence of the woman, Estelle Long, with whom the three deceased's husband/father lived at the time of their disappearance – where the evidence of the witness was led to exclude the possibility that the husband/father had killed his wife/daughters – whether the trial judge failed to address the matter of the reliability of the witness in summing up – where this ground cannot be accepted – where his Honour first dealt accurately and in detail with the content of Ms Long's evidence and emphasised to the jury her inability positively to exclude the possibility that Billy had done away with his family at a time when Ms Long was unaware of his absence – where his Honour pointed out that Ms Long had found out that Billy had been seeing another woman behind her back and had used her car to do so – where the evidence was that Billy McCulkin had confronted the appellant and Dubois on Saturday 19 January 1974 and asked them whether they had been at Barbara's home on the previous Thursday – where earlier on the same day Billy had put to the appellant that one of the



neighbour's children had seen him there with Dubois – where both the appellant and Dubois denied to Billy that they had been there – where it follows that the question of their presence at the Highgate Hill house had been raised at a time when it was possible for the appellant to determine where he had been on that Thursday night if not at Barbara McCulkin's house – where in any case, this was not in issue at the trial because the appellant accepted that he had been there – where consequently, the appellant was in no way disadvantaged in formulating his answer to the charges by the delay from the events until trial – where otherwise, the submission that the reliability of Ms Long's evidence was not addressed by his Honour in the summing up is not correct and is rejected – where her ability to exclude the possibility that Billy McCulkin had opportunities to visit his wife without Ms Long's knowledge was the substance of the cross-examination, it was the single point made by defence counsel in his final address and it was fairly identified to the jury as an issue and explained by his Honour – where it is impossible that the jury could have failed to understand that Ms Long's evidence did not give Billy an unassailable alibi – where the Crown case was a circumstantial case that relied on an array of facts from which the appellant's guilt should be drawn – where the appellant submits that a *Shepherd v The Queen* (1990) 170 CLR 573 direction ought to have been given to the jury – where in this case there were no "intermediate facts which constituted indispensable links in a chain of reasoning towards an inference of guilt" – where rather, guilt was to be inferred from a

number of circumstances which, taken as a whole, eliminated the hypothesis of innocence – where no *Shepherd* direction was called for – where the appellant submits that the cumulative effect of the summing up was that it favoured the prosecution, undermined the defence case and "traversed the proper boundaries of judicial direction" – whether the summing up was unfair, lacking in judicial balance and so partaking of partiality as to render the trial a miscarriage of justice – where the summing up took two days to complete – where in cases, such as the present, in which the defence calls no evidence, a proper summing up will inevitably be devoted to the facts led by the Crown to support its case and the summing up can deal with the defence case only by reference to the way in which the defence invites the jury to treat the Crown evidence – where the appellant's particularised complaints are nothing more than cherry-picking statements in the summing up without acknowledgement of context – where the present is not a case in which Applegarth J expressed any view at all about the facts – where instead, as his Honour was bound to do, he laid out the relevant evidence and instructed the jury about the real issues to which that evidence gave rise – where confessional evidence was given by a number of witnesses in the trial – where the appellant, by leave, advanced a ground that the trial judge erred in directing the jury to consider the whole of the evidence suggestive of guilt in assessing whether each confession was made and whether it was true – where the appellant submits that the jury's assessment of each of the confessions should have been limited to the

circumstances of the making of each individual confession, rather than as part of the broader prosecution case – where the admissions made by the appellant to the relevant witnesses were made years apart and where none of the witnesses were said to have known each other – whether it was impermissible for the jury to consider all of the evidence in the case in deciding whether a doubt had raised about the making of the admissions to the witnesses – where this was not a case like *Burns v The Queen* (1975) 132 CLR 258 in which it was contended that police had identified a person who could plausibly be suspected of being guilty by reason of other, inconclusive evidence and against whom the police had decided to offer fabricated evidence of a confession – where in such a case, reliance upon such other evidence would beg the question whether the confession had been fabricated – where that is not this case – where the defence case was an assertion that the appellant was a cautious man who had a propensity not to make disclosures or admissions to anybody – where the jury had to consider all of the evidence in the case in deciding whether that proposition was plausible and whether it raised a doubt about the making of the admissions – where nothing in *Burns* supports the impermissibility of such reasoning.

Appeal dismissed.

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

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# High Court and Federal Court casenotes

## High Court

### Statutory construction – superannuation – incapacity for work

In *SAS Trustee Corporation v Peter Miles* [2018] HCA 55 (14 November 2018) the High Court considered the proper scope of the *Police Regulation (Superannuation) Act 1906* (NSW) in relation to injuries not caused directly by being hurt on duty. The respondent was a police officer who suffered four infirmities of an orthopaedic nature caused by being hurt on duty. He therefore fulfilled the definition of a “disabled member of the police force” within s10 of the Act and received a superannuation benefit. Section 10(1A)(b) of the Act allowed for an increased superannuation amount if the person had an incapacity for work outside the police force. The respondent sought an increase for incapacity flowing from post-traumatic stress disorder (PTSD). The appellant rejected the application. The District Court held that the increased amount could only be sought for incapacity for work arising from the infirmities connected with being hurt on duty. The PTSD in this case was not linked to the respondent’s orthopaedic infirmities. On appeal, the Court of Appeal overturned this decision, accepting the respondent’s argument that once he met the definition of “disabled member of the police force”, he could seek increases of incapacity unrelated to the original infirmities. The court held that there was no reason to restrict the interpretation of s10(1A)(b) and the additional payment to incapacity for work outside the police force arising directly from being hurt on duty. The High Court allowed the appeal, holding that the text, context and purpose of s10(1A)(b)(ii) supported a construction that additional allowances were not allowed unless the incapacity was attributable to a specified infirmity that rendered the person incapable of acting as a police officer because of being hurt on duty. Kiefel CJ, Bell and Nettle JJ jointly; Gageler J and Edelman J each separately concurring. Appeal from the Court of Appeal (NSW) allowed.

