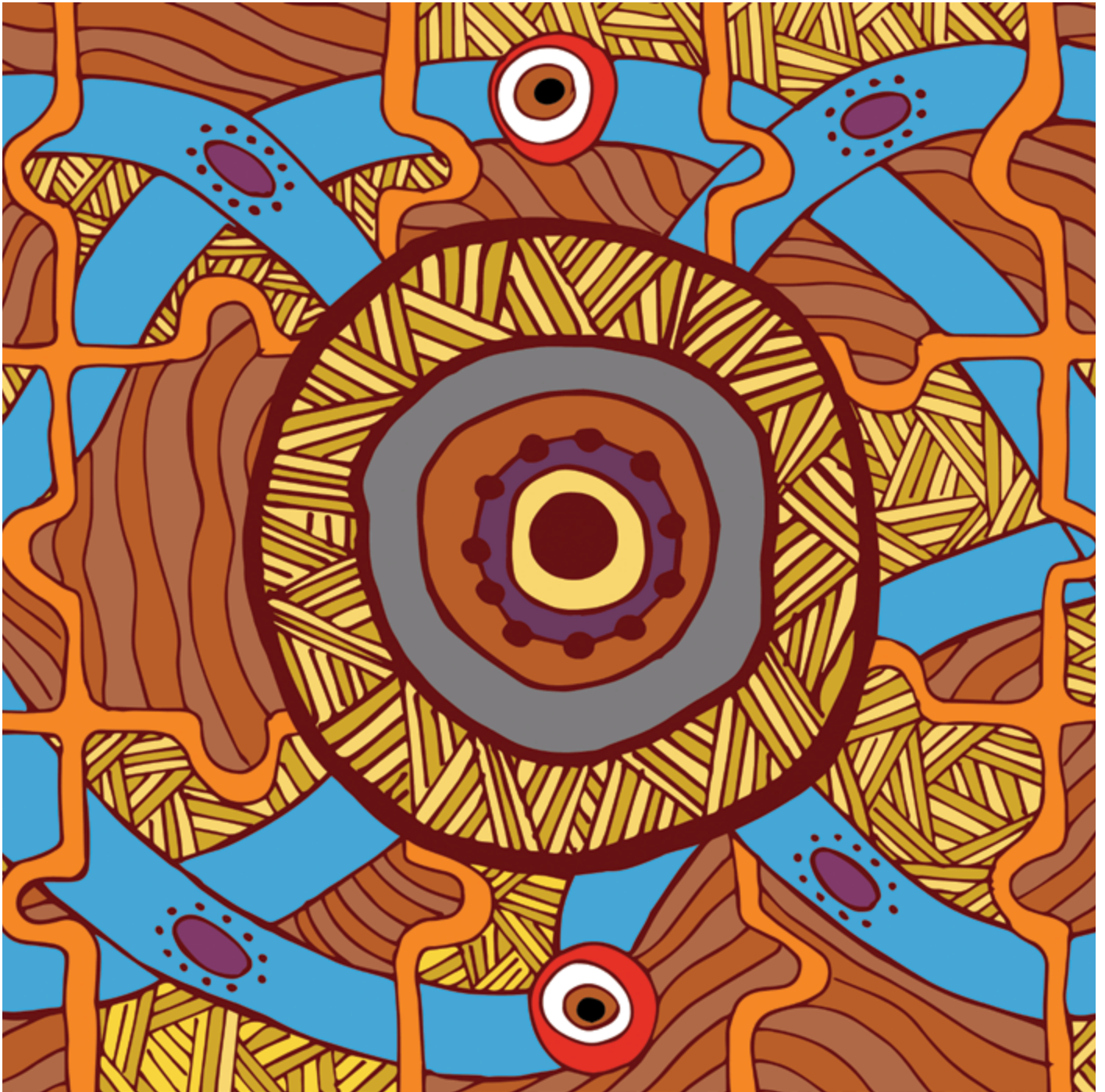



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Queensland
Law Society

May 2018 – Vol.38 No.4

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Cover image and right: *A Pathway to Justice*, by Gilimbbaa artist/designer Rachael Sarra, Goreng Goreng.



National Reconciliation Week 2018

27 May - 3 June



**don't keep
history a
mystery | Q**

learn • share • grow

**Queensland Law Society
is proud to participate in
National Reconciliation Week.**

In keeping with this year's theme, 'don't keep history a mystery', we encourage the profession to learn about the true history of Indigenous Australians, share your stories of reconciliation and together we can grow our understanding of what reconciliation means.

Get involved. **#NRW2018**

[reconciliation.org.au/
national-reconciliation-week](http://reconciliation.org.au/national-reconciliation-week)

A Law Week celebration

A time for connection and reflection



Queensland's legal profession is fortunate to have a strong culture of collegiality and support, which we will see this month with numerous events celebrating the profession in our state.

We have also seen a momentous occasion for Queensland's legal profession in the recent appointment of our state's first Indigenous judge, barrister-at-law Nathan Jarro.

I congratulate Mr Jarro on his appointment to this key role and I hope that this will be the first of many merit-based First Nations appointments to the bench. QLS is committed to supporting our Indigenous practitioners and improving access to our legal system for the community and emerging First Nations solicitors. We hope to see more of our solicitors on the bench in the future, including First Nations representatives.

Mr Jarro is leading the way for our state, and his significant experience and contributions to the profession and the wider community will assist him greatly in his new role. The Society will continue to support merit-based appointments, including First Nations solicitors, in future judicial appointments both locally and nationally.

We are also pleased to welcome another former solicitor to the District Court in Judge John Coker. Judge Coker practised for many years as a partner in a firm in Townsville before his appointment to the Federal Circuit Court. He brings a reputation of efficiency and hard work with him to his new role.

We have celebrated both judicial appointments and valedictories in recent weeks, and the month of May is also a time when all members of the Queensland legal profession come together to celebrate the law. With Law Week being held between 14 and 20 May, there are various events and initiatives that solicitors can be a part of. It's a week of reflection and celebration

for solicitors and the wider profession, and I encourage you to consider getting involved in some way. You can attend our open day on Wednesday 16 May or visit the Law Week website for further events and initiatives: justice.qld.gov.au/corporate/events-seminars/law-week.

Although we should regularly take stock of the great work that solicitors do for their local communities and the wider state of Queensland, it's important that we take the time in weeks such as Law Week to reflect on our contributions. Our solicitors carry out excellent, valuable work each and every day, contributing in positive ways to clients, the community and the wider profession. I encourage you to celebrate the profession during May, and if you have a story of a solicitor who has achieved something exceptional, please let us know. We are always eager to promote the great work of our solicitors to the wider public.

Access to justice

I am pleased to announce the release of our 2017 Access to Justice Scorecard in April, which you can find on our website. This annual survey asks QLS members what they believe to be the biggest barriers to access to justice in Queensland. 80% of respondents indicated that inadequate funding for legal aid assistance services is the biggest barrier to access to justice.

Other issues listed included the capacity of many Queenslanders to afford the legal services they need, the perceived complexity and length of time involved in resolving legal issues through courts and tribunals, and insufficient court resources, in particular, insufficient numbers of judges and magistrates to resolve disputes.

Based on the responses, key items for continued development and reform to improve access to justice include increased funding and resources, development by the legal profession of alternative fee structures, including discrete task assistance, expansion of online resources and file management capabilities.

Thank you to the QLS Access to Justice/ Pro Bono Law Committee for facilitating the survey and to our members who took part. To read the full report visit qls.com.au/accesstojusticescorecard.

Council support

Our Council has met three times this year so far, considering budgets, reviewing Council Committee Charters, agreeing on a number of QLS committee appointments and other key strategic items. We are always open for feedback from members, so please feel free to contact me with anything you would like our Council to be made aware of. We are here to support you and your practice.

Trust money

Lastly, I would like to remind our solicitors that all law practices are subject to trust account investigations (an investigation of the affairs of the law practice), regardless of whether or not the law practice operates a specific trust account.

This process ensures that all trust monies are being dealt with correctly and that no unpaid disbursements are being received to general accounts. This protects both you and your clients by keeping the process transparent and regulated.

The Society offers a complimentary Trust Account Consultancy service to newly established practices across Queensland. Should you have any questions about your trust accounts, you can find further information and guidance via the QLS website qls.com.au/Trust_accounting_resources.

Ken Taylor

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Have you renewed your practising certificate?

Visit qls.com.au/renewals for information about renewing your practising certificate for 2018/19 and complete your online renewal application before **31 May 2018** to avoid a late fee.

Renew your **QLS membership** at the same time to continue receiving exclusive member services and benefits.

If you have any questions, contact our Records & Member Services team at records@qls.com.au or on 1300 367 757.

You're invited...

...to our open day, ball and breakfast.
Renewals and reconciliation also on
this month's agenda



QLS president Ken Taylor has already mentioned Law Week in his column this month.

It's a very significant event for our profession and I would also like to highlight some of the activities of particular relevance to members.

On Wednesday 16 May we are delighted to offer you a complimentary half-day of professional development event at our QLS Open Day, held at Law Society House. This afternoon program, which is followed by networking drinks, features two streams with a number of meaty topics on both law and subjects of interest to the profession.

The Open Day is invariably popular, so make sure you book now.

The QLS Annual Ball wraps up Law Week and is also well-attended, particularly by our early career lawyers. This year's ball, on Friday 18 May, takes a different tack to the usual with a Brisbane River excursion on Seadeck, a 42-metre vessel with excellent dining and entertainment facilities spread across three luxurious decks.

I would like to draw particular attention to one event during Law Week, the Leading Wellbeing in the Legal Profession complimentary member breakfast on Thursday 17 May. This is an initiative of the QLS Wellbeing Working Group and aims to raise awareness and help all practitioners better understand mental health and wellbeing within the profession.

Belinda Winter, who will be on a discussion panel at the breakfast, is a member of the group and a partner at Cooper Grace Ward. I have spoken with Belinda about the responsibilities that employers face in regard to mental health in the workplace, and this interview appears on page seven of this edition of *Proctor*.

Limitation of Liability Scheme

We have written to a number of law practices to advise of a change in the operation of the Queensland Law Society's Limitation of Liability Scheme under the *Professional Standards Act 2004*. The scheme operates to limit the liability of Society members for damages for acts or omissions in relation to legal services to amounts of \$1.5 million or \$10 million, depending on the size of the law practice in which they are staff or a member.

The Society has operated membership of the scheme on the basis that, in order to be covered by the scheme, a Society member must opt in to the scheme and pay the relevant administration fee. This will change this year so that a member of the Society is a member of the scheme unless they have applied for and been granted exemption from the scheme.

For those who wish to be exempt from the scheme, the facility to apply for and be granted exemption is available on our annual practising certificate and membership renewal form, which is now available on your myQLS profile.

To be exempt from participation, a solicitor should choose to opt out of it. If the exemption is not chosen, then the member will be enrolled in the scheme and charged the Society's administration fee.

If you have any questions about the scheme, please contact our Records and Member Services team on 07 3842 5887 or email capscheme@qls.com.au.

Renewing practising certificates and QLS membership

The annual renewals process, covering practising certificates and QLS membership, runs from 1 May to 30 June, and can be completed quickly and easily by logging in to qls.com.au/myQLS and selecting the renewal walkthrough tab.

There are, of course, many reasons to renew your QLS membership, including the work the Society undertakes to protect legal practitioners through measures such as the Limitation of Liability Scheme discussed above. QLS membership will ensure you are 'first to know' about important legal issues, guide you throughout your career, represent your interests and the interest of the wider profession through advocacy, and connect you with other members of our collegial profession...and provide access to a plethora of legal articles every month in *Proctor*!

Reconciliation Week

This month we will be joining in the celebration of National Reconciliation Week, which runs from 27 May to 3 June, and I would encourage all practices to include this on their event calendars.

In keeping with this year's theme, 'don't keep history a mystery', we encourage the profession to **learn** about the true history of Indigenous Australians, **share** your stories of reconciliation, and together **grow** our understanding of what reconciliation means.

As an integral part of our QLS Reconciliation Action Plan, we recently had cultural awareness training consultant Tom Kirk provide training to all staff and Council members. This was very well received, and provided QLS staff and Council members with an opportunity to learn, develop insight and gain a greater understanding of First Nations Peoples' history and culture. If you would like to learn more about this training please let us know.

I look forward to seeing members during Law Week and at the QLS Ball. In coming months I am heading north as far as Townsville with a few stops on the way to run training sessions and meet members as part of our learning and professional development calendar of events. I'll update you on this in future editions of *Proctor*.

Rolf Moses
Queensland Law Society CEO

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practising certificates
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across

3390

organisations



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- 9 practise solely in foreign law
- 3251 are principals in their practices
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- protecting legal practitioners
- ensuring you are 'first to know' about important legal issues
- guiding you throughout your career
- representing your interests and the interest of the wider profession through advocacy
- connecting you with other members of our collegial profession.

*All figures current at 13 April 2018.



RENEW BY 31 MAY 2018

via the renewals tab available on
your myQLS profile qls.com.au/myQLS



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Mental health: The onus on employers

by Queensland Law Society CEO Rolf Moses



As part of the QLS program for Law Week (14-20 May), we have included a specific session on mental health – the Leading Wellbeing in the Legal Profession complimentary member breakfast on Thursday 17 May.

Fundamentally poor health – in particular, poor psychological health – is not compatible with a profession dedicated to high competence, client service and sustainability.

The member breakfast is organised by the QLS Wellbeing Working Group, which I chaired for four years. Its focus will be a panel discussion on the concept of 'Do No Harm', which was the theme for the 7th annual National Wellness for Law Forum hosted by Bond University in February this year.

One of the panel members will be Belinda Winter, *pictured*, an employment and industrial relations partner at Cooper Grace Ward and a member of the QLS Wellbeing Working Group. A number of QLS members have suggested that they would appreciate guidance on the complexities of employment law and employee relations when dealing with mental health issues in the workplace. To shed light on some of these key issues, I asked Belinda to address several questions:

From an employment law perspective, how are psychological and physical injuries different, particularly in terms of the obligations that employers have to manage them?

This is a very complex answer, subject to a number of qualifying factors and exceptions; however, in brief:

They are similar in that:

- employers have an obligation under the *Workplace Health and Safety Act 2011* (Qld) (WHS Act) to ensure, so far as is reasonably practicable, the health and safety of their workers. 'Health' in this context means both physical and psychological health
- employers also have a duty to make reasonable adjustments for employees suffering from a psychological or physical injury under the anti-discrimination laws.



However, psychological and physical injuries are treated differently under the *Workers Compensation and Rehabilitation Act 2003* (Qld) (WCRA). If a worker sustains a psychological injury "arising out of or in the course of employment" they may have a claim under the WCRA.

For a psychological injury to arise out of or in the course of a person's employment, their employment must be a "major significant contributing factor to the injury". A psychological injury arising out of or in the course of employment will not be compensable under the WCRA if it arises out of "reasonable management action taken in a reasonable manner".

Do employers understand their obligations to address psychological health issues at work?

In my experience with clients, a majority do not. Employers sometimes ignore the problem, too afraid of any legal claims that may arise as a consequence of performance managing an employee who is suffering from a mental illness. Other times, employers engage in unlawful conduct, knowingly or unknowingly, imputing various disabilities (often incorrectly) on their employees who are suffering from a mental illness.

If I am an employee, do I need to disclose a mental health issue to my employer?

If it results in long and/or regular periods of absence and/or affects your ability to perform your duties safely, you should disclose your mental health issue to your employer.

Where do you see the greatest need for training to help employers address the management of mental health issues in the workplace?

I recommend that employers ensure they have employee representatives who are trained in mental health first aid (much like having physical first aid officers). I also recommend that managers and human resource professionals receive practical training in the legal risks of managing ill and injured employees.

What role can leaders take in creating a more healthy work environment?

A huge role. Firstly, leaders should be mindful how their behaviour may impact others. Then, leaders should get to know their team, so they can recognise if there is a change in a team member, that may indicate a problem. And finally, be open about mental health issues, destigmatise it, talk about it and invite discussion. That way, if a member of your team needs help, they are more likely to ask for it.

You recently became an accredited mental health first aid officer trainer. Why did you attain this accreditation and what does it mean?

I provide a lot of training to my clients on the legal aspects of managing ill and injured employees. But this is not the complete picture. Employers need to accept that, statistically, they already have employees suffering from mental illness now in their workplace, and it's okay and nothing to be afraid of. It is in the interests of all employers and employees to focus on prevention and good management of mental illness. This is where mental health first aid comes in. It completes the picture in my view.

As a mental health first aid trainer, I deliver training to individuals who want to become accredited in mental health first aid, whether that be in the workplace, as a member of the community or within their own family.

Thank you very much Belinda.

Please note that a more detailed FAQ document on employment law obligations when managing mental health issues and psychological injuries, developed by Belinda, is available. Look for 'FAQ: Mental Illness and Health – An employer's perspective' at qls.com.au/wellbeing-resources.

I'm looking forward to this session at Law Week, and hope as many practitioners as possible will join me at the breakfast, as well as the many other Law Week events.

Walk this way for pro bono!

The Queensland Legal Walk is a regular highlight of Law Week (14-20 May), celebrating the legal profession's commitment to pro bono.

This year's walk will be held at 7am on Tuesday 15 May 2018 in centres across Queensland, including Cairns, Townsville, Mackay, the Sunshine Coast, Gold Coast, Toowoomba and Brisbane.

In Brisbane, more than 600 supporters will walk from the Queen Elizabeth II Courts of Law through the city and beside the Brisbane River, finishing with the walk awards and a breakfast sponsored by Queensland Law Society at the courts.

LawRight aims to raise \$150,000 to continue providing its services to clients of hospitals, mental health and Indigenous health services through its health justice partnerships. These partnerships improve the health and well-being of clients by addressing their housing, income and legal rights.

Walkers and supporters are encouraged to donate or raise \$200 each. Last year the



individual award went to Chloe Sheptooha of Clayton Utz, who raised \$1648, and the team award went to North Quarter Lane Chambers, who raised over \$13,000.

Please register for this year's walk at qldlegalwalk.org.au by 8 May.

Appointment of receiver for Buck Rigley & Associates, Kedron

On 5 April 2018, the Council of the Queensland Law Society Incorporated passed resolutions to appoint officers of the Society, jointly & severally, as the receiver for the law practice, Buck Rigley & Associates.

The role of the receiver is to arrange for the orderly disposition of client files and safe custody documents to clients and to organise the payment of trust money to clients or entitled beneficiaries. Enquiries should be directed to Sherry Brown or Glenn Forster, at the Society on 07 3842 5888.

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LawLink 2018 – connecting with First Nations students

Queensland Law Society was delighted to welcome First Nations law students to two LawLink events recently.

On 20 March 2018, students attended the QLS Legal Careers Expo to meet with new CEO Rolf Moses and learn about QLS, including the QLS Reconciliation Action Plan. Students then had the opportunity to access the QLS Resume Rescue service, kindly provided by the QLS HR team, and to enter the Expo early to meet with law firms, community legal centres, educational institutes and membership organisations.

For the first time, the Aboriginal and Torres Strait Islander Legal Service attended as an exhibitor at the Expo.

The Women's Legal Service (WLS) hosted a second LawLink event on 27 March 2018, *pictured*. The students met with members of the WLS team to learn about working in a community legal centre.

The personal accounts of the team members' varied careers provided great insight into the many career paths available after completing



their studies. The WLS team also gave an inspirational overview of their many valuable services that support women's legal needs in the community. The evening was also attended by QLS staff and members of the QLS Equity and Diversity Committee.

QLS is very grateful for WLS' support of the event and the time taken by their team to meet with the students and QLS representatives.

LawLink was established in 2003 by the QLS Equity and Diversity Committee with the aim of bridging the cultural divide between First Nations law students and the legal profession.

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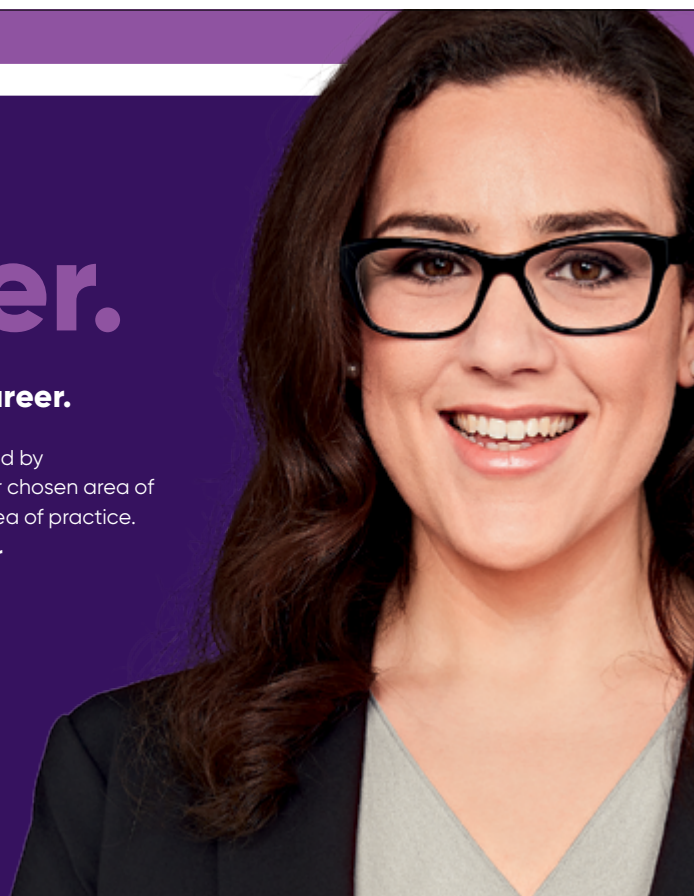
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Thynne + Macartney celebrates 125 years



Thynne + Macartney is celebrating 125 years of practice in Queensland this year, and claims the title of the oldest Brisbane law firm still trading under its original name.

Andrew Thynne and Sir Edward Macartney entered into a partnership on 1 March 1893 with offices in Edward Street, Brisbane. Today the firm is based at the Riverside Centre, Eagle Street, and has had a long association with the political, commercial, and public life of Queensland.

Throughout the firm's early decades, the founding partners divided their attention between public life and developing their legal practice. Thynne, the senior founding partner, was a distinguished member of the

Legislative Council and Macartney was a member of the Legislative Assembly.

The firm celebrated its 125th anniversary at a gala event on 15 March at the Queensland Art Gallery with more than 200 guests, including Governor of Queensland Paul de Jersey AC, judges of the Supreme Court, barristers, and clients of the firm.

In his speech, the Governor noted that the 125-year legal partnership was an "extraordinary phenomenon".

"[It] is built on nothing but excellence, integrity, quality of advice, legal and business acumen and the assiduous building of a loyal client base," he said.

Firm chairman Peter Jolly said Thynne + Macartney remained a strongly independent,



Queensland-based law firm. "That was the case in 1893 and remains so to this day, it is the very essence of Thynne + Macartney," he said.

"While the contrasts between the practice of law in 1893 and 2018 are numerous and vast, the key elements of any successful legal firm, such as the quality of the advice, the character of the people, and culture of the firm virtually remain unchanged."

Above left: Governor of Queensland Paul de Jersey AC, left, cuts the 125-year birthday cake with partners chair Peter Jolly.

Above: Celebrating Thynne + Macartney's 125 years, from left, Supreme Court Justice Martin Daubney, Thynne + Macartney partner John Moore and Supreme Court Justice Robert Gotterson AC.

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Careers focus for tomorrow's lawyers

On Tuesday 20 March, Queensland Law Society hosted its annual Legal Careers Expo at the Brisbane Convention and Exhibition Centre. More than 490 law students attended the expo eager to learn about graduate and clerkship opportunities from motivated leaders working within a variety of practice areas. Students listened to inspirational speakers during panel sessions that brought awareness to potential and exciting pathways to take with a law degree, while equipping them with practical skills towards applications and resume writing.



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Inadequate funding the biggest justice barrier

2017 Scorecard results online

prepared by the QLS Advocacy team

Queensland Law Society has released the results of the 2017 Access to Justice Scorecard survey.

Each year, the Scorecard assesses whether laws achieve fair and intended outcomes in Queensland, identifies where improvements are necessary, and proposes solutions to overcome barriers to accessing justice.

In 2017, we received our largest response to date. Respondents voiced clear concern about ongoing barriers to accessing justice in Queensland, and in particular, inadequate funding of the legal assistance sector, the perceived complexity and length of time involved in resolving legal issues through courts and tribunals, and insufficient court resources.

The report is available at qls.com.au/accesstojusticescorecard.

Legislative reform update

Following the state election in late 2017, Parliament returned in February 2018. When the election was called, all outstanding Bills lapsed and the legislative program for early 2018 involved re-introducing many of the lapsed Bills.

