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October 2017 – Vol.37 No.9

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Collegiality on a world stage

Why we should lead the way

There is a tendency for the general public to assume that the practice of the law is something akin to combat – a constant battle to defeat your opponent or gain advantage for your client.

Probably as a result of a diet of stereotypical lawyers parading across our TV screens in US-made productions, the public has gained the idea that everything in the law – from the negotiation of a cottage conveyance to High Court applications – resembles *Game of Thrones* without the costumes.

In truth, collegiality is at the heart of the profession and I have often emphasised this when speaking at conferences and events. Because the commoditisation of many parts of the law through technology has reduced the opportunities for members of our profession to interact and sustain those professional relationships, it is important that we continue to make efforts to sustain collegiality whenever we can.

That collegiality also has a place in the bigger picture of the profession, not just across state borders but also throughout the world. The breakneck pace at which we communicate in the digital age, and the burgeoning opportunities to interact with our colleagues around the globe, have made the pace at which trade negotiations and the legislation which enlivens their outcomes seem glacial by comparison.

In order to manage the gap in this two-speed brave new world, our collegial ties to lawyers in other jurisdictions and nations will be invaluable. It is for this reason that I am currently working on reinvigorating the Society's International Relations Committee, with a particular focus on cross-border collegiality.

It is the Society's role to provide leadership for the profession in these exciting and hectic

days, as well as to open up opportunities for partnerships and collaboration with lawyers in other parts of the world. These times are not without their challenges, but the opportunities far outweigh the risks and, properly managed, greater engagement – especially in the Asian region – will be of great benefit to the Queensland legal profession.

In fact, Australia in general, and Queensland in particular, is well-positioned to thrive in the 'Asian century'. While it is true that in our hyper-connected world, dividing the globe into geographic regions is becoming less relevant and may soon be redundant, positioning is not just a geographic concept.

Queensland has strong ties to Asia through trade and tourism over many decades; Queensland Law Society has hosted delegations of lawyers from China and other Asian nations in the past, and will continue to build on those relationships going forward.

As a part of that effort, last month I was privileged to attend the 30th LAWASIA conference in Tokyo, which proved a wonderful opportunity to network and engage with like-minded colleagues from throughout the region; it is clear that Australia and Queensland have a leadership role to play in the ongoing process of creating closer ties with the international legal profession.

One look at the program confirms that the issues which are critical to this process are those in which our state and country are strong. Access to justice and elder law – two issues which have been the focus of highly successful advocacy by the Society over the past two years – were high on the agenda. Topics also having a prominent position at the conference were the independence of the judiciary and the rule of law, and anti-corruption efforts.

Australia has an impeccable record in relation to judicial independence and the rule of law, themes which again have been prominent for QLS for several years. Our leadership in this area – and our strong and

successful anti-corruption regimes – place Queensland and Australia as natural leaders here, which is so important to greater engagement across Asia.

Discharging that role appropriately and successfully will again fall back on those collegial ties, the professional friendships forged at conferences and other arenas which will assist in navigating the challenges ahead. While we are well-placed, there are stark differences in the way law is practised in our broad and diverse region, and smoothing out the bumps and snags along the way will require patience and hard work on both sides – which is much more likely to be forthcoming between true colleagues and business partners than between strangers or diplomats with inevitably political agendas.

For that reason, this was an opportunity well-seized and the relationships forged and connections made will no doubt bear fruit over the coming months as we move confidently forward into an era of truly multi-jurisdictional practice and global engagement. Scary, exciting, risky, fertile – the future of the legal profession is all these things, but we need not fear it if we are prepared, and we have made a good start.

The brave new world will be one navigated by collegiality, people skills and open, engaging attitudes – not a bad omen for a country whose most oft-used word is 'mate'.

Christine Smyth
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When challenge turns to crisis

The services we hope you'll never need



We hear a lot these days about the challenges a digital future has in store for the legal profession. An entire industry has arisen warning of the issue and their proposed solutions.

There are many real issues facing the profession right now and some just over the horizon. However, not all these challenges are related to the relentless progress of technology; the practice of law is becoming more complicated, even without mysterious concepts such as blockchain, deep learning and bitcoin.

With the Richard Susskinds of the world somewhat gleefully predicting our downfall through technology, non-legal service providers trying to steal our clients, and the everyday challenges of being a lawyer, it can sometimes seem like we are on our own against Shakespeare's 'sea of troubles' or wading through Lady Macbeth's river.

Fortunately, there is help for Queensland Law Society members. Not only does the Society provide many member services, including ethics and practice support telephone advice, but there is also a vital partnership with Law Foundation-Queensland (LFQ).

It has a number of invaluable services offered exclusively to Queensland Law Society members, and this month I take a look at those services and how they can benefit our members.

What is Law Foundation-Queensland?

Law Foundation-Queensland is a trust fund administered by its trustee, Queensland Law Foundation Pty Ltd (commonly known as 'the Foundation'), and every solicitor who is a member of the Queensland Law Society is a beneficiary of this trust fund; it holds the assets previously held by Law Foundation Insurance Trust.

The capital and income is held on behalf of the beneficiaries named in the trust, and these beneficiaries include all members of QLS, as well as QLS itself. LFQ supports its beneficiaries by way of conferring grants upon application, and eligibility is determined by the terms of the trust deed.

What services does it provide?

Through working with QLS, in particular Queensland Law Society's professional leadership department and LawCare, LFQ has established programs to provide on-the-spot advice, as well as hands-on, in-practice assistance to solicitor members of QLS, free of charge.

Confidentiality is assured, with these Solicitor Assist services provided by practising solicitors on a solicitor/client basis. Other Solicitor Assist service providers (for example, accountants, practice managers, etc.) similarly operate under strict confidentiality arrangements.

The Solicitor Assist hotline is manned by two experienced Queensland practitioners, who have each operated in private practice in Queensland for more than 30 years, and who fully understand the day-to-day difficulties which arise in running a practice and attending to client needs.

If a phone call is not enough, or if there is a need for support to address difficulties arising in the course of practice, the Foundation has established the Solicitors' Helping Hand Panel, a group of experienced practitioners willing to attend the offices of QLS members to provide hands-on assistance.

The LFQ has also established a Benevolent Fund to provide financial assistance, at the discretion of the board, to QLS members, families and dependents, who may be experiencing financial difficulty.

The difficulty may arise from any cause, and need not be practice or work-related. This includes illness, accident or an event which creates financial adversity for QLS members or their families.

Other projects

The LFQ also partners with QLS in particular projects to assist members, especially those in the regions. For example, the *Primary Producers Legal Handbook*, a guide produced by LFQ with the assistance of QLS members, is intended to assist primary producers by giving them a broad understanding of the various state and Commonwealth laws.

LFQ also assists the Society through direct funding of regional roadshows and learning and professional development events, to help ensure all members in Queensland's far-flung legal profession have access to high-quality and relevant professional development tools and resources.

I would urge all members who may have reason to avail themselves of these services to contact LFQ via the details below. I hope very much that you never need these services, but if you do, it is important to know that they are there.

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Legal Profession Regulation 2017 commences

On 1 September, the *Legal Profession Regulation 2017* (LPR 2017) commenced,
replacing the *Legal Profession Regulation 2007*.

The table below summarises the changes under LPR 2017:

Section	Comment
S29(1) Keeping and printing trust records	Change in regulation now allows law practices that maintain computerised trust accounting records to retain monthly reports (cashbook, reconciliation statements, listing of ledger balances and listing of controlled money) in an electronic format as long as the reports can be printed later upon request.
	Former S29(1)(e-f) have been incorporated into s29(2).
S44(3) Reconciliation of trust records	Principal of the law practice to review monthly reconciliation statement. Evidence of the principal's review to be annotated to the monthly reconciliation statement.
S50(2) Withdrawal of controlled money	Withdrawal from controlled money account can only be effected by cheque or electronic funds transfer.
S51(9) Register of controlled money	Principal of the law practice to review monthly reconciliation statement. Evidence of the principal's review to be annotated to the monthly reconciliation statement.
S55(1) Register of investments	The former s55(1) has been deleted: "This section applies if trust money mentioned in section 238(3) of the Act is invested by a law practice for or on behalf of a client, but this section does not itself confer power to make investments."
S55(2)(g) Register of investments	The former s55(3)(g) was: "...particulars sufficient to identify the source of the investment, including for example: (i) A reference to the relevant trust ledger; and (ii) A reference to the written authority to make the investment; and (iii) The number of the cheque for the amount to be invested". It has been replaced with s55(2)(g), that is: "...particulars sufficient to identify the source of the investment".
S57(2) Register of powers and estates in relation to trust money	Subsection 2 has been inserted: "Subsection (1) does not apply if the law practice or associate is also required to act jointly with 1 or more persons who are not associates of the law practice."
S58 Procedure and requirements for withdrawing trust money for legal costs – Act, s258	This section has been restructured into the following categories: (i) Bill of costs given to client (s58(2)), (ii) Costs agreement or trust account authority held (s58(3)), and (iii) Reimbursement of outlay paid (s58(4)). Each of these sections has two parts and both parts must be complied with before effecting a withdrawal.
S66 Way in which external examination must be carried out – Act, s273	New subsection 2 that allows Queensland Law Society to grant external examiners an exemption from reporting in the approved form.

17-year-olds to transition into youth justice system

Queensland Attorney-General and Minister for Justice Yvette D'Ath has detailed the Government's timeline for the integration of 17-year-olds into the youth justice system.

The *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (the Act) will commence on 12 February 2018. Under the Act, 17-year-old offenders will be transitioned out of the adult justice system into the youth justice system in a staged process.

"After widespread consultation, we have determined that this vital policy change – to keep Queensland in line with national and international standards – will now be introduced in stages to allow for safe and orderly transfer," Ms D'Ath said.

The transition will commence from November 2017, with every new offender aged 17 and under being dealt with in the youth justice system.

When the Act commences in February, all 17 year olds on adult community-based orders will be transferred to the youth justice system.

The plan also includes supervised bail accommodation services, separate zones at detention centres for 10-13 year olds, recruitment of new frontline staff, more court resources and provision of after-hours legal services to young people including increased funding for Legal Aid Queensland.

The Attorney-General also noted that around 80% of young people in youth detention in Queensland were on remand while they awaited the outcome of their matters,

due to a lack of suitable accommodation or support services for their release.

"What this means is that roughly four in every five young people in custody have not been convicted or sentenced," Ms D'Ath said.

"The Palaszczuk Government recognises this must be addressed, as the nationwide average for young people on remand is 57%. We are building on solutions that are proven to work."

The youth justice system reform aims to hold young people to account for their actions while also addressing the issues that cause youth offending and re-offending.

QLS has advocated strongly on this issue and was pleased to see the Government make some of our proposed amendments.

Boosting creativity in law firms

The Australasian Legal Practice Management Association (ALPMA) and InfoTrack have released preliminary results of a survey measuring Australian law firms and their focus on creativity.

The preliminary results indicate that most law firms do not value creativity, and have focused little effort on improving creativity at their firms, according to ALPMA and InfoTrack.

The 'ALPMA/InfoTrack 21st Century Thinking at Australasian Law Firms' survey measured how well firms within Australasia were

embracing the key 21st Century learning skills of creativity, critical thinking, communication and collaboration as defined by the P21 organisation.

More than 100 firms participated in the survey, with the aim being to help firms successfully adapt to the changing legal landscape.

According to ALPMA and InfoTrack, only 40% of respondents valued creativity, with the most valued skill being communication at 76%. This was followed by collaboration at 66% and critical thinking at 59%.

ALPMA president Andrew Barnes said that creativity was often undervalued in law firms.

"By not fostering creative thinking, firms are missing the opportunity to tap into the minds of their own people, many of whom have unexplored potential," he said.

InfoTrack CEO John Ahern said that creativity drove innovation.

"Firms are aware of this, as evidenced by the greatest benefit measure to the business being innovation, however many still see no benefit to investing in creativity," he said.

You can view the survey via alpma.com.au.

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Extra funding to aid CLCs

The Queensland Government has allocated almost \$4.8 million in additional funding for Queensland community legal centres (CLCs) to support 10 organisations until 2020.

"This funding will go towards supporting legal services that assist with family law and family violence, which are two areas of law where demand for service is rapidly growing, especially in the community legal sector," Attorney-General and Minister for Justice Yvette D'Ath said.

She said the new funding would complement the interim funding provided by the Government to 22 organisations impacted by the delay in receiving funding from the Commonwealth Government earlier this year.

