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Bad money for good

A \$95m solution to legal aid funding?



The lack of sustainable and increasing funding for legal aid is one of the most significant problems facing our justice system.

Its symptoms are manifold. Last month we talked about the impact of this problem on a personal level for family law matters, but of course it is much broader than that.

We look to government to provide an independent judiciary and resources to support the courts, but increasingly we see that ordinary people are excluded from proper representation and legal advice because of the significant restrictions that have been placed on legal aid.

We see more and more people in contentious family law matters and in criminal matters appearing self-represented. This causes significant difficulties and delays for the courts as hard-working judges have to ensure the rights of litigants who are often under stress and overload the courts with well-meaning but irrelevant submissions and speeches.

We see so many lawyers doing huge amounts of pro bono work and we marvel at the level of assistance they provide to community legal centres. These are fine examples of our members aiding a system that is showing signs of significant stress.

So while governments ought to live within their means and nation-build by ensuring that we have proper infrastructure for business, health, defence, education and so on, they must also consider the social infrastructure of justice. After all, it is a fundamental principle of our society that every person must have reasonable access to justice.

So what can be done about it?

Well, one of the potential sources of legal aid funding that must be explored is the millions raised through the confiscation of criminal profits by federal and state governments.

We are aware that the balance of the Confiscated Assets Account administered by the Australian Financial Security Authority stood at \$95.535 million in surplus as of 30 June 2015.

Of course it is appreciated that significant sums from this account are used for specific purposes listed in s298 of the *Proceeds of Crime Act 2002* – crime prevention and law enforcement measures, and the treatment of drug addiction and related drug diversionary measures.

A report that documents how these funds are spent is available from the federal Attorney-General's website (ag.gov.au > Crime and corruption > Crime prevention > Proceeds of Crime Act). It is money well spent, though I can't help but wonder whether access to justice for vulnerable Australians is more important than graffiti removal.

Given the surplus mentioned above, I would respectfully suggest that some of these funds would also be well spent in ensuring justice for those who need it most.

This would truly be 'bad money for good', and all that would be required is the political will to make a small legislative change.

We are not talking about enormous amounts, comparatively. Commonwealth funding for Legal Aid Queensland – mainly for family law matters – was reduced by \$1.5 million this financial year following a \$3 million cut last year. Even returning to the status quo nationwide shouldn't 'break the bank'.

Our Call to Parties document for the forthcoming election (see the April edition of *Proctor*, page 5) asks our politicians to investigate allocating the money seized from proceeds of crime actions as an ongoing funding source for legal assistance services.

I have also written to the Prime Minister to suggest that some of this money could be used to help overcome some of the problems – court delays, particularly in family law matters – discussed in my column last month.

We call on the Federal Government to utilise this 'bad' money – taken by people who have broken the laws of our society – and use it for the good of our society by properly funding legal aid.


In an election year, QLS members could consider talking to their local parliamentarians about using this bad money for good.

Bill Potts

Queensland Law Society president

president@qls.com.au

Twitter: @QLSPresident



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A time for lawyers

What's happening in Law Week 2016

Law Week 2016 isn't simply a 'public' event.

It is also about lawyers, *for* lawyers. It is a time that we celebrate being lawyers; we have some fun and enjoy our collegiality, but we also take time to involve ourselves in some of the elements that form essential parts of our professional lives.

These include our community's access to justice, our mental health and that of our colleagues, our membership organisation and our professional development.

Let me illustrate that. Our Law Week begins a little early this year with the Queensland Law Society Touch Football Tournament, a popular and hotly contested tournament now in its second year.

It is a six-a-side mixed competition with a maximum of 14 players registered per team. There'll be a QLS team and representative sides from several firms playing for bragging rights and to get their name on the trophy alongside 2015 champions K&L Gates.

See you on Saturday 7 May at JF O'Grady Park, 104 Brougham St, Fairfield.

Law Week formally begins with the Queensland Legal Walk on Tuesday 17 May to support the Queensland Public Interest Law Clearing House (QPILCH) and to celebrate our commitment to pro bono and the right of everyone to be able to access justice when they need it most. This is something very close to our professional hearts, and I urge all members to take this short morning walk for justice in their nearest centre – Brisbane, Toowoomba, Sunshine Coast, Gold Coast, Mackay, Toowoomba or Cairns.

On Wednesday 18 May we invite you to Law Society House for a complimentary breakfast session entitled Mindfulness for Lawyers. Rather than focusing on the 'bad news' of mental health issues within the profession, this is a positive approach to strengthening our resilience to prevent issues arising, and I commend it to you.

The afternoon of Thursday 19 May is our QLS Open Day, with an emphasis on your professional development – including eight complimentary sessions to help you remain current and also navigate future change – and the opportunity to exchange views with the staff of your membership organisation.

The collegiate highlight of the week is, of course, the QLS Annual Ball on Friday 20 May.

More information on the ball appears in this edition of Proctor, and details for all of the above, including registration information, is available at qls.com.au.

Law Week, be in it, as it is *your* event too!

PC and membership renewals

QLS Council is delighted to announce that combined membership and practising certificate renewal fees will be reduced again for the 2016-17 year.

This is due to initiatives and support provided to members by Lexon and the Society which has led to the reduction in Fidelity Guarantee Fund claims.

The renewal of practising certificates and QLS membership opens online on Tuesday 3 May, and all renewals must be successfully lodged and prescribed fees received by QLS before 31 May 2016. Any unpaid practising certificate fees will attract a late fee.

It is also mandatory for all firms to ensure their professional indemnity insurance is renewed and that it accurately reflects their circumstances.

I'd like to add that there have been some slight changes to the renewals form this year. This isn't just to help us improve the products and services we offer to members but also to assist us in assessing and promoting the valuable work that our members perform in our community through pro bono and other activities.

Thank you to those who updated their details and areas of practice in preparation for the renewal process.



Grant supports regional programs

With almost a third of our Queensland solicitors working in country or regional areas,¹ it is essential that we provide them with a comprehensive program of professional development that is both accessible and affordable.

I would like to thank the Queensland Law Foundation for a recent grant of \$53,000 to assist the Society in the provision of regional professional development events and webinars this year.

These funds will be applied to staging regional events in centres such as Hervey Bay, Gladstone, Emerald, Mt Isa and Toowoomba, as well as to our comprehensive series of webinars, of which around 17 are currently scheduled.

Thank you!

Thank you to the many who supported my involvement, and that of Clarissa Rayward, in last month's Dancing CEOs event. Your contributions have made an important difference to the Women's Legal Service, which is really what our participation was all about.

It was a great night and an exhilarating experience, but I won't be giving up my day job!

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

Note

¹ 29.9%, more than double the level of any other state, according to the 2014 Law Society National Profile Final Report, p22.

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BSWAT: Advising workers with disability

The Australian Government is encouraging legal advisors to register to provide legal advice to participants in the Business Services Wage Assessment Tool (BSWAT) payment scheme.

The Government will not provide any direction to legal advisors on their interaction with clients, as the advice provided is to remain independent. Legal advisors will be paid a fee of \$850 per client. Those interested in providing services as a legal advisor for the scheme can find out more information and register at dss.gov.au/bswat-advisors-counsellors.

BSWAT is a wage tool developed by the Department of Social Services for use in Australian Disability Enterprises (ADEs). The scheme will provide a one-off payment to eligible supported employees of ADEs who have been paid a pro-rata wage assessed using the BSWAT. About 10,000 workers with disability may be eligible for the scheme.

Participants considering a payment offer can first discuss their options with a legal advisor. This gives them the opportunity to receive independent legal advice to understand the consequences of a decision to accept or decline a payment offer.

One consequence of acceptance may be to remove any right the participant might have to sue any person for any loss arising from the use of the BSWAT to assess the participant's wages.

On 18 March 2016, an Act to amend the scheme received royal assent. The amendments include increasing payments to participants and making the current requirement for legal advice voluntary, rather than mandatory. The Act can be viewed in full at legislation.gov.au/Details/C2016A00021.

The scheme follows a Federal Court finding that two supported employees with intellectual disability were unlawfully discriminated against because their wages were determined using the BSWAT. A representative proceeding has been filed on behalf of workers with intellectual disability whose wages were assessed using the BSWAT. The action is being led by Maurice Blackburn Lawyers and, in part, seeks compensation for wages allegedly lost.

The Commonwealth and the applicant in the representative proceeding have agreed to settle if the Commonwealth introduces a Bill that would, among other matters, increase payments under the scheme.

Redkite Corporate Quiz – coming soon

The 2016 Redkite Corporate Quiz will be held on 22 July, with all funds raised going to support children and young people with cancer and their families.

The event pits corporate teams against each other in a tough trivia challenge. For details, see redkite.org.au/redkite-corporate-quiz.

Change to courts' collection service

The Supreme, District and Land Courts Service has advised that, from 1 April 2016, orders, appeal record books, probates and pre-sentence reports are available for collection from the Search and Copy counter on level 1 of the QEII Courts of Law complex. This change, a part of regular client service improvements, is to reduce waiting times and to expedite service. For more information, please contact 07 3224 8924.

CQ Uni students network in Bundaberg



At the networking function were CQ Uni student Rebecca Markwell, Nicole McEldowney and Ted Donegan (Payne Butler Lang), and student Sarah Olsen.

The Bundaberg Law Association recently opened its membership to Central Queensland University (CQ Uni) students, inviting them to also attend a networking event with members and Magistrate Aaron Simpson.

The law association is one of only two in Queensland that offer membership to CQ Uni students, providing them with opportunities to meet local practitioners, be involved in professional moots and attend court.

The event saw Magistrate Simpson speak to students about the association, practising regionally and the Magistrates Court.

QLS welcomes organised crime report

Queensland Law Society has welcomed the release of the Taskforce on Organised Crime Legislation report in response to the state's controversial 'anti-bikie' laws.

The Society is now working on a detailed analysis of the report and its legal implications.

QLS deputy president Christine Smyth said that, while the laws had been the subject of much fiery and heated public debate – particularly in the media – a fair deal of it was fueled by large helpings of misinformation and speculation.

"We have been concerned that positions have been adopted without the benefits of the text of the report," she said. "Upon release it is time for calm and considered review.

"We know there's been a great deal of public debate and discussion, particularly during the taskforce's review of the VLAD laws, much of which was based on pure speculation."

Ms Smyth said it might take some time to digest and respond to the report as it involved consideration of changes to some 17 separate pieces of legislation.

"The Society has always strongly advocated for evidence-based legislation and policy," she said. "We have always sought to consult with the Government and the Opposition so that the legislation can be properly developed."

Ms Smyth said QLS was not consulted on the legislation and the poor history of prosecutions arising from this legislation has been a testament to the haste in which it was drawn.

The report by the taskforce, led by retired Supreme Court justice Alan Wilson, was commissioned by the Labor-led Palaszczuk Queensland Government when it took office in response to criticism by the legal profession of the LNP Newman Government's controversial *Vicious Lawless Association Disestablishment Act 2013*.

QLS provided two submissions and two members to the taskforce in conjunction with delegates from the Queensland Police Service and Union, Queensland Police Commissioned Officers' Union of Employees, Bar Association of Queensland, Public Interest Monitor, Department of Justice and Attorney-General and Department of Premier and Cabinet.

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Peter Lynch
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Draft policy seeks equitable briefing practices

The Law Council of Australia has released a draft model policy on equitable briefing practices.

The draft policy aims to achieve a nationally consistent approach to creating cultural and attitudinal change within the legal profession with respect to gender briefing practices.

At present, women barristers represent 21.6% of the Queensland Bar.

The draft policy asks law firms which select and work with barristers to (on an 'opt-in' basis):

1. Make all reasonable endeavours to brief women barristers with relevant seniority, expertise, experience or interest in the relevant practice area.
2. By 1 July 2018, offer women barristers at least 30% of all briefs and 30% of the value of brief fees paid to counsel to women barristers.

3. To provide a report to Queensland Law Society and the Bar Association of Queensland on the steps the firms taken by 30 March each year with respect to the measures taken to implement the draft policy.

Each local law society and Bar association is required to report the figures to the Law Council of Australia.

The draft policy was developed following a National Equitable Briefing Roundtable held in Sydney on 26 October 2015. Representatives of each Bar association and law society, and those active in developing equitable briefing strategies, were invited to discuss the basis of national equitable briefing guidelines for the profession.

The draft policy was released in mid-February and QLS established an equitable briefing policy working group which met on 14 March and 11 April. The group has consulted widely with the profession on the draft policy and is preparing written feedback.

The working group also identified the strong presence that QLS has in supporting, fostering and encouraging gender diversity and equity.

The QLS Equalising Opportunities in the Law Committee is dedicated to fostering parity throughout the profession and has been in existence for more than 10 years. QLS celebrates firms and solicitors who uphold these values by annually recognising them in the Equity and Diversity Award and the Agnes McWhinney Award. QLS has a model dignity at work charter, as well as a number of resources and support on gender equality available at qls.com.au.

Members are welcome to provide commentary on the LCA's draft model policy by emailing QLS policy solicitor Louise Pennisi on l.pennisi@qls.com.au.

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Cairns student wins Koowarta scholarship

The Law Council of Australia has named 18-year-old Cairns student Mikaela French as the 2016 winner of the national John Koowarta Scholarship.

This scholarship is the only national scholarship dedicated to helping Indigenous students realise their ambitions of becoming lawyers, and was launched 22 years ago in honour of Aboriginal land rights pioneer John Koowarta.

Mikaela has decided to study law due to the over-representation of Indigenous people in the justice system and has volunteered at the Cairns Magistrates Court during her school holidays to learn the process and etiquette of the court.

*Right: QLS immediate past president and Law Council executive member Michael Fitzgerald with Mikaela French following the scholarship presentation in Sydney.
Photo by Chris Gleisner.*



DibbsBarker farewells managing partner of nine years

DibbsBarker will farewell managing partner Alan McArthur when his current term ends in July 2016, and is in the process of selecting a new managing partner.

Mr McArthur served as managing partner for nine years and steered the firm through significant events, including the global financial crisis. Chairman of DibbsBarker Andrew Saxton said that he was also a key driver of transformational change within the firm.

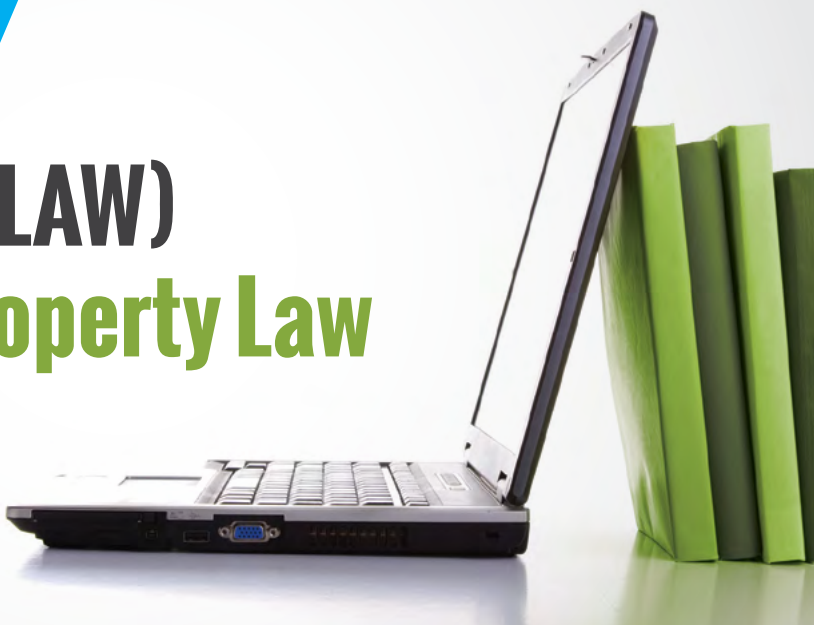
Mr McArthur said that "it has been a privilege to play a part in DibbsBarker's development over the years. The firm will continue to thrive with outstanding talent and a strong portfolio of leading institutions as key clients."

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Letters to the editor

Please use official charities register for checks

Since December 2012, the Australian Charities and Not-for-profits Commission (ACNC) has received over 1000 complaints from registered charities about the way banks and other financial service providers have tried to verify their information by using the now out-of-date Australian Securities and Investments Commission (ASIC) Companies Register.

The issue as it relates to charities is that banks and other financial services providers that are required to check a government register to verify information are continuing to access the ASIC Company Register.

While this was the norm for a long period of time, and was in the past appropriate for checking information about a for-profit organisation, the ASIC Company Register has not been the source of charity data since December 2012 – when the ACNC was established.

Therefore, anyone seeking to verify the details of a registered charity must check the ACNC Charity Register, available free of charge at acnc.gov.au, to ensure that they access current information.

Mr Greg Tanzer, ASIC Commissioner, and I are calling on banks and other service providers to alter their internal processes to reduce the burden on registered charities.

Over the last three years we have been made aware of hundreds of instances where charities have been denied loans and other financial assistance.

As well as being denied bank loans, other issues reported by charities include:

- missing out on grants or funding
- loss of AAA credit rating
- previous directors being held accountable for the charity, and
- previous directors being able to access charity bank accounts when they should no longer be able to do so.

These issues have been impacting charitable companies, which accounts for around 10% of the ACNC Charity Register.

To assist, the ACNC and ASIC are contacting the key stakeholders, including bank CEOs, the Australian Bankers' Association, lawyers and accountants to further raise awareness of the ACNC Charity Register and the information it holds.

Once the message filters down within these organisations I anticipate it will decrease the impost that charities are currently facing.

This slow adoption of the use of the ACNC register has put many charities under significant financial pressure for an extended period. We are keen that the financial sector takes note of the primary source of information on charitable companies, the ACNC register (acnc.gov.au), so we can resolve this issue for the benefit of the charity sector.

More information: Registered charities that are facing these issues are encouraged to contact the ACNC

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

by emailing advice@acnc.gov.au, and banks and financial service providers can find more information about the charity register at acnc.gov.au/checkthecharityregister.

Susan Pascoe

Commissioner, Australian Charities and Not-for-profits Commission

Advocacy views not necessarily those of members

In reference to Peter Eardley's response (*Proctor*, April 2016) to my letter to the editor (*Proctor*, March 2016), he appears to have missed the point of my letter, which was that what the QLS advocates say about legislation does not necessarily represent the views of its members.

I will not labour the point. It is up to other members to have their say, if they wish, on the role of our Society in respect of advocacy.

Martin Punch

Bundall

Most offer 'no win no fee'

I wish to respond to Peter Matus' letter published in the March edition of *Proctor*.

Firstly, I wish to thank Mr Matus for his response and opening up the debate on 'no win no fee'.

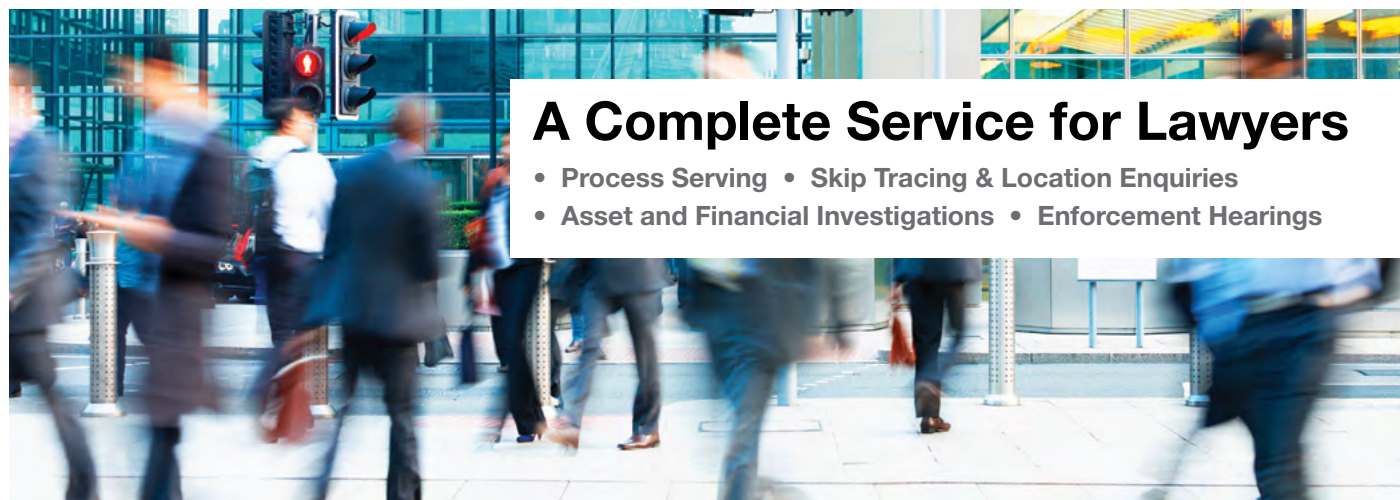
It is my view that the law societies of Australia should let the public know that 'no win no fee' has been around for many years and is a service offered by most members. Mr Matus mistakenly ties my views on 'no win no fee' to personal injury matters alone.

I am seeking, through the law societies, that the public is made aware that its members may approach any solicitor with problems and negotiate the professional fees around the concept of 'no win no fee'. Mr Matus argues for an uplift fee and I am not against such charges, but what I am saying is that the public would be better able to gauge the value of the uplift fees if it were aware many solicitors offer the services and fee arrangements being sought.

Mr Matus states that larger firms perform pro bono work which is important to the community. On behalf of small firms, I can assure him that we too perform pro bono work on a regular basis for those persons who attend with problems which are very important to them. On many occasions, their problems are solved with advice and possibly, correspondence and no fees are charged, thereby practitioners generate goodwill for their profession. I see that as what is encompassed by 'no win no fee'.

Peter Daley

Daley Law Practice



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Let's have a Ball!



This year's Queensland Law Society Annual Ball, hosted by the Early Career Lawyers Committee, will again see members of the state's legal profession come together to celebrate, network and enjoy a fabulous evening of fine hospitality and entertainment.

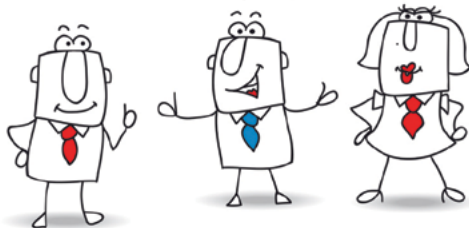
This event has, and continues to gain, a strong reputation and is considered by the legal profession as its 'night of nights'.

The ball, on Friday 20 May, will be the geometric experience of the year at Cloudland's Rainbow Room in the heart of the Fortitude Valley precinct. Glide into Cloudland's sumptuous dining room to a décor of pattern upon pattern set against the vibrant lights of the city skyline. This glamorous black-tie evening will bring you a delectable three-course dinner, premium beverage package and live entertainment.

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Be sure to tell your friends and colleagues, and buy your tickets early as they're sure to sell out. See qls.com.au/annual-ball.

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Book goes beyond social media

A new book explains to lawyers and other professionals why they need more than a profile on social media to succeed.

Social Media is Not Enough to Maximise Your MarketAbility was written by Margot de Groot of de Groot's Wills & Estate Lawyers and Insight Plus director Mark Vincent, and published by de Groot's Publishing.

