

# PROCTOR



Queensland  
**Law Society**

November 2017 – Vol.37 No.10

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# The rule of law

Why does it matter in a free and just society?



Though the stakes are considerably higher at an international level, I recently learned at the Law Asia Conference, we lawyers are all grappling with the same issues. That is, protecting the rule of law. It is the rule of law that keeps governments in check.

The global legal profession is comprised of around 12 million lawyers. We share fundamental beliefs. We stand between the state and the individual, ensuring that rights for all are created and enforced, justly and equitably.

The more power a state has, the fewer rights individual citizens have in a community. By increasing state power, governments increase their control over their citizens; although state actors often claim that this is for the benefit of the citizenry, it is rarely the case. All too often it is done to advance populist causes and exclusionary mandates designed largely to maintain power.

Despotic regimes and more legitimate governments alike across the world persistently attempt to muzzle the voice of law societies. Why? Because we are the ones who stand up for the rule of law.

By dampening, and in some cases silencing the voice of those who stand for the rights of individual citizens, governments have greater freedoms in expanding their powers and diminishing the rights of the individual.

By persistently demonising legal bodies, seeking to control the licensing of legal practice (practising certificates), and the appointment of judges, the state is able to vet and control the very lawyers whose role it is to monitor the conduct of government.

Another method governments use, is to control the voting process for those who may lead legal organisations. This recently occurred with the Malaysian Bar Association, after the leaders exposed corruption in the government.

By controlling the lawyers, their representative bodies, and diminishing the value of lawyers in society, governments dilute the capacity of lawyers to speak out against injustice and the deprivations which accompany the diminishing of the rule of law.

History is replete with examples of dictators who have targeted the legal profession to facilitate and perpetuate their hold on power. Both Mussolini and Hitler had thugs beat, rob and harass the lawyers who stood against them, those brave souls who stood up for the rule of law even though their lives were at risk.

For those like Hans Litten, the German lawyer who once cross-examined Adolf Hitler, the ultimate price was paid, with Litten dying in Dachau during the war. Unfortunately, it cannot be said that the threat to the rule of law is confined only to history.

For example, in the last year alone, the Tanzanian Law Society president has been arrested six times. The charges he has faced include insulting the president of the government – which may give some indication as to the credibility of, and underlying motives for, the charges.

Another example is Zambia. There, the ruling government has made threats against the bar association because the president of their association has spoken out against the government.

These examples are given for their patency, however the concern common to us all, is the latent, incremental degradation of fundamental rights. The chipping away at fundamental legal principles, often under the guise of protecting the public, is a device

used by governments worldwide, Australia included. While being charged for insulting a politician or disagreeing with the government seems unimaginable to most of us, that will only be true if we remain vigilant in our support for the rule of law.

Such assaults on human rights need not be sought via one blatant stroke unlikely to be tolerated by the Australian public, but can be achieved by the subtle and continual erosion of protections; legitimate concerns, such as the fear of terrorism and concerns about money laundering, can be twisted to justify the reduction of fundamental legal rights, such as the right to legal confidentiality and privilege.

One way lawyers can prevent increased government power is to have the support of the community and to speak out when there is any encroachment on the rule of law and the role of lawyers within.

The importance of speaking out about unjust/inequitable laws or their enforcement is critical. Prominent LawAsia representatives emphasised that is what we do as lawyers – speak out.

The presence of effective law societies, prepared to exercise their voice, is essential in tempering the corrupt conduct and legislative overreach of zealous governments determined to reduce the rights of citizens.

**Christine Smyth**  
Queensland Law Society president

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# If clients can't find you, the Society can help



*Don't know where I'm going.  
Don't know where it's flowing.  
But I know it's finding you.*

The dulcet tones of the Go-Betweens, reminding us of the importance of finding the right people – as Homer once said, “Rock stars...is there anything they don't know?”<sup>1</sup>

What they might not know, however, is how to find you – and the Society can help with that – through one of our little known but most valuable member services called ‘Find a solicitor’.

For those members who aren't aware of this service, I will explain a bit about it, because it is a valuable tool in connecting clients with members in our highly competitive legal market. QLS has established a referral list of solicitors and firms who have identified to the Society that they practise in certain areas of law. That data has allowed us to create a searchable database for clients seeking a solicitor or firm in a certain location or practice area.

Signing up to the referral list in a particular area of law does not represent that a practitioner specialises in that area of law or practices only in that area. Rather, it is an indication that the practitioner has a substantial involvement in that area of law.

To be eligible for inclusion on the referral list, a practitioner must be a member of the Society and have practised as a legal practitioner for at least five consecutive years. If a practitioner has practised interstate for part of that five-consecutive-year period, the practitioner will be eligible for inclusion on the referral list for federal areas of law, such as family law, immigration/citizenship law and taxation law. They will not be eligible for inclusion under other areas of law unless they have practised as a legal practitioner for a period of six consecutive years, at least three of which must have been in Queensland.

Inclusion on the list is not automatic, and an initial assessment is made by Society staff, with practitioners being limited to nominating three areas of specialisation. There are certain criteria established by QLS Council which will prevent a practitioner from inclusion, including if the practitioner has had involvement with the Legal Services Commission. Those criteria and the application form to register yourself on the ‘Find a Solicitor’ service are available on the website at [qls.com.au/For\\_the\\_community/Find\\_a\\_solicitor](http://qls.com.au/For_the_community/Find_a_solicitor).

The website also has links to help find accredited specialists, arbitrators and mediators, as well as your local district law association (DLA). Getting involved with your local DLA is a great way to connect with colleagues and the local community – which is also a great way to connect with clients. I highly recommend checking out and engaging with your local DLA.

Those colleague and community connections are doubly important to our profession as we enter what is sometimes known as the ‘silly season’, but which can be the sombre season for those struggling with their mental health. This time of year can often mask those struggles, and it is important that we keep our lines of communication with our colleagues open.

On 9 November, the Society, in conjunction with the Bar Association of Queensland, presents the annual Tristan Jepson Memorial Foundation Lecture. If you can't attend in person, a recording of the lecture will be available on the Society's website. This year Jerome Doraisamy, ex-lawyer and author of *The Wellness Doctrines for Law Students and Young Lawyers*, shares his personal insights on dealing with mental health challenges.

It is a good time to remind ourselves that people struggling don't always reach out, and we need to keep a lookout for the signs and not be afraid to ask, “are you ok?” The signs of depression can be subtle, and our profession is infamous for its susceptibility to the black dog. It is also worth watching for problems in our own lives, as being busy can mask the signs even to ourselves and maintaining collegial networks with our fellow professionals is a must.

Finally, by the time you read this, the QLS elections will have been run and our member representatives for the next two years selected. I would like to thank all those who have served in the current Council and wish the new Council the best of luck in its endeavours.

**Matt Dunn**

Queensland Law Society Acting CEO

## Notes

<sup>1</sup> “Lisa the vegetarian”, *The Simpsons*, 19 November 1995, television.



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## Advancing reconciliation in the profession

As part of the first Reconciliation Action Plan (RAP) for the solicitors of Queensland, the first meeting of the Queensland Law Society (QLS) Reconciliation and First Nations Advancement Committee was held in October.

This is the first of its kind for QLS, and the policy committee aims to raise awareness, promote reconciliation, advocate for and communicate the community and legal interests of Queensland's First Nations peoples. The committee is comprised of First Nations lawyers, First Nations legal professionals and advocates from all backgrounds.

This committee is one of the many initiatives borne out of the RAP and differs from the monitoring and implementation process of the RAP itself.

The inaugural committee chair is Linda Ryle, also president of the Indigenous Lawyers Association of Queensland, deputy chair of the QLS Equity & Diversity Policy Committee and deputy chair of the QLS RAP Working Group.

"It is an absolute pleasure to sit around a table with a group of such well-informed, committed and action-oriented First Nations changemakers," she said.

"We are only too aware of the great deal of work to be done and the contributions of this committee will provide the authoritative basis upon which QLS policy can reflect and include the perspectives and experiences of Queensland's First Peoples.

"It is the intention of this committee to also support and inform each of the other 25 QLS policy committees as and when invited."

The committee will meet bi-monthly to discuss current issues and proactively advocate around policy reform, participate in advancing the rights and interests across legislative developments, and be involved in discussions on how to increase the participation of First Nations peoples in the legal profession, and to support cultural inclusion and advance evidence-based submissions.

Keep updated via the First Nations People page on the QLS website [qls.com.au/For\\_the\\_profession/First\\_Nations\\_People](http://qls.com.au/For_the_profession/First_Nations_People).





# Law students and avatars bridge the justice gap

LawRight and The University of Queensland's Pro Bono Centre have recently unveiled an 'A2J & Innovation' clinic, with students taking steps to bridge the justice gap by using technology to help self-represented litigants.

During the clinic, students were asked to consider how digital disruption may be harnessed to improve access to justice and how technology may assist people who represent themselves in court.

Students used open source software A2J Author™ to develop web-based guided interviews to help alleviate the barriers faced by self-represented litigants. This software allows authors to simplify the language utilised in court forms, as well as present the questions one at a time via a virtual avatar representing a human lawyer. Following the interview, users can download the documents ready for review by a solicitor or for filing in a court registry.

Six students who had no prior experience with this technology are now implementing the software in the hope that it will lead to real, positive outcomes for clients, community legal centres and courts. The students have gained greater awareness of the challenges faced by self-represented litigants and innovation in the profession, as well as practical skills in design thinking, team work and technical literacy.

LawRight is grateful to Clayton Utz for its recent offer to provide employment law expertise to this project.

LawRight solicitor and clinical legal education supervisor Andrea Perry-Petersen was recently named on the 2017 Legal Innovation Index for her work in using technology to increase access to justice and design of the collaborative 'A2J & Innovation' clinic.

"In an environment of reduced funding to legal assistance services but increasing demand for legal assistance, innovative solutions are required. Technology provides an unprecedented opportunity to bridge the justice gap," she said on accepting the award.

Following further development and user testing of the current interview, LawRight aims to make available further guided interviews for other frequently used court forms.

For more information, contact Andrea Perry Petersen – [andrea.pp@lawright.org.au](mailto:andrea.pp@lawright.org.au).

## QLS Annual General Meeting

Following the gazettal of the AGM notice on 6 October 2017, the 89th Annual General Meeting (AGM) of members of Queensland Law Society Incorporated will be held in the Auditorium, Level 2, Law Society House, 179 Ann Street, Brisbane at 5.30pm on Thursday 16 November 2017.

If you would like to attend in person, please RSVP by 5.30pm on Tuesday 14 November 2017 to [f.culnane@qls.com.au](mailto:f.culnane@qls.com.au) or phone 07 3842 5904.

Any full member whose subscription is not in arrears and who is present in person or by proxy is entitled to vote at the meeting.

Associate, student and honorary members may attend and speak at the AGM, but are not entitled to vote on any of the proposed resolutions.

For more information [qls.com.au/About\\_QLS/Queensland\\_Law\\_Society/Resources\\_publications/Corporate\\_documents/Annual\\_General\\_Meeting](http://qls.com.au/About_QLS/Queensland_Law_Society/Resources_publications/Corporate_documents/Annual_General_Meeting).

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# Advocacy highlights

Queensland Law Society's (QLS) 25 standing policy committees and over 350 committee members represent a foundational aspect of the Society, contributing their expertise to good law in the state.

This year, committees were extremely active, with 146 submissions over the 2016-17 financial year. Committee members attended 178 meetings and had 91 mentions in Hansard.

Each volunteer committee member is a subject-matter expert in their chosen field, and during this past financial year, they contributed their knowledge to 132 articles and publications. Their assistance in fulfilling the Society's purpose of being the profession's trusted advisor has been greatly appreciated by all at the Society.

This year, QLS has once again had numerous successes across multiple areas of law. Our advocacy team is appreciative of the efforts

of all committee members, as well as the leadership of committee chairs and deputy chairs who consistently rally their committees.

One key area we have highlighted this year is for the benefit of seniors in the community, focusing on raising the awareness of elder abuse across the nation. On 15 June, an awareness campaign was launched with the Australian Medical Association Queensland, with the aim of raising awareness of elder abuse and supporting seniors in reporting abuse.

The Society also worked hard to reinstate funding for community legal centres by the Federal Attorney-General, and it was pleasing to see a reversal of the funding cuts announced earlier this year.

In the space of access to justice for Queenslanders, the 2016 Access to Justice Scorecard report was released to members, and the 2017 scorecard was launched and completed by the profession.

The Society also welcomed State Budget funding on justice initiatives, including the return of the Drug Courts, the permanency

of Southport's Domestic Violence Specialist Court and two new specialist courts to roll out in Townsville and Beenleigh. More appointments to the courts were also welcomed, and the Society will continue to advocate for further resources.

There has been extensive work on key pieces of legislation by our committees, including:

- Moves to expunge historical gay convictions
- Launch of the Search Warrant Guidelines in collaboration with the Queensland Police Service
- Highlighting issues with the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017
- Participation in the Coal Workers' Pneumoconiosis Stakeholder Reference Group. QLS was successful in ensuring that a decision to accept or reject an application for a medical assessment was subject to review by the regulator and in requiring the insurer to pay for the worker's travel expenses to this assessment.

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by Binari De Saram and Melissa Raassina

- Contributions to the ongoing Queensland property law review project, including proposed body corporate law reform
- The Farm Business Debt Mediation Bill
- The introduction of a class action regime in Queensland
- Updates to the REIQ contracts in conjunction with REIQ following amendments to the Federal Government's foreign resident CGT withholding framework
- QLS and REIQ have also released the new jointly endorsed Commercial Tenancy Agreement
- The State Penalties Enforcement Amendment Bill
- The Criminal Law Amendment Bill
- The Police Powers and Responsibilities (Commonwealth Games) Amendment Bill
- Involvement in the civil litigation reforms arising out of the Royal Commission into Institutional Responses to Child Sexual Abuse
- Participation in the stakeholder working group which produced the Guideline under the *Environmental Protection Act 1994* for issuing "Chain of Responsibility" environmental protection orders
- Involvement in legislative changes to move 17 year olds from the adult justice system back into the youth justice system
- Work on child protection reforms
- Contribution to the Australian Consumer Law review
- The Federal Government's plan to extend the Anti-Money Laundering and Counter-Terrorism Funding compliance regime to solicitors
- The Strong and Sustainable Resource Communities Bill
- The Land and Other Legislation Amendment Act, introducing priority notices in Queensland
- The compulsory third-party insurance scheme review
- Tow truck industry reforms

- Ongoing participation in the review of court practice and procedure, including the review of practice directions.

The Society's committees have also been approached by the government, opposition and media for their expertise on a range of other topics.

QLS also released a marriage equality policy position in August, focusing on the issue as a matter of law.

The Society's 'Call to Parties' document is also being finalised ahead of the next Queensland State Election. Updates will be included in the December edition of *Proctor*.

Binari De Saram is the acting advocacy manager at Queensland Law Society and Melissa Raassina is the acting editor of *Proctor* and the media and public relations advisor at Queensland Law Society.

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## Exploring life and death

Over 100 succession law and elder law practitioners converged on the Surfers Paradise Marriott Resort and Spa in October to discuss life, death and the rights of older Australians. QLS thanks sponsors Cyber Audit Team, Perpetual Trustees and all trade exhibitors for their support of this year's event.



Thank you to our gold sponsor



## Contributing to good law

Queensland Law Society's policy committee chairs and deputy chairs gathered for their annual discussions over breakfast in October, to discuss advocacy successes for the past year. Acting CEO Matt Dunn and acting advocacy manager Binari De Saram took the opportunity to thank them for their dedication and contributions to the Society.







## Connecting with regions – spotlight on central Queensland

Thank you to our gold sponsors

In October, QLS partnered with the Central Queensland Law Association to launch the CQLA & QLS Conference. Delegates were provided the opportunity to learn from the experts, meet with QLS specialist staff and network with fellow colleagues. CQLA and QLS thank sponsors Worrells, Meridian, legalsuper, Central Queensland University Australia and Herron Todd White.

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# 2017 QLS Council election results

Queensland Law Society's 2018-2019 Council has been elected, with 27% of the Society's membership voting in the 2017 election. The voting period wrapped up Monday 16 October 2017, with 22 candidates in the running for a position on Council.

The Society would like to thank all members who were engaged in this year's election and congratulate the successful candidates. The incoming Council will drive the strategic direction of Queensland Law Society over the coming two years. QLS also thanks the current Council for their work thus far as leaders of the Society.

Edited versions of the profiles submitted by election candidates appear below. For more information on Council and the election, visit [qls.com.au](http://qls.com.au) > About QLS > Council.

Elected candidates:

**President** – Ken Taylor

**Deputy president** – Bill Potts

**Vice president** – Chris Coyne

**Ordinary members of Council**

Peter Lyons, Paul Tully, Kara Thomson, Luke Murphy, Michael Brennan, Travis Schultz, Kirsty Mackie, Chloe Kopilovic



**President elect  
Ken Taylor**

Ken is a director of Purcell Taylor in Townsville having been admitted in 1989. He is a current serving Councillor on the QLS having commenced in 2014. Ken is also a current member of the TDLA and the ALA, holds specialist accreditation in personal injuries law, and he is a member of the S.193A Workers Compensation Review Panel.

He was awarded life membership with the Townsville CLC and is a director of Mater Health NQ. Ken supports the maintenance of high professional and ethical standards in the profession and the promotion of the value of solicitors to the general community. He recognises the challenges that are facing QLS members across Queensland.

Ken is focused on the service that QLS can offer its members as being central to the growth of the organisation and to QLS remaining relevant to all members in rapidly changing and challenging times.



**Deputy  
president elect  
Bill Potts**

A proven, energetic leader of the profession, with a strong history of achievement for QLS members. As the 2016 President I travelled throughout Queensland speaking for and to our members and can claim to have given persuasive voice to the aspirations of members for good law, good lawyers, for the good of the community.

I stood on a publicly declared platform, as a dynamic team with Christine Smyth through 2016-2017, and transformed QLS as the peak legal body in Queensland. I can proudly claim to have achieved successes in advocacy, reductions in insurance premiums and invigorated our engagement with government. But there is unfinished business. So why would we do it again? QLS needs continuity solidifying the successes and building on them.

I have the drive, energy and skill set to reach across all practice types to ensure the progress of QLS as a dynamic and respected membership organisation.



**Vice  
president elect  
Chris Coyne**

Christopher was admitted to practice in 1979. Previously a partner in Clayton Utz, and now practises on his own account as Lexon Legal.

As a member of Council, his commitment has been to the continued development of the practice of law as a financially viable and sustainable business.