"Altogether, this will mean the community legal organisations will receive close to \$60.4 million of combined state and federal funding to deliver services until 2020."

As part of the announcement Mrs D'Ath said further funding of \$790,000 over 2017-20 had been allocated for the Women's Legal Service helpline.

The new funding covers CLCs in Brisbane, on the Gold Coast, and in Mackay, Cairns and Townsville.

Recently published results from the National Association of Community Legal Centres census covering 2015-16 show that Queensland CLCs have also been making greater efforts to self-generate funds.

The report showed that 19% of Queensland-based CLCs were receiving funding from philanthropic sources and 31% were fundraising or receiving sponsorship to provide services. Three of the 28 centres surveyed had employed specialist fundraising staff and two had recruited volunteers to undertake this work.

The census also revealed an extraordinary number of hours spent by the CLCs in seeking funding; in total, the 28 CLCs spent 453 hours per week on activities such as grant applications and fundraising.

"The battle for funding which took place last year showed us we had to make increased efforts to attract funds through events, donation drives and partnerships with philanthropic organisations," the director of Community Legal Centres Queensland, James Farrell, said.

"The census results also showed that each year Queensland's CLCs turned away over 55,000 people. Vulnerable Queenslanders are missing out on the legal help they need, and holding sausage sizzles isn't ever going to address this unmet need.

"Ideally we would like the government to deliver on the Productivity Commission recommendation of an additional \$200 million. When people are unable to access legal help, they end up costing taxpayers more as they try to navigate the legal system alone or have problems that escalate, eventually needing more help from other government services."

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Mitchell has joined the team at RSM in Brisbane, leading the Restructuring & Recovery division in Queensland.



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Brisbane firm raises funds for mental health

DibbsBarker Brisbane recently took part in the annual Bridge to Brisbane charity run to raise funds for the QIMR Berghofer Medical Research Institute.

The event, held on 27 August, saw the firm represented by 30 partners and staff taking part in a 5km or 10km course.

The DibbsBarker team placed in the top 10 fundraising teams, raising more than \$10,000 to support QIMR Berghofer's research into mental health.

Prior to the event, the firm hosted a seminar featuring the head of the Neurogenomics Laboratory at QIMR Berghofer, Dr Guy Barry, who shared his work relating to the importance of work-life balance from a cognitive perspective.

DibbsBarker partner and member of the charity run team Angela Brookes said that it was a privilege to hear about QIMR Berghofer's research.

"With statistics indicating that lawyers are more likely than other professionals to experience depression, we wanted to do something that would have a tangible impact on improving mental health and promoting



mental wellbeing in the workplace. The Bridge to Brisbane event gave our team an opportunity to support an excellent cause while enjoying a great day," she said.

DibbsBarker has raised funds previously for QIMR Berghofer's Cancer Research Program through the Ride to Conquer Cancer cycling event from 2011-2015.

This is the first time they have participated as a team in the Bridge to Brisbane event,

and head of QIMR Berghofer's Mental Health Research Program Professor Michael Breakspear expressed his gratitude to DibbsBarker for their support in the run.

"The money raised will help us in our quest to develop new and better ways of diagnosing and treating debilitating conditions like depression and bipolar disorder."

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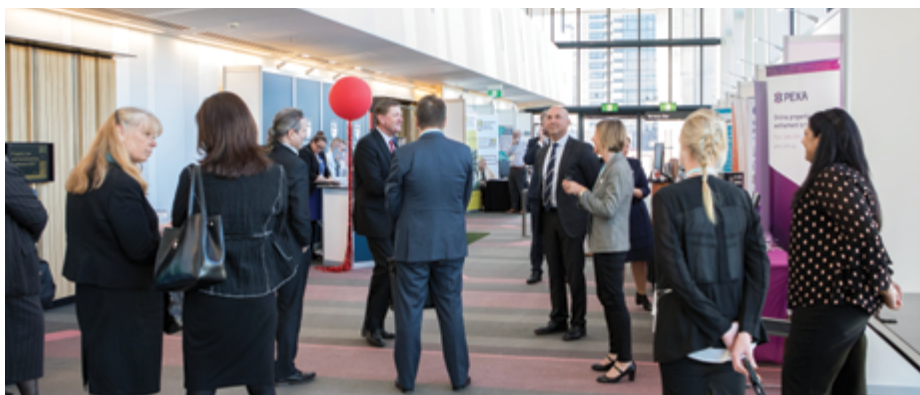
Tropo for the tropics

From Thursday 17 until Friday 18 August, QLS visited sunny Port Douglas for Law in the Tropics. This two-day conference saw the latest in legal updates, essential skills, practical workshops and handy tools and techniques for delegates to advance their practice. QLS thanks sponsors Allied Law, ESS, GlobalX, Herron Todd White, Leap and PEXA for their support of our regions.



Thank you to our sponsors



Conversations, property and conveyancing

In September, over 100 delegates attended the inaugural two-day QLS Property Law and Conveyancing Conference. This new event joined the two areas of practice for the first time, sharing with delegates the latest updates and topical issues. The support of gold sponsor Leap is acknowledged for this integral event.



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The *Sam Hawk* supply chain creditors, stakeholders and the PPSA

Ship 'Sam Hawk' v Reiter Petroleum Inc. [2016] FCAFC 26



Peter Mills explores some of the complications that can arise for goods in transit when one of the 'links' in a modern supply chain becomes insolvent.



The article discusses some of the issues for stakeholders in modern supply chains.

These involve the 'stoppage notices' under the *Sale of Goods Act 1896* (Qld) and similar laws (SOG laws), and rights under the *Personal Property Securities Act 2009* (Cth) (PPSA) and similar unitary model secured transactions laws (PPS laws).

These are equally relevant to sellers, buyers, transport and logistics providers (as carriers), financiers and credit risk insurers of each stakeholder, and controllers who might be appointed to any of the stakeholders.

The writer recently acted¹ on behalf of the South Korea-appointed controller of Hanjin Shipping Co Ltd (Hanjin)². Hanjin was carrying some US\$14 billion worth of cargo – it was the carrier of some 10% of the total annual cargo shipped into the west coast of the United States – and its worldwide creditors were owed about US\$840 million³ when the administrator was appointed by a Republic of (South) Korea court.

Supply chain creditors

In modern commerce and supply chains, businesses buy and sell goods⁴ (which become part of the end mass or product,⁵ or are consumed (for example, fuel)) several times before an end user acquires them, as well as provide finance, insurance, transport and logistics.⁶ These stakeholders are often from more than one jurisdiction (both within and outside of Australia).

The goods will transit through one or more jurisdictions, and multiple stakeholders will have possession from time to time (for example, carriers). Often, one insolvent stakeholder will cause a chain reaction of payment problems both up and down the supply chain.

The PPS laws are designed to enable the efficient and transparent recording and priority over goods of 'security interests' of sellers or other financial transactions.⁷ The SOG 'stoppage notices' are designed to provide additional rights to the unpaid seller if the goods are still in transit when a buyer becomes insolvent.

Sam Hawk – the unpaid fuel supplier – no lien and no right to give a stoppage notice – possible PPS rights

The *Sam Hawk* was chartered by its owner to an Egyptian company, Egyptian Bulk Carriers (EBC). Fuel (worth US\$122,000) was ordered by EBC and supplied to the vessel in Istanbul, but was not paid for.

As the buyer of the fuel had already obtained possession, it was likely that a SOG 'stoppage notice' was not able to be given. The fuel supply contract stated that the laws of the US applied. Under the US maritime lien laws, a supplier of fuel is entitled to a maritime lien (as opposed to a contractual lien) over the vessel, and to have the vessel arrested, despite having no contract with the owner. The law of Australia, however, is that the supply of fuel does not give rise to a maritime lien under the *Admiralty Act 1988* (Cth).

The *Sam Hawk* was arrested in Australia under a Federal Court arrest warrant under the *Admiralty Act*. The creditor asserted that, as the contract provided for the US law, the *Admiralty Act* allowed for the arrest.

The Full Federal Court rejected this argument and held that the Australian law was the applicable law and so no lien existed. The *Sam Hawk* was ordered to be released. This effectively left the fuel supplier as an unsecured creditor.

Hanjin's chartered vessel, the *Hanjin California*, was arrested in Australia under a Federal Court *Admiralty Act* warrant by another fuel supplier, for fuel supplied in Singapore. The vessel was immediately released following the *Sam Hawk* decision, with a similar outcome. The supplier also remained potentially liable for damages and costs of the unlawful arrest, due to the provisions and undertakings required under the *Admiralty Act* and Federal Court practice.

It is worth noting that orders were also granted by the Federal Court under the model law,⁸ to restrain the arrest of any further Hanjin vessels and allow the unloading of cargo in Australia, so as to reduce additional claimants and claims up and down the supply chain.

If, however, the fuel suppliers in each case had been granted a security interest (for example, its retention of ownership of fuel until paid) and perfected it by registration under the PPS laws, they might have been entitled to obtain preservation orders, including the seizing of the vessel to preserve the collateral (being the unpaid fuel). This may have given the suppliers potential leverage in obtaining payment.

PPS laws and 'stoppage notices'

Under many goods supply contracts, the ownership of the goods is retained until payment in full is made. This is a registrable 'security interest' under the PPS laws.⁹ This issue was not apparently argued in the *Sam Hawk* or *Hanjin California* cases.

The PPS laws recognise the transit of goods entering countries which have PPS laws, even though they may not have previously been subject to PPS laws before entry.¹⁰ This gives rise to several issues when you have an insolvent party in a supply chain who is a supplier, carrier, buyer or seller. These are just some of the examples and possible options:

- A buyer who gives possession of the purchased goods (which they own) to their insolvent seller (as bailee) is not normally granted a PPS laws security interest,¹¹ and so their ownership will not be lost if they have not registered against the insolvent seller.¹²
- Lack of familiarity with the PPS laws of a country into which the goods will be located can result in substantial loss being suffered by a non-compliant lessor or owner of goods.¹³
- Under many SOG laws, an unpaid seller may recover unpaid goods that are in transit by providing a 'stoppage notice' to the bailee/carrier before the goods are delivered to the buyer.¹⁴ This right will generally still arise despite lack of a security interest or perfection under PPS laws.
- The seller must give this stoppage notice as soon as possible and ensure that the goods are not released to the buyer (or their agent).
- Its purpose is to ensure that the 'stopped goods' do not become the property of the buyer/debtor's insolvent estate,¹⁵ so that the seller's rights in the stopped goods and sale proceeds remain superior to those of the buyer's controller and other creditors of the buyer.
- If the goods are released, despite the notice, the seller will lose their rights to recovery of the goods, but will be left with rights of conversion against the carrier and/or proof of debt against the insolvent buyer.¹⁶
- A supplier of goods to an insolvent buyer (which buyer has obtained possession of the goods) should check whether the supply contract grants the supplier a PPS laws security interest in the goods. Generally:
 - under the common law, commingling (for example, mixed supplies of fuel held in a tank) or processing of the goods (for example, refining) with other goods destroys the supplier's right of ownership in the goods.¹⁷ In some jurisdictions which do not have PPS laws (for example, the United Kingdom), this problem has been addressed in part by statute,¹⁸ following numerous cases involving goods such as commingled wine barrels,¹⁹ grain²⁰ and bullion²¹

- under PPS laws, a supplier's security interest in the goods automatically becomes a security interest over the whole of the commingled or processed product or mass.²² As such, a supplier of fuel which has become commingled with other suppliers' fuel may still be able to perfect and enforce priority over the whole of the fuel²³
- priority in commingled or processed goods is not determined by the date of lodgement,²⁴ for example, if one supplier lodges earlier than the others, it will not have priority ahead of other, later suppliers' registrations, and they will share under a statutory formula in the PPS laws
- the security interest should be perfected in the other jurisdictions and in Australia. Most registers are online, and take little time to effect a suitable registration, though they too have stringent rules as to the correct data to be lodged
- rights under bills of lading and other rights might also arise or have to be dealt with, instead of or in conjunction with exercising any rights under the SOG and PPS laws.²⁵

Takeaways

Suppliers and sellers in the supply chain should ensure that they have suitable contract terms and procedures to be:

- granted and register security interests under the PPS laws in whatever country the goods may be located in from time to time, and
- able to give 'stoppage notices' under SOG laws in a timely fashion, in addition to any rights under PPS laws.