### Tax – stamp duty – land holding corporations – legal goodwill

*Commissioner of State Revenue v Placer Dome Inc* [2018] HCA 59 (5 December 2018) concerned the construction of the *Stamp Act 1921* (WA), the value of legal goodwill in a business under that Act, and whether the respondent was a “listed landholder corporation”. Part IIIA of the Act imposes ad valorem duty on purchase of “listed landholder corporations”, defined as entities entitled, at the time of acquisition, to land in Western Australia with an unencumbered value of not less than A\$1 million and where 60% or more of the value of all of its property is land. The respondent and Barrick Gold Corporation

are substantial goldmining enterprises. Barrick acquired the respondent in a hostile takeover. The appellant stated that the respondent was a “listed landholder corporation” and assessed stamp duty payable by Barrick. The single issue in the appeals from that assessment was whether the value of all of the land to which the respondent was entitled was valued at 60% of the respondent’s total value. Barrick asserted that the valuation had to take into account goodwill of the business. If that was correct, the value of the land against the total assets would be less than 60%. The appellant argued that goodwill did not constitute material property and should not be counted. The State Administrative Tribunal found that the assets did not include goodwill. The High Court noted that the statutory valuation exercise called for a comparison between the value of land of the entity as a going concern and the value of total property of the going concern. The court held that the “goodwill” identified by Barrick was not included in Barrick’s goodwill or going concern value. At the acquisition date, Placer was a land-rich company which had no material property comprising legal goodwill. The value of its land assets exceeded 60% of its total value. Stamp duty was payable. Kiefel CJ, Bell, Nettle and Gordon JJ jointly. Gageler J separately concurring. Appeal from the Supreme Court of Western Australia allowed.

### Family law – orders against third parties – powers of the court

In *Commissioner of Taxation for the Commonwealth of Australia v Tomaras* [2018] HCA 62 (13 December 2018) the High Court answered questions reserved to the Full Family Court about the power of courts to make orders under s90AE of the *Family Law Act 1975* (Cth) (FLA) directed to the property interests of third parties. The respondents were a husband and wife, married in 1992 and separated in 2009. During their marriage, the appellant issued various assessments to the wife, who failed to pay the amounts assessed or to object. On 12 November 2009, the appellant obtained default judgments. On 5 November 2013, the husband was declared bankrupt. The wife sought an order pursuant to s90AE that her husband be substituted for her as the debtor to the appellant and that he be liable solely for the wife’s debts to the appellant. Section 90AE(1)(b) allows for the court, in property settlement proceedings under s79 of the FLA, to make an order directed to a creditor of one party to the marriage to substitute the other party to the marriage in relation to the debt owed to that creditor, subject to preconditions to the exercise of power in s90AE(3). A precondition imposed by s90AE(3)(b) is that it is not foreseeable that the making of the order would result in the debt not being paid in full. The High Court held that s90AE(1) did confer on courts powers that would allow for the making of the order sought by the

wife. However, the conditions in s90AE(3) would need to be satisfied. Without further evidence, the court could not answer whether the order could be made in this case, but it was difficult to see how s90AE(3)(b) would be satisfied given that the husband was bankrupt and the wife not solvent. Other preconditions were also doubtful. The court held that the question in respect of the general powers of the court could be answered in the affirmative, but that other questions were not appropriate to answer and the appeal should be otherwise dismissed. Gordon J; Kiefel CJ and Keane J jointly concurring; Gageler J separately dismissing the appeal without formally answering the questions. Answers to Questions Reserved given; appeal from the Full Family Court dismissed.

### Corporations law – directors’ duties – section 601GC – validity of resolutions

In *Australian Securities and Investments Commission v Lewski*; *Australian Securities and Investments Commission v Wooldridge*; *Australian Securities and Investments Commission v Butler*; *Australian Securities and Investments Commission v Jaques*; *Australian Securities and Investments Commission v Clarke* [2018] HCA 63 (13 December 2018) the High Court reinstated declarations of contraventions of the *Corporations Act 2001* (Cth) in respect of the respondents. Each of the respondents was a director in the second respondent, Australian Property Custodian Holdings Ltd (APCHL). APCHL was the responsible entity of a managed investment scheme. On 19 July 2006, the directors resolved to amend APCHL’s constitution, with the effect of introducing new fees that would have been payable by members of the scheme to the APCHL without any corresponding benefit to the members. On 22 August 2006, the board resolved to lodge the amended constitution with the appellant. The appellant failed to bring proceedings relating to the July 2006 resolution within time. But it was in time to challenge the August 2006 resolution and commenced proceedings alleging breaches of both resolutions and contraventions of related party transactions provisions. The focus was on whether APCHL and the directors had breached the Act by making the resolutions and by later acts effecting the payment of the fees imposed. At first instance, the judge found that the directors had contravened numerous provisions of the Act. He made corresponding declarations, as well as imposing penalties. The Full Court allowed an appeal, holding that although the July amendment was invalid, it had “interim validity” and once lodged the amendments had to be considered valid until set aside. The directors were entitled to act in accordance with the amended constitution they honestly believed existed. The High Court held that each of the resolutions was invalid for want of compliance with s601GC of the Act as they