QLS roles include: vice president appointed August 2017; member of council since 2014; chair – governance committee. Committee memberships including executive, finance and risk, fidelity fund. Previously: director Lexon Insurance Pte Ltd (2005-2015); director Specialist Accreditation Board; director Australian Insurance Law Association; president Medico Legal Society. Community and academic roles: director – Incorporated Council of Law Reporting; chair – Professional Indemnity Committee for LawAsia; deputy chair – QIMR Berghofer Medical Research Institute; director – QPharm Pty Ltd; sessional member – QCAT/CCT 2004-2011; member – Australian Health Ethics Committee; adjunct professor of law, University of Queensland 1999-2006; graduate – Program on Negotiation at Harvard Law School.



## Elected ordinary members

### Peter Lyons

I am the director/principal solicitor at the Prisoners Legal Service Inc. I believe that I can bring to the Council the voice of a person with new ideas to assist QLS to meet the challenges it faces over the next two years and to give voice to those members who may feel they are not being heard.

Having been a member of QLS for over 25 years I have been able to observe with pride the growth of QLS as a vital and influential voice for the solicitors of Queensland. I am seeking the opportunity to give something back to the legal profession and would be honoured to be a member of the next QLS Council.

### Paul Tully

Paul is a principal and practice chairman of McInnes Wilson Lawyers Pty Ltd. He is a present councillor of seven years standing and seeks re-election. He is a member of the Finance & Risk Committee of QLS. Paul is keen to promote and support the profession and has been integral to the reduction of insurance premiums, increased access to services and the promotion of good law. Paul is a personal injuries accredited specialist and 30 years of practical experience is the foundation for QLS to support a pragmatic approach to the continuation of common law rights for the injured.

### Kara Thomson

Practising as a solicitor since 2006, I have worked across commercial litigation, retail leasing, insurance and personal injuries. I have worked within large practices, in-house for a Queensland insurer, and had fantastic opportunities to work across regional areas. I have worked as an elected councillor during the 2016 and 2017 years, gaining experience across a variety of committees and building a better understanding of what issues face our profession now and what risk areas there are into the future. Our profession is ever evolving and it is important to ensure that our good community standing is upheld and that we continue to advocate for evidence based, good law.

### Luke Murphy

I am an Accredited Specialist (Personal Injuries) and also practise in succession law. I am deputy chair of QLS's Tort Law/Accident Compensation Committee, and have served on the Practice Management Committee and Personal Injuries Conference Committee.

I have represented QLS at parliamentary inquiries and committee hearings, in negotiations with the Motor Accident Insurance Commission and WorkCover, CTP reviews, WorkCover Stakeholders' Reference Groups and QIRC interest groups. I am committed to serving the profession.

Outside the law I have held the following positions: deputy president, board member of Royal Life Saving Society (1994-2004), deputy chairman, board member of Holy Spirit Care Services (2007-2014), and member Salvation Army Red Shield Appeal Committee and chairman Inaugural Young Professionals Committee.

### Michael Brennan

Michael Brennan is a current QLS councillor who is passionate about supporting and guiding the industry through the many challenges which it is currently facing. Michael is managing principal of Offermans Partners. With offices in Brisbane and across regional Queensland, Michael has a unique understanding of the profession across the State.

Admitted in 1999, Michael practised in commercial law before becoming an insolvency practitioner. In addition to maintaining his practising certificate, Michael is a liquidator and bankruptcy trustee.

Michael sits on the Queensland Insolvency Committee of the Law Society and is the deputy chair of the Queensland Committee of ARITA, the nation's peak insolvency body. He is a past president of the TDLA.

### Travis Schultz

My career has seen me become managing partner of an established firm (at the age of 27) and then continued to grow that entity to a total staff of 76 at the time it was sold in 2014. My service of the community and

profession includes: two terms as president of the SCLA; life member of Sunshine Coast Legal Service; Human Research Ethics Committee of USC; QLS Personal Injuries Specialist Accreditation Committee and Accident Compensation Committee; speaker at dozens of conferences for QLS, LexisNexis, Law Associations and the ALA; serving on committees of numerous charities including Wishlist, SunnyKids, Coast to Bay Housing, Cystic Fibrosis Qld; board member Sunshine Coast Turf Club and Matthew Flinders Anglican College (deputy chair).

### Kirsty Mackie

Since admission, I have practised both in private practice and the community legal sector in family law and elder law. I have been chair of QLS' Elder Law Committee since 2014 and have been extensively involved in advocating to government for legislative change in elder law and guardianship issues. Since 2015 I have been working with law students from the University of the Sunshine Coast at Suncoast Community Legal Service in a practical legal clinic where we assist and represent vulnerable clients in courts and tribunals in the areas of domestic violence, family law and minor civil law. Currently, I am tutoring equity and trusts at QUT and have partnered with QUT law school colleagues to write a book on elder law from a human rights' perspective.

### Chloe Kopilovic

Chloe is an associate with Sajen Legal, practising in succession law. Having moved from WA to Queensland in 2011, Chloe joined Sajen Legal (formerly Ferguson Cannon Lawyers) as a trainee solicitor. After working and studying full time, Chloe was admitted in 2013. She identified an area of growth for her practice in succession law and has been focussed on developing her skills and expertise in this area. She is currently completing her Masters in Wills and Estates with the College of Law and is committed to completing her specialist accreditation. Chloe served as the youngest council member for QLS in 2016-2017.





# Your legal workplace

## Does your firm have appropriate post-employment restraints?

**Rob Stevenson** looks at post-employment restraints and how employers can safeguard against risks associated with staff departing the firm.



Consider this scenario: you have trained up a bright young solicitor who you thought was going to stay with your firm for many years, and that solicitor has built a relationship with some of your best clients.

Out of the blue, the solicitor resigns and you stop hearing from those clients. You later find they have given their business to your old employee, who is either with a new employer and competitor, or has set up their own firm.

What can you, as an employer, do about these situations? This depends on the quality of the restraint provision in your contract with the employee.

### Some restraint is better than no restraint

It is trite to say that every employee should have a signed employment contract. In this context, even a poorly worded contractual restraint may be of some value. But if you don't have a contractual restraint, then there is nothing on the face of it to prevent an ex employee poaching your clients or accepting the approach of a soon-to-be ex client once they leave your firm. A confidential information provision may by itself be of some assistance in stopping your ex employee from blatantly soliciting your clients for work.<sup>1</sup> However, in the absence of a specific term, implied duties of confidentiality will not generally cover the mere identity of clients.

### 'A stitch in time saves nine'

Restraints are not things that should be put in the bottom drawer of the desk and forgotten about until an employee tells you they are leaving. Most employment restraint related litigation is about trying to minimise the damage to your firm or, to put it another way, trying to shut the gate once the horse has bolted. Whilst preventing your ex employee from dealing with your clients may be of some comfort, it may be a pyrrhic victory if you have still lost one or more clients.

A good preventative strategy involves the following elements:

1. Ensure the contractual post-employment restraint is reasonable in the first place.
2. Explain the restraint to your employee before they start work and the reasons for the restraint (and make a note of the conversation).
3. Ensure that you keep in touch with important clients and referrers and remain 'the face' of the firm.
4. Review the restraint when considering pay rises or promotions.
5. If an employee resigns, make them work out their notice period or stay at home on "gardening leave" – and use the time to contact clients (sometimes jointly with the employee) and manage the transfer of their business to other employees or make the time to do the work yourself for some period.
6. Remind the departing employee about the restraint.
7. Sometimes, it may be wise to take a commercial approach and negotiate a suitable fee if the employee wishes to retain the business of the client and it is clear that you are going to lose the client anyway.

### The legal approach to post-employment restraints

What is a reasonable restraint? The starting point is that a contractual provision which imposes a restriction on the ability of employees to earn their livelihood will be void as a matter of public policy. However, there is also an interest in holding parties to their voluntary contractual obligations. Accordingly, courts will enforce post-employment restraints but only where they are clear and only so far as necessary to protect the employer's reasonable business interests.<sup>2</sup> Whilst an employer is entitled to protect its trade secrets, confidential information and goodwill including customer connections, this does not extend to protection against mere competition with a former employee.<sup>3</sup>

A narrower and more strict approach is taken to interpreting an employment restraint provision than a commercial restraint.<sup>4</sup> In this context, restraints preventing ex partners from working in competition to their old firm are likely to be more generously interpreted than similar provisions in employee agreements.<sup>5</sup>

### The elements of a restraint

A contractual employment restraint normally comprises several types of restraint and time qualifiers on the operation of the restraint. Restraints on employees generally take three main forms:

1. A restraint from poaching another employee of the employer.
2. A restraint from poaching or accepting the business of clients of the employer.
3. A restraint from misusing confidential information gained during the employment.

In most cases, I suggest that the second type of restraint be limited to clients with whom the ex employee has had personal dealings, usually within a period of 12 months before the employment ends. This is the group of people most at risk of taking their business away from the firm. Restraints which seek to prevent an ex employee from dealing with all clients, or from working in the same industry for a period of time, are less likely to be enforced by a court, even for quite senior employees.<sup>6</sup>

Restraints are not indefinite in their operation. The most common restriction is on the time for which the restraint operates. You should consider how long may be necessary for you to take steps to salvage your clients and for the ex employee's influence to wane. The current commonly accepted form of drafting restraint provisions is to allow for several options for the period of restraint depending on the particular circumstances of a case (sometimes called a 'cascading' or 'ladder' restraint). When drafting the restraint, it is difficult to know precisely the length of restraint which is likely to be called for. Accordingly, restraints commonly provide several options of between one and six months from the ending of employment (although longer periods of nine or even 12 months may be justifiable in particular cases).

A shorter period of restraint may be more appropriate for short term or more junior employees, whilst a longer period may be suitable for longer serving and/or more senior employees. The benefit of the 'cascading' approach is that it allows a court to choose a particular combination of restraints it considers reasonable in the circumstances when considering granting an injunction or awarding damages to enforce the contract. In Queensland, courts cannot rewrite an employment contract.<sup>7</sup> Accordingly, in Queensland, if the only time option included in a contractual restraint is, say six months, and the court considers that length of restraint to be unreasonable, then the whole restraint may fall over and be unenforceable.

It is possible to include detailed combinations of restraints as long as the nature of each restraint is clear and reflects a genuine attempt to define the reasonable protections given to the employer. However, a court is unlikely to grant an injunction where there are so many combinations that the restraint amounts effectively to asking a court to write the contract for the parties.<sup>8</sup>

Geographical restraints are more controversial and should only be used where there is a real 'face of the firm' element and the employee's influence extends to more than just the clients they have dealt with. This sort of restraint will not often be enforced.<sup>9</sup> If this sort of

restriction is included, it should be in addition to alternative and more specific restraints.

A middle of the road approach would see an anti-competition restraint restricted to those clients, potential clients and referrers of work with whom the employee has had dealings in the 12-month period before termination of the employment for a period of up to six months.

This type of restraint may cover any action by an ex employee to persuade, solicit or even accept an approach by a relevant client, potential client or referrer. A restraint can be effective to stop an ex employee dealing with a client even where the client makes the initial approach.<sup>10</sup> A broader or longer restraint may be justifiable where a practitioner sells their practice for valuable consideration and is taken on as an employee of the new practice.<sup>11</sup>

The contractual provision should also contain acknowledgements that:

1. Each restraint has effect as an independent provision and severance of any of the restraint provisions won't affect the validity of the remaining provisions.
2. The employee has had the opportunity to obtain independent legal advice and that each specified restriction is reasonable and necessary to protect the employer's legitimate business interests.
3. The remuneration paid to the employee by the employer for their service includes adequate consideration for the post-employment restraint covenant.

## Does it matter how the employment ends?

A restraint is prima facie enforceable regardless of whether the employment ends due to resignation of the employee or termination at the instigation of the employer, whether for poor performance, misconduct or redundancy. However, a recent case has reinforced that a restraint will not be enforceable where the employer, by its conduct, repudiates the common law contract.

In *Crowe Horwath (Aust) Pty Ltd v Loone* [2017] VSCA 181, the court affirmed that the employer had breached its employment contract with a senior accountant when it unilaterally made changes to a bonus payment scheme and to his role in the firm. The court found these breaches were repudiatory, allowing the accountant to lawfully end his contract.

The most common scenarios of repudiation are likely to be those where the employer unilaterally demotes an employee or reduces their pay and the employee decides to accept the repudiatory conduct and leave the employment.

Unjustified summary dismissal may also result in the restraint not being enforceable. Unfair dismissal in the context of a statutory unfair dismissal claim in the Fair Work Commission will not automatically amount to repudiating behaviour, but may be relevant for a court to consider in exercising its equitable discretion whether or not to issue an injunction.

## The final word

Clients are difficult to come by and hard to keep, even without the risk of losing them to a departing employee. This risk can be addressed by including a reasonable restraint in your contract of employment and proactively managing the employment relationship and your clients. This will minimise the prospects of having to consider taking action to enforce the restraint in a court, whether by way of injunctive relief or damages. It will also minimise the prospect of having to wave goodbye to valuable clients.

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### Notes

- <sup>1</sup> See *APT Technology Pty Ltd v Aladesaye*, In the matter of *APT Technology Pty Ltd* [2014] FCA 996
- <sup>2</sup> See *Portal Software v Bodsworth* [2005] NSWSC 1179 at [63] – [68] for a useful summary of the principles
- <sup>3</sup> Ibid at [65]
- <sup>4</sup> *Butt v Long* (1953) 88 CLR 476 at 486 (per Dixon CJ)
- <sup>5</sup> See *Pryse v Clark* [2017] NSW SC 185
- <sup>6</sup> See *Just Group Ltd v Peck* [2016] VSC 614
- <sup>7</sup> Unlike New South Wales – see *Restraints of Trade Act 1976* (NSW) s.4
- <sup>8</sup> See *Bulk Frozen Foods Pty Ltd v Excell* [2014] TASSC 58
- <sup>9</sup> See *Stacks Taree v Marshall* [No 2] 2010 NSWSC 77, but cf *Emeco International Pty Limited v O'Shea* [2010] WASC 348 and *Epichealth Pty Ltd v Yang* [2015] VSC 516
- <sup>10</sup> See *Barrett and Ors v Ecco Personnel Pty Limited* [1998] NSWSC 545
- <sup>11</sup> See *Southern Cross Computer Systems Pty Ltd v Palmer* (No 2) [2017] VSC 460 but cf *GBAR (Australia) Pty Ltd & Ors v Brown & Ors* [2016] QSC 234



# Which Practice Manager Are You?

Don't let clients' legal disbursements affect cashflow and profit!



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# Member focus

## Summary of Queensland Law Society's 2016-17 annual report

Following is a summary of key points and achievements for members as a snapshot of the Society's financial year. For members interested in viewing the report in its entirety, it is available at [qls.com.au/annual-reports](http://qls.com.au/annual-reports).



### Membership snapshot

Queensland Law Society membership numbers increased once again during the 2016-17 year. Total membership increased by 1.5% to 13,451 and the total number of QLS full members increased to 10,165. Of all full members, 77.6% work for law firms, which is marginally higher than last year's percentage of 77.4%.

The proportion of female full members continued to climb, with females accounting for 49.1% of all full members, an increase on last year's 48.3%. This change is driven by newly admitted practitioners, of which approximately 60% are female.

Students of law are the future of the profession, and the Society was pleased to welcome 104 new student members in 2016-17.

### TOTAL MEMBERSHIP BY CATEGORY

<b>75.6%</b> 10,165	<b>FULL</b>
<b>3.5%</b> 471	<b>ASSOCIATE</b>
<b>19.9%</b> 2,678	<b>STUDENT</b>
<b>1.0%</b> 137	<b>HONORARY</b>

### FULL MEMBERS BY SEGMENT

Post-admission experience	Number	%
0-5 years	2,888	28.4%
6-12 years	2,708	26.7%
13-20 years	2,057	20.2%
21+ years	2,511	24.7%

### Advocating for good law

During the financial year, the Society had 26 standing policy committees and five working groups whose dedicated, expert members work tirelessly to further the Society's advocacy in assisting the government to draft and amend legislation and policy that has a positive impact on both the legal profession and the Queensland community.

There were 163 committee and working group meetings held during the 2016-17 financial year. The Society received 184 mentions in Hansard and made a total of 142 submissions during the year. The number of successes accomplished as a result of these submissions increased from 88 to 167, almost a 50% increase on successes from the previous year.



Queensland Law Society's (QLS) 2016-17 annual report was tabled in the Queensland Parliament on 29 September 2017 by Queensland's Attorney-General, the Honourable Yvette D'Ath MP.

	2016-17	2015-16
<b>Submissions dispatched – proactive</b>	<b>9</b>	43
<b>Submissions dispatched – reactive</b>	<b>133</b>	103
<b>Quotes in Hansard</b>	<b>184</b>	82
<b>Consultative events and meetings attended</b>	<b>180</b>	92
<b>Articles and publications</b>	<b>82</b>	89
<b>Successes (defined as obtaining changes to legislation, policy or procedure of Government)</b>	<b>167</b>	88

Concentrated media activity promoted a strong, clear QLS voice, both throughout Queensland and nationally, on the key legal topics that have lasting impacts on the profession and wider community. A total of 60 media releases were produced and there were 1,659 mentions of QLS in media reports, an increase of 18% over the previous year.

### Supporting good lawyers

The past financial year has been the busiest on record for the QLS Ethics Centre which provides ethical guidance, practice support, education and thought leadership to the Queensland profession.

The Centre responded to 4,259 enquires, compared to 3,680 last year, and delivered 55 Bespoke Ethics Sessions. In addition, Centre solicitors delivered presentations to students undertaking Practical Legal Training courses at University.

The Centre sought to foster collegiality with the launch of the Modern Advocate Lecture Series – an initiative of 2017 QLS president Christine Smyth. Key to the success of the lecture series was the quality of both the speakers and the subject matter, with topics including advocate's immunity, advocacy within and outside the courtroom, and maximising impact as an advocate. Four lectures are planned each year, with lectures due to take place in the regions as well as in Brisbane. Lectures have also been live-streamed on Facebook and video recordings can be viewed on the Centre's website pages.

### Professional development for members

The Society delivered 72 professional development events across a range of practice areas and locations during the year,

including 26 webinars. This was an exceptional increase of six on the 20 offered last year, ensuring all members, regardless of physical location, can access content. Practitioners also had the opportunity to access recordings of webinars and a selection of conference DVDs.

QLS offered four complimentary events comprising 6.5 CPD points, and plans to expand the number of complimentary CPD events for members in 2017-18.