Consider if goods are to be commingled or processed in the supply chain, and whether you can use PPS laws to overcome shortcomings in SOG laws.

Take steps to ensure that rights under the SOG or PPS laws are not lost due to delay in giving stoppage notices or lodging registrations.

It is also in the interest of financiers and credit risk insurers of sellers (and other members of the supply chain) to ensure that effective regulatory compliance for each of these rights is put in place, in order to minimise loss of property and risk exposure.

This article appears courtesy of the Queensland Law Society Banking and Financial Services Law Committee. Peter Mills is a special counsel at Thomson Geer and a member of the committee.

Notes

- ¹ By myself in PPSA and my colleague, Dr Neil Hannan, who is an expert on international insolvency.
- ² *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 and *Suk v Hanjin Shipping Co Ltd* [2017] FCA 404 – Hanjin was once one of the world's largest container ship operators, and was a key member of literally thousands of businesses' supply chains.
- ³ Urgent court orders were obtained to protect Hanjin's vessels and cargo, so as to enable the delivery of cargo to businesses of the supply chain/s and so reduce claimants from Australia and elsewhere. The application was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency that has been incorporated into the domestic law of Australia under the *Cross-Border Insolvency Act 2008* (Cth) and those of a number of its trading partners.
- ⁴ Which become part of the end mass or product, or are consumed (for example, fuel). Section 10 definition of 'goods' PPSA.
- ⁵ See commingling provisions of the PPSA.
- ⁶ More often as carriers or storers of the goods.
- ⁷ See section 12 PPSA. This includes mortgages, charges, assignment of receivables and chattel papers, commercial consignments and PPS leases.
- ⁸ *Cross-Border Insolvency Act 2008* (Cth).
- ⁹ Section 12 (2)(d) PPSA. Examples: Section 17(1) *Personal Property Securities Act 1999* (NZ); Article 9 *Uniform Commercial Code* (USA); section 2(2) *Personal Property Security Act 2011* (PNG); Chapter 1 Article 2 Clause (kk)(i) UNCITRAL Model Law on Secured Transactions. There are more than 50 countries now subject to PPS laws.
- ¹⁰ See section 39 PPSA (relocation of collateral or grantor to Australia).
- ¹¹ *THC Holding Pty Ltd v CMA Recycling Pty Ltd* [2014] NSWSC 1136.
- ¹² See, however, lessors and bailors under PPS leases (section 13 PPSA) and section 267 PPSA.
- ¹³ *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed)* [2017] NSWCA 8 (6 February 2017) – loss of \$50m of equipment – both original lessor and buyer of the lessor's business did not apparently do due diligence as to PPS laws in Australia, as Article 9 Uniform Commercial Code (US) (where the equipment originated from) does not have 'PPS leases' for operating leases.
- ¹⁴ Examples: See sections 42(1), 46, 47 and 48 of the *Sale of Goods Act 1923* (NSW) and Division 3 *Sale of Goods Act 1896* (Qld); Article 2, § 2-705, *Uniform Commercial Code* (US).
- ¹⁵ See especially *Re Amerind* [2017] VSC 127 (subject to appeal).
- ¹⁶ *Toll Holdings Ltd v Stewart* [2016] FCA 256; see also opinion at *O2Cool LLC v TSA Stores Inc. (In re TSAWD Holdings Inc.)*, No.16-51014-MFW, 2017 Bankr. LEXIS 559, *2 (Bankr. D. Del. March 1, 2017).
- ¹⁷ *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25, 44-45.
- ¹⁸ For example, see section 18 rule 5(3) and (4) and sections 20A and 20B United Kingdom's *Sale of Goods Act 1979*. Similar, but not exactly the same provisions or having the same affect, appear in section 25A *Sale of Goods Act 1923* (NSW) (see discussion in *THC Holdings Case*, op. cit.) No equivalent provisions appear in the Queensland *Sale of Goods Act 1896*.
- ¹⁹ *Re Stapylton Fletcher Ltd* [1994] 1 WLR 1181 (ChD).
- ²⁰ *Re Wait* [1927] 1 Ch 606 (CA).
- ²¹ *Coleman v Harvey* [1989] 1 NZLR 723 (CA).
- ²² Section 99 PPSA and equivalent provisions in other secured transactions laws.
- ²³ See Part 7.2 PPSA esp. section 238.
- ²⁴ See section 98-103 PPSA.
- ²⁵ See section 8(1)(a) PPSA.

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Another 13½-year marathon nears its finish

Chief Justice Diana Bryant AO retires

Chief Justice Diana Bryant AO retires this month after almost 13½ years of leading the Family Court of Australia. Her Honour reflects on her career, and her role at the court, in an interview with **John Teerds**.



It is not that uncommon for professionals to find their careers progressing in almost equal timeframes.

For Family Court of Australia Chief Justice Diana Bryant AO, each of those phases has been curiously close to 13½ years, beginning with the period she spent in Perth as a family law solicitor/advocate.

This was followed by a decade at the Victorian Bar, progressing to her four-year appointment as Chief Federal Magistrate in what would eventually become the Federal Circuit Court.

Then, in July 2004, she was appointed to her current role.

She subscribes to the view that a judicial career is a marathon, not a sprint, and that judges need strategies that will keep them engaged over the long term.

"I also think people should aspire to do something different in their careers to keep them enthused," she said. "Once you are on the bench, there's the opportunity to do appellate work, and I went from being a trial judge, which I enjoyed, to being an appeal judge, which has a different enjoyment to it."

"I was fortunate in my four years in the Federal Magistrates Court that I had the opportunity to work in different jurisdictions. We did migration work, administrative law, quite a lot of bankruptcies and some fair work matters, and I enjoyed that mix."

"Finally, as Chief Justice, I am fairly lucky because the job is never boring and in the course of a day you might have 10 different aspects of the role that you need to attend to."

Her thoughts on career variety are also relevant to young lawyers considering family law, in that her Honour believes it is critical

to have knowledge of all areas of the law because family law embraces so many different areas.

"These include bankruptcy, commercial law, contracts, trusts, succession law, property issues come up all the time, negligence, even criminal law and corporations law, sentencing, and we are about to get a decision from the High Court on financial agreements, which is all about duress and unconscionability and advantage," her Honour said.

"It's important for young lawyers starting off in family law to have a really good grounding in other areas; if you do, you have a distinct advantage in my view, as it enables you to think slightly differently."

Another piece of her Honour's advice for intending family lawyers is "don't do it if you don't like people".

"Some people do it, but they don't actually like having to deal with people; family law is not for them, I would say, and even those who do like people need to improve themselves and develop new communication skills."

While other requirements included the willingness to work hard but maintain balance, she said it was also important to contribute to the profession.

"Being on committees that actually give something back can be a very rewarding part of your professional life," she said. "In my experience, if you give something you often get something in return. It's good to give to the community as well, but certainly law societies and other professional committees can be beneficial to your career."

Speaking of the current trends in family law, Chief Justice Bryant said it was definitely "a swinging pendulum of people's rights".

"Unfortunately, probably the most depressing part for me is that consistently it's all about

the gender wars. In the courtroom it's between the parties, but out in the media we have the feminist groups and the fathers' groups and mothers' groups, and in a sense the court is sandwiched in the middle."

Over decades the focus has shifted from children being brought up by someone other than their mother to fathers' groups agitating for change in their rights to access, to the current focus on family violence.

"The thing that has made a huge difference and will probably be the biggest factor in the future is social media," she said. "Social media has changed a lot, for good and bad, in family law. A lot of evidence demonstrating poor behaviour is now produced by way of social media, and obviously this evidence is much easier to obtain than it used to be."

"Parties have to be very careful about the way they behave to each other because now it's all in emails, and of course on Facebook, Twitter and everything else."

"It also has the downside that there are groups on social media who are disaffected with the court system and who I think give bad advice to people. This is dangerous and unfortunately it is happening quite a bit."

Chief Justice Bryant said her most memorable moments were probably as a barrister, such as those when she achieved a big win after exposing something through cross examination.

However, a particularly memorable moment came not long after she was appointed as a judge and was interviewed by three final-year high-school students in Canberra.

"I was having a cup of tea afterwards and talking to them; unsurprisingly, all three came from separated families, but the interesting part for me was that each one talked about 'my' case."

"Now we always talk about the 'parties'; we never talk about it being the children's cases."

It was really quite striking and I took that away with me.

"Some years later I had the opportunity to set up the Children's Committee, which is a joint committee at both courts. I wanted to try to ensure that children understood we were engaged with that they were telling us. Traditionally judges don't interview children in Australia, and I have never been quite convinced that the children understand the extent to which we are taking into account their wishes and their views."

Although this remains a work in progress, her Honour sees it as an important task for the Family Court, and looks forward to seeing how children's perceptions of family law processes change over time.

Looking back at what she considers her key achievements as Chief Justice, she said that the publication of judgments was a major milestone. When she started, the court published very few first instance judgments and only some Full Court judgments, all of which were anonymised by the use of initials.

She made the decision to publish all judgments and set up a judgments publications office, choosing to use pseudonyms for the parties' names.

"We now publish virtually all of our judgments. Occasionally there might be a reason to suppress a judgment if you can't anonymise it, but very rarely. I think this has been very successful, not only because it is entirely appropriate, but also because I believe strongly in transparency."

She also considered the elimination of wigs and gowns as a significant achievement.

"While most courts have done that, in our court there was great sensitivity about it, particularly in New South Wales, where judges' homes had been bombed. In Sydney, we had people in the court who were practitioners at that time and felt strongly about retaining them. In the end the majority thought that we should change, and we did, and I am pleased to see we were able to do that."

Asked about gender balance in the judiciary, Chief Justice Bryant said that, by and large, this had been achieved and that attention should now focus on the legal profession itself, particularly in the upper levels of the Bar.

"I don't think there is a problem for women in the judiciary anymore, and at the April meeting of the Australia and New Zealand Council of Chief Justices we had gender parity for the first time.

"One of the problems I think is in the upper levels of the Bar, because what happens is that there is a desire to appoint women to the bench, and it seems that as soon as somebody takes silk they are appointed.



As a result, there appears to be a dearth of experienced women at senior counsel level at most of the Bars.

"This is a challenge we still have to meet, and of course there is the ongoing challenge about work-life balance for women with careers and having children. I think we are improving, but there is still a lot to be done."

Asked if there was anything else her Honour wished to mention, she quickly brought up the subject of collegiality amongst judges.

"I think everybody wants to have a collegiate court and there are different ways of doing it, but it's a bit more challenging when you have a court that's spread around the country," she said.

"I think it's a challenge in the jurisdiction to make sure that everybody across the court understands that people work in different ways, and a respect for differences is a really important thing to engender."

Rather than a leisurely retirement, Chief Justice Bryant is keen to try something new – in academia – and will be judge in residence at Melbourne University for the first semester next year.

She will then join an academic group doing research on the Hague Abduction Convention, looking at what happens to families who are returned under the convention across the world.

"I'm looking forward to doing that," she said. "That's something different; I haven't been an academic before."

Which perhaps leaves us wondering what her Honour will turn to after the next 13½ years.

John Teerds is the editor of *Proctor*.

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Can you escape the time barrier?

Adding a new cause of action time barred under the UCPR

By s16 of the *Civil Proceedings Act 2011* (Qld) and rule 375(1) of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), the court is empowered to allow an amendment to a claim in the way and on the conditions that the court considers appropriate.

However, this apparently broad discretion must be read subject to rule 376. If the effect of the proposed amendment would be to add a cause of action which, although current at the commencement of the proceeding, is now time barred, then rule 376(4) applies. It provides:

376 Amendment after limitation period

...

- (4) The court may give leave to make an amendment to include a new cause of action only if –
- (a) the court considers it appropriate; and
 - (b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.

Generally, there will be four separate questions to consider in an application for leave to amend:¹

1. Has a relevant limitation period expired?
2. Is there a new cause of action?
3. Does it arise out of substantially the same facts?
4. Is it appropriate to give leave to make the amendment?

Has a relevant limitation period expired?