with Andrew Yuile  
and Dan Star QC



adversely affected members' rights. The concept of interim validity was not supported by the text or purpose of s601GC, nor by the structure of the Act, and had to be rejected. Further, it was not sufficient for the directors to hold "honest beliefs" in the validity of amendments to avoid breaches of duties. Each of the breaches, aside from an alleged breach of s209 of the Act, was made out. The High Court reinstated the declarations made by the primary judge aside from two; and remitted the matter to the Full Court for determination of penalties, disqualification orders, costs and a cross-appeal to that Court. Kiefel CJ, Bell, Gageler, Keane and Edelman JJ jointly. Appeal from the Full Federal Court allowed in part.

Andrew Yuile is a Victorian barrister, phone 03 9225 7222, email [ayuile@vicbar.com.au](mailto:ayuile@vicbar.com.au). The full version of these judgments can be found at [austlii.edu.au](http://austlii.edu.au).

## Federal Court

### Practice and procedure – whether vexatious proceedings order should be made

In *Barkla v Allianz Australia Insurance Limited* [2018] FCA 2070 (20 December 2018) the court made a vexatious proceeding order against the applicant under s37AO of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) prohibiting him from instituting proceedings in the court.

The case arose from a long line of Western Australian litigation, initially from an allegation that Allianz was liable to pay Mr Barkla compensation for a workplace injury. In addition to several proceedings against Allianz, Mr Barkla had subsequently brought actions against WorkCover and judicial staff.

The principles applicable to s37AO were considered at [76]-[79]. Charlesworth J explained at [79]: "The purpose of an order pursuant to s37AO of the FCA Act is not to punish a litigant for his or her conduct in a proceeding. The conduct of a litigant in proceedings may, however, be taken into account for the purpose of evaluating whether a particular proceeding satisfies the definition of a vexatious proceeding... The litigant's conduct will also be relevant to the Court's evaluation of the likelihood that the litigant will continue to institute vexatious proceedings if an order pursuant to s37AO is not made and so inform the exercise of the Court's discretion..."

The court was satisfied that the applicant is a person who had frequently instituted or conducted vexatious proceedings in Australian courts or tribunals (at [80]). That conclusion was able to be reached irrespective of whether the applicant had a genuine belief in the correctness of his legal position (at [81]). In considering the discretionary aspect of making an order, the applicant's status

as a self-represented litigant required a "cautious approach" (at [85]). Nonetheless the court made an order that had the effect that the applicant is prohibited from instituting a proceeding of any kind in the Federal Court without first obtaining leave to do so (see [82]). At [117]: "If an order is not made prohibiting Mr Barkla from commencing any action in this Court, there is an unacceptable likelihood that Mr Barkla would commence vexatious proceedings against a widening circle of perceived opponents. He would, I am satisfied, seek to draw Allianz back into any proceeding whether by purporting to serve subpoenas on its officers or by other mischievous means. I am also satisfied that if the order was not made, Mr Barkla would continue to vex the Court itself with threatening correspondence, to ignore the orders of the Court and to waste the Court's judicial and administrative resources, as he has done in the present case."

### Migration law – jurisdiction error by making an important finding of fact without underlying material to support it

In *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 (17 December 2018) the Full Court allowed an appeal from a single judge dismissing a review application of a decision by the Assistant Minister to cancel Mr Hands' absorbed person visa. The court allowed the appeal because the Assistant Minister's decision to cancel the visa was affected by jurisdictional error.

Mr Hands is a New Zealand citizen who had arrived in Australia as a three-year-old child in the 1970s. By operation of law, in 1994 he was granted an absorbed person visa. He had grown up and been accepted into the Aboriginal community on the South Coast of New South Wales, fathering five children throughout his 14-year relationship with an Aboriginal woman. The cancellation of the visa came about following Mr Hands' guilty pleas to a number of charges stemming from a domestic violence incident, receiving a sentence of 12 months' imprisonment. This engaged s501 of the *Migration Act 1958* (Cth), which provides that the Minister must cancel the visa of a person who does not pass the "character test" for having a "substantial criminal record".

The Full Court found that the Assistant Minister had made critical findings of fact without any basis in evidence. Refuting the unsubstantiated claim of the Assistant Minister that Mr Hands could resettle with relative ease in New Zealand, Allsop CJ held at [45] (with whom Markovic J and Steward J agreed): "the statements that he 'may experience some emotional and psychological hardship' and 'may experience short term hardship, [but] would be capable of settling in New Zealand without undue difficulty' are findings of fact simply incapable of being reasonably made by any decision-maker, there being no evidence

at all to support them, and all evidence being to the contrary to a reasonable decision-maker". The making of the findings, without any material to found them, given their central importance in the reasoning, was a sufficient basis for a conclusion of jurisdictional error (at [46]).