The QLS Practice Management Course (PMC) remains the program of choice for the overwhelming majority of aspiring principals, with 217 practitioners completing the course during 2016-17.

More than 60 candidates entered the family law, succession law and property law 2017 specialist accreditation programs, with committees and the Specialist Accreditation Board continuing to develop the program to meet the needs of an evolving profession.

### Launching the Reconciliation Action Plan

In May 2017, the Society's inaugural Reconciliation Action Plan (RAP) was presented to the QLS Council for consideration, and on the eve of National Reconciliation Week, the QLS Council approved the Society's RAP for the period 1 July 2017 to 30 June 2019. Reconciliation Australia provided its endorsement of the Society's RAP in June 2017.

The QLS RAP seeks to promote unity and respect between Aboriginal and Torres Strait Islanders and non-Indigenous Australians. It states that QLS aims to improve access to the Queensland legal system for budding lawyers who identify as First Nations peoples, to support current Indigenous lawyers, and to

encourage Indigenous legal professionals to succeed in their careers and go on to represent First Nations peoples in the judicial system.

### Supporting regional practitioners

The QLS Ethics Centre continued to provide Bespoke Ethics Sessions to law firms, district law associations (DLAs) and community legal centres across the state. The sessions, tailored to the needs of each group, have proven to be increasingly popular and are regularly delivered in the regions. The Centre will look to partner with DLAs to accommodate the needs of regional practitioners further in 2017-18.

Local DLAs were also consulted on targeted regional initiatives which saw the launch of QLS roadshows into the regions of Bundaberg, Toowoomba and the Gold Coast.

Additionally, live-streaming and video recordings are making Brisbane-based events and lectures more accessible to regional members.

### Financial performance

Queensland Law Society's Group consolidated financial results comprise the financial results of Queensland Law Society Incorporated (parent entity), the Law Claims Levy Fund (LCLF) and the Society's wholly-owned subsidiary, Lexon Insurance Pte Ltd (Lexon).

In 2016-17, the Group made an operating surplus before tax of \$4.3million and net assets at 30 June 2017 were \$143.1million. The retained surplus supports the Group's sustainability and ability to deliver strategic improvements for members. Revenue from fees and membership services grew due to an increase in the number of practising lawyers. Insurance levies decreased due to the reduction in base levies offered to practitioners, resulting in most members benefiting from a 20% reduction in Lexon Insurance premiums. Investment income increased, and investment activity resulted in \$2.7million of unrealised gains recognised as fair value at the end of the financial year. This is due to the overall growth in performance of the investment portfolio held by the Group.

Employee expenses were higher in 2016-17 due to changes in the parent entity over the course of the financial year. An overall increase in Group expenses was recognised mainly from the increase in provision for outstanding claims.

# Prepare yourselves

What you need to know about the National Mortgage Form



In one of the most radical changes to our mortgage forms since the introduction of the white A4 mortgage form and standard terms documents with the *Land Title Act 1994*, the registrars have agreed on a uniform format for the National Mortgage Form (NMF) for use in both paper-based and electronic transactions.

In Queensland, all mortgages lodged after 2 March 2018 must adhere to the NMF. This means practitioners must start using the form well before this date to ensure compliance with this requirement. Practitioners with a national mortgage practice or those who lodge through PEXA need only look to one form in future.

The change also means that clients who hold unregistered mortgages need to ensure that the mortgage has the mechanisms necessary to enable the mortgagee to cause a replacement mortgage to be signed, or to sign one if the mortgagor refuses to do so. A further assurance clause coupled with a power of attorney authorising the mortgagee to do anything the mortgagor should have done but fails to do, works at present.

## What is the National Mortgage Form?

The National Mortgage Form is a multipage mortgage prescribed in extensive detail in design specifications, which span over 120 pages. You can get a copy of the design specifications and user guide at the Australian Registrars National Electronic Conveyancing Council's (ARNECC) website [arnecc.gov.au/publications/national-mortgage](http://arnecc.gov.au/publications/national-mortgage).

The design specifications not only specify the size, content, location and fonts for each element of the form, but also variations to cater for each state and PEXA's own nuances. For example, the amount of space for the name of the person lodging the document is unrestricted in the Northern Territory, and restricted to the following number of characters in the remaining states and territories:

- 60 characters for Queensland and the Australian Capital Territory
- 75 characters for Tasmania
- 100 characters for South Australia
- 120 characters for New South Wales
- 130 characters for Victoria
- 255 characters for Western Australia.

The level of detail in these specifications means that practitioners will want to use a computer program to prepare these documents, especially if working across jurisdictions. Practitioners need not worry as the registrars



**Gordon Perkins** discusses how practitioners can prepare themselves for the change to Queensland's mortgage forms to the new National Mortgage Form that is mandatory after 2 March 2018.



have taken the trouble to create a computer program, which tailors the mortgage to comply with each state and territory's requirements.

The computer-generated form is also available at ARNECC's website. It includes a feature to allow practitioners to save the data file for a partially completed mortgage on their computer and upload it to the form when you wish to complete it. There is a link to the ARNECC online form on the Department of Natural Resources and Mines' Titles Registry forms web page [business.qld.gov.au/industries/building-property-development](http://business.qld.gov.au/industries/building-property-development). The advantage of this form for the occasional transaction is that it changes the document to comply with the jurisdictional nuances for a mortgage of land in another jurisdiction.

The NMF has no schedules, but the relevant panels can expand to accommodate additional information. For example, all secured properties can be described in the mortgage itself and there is no need for an enlarged panel. This also means it is not possible to attach mortgage covenants to the back of the form, they must be in a standard terms document linked to the form by the document's registration number (as for existing mortgages) or included in the form itself as additional terms and conditions.

Electronically lodged mortgages, for example through PEXA, and paper-based mortgages in New South Wales, Northern Territory, Victoria, South Australia and Western Australia have a 4000 character limit on the additional terms and conditions. Foreign jurisdictions also have their own nuances you need to be aware of when preparing mortgages for use interstate.

Even though there is no restriction on the amount of characters included in a Queensland paper-based mortgage, the online form has a limit on the number of characters which will fit in the additional terms and conditions field. For example, if you cut and paste your mortgage covenants into the form, only about one page of covenants will be retained and the rest are likely to disappear into the ether.

The input field for the additional terms and conditions in the online form is two-lines deep, making it very difficult to check what has been entered without printing the form. As the online form is XML based, only characters can be entered and there are no facilities to accommodate formatting of the text including underlining, bold and italics. However, this form is convenient for the occasional mortgage if you

have registered a standard terms document, or you are preparing an interstate mortgage.

Practitioners can also create their own Queensland only mortgage from the template on the Titles Registry Forms web page. It can only be used for paper-based transactions in Queensland, which currently have no limit to the number of characters you can insert into the additional terms and conditions section of the mortgage. As the form is a Microsoft Word template, you have the opportunity to format the text in the additional terms and conditions, if you adhere to the font type and size specified in the design specifications, which is Arial 11pt.

You may recall that in late 2015, the registrar aligned the Queensland verification of identity requirements for mortgagors with the national model for the verification of identity of people dealing with land. ARNECC was established by the registrars for electronic conveyancing, so at some point we can expect Queensland to require all mortgages to be lodged electronically. It would only take a stroke of a pen for the registrar to follow New South Wales and Victoria in mandating the electronic lodgement of mortgages. Those states have done so for authorised deposit-taking institution (ADI) to ADI (bank, building society or credit union) refinances of consumer and commercial mortgages from 1 August 2017. There are only a few exceptions that are allowed.

### Dealing with these changes

As a profession, we can adopt the use of standard terms documents for all mortgages. This will mean considering the consumer laws and making sure the forms are clear and concise. It is a professional courtesy to present clear, concise, readable and well-drafted documents to parties signing them.

This avoids some of the formatting restrictions in the mortgage form, and is easier to implement than drafting a compliant national mortgage, or for national practices lodging mortgages in multiple jurisdictions. It is also likely to ease the transition to electronic lodgement of your mortgages when the registrar decides to mandate electronic lodgements.

For transactions where mortgage covenants are negotiated, we can consider preparing and lodging tailored standard terms documents where no lodgement fee applies in Queensland, or if only some modifications are

required, using a standard terms document and include the modifications in the additional terms and conditions field of the mortgage.

There is no provision for parties other than the mortgagor and mortgagee to sign the mortgage unless the registrar will allow third-party executions in the additional terms and conditions field. It is not clear if this will be allowed, as it won't work in an electronic mortgage, and the character restrictions in the online form will make this impractical for that particular form.

Instead of a third-party mortgage including loan covenants or third-party debt acknowledgment, practitioners can prepare a first-party mortgage securing the mortgagor's obligations under a guarantee of the debt. The National Credit Code and the various codes of practice for ADIs only allow third-party mortgages in this form, meaning that mortgages directly securing a third-party debt should be rare.

In the form, font sizes and margins are mandated and the form is not scalable. This means that practitioners should print and forward mortgages for execution or send them in an electronic format that will not shrink the document to fit the page – such as a Microsoft Word document that has editing restricted. It is important to note that the default printing settings for Adobe PDF documents are 'shrink to fit' and if not changed, will shrink the mortgage by at least 5%, making it non-compliant with the design specifications.

In an increasingly litigious society focused on consumer protection, one day there will be a claim by a disappointed party to a transaction that the mortgage was not valid because it did not meet the design specifications. Regardless of whether or not a claim has merit, it will cost the practitioner. It is easier and safer to comply with the design specifications from the outset.

### Summary

The changes are most likely to affect those practitioners and mortgagees, especially financial institutions, who currently include all of the terms of their mortgages in a schedule to the mortgage, or who have multi-jurisdictional practices. We must adapt to the new format as soon as possible to avoid the embarrassment of being unable to lodge a client's mortgage once the National Mortgage Form becomes compulsory.

Gordon Perkins is special counsel at Mullins Lawyers.

# Pre-action disclosure in the state courts

You may be presented with a situation where your client wishes to bring legal proceedings but lacks the information needed in order to decide whether or not to bring the action against an identified person or to bring proceedings at all.

If you are contemplating proceedings in the Federal Court, the *Federal Court Rules 2011* (Cth) specifically provide for a process of preliminary discovery.<sup>1</sup> However, if you are contemplating proceedings in the Queensland State Courts, the *Uniform Civil Procedure Rules 1999* (Qld) (the UCPR) contain no such equivalent.<sup>2</sup>

Instead, depending on the kind of information that is sought, prospective litigants before the state courts may seek three types of orders which are now considered below.

## Interrogatories under rule 229(1)(b)

Rule 229(1) of the UCPR provides that:

- (1) With the court's leave, a person may, at any time, deliver interrogatories—
  - (a) ...
  - (b) to help decide whether a person is an appropriate party to the proceeding or would be an appropriate party to a proposed proceeding – to a person who is not a party.

In *Pacific Century Production Pty Ltd v Netafim Australia Pty Ltd* [2004] 2 Qd R 422, Douglas J stated that rule 229(1)(b) permitted interrogation of a non-party for the purposes of both identity and information discovery. His Honour noted that the wording of the section was not directed towards identifying a “potential party” but rather, an “appropriate party”.

While interrogatories may seek both identity and information, the obvious limitation is that the rule does not allow an applicant to seek pre-action disclosure of documents.

## Inspection of documents under rule 250 of the UCPR

Rule 250(1) of the UCPR provides that:

- (1) The court may make an order for the inspection, detention, custody or preservation of property if—
  - (a) the property is the subject of a proceeding or is property about which a question may arise in a proceeding; or
  - (b) inspection of the property is necessary for deciding an issue in a proceeding.

Rule 254 contemplates that an order under rule 250 may be made before a proceeding starts, but only in urgent circumstances.

An applicant for pre-action disclosure of documents under rule 250 and 254 must therefore show:

1. That those documents constitute “property” for the purposes of rule 250;<sup>3</sup>
2. That the documents are either:
  - a. the subject of a proceeding
  - b. property about which a question may arise in a proceeding
  - c. property of which the inspection is necessary for deciding an issue in a proceeding, and
3. That the circumstances in which the inspection is sought are urgent.

In determining what is meant by “property about which a question may arise in a proceeding”, and “property of which the inspection is necessary for deciding an issue in the proceeding”, it is necessary to consider the purpose of the rule in question.

The equivalent Western Australian rule was considered in *Atwell v Roberts*.<sup>4</sup> Newnes M stated that this rule “is not an alternative to discovery and inspection under [the rules of court], nor does it, in effect, provide, by another means, discovery and inspection of a more general scope. If it were otherwise it would simply be an avenue by which the requirements and limitations set out in [the rules governing discovery] might be avoided, notwithstanding that those requirements and limitations exist for good reason....[The rule] is directed to the inspection of physical objects, including, where appropriate, documents. It will generally apply to a document when what is in issue is the form of the document or by whom it was made, such as whether the document is a forgery...”

Other cases have indicated that the purpose behind the rule is the preservation of evidence that relates to the proceeding, rather than as an alternative form of discovery.<sup>5</sup>

Accordingly, rule 250 of the UCPR is not, in truth, an effective means of obtaining pre-action disclosure. It is, rather, a means for preserving property in advance of trial, being a rule contained in chapter 8 of the UCPR (that chapter being entitled “preservation of rights and property”). Documents are subject to the rule, but only insofar as it is the physical form of the document that is relevant to the matters in issue in the proceeding, rather than its contents – the primary objective of the rule being to ensure that the physical form of the document, to the extent that it is relevant to a matter in issue in the proceeding, be preserved.

## The principles in *Norwich Pharmacal*

Aside from the UCPR provisions discussed above, the Supreme Court retains its equitable jurisdiction to determine an application for pre-action discovery in accordance with the principles set out in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (“*Norwich Pharmacal*”).<sup>6</sup>

In that case, Lord Reid explained the basic principle as follows. “[The authorities] seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.”<sup>7</sup>

*Norwich Pharmacal* was concerned with an application for the disclosure of information so as to enable the applicant to identify potential defendants – it did not involve the making of a general discovery order to enable the applicant to obtain whatever information it may have needed in order to plead its case.<sup>8</sup> Because of this, *Norwich Pharmacal* has not been regarded as authority for the proposition that a potential plaintiff can obtain pre-trial discovery orders for any information that it needs in order to make its case, rather than just information needed to establish the identity of the defendant.<sup>9</sup>



Kylie Downes QC and Fiona Lubett explain the process of pre-action disclosure when bringing legal proceedings before the state courts.



However, there have been cases where the *Norwich Pharmacal* principle has been applied more broadly.<sup>10</sup>

The ability to rely upon the *Norwich Pharmacal* principle in order to obtain pre-action discovery in the Supreme Court may be uncertain to the extent that preliminary discovery is sought beyond obtaining information in order to identify the proposed defendant.

## Conclusion

The current approaches to obtaining pre-action disclosure in the State Courts are uncertain and limited. It is recommended that the UCPR be amended to introduce specific rules to enable pre-action discovery to be ordered in defined circumstances.

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

### Notes

<sup>1</sup> This was addressed in the Back to Basics article in the February 2016 edition of *Proctor*.

<sup>2</sup> That is in contrast to a number of other State and Territory jurisdictions. See, for instance, Part 5 of the *Uniform Civil Procedure Rules* 2005 (NSW) and Order 32 of the *Supreme Court (General Civil Procedure) Rules* 2015 (Vic).

<sup>3</sup> Given the broad definition of property in the *Acts Interpretation Act* 1954 (Qld), and the context in which that word is used in the rules, it appears that the term can include documents.

<sup>4</sup> [2006] WASC 269 at [14]-[15].

<sup>5</sup> See, for example, *Vowell v Shire of Hastings* [1970] VR 764 at 766; however, compare *Wilkinson v Wilkinson* [2009] QSC 191.

<sup>6</sup> Recognised by Shepherdson J in *Re Pyne* [1997] 1 Qd R 326 (prior to the introduction of the UCPR) and subsequently by Douglas J in *Pacific Century Production Pty Ltd v Netafim Australia Pty Ltd* [2004] 2 Qd R 422 and *Wilkinson v Wilkinson* [2009] QSC 191.

<sup>7</sup> *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] AC 133 at 173 and 175 per Lord Reid.

<sup>8</sup> *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 446 per Gummow J.

<sup>9</sup> *AXA Equity v National Westminster Bank*, unreported, Ch Div, Rimer J, 2 February 1998; *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911 at 914. See also *Hogan v Ellery* [2009] QDC 154 at [21] – [22]; *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623.

<sup>10</sup> See, for example, *Bankers Trust Company v Shapira* [1980] 3 All ER 353 at 357-358 per Lord Denning MR. It has also formed the basis of a discovery order against the wife of a defendant in aid of a post-judgment Mareva injunction, see *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366 at 374-375 per Hoffman LJ.



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# For the good of the client

An example of a solicitor carrying out the client's wishes to a 'T'

If you considered only the 'newsworthy nanoseconds' that dominate the media today, you might be hard-pressed to find anything good about solicitors, so in this column I am happy to report on a case which is a perfect example of a solicitor doing everything carefully and well, resulting in his client's final wishes being carried out exactly as she wanted them to be.

It is also a wonderful example of why you are always better off having a solicitor in your corner when it comes to succession and estate work; had this been a 'Will kit wonder' effort it could have dragged through the courts for years.

*Londy & Pender as executors and trustees of the Will of Mary Hilary Kavanagh (deceased) v Kavanagh [2017] QSC 161*

## The facts

The deceased, Mary Hilary Kavanagh, did not marry and had no children. She was 100 years old at the time of her death, and had amassed an estate worth around \$2 million. This is the sort of figure that generally brings relatives out of the woodwork, which in this case included the respondent, Michael Anthony Kavanagh, whose grandfather was the brother of the deceased's father.

The deceased had made many Wills in her lifetime – the first in 1972 with seven more following – in all but the last two the respondent was a beneficiary and executor. The last Will made no provision for the respondent and appointed the applicants as executors.

The deceased's change of heart had been brought about by a number of factors, including that she believed the respondent had bullied and manipulated her into including him in previous Wills, as he had a strong influence over her in the years that her sisters had been ill and passed away.

The respondent, however, believed that the deceased had been the victim of undue influence on the part of the female applicant. This was a belief in part fuelled by the fact that the female applicant had attended all the meetings with the male applicant when he took instructions from the deceased. The respondent filed a caveat in response to their application for probate, and the applicants sought the removal of the caveat in this matter.

It seemed the deceased had left little doubt as to her view of the respondent, to the extent that she produced a letter to the male applicant (signed by her doctor) which included, among other things, the following eloquent expression of her feelings:

"You really are a greedy lousy person Michael and I hope my ghost haunts you."