The book is billed as an "essential go-to guide for attracting and retaining clients, developing your professional profile and working profitably".

It was launched by QUT deputy vice-chancellor Professor Peter Little at a well-attended event in Brisbane City Hall on 14 April.

Right: Authors Mark Vincent and Margot de Groot at the launch with Dr John de Groot and Professor Peter Little.



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Domestic violence: Helping the children

Earlier this year, Queensland Law Society Amelia Hodge asked members to let her know of proactive initiatives related to domestic violence. QLS member Carmel Martin was among those who responded.

In April 2013, Carmel Martin and her sister, Isabella Bevan, read an article in *The Courier-Mail* highlighting the plight of mothers and their children arriving at domestic violence shelters, often with only the clothes on their backs.

The article made a plea for essential school items for the children, such as school bags and shoes.

"A drastic consequence of the upheaval in the lives of these children is that their education is often severely disrupted," Carmel said. "This makes their transition to a new school in a new location far more difficult, firstly because without the proper clothing and equipment they stand out from the other children at a time when it is important for their self-confidence that they fit in.

"Secondly, without the relevant textbooks etc., they will quickly fall behind in their schooling. They encounter many other problems, two examples of which are that without a hat they may run up against the 'no-hat, no-play' rule or without proper school shoes or equipment they may not be allowed to play sport."

Carmel and Isabella decided to set up a registered charity, the Zephyr Foundation, focusing on supplying uniforms, shoes, textbooks, stationery and other school items. For schools which required a set fee for resources for particular years, the charity would also pay these if funds were available.

Isabella managed the Brisbane Girls Grammar School parents and friends' shop for nine years, and last year a past Young Australian of the Year, Jonty Bush, agreed to become the foundation's patron. Carmel, who is the foundation's treasurer, said no one who assisted Zephyr received any remuneration for their work.

"This time last year, Zephyr was providing, on request, payment of school-related expenses and supplying uniforms, textbooks, stationery, backpacks, socks, shoes and



other related incidentals to nine women's domestic violence refuges in Queensland," she said. "At that time we believed there to be 30 refuges in existence. The actual number is 60 and we are currently supporting 25 refuges throughout Queensland.

"What has evolved over the last three years as a result of my sister's idea and determination is an efficient, effective, uncomplicated method of providing everything necessary to help these kids be on a par with other children, and fit in to the new schools they abruptly land in as a consequence of escaping their violent environment.

"We know we're on the right track because of the feedback from shelter coordinators. After the initial suspicion of being another lot of well-intentioned do-gooders who probably can't deliver is overcome, they find Zephyr does what's required.

"Every cent donated is spent on outfitting the kids. We also coordinate a laborious side business of providing household goods where possible. One example is that when we learned the women used plastic bags to carry their goods, we started collecting luggage."

More information can be found at zephyrfoundation.com.au.



'I am just writing to say thank you for the support you have provided for our families this term. Without your support the children in this refuge would have had second hand uniforms and whatever stationery we could have collected ourselves. This term you have supported the smooth transition of at least 10 children.

A teacher at the local school stated that she has noticed a difference in the students coming to school with brand new uniforms and their full booklist in comparison to past students we have supported. The look on the face of the kids as they open up their brand new school bags full of new stationery and books makes our job worthwhile. One boy in particular who was saying he saw no value in school and had no interest in returning started at the local high school and hasn't missed a day yet! He said that it was "heaps easier to settle in and look normal" as he looked the same as everyone else and no-one could tell that he was coming from refuge.'

— excerpt from a shelter coordinator's email

Donations can be made to the Zephyr Foundation directly:

BSB: 084-004
Account: 15-629-0526

All donations over \$2 are tax deductible. Please reference your name and email zephyrfoundation@hotmail.com to receive a tax receipt.

Unwanted bags, luggage or toiletries can be sent to the chambers of Judge Terry Martin SC by contacting his associate, Michael O'Brien, on 07 3247 9116.

Lexon reduces insurance levies by up to 20%

Outstanding risk management by lawyers has resulted in the Queensland Law Society approving a levy reduction of up to 20% in annual insurance premiums.

Society president Bill Potts said the double-digit levy reduction had been recommended by its wholly owned professional indemnity insurer – Lexon Insurance – and approved by the QLS Council on March 23.

“The levy reduction is the result of really hard work by Lexon and is good news for the profession,” Mr Potts said. “Lexon continues to be a prudent and sustainably cheap insurance scheme and should be congratulated for passing on the benefits of their hard work to their clients.

“This is fabulous news for the legal profession in Queensland.”

QLS chief executive officer Amelia Hodge said the significant reduction recognised the time and effort spent by Lexon and the Society over recent years to support its members by providing resources and guidance in ethics and practice support.

“The Society will continue to build upon these foundations to ensure our members have the best available tools to meet the needs of modern practice,” Ms Hodge said.

Lexon Insurance chief executive officer Michael Young told QLS Council the recommended levy reduction was the result of outstanding risk management by members of the Queensland profession.

“The key driver has been the excellent claims performance of the profession in recent times,” Mr Young said. “The performance of the profession in Queensland has been fantastic.”

Mr Young said it was important to note that not all clients would be the recipient of a 20% levy cut and that reductions would be based on claims history, and a practitioner or firm's annual turnover,

He said the 2016/17 reduction related to bands two to nine. Band one – or low fee-earning practitioners – received a \$500 fee reduction in 2015/2016.

The reduction of the levy fulfils a key plank in Mr Potts' presidential campaign promise to make the cost of practising law in Queensland much more affordable.

Mr Young also said that the legal profession had maintained constant growth.

“The profession has grown year on year by 3% and that is pleasing,” he said.

Practising certificate and membership renewals



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A worrying decision for Queensland children

Maggs v RACQ Insurance Limited [2016] QSC 41





by Mark D Evans

A recent decision of the Supreme Court of Queensland has ominous implications for minors who bring a dependency claim for wrongful death.

Justice Boddice has held that, in a Lord Campbell's action, the Public Trustee's fees of managing the damages for a child are not claimable at all.

If correct and if not reversed by legislative action, the decision in *Maggs v RACQ Insurance Limited* [2016] QSC 41 will mean that those who by reason of minority must have their awards administered for them, will have the award eaten up by these fees (which can be substantial).

His Honour relied primarily on two decisions. The first was by Thomas J in *Fox v The Commissioner for Main Roads* [1988] 1 Qd R 120 at 122-123 (Fox). The second was by Badgery-Parker J in *Rouse v Shepherd* (1994) 35 NSWLR 250 at 267-268.

As to the reasoning by Thomas J in *Fox*, the premise was that the management of the fund was "a post-decree matter". Thomas J expressed it in these terms:

"The fact that such a fund will, by reason of the Court's protection of infants, and in particular their desire to ensure that the fund is not improperly dissipated, be administered by a trustee (be he the Public Trustee or not) does not in my view affect the question of the assessment of the damages for which the defendant is liable. It is a post-decree matter."

It is not sought to elaborate on this concept, and the reasoning later given is, with respect, circular.

Thomas J continued:

"...I am concerned with the administration of money which already represents the sum which the court considers to be the plaintiff's true pecuniary loss. The monies pass out of the defendant's control into the control of the plaintiff's trustee. Costs associated with the administration of the funds thereafter are not properly chargeable against the defendant." [emphasis added]

One should also note when *Fox* was decided by Thomas J, and his Honour's attitude generally to this as a head of damages.

Fox was decided when there was controversy, and conflicting decisions, as to whether these fees could even be claimed in an action for damages for personal injuries.

In *Mullins v Duck* [1988] 2 Qd R 674, decided by Carter J shortly after *Fox*, the defendant sought to rely on *Fox* as authority for this "post-decree matter" principle so that in a claim for damages for personal injuries (not a Lord Campbell's action) the plaintiff had no entitlement to fund management fees as a head of damage. Carter J rejected this and refused to accept any such principle.

From later decisions of the High Court, it is now uncontroversial that, in personal injuries actions, subject to certain nuances, fund management fees are generally claimable.¹ Any concept of "post-decree matter" finds no support in these later decisions.

It is suggested that *Fox* was not decided on any firm principle based on the statute and fails to recognise that the benefits lost from the death of the deceased will not be adequately compensated in the first place, unless the trustee's fees are taken into account. The fees are not a "post-decree matter" breaking causation, or not within the statute, because they form part of the loss of expectation for the reasons developed below.

The reasoning underpinning the second decision is, with respect, unconvincing. Two reasons were given. The second related to particular statutory provisions in New South Wales to do with management of funds and so is left to one side. It was not relied on by Boddice J.

The first, was that the claim for this head of "pecuniary loss" was akin to a claim for funeral expenses, which are not allowable as part of a Lord Campbell's claim:

"These are not claims for damages at common law. They are statutory claims and what is recoverable is compensation for the loss of the chance that the particular claimant would have derived some financial benefit from the deceased had the latter lived. Other losses are not recoverable.

The principle is stated in *Luntz, Assessment of Damages* (3rd ed.) in para. 9.2.10:

'Apart from the loss of a reasonable expectation of benefit if the deceased had lived, losses resulting from the death, even though pecuniary, are not recoverable. Thus funeral expenses are not recoverable under the ordinary Lord Campbell's Act legislation, though this has been amended to allow some recovery in some jurisdictions ... Nor are the costs of representation at an inquest (*Swan v Williams Demolition Pty Ltd* (1987) 9 NSWLR 173 at 188).'

"Clearly, the incurring by the dependants of the cost of the funeral of a deceased person is 'a necessary reasonable and foreseeable result of the negligence' which led to his death and hence to the verdict; but it is not recoverable cause it is not within the concept of the kind of losses to which the *Compensation to Relatives Act 1897* is directed. It seems to me that the same must be true of the cost of fund management."

Funeral expenses are clearly not claimable by a child of the deceased as part of the child's loss because the obligation to arrange and pay for the funeral is that of the administrator of the deceased's estate, who may or may not be a relative, and who is even less likely to be a child who has not obtained majority. In any event, this is the claim of the estate, having nothing to do with the child, or for that matter any other dependant in their capacity as a dependant.

Costs of legal representation at an inquest are not claimable on a different basis. They are simply not caused by the death or are too remote. In *Swan v Williams Demolition Pty Ltd* (1987) 9 NSWLR 173, 188, Samuels JA said:

"I agree with the learned judge that the costs of representation at the inquest are not recoverable because I cannot see that they reasonably fall within the limits of the measure of damages permitted in cases of this kind. I am very doubtful whether such expenses are foreseeable but, even if they are, I do not think they satisfy the requirements of the causal nexus which must be established between breach and damage."

When one goes to the statutory provision there is no limitation other than “the damages ... proportional to the damage to them resulting from the death”. Section 64 *Civil Proceedings Act 2011* provides:

64 Liability for a death

(1) This section applies if—

- (a) a death is caused by a wrongful act or omission, whether or not an offence; and
- (b) the act or omission would, if death had not resulted, have entitled the deceased person to recover damages in a proceeding for personal injury.

(2) The person who would have been liable if the death had not resulted is liable for damages despite the death and whether or not the death was caused by circumstances that were an offence.

(3) In a proceeding under this part, a court may award to the members of the deceased person's family the damages it considers to be proportional to the damage to them resulting from the death.

Why are the fees of managing of the award, which the child cannot manage because the law insists the award be managed for the child's protection, not part of the damage to the child “resulting from the death”? The deceased parent is no longer there to manage the pecuniary and other benefits the child would have received but for the death. During the deceased's life, the child would have received the full benefit of these pecuniary benefits. There would have been no need for any trustee and the benefits would not have been diminished or (in some cases) extinguished because of a trustee's fees. Another way of looking at it is to look at the benefits provided by the deceased as including also a notional pecuniary benefit (from non-depletion) deriving from the parent's existence.

It is true, that over time judge-made law has read limitations into the statute's equivalents, so that in *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, French CJ, Crennan, Bell JJ summarised the law:

“[12] In a *Relatives Act* action the jury, or, where the action is tried without a jury, the judge, ... is to assess damages ‘proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought’ ... This somewhat imprecise statutory formulation has acquired a well-settled meaning as the result of judicial exegesis. From shortly after the enactment of Lord Campbell's Act it was determined that no component of damages in the statutory action was to be awarded by way of solatium for injury to the feelings of the relatives: *Blake v*

Midland Railway Co (1852) 18 QB 93; 118 ER 35. Damages are compensation for pecuniary loss ... the assessment being ‘a hard matter of pounds, shillings and pence’ ... Barwick CJ explained the principle in contemporary language in *Ruby v Marsh* [(1975) 132 CLR 642]:

‘[Q]uite clearly, the damages, the right to which the statute gives, are to *compensate for the loss by death of the financial support reasonably expected to have been given by the deceased*, had he continued to live. Thus the situation in relation to that financial support, or to its expectation as at the date of death, will be definitive of the loss which has been suffered. (emphasis added).

“[13] It is the loss of the chance of obtaining a financial benefit from the continuance of the life of the deceased that is the subject of the action: *De Sales v Ingrilli* (2002) 212 CLR 338 at [91] per McHugh J citing *Davies v Taylor* [1974] AC 207 at 213 per Lord Reid. The money value of the injury occasioned by the death is the product of the loss of the expectation of material benefits less any gains accruing from the death: *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 279 per Dixon J. The assessment of the former takes into account not only the expectation of support derived from the deceased's income and capital but also the value of any services that the deceased would have provided had life continued. A surviving spouse (or other eligible relative) may reasonably choose to give up or alter his or her employment in order to provide the services that were formerly provided by the deceased. One means of valuing the loss of the expectation of the services in such a case is to have regard to the claimant's lost earnings: *Mehmet v Perry* [1977] 2 All ER 529 at 533 per Brian Neill QC; *Croker v Wright* (unreported, NSWCA, 12 June 1980) at 6 per Samuels JA; *Nguyen v Nguyen* (1990) 169 CLR 245 at 263–4; per Dawson, Toohey and McHugh JJ; *Roads & Traffic Authority v Jelfs* (2000) Aust Torts Reports ¶181–583 at [24] per Mason P; *Dwight v Bouchier* (2003) 37 MVR 550. In some cases the deceased's services may have generated income directly in the hands of a *Relatives Act* claimant and the loss of that income may be taken into account in estimating the pecuniary injury resulting from the death...”

Boddice J summarised his reasoning for refusing the fees thus:

“[18] The *Civil Proceedings Act 2011* creates a statutory entitlement to damages in relation to losses suffered by a dependent child as a consequence of the wrongful death of a parent. That statutory entitlement limits the damages that are recoverable. There is no basis to extend the recoverable damages to include damage not resulting from the death that arise post the assessment of those damages.”

This raises ‘causation’ and ‘post assessment’.

As to causation, a child who loses a parent from the wrongful act of the defendant loses the pecuniary benefits (and pecuniary value

of the loss of services)² that parent provided. All of these losses occur post-death and as a result of the death. The fact that the child is a child means that any amount for these losses must be administered by a trustee and trustee's fees will be incurred. This is a loss flowing directly from the loss of dependency and the death of the deceased. It is a far cry from funeral expenses or the costs of legal representation at an inquest. It is hard to see that it does not result from the death.

But does the matter truly arise post-assessment?³

To express the matter in terms of the accepted principle that “it is the loss of the chance of obtaining a financial benefit from the continuance of the life of the deceased that is the subject of the action”:⁴

- a. The child would have a reasonable expectation that whilst the deceased parent lived, the parent's existence would have meant the parent would have provided pecuniary benefits (including services)⁵ **un-depleted by trustee's fees.**
- b. The reasonable expectation of loss of a chance of financial benefit from the continuance of the life of the deceased would not be adequately assessed by not taking this into account.
- c. Failure to allow the trustee's fees would inadequately value this loss.⁶
- d. The simplest practical way to value the loss would be to assess the claim ignoring the trustee's fees and then allow the trustee's fees in addition.
- e. No question of ‘post-decree matter’ or ‘post assessment’ arises because the trustee's fees form part of the value of the lost chance.

If, however, the law is as stated by Boddice J it is a sad situation for Queensland children who not only suffer the loss of a parent, but have any award eaten up (and perhaps, in some cases, depleted) by trustee's fees through no fault of their own. To put the matter beyond doubt, s64 should be amended as soon as possible to ensure that other Queensland children do not suffer from this decision.

Mark D Evans is a Brisbane barrister.

Notes

¹ *Willett v Fletcher* (2005) 221 CLR 627; *Gray v Richards* (2014) 253 CLR 660.

² *Nguyen v Nguyen* (1990) 169 CLR 245.

³ If this is a valid reason to disallow such claims.

⁴ *Davies v Taylor* [1974] AC 207, 213; *De Sales v Ingrilli* (2002) 212 CLR 338, [91]; *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, [13].

⁵ The pecuniary value of which can be claimed in these actions: *Nguyen v Nguyen* (1990) 169 CLR 245.

⁶ Another way of looking at this is to look at the benefits provided by the deceased as including also a notional pecuniary benefit (from non-depletion) deriving from the parent's existence.

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The spectre of registered interests stuck on old plans

Moreton Bay Regional Council v Mekpine Pty Ltd [2016] HCA 7

In *Moreton Bay Regional Council v Mekpine Pty Ltd*,¹ M had leased a shop which was one of a number in a shopping centre situated on lot A.

The lessor later acquired additional adjacent land which was amalgamated to create a new lot B incorporating all the old lot A. M's lease was duly noted on the plan of amalgamation as an 'existing lease allocation' affecting the newly created lot B.

Later, a corner of lot B was resumed by a local government for road-widening, but the resumed corner was part of the newly acquired area of land. The corner was not land that had been within the boundaries of the old lot A.

Indeed, M had only ever had a lease over part of the old lot A – a part of a building, which was not resumed – but the relevant balance of lot A was a (so it was argued) 'common area' of which M and its customers could make use along with other tenants.

The Queensland Court of Appeal² by majority had held that M was entitled to statutory compensation, being affected by the resumption. It held that that the plan of subdivision (the expression used in the *Land Title Act 1994*; in fact, here, a plan of amalgamation which falls within the Act's definition of 'plan of subdivision') was an *instrument* which transferred to or created in M a registered lease interest which – since it had to attach to *something* currently in the register – had to attach to the new, expanded, lot B, after lot A had ceased to exist in a legally relevant sense. The expression 'the Land' in the lease had to be construed as a reference to the newly created and registered lot.

The High Court unanimously reversed the Court of Appeal. It reasoned that the relevant instrument which created or transferred to M a registered interest was the lease. The plan of amalgamation indeed created a new distinct parcel of land, and a new indefeasible title, as to which the lessor was registered as the owner, and upon which the existing lease was noted.

But the terms of the registered instrument giving M its interest, the lease, on its proper construction, has as its subject matter only so much of lot B as had comprised the old lot A. The *grant* and all that had made up the lease had not changed; it was just that the maps on which its situation could be plotted and shaded had been revised.

The decision does lead to speculation about how interests in land – whether they be leases, mortgages, covenants, easements or profits – *can* remain, as it were, stuck in the past, confined to an original piece (to use a neutral term) of land notwithstanding the amalgamation of the original piece with additional land to create a new registered lot, and perhaps in some cases, its subdivision.

By registered lot here is meant simply a separate, distinct parcel of land which is a current lot in the form familiar to all conveyancers in Torrens system land: an enclosed polygon having its own lot-on-plan and title reference in the freehold land register.

It does seem that the capacity of a registered interest to expand spatially to new land amalgamated with the original can be provided for in an instrument. The High Court perhaps does not expressly say as much in the reasons, but the close examination made of expressions such as 'the Land' as used in the lease inevitably display an assumption that expansion is feasible.

If in an instrument, 'the Land' or 'the Security', provides that the subject matter 'includes any lots into which the subject matter may be subdivided or any lot with additional land with which the subject matter may be amalgamated or consolidated', then construction of the interest giving-instrument and the plan-instrument together will yield an interest embracing the expanded area. However, the High Court's reasoning suggests that implications in instruments that amalgamated parcels will become subject to the interests in the original part should not be too readily perceived.

Although the parties appeared to have contemplated that the common area could be reduced, French CJ, Kiefel, Bell and Nettle JJ suggested it did not follow that:

"... the parties should be taken to have intended that, if the Land [capital L, as stipulated in the lease] were amalgamated with other land to form a new expanded lot, but the Lease were registered as an existing encumbrance over only such part of the new lot as was previously comprised in the Land, the definition of 'Land' in the Lease should be read as extending to the remainder of the new lot. To the contrary, it is opposed to business common sense to suppose that honest and reasonable business persons would contemplate that, whenever and if the Land were amalgamated with other land, the lessee should automatically and without additional consideration acquire an interest in or right over the further land so acquired."^[54]

A recent High Court challenge uncovers a curious circumstance which may arise when lots are amalgamated. Report by **Kevin Johnson**.

A problem in this context may be that lawyers working in the field of property and property development in Queensland know in general terms about the Titles Registry's practice of allocation of existing interests into or across new lots. They know the registrar is careful to account for them all and that in practice there can be no doubt that if lot 1 is to be amalgamated with adjacent lot 2 to create new lot X, then the leases, mortgages, covenants etc recorded on lot 1 (and those recorded on lot 2) must find their way on to the title issued for new lot X.

It is not a far stretch to say that the mortgagee, lessee, etc, who gives the necessary consent to registration of the plan of subdivision under s50(1)(j) of the *Land Title Act* does so on the basis that the registered interest, like gas in a vessel, fills the whole of the new or enlarged vessel – the entire lot, especially since the registered interest will on the face of the register be recorded in this way. That is, the interest will appear simply as an encumbrance or interest on lot X, and it will not be limited by any text such as 'an interest in so much of lot X as was comprised in the since cancelled lot 1 on SP---'.

In any event, the lessons from *Mekpine* seem to be these:

1. Leases and mortgages should be drafted and considered with the question of whether the metes and bounds of their subject matter can or should accommodate subdivision, expansion or any form of revision of boundaries of lots.
2. When in doubt a mortgagee will certainly want a new instrument registered describing the newly created lot as amalgamated.

3. While in practice the risk may not be great, there may be a need occasionally to assess whether registered interests such as leases, mortgages, covenants and other interests on their face affecting a lot in its entirety could in fact be confined in operation or validity to some part only by reason of being carried over or allocated from previous titles to lots which no longer exist in their original form.

It is doubtful whether lessees will enjoy net gains by having an ambulatory lease area or common area rights, that is, rights which expand if and when the base parcel is amalgamated with more land. Unthinking consent to expansion by the lessor will almost inevitably mean additional outgoings recoverable from them in respect of the additional land and that will surely always outweigh loss of the rights to compensation for compulsory acquisitions of any part of the additional land.

'Common areas' definition

A secondary argument advanced by M, the tenant, in *Mekpine* is worth noting.

M argued that the definition of 'common areas' contained in the *Retail Shop Leases Act 1994* (RSLA) should be substituted for an inconsistent definition of the same concept (however labelled) in the lease, and that properly construed and applied, the statutory 'common areas' for present purposes embraced the whole of new lot B (except for parts leased to others and other immaterial exceptions).