The Chief Justice made these pertinent introductory comments at [3]: "By way of preliminary comment, it can be said that cases under s501 and the question of the consequences of a failure to pass the character test not infrequently raise important questions about the exercise of Executive power. Among the reasons for this importance are the human consequences removal from Australia can bring about. Public power, the source of which is in statute, must conform to the requirements of its statutory source and to the limitations imposed by the requirement of legality. Legality in this context takes its form and shape from the terms, scope and policy of the statute and fundamental values anchored in the common law: *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at 5 [9]; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 357 ALR 408 at 423 [59]. The consequences of these considerations are that where decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people. This obligation and the expression of its performance is not a place for decisional checklists or formulaic expression. Mechanical formulaic expression and pre-digested shorthand expressions may hide a lack of the necessary reflection upon the whole consideration of the human consequences involved. Genuine consideration of the human consequences demands honest confrontation of what is being done to people. Such considerations do not detract from, indeed they reinforce, the recognition, in an assessment of legality, that those entrusted with such responsibility be given the freedom of lawful decision-making required by Parliament."

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





Mitchell Stanbrook



Julie Ackerman



Constance McClymont



Kirk Watterston

# Career moves

## Brooke Winter Solicitors

Brooke Winter Solicitors has announced that **Mitchell Stanbrook** has joined its team as a solicitor in the Southport office. As a member of both the Criminal Law and Family Law divisions, Mitchell has appeared in various jurisdictions in relation to criminal law, traffic law, domestic violence and family matters.

## Cooke & Hutchinson Lawyers

Cooke & Hutchinson Lawyers has announced the appointment of two senior associates.

**Julie Ackerman**, who joined the Estate Planning team in September 2016, focuses on providing tailored advice to high net worth private clients. She has worked in various industries across multiple jurisdictions including London, the Cayman Islands, Canada and New South Wales.

**Constance McClymont**, who also joined the firm September 2016, is a member of the Commercial team and provides advice on commercial business transactions, property, competition and commercial litigation, as well as corporate advisory work.

## Corney & Lind Lawyers

Corney & Lind Lawyers has announced the appointment of four new directors: **Eduardo Cruz**, as Director practising in compensation and employment; **Heilala Tabete** as Director, Client Engagement & Business Development; **James Tan**, as Director practising in litigation and family law; and **Nina Brewer**, as Director practising in commercial corporate and not-for-profit law.

The new appointments see **Andrew Lind** become Director and Chair, and **Alistair Macpherson** the firm's Managing Director.

## Creevey Russell Lawyers

Commercial and property lawyer **Helen Kay** has joined Creevey Russell Lawyers as a special counsel.

Helen has worked in top-tier firms in the United Kingdom and Australia, and has also run her own practice, providing advice to listed companies, private and not-for-profit organisations, overseas clients, private investors and state governments on all aspects of commercial transactional work, including high-profile developments, acquisitions, disposals and mergers.

## Murphy's Law Accident Lawyers

Murphy's Law Accident Lawyers has announced the appointment of **Chris McMahon** and **Kirk Watterston**.

Chris, an experienced personal injuries litigator, has joined the firm as special counsel and will be heading up the new Institutional Abuse division. He has been in practice for more than 26 years and is a QLS accredited specialist in personal injuries.

Kirk has joined the practice as an associate and has appeared both for and against insurers in personal injuries claims. He has a special interest in medical negligence cases.

## NB Lawyers

NB Lawyers has announced the promotion of **Daniel Dash** to senior associate. Daniel is a key member of the commercial team and provides advice on shareholder disputes, commercial arrangements for business, and preparing risk mitigating legal documentation.

## P&E Law

P&E Law has announced the appointment of **Raquel Bond** as a senior solicitor in its new Chinchilla office. Raquel's arrival will help drive the continued growth of the firm's CSG, mining and resources practice in the Surat Basin and beyond.

Raquel has experience in private practice, local government and the CSG industry, with an in-depth understanding of the issues affecting landholders when negotiating agreements with mining companies.

## Rees R & Sydney Jones

Rees R & Sydney Jones has announced the promotion of **Nicole Collins** to associate. Nicole, who has been with the firm since 2017, is a member of the Commercial Division, with a focus on property law.



Eduardo Cruz



Helala Tabete



James Tan



Nina Brewer



Helen Kay



Chris McMahon



Daniel Dash



Raquel Bond



Nicole Collins



Tim McClymont



Reagan Wilson

### Travis Schultz Law

Travis Schultz Law has welcomed **Tim McClymont** as a senior associate.

Tim, who has previously worked with Ernst and Young, the Australian Taxation Office, WorkCover Queensland and the Australian Federal Police, has now practised law for more than 12 years, gaining extensive experience across a range of civil litigation

matters that include contract and leasing disputes, bankruptcy and corporate insolvency, trade practices, debt recovery, wills and estates, and personal injury (WorkCover, motor vehicle accidents and public liability claims).