The QLS advocacy team and our policy committees had a busy start to 2018, reviewing the 16 Bills which were introduced in the first February sitting (some of which had changed since the 2017 version) and preparing written submissions in response when the Bills affected our members' interests. More Bills were also introduced in the two parliamentary sittings in March.

Throughout March and April 2018, parliamentary committees reconvened and held a number of public hearings on the new Bills. QLS represented its members' interests at the following hearings:

- On Monday 19 March, QLS government relations principal advisor Matt Dunn and QLS senior policy solicitor Kate Brodnik attended a hearing by the parliamentary Transport and Public Works Committee on the Plumbing and Drainage Bill 2018. We raised issues with the Bill concerning the abrogation of the right to claim privilege against self-incrimination, the proportionality of penalties, and the appropriateness of a wide regulation-making power.
- Also on 19 March, QLS president Ken Taylor, acting advocacy manager Binny De Saram and Kate Brodnik appeared before the parliamentary Economics and Governance Committee on the Local Government (Councillor Complaint) and other Legislation Amendment Bill 2018. We highlighted our concerns with the Bill's offence provisions relating to frivolous complaints, issues with preserving procedural fairness and natural justice, and a concern about requiring someone to make an admission he or she would not otherwise make.
- On 23 March, Matt Dunn, Planning and Environment Committee chair Michael Connor and acting principal policy solicitor Wendy Devine appeared at the public hearing on the Vegetation Management and Other Legislation Amendment Bill 2018. We discussed our concerns about the retrospective amendments included in the Bill, which would allow the imposition of restoration notices retrospectively to clearing conducted before the Bill is passed, and also raised a number of other technical issues with the Bill.
- On 28 March, deputy president Bill Potts and Kate Brodnik appeared at the public hearing conducted by the parliamentary Economics and Governance Committee on the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018. QLS cautioned against the retrospective effect of some of the Bill's provisions, stating that this was a breach of fundamental legislative principles. We also recommended that the definitions in the Bill be clarified to ensure certainty for those it would impact.
- Also on 28 March, senior policy solicitor Vanessa Krulin and QLS Mining and Resources Committee members James Plumb and Martin Klapper appeared before the parliamentary Economics and Governance Committee to discuss the Mineral and Energy Resources (Financial Provisioning) Bill 2017. The Bill makes changes to the current method and

process of calculating the monies that mining and resource authorities must provide as financial assurance in case of an incident which causes environmental damage. Key policy objectives identified by the Government were the risk of financial burden incurred by the state, and ensuring that land disturbed by mining activities is rehabilitated safely and in such a way that is sustainable and does not cause environmental harm.

QLS raised concerns that the powers bestowed on the 'scheme manager' are particularly wide. Our apprehensions may be alleviated by the publication of statutory guidelines which the scheme manager is to refer to when making several key determinations, including the risk category which is to be allocated to each resource authority. However the guidelines have not been created and in its current form the Bill only allows, but does not require, the scheme manager to make such guidelines.

QLS advised the committee that the powers of the scheme manager must be adequately restrained to ensure that fundamental rights and liberties are not infringed, and statutory guidelines must be published to give parties certainty on their obligations under the new laws.

- On 4 April, president Ken Taylor, deputy president Bill Potts, Criminal Law Committee deputy chair Rebecca Fogerty and Binny De Saram attended the public hearing on the Heavy Vehicle National Law and Other Legislation Amendment Bill 2018. We raised concerns about the mandatory driver licence disqualification scheme proposed in the legislation and our long-held view that a discretion for sentencing decisions should rest with highly trained judges who can assess the appropriate sentence in all of the circumstances of a case.

QLS submissions to parliamentary committees are available at the committees' inquiry pages at parliament.qld.gov.au/work-of-committees/committees.

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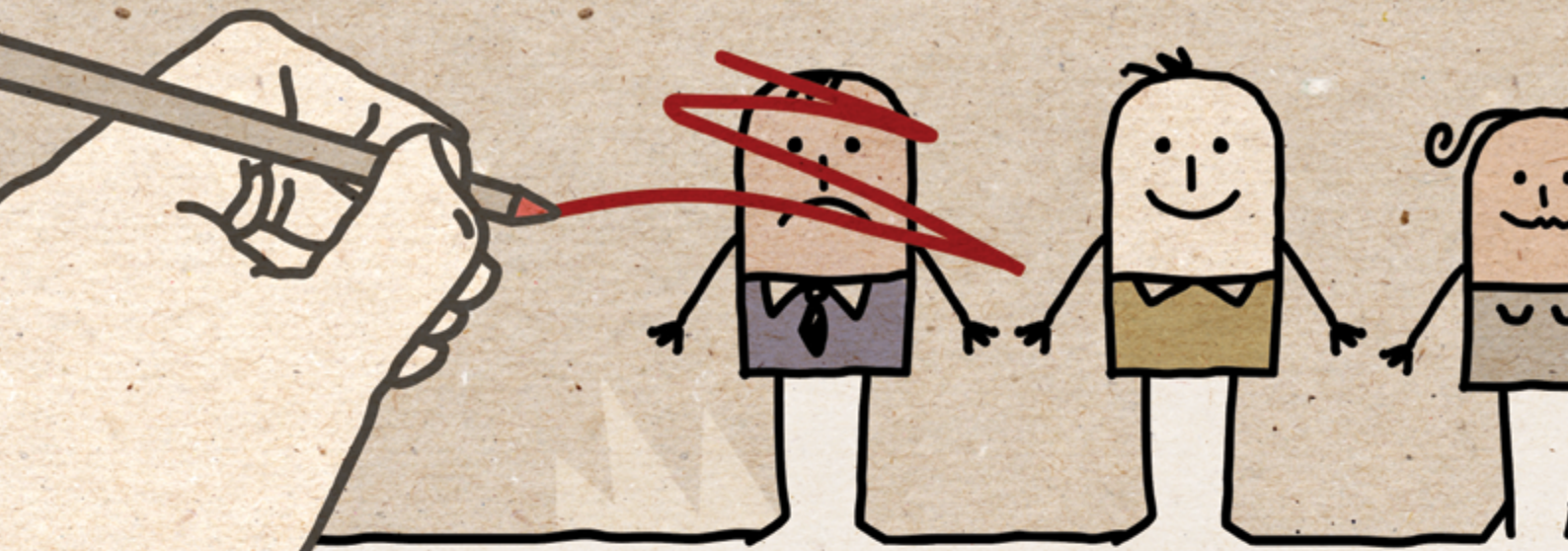
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Genealogical witch-hunts and the 'Citizenship 7'

Re Canavan and Others [2017] HCA 45



The fallout from one of the biggest political stories of 2017 continues to disrupt Australia's Parliament. **James Stokes** and **Gim del Villar** look at some of the legal ramifications of the High Court's examination of dual citizenship.

The application of section 44 of the Australian Constitution has rocked the 45th Parliament and the country.

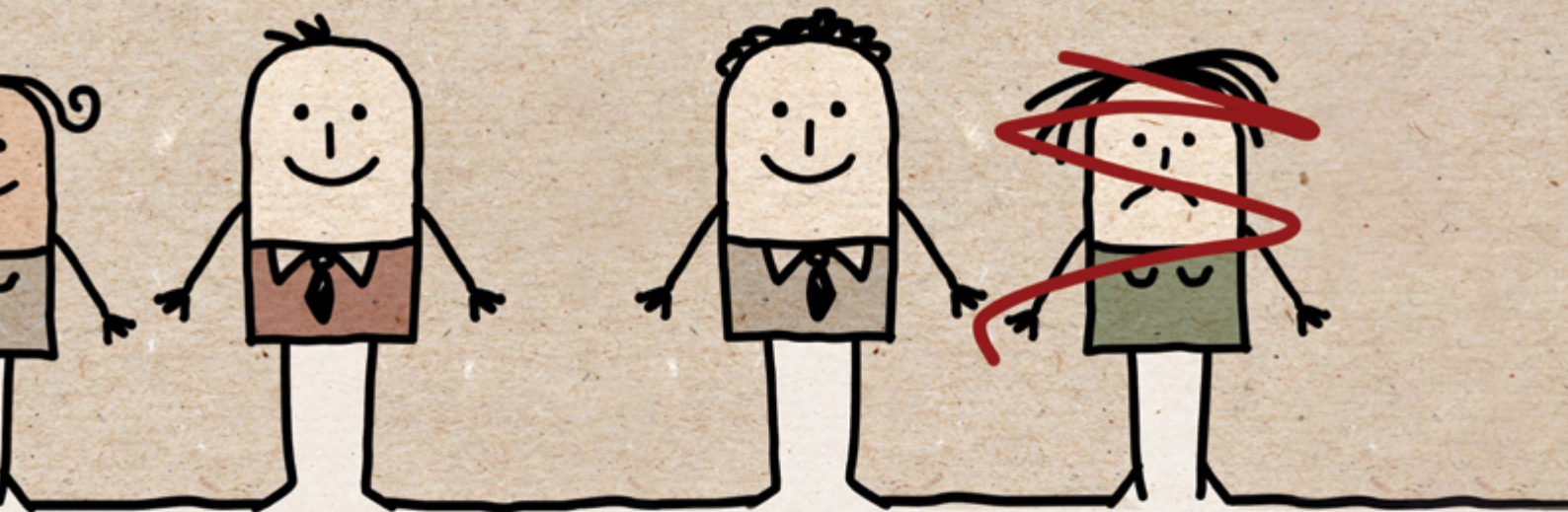
Otherwise eligible senators and members – including senior parliamentarians – have lost their positions as the list of potentially ineligible members grows.

While the saga appears to be far from abating, and may yet result in further by-elections or Senate vacancies to be filled, in October 2017 the High Court in *Re Canavan and Ors*¹ considered the eligibility of seven parliamentarians with potential dual citizenship.

In doing so, the High Court clarified the operation of section 44 of the Constitution in several respects, but has left some important questions unanswered.

Background

The decision, followed sensationally by the media, resulted from six references from the Senate and one reference from the House of Representatives relating to parliamentarians (the referred parties) who had recently become aware that they were, or might be, dual citizens.



The issue of dual citizens being ineligible for parliament arises from section 44 of the Australian Constitution which provides:

“Any person who:

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power;

...

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.”

For most of Australian history, the potential impact of section 44 was largely overlooked. King O'Malley famously claimed that his mother had crossed the US-Canada border so that he could be born British and John Christian Watson, Australia's first Labor Prime Minister, was born in Chile to a Chilean father.²

Indeed, all 'Australians' had been 'British subjects' until 1948 when the Commonwealth Parliament first provided for Australian citizenship, and it was not until 1999 that the High Court held that British citizens were citizens or subjects of a foreign power.³

The most recent decision on citizenship and section 44, *Sykes v Cleary*,⁴ was decided in 1992. The High Court had found two Australian citizens born in other jurisdictions – and therefore citizens by the principle of '*jus soli*' or 'the soil' – to be ineligible.

A variety of factors created the possibility of different outcomes for at least some of the referred parties:

- Most of the referred parties were dual citizens by descent, or by virtue of the *jus sanguinis*, rather than by birth.
- Most did not know and did not suspect that they were foreign citizens when they nominated for the Parliament.

- Some of the reasons in *Sykes v Cleary*, particularly the reasons of Justice Deane, suggested the existence of exceptions to section 44 that might apply.

While not an initial factor in seeking the reference, there was also a compelling context provided in the form of historical information obtained by the Solicitor-General of the Commonwealth that indicated the ultimate wording of section 44 was a minor drafting change that was consistent with the focus in British and colonial legislation on addressing positive steps taken while in Parliament to demonstrate allegiance or adherence to a foreign power or to obtain foreign citizenship.

The referrals were heard and decided together in the High Court's original jurisdiction as the Court of Disputed Returns.

Facts in each reference

Senator Scott Ludlam and Senator Larissa Waters had both resigned following the discovery that they were citizens of New Zealand and Canada respectively by virtue of having been born in those countries.

In the wake of these resignations, Senator Matthew Canavan discovered that he was on Italy's 'Register of Citizens Residing Abroad' as a result of his mother's application for citizenship in 2006. Senator Canavan resigned from the Cabinet, in which he was the Minister for Resources and Northern Australia, but did not resign from the Senate.

Subsequently, Senator Nick Xenophon discovered, notwithstanding substantial efforts before his nomination to divest himself of both Cypriot and Greek citizenship prior to the election, that he held the quaint and anomalous designation 'citizen of the United Kingdom and the Colonies', stemming from his father, a naturalised Australian citizen, not being 'ordinarily resident' in Cyprus on its independence in 1960.

The issue for Senator Malcolm Roberts arose from his father being a British citizen. In an earlier decision, the court found that Senator Roberts at the date of his nomination knew that there was at least a real and substantial possibility that at May 1974 (when he applied to become an Australian citizen) he was a citizen of the United Kingdom and had remained so thereafter. The court cited Senator Roberts' attempts to clarify and renounce his British citizenship by emails. Senator Roberts had received responses directing him on the course for renunciation, which he then followed. However, the response and actions were taken after the date of his nomination.

In the case of Deputy Prime Minister Barnaby Joyce, the New Zealand Government confirmed that Mr Joyce was a New Zealand citizen due to his father's birth and residence in that country prior to 1948. Senator Fiona Nash's British citizenship arose due to her father's birth in Scotland.

The decision

The court, in a unanimous joint judgement, held that:

- Section 44(i) was cast in "peremptory terms" and not concerned with negligence or the reasonable efforts of a parliamentary candidate to comply. Reasonableness was immaterial to disqualification.⁵
- A "unilateral declaration renouncing foreign citizenship when some further step can reasonably be taken which will be effective under the relevant foreign law to release that person from the duty of allegiance or obedience" would not be sufficient. The 'exception' identified in *Sykes and Cleary* was limited to those in which the candidate was rendered "irremediably incapable" of divesting the citizenship.⁶
- All referred parties were disqualified, except for Senator Xenophon and Senator Canavan.

- d. Senator Xenophon's status did not disqualify him as it had none of the essential characteristics of citizenship – he could not by virtue of the status even require entry to, or reside in, the United Kingdom.
- e. Senator Canavan was not disqualified because the court was not satisfied that he was in fact an Italian citizen. The court considered that as Italian citizenship by descent could “extend indefinitely – generation after generation – into the public life of an adopted home”, the reasonable view was that positive steps under the relevant Italian citizenship law were required as conditions precedent to citizenship.

The court rejected an interpretation based on the historical extrinsic material, stating that “the drafting history of s44(i) does not support identification of a narrower purpose sufficient to constrain the ordinary and natural meaning of the language ultimately chosen”.

The court explained that disqualification “from being chosen as a parliamentarian was an innovation”,⁷ nor could the change in wording be attributed solely to drafting queries associated with the Colonial Office memorandum (as the Solicitor-General of the Commonwealth had submitted).⁸

The court acknowledged that there would be some cases in which a dual citizen would not necessarily be disqualified. An example was given of a situation in which citizenship may not disqualify – when a requirement of the foreign law was that “the citizens of the foreign country may renounce their citizenship only by acts of renunciation carried out in the territory of the foreign power. Such a requirement could be ignored by an Australian citizen if his or her presence within that territory could involve risks to person or property.”

The court declined, however, to provide further examples, instead stating: “It is not necessary to multiply examples of requirements of foreign law that will not impede the effective choice by an Australian citizen to seek election to the Commonwealth Parliament. It is sufficient to say that in none of the references with which the Court is concerned were candidates confronted by such obstacles to freeing themselves of their foreign ties.”⁹

Lessons from the decision

While *Re Canavan* highlights the potential impact of many foreign citizenship laws on Australia's system of representative government, dual citizenship may have other unintended consequences more regularly encountered by practitioners in their areas of practice, including:

- a. taxation, with the example of the United States of America taxing all its citizens wherever situated or residing, as the common seminal example
- b. succession, both for the operation of death duties and like taxes and for the application of foreign rules that may apply to assets and individuals
- c. the operation of foreign criminal laws to its citizens overseas. While diminished in recent years, responsibilities such as national service extend to foreign-born citizens.

In a report submitted to the court, the Economics and Law Research Institute estimated that at least 45% of Australians are potential dual citizens. Practitioners should be aware:

- a. of the far reach of citizenship laws and that, while there are public international law decisions and authority limiting the extent to which countries may assert citizenship in some instances, the laws and their exceptions are complex. Remoteness of connection with a country or lack of knowledge on the part of the dual citizen will not necessarily prevent disqualification.
- b. that embassies and consulates are not necessarily able to provide accurate or conclusive statements on citizenship status and may be limited to administrative databases or other application of procedures. In several of the references in this case the parties were initially told by consulates or embassies that they were not citizens. In other cases, such as that of Senator Xenophon, the initial advice was later overruled.
- c. seeking status or clarification from embassies may be and usually is a time-consuming process. While these parliamentarians generally received prompt and attentive processing of their renunciations, anecdotal evidence is that renunciation can take a significant period of time, up to several months.
- d. place of birth will inevitably give rise to potential citizenship, but so could any ancestors born in foreign entities. The rules on cessation of citizenship sometimes depend on whether the parent was naturalised prior to the birth of the child, which may not be information that is known for earlier generations. New or former nation states may give rise to citizenship status that are unusual or not initially considered.
- e. some citizenship can be passed on by marriage and may differ within a family or blended family. For example, the Australian-born co-writer of this article has three Australian-born biological children who are Italian-Mexican Australians. One embassy official indicated during this matter that there are up to one million potential citizens of its country living in Australia and that less than one-third were aware of their citizenship.
- f. factual information may not be readily available but may be crucial to the application of foreign citizenship laws.

The Canavan family undertook extensive archival and genealogical research to inform the expert advice sought on Italian law. That advice highlighted the far-reaching and almost arbitrary impact of the 1912 Italian law on citizenship, seen in the light of the Italian Constitution of 1948. These facts and documents were referred to by counsel and the court to the benefit of Senator Canavan.

The decision in *Re Canavan* sets a firm line of ineligibility for any dual citizen who does not take ‘all reasonable steps’ to remove other citizenships prior to nominating for Federal Parliament. It provides greater certainty and places a firm onus on the individual to undertake thorough enquiries. At the same time, some questions remain unanswered, including whether a person who has applied to renounce foreign citizenship before being nominated for election, but whose renunciation is only processed after the date for nominations has closed, has done enough to avoid disqualification.

Re Canavan also provides a timely reminder for practitioners to consider again potential citizenship issues within their areas of practice and be aware of the remoteness and ‘long arm’ of these laws, particularly in the context of Australia's immigrant context and the modern mobility of individuals.

James Stokes is a director of Stokes Moore and Gim del Villar is a Brisbane barrister. They were on the legal team which acted for Senator Matt Canavan.

Notes

¹ *Re Canavan*; *Re Ludlam*; *Re Waters*; *Re Roberts* [No.2]; *Re Joyce*; *Re Nash*; *Re Xenophon* [2017] HCA 45 (27 October 2017)

² en.wikipedia.org/wiki/King_O%27Malley, en.wikipedia.org/wiki/Chris_Watson and compare with the *Nationality and Citizenship Act 1948* (Cth).

³ See the *British Nationality and Status of Aliens Act 1914* (UK), *Nationality Act 1920* (Cth) and confer with changes per *Nationality and Citizenship Act 1948* (Cth).

⁴ [1992] HCA 60; (1992) 176 CLR 77.

⁵ *Re Canavan*; *Re Ludlam*; *Re Waters*; *Re Roberts* [No.2]; *Re Joyce*; *Re Nash*; *Re Xenophon* [2017] HCA 45 (27 October 2017 at para 61.

⁶ Citing Brennan J in *Sykes v Cleary* [1992] HCA 60; (1992) 176 CLR 77 at 113-114.

⁷ *Re Canavan*; *Re Ludlam*; *Re Waters*; *Re Roberts* [No.2]; *Re Joyce*; *Re Nash*; *Re Xenophon* [2017] HCA 45 (27 October 2017 at para 35.

⁸ Para 35.

⁹ Para 69.

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The incarceration equation

ALRC report seeks reductions in Indigenous remand population



A Pathway to Justice,
by Gilimbaa artist/
designer Rachael Sarra,
Goreng Goreng

The Australian Law Reform Commission has reported to the Federal Government on its examination of incarceration rates for Aboriginal and Torres Strait Islander peoples.

Its recommendations include facilitating the release on bail for accused Aboriginal and Torres Strait Islander people, when risk can be appropriately managed.

Bail likely to be refused

Some 28% of all accused people held in prison on remand are Aboriginal and Torres Strait Islander people.¹

In its report, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017),

the ALRC found that a large proportion of Aboriginal and Torres Strait Islander people held on remand did not receive a custodial sentence upon conviction, or may have been sentenced to time served while on remand.

This suggests many Aboriginal and Torres Strait Islander prisoners may be held on remand for low-level offending. This particularly affects female Aboriginal and Torres Strait Islander prisoners.

Aboriginal and Torres Strait Islander peoples are less likely to be granted bail than non-Indigenous people.² Irregular employment, language barriers, previous convictions for often low-level offending or breach of court orders, and a lack of secure accommodation can disadvantage some accused Aboriginal and Torres Strait Islander people when applying for bail. Aboriginal and Torres Strait Islander people may also be unlikely to meet pre-release requirements, especially sureties.

In 1991, the Royal Commission into Aboriginal Deaths in Custody received a submission from the Queensland Attorney-General's Department acknowledging that high rates of mental and physical disability, lifestyle, communication difficulties, and lack of education could lead to Aboriginal and Torres Strait Islander people being held on remand, not because they were attempting to 'escape justice', but because of the particular difficulties they faced in appearing at a court at an 'appointed place or time'.

Further, when bail was granted, cultural obligations to attend sorry business following a death in the community or to take care of family could conflict with commonly issued bail conditions—such as curfews and exclusion orders—and could lead to breach of bail conditions, revocation of bail and subsequent imprisonment.

The Australian Law Reform Commission (ALRC) report on Indigenous incarceration rates was tabled in Federal Parliament on 28 March. The ALRC's **Sallie McLean** discusses its recommendations.



The 2011 report, *Exploring Bail and Remand Experiences for Indigenous Queenslanders*, observed that compliance with 'standard' conditions (curfews, resident restrictions, reporting requirements and alcohol bans) was difficult for some Aboriginal and Torres Strait Islander people.

The report concluded that "[f]ailure to comply with these conditions along with the stringent policing of minor breaches in some locations increased the risk of custodial remand for Indigenous defendants, with court delays then contributing to the length of time defendants remained in remand".³

Bail Act 1980

There are mechanisms in place to permit or encourage bail authorities to take into account issues that arise due to Aboriginality when making bail determinations. These include legal frameworks that provide guidance to judicial decision-making, and statutory provisions to consider Aboriginality or culture in bail determinations in New South Wales, the Northern Territory and Queensland.

In Queensland, section 16(2)(e) of the *Bail Act 1980* permits bail authorities to consider submissions from a community justice group (CJG) regarding the defendant's relationship to their community, any cultural considerations, or any considerations relating to programs and services in which the community justice group participates. CJGs were established in 1993, and consist of elders, traditional owners, and other respected Aboriginal and Torres Strait Islander community members.

The ALRC found that this provision was rarely used and, when used, statutory construction had limited the application and effectiveness of the provisions. The provision permits, rather than requires, the bail authority to receive evidence relating to culture and Aboriginality. CJGs received strong support from Queensland stakeholders, although reliance on ongoing funding of CJGs renders the Queensland provision vulnerable.

Model from Victoria recommended

The ALRC seeks to enable Aboriginal and Torres Strait Islander peoples accused of low-level offending to be granted bail in circumstances in which risk can be appropriately managed.

To this end, the ALRC recommends that all states and territories adopt a provision similar to the standalone Victorian provision, s3A of the *Bail Act 1977* (Vic.). Section 3A requires bail authorities to take into account any issues that arise due to person's Aboriginality, including cultural background and ties to family or place, and any other relevant cultural issue or obligation.

Victorian courts have interpreted s3A to also permit consideration of the over-representation of Aboriginal and Torres Strait Islander people in prison and the effects of policing practices (*Re Mitchell* [2013] VSC 59). The Supreme Court of Victoria has, however, stressed that the provision does not operate to grant bail to an Aboriginal or Torres Strait Islander applicant who presents an unacceptable risk to community safety (*DPP v SE* [2017] VSC 13; *R v Chafer-Smith* [2014] VSC 51; *Re Hume (Bail Application)* [2015] VSC 695).

The ALRC considers that a s3A provision would fill the gap in jurisdictions that currently do not have a statutory requirement to consider issues relating to a person's Aboriginality, and be a better option for those that do. Section 3A is prescriptive; it requires (rather than permits) the court to consider issues related to Aboriginality, and it is wide enough to be of broad application and to include considerations of appropriate bail conditions. Under s3A, the court can hear evidence from any person or group, including the defendant, regarding cultural issues.