This followed, it was said, from s20 of the RSLA: any provision of the Act inconsistent with a provision of a retail shop lease was to prevail over the lease provision.

The High Court found that the definition of the expression 'common areas' operated merely to define what was meant by those words where they appeared in the RSLA. The court found no inconsistency between the lease and the operative provisions of the RSLA.

For example, as to outgoings, M argued in effect that the statutory formula or cap for recovery of contributions from it towards the lessor's outgoings could not work as intended unless the expanded 'common area' for the new enlarged lot A was adopted.

The High Court found that this was beside the point, for two related reasons. Firstly, M had no liability under the lease to contribute to the lessor's outgoings. And in any event, had M been subject to such a liability by express provision of the lease, wholesale substitution of a new definition (and, it follows, a new total measurement of common areas) was not necessary to resolve specific conflicts.

If the *lease* had provided for the lessee to pay apportionable outgoings on a different basis from that provided for in the operative provision of the RSLA (namely, s38(2)), then *that* operative provision would prevail to the required extent over the lease.

In short, the RSLA definition of 'common areas' did not supplant the definition of that phrase in the lease because there was no express provision in the Act for this and no necessary implication made it necessary.

Kevin Johnson is a solicitor with Askew & Co, Solicitors.

Notes

¹ [2016] HCA 7 (10 March 2016).

² [2014] QCA 317 (McMurdo P and Morrison JA; Holmes JA, as she then was, dissenting).

QCAT disciplinary orders

Look beyond the QCAT Act

When the Queensland Civil and Administrative Tribunal has determined an application or matter and is required to make orders and possibly also impose sanctions, it is vital to be aware of and look to the sources of the tribunal's powers.

Two case examples from the occupational disciplinary sphere provide illustrative lessons for solicitors practising within the QCAT jurisdiction.

The relevant statutory scheme

The tribunal is established by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the QCAT Act), section 9(1) of which provides that the tribunal "has jurisdiction to deal with matters it is empowered to deal with under this Act or an enabling Act".

Section 6(2) defines an "enabling Act" in terms which include "an Act, other than this Act, that confers original, review or appeal jurisdiction on [the tribunal]", while Section 9(3) provides that an enabling Act confers jurisdiction on the tribunal to deal with a matter if the enabling Act "provides for an application, referral or appeal to be made to [the tribunal] in relation to the matter".

Divisions 2, 3 and 4 of Chapter 2 of the QCAT Act go on to address each of "original, review [and] appeal" jurisdictions in greater detail.

Legislative provisions for such "application, referral or appeal" to the tribunal were inserted into numerous other Queensland Acts at around the same time as the QCAT Act was created, by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld). The Acts which thereby became "enabling Acts" traversed administrative issues across a very wide range of subject matter, including social management,¹ animal management² and occupational discipline.³

Within the QCAT Act itself, Chapter 2 Part 7 (Sections 114 and following) make a series of provisions in respect of decisions and enforcement but are relatively silent on the types of orders which may be made or the powers of the tribunal when making orders, particularly final orders in respect of matters it is empowered to determine.

Consequently, regard should be had to the relevant provisions of the enabling Act to establish the existence of a statutory power within the tribunal to make orders and of what sort, and the parties to any matter should be prepared to assist with that process. This process is made clear from the legislative scheme, and illustrated by the decided cases, including two useful decisions discussed below.

Interpreting a broad enabling Act power

A relatively straightforward example of this process arose in the case of *Queensland College of Teachers v Hayes*,⁴ in which the tribunal was required to determine the appropriate orders when a former school principal had been found guilty of professional misconduct. That finding had been made by the tribunal following a discipline application made pursuant to the *Education (Queensland College of Teachers) Act 2005* (Qld), an enabling Act within the meaning of section 6(2) of the QCAT Act.

Section 160 of the enabling Act provided a range of penalties that could be imposed on a teacher at the completion of a disciplinary hearing. These included cancellation or suspension of the teacher's registration, and also a generally expressed power to "make another order QCAT considers appropriate".

It was submitted to the tribunal (on behalf of the former school principal) that it had power to make an order "imposing community service", and the tribunal considered the scope of the general power in section 160 of the enabling Act. Despite the absence of any precedent, the tribunal – constituted by presiding member Howard and members Browne and MacDonald – held that:

"...s160 is broad enough to cover such a sanction. Several organisations at which such service could be done were proposed, Rosie's and St Vincent de Paul. We consider it is also appropriate to require Mr Hayes to perform 50 hours of community service

over a 12 month period at one of these organisations (or another organisation as may be approved by QCT) as part of the sanction imposed. In due course, Mr Hayes should provide evidence of having completed the required community service."

By this process, the interpretation of the enabling Act allowed the making of what were considered to be novel orders, which the tribunal considered appropriate to the matter.

Retracing steps – going beyond the comparable decisions

By contrast, the matter of *Pharmacy Board of Australia v Tavakol*⁵ involved a less straightforward determination by the tribunal of final orders, in a matter concerning a pharmacist found guilty of professional misconduct under the *Health Practitioner Regulation National Law* (Qld) (the National Law).

Prior to the introduction of the National Law (also an enabling Act within the meaning of Section 6(2) of the QCAT Act), similar matters had been considered and determined pursuant to earlier legislation, such as the *Health Practitioners (Disciplinary Proceedings) Act 1999* (Qld). Not only did the earlier Act empower the tribunal to "suspend the registrant's registration for a stated time",⁶ but it also expressly provided that if the tribunal made a final decision under certain provisions⁷ the tribunal "may order that the decision is suspended", though "only if it is satisfied that is appropriate to do so in the circumstances".⁸ Accordingly, a "suspended order for suspension of registration" was within the tribunal's power.

Following the introduction of the National Law, there had been a series of disciplinary decisions – including in particular a prosecution of Mr Tavakol's wife⁹ (Ms Naghdi, who also was a pharmacist) as a result of her involvement in the very circumstances which also gave rise to Mr Tavakol's own matter – in which orders in the nature of a "suspended suspension" were made.

In the *Tavakol* case, the tribunal – constituted by Judge Horneman-Wren SC assisted by a number of other members – considered the question of whether in 2014 the tribunal was empowered by the National Law to make an order in the nature of a suspended suspension.

A substantial number of enabling Acts allow QCAT to draw on significant powers when making orders.

Report by **Andrew Knott** and **Nola Pearce**.



In its reasons, the tribunal determined that, unlike the earlier legislation, the National Health Law empowered the tribunal to, among other things, “suspend the practitioner’s registration for a specified period”,¹⁰ but “makes no express provision for”¹¹ a suspended suspension.

With reference to the previous decisions under the National Law (including that of Mr Tavakol’s wife, Ms Naghdi) in which the tribunal had ordered a suspended suspension, Judge Horneman-Wren observed that “I am not aware of the question of the Tribunal’s power to suspend a suspension having been considered in any of those earlier cases” and that “It may well be that they proceeded ... on an assumption shared by the parties that such a power existed”.¹²

Looking beyond that apparent “assumption”, and despite observing that such a power “has featured in the law from time to time and in different contexts from as early as the ecclesiastical courts of the 14th century”, the tribunal concluded that:

“...in the absence of a statutory power I do not consider that the Tribunal is able to suspend the operation of any of the actions it is authorised to take under s196 of the National Law”.¹³

This decision, which has been subsequently applied by the tribunal, presided over again by Judge Horneman-Wren¹⁴, makes explicit the vital importance of establishing a clear statutory power in the tribunal to make any orders which are proposed to be sought in a matter.

Conclusion

When considering the orders to be sought from the tribunal, it is essential that the parties (and their legal representatives) go beyond the QCAT Act and even beyond assumptions which have underpinned apparently comparable cases determined by the tribunal itself, to carefully examine the provisions of the enabling Act relevant to the particular matter. Practitioners who fail to identify a clear statutory basis for the making of any proposed order do so at their peril, and that of their clients.

This article appears courtesy of the Queensland Law Society Occupational Discipline Working Group. Andrew Knott is a special counsel at TressCox Lawyers and Nola Pearce is a special counsel at Carter Newell. Both are members of the group.

Notes

¹ For example, *Child Protection Act 1999* (Qld), *Disability Services Act 2006* (Qld) and *Disaster Management Act 2003* (Qld).

² For example, *Animal Care and Protection Act 2001* (Qld), *Guide, Hearing and Assistance Dogs Act 2009* (Qld), and *Fisheries Act 1994* (Qld).

³ For example, *Legal Profession Act 2007* (Qld), *Education (Queensland College of Teachers) Act 2005* (Qld) and *Police Service Administration Act 1990* (Qld).

⁴ [2013] QCAT 657 (29 November 2013).

⁵ [2014] QCAT 112 (8 May 2014).

⁶ Section 241(2)(g).

⁷ Section 241(2)(g), et al.

⁸ Section 247(1).

⁹ *Pharmacy Board of Australia v Naghdi* [2012] QCAT 675.

¹⁰ Section 196.

¹¹ At [40].

¹² At [49].

¹³ At [50].

¹⁴ *Medical Board of Australia v Andersen* [2014] QCAT 374 (30 July 2014), see at [27].

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Dismissal of proceedings for want of prosecution

Factors that influence the court's decision

In the state courts, rule 280 of the *Uniform Civil Procedure Rules 1999* (UCPR) enables a defendant or respondent to apply to the court dismissing the proceeding for want of prosecution if:

- a. the plaintiff or applicant is required to take a step within a stated time as required by either the UCPR or an order of the court, and
- b. the plaintiff or applicant does not do what is required within the time stated for doing the act.

Such an application must be preceded by a rule 444 letter if it relates to a failure by the plaintiff or applicant to comply with an order or direction of the court.¹

Factors set out in *Tyler v Custom Credit Corporation Ltd & Ors* [2000] QCA 178

The decision of *Tyler v Custom Credit Corporation Ltd & Ors* [2000] QCA 178 continues to be the leading authority on such applications in the state courts.

The court's discretion under rule 280 UCPR is not fettered by rigid rules but should take into account all of the relevant circumstances of the particular case, including the consideration that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them.²

The power expressly given to the courts by rule 280 UCPR is not exhaustive of the court's powers in the circumstances of delay. Rather, it is an example of an express recognition of the inherent power in a court to prevent an abuse of jurisdiction by permitting the termination or stay of a claim that would inflict unnecessary injustice upon an opposite party were it to be further prosecuted.³

When the court is considering whether or not to dismiss an action for want of prosecution, there are a number of factors that it will take into account in determining whether the interests of justice require a case

to be dismissed. These include (but are not limited to) the following:⁴

1. how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced
2. how long ago the litigation was commenced or causes of action were added
3. what prospects the plaintiff has of success in the action
4. whether or not there has been disobedience of court orders or directions
5. whether or not the litigation has been characterised by periods of delay
6. whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant
7. whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity
8. whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim
9. how far the litigation has progressed
10. whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client, but it may be. Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers.
11. whether there is a satisfactory explanation for the delay
12. whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.⁵

Recent decision of *Pittaway v Noosa Cat Australia Pty Ltd & Ors* [2016] QCA 4

Some of these factors were considered in the recent decision of *Pittaway v Noosa Cat Australia Pty Ltd & Ors* [2016] QCA 4 (*Pittaway*).

In that case, proceedings were commenced in 2010 in relation to events which occurred in 2003 and 2004. Orders were made on 30 May 2014 to bring the matter to trial but, by October 2014, the plaintiff had been unable

to comply with any of them. The defendant brought an application to dismiss the proceeding for want of prosecution pursuant to rule 280 UCPR and was successful. However, the dismissal was overturned on appeal.

Nature of delay

In some cases, the plaintiff's failure to prosecute the proceedings with diligence can be demonstrated by an extensive delay during the litigation itself. In other cases, the plaintiff's failure to prosecute the litigation may be for a comparatively short period of time but that may be sufficiently prejudicial to the defendant, taking into account the delay between the events which are the subject of the action and the commencement of the proceeding.

This was addressed by North J in *Pittaway* at [83] where his Honour said:

"[The] temptation to limit, in all cases of applications under rule 280 UCPR, the consideration only to aspects of delay in the course of litigation or the time elapsed since the last order or step in the proceedings and prejudice flowing only from that, should be resisted. Depending upon the circumstances and the issues between the parties, the enquiry may necessarily be much wider. Thus just as it may be wrong to 'gross up' all of the elapsed time and the costs and effects of it in the context of a consideration of, properly limited to, the time elapsed since the last step or order or the period of noncompliance and the effect of that 'delay', in a different case the elapsed time since the event the subject of the litigation and the ultimate consideration of a complaint by a party about delay or noncompliance may indicate that a fair trial cannot be held notwithstanding that the impugned time of noncompliance or delay may be comparatively short."

Whether prejudice to the defendant leads to an inability to ensure a fair trial

Being sued, and incurring the time and money costs of litigation, is prejudicial to all defendants. It is only the prejudice caused by the relevant delay (which itself was caused by the plaintiff) which is to be taken into account.⁶

In *Pittaway* at [41], Morisson JA emphasised this passage in *Spitfire Nominees Pty Ltd v Ducoco*:⁷



Kylie Downes QC explains the factors relevant to a decision on whether a proceeding may be dismissed for want of prosecution.

"[One] must look at each of the elements of prejudice asserted and examine the time at which it is likely to be suffered, always making due comparison between prejudice which the defendant has suffered or will be likely to suffer because of inordinate and inexcusable delay and any prejudice it might have suffered in any event."

Consideration must be given to whether the delay is the plaintiff's fault or shared by other parties to the litigation.⁸ It must be remembered that both parties bear obligations under rule 5 UCPR.⁹

If the fault for the delay is not solely caused by the plaintiff, then this tends against an order dismissing the proceeding for want of prosecution.

Consideration must also be given to whether the prejudice to the defendant will lead to an inability to have a fair trial.¹⁰ If a fair trial can still occur, then this tends against an order dismissing the proceeding for want of prosecution.

Prospects of success in the action

In *Pittaway*, the defendant relied on an affidavit in which a central witness to its defence had sworn to matters in detail whereas the plaintiff had sworn to the truth of a detailed pleading

but had not sought to meet the assertions contained in the defendant's affidavit material.¹¹ There was evidence to explain this failure, including that the plaintiff could not access his file to prepare his affidavit because of a dispute with a former solicitor.¹²

In *Pittaway*, Morrison JA, with whom the court agreed, determined that the failure by the plaintiff to deliver a "blow-by-blow response" to the defendant's evidence did not mean that the case should be dismissed because the plaintiff's "prospects of making out his claim could not be considered strong".¹³

His Honour observed that:

"On an application to strike out for want of prosecution under r 280 UCPR, the question of assessing the prospects of success is but one factor of many that must be weighed in the balance. The assessment can only be provisional as such an application is not the trial and will not be attended by the level of evidence that a trial involves. Therefore, in my view, the Court must be careful not to let the application become a trial, nor to treat the differences in evidentiary detail as one might on a trial. The same caution should be adopted in preventing an application under r 280 from being treated as one for summary judgment under r 292."

His Honour concluded at [32] by stating that the correct approach when considering the prospects of the plaintiff's claim was to consider whether it is unarguable or doomed to fail, and that, if it is not, then that is a reason to refuse rule 280 relief.¹⁴

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

Notes

¹ See rule 443(d) UCPR.

² At [2]; see also *Pittaway v Noosa Cat Australia Pty Ltd & Ors* [2016] QCA 4 (*Pittaway*) at [80].

³ *Pittaway* at [82].

⁴ *Pittaway* at [80].

⁵ At [2].

⁶ *Pittaway* at [41].

⁷ [1998] 1 VR 242 at 247-248.

⁸ *Pittaway* at [42] – [43].

⁹ Cf *Pittaway* at [53].

¹⁰ *Pittaway* at [44] – [45].

¹¹ *Pittaway* at [12] and [29].

¹² *Pittaway* at [29].

¹³ *Pittaway* at [30] and [31].

¹⁴ Referring to *Gold v State of Queensland* [2011] QSC 112.

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Our will to travel

The conflict of laws and intestacy

with Christine Smyth



*"I haven't been everywhere, but it's on my list."*¹

Australians are a peripatetic lot. In 2012, a record-breaking 8.2 million Australian residents travelled abroad.²

Add to that our reluctance to make a will³ and it is not surprising conflict of laws is a trending feature in estate administrations. *Application of Perpetual Trustee Company Ltd; Re: Estate of the late Evelyn Mary Dempsey* [2016] NSWSC 159 traverses the many issues arising when intestacy and uncertainty of domicile intersect, giving us a comprehensive analysis on how to approach estate administrations with these features.

Evelyn Mary Dempsey (the deceased) was born in Queensland, but spent much of the second half of her life in England and New South Wales,⁴ dying in an institution in England in 1982. She left an Australian will dated 1 April 1968, in which she left the residue to two individuals who predeceased her, creating a partial intestacy.

This raised the question, through an application for judicial advice, as to which intestacy provisions applied to the residue of the estate – NSW, Queensland or England?⁵ Relevantly, the bulk of her assets were Australian shares,⁶ with a small portion of her assets in England.⁷

The deceased did not marry, had no issue, was an only child,⁸ and was survived by at least⁹ four cousins.¹⁰ She travelled extensively, basing herself in the UK and travelling to various places throughout the world, but frequently spending time in NSW and Queensland.

Four years before her death she became incapacitated and was admitted to a UK facility, at which time her affairs were placed under administration. As a result, the court was asked to identify her domicile. Through paragraphs 168-200 there is a detailed consideration of her lifestyle, investments, testamentary dispositions and capacity, with the court ultimately finding¹¹ that the plaintiff executor would be justified in treating the deceased as domiciled in Australia.

However, uncertainty prevailed as to whether she was domiciled in Queensland or NSW,

with the court advising that further investigations were required. To that end the decision is highly instructive as to the general principles of domicile and the treatment of shareholdings, affirming that shareholdings are a moveable asset.¹²

Probate update – Cognitive illnesses, wills and affidavit of testamentary capacity¹³

Increasingly, the Probate Registry is processing applications for a grant in circumstances in which the testator's death certificate cites a cause of death related to an illness or condition affecting cognition.

Frequently, the death certificate fails to identify the length of time the testator suffered from the condition. This can cause difficulties in the process of applying for a grant by raising red flags for the registry as to testamentary capacity, often resulting in requisitions. Practitioners alive to these issues are aware that differing remedial actions have been suggested in the List of Probate Requisitions and troubleshooting guide for this issue.

As part of QLS advocacy on succession law matters, we liaised with the Supreme Court Registrar of Probate, Leanne McDonnell (Brisbane Registry), to seek guidance and clarity as to what the registry requires in the circumstances.

Ms McDonnell advises that if a will was made 10 or more years before death and there is a cognitive illness listed on the death certificate with unspecified duration, the registry is unlikely to order a requisition. If a will was made less than 10 years before death, the registry is unlikely to order a requisition if the application is furnished with an affidavit deposing to testamentary capacity as per paragraph 4 of Form 105 and Form 106.

The registrar advises that practitioners *should* follow the probate requisition list which requires the following remedial action:

"Cause of death – Testamentary capacity

"25. A cause of death namely <~State cause of death~> mentioned in the Death Certificate raises a question of testamentary capacity. The duration of this illness

specified in the death certificate raises the possibility the will may have been executed during this period.

"Action required:- File a further affidavit by the applicant/s with the details as required by para 4 of form 105 of the *Uniform Civil Procedure Rules 1999*."

Note that the supporting affidavit of testamentary capacity must be completed by the applicant/s, (that is, the executor, administrator etc.). However, practitioners may obtain an affidavit of testamentary capacity from a medical practitioner if they consider the circumstances of the case warrants.

The registry is revising the troubleshooting guide, but in the interim practitioners are directed to follow the List of Probate Requisitions (accessible at courts.qld.au > Wills and estates (probate) > Requisitions Estate Matters).

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

Notes

¹ American writer, filmmaker, teacher and political activist Susan Sontag.

² auspost.com.au/how-australians-travel.html.

³ Some estimates say that at least 45% of Australians die without a will, tag.nsw.gov.au/wills-faqs.html.

⁴ At [6].

⁵ At [57].

⁶ At [23] which had increased in value from the date of her death of \$698,455.19 to \$6,340,672.89 as at 1 March 2016.

⁷ This created the issue of whether English Inheritance Tax applied, not discussed here.

⁸ At [32].

⁹ A comprehensive genealogical analysis was undertaken by the solicitors with significant portions referenced in the judgment.

¹⁰ At [90].

¹¹ At [235].

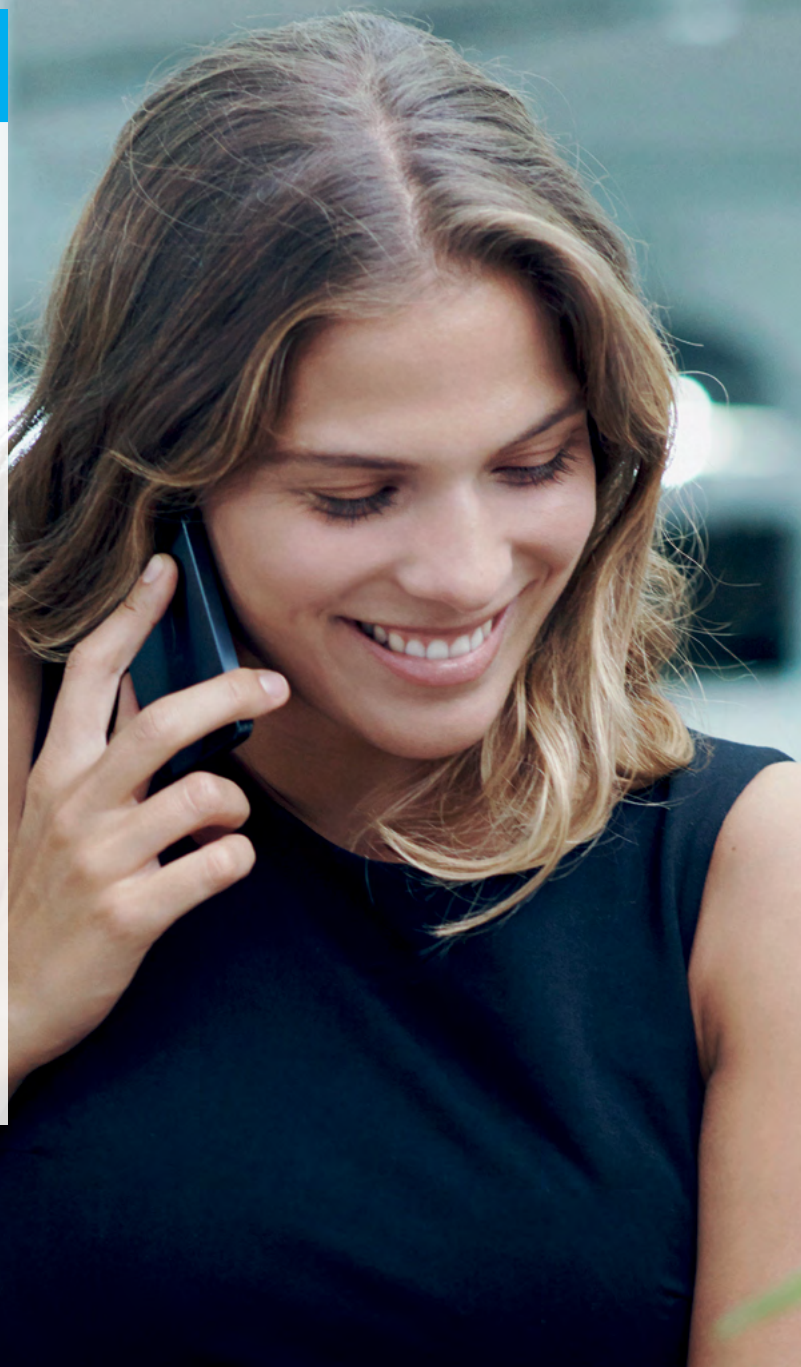
¹² At 170.