If the limitation period expired before the commencement of the proceeding, leave cannot be obtained to add the new cause of action under rr375 and 376.²

If the limitation period has not expired at the time of bringing the application to add the

cause of action, leave will not be required under r376,³ but if there is dispute about this, the court will usually still proceed to approach the matter by considering the requirements of r376(4). This is because, if those requirements are met, the plaintiff should be granted leave to amend regardless of whether the limitation period has expired since the commencement of the proceeding.⁴ In such a case, there would be no relevant detriment to a defendant in being deprived of a limitation defence.⁵

If the requirements of r376(4) are not clearly met, and if the issue of whether the limitation period has expired cannot be fairly determined at the interlocutory hearing, “the amendment may be permitted but on terms that it take effect from the order giving leave or some other time, so as not to prejudice a possible limitation defence”.⁶

On the other hand, if it is possible to determine (or it is conceded) that the relevant limitation period for the new cause of action has ended, and if the requirements of r376(4) are not satisfied, then the power to give leave to amend to include the new cause of action under r376(4) is not engaged.⁷ In short, if the limitation period has ended since the commencement of the proceeding, then the requirements of r376(4) must be satisfied before a plaintiff will be permitted to add a new cause of action.

Is there a new cause of action?

The nature of a cause of action in the context of r376(4) was addressed by Philip McMurdo J (as his Honour then was) in *Borsato v Campbell*.⁸ The term has been defined to mean “every fact which is material to be proved to entitle the plaintiff to succeed”.⁹ However, not every new fact pleaded raises a new cause of action. McMurdo J noted:¹⁰

“... The dividing line is between the addition of facts which involve a new cause of action and those which are simply further particulars of the cause already claimed, and its location involves a question of degree which can be argued, one way or the other, by the level of abstraction at which a plaintiff’s case is described.”

Ascertaining where this dividing line lies in a particular case, and thus identifying whether a new cause of action is pleaded, can be tricky

in practice. As acknowledged in *Murdoch v Lake*,¹¹ it is often difficult to distinguish between a material fact, and a piece of information which it is reasonable to plead so that the defendant knows the case to be met.¹² Peter Lyons J (with whom Morrison JA agreed in the result) went on to observe:¹³

“... if an amendment introduces a new material fact, then a new cause of action is introduced, even if the cause of action is of the same type or category as one pleaded before the amendment. However, if the material facts remain the same, then no new cause of action is introduced.”

Thus, whether a new cause of action is pleaded will depend on whether any of the proposed amendments constitute material facts. This requires an examination of each of those facts to determine its role. If it is a fact which comprises an essential plank (or element) of a cause of action, then it is likely to be material, although frequently it will be a question of degree.

Does it arise out of substantially the same facts?

In *Paul v Westpac Banking Corporation*,¹⁴ Fraser JA (with whom Gotterson JA and Douglas J agreed) observed:¹⁵

“... The question in each case is whether the facts out of which a new cause of action arises are substantially the same as facts relied upon in a cause of action for which relief has already been claimed in the proceeding. As has been mentioned in other cases, this may involve questions of degree and fine judgment, but the answer to that question should be informed by an appreciation that the policies underlying the applicable statute of limitation may be inappropriately undermined if the required analysis is conducted at too high a level of generality... This approach is consistent with the careful way in which the rule has generally been applied since it was enacted.”

The expression ‘substantially the same facts’ is not tantamount to *the same facts*. Rule 376(4) anticipates the addition of facts in an amended pleading in support of a new cause of action.¹⁶ As put by Thomas JA in *Draney v Barry*:¹⁷

“... If the necessary additional facts to support the new cause of action arise out of



by Jade Marr

substantially the same story as that which would have to be told to support the original cause of action, the fact that there is a changed focus with elicitation of additional details should not of itself prevent a finding that the new cause of action arises out of substantially the same facts. In short, this particular requirement should not be seen as a straitjacket.”

In *Thomas v State of Queensland*,¹⁸ the Queensland Court of Appeal clarified that ‘the story’ referred to by Thomas JA in *Draney* is “a shorthand reference to the matters that the plaintiff has to prove”.¹⁹

Ultimately the exercise is one of comparison of the additional alleged facts to those already alleged in the statement of claim to ascertain whether the proposed amendments arise out of “substantially the same story”. The rationale is whether the defendant has already been effectively put on notice as to what in substance amounts to the plaintiff’s claim such that the addition of the new facts do not in truth take the defendant by surprise, or expand the plaintiff’s claim into a new realm not already chartered in substance by the existing statement of claim.

In *Menegazzo*,²⁰ Applegarth J postulates one practical test for assessing whether the new cause of action arises out of substantially the same facts. His Honour suggests considering the proposed additional facts from the perspective of what would happen at trial if the plaintiff sought to lead evidence of these facts without having made the amendment. If the evidence would clearly be objectionable on the ground of surprise or on the ground that it was simply irrelevant to the case raised by the plaintiff’s pleading, then this may assist in determining whether the requirement of “arising out of substantially the same facts” is satisfied.²¹

Is it appropriate to allow the amendment?

The requirement of appropriateness in r376(4) (a) is potentially a broad one, and is not confined only to questions of prejudice. As put by Applegarth J:²²

“... A proposed amendment will be inappropriate when it is bad in law. Caution is required not to reject a claim as bad in law

where the law may be in a state of uncertainty or development.”²³ A proposed pleading also will be inappropriate where it does not comply with the rules of pleading and is liable to be struck out. A pleading which is ‘difficult to follow or objectively ambiguous or creates difficulty for the opposite party insofar as the pleading contains inconsistencies, is liable to strike out because it can be said to have a tendency to prejudice or delay the fair trial of the proceeding’.²⁴

In addition, the expeditious philosophy encapsulated in r5 and the case management principles invoked in *Aon Risk*²⁵ are relevant considerations.²⁶ An application to amend should not be approached on the basis that the plaintiff is entitled to raise any arguable case at any point in the proceeding, subject only to the payment of costs.

Unexplained or unjustifiable delay by the plaintiff in seeking leave to make the amendment will weigh against the discretion.²⁷ The court must consider the prejudice to the other parties if the amendment is allowed, including “the strain litigation has on litigants and the distress caused by delay and proposed changes to a case. These may be greater where there is no adequate explanation for why the changes were not made sooner”.²⁸

Any forensic disadvantage suffered by the defendant may also be relevant – either consequent upon the plaintiff’s delay in seeking leave to amend, or as a result of the expanded scope of issues in dispute raised by the proposed amendments.²⁹

Conclusion

An application to add a cause of action which has become time barred should be brought to court at the earliest opportunity. It will be necessary to plead the additional cause of action in a way that sufficiently connects it to the existing allegations of fact. If the court perceives the proposed amendment as a new ‘story’, it is unlikely that leave will be granted under rr375 and 376.

Jade Marr is a barrister at North Quarter Lane Chambers, Brisbane.

Notes

¹ In *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94 at [41] Applegarth J identifies the latter three questions, however, later in his Honour’s judgment at [44] to [47], his Honour also addresses the first question.

² Rule 376(1).

³ Although leave will still be required under rr375 and 377.

⁴ *Mokrzecki v Popham* [2013] QSC 123 at [21] per Philip McMurdo J.

⁵ *Ibid*.

⁶ *Ibid* at [22], cited by Applegarth J in *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94 at [44]; *Mineral Resources Engineering Services Pty Ltd as Trustee for the Meakin Investment Trust v Commonwealth Bank of Australia* [2015] QSC 62 at [18] – [19]; *Baldwin v Icon Energy Ltd (No 2)* [2015] QSC 286.

⁷ *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94 at [46] per Applegarth J.

⁸ *Borsato v Campbell* [2006] QSC 191.

⁹ *Ibid* at [8].

¹⁰ *Ibid*.

¹¹ *Murdoch v Lake* [2014] QCA 191.

¹² *Ibid* at [17].

¹³ *Ibid*.

¹⁴ *Paul v Westpac Banking Corporation* [2016] QCA 252.

¹⁵ *Ibid* at [15] per Fraser JA. At [21] his Honour goes on to cite McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552 – 553 regarding the four underlying rationales for the enactment of limitation periods.

¹⁶ *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94 at [48] per Applegarth J.

¹⁷ *Draney v Barry* [2002] 1 Qd R 145 at [57] per Thomas JA.

¹⁸ *Thomas v State of Queensland* [2001] QCA 336.

¹⁹ *Ibid* at [19].

²⁰ *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94.

²¹ *Ibid* at [49].

²² *Ibid* at [51].

²³ *Project Company No.2 Pty Ltd v Cushway Blackford & Associates Pty Ltd* [2011] QCA 102 at [27] – [29].

²⁴ *Robert Bax v Cavenham* [2011] QCA 53 at [16].

²⁵ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

²⁶ *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94 at [52] per Applegarth J; also *Mt Isa Mines Ltd v CMA Assets Pty Ltd* [2016] QSC 260 at [46] per Flanagan J.

²⁷ *Paul v Westpac Banking Corporation* [2016] QCA 252 at [26] – [27] per Fraser JA.

²⁸ *Menegazzo v Pricewaterhousecoopers (A Firm) & Ors* [2016] QSC 94 at [52] per Applegarth J.

²⁹ *Mt Isa Mines Ltd v CMA Assets Pty Ltd* [2016] QSC 260 at [70] per Flanagan J.

Payment of money into court

Kylie Downes QC and Rhett Kipps explain the processes involved in the payment of money into the state courts and related issues.



The circumstances in which money may be paid into the state courts are many and varied.

Payment may be made as a result of an order made by the court, with respect to competing claims to certain monies, or as a result of various statutory provisions and rules of court which require, or permit, payment into court.

The payment of money into court is a practical way to preserve funds on an interim basis pending final determination of disputes about the entitlement to those funds.

Relevant legislation

Money paid into court, and securities deposited with the court, are governed by the *Court Funds Act 1973* (Qld) (the Act) and the *Court Funds Regulation 2009* (Qld) (the regulation). Rules 560 and 561 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) are also relevant.

Securities include debentures, stocks and shares.¹ The usual type of security deposited with a court is a bank guarantee and this is typically provided by one party as security for the other party's costs.²

Before seeking to pay money into court or deposit securities with the court, the basis upon which the money is being paid into court or security deposited into court will need to be identified, whether it be legislation, a rule of court or an order of the court.

The most common basis is a court order. An order providing for the payment of money into court should address the following:

- the party bound to pay the money into court
- the amount of money to be paid, or the process by which the amount of money to be paid is to be determined
- the date by which the money is to be paid into court
- the period for which the court is to hold the money (which usually provides to the effect that the money be held pending further order).

Payment or deposit into court

Under section 4 of the Act, 'court' means the Supreme Court or the District Court, or a Magistrates Court into which an amount that is money in court is paid.

Section 4 of the regulation provides that money to be paid into court must be paid to the registrar including, for example, by cheque made payable to the registrar, and that securities to be deposited into court must be deposited with the registrar. The registrar must issue a receipt which contains certain information and keep securities in court in a safe place.³

Section 5 of the regulation requires an affidavit to be filed when the payment into court or deposit of the securities is made.⁴ The affidavit must:

- state the name of the person by or for whom the payment or deposit is made
- state the amount of the payment or, for securities, the number and face value of the securities, and the way the payment or deposit is made
- describe the money or securities in a way sufficient for identification
- state the provision of the Act or the rules of court that authorise the payment or deposit and the circumstances in which the payment or deposit is made
- request the registrar to receive the money or securities.

Depending on the basis upon which the payment or deposit is being made, a rule of court, order of the court or statutory provision may require another document to be filed or served or given. The affidavit complying with section 5 of the regulation must be filed in addition to any other such requirement.⁵

Where the affidavit is filed in accordance with section 5 of the regulation in relation to the payment of money into court, that affidavit must be served on all other parties and any interested person as soon as practicable after it is filed.⁶

Payment out of court or return of securities

Subject to the UCPR providing otherwise, money or securities in court may only be paid, delivered or transferred out of court, or be invested or sold, under an order of a court.⁷

An application for payment out of court of money paid into or deposited in court in a proceeding must be served on all other parties. The applicant must also state whether the person is aware of a right or a claim made by another person to all or part of the money.⁸

An order for payment out of court should provide:

- who is to receive the money
- the sum that person is to receive (inclusive or exclusive of accretions)⁹
- when the money is to be paid out.

A party who obtains an order of a court directing that money in court invested under an earlier order of a court be paid out of court must serve a copy of the later order on the registrar of the court.¹⁰

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

Notes

¹ Section 4, *Court Funds Act 1973* (Qld).

² Subject to rule 673 UCPR.

³ Section 6 *Court Funds Regulation 2009* (Qld).

⁴ See also rule 560(2) UCPR in relation to payment or deposit of money in court.

⁵ Section 5(5) *Court Funds Regulation 2009* (Qld).

⁶ Rule 560(3) UCPR.