Balanced against this was the respondent's view that the deceased was under the undue influence of the female applicant, the fact that he had been in all of the Wills previously, and that the deceased never gave instructions to her solicitor without the female applicant being present – a fact which the respondent regarded as sufficiently suspicious to stop the probate.

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## The solicitor's actions

Had that been all of the evidence, there may well have been an arguable case and a long and expensive battle through the courts. However, the solicitor went to great lengths to ensure that the instructions he was receiving were given freely, by a client with competence and recorded fully.

The following factors are worthy of note:

- the solicitor took thorough and meticulous file notes
- the solicitor regularly had the deceased's capacity confirmed
- the solicitor gave detailed advice of the consequences of the deceased actions, and advice as to how to ensure that her wishes were carried out after her death
- all instructions were confirmed in writing
- the solicitor prepared, and had the deceased execute, a detailed affidavit which described her estate fully, and thoroughly explained her relationship with the respondent, the reasons she had previously included him in her Wills and the reasons she wanted him out at this juncture.

Tellingly, that affidavit included the following:

- "81. I strongly believe that my second cousin Michael Anthony Kavanagh has no right or entitlement to any property that I own. Apart from in recent years, he has had no family association with the properties or my family.
82. I believe that I was bullied and manipulated by him into making the changes to my previous Wills, as he had a strong influence over me in the years that my sisters were ill and subsequently died.
83. His threats of court action whereby he stated he would receive what he believed was rightfully his has made me concerned for the remaining executors and beneficiaries and I did not want to leave them with trouble. This was the only reason for my previous Wills in which he was left a share.
84. As I no longer trust my second cousin Michael Anthony Kavanagh I have appointed my trusted close friend and niece of my sister Kathleen Roache, Anne Lynette Londy to be one of the executors and trustees of my Will."

The file notes, the affidavit and the confirmation of capacity carried the day, and the applicants were successful in removing the caveat. A switched-on solicitor saved the day proving that robot lawyers and Will kits are no substitute for a vigilant expert.

The author expresses her gratitude for the assistance provided by Queensland Law Society ethics solicitor Shane Budden in the writing of this article. Christine Smyth is 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.

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# Lord Atkin: from Queensland to the House of Lords

with Supreme Court  
Librarian David Bratchford



Lord Atkin was one of the most influential judges of his (or any) generation. His landmark judgments still guide the laws of our nation and the rest of the common law world today.

James Richard (Dick) Atkin was born in Tank Street, Brisbane on 28 November 1867. This November marks the 150th anniversary of his birth.

To commemorate this anniversary and his lasting legacy to the common law, the library is launching a new exhibition, 'Lord Atkin: from Queensland to the House of Lords.'

Also, in conjunction with the Australian chapter of the Selden Society, we will host the inaugural Lord Atkin lecture on 28 November, presented by the Chief Justice of Australia.

## About the exhibition

### Opens 29 November 2017

'Lord Atkin: from Queensland to the House of Lords' examines Atkin's life, career and impact.

Visit the library on level 12 of the Queen Elizabeth II Courts of Law to view a series of displays exploring Atkin's:



Above: Lord Atkin with eight of his eldest grandchildren at Aberdovey, Wales, c. 1929. Reproduced courtesy of the Atkin family.

- uncompromising support for social justice
- enduring influence on the rule of law
- connection to family and the social and political landscape of the Queensland into which he was born.

Supreme Court Library Queensland  
Level 12, Queen Elizabeth II Courts of Law  
Weekdays, 8.30am to 4.30pm, Free entry

## About the lecture

Selden Society lecture five:  
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Register online by 21 November (limited spaces available). Visit [legalheritage.sclqld.org.au/lecture-five—inaugural-lord-atkin-lecture](http://legalheritage.sclqld.org.au/lecture-five—inaugural-lord-atkin-lecture) for details.

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# De facto relationship: married man and sex worker

with Robert Glade-Wright



## Property – Married man and sex worker found to be in a de facto relationship

In *Sha & Cham* [2017] FamCAFC 161 (16 August 2017) the Full Court (Bryant CJ, Ainslie-Wallace & Cronin JJ) dismissed Mr Sha's appeal against Johnston J's finding that Mr Sha had been in a de facto relationship with Ms Cham. The appellant (who lived with his wife) met Ms Cham in a massage parlour where she worked. They began having sex; discussed having a baby; she stopped work at his request (Ed: cf. *Kristoff & Emerson* [2015] FCCA 13 where Ms K continued her sex work); he helped with her mortgage; then they entered into a s 90UC financial agreement (which at trial he claimed not to understand). Ms Cham then fell pregnant to Mr Sha via IVF and it was found that the parties did have a de facto relationship when they made their agreement.

The Full Court said (from [28]):

"( ... ) In determining whether two people have a relationship as a couple living together on a genuine domestic basis the court is to have regard to all of the circumstances of their relationship, which may include the matters to which s 4AA refers. Whether such a relationship exists will depend on an assessment of all of the circumstances of the relationship, each ... to be given such weight as the court considers appropriate (see *Sinclair & Whittaker* [2013] FamCAFC 129; ... [E]ach ... element that makes up a relationship should be considered in the context of all the aspects of the ... relationship (*Lynam v Director-General of Social Security* (1983) 52 ALR 128 at 131) ('*Lynam*'). ( ... )

[50] As was said in *Lynam* at 131:

' ... [e]ach element of a relationship draws its colour and its significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case,

it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meets the statutory test.' (Emphasis added)"

## Property – exclusion of any property from consideration is an error of principle – post-separation inheritance should be in one or two pools

In *Holland* [2017] FamCAFC 166 (9 August 2017) the Full Court (Ainslie-Wallace, Murphy & Aldridge JJ) allowed the wife's appeal against a property order in a case where the parties cohabited for 17 years and had two children. The husband inherited Property W from his late brother's estate three years after separation, which was worth \$715,000. Judge Jones excluded Property W from the asset pool and the wife appealed. The Full Court said (from [25]):

"( ... ) In our view it is wrong as a matter of principle to refer to any existing legal or equitable interests in property of the parties or either of them as 'excluded' from, or 'immune' from, *consideration* in applications for orders pursuant to s 79. ...

"[26] More often than not, the expression is used to indicate that particular property, or a particular category of property, or superannuation interests, are to be treated separately from other property for the purpose of a consideration of s 79(2) or for the purpose of assessing contributions. ( ... )

"[59] If her Honour was to adopt an 'asset by asset' or 'two pools' approach to the assessment of contributions, her Honour's task was to assess contributions across the whole of the more than 25 year period under consideration (approximately 17 years of cohabitation and approximately eight and a half years post-separation) in respect of Property W and to assess contributions separately across the same period in respect of the balance of the parties' interests in property (and superannuation). In our view, her Honour cannot on any view be seen to have done so."

## Children – maternal grandmother wins appeal against parenting order that discharged supervision of violent father

In *Stott & Holger and Anor* [2017] FamCAFC 152 (7 August 2017) the Full Court (Thackray, Kent & Watts JJ) allowed the maternal

grandmother's appeal against Berman J's order that permitted a 10-year-old child who lived with her to spend time with the father who had "a history of serious violence" ([1]). At the time of the order the child had not seen the father since April 2016. The Full Court said (from [34]):

"The 'unacceptable risk' test articulated by the High Court, in the context of disputed allegations of sexual abuse, is expressed ... in *M v M* (1988) 166 CLR 69 where the High Court said at 78:

'In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.' ( ... )

"[38] We accept that where an unacceptable risk is alleged, the court must give real and substantial consideration to the facts of the case and decide whether or not, and why or why not, those facts could be said to raise an unacceptable risk of harm (*N & S and the Separate Representative* (1996) FLC 92-655 per Fogarty J; *Napier & Hepburn* [2006] FamCA 1316 ... per Warnick J adopted with approval in *Potter & Potter* (2007) FamCA 350 ...

"[39] We find merit in the argument that this did not occur here ( ... )

"[40] All the more is this so in the face of findings by the primary judge that the father seemed incapable of accepting his history and was dismissive of his propensity to violence ... the father's trenchant denials accompanied by 'barely restrained anger when giving evidence' and being 'aggressive' and at times raising his voice 'to a frightening level' ... and findings that the father was not a truthful witness about either his criminal history or the nature of his engagement historically with the child's mother ... "

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

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# Dr Malcolm Wallace Joins the ASSESS Medical Specialist Team

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# The intangible force behind innovation

by Sophie Tversky,  
the Legal Forecast



Conversations based on innovation have been primarily tech-oriented. This is unsurprising, as technologies are improving both internal and external legal processes and services. However, underpinning this is an organisational culture. This should embrace the disruption of the market, flexibility and diversity of thought.

The unspoken force of organisational culture is increasingly important as millennials step into leadership positions and Generation Z joins the workforce. For millennials, organisational culture is a key driver in their choice of workplace, and they view collaboration and innovation as ways to belong and contribute to organisational purpose.<sup>1</sup> Environments which facilitate intergenerational creative collaboration will be the ones that succeed and foster agile cultures.

## How does organisational culture impact innovation?

Organisational culture is considered the “glue that holds the organisation together”.<sup>2</sup> It plays a central part in driving workplace behaviour and productivity, and can set the tone for innovative practices.

Business models, structural processes, programs and leadership can facilitate the expression of creativity and innovation within law firms. Shifts in the market have resulted in senior management, employees and clients, all playing central roles in contributing to organisational culture. The industry now recognises that innovative cultures are fuelled by collaborative and multi-disciplinary approaches.

The broadening of the legal industry into a buyer's market brings with it increased competition where “[law] becomes {law + tech + design + delivery} where law is substantive legal expertise {tech + design + delivery} are process”.<sup>3</sup> However, the innovative process remains dependent on human capital.

One barrier to organisational change is fear or adherence to the status quo. However, shifting attention to “the people in the process”<sup>4</sup> and creating incentives for innovation can assist in creating dynamic cultures.

Law firms and professional service providers are already adopting programs such as corporate hackathons and innovation laboratories to initiate new products and services. Resource allocation is imperative, but success is also dependent on organisations adopting a growth and learning mentality.

This is influenced by having innovation as an expressly-stated value or purpose, articulating this clearly in management strategy, enabling experimentation and importantly, seeing ‘failure’ as a learning process.<sup>5</sup> This builds resilience and trust which further encourages innovation, motivation and successful risk-taking.<sup>6</sup> Diversity of experience drives critical thinking and problem solving, decreases silos and promotes connectivity.

## Millennials and beyond

By 2020, millennials will comprise 20 per cent of the international workforce.<sup>7</sup> Organisations are now contending with a four-generation workplace, which can present challenges. This includes a breakdown in intergenerational communication, often fuelled by stereotypes and the misunderstanding of behavioural practices. Millennials are considered as tech-literate, globally minded, entrepreneurial and committed to making a positive impact.<sup>8</sup> However, they are also seen as lacking job loyalty, selfish or undisciplined.<sup>9</sup> These stereotypes detract from the fundamental driver of successful organisations – people. Organisations must continually innovate in order to increase value for clients and decrease costs, so harnessing the knowledge of all generations will be imperative. This builds an inclusive, collaborative and therefore productive and innovative organisational culture which harnesses the insight and talent of all generations.

Mentoring plays a fundamental role in breaking down hierarchical barriers, builds trust and furthers creative output.<sup>10</sup> Interestingly, reverse mentoring is becoming more prevalent, ‘flipping’ the traditional mentor-mentee model. This has been observed to equalise interactions and increase bi-directional learning.<sup>11</sup>

Generation Z (born 1995-2014) will soon enter the workforce, with creativity seen as one of their most valuable assets. Indeed, 67 percent of millennials in senior positions believe Generation Z will positively impact the workplace.<sup>12</sup> Organisations must develop

strategies, structures and programs that can flexibly encompass both younger millennials climbing the corporate ladder and facilitating the emergence of Generation Z.

Investing in human capital and opening the net for intergenerational and interdisciplinary communication will be vital to the advancement of an organisation's vision and, ultimately, its competitive edge in the marketplace. However, this is dependent on an environment that nurtures and rewards new ways of thinking as an integral part of the organisation, not solely as a side project.

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

## Notes

- <sup>1</sup> Christie Smith and Stephanie Turner, Deloitte University The Leadership Center for Inclusion: *The millennial majority is transforming your culture* (2016), 2-5, <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/millennial-majority-transforming-culture.html>.
- <sup>2</sup> D Denison, ‘Organisational culture: Can it be a key lever for driving organisational change?’ in C.L. Cooper, S. Cartwright & P.C. Earley (eds) *The international handbook of organizational culture and climate* (John Wiley & Sons, 2001), 347.
- <sup>3</sup> Daniel Martin Katz, ‘The MIT School of Law? A Perspective on Legal Education in the 21st Century’ (2014) *University of Illinois Law Review* 1431, 1452.
- <sup>4</sup> Teresa M. Moon, ‘Mentoring the Next Generation for Innovation in Today's Organization’ (2014) 5(1) *Journal of Strategic Leadership* 23, 24.
- <sup>5</sup> Ellen Martins and Nico Martins, ‘An Organisational Culture Model To Promote Creativity and Innovation’ (2002) 28(4) *SA Journal of Industrial Psychology* 58, 61-63.
- <sup>6</sup> Ibid, 62.
- <sup>7</sup> PriceWaterhouseCoopers, *Millennials at work Reshaping the workplace Report* (2011), 3, <https://www.pwc.com/m1/en/services/consulting/documents/millennials-at-work.pdf>
- <sup>8</sup> Moon, n 6, 26; Smith and Turner, above n 1, 5, 7.
- <sup>9</sup> See Moon, n 6, 26.
- <sup>10</sup> Ibid, 27.
- <sup>11</sup> Wendy Marcinkus Murphy, ‘Reverse Mentoring at Work: Fostering Cross-Generational Learning and Developing Millennial Leaders’ (July-August 2012) 51(4) *Human Resource Management* 549, 549-574.
- <sup>12</sup> Deloitte, *The 2017 Deloitte Millennial Survey Apprehensive millennials: seeking stability and opportunities in an uncertain world*, 28, <https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html>

# Reaching a binding agreement to compromise litigation

A recent decision of Flanagan J in the Supreme Court of Queensland raises some interesting questions about whether and when a binding agreement to compromise litigation has been reached between parties.

*Gailey Projects Pty Ltd v McCartney & Anor (Gailey)*<sup>1</sup> demonstrates some of the pitfalls of rapid and informal negotiations conducted between legal representatives outside a courtroom during the course of a trial, as well as the circumstances in which a court might nonetheless find that a binding agreement to compromise has been reached.

Two practical messages for practitioners are:

1. A detailed file note regarding the course of negotiations, including details of the terms of any offers made, may assist the court in making findings of fact in the event of a dispute.
2. It may be helpful to clearly identify in an email regarding the terms of an agreement to compromise reached between the parties, which terms have been agreed and which are merely seeking clarification, proposing new terms, or attempting to give content to an implied term.

In *Gailey*, the parties had commenced a two-week trial in the Supreme Court concerning an alleged consultancy agreement. After returning from the luncheon adjournment on the first day of trial, the parties asked that the matter be stood down to allow discussions to occur. The trial judge granted the request.

The parties, through their legal representatives, began negotiating in the conference rooms outside the courtroom. The plaintiff was represented by senior counsel and an instructing solicitor. The defendants were represented by senior counsel, junior counsel and an instructing solicitor.

The question before Flanagan J was whether the litigation had been compromised by a verbal agreement reached at approximately 5pm on the first day of the trial.

The defendants submitted that it had been compromised. The plaintiff submitted that there was no agreement to compromise, or in the alternative, that any agreement had been conditional upon execution of a deed of settlement, repudiated by the

defendants, or made unenforceable by operation of sections 11(1)(a) and 59 of the *Property Law Act 1974* (Qld) (PLA).

All five legal representatives gave evidence before Flanagan J about the negotiations and the verbal agreement. The evidence was not uniform, and the court was not able to identify the precise order in which relevant events occurred.<sup>2</sup>

His Honour found that the defendants had made an offer of \$450,000 to be paid to the plaintiff within 24 hours and a call option to be exercised by the plaintiff's nominee over a two-bedroom unit (to be chosen by the plaintiff from a range of units available in a particular development). The plaintiff's senior counsel accepted the offer by saying words to the effect of, 'we accept', 'we have a deal', 'you must have worked hard on your guy' or similar.<sup>3</sup> The defendants' senior counsel suggested that the solicitors exchange emails recording the terms of the settlement that evening, and the trial judge be informed of the development the following morning.<sup>4</sup>

## Intention to create legal relations

Flanagan J relied on the following circumstances to hold that the parties had intended to create legal relations:

1. The negotiations were conducted on each side by senior counsel.
2. There had been previous attempts to settle at mediation.
3. The negotiations took place on the first day of trial, while the matter had been stood down to allow discussions to occur.
4. In the circumstances, the language used by the plaintiff's senior counsel to accept the offer was that of a concluded agreement.
5. The terms of the agreement required action to be taken within 24 hours.<sup>5</sup>

## Certainty

The parties had not however, expressly decided some terms, including the timing of various steps.

Further, as contemplated, after the agreement had been reached, the defendants' solicitor sent an email to the plaintiff's solicitor about the terms of the settlement. That email differed from the terms of the verbal agreement in some respects, including providing specific times for certain steps to be taken.

Flanagan J observed that, "courts are always loathe to hold a condition bad for uncertainty and will strive to give effect to the intention of the parties' agreement, no matter what difficulties of construction arise".<sup>6</sup> His Honour held that implied terms of reasonable time and requiring reasonable steps to be taken were sufficient to overcome any uncertainty in relation to the timing of various steps, such that a binding agreement of compromise had been reached.<sup>7</sup> His Honour was able to resolve the other relevant terms on the facts.

## Deed of settlement

Flanagan J found as a matter of fact that the parties had not made the agreement conditional upon the execution of a deed of settlement.<sup>8</sup> In circumstances where the parties were negotiating on the first day of trial while the matter had been temporarily stood down, it was "hardly surprising that no condition requiring a deed of settlement prior to there being a concluded agreement was discussed"<sup>9</sup>, in that time was essentially ticking on the court's indulgence.