¹³ Thank you to Supreme Court Registrar of Probate, Leanne McDonnell (Brisbane Registry), for her assistance with this issue and to QLS policy solicitor Louise Pennisi for her liaison assistance.


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Serving the bodies corporate

Information and dispute-resolution services

The Queensland Commissioner for Body Corporate and Community Management, **Chris Irons**, explains the role of his office and the services that solicitors are likely to make use of.



Queensland's body corporate sector is one in which growth is witnessed not just by the number of cranes dotting the skyline constructing brand-new apartments, but also by figures showing that the number of community titles schemes and the number of lots in schemes is increasing year on year.

Supporting this sector is a legislative framework which promotes a range of objectives, of which arguably the main one is that bodies corporate should, ideally, be managing their own affairs.

To this end, my office exists to provide two essential services – an information service and a dispute resolution service.

The information service is, as the name suggests, there to provide information only and does not provide advocacy, interpretation, complaints handling or 'rulings'.

The main way in which information is delivered is via our telephone call-back service on 1800 060 119, with calls usually returned within the hour.

Another means is via our website, qld.gov.au/bodycorporate. The site contains information on a wide variety of topics as well as the ability to download forms and pay for services online.

One of the purposes of the information service is the provision of information to prevent disputes from occurring, or at least mitigating their impact.

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Given that living in or owning an apartment, or working with a body corporate, involves a significant number of rights, responsibilities and obligations, it is inevitable that a dispute may occur.

The Office of the Commissioner for Body Corporate and Community Management receives more than 1200 dispute-resolution applications each year, covering a spectrum of matters from by-law enforcement, breaches of legislative obligations and procedural requirements, through to meeting procedures and motions, and matters of complex points of law involving significant financial and property implications.

The jurisdiction is a low-cost and relatively informal one, while still adhering to principles of natural justice and fairness.

Parties can be legally represented in the body corporate jurisdiction without having to apply to have representation.

In general, I am seeing increasing numbers of dispute applications in which one or both parties are legally represented.

For practitioners who have never been involved in the jurisdiction previously and/or who are not routinely familiar with body corporate legislation, dispute resolution through my office can present some challenges, as it is a unique dispute-resolution forum.

To deconstruct some of those challenges, I will focus on three of the main threshold issues – exclusivity of jurisdiction, the idea of a ‘dispute’ and the combination of parties.

Firstly, the provisions of Chapter 6 of the *Body Corporate and Community Management Act 1997* (the Act) set out the dispute resolution functions of my office. Those functions are in the form of departmental conciliation and adjudication.

In the vast majority of cases, departmental conciliation will be the first step, with matters then proceeding to adjudication if still required.

Departmental conciliation is not the same as mediation undertaken in, say, a commercial dispute. It is a form of guided mediation in which conciliators have a legislated responsibility to assist by facilitating discussion around the matters in dispute, as well as to give information to parties on the operation of the Act as it relates to their dispute.

Agreements reached through this process are not legally binding, although my office has considerable success in assisting parties to arrive at mutually agreed outcomes.

One of the main reasons why departmental conciliation is a first legislative step is that, in body corporate disputes, the parties in dispute will invariably see, interact with and live alongside each other even after the dispute is resolved.

Accordingly, departmental conciliation seeks to establish and enhance some longer-term harmony for parties in the scheme.

Adjudication is the formal dispute resolution outcome in which a decision results from consideration of evidence and submission on the papers.

Adjudicators are independent decision-makers and their orders are both legally enforceable (through the Magistrates Court) and appealable (to the Queensland Civil and Administrative Tribunal, but only on a question of law).

Section 229 of the Act provides for the exclusivity of the jurisdiction.

It is also in this section that provision is made for so-called ‘complex disputes’ to not be part of that exclusive jurisdiction.

Complex disputes are disputes which are largely of a contractual nature, or which are concerned with lot entitlement adjustment under certain circumstances.

Complex disputes (defined in Schedule 6 to the Act) are resolved either by specialist adjudication or, more commonly, by QCAT.

Where it is argued that a dispute falls within my office’s exclusive jurisdiction, it is open to an adjudicator to make an order to, for example, dismiss an application for want of jurisdiction.

This discussion then highlights the use of the term ‘dispute’.

In order for the Office of the Commissioner for Body Corporate and Community Management to accept an application for dispute resolution, there needs to be an actual ‘dispute’ in existence.

This is an important clarification, as sometimes my office receives applications in which a ‘dispute’ is not currently in existence but the application is lodged in anticipation of a dispute.

Applications can be lodged in which there is no dispute or respondent and where a so-called ‘declaratory’ order is sought.

The only declaratory orders issued by adjudicators in my office are for changes to a body corporate’s financial year or an ‘emergency’ application seeking approval for emergency expenditure [Act, s229(2)].

Otherwise, there needs to be an on-foot dispute and one in which it can be shown that there have been attempts at what the Act refers to as ‘internal dispute resolution’ [Act, s238(1)(b) and at Schedule 6].

‘Internal dispute resolution’ is sometimes simply known as ‘self-resolution’ and, in its simplest form, refers to the need to the applicant for have undertaken steps to resolve the matter themselves and to be able show evidence of this.

A typical example of self-resolution might be putting a request to the body corporate in writing and then having evidence of both having done so and received the body corporate’s refusal – at this point, it is therefore clear the dispute is still in existence.

As self-resolution is a legislated requirement, I generally would only consider waiving this requirement in exceptional circumstances.

Finally, the Act provides, again in section 227, for the combination of parties which would give rise to a ‘dispute’.

This section provides a list of the possible and acceptable combination of parties as applicant and respondent for a dispute.

In the dispute-resolution process, the onus remains on the applicant to ‘make their case’ and this includes identifying parties’ capacities, naming the correct respondent and being able to comply with the combination of parties in section 227 of the Act.

Applicants and/or their legal representatives are encouraged to read the guide to completing dispute-resolution application forms, as well as relevant practice directions, prior to lodging applications.

For more information and for general questions about the body corporate legislation, please contact the information service of my office on 1800 060 119, email bccm@justice.qld.gov.au or visit our website, qld.gov.au/bodycorporate.

Another useful resource is published adjudicators’ orders, available at austlii.edu.au/au/cases/qld/QBCCMCmr.

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The facilitative difference

Utilising the power of self-determination

Facilitative and evaluative mediation offer different approaches to resolving disputes. **Cady Simpson** looks at the benefits that flow from application of the former.



Facilitative mediation is an assisted negotiation process in which the mediator, an impartial third party, assists the disputing parties to communicate their concerns, generate options for the resolution of the dispute and come to an agreement that they can live with.

Facilitative mediators provide the parties with a process that empowers them to self-determine a useful way forward through the dispute.¹

Facilitative mediators are not expected to, and do not, give explicit advice as to each party's prospects of success in litigation and the reasonableness of particular settlement offers. By contrast, the provision of advice is a key function of an evaluative mediator, and these mediators are often selected having regard to their experience as a senior legal practitioner or other expert.²

Facilitative mediation processes aim to keep the parties together in a 'joint session' discussing their concerns and generating options for as long as the parties are able to do so constructively and respectfully. By contrast, evaluative mediation processes often split up the parties into breakout rooms following each party's opening statements, after which the mediator conducts the mediation by 'shuttling' between rooms and then reconvening a joint session after an agreement has been reached.

As the focus of facilitative mediation is self-determination, it is common for the parties to the dispute to attend the mediation in person and it is less common for their legal practitioners to accompany them. By contrast, in an evaluative mediation it is more likely that the parties' legal practitioners will be present and also take the leading role. The client may be present or may simply be available by telephone.

Facilitative mediators, through queries, often prompt the parties to put forward and consider options for resolution of the dispute that range beyond a monetary settlement.

The parties often find this approach empowering, as they are able to view their dispute from a different perspective and discover a resolution that they did not 'see' previously.

By contrast, evaluative mediation is often employed in disputes about how much money should be paid from one party to another. Parties to these disputes often view evaluative mediation as a simple and efficient method of resolving the dispute.

Due to its focus on self-determination, facilitative mediation is often preferred in cases in which the parties have an unavoidable relationship that must be continued into the future. The most obvious examples of these relationships are separated parents, and employees and employers. There are other examples too, such as disagreements between elderly parents and their adult children as to what constitutes appropriate care for the elder.

In the case of separated parents, the mediation is conducted having regard to what is in the best interests of the children.³ Many parents find it empowering to rediscover the needs of their children, which have to some extent been lost in their adult dispute. Similarly, mediation between an elderly parent and their adult children may be ethically conducted in a way that is in the best interests of the elder.⁴

Facilitative mediators frequently stress to their clients that an agreement achieved through facilitative mediation should not be viewed as a 'once and for all' agreement. This is because the dynamics of these relationships change over time, meaning the agreement must also change to keep pace. For example, a child of the relationship may grow into a teenager and the parents may need to consider the gradual release of responsibility that comes with the child's progress towards adulthood. In the case of an elderly parent, that parent's need for assistance with daily living may change and increase over time.

Facilitative mediation does not negate the role of the legal practitioner. As facilitative mediators do not give legal advice as part of the mediation process, they strongly urge their clients to each seek their own legal

advice prior to signing an agreement with the other parties. Clients of a facilitative mediation therefore get the best of both worlds.

During the mediation, clients have an opportunity to exercise their power of self-determination by discussing their concerns within the mediation process. This process can be rewarding for clients as it may result in improved relationships and a sense of fairness and satisfaction.⁵ As well, clients of facilitative mediation have the comfort of knowing they are receiving the benefit of sound legal advice from their legal practitioners prior to signing the agreement, through the course of drafting and filing any consent orders, and until the next review of the agreement.

Facilitative mediation may assist legal practitioners when animosity between their client and another party rises to a level that threatens to be counter-productive to the efficient resolution of the dispute. Legal practitioners can prepare their clients for facilitative mediation by highlighting the opportunity for improved wellbeing through the process of discussing their concerns with the other party.

Facilitative mediation tends to work best when legal practitioners allow their client to take the leading role during the mediation process. This allows them, for that brief time, to manage their relationships on a personal level. The result is often a happier client and more efficient case management.

Cady Simpson is a nationally accredited mediator and director of Sorted Dispute Resolution.

Notes

¹ See R Charlton R and M Dewdney, *The Mediator's Handbook* (Law Book Company, 4th ed., 2004).

² See L Boule, *Mediation: Principles, Process, Practice* (Butterworths, 3rd ed., 2008).

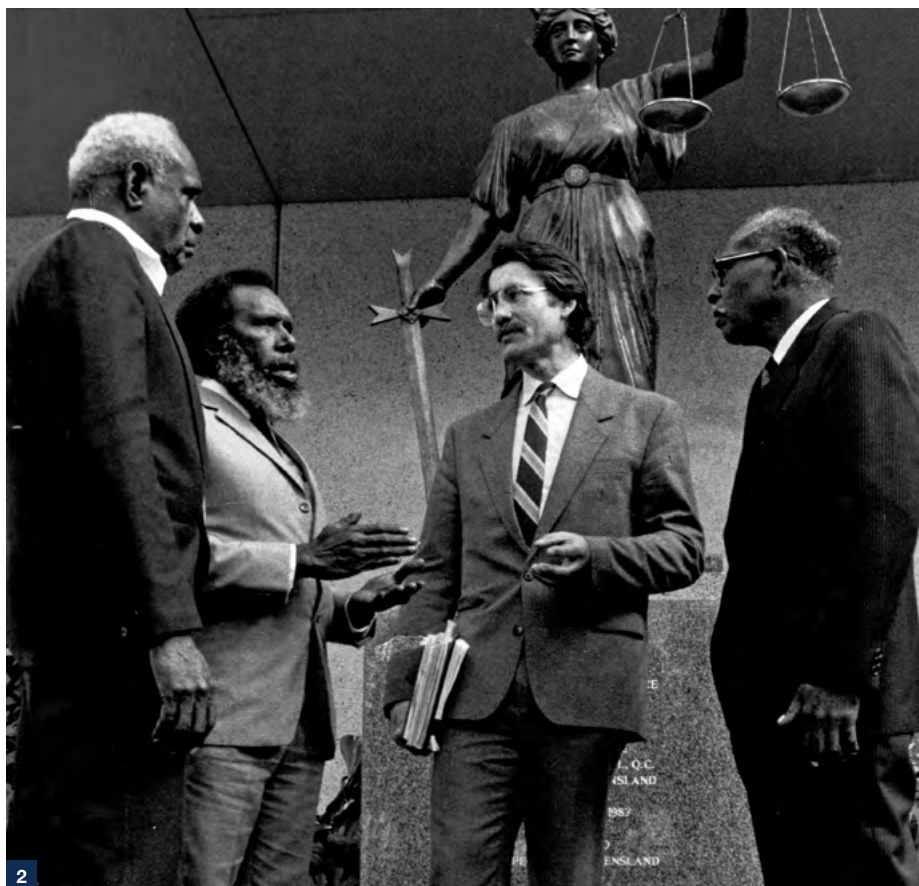
³ *Family Law Act 1975* (Cth), s60D.

⁴ A Molomby, 'Getting to 'yes' in elder mediation' (speech delivered at 'kon gres (Resolution Institute Conference), Brisbane, 11 September 2015).

⁵ See M Miller, B Bornstein, *Stress, trauma and wellbeing in the legal system* (Oxford New York, NY Oxford University Press, 2013).

Illuminating lectures for 2016

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Our 2016 Selden Society lecture series is exploring six new themes, each chosen for its broad appeal and suitability as a framework for future lecture programs.

David Jackson AM QC presented the first lecture in March on the theme, 'Justices of the High Court of Australia', in which he provided a masterly portrait of Sir Harry Gibbs CJ.

'Notable Trials' was the theme of Thomas Bradley QC's April lecture on the Dobell Case – *Attorney-General v Trustees of the Art Gallery of NSW* (1944) 62 WN (NSW) 212.

Both lectures, and our 2015 lecture series, are available to view on our YouTube channel (search for 'sclqld').

Join us on 19 May when Emeritus Professor Wilfred Prest presents on the theme of 'Legal Writers' with a portrait of Sir William Blackstone, creator of the *Commentaries on the Laws of England* (1765-69) and a major figure in 18th Century public, academic and cultural life.

And don't miss our later lectures:

- Lecture four: Leading Cases of the Common Law – *Mabo v State of Queensland (No.2)* (1992) 175 CLR 1, presented by the Honourable Margaret White AO on 22 September.
- Lecture five: Justices of the US Supreme Court – Justice Sandra Day O'Connor, presented by Justice Margaret McMurdo AC on 27 October.
- Lecture six: Legal History of Queensland – Supreme Court Fire of 1968, presented by the Honourable Richard Chesterman AO RFD QC on 24 November.

On 13 June we are honoured to welcome the Deputy Chief Justice of the Republic of South Africa, Justice Dikgang Moseneke, to present the 2016 Supreme Court Oration.

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The venue for all lectures will be the Banco Court, Queen Elizabeth II Courts of Law, Level 3, 415 George Street, Brisbane.

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1. Portrait of Sir William Blackstone, 1755. Courtesy of National Portrait Gallery, London.
2. Dave Passi, Eddie Mabo, Bryan Keon-Cohen QC and James Rice outside the Supreme Court of Queensland, 1989. Photo courtesy of James McEwan.
3. Supreme Court building after the 1968 fire. Supreme Court Library Queensland. Courtesy and copyright the Hon Kenneth Mackenzie.

DV and job termination

When will it be justified?

Dismissing an employee for reasons connected with domestic violence – either a perpetrator or victim – will require careful consideration of the circumstances, including their relation to the workplace. Report by **Andrew Ross**.



Employers have responsibilities to employees who are victims or perpetrators of domestic violence.

Employers should become familiar with their obligations to employees who are affected by domestic violence, particularly when the issue of termination arises.

Obligations in the public sector

The *Public Service Act 2008* (Qld) (the Act) imposes obligations on public sector employees for both work performance and personal conduct. Specifically, s26(1)(k) of the Act requires that the conduct of public service employees “does not reflect adversely on the reputation of the public service”. This means that an employer is permitted to consider an employee’s involvement in domestic violence when assessing their fitness for work and, by extension, termination.

The decision in *Public Employment Office Department of Attorney General and Justice (Corrective Services New South Wales) v Silling* looks at the way in which an employer can exercise their termination rights when considering whether an employee who is a domestic violence perpetrator should face disciplinary action.

Perpetrators

Mr Silling was employed by Corrective Services NSW (CSNSW) for 15 years. Between 1998 and, Mr Silling committed two assaults on his wife and one on his daughter.

After being charged for the first assault, Mr Silling was issued a letter of warning. After being charged for the third assault, he was issued with a letter to show cause. Mr Silling responded to this request, albeit about two weeks late, and also provided CSNSW with a medical certificate outlining that he was suffering from anxiety and depression.

On 10 June 2011, following a meeting with his employer, Mr Silling was issued with a letter of dismissal and dismissed from the role of senior correctional officer on 17 June 2011. He subsequently filed an application for unfair dismissal.

Both at first instance and on appeal, the Fair Work Commission found that Mr Silling’s dismissal was harsh, unjust and unreasonable. The reasons for this include that:

- He was being treated for his anxiety and depression.
- He had an untarnished record as a correctional officer.
- There was no evidence that his conduct outside of work would compromise his ability to perform his duties at work.
- There was no acceptable justification given for why the harshest industrial penalty was warranted when the local court dealt with the conduct so leniently.
- He had actually only been convicted of one criminal offence.

This case highlights that employers do have a responsibility to consider an employee’s involvement in domestic violence. However, to terminate on that basis, a connection needs to be established between that conduct and the employee’s conduct in the workplace. The connection may be made if the offending conduct takes place during work hours, for example abusive Facebook posts, or if the employer has a policy requiring its workers and management to present a professional image of the employer.

Victims

Similarly, while employers have the right to assess the fitness of work of an employee who has suffered domestic violence, they should exercise these rights with caution and note their obligations to make accommodations for these employees before progressing to an assessment.

In *Moghimi v Eliana Construction and Developing Group Pty Ltd*, Ms Moghimi was employed as a full-time architectural draftsman at Eliana Construction for about six months between 2014 and 2015. Her partner also worked for Eliana Construction, although their work did not require them to interact with each other.

After an incident that left Ms Moghimi “in fear for her life”, she obtained an intervention order preventing Mr Moghimi from taking

certain actions against her. On 22 January, Ms Moghimi had a meeting with her superior about the situation, which resulted in her being dismissed. Accordingly, Ms Moghimi filed an application for unfair dismissal.

The New South Wales Industrial Relations Commission found that the reason for Ms Moghimi’s dismissal, namely that the intervention order meant she could no longer work in the office, was not valid and that her termination was “particularly harsh” because of her vulnerable state. The commission also found that Eliana Construction did not explore all available options and discuss these matters over a reasonable period of time with those affected.

This case highlights that employers need to make accommodations for employees who are the subject of intervention orders where the commission considers finding the dismissal valid.

The Queensland Government has developed a domestic and family violence (DFV) directive outlining the types of accommodations and support options for workers affected by domestic violence. Some of these include:

- flexible working arrangements
- counselling
- reasonable workplace adjustments
- a minimum of 10 days of paid special leave.

Government agencies need to ensure they put policies in place to implement the DFV directive.

Summary of responsibilities

Employers need to be careful not to dismiss employees for reasons concerning their conduct outside of work if it does not affect their ability to fulfil their duties at work.

Employees, in turn, are obliged to conduct themselves in their personal lives in a way that does not have a detrimental effect on the reputation of their employer. To do otherwise can constitute a reason for dismissal of the employee.

Andrew Ross is a senior associate at Sparke Helmore Lawyers. The assistance of Larissa Harrison in the preparation of this article is gratefully acknowledged.

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Electronic signatures: How reliable are they?

Williams Group Australia Pty Ltd v Crocker [2015] NSWSC 1907

The recent case of *Williams Group Australia Pty Ltd v Crocker* [2015] NSWSC 1907 illustrates the potential vulnerability of a party which relies on documents executed electronically without taking further steps to confirm that the person purporting to have signed the document actually did so.

Facts

The case concerned a guarantee allegedly given by a director of IDH Modular Pty Ltd to secure that company's performance of the terms of a trade credit agreement. The amount alleged to have been owing under the guarantee was \$995,059.62. Two of the three directors of IDH Modular were Mr Brooks and Mr Crocker.

Mr Brooks set up an electronic signing system for the directors using a program that permitted users to upload an electronic signature that could then be applied to documents electronically. He informed Mr Crocker that he had set up the program and the purpose for which he had done so, namely to enable IDH Modular's directors to sign documents electronically when it was not convenient to do so in person.

Mr Brooks provided Mr Crocker with a username and password to enable him to access the electronic signature system. Mr Crocker uploaded his signature, but did not immediately change the password. It was common ground that, during the period prior to Mr Crocker changing the password, someone other than Mr Crocker applied his signature to a guarantee to Williams Group Australia Pty Ltd (WGA). Ms Harrison, an employee of IDH Modular, purported to witness Mr Crocker's signature.

WGA sued on the guarantee, and lost.

Analysis

Actual or ostensible authority

WGA argued that by uploading his signature and not changing his password, Mr Crocker thereby enabled Mr Brooks (or anyone else to whom Mr Brooks supplied the password) to fraudulently apply his signature. This, argued WGA, amounted to actual or ostensible authority.

As to actual authority, while it was acknowledged that an intention to create an agency may be manifested by placing another in a situation in which they are understood to represent and act for that person, it was found that the evidence fell well short of establishing such an intention, and the mere failure to change a password did not demonstrate any intention to authorise Mr Brooks to apply his signature to a document incurring considerable personal liability.

As to whether ostensible authority had been established, WGA relied by analogy on the decision of the High Court in *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451 (*Pacific Carriers*). In that case a bank officer issued a "bank letter of indemnity" bearing the bank's stamp without the authority to do so. The High Court held that in placing the bank officer in the position to issue the indemnity, BNP Paribas was not permitted to depart from the assumption that the bank officer was authorised to do so.

However, the court held that the two situations were different. It found (relying on the observations of the High Court in *Pacific Carriers*) that an institution may hold out a person as having authority by presenting them to the outside world as a representative of the bank and equipping them with a title, status and facilities. In other words, the organisational structure which is a feature of an institution such as a bank will form part of the representational conduct.