⁷ Section 8 *Court Funds Regulation 2009* (Qld).

⁸ Rule 561 UCPR.

⁹ See section 7 and Part 5 *Court Funds Regulation 2009* (Qld).

¹⁰ Section 20 *Court Funds Regulation 2009* (Qld).

Making due enquiry on testamentary capacity

by Stafford Shepherd



The affidavit supporting probate application (Form 105) requires that if the cause of death or other evidence suggests lack of testamentary capacity, the deponent of the affidavit is either to swear or affirm that:

- to the best of the deponent's knowledge, information and belief, the deceased had testamentary capacity at the time of executing his or her will, or
- if the deponent is aware of any circumstances which might give rise to any apparent doubt as to testamentary capacity, that circumstances must be disclosed.

The deponent executor has an obligation to make due enquiry as to whether the deceased had testamentary capacity at the time of execution of the will, if the cause of death, or other evidence, may suggest a lack of testamentary capacity.

A client cannot be expected to realise the whole scope of this obligation without the aid and advice of the solicitor.

As officers of the court, we have a duty to carefully investigate the issue of testamentary capacity before a deponent swears or affirms the prescribed Form 105 affidavit. A solicitor cannot simply allow the client to make whatever affidavit the deponent thinks fit, nor can the solicitor escape the responsibility of careful investigation or supervision.¹

If the client will not give the solicitor the information needed or insists on swearing or affirming an affidavit which the solicitor knows to be imperfect, or which the solicitor

has reason to think is imperfect, then the solicitor's proper course is to withdraw and terminate the retainer.²

To knowingly permit a client to swear a false affidavit, or to knowingly submit a false affidavit to the court, would be unethical conduct by the solicitor and can lead to disciplinary sanction.³

Stafford Shepherd is director of the QLS Ethics Centre.

Notes

¹ *Myers v Elman* [1940] AC 282, 322 (per Lord Wright).

² *Myers v Elman* [1940] AC 282, 322 (per Lord Wright).

³ *Rajasooria v Disciplinary Committee* [1955] 1 WLR 413, 413 (per Lord Cohen PC); *In Re Davies* (1983) 14 Times L.R. 332, 333 (per Lord Justice A. L. Smith); see also *Australian Solicitors Conduct Rules 2012*, rules 14.2, 19.1, 19.2 and 20.1.

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Watching the watchers

Are you undertaking workplace surveillance appropriately?

Workplace surveillance now comes in limitless forms, thanks to rapid advances in technology.

Capturing and storing data has never been easier – which is of great benefit across all areas of the workplace – but it's important to remember that the fundamental principles around privacy, data retention and employee rights apply to workplace surveillance, whatever form it may take.

Technology has also leapt well beyond the legislation that regulates surveillance in Queensland, however recent case law is proving that workplaces can find themselves in the spotlight if they don't manage their surveillance activities in line with employee rights.

Know what you are getting into

Workplace surveillance can range from data monitoring (for example, email, phone and internet history collection), optical and auditory recordings (using a smartphone) to sophisticated GPS tracking mechanisms, drones and biological surveillance (for example, drug and alcohol testing, and fingerprint detection).

Surveillance data can be a valuable source of objective, unbiased evidence when investigating allegations of workplace misconduct and can help to improve safety, training, security and production outcomes. But it's crucial for employers to be aware of the risks to worker morale, privacy and trust if surveillance is not implemented and managed carefully. This is especially the case as work and home life increasingly overlap.

Overview of the laws

The *Invasion of Privacy Act 1971* (Qld) regulates surveillance¹ in Queensland and is explicit about the use of listening devices to covertly overhear, record, monitor or listen to private conversations. The Act does not, however, address other common forms of surveillance, such as optical recordings or GPS tracking, nor does it specifically address workplace surveillance.

By comparison, other states have created specific legislation to regulate workplace surveillance – *Workplace Surveillance Act 2005* in New South Wales and the *Workplace*

Privacy Act 2011 in the Australian Capital Territory. Both Acts regulate beyond just listening devices and include, for example, restrictions on computer surveillance (except when covered by a clear workplace policy). Victoria has also integrated workplace privacy provisions into its broader *Surveillance Devices Act 1999* (Vic.).²

The variation in legislation can present challenges for companies working across jurisdictions, especially when the disclosure and retention requirements are more onerous in some states than others, or for national employers with single integrated IT systems.

Surveillance and the employment relationship

While Queensland has little formal regulation around workplace surveillance, other contractual and regulatory protections applicable to the general employment relationship still apply.

Several recent cases highlight when and how surveillance can lawfully be relied on during disciplinary proceedings and the importance of affording employees their existing legal rights under the employment relationship.

Security and theft

In *Mulhall v Direct Freight*,³ CCTV footage was relied on as evidence to dismiss a delivery driver for “serious misconduct” on the basis that he had allegedly stolen a laptop.

The CCTV footage showed the driver was involved in “suspicious activity” while loading the relevant order. It showed him repeatedly looking at the camera and unnecessarily dragging other boxes to hide the one that went missing. The investigators believed they could identify the missing box from the footage due to its size and a distinct tape used.

The employee brought an unfair dismissal claim against his employer, claiming that the box could not be identified as the footage was too poor to provide a clear image. He also alleged he was not afforded procedural fairness because he was not given an opportunity to view and respond to the CCTV footage before he was terminated. The employer attempted to show the employee the footage, but he declined to attend due to illness and provided a medical certificate.

The Fair Work Commission (FWC) rejected the company's arguments that the surveillance footage proved the worker had engaged in serious misconduct, finding that the so-called “suspicious behaviour” was speculative and the employee should have been given an opportunity to view the footage first. The FWC found that the dismissal was unjust and unreasonable, and the employee was awarded \$25,468.13 in damages.

Social media

The appropriateness of monitoring and intervening in an employee's personal social media accounts is an increasingly common challenge for workplaces.

In *Clint Remmert v Broken Hill*⁴ an employer discovered a Facebook post by an employee that, in their view, mocked the employee's work supervisor. The employee was dismissed and he subsequently brought an unfair dismissal claim against the company. He argued that there was no valid reason to dismiss him because he was not at work when he posted the comment and he did not name his supervisor in the post.

The FWC found there was a “relevant and sufficient connection” between the employee's out-of-hours conduct and employment relationship. Many of the employee's Facebook friends were also employees of the company and his comments were made in relation to a photo taken at the workplace. Further, it was found that the employee's comments were either knowingly directed at his supervisor, or at best, the employee was aware that others would understand the inference.

The employer relied on its social media policy (SMP), which prohibited workers from using any platforms to discriminate, harass, bully or victimise other employees. The FWC held that because the employee breached the SMP and was on his final warning for inappropriate conduct, there was a valid reason for his dismissal. However, the FWC did not accept that the employee had been afforded the requisite procedural fairness because he was not told about a confidential report relevant to the investigation. Further, the employee had not been fully briefed on the SMP or assessed to ensure he understood it. The employer was ordered to pay the employee \$28,000 in compensation.

Laura Regan looks at the risks and benefits of workplace surveillance across different jurisdictions and how case law is shaping the space in Queensland.



Employees undertaking surveillance

Smartphones have made it increasingly common for employees to record conversations with employers or colleagues.

In *Stover v Charters Towers Regional Council*,⁵ an employer dismissed a senior road supervisor when it discovered he had covertly recorded his conversations with other employees and had made obscene comments about a female colleague to other employees. Mr Stover submitted an application for reinstatement to the Queensland Industrial Relations Commission, alleging his dismissal was unfair.

At the hearing, witnesses testified that the employee had advised them that he had a history of taping conversations at work. Deputy president Swan said that regardless of whether the employer had issued a memorandum banning covert recordings, the supervisor's conduct was "intimidatory, threatening and menacing and were actions which warranted serious responses... anyone surreptitiously taping the conversations of work colleagues in the workplace would be automatically deemed untrustworthy". The comments regarding the female employee were also a factor in his dismissal, evidencing a level of disrespect for his co-workers "far outside the ordinary bounds of reasonable

behaviour". The tribunal held that, due to the employee's conduct, the relationship was irretrievably broken down and that the employee was not unfairly dismissed.

Best practice

To ensure workplace surveillance is used appropriately, including managing the employment relationship, employers should:

- consider providing clear notice or obvious signage that surveillance may be conducted
- ensure policies regarding the use of information systems and how they may be monitored are developed, implemented and understood by all staff
- regularly conduct and document training on appropriate workplace behaviour and expected standards of conduct
- focus on procedural fairness when surveillance material is used to make employment and other decisions
- be aware that different jurisdictional laws may apply.

Employees should also:

- carefully read and understand the terms of their contract as well as internal policies and procedures about workplace surveillance activities that may be undertaken covertly or overtly in their workplace

- consider and understand the expectations, policies and procedures that apply to their use of social media
- understand that they may be subject to legal or internal restrictions on how they can personally undertake surveillance, such as using a phone to covertly record meetings or other conversations in the workplace
- ask to review any workplace surveillance material that supports an allegation.

Laura Regan is a senior associate at Sparke Helmore Lawyers. The author gratefully acknowledges the assistance of Edwina Sully in the preparation of this article.

Notes

- ¹ There is also other legislation specific to government authorities or certain circumstances.
- ² *Surveillance Devices Act 1999* (Vic.) ss9A-9D.
- ³ *Mulhall v Direct Freight (Qld) Pty Ltd T/A Direct Freight Express* [2016] FWC 58.
- ⁴ *Remmert v Broken Hill Operations Pty Ltd T/A Rasp Mine* [2016] FWC 6036.
- ⁵ *Garry Stover v Charters Towers Regional Council* [2013] QIRComm 460.

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Cold comfort

A quick update on cryonics

Until someone actually creates the youth potion from the movie *Death Becomes Her*,¹ people will continue to expire.

Most of us have heard the rumour that Walt Disney has been cryopreserved and might one day be revived; however, this has been shown to be false. But, while that claim is fake, the ability to freeze your body with a view to being revived at a later date is not.

Cryopreservation – the concept of freezing a body – is an option available to those who wish to resume existence after they die, should science come up with a way to revive them.

Recently, I was a guest presenter at both the Queensland and New South Wales Cemeteries and Crematorium Associations discussing the future of body disposal, including cryopreservation, as we know it. So, what is cryopreservation? Well, simply put, a corpse is frozen to -196°C with the intention of reviving the body at a time when technology has advanced sufficiently to restore the body and cure the ailment or disease that caused the death.

Although it is not currently possible to revive the dead, except in the movies, many people are becoming interested in the concept of cryopreservation as a possible means to achieve eternal life.

Australians who have wanted their whole body frozen have only had the option of transporting their corpses overseas as currently there are only four major companies that provide cryonics services:

1. Alcor in Arizona, USA
2. Cryonics Institute (CI) in Michigan, USA
3. American Cryonics Society (ACS) in California, USA
4. KrioRus, Russia.

These companies make no promises that there is life after death, and consider that their 'patients' are donating their bodies for scientific research.² In Australia, the New South Wales town of Holbrook is set to build the first cryonics facility in Australia – apparently it will cost around \$90,000 to have your body frozen.³

While this raises a lot of questions, including whether \$90,000 is enough to sustain a body over an indefinite period until science finds a way to revive it, there are other questions that relate to us as a profession.

From a legal perspective, some questions, well put by senior lecturer Heather Conway

of the School of Law at Queen's University Belfast are:⁴

- What is the status of the corpse during its time in the deep freeze; does it have any legal rights, or is it a method that is part of the work and skill exception principle derived from the seminal case of *Doodeward v Spence*⁵ in which case the corpse becomes property subject to property rights?
- How long should a frozen corpse be stored, and who has the responsibility to thaw or destroy the corpse without reanimating it?
- If a claim should be made on an estate, how does that affect funds that may be set aside for preservation of the frozen corpse?
- Could a reanimated corpse reclaim assets that they owned in life, but had passed to family members on death? Could inheritance laws be undone?
- How would laws operate if the frozen corpse was married prior to cryopreservation, and the deceased's spouse remarries? Would that marriage still be valid when the former partner returns from the dead?

Interestingly, there has already been case law around this technology coming out of the United Kingdom. In the case of *Re JS (Disposal of Body)* [2016] EWHC 2859 (Fam), a 14-year-old girl, referred to as JS, was diagnosed with a rare form of cancer. She had

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with Christine Smyth

extensively researched cryonics in the hope that resuscitation and a cure may be possible in the future. She expressed the wish to her parents that she wanted to be transported to a United States cryonics preservation facility after her death so that her body could be preserved.