## Repudiation

His Honour concluded that the defendants' solicitor's email (containing terms that differed in part from the verbal agreement) did not amount to a repudiation of the terms of the agreement to compromise. The email had expressly stated that it "recorded the terms of settlement" (a reference to the terms verbally agreed that afternoon) and the inclusion of different terms did not evince any intention by the defendants not to be bound by the existing terms of the agreement. Rather, the different terms were properly construed as seeking clarification, proposing new terms that may or may not be accepted, and an attempt to give more precise content to the implied term of reasonable time.<sup>10</sup>

## PLA

Finally, Flanagan J considered sections 11(1)(a) and 59 of the PLA. Section 11(1)(a) relevantly provides that no interest in land can be created or disposed of except in writing. Section 59 relevantly provides that no action may be brought upon any contract for the sale of land or other disposition of land or any interest in land, unless the contract is in writing.





by Susan Forder

His Honour observed that there was a difference between an agreement to compromise and the execution of written documents concerning the creation or transfer of an interest in land.<sup>11</sup> In the present case, the agreement to compromise was properly construed as a contractual promise that once the plaintiff exercised their right to choose a lot, the defendants agree to enter into a contract 'for' the sale of that lot (or 'create' an interest in that lot) by the grant of the call option. As such, sections 11(1)(a) and 59 did not apply to the agreement to compromise itself.<sup>12</sup>

Further, section 59 did not apply to the raising of a defence to an action, and the agreement to compromise in *Gailey* was only raised in that context.<sup>13</sup>

In light of the above, Flanagan J concluded that a binding agreement to compromise the litigation had been reached.

Susan Forder is a Brisbane barrister.

#### Notes

<sup>1</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185.

<sup>2</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [7].

<sup>3</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [19], [22].

<sup>4</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [34].

<sup>5</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [48]-[50].

<sup>6</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [54].

<sup>7</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [65]-[67], citing *Moffatt Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2009] QCA 60, [51] and *Mermaids Café & Bar Pty Ltd v Elsafty Enterprises Pty Ltd* [2010] QCA 271, [47].

<sup>8</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [69] and [71].

<sup>9</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [71].

<sup>10</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [80].

<sup>11</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [83], citing *Nateau Investments Pty Ltd v Pitt St Properties* [2015] QSC 101, [42] and various sources in the Defendants' Written Submissions.

<sup>12</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [85].

<sup>13</sup> *Gailey Projects Pty Ltd v McCartney & Anor* [2017] QSC 185, [84].

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# High Court and Federal Court casenotes

## High Court

### Constitutional law – Legislative power – s75(v) of the Constitution – migration decisions

*Graham v Minister for Immigration and Border Protection; Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33 (6 September 2017) concerned s503A of the *Migration Act 1954* (Cth), which allowed the Minister not to disclose information to a court on judicial review of certain migration decisions. The visas of Graham and Te Puia were cancelled under s501(3) of the Act. In making his decision in each case, the Minister considered information that was purportedly protected from disclosure by s503A. Section 503A(2)(c) prevents the Minister from being required to divulge or communicate certain information to a court when the court is reviewing a purported exercise of power by the Minister under ss501, 501A, 501B or 501C of the Act, to which the information is relevant. Graham and Te Puia argued that s503A(2) is constitutionally invalid because it requires the relevant court to exercise judicial power inconsistently with the essential characteristics of a court; or because it is inconsistent with the right of individuals to seek judicial review pursuant to s75(v) of the Constitution. A majority of the court upheld the second point. The majority held that parliament cannot enact a law that denies the High Court (or another court when exercising jurisdiction conferred under s77(i) or (iii) of the Constitution), the ability to enforce the limits of a Commonwealth officer's power when exercising jurisdiction under s75(v). In practical terms, s503A prevented access to material relevant to the exercise of power under review and relevant to determination of whether the power had been exercised lawfully. It amounted to a substantial curtailment of the capacity of the court exercising jurisdiction. To the extent that it operated on the High Court in its exercise of jurisdiction under s75(v), or on the Federal Court in the exercise of jurisdiction under ss476A(1) and (2) of the Act, it was invalid. Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ jointly; Edelman J dissenting. Answers to Special Case given.

### Migration law – complementary protection – meaning of “significant harm” – intention

In *SZTAL v Minister for Immigration and Border Protection; SZTGM v Minister for Immigration and Border Protection* [2017] HCA 34 (6 September 2017) the court considered the requirements of intention for the purposes of assessing an applicant's case against the complementary protection provisions in s36 of the *Migration Act 1954* (Cth). Those provisions allow for a protection visa to be granted to a person at real risk of suffering significant harm if returned to their home

country. Significant harm includes being subject to cruel or inhumane treatment or punishment, or degrading treatment or punishment. The appellants had both claimed to be at risk of harm if they returned to Sri Lanka. The Refugee Review Tribunal (RRT) found that, if they were returned, they would likely be held in prison for a short time. It also accepted that prison conditions in Sri Lanka were such that the appellants might be subjected to pain, suffering or humiliation. However, the RRT found that there would be no intention by Sri Lankan authorities to inflict the pain or suffering. The question on appeal was whether “intention” in this context requires subjective intention or whether it was sufficient that a person doing an act knew the act would, in the ordinary course of events, inflict pain or suffering or cause extreme humiliation recklessness sufficed. A majority of the court held that actual subjective intention to bring about pain or suffering or humiliation was required. Kiefel CJ, Nettle and Gordon JJ jointly; Edelman J separately concurring; Gageler J dissenting. Appeal from the Full Federal Court dismissed.

### Criminal law – incitement to procure offences

In *The Queen v Holliday* [2017] HCA 35 (6 September 2017) the accused was serving a sentence for sex offences and was alleged to have offered another inmate, Powell, a reward in return for the inmate organising third parties outside the prison to kidnap two witnesses, procure statements exculpating the accused, then kill the witnesses. Powell reported this and did not go through with the plan. Counts four and five charged that Holliday “committed the offence of incitement in that he urged [Mr Powell] to kidnap” each witness. The jury convicted on those counts. The conviction was overturned on appeal; the prosecution appealed to the High Court. The issue was whether Holliday could be guilty of the offence of inciting another (Powell) to commit an offence given that the plan was for Powell to procure a third party to carry out the kidnapping. The High Court held that, at least where there had been no kidnapping, Holliday could not be convicted of urging Powell to commit that offence. A majority of the court held that incitement requires the accused to urge a person to commit a discrete, substantive offence. However, there is no discrete offence of incitement to procure. Holliday could not, in the circumstances, be convicted of incitement. Kiefel CJ, Bell and Gordon JJ; Gageler J and Nettle J separately concurring in the orders of the majority. Appeal from the Supreme Court (ACT) dismissed.

### Criminal Law – criminal procedure – jury directions – standard of proof

*The Queen v Dookheea* [2017] HCA 36 (13 September 2017) concerned directions to the jury as to the standard of proof required to convict

in a criminal case. The accused admitted that he had killed the deceased, but argued that he did not have the requisite intent. In the course of summing up to the jury, the trial judge stated that they needed to be satisfied of the accused's guilt “not beyond any doubt, but beyond reasonable doubt”. On a number of occasions, the trial judge also used only the phrase “beyond reasonable doubt”. The Court of Appeal held that by referring to “not beyond any doubt”, the trial judge had erred in summing up. The High Court unanimously allowed the appeal. The court held that what is a “reasonable doubt” is a question for the jury. It is generally undesirable to contrast “any doubt” with “reasonable doubt”, but as a matter of principle it is not wrong to notice the distinction. Whether such a reference gives rise to error depends on all of the context. In this case, having regard to the circumstances, including the whole summing up and addresses, it could not “realistically be supposed that the jury might have been left in any uncertainty as to the true meaning of the need for proof beyond reasonable doubt.” Kiefel CJ, Bell, Gageler, Keane, Nettle, and Edelman JJ jointly. Appeal from the Court of Appeal (Vic) allowed.

### Criminal law – offence of persistent sexual exploitation – where jury required to identify acts of exploitation

In *Chiro v The Queen* [2017] HCA 37 (13 September 2017) the accused was charged with persistent sexual exploitation of a child. That offence requires the commission of at least two acts of sexual exploitation (each of which could be the subject of a sexual offence charge) over less than three days. The jury was directed that it would be sufficient if the accused had kissed the complainant in circumstances of indecency (which was a particular of the offending), or had committed any of the other, more serious, acts particularised on more than one occasion within three days. The jury returned a verdict of guilty. No further questions were asked of them. A majority of the High Court held that the trial judge should have asked further, more specific questions of the jury, designed to understand which of the alleged acts of exploitation they had found proved. It would also have been open to give directions to the jury that they would, if a guilty verdict was returned, be asked those questions. However, the conviction of the accused in this case was not uncertain because that had not happened. The appeal on conviction was dismissed. However, in this case, because the trial judge did not know which acts of exploitation the jury had found proved, the accused should have been sentenced on the view of the facts most favourable to him; that is, on the basis that the least serious alleged acts had been proved. Because the trial judge sentenced the accused on another basis, the appeal against sentence was allowed. The matter was remitted for



with Andrew Yuile and Dan Star QC



the accused to be resentenced. Kiefel CJ, Keane and Nettle JJ jointly; Bell J separately concurring; Edelman J dissenting. Appeal from the Supreme Court (SA) allowed in part.

#### **Criminal Law – offence of persistent sexual exploitation – legality of actions relating to regional processing in PNG**

*Hamra v The Queen* [2017] HCA 38 (13 September 2017) concerned the same persistent sexual exploitation of a child offence as *Chiro v The Queen* (above). This case was heard by judge alone. At the end of the prosecution case, the defence made a no case submission that was accepted. The judge held that it was not possible to identify two or more proved sexual acts or offences as required, given the general nature of the complainant's evidence. The Court of Appeal allowed an appeal, holding that it was not necessary for each act of sexual exploitation to be identified so as to be distinguishable from the others. The evidence, if accepted, was capable of proving the offence. The High Court agreed that, so long as two or more distinct acts committed in a three-day period could be identified, the acts do not need to be particularised beyond the period of the acts and the conduct constituting the acts. It would be sufficient, for example, if evidence was accepted that an act was committed every day over a two-week period without further differentiation, allowing for a deduction that the acts occurred over not less than three days. The appeal on that point had to be dismissed. The High Court also held that the Court of Appeal had considered and decided whether to grant permission to appeal, though no reasons had been given. The court also had not erred by failing to refer to double jeopardy as a factor weighing against a grant of permission to appeal. Kiefel CJ, Bell, Keane, Nettle, and Edelman JJ jointly. Appeal from the Supreme Court (SA) dismissed.

Andrew Yuile is a Victorian barrister, ph (03) 9225 7222, email ayuile@vicbar.com.au. The full version of these judgments can be found at [austlii.edu.au](http://austlii.edu.au). Numbers in square brackets refer to paragraph numbers in the judgment.

## **Federal Court**

#### **Competition law/practice and procedure – Competition and Consumer Act 2010 (Cth) – challenges on appeal to inferences drawn and not drawn by the primary judge**

In *Australian Competition and Consumer Commission v Australian Egg Corporation Ltd* [2017] FCAFC 152 (23 September 2017) the Full Federal Court dismissed the ACCC's appeal from the primary judge's dismissal of the proceeding (see [2016] FCA 69).

The ACCC's case was that the respondents attempted to induce egg producers to contravene s44ZZRJ of the *Competition and Consumer Act 2010* (Cth) by making an arrangement or arriving at an understanding which contained a cartel provision. The ACCC alleged that the respondents engaged in conduct which involved encouraging egg producers to act in a coordinated and consolidated fashion and, thereby, to enter into an arrangement or arrive at an understanding containing a provision to limit the production for supply of eggs in Australia.

There was no challenge to facts found by the trial judge and the appeal largely related to inferences which the trial judge drew or did not draw from those primary facts. The Full Court (Besanko, Foster and Yates JJ) discussed the key authorities on the scope of the Full Court's review in an appeal in such a case (at [126]-[131]).

The Full Court rejected all of the ACCC's arguments on the appeal.

#### **Costs – applications for indemnity costs – where parties failed to notify court prior to judgment being reserved that alternative costs orders might be sought**

In *Thomas v Commissioner of Taxation (No 2)* [2017] FCAFC 144 (18 September 2017) the court rejected a taxpayer's application to vary costs orders made after the judgment was given in four separate appeals.

The taxpayer was successful in two of the appeals and, when giving judgment, the court ordered that the Commissioner pay the taxpayer's costs in those appeals. The taxpayer later sought to vary that order with an indemnity costs orders based on previous offers of compromise. At the hearing of the appeals, no separate debate was flagged by the taxpayers that any further submissions would need to be made about costs.

The Full Court (Dowsett, Perram and Pagone JJ) referred to clear statements and authorities supporting the principle that if a departure from the usual approach to costs is to be urged this should be flagged with the court before judgment is reserved (at [4]-[5]).

Upon considering the specific basis on which indemnity costs were sought, the Full Court held there was no basis for interfering with the costs order already made (at [26]).

#### **Costs under s570 of the Fair Work Act 2009 (Cth)**

In *Australian Building and Construction Commissioner v ADCO Constructions Pty Ltd (No 3)* [2017] FCA 1090 (15 September 2017) the respondent sought a costs order in its favour against the Commissioner.

In an earlier judgment, the court (Collier J) dismissed the Commissioner's case seeking orders that the respondent contravened s354(1) of the *Fair Work Act 2009* (Cth) (FW Act) by

discriminating against a particular subcontractor, Surf City Cranes Pty Ltd (SCC), because alleged employees of SCC were not covered by an enterprise agreement which also covered the Construction, Forestry, Mining and Energy Union. Relevantly, the court found that SCC was not the employer of the employees for the purposes of s354(1) of the FW Act.

Proceedings under the FW Act are generally a "no costs" jurisdiction. The respondent sought costs under s570(2)(a) and (b) of the FW Act. Section 570(2)(a) and (b) of the FW Act provides that a party may be ordered to pay costs only if: "(a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs ..."

Collier J referred at [11] to and applied the principles summarised by the Full Court in *Australian Workers' Union v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23; (2013) 232 FCR 428 at [7]-[8]. Justice Collier made no orders for costs on the basis that the respondents had not substantiated its claims for costs under s570(2)(a) or (b) of the FW Act.

#### **Practice and procedure – application to reopen a case after judgment reserved but not delivered**

In *FYD Investments Pty Ltd v Promptair Pty Ltd* [2017] FCA 1097 (15 September 2017) the court (White J) considered an application to reopen a hearing after judgment had been reserved but before it had been delivered.

The proceeding concerned contractual claims and misleading or deceptive conduct. The trial took place for five days concluding on 30 March 2017, at which time judgment was reserved. On 27 June 2017, the applicants filed an interlocutory application seeking leave to reopen their case in order to adduce further limited evidence. The need to advance additional evidence and to advance certain claims were attributed to oversights by the applicants' legal representatives at the trial (at [10] and [19]).

Justice White referred to the settled principles on which the court acts in deciding whether to grant leave to reopen a case (at [30]-[31]). The overriding principle is the interests of the administration of justice having regard to all the circumstances of the case.

Applying those principles, while conscious that the court ought not readily grant an application to reopen following the reservation of judgment, White J exercised his discretion to permit the applicants to reopen their case (at [45]).

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

# Court of Appeal judgments

1 to 30 September 2017

with Bruce Godfrey



## Civil appeals

*Jensen v Legal Services Commissioner* [2017] QCA 189, 1 September 2017

*Appeal Queensland Civil and Administrative Tribunal Act* – where the Queensland Civil and Administrative Tribunal determined that the appellant's name was to be removed from the roll of solicitors – where the charges against the appellant related to an email sent to the appellant's client by the client's son who was the other party to a property dispute – where the son used his work email address and that his electronic signature block at the end of the email showed his position with his employer – where the appellant claimed that email was defamatory of him and sought payment of \$20,000 in settlement of the matter – where the son made a complaint to the respondent about the appellant – where the appellant asserted the email was "grossly defamatory" of him – where the appellant did not set out why he described the email as "grossly defamatory" rather than "defamatory" but unfortunately there appears to be a pattern of excessive or emotional language used by the appellant of which this is the first example in the material before the court – where Dr Jensen had no reasonable basis to require Mr Humphreys to pay him \$20,000 promptly for defamation, particularly when combined with the statement that his employer "would also be" vicariously liable for defamation but that Dr Jensen had not yet sent any demand to the employer because Dr Jensen expected that could cause difficulties for Mr Humphreys in his employment – where Dr Jensen could not articulate any basis for asserting that \$20,000 was a genuine pre-estimate of the damages that might be awarded against him – where so far as the claim for vicarious liability of the employer is concerned, it is difficult to accept that that claim was made honestly or reasonably – where an employee sends an email using a work email address for personal matters, entirely unrelated to the employee's responsibilities, in the employee's personal time, there is not sufficient connection between sending an allegedly defamatory email and the employment so that the act could be said to have occurred within the course of employment – where the appellant claimed that the complaint republished the defamatory material and would increase the damages which would be awarded to him by the court – where the respondent claimed that the complaint was protected by s 487 of the *Legal Profession Act 2007* (Qld) (the Act) – where the respondent alleged that the appellant knew or ought to have known that the complaint was protected by s 487 of the Act and pursued the claim that had no reasonable prospect of success – where s 487(2) of the Act completely protects a person from civil liability, specifically including in an action for defamation, for making a complaint or giving information to the Commissioner – where

because of the effect of s 487(2) of the Act, there could be no cause of action against Mr Humphreys nor aggravation of any damages to be awarded against him because of his authorisation of the publication of the email to the Commission – where that is because no civil liability could attach to him for making the complaint – where it appears that Dr Jensen was, at the time he wrote the letter of 11 October, unaware of s 487 of the Act – where a legal practitioner who has been the subject of a complaint under the Act is expected to familiarise himself with the provisions of the Act rather than sending a letter containing accusations about another's behaviour in apparent ignorance of the applicable law – where Dr Jensen forwarded a letter to David Millwater of McNamara & Associates which contained false statements – where it represented unsatisfactory professional conduct in that it fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner – where the appellant pursued a claim, that is a claim for aggravated damages for defamation, that had no reasonable prospect of success – where it represented unsatisfactory professional conduct in that it fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner – where the appellant also made a complaint to the respondent about the solicitor who acted for the son – where the appellant was charged with making a complaint that contained baseless allegations against the solicitor – where Dr Jensen knew, or ought to have known, that the complaint he made against Mr Millwater was baseless because Mr Millwater had not made a complaint against him – where the appellant nevertheless argued that he was protected from liability both by s 487(2) and s 487(3) of the Act – where it is part of the professional ethics of a solicitor not to make allegations against a legal practitioner unless the allegations are made *bona fide* and the solicitor believes on reasonable grounds that available material by which the allegations could be supported provides a proper basis for them – where if the solicitor acts in such a way the solicitor is not merely making a complaint but is making a complaint which is not *bona fide* and so is not protected by the section which protects a solicitor who is acting honestly or reasonably – where Dr Jensen could not have made his allegations of unsatisfactory professional conduct or professional misconduct against Mr Millwater *bona fide* nor could he have believed on reasonable grounds that material was available by which the allegation could be supported to provide a proper basis for making the allegations – where Dr Jensen's allegation represented professional misconduct as it was conduct which involved a substantial failure to reach a reasonable standard of competence and diligence – where in a letter to the Legal Services Commission he accused Ms Ingram, principal

legal officer at the Commission, of "grossly flawed and unbalanced" analysis, of being incompetent, of appalling behaviour, arguably conduct to exert pressure on him not to plead aggravated damages, possibly reckless as to whether her behaviour was in contempt of court, of being unfair and unreasonable and treating him as a liar and then made threats about demanding actions and costs against her personally – where his extraordinarily virulent reaction to the investigation and the aggressive, offensive and professionally improper language used against the investigator cannot be justified and demonstrates that he was not a fit and proper person to engage in legal practice at that time – where it is professional misconduct – where by his correspondence with the Commissioner on 11 October 2013, 15 November 2013 and 12 February 2014, he demonstrated that he was not a fit and proper person to practise law – where the findings of this court are different to those made by QCAT and mean that the appeal should be allowed and replaced by these findings – where the correspondence from Dr Jensen from 11 October 2013 to 12 February 2014 showed that he was not a fit and proper person to practise law during much of that period – where he continued to show lack of insight into the inappropriateness of his behaviour during the hearing in QCAT – where, however, he had never previously been the subject of complaint during a very long period in legal practice – where his affidavit filed with this court on 4 July 2017 showed an emerging understanding of the inappropriateness of his behaviour – where there is reason to conclude that with a period of suspension from practice, during which he is professionally counselled, the appellant will attain an appropriate level of fitness for practice. Appeal allowed. Order: the appellant be publicly sanctioned; the appellant be suspended from practice from 22 May 2017 to 21 February 2018; the appellant receive counselling from a senior counsellor nominated by the president of the Queensland Law Society until 21 February 2019.