### Wilsons, The Family Lawyers

Prominent family lawyer **Reagan Wilson** has announced the launch of his new firm in Toowoomba. Wilsons, The Family Lawyers, opened on 7 January and offers the full suite of family law services.

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

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# Basic entitlements – personal/carer's and compassionate leave

by Rob Stevenson



## Full-time employees are entitled to 10 days of paid personal/carer's leave for each year of service under the National Employment Standards (NES).

Part-time employees have a pro rata entitlement. The entitlement accrues progressively during each year and is cumulative but is not paid out on termination. Casual employees are not entitled to paid personal/carer's leave.

Personal leave is the same as sick leave (where an employee is not fit for work because of a personal illness or injury). Carer's leave means leave taken to provide care or support to a member of an employee's immediate family or household because of a personal illness/injury or an unexpected emergency. The term 'immediate family' is broadly defined in the *Fair Work Act 2009* (Cth).

When the paid entitlement is exhausted, all employees (including casuals) can take up to two days per occasion of unpaid carer's leave. These are minimum entitlements, so industrial awards, enterprise agreements, contracts or policies can provide for a greater entitlement.

The unpaid entitlement can be spread out over several days if the employer agrees.

Unlike annual leave, personal/carer's leave cannot be cashed out as a general rule.

Full-time and part-time employees are entitled to two days of paid compassionate leave per occasion and casual employees are entitled to two days of unpaid leave. The entitlement arises where a member of an employee's immediate family or household suffers a life-threatening personal illness or injury or dies. The two-day entitlement does not have to be taken in a single block.

What if an employer suspects an employee is abusing the entitlement? Firstly, employees are required to give notice of taking leave as soon as practicable and must advise how long they will be, or expect to be, away from work. Employees who fail to do this can be counselled and potentially disciplined. Secondly, an employer can require an employee to provide reasonable evidence to support their leave claim. This commonly takes the form of a medical certificate but a statutory declaration may also be satisfactory, particularly if carer's or compassionate leave is involved.

Commonly, medical certificates merely state that a person is/was suffering from

a 'condition'. An employer may be able to refuse pay for the leave until some further detail is provided, particularly if an employee has a history of taking leave. When the claim is for carer's leave, further details of the care or support given and the nature of the illness, injury or emergency affecting the family or household member can be sought. However, an employer's requests for evidence must be reasonable because an employee could complain to the Fair Work Ombudsman or potentially even take legal action if an employer unreasonably refuses payment.

A couple of other points should be kept in mind. Firstly, there is debate about whether absences for elective medical procedures are strictly personal leave, but the safer approach is to allow it. Secondly, care should be exercised when an employee has used up their paid entitlement and exceeds their unpaid entitlement. There are a number of overlapping requirements in this area, which means that employers should obtain advice before taking any disciplinary action against an employee.

Rob Stevenson is the Principal of Australian Workplace Lawyers, [rob.stevenson@workplace-lawyers.com.au](mailto:rob.stevenson@workplace-lawyers.com.au).

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Would any person or firm holding or knowing  
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Wiseman** of Unit 3, Fiddlewood Lane, Earl  
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Please contact Geoff Armstrong of Bennett &  
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Would your firm be holding or any solicitor  
know the whereabouts of the last will of my  
late father **MARKO SHORE** who lived in 50  
Canterbury St, Mount Gravatt and owned 8  
Colville St, Highgate Hill. Born 5 March 1919.  
Died 8 April 1998. My father was a chef in a  
restaurant called Sunshine Café in Stanley St,  
Woolloongabba. Please contact Ilo Shore on  
0431 162 694 or **shorelinesalbani@gmail.com**

## Missing wills continued

Would any person or firm holding or knowing the existence of the original Will for **Henry Thomas Spinks**, DOD 24/12/2018, DOB 23/05/1918 late of BUPA Aged Care Pottsville Beach, Pottsville in New South Wales. Please contact Melanie Harris, Solicitor at O'Rourke & Kelly, Solicitors. Phone: 03 6424 4633 or email [melanie@orourkekelly.com.au](mailto:melanie@orourkekelly.com.au) within 14 days of this notice.

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# What's in a name?

with Matthew Dunn



## Bubbly and approachable prosecco is now at the centre of an international trade brouhaha over the use of its very name.

And with sales booming, the use of the prosecco name becomes a high-stakes affair.

The story of prosecco is not dissimilar to many other famous venerable wines in that confusion and years of misrepresented usage don't fit neatly with the European Union's system of geographic indications. Bordeaux, for example, is a region where wines are made, and also a style of wine.

Prosecco is a light, white sparkling wine made traditionally in and near the village of Prosecco on a hill overlooking the Gulf of Trieste, not far from the border of Slovenia. Complicating this is the fact that, for many years, the principal grape variety used in prosecco was called prosecco and relatively recently (in 2009) this was rediscovered and rebadged as the variety 'glera' by the Italian Agriculture Ministry.

Glera and winemaking in Prosecco are both quite ancient. The town comes from Roman times when it was Castellum Pucinum and the centre for the wine celebrated by Pliny the Elder in his *Natural History* as being

responsible for Empress Julia Augusta's long life.<sup>1</sup> The Latin name Pucinum evolved over time with a Slovenian influence to the current Prosecco.