JS' mother and father had divorced and the father had not seen his daughter for eight years; JS refused contact with her father and did not want him to have detailed knowledge of her medical condition. The father's position fluctuated during proceedings; initially he was concerned about the costs attached to JS' decision, saying that "even if the treatment is successful and [JS] is brought back to life in let's say 200 years, she may not find any relatives and she might not remember things and she may be left in a desperate situation given that she is only 14 years old and will be in the United States of America".⁶

The court made it clear in its judgment that this particular case was not a precedent for other cases, and that the case was not about whether cryonic preservation has a scientific basis or whether it is right or wrong, nor was the court approving or encouraging cryonics.⁷ Subsequently, the court made the following orders:⁸

- a specific issue order permitting the mother to continue to make arrangements during JS' lifetime for the preservation of her body after death

- an injunction *in personam* preventing the father from applying for a grant of administration in respect of JS' estate, making or attempting to make arrangements for the disposal of JS' body, and interfering with arrangements made by the mother in respect of the disposal of JS' body
- a prospective order under s116 of the *Senior Courts Act 1981* (or alternatively under the inherent jurisdiction) to take effect upon JS' death appointing the mother as sole administrator of her estate and specifically that the mother shall have the right to make arrangements for the disposal of the body and to decide who should be permitted to view it.

I don't know about you, but I am of the same opinion as microbiologist Cedric Mims – do we really want Australia "filled to capacity with the thawed remnants of [our] previous generations?"⁹

The author expresses her gratitude for the assistance provided by solicitors Vy Tran and Chelsea Baker of Robbins Watson Solicitors who assisted in the research and 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.

Notes

- ¹ *Death Becomes Her*, directed by Robert Zemeckis, Universal Pictures, 1992.
- ² Zack Guzman, 'This Company Will Freeze Your Dead Body For \$200,000', NBC News, 2016 – nbcnews.com/tech/innovation/company-will-freeze-your-dead-body-200-000-n562551.
- ³ Barbara Miller, 'Australians Offered Chance To Cheat Death By Freezing Bodies', ABC News, 2017 – abc.net.au/news/2017-02-14/holbrook-australians-cryonics-capital-frozen-bodies/8265416.
- ⁴ Heather Conway, 'Is Someone Reanimated From Cryogenic Freezing Legally Dead Or Alive? And Other Problems', *The Conversation*, 2016 – theconversation.com/is-someone-reanimated-from-cryogenic-freezing-legally-dead-or-alive-and-other-problems-69514.
- ⁵ [1908] HCA 45.
- ⁶ *Re JS (Disposal of Body)* [2016] EWHC 2859 (Fam) at [21].
- ⁷ *Re JS (Disposal of Body)* [2016] EWHC 2859 (Fam) at [30].
- ⁸ *Re JS (Disposal of Body)* [2016] EWHC 2859 (Fam) at [41].
- ⁹ Cedric Mims, *When We Die*, St Martin's Press, 2014.

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The good news is that, although we are based in Brisbane, we also maintain regional library collections in some of the larger Queensland courthouses (see *table*). Each facility offers public PCs with internet access, Court WiFi (contact the registry for access details), printing and photocopying.

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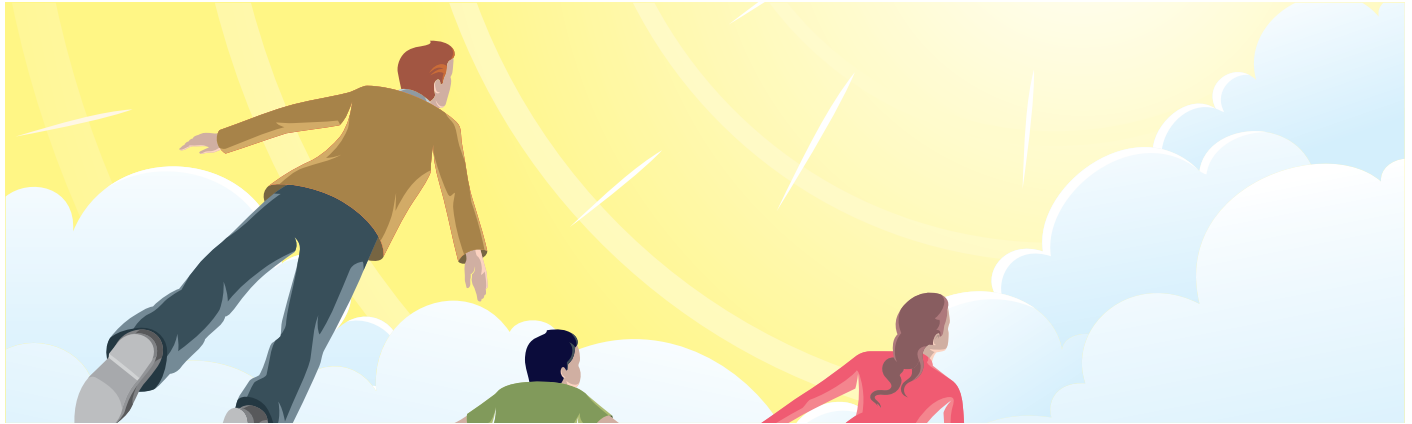
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The days of handwritten letters, photo albums, CDs and encyclopedias are virtually gone.

Courtesy of our unwavering desire for greater speed, more accessibility and cheaper products, we have all but replaced them with email, social media, streaming and online portals.

These developments are just the tip of the iceberg. At this very moment we are in the midst of an attempt to overthrow fiat currency with a digital equivalent, cryptocurrency, proselytised by an odd mix of entrepreneurs, coders, criminals, bankers and libertarians.

As we journey up the exponential curve of technological innovation, more of our physical assets will be replaced by digital assets, and more of our life will be lived online. A Pew Research Centre study found that 88% of American adults are regularly using the internet, with usage among those 65 and older jumping from 14% in 2000 to 64% in 2016.¹ If estate-planning lawyers haven't had to deal with a client's digital assets or their digital footprint already, they soon will.

Digital difficulties

Effectively transferring property from one generation to another has always been the primary focus of proper estate-planning. But, what happens when as a society we exchange objects you can hold in your hand for intangible contractual rights in a multinational's terms of service agreement?

If you want the vinyl records you purchased over the years to be gifted to a person of

choice upon your death, this is relatively simple. However, if you want to do the same with the albums you purchased over the years through Apple's iTunes, you will be left disappointed. This is because you don't purchase music through iTunes; you purchase a non-transferrable licence to access the music.²

The difficulties presented by digitally stored assets were demonstrated when international best-selling author Marsha Mehran died unexpectedly in Ireland and her Australia-based father and a beneficiary of the estate, Abbas Mehran, wanted to see whether she had left any literary works on her Google Chromebook. After repeatedly reaching out to Google, Mr Mehran eventually hired an attorney and filed a petition in court requesting access to his daughter's account. Following weeks of negotiations, he was granted access to more than 200 documents, with the entire process taking more than a year.³

These stories are not uncommon. Apple came under fire in 2016 for refusing to give a 72-year-old widow in Victoria, British Columbia, the password for her late husband's iPad to play games, demanding that she obtain a court order.⁴

Digital footprint

These newfound estate-planning issues do not stop with difficulties of ownership and access to digital assets. The digital age has not only transformed the form of personal assets, it has transformed how we communicate. We can now instantly, globally and publically broadcast our thoughts, photos and videos to anyone with an interest and an internet connection.

Due to the digital nature of an individual's online presence, or 'digital footprint', the potential exists for it to remain public indefinitely. Facebook and Google have implemented their own mechanisms to allow for users to decide who can access their account and what they can access upon their inactivity, incapacitation or death. However, if you do not make use of these tools or no such tool is provided, it may be up to either your next of kin or a global technology company to decide on whether to remove your presence (and data) or to turn your social media profiles into digital memorials.

But, before arms are taken up against the 'heartless' tech-giants, it must be acknowledged that they are heavily restricted by privacy legislation and there are legitimate moral reasons to keep certain data private. A Facebook account is likely to contain far more private and sensitive information than anyone would intend to be passed on to their beneficiaries. In most cases, a carte blanche disclosure of everything the deceased has discussed through a social media platform would be against their wishes.

The rise of digital estate planning

Lawmakers globally are grappling with how they strike a balance between an individual's right to post-mortem privacy, a beneficiary's right to (possibly) valuable digital assets, and testamentary freedom. If balancing all these competing interests isn't complicated enough, there is another further hurdle. A majority of the large internet companies are based out of Silicon Valley and have made it clear that they will not breach their privacy obligations under local law. Any changes to

by Iain McGregor-Lowndes, The Legal Forecast



laws outside of that jurisdiction will likely have no effect on their practices.

In August 2014, Delaware became the first state in the United States to enact a broad law that attempts to provide clarity. Only a few years on, 36 US states have enacted similar legislation dealing with digital assets.⁵ Most importantly, the 'Revised Uniform Fiduciary Access to Digital Assets Act' came into force on 1 January 2017 in California.

The Act creates a preference for 'online tools', such as Google Inactive Account Manager or Facebook legacy contact system, which will take precedence for access to digital assets against a contrary provision made in a will, even if the will was executed at a later date.⁶ The Act also allows the appointment of a 'personal representative' to receive disclosure of digital assets in the case that no 'online tools' are available or they have not been used. However, the Act has been criticised

for being overly protective of internet companies as, among other favourable provisions, they may still insist upon a court order before releasing anything.

In an era of escalating digitisation, it is difficult to predict what the future holds for estate planning. Will the law be able to adapt quickly enough to the lightning pace of technological innovation? Will new problems emerge at a greater rate than they can be handled by traditional legal systems? Only time will tell.

Iain McGregor-Lowndes hosts the soon-to-be-released TLF: Live podcast and is currently practising at Paxton-Hall Lawyers. Special thanks to Michael Bidwell 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

- ¹ Pew Internet Research, 'Tech Adoption Climbs Among Older Adults', 17 May 2017, Monica Anderson Andrew Perrin.
- ² Apple, iTunes Terms and Conditions, apple.com/legal/internet-services/itunes/us/terms.html.
- ³ *The Mercury News*, 'Who owns your digital afterlife?', 28 August 2015, Matt O'Brien, mercurynews.com/2015/08/28/who-owns-your-digital-afterlife.
- ⁴ CBC News, 'Apple demands widow get court order to access dead husband's password', 18 January 2016, Rosa Marchitelli, cbc.ca/news/business/apple-wants-court-order-to-give-access-to-appleid-1.3405652.
- ⁵ Uniform Law Commission, *Fiduciary Access to Digital Assets Act, Revised*, (2015) [uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)).
- ⁶ CA Prob Code § 873(a).



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Post-separation property at court's discretion

with Robert Glade-Wright



Property – treatment of property acquired after separation is discretionary

In *Calvin & McTier* [2017] FamCAFC 125 (12 July 2017) the Full Court (Bryant CJ, Ryan & Aldridge JJ) dismissed with costs the husband's appeal against a property order of the Magistrates Court of Western Australia. Magistrate Calverley included among the parties' divisible property an inheritance received by the husband four years after separation (of which \$430,686 was unspent). He had also made initial contributions to the \$1.3m pool, being real estate to the value \$580,000 and a car, shares and superannuation of unstated value ([10]-[11]). The parties were married for eight years and had one child who spent equal time with them.

Contributions (which were found to have been otherwise equal) were assessed as 75:25 in favour of the husband, a 10% adjustment being made for the wife under s75(2).

The Full Court said ([24]) that "both the relevant definition of 'matrimonial cause' and s79 refer to all of the property held by the parties at the time of the hearing before the court" and that "[a]ll of the property then held by both of the parties or either of them can therefore be the subject of orders under s79, regardless of when particular assets were acquired".

The husband's counsel ([38]) argued that "where there is after-acquired property and the owner of that property objects to its inclusion ... there must be a separate ... consideration as to whether there is a principled reason for its inclusion and division". The court rejected that submission as being ([44]) "contrary to the extensive weight of authority", saying (at [51]-[52]):

"In short ... the court retains a discretion as to how to approach the treatment of after-acquired property. The trial magistrate could have included the inheritance amongst the property to be divided or dealt with it separately. The trial magistrate was not obliged to follow one course or the other. (...) It is worth repeating that it was not submitted that any error said to have arisen from the inclusion of the inheritance for division led to a result which, after consideration of the contributions and the s75(2) factors, was inappropriate. Rather, the submissions were directed to the process."