In the case of Mr Crocker, however, it was found that he had not put in place any organisational structure to give the appearance that others had authority to bind him contractually. There was, therefore, no representational conduct and no holding out. Accordingly, the case based on ostensible authority failed.

Ratification

The further basis on which WGA sought to uphold the guarantee was that Mr Crocker ratified it by subsequent conduct.

Inherent in the use of digital signatures is a susceptibility to conduct such as that to which Mr Crocker fell victim. A wet-ink signature can be (albeit after the fact) analysed to assist to identify its maker. The act of witnessing a wet-ink signature is less conceptually complicated (and therefore less open to abuse) than the witnessing of an electronic signature.

In an apparent attempt to address some of these issues, the program used by IDH Modular to facilitate the use of electronic signatures had built-in mechanisms designed to notify the signatory that their electronic signature had been applied to a document. Those safeguards included a notification sent by email prior to the application of the electronic signature that a document had been posted for signature, and a subsequent email to the application of a signature on a document. Moreover, every time a user logged in to the program, he or she could see a list of the documents to which a signature had been affixed.

It was these circumstances that laid the foundation for the final argument put by WGA. It submitted that such emails were sent to Mr Crocker and by receiving notice both prior and (particularly) subsequent to the application of his signature on the guarantee. The court was further invited to draw the inference that, on one of the occasions he logged into the program, Mr Crocker had seen the guarantee on the list of documents displayed as being those he had signed.

The court found that the receipt of such emails was a "slender basis" on which to fix Mr Crocker with substantial liability. In any event, it accepted Mr Crocker's evidence that he did not see any of the emails sent to him.

The court ultimately held, relying on the case of *Rowe v B & R Nominees Pty Ltd* [1964] VR 477, that an insuperable obstacle to the success of the ratification argument was the principle that a forgery which does not profess to be executed by a person as agent cannot be ratified by the alleged principal. For this reason, WGA's argument based on ratification failed.

Electronic signatures are becoming more prevalent in commercial life, but to what extent can they be relied on, and how should they be treated differently?

Report by **Benjamin Shaw**.



Comment

The decision illustrates that contracting parties relying on documents executed by way of electronic signature are perhaps left more exposed than those who rely on wet-ink signatures. Forgery is an ever-present risk in the case of wet-ink signatures, however the inherent impediments to the 'success' of a forged document (such as the extent to which the characteristics of a particular signature make it more or less susceptible to forgery) are not present in the case of electronic signatures. As this highlights, carelessness which facilitates the misuse of an electronic signature will not necessarily assist a party seeking to rely on a signed document.

Further, while the witnessing of a wet-ink signature is conceptually straightforward, witnessing the application of an electronic signature is less so, thus weakening that important safeguard.

While it cannot be suggested that WGA was in any way at fault in respect of the loss flowing from the unenforceability of its guarantee, so as to avoid the repetition of those circumstances, parties who wish to rely on electronic signatures should take steps subsequent to the execution of the

document to obtain an acknowledgement from the signatory. At a minimum, a copy of the executed document should be returned to the signing party.

For more on electronic signatures, also see 'Signing of the times', Proctor, March 2016, p40.

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

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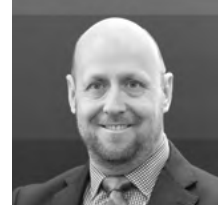
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Preparing a will: The potential for conflict

by Stafford Shepherd



Occasionally, we are approached by an established client to prepare a will for a third party, when that client is to be the principal or major beneficiary under the proposed will and, in particular, the established client instigates that will.

In *Petrovski v Nasev; the Estate of Janakievski*,¹ Hallen AsJ considered our duties when we may face this situation. His Honour also endorsed the comments of Santow J in *Pates v Craig & Anor; the Estate of Cole*.² The following principles can be taken from the judgment:

1. The essence of our fiduciary duty is to give unfettered service to our client's interest (refer to Rule 4.1.1 *Australian Solicitors Conduct Rules 2012* (ASCR)).
2. This requires that we avoid acting for more than one party to a transaction when there is a likelihood of a real conflict of interest between the parties (refer to Rule 11 ASCR).
3. A conflict of interest may arise between the interests of an intended principal beneficiary seeking to prove a will in his or her favour and the interests of the testator.
4. We must seek to assist our client in making a valid will. This means that the natural object of our client's bounty must be capable of being appreciated by our client, even though our client may choose to exercise that capacity so as to omit such objects or disfavour them.
5. We need to take steps as are reasonably practicable to enable us to give proper consideration to any matter going to the validity of the proposed will. Then, we should advise and act in conformity with that consideration (refer Rules 7.1 and 8 ASCR).

6. A conflict can arise when there is reason to be concerned regarding a lack of testamentary capacity by reason of fragility, illness or advanced age. Informed consent will not absolve us of the conflict, particularly if there are doubts as to the client's capacity (refer to Rules 8 and 11 ASCR).
7. If our client is obviously enfeebled and the capacity to make a will is potentially in doubt, we need to take particular care to gain reasonable assurance as to the testamentary capacity of the client (see *Legal Services Commissioner v Ford*).³
8. We should attend on our client personally and fully question the client to determine capacity – the questions should be directed to ascertaining whether our client understands that he or she is making a will and its effects, the extent of the property he or she is disposing of and the claims which he or she ought to give effect.
9. Have another person present, have regard to their calibre as a potential witness (if possible a medical practitioner should also be considered as witness (preferably the client's treating doctor) – use the Lexon letter to seek advice as to testamentary capacity). Of course, the presence of such persons will require our client's consent (refer to Rule 9 ASCR).
10. Make a detailed written memorandum of your attendance and the results of any medical examination.
11. Be present at the signing of the will and make detailed notes.

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

Notes

¹ [2011] NSWSC 1275.

² NSWSC, 28 August 1995, unreported.

³ [2008] QLPT 12.

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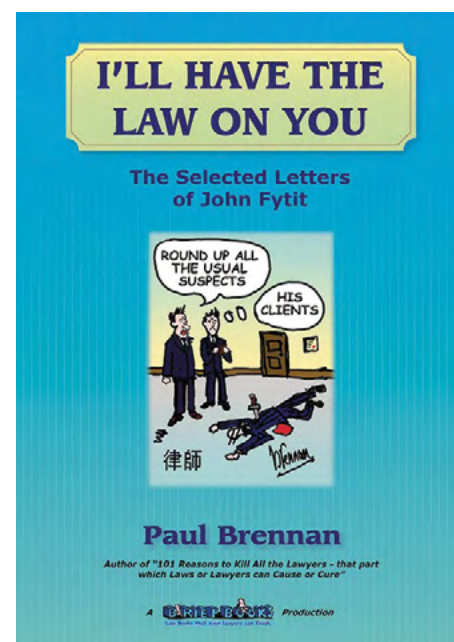
If you are a lover of legal humour, you may already be familiar with Paul Brennan, a Sunshine Coast solicitor and author of books including *The Law is An Ass: Make Sure it Doesn't Bite Yours!* and *101 Reasons to Kill All the Lawyers*.

His latest book, *I'll Have the Law on You: The Selected Letters of John Fytit*, is the first major edition of the works of John Fytit (pronounced 'Fight it'): a former embittered sole practitioner and the central cartoon character in the Law & Disorder cartoons which started in 1992. Fytit went on to be appointed an 'Agony Ombudsman' in 2013 in recognition of his 21 years' experience in legal misfortunes.

In the book Mr Fytit dishes out practical advice and heartfelt guidance on a wide range of issues including neighbours, car parking spaces, social media, modern partnerships and legal receptionists. There's also some insights on procrastination – and this book would indeed be the perfect distraction for any lawyer who doesn't want to dive into the next big nasty file just yet.

It's some light relief but the insights are spot-on in lampooning all types of legal foibles, pretensions, challenges and frustrations, and the cartoons rarely fail to bring a smile to the face.

The best thing about this sort of incisive humour is that the dryness and irony in the jokes successfully illustrate serious and important truths and challenges – in the law, in life, in client communication and in legal careers. There's a big focus in the book on relationships with adult children and on inheritance, for instance, and the interplay



of real but humorous personal motivations and genuine practical issues is fascinating.

Funny and informative, I can confidently recommend this book.

Giles Watson is an independent legal practice management consultant.



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Shorter life expectancy finding set aside

with Robert Glade-Wright



Property – finding of shorter life expectancy due to ill health in the absence of expert evidence set aside

In *Fontana* [2016] FamCAFC 11 (9 February 2016) the Full Court (Strickland, Murphy & Watts JJ) allowed the husband's appeal against a property order made by Collier J in which the wife was granted an adjustment of 4.5% under s75(2) in respect of a \$1.7 million pool based on findings that included the husband's life expectancy. It was found that he suffered renal failure and diabetes, was "dependent on dialysis three or four times weekly" ([5]), that "[his] needs ... are likely to subsist for a shorter time than ... the wife's needs" ([19]) but that the court was "unable, on the material available ... to put any realistic figure on his life expectancy" ([23]). After citing case law, in particular *Lawrie* (1981) FLC 91-102, the Full Court said ([26]-[27]):

"The guidance provided by these ... cases has been followed in subsequent cases where there has been clear expert evidence, which was accepted, relating to shortened life expectancy of a predictable duration arising from a medical condition (see *T & D & Anor* [2006] FamCA 1248; *Miklic & Miklic and Anor* [2010] FamCA 741; *Jurlina & Jurlina* [2014] FamCA 284).

"In this case his Honour, having ... said that he was unable to make even an educated guess, let alone a finding, about the husband's life expectancy, has ... reached a conclusion that the husband's needs are likely to subsist for a shorter time than the wife's needs. His Honour was in error in making that finding ... where he had explicitly found that he could make no conclusive finding in relation to the husband's life expectancy."

Property – setting aside of consent order due to husband's non-disclosure of inconsistent valuation he gave to his bank upheld

In *Pearce* [2016] FamCAFC 14 (11 February 2016) the Full Court (Murphy, Aldridge & Forrest JJ) dismissed the husband's appeal against an order made by Dawe J under s79A setting aside a final order (made by consent) for the husband's failure to disclose to the wife "significant information" ([2]). The Full Court said (at [19]-[21]):

"Her Honour found that there was a lack of disclosure causative of miscarriage of justice by reason of the husband's failure

to disclose a representation made by [him] to a bank ... that D Street had a value of \$700,000 [not \$550,000 which he claimed before the consent order].

"Her Honour was plainly of the view that if that representation had been disclosed ... the wife would have been put on notice of the discrepancy between that representation as to value and the significantly different representation as to value made relatively contemporaneously in the consent orders. She was denied that knowledge, and the consequent opportunity to make such further or other enquiries as she might choose, as a consequence. She was also denied the opportunity to negotiate a settlement whose terms may have reflected that difference. [court's emphasis]

"The impugning of 'the integrity of the judicial process' which, as her Honour recognised, lies at the heart of s79A's requisite miscarriage of justice occurred here not because the property may or may not have had a particular value, but because the wife's consent was not a fully informed consent."

Property – initial contributions (\$959,000 by husband and \$168,000 wife) – seven-year marriage – two children – \$4.25 million pool

In *Telfer* [2016] FCWA 2 (4 January 2016), a case before Walters J of the Family Court of WA, a seven-year marriage produced two children (aged six and eight) and assets of \$4.25 million although the wife made initial contributions of \$168,000 and the husband \$960,000. As separation occurred in 2011 post-separation contributions were also considered. The husband worked in the building industry, undertaking studies which led to his qualifying as a builder (and an income of \$585,358) when the parties separated whereas the wife was a teacher in part-time work (income \$32,926) while caring for the children.

After citing *Williams* [2007] FamCA 313 as to the relevance of initial contributions Walters J concluded ([234]):

"In all the circumstances ... I conclude that between 60% and 65% of the overall property pool should be awarded to the husband [for] his contributions from the commencement of cohabitation to the date of trial ... As it would be intellectually dishonest of me to choose either the higher or lower figure within the range

I have specified, I shall fix the midpoint – being 62.5% – as being appropriate."

An adjustment of 7.5% was made under s75(2) in favour of the wife for the husband's "very substantial" earning capacity and the wife's care of the children, producing an overall division of 55:45 in favour of the husband.

Property – de facto property application dismissed – not just and equitable to make an order

In *Chancellor & McCoy* [2016] FCCA 53 (25 January 2016) Judge Turner considered a 27-year de facto relationship between a childless, same-sex couple – the applicant Ms Chancellor and respondent Ms McCoy. The court found that Ms McCoy acquired a property in her name the year after the relationship began; that the parties lived in and renovated that property, Ms McCoy funding the renovations, Ms Chancellor "assisting with the labour" and paying "\$100 to \$120 a fortnight to Ms McCoy" during "most of the relationship" ([52]); and that Ms Chancellor bought a property in 2002 in her name, renovations to that property being funded by Ms Chancellor, Ms McCoy "assisting with the labour" ([11]).

After citing *Stanford* (2012) 293 ALR 70, *Bevan* [2013] FamCAFC 116 and other case law (from [25]) the court concluded ([59]) that "it would not be just and equitable to make an order altering the property interests".

The court said that the parties for 27 years "conducted their affairs in such a way that neither party would or could have acquired an interest in the property owned by the other" in that there was no intermingling of finances; each acquired property in their own name, remained responsible for their own debts and were able to use their wages as they chose without accounting to the other party; neither party provided for the other in the event of their death and at separation neither was aware of the assets the other had acquired.

Ms Chancellor's application for a property order was dismissed.

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

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High Court

Gaming regulation – construction of statutes and agreements with government

In *Tabcorp Holdings Limited v Victoria* [2016] HCA 4 (2 March 2016) the High Court held that Tabcorp was not entitled to a terminal payment under the *Gambling Regulation Act 2003* (Vic) (GR Act) following the non-renewal of its wagering and gaming licences. Since 1991, Tabcorp and Tatts Group had enjoyed a duopoly over gaming licences. Section 4.3.23(1) of the GR Act, which applied specifically to Tabcorp, provided for a terminal payment – if new licences were issued, the holder of former licences would be entitled to a payout equal to the value of the former licences or the premium paid for the new licences. In 2008 and 2009, the Government substantially restructured the regulation of the gaming industry, replacing the existing gaming licences with new gaming machine entitlements (GMEs). One result of this was that neither Tatts nor Tabcorp were to have their licences reissued. Tabcorp claimed entitlement to the terminal payment, arguing that the substantive operation of the GMEs was to authorise substantially the same activities as its licence. The court held that, properly construed, s4.3.23 applied only in relation to new licences issued under the former structure of the GR Act. New licences did not include the grant of other entitlements (such as the GMEs under the new structure). Accordingly, Tabcorp was not entitled to a terminal payment. French CJ, Kiefel, Bell, Keane and Gordon JJ jointly. Appeal from the Court of Appeal (Vic) dismissed.

Gaming regulation – construction of statutes and agreements with government

The High Court dealt with a related appeal involving Tatts in *Victoria v Tatts Group Limited* [2016] HCA 5 (2 March 2016). That decision concerned a different part of the GR Act which dealt specifically with Tatts. However, the question was essentially the same: was Tatts entitled to a terminal payment when its licence was not renewed as a part of the gambling regulation restructure? The wording of s3.4.33, which conferred on Tatts an entitlement to a terminal payment in certain circumstances, was slightly different – a terminal payment would be payable if Tatt's gaming operator's licence expired without a new licence having been issued to Tatts (or a member of the Tatts group), unless a gaming operator's licence was not issued to any person. Similar to the *Tabcorp* decision, the court held that gaming operator's licence meant a licence issued under the former structure of the GR Act and did not include the entitlements under the new GME regime. Accordingly, Tatts was not entitled to a terminal payment. French CJ, Kiefel, Bell, Keane and Gordon JJ jointly. Appeal from the Court of Appeal (Vic) upheld.

Criminal law – evidence – unsworn evidence – jury directions

In *The Queen v GW* [2016] HCA 6 (2 March 2016) the High Court held that there was no requirement under the *Evidence Act 2011* (ACT) (*Evidence Act*) for a trial court to give a direction to the jury about the general unreliability of unsworn evidence, and that the trial judge had properly approached the question of whether unsworn evidence should be given. The trial judge had directed that evidence from the 6½-year-old complainant should be taken unsworn, under s13(5) of the *Evidence Act*, as he was not satisfied that the child understood the obligation to give truthful evidence. The defence later argued that the judge wrongly approached the test under s13(5) and had erred in receiving the evidence unsworn. In addition, defence argued that the trial judge erred in refusing an application to give directions to the jury that the evidence was given unsworn and might be unreliable. The High Court held that the trial judge's approach to the test was satisfactory, taking into account that the ruling was given *ex tempore* and no party objected to the judge's proposal to proceed under s13(5). The court also held that the *Evidence Act* did not treat unsworn evidence inherently as a kind of evidence that may be unreliable and there was no requirement to warn a jury to that effect. Nor did the common law require a warning to the jury to exercise caution in accepting the evidence. French CJ, Bell, Gageler, Keane and Nettle JJ jointly. Appeal from the Court of Appeal (ACT) allowed.

Property law – real property – construction of leases – amalgamation of lots

In *Moreton Bay Regional Council v Mekpine Pty Ltd* [2016] HCA 7 (10 March 2016) the High Court held that Mekpine did not have a leasehold interest in an expanded area of land following the amalgamation of lots. Mekpine held a lease over premises on land described as former lot 6. The lessor amalgamated former lot 6 with an adjacent lot, former lot 1, to create one larger lot: new lot 1. Prior to the amalgamation, Mekpine held no interest in former lot 1 and the terms of the lease did not change with the amalgamation. The council subsequently sought to resume a part of new lot 1 that had been part of former lot 1. Mekpine claimed compensation for the resumption under the *Acquisition of Land Act 1967* (Qld) (ALA). It argued that, after the amalgamation, its rights under the lease over the land extended to the whole of the area comprising new lot 1. Alternatively, Mekpine argued that the definition of common areas in the *Retail Shop Leases Act 1994* (Qld) (RSLA) had to be substituted for the definition of common areas in the lease, and the RSLA definition was broad enough to include areas in the resumed land in new lot 1. The court held that, on the proper construction of the lease and the ALA,

Mekpine's interest was limited to that part of new lot 1 that corresponded with former lot 6. Further, the definition of common areas in the RSLA was to be read as confined to the RSLA, there was no relevant inconsistency with the lease, and therefore Mekpine had no interest in the common area part of the resumed land. French CJ, Kiefel, Bell and Nettle JJ jointly; Gageler J concurring. Appeal from the Court of Appeal (Qld) allowed.

Power to conduct examinations – statutory interpretation – investigation powers – examinations where possible future criminal charges

In *R v Independent Broad-based Anti-corruption Commissioner* [2016] HCA 8 (10 March 2016) the High Court held that it was open to the commission to compulsorily examine persons who might be, but had not yet been, charged with criminal offences. The commission had begun investigating members of Victoria Police in relation to assaults and human rights-based complaints. The appellants were issued witness summonses under the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act). The IBAC Act allowed the commission to begin or continue an investigation despite civil or criminal proceedings being on foot, though the commission was required to take all reasonable steps to ensure the investigation did not prejudice such proceedings. Officers could be directed to give information or documents, or to answer questions. The privilege against self-incrimination was abrogated for such examinations but answers were subject to a 'use immunity'. Non-publication orders were also to be made in some circumstances. The appellant had not been charged with any offence but argued that the IBAC Act could not authorise compulsory examination of a person reasonably suspected of a crime. The court held that the companion principle (that an accused person cannot be required to testify or assist the prosecution) was not engaged, as the appellants had not been charged and there was no basis for extending the principle to cover situations of reasonable suspicion of crimes, or similar. Further, to so limit the IBAC Act would be to fetter the pursuit of the objects of the Act. The IBAC Act had also clearly adverted to the possibility of curtailing the privilege against self-incrimination and of examining persons whose actions might be the subject of the investigation. French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ jointly; Gageler J concurring. Appeal from the Court of Appeal (Vic) dismissed.

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with Andrew Yuile and Dan Star



Federal Court

Courts and tribunals – whether a statistical analysis of a judge's previous decisions establishes bias

In *ALA15 v Minister for Immigration and Border Protection* [2015] FCCA 2047, Judge Street of the Federal Circuit Court of Australia (FCCA) refused to recuse himself from the applicant's challenge to a decision of the Refugee Review Tribunal (RRT) refusing him a protection visa and also refused to extend time to enable the applicant to seek judicial review of the RRT's decision.

The recusal application to the FCCA was supported by an affidavit of the current editor of the Federal Court Reports and the Federal Law Reports who deposed to having reviewed Judge Street's judgments and found (according to the Full Court at [11]):

- “(a) He identified 286 decisions of Judge Street during the relevant period, of which 254, or 88.81% were in the area of immigration law where the Minister for Immigration and Border Protection was the respondent (immigration judgments).
- (b) In all 254 or 100% of the immigration judgments, they were, or appeared to be, delivered ex tempore.
- (c) Only in two of the 254 immigration judgments, or 0.79% of the immigration judgments, Judge Street found in favour of the applicant against the respondent Minister for Immigration and Border Protection.
- (d) In 252 out of the 254 immigration judgments, or 99.21%, Judge Street found in favour of the respondent Minister for Immigration and Border Protection.
- (e) There were only two judgments where the primary judge found in favour of the applicant. In ... [one] the Minister for Immigration and Border Protection conceded that there was an error and in ... [the other] there was jurisdictional error.
- (f) In at least 163 of the 254 immigration judgments, or 64.96%, the immigration judgments were given at the first court date ...
- (h) The most recent Annual Report of the Migration Review Tribunal (MRT) – Refugee Review Tribunal (RRT) disclosed that 10.8% of MRT decisions and 12.2% of RRT decisions were set aside, compared with only 0.79% being set aside by the primary judge on judicial review.”

In *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30 (10 March 2016) the applicant sought an extension of time and leave to appeal to the Federal Court. The questions before the court were whether Judge Street denied procedural fairness to the applicant or fell into jurisdictional error by refusing to disqualify himself due to a reasonable apprehension of bias.

The applicant contended that the statistical material should be attributed to the hypothetical observer without any further analysis or attempt to go behind the raw statistics and, if this approach was followed, apprehended bias would be made out.

The Full Court (Allsop CJ, Kenny and Griffiths JJ) rejected the applicant's contentions for several reasons (at [38]-[46]). Among other reasons, the Full Court stated at [41] that “the mere fact that a particular judge has decided a number of cases, the facts and circumstances of which are unknown, one way rather than another, does not go any way to assisting the hypothetical observer making an informed assessment as to whether that judge might not bring an impartial and unprejudiced mind to the resolution of the question in a particular proceeding before that judge”. The Full Court cited with approval observations of Heerey J in *Vietnam Veterans' Association of Australia (New South Wales Branch Inc) v Gallagher* [1994] FCA 489; (1994) 52 FCR 34 at [26] and [31].

Competition law – price fixing by international airlines for freight services – what is a market ‘in Australia’?