The wine prosecco was originally still, and then became sparkling earlier last century. For many years it was produced as a sweet sparkling similar to Asti from Piedmont. Comparatively recently it became more quality focused and tended to become drier. It was only in 2009 that the Prosecco Superiore DOCG region was created to recognise the new quality focus and status amongst the top wines of Italy.

In Australia in 1999, Veneto region-born Otto Dal Zotto planted the first few rows of the 'prosecco' grapes in Victoria's King Valley and released his first 'prosecco' wine five years later.<sup>2</sup> Brown Brothers followed into prosecco, releasing its first wine in 2009 and, with increased planting in Victoria's King Valley, became Australia's largest producers.

Since then sales of prosecco have boomed in Australia, the United Kingdom and United States. Our producers argue they planted the prosecco grape and are selling their wine by grape variety name. There is some credence to this proposition as the Italians unilaterally changed their grape name after our vineyards were planted and producing wine.

Australian prosecco is exported to many countries and this is the nub of the fight for the name.<sup>3</sup> In Italy and Europe, Prosecco is now not the name of a grape variety but a protected name of origin for a wine produced in the region. Australia's European market has dried up and the battle has now turned to our other markets.

Italy has been successful in having the name 'Prosecco' protected in Japan and is making applications in India, Malaysia, New Zealand and China. These are all strong or emerging Australian export markets. The trade war is on in earnest for the name of prosecco.

### Notes

<sup>1</sup> "Julia Augusta LXXXVI annos vitae Pucino vino rettulit acceptos, non alio usa. Gignitur in sinu Hadriatici maris non procul a Timavi fonte, saxoso colle, maritimo adflatu paucas coquente amphoras; nec aliud aptius medicamentis indicatur. Hoc esse crediderim quod Graeci celebrantes miris laudibus Praetutianum appellaverint ex Hadriatico sinu."

<sup>2</sup> [essentialsmagazine.com.au/wine/otto-dal-zotto-on-australian-prosecco](http://essentialsmagazine.com.au/wine/otto-dal-zotto-on-australian-prosecco).

<sup>3</sup> [abc.net.au/news/2018-08-31/australian-prosecco-success-sees-italy-stake-a-claim-on-name/10168914](http://abc.net.au/news/2018-08-31/australian-prosecco-success-sees-italy-stake-a-claim-on-name/10168914).

## The tasting Three intriguing examples of the wine were subjected to close inspection.



The first was the strikingly labelled **De Bortoli King Valley Prosecco NV**, which was a light straw colour. It had a lazy bead rising sluggishly off the glass and a nose of citrus and crushed sultana. The palate was a jolly spritz in the mouth, the initial burst of sweetness being cut back handsomely with acid to an almost dry finish. The flavours of lime zest and ripe, warm summer peach fell upon the tastebuds. Handsome wine at a handsome price.



The second was the seriously created **Brown Brothers 2017 King Valley Prosecco**, which was straw coloured and beading strongly. The nose showed some restrained granite and floral touches. The palate was similarly restrained and dry, with some fruit and more floral tones supported by a hint of spirit (surprising in a wine of only 11.5% alcohol).



The last was the **Santa Margherita Valdobbiadene 2017 Prosecco Superiore DOCG**, which was a very clear blonde colour and a nose combining the best of floral tones and white peach. The sophisticated palate was pear and pink grapefruit, lychee and zingy citrus acid making a fine dry cutting sparkling wine.

**Verdict:** The most preferred was the Santa Margherita, which was the reference wine, but the De Bortoli would be one to return to again, and again.

Matthew Dunn is Queensland Law Society policy, public affairs and governance general manager.