Children – father withheld children – court's refusal to make recovery order set aside – refusal of urgent listing unjustified

In *Renald (No.2)* [2017] FamCAFC 133 (14 July 2017) a consent interim order provided that the parties' seven children live with the mother and spend long weekends and some holidays with the father (who lived in Town H, a two-hour drive away). While not pursuant to the order, the mother agreed to the father having the children B, V and A from 8 to 29 January 2017. At the end of that time the father returned A but withheld B and V, saying that they did not wish to return to the mother. The Magistrates Court of Western Australia did not dismiss her application but refused the mother both an urgent listing "notwithstanding [that] the school year was about to commence" ([2]) and a recovery order (inter alia) as the court did not wish to "chop and change" arrangements prior to the hearing ([14]).

On appeal Thackray J observed [10] that the mother would have been entitled to seek a review of the refusal to grant an urgent listing, saying ([17]-[19]) that there was substance in her argument that in not dismissing the mother's application the magistrate failed to determine it and that that error was compounded by the delay in listing (which, it was argued, was "not justified in view of the nature of the application and the evidence ... including that of the single expert").

Thackray J said (at [30]) that "there was ample evidence in the reports to have persuaded his Honour that the exercise of some appropriate ... encouragement by the father would have ensured the children's return to the mother" and ([34]) that "his failure to consider the effect on the other children of seeing the father flouting an order with impunity, constituted error" (at [71] citing *Bondelmonte* [2017] HCA 8 at [39]).

While allowing the child B due to his age (born 2002) to stay if he wished to do so, Thackray J said ([82]) that "an order requiring V to be returned, even with a trial looming, may send a message to the legal profession and their clients that the court is willing to enforce its orders, and that parents should not take matters into their own hands where there is no evidence of risk".

Children – mother wins appeal against dismissal of her application to vary parenting order to allow her to relocate

In *Searson* [2017] FamCAFC 119 (5 July 2017) the parties consented during proceedings to a final order in 2015 that the children live with the mother and spend five nights a fortnight and holidays with the father. In 2016 the mother applied for a variation of the order so as to allow her to relocate from Melbourne to Queensland and an order for another family report. The father opposed both applications. At a preliminary hearing Judge Harland dismissed the applications, holding that the mother had not satisfied the rule in *Rice & Asplund*, "raising something now which she ought to have raised previously" ([41]). The mother appealed.

Murphy J (with whom Kent and Loughnan JJ agreed) referred (at [11]) to Warnick J's statement in *SPS & PLS* [2008] FamCAFC 16 that "[w]here an application is dismissed at a preliminary stage, it is not dismissed for some technical reason, such as the failure of a party to appear or some lack of compliance with form and procedure, but rather because, assuming the evidence of the applicant is accepted, there is an insufficient change of circumstance shown to justify embarking on a hearing".

The court said [23] that it was "abundantly plain from the mother's affidavit material that no part of the ... matters to which she deposed prior to the making of the consent orders involved living permanently with her now partner or postulated a significant future role for her now partner in the children's lives or involved her moving to south-east Queensland" and ([25]) that "[n]owhere in ... [the earlier] family report [was] any factual foundation offered which might provide the reason for providing any opinion about relocation".

The mother's appeal was upheld and the case referred to another judge for orders and directions to prepare the case for trial.

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



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High Court and Federal Court casenotes

High Court

Tax law – income tax – privileges and immunities of international organisation – holding an office

In *Commissioner of Taxation v Jaysinghe* [2017] HCA 26 (9 August 2017) the High Court held that the appellant did not “hold an office” for the purposes of the *International Organisations (Privileges and Immunities) Act 1963* (Cth) and was not exempt from paying income tax. Section 6(1)(d)(i) of the Act relevantly exempted from taxation salaries and emoluments received by those holding an office, or performing the duties of an office, in particular organisations, of which the United Nations (UN) is one. The High Court held that s6(1)(d)(i) is concerned with the incidents of relationship between the person and the organisation, which depends on the substance of the terms of engagement. The structure of the organisation and the place of the person within it will be important, as will the duties and authorities associated with the person’s position. In this case, the appellant was engaged as an independent contractor to an arm of the UN in his individual capacity to perform a specific task or complete a specific piece of work. He had no authority or right to enter into legal or financial commitments or incur any obligations on behalf of the UN. He was responsible for paying any tax levied by Australia on his earnings and was solely responsible for any claims arising for any negligent acts performed by him. He was not an official of the UN for the purposes of the Convention on the Privileges and Immunities of the United Nations. He therefore did not hold an office for the purposes of s6(1)(d)(i). Kiefel CJ, Keane, Gordon and Edelman JJ jointly; Gageler J separately concurring. Appeal from the Full Federal Court allowed.

Criminal law – joint criminal enterprise – murder and manslaughter

In *IL v The Queen* [2017] HCA 27 (9 August 2017) the appellant was relevantly tried on two charges: first, manufacturing a large commercial quantity of methylamphetamine; and second, murder, or alternatively manslaughter, pursuant to s18(1) of the *Crimes Act 1900* (NSW). The deceased was killed when a gas-ring burner was lit in a small and inadequately ventilated bathroom, causing a fire. Relevantly, on the second count, the Crown alleged that the appellant was guilty of “felony” or “constructive” murder (alternatively, manslaughter), because the act that caused the deceased’s death was committed in the course of the joint criminal enterprise. The Crown could not exclude the possibility that the deceased lit the gas burner himself and was accidentally killed by his own act. However, it was argued that because the appellant participated with the deceased in the joint criminal enterprise, the appellant was criminally liable for all acts committed in the course of carrying out that enterprise. The trial judge directed the jury

to enter a verdict of acquittal on the second count. The Court of Criminal Appeal overturned that decision. The High Court allowed an appeal by majority, for differing reasons. Kiefel CJ, Keane and Edelman JJ held that s18 of the *Crimes Act* requires the killing of another. It is not engaged if a person kills himself or herself, whether intentionally or accidentally. Bell and Nettle JJ held that joint criminal enterprise only extends to attribute liability to participants in the enterprise for acts committed by others that are capable of comprising the actus reus of a crime. In this case, assuming it was the deceased’s act that caused his death, no actus reus of a crime was committed. The appellant also could not be “taken” to have lit the stove through the joint criminal enterprise – that confused liability of an act committed by an agent with the doing of the act itself. Gageler J and Gordon J dissented in separate judgments. Appeal from the Court of Criminal Appeal (NSW) allowed.

Bankruptcy – creditor’s petition – whether court can ‘go behind’ judgment to investigate debt

In *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28 (17 August 2017), Ramsay entered into an agreement with Compton Fellers Pty Ltd, trading as Medichoice. The respondent was a director of Compton Fellers. After the agreement expired and Medichoice went into liquidation, Ramsay started proceedings against the respondent, claiming \$9,810,312.33 allegedly owed to it under the agreement. The respondent raised a defence disputing liability but not quantum, which was unsuccessful. Both parties were represented and there was no suggestion of fraud. The respondent then failed to comply with a bankruptcy notice served on him by Ramsay. Ramsay presented a creditor’s petition in reliance on the failure to comply. In those proceedings, the respondent adduced evidence to show that Ramsay owed money to Medichoice, not vice versa. At first instance, the judge declined to go behind the judgment establishing the debt, noting that the respondent had chosen not to dispute quantum. That decision was reversed on appeal, the court holding that the central issue was not how the respondent ran the earlier proceedings, but whether there was reason to question whether the debt was truly owing. The High Court held that while a judgment is usually sufficient evidence of a debt, the discretion of a Bankruptcy Court to go behind a judgment is not limited to cases of fraud, collusion or miscarriage of justice. The obligation of the court is to be satisfied that the debt on which the petitioning creditor relies is still owing. In this case, the evidence gave rise to the possibility that the debt was not truly owing and the court should have investigated the issue. Kiefel CJ, Keane and Nettle JJ jointly; Edelman J separately concurring; Gageler J dissenting. Appeal from the Full Federal Court dismissed.

Constitutional law – Chapter III – Kable principle – parole consideration conditions applying specifically to an individual

In *Knight v Victoria* [2017] HCA 29 (17 August 2017) the High Court held that legislation imposing conditions on the consideration of parole specifically for the appellant were valid. The plaintiff was sentenced to life imprisonment for each of seven murder counts and 10 years’ imprisonment for each of 46 attempted murder counts, with a non-parole period of 27 years. Just before the non-parole period ended, s74AA was inserted into the *Corrections Act 1986* (Vic). It applied only to the plaintiff and prevented his release on parole unless the Parole Board was satisfied that he was “in imminent danger of dying or is seriously incapacitated and that, as a result, he no longer has the physical ability to do harm to any person”. The plaintiff argued, relying on *Kable* and limitations stemming from Ch III of the Constitution, that s73AA interferes with the sentences of the Supreme Court and impairs the institutional integrity of the court; and that s73AA enlists judicial officers who are members of the board in a function that is incompatible with the Supreme Court’s exercise of federal jurisdiction. On the first point, the High Court held that s73AA did not interfere with the sentence as it concerns only the conditions for the plaintiff’s release on parole after the expiry of the minimum term. Those are matters outside the scope of the exercise of judicial power. On the second point, the Parole Board was not constituted by current judicial members in this case (and did not have to be). In those circumstances, there was no constitutional issue with the makeup of the board. It was unnecessary and inappropriate to decide whether s74AA would be invalid if the board did have a current judicial officer as a member. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Answers to questions in Special Case given.

Administrative law – statutory interpretation – failure to comply with condition precedent – whether exercise of statutory power invalid

In *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30 (17 August 2017), the appellant held a pastoral lease over land the subject of an application for mining leases. The applications for the leases were not accompanied by, relevantly, a mineralisation report as required by s74(1)(ca)(ii) of the *Mining Act 1978* (WA). A report was later lodged. The first respondent determined that he had jurisdiction to consider the contested applications and after doing so made a recommendation to the Minister to grant the leases. The appellant sought judicial review, arguing that the warden’s power to consider the applications was dependent on compliance with s74(1)(ca)(ii). The primary judge held there was no error. The Court of Appeal agreed, holding that s74(1)(ca)(ii) allowed for the report to be lodged later in time. Applying the

with Andrew Yuile and Dan Star QC



principles in *Project Blue Sky*, the High Court held that s74(1)(ca)(ii) imposed an essential preliminary to the exercise of power, having regard to the language and structure of the statute, its subject matter and objects, and the consequences for the parties of holding void acts done in breach of the Act. This outcome was also consistent with authority that it is essential to comply with the requirements of a statutory regime conferring power to grant exclusive rights to exploit the resources of the state (subject to provision to the contrary). Kiefel CJ, Bell, Gageler and Keane JJ jointly; Nettle J dissenting. Appeal from the Court of Appeal (WA) allowed.

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. Numbers in square brackets refer to paragraph numbers in the judgment.

Federal Court

Corporations/practice and procedure – recusal application on the eve of a trial regarding whether liquidator breached s180 of the Corporations Act 2001 (Cth)

In *Asden Developments Pty Ltd (in liq) v Dinoris* [2017] FCAFC 117 (10 August 2017) the Full Federal Court dismissed an appeal from the primary judge's dismissal of the proceeding. At first instance the primary judge held that a liquidator (Mr Dinoris) breached his duty as the liquidator of the appellant company and made a finding of contravention of s180(1) of the *Corporations Act 2001* (Cth) (the Act) against him. However, the primary judge did not award compensation under s1317H of the Act on the basis that the company had not established that any damage had resulted from the contravention. The Full Court also dismissed a cross-appeal against the findings made against Mr Dinoris.

One of the appellant's grounds of appeal was that the primary judge should have recused himself for apprehended bias (at [35]-[51]). The basis of this ground were comments made by the primary judge at a pre-trial management hearing a few days before the trial commenced. The primary judge dismissed the recusal application that was made at the commencement of the trial. The Full Court (Greenwood, Davies and Markovic JJ) found no error by the primary judge in doing so.