*Multiplex Bluewater Marina Village Pty Ltd & Anor v Harbour Tropics Pty Ltd* [2017] QCA 202, 12 September 2017

General Civil Appeal – where the respondent owns a property adjacent to a large marina – where the appellants own the freehold land where the marina is located – where the respondent granted an easement to the appellants to use and enjoy facilities (car parks, showers, toilets and a laundry) on the respondent's property – where the respondent sought to impose restrictions on the appellants' use of the facilities, in particular the car parks – where the appellants sought relief in terms of 'unlimited use' of the car parks – where the learned primary judge held that the right of access was to facilitate the use of and access to vessels moored in the marina and that use of the car parks was for a limited time of ten hours

only – where the appellant submitted on appeal that on a proper construction of the easement, the appellant is entitled to unlimited use of the car parks and that there was no basis for the learned primary judge's selection of a ten-hour time limit – whether the learned trial judge was correct in her Honour's construction of the easement – whether enjoyment of the facilities confers a right to unlimited use of the facilities – where the only issue for determination is the proper construction of the Easement and in particular cl 2 thereof – where the rights of access and use granted in favour of the Dominant Tenement under the easement are limited in the manner provided for by the Easement – where although the Grantor (and others having like right) have an entitlement to the use and enjoyment of the marina berth facilities, that entitlement is qualified to the extent that the Grantee and marina berth users are to have "free and uninterrupted right of access and use of the marina berth facilities at all times" – where the easement does not expressly impose a limitation on the duration of use of the marina facilities in terms of a continuous period during which the carparks may be used – where it certainly does not limit the use to no more than ten hours – where there is nothing to suggest the carparks should be shared equally – where on the contrary, it is apparent from the terms of cls2 and cls5 that the Grantor's use of the carparks yields to that of the Grantee and to the rights granted under the easement. Appeal allowed. The declaration made on 23 August 2016 is varied to the extent that the words "and that such use of any of the 64 carparks may be for a continuous period not exceeding ten hours" are deleted. Unless the parties file submissions as to costs in accordance with Practice Direction 3 of 2013, paragraph 52(4), within 14 days of the publication of these reasons, the respondent is to pay the appellants' costs.

*Brisbane Youth Service Inc v Beven* [2017]  
QCA 211, 22 September 2017

General Civil Appeal – where the appellant is an organisation that provides counselling and other support services to homeless and drug affected

young people – where the respondent was hired by the appellant to work as a family support worker – where one of the appellant's clients was a young woman, T, with a history of making sexual advances towards staff of the appellant – where the respondent was assigned to work with T – where the respondent's role was to act as an advocate for T and to deliver an educative program to T – where senior staff members of the appellant questioned whether T was an appropriate client – where T eventually indecently touched the respondent at a meeting at government offices that had been organised by the appellant – where the respondent developed a major depressive disorder as a result of the assault – where the respondent had a pre-existing vulnerability due to childhood sexual abuse and this increased the severity of her impairment – whether the risk of harm to the respondent was reasonably foreseeable – where sexual assaults frequently occur in the most unlikely, and public, of situations – where those who are prone to commit them often do so on occasions that a normal person would regard as fraught with the risk of embarrassing discovery – where a normal person does not commit sexual assaults – where having regard in particular to T's frequent episodes of irrational sexual behaviour, including her serial sexual fixations, it was foreseeable that an assault of the kind that actually happened could have happened and that it could have happened anywhere – where the respondent was aware of T's behavioural history but agreed to work with T – whether the respondent accepted the risk of suffering an injury of the kind she suffered – whether the risk of this kind of injury is inherent in the nature of social work – where the issue of the risk of physical violence to which social workers might be exposed has not emerged for the first time only in this litigation – where it had been the subject of professional literature that also includes studies about how those risks can be prevented – where the appellant's attitude was simply to assert, without evidence, that the respondent was justifiably regarded by the appellant as capable of both judging the extent and of running the risk of physical assault from

a client like T – where however, it is not self-evident that social workers, unlike almost all other workers, implicitly accept the sole obligation of assessing, upon the information available to them, the risk of injury when undertaking work with a client of the employer so as to absolve the employer from the usual duty to ensure the safety of the workplace – where nor is it self-evident that social workers, because they possess appropriate learning, skill and experience to gauge such risks, do so – where this was a case in which the employer knew the risks that T presented to its staff – where this was also a case in which the employer had an appreciation of its own limitations in dealing with some of the problems presented by T and knowledge of the existence of other services that were better suited – where the employer also knew that its employees had a vocation which would impel them to make personal sacrifices if they believed that by doing so they might serve another human being – where the presence of risk of injury in dangerous occupations does not work to throw the responsibility of avoiding such risks onto the shoulders of employees beyond the application of the law relating to contributory negligence and, in appropriate cases, the doctrine of *volenti non fit injuria* – where s 305B of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) provides that a person does not breach a duty to take precautions against a risk of injury unless the risk was foreseeable, the risk was not insignificant and a reasonable person would have taken precautions – where T had a history of making sexual advances towards staff of the appellant – where senior staff members of the appellant questioned whether T was an appropriate client for the appellant – whether the risk of injury to the respondent was not insignificant – whether the appellant should have taken precautions – whether it would have been reasonable for the appellant to have taken precautions by discontinuing its provision of services to T – where the step of dispensing with T as a client, as a necessary precaution to avoid the risk of harm to the respondent, was a reasonable one to take – where T would not have been abandoned without

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succour of any kind – where she would only have been left without the kind of services that were being provided by the appellant, but that were of no use to her anyway as two years of experience had already shown – where there were others, psychiatrists, dedicated rehabilitation centres and the like, who could satisfy her real needs, with no evidence being led to suggest otherwise – where the appellant's failure to send T to another service was a breach of its duty of care to the respondent and caused her injuries. Appeal dismissed. Costs.

*Chief Executive, Department of Environment and Heritage Protection v Alphadale Pty Ltd* [2017] QCA 216, 26 September 2017

Appeal from the Land Appeal Court – where the respondent was required to pay \$4,345,852 by way of financial assurance as a condition of an environmental authority – where that original decision was confirmed by the applicant after an internal review – where the respondent appealed to the Land Court and applied for a stay of the review decision pending the appeal – where the power to grant a stay conferred by s 522(2) of the *Environmental Protection Act 1994* (Qld) (the Act) is constrained by a requirement under s 522A(2) to provide security for at least 75% of the amount of financial assurance – where the respondent contended s 522(2) of the Act is limited only to stays pending the determination of an internal review and not thereafter – where the respondent further contended that the stay should therefore be granted under s 7A of the *Land Court Act 2000* (Qld) (the LC Act) – where the member of the Land Court rejected this argument and refused the stay on the basis that the respondent had not complied with s 522A(2) – where the respondent appealed to the Land Appeal Court – where the Land Appeal Court accepted the respondent's submissions and found the Land Court's power to stay a review decision is conferred by s 7A of the LC Act which is not constrained by a provision analogous to s 522A(2) of the Act – where the Land Appeal Court therefore allowed the appeal and ordered a stay of the review decision pending the substantive appeal – whether s 522 of the Act confers a power to grant a stay of the original decision for both the duration of a review and an appeal against a review decision – whether the power to grant an application for a stay made after a review decision is governed by s 522 or s 7A of the LC Act – whether s 522 is the sole source of power for the Land Court to stay an original decision in respect of a schedule 2 part 1 matter under the Act – whether, consequently, the power for the Land Court to stay an original decision is constrained by the condition in s 522A(2) of the Act – whether the Land Appeal Court erred in ordering a stay of the review decision in reliance upon s 7A of the LC Act – where the legislative history of s 522 reveals a consistent and clear legislative intention that s 522(2) be the sole source of power for the Land Court to stay an original decision in respect of a schedule 2 part 1 matter not only during a review of the original decision but also during an appeal against a review decision – where the Land Appeal Court erred in holding, firstly, that s 522(2) is not the source of power to order a stay of an original decision, as confirmed or varied on review, once an appeal against a review decision is instituted, and, secondly, that s 7A of the LC Act empowers the Land Court to grant a

stay pending appeal in respect of a schedule 2 part 1 decision unconstrained by the condition in s 522A(2) – where s 522 confers a power to stay original decisions – where it is, however, significant that the original decision is not substituted or superseded by the review decision – where it is the original decision, as confirmed or varied, that a dissatisfied person will be interested in having stayed pending an appeal against the review decision – where ss 522(2), 522A and 522B have not been rendered redundant by the enactment of ss 535, 535B and 535C in the case of the Planning and Environment Court – where division 3 subdivision 1 is imprecisely drafted, however, it is to be interpreted as permitting an appeal of review decisions only to the Land Court – where a person who is dissatisfied with an original decision in schedule 2 part 1 may not appeal it directly to the Land Court – where features which indicate that the heading to s 523 "Review decisions subject to Land Court appeal", which itself appeared in the Explanatory Memorandum for the Bill for the 2000 Amending Act, and the provision in s 527 that the appeal is by way of rehearing "unaffected by the review decision" – where the use of the definite article implies that there will have been a review decision – where it was correct for the member of the Land Court to have refused the application for the stay – where, technically, that could have been done on the basis that the stay sought was not of the original decision as confirmed, but of the review decision, given that there is no power under s 522(2) or elsewhere for the Land Court to order a stay of a review decision – where additionally, the stay could have been refused for lack of utility in a stay of a review decision on its own – where as noted, despite such a stay, the original decision as confirmed would have continued as an operative decision – where it is noted that had the application been for a stay of the original decision as confirmed, the member of the Land Court would have acted correctly in refusing it for non-fulfilment by Alphadale of the condition in s 522A – where the Land Appeal Court erred in ordering a stay of the review decision purportedly in reliance upon s 7A of the LC Act – where, in particular, it erred in acting upon the footing that it could order a stay without regard for non-fulfilment of the condition in s 522A. Leave granted. Appeal allowed. The orders of the Land Appeal Court made on 23 September 2016 be set aside. In lieu thereof, it is ordered that the appeal to the Land Appeal Court be dismissed. Costs.

## Criminal appeals

*R v Perrin* [2017] QCA 194, 5 September 2017

Appeal against Conviction & Sentence – where the appellant was convicted of six counts of aggravated forgery and three counts of aggravated fraud – where the appellant contends that the trial judge wrongly decided that the exculpatory provision in s 22(2) of the *Criminal Code* (Qld), an honest claim of right, would not be left for the jury to consider – where the appellant submits that by failing to leave s 22(2) to the jury, a miscarriage of justice was caused – where there are similarities between the criteria that establish a forgery or fraud offence and the defence in s 22(2) – where the respondent submitted that if an offence of forgery is proven, s 22(2) cannot apply – where case law demonstrates that s 22(2) has three

criteria, which must be satisfied with reference to the act constituting the offence – where defence counsel at trial conceded that there was a logical difficulty in satisfying the three criteria, because of the similarities between the defence in s 22(2) and the elements of fraud and forgery – whether the trial judge was correct to conclude that a direction on s 22(2) was not necessary – where the appellant's case was that he had an honest claim of right in respect of his writing Mrs Perrin's name on documents given to the lending bank, including guarantees and mortgages of Mrs Perrin's property – whilst the particulars of the forgery charges were based on forging Mrs Perrin's signature, and not that of Fraser Perrin (the appellant's brother), the forging of Fraser Perrin's signature occurred (in each case) at the same time as that of Mrs Perrin, and for the same purpose – where there was no claim of right that could be made in respect of the forgery of Fraser Perrin's signature – where, thus, when the jury came to assess whether there was an intention to defraud for the purposes of s 488, or whether there was an absence of an intention to defraud for the purposes of s 22(2), they had the admissions of the appellant that Fraser Perrin's signature was put on the documents: (i) without any claim to authority, (ii) without Fraser Perrin's knowledge, (iii) for the purpose of pretending to the lending bank that the documents had been regularly executed, and (iv) at least on one occasion, in the knowledge that the bank required the documents to be properly witnessed and would have (at least) sent them back to be redone if they were not – where that may well have been seen by the jury as powerful evidence of intention to defraud, albeit that it arises in respect of an act that is not the charged act – where in the face of the admissions as to forging the documents, and the unchallenged evidence that as a consequence of the forgery and fraud counts Mr Perrin received a pecuniary benefit, and given that the only substantive defence was that he was entitled to do what he did, the directions actually given were adequate to identify that which the jury required, and satisfied what was said in *MacLeod v The Queen* (2003) 214 CLR 230 to be sufficient – where the jury were directed that they had to assess the appellant's state of mind, not by reference to the standards of others, and if he honestly believed that he was entitled to do what he did then he was to be acquitted – where that direction has all the elements of the relevant part of the standard Benchbook direction – where the applicant was sentenced to concurrent terms of imprisonment with a head sentence of eight years imprisonment with a parole eligibility date of 20 December 2020 – where the applicant contends that the learned sentencing judge erred in failing to account for his cooperation in the administration of justice – where the only aspect of the sentence challenged was the parole eligibility period – where the applicant made a number of admissions during the course of the trial – where such admissions avoided the need for expert witnesses – where the learned sentencing judge expressly referred to that in her Honour's sentencing remarks but did not state what discount would be applied because of such cooperation – where the learned sentencing judge set parole eligibility at the default statutory position, after serving fifty per cent of the sentence – where it is possible to conclude that no allowance was considered when setting the parole

eligibility date – whether the sentence as whole is manifestly excessive – where some modest but demonstrable allowance should have been made for the fact that the admissions meant that the trial was shortened, at a considerable saving in time and cost. Appeal against conviction dismissed. Application for leave to appeal against sentence allowed. Appeal against sentence is allowed. The order as to parole eligibility, imposed on 27 January 2017, is set aside, and in lieu thereof it is ordered that the parole eligibility date is set at 20 June 2020. Otherwise the sentences imposed on 27 January 2017 are affirmed.

#### *R v SCU* [2017] QCA 198, 8 September 2017

Sentence Application – where the applicant was found guilty of stealing, attempting to enter premises with intent and wilfully and unlawfully setting fire to a building – where the applicant was sentenced to a head sentence of two years' imprisonment – where the applicant is to be released after serving 50 per cent of his sentence – where the applicant is a 17-year-old Aboriginal child with a history of committing minor offences – where the primary court received reports from a community justice group and a youth service recommending that the applicant be released from custody – whether the sentencing judge gave adequate weight to these reports and the circumstances of the applicant as required by the *Youth Justice Act 1992* (Qld) – where the *Youth Justice Act* stipulates that detention should only be imposed as a last resort – whether it was appropriate to incarcerate the applicant – where a child's age is a mitigating factor in determining whether or not to impose a penalty and the nature of the penalty imposed: s 150(2)(a) of the Act – where this provision recognises the relevance of the child's age for the consideration of all or any of the purposes to be served by a sentence – where it necessarily affects the weight to be given to the objects of punishment, denunciation and deterrence and thereby lessens their importance relative to the object of rehabilitation – where by further provisions of the Act, rehabilitation is given an importance which it need not have in the case of an adult offender – where the sentencing judge's reasoning was inconsistent with the prescribed consideration that a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community – where in some cases a child offender must be detained, but where that is necessary, it will not be for a rehabilitative purpose – where by s 227(1), unless a court makes an order under s 227(2), a child sentenced to serve a period of detention must be released from detention after serving 70% of the period of detention – where a sentence of 12 months' detention is appropriate – where under that sentence, the applicant would be entitled to be released already, with the Chief Executive at the same time making a supervised release order under s 228(1) – where the sentencing judge recorded a conviction against the applicant – where the *Youth Justice Act* requires the court to consider the circumstances of the offender when determining whether to record a conviction – whether it was appropriate to record a conviction against the applicant – where the present case fell with s 183(3) of the Act, so that the court was able to "order that a conviction

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be recorded or decide that a conviction not be recorded.” – where the necessary considerations for the court in that respect were prescribed by s 184(1) – where of those considerations, the only one which was considered again in this respect was “the nature of the offence.” – where more importantly perhaps, there was no consideration of the impact which the recording of a conviction would have on the child’s chances of rehabilitation generally or finding or retaining employment – where consequently, the exercise of the discretion miscarried and this Court must decide on the matter – where balancing the relevant considerations, the likely impact upon his future employment and his rehabilitation, from the recording of the convictions, could be so serious that the convictions should not be recorded. Grant leave to appeal. Set aside the order that convictions of the three offences on the indictment be recorded, and substitute an order that the convictions not be recorded. Set aside the sentence for count three on the indictment and substitute a sentence that the applicant be detained for a period of 12 months, commencing on 29 November 2016.