In *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* [2016] FCAFC 42 (21 March 2016) the Full Court considered what is a market ‘in Australia’ within the meaning of s4E of the *Trade Practices Act 1974* (Cth) (TPA). While this particular issue is no longer an element in relation to cartel conduct under the *Competition and Consumer Act 2010* (Cth) (CCA), this has been a significant question under the TPA and the Full Court's reasoning on issues in the appeal is still likely to be relevant to cases under the CCA.

Since 2008, the Australian Competition and Consumer Commission (ACCC) has brought separate proceedings against 15 airlines alleging they had engaged in price-fixing in relation to surcharges for the carriage of air cargo from outside Australia to destinations within Australia. Most of these airlines ‘settled’¹ with the ACCC on the basis of consent orders. However, two airlines, PT Garuda Indonesia Ltd (Garuda) and Air New Zealand Ltd (Air NZ), contested the ACCC's allegations of contraventions of s45(2) of the TPA (read with s45A of the TPA).

At first instance, Perram J found that Garuda and Air NZ had arrived at a number of understandings containing provisions that had the purpose, effect or likely effect of substantially lessening competition. This concerned fixing surcharges and fees on the carriage of air cargo from Hong Kong, Singapore and Indonesia into Australia. However Perram J ultimately dismissed the ACCC's proceedings against Garuda and Air NZ. The trial Judge found that no contraventions were established because the purpose, effect or likely effect of each impugned provision was not

to substantially lessen competition in a market in Australia. Perram J held that the markets for airborne cargo out of Hong Kong, Singapore and Indonesia were not markets ‘in Australia’ within the meaning of s4E of the TPA. See *Australian Competition and Consumer Commission v Air New Zealand Limited* (2014) 319 ALR 388; [2014] FCA 1157.

The ACCC appealed on the correctness of the trial judge's conclusion that none of the relevant markets was a market in Australia within the meaning of s4E of the TPA. A majority of the Full Court (Dowsett and Edelman JJ; Yates J dissenting) upheld the ACCC's appeal.

The majority summarised their conclusion at [7]: “Ultimately, the determination of whether a market is ‘in Australia’ is an evaluative exercise, which should not exclude any aspect of the market from consideration. In this case, Air NZ and Garuda supplied a suite of air cargo services to each port in Australia, commencing the provision of those services outside Australia. But (i) the suite of services they provided included important components which were provided in Australia; (ii) the services were marketed and ultimately supplied to customers, including significant customers in Australia; and (iii) there were Australian barriers to entry into the market. Wherever else the market might also have been located, the market was ‘in Australia’. This conclusion is based on the legislative text of s4E of the *Trade Practices Act* when read with ss45 and 45A. It is a conclusion which is consistent with the purpose of s4E and the overarching purpose of the *Trade Practices Act*, being ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’. It is also consistent with Australian authorities to which we refer later in these reasons. Those authorities emphasise matters other than the physical location of a supplier, or where any substitution is given effect, as relevant factors in the identification of the market...”

The respondent airlines had wide ranging notices of contention which, in the vast main, were dismissed.

Dan Star is a barrister at the Victorian Bar and invites comments or enquiries on (03) 9225 8757 or email danstar@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au. Numbers in square brackets refer to a paragraph number in the judgment.

Notes

- ¹ Leaving to the court the ultimate responsibility of whether to make the orders and, in particular, to determine the penalty in accordance with the principles set out by the Full Court in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) ATPR 41-993 (Branson, Sackville and Gyles JJ).

Court of Appeal judgments

1-31 March 2016

Civil appeals

Thorne Developments Pty Ltd v Thorne & Anor [2016] QCA 63, 18 March 2016

General Civil Appeal – Equity – Trusts and Trustees – where the appellant was trustee of a family discretionary trust – where the appellant was deregistered – where the Commonwealth became a trustee by operation of s601AE(1) of the *Corporations Act 2001* (Cth) upon the appellant's deregistration – where the respondent was appointed as a trustee during the period of the appellant's deregistration – where the appellant was subsequently reinstated – where it was accepted by the appellant, as the Attorney-General submitted, that the Commonwealth becoming a trustee did not preclude appointment of a trustee under s12(1)(h) of the *Trusts Act 1973* (Qld) or the Deed of Trust – where the appellant submitted that the Deed of Appointment did not validly appoint the respondent as a trustee – where it was not contested that dissolution and deregistration were the same for the purposes of s12(1)(h) of the *Trusts Act 1973* (Qld) – where the appellant submitted the factual basis for the appointment was an erroneous belief of the appointor that deregistration of the appellant left the office of trustee vacant – where the appellant submitted the appointment was ineffectual as it was made on an erroneous basis – where the judge was clearly correct in identifying that there was no erroneous belief as to the fact of deregistration – where it was sufficient for the purpose of s12(1)(h) that the corporate trustee had been dissolved, in which case the nominated person became entitled to appoint a trustee in the place of the corporate trustee, if the appointment was made in writing – where the Deed of Trust provided that the trustee must vacate office if the trustee becomes subject to any bankruptcy law – where the respondent was served with a bankruptcy notice – where the appellant submitted that service with a bankruptcy notice made the respondent subject to a bankruptcy law – where the appellant further submitted that the respondent became subject to any bankruptcy law by seeking to set aside the bankruptcy notice – where the mere issue and service of a bankruptcy notice does not result in the respondent becoming "subject to" any bankruptcy law – where it would be a perverse outcome if the fact that a trustee elected to challenge the validity of a bankruptcy notice disqualified the trustee from acting as trustee – where there is no substance to this argument.

Appeal dismissed with costs.

Keeley & Ors v Horton & Anor [2016] QCA 68, 22 March 2016

General Civil Appeal – where the first appellants purchased the issued share capital in the second appellant from the respondents – where in respect

of that purchase the respondents breached a warranty that affected the calculation of the purchase price – where Mr Ham, a chartered accountant in private practice, had acted for the company as well as the Horton family for almost 40 years – where over much the same period, he also acted for the Keeley family – where Mr Ham was a central figure in the case, and not only because he acted for all parties in the transaction – where he also provided a written valuation of the business that the parties accepted and then relied on, in reaching agreement regarding the purchase price – where despite all of this, however, Mr Ham was not called as a witness at the trial – where by 4 January 2005, Mr and Mrs Horton, the company and Mr and Mrs Keeley had all executed an agreement styled "Agreement for the Transfer of Shares in Marine Warehouse Pty Ltd ACN 066 954 112" – where subsequently it emerged that Mr and Mrs Horton had received correspondence in late October 2004 from Hy-Drive (Qld) Pty Ltd indicating that, as from 1 November 2004, the company's distributorship of Hy-Drive marine hydraulic steering kits and componentry would be cancelled – where that distributorship accounted for a not insignificant proportion of the revenue generated by the business and, thus, the company – where significantly, the primary judge also found that Mr Ham was unaware that the distributorship had been lost when he valued the business on 9 December 2004 and, two days later, gave written advice about the purchase price for the issued share capital – where the preferable and correct measure of damages will be the difference between the price paid and what price Mr Ham, using the same construct, would have advised if he had known of the loss of the Hy-Drive distributorship at the time he valued the business and gave his advice – where that will then properly reflect the position Mr and Mrs Keeley would have been in if the earnings warranties had not been breached; that is, if the accounts and records for the company revealed the actual earnings and not those that had been inflated by the inclusion of income from the lost distributorship – where it is only in this way that the benefit of the bargain lost through the breach of the earnings warranties can be captured – where although it is quite apparent that the assessment of loss was made difficult by a lack of focus on the real issues in the evidence and arguments in the court below, his Honour's ultimate findings on that question were unfortunately affected by what seems to be three errors – where it was not correct to hold that it had not been established what Mr Ham would have done if he had "taken the figures relevant to the loss of the Hy-Drive distributorship into account" – where as such, the goodwill actually assessed by Mr Ham in the sum of \$96,367 would have been reduced to nil – where the correct measure of damages for

the breach of the earnings warranties was the difference between the price paid and what price Mr Ham, using the same methodology, would have advised if he had known of the loss of the Hy-Drive distributorship at the time he valued the business and gave his advice – where even on the analysis accepted by the primary judge, the worth of the bargain secured by Mr and Mrs Keeley under the terms of the share sale agreement was reduced by \$98,000 in consequence of the breach by Mr and Mrs Horton of the earnings warranties – where the nominal award of damages for breach of the earnings warranty cannot stand.

Leave granted. Appeal by the first respondents allowed in part, varying paragraph A(1) of the judgment by deleting "\$100" and substituting "\$96,367". Written submissions on costs. (Brief)

Amos v Wiltshire [2016] QCA 70, 29 March 2016

Miscellaneous Application – Civil – where the Court of Appeal heard the applications of the applicant on 25 August 2015 – where, on the date of the hearing, orders were made that a paragraph of relief which was no longer being pursued by the applicant be struck out, and another order of an interim nature – where further orders were made on 28 August 2015, dismissing the applications, with consequential orders – where the reasons are to be published at a later date – where the applicant filed an application applying for orders that: (1) the orders made on 25 August 2015 and 28 August 2015 be vacated; (2) that the applications be relisted for a fresh hearing; and (3) that the parties' costs be allowed under the *Appeal Costs Fund Act 1973* (Qld) – where the basis of the application is the alleged existence of evidence of apprehended bias on the part of a judge whom was a member of the Court of Appeal hearing – where the applicant submits the judge ought to have disclosed that, whilst at the Bar, his Honour was briefed to appear for another party in a proposed appeal by the applicant – where the relevant matter was heard in 1998, the applicant was not cross-examined and the court did not make findings with respect to the applicant's credit – whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge was required to decide in the Court of Appeal hearing – where a sharp contrast may be made with the litigation in which Philip McMurdo J had been involved where it was alleged by his client the documents relied on by Mr Amos had been forged – where a case of apprehended bias has not been established.

Application refused. Applicant to pay the respondent's costs of the application fixed at \$8000.



with Bruce Godfrey

Criminal appeals

R v Coss [2016] QCA 44, 1 March 2016

Appeal against Conviction & Sentence – where the appellant was convicted of two counts of rape – where, at trial, the appellant's counsel suggested the complainant had invented the allegations against the appellant because she did not like the appellant being her father's drinking mate and because she did not like her father's partner at the time – where, in the closing address, the prosecutor asked the jury a rhetorical question as to why the complainant would make a false allegation against the appellant – where the prosecution encouraged the jury to place the complainant in a class of people unlikely to give false evidence – where the primary judge directed the jury that it was for the prosecution to prove that the complainant was accurate and truthful and not motivated by malice or any other reason and that it was not for the defence to identify any motive for making a false allegation – where the primary judge did not direct the jury that any failure or inability on the part of the accused to

prove a motive to lie did not establish that such motive did not exist; if such a motive existed, the accused may not know of it; there could be many reasons why a person may make, or join in the making of, false complaints; and if the jury was not persuaded that any motive to lie on the part of a complainant had been established, it would not necessarily mean that the complainant was truthful and it remained necessary for the jury to satisfy themselves of the complainant's truthfulness – where defence counsel, at the conclusion of the judge's directions to the jury, asked for time to formulate a request for re-direction concerning the prosecutor's statements about motive – where the primary judge stated that he did not intend to give further directions – where it is accepted that the prosecutor in the present case was entitled to address the jury as to why they should not accept the motives for giving false evidence put to, but rejected by the complainant in cross-examination – where there is no doubt that the otherwise fair, balanced and comprehensive primary judge's directions to the jury made clear that before convicting the appellant on either charge they must be satisfied of his guilt beyond

reasonable doubt and that they could not act on the complainant's evidence without scrutinising it with great care and being satisfied of its truth and accuracy – where, however, the judge's directions failed to instruct the jury that, even if they found no evidence of any motive to lie, this did not establish that such a motive did not exist; if there was a motive the appellant may not know of it; there may be many reasons why a person may make a false complaint; if they found no evidence of a motive to lie, this did not necessarily mean the complainant was truthful; it remained necessary to satisfy themselves that she was truthful – where in the absence of such a direction, there was a real possibility that the jury may have impermissibly reasoned that they could be more easily satisfied beyond reasonable doubt that the complainant's evidence was reliable as there was no evidence of any motive for her to make up these allegations – where defence counsel in this case noted his concern about the judge's directions as to motive and sought time to research the question but the judge determined that his directions were adequate – where this may be contrasted with *R v Van Der Zyden* [2012] 2 Qd R 568, where



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no re-direction was sought so that there was no error of law with the result that the appeal in that case could succeed only if a miscarriage of justice was established – where in the present case the judge's omission to give a comprehensive direction of the kind set out in *Van Der Zyden* was an error of law under s668E(1) *Criminal Code* – where the complainant and the appellant in this case gave contradictory sworn evidence – where the appellant has been deprived of the chance of a properly instructed jury considering the case.

Appeal against conviction allowed. Convictions quashed. A retrial is ordered.

***R v Chardon* [2016] QCA 50, 4 March 2016**

Miscellaneous Application – Criminal – where an indictment charging the applicant with three offences of indecent treatment of a child and one offence of rape was presented at the District Court at Southport on 10 September 2014 – where the applicant applied for two pre-trial directions: (1) that the venue of the trial be transferred to Brisbane, and (2) that he be tried by a judge sitting without a jury – where both applications were dismissed and a Form 26 Notice of Appeal was filed against the dismissal orders – where at the hearing of the appeal, counsel for the applicant acknowledged that s590AA(4) of the *Criminal Code* (Qld) precludes a right to appeal before conviction or sentence against a pre-trial direction or ruling made under s590AA(1) of the *Criminal Code* (Qld) – where accordingly, the appeal was dismissed – where once the appeal was dismissed, leave was sought on behalf of the applicant to file an application in which a

declaration was sought that the applicant be tried on indictment 4267/14 presented in the District Court at Southport by a judge without a jury – where there was no objection and leave was granted – where the court ordered the application be dismissed at the hearing of the appeal and that reasons of the order be provided at a later date – where it need be said at once that this court does not have original jurisdiction under s590AA(1) to hear and determine an application for a judge-only trial – where the appellant has not asserted, and could not assert, an underlying right to a trial by a judge without a jury which the decision made on 19 March 2015 denied him, nor has he sought to impugn the decision to refuse such a trial as one that could not lawfully have been made by the pre-trial judge – where it is far from clear that this court has jurisdiction to grant the declaratory relief sought – where on this occasion, the court did not have the benefit of full argument on the issue and in these circumstances would refrain from making a determination of it – where if such a jurisdiction exists, discretionary considerations would weigh conclusively against the granting of the declaratory relief sought.

Application for a declaration that the applicant be tried by a judge without jury is refused.

***R v Theohares* [2016] QCA 51, Orders delivered ex tempore 19 February 2016; Reasons delivered 4 March 2016**

Sentence Application – where the applicant pleaded guilty to two counts of indecent treatment of a child under the age of 16 years – where the applicant was sentenced to nine months' imprisonment

(suspended after serving two months and for an operational period of 18 months) on both counts to be served concurrently – whether the sentencing judge erred in approaching the sentencing as a two-stage process – where sentencing under s9(4) of the Act requires an integrated approach which takes into account all of the circumstances of the case, having regard to s9(5) and the circumstances specified in s9(6) of the Act – where the approach taken by the sentencing judge was contrary to what was stated in *R v Tootell*; *Ex parte Attorney-General (Qld)* [2012] QCA 273 and reiterated in *R v BCX* as the correct sentencing process: "... a finding whether exceptional circumstances exist is but one part of the overall process of 'instinctive synthesis' discussed by McHugh J in *Markarian v The Queen* whereby each of the factors relevant to the sentence are identified and then weighed before a value judgment is made as to a sentence which is, in *all* of the circumstances of the case, appropriate" – where the sentencing judge's approach, in adopting a two-stage process, proceeded on an error in principle as to the exercise of the sentencing discretion under s9(4) of the Act – whether the sentence imposed was manifestly excessive – whether the sentencing judge erred in failing to find that "exceptional circumstances" under s9(4) of the *Penalties and Sentences Act 1992* were established – where it was contended that the applicant's lack of prior history, early guilty plea, genuine remorse, age and health issues, combined with the extremely low level of the offending were sufficient to compel a finding of exceptional circumstances – where the applicant was correct in his submissions – where the very low level of offending is considered in the

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circumstances referred to, it cannot be said that this was a case where reasonable minds could differ as to the existence of exceptional circumstances; they were clearly established – where sentences of six months' imprisonment suspended forthwith and operational for nine months were appropriate to reflect the gravity of the offending, while also recognising that it was very low-level offending, by a man of advanced years with health problems, who had no prior history, was genuinely remorseful and had cooperated by proceeding by way of a full hand-up committal and entering early pleas – where those sentences reflect that when the low level of the offending is considered in all the circumstances of the case, exceptional circumstances were established and no actual custodial sentence was called for.

Application allowed. Appeal allowed. In relation to each count, the sentence imposed at first instance is set aside and in substitution for it this court imposes a sentence of six months' imprisonment, suspended forthwith, with an operational period of nine months.

R v Forster [2016] QCA 62, 15 March 2016

Appeal against Conviction – where the appellant was convicted of one count of entering a dwelling with intent – where it was alleged that the appellant stole about \$12,000 from a bolted safe – where the safe had been washed – where a small smear of blood was found on a doona cover inside the bedroom – where the appellant's DNA profile matched a swab of the stain on the doona cover – where police found fingerprints that could not be identified on a tin, discovered by the complainant, which had been inside the safe with money in it – where the tin was in a suitcase underneath the bed covered by the blood smeared doona – where, prior to the offence occurring, the complainant's daughter, Nicole, had resided in the house – where Nicole left the house in disarray and the complainant said she could not collect her belongings until the house had been cleaned – where Nicole was angry at the complainant for refusing her entry into the house – where the complainant gave his daughter Kelly a key to arrange for Nicole's belongings to be collected – where the complainant arranged for the house to be professionally cleaned – where the appellant gave evidence of an innocent explanation for being in the house at about the time of the offence – where the complainant's daughter, Nicole, gave the appellant's partner, who was cold, a doona in which she and the appellant cuddled – where the appellant had an injury to his shin that bled when knocked – where the prosecution did not call the complainants' daughters – where the prosecution failed to exclude a rational hypothesis consistent with innocence – where in determining whether a conviction is unreasonable and against the weight of the evidence the question is whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt – where it was open to the jury to consider the appellant may have been guilty or may have been involved in some way in the offence, but it was not open to them to conclude that the only rational inference was that the appellant was guilty of the offence – where the rational explanation, that he was innocently at the complainant's house between 20 and 24 March 2014 and that a smear of blood from his injured leg got onto the doona cover when he was cuddling Ms Anthony, and that another or others put the

doona on the bed in the main bedroom and committed the offence after he and Ms Anthony left, could not be excluded beyond reasonable doubt – where it was not open to the jury to conclude that the only rational explanation for the appellant's blood smear being on the doona cover was that he entered the complainant's residence and stole the money from the safe.

Appeal against conviction allowed. Guilty verdict set aside. Instead, a verdict of acquittal is entered.

R v Goulding; R v Goulding, Peters, Potts & Knox; Ex parte Attorney-General (Qld) [2016] QCA 65, 22 March 2016

Sentence Application; Sentence Appeal by Attorney-General (Qld) – where the respondents pleaded guilty to torture at the District Court at Southport – where, for the torture offence, each respondent was sentenced to six years' imprisonment – where the sentencing judge declined to make a serious violent offence declaration in respect of the torture offence – where the Attorney-General of Queensland filed a notice of appeal against the sentences imposed on each respondent – where the Attorney-General submitted that the: (1) sentence imposed is manifestly inadequate; and (2) the sentencing judge erred in not declaring the offence of torture to be a serious violent offence – where the Attorney-General alleged that the head sentence of six years is, in itself, manifestly inadequate, and, in the alternative, either or both of: (1) the failure to declare the offence a serious violent offence; and (2) ordering early eligibility for parole, renders the sentence manifestly inadequate – where the Attorney-General submitted that the sentencing judge failed to properly apply the parity principle – where the Attorney-General alleged that the sentencing judge erred in unduly confining the exercise of the discretion to make a serious violent offence order by limiting the consideration to previous decisions – where his Honour's sentencing remarks were made after he had recounted in detail the course of the offending, the complainant's injuries and continuing suffering, the pleas of guilty, the offenders' respective ages, their antecedents and time spent in custody – where this sequence indicates that those were all factors which were taken into account in deciding how the discretion was to be exercised – where it remains to note that while the appellant questioned whether the offending here was within the norm for torture, no submission was made, nor could it creditably have been made, that the circumstances of the offending compelled the exercise of the discretion in favour of a declaration such that the decision not to make a declaration was so unreasonable that no court acting reasonably could have made it – where it is common ground that the injuries to the complainant here are broadly comparable with those sustained by the complainant in *R v Melling & Baldwin* [2010] QCA 307 – where drawing upon this comparative analysis of the present case with *Melling & Baldwin*, and having regard to the circumstances relevant to sentencing here to which have been referred, it is concluded that although the sentences are towards lenient in respect of the actual time required to be served, they are not unreasonable or plainly unjust – where the sentences were not arrived at by some misapplication of principle such as would warrant intervention by this court on the basis that they are manifestly inadequate – where the respondent Goulding filed an application for leave to appeal

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against his sentence – where he submits that: (1) the sentence is manifestly excessive; and (2) the sentencing judge erred in improperly applying the parity principle – where he alleged that the circumstances of his offending differed from those of his co-offenders – where he was not an active participant in the more egregious aspects of the infliction of torture on the complainant – where apart from his conduct in the drawing on the complainant's body with a marker pen, he did not make physical contact with the complainant's body either with his own body or with an object wielded by him – where his role was one of an encourager and observer – where another point of difference is that Goulding did participate in an interview with police and made partial admissions whereas his co-offenders did not – where further, Goulding had no criminal history at the time – where it cannot fairly be said that his relevant circumstances and those of the other co-offenders were so alike as to call for the same treatment in sentencing.

Attorney-General's appeal against sentences dismissed. For Goulding: Application granted. Appeal allowed. Sentence varied by substituting for the sentence of six years' imprisonment, a sentence of five years' imprisonment. Said sentence otherwise confirmed.