The ALRC suggests that the introduction of provisions similar to s3A in bail statutes would require bail authorities to contextualise issues that arise due to a person's Aboriginality when making bail determinations and in setting conditions. The provisions should:

- require bail authorities to consider community supports, the person's role in their community and cultural obligations when determining risk. These considerations

can be balanced against the lack of otherwise permanent residency, employment and immediate family supports.

- require bail authorities to consider any previous offending – especially low-level offending – in context, particularly where a person has experienced historical and continuing disadvantage
- require bail authorities to consider remoteness, flexible living arrangements and mobility when setting bail conditions
- lower the likelihood of bail authorities imposing inappropriate conditions, including sureties, that are difficult, if not impossible, to meet
- decrease the risk that considerations of cultural practice and obligations by bail authorities will be taken into account inconsistently
- reduce the number of Aboriginal and Torres Strait Islander peoples in prison on remand – especially critical for women on remand, who may lose accommodation and custody of their children while in prison.

The ALRC further recommends that governments work with relevant Aboriginal and Torres Strait Islander organisations and legal bodies to produce guidelines for the judiciary and legal practitioners, and to identify gaps in the provision of bail supports.

Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133) is available at alrc.gov.au/publications.

Sallie McLean is principal legal officer at the Australian Law Reform Commission.

Notes

¹ Australian Bureau of Statistics, *Prisoners in Australia 2017*.

² Lucy Snowball et al, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act*, NSW Bureau of Crime Statistics and Research, July 2010, 5.

³ Jennifer Sanderson, Paul Mazerolle and Travis Anderson-Bond, *Exploring Bail and Remand Experiences for Indigenous Queenslanders*, final report, Griffith University, 2011, 4.

A proper approach to winding up

Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd [2018] QCA 048



The Court of Appeal has handed down its decision in an important case for insolvency practitioners, *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd* [2018] QCA 048.

The case concerned an application for orders under s233 or s461 of the *Corporations Act 2001* (Cth). In that application it was claimed that Asia Pacific Joint Mining (the respondent to the application and the appellant), which was a majority shareholder in a company

called Samgris Resources Pty Ltd, had conducted the affairs of Samgris in a manner that contravened s232 and s461 of the Act.

The trial judge upheld the claims and in doing so held that the relationship between the appellant and the respondents, as shareholders of Samgris, should be characterised as a “quasi-partnership” or “a majority controlled business requiring mutual cooperation and a level of trust”.¹

Against that backdrop, his Honour found that the relationship had irretrievably broken down, that the appellant’s conduct had contravened s232, and that the respondents

were entitled to relief under both s233 and s461.² It was ordered that the company be wound up.

The appeal did not raise any challenge to the trial judge’s findings. Rather, the appellant argued that his Honour erred in determining that the appropriate relief was a winding-up order, rather than an order that the appellant buy the respondents’ shares in Samgris at a price to be determined by the court. In doing so, it was argued, the trial judge had erred in the construction of s467(4) and in his consideration of the interaction between ss232, 233 and 467(4).



by Hamish Clift

This is the first time s467 has been considered by an intermediate appellate court.

Oppressive conduct

The relevant sections of the *Corporations Act* are well known to practitioners. Sections 232 and 233 are concerned with members' remedies for oppressive conduct and empower a court to, in its discretion, make orders in favour of a member against a company in response to oppressive conduct.

Section 467 sits within the winding-up regime in Part 5.4B and empowers a court, also in its discretion, to make orders on a winding-up application. Given the construction issue regarding s467(4), it is useful to set out its full:

- “ (4) Where the application is made by members as contributories on the ground that it is just and equitable that the company should be wound up or that the directors have acted in a manner that appears to be unfair or unjust to other members, the Court, if it is of the opinion that:
- (a) the applicants are entitled to relief either by winding up the company or by some other means; and
 - (b) in the absence of any other remedy it would be just and equitable that the company should be wound up;
- must make a winding up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.”

Justice McMurdo wrote the leading judgment.³ The question of the proper construction of s467(4), in essence concerned the meaning of “unreasonably” in the proviso in that section.

Justice McMurdo wrote: “Undoubtedly it requires an objective assessment of the applicant's preference for a winding up order, rather than a consideration of whether the applicant believes that it has good reason to prefer that outcome. But to what extent,

if at all, is the reasonableness of the applicant's position affected by the consequences for others of a winding up? In particular, in a given case, could those consequences outweigh the applicant's interests in obtaining a winding up where that is the only adequate outcome from its perspective?”⁴

His Honour went on to explain that the reasonableness of the applicant's position is to be assessed by reference to the consequences of the facts and circumstances that form the basis of the application and what is necessary to redress them.

The appellant's complaint in this regard was that the trial judge did not apply McPherson J's statement in *Re Dalkeith Investments Pty Ltd* that “winding up is to be regarded as a remedy of last resort and which ought not to be granted if some other less drastic form of relief is available and appropriate”.⁵ After a short analysis of the language of s467(4) and McPherson J's statement, McMurdo JA accepted the appellant's argument in that regard.⁶

Unfortunately for the appellant, it was a Pyrrhic victory.

Justice McMurdo then considered the appellant's argument that, when s233 is engaged, s467(4) becomes irrelevant.⁷ There were two steps to that argument: first, that the discretion to order a winding up under s233 is unaffected by s467(4) considerations; and second, that (assuming discretion under s233 is broader than that confined by s467(4)) a court may disregard s467(4) even though it is engaged. Neither of those steps was accepted.

Observing that there will often be facts and circumstances by which the court has powers both under s233 and s461, McMurdo JA held that the requirements of s467(4) could not be avoided by a court declaring that it was exercising only the discretion under s233.⁸ Where s467(4) was engaged, it confined the exercise of the court's discretion to grant relief, regardless of whether there was also a claim for relief under s233.⁹

Lastly, the court re-exercised the discretion regarding relief. Fundamental to the

consideration of relief and the reasonableness of the winding up were two facts: first, that the performance of a buy-out was uncertain and the ultimate outcome might still have to be a winding up, in circumstances where a valuation of the shareholding to be valued would be extensive, expensive and time-consuming; and the appellant's admission that it might not perform a buy-out, coupled with no evidence to support that a buy-out order would be complied with.¹⁰ Justice McMurdo therefore held that the respondents were not unreasonable in seeking a winding up. The appeal was dismissed with costs.

Conclusion

The decision provides useful guidance to practitioners regarding the proper approach to seeking orders for a company to be wound up.

In explaining the construction of s467(4) of the *Corporations Act* and its interaction with ss232 and 233, McMurdo JA makes it clear that a winding-up order is a remedy of last resort.¹¹ But that does not mean such relief is unobtainable, especially if an applicant can demonstrate the reasonableness of such relief, measured against its consequences.

Hamish Clift is a Brisbane barrister.

Notes

¹ At [5], referring to [356] of the primary reasons: *Always Resources Holdings Pty Ltd & Anor v Samgrs Resources Pty Ltd & Anor* [2017] QSC 74.

² At [5], referring to [359], [362] and [371] of the primary reasons.

³ Gotterson JA and Jackson J agreed with that judgment. Jackson J added some short reasons regarding the statutory history of s467(4).

⁴ At [45].

⁵ (1984) 9 ACLR 247 at 252.

⁶ At [53].

⁷ At [54] to [64].

⁸ At [62].

⁹ At [63].

¹⁰ At [66] to [73].

¹¹ To use the language of McPherson J in *Re Dalkeith Investments*. For a very recent example of this at a trial level, see Henry J's reasons in *Posgate & Anor v Hanson & Anor* [2018] QSC 51.

Technology for government

Queensland's new ICT contracting framework

The Queensland Government's new information and communications technology (ICT) contracting framework was released in August 2017.

It is available at forgov.qld.gov.au/new-ict-contracting-framework.

The Queensland Information Technology Contracting (QITC) framework is the result of the Government Information Technology Contracting (GITC) framework review and refresh project which commenced in late 2015. It is the product of an extensive government and ICT industry co-design process.

For over 20 years, the utilisation of the GITC framework has been mandatory for agencies when procuring ICT products and services. The QITC framework, which replaced the GITC framework in its entirety, represents a substantial change for agencies and suppliers for the procurement of ICT products and services by Queensland Government.

The QITC framework was designed to make Queensland Government procurement simpler and faster.

IS13 – Procurement and disposal of ICT products and services

In conjunction with the release of the QITC framework, Queensland Government Information Standard IS13 (IS13) was amended.

IS13 now provides that the use of the QITC framework should be the basis for all contracts established for the procurement of "ICT products and/or services".

The Queensland Government Chief Information Office (QGCI) defines ICT products and/or services as follows:

"...generally...all types of technology (data, voice, video, etc.) and associated resources, which relate to the capture, storage, retrieval, transfer, communication or dissemination of information through the use of electronic media. All resources required for the implementation of ICT are encompassed, namely equipment, software, facilities and services, including telecommunications products and services that carry voice and/or data."

A guideline to the amended IS13 is available at qgcio.qld.gov.au/documents/procurement-and-disposal-of-ict-products-and-services-implementation-guideline.

In accordance with the amended IS13, the use of the QITC framework is now mandatory for the procurement of all ICT products and services by Queensland Government departments and other Queensland Government entities which are in scope for applicability of the Queensland Government Enterprise Architecture (QGEA) as specified in the QGCIO 'Applicability of the QGEA' publication available at qgcio.qld.gov.au/information-on/qgea/applicability.

Key differences between GITC and QITC

Contracting options

Under the GITC framework, Queensland Government agencies had the two contracting options shown in table one.

Agencies could also elect to procure ICT products and services under a standing offer arrangement (SOA). All existing SOAs are predominantly on the terms of GITC.

Under the QITC framework, Queensland Government agencies now have the four contracting options shown in table two.

Agencies continue to have the option of procuring ICT products and services under an SOA. The terms of those SOAs will vary. Existing SOAs will be on the terms of GITC. Future SOAs will likely be on the terms of the QITC Comprehensive Contract Conditions. The new ICT SOA conditions, which have been drafted to interoperate with the QITC framework, are available at forgov.qld.gov.au/ict-templates-standing-offer-arrangements.

An SOA should be utilised when an existing SOA is applicable and appropriate.

Table one

Contracting options	Prescribed circumstances for use	
	Contract risk	Contract value
Non-ICT general contract conditions	Low risk	Under \$1 million
Government Information Technology Contracting framework (GITC Version 5.03)	Any risk	Any value

Table two

Contracting options	Recommended circumstances for use	
	Contract risk	Contract value
QITC General Contract Conditions*	Low risk	Under \$1 million
QITC Comprehensive Contract Conditions	Low risk	Over \$1 million
	Moderate risk	Any value
	High risk	Any value
Bespoke contract**	Very high risk	Any value
	Extreme risk	Any value
Supplier's terms and conditions	Low risk	Under \$100,000

* The QITC General Contract Conditions only govern the procurement of hardware, software, cloud services and ICT professional services.

** A bespoke contract will likely be based on the QITC Comprehensive Contract Conditions with necessary amendments to address the unique risks and requirements of the individual procurement.



by Adam Hall

A list of ICT SOAs is available at forgov.qld.gov.au/information-and-communications-technology-ict-arrangements or they can be identified by searching the Queensland Contracts Directory at: qcd.hpw.qld.gov.au/Pages/home.aspx.

Choice of contracting options

The use of the QITC framework is mandatory as prescribed by IS13. However, it is not mandatory for agencies to use a particular contracting option in particular circumstances. The circumstances for use of each contracting option, based on an assessment of risk and value, is a recommendation only and is not binding on agencies.

For example, for ease of contract administration and management, an agency may elect to procure all ICT products and services using the QITC Comprehensive Contract Conditions, irrespective of the risk and value of each individual procurement.

Similarly, an agency might elect to procure ICT products and services under the supplier's terms and conditions, even when the individual procurement is high risk and high value.

Agencies will need to have regard to the recommendations, but they are not mandatory. If an agency uses one of the four contracting options, or procures under a SOA, it will be complying with the QITC framework.

It is strongly recommended that agencies determine the most appropriate contracting option for their circumstances by conducting their own independent risk assessment and determining the estimated contract value of their individual procurement. The QITC framework can then be used to determine which contracting option is recommended for use in those circumstances.

Comparison with GITC contracting options

Most of the contracting options under the QITC framework correspond to an equivalent option under the GITC framework as shown in table three.

The biggest change for agencies is the option to use a supplier's terms and conditions, which was previously not possible under the GITC framework. An agency should only use a supplier's terms and conditions if they consider and accept the legal and commercial risks of doing so.

Comparison of QITC Comprehensive Contract Conditions and GITC Version 5.03

Despite the non-ICT General Contract Conditions being available as an option to agencies since early 2015, the use of GITC Version 5.03 has remained the most popular contracting option.

For agencies and suppliers who ordinarily enter into GITC customer contracts under the GITC framework, the QITC Comprehensive Contract Conditions will be the most familiar contracting option under the QITC framework. The QITC Comprehensive Contract Conditions share a number of similarities with GITC Version 5.03, but there are also some major differences. See table 4.

Table three

QITC framework	GITC framework
QITC General Contract Conditions	Non-ICT General Contract Conditions
QITC Comprehensive Contract Conditions	GITC Version 5.03
Bespoke contract	GITC Version 5.03 with negotiated and agreed amendments and additional terms and conditions
Supplier's terms and conditions	No equivalent

Table four

GITC Version 5.03	QITC Comprehensive Contract Conditions
GITC, Part 1 – Contract authority provisions (head agreement) between the contractor and the contract authority (GITC Services)	No equivalent. There is no head agreement between the supplier and the Queensland Government under the QITC framework
GITC, Part 2 – Customer contract provisions between the contractor and the customer	QITC Comprehensive Contract Conditions between the supplier and the customer
Schedule C1 – General order completed by the contractor and the customer to form a customer contract	QITC Comprehensive Contract Details completed by the supplier and the customer to form a contract
Schedule C2 – Intellectual property ownership	No equivalent schedule. See clause 12 of the QITC Comprehensive Contract Conditions
GITC, Part 3 – Customer contract modules – 15 modules (including two versions of Module 10) to choose from	Modules – Seven modules to choose from
GITC, Part 4 – Customer contract schedules – 19 schedules to choose from	Schedules – 11 schedules to choose from
GITC, Part 5 – User guide	QITC Framework User Guide and Guidance notes for Comprehensive Contract Details and module order forms
Schedule A2(A) – Variations to the agreement (GITC, Parts 1 to 3) agreed between the contractor and the contract authority (GITC Services) and applicable to all customer contracts entered into by the contractor	No equivalent. The standard terms of the QITC Comprehensive Contract Conditions cannot be amended by the supplier and the customer. Any variation of the standard terms will result in the creation of a bespoke contract

Comparison of QITC Comprehensive Contract Conditions and QITC General Contract Conditions

The QITC Comprehensive Contract Conditions are similar to the QITC General Contract Conditions, except that the QITC Comprehensive Contract Conditions:

- include more detailed and in-depth terms and conditions
- cover a broader range of legal issues, for example, resellers, staged implementation and liquidated damages, and
- cover additional ICT products and services, including managed services, telecommunications services and systems integration services.

Agencies will need to ensure that they use the most appropriate standard terms under the QITC framework, taking into consideration their assessment of risk and value, the ICT products and services to be procured, and the required scope of the contract.

Removal of mandatory accreditation and head agreements

In order to be eligible to provide ICT products and services to agencies under GITC, suppliers had to hold:

- industry accreditation (QAssure certification), and
- GITC accreditation.

In accordance with the Queensland Procurement Policy 2017, which commenced on 1 September 2017, and in an attempt to simplify ICT procurement and to reduce barriers to working with the Queensland Government, suppliers will no longer need to hold any form of accreditation to provide ICT products and services to agencies, irrespective of the contract value. The removal

of the requirement to hold accreditation applies to procurements under GITC or QITC.

As suppliers are no longer required to hold accreditation, they will no longer enter into a head agreement with the Queensland Government under which the suppliers agree to provide ICT products and services to agencies on the standard terms of the QITC General or Comprehensive Contract Conditions.

The removal of the supplier's requirement to hold accreditation places greater responsibility on agencies to:

- conduct their own due diligence checks of potential suppliers, and
- ensure that their procurement process clearly specifies the applicable contracting option from the four available options.

Supporting resources

In addition to the contractual documents, the following have been prepared to provide support in understanding and using the QITC framework:

- QITC Framework User Guide
- QITC General Contract Conditions – Guidance notes for completing the contract details
- QITC Comprehensive Contract Conditions – Guidance notes for completing the contract details and module order forms
- Guidelines for using Supplier Terms and Conditions
- Contract Type Decision Tool, and
- QITC Toolkit, including videos and fact sheets.

All of these support resources are available at forgov.qld.gov.au/create-ict-contract.

Existing contracts

The following existing contracts will all continue until expiry or earlier termination:

- GITC customer contracts
- standing offer arrangements
- GITC customer contracts entered into under SOAs, and
- contracts entered into under the non-ICT General Contract Conditions.

What this means for agencies

The QITC framework represents a substantial change for Queensland Government agencies procuring ICT products and services.

Agencies should confirm whether they're bound to use the QITC framework under IS13 and, if so, familiarise themselves with the QITC framework. The QITC framework presents agencies with greater ICT products and services procurement options, but agencies should inform themselves about the risks and benefits of each contracting option to ensure that they are adequately protected.

What this means for suppliers

Suppliers no longer need to hold any form of accreditation or pre-qualification or to enter into any form of head agreement to supply ICT products and services to the Queensland Government.

Queensland Government agencies also now have the option of using supplier's terms and conditions, which was previously not possible under the GITC framework.

This article appears courtesy of the Queensland Law Society Government Lawyers Committee. Adam Hall is a principal lawyer at Crown Law.

The advertisement features the LexiMed logo (three colored dots) and the text 'LexiMed Medicolegal Specialists' in the top left. The background is dark with a geometric pattern. Three overlapping circles contain the following text: 'experienced expert medicolegal consultants' (top right, pink circle), 'comprehensive objective reports' (bottom left, dark blue circle), and 'committed to making a difference' (bottom right, dark blue circle).

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Getting beyond 'the principle' in negotiations

by Bevan Hughes



How often have we heard our clients say, "It's not about the money, it's the principle!"?

Principles are important to people. However, fighting for them comes at a cost. And because principles are less tangible and emotionally-charged, people may find it difficult to realistically assess the value of what they are fighting for and whether the cost is worth it. Your client may *feel* something is worth fighting for "no matter what the cost".

Some things in life may be worth fighting for. This will usually involve a value judgement. It will also come at a cost – in time, money, opportunity and emotion. More often, the *principle* is a barrier to settlement that could otherwise benefit your client. Either way, your job is to help your client quantify both the value and the cost to help your client decide whether the principle really is worth fighting for.

So how can we get beyond 'the principle' in negotiations? How can we help our clients move beyond a principle to move forward with their lives?

What is the principle?

Conflict has recurring themes and many principles will be familiar to you. They include vindication ("I'll show them who is right"), reputation ("They humiliated me"), and legacy ("I want to make sure this doesn't happen again"). Each of these can require strategies beyond the scope of this article, but they can all be broken down by focusing on the clients' needs and interests.

Respectfully asking your client what principle they are fighting for can help in several ways:

- it helps them to pause, think and reflect on exactly what it is they are fighting for (sometimes this alone is sufficient to shift the focus to the 'here and now')
- it opens up discussion about their needs and interests
- it converts the abstract into something more tangible – and therefore negotiable.



Sometimes, God doesn't send you into a battle to win it; he sends you to end it."

– Shannon L. Alder

For example, being 'vindicated' has a different meaning for different people. Is it really not about the money? Most people will get as much satisfaction from a settlement sum as a judgment. Most civil disputes have a quantifiable value that can be converted into time and money, making them more amenable to settlement.

Why is it important?

Asking why a particular principle is important to *them* again allows exploration of *their* underlying needs and interests. This can help create options beyond the 'right and wrong' paradigm to address those needs and interests.

Being 'right' is usually about a need to feel respected or vindicated. How can this be achieved without the risks and costs of a hearing? After all, a hearing risks adverse findings on the public record *forever*. This takes on more significance in the age of digital communications and cyberspace.

If it is about reputation, is it business or personal? Larger entities may have shareholder approval to litigate 'at all costs', as it may be perceived better to defend their reputation and lose, than to settle. Can these perceptions be managed by other means? (For example, properly worded media statements agreed to by all parties, using funds for a public relations campaign rather than ongoing litigation?)

Will protracted litigation/a hearing/ the law uphold the principle?

Principles are inherently idealistic. Ideals create unrealistic expectations. The legal process does not always fulfil these

expectations. Legal process focuses on evidence and law. The law focuses on rights and obligations, which may or may not deliver satisfaction for your client.

Clients need solutions. Using legal process to fight for an intangible principle costs real time and money – with no guarantee of a solution. Reminding clients of this can help refocus them on the real world (their world) and solutions that are real, tangible, and most importantly, target their underlying needs and interests.

If the principle is reputation, is there another way of protecting or restoring their reputation without a hearing? Apologies, statements of regret, acknowledgements and confidentiality clauses can move mountains, cost little and may provide something more than what a hearing can provide. Most court and tribunal orders in civil disputes do not descend into character references but simply order payment of money or rectification. Can your client get that money or rectification from a settlement instead of proceeding to a hearing, with all its risk and cost?

If the principle is taking a stand for others ('crusade principle'), highlight the costs of the crusade for *that individual*. Ask them whether any of the 'others' are willing to contribute to their costs or are even aware of the fight. Remind your client of the wisdom of 'picking your battles'. Are their resources better directed towards more positive and lasting change, for example, lobbying for a change in policy?

Conclusion

Your aim should always be a satisfied client. This means focusing on solutions, rather than having to 'win the battle'. The key is to convert the intangible ('principle') into tangible options (usually involving time and money) to address the underlying needs and interests of your client. With these options, you are well on your way to negotiating a *solution* for your client to end the battle, without having to 'win' it.

Bevan Hughes is a full-time member of the Queensland Civil and Administrative Tribunal. He is a nationally accredited mediator and has mediated over 1000 matters with a 97% settlement rate. The views expressed are those of the author only and are not made on behalf of QCAT.

Out with the trash!

ACCC acts on unfair contract terms

On 12 November 2016 the unfair contract term protections in the Australian Consumer Law were extended to apply to standard form small business contracts where one of the parties is a small business.

The recent Federal Court decision of *ACCC v JJ Richards & Sons Pty Ltd* provides a detailed example of the application of the regime to a small business contract and what factors the courts will look at to determine whether a term in a small business contract is unfair.

Bargaining power rests at the heart of the negotiation of commercial contracts. One party often holds a stronger position of power. Practitioners must be mindful to ensure that such a position of power is not unfairly taken advantage of.

Section 24(1) of the Australian Consumer Law (ACL) provides that a term of a consumer or small business contract (but not the entire contract itself) will be unfair if it:

- a. would cause a significant imbalance in the parties' rights and obligations arising under the contract
- b. is not reasonably necessary to protect the legitimate interests of the stronger party who would be advantaged by the term
- c. would cause detriment to the weaker party if applied or relied upon.

All three elements must be present for a term to be unfair,¹ and subsequently void.² The regime allows the entire contract to continue unless it is unable to operate without the unfair term.

The JJ Richards case

In *ACCC v JJ Richards & Sons Pty Ltd*,³ the Australian Competition and Consumer Commission (ACCC) alleged that eight clauses in customer contracts for waste removal services were unfair because they created a significant imbalance in the rights and obligations between JJ Richards & Sons Pty Ltd (JJ Richards) and its customers.

The provisions were held not to be reasonably necessary to protect JJ Richards' legitimate interests and would, if relied upon, cause significant financial detriment to customers. Such clauses went beyond what was necessary to protect JJ Richards' legitimate commercial interests.