*R v Raine* [2017] QCA 204, 15 September 2017

Sentence Application – where the applicant was sentenced to a head sentence of five years and three months’ imprisonment on one count of trafficking in heroin and methylamphetamine – where the sentencing judge accepted that s 5(2) of the *Drugs Misuse Act 1986* (Qld) applied to the head sentence so that the applicant was required to serve not less than 80% of the sentence

before being eligible for parole – where defence counsel at sentence accepted the proposed range for the head sentence and that the 80% rule applied – where the applicant submitted that the sentencing judge erred by failing to consider if the effect of s 5(2) could be mitigated by reducing the head sentence – whether the head sentence should be reduced to mitigate the effect of s 5(2) – whether, if the applicant fell to be re-sentenced, he would be sentenced under the legislation as it is now or under the legislation which applied at the time he committed the offence – where her Honour explicitly observed that she was unable to do anything about requiring him to serve 80% of the sentence but there seems little doubt that her Honour took that into account in the head sentence imposed on the second count of trafficking, that is on indictment No. 846 of 2015 – where the requirement for him to serve 80% of his sentence was explicitly taken into account when the sentence was reopened to reduce the sentence that he was otherwise required to serve – where it appears that the learned sentencing judge was very cognisant of the need to ameliorate the head sentence to take account of the fact that the applicant would be required to spend 80% of that sentence in actual custody – where s 182A(3)(a) of the *Corrective Services Act 2006* (Qld) (CSA) expressly provides that his parole eligibility date does not arrive until after he has served 80% of his sentence – where in this case there is no ability for the court to depart from the provision of s 668E(3) of the *Criminal Code 1899* (Qld) which provides that if

on appeal this court is of the opinion that some other sentence should have been imposed at first instance then it should quash the sentence which was imposed and pass the sentence that should have been imposed – where the specific provision found in s 182A(3)(a) of the CSA prevails over the more general provision found in s 180(2) of the *Penalties and Sentences Act 1992* (Qld), which has an analogue in s 4F(2) of the *Crimes Act 1914* (Cth), which provides that if a provision of an Act reduces the sentence for an offence, or the maximum or minimum sentence then the reduction extends to offences committed before the commencement of the provision but does not affect any sentence imposed before the commencement – where if this court were to re-sentence the applicant, it would be required to sentence him according to the sentencing regime that applied at the time when he committed the offence – where at that time, a person convicted of an offence under s 5 of the *Drugs Misuse Act 1986* was required to serve 80% of the sentence in prison before being eligible for parole unless subsection 5(3) applied – where accordingly this court would be bound to apply the same sentencing regime which bound the learned sentencing judge. Application for leave to appeal refused.

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

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# Legitimate advocacy

by Stafford Shepherd



Rule 34.1.3 of the *Australian Solicitors Conduct Rules 2012* ('ASCR')

provides that a solicitor must not, in any communication associated with representing a client, use tactics that go beyond legitimate advocacy which are designed to embarrass or frustrate another person.

One of the fundamental duties of a solicitor is to act in the best interests of a client in any matter in which we represent the client.<sup>1</sup> The responsibility we owe towards our client does not mean that we should ignore or disregard the rights of third parties. Such third-party rights may include: restrictions on methods of obtaining evidence from third parties, and interfering with the solicitor-client relationship of other practitioners.

This rule can be said to temper overzealousness in representing a client. Although we should act with robustness and dedication to our client's interests, we are bound by our duty to the administration of justice, and as officers of the court, not to engage in conduct that goes beyond legitimate advocacy and which is primarily designed to embarrass or frustrate another person.<sup>2</sup> Evidence gathering may fall within the ambit of rule 34.1.3 ASCR. In dealing with an opponent<sup>3</sup> in relation to a case, we must not knowingly make a false statement.<sup>4</sup> If we do, then we are required to take all the necessary steps to correct any false statement made by us to an opponent as soon as possible after we become aware that the statement was false.<sup>5</sup>

We must not engage in conduct which is likely to be to a material degree prejudicial to, or diminish the public confidence in the administration of justice.<sup>6</sup>

In *In re Comfort*<sup>7</sup> a lawyer wrote and then published an accusatory letter to another

lawyer. The disseminating of the letter was seen by the court as designed to embarrass the lawyer for no legitimate reason. The decision of *Legal Services Commissioner v Orchard*<sup>8</sup> is also illustrative of the rule's application. The judicial member described the material as a "scandalous document" which went "beyond the limits of a proper defence", containing descriptions which attempted to embarrass.<sup>9</sup>

Stafford Shepherd is director of QLS Ethics Centre.

## Notes

<sup>1</sup> *Australian Solicitors Conduct Rules 2012* ('ASCR'), rule 4.1.1.

<sup>2</sup> ASCR, rule 34.1.3.

<sup>3</sup> 'opponent' is defined in the glossary to the ASCR

<sup>4</sup> ASCR, rule 22.1.

<sup>5</sup> ASCR, rule 22.2.

<sup>6</sup> ASCR, rule 5.1.

<sup>7</sup> 59 P.3d 1011 (Kan. 2007).

<sup>8</sup> [2012] QCAT 583 ('Orchard').

<sup>9</sup> *Ibid*, [8].

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# Time

## Finding time to build your practice

by Jamie Cunningham



**Tactics to combat ‘busyness’ and create the free time you need to build your practice or firm.**

Building a thriving legal firm or practice requires a specific set of skills and a unique sense of balance in managing your time. As busy professionals, this is almost always easier said than done. On one hand you need to protect your billable hours, but on the other hand, there are critical ‘working on the business’ tasks such as marketing, leadership and managing finances, which tend to fall by the wayside in favour of ‘the immediate’.

The most astute lawyer recognises the long-term, sustainable results garnered from working on the business; however, the reality of working on these tasks often falls short of expectation. The positive news is that there are a number of ways to gain an advantage over the time crunch. Here are five tips you can use to give yourself the edge in managing your time:

### Why?

The inclination to work on files now versus investing time on proactive yet non-billable tasks is often a case of immediate versus delayed gratification. It is often easy to see the payoff for working on these files now, but often harder to see the payoff for longer term strategies, which subsequently become seemingly less important.

Developing a clear vision of what it will mean for you when you grow your firm, and knowing what emotional benefits you will get at that stage, switches your thinking patterns from short to long term. This, in turn, affects your behaviour and your choices. Every decision we make is influenced by emotion in one way or another, so becoming clear on what you will get emotionally is a driver to resist the immediate gratification. Ask anyone who has lost weight successfully and they will tell you the same thing.

### Dedicated time and rhythm

If you had a medical condition that required you to attend hospital for half a day each week, could you make that work and still run your business? The answer is yes, you could. It could be said that the only reason you don’t allocate the time to work on your business now is that you don’t see it as important. Review point number one.



Once you understand the importance of working on your business, set a regular time that becomes non-negotiable. Nothing should trump that time. In setting this time, set it up so that you can be successful at adhering to it. For example, if you are unable to keep to half a day, start with 90 minutes, but don’t miss it. Achieving rhythm through a regular time slot is critical to building momentum, as per the laws of physics.

### Have a plan

It’s one thing to allot time to undertake proactive business-building tasks, but if you’re not clear on what you need to do during this period, procrastination sets in and you’ll default to things you know you can do, such as work on matters.

Organising your thoughts into a structure with priorities gives you clarity on what to do. Be sure to break your work down into manageable tasks. Big tasks that leave you unclear where to start will also induce procrastination, and if a task feels too big, ask yourself “what is the first step here?”

Once you have an answer to that, just focus on that step. Once you get started, things will roll on from there.

### Move out of urgency

Everything you do has a level of urgency and importance. For busy lawyers, a lot of their time is spent on urgent tasks. The opportunity here is to understand the distinction between things that are important and those that are not. This might sound like a simple concept, yet it can often become clouded if you’re operating from a place of urgency.

When things are urgent, they have the perception of also being important, yet this is not always the case. If you gain more objectivity on each of your tasks, you’ll find some that can be reprioritised which will immediately free up time. Assess the importance of tasks based on whether they achieve *your* goals – not somebody else’s.

### Eliminate your excuses

As humans, we are very good at justifying our choices. But at the end of the day, any reason for not following through on what you want to do just boils down to you being very good at excuses. This is the point where the rubber hits the road. If you want to make change, there is only one person that is 100% in control of making that happen. You need to be prepared to **be** the change.

Good luck!

Jamie Cunningham is business coach and the founder of SalesUp!





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# New QLS members

Queensland Law Society welcomes the following new members who joined between 30 August to 29 September 2017.

**Rachael De Valence**, Fragomen (Australia) Pty Limited  
**Amelie Wilkinson**, David K Lawyers  
**Donna Abella**, Hirst & Co  
**Madeleine Walsh**, Cooper Family Law  
**Andrew McCarthy**, Shine Lawyers  
**Lauren Stevens**, Shine Lawyers  
**Anthony Smith**, FNQ Commercial Law  
**Catherine Wei**, Colin Biggers & Paisley Pty Ltd  
**Irana Gray**, Certus Legal Group  
**Shannon Etwell**, King & Wood Mallesons  
**Adria Askin**, Small Myers Hughes Lawyers  
**Anthony Atkinson**, RowelLegal Pty Ltd  
**Sophie Dube**, Radcliff Taylor Lawyers  
**Thomas Cameron**, Gadens Lawyers – Brisbane  
**Emily Sehu**, Australian Institute of Marine Science  
**Linda Miller**, Hetherington Family Law  
**Hee Su Yoo**, Park & Co Lawyers  
**Abbey Stockley**, Stockley Pagano Lawyers  
**Victoria Hansen**, National Retail Association Legal Limited  
**Jenawai du Preez**, KT Lawyers  
**Natassja Hollows**, Matthew Love Solicitors  
**Tinashe Makamure**, Legal Aid Queensland  
**Simon Patchett**, Sparke Helmore  
**Pamela Sweetapple**, Cooroy Legal Centre  
**Ryan Tan**, Corney & Lind  
**David Burns**, Peters Criminal Lawyers  
**Benjamin Avis**, Avis & Funk Law  
**Larissa Funk**, Avis & Funk Law  
**Chris White**, Stewart Burr and Mayr Lawyers  
**Roseanna Killip**, Anderson Fredericks Turner Pty Ltd  
**Pao-Yang Tung**, Thomas Kung Lawyers  
**Eilish Copelin**, Mills Oakley  
**Kirstiana Ward**, P&E Law Pty Ltd

## Career moves

### Barry.Nilsson

Barry.Nilsson has welcomed family law solicitor **Amelia Beveridge** to the Melbourne practice. Amelia practises exclusively in family law, with a special interest in property settlements involving third-party creditors, and parenting disputes involving international relocation applications and child abduction matters.

### Hartley Healy

**Nikla Schomberg** and **Gabrielle Baker** have been appointed as solicitors at Hartley Healy following their admission to the legal profession. Both solicitors worked as law clerks with the firm prior to admission.

### Howden Sagggers Lawyers

Howden Sagggers Lawyers has appointed **Joe Wicking** as senior associate. Joe has worked exclusively in criminal law since his admission in 2010, advising on all matters relating to the practice area including traffic law, domestic violence and corporate crime.



Amelia Beveridge



Nikla Schomberg



Gabrielle Baker



Joe Wicking



Oliver Jones



Brendan Nyst

### Marino Law

Marino Law has appointed **Oliver Jones** as senior associate. Oliver specialises in commercial, business and corporate law, and is a registered Migration Agent in Australia. He has nearly a decade of experience practising law on the Gold Coast.

### Nyst Legal

**Brendan Nyst** has been appointed as director, in addition to heading the Dispute Resolution & Litigation, and Commercial, Corporate and Property divisions. He joined Nyst Legal in 2009, and conducts civil and commercial litigation matters at all levels in all state courts and in the federal jurisdiction.

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

# In November ...

● Brisbane ● Online ● Regional

Practical Legal Ethics ✓

Practice Management & Business Skills ✓

Professional Skills ✓

Substantive Law ✓

## 9 Masterclass: Disciplinary Law

8.30am-12.30pm | 3.5 CPD

Law Society House, Brisbane

Disciplinary law is an area of practice that lawyers are often left to navigate by themselves as they become more experienced. This half-day event has been especially designed in consultation with Queensland Law Society's Occupational Discipline Law Committee to keep you up to date with this niche area of practice.



## 9 2017 Queensland TJMF Lecture

5.30-7.30pm | 1 CPD

Law Society House, Brisbane

Upholding the tradition of an annual Tristan Jepson Memorial Foundation Lecture, Queensland Law Society, in partnership with the Bar Association of Queensland, are proud to present this important event to shine the spotlight on mental health in the legal profession. Jerome Doraisamy, ex-lawyer and author of *The Wellness Doctrines for Law Students and Young Lawyers*, shares his personal insights on dealing with mental health challenges, followed by question time and networking drinks. Join us at this complimentary member event to show your support.



## 10 Essentials: Navigating Leases for Client-Focused Results

8.30am-12.30pm | 3.5 CPD

Law Society House, Brisbane

Designed for lawyers seeking an overview on the essentials or a refresher on the basics, this half-day leasing workshop provides an ideal opportunity to gain practical knowledge on the fundamental issues of leasing. Relevant to both the lessor and the lessee, the program guides you logically through the leasing process and identifies crucial steps along the way. Scenarios will be used throughout the program to help you absorb the wealth of information covered.



## 14 Essentials: Immigration Law Update

12.30-2pm | 1.5 CPD

Online

Outlining the significant changes made this year, immigration law accredited specialist Cherie Wright will update you on key legislative changes in immigration law, including the abolition of the 457 visa, the new temporary skill shortage visa and the new pathway for New Zealand citizens. This webinar will give you practical guidance to navigate these changes and obtain the best outcome for your client.



## 15 Essentials: Starting Your Legal Practice

12.30-1.30pm | 1 CPD

Online

Thinking of starting a legal practice and don't know where to start?

This practical webinar will give you the basics, take you through the resources available to you and give you access to legal practitioners who have successfully started a legal practice. This webinar is what you need to ensure your new business thrives in a crowded market.



## 17 Solicitor Advocate Course

17-18 | 5-7pm, 9am-5pm | 8 CPD

Brisbane Magistrates Courts, Brisbane

To enhance your ability to deliver personalised and effective advocacy and give you the edge in court, the QLS Ethics Centre have partnered with the Australian Advocacy Institute to offer an intensive full-day advocacy workshop conducted at the courts. Disciplines covered by the workshop include:

- presenting applications and injunctions
- development of case theory
- preparing and delivering effective examination and cross-examination.



## 21 Essentials: MS Outlook Tools to Boost Productivity

12.30-1.30pm | 1 CPD

Online

Do you spend a significant portion of your day in MS Outlook? Are you using Office 365, or planning to?

If saving time and money appeals to you, this webinar will give you the tools you need to get the most out of common office technology. Our experienced presenter will give you practical guidance on using MS Outlook to your advantage, boosting your productivity and allowing you to manage your time better.



## 28 Introduction to Conveyancing

28-29 | 8.30am-5pm, 8.30am-2.30pm | 10 CPD

Law Society House, Brisbane

Aimed at junior legal staff, this introductory course provides delegates with the skills to:

- understand key concepts and important aspects of the conveyancing process, including ethical dilemmas
- develop an applied understanding of the sale and purchase of residential land and houses, and lots in a Community Titles Scheme
- get ahead of the game with insight into E-Conveyancing in practice.



Earlybird prices and registration available at

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## Agency work continued



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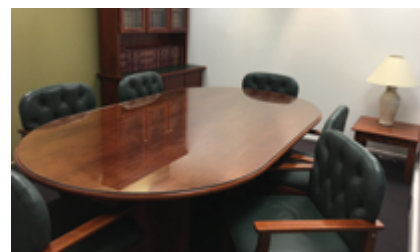
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## Missing wills

## MISSING WILLS

**Queensland Law Society holds wills and  
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Would any firm knowing the whereabouts of a  
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August 2017 please urgently contact Real Time  
Law Pty Ltd of PO Box 371 Upper Coomera  
QLD 4209 telephone no 0404 377 422 email  
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Would any person or firm knowing the  
whereabouts of a Will of **FRANCIS DESMOND  
DWYER** late of 70 Orchid Street, Enoggera  
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**John Frederick Thompson** of 81 Mein Street,  
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Would any person or firm holding or knowing  
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Edwin Goodman** late of 162 Hyde Street,  
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by Dominique Mayo



Gauge is a little gem of a restaurant located a stone's throw away from the Fish Lane dining precinct, delivering cleverly understated delicious modern Australian fare.

While the wait staff present with a cool and casual demeanour, any queries arising from the menu are met with absolute focus and precision. One quickly gains the impression that, here, the service of food is an art form, not simply something to cure hunger pangs.

Wishing to experience the myriad of flavours on offer, I opted for the six-course degustation menu. As it seemed to me, there was no other legitimate way to eat two desserts!

The silken sesame tofu in the first course was simply melt in your mouth stuff, and the turnip dashi cleverly created a tangible texture to sit alongside the silken tofu. While the distinct aniseed taste of the dish caught me off guard, I did enjoy its bold flavour.

Next up was the spanner crab, proving lusciously creamy and tasty. The spirit of the sea was clearly with me as I munched on the stringy seaweed and spanner crab combination. The sprinkling of sansho pepper provided a delicate kick, if such a thing exists! I only wished there had been more of this delicious course.

My deeply entrenched carnivorous ways led me to be sceptical of the third course of



the evening: beetroot cooked in beef juices, celeriac and native hibiscus.

The beetroot enjoyed a perfect pairing with the celeriac, and the native hibiscus provided some interest and a very subtle fruitiness to the dish. I confess I was especially drawn to the comforting qualities of the celeriac. The subtle beef juices had the effect of replacing the ordinary tartness of the beetroot with a more earthy flavour. Despite the subtle flavours employed to make up this dish, make no mistake, this was a robust and filling course!

The next course, the Berkshire pork tenderloin, was simply cooked to perfection. My mouth still waters at the thought of this dish. The broad beans sat atop the two parcels of pork against the kombi vinaigrette and smoked eel emulsion. The menu, rather cheekily, had not revealed the form of the smoked eel – well played. It was the perfect finish to the savoury component of the degustation menu.

Talk about a bittersweet dessert: the blackberry pieces were drunk on sweet vermouth and took to the tongue like a short,



sharp punch to the guts – but in a good way. I was delighted by the purple carrot sorbet, which was not only a gorgeous dark plum colour, but tasted better than I could have imagined. I was definitely a fan. Might I add, this served as a superb palate cleanser.