R v Vecchio & Tredrea [2016] QCA 71, 30 March 2016

Appeal against Conviction – where the appellant, Vecchio was convicted of one count of rape – where the appellant Tredrea was convicted of one count of rape and one count of indecent assault – where both appellants argued that their convictions

ought be set aside as unreasonable because of the poor quality of the evidence – where the appellants argued that the complainant's evidence was shown to be unreliable, inconsistent with, and contradicted by other compelling evidence – where the complainant alleged that she was extremely unwell at the time of the offending – where the testimony of the appellants suggested that they were aware of her extreme illness at the time of the offending – where the trial judge appropriately directed the jury – where the individual and cumulative effect of the matters raised for the appellants deserved consideration, but there is no reason to think that this properly directed jury did not properly perform that task – where the jury was in a good position to consider the credibility and reliability of the complainant's evidence, particularly having regard to the extensive and intensive cross-examinations of her, the submissions to the jury by the respondent and the appellants through their counsel at trial, and the trial judge's careful summing up – where the jury must have accepted that the complainant's account of the alleged offences was honest and reliable – where that conclusion presumably depended to some degree upon the manner in which the complainant and other witnesses gave evidence – where Tredrea was convicted of one count of rape – where Tredrea alleged that the evidence of his statements to police was insufficient to prove penetration – where it was reasonable to infer he had no reliable perception of whether there had been penetration – where the complainant gave no evidence of penetration by Tredrea – whether the jury's verdict was open on the evidence – where

the complainant gave no evidence of penetration by Tredrea even though her evidence was that she had been roused from unconsciousness when Vecchio had sexual intercourse with her and she was subsequently awoken by less intrusive conduct when Tredrea placed her hand on his penis – where the Crown case on this issue was based entirely upon Tredrea's vague and uncertain statements about what happened at a time when he is said to have been intoxicated and not thinking straight – where the poor quality of that evidence inevitably leaves a reasonable doubt whether penetration occurred – where the rape conviction must be set aside – where it is appropriate to substitute a verdict a conviction of attempted rape in circumstances in which Tredrea clearly admitted to taking steps designed to put into effect his intention to have vaginal sexual intercourse with the complainant, and where the jury's guilty verdicts signify that they were satisfied that the prosecution proved beyond reasonable doubt that the complainant did not consent, and Tredrea did not honestly or reasonably believe that she did consent, to any sexual activity with him.

Vecchio: Appeal dismissed. Tredrea: Conviction of rape is set aside and instead a conviction of attempted rape is entered. Remit matter to the District Court of Queensland for sentence upon the conviction of attempted rape.

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 sclqd.org.au/qjudgment/summary-notes. For detailed information, please consult the reasons for judgment.



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My flexibility story

Two children and a rare autoimmune disease led to **Monica Erridge's** flexibility arrangements evolving to suit her needs. She explains how an understanding workplace allowed her to find the best solutions for her family.

I commenced with V.A.J. Byrne & Co Lawyers Pty Ltd in 2007, and have continued as a solicitor with the firm through an autoimmune disease and two children.

I currently work three days a week from 9am to 4pm in the office, and from home as required. This arrangement began when I had my first child and returned to work after four months. In the beginning, I worked part time around his feeding times, but unfortunately that did not allow enough time in the office. I then set up a nursery in the office to enable me to work three days in the office and two days from home.

Fortunately, the negotiation for my flexible arrangements was fairly simple as my boss at the time was very understanding and allowed me to try different arrangements until I found what was best. The eventual solution of bringing my son to the office allowed me to see clients during his naps, and the office beside mine was converted into a makeshift nursery to facilitate his sleep times.

My son came to work with me for the first two years of his life prior to commencing at home day care. I then gave birth to my second child and continued the prior arrangements when I returned after three months. Unfortunately, I fell ill with a rare autoimmune disease in 2013 and had to cease bringing my daughter to work. She is now at day care two days a week and I have limited my work from home to an as-required basis.

Flexibility in the workplace has allowed me to continue to practise law. My husband and I wanted to be involved in our children's school and lives, and not have our children in day care for the entire week. I was fortunate to not have to take time away from my career, and it also benefitted my employer for me to have limited time away from work.

My employer still assists when flexibility is hard. When my first child was born, the previous firm owner allowed my secretary to come to court with me for the day to look after my son, and there have been times



when the firm has sent support staff to my house to collect work from me when my child has been asleep.

These days, my children occasionally come to work with me, and both my employer and I are respectful of each other in regard to them running a business and myself as a mother.

The majority of the staff currently at the firm were not there when I worked full time and so my flexible arrangements are not out of the ordinary for them. They are all very happy to assist me, which I think is part of working in a smaller firm.

Although I work flexible hours, my workload has not decreased in the slightest and I still contribute as a full-time employee. It is imperative that I manage my time well, which may sometimes result in me working on days off, weekends or late into the night. My children have grown up with this arrangement and are understanding when I am working.

Flexibility is very much a two-way street and I am sure that if I was to take on less than

the full workload my arrangements would have to be revisited. It definitely took a lot of self-control to manage the work and home-life balance, and I feel that I have managed to effectively gain that balance.

I am thankful to my employer for my arrangements as they also assist me in working around my husband's shift work. This ensures that most days one of us is able to collect our son from school and limits the amount of time our daughter spends in day care.

I am pleased that the flexibility of my working arrangements has been very advantageous to both my family and myself in continuing my career.

This story appears on behalf of the flexibility working group, an initiative of the Queensland Law Society and Women Lawyers Association of Queensland. The group needs your story – good or bad. Please contact flexibility@qls.com.au and share your experiences with flexibility in the legal profession. Monica Erridge is a solicitor at V.A.J. Byrne & Co. Lawyers Pty Ltd.

New QLS members

Queensland Law Society welcomes the following new members, who joined between 9 March and 8 April 2016.

Anne Crittall, Minter Ellison

Kate Mann, Minter Ellison

Ivan Mukarev, Minter Ellison

Verina Morwood, Deloitte Services Pty Ltd

Craig Sawford, Construct Law Group Pty Ltd

Youngmi Oh, Littles Lawyers

Thomas Brauns, Stanwell Corporation Limited

Marteka Chua, National Legal Services Pty Ltd

Kathryn Rundle, Queensland Law Practice Pty Ltd

Lucy Harper, National Retail Association Legal Limited

Emily Hawthorne, Hede Byrne & Hall Lawyers

Kristy Greenhatch, Murdoch Lawyers

Rhonda Laws, Robert Searle

Rohan Doyle, Herbert Smith Freehills

Shona Stevens, Leanne Bowie Lawyers

Clarissa Connell, Office of Health Ombudsman

Ryan Mitchell, V.A.J. Byrne & Co Lawyers

Kristina Belci, Mills Oakley

Peta Miller, Maurice Blackburn Pty Ltd

Jesse Inns, non-practising firm

Anneliese Mickelberg, Pippa Colman & Associates

Emma-Louise Watson, non-practising firm

Julianne Wilson, Brooke Winter Solicitors & Advisers

Kimberley Aplin, Telstra – Legal Services

Matthew Parker, Essen Lawyers Pty Ltd

Kris-Anne Birch, Lesbian Gay Bisexual

Trans Intersex Legal Service

Kelly Thompson, Robertson O'Gorman Solicitors

Robert Johnstone, Smart Vision Legal

Lenin Volney, Suited To Success Inc

Stephanie Forward-Smith, Banks Lawyers Pty Ltd

Catherine Blatch, non-practising firm

Robert Turnbull, BMSA Legal

Katherine Stasiak, CBC Lawyers

Rebecca O'Brien, Phillips Family Law

Bonnie-Brooke Stevenson, Cope Family Law

Michelle King, Disability Law Queensland

Rehana Seedat, Idealaw

Yolanda Battisson, Murdoch Lawyers

Helen Dixon, Capricorn Legal

Tracy Brown, Ross Lawyers

Linda Geyser, non-practising firm

Mussarat Deen, RappLaw

Zak Worrall, non-practising firm

Raymond Bull, Graham + Bull

Practice Management Course



The Practice Management Course (PMC) is an essential requirement for those who intend to practice as principals and integral to practice success. Queensland Law Society would like to acknowledge and thank our 2016 PMC sponsors for their support this year.

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2016 Medium and Large Practice Focus course sponsors





Katherine Marshall



Tamara de Kretser



Jenni Weick



Joeline Nel



Sonaaz Farhadi-Fard



Nick Stevens



Kristy McCluskey



Sasha McCann



Ashleigh Simpson-Wade



Jordan Wunsch

Career moves

Best Wilson Buckley Family Law

Katherine Marshall has been appointed as a solicitor at the firm's Toowoomba office. Katherine has returned to family law after practising in commercial litigation, building and construction law, and estate planning, and a brief period in corporate law and personal injury law.

Cook Legal

Cook Legal has welcomed **Tamara de Kretser** as a consultant. Tamara is a QLS accredited specialist (family law) and has practised exclusively in family law since her admission in 2007. Tamara's experience includes complex property settlements, parenting disputes, child support, domestic violence and child protection matters.

Couper Geysen – Family and Animal Law

Couper Geysen – Family and Animal Law has announced the promotion of **Julia Jasper** to senior associate. Julia is an accredited specialist (criminal law) who focuses on all aspects of criminal law, including domestic violence and white-collar crime.

The firm also announced the return of **Jenni Weick** as a senior associate based in the Springwood office. Jennifer practises in family law and animal law, as well as wills and estates.

McLaughlins Lawyers

Joelene Nel has joined McLaughlins Lawyers as a senior associate. Joelene has practised exclusively in family law for more than 10 years.

The firm has also promoted **Sonaaz Farhadi-Fard** to senior associate. Sonaaz commenced with McLaughlins in 2009 as a law clerk and graduate lawyer, completing her Master's degree with majors in corporate and commercial law in 2010.

McMahon Clarke

McMahon Clarke has announced the promotion of **Nick Stevens** to senior associate (real estate) and **Kristy McCluskey** to associate (funds management).

Nick focuses on property acquisitions and disposals; commercial, residential and mixed-use developments; commercial and retail shop leasing; joint venture and development agreements, and security documentation.

Kristy's areas of expertise include establishing and operating funds management businesses and vehicles, including AFS licensing, fund structuring, establishing registered (retail) and unregistered (wholesale) funds, preparing and reviewing regulated and unregulated offer documents, and advising trustees and responsible entities about their duties.

Results Legal

Results Legal has welcomed three new solicitors to its team.

Sasha McCann has an established reputation in advising creditors, directors and insolvency practitioners on commercial litigation and insolvency matters.

Ashleigh Simpson-Wade joins the firm after a career as an insolvency practitioner, having completed her CPA and the ARITA Insolvency Education Program.

Jordan Wunsch focuses on commercial litigation, legal recovery and insolvency.

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

This month ...

Webinar: OSR Self-assessment – Managing the Risks

Online | 12.30-1.30pm

OSRconnect, an online lodgment and payment system for duties (including payroll tax and transfer duty), requires practitioners to assume the responsibility of self-assessment. However practitioners may not understand the risks and exposure of incorrect self-assessments or failure to adhere to the required procedures.

This practical session will provide you with valuable insight into these procedures. It will also assist you to navigate the technical provisions of the *Duties Act 2001*, to mitigate such exposure without compromising your obligations to act in the best interests of the client.



1 CPD POINT

WED
4
MAY

Essentials: Leasing

Law Society House, Brisbane | 9am-12.30pm

Whether you are a seasoned practitioner or only have a few years of practice under your belt, our Essentials workshop on leasing is an ideal opportunity to gain practical knowledge on fundamental leasing issues. Relevant to both the lessor and the lessee, our workshop will guide you logically through the leasing process and identify crucial steps along the way. Industry experts will share tips and examples and discuss relevant legislative developments. Case studies and scenarios will be used throughout the session to help you absorb the wealth of information.



3 CPD POINTS

THU
5
MAY

QLS Touch Football Tournament

JF O'Grady Memorial Park, Fairfield | 8.30am-4pm

Kick off Law Week at the Queensland Law Society Touch Football Tournament. Now in its second year, this popular and hotly-contested tournament will be a six-a-side mixed competition with a maximum of 14 players registered per team. There must be at least three females on the field at all times. Each game will run for 20 minutes.

Register your team today as this event is sure to sell out!

SAT
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MAY

In Focus: NDIS – Lessons Learned

Law Society House, Brisbane | 12.30-2pm

The National Disability Insurance Scheme (NDIS) is due to be launched in Queensland on 1 July 2016. In this session two experienced personal injury solicitors, one of whom co-authored the NDIS Handbook, will share their expertise and lessons learned from almost three years of operation of the NDIS in Victoria.



1.5 CPD POINTS

TUE
10
MAY

Support Staff Webinar: Getting More Out of MS Outlook

Online | 12.30-1.30pm

This webinar is a great opportunity to learn more about the functionality of calendar and tasks in MS Outlook. It will enable you to reduce your inbox to zero, manage your priorities in one central place and boost your productivity in the workplace.



1 CPD POINT

WED
11
MAY

Regional: Mount Isa Intensive

Red Earth Boutique Hotel, Mount Isa
8.30am-5pm

This one-day event is the perfect opportunity for regional practitioners to learn from the experts without the need to travel far from home. Receive updates in substantive law, develop your essential skills, and interact with presenters and peers.

Full or half-day registrations are available.



7 CPD POINTS

THU
12
MAY

QLS Open Day: Stay Current and Navigate the Future

Law Society House, Brisbane | 12-5.30pm

QLS Open Day will include eight professional development sessions designed to help you remain current as well as navigate the future. By attending QLS Open Day you can connect with the broader legal profession, share your views and collect three CPD points.

QLS Open Day will conclude with networking drinks and presentation of the Equity and Diversity Awards.



3 CPD POINTS

THU
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MAY

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qls.com.au/events

QLS Annual Ball

Cloudland, The Valley | 7pm-12am

Shape up for the geometric experience of the year at the 2016 Queensland Law Society Annual Ball. Glide into Cloudland's sumptuous dining room to a décor of pattern upon pattern set against the vibrant lights of the city skyline. This glamorous black-tie evening will also bring you a delectable three-course dinner, premium beverage package and live entertainment. Buy your tickets early as they are sure to sell out.

FRI
20
MAY

Masterclass: Criminal Law

Law Society House, Brisbane | 8.30am-12pm

Designed for experienced criminal law practitioners who want to extend their skills and knowledge, this masterclass uses scenarios and questions taken from past specialist accreditation assessments to explore various aspects of criminal law practice. It will include a detailed examination of a complex criminal law scenario, plus review and discussion of a simulated summary trial. The masterclass will conclude with a panel session at which you can ask questions and receive expert guidance from three accredited specialists.

THU
26
MAY



3 CPD POINTS

Masterclass: Commercial Litigation

Law Society House, Brisbane | 8.30am-12pm

Designed for experienced commercial litigators who want to extend their skills and knowledge, this masterclass explores various aspects of commercial litigation taken from past specialist accreditation assessments. It will include a detailed examination of a corporate insolvency and bankruptcy scenario and a *Corporations Act* scenario. At the conclusion of the masterclass a panel of accredited specialists will provide expert advice and feedback on delegate questions.



3 CPD POINTS

TUE
24
MAY

Masterclass: Business Law

Law Society House, Brisbane | 9am-12.20pm

Are you identifying all the key legal and commercial elements in a complex business law case and communicating your advice to the client in a clear, succinct manner?

This interactive advanced workshop has been designed using a scenario from a past specialist accreditation assessment, for experienced business law practitioners to develop their legal and commercial skills. The three-hour workshop involves facilitated small group discussions, so be prepared to share your views.

TUE
31
MAY



3 CPD POINTS

Masterclass: Workplace Relations

Law Society House, Brisbane | 9am-12.20pm

This masterclass is designed for experienced workplace relations practitioners who want to extend their skills and knowledge. Using a scenario from a past specialist accreditation assessment in workplace relations law, various aspects of an application to the Fair Work Commission for an order to stop bullying under the *Fair Work Act 2009* will be explored. Our experienced facilitators will guide you through a scenario and lead discussions on the drafting of submissions and advocacy essentials.



3 CPD POINTS

WED
25
MAY

Save the date

Gold Coast Symposium	10 June
Early Career Lawyers Conference	15 July
QLS and FLPA Family Law Residential	21-23 July
North Queensland Symposium	11 August
Government Lawyers Conference	26 August
Property Law Conference	8-9 September
Criminal Law Conference	16 September
Personal Injuries Conference	21 October
Succession and Elder Law Residential	4-5 November
Conveyancing Conference	25 November

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Remaking your law firm

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The challenge for all law firms today is understanding that the traditional professional values of bespoke, technically excellent client service and perfectionism can have the effect of compromising the delivery of excellent value, as defined by a firm's commercial clients.

Invariably, clients are under time and cost pressures in their own businesses that frame their value equation in a way that expects firms to provide only what is required: accurate, fit-for-purpose advice, delivered promptly and economically.

Today's legal services industry is in a state of change. Margins are shrinking. Alternative fee arrangements are on the rise. Providers with novel ways of delivering legal services are hungry for business. There is a great deal of uncertainty about where legal services are heading and how traditional law firms should react to these changes.

Traditional law firms share a business model that Beaton has termed 'BigLaw'. BigLaw has been immensely successful for clients and firms over many decades, but the model is increasingly less well suited to competing in an industry characterised by buyer power, cost-down pressures, increasing digitisation, and substitute services.

Demands to 'do more for less', an ongoing shift of work from law firms to in-house legal departments, a move away from one-off practices to commoditised services and hyper-competition with each other are pervasive trends shaping the future of the industry.

Clients of the future

Clients of the future will be more discerning, expect increasing levels of service and seek value beyond price reductions. The growth of in-house departments parallels a reduction in external legal expenditure with the allocation of the remaining spend depending on the nature of the work.

Spending is more consolidated to maximise clients' buying power and the benefits of cooperation between clients and external providers. Procurement professionals are increasingly involved in selecting outside counsel.

Client companies without in-house legal departments offer growth opportunities for law firms. Rapidly scaling start-up companies are a subset of these that need legal services which meet their needs over the company lifecycle.

Traditional law firms that are trying to adapt to changing clients and compete in a mature industry need to make significant changes in their business model and the key elements of delivering service to clients.

Designing the business model

A business model sums up how a firm works, and how it makes money, that is, how work is won, how work is done, and how the enterprise is led and governed. The business models of BigLaw and NewLaw firms are quite different.

Remaking a firm means designing its business model to move toward the more client-centric, more efficient, and more agile hallmarks of the NewLaw business model. A larger firm can consist of two or more different business models through an ownership stake in captives or legal start-ups, through sourcing from NewLaw providers, by providing on-demand legal talent agencies, and/or by offering commoditised online services.

Brand, marketing and business development

Brands are what make services providers stand out in commoditised markets. Law firms are missing opportunities by focusing too much on personal partner brands.

Building a credible brand around differentiated and, for some, diversified offerings, is based on comprehensive market and client-derived insights. Diversification into new services and markets cannot succeed without brand permission.

Marketing-related activities communicate the firm's brand purpose to influence clients' decision-making. Successful marketing is based on research and analysis. A dedicated, professional sales team creates value through better business development, quality client relationships, and client service.

Pricing and fee arrangements

The billable hour has shaped the culture of the traditional law firm in a profound manner, but in the interests of clients, law firms must move more rapidly away from it as the dominant form of pricing. Alternative fee arrangements can be employed profitably and have the potential to increase realisation rates and demonstrate better alignment with clients' needs.

Pricing strategy needs to address how pricing fits into the firm's overall strategy, who is responsible, and how pricing is measured and executed. Pricing needs involvement and data input from all parts of the firm. It is important for firms to understand that cost consciousness is a stronger driver of clients' perceptions of value than is low-price offers and that there is a positive relationship between price and quality.

Beaton's **David Goener** explains how changes in client expectations are creating a seismic shift in the way today's law firms do business.



Sourcing and outsourcing

Options for innovative sourcing include on-demand workers, captive entities and third-party outsourcing. Clients are the driving force that leads law firms to explore alternative sourcing options. A clear understanding of how legal work is produced, at what cost, and how it relates to risk is necessary to identify appropriate outsourcing targets. Law firms working with outsourcing are understandably concerned about quality and client confidentiality, which have to be managed by communication, procedures, and agreements.

Legal project management and process improvement

Legal project management (LPM) is about a structured approach to the management of legal matters to meet the clients' and the firm's expectations in respect of quality, time, and budget, whereas legal process improvement (LPI) is about optimising processes to achieve a balance of quality, cycle time and efficiency.

The two methods need to be combined in any initiative aimed at reducing costs and improving service levels. Relying too heavily on technology in implementing LPM ignores the significant challenge in helping lawyers learn to work differently. Bringing LPM and LPI together requires significant time, investment and dedicated project management expertise.

Technology, knowledge management, and analytics

Driving maximum value from IT is achieved by structuring IT governance with senior management accountability and seamless IT integration across the firm.

Information technologies are already replacing lawyers to some extent. Artificial intelligence enables the analysis of vast amounts of complex, language-based data in a more consistent and efficient way than humans can. Expert systems allow firms to broaden their services to clients and leverage their expertise beyond custom-made individual advice. Analytics help firms provide more quantitative information relating to legal risk management.

Partners, innovation and change

The ubiquitous nature of change in the legal industry necessitates transformational rather than incremental change in law firms. This invokes negative emotions, the 'change monster', added to which lawyers are conservative and risk-averse. Their quest for perfection is at odds with the experimental approach that is a necessary part of change.

Innovation—or *remaking*—must be an integral part of a firm's overall strategy, starting in small ways with a portfolio of innovation initiatives. Sustainable change initiatives require very considerable resources and must be led from the top. Successful change depends on monetary and non-monetary signals, that is, partner performance management and remuneration. The change journey needs to start now and be continuous.

Law firm leaders need to take time to stop and consider the changes that are impacting the markets that their firm services. Thorough analysis of changing client requirements and competition from traditional and NewLaw rivals is necessary to allow the firm to accurately access the priorities for change.

Firms must decide if they are seeking to be the disruptor and want to catch the next wave or if they are under disruptive attack and need to prevent the next wave from catching them. Either way, a decision needs to be made soon.

For more detailed information on this topic you may like to read the book titled *Remaking Law Firms: Why and How* by Dr George Beaton and Dr Imme Kaschner, recently published by the American Bar Association and available now in hard and soft copies from ShopABA – shopaba.org.

David Goener is a partner at Beaton Capital, Brisbane. He advises on cost reduction, operational efficiency, strategic planning, partner performance management, capital structuring and risk management.

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I'm over all this!

A practice idea that might make a big difference



Losing interest in your work is a risky business...

We regularly come across this condition. It isn't about the perfectly normal Monday morning sigh of exasperation, or the occasional blow-up after a matter goes wrong. These things come and go. No, here we are talking *existential*.

Think of a principal who *every day* wakes up and thinks, "I just can't do this anymore".

This isn't just about pre-retirement senior lawyers who have simply had enough. We see many financially successful young principals moving into a '*there has to be more to life than this*' phase quite early in their careers.

When we recently reviewed many Legal Services Commission/Queensland Civil and Administrative Tribunal cases for our core CLE training, it was clear *reading between the lines* that many respondents were people utterly tuned out and/or preoccupied elsewhere with little thought for the professional consequences... including delay, lost opportunity, conflict, failure to communicate and financial mismanagement.

How and why seemingly well-paid professionals mentally turn off is an enduring subject of research. Are lawyers unique? Absolutely not. Imagine a dentist suddenly deciding that he's stared into his last ever after-lunch, garlic, red wine and infected mouth. Who would want to be his next patient?

So how can we deal with this? The first step is symptom recognition. This is no easy task. The legal profession doesn't naturally do *weakness* all that well. If you find yourself habitually not wanting to go to work, not thinking about your files, extending bring-ups and avoiding phone calls, not recording time, and leaving the office for extended (non-work) periods, then you almost certainly have a problem. If this is happening, talk to your husband/wife/partner if you can. This isn't easy either. The conversation may be totally inconsistent with *the person they want you to be*. Alternatively, it could be highly supportive.