Of the 18 terms contained within JJ Richards' standard form contracts, these eight terms were 'unfair' and subsequently declared void for the following reasons:⁴

1. An automatic renewal provision binding customers to subsequent contracts unless customers cancelled the contract within 30 days before the end of the contractual term could potentially result in customers inadvertently missing the opportunity to terminate their contract. Those customers were then contracted to JJ Richards for extensive periods with no opportunity to exit the contract early. JJ Richards had no positive obligation to provide notice to customers that the expiry of the contract was imminent, and that automatic renewal would occur. JJ Richards would be more likely than small business customers to be aware of when a customer's contract was coming up for renewal.
2. JJ Richards' right to unilaterally increase its prices resulted in customers potentially facing higher costs for the services provided without a corresponding opportunity for the customer to negotiate a lower price or scope of service, or to terminate the contract. This clause would allow JJ Richards to increase its prices simply because it wished to increase its revenue or profitability.
3. JJ Richards' exemption from liability where JJ Richards' performance of services at agreed times was 'prevented or hindered in any way' left customers without any recourse, even if the customer had no control over the prevention or hinderance, or where JJ Richards was better placed than the customer to manage or mitigate the risk. Customers therefore assumed risk for circumstances over which they had no control.
4. The right for JJ Richards to charge customers for services not rendered for any reason unless the customer had first notified JJ Richards allowed JJ Richards to charge customers for events which may have been outside of the customer's control. This could extend to JJ Richards charging a customer even if the reason resulted from the default of JJ Richards, such as JJ Richards attending the premises to perform the service outside of the times agreed with the customer or the failure of JJ Richards' equipment.
5. JJ Richards' exclusive right to remove waste from a customer's premises prevented customers from obtaining services from alternative suppliers, even if the customer was seeking additional services to those provided by JJ Richards. This restraint extended to types of services offered by JJ Richards which were not contained in the customer's original contract. In effect, the customer's general right of contracting with whomever they wanted was restricted as they were prevented from seeking a better price from a third party. JJ Richards did not need an exclusivity clause in relation to waste management in order to conduct its business.
6. The right of JJ Richards to suspend its services, but to continue to charge customers if payment was not made within payment terms, resulted in customers continuing to pay for services without receiving a benefit in exchange. The provision further gave customers no corresponding rights to withhold payment if JJ Richards had failed to provide a service.
7. An unlimited indemnity in favour of JJ Richards meant a customer could be liable even when the loss incurred by JJ Richards was not the fault of the customer and could have been avoided or mitigated by JJ Richards. Customers received no corresponding benefit from this indemnity.
8. A prohibition on customers terminating their contracts if they had payments outstanding entitled JJ Richards to continue charging customers for equipment rental after the termination of the contract. Again, this resulted in customers continuing to pay for services without receiving a corresponding benefit in circumstances in which JJ Richards could recover monies owed through ordinary legal recovery processes, or charge the customer interest.

The court emphasised that the provisions of the contract must be taken into account as a whole when evaluating whether a term was unfair.⁵ In addition, the court was also critical of the legalistic, rather than plain English, language of the drafting, along with the small font size of the problematic terms. The terms were not presented in a way which drew the customer's attention.⁶

The consent orders agreed by JJ Richards included restraints against JJ Richards relying on such terms, publication of a corrective notice, the requirement to provide a copy of the court's orders to all relevant customers



by Luke McKavanagh

and the requirement to establish and implement an ACL compliance program. Be mindful that, if the orders were instead subject to the court's determination, rather than consent orders, the remedies may have been different.

What constitutes an unfair term?

The unfair contract provisions of the ACL will apply to terms of small business contracts if the contract is a standard form contract entered into or renewed on or after 12 November 2016, or to terms of pre-existing contracts varied from that date.

Section 23(4) provides that a small business contract will exist if:

- a. the contract is for, among other things, a supply of goods or services or the grant of an interest in land
- b. at the time of being entered into, at least one party is a business employing less than 20 people (excluding casual employees, unless employed on a regular and systemic basis), and
- c. either the upfront price payable does not exceed \$300,000, or if the duration of the contract exceeds 12 months, the upfront price payable does not exceed \$1,000,000.

Upfront price includes payments, fees and charges payable over the life of the agreement. For example, a lease would include all rent payable for the term of the lease, and a franchise agreement would include both the initial franchise fee paid to the franchisor upon entry into the agreement along with ongoing royalties throughout its term. Calculating the upfront price may therefore involve an element of estimation using the methodology specified under the relevant contract.

Various examples of what may constitute unfair terms are set out under section 25. These include terms enabling one party (but not the other) to:

- a. avoid or limit their obligations under the contract
- b. terminate the contract
- c. penalise the other party for breaching or terminating the contract
- d. vary the contract, such as:
 - the characteristics of goods and services to be performed
 - the upfront price
 - the term, by extension or renewal.

The JJ Richards case is not the first of its kind. The ACCC took proceedings against Chrisco Hampers Pty Ltd, which offered contracts to customers enabling hampers to be paid off gradually via direct debit. Customers would then receive their hampers at Christmas.

In 2015,⁷ the ACCC successfully argued that certain contractual provisions contained a significant imbalance of rights. Unless customers ticked a box (in fine print) to elect otherwise, the contracts automatically rolled over annually, leaving customers contractually bound to another year's worth of direct debits.

Takeaways

The JJ Richards case serves as a clear example of how the ACCC has sought to use its powers to protect small businesses where the ACCC considers the small business contracts contain unfair contract terms. JJ Richards identified that at that time it had about 26,000 small business contracts with its small business customers. The case also demonstrates how difficult it is for a contracting party to know at the time the contract is entered into whether the other contracting party is in fact a small business.

The approach taken by the ACCC was to seek relief to protect more than one small business affected by the unfair terms. That approach should, however, be contrasted against the way courts and state tribunals have sought to apply the unfair contract term regime between the parties in business-to-business and business-to-consumer cases.⁸

In most cases application of the regime is one of a number of grounds for which relief is sought. Some of those cases involve debt recovery proceedings in which the small business alleges the term is unfair to avoid having to pay the debt. The cases demonstrate that the regime may also be used "as a shield, rather than a sword",⁹ and in many cases even if the term is considered to be unfair, the relief obtained by an applicant may not necessarily be relief that they originally sought.¹⁰

Many commercial contracts used by small businesses will be captured by the unfair contract provisions of the ACL. These may include business sale contracts, leases and franchise agreements which are often offered on a 'take it or leave it' basis, regardless of whether one party holds a traditional position of power. Contracts that have been subject

to genuine negotiation will be less likely to be regarded as unfair.¹¹ If a contract satisfies the criteria of s23(4) and one party is unwilling to negotiate, the contract will be open to scrutiny.

Franchisors in particular should pay careful attention to the provisions of their standard-form franchise agreements. The provisions of the ACL amplify the 2015 amendments to the Franchising Code of Conduct,¹² which codified the common law principles of good faith. If a franchisor or franchisee were to act on an 'unfair' contract term, they could be accused by their counterpart of acting in bad faith.

Businesses which fail to review and adjust their small business contracts for this regime also are at risk of engaging in misleading and deceptive conduct.

There may still be freedom to enter into a contract containing whatever terms you want, but there will not be freedom to enforce those terms if they are unfair.

This article appears courtesy of the Queensland Law Society Franchising Law Committee. Luke McKavanagh is a lawyer at Rouse Lawyers and a member of the committee.

Notes

¹ *ACCC v Chrisco Hampers Australia Ltd* [2015] FCA 1204 at [43].

² Pursuant to s23 ACL.

³ *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224.

⁴ *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 at [56] to [58].

⁵ *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 at [63].

⁶ *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 at [60]; *ACCC v Chrisco Hampers Australia Ltd* [2015] FCA 1204 at [89].

⁷ *ACCC v Chrisco Hampers Australia Ltd* [2015] FCA 1204.

⁸ See *Sanctuary Cove Golf Club And Country Club Pty Ltd v Machon* [2017] QCAT 271; *Abraham v Gogetta Equipment Funding Pty Ltd* [2017] NSWCATCD 22.

⁹ *Sanctuary Cove Golf Club And Country Club Pty Ltd v Machon* [2017] QCAT 271 at [53].

¹⁰ In *Abraham v Gogetta Equipment Funding Pty Ltd* [2017] NSWCATCD 22 the tribunal held the warranty term was unfair, however the applicant relied on a different term to recover the debt that was owed.

¹¹ *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd (Civil Claims)* [2008] VCAT 482 at [66].

¹² *Competition and Consumer (Industry Codes-Franchising) Regulation 2014* s6.

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 - photographs
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 - admission certificates
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- current statistics on the representation of women at the Bar and on the Bench
- recommended reading about female lawyers and leaders in the profession, selected from the library's monographs collection.

2018 Supreme Court of Queensland Oration

Criticism of the courts and judges: informed criticism and otherwise

Presented by Chief Justice Geoffrey Ma Tao-li GBM, Chief Justice of the Hong Kong Court of Final Appeal

The freedom of speech and of the press are proven precious rights, not only in Hong Kong but throughout common law jurisdictions. No institution, especially public ones, should be exempt from either adverse comment or criticism. However, there has been a noticeable trend that criticism of the work of the courts and of judges has become much less restrained than before, even sometimes to the point of being personal and at times abusive. Ought we be able to brush such criticisms aside or can more be done to enable criticisms to be based on commentators being better informed? What does 'being better informed' actually mean?

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Be clear as to grounds to terminate a retainer

by Stafford Shepherd



In *The Trust Company (PTAL) Pty Ltd v Romeo (No.4)*,¹ Schmidt J had to consider a solicitor's application for leave to file a notice of ceasing to act and to withdraw from the proceedings.

The cost agreement entitled the solicitor to file a notice of ceasing to act if the client either:

- unreasonably refused to act in accordance with the solicitor's advice, or
- an amount in excess of \$1000 in respect of any account was outstanding for more than 30 days, or
- the client didn't, within seven days, comply with a request to pay a disbursement or a prepayment.

The solicitor at the time of making the application was owed in excess of \$100,000 in legal costs and disbursements in the proceedings.

In accordance with the cost agreement, the solicitor filed and served a notice of intention to file a notice of ceasing to act on number of occasions.

After these notices were served the solicitor and client agreed that he would continue to act for the client provided that the sum of \$105,000 (\$80,000 for counsel and \$25,000 for the firm to conduct the hearing of the proceedings) be deposited into the firm's trust account by a specified date. These funds were not received. Despite further negotiations for provision of funds for the conduct of the proceedings, the client failed to pay and this led to the services of the various notices.

The solicitor finally, on a specified date, gave certain advice to the client which the client refused to act on; at the same time the client had still not honoured prior representations that the solicitor would be put in funds. The solicitor served a final notice of ceasing to act and sent both a letter and email to the client to explain why he proposed to cease to act.

The client opposed the application. He contended that he should not be left unrepresented when he had been paying the solicitor \$3000 a week, money which ought not to have been taken if the solicitor intended to withdraw. The solicitor's position was that these amounts were paid to pay off what was owing in respect of other matters in which he acted for the client.

Justice Schmidt noted "that a client's failure to provide money for costs and disbursements can be an appropriate basis upon which the leave which is sought may be granted".²

In *Super 1000 Pty Ltd v Pacific General Services Ltd*,³ Gzell J held that:

"... a failure by a client to provide funds to cover disbursements is good cause for termination of a retainer (*Wadsworth v Marshall* (1832) 2 Cr&J 665 (149 ER 2 79), *Robins v Goldingham* (1872) LR 13 Eq 440, *Warrington v McMurray* [1937] 2 All ER 562...)"

In *Wadsworth v Marshall*,⁴ Bayley B said:

"[a solicitor]⁵ has a right to call upon the client from time to time, on reasonable notice to make advances, and, for the purposes of taking the cause to trial, to supply him with adequate funding [to pay] the expense out of pocket."

In *Super 1000 Pty Ltd*⁶ Gzell J also noted that *Ritchie's Uniform Civil Procedure New South Wales* stated that "where a solicitor is prevented by the client from properly carrying out the duties required by the retainer good cause for termination is established (*Underwood, Son & Piper v Lewis* (1894) 2 QB 306 at 314) (*Underwood*).

In *Underwood*⁷ A. L. Smith L. J. said:

"... it is clear that the solicitor may be placed in such a position by the client as to absolve him from further performance...the client may put the solicitor in such a position as to entitle him to decline to proceed; for instance, if the solicitor asks for necessary funds for disbursements, and such funds are refused by the client, the solicitor is not bound to go on...the solicitor is not bound to go on acting for the client if the client insists on some step being taken which the solicitor knows to be dishonourable...[or] when a solicitor is in a position to show that the client has hindered and prevented him from continuing to act as a solicitor should act, then upon notice he should decline to act further..."

Schmidt J held that the solicitor was justified in ceasing to act. The evidence established ongoing attempts to secure necessary funds and that he was not dilatory.

Matters to consider:

1. Review cost agreements to expressly provide for a right to terminate where:
 - the client has, within a specified time, failed to comply with a request to pay a disbursement or provide adequate advances for disbursements and out-of-pocket expenses

- a client insists on some step being taken which in the solicitor's opinion is dishonourable
 - the client hinders and prevents the solicitor from continuing to act as he or she should act or unreasonably refuses to act in accordance with your advice.
2. Do not be dilatory in your pursuit of the client putting you in funds to cover future costs and disbursements.
 3. Act promptly on breaches and give clear notice (remember, a reasonable time is required to be given).⁸
 4. Do not delay in seeking to extract the necessary funds, as dilatory behaviour may lead the court to conclude that reasonable notice has not been given.

In *Stark v Dennett*¹⁰ Justice Keane reminded us that, notwithstanding that we may regard a client "as a demanding and even ungrateful client" and this indicates a client's expression "of a want of confidence in" our advice, we must, at an early stage require the client "to state clearly, once and for all whether" the client wishes to continue to retain us in the matter.

We must make it "clear that continuation of the client's expressions of discontent will be treated by us as manifesting a breakdown of the trust and confidence, so essential, to a continuation of the retainer". In other words, we must bring matters to a head in a clear and unequivocal manner. We must always remember that, if we wish to rely on a just cause to terminate, we are also required to do so on reasonable notice.¹¹

For more information on termination of a retainer, please refer to Guidance Statement No.8 – Termination of a retainer, published 31 August 2017.

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

Notes

¹ [2013] NSWSC 1447.

² At [8].

³ [2007] NSWSC 171.

⁴ (1832) 2 Cr&J 665 (149 ER 279).

⁵ Words inserted.

⁶ *Super 1000 Pty Ltd* at [14].

⁷ *Underwood* at p314.

⁸ Rule 13.1.3 Australian Solicitors Conduct Rules 2012.

¹⁰ [2008] 2 Qd R 72.

¹¹ *Ibid* generally [46].

Simple tips for a successful secondment

Starting a secondment can be a daunting prospect at first.

In reality, secondments are fantastic opportunities for lawyers to gain exposure to key clients and experience the everyday challenges faced by in-house practitioners.

For early career lawyers, secondments offer unique insights they can take with them throughout their careers. This article discusses five key ways to make the most of a secondment.

1. Do your research

Before you start your secondment, it's important to find out as much as possible about the client and their business. You will be of much more assistance to the client from the beginning if you're not spending the first week trying to understand the basics of the business.

- Review the client's website. Find out what legal structure the client uses. Is the client a listed company, a proprietary company, a government-owned corporation or a statutory body? Is there an organisational chart online you can take with you? Who are your client's key customers or clients? What are your client's values?
- Find out as much as you can about the client's industry. What reports about this industry have recently been in the news? Is there any industry-specific terminology that you need to be aware of?
- If the client is in the private sector, consider whether there is particular legislation that affects their business. If the client is a government body, review its establishing legislation and general sources of public entity governance.

- Talk to colleagues at your firm who have previously worked with the client. Ask them if the client has any preferences or particular requirements in relation to advice or documents.
- See if you can find the team members you will be working with on LinkedIn. Find out what skills they bring to the client and look for opportunities if there are skill gaps you can fill.

If you take the time to prepare and find out as much about the client as possible, you'll be able to avoid obvious errors and quickly jump into the seconded role.

2. Get involved and look for opportunities

For the period that you are on secondment, treat the client as your employer.

If you're able to, attend social events hosted by the client and get involved with any extracurricular activities that the client offers, such as sporting teams or interest groups.

It's also important to look for opportunities for which you and your firm can add value while you're on secondment. For example:

- Does the client often have to deal with property issues? If so, connect the client's legal team to your firm's real estate team.
- Does the HR team often ask for legal advice? If so, offer to see if your firm's workplace team can deliver some free training.
- Have a look at the precedents that the client is using. See if you can add value to the client by updating them.

Take the time to invest in the relationship to ensure that you are front of mind the next time the client needs legal services.

3. Get to know your client

Anyone who has been on a secondment will tell you that the experience is an invaluable way to gain insight into the internal processes of a key client.

Obviously your first consideration needs to be your confidentiality obligations and other duties to your client. However, this doesn't preclude you from gaining general insight into the client, the legal team and its business. Ask the general counsel why they like to instruct your firm. Ask them what they don't like about your firm. Ask the legal team about what annoys them when dealing with external lawyers or for tips on how you can better service them. If the opportunities arise, try to sit in on meetings between the legal team and other business units.

The more you can find out about the client and its challenges, the better you will be able to service them, both while you are on secondment and afterwards.

4. Don't forget your firm

It can sometimes be difficult to stay connected with your firm and your colleagues while you're on secondment, particularly if the secondment is for an extended period of time or if the client's office isn't close to your firm's office.

If the client is receptive to it, try to go back to your firm periodically for relevant CLE sessions or meetings. It's also important to continue to attend firm social events when you can to catch up with colleagues and find out about important updates.

Should a secondment opportunity come your way, it is critical that you make the most of it. **Aron Gibbs** offers some essential tips to ensure your success.



Returning to your firm after a long secondment can seem like starting a new job all over again. By keeping in contact with your colleagues, you'll be able to ensure a smooth transition back to private practice.

5. Keep in touch

Once your secondment ends, it can be easy to get back into the routine and forget you ever worked away from your firm. Don't do this! There are some simple ways to maintain your new relationships.

- Organise to catch up for coffee or lunch every few months. If this is set up as a recurring appointment, you're much more likely to actually get together. Make sure you check in often and ask the team about updates and any changes to the business.

- Alert your contacts to changes in the law that may affect the client and their business. This is easily done as part of your review of your current awareness feeds. Send an email to your contacts linking them to legislative updates or interesting articles relevant to them.
- The next time your firm hosts a client event or a relevant CLE session, invite your contacts and encourage them to circulate the invitation with others in the client's business that might be interested. At the event, be sure to be a good host and introduce your contacts to key people at your firm.

The relationships you've made with the legal team and the wider business are invaluable. If you can maintain these relationships, you will be first in mind when the client next needs legal assistance.

In your early career, you're unlikely to get a better opportunity to quickly establish a relationship with a client than when you're on a secondment. By implementing these tips you will be well on the way to ensuring that your secondment is a success.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au). Aron Gibbs is a lawyer at Clayton Utz and the chair of the QLS Early Career Lawyers Committee.

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Legal professional privilege

Why and when communications are protected

Legal professional privilege is a rule of substantive law that prevents confidential communications between a lawyer and client, and sometimes with a third party, from being disclosed without the client's consent.

It is necessary that the communications were made for the dominant purpose of:

- a. giving or obtaining legal advice, or
- b. providing legal services in respect of existing or reasonably contemplated litigation.¹

The former is often described as advice privilege and the latter as litigation privilege, although they have the same legal effect.²

The rule serves the administration of justice by encouraging full and frank communication between lawyer and client³ and proper trial preparation in an adversarial system.⁴ It is now largely reflected in the uniform Evidence Acts in some jurisdictions in Australia, including the Commonwealth, where it is known as client legal privilege.⁵

Legal professional privilege is a fundamental common law right.⁶ As such, it may protect privileged communications not just from disclosure or production in courts and tribunals, but also during investigations or tax assessments, depending on the relevant statutory powers in question.⁷

Duty to claim privilege

Lawyers need to take care when dealing with issues involving privilege.

Any conduct inconsistent with maintaining the privilege may be considered an implied waiver if it would be unfair to maintain the privilege in the circumstances⁸ (subject to certain exceptions, such as having a joint or common interest).

Conduct that may raise questions of implied waiver include giving a summary of legal advice to the media, putting the contents of privileged communication in issue through the client's state of mind or inadvertent disclosure. While the High Court recently held in the case of the latter that "the court should ordinarily permit the correction of that mistake and

order the return of the document", this is by no means the assured result in every case.⁹

In addition, as with other forms of privilege, legal professional privilege has no effect unless and until it is claimed by or on behalf of the client at the appropriate time (that is, before the privileged communications are disclosed). Lawyers therefore have a duty, not simply to refrain from disclosing communications to which a valid claim of privilege has been made, but to "ensure that a valid claim for privilege is not lost" by failing to claim it at the appropriate time.¹⁰

When faced with an urgent situation for which there is no time to seek specific instructions (including after a retainer has ended), lawyers may therefore need to make a claim for privilege even when they have no specific instructions to do so.

Scope of legal professional privilege at common law

The courts have emphasised that legal professional privilege at common law will protect a communication between a lawyer and client, or between such a party and a third party, if it was confidential and made for the dominant purpose described above, regardless of the ultimate use to which it was put.

It is important to remember, however, that legal professional privilege protects the oral or written communication itself, not a piece of paper on which it may be recorded. Where the same document includes both privileged and non-privileged communications, the non-privileged communications may still need to be disclosed, depending on the relevant procedure.¹¹

Confidentiality

The requirement that the communication be confidential should not be overlooked. The communication will not be privileged unless the communication was made in confidence or based on material obtained as a matter of confidence.¹²

For example, a communication in a file note made by a lawyer about discussions with the other side would not be privileged, as it is inherently non-confidential.¹³ Trust account ledgers, back sheets and fee notes face the

same issue.¹⁴ Similarly, a communication in the final version of an affidavit or pleading which is to be filed and served may not be privileged (even if for some reason it was never filed).¹⁵

This has a great deal of relevance in the world of modern litigation. Lawyers would be wise, when circulating otherwise confidential material, to do so only on express terms of confidentiality, lest the privilege be lost.

Dominant purpose

Even confidential communications will not be privileged, however, unless they are made for the dominant purpose of giving or obtaining legal advice, or for the provision of legal services in respect of existing or reasonably contemplated litigation.

The dominant purpose in this respect is said to be the ruling, prevailing, paramount or most influential purpose.¹⁶ It is a question of fact to be determined objectively¹⁷ (although subjective intention will be relevant and may be decisive).¹⁸ What matters is the dominant purpose in making (that is, creating) the communication, not in its eventual use.

For example, a communication that was created for a managerial purpose (such as those in a performance review or management report) is not privileged, even if it is later provided to a lawyer or annexed to an otherwise privileged proof of evidence, because the communication was not created for a relevant dominant purpose. However, if a copy of such a document was annotated with comments made for the dominant purpose of assisting a lawyer preparing for litigation, the comments on the copy may be privileged even if the original is not.¹⁹

In past cases, legal professional privilege has been held to cover not just a client's instructions or a brief to counsel (being confidential communications for the dominant purpose of obtaining legal advice or preparing for litigation), but also:²⁰

- drafts of both privileged or unprivileged documents, if the draft was intended to remain confidential and was created with the relevant dominant purpose – for example, draft letters, advices, proofs of evidence, affidavits or pleadings

Kylie Downes QC and Susan Forder explain the purpose and parameters of legal professional privilege.



- file notes, research memoranda, summaries, chronologies and any other confidential document recording the detail of, or basis for, such privileged communications (such as the exact copy of a privileged communication), even if they were never actually communicated (on the basis that disclosure of such material will tend to reveal the content of the privileged communication or would undermine the purpose of the privilege)²¹
- any confidential communications passing between the client's lawyers (such as between a solicitor and partner or a solicitor and town agent), if the communications are made for the relevant dominant purpose
- the client's knowledge, information and belief derived from such privileged communications.

The privilege will not, however, protect a communication the object of which is to further an unlawful purpose.²²

Kylie Downes QC is a Brisbane barrister and member of the Proctor Editorial Committee. Susan Forder is a Brisbane barrister.

Notes

- ¹ *Daniels Corporations International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 at 552 [9]; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 64 [35], 73 [61]-[62], 107 [173].
- ² *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [50].
- ³ *Baker v Campbell* (1983) 153 CLR 52 at 63, 93-95, 115-116; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 480, 487; *Esso Australia Resources Ltd v Federal Commissioner of Taxation*, supra, at 64 [35].
- ⁴ *Mann v Carnell* (1999) 201 CLR 1 at 36 [114].
- ⁵ *Evidence Act 1995* (Cth), ss117-126.
- ⁶ *Daniels Corporations International Pty Ltd v Australian Competition & Consumer Commission*, supra, at 552-553 [10]-[11].
- ⁷ *Ibid*, citing *Baker v Campbell*, supra.
- ⁸ *Attorney-General (NT) v Maurice*, supra, at 487-488, 497-499; *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd & Ors* (2013) 250 CLR 303 at 319 [45], 320 [49].
- ⁹ *Ibid* at 319-320 [45]-[49], 324 [61]-[63].
- ¹⁰ *Kang v Kwan* [2001] NSWSC 698 at [30]; *State Drug Crime Commission v Larsson* (1991) 53 A Crim R 131 at 134.
- ¹¹ The Federal Court, for example, does not generally permit redaction of documents during the discovery process. In those circumstances, a claim for privilege may therefore need to be made over the whole document, even where the document contains some non-privileged material.