Now, for the final chapter: beetroot sorbet with white chocolate crème and yoghurt crumb with fried rosemary. The dish quickly transported me back to my childhood with its hints of white Christmas, and while I initially considered the beetroot sorbet was at risk of overpowering the otherwise sweetish dish, ultimately, it all worked a treat.

I thoroughly enjoyed the culinary risk taking in the kitchen, exploring unique and interesting modern Australia fare and, in particular, the savoury sweetness of the dessert courses. Never in my wildest dreams did I consider I would get so excited over purple carrot sorbet! I can hardly wait for my next encounter.

Dominique Mayo is a senior lawyer at Clayton Utz.



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# Give me a riesling to love

with Matthew Dunn



In Queensland, when the switch is flicked and the cold turns to hot, the reds go back into the cupboard and the whites come out to play. If you're looking for a new style for the warmer months, try a crisp, cool, dry riesling.

Riesling as a wine has a mixed history in this country. The continuing love affair with this Angel of the North has been a story of ups and downs, but throughout it all, real Australian riesling has been faithful to a fickle drinking public.

In the early years, there was confusion. For many years, riesling was the term used for a style of wine rather than the variety. In the Hunter Valley, Hunter Riesling was sold for many years and was actually the variety semillon. In the Clare Valley, the variety called crouchen was incorrectly described as Clare Riesling until being positively revealed in 1976. On top of that, historic amounts of cask wine would be variously labelled as riesling, but would usually be a blend of

white wine varieties with a little too much sugar. For many years, only Rhine Riesling could be relied upon as the real deal.

It is not surprising therefore, that riesling had a mixed reputation as many people drinking riesling were actually drinking something else.

Real Australian rieslings (including Rhine Rieslings), have always been wines of power and crisp citrus dryness. While a classic German Riesling may work on a clever balance of sweet fruit balanced out with a natural cool climate acid, Australian rieslings (and especially ones from South Australia) have tended to be more bone dry and heavy on the mineral and lime type flavours. One back label described an Australian riesling as having the flavour of 'quartz rocks' – a compelling description, if not one that most people could honestly say they have experienced. Many of these wines develop a unique flavour with age which some commentators have likened to kerosene (again outside most people's experience). However, I believe it is more mineral than petrochemical and not at all unpleasant.

A new and interesting development in riesling is the taming of off-dry styles in some

cool climate areas such as Tasmania and Mansfield (Victoria high country, not Brisbane southern suburbs). There are some impressive examples of refined rieslings with a decidedly Germanic twist, bringing fruit flavours first and then acid and lime notes to cut through in the mid palate. Early leaders of the style include lawyer Greg Melick and his Pressing Matters, or Frogmore Creek and their FGR Riesling. Many other talented winemakers in cool climates are experimenting with the balance and achieving outstanding results – Devils Corner 2016 Riesling recently won three trophies at the 2017 Tasmanian Wines Show with such a wine.

Given there is now reliable winemaking and a variety of styles staking a claim in the Australian riesling spectrum it is time to revisit this much misunderstood and misrepresented variety. It is perfect for Queensland summers, it loves to be chilled and it loves seafood – especially prawns. Now there is a riesling to love.

## The tasting Three cracking examples were examined to find the reason for riesling.



The first was the O'Leary Walker 2016 Polish Hill River Riesling Clare Valley, which was a lemon pale straw in colour. The nose was a heady mix of sweet honeydew melon on a core of steely granite and lime. The palate was fruit to the fore with a crisp line of citrus tang with honey notes on a core of mineral acid on the mid palate. A young wine with many years ahead.



The second was the Devils Corner 2016 Tasmania Riesling, which was the palest yellow with a hint of green tinge. The nose was sweet passionfruit, melon and crisp citrus. The palate was a tour de force with none of the sweet warning of the nose. It was fruit driven at the forefront with floral notes and an emerging citrus acid. On the mid palate was a length of ripe fruit on a base of mineral foundation. While a little sweeter, on the body the acid cut completely through to dryness. Almost Germanic in style.



The last was the Steingarten Riesling Barossa 2014, which was green tinged and white gold in colour. The nose was a mix of mineral, developed notes and charcuterie. The palate was clean as a whistle with mineral and lime lining up beautifully – straight purity and clear length on the palate.

**Verdict:** Three great wines with differing styles but the clear favourite was the Devils Corner, which despite winning a number of trophies and accolades at wine shows and reviews, is actually a damn good drop.

Matthew Dunn is Queensland Law Society acting CEO and government relations principal advisor.

# Mould's maze

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

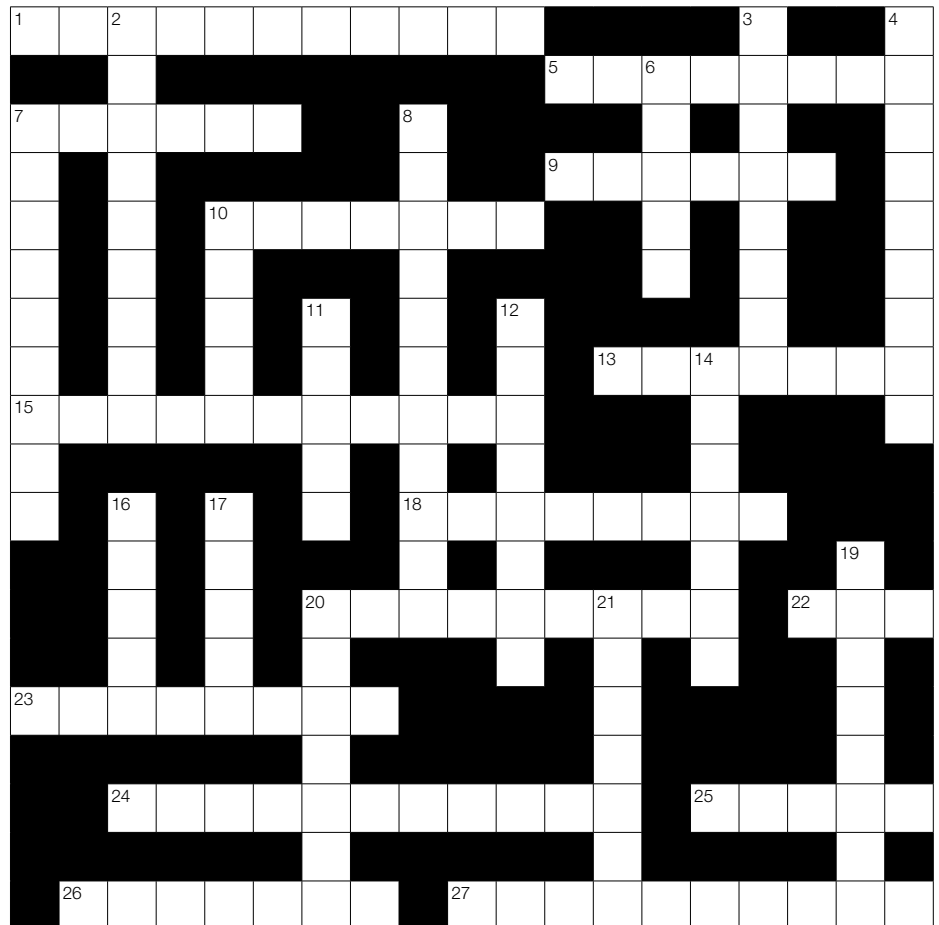


## Across

- 1 In 2010 Australian rock band The Paradise Motel released the album Australian Ghost Story on the 30th anniversary of the disappearance of Azaria ..... (11)
- 5 Grant of resources by a legislative body to maintain a dependent member of a ruling family (8)
- 7 1998 High Court cases involving double jeopardy ..... v. *The Queen* (6)
- 9 A person who promises a court that an accused person released on bail will attend court on a hearing date (6)
- 10 Common surname of persons convicted of the separate murders of Anita Cobby and Peter Falconio (7)
- 13 The motto of Queensland's State Arms, Audax at ..... (Lat.) (7)
- 15 A clause at the end of a legal instrument wherein witnesses certify that it has been executed before them, and the manner of its execution (11)
- 18 With what the famous tainted ginger beer was mixed in *Donoghue v. Stevenson* (8)
- 20 An item of value which does not have the certainty of property in family law, ..... resource (9)
- 22 Lease (3)
- 23 The name of the seat of the Lord Speaker in the House of Lords (8)
- 24 Legal doctrines by which liability is extended to a defendant who did not actually commit a criminal act eg. vicarious liability, conspiracy, attempt (11)
- 25 Operating officially as the Brisbane Prison between 1883 and 2002, ..... Road Gaol (5)
- 26 The period during which a court conducts its business (7)
- 27 Stated belief or assertion (10)

## Down

- 2 Self-help to remove a legal nuisance (9)
- 3 The initial trial court where an action is brought, the court of first ..... (8)
- 4 High Court decision dictating the court's preferred approach in family provision cases, *Singer v. ....* (9)
- 6 High Court case involving the principles to be applied by appellate courts when considering whether or not to overturn findings of credit made by a trial judge, *Fox v. ....* (5)
- 7 Period of a barrister's traineeship (9)
- 8 A safety notice that bans activity that could be a risk to workers (11)



- 10 Symbols of a speaker's authority in Australian parliaments (5)
- 11 Disclosure must be full and ..... (5)
- 12 Notice issued prior to defamation proceedings (8)
- 14 Legal status following breach of a contract or court order, in ..... (7)
- 16 In the context of arbitration, "ex ..... et bono" refers to the power of arbitrators to dispense with consideration of the law in preference to what they consider to be fair and equitable (Lat.) (5)
- 17 Valmae Beck's husband, Barrie ..... (5)
- 19 Ivan Milat murdered seven tourists and buried their bodies in this state forest (8)
- 20 The concept of the law treating corporate entities as if they were persons is an example of a legal..... (7)
- 21 Legally restrain (7)

Solution on page 52



# Appeasing the modern-day child

There's something fishy about this birthday present

by Shane Budden



If you are anything like me, your brain will spend a lot of time remembering unimportant things, like the lyrics to the *Gilligan's Island* theme song, the names of the monsters under Calvin and Hobbes' bed (Maurice and Winslow, in case you were wondering), and the origin of the Court of Exchequer. (NB: to anyone about to write a furious letter to the editor extolling the overwhelming importance of the Court of Exchequer, please note that I am of course kidding. I remember nothing about the origin of the Court of Exchequer, as the 5th edition of *The English Legal System* by Walker & Walker does not cover it until page seven – a good four pages after I stopped reading).

The point is that important things, such as passwords, credit card numbers and the exact names, if you want to be technical about it, of your children, can often escape you. This has a downside – for example, if you are picking your kids up from after school care saying something like, "I'm here to pick up... I wanna say Susan? No? Jane, maybe?" will likely end in a sub-optimal conversation in a police station.

The upside is that if you only remember the unimportant things, you might recall my last column, in which I was detailing my search for a birthday present for my son. The search was taking place in the light of an inherent conflict. My son feels that everything he owns, including his toothbrush, should be able to connect to – and buy things from – the internet (he does not feel that he should

have to pay for these things). Whereas I long for the days when the internet was just a hyper-efficient joke delivery system, which I believe is the real reason it was developed.

Bill Gates may claim, these days, that he developed the internet to help people and deliver world peace, but I suspect he did it just to be able to spread around the joke about the nun who walks into a pub carrying a frog, a rubber glove and a bicycle pump (note to tech-head nerds: before you blast me on Instagram for claiming that Bill Gates invented the internet, please note that was done for comedic effect; I know it was really Al Gore with help from Mike Nesmith's mum).

The point is, I did not want to get him anything that connected to the internet, so I threw open the floor for suggestions. My wife said that anything that wasn't a drum kit was fine, which was precise but not overly helpful – and I would bet there are drum kits with Wi-Fi connections these days.

My daughter suggested we get him a fish, so that he gets to have a pet like she does (technically our dog belongs to my daughter, because she wanted a dog and made five promises to seal the deal: that she would wash, walk, feed, play with him and clean up after him; to her credit she has made good on all but four of those promises).

My problem with getting my son a fish is that I recall having fish as a kid, and my memory is that they require a startling amount of looking after for an animal that doesn't come when you call it, does little but mope around the way you would mope around if you lived in a room the respective size of a toilet and – let's be honest here – stretches credibility a fair bit by claiming to be a 'pet'. I suspect you could have a more satisfying owner-pet relationship with mould.

In addition, fish traditionally exhibit the same overall life expectancy as a doughnut in the vicinity of Clive Mensink. Partly, this is because they are sensitive to changes in temperature, acidity, alkalinity and government, but also because historically children have been remarkably poor judges as to what can be put into a fish tank without negatively impacting on the fish.

The list of things that I can personally vouch for having a less than ideal effect on the prospects of a fish is as long as your arm, and indeed includes your arm – and so I have the feeling that if my son got a fish I might find myself explaining that Goggles the Goldfish probably didn't want to play with a remote-controlled car, and has gone to fishy heaven with the other four fish that reacted badly to things they wouldn't encounter in nature, such as porridge and crayons.

So the idea of a fish was out, and I had no love for the idea of non-traditional pets from the reptile family, such as lizards or snakes. People do have lizards and snakes as pets, despite the fact that 'reptile' is a Latin word meaning, "something that will totally not ever be a pet no matter how long you have it, although it might eat you if you sleep too long", (Latin, as you can see, was a very economical language).

For those of you dying to know what we actually got him, we decided – after long and careful consideration of many fine non-internet-capable items – to get him an Xbox. That may sound like I caved in to persistent whining, but that is only because I did – although in my defence it was whining from my wife. She noted that the Xbox would keep him and his friends happy and occupied during his birthday party, noting also that she had to host it while I was at work sipping chardonnay in the rooftop spa at QLS.

This is not an entirely accurate depiction of your typical QLS workday, but I sensed – call me a sensitive, caring husband if you must – that this was not the time to point that out. I realised my wife was masking her true feelings with sarcasm, and that she was really offering me a choice between an Xbox and a divorce.

So my son has an Xbox, enjoyed his birthday party and hackers have yet another way to steal everything we own, but on the whole it was a good result. Oh, and there is no joke about a nun, a frog, a rubber glove and a bicycle pump; if you don't believe me, Google it – but I wouldn't do it from work if I were you.

© Shane Budden 2017. Shane Budden is a Queensland Law Society ethics solicitor.

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## Crossword solution from page 50

**Across:** 1 Chamberlain, 5 Appanage, 7 Pearce, 9 Surety, 10 Murdoch, 13 Fidelis, 15 Attestation, 18 Ice cream, 20 Financial, 22 Let, 23 Woolsack, 24 Attribution, 25 Boggo, 26 Sitting, 27 Contention.

**Down:** 2 Abatement, 3 Instance, 4 Berghouse, 6 Percy, 7 Pupillage, 8 Prohibition, 10 Maces, 11 Frank, 12 Concerns, 14 Default, 16 Aequo, 17 Watts, 19 Belanglo, 20 Fiction, 21 Injunct.

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## Historical standard default contract rate %

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9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.30	9.30	9.30

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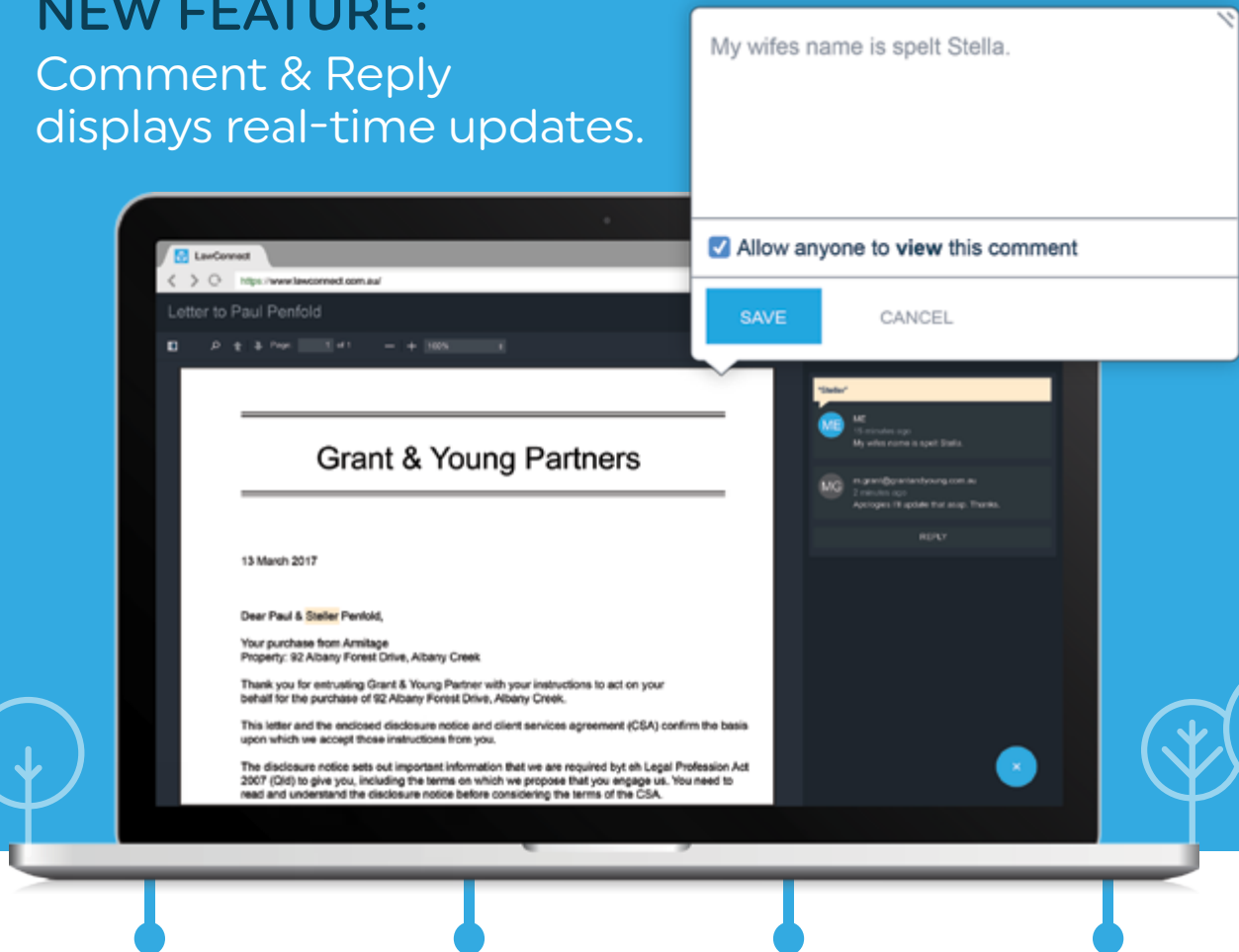






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