# Mould's maze

By John-Paul Mould, barrister  
and civil marriage celebrant  
jpmould.com.au

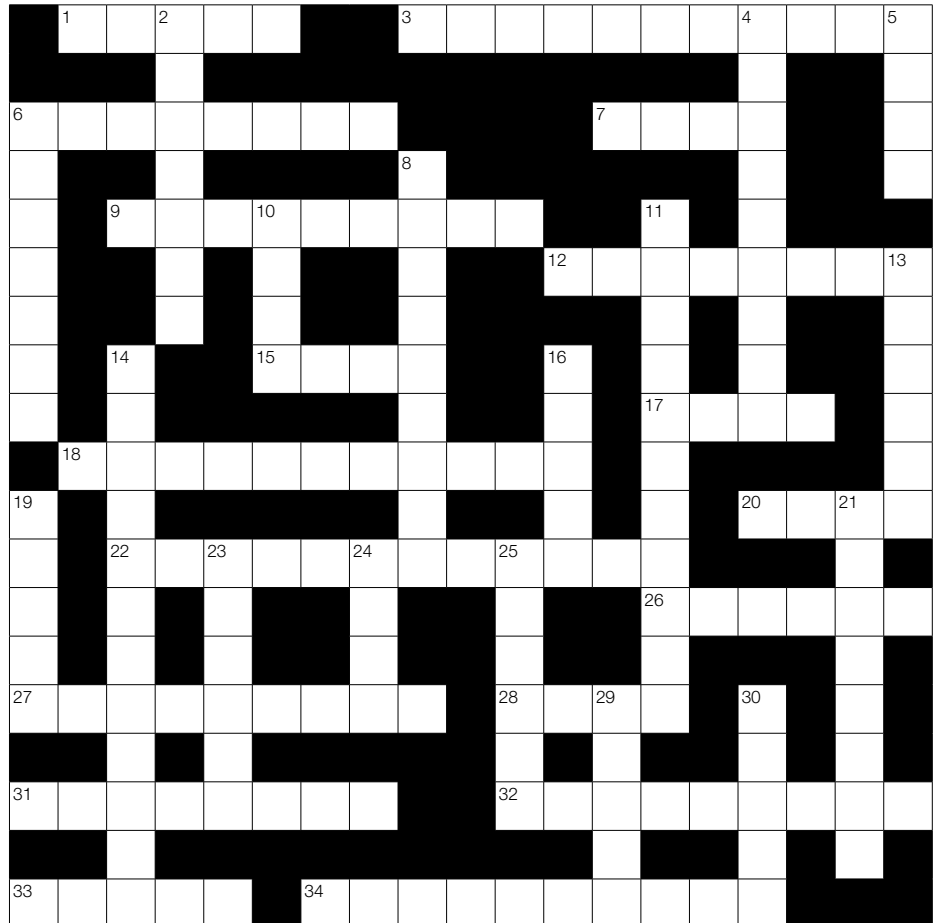


## Across

- 1 Judgment is reserved, ..... *advisari vult*. (Latin) (5)
- 3 Barrister, author, film producer, journalist and co-creator of *Rake*, Charles ..... (11)
- 6 High Court of Australia (HCA) decision providing authoritative guidance for sentencing Indigenous defendants, *R v* ..... (8)
- 7 HCA decision which cast doubt over the constitutional validity of guideline judgments, .... *v The Queen*. (4)
- 9 To determine a case without a full trial, ..... dismiss. (9)
- 12 Makes amends or reparation for. (8)
- 15 A .... contract occurs when an employer deliberately disguises an employment relationship as an independent contractor arrangement. (4)
- 17 'A trial within a trial', voir ..... (4)
- 18 Imprison. (11)
- 20 The court will not grant a work licence if an applicant's licence has been suspended, cancelled or disqualified within .... years prior to the application. (4)
- 22 An application brought when a person holds property on behalf of another but does not know to whom the property should be transferred. (12)
- 26 Explanation to the court of the personal consequences of an offence tendered upon sentencing, victim ..... statement. (6)
- 27 Civil culpability. (9)
- 28 Quasi-legal instruments which do not have any legally binding force, or whose binding force is weaker than traditional law, '.... law'. (4)
- 31 Inaugural Chief Justice of the HCA, Chief Justice of the Supreme Court of Queensland and twice Premier of Queensland. (8)
- 32 Referring to a person's functionality prior to an accident. (9)
- 33 Destination of newly appointed judges, The ..... (5)
- 34 Courts will not compel disclosure of documents where to do so would be ..... (10)

## Down

- 2 District Court judge and Chief Magistrate, Ray ..... (7)
- 4 Entity who prosecutes WorkCover fraud offences, Workers' Compensation ..... (9)
- 5 HCA case involving a personal injuries claim arising from a psychiatric condition developed after a police officer wrongly recorded the plaintiff's blood alcohol reading at an accident, .... *v NSW*. (4)



- 6 Customary further percentage discount for contingencies for future economic loss claims. (7)
- 8 The Commonwealth of Australia, but not Queensland, has a ..... legislature. (9)
- 10 Concurrence requires the simultaneous occurrence of both *actus reus* and .... *rea* to constitute a crime, except in relation to offences of strict liability. (4)
- 11 A ..... trust gives a trustee full authority to make decisions as to how the trust funds may be spent for the beneficiary. (11)
- 13 It is only appropriate to commission a medico-legal report when the patient's condition is ..... and stationary. (6)
- 14 Property mediation conducted by a Family Court Registrar, ..... conference. (12)
- 16 Police recordings at the scene of a crime, .... tapes. (5)
- 19 Brief given by one barrister for work to be performed primarily by another barrister but whose authorship remains with the former. (5)
- 21 HCA decision in which it was held that there was no property in a spectacle: ..... *Park Racing & Recreation Grounds Co Ltd v Taylor*. (8)
- 23 The maximum penalty for an offence is decided by Parliament whereas the ..... for an offence is recommended by the courts. (9)
- 24 A written agreement between two states or sovereigns. (4)
- 25 Chief Justice of the Federal Court of Australia. (6)
- 29 Estates of land held on condition of feudal service. (5)
- 30 A .... *v Nugus* statement is prepared by a solicitor who originally prepared a disputed will or witnessed its execution. (5)

Solution on page 56

# If the shoe doesn't fit...

## At least it's too late to wash the car

by Shane Budden



**As I type this, the new school year is about to start and we are in the midst of the 'back-to-school' frenzy.**

Whether or not that is a good thing depends on which of my children you ask. My daughter looks forward to the start of the new school year as if she is about to be beamed aboard the Starship Enterprise (original series, not the dorky dross that followed) and be allowed to fly it to the planet of the talking puppies.

My son views it more the same way the dinosaurs would have viewed the approach of the asteroid which wiped them all out by slamming into the Earth (65 million years ago last Tuesday, to be exact), had they not had brains the size of a walnut.