- ¹² *Attorney-General (NT) v Maurice*, supra, at 487, 490; *Ritz Hotel Ltd v Charles of the Ritz Ltd (No.22)* (1988) 14 NSWLR 132 at 133; *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No.2)* (2014) 312 ALR 403 at 413 [47].
- ¹³ *Raunio v Hills* (2001) 116 FCR 518 at 522 [13]-[14].
- ¹⁴ *Lake Cumbeline Pty Ltd v Effem Foods Pty Ltd* (1994) 126 ALR 58 at 68.
- ¹⁵ *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547 at 562-563 [64]; *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No.2)*, supra, at 413 [46].
- ¹⁶ *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd* (2005) 225 ALR 266 at 279 [30](7) and cases cited therein.
- ¹⁷ *Ibid* at 278 [30](3) and cases cited therein.
- ¹⁸ *Esso Australia Resources Ltd v Federal Commissioner of Taxation*, supra, at 107 [172].
- ¹⁹ *Federal Commissioner of Taxation v Pratt Holdings Pty Ltd*, supra, at 279 [30](6) and cases cited therein.
- ²⁰ This list is taken from the non-exhaustive summary given in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245-246.
- ²¹ *AWB Ltd v Cole (No.5)* (2006) 155 FCR 30 at 46 [44] (8) and cases cited therein.
- ²² *R v Bell*; *ex parte Lees* (1980) 146 CLR 141 at 161-162.

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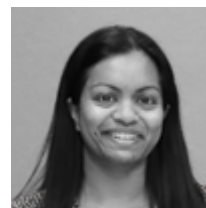


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Communities, collaboration and collegiality

Surviving rural and regional practice

by Sheila Kushe and Sarah-Elke Kraal

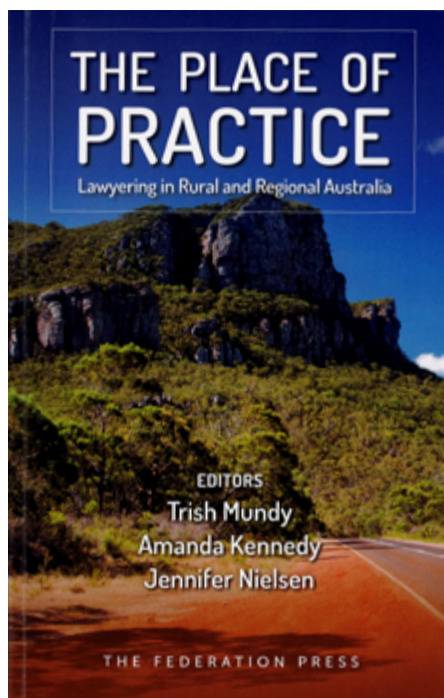


Title: *The Place of Practice: Lawyering in Rural and Regional Australia*
Editors: Trish Mundy, Amanda Kennedy and Jennifer Nielsen
Publisher: The Federation Press 2017
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RRP: \$89.95

What does it mean to practise as a lawyer in a rural or regional community in Australia, and how might the uniqueness of the rural and regional context impact on the legal practice experience?¹

These are the questions *The Place of Practice: Lawyering in Rural and Regional Australia* seeks to answer as it treats readers to a tour across some of Australia's toughest terrains and great, winding landscapes, and oceanic vistas.

Using multiple perspectives and immensely readable insights, this book expertly uses a mere 268 pages to provide insight into the reality of practising in rural and regional Australia. With a course set specifically for practice in rural and regional communities (versus those classified as 'remote'), *The Place of Practice* explores both the benefits and challenges encountered by rural and regional practitioners. Areas covered include the female lawyer experience, the very real ethical danger of conflicts of interest for one-lawyer communities, entrepreneurialism and innovation in rural and regional practice, and tackling access to justice issues for diverse client groups.



If that wasn't enough to pack into your trip, you will also observe the unique professional and interpersonal skillset practitioners in rural and regional communities need in order to thrive in the harsh practising climate, and finish with a sojourn into self-care for those carrying the heavy burden of being justice resources for their community. Here you explore the risks associated with burnout and vicarious trauma, and also learn valuable habits to support wellness: fantastic lessons for us all.

To that point, it is heartening to discover that, no matter where you practise, isolation is a key risk for our profession. *The Place of Practice* provides valuable lessons from the perspectives of our legal frontiers; not the least of which is that creating and maintaining networks has never been more important.

Whether it is through your local district law association, Queensland Law Society, or even extending your professional network circles to encompass other professions (accountants, engineers and doctors, for example), your network is a support system that will carry you through the good times and the bad. Our rural and regional colleagues are learning to rely on this wellness strategy to strengthen their communities, and increase collaboration and collegiality amongst their local professional network. A timely reminder for those of us in the big smoke bemoaning a lack of professional collegiality, perhaps?

Written by an impressive roster of contributors boasting extensive academic, industry and regional experience, *The Place of Practice* provides readers with an excellent introduction to the rural and regional practice experience. In many ways, the authors have created *The Place of Practice* as a resource to attract lawyers to, and remain in practice in, rural and regional Australia. In many other ways, curious armchair explorers can use it as a voyeuristic look into a side of practice so foreign to the concrete jungle.

If you have ever considered a sea or tree change – but didn't know what to expect – or are keen to pop on the Akubra and experience the human side of legal practice, this is your chance to travel far and wide across the many rural and regional centres that make up Australian lawyering.

Rating: 5

Sheila Kushe is a Queensland Law Society legal professional development executive and solicitor, and a member of the QLS Wellbeing Working Group. Sarah-Elke Kraal is a QLS legal professional development executive and solicitor.

Note

¹ Trish Mundy, Amanda Kennedy and Jennifer Nielsen, *The Place of Practice: Lawyering in Rural and Regional Australia* (The Federation Press, 2017) 1.

Wills, capacity and life events

with Christine Smyth



Wills – QLS advocacy on the world stage

Last year, *Re Nichol* [2017] QSC 220 captured legal and media attention because of its modern circumstance.

The Supreme Court admitted to probate a will in the form of an unsent text message, and was able to do so under the dispensing provision – section 18 *Succession Act 1981*.

Our dispensing powers have now hit the international stage with the Law Commission of England and Wales (LCEW) undertaking a review of a broad range of issues around will-making with a special focus on a proposal to introduce a similar provision there. The dispensing powers are reported to be one of the most “hotly debated topics to emerge from [their] consultation”.¹

As a result, the LCEW recently wrote to QLS seeking its views on the operation of the dispensing provisions in Queensland. The *STEP Journal* reports² that the assessments from those consultations will inform “analysis of whether worries about a flood of litigation are well founded”.³

Another area under review by the LCEW is electronic wills. Readers will recall that in my capacity as deputy president I convened a Wills Register Working Group (WRWG) to investigate the viability of an electronic wills register in Queensland. The WRWG delivered its report to QLS last year, and in my capacity as president I provided the report to the Attorney-General for her consideration.

In a watch-this-space moment, the LCEW has also investigated the “possibility of wills being executed and stored electronically”.⁴ It has advanced to the stage of proposing to the Lord Chancellor the establishment of a “power to make provision for electronic will-making in secondary legislation, but only when there is sufficient protection for testators against fraud and influence”.⁵

Life events – Review of *Births, Deaths and Marriages Registration Act 2003*

As part of its ongoing review of life event certificates,⁶ the State Government is considering the inclusion of a non-specific category of sex on Queensland birth certificates

and amendment to the *Births, Deaths and Marriages Registration Act 2003 (Qld)* to permit same-sex parents to choose how they are recorded on the birth or adoption register.

The State of Queensland (Department of Justice and Attorney-General) has published its ‘Registering life events: Recognising sex and gender diversity and same-sex families’ report,⁷ and the QLS advocacy team, through the assistance of QLS Family Law and Health and Disability Law Committees, provided a submission on the QLS position on review of these descriptors. Consultation is ongoing.⁸

Capacity – ‘A delusion is something that people believe in despite a total lack of evidence.’⁹

Case law is also modernising the law of wills, with *Carr v Homersham* [2018] NSWCA 65 reviewing the test for capacity.

It had a number of sensational elements, including a dispute between the testator and her niece in regard to a discussion they had over euthanasia, as well as the testator having mild dementia and her ultimate decision to leave her substantial estate to her carer, excluding her niece (the challenger) and the primary beneficiary of a prior will.

The niece challenged the grant of probate of the 2004 will, seeking to propound the 2001 will. She was successful in the first instance, however the primary decision was overturned on appeal. While a majority decision, there were three separate reasons because the court disagreed on the conclusions of the primary judge:¹⁰ “[T]he whole case turned upon whether the primary reason for excluding her niece was a false belief as to the niece’s conduct.”¹¹

The analysis considered the elements of testamentary capacity with a particular focus on the element of insane delusions as a factor, giving it a modern makeover. The court finessed the *Banks v Goodfellow* test, observing that it has three affirmative elements:

[5] “1. the capacity to understand the nature of the act of making a will and its effects; 2. understanding the extent of the property the subject of the will, and 3. the capacity to comprehend moral claims of potential beneficiaries.”

While qualifying that the negative elements: [6] “The negative elements, commonly identified in archaic language, do no more than identify the conditions which might be understood to interfere with full testamentary capacity. They include ‘disorders of the mind’ and ‘insane delusions’. Too much attention should not be paid to the precise language of the negative elements; importantly, although they tend to be expressed in general terms, they are only relevant to the extent that they are shown to interfere with the testator’s normal capacity for decision-making.”

Further identifying at [14] that “A false belief, by itself, is not sufficient to warrant a conclusion that the testator lacked testamentary capacity. The case-law affirms that the false belief must be in the nature of a ‘delusion’ and be of a kind to indicate unsoundness of mind... The scope for difference of opinion about the character of other people, in particular, is so wide that great care needs to be exercised before concluding that a harsh or unreasonable judgment of another person amounts to a delusion.”¹²

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

Notes

- ¹ See page 65 of the *STEP Journal*, March 2018, ‘Time Will Tell’.
- ² March edition, volume 26 Issue 2, pages 64 to 65.
- ³ *Ibid*, 65.
- ⁴ *Ibid*, 65.
- ⁵ *Ibid*, 65.
- ⁶ justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-births-deaths-and-marriages-registration-act-2003.
- ⁷ publications.qld.gov.au/dataset/review-of-the-births-deaths-and-marriages-registration-act-2003-qld/resource/1e272ba5-396a-4a19-a992-25697393fae2.
- ⁸ Thanks to QLS policy lawyer Vanessa Krulin, Succession Law Committee chair Gary Lanham and Wills Register Working Group chair Bryan Mitchel for their assistance in the provision of information and advice for this column.
- ⁹ Richard Dawkins.
- ¹⁰ At [128].
- ¹¹ At [13].
- ¹² Citing in *Re Estate of Griffith (dec’d)*; *Easter v Griffith* [7] by Gleeson CJ, with whom Handley JA agreed.

Artificial intelligence and legal liability

What happens when AI goes wrong?

Artificial intelligence (AI) is the ability of machines to imitate human decision-making and behaviour.¹

AI can thus take many forms, with varying levels of sophistication. AI might imitate intelligent human behaviour by simply executing a series of preordained, prioritised protocols. More advanced AI might be self-learning, possessing the ability to rewrite its own code in response to its own experiences (self-learning AI).

While we are yet to develop sentient AI (strong AI) that can pass the famous Turing test (AI that can exhibit intelligent behaviour indistinguishable from that of a human),² self-learning AI itself still possesses fantastic and terrifying potential.

The capacity to self-learn enables such AI to evolve beyond what it was initially programmed to be. In one documented case, programmers of self-learning AI admitted to not understanding the 'mysterious mind' of the machine that they themselves had created.³

These self-learning characteristics pose interesting and difficult questions for the law. In particular, who is legally liable when self-learning AI goes wrong? The programmers? The users? Or even the AI itself?

This article introduces this AI liability conundrum, and then offers some solutions to it.

The AI liability conundrum

In one sense, the law is about attributing fault. The law attributes fault through legal mechanisms such as causation and foreseeability. In tort, for example, an individual is only liable for negligence if they caused foreseeable harm.⁴

This in mind, can it really be said that a programmer has been negligent or has caused foreseeable harm when self-learning AI learns to act in a way that it was not intended to? When it becomes effectively autonomous?

Problematically, what AI learns and becomes is unpredictable because it is a function of what AI experiences, which is not necessarily controlled by its programmers.⁵ Consider two

identically programmed driverless cars, C_1 and C_2 , that are released onto the road at T_0 . One week later, at T_1 , C_1 has been involved in a wet weather accident and so now drives five kilometres under the speed limit during wet weather, but C_2 , having experienced no such accident, does not.

What if, for example, AI-controlled traffic lights, programmed to ensure efficient traffic flow, learned that they could manage traffic more efficiently by changing to a green light one second instead of three seconds after the pedestrian crossing lights turned red, but that this caused more accidents.

The AI-controlled lights were not programmed to cause more accidents. It is therefore difficult to see how those accidents were foreseeable or caused by the programmers and, if there were no relevant identifiable faults in the programming of the AI, how those programmers could be said to have been negligent.⁶

So, what happens when AI goes wrong?

Some solutions

There are a number of possible solutions to the AI liability conundrum.

First, it has been suggested that AI programmers could be held liable on a novel agency basis.⁷ Current agency law would not apply when agent AI begins to make its own decisions and goes rogue, it exceeds its authority or severs the agency relationship to its programmer principal.⁸ But perhaps the authority given by a programmer to AI could be construed as an authority to fully explore and utilise its deep learning algorithms, irrespective of the consequences?

Second, AI programmers could be held strictly liable. This is a simple solution, but it risks suppressing our exploration of the awesome potential of AI by deterring would-be programmers for fear of being held strictly liable.⁹ The law should be mindful of this. Strict liability makes sense in a paradigm manufacturer-and-consumer compensation case, but self-learning AI is unique. What is more, a strict liability model does not assist in the case where self-learning AI commits a criminal offence because a well-intentioned programmer will always lack *mens rea*.

Third, no one could be held liable. Instead, parties who suffer civil damages caused by AI could be compensated from a 'claims pool' maintained by the AI industry.¹⁰ AI programmers and manufacturers could be required to pay a levy to obtain a certificate from a 'Turing Registry',¹¹ which allows them to sell their product on the market.¹² This levy would essentially be anticipatory consideration for and proportional to the risk that the AI will cause harm. A similar no-fault system, albeit not in an AI context, already exists in New Zealand under the *Accident Compensation Act 2001*, which establishes a claims pool to settle all forms of personal injury accidents.¹³

Finally, could it be possible to hold the AI itself liable? In *United States v Athlone Industries, Inc.*, the Court of Appeals for the Third Circuit stated that "robots cannot be sued",¹⁴ but did the court countenance the self-learning AI that we have today? Practically, AI (probably) will not ever have currency, so to hold AI liable is probably not going to assist in the resolution of civil cases requiring the payment of compensation.

In the context of AI crime, our criminal justice system currently seems irreconcilable with prosecuting AI; from incompatibilities associated with courtroom procedure¹⁵ and punishment to deterrence and *mens rea*. More generally, there are complicated philosophical issues associated with imbuing '*machina sapiens*' with legal personhood and holding 'them' liable under the law.¹⁶

Conclusion

The exponential rate at which AI technologies are developing can be contrasted with the careful and gradual march of the law.¹⁷ When put in perspective, the liability conundrum, while significant, is just *one* of the legal issues engendered by AI.

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

by Benjamin Teng, The Legal Forecast



Notes

- ¹ NP Padhy, *Artificial Intelligence and Intelligent Systems* (Oxford University Press, 2005) 3.
- ² Kevin Warwick and Huma Shah, 'Can machines think? A report on Turing test experiments at the Royal Society (2016), *Journal of Experimental & Theoretical Artificial Intelligence* 889, 991.
- ³ Will Knight, *The Dark Secret at the Heart of AI* (11 April 2017), MIT Technology Review, technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai/.
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- ¹⁶ Gabriel Hallevy, 'The Criminal Liability of Artificial Intelligence Entities – from Science Fiction to Legal Social Control' (2016), 4(2) *Akron Intellectual Property Journal* 175.
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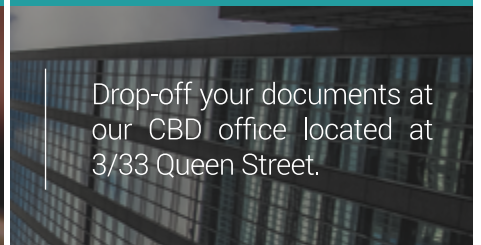
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High Court and Federal Court casenotes

High Court

Constitutional law – ‘office of profit under the Crown’ – section 44(iv) of the Constitution

In *Re Lambie* [2018] HCA 6 (14 March 2018) the High Court considered the meaning of the phrase “under the Crown” in s44(iv) of the Constitution in deciding whether Mr Steven Martin was incapable of sitting or being chosen as a senator. In December 2017, the High Court answered questions referred to it, finding that Ms Jacqui Lambie was incapable of being chosen as a senator. Mr Martin was identified by a special count as a candidate who could be elected in her place. Mr Martin was, at all relevant times, the mayor and a councillor of the Devonport City Council, which is established by the *Local Government Act 1993* (Tas). The question for the court was whether those positions were “offices of profit under the Crown” within s44(iv). It was accepted that they were “offices of profit” and that the “Crown” in s44(iv) meant the “executive government” of the Commonwealth or a state. The decision turned on the meaning of “under” and the relationship required between the executive and the office. A majority of the court held that s44(iv) seeks to avoid a conflict between a parliamentary member’s duties to the House and a pecuniary interest allowing for executive influence over the performance of parliamentary duties. Relevantly, an office would be held “under” the Crown if it was held at the will of the executive or the receipt of profit from the office depended on the will of the executive. In this case, Mr Martin’s positions depended on the *Local Government Act* and the executive did not have effective control over Mr Martin holding or profiting from them. The offices were, therefore, not “under the Crown”. Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ jointly; Edelman J separately concurring for different reasons. Answers to questions referred given.

Criminal law – appeal against conviction – application of the ‘proviso’ – whether ‘substantial miscarriage of justice’ occurred

In *Kalbasi v Western Australia* [2018] HCA 7 (14 March 2018) the High Court considered the ‘proviso’ that, notwithstanding error, a court may dismiss an appeal against conviction if “no substantial miscarriage of justice has occurred”. The appellant was convicted of attempting to possess 4.981kg of a prohibited drug with intent to sell or supply to another, contrary to the *Misuse of Drugs Act 1981* (WA) (MDA). A consignment of methylamphetamine was replaced with rock salt by police. A person known to the appellant collected the consignment. The appellant was present when the ‘drugs’ were unpacked and the appellant’s DNA was found in gloves used to cut drugs in the premises. The issue at trial

was whether the appellant was ‘in possession’ of the ‘drugs’. Section 11 of the MDA deems that a person in possession of more than 2g of methylamphetamine, subject to proof to the contrary, possesses the drug with intent to sell or supply. However, prior authority held that s11 does not apply to the charge of attempted possession of a prohibited drug. At trial the judge and counsel assumed that s11 applied. The jury was directed accordingly on the issue of intention to sell or supply. On appeal the Crown admitted the misdirection but argued that the proviso applied. The Court of Appeal agreed and dismissed the appeal. In the High Court, the majority declined to re-open the principles governing the proviso stated in *Weiss v The Queen* (2005) 224 CLR 300. The majority also rejected the appellant’s arguments about the way the trial would have been run or the way the jury might have decided the case if the misdirection had not occurred. Their Honours held that there was nothing in the evidence or the way the appellant ran his case that left open the possibility that the jury could find he was in possession of less than the whole of the ‘drugs’ with a view to purchasing an amount for his own use. The Court of Appeal was correct to hold that proof beyond reasonable doubt that the appellant had attempted to possess the ‘drugs’ compelled the conclusion that he intended to sell or supply them to another. Therefore, the misdirection did not occasion a substantial miscarriage of justice. Kiefel CJ, Bell, Keane and Gordon JJ jointly; Gageler J, Nettle J and Edelman J each separately dissenting. Appeal from the Court of Appeal (WA) dismissed.

Criminal law – verdicts unreasonable or unsupportable on evidence – criminal responsibility and foreseeability

In *Irwin v The Queen* [2018] HCA 8 (14 March 2018) concerned whether the jury’s verdict was unreasonable or incapable of being supported by the evidence. The appellant was convicted of one count of unlawfully doing grievous bodily harm and acquitted of one count of assault occasioning actual bodily harm. At trial, an issue was foreseeability. Section 23(1) of the *Criminal Code* (Qld) provides that a person is not criminally responsible for an event that the person does not intend or foresee as a possible consequence, and that an ordinary person would not reasonably foresee as a possible consequence. The appellant accepted that the judge’s directions on this point were correct, but argued that the jury could not rationally have excluded the possibility that an ordinary person in the appellant’s position would not reasonably have foreseen the possibility of an injury of the kind sustained by the complainant as a possible consequence of the appellant’s actions. In the High Court, the appellant argued that the Court of Appeal had applied an incorrect test of

whether a reasonable person ‘could’ as opposed to ‘would’ have foreseen the outcome. The High Court held that there was a difference in meaning between those two words and the proper test was ‘would’. The Court of Appeal should not have expressed the test in terms of ‘could’. However, the jury had been properly directed and there was no reason to doubt that they had adhered to the directions or to doubt the reasonableness of the verdict they gave. Other alleged errors in the Court of Appeal’s approach were rejected. Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ jointly. Appeal from the Court of Appeal (Qld) dismissed.

Planning law – town planning – conditions on development – enforcement orders

In *Pike v Tighe* [2018] HCA 9 (14 March 2018) the High Court considered whether conditions on planning approvals run with the land and oblige successors in title to fulfil conditions that were not fulfilled by the original owner. The Townsville City Council (council) issued a planning approval over land allowing for it to be developed into two lots. One condition of the approval was that an easement had to be registered over lot 1 for the benefit of lot 2. Easements were created by the owner, but not in accordance with the condition. Nonetheless, the council approved the relevant survey plan and the easements were registered. The Tighes were later registered as owners of lot 1 and the Pikes were registered as owners of lot 2. The Pikes applied to the Land and Environment Court for a declaration that the development approval had been contravened and for an enforcement order requiring compliance with the condition. The Tighes argued that any development offence committed by a failure of the original owners to comply with a condition was the fault of the original owner, not the successor. At first instance, the judge granted relief, holding that the conditions in the approval ran with the land. The Court of Appeal overturned that decision. The case turned on the meaning of s245 of the *Sustainable Planning Act 2009* (Qld) which stated that a development approval attaches to the land the subject of the application and binds the owner and any successors in title. The High Court held that s245 “expressly gives development conditions of a development approval the character of personal obligations capable of enduring in their effect beyond the completion of the development”. The approval and the conditions attach to the whole of the land, not just the lots. Because the condition had not been complied with, there had been a contravention of the Act. The enforcement order could therefore be made. Kiefel CJ, Bell, Keane, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Qld) allowed.

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with Andrew Yuile
and Dan Star QC



Federal Court

Contempt of court – practice and procedure – the Harman obligation

In *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* [2018] FCAFC 38 (20 March 2018) the Full Court considered the interaction between the statutory power conferred on the Commissioner of Taxation (commissioner) under s353-10 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA 1953), which includes a coercive power to require the production of documents, and the general law obligation commonly referred to as ‘the Harman obligation’ (see *Harman v Secretary of State for Home Department* [1983] 1 AC 280).

The Harman obligation was described by the plurality of the High Court in *Heame v Street* (2008) 235 CLR 125 at [96] as follows: “Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.”

The issue before the Federal Court (in its original jurisdiction that was being exercised by a Full Court) was whether the Harman obligation constrained the operation of s353-10(1)(c) of the TAA 1953. That provision provides power to the commissioner to require the recipient of a notice in writing to the relevant effect to produce documents in the custody or control of the recipient.

Justices Kenny, Robertson and Thawley held that the Harman obligation does not prevent or excuse a person owing that obligation from complying with a valid notice issued under s353-10(1)(c) of the TAA 1953 (at [56]). Further, the Harman obligation did not prevent the commissioner or taxation officers receiving documents the subject of a Harman obligation from using those documents in the lawful exercise of the powers and functions vested in the commissioner (also at [56]).

Their Honours noted at [42] in relation to *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 453: “We do not think it correct to equate the Harman obligation to the common law right to legal professional privilege. *Daniels* concerned the question of whether the common law right to legal professional privilege was abrogated by statute. That is not the question which arises here.”

Competition law – appeal from judgment finding price-fixing and market-sharing arrangement in contravention of the *Trade Practices Act 1974* (Cth)

In *Prysmian Cavi E Sistemi SRL v Australian Competition and Consumer Commission* [2018] FCAFC 30 (13 March 2018) the Full Court (Middleton, Perram and Griffiths JJ) dismissed Prysmian’s appeal from having been found to have contravened s45 of the *Trade Practices Act 1974* (Cth) (TPA).