There are a number of other approaches. Talk with a partner you feel you can trust. Talk confidentially with one of the QLS Senior Counsellors. Call LawCare.

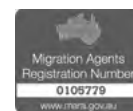
In many cases, after the opportunity of sharing your problem with others, you may decide that it isn't *existential* at all, but *situational* – something you can work through with some help. Alternatively, you may (as an example only) resolve to sell the practice, but take steps in the interim to ensure it remains under control. There are many possibilities. Hopefully through the process you will better appreciate how your situation potentially impacts clients and others. And you can at least temporarily refocus and manage the risks.

I'm over all this! is a very real condition. If you identify with the symptoms, don't ignore them. They may be passing or they may be terminal. You won't know until you explore them with others. And regardless of where that takes you, there'll be a much lower chance of your own reputation going up in flames.

Dr Peter Lynch
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Agency work continued



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PUBLIC NOTICE

(online edition)

NOTICE OF INTENTION TO APPLY TO THE FEDERAL COURT FOR CONFIRMATION OF A SCHEME FOR THE TRANSFER OF THE GENERAL INSURANCE BUSINESS OF POSEIDON INSURANCE CO PTY LTD TO GORDIAN RUNOFF LIMITED UNDER DIVISION 3A OF PART III OF THE INSURANCE ACT 1973 (CTH).

TAKE NOTICE that Gordian RunOff Limited ABN 11 052 179 647 (**GRO**) intends to make an application to the Federal Court of Australia in Sydney at 9:30am on 6 June 2016, or on such later date or time as the Court appoints, for confirmation of a scheme to transfer all of the general insurance business of Poseidon Insurance Co Pty Ltd. ABN 25 000 162 649 (**Poseidon**) to GRO (**the Scheme**).

GRO is a company incorporated in Australia, regulated under the *Corporations Act 2001* (Cth) and authorised under the *Insurance Act 1973* (Cth) (**the Act**) to carry on general insurance run-off business in Australia. Poseidon is a body corporate authorised under the Act to carry on general insurance run-off business in Australia.

Persons who are insured under insurance contracts written by Poseidon (**Affected Policyholders**) may attend the Court hearing and request to be heard by the Court on the application for confirmation of the Scheme. The hearing will be held at the New South Wales Registry of the Federal Court of Australia. Any holder of a Policy who wishes to appear before the Court or wishes to object to the terms of the Scheme, is requested to advise the solicitor for GRO, Mark Kimberley of HWL Ebsworth, Level 14 Australia Square, 264-278 George Street, Sydney Australia (p: +61 2 9334 8793 or e: mkimberley@hwle.com.au) at least seven days prior to the hearing date specified above.

Affected Policyholders are not required to take any action if they have no objection to the Scheme. A copy of this notice, the Scheme, a summary of the Scheme and the report by Sandra O'Sullivan of Enstar Australia Limited dated November 2015 (**the Report**) upon which the Scheme will be based (**the Scheme Documents**), will be available for public inspection between the hours of 9.00am and 5.00pm (local time) every day (except weekends and public holidays) for the period commencing on 9 May, 2016 through to 27 May 2016 (inclusive) at:

- (a) the offices of GRO at level 9, 220 George Street, Sydney NSW 2000; and
- (b) the offices of HWL Ebsworth at Level 26, 530 Collins Street, Melbourne VIC 3000

Any policyholder of Poseidon or GRO may obtain a copy of the Scheme Documents free of charge by contacting Vu Pham on +61 2 8062 4237 or by email at vu.pham@enstargroup.com.au.

If you have any other enquiries you may contact Mr Pham at the contact details referred to above.

A copy of the Scheme Documents can be viewed during the period set out above at the following website
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We recommend that each holder of a Policy obtain and review both the Scheme and the Report, each of which contains a discussion of the impact of the Scheme on policyholders.

THIS NOTICE HAS BEEN PREPARED BY
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Seeing red on May days

with Matthew Dunn



As the winter months draw near, Queensland wine drinkers' thoughts inevitably turn from light summer whites to meaty reds.

This year, go beyond youthful shiraz and embrace a different accompaniment to your hearty beef stew.

Australian red wines are famous throughout the world for being hefty, big-flavoured, fruit-driven monsters. Monty Python immortalised Australian table wines of the '70s saying: "Another good fighting wine is 'Melbourne Old-and-Yellow', which is particularly heavy, and should be used only for hand-to-hand combat." While this is probably not a good description of anything from the Yarra Valley, Geelong or the Mornington Peninsula, there are places in this country where the jest borders on truth.

However, wine is a fickle and somewhat faddish product. Many wine consumers are moderating their tastes and seeking out reds with less machismo or real alternatives to the mythical Melbourne Old-and-Yellow.

One way of having the best of both worlds is the addition of time. Many of the heavier Australian wines age wonderfully and take on a very different persona with six, eight or even 15 years of quiet thinking time.

Aging wine was once popular, but today is the odd exception to the rule of near-immediate-to-purchase consumption. Nonetheless, many of the fit and hefty reds are still made to last the test of time and develop in the bottle.

Aging soothes the fires of dry, feisty tannins, mellows acids and deepens fruit flavours, but many of the secondary flavours of older wines are unfamiliar to the modern drinker. A slight tinge of brown around the edge of the glass is not something to be alarmed at in an old wine and less fruity and more savoury/leathery characteristics come out with time. It is the same fruit bomb but with a new mature personality, and it provides a golden opportunity for the jaded shiraz enthusiast to explore their favourite subject with a new lens.

Another way to approach difference is to leave Australian shores and invest in the headline

reds of other countries. Red Bordeaux for example is famous, but not as familiar to Queensland wine drinkers as Margaret River cabernet merlot. While the array of placenames and classifications is a bit impenetrable at first (wines that say Bordeaux are less good and ones that have names like Pauillac, Margaux or Pessac-Leognan can be the best, but cost much more).

Italian options can lead to unexpected pleasures for red-wine enthusiasts – Chianti Classico is very good with food and Brunello di Montalcino or Amarone should satisfy anyone's thirst for a full-bodied wine to accompany a Bistecca alla Fiorentina. Rioja or Vega Sicilia for those interested in a challenge – both from Spain – will make for a happy exploration of new territory. Even Zinfandel from California offers a new and interesting style of red, particularly for those who already know and love the worthy Durif from Rutherglen.

With a world of options and new ways to enjoy old favourites, the time is ripe to march out in May and enjoy your reds, Queensland.

The tasting Three different options for winter reds were examined in fine detail.



The first was the **Mouton Cadet 2013 Bordeaux Rouge**, being a rich red garnet colour with a nose of blackcurrants and a dusting of white pepper. The palate was rich rounded and fruit driven with red berry fruits to the fore, balanced by a savoury backbone draped with dry tannins and a little spice on the finish. A little lighter in body than your average South Australian shiraz, but excellent composition at its end of the market.



The second was the **Balnave Coonawarra Cabernet Merlot 1999** which, despite the irresistible run of the years, was still an impenetrable purple black with a browning halo appropriate for its venerable character. The nose was blackberry jam opening up with oxygen as an older wine will. The palate was still full of flavour with a depth of fruit, oak and leathery qualities. The rich berry notes were accompanied by reductive flavours, but it was still mouth filling and toned, but did tend to oxidise and change faster than more youthful wines. A wine ready for its fate.



The last was the **Penfolds Bin 138 Barossa Valley Shiraz, Grenache, Mataro 2013**, which was an aloof deep purple. The nose was redolent of youthful vigour, power in a symphony of spicy red fruits, roses, talc, pepper and a complex mix of aniseed and green leaves. The palate was a tour de force of feisty passions, heavy tannins mixing with chocolate, ripe berry fruits and an upfront attack which promises some time to mature and get to know the family.

Verdict: The best wine of the day was the smooth mature sophistication of the Balnave – or the Penfolds in 10 years' time.

Matthew Dunn is Queensland Law Society government relations principal advisor.

Mould's maze

By John-Paul Mould, barrister
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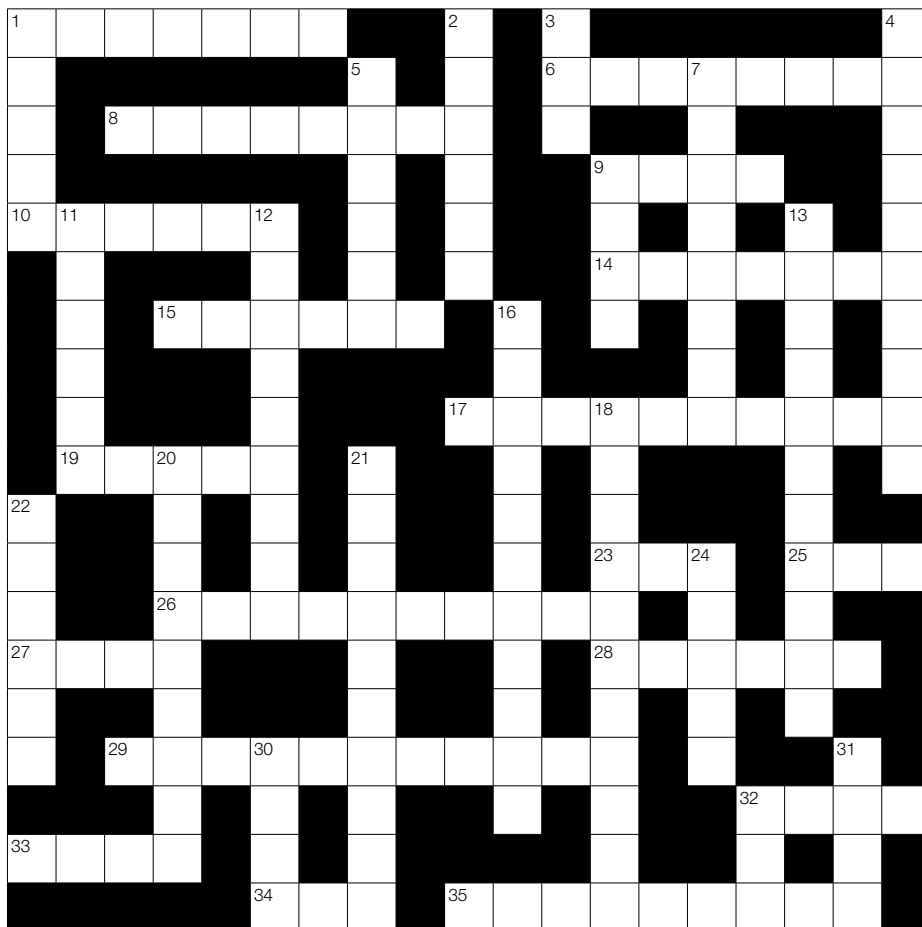


Across

- 1 Queensland Family Court judge, Colin SC. (7)
- 6 Judge-made uniform procedural guidance, directions. (8)
- 8 Claim, Defence, Reply. (8)
- 9 The duty in a negligence action. (4)
- 10 The stolen generations case, v *The Commonwealth*. (6)
- 14 Maryborough law firm. (7)
- 15 Testamentary disposition of real property. (6)
- 17 Pre-emptive denial of legal liability. (10)
- 19 The *Neighbourhood Disputes (Dividing Fences and) Act 2011*. (5)
- 23 A floating charge over a boat would be regulated by this Queensland Act. (abbr.) (3)
- 25 Go ... *A Watchman*, written by Harper Lee. (3)
- 26 Psychologist or social worker assigned to a Family Court parenting matter, family (10)
- 27 It is a principle of valuation procedure to value land in accordance with its highest and use. (4)
- 28 Appeal. (6)
- 29 A party who wishes to challenge the jurisdiction of a civil claim should file a Notice of Intention to Defend. (11)
- 32 Incite. (4)
- 33 Important personal injuries document, Statement of and Damage. (4)
- 34 Registrar of the Caloundra Magistrates Court, David (3)
- 35 A specific plea to a criminal charge, acquit. (9)

Down

- 1 Parties in civil litigation have an ongoing duty to make full and disclosure. (5)
- 2 President of the Queensland Bar Association, Christopher QC. (6)
- 3 The prosecutors of graver crimes. (abbr.) (3)
- 4 The court holds invalid a purported exercise of administrative power which breaches the doctrine of reasonableness. (10)
- 5 Federal Circuit Court judge based in Cairns, Josephine (6)
- 7 The principle provides that the acts of government departmental officials are synonymous with the actions of the Minister in charge of that department. (8)



- 9 Interlocutory motion in the Family Court, Application in a (4)
- 11 Edit by deletion. (6)
- 12 Any future interest retained by a person who transfers property to another. (9)
- 13 The statute which provided that no British Act should be deemed to extend to the dominions without their consent, invoked by Australia in 1942. (11)
- 16 A document used to commence a civil action, Application. (11)
- 18 Head of the Australian Customs and Border Protection Service,-General. (11)
- 20 Equitable forms of waiver; voting forums. (9)
- 21 Pertaining to subordinate legislation or occupational discipline. (10)
- 22 Usual basis upon which a matrimonial pool of assets is determined. (6)
- 24 At common law, if a person is not heard of for a period of years, that person is presumed to have died. (5)
- 30 Queensland Attorney-General, Yvette (4)
- 31 Associate to a magistrate, clerk. (jargon) (4)
- 32 New South Wales equivalent of a domestic violence order. (abbr.) (3)

Solution on page 64

A return to the puppy rule

Why dogs rule OK

by Shane Budden



Recently, a colleague shocked a gathering by noting that we were about to return to the postal rule.

This caused most of those present to react in the same calm and measured way John McEnroe tended to react when he was of the view that the linesman might well have committed something of an error by making a ruling which did not favour John's prospects.

True, none of our gathering wrapped a tennis racket around a ball boy's head, or screamed unintelligibly at strangers walking past, but the overall reaction was more or less 'you cannot be serious!'

Outwardly, I shared this reaction, but in truth my internal response was 'huh?', because if you want to get technical about it, I couldn't exactly remember what the postal rule was. I walked off quickly to my office pretending to be so shocked that I needed time to myself, while all the while wondering if I had misheard and they were referring to a 'post-hole rule' which mandated the depths of post-holes for wooden fences or something.

That may sound unlikely, but I can tell you from my long experience in construction law (which I clearly remember better than I do my contract law), that things such as the depths of holes can indeed be mandated in codes and standards in the building trade – everything from the size of gutters to the width of gaps in timber decking (they have to be narrow enough for useful, normal-sized dogs to negotiate, but just wide enough to let those little yappy dogs slip right through; at least, they would if I wrote the standards).

Speaking of dogs, we still have one and by the time you read this he will have graduated from puppy pre-school, although from what I have seen so far a puppy pre-school diploma may be one of the few qualifications less substantial than my commission as a Captain in the Kiss Army (although it is still far more prestigious than a homeopathy qualification).

I base this on the fact that all our puppy appears to have learned at puppy pre-school is that if you relieve yourself in the middle of the pet shop the puppy trainer is cheerful when she cleans it up (to be clear, when

I say 'you' I mean the dog, because I presume that's how he thinks about himself; I would be surprised if she were as cheery if you, personally, relieved yourself there).

Part of the reason our dog isn't learning much, in my view, is because – and here is a tip for any education department types out there – the puppy trainer isn't attempting to teach him much. That is because the puppy trainer is what I would call a 'dog person' in the same way that I would refer to a Keith Richards as a 'heroin person'.

She is very keen on dogs and I think her affection has blinded her to the fact that, on average, dogs have the collective intelligence of a large bag of rocks (note to dog lovers: please do not write angry letters to *Proctor* defending the intelligence of dogs and calling for me to be thrown to the wolves, who are related to dogs and would know exactly what to do with morons like me. I was not referring to your personal dog, who I happily concede can type, make soufflé and probably do a fair job of piloting the space shuttle if given the chance).

The puppy trainer is one of those people who feel that the world would be a better place if it were run by dogs, and is certain they have the intelligence and skills to do it. I suspect that the reason she hasn't tried to teach the dogs in our group anything is that she believes they can already do all these things and it is the moron owners who are holding the dogs back.

The trainer has that pure and holy fanaticism that you usually only see in devotees of the paleo diet, who unswervingly believe that we will all live longer if we eat what our caveman ancestors ate, in spite of the fact that our caveman ancestors tended to die at about 40 and in any event did not actually have access to the large slabs of steak you always see paleo people eating and derived most of their protein from eating insects (incidentally, I would pay good money to watch paleo diet enthusiasts force-feed spiders and beetles, but I digress).

Based on her somewhat ambitious assessment of the capabilities of puppies, the trainer made many claims at the start of the course to the effect that by the end

of it our puppies would walk, sit, stay, bark and relieve themselves on command, which would have been brilliant if it were true. She has stated that her dogs do all these things (presumably not all at once), although I note they are never in attendance at puppy pre-school to show the rest of us and our dogs how it is done.

If the dogs at puppy pre-school are following commands, those commands are being beamed in by Vladimir Putin who obviously thinks his invasion of Australia will be much more successful if we are all deafened by barking and busy cleaning up after our dogs, because all they do at puppy pre-school is alternate between barking and relieving themselves (come to think of it, that is a lot like human pre-school as well).

One of the first things we did at puppy pre-school was hand our dogs around the group so that the dogs would get to know and be comfortable around the people in the group. The puppies did this by providing clear and unequivocal proof to everyone in the group that they had yet to have their claws clipped (the dogs, not the people). I have assumed from this that the smell of Dettol is supposed to make dogs calm and comfortable as we used about half a bottle of it dabbing at the scratches on our arms, but at least the training area smelled better.

Seriously though, I look forward to the graduation, where I suspect the puppy trainer will hand out diplomas and ask one of the dogs to give a valedictory speech (this will not be our dog, who won't exactly be going to puppy Harvard, if you get my drift), because graduation will mean puppy pre-school is over and we can go back to training our dog via traditional means, by which I mean bribery with food; after all, it worked on the kids.

And the postal/post-hole rule? Well, that's a story for another day.

© Shane Budden 2016. Shane Budden is Queensland Law Society senior ethics solicitor.

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Crossword solution from page 62

Across: 1 Forrest, 6 Practice, 8 Pleading, 9 Care, 10 Kruger, 14 Suthers, 15 Devise, 17 Disclaimer, 19 Trees, 23 PPS, 25 Set, 26 Consultant, 27 Best, 28 Review, 29 Conditional, 32 Abet, 33 Loss, 34 Hay, 35 Autfois.

Down: 1 Frank, 2 Hughes, 3 Dpp, 4 Wednesbury, 5 Willis, 7 Carltona, 9 Case, 11 Redact, 12 Reversion, 13 Westminster, 16 Originating, 18 Comptroller, 20 Elections, 21 Regulatory, 22 Global, 24 Seven, 30 D'Ath, 31 Deps, 32 Avo.

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 >> qls.com.au under 'Knowledge centre' and 'Practising resources'

Rate	Effective	Rate %
Standard default contract rate	4 April 2016	9.60
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 January 2016 to 30 June 2016	8.00
Federal Court – Interest on judgment debt for half year	1 January 2016 to 30 June 2016	8.00
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 January 2016 to 30 June 2016	6.00
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 January 2016 to 30 June 2016	8.00
Court suitors rate for quarter year	to 1 July 2016	1.28
Cash rate target	from 6 April 2016	2.00
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2016	8.00

Historical standard default contract rate %

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

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

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

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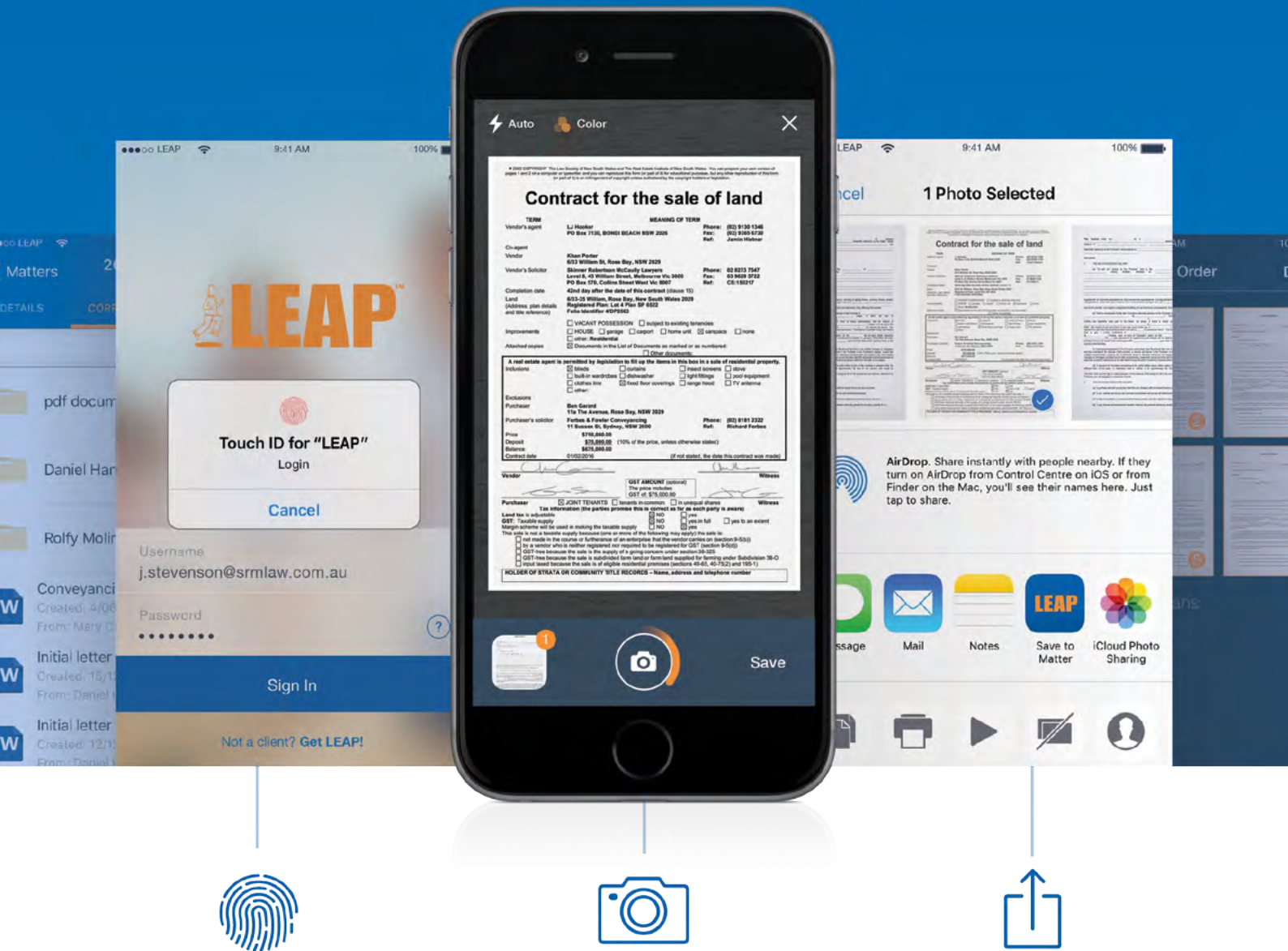
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