Indeed it is astonishing to think that millions of years ago the world was very different, ruled by the dinosaurs, the most powerful of which was the T-Rex. Can you imagine being ruled by a dinosaur with a brain the size of a walnut and freakishly small hands? I bet Americans can.

However, I digress and return to the subject at hand (Ha! See what I did there?) which is the back-to-school frenzy.

Thankfully, much of this frenzy is now automated. When I was a kid, we would simply pop down to the newsagency (which in those days sold something other than Lotto tickets) and bought a couple of plain exercise books, an 'Oxford Rule' book (the purpose of which was never revealed in all my years of schooling) and some 2B pencils – total cost about a dollar – and we were done. All that was left was to pester mum to throw in a Spider-Man comic.

The only thing similar today is that kids still pester their parents about Spider-Man. Now, we simply order a pre-packaged box of books, pencils, glue, compasses, sextants, barometers and God knows what else, all of which are apparently made of a rare mineral which can only be found on the far side of the Moon, at least going by the price.

Actually that was just for my son's stuff. For my daughter, we were required to visit Kmart and buy one or more of, effectively, every piece of stationery they had or could have flown in on short notice. This made my daughter ecstatic, because she loves

Kmart the way Donald Trump loves walls and learning about Russian culture. Veteran parents tell me to make the most of this, as she will soon love fashion boutiques which tend to charge the GDP of Tasmania for simply speaking to a staff member.

Funnily enough, I had thought that all of this was over, as we had spent the two weeks over Christmas, and the equivalent of Clive Mensink's allowance, on school supplies, which included shoes. That is important because one Sunday late in January I was informed by my wife that we needed to get school shoes for my daughter. Naturally, I pointed out that we already had bought school shoes for her, and that it was Sunday, a day of devotion (specifically, devotion to putting off washing the car until it is too late to do so).

My wife and my daughter responded by looking at me as if I had just suggested that she didn't need an iPad because she had a perfectly good pocket calculator. It seems we needed PE shoes, and despite her having several sets of joggers (including a set that has wheels in them, which would be very useful on sports day in my view) none of them would do.

Which is how I ended up at a certain sports store – let's call it 'Conformist Sports' to preserve its privacy – witnessing a confirmation of the Budden Uncertainty Principle. You may have heard of this principle, but since I just made it up that seems unlikely; it is based on the famous Heisenberg Uncertainty Principle, thought up by – now here's a shock – a guy named Heisenberg, probably after a few too many sherbets.

As you are no doubt aware, the Heisenberg Uncertainty Principle states that you can't know where a particle is if you know how fast it is going (think of it as similar to the way the later you are, the harder it is to find your keys).

The Budden Uncertainty Principle states that if you are just browsing in a store, every staff member will approach you at least three times offering to sell you something; but if you actually want to purchase something, even if you are standing there with a wheelbarrow full of money and Elvis Presley, staff will not speak to you, approach you or even acknowledge your existence.

We stood there trying to attract the attention of two staff members who were not serving the customers but were engaged in a deeply important discussion which I couldn't quite hear, but based on the looks of them I deduced that it was about Dungeons & Dragons or computers (or playing Dungeons & Dragons on computers).

Thankfully, my son took charge and began dancing in front of a mirror singing one of the most annoying songs I have ever heard, which he discovered on an Xbox game and is basically a highly inaccurate take on the noise foxes make. If you have ever heard that song, you will appreciate that, attention-getting wise, it was more effective than setting fire to the shoe display (which by that time was plan B).

We really should have experienced success on this trip. My daughter is the most organised shopper in history, and so she was well-prepared. She knew the make and model of shoe, the size and she had confirmed that the store we were in actually had the shoe in stock. Unfortunately, she was about to formulate her first law of physics, the Budden Conjecture: no amount of planning and preparation can survive contact with an intellectually unremarkable shop assistant.

After we gave him the information he strode purposefully into the storeroom, looking like a man that knew exactly where the shoes were, which was exactly what he was: a man who only *looked* like he knew where the shoes were. What he actually was, was a man who needed some guidance on what shoes *are*.

After the passing of approximately an ice age, he returned to confirm that the system did say they had the shoes, but that he, alas, could not find them. He had found a different shoe in the wrong size, and seemed genuinely perplexed as to why this was not an acceptable solution to our problem.

So we never got the shoes, meaning that there are more visits to shops for school supplies in my future. On the plus side, by the time we got home it was far too late to wash the car.



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## Crossword solution

From page 54

**Across:** 1 Curia, 3 Waterstreet, 6 Fernando, 7 Wong, 9 Summarily, 12 Expiates, 15 Sham, 17 Dire, 18 Incarcerate, 20 Five, 22 Interpleader, 26 Impact, 27 Liability, 28 Soft, 31 Griffith, 32 Premorbid, 33 Bench, 34 Oppressive.

**Down:** 2 Rinaudo, 4 Regulator, 5 Tame, 6 Fifteen, 8 Bicameral, 10 Mens, 11 Spendthrift, 13 Stable, 14 Conciliation, 16 Field, 19 Devil, 21 Victoria, 23 Tariff, 24 Pact, 25 Allsop, 29 Fiefs, 30 Larke.

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