The litigation concerned allegations that Prysmian entered into an arrangement with other companies involving market sharing and price fixing in the cable market (the A/R Cartel Agreement). One of the procedures envisaged by the A/R Cartel Agreement was alleged to involve an initial agreement between two sets of companies as to which of these groups would be allotted a given tender or project, followed by a subsequent agreement within the allotted group to determine which company within that group would be allotted the tender or project. The alleged contraventions of the TPA were said to flow from a particular instance in which the A/R Cartel Agreement was given effect through this procedure, namely an instance in which Prysmian was allocated a tender as a member of the R Group (the Snowy Hydro Project Agreement).

The trial judge (Beach J) found that, in making the Snowy Hydro Project Agreement, Prysmian contravened ss45(2)(a)(i) and (ii) of the TPA and gave effect to the A/R Cartel Agreement in contravention of s45(2)(b)(i) of the TPA. Further, the trial judge found that Prysmian gave effect to the Snowy Hydro Project Agreement in contravention of ss45(2)(b)(i) and (ii) of the TPA and gave effect to the A/R Cartel Agreement in contravention of s45(2)(b)(ii) of the TPA.

The Full Court rejected Prysmian’s arguments on appeal that the trial judge’s findings were inconsistent with the Australian Competition and Consumer Commission’s (ACCC) case or gave rise to a denial of natural justice to it by reason of the departure from the case run by the ACCC (at [39]-[73]). The Full Court referred to the “relevant guidance on the principles applicable to due process in this regard ... provided by the Full Court in *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 at [50]-[52] (this aspect of the matter was not taken on appeal to the High Court)”.

Various other grounds of appeal by Prysmian were also rejected (at [74]-[95]).

Privilege – whether waiver of legal professional privilege

In *University of Sydney v ObjectiVision Pty Ltd* [2018] FCA 393 (16 March 2018) the court (Burley J) made a ruling on the fourth day of a

trial as to whether certain documents that fell within the respondent’s notice to produce to the applicant were covered by legal professional privilege and, if so, whether that privilege had been waived. The proceedings concerned a dispute between ObjectiVision and the University of Sydney (University) about whether certain intellectual property licence agreements had been validly terminated, and copyright and breach of confidence claims.

Relevantly, the disputed documents were (1) emails from Mallesons, the solicitors for the university (KWM letter) (including the 22 November email); and (2) notes of the meeting at Mallesons (including Mallesons’ file notes) (KWM file notes).

The key dispute was ObjectiVision’s contention that privilege had been waived by the provision of the documents to two people who were not employees of the university (Mr Ken Coles and Dr Chris Peterson) because the disclosure was inconsistent with the maintenance of privilege: see the test for waiver in *Mann v Carnell* (1999) 201 CLR 1 at [29].

The court held that ObjectiVision had not made out that there had been a waiver of legal professional privilege that applied to the disputed documents. Mr Coles was the president of an institute of the university (SSI) that became a complying institute within it. Dr Peterson was appointed to the SSI board. The court stated at [36]: “In the present case, Mr Coles and Dr Peterson formed part of an advisory board that was instrumental in assisting SSI and Sydnovate in relation to the University’s dispute with ObjectiVision. I am comfortably able to infer that it was desirable or necessary for the University to have the benefit of the knowledge of each of these individuals in considering the 22 November email. In this regard, I note, in addition to the matters concerning their respective roles identified above, that ObjectiVision’s pleaded case in relation to the breach of the Technical Assessment Agreement and the Training Sessions Agreement is that both individuals attended the technical and training assessments on behalf of the University that were said to have failed to satisfy the University’s obligations under those agreements. Further, as I have noted, Mr Coles attended the mediation. Both Mr Coles and Dr Peterson were in a position to contribute knowledge to the decision making process of the University. Accordingly, I find that the presence of Mr Coles and Dr Peterson at the meeting on 30 November 2010 did not serve to waive legal professional privilege in the KWM file notes.”

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'Hidden' \$600K debt derails orders

with Robert Glade-Wright



Property – parties suppressed evidence of husband's \$606,000 debt in their application for consent orders

In *Trustee of the Bankrupt Estate of Hicks & Hicks and Anor* [2018] FamCAFC 37 (26 February 2018) a majority of the Full Court (Strickland and Murphy JJ) allowed an appeal by the trustee in bankruptcy against Stevenson J's dismissal of its s79A application. Austin J dissented. The trustee argued at trial that consent orders should be set aside as the parties had entered into a scheme to defeat a creditor by applying for those orders without divulging that 'Mr S' was suing the husband for \$606,000 (judgment was entered against him a week after the orders were made) or notifying Mr S of the proposed orders.

The trial was bifurcated, the court only hearing and determining the s79A issue. At first instance, the wife conceded that there was a miscarriage of justice but persuaded Stevenson J not to exercise discretion to set aside the order, her Honour finding that the wife had no involvement in the husband's debt to Mr S; that the debt was not incurred for a matrimonial objective; and that the trustee would find itself in no better position if the order were set aside.

Strickland J said (from [46]):

"This appeal highlights the difficulties in bifurcating the s79A and the s79 proceedings, rather than determining both issues together as is generally the preferred option ... (e.g. see ... *Patching* (1995) FLC 92-585).

[47] The ... difficulty ... is ... that in exercising ... discretion [under s79A] the court is entitled to take into account the likely outcome of the s79 proceedings, if the orders are set aside (...)

[85] The debt was incurred during the marriage on any view of the date of separation. (...)

[87] It is readily apparent that the ... projects [linked to the loan] ... were intended to benefit the marriage relationship. (...)"

Murphy J concluded his reasons by saying (at [195]):

" ... It would in my view be ... a highly exceptional case for a conscious abuse of the court's process – in effect a fraud on the court – to not result in orders being set aside ..."

Property – husband's tax debt and gambling losses produced net deficit – wife's initial contributions and s75(2) needs – wife to pay 10% of that debt

In *Snipper & James and Anor* [2018] FamCA 7 (12 January 2018) Watts J considered a 21-year marriage that produced three children and a net pool of \$1.28m excluding tax debts. The husband owed the Australian Taxation Office (ATO) \$2.01m and the wife owed the ATO \$113,000, creating a total net deficit of \$842,000. The ATO intervened to seek \$713,000 from the wife, being her debt plus \$600,000 towards the husband's tax debt.

The wife and husband were found to have adopted "traditional roles" ([277]). The wife "brought in about \$2.5 million from outside the marriage" ([283]). The husband's gross annual salary was \$589,000, but it was found that he lost more than \$1 million from gambling ([294]). Without the tax debts, the court assessed contributions as 80:20 in the wife's favour and made a further 15% adjustment for her under s75(2) (\$1.2m before tax provision).

After observing (at [252]) that if the whole of the tax debt was deducted the wife would receive nothing under s79, the court said (from [303]):

" ... [T]he Commissioner submits that ... where the husband's ... income has been used ... to support the wife and the children there is no reason why the wife ought not, at least in part, 'take the good with the bad' (...)

[305] The Commissioner maintains that the wife along with the husband should bear responsibility for the husband's taxation debts ... prior to separation. (...)

[306] The wife ... argues that the monies lost in gambling ... [and the capital introduced by her] were of such magnitude ... that it would not be open to conclude that she received benefit from the husband's ... income in respect of which tax had not been paid. (...)

[320] ... [T]he husband ... envisages that he will be employed ... for the next 14 years. ... [I]f the Commissioner entered into an arrangement over a 15 year period to receive payment of the outstanding debt then I could see no reason why ... the debt could not be paid off (...)

[323] ... [I]t is just and equitable for the wife to make a payment of \$200,000 towards the husband's tax debt. This ... is 10 per cent of the husband's debt ... It is 18 per cent ... of the net assets of \$1,113,281 ... the wife has after she has paid her tax debt."

Property – pre-Part VIIIB order that husband pay wife 25% of his super when he qualified for payment – wife's attempt to enforce order after husband's death dismissed

In *Heyman & Heyman & Anor* [2018] FCCA 129 (6 February 2018) a consent order made in 2002 (pre-super splitting) provided that the husband authorise his super trustee to pay the wife 25% of the funds available to him once he qualified for payment ([28]). The husband remarried in 2008 and notified the wife that he planned to transfer his super to a pension, saying that he would leave 25% in the fund for her. The wife requested payment by the trustee who replied requiring a splitting order to that effect (to which the wife did not respond).

The husband died in 2012, his new wife being executor of his estate. The trustee paid the rest of the husband's super to the new wife as a dependent. The wife applied for the setting aside of the 2002 order under s79A(1)(b) or (c) (impracticability or default) as she had not yet received 25% of the husband's super. Upon the application of the new wife, Judge Middleton summarily dismissed the wife's application.

The court said (from [53]):

"The Applicant had an opportunity to enforce the consent orders at the time the husband received 75% of his superannuation entitlement. She chose not to. (...)

[61] It is clear on the evidence that no monies were received into the estate of the late Mr Heyman from the relevant superannuation fund. Accordingly order 3.1 cannot be enforced. (...)

[79] As against the Second Respondent the Applicant has no standing in which to bring Family Court proceedings for the adjustment of property against her."

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

Court of Appeal judgments

1 to 31 March 2018

with Bruce Godfrey



Civil appeals

Longley & Ors v Chief Executive, Department of Environment and Heritage Protection & Anor; Longley & Ors v Chief Executive, Department of Environment and Heritage Protection [2018] QCA 32, 9 March 2018

General Civil Appeals – where a company was the proprietor of land and held resource tenements in respect of that land – where the company held an environmental authority issued under the *Environmental Protection Act 1994* (Qld) (EPA) in relation to each of the resource tenements – where the first respondent issued an environmental protection order to the company prior to the appointment of the appellants as liquidators of the company – where the appellant liquidators gave notice disclaiming the land, the resource tenements and the associated environmental authorities under s568 of the *Corporations Act 2001* (Cth) (CA) – whether the company's liability to comply with the environmental protection order is a liability in respect of property which the liquidators disclaimed by the disclaimer notice – whether the disclaimer terminated the company's liability to comply with the environmental protection order – where extracts were set out from the written submissions for the Chief Executive and the Attorney-General, in which there were unambiguous admissions that the Chinchilla land and the mineral development licence (MDL) had been disclaimed under s568 – where their arguments were about the effect of that disclaimer – where in their reliance upon s5G of the CA, they did not go as far as saying that the inconsistency between the disclaimer provisions and the EPA provisions required the disapplication of ss568 and 568D in their entirety – where rather, they limited that disapplication to an effect of the disclaimer which would be otherwise inconsistent with the obligations imposed or which might arise under the EPA – where those admissions were consistent with the State's conduct outside of the litigation – where in his affidavit, Mr Goldsworthy, who was the project director, petroleum gas and compliance, within the Department of Environment and Heritage Protection, said that since that date, the State of Queensland, through his department, "has been in control of the Chinchilla Site" and added that he was unaware of any request

by the appellants for access to that site – where the one respect in which the argument for the Chief Executive tended to differ from that for the Attorney-General was that in this court, there was an attempt by the former to depart from the admission made before the primary judge that the appellants had validly disclaimed the land, the plant and equipment and the MDL – where given the content of Mr Goldsworthy's letter and affidavit, the conduct of the State since 1 July 2016 and the terms of the contentions and submissions before the primary judge, the stance on behalf of the Chief Executive in this court is remarkable – where it was sought to be justified by arguments that what had been said in the statement of contentions for the Chief Executive was "no more than a statement of historical fact that on 30 June 2016 the Liquidators disclaimed the Chinchilla Land, MDL309 and PFL5" and that "[a]t the point at which the Statement of Contention was filed, the Liquidators had not put in issue the disclaimer of [that property], nor was the potential validity of the disclaimer in issue." – where it was for the respondents to the proceeding to put in issue the disclaimer, which it is clear, they did not do – where it is further submitted that the Chief Executive's written submissions went no further than accepting that the Chinchilla Land and MDL309 were each "property" for the purposes of s568" – where that characterisation of the submissions cannot be accepted – where the Chief Executive ought not to be permitted to depart from that position, by seeking to mis-describe the way in which it had conducted its case – where there is no argument that the admission that this property had been disclaimed was made in error and that, in the interests of justice, the Chief Executive should be permitted to resist this appeal upon a different basis, particularly when the submissions for the Attorney-General have not departed from the same admissions – where nor is it explained how the present position of the Chief Executive on this question might be reconciled with the State's conduct since the purported disclaimer – where once the land and MDL had been disclaimed, there was no activity which could be carried out by Linc to which the general environmental duty could attach, and for which this EPO could have operated in the pursuit of its stated purpose – where the connection between the disclaimed property and the liabilities under the EPO is thereby clear

and immediate: the liabilities under the EPO were premised upon Linc's carrying out activity which it could not and would not carry out, once the land and the MDL had been disclaimed – where Linc's continued enjoyment of the disclaimed property depended upon meeting the ongoing obligations under the EPO – where once the effect of the loss of the land and the MDL upon Linc's activity on the site is considered, then having regard to the purpose and terms of this EPO, there is a connection by which they are liabilities in respect of the disclaimed property in the terms of s568D – where that connection is starkly illustrated by the requirements of the EPO that Linc retain and maintain infrastructure (some of which, the judge inferred, were fixtures) – where performance of that requirement is now impossible if, as the State has admitted and alleged in correspondence, the property has already passed to the State – where the appellants submitted that the company's liability to comply with an environmental protection order arising under the EPA was terminated by a disclaimer under s568 of the CA – where any inconsistency between the operation of the relevant sections of the CA and the EPA would be resolved in favour of the relevant sections of the CA by s109 of the Constitution – whether s5G of the CA operates to avoid any inconsistency between the operation of the relevant sections of the CA and the EPA – where the engagement of s5G(8) of the CA requires more than the existence of a provision of a law of a state or territory which is a law to be observed in the carrying out of the external administration – where it requires that state or territory provision to be a law whose subject matter is the external administration of a corporation or corporations, or more specifically here, to be a law about how companies are to be wound up – where as *HIH Casualty and General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation* (2003) 202 ALR 610 illustrates, the provision of the law of a state need not regulate the entirety of the winding up in order for it to be a provision which would engage s5G(8) – where however it must be a provision which can be characterised as providing for how a company is to be wound up at least in some respect during that process – where in conclusion, if it is necessary to consider the operation of s5G, neither s5G(8) nor s5G(11) disapply relevant provisions of the CA – where consequently, any inconsistency

must be resolved in favour of the CA, and the validity and effect of the disclaimer of Linc's property is unaffected – where the primary judge ordered that the costs of the present appellants and those of the Chief Executive, each calculated on an indemnity basis, be costs in the liquidation of Linc – whether the first respondent's costs of the proceeding before the primary judge should be treated as costs in the liquidation of the company – where the appellants do not seek an order that the Chief Executive pay their costs – where they seek only an outcome whereby the Chief Executive bears his own costs – where the interests of justice favour that outcome, rather than the order which was made by the primary judge – where the judge's discretionary decision on costs, of course, must have been affected by the outcome of his judgment.

In Appeal No.4657 of 2017: Allow the appeal. Set aside the order made in proceedings 11363 of 2016 on 13 April 2017. The appellants be directed that they are justified in not causing Linc Energy Limited (in liquidation) to comply with the environmental protection order issued by the respondent Chief Executive on 13 May 2016, insofar as that order required anything to be done or not done at a time after 30 June 2016. Written submissions on costs of the appeal. In Appeal No.6449 of 2017: Allow the appeal. Set aside the order made in proceedings 11363 of 2016 on 31 May 2017, whereby the respondent Chief Executive was to have his costs as costs in the liquidation of Linc Energy Limited (in liquidation). The Chief Executive bear his own costs of proceedings 11363 of 2016.

See also the April 2018 edition of Proctor, pages 16-17.

***Central Highlands Regional Council v Geju Pty Ltd* [2018] QCA 38, 16 March 2018**

General Civil Appeal – where the appellant appealed against a judgment given after a trial that the appellant pay the respondent \$852,205.50 – where the appellant council issued a limited planning and development certificate to the new owner of a lot which incorrectly noted the lot as zoned industrial – where the lot was zoned rural – where a previous owner had successfully applied for a material change of use over the lot from rural to industrial that would lapse within four years of being granted – where the respondent purchaser relied on a statement in the limited planning and development certificate that the lot was zoned industrial when purchasing the lot – where the lot was worth considerably less than the purchase price as a result of its real zoning – where the limited planning and development certificate was not issued to the respondent – where the respondent argued that it was a member of an identified class of persons who the appellant knew or ought to have known

would receive the information – whether the appellant owed the respondent a duty of care – where in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, Brennan CJ observed, citing *San Sebastian Pty Ltd v Minister Administering Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340, that there are some situations in which a plaintiff who has suffered pure economic loss by entering into a transaction in reliance on a statement made or advice given by a defendant may be entitled to recover without proving that the plaintiff sought the information and advice, and continued: “But, in every case, it is necessary for the plaintiff to allege and prove that the defendant knew or ought reasonably to have known that the information or advice would be communicated to the plaintiff, either individually or as a member of an identified class, that the information or advice would be so communicated for a purpose that would be very likely to lead the plaintiff to enter into a transaction of the kind that the plaintiff does enter into and that it would be very likely that the plaintiff would enter into a such transaction in reliance on the information or advice and thereby risk the incurring of economic loss if the statement should be untrue or the advice should be unsound.” – where that statement refers to a member of an identified class of persons who the appellant knew or ought to have known would receive the information – where the trial judge's conclusion that the respondent was a member of an identified class to whom it was likely that the certificate would come and the certificate would be very likely to lead it to enter into a transaction of the kind it did enter into is respectfully disagreed with – where there was no rational way to define a class of which the respondent was a member other than in very broad terms – where it was foreseeable that Mayfair Developments might pass on the zoning information in the certificate to one or more of the people in the very broad class of persons who might rely upon that information in making serious financial decisions, but there is no basis in the evidence for concluding that the appellant knew or ought to have known that Mayfair Developments would do so, much less that the appellant intended, knew, or ought to have known, that a person would buy Lot 70 in reliance upon the zoning information in the certificate – where the respondent relied upon the statutory provisions governing the issue of limited planning and development certificates and for compensation for errors in such certificates – where the significant features of the statutory scheme are that any person was entitled to apply to the appellant for a limited planning and development certificate (s5.7.8 *Integrated Planning Act 1997* (Qld) (IPA)), the appellant was under a statutory obligation to supply to any such applicant a limited planning and development

certificate containing information about the zoning of the land (s5.7.9), and any person suffering financial loss because of an error or omission in such a certificate was entitled to reasonable compensation by the local government (s5.4.5) – where s5.4.5 does not provide that the right to compensation is available only to the person who applied for and received the certificate – where the respondent's claim in the trial division was not for breach of the statutory duty or for compensation under the statute – where the circumstance that the statutory provisions provide for compensation to a person who sustains financial loss as a result of errors or omissions in certificates without any of the common law limitations upon the circumstances in which a duty of care is owed does not justify the court in discarding those limitations in a common law claim – where the relative liberality of the statutory right to reasonable compensation might explain why the parties were unable to cite any decision in a Queensland court concerning a common law action of the present kind against a local government – where the conclusion is that the collection of features upon which the respondent relied does not justify a conclusion that the appellant owed the respondent the alleged duty of care.

Appeal allowed. Set aside the orders made in the Queensland Supreme Court on 13 December 2016. Submissions on costs in relation to the proceedings in the trial division and on appeal in accordance with the practice direction.

***Central and Northern Queensland Regional Parole Board v Finn* [2018] QCA 47, 23 March 2018**

General Civil Appeal – where the appellant suspended the respondent's parole order for an indefinite period under s205(2)(a)(i) *Corrective Services Act 2006* (Qld) (CSA) – where the appellant reasonably believed the respondent had failed to comply with the conditions of the parole order by attempting to use a concealed device to provide a false sample – where the appellant had made subsequent decisions under s208 CSA not to change its original decision – where s208 CSA acts as a “review provision” – where the Supreme Court made an order to set aside the decision of the appellant because the appellant's decision failed to refer to the reason for the decision – whether the trial judge erred in holding that s205 CSA did not exclude the right to be provided an information notice and the common law natural justice rules including the right of the prisoner to be provided a reasonable opportunity to be heard when making the decision to suspend or cancel a parole order – where so far as amendment of a parole order is concerned, any applicable common law requirements of natural justice

are modified by s205(3) CSA, both by the statutory obligation to give the prisoner an information notice and by the qualification that both obligations are to apply only where that is “practicable” – where so far as suspension or cancellation is concerned, s205(4) CSA is evidently designed to achieve two objects: first, to dispense with any common law requirement that the parole board give the prisoner a reasonable opportunity to be heard before the parole board suspends or cancels the prisoner’s parole order and, secondly, to preclude any argument that a cancellation or suspension amounts to an amendment which attracts the statutory right in s205(3) CSA – where it is true that s205(4) CSA does not in terms refer to a dispensation of the requirement to give the prisoner either an information notice or a reasonable opportunity to be heard before the parole board suspends or cancels the prisoner’s parole – where there is in any event no statutory right to an information notice before a suspension or cancellation and, notwithstanding the various oddities in the drafting, when s205(4) CSA is read together with s208 it appears with irresistible clarity that a parole board is not required to give the prisoner an information notice or a reasonable opportunity to be heard before a parole board decides to suspend or cancel a prisoner’s parole

order under s205(2) CSA – where the requirement to give an information notice as defined in s205(6) CSA is a creature of statute – where no such requirement is imposed upon a parole board as a condition of the efficacy of a decision suspending or cancelling a parole order – where the rights of a prisoner in this respect are confined to the requirements imposed by s208 CSA that the parole board give the prisoner an information notice when the prisoner returns to prison, that the parole board consider any “properly made submissions” (as defined in s208(4) CSA), and that the parole board make a decision whether or not to change the decision previously made under s205(2) CSA to suspend or cancel a parole order – where thus any common law obligation to afford natural justice as a condition of the efficacy of a decision prejudicial to a person affected by the decision is in this statute replaced by a provision for subsequent review under s208(2) CSA of an order under s205(2) CSA cancelling or suspending a parole order – whether or not a decision under s208(2) CSA resulted in there being no change to a previous decision under s205(2) CSA to suspend or cancel a parole order so that the previous decision remained in force, the subsequent decision under s208(2) CSA would itself amount to an administrative decision under an enactment

which would be amenable to judicial review under the *Judicial Review Act 1991* (Qld) in appropriate circumstances – where the powers of the court in relation to such matters are sufficiently broad to ensure that any non-compliance by a parole board with a requirement of s208 that results in an injustice between the parties is remedied: see *Judicial Review Act 1991* (Qld) s30(1)(c) and (d).

Appeal allowed. Set aside so much of the decision in the Supreme Court Trial Division delivered on 23 September 2016 that the decision of the appellant to suspend, for an indefinite period, the board-ordered parole granted to the respondent be set aside. The order made in the Trial Division that the appellant pay the respondent’s costs of the application in the Trial Division is not varied.

Criminal appeals

R v Kelley [2018] QCA 18, 2 March 2018

Sentence Application – where the applicant was sentenced to one month of imprisonment and had served this by date of hearing – where prompt urgent hearing as an alternative to bail application discussed – where Mr Kelley and the officers of Legal Aid acted with great speed and efficiency – where one can only speculate as to why Mr Kelley discontinued the application for

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appeal bail – where perhaps he took a pragmatic view that it was better to serve out the one month of actual imprisonment rather than face the alternative possibility of being released on bail only to be sent back to prison if the appeal failed – where an approach to the court would almost certainly have resulted in an urgent hearing date being set, at least well inside the period of actual custody being served under the sentence – where practitioners in cases in which there is a short sentence that may well be served before the appeal can be brought on should be aware that an approach to the court is desirable and that the court can and will do all it can to arrange an urgent hearing as an alternative to a bail application – where the applicant pleaded guilty to one count of assault occasioning bodily harm – where the charge was a domestic violence offence – where the applicant was sentenced to imprisonment for three months with parole release set for one month after the commencement of the period of imprisonment – where the application was heard after the sentence was fully served – where it was submitted that the sentencing judge was not referred to comparable cases regarding the sentencing of youthful first offenders – where significant mitigating factors such as the applicant's age and prospects of rehabilitation existed – where it was submitted that these factors were given little weight by the sentencing judge – where it should also be noted that the prosecutor advanced no submission directed at a sentence involving actual custody – where on the contrary the prosecutor's submissions were squarely aimed at a community-based sentence – where of course the prosecutor's approach does not bind a sentencing judge but it does lend some force to the complaint that a sentence of actual custody was unwarranted – while a period of actual custody could not be said to be outside the range of what might be imposed for an offence such as this (assault causing bodily harm, and a domestic violence offence), the particular circumstances here reveal that the sentence imposed was manifestly excessive.

Leave to appeal granted. Appeal allowed. Set aside the sentence imposed on 11 August 2017, except as to the recording of a conviction. Order that the applicant be imprisoned for a period of three months, suspended forthwith for an operable period of two years.

R v Tran; Ex parte Attorney-General (Qld) [2018] QCA 22, 6 March 2018

Sentence Appeal by Attorney-General (Qld) – where the Attorney-General appeals against the respondent's sentence – where the respondent was convicted of one count of trafficking in a dangerous drug, one count of possessing a dangerous drug in excess of 200 grams, and one count of possessing

a dangerous drug in excess of two grams – where the respondent was sentenced to 9½ years' imprisonment on the trafficking count and convicted, but not further punished on each of the possession counts – where after declaring 59 days pre-sentence custody as time served, the respondent's parole eligibility date was set at 1 June 2020 – where the drug trafficking activities were engaged in with a commercial motivation – where the respondent had no prior criminal history – where the respondent pled guilty to the offences charged – where the pleas of guilty were not early – where the respondent was given a double benefit for the guilty pleas in the sentence imposed – where the Attorney-General accepts the head sentence of 9½ years' imprisonment falls within the scope of the sound exercise of the sentencing discretion – where however, the Attorney-General submits the sentence imposed was manifestly inadequate when regard was had to the fixing of the parole eligibility date after serving three years and two months' imprisonment – where the sentencing judge correctly observed, the respondent's criminal conduct properly would have attracted a sentence of 10 years' imprisonment, but for his pleas of guilty – where the respondent had engaged in wholesale trafficking in large quantities of drugs, purely for commercial profit – where the respondent's pleas of guilty, whilst late, warranted a reduction in that head sentence in recognition of the cooperation with the administration of justice evidenced by the pleas of guilty – where the reduction of the head sentence to 9½ years' imprisonment meant the respondent was no longer subject to an automatic declaration that he had been convicted of a serious violent offence, which would have required him to serve 80% of the head sentence of 10 years' imprisonment – where once the sentencing judge had determined to undertake that course, in recognition of the pleas of guilty, there was no legitimate basis upon which to further ameliorate the sentence by fixing a parole eligibility date earlier than would be set pursuant to s184(2) of the *Corrective Services Act 2006* (Qld) (CSA) – where to do so was to extend a double benefit to the respondent – where while a double benefit may, in certain circumstances, be an appropriate exercise of the sentencing discretion, there was no proper basis for affording a double benefit in the present case – where the respondent's plea of guilty was late, he subsequently failed to appear at his initial sentence date and he only appeared in court after being arrested pursuant to a warrant issued as a consequence of his failure to appear at his sentence – where regard to the respondent's criminality and the mitigating factors in his favour, including his lack of criminal convictions and his pleas of guilty, the sentence which properly

reflected the respondent's criminality was the sentence of 9½ years' imprisonment, with parole eligibility in accordance with s184(2) of the provisions of the CSA.

Appeal allowed. The parole eligibility date of 1 June 2020 be set aside.

R v Norris; ex parte Attorney-General (Qld) [2018] QCA 27, 9 March 2018

Sentence Appeal by Attorney-General (Qld) – where the respondent was convicted of unlawful trafficking, production and possession of a dangerous drug, and possession of equipment used in its production – where convictions were recorded for all offences – where sentences imposed for counts 1 and 2 were four years' imprisonment and 12 months' imprisonment respectively, to be served concurrently with each term of imprisonment suspended forthwith with an operational period of five years – where in respect of count 3, the respondent was released on probation for a period of two years with additional conditions that he submit to such medical, psychological or psychiatric assessments and treatment as the probation officer might reasonably require, and that he abstain from unlawful use of any dangerous drug and submit to drug testing as the probation officer might lawfully require – where there was no separate punishment in respect of count 4 – where the respondent was a citizen of New Zealand but had lived in Australia on a visa since he was two years old – where the *Migration Act 1958* (Cth) (MA) obliged the Minister to cancel the respondent's visa if a full-time custodial sentence was imposed – where the sentencing judge considered there to be a distinct prospect that, if revocation of the respondent's visa was mandated, the respondent might be detained in immigration detention pending the determination of a revocation application – where the sentencing judge considered the effect of immigration detention beyond a fixed release date upon the respondent's rehabilitation – where the appellant argued the sentencing judge had imposed a sentence to avoid, defeat or circumvent the possibility of deportation – whether the sentencing judge erred in failing to require the respondent to serve a period of actual incarceration – where the respondent sold cannabis to the same three or four individuals for below street value – where the sentencing judge considered that the respondent had cooperated with the administration of justice and had good prospects of rehabilitation – where the sentencing judge considered the potential implications of immigration detention on the respondent's rehabilitation – whether the sentencing judge's failure to require the respondent to serve a period of actual incarceration resulted in a sentence that was manifestly inadequate – where

his Honour did not deliberately impose the sentence he did for the purpose of defeating, avoiding or circumventing the operation of provisions in the MA – where it may be accepted that the immediate suspension of the sentences of imprisonment had the effect that the respondent's visa was at risk, rather than certainty, of cancellation – where his Honour's purpose was to minimise the risk of interruption to the respondent's rehabilitation that immigration detention beyond a fixed release date would entail – where further, as to the principle in *Guden v R* (2010) 28 VR 288, the sentencing judge concluded that the prospect of an ultimately unfavourable decision with respect to the respondent's prospective deportation was entirely speculative – where consistently with that conclusion, he declined to take into account any hardship that might ensue from a deportation, by way of mitigation of sentence – where in doing so, his Honour correctly applied the principle – where moreover, the approach taken by his Honour aligns with the companion principle applied in *R v Abdi* [2016] QCA 298 – where consistently with it, it was appropriate for him to have taken into account the distinct prospect of adverse potential consequences for the respondent's rehabilitation arising from immigration detention beyond a date from which the respondent's sentence might have been suspended – where it is a sentence that takes fairly into account the nature and seriousness of the offending as well as the respondent's personal circumstances, including his continuing rehabilitation – where it was within a sound exercise of the sentencing discretion.

Appeal dismissed.

***R v Hutchinson* [2018] QCA 29,
9 March 2018**

Sentence Application – where the applicant pleaded guilty to one count of fraud and not guilty to one count of murder at trial – where the applicant was acquitted of murder, but found guilty of manslaughter – where the victim was his wife – where the sentence for manslaughter was 15 years six months' imprisonment to reflect the overall criminality for both offences – where the offence of manslaughter was recorded as a domestic violence offence – where the offence of manslaughter was committed before the commencement of s9(10A) of the *Penalties and Sentences Act 1992* (Qld) (PSA) – whether the sentencing judge erred in applying s9(10A) (PSA) or whether the sentence was otherwise manifestly excessive – where Mrs Hutchinson was killed in March 2015, more than 13 months prior to the assent to the *Criminal Law (Domestic Violence) Amendment Act 2016* (the Amendment Act) given on 5 May 2016 – where there is no express transitional provision in that Act relating to s5 which inserted subsection (10A) into s9 of the Act, so it commenced on the date of assent: s15A *Acts Interpretation Act 1954* (Qld) (AI Act) – where the sentencing judge had therefore treated s9(10A) (PSA) as a procedural amendment to which the common law presumption against retrospective operation did not apply – where the nature of the amendment made by the insertion of s9(10A) PSA is to direct the sentencing judge to treat the fact the offender has been convicted of a domestic violence offence as an aggravating factor to be taken into account in weighing up all the relevant factors that apply to sentencing that particular offender for the offence – where

the sentencing judge's sentencing discretion remains intact – where it is the approach to the exercise of the discretion that is affected by the insertion of subsection (10A) into s9 of the Act, rather than a mandated outcome by following that approach – where consistent with *R v Truong* [2000] 1 Qd R 663, *R v Carlton* [2010] 2 Qd R 340 and *R v Pham* (2009) 197 A Crim R 246, s9(10A) PSA is therefore a procedural provision – where the sentencing judge did not err in applying s9(10A) PSA and Mr Hutchinson cannot succeed on the ground the sentence was manifestly excessive due to the application of the principle set out in s9(10A) PSA of the Act – where although the sentencing judge explained how he arrived at the effective sentence of 15 years six months for the offence of manslaughter, it is not scrutiny of that calculation which determines whether that sentence was manifestly excessive – where it is a consideration of whether that was the appropriate sentence for Mr Hutchinson for the offending, having regard to the application of the principle in *R v Nagy* [2004] 1 Qd R 63 that it is permissible to fix a sentence for the most serious offence that takes into account the overall criminality and which is higher than that which could have been fixed for the most serious offence had it been the only offence – where taking into account that Mr Hutchinson was convicted of a domestic violence offence which under s9(10A) of the Act must be treated as an aggravating factor in conjunction with his failure to disclose the whereabouts of his wife's body which meant there could be no forensic investigation into the cause of her death, the deceit he engaged in after she disappeared in order to pretend she was still alive, that he was being sentenced after a trial in which he had not been prepared

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to plead guilty to manslaughter, the finding that is not challenged that the victim had died as a result of a violent death, and that Mr Hutchinson had shown no remorse does not suggest there was any error in principle in the imposition of a sentence of 15 years six months for the offence of manslaughter that covered Mr Hutchinson's overall criminality for the unlawful killing of his wife and the related fraud – where Mr Hutchinson does not succeed on his alternative ground for showing the sentence was manifestly excessive.

Application refused.

***R v Gowda; R v Mashru* [2018] QCA 31, Date of orders: 18 December 2017; date of publication of reasons: 9 March 2018**

Appeal against Convictions – where the appellants operated a scheme under which they arranged what they represented to be marriages between foreign nationals and Australian women, in order that the men might obtain visas to remain in Australia – where the appellants were convicted of 16 counts of attempting to arrange a marriage contrary to s240(1) of the *Migration Act* 1958 (Cth) – where s240(1) provides that a person must not “arrange a marriage ... with the intention of assisting ... [an applicant] to get a stay visa by satisfying a criterion for the visa because of the marriage” – where, with one possible exception, the transactions arranged by the appellants were not validly solemnised marriages under the *Marriage Act* 1961 (Cth) and were therefore void – whether the appellants had “arranged a marriage” or acted with the intention of “satisfying a criterion for the visa because of the marriage” – whether s240(1) applies only where a person arranges, or attempts to arrange, a marriage valid under the *Marriage Act* 1961 (Cth) – where it was conceded, in relation to 15 of the counts, that if s240(1) applies only to a valid marriage the appellants were entitled to be acquitted – whether an acquittal should be entered – where an essential ingredient of a “married relationship”, as it is defined for the *Migration Act*, is that the parties are married to each other under a marriage that is valid for the purposes of the Act – where s12 indicates, it is the *Marriage Act* which determines the validity or otherwise of a marriage for the purposes of the *Migration Act* – where there is no provision within the *Migration Act* which could do so – where the respondent's argument concedes that the answer can be found only in the *Marriage Act* – where it follows that to commit an offence under s240, a person must act with the intention of arranging a valid marriage – where the judge directed the jury that the appellants were guilty if they attempted to make it look as if these were valid marriages, with the intention of assisting the groom to get a visa by appearing to satisfy a

criterion for the visa – where that involved a substantial departure from the terms of s240 – where the physical element of an offence against s240 is the arrangement of a marriage – where the respondent said the fault element is the intention of assisting a person to obtain a visa *by satisfying the spousal criterion of a marriage* – where the words which have been emphasised cannot be overlooked – where the satisfaction of that criterion could be achieved only by a valid marriage – where the fault element thereby requires an intention to arrange a valid marriage – where the respondent conceded, that was not the prosecution case – where the appellants were not charged with offences against s240, but with the distinct offence of attempting to commit a s240 offence – where on these charges, the prosecution did not have to prove that a valid marriage had resulted, but it did have to prove, against each appellant, that he or she intended that a valid marriage should result – where that was not the way in which the prosecution argued its case – where rather, its case was that the appellants had meant to create only the appearance of a valid marriage – where in turn, the judge did not direct the jury to consider whether the appellants meant to arrange a valid marriage – where consequently, the appeals had to be allowed on each of these counts because the jury was not directed to consider essential questions and instead were directed that they could convict upon proof of something short of the elements of the offence – where further, in this court it was conceded that if a marriage under s240 means a valid marriage under the *Marriage Act*, with one exception (count 32), the case was not proved on the evidence at the trial, and the appellants were entitled to be acquitted – where, in relation to one count, count 32, it would have been open to the jury, properly instructed, to have considered that the marriage was valid under the *Marriage Act* 1961 (Cth) and therefore to have convicted under s240(1) of the *Migration Act* – whether a retrial should be ordered – where the jury was not asked to consider whether the evidence for count 32 proved that the marriage was solemnised as required by s45(2) – where nor was the jury asked to consider whether there had in fact been a marriage ceremony – where if there was a ceremony, then the due compliance with s45(2) would have been proved by the marriage certificate: s45(3) – where it was open to the jury to have found, had they been asked the question, that in this case there was a duly solemnised marriage, so that there was a valid marriage under the *Marriage Act*.

In each appeal: The appeal be allowed. The conviction of the appellant on counts 1, 14, 25-27, 29-34 and 45-49 on the indictment

be set aside. The appellant be acquitted on each of those counts, save for count 32. The appellant be re-tried on count 32.

***R v Sitters* [2018] QCA 35, Date of orders: 8 March 2018; date of publication of reasons: 14 March 2018**

Appeal against Conviction – where the appellant was convicted after trial of one count of rape and two counts of indecent assault – where after trial concerns were raised about the cognitive ability of the appellant – where sentencing proceedings were adjourned for the purpose of obtaining a pre-sentence report addressing those concerns – where the parties agree that the expert evidence obtained demonstrates that the appellant may not have been fit to plead and stand trial – where it is agreed that a real and substantial question exists about the appellant's fitness at the time of trial – whether as a result a miscarriage of justice occurred – where the respondent very properly concedes, the expert evidence demonstrates that the appellant may not have been fit to plead and stand trial, and that a miscarriage of justice has been established because there is a real and substantial question to be considered about the appellant's fitness – where the respondent notes that the procedure in s613 of the *Criminal Code* (Qld), which sets out the procedure to be followed when there is any uncertainty surrounding an accused person's fitness for trial, was not followed in this case – where the issue of the appellant's fitness for trial was not raised by either party at any point until the commencement of the sentencing proceedings – where in *Eastman v The Queen* (2000) 203 CLR 1, Hayne J had the following to say at [320] “... If the appellate court were affirmatively persuaded that the material before it demonstrated that the accused was not fit, not only would the conviction be set aside, the appellate court would make such order as the trial judge should have made on such a finding. If, however, as would ordinarily be the case, the appellate court could not reach that affirmative conclusion, it would set aside the conviction and order a retrial, thus allowing the statutorily prescribed tribunal to determine the issue of fitness.” – where those circumstances apply here – where for these reasons it was appropriate for the Crown to agree to the orders which were made.

Application for leave to adduce new evidence granted. Appeal allowed. Convictions on counts 1, 2 and 3 set aside. New trials on counts 1, 2 and 3 ordered.

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

Career moves



Allanah Patron



Rosalie Cattermole



Callan Lloyd



Sarah Ford



Patrick Quinn



Daniel Lilley



Janet Campbell



Nicholas Robson



Julian Barclay



Lauren Blud



Ben Thorn

Brooke Winter Solicitors

Brooke Winter Solicitors is pleased to announce the promotion of **Allanah Patron** to senior associate. Allanah, who joined the firm in 2014, has a focus on criminal law and has been working in the family law and criminal law divisions, appearing regularly in courts throughout Queensland.

Cooper Grace Ward

Cooper Grace Ward has appointed **Rosalie Cattermole** as a special counsel in the firm's tax practice. Rosalie has more than 15 years' legal experience, including 11 years of tax expertise in stamp duty Australia-wide, income tax, GST, fringe benefits tax, payroll tax and superannuation matters.

Gilshenan & Luton Legal Practice

Gilshenan & Luton Legal Practice has announced the promotions of **Callan Lloyd** to senior associate and **Sarah Ford** to associate.

Callan joined the firm in December 2011, and has extensive experience in professional regulation and discipline, coronial inquests, and general criminal defence, particularly fraud, drug, assault and proceeds of crime offences.

Sarah has been with the firm since 2013. She works in both defence and prosecution work, and handles a wide variety of matters including drug, traffic and assault offences, and professional disciplinary matters.

Gilshenan & Luton is also pleased to welcome senior associate **Patrick Quinn**, who has practised predominantly in criminal and

misconduct law since his admission in 2011, and will represent clients in a wide range of matters including transport and driving matters, sexual and drug offences, coronial investigations, commissions of inquiry, weapons licencing, crime and corruption proceedings, and in professional body investigations and disciplinary proceedings.

Hillhouse Legal Partners

Hillhouse Legal Partners has welcomed **Daniel Lilley** as a special counsel in its property practice. Daniel, who has more than 23 years' experience, focuses on commercial, residential, industrial, retail and mixed use property development and the provision of associated business services. He has particular expertise on project acquisition and structuring, advising clients through all stages of major developments and property dealings.

LandLawyersQLD

LandLawyersQLD has announced its opening as a new Sunshine Coast firm. Its principal solicitor is **Janet Campbell**, who has more than 20 years' experience in practice.

LandLawyersQLD provides property law and conveyancing services across the Sunshine Coast and hinterland.

Olsen Lawyers

Olsen Lawyers is pleased to announce that **Nicholas Robson** has been promoted to associate. Nicholas has worked as a solicitor with the firm since 2015, and is largely focused on property and commercial law,

assisting a range of clients including property developers, super funds and businesses.

Ramsden Lawyers

Ramsden Lawyers is pleased to announce the promotion of **Julian Barclay** to senior associate and **Lauren Blud** to associate.

Julian, who works in the business law team, has practised in both corporate and commercial law in health, veterinary, technology and automotive sectors since his admission in 2013. Julian has a focus on structuring, intellectual property and employment law.

Lauren is also a member of the business law team and has focused on insolvency, business restructuring, asset protection and migration law since her admission in 2015.

Xuveo Legal

After over a decade of practice in intellectual property and commercial law, **Ben Thorn** has founded Xuveo Legal.

Ben's areas of expertise include domestic and international trade mark registration, trade mark enforcement, passing off and misleading and deceptive conduct, copyright, commercial dispute resolution, corporate structuring, asset protection and PPSR registration. He has acted for clients across a range of industry groups from start-ups, SMEs and not-for-profits to larger corporations.

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9 Elder abuse forum: Bad behaviour or criminal conduct?

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This masters forum brings together eminent elder law and criminal law practitioners, as well as leading experts in elder abuse to discuss the intricacies and overlap of issues arising out of abuse – EPoAs and guardianship, how to identify an at-risk client and what action to take, and the perspective from Queensland Police Service officers on the front line.



23 The new Queensland Building Industry Fairness Act

12.30-1.30pm | 1 CPD

Livecast

The new *Building Industry Fairness (Security of Payment) Act 2017* (Act) heralded as a mechanism for securing payments within the construction industry is coming into effect progressively, commencing 1 March 2018. This livecast will identify the key points that practitioners will need to have in mind when considering and providing advice to clients.



10 Challenging DNA evidence: Criminal law masterclass

12.30-2pm | 1.5 CPD

Livecast

Co-presented by leaders in criminal law and forensic science, this presentation will aid both prosecutors and defenders to understand what the forensic DNA laboratory looks like in 2018. You will also tackle the statistics behind the DNA match and the questions you should be asking to test that the DNA evidence can be relied upon.



29 Protecting legal rights conference

8.30am-5pm | 7 CPD

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10 Modern Advocate Lecture Series: 2018, Lecture two

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31 Early career lawyers workshop

8.30am-12pm | 3 CPD

Law Society House, Brisbane

The early career lawyer workshop is a half-day event especially designed to give solicitors the fundamental practical advice and tips they need to build, grow and maintain a successful and lasting career in the legal profession. Aimed at practitioners in small firms, this conference will tackle the key issues faced by this market segment. Make new connections and share ideas at this event.



16 QLS open day 2018

1-6.30pm | 3 CPD

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We are delighted to invite you to a complimentary half-day professional development event at Law Society House. Hear from legal industry experts on a range of important legal and business issues where you will take away practical tips and strategies. You will have the opportunity to collect up to 3 CPD points. Registration for each session is essential as places are limited!



31 Practice Management Course: Sole practitioner and small practice focus

31 May-2 June | 10 CPD

Law Society House, Brisbane

Climb the legal career ladder by completing the premier Practice Management Course with QLS. As the peak representative body for solicitors in Queensland, we are uniquely positioned to understand the benchmarks of success for the profession. Our three-day course is designed to help you succeed with progressive, best practice content and professional development in trust accounting, ethics and risk management.



18 QLS annual ball

7-11.15pm

Seadeck, South Bank

Calling all early career lawyers. Be part of one of QLS's premier events – the QLS annual ball. Get on board one of Brisbane's most sought after party venues – Seadeck – and enjoy a night of networking and entertainment under the stars. Dress to impress in cocktail attire and conclude Law Week in style. Tickets are limited!

Earlybird prices and registration available at



qls.com.au/events

Are you flexible, or chaotic?

A practice idea that might make a big difference

There is a clear shift to flexible working arrangements – both in and out of the office – but as with most things, it can be done well or poorly.



Work flexibility seems here to stay. Indeed, it enables micro practices to exist. But let's talk about more conventional practices...

There is obviously a continuum between highly structured (prescriptive) and very unstructured (self-managed) working arrangements. Some of the examples are:

- job sharing – organised, structured flexibility
- working from home (including log-in from home) – a two-way bargain built around trust and accountability
- early start/late finish/working in with (say) M1 traffic conditions, and
- totally self-managed – *just give me the output and I don't really care about the rest.*

When agreeing to flexible work conditions, there are a few principles you need to take on board.

Firstly, your staff are employed to do a job – but not all jobs are the same. The working

arrangements should not create unhelpful demands on co-workers. Similarly, with clients and matters, if the nature of the clients and/or matters is of an intensity that requires continuity and a consistent 'touch' in style and communication, then job sharing can be a problem.

With working remotely, the keys are always clear expectations on style and output (how, how much, and how reliably) and regular monitoring and feedback. Don't just provide negative feedback when the productivity slips – tell the staff member when they are doing well, so they can use that to develop good habits.

Working remotely can be really challenging... the distractions are ever present. If you don't provide feedback early and regularly, staff can quickly adopt a view of *I know I'm expected to get 5.5 hours from home, but nobody seems to really care so far, so I might just cruise for a bit until someone says something.* It is important to understand that usually if remote working doesn't go to

plan, it is more likely to be your fault (poorly managed expectations and follow-up) than the staff's fault.

If some of that sounds a bit negative, don't be put off. Usually it's a matter of finding what works. And it makes sense to explore flexible arrangements if they are the alternative to losing a very productive person.

Finally, cherry picking favourites for special conditions in the workplace is the kiss of death. If you support certain types of flexibility (subject to client, matter, and support issues) then you have to have a whole-of-firm policy on how it works in your firm.

So while the environment is slightly changed, the same old story applies – clarity in expectations and honesty in evaluation will take you a long way towards success – *'this is what we agreed would happen/this is what actually happened'*.

Dr Peter Lynch
p.lynch@dcilyncon.com.au

Introduction to family law

6-7 June | Law Society House

Develop your knowledge and practical skills in family law. This two-day introductory course is ideal for junior legal staff – offering an overview of family law and practical guidance on the most common processes and tasks associated with handling family law matters.

Register online

 qls.com.au/introtofamilylaw



Queensland
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QCF – What's that?

The gift that keeps giving to those in need

Since my departure from the Court of Appeal, kind and curious lawyers and erstwhile judicial colleagues often inquire how I am filling my time.

A complete answer would require a lengthy monologue. My activities include the occasional speech, French lessons, keeping fit, reading (not law-related subjects), patronage of three organisations, perfecting the soufflé, travelling, day-time attendance at movies, plays and concerts, two university law school appointments and more. Mention any of these newfound pleasures and there is always lively conversation.

But when I say how much I am enjoying my role as chair of the board of governors of Queensland Community Foundation (QCF), all too often even senior lawyers and judges respond, “QCF – what’s that?”. This *Proctor* article is needed, I reckon. After all, QCF turns 21 this year. Time for it to be taken seriously now it is a grown-up!

I often tell QCF patron Mike Ahern AO that he did two great things for Queensland. The first was his commitment to implementing the Fitzgerald Inquiry recommendations, “lock, stock and barrel”. The second was establishing QCF, a public charitable trust. Every student of equity knows what that means: tax deductible donations from the public become part of a permanent capital fund, the income from which is used for charitable purposes forever. QCF only requires that the recipient charity have Deductible Gift Recipient (DGR) status. The fund is prudently invested and managed by the trustee, the Public Trustee of Queensland, presently Peter Carne, a former president and CEO of the Queensland Law Society (QLS). The trustee is advised on investment matters by Queensland Investment Corporation (QIC), one of Australia’s leading investment advisers.

One especially attractive feature for donors is that, since QCF’s inception, generous sponsors (presently QIC and the Public Trustee, and until recently Anglo-American) have covered all QCF administrative and marketing costs. This means that every cent of every dollar donated goes to the charitable capital fund.

Another special feature of the QCF model is that, while it has a substantial general fund of over \$9 million which last year gave almost \$300,000 in grants to charities in Queensland, QCF is also an umbrella organisation for other funds. These sub-funds, usually with minimum seed capital of \$50,000, may be established by charities; through bequests in wills; or by any philanthropic individual, family or organisation, including law firms. Funds are often named after the donor or in memory of a loved one. Income from sub-funds may be designated for a specific charity or type of charity, for charities to be determined by the trustee, or for charities chosen each year by the donors.

QCF has more than 200 sub-funds. They include the Cancer Council Queensland Fund which began with \$10,000. It has grown to more than \$5 million and is still growing. Another is the Patrick and Dorothy Woolcock Medical Research Fund which was established in 2001 with \$2.7 million and has already provided \$2.2 million for ground-breaking research. A favourite of mine is LawRight’s Civil Justice Fund (CJF), of which I am patron. Imagine if lawyers, judges and community members left enough bequests to CJF so that, in time, LawRight could ensure access to justice for disadvantaged Queenslanders, independent of the fickle whims of government.

As QCF’s generosity is aimed at making the whole of this vast state a more cohesive society, we have regional sub-funds to encourage Queenslanders to give where they live.

QCF takes on the substantial administrative burdens of establishing and maintaining the sub-funds and that income is also used to ensure the true value of their capital, and that of the general fund, is not diminished by inflation.

QCF’s original capital seed funding of \$300,000 in 1997 has grown to over \$86 million today. Last financial year, QCF distributed more than \$2 million to a wide range of charitable organisations across this vast state. Over the past 20 years, QCF has shepherded more than \$20 million to charities from the Gold Coast to Cape York Indigenous communities. No wonder it is the envy of other states which are now trying to emulate it.

The trustee is assisted in his duties by a skilful board of governors which I am honoured to chair. It is presently made up of Inspiring Cities Pty Ltd managing director and former Brisbane Marketing Pty Ltd CEO John Aitken, Rowland managing director Helen Besly, former QUT Vice-Chancellor Professor Peter Coaldrake AO, BDO business services partner and Prince Charles Hospital Foundation chair Bernard Curran, former QLS president and former QCF board of governors chair Dr John de Groot, former Governor of Queensland the Hon. Leneen Forde AC, Queensland Investment Corporation (QIC) CEO Damien Frawley, QIC portfolio manager – retail partnerships Melissa Impiazzi, and former Crime and Misconduct Commission Commissioner Dr Margaret Steinberg AM. The board has established regional committees to promote QCF and its regional sub-funds and grants.

QCF encourages philanthropy in the Queensland community generally, not just those who give through QCF. At its annual lunch during Philanthropy Week, in partnership with the QUT Business School and Australian Centre for Philanthropy and Nonprofit Studies, QCF presents awards to those who have made an outstanding philanthropic community contribution. These are known to many in the sector as the Philanthropy Oscars! Categories include Corporate, Small-Medium Enterprise, Community, Emerging, and Higher Education.

Embracing the need for creativity to inspire philanthropy, QCF has an annual Philanthropy in Focus Photo Challenge for the professional or amateur photographer who best uses the medium to capture the positive impact of philanthropy on Queenslanders.

The Honourable **Margaret McMurdo AC** invites *Proctor* readers to become acquainted with a public charitable trust she is passionate about, the Queensland Community Foundation.



Another valuable partnership between QCF and QUT, this time with its law school, is the sponsorship of the WA Lee Equity Lecture. This prestigious lecture is presented each year to a full house of lawyers, judges and community members in the beautiful Banco Court of the Supreme Court of Queensland.

If this has whetted your appetite, you will find more information about QCF at qcf.org.au. Alternatively phone or email our executive officer, Bronwynn van Baalen, on 07 3360 3854 or enquiries@qcf.org.au.

Now you know what QCF is, I hope you are asking what you can do to help it make Queensland an even more compassionate, caring, functional and socially cohesive community, now and for our grandchildren and great grandchildren.

Why not invigorate those creative juices and start taking photos for next year's Photo Challenge, nominate your favourite philanthropist for a QCF award, or assist a charity to apply for a QCF grant?

I encourage you to organise a table at the annual QCF Philanthropy Week awards luncheon at Brisbane City Hall on Friday 15 June, where you will hear Australian billionaire businessman Anthony Pratt share his vision for philanthropy in Australia.

And for those on the Sunshine Coast, I'd love you to join me for a QCF Breakfast at 7am on Monday 11 June at the Lakehouse, Mountain Creek.

And please, tell your firm or organisation and your philanthropic clients, friends and family members about QCF. Consider, and invite them to consider, a tax-deductible donation or bequest, either to the general fund, an established sub-fund, or to set up a new sub-fund. It really will be the gift that keeps on giving to Queenslanders in need, forever.

The Honourable Margaret McMurdo AC is a former President of the Court of Appeal, Supreme Court of Queensland, chair of Legal Aid Queensland, and chair of the Queensland Community Foundation board of governors.

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The restaurant interior is rich in natural materials – wood, leather and iron – oozing historic craftsmanship fused with a contemporary feel, and is clearly inspired by Heston Blumenthal's deep interest and knowledge of 15th and 16th Century cookery.

The menu is the result of several years of research of Britain's gastronomic history at the British Library as well as consultation with food historians, but with a twist – it offers a very modern interpretation of historic British gastronomy from Medieval c.1300 to Victorian c.1800.

Upon entering the restaurant proper, which emerges at the end of the dark interior passageway, I immediately spot an intriguing decorative piece at the heart of the open kitchen, a kinetic art installation, which I learn is an interpretation of the first automated spit roast mechanism, invented by the British clockmakers of Greenwich.

The brown embossed leather menu is presented on the table underneath my napkin, which is wrapped with a cardboard note containing what you might call a fun fact. The cardboard note informs me that, despite having been used by the Greeks and the Romans and being popular throughout Europe by the 17th Century, the English were reluctant to use forks when they were first introduced from Venice in the early 17th Century (before then only spoons, knives and fingers were used). They were slow to catch on, but had gained popularity by the time of the Restoration (1660) and were in common usage by the end of the 18th Century.

I turn to the menu, and realise I have opened Pandora's box.

I examine the various starters and their sources of origin, and decide on the Meat Fruit (c. 1500). The Powdered Duck from the 1670 cookbook, *The Queen Like Closet or Rich Cabinet* by Hannah Woolley, immediately catches my eye for the main meal. For dessert, how could I possibly pass up the Ice Cream with Vegemite, said to have been inspired by Fred Walker and Dr Cyril P. Callister (1920).

The Meat Fruit is served without any fuss on a wood board and is, quite simply, mandarin,



chicken liver parfait and grilled bread. I am warned that the leaf is for decorative purposes only and not to be consumed. Duly noted. The dish, *above*, is silky smooth, soft, with an almost buttery quality and the outer skin of the Meat Fruit mimics so closely that of the skin of a mandarin. Whilst it appears a dense dish, I devour it within minutes! I simply love this, both aesthetically and in terms of its taste. Truly, a little bundle of goodness!

The Powdered Duck, *above right*, has, as its accompaniments, smoked beetroot, grilled red cabbage, umbles and pickled cherries. The sizeable portions of the duck are cooked exquisitely with a delicious crusty exterior and I am careful to apportion the duck with alternating accompaniments to ascertain my preferred combination, if any. I find the braised cabbage to be particularly delicate and the pickled cherries, true to form, deliver a sharp and then slightly fruity contrast to the other components of the dish. And whilst the beetroot quarters match perfectly the colour palette of the dish, they are unnecessary – the smoked beetroot puree is quite sufficient. The jus poured over the dish at the table is, in my view, the glue that holds the dish together.

One further ingredient requires a mention: the umbles. One might be forgiven for mistaking the crumbed duck hearts, which are robust and earthy in taste, for crumbed mushrooms, in the light of their colouring, and even their texture.

For the most Australian dessert I've ever indulged in, the Ice Cream with Vegemite



is an interesting experience. The sweetness of the combination of toasted barley cream, yeast caramel, macadamia, puffed spelt and sourdough crumble offsets the blandness of the Vegemite ice cream. When tasted alone, the Vegemite ice cream is almost unpalatable, and the weakest link of the dish. Though, the fruit gel piped ever so delicately on the plate provides a lovely diversion for the taste buds.

Following dessert, the waiter delivers chocolate ganache in a little glass pot with what appears to be a ginger snap biscuit with caraway seeds. An amuse bouche of sorts, only here, at the close of the meal.

But wait, there's more! One can enjoy an ice cream made at the table by the waiter using the nitrogen trolley, which transforms custard into ice cream, though some serious manual labour is required on the part of the waiter. Nitrogen flows out of the trolley and onto the table, like thick fog, and brings about a sweet aroma. This is certainly something to be experienced! Blood orange is placed in the bottom of the cone followed by the ice cream and I am offered a selection of toppers – I opt for the popping apple candy, which gives my mouth a nice little buzz.

This was a dining experience like no other that has come before it, and I don't expect I should find anything comparable in the immediate future.

This restaurant is truly the sum of all of its parts, all of which are excellent.

Dominique Mayo is a senior lawyer at Clayton Utz

The trouble with tinnies

with Matthew Dunn



Wine in a can is starting to pop up on the shelves of the local bottle shop, with major retailers embracing this new form of packaging.

Wine in a can owes more to the culture of ready-to-drink, pre-mix spirits than our usual practices in wine consumption, and is more of an attempt to bring wine to a new generation of consumers.

The challenge in making fair comment about this canned nectar is dealing with our prejudices head on. Wine, and its consumption, is heavy on ritual. Everything we learn about wine conventions is designed to enhance and extend the experience.

Cracking a can of wine and sipping it like a Milton Mango or Bacardi Breezer is surely a very different experience. But why must it be so?

Australia has a proud history of inventing new and disruptive wine packaging. Wine casks were proudly South Australian¹ and the wine in a can packaging system comes to us from Victorian inventors Anthony Baricks and Gregory Stokes.

The story starts when enterprising winemakers Baricks and Stokes “committed over a decade of research and development (since 1996) to create a purpose-built product for the global wine market”.² Wine in a can was the result.

Evidently the trouble with traditional aluminium canning methods was that the acidic wine would react with the metal and spoil the wine within six months of canning. The inventors found something marvellous; they invented a filling system and a membrane inside the can which prevented the usual reductive reaction.

Trials showed this new system would keep the wine fresh for at least five years. Baricks and Stokes formed a company to exploit their invention, Barokes Pty Ltd (a title derived by blending their names), and patented their proud new invention as ‘Vinsafe’.

For the IP lawyers, Australian patent 2002304976 with an earliest priority date of 28 September 2001 is romantically called “Process for packaging wines in aluminium cans”. Barokes now has patents covering 41 countries for its inventions.³

All went well until Barokes ran into trouble with its Japanese supplier-turned-partner and

bouts of litigation broke out in the Victorian Supreme Court.⁴ The disputes featured Japanese and Chinese patent infringement actions, applications for winding up Barokes and removing Stokes as a director, and parties failing to provide additional funding for Barokes operations. King & Wood Mallesons’ IP Whiteboard has an excellent summation of the patents, claims and counter-claims for the curious reader.⁵

Despite the legal drama behind the scenes, wine in a can has started making inroads, and *Vogue Australia* has called rose in a can its drink of choice for the summer.⁶

Notes

¹ Thomas Angrove invented the wine bladder in 1935. The familiar plastic tap came later in 1967 in association with Penfolds wines.

² wineinacan.com/about.

³ Colour copies of international certificates are available at wineinacan.com/vinsafe/patents.

⁴ [2015] VSC 502, [2015] VSC 601, [2016] VSC 296 & [2016] VSC 737.

⁵ ipwhiteboard.com.au/stuck-wine-hard-case-lessons-barokes-wine-can-saga.

⁶ vogue.com.au/culture/lifestyle/ros-in-a-can-is-officially-our-drink-of-choice-this-summer/news-story/a1f7e602b4db59f7c3d326da89437e7a.

The tasting A number of tinned treats were tasted to see where this wave might take us.



The first was the Mascareri NV Prosecco which was pale yellow, had a good bead and was lime and coconut on the nose. The palate was light with a line of zesty lime and bright acid and sugar.

The second was the Crafters Union 2017 Hawke’s Bay Pinot Gris which was yellow with a hint of blush. The nose was passionfruit and citrus, and the palate lime and tropical fruit with some granite on the finish. Classy cold from a tin.



The third was the Elephant in the Room 2017 Limestone Coast Chardonnay which was pale straw. The nose was buttery oak and peach. The palate was white peach with a familiar hint of Lindemans Bin 65.

The fourth was the Elephant in the Room 2017 Pinot Noir (no origin) which was deep ruby red. The nose was liquorice and nutmeg spice. The palate was approachable with red fruits, tannin but little that seemed familiar in a pinot noir.



The fifth was the Take it to the Grave 2017 Pinot Noir (no origin) which was a strawberry red colour. The palate was light with pepper, strawberry and funky forest floor.

The last was the Take it to the Grave 2016 Langhorne Creek / Barossa Shiraz which was black red purple. The nose was dusty black pepper and currants. The palate was white pepper, chocolate and five spice. A better wine than almost all the others.



Verdict: In the end, the Crafters Union and the Take it to the Grave Shiraz showed that the can need not be inferior to the bottle. But, in the heady rush to a youthful RTD market, I suspect the temptation will be to concentrate on the allure of the graphics on the can rather than the depth of its contents.

Matt Dunn is Queensland Law Society government relations principal advisor.

Mould's maze

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

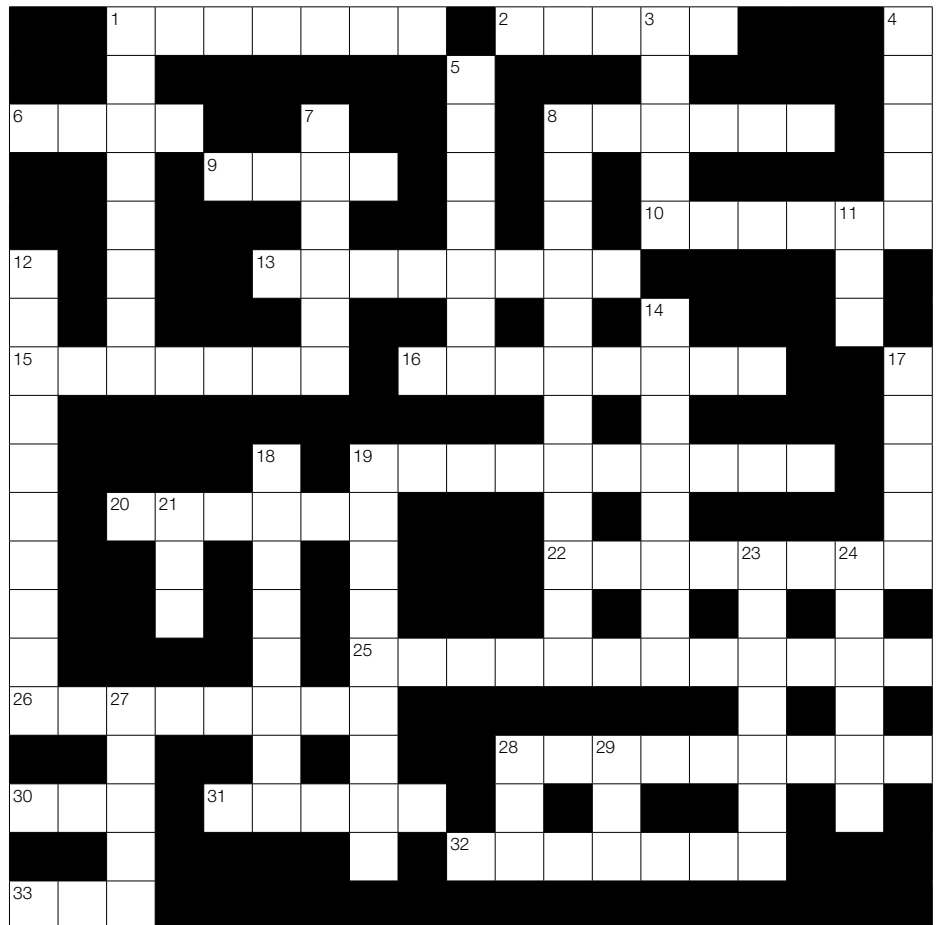


Across

- 1 The rule by which courts may ignore trifling or unimportant matters, *de (Latin)* (7)
- 2 Mick was found not guilty of the murder of Melbourne hitman Andrew 'Benji' Veniamin in 2004 on grounds of self-defence. (5)
- 6 District Court judge sitting at Maroochydore. (4)
- 8 A group of independent entities that join together to fix prices, control distribution or reduce competition. (6)
- 9 Prior to the *Company Law Review Act 1998*, it was mandatory to affix a company to deeds. (4)
- 10 A tax directly related to goods imposed at some step in their production or distribution before they reach the hands of consumers: *Bolton v Madsen*. (6)
- 13 Referring to land adjoining a river or stream. (8)
- 15 Unlawful physical contact. (7)
- 16 De facto spousal maintenance. (Jargon) (8)
- 19 Minor violation of law. (10)
- 20 The lawyer played by Simon Baker in *The Guardian*, Nick (6)
- 22 Doctrine arising from customary international law which provides that officials who commit crimes while performing acts of state cannot be prosecuted, functional (8)
- 25 Money paid for work or service. (12)
- 26 State in which a person has, or intends to maintain, permanent residence. (8)
- 28 When parties pay for a property in unequal shares, even if they are listed as joint tenants, there is a presumption that the person who paid less holds that portion of the property they did not pay for in trust for the other person: v *Green*. (9)
- 30 A Queensland criminal trial cannot continue with less than ... jurors. (3)
- 31 Time during which a debtor is not required to make payments on a debt or will not be charged interest, period. (5)
- 32 In *Kane and Kane* the Full Court of the Family Court held that there was no doctrine of "..... contributions". (7)
- 33 Conciliation and arbitration are forms of such process. (Abbr.) (3)

Down

- 1 A permanent landmark established for surveyors to ascertain boundaries and create legal descriptions of real estate. (8)
- 3 The duration of each Commonwealth House of Representatives is years subject to earlier dissolution by the Governor-General. (5)



- 4 Elephants, bears, zebras and dingoes are all *naturae*. (Latin) (5)
- 5 Voluntary assumption of risk, *volenti non fit (Latin)* (7)
- 7 Sign or give formal consent to a treaty. (6)
- 8 Commencement date of a de facto relationship. (12)
- 11 Section 13 of the Commonwealth Constitution provides for half the Senators from each state to retire every ... years, with each Senator's term being six years. (3)
- 12 An amount of money representing capital paid up, capital credited as paid up and capital yet unpaid on all shares which have been issued and have not been cancelled, capital. (10)
- 14 Author of *Rumpole of the Bailey*, John (8)
- 17 Copyright subsists in a literary dramatic or musical work for years after the end of the calendar year in which the author passed away. (5)
- 18 "..... harm" is caused by a contingency that occurs after the subject event which a defendant fails to foresee and guard against, and which is causally independent of that event. (8)
- 19 Conclusion arrived at by logically drawing on known facts. (9)
- 21 Corporate identification. (Abbr.) (3)
- 23 Philosophy which asserts that legal rights are inherent and endowed by God or a transcendent source, understood universally through human reason, Law. (7)
- 24 Predecessor to the tort of conversion. (6)
- 27 Child. (5)
- 28 Police officer. (Jargon) (3)
- 29 Form of private company in the United States. (Abbr.) (3)

Solution on page 60

A threat to my ethical purity

But my commitment to exercise remains

by Shane Budden



One of the few joys of growing old is the tacit permission you have to become overly upset about decisions which barely affect you and in which you have little, if any, stake (to be clear, when I say 'you' I mean me; if you want this to be about you I suggest you get a column of your own).

The most recent manifestation of this in my life is the fact that my gym, without reference to me, has decided to upgrade the cardio equipment which, photographic evidence to the contrary, I actually do use. In case you have actually seen me in real life and have come to the conclusion that I have not used cardio equipment since oxygen was invented, I should perhaps explain.

You see, we ethics solicitors give off a glow of ethical purity, which we attempt to conceal with our shirts; this results in a bulge around the middle which can look – to the untrained eye – like a middle-age spread. I can assure you that this is not the case, and we ethics solicitors are all remarkably fit, and far too youthful to be considered middle-aged.

Anyway, the difficulty with the new cardio machines is that I will have to learn how to operate them. This is a problem because people my age (which I remind you is very youthful) are surrounded by a quantum field which causes electronic devices to operate in a way that is utterly alien to any form of intelligence ever detected on Earth (the IT industry term for this is 'user friendly').

This will not be helped by virtue of the fact that no new cardio machine operates anything like the one it replaces, an effect known as the Jobs Co-efficient. It is similar to the way no two Apple products will accept the same charger or sync with each other, any rival devices or the computer system used by the aliens in the movie *Independence Day*, which Jeff Goldblum was amazingly able to infect with a virus. I suspect his experience as a chaos theoretician (it is so a word) in *Jurassic Park* helped.

I have maintained my commitment to exercise in spite of these challenges, however, because I feel it is very important for parents to set a good example for their children, and without exercise the example I set is that the most important things in life are wine, Manchester United and Vegemite toast, although not necessarily in that order (if that sounds familiar, it is what leading parent scientists call 'the holy trinity of great parenting').

As a dedicated parent, however, I should warn any other dedicated parents reading this (although if you have time to read this your dedication to anything of importance is probably up for debate) that once you set an example for a child, there is some chance – assuming they are not teenagers, who are guided by a higher power, specifically Instagram – that they will follow it, significantly reducing your opportunities to consume wine and eat toast.

At least, that is what happened to me, as following my example my daughter has shown interest in sports. She has taken up soccer, which we now call football based on the novel acceptance of the fact that it is the only major sport where the ball is regularly kicked by the foot (NB to people from Melbourne: Australian Rules is not a sport – any activity in which you get a point for missing is merely something deigned to allow less-gifted people to feel they are capable of athletic achievement).

Don't get me wrong, I am glad my daughter has picked up a sport, and even happier that it is soccer, not just because I also used to play it, but because it is much shorter than the competitions for her other sporting love, gymnastics. Gymnastics contests are measured in days (sometimes even parsecs). The daughter of a friend of mine did gymnastics about five years ago, and some of the competitions she entered are still going; she is hopeful that the results will be announced at her 30th birthday.

So soccer is much better duration-wise, but also aesthetically. The simple rules of the game mean that even a bunch of beginners can produce a reasonably watchable game, as long as there is alcohol available to the

spectators; other sports do not transition well at the junior level. Junior rugby, for example, generally resembles a group of colour-blind kids playing Twister, with reports of seeing the actual ball being up there with Elvis sightings (actually, come to think of it, that is what adult rugby looks like as well). Junior league is basically one very large kid running around knocking the others over like ninepins, which is very amusing for the parents of that one kid, but a health insurance nightmare for everyone else.

My daughter is also playing at the right time. When I played, back in the '70s and '80s, announcing that you played soccer was similar to announcing that you thought everyone should walk around wearing nothing but a bowler hat. That is, it would cause most people to edge away from you whispering about which way they would run if you followed them.

Nowadays parents have worked out that other codes of football largely involve watching your children beat each other up, soccer is quite acceptable; I suspect the fact that your average professional soccer player earns as much during the time it takes them to shower, as professionals in other codes earn in a decade, has also increased parental acceptance (in fairness, I note that some professional soccer players – and I am thinking here of Maradona – can take close on a decade to take a shower, but I digress).

Of course, nature abhors a win-win situation, so there is a downside: soccer is played at **8AM** on a Sunday morning. This is a time I usually reserve for trying to sleep. Still, it will be fun to watch my daughter out there enjoying herself, and it may even inspire my son to consider there is more to life than writing songs on his iPad. Plus, walking down to the field will make up for the time I waste arguing with the AI in the cardio machine about whether or not my running shirt makes my ethical purity look big.

© Shane Budden 2018. Shane Budden is a Queensland Law Society ethics solicitor.

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Crossword solution

From page 58

Across: 1 Minimis, 2 Gatto, 6 Long, 8 Cartel, 9 Seal, 10 Excise, 13 Riparian, 15 Battery, 16 Palimony, 19 Infraction, 20 Fallin, 22 Immunity, 25 Remuneration, 26 Domicile, 28 Calverley, 30 Ten, 31 Grace, 32 Special, 33 ADR.

Down: 1 Monument, 3 Three, 4 Ferae, 5 Injuria, 7 Ratify, 8 Cohabitation, 11 Six, 12 Subscribed, 14 Mortimer, 17 Fifty, 18 Ulterior, 19 Inference, 21 ACN, 23 Natural, 24 Trover, 27 Minor, 28 Cop, 29 Llc.

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