Among other reasons, the Full Court stated that it would be wrong to have regard to the final reasons for judgment in the proceeding in determining whether the comments at the pre-trial case management conference gave rise to an apprehension of bias (at [48]). Their Honours

cited and relied upon the following observations of the High Court in *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [67]: "As pointed out earlier in these reasons, an allegation of apprehended bias requires an objective assessment of the connection between the facts and circumstances said to give rise to the apprehension and the asserted conclusion that the judge might not bring an impartial mind to bear upon the issues that are to be decided. An allegation of apprehended bias does not direct attention to, or permit consideration of, whether the judge had *in fact* prejudged an issue. To ask whether the reasons for judgment delivered after trial of the action somehow confirm, enhance or diminish the existence of a reasonable apprehension of bias runs at least a serious risk of inverting the proper order of inquiry (by first assuming the existence of a reasonable apprehension). Inquiring whether there has been "the crystallisation of that apprehension in a demonstration of actual prejudice" impermissibly confuses the different inquiries that the two different allegations (actual bias and apprehended bias) require to be made. And, no less fundamentally, an inquiry of either kind moves perilously close to the fallacious argument that *because* one side lost the litigation the judge was biased, or the equally fallacious argument that making some appealable error, whether by not dealing with all of the losing side's arguments or otherwise, demonstrates prejudice" (footnotes omitted).

Employment & industrial law – whether work was performed as employees or independent contractors

In *Putland v Royans Wagga Pty Ltd* [2017] FCA 910 (9 August 2017) the court determined an employment law dispute arising between a husband and wife (the Putlands) and Royans Wagga Pty Ltd (Royans Wagga) whose principal business was repairing trucks. From September 2012 to early May 2015, the Putlands performed an "accident reporting service" for Royans Wagga, namely obtaining or otherwise receiving and passing on information about vehicle accidents or other incidents resulting in damage to trucks.

The central issue in this case was the capacity in which the accident reporting service work was performed by the Putlands for Royans Wagga – were they employees of Royans Wagga or independent contractors? If either of the Putlands were found to be an employee of Royans Wagga, back pay was sought according to the *Clerks-Private Sector Award 2010* and civil penalties were sought for alleged contraventions of provisions of the *Fair Work Act 2009* (Cth) such as ss45, 357(1) and 536. Alternatively, even if the Putlands were independent contractors, they sought relief in

that capacity by way of contract variations for harsh or unfair terms under s16(1)(b) of the *Independent Contractors Act 2006* (Cth).

The court (Bromwich J) ultimately found that the Putlands were employees of Royans Wagga (at [16] and [258]-[281]). Bromwich J summarised the established principles from the case law on the characterisation of employment contracts and independent contractors (at [17]-[31]). By reference to the leading authorities, his Honour discussed the prominent factor of the degree of control which a person who engages another to perform work has and the "modernisation that produced the shift from actual control to the right to exercise it" (at [24]).

Applying the factors telling for and against the Putlands being in an employment contract relationship or independent contractors, the court found "in the end by a comfortable margin" that they performed the accident reporting service works as employees. Bromwich J said at [279]: "The weight of the indicia established by the evidence, dominated by the finding of Royans Wagga's authority to control, favours finding an employment relationship rather than an independent contractor relationship, notwithstanding certain lesser features that are in common or more telling of the latter. The reality is that the impact of technology, and in particular communications technology, has greatly facilitated working from home where the substance of work is no different from that which was done in the workplace in the past. However, quite apart from the arrangements in the Hut which strongly tell of an employment relationship, the key features, even for the weekend and after-hours work from home, are the undoubted control that Royans Wagga, through Mr Andrews, had the authority to exercise and did exercise from time to time, and the fact that the work was only done for Royans Wagga. Any sense in which the applicants were entrepreneurs and running their own business was illusory and, in any event, a matter of form rather than substance. They were not truly performing work as entrepreneurs owning and operating a separate business. They were not truly working in and for their own business and as representatives of that business but, rather, were performing work as representatives of Royans Wagga."

The court then addressed the alleged breaches of the *Fair Work Act 2009* contingent on finding an employment relationship (at [282]-[336]).

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. The full version of these judgments can be found at austlii.edu.au.

Court of Appeal judgments

1 to 31 August 2017

with Bruce Godfrey



Civil appeals

Mineralogy Pty Ltd v BGP Geoeplorer Pte Ltd [2017] QCA 162, 1 August 2017

General Civil Appeal – where the plaintiff guaranteed the debts and obligations of a company, which has been referred to as Palmer Petroleum, being obligations owed under a contract to the defendant – where the appellant sought leave to amend its statement of claim – where the primary judge refused leave to the appellant to make substantial amendments to the appellant's statement of claim – where the primary judge allowed some amendments but refused others – where the respondent argued that amendments would prevent the matter from being heard within the allotted five days – where broadly speaking, the amendments allowed were ones which the trial judge considered would not put at risk a prompt trial – whether the primary judge erred in refusing to give leave to the appellant to make the proposed amendments – where the primary judge took into account various discretionary considerations, notably including a very substantial period of delay in the context of a commercial cause and the plaintiff pleading grounds of denial of a liability to the defendant in relation to payments that Palmer Petroleum had made to the defendant – where counsel for the plaintiff in the trial division, and the different counsel retained on the appeal for the appellant, referred to a provision in the contract requiring invoices to be signed by a representative of Palmer Petroleum – where in view of the background to the litigation, including the failure of the director common to both the alleged debtor and the guarantor ever to raise this before, the primary judge was not satisfied that it was sufficient for the plaintiff to make such a broad allegation – where there is no persuasion that there was any error in the primary judge's decision that this pleading was hopelessly inadequate – where the second category of the proposed amendments relies upon previous pleadings of claims under the *Trade Practices Act 1974* (Cth), under the Australian Competition Law, and for breach of contract by Palmer Petroleum – where counsel for the appellant properly acknowledged that the plea was unsatisfactory because it rolled up a series of different claims and attributed the same consequence to each of them, namely, a liability for the agreement to be terminated ab initio and an entitlement to repayment of a sum exceeding \$18 million – where it is evident, and this was, again, properly acknowledged by counsel for the appellant, that the statutory claims must be put on the basis that the claim is not, in truth, that the agreement is liable to

be terminated ab initio – where rather, if those statutory claims are made out, the plaintiff seeks discretionary remedies under the various statutory provisions – where furthermore, in the course of argument counsel for the appellant outlined what were submitted to be the factual bases of a claim that breaches of the agreement were causally related to the damages exceeding \$18 million – where those facts were not pleaded – where there was a dispute whether or not the reasons given by the primary judge for refusing leave to add this claim were adequate – where the primary judge did refer to the strong discretionary reasons for not permitting such a substantial amendment to the pleadings at this late stage of the proceedings – where it is unnecessary for the court to deal with that dispute – where particularly because it is a pleading for a very large amount of money, it is plainly unsatisfactory.

Application to amend paragraph (3)(a) of notice of appeal refused; otherwise leave is granted to amend the notice of appeal. Appeal dismissed with costs. Application for a stay filed in this appeal by the appellant on 2 May 2017 is dismissed with costs.

Berhane v Woolworths Ltd [2017] QCA 166, 8 August 2017

General Civil Appeal – where the appellant was employed by the respondent as an order selector in a large warehouse – where the appellant's employment required him to lift and stack heavy cartons more than 1000 times a day – where the appellant had a pre-existing degenerative condition in his shoulder when he commenced work – where the strain caused by lifting the cartons aggravated that condition and caused a further injury – where the trial judge dismissed the appellant's claim on the grounds that there was no breach of duty or causation – where the system of work involved lifting weights in excess of the recommendations of the relevant work safety guides – where a work success rating system encouraged selectors to work harder and faster – where casual employees were frequently sent home if their rating was less than the other employees – where expert evidence called at the trial supported that the workplace activities aggravated and accelerated the onset of the injury – where a significant portion of the general population has the same degenerative condition – whether the respondent's duty was breached – whether the risk of injury to the appellant was foreseeable – whether a breach of duty caused the appellant's injury – where the central issue on the appeal concerned the issue of causation, which was determined at the trial adversely to Mr Berhane – where Dr Blenkin's evidence, properly understood, is that

while the institution of the countermeasures recommended by Intersafe (produced by a consulting engineer, Mr McDougall, detailing many recommendations as to how the system of work could have been made safer) would not have prevented the rotator cuff bursitis from ever occurring, nonetheless the work activities without those measures had accelerated the underlying degenerate rotator cuff disease by some years – where in other words, had the Intersafe measures been implemented, the acceleration that was actually suffered would have been prevented – where the trial judge's finding on causation cannot be sustained – where the medical experts were agreed that the description of what Mr Berhane was required to do, because of a negligently implemented system, during the average working day caused the aggravation or acceleration of the condition suffered – where as *Calvert v Mayne Nickless Ltd* (No. 1) [2006] 1 Qd R 106 shows, if the pre-existing degenerative condition is quite common in persons of the employee's age, that can be a basis for concluding that the employee is nonetheless within the class of people within the normal range of health and strength – where the condition is sufficiently common that it should be found that a significant segment of the population has it, and it becomes more prevalent as one gets older – where the risk of injury to such a segment of the population is foreseeable – where accordingly, the duty that should have been found was not a special or higher duty, but rather the normal duty to take reasonable care not to expose Mr Berhane to a risk of injury – where the respondent challenged the trial judge's assessment of quantum – where the respondent submitted that the pre-existing condition was responsible for the appellant's loss of working capacity – where the respondent challenged the trial judge's classification of the injury using Schedule 9 to the *Workers' Compensation and Rehabilitation Regulation 2003* (Qld), submitting that item 97 applied, not item 96 – where the respondent contended that economic loss should have been assessed on the basis that it was improbable that the appellant would work beyond September 2012 and other medical problems would have prevented the appellant from continuing to work – where the trial judge made mixed findings as to the appellant's credibility as a witness – whether the trial judge's assessment of quantum accurately reflects the loss suffered – whether the assessment of damages is adequate – where the trial judge did not accept Mr Berhane as a reliable witness with respect to the extent of his injury – where that was for a number of reasons, including a video that showed him to be capable of greater movement and use of his shoulder than he exhibited to examining

doctors, or claimed in his testimony – where senior counsel for Woolworths submitted that Mr Berhane was pain-free on the video, but that is contrary to the unchallenged finding made by the trial judge – where his Honour found that the video “does not show that [Mr Berhane] has no restriction of movement or pain” and that one “cannot say he experienced no pain” – where those findings were open to his Honour, and plainly were to the effect that Mr Berhane had ongoing symptoms of pain some years after the initial onset of the symptoms – where item 97 would be applicable only if it could be said that Mr Berhane had made an “almost full recovery in less than 18 months” – where that was clearly not the case.

Appeal allowed. Dismiss the cross-appeal. Enter judgment for the plaintiff against the defendant in the sum of \$231,211.45. Costs.

QNI Resources Pty Ltd & Ors v Queensland Nickel Pty Ltd (in liq) [2017] QCA 167, 8 August 2017

General Civil Appeal – where the appellants are two joint venturers and the current manager of the joint venture – where the respondent is the former manager of the joint venture and a company in liquidation – where the appellants brought legal and equitable claims against the respondent which rely on an unconditioned obligation under the joint venture agreement to return joint venture property – where the primary judge found the appellants’ pleadings claimed unconditional relief for which it would be necessary for them to negate the respondent’s entitlement to an indemnity conferring proprietary or beneficial rights in the joint venture property – where the primary judge found the appellants’ pleadings failed to establish a solid foundation for the pleaded negations – where leave to proceed against the respondent under s500(2) of the *Corporations Act 2001* (Cth) was therefore refused because the appellants failed to establish that there was a serious question to be tried – whether the primary judge erred

in his approach – whether the primary judge failed to assess whether the appellants had a reasonable prospect of proving the negations in the absence of any pleadings of relevant factual matters – whether the primary judge erred in exercising his discretion under s500(2) of the *Corporations Act 2001* (Cth) – where the appellants’ criticism that the primary judge attributed decisive significance to the conditions upon which any final relief might be granted mischaracterises his Honour’s approach – where relevantly he attributed decisive significance to the relief actually claimed and the pleadings made in support of it in the statement of claim – where he concluded that the appellants had not established a serious question to be tried as to the pleaded non-existence of Queensland Nickel’s entitlement to a right of indemnity conferring proprietary or beneficial rights on it in the joint venture property – where his Honour did not anticipate conditions upon which any final relief might be granted and attribute significance to them – where it is accepted as accurate the appellants’ submissions with respect to the consent order and the provisions of the *Uniform Civil Procedure Rules 1999* (Qld) – where, however, they do not advance the appellant’s case – where it needs to be steadily borne in mind that the question before his Honour was whether the appellants ought to have leave to proceed against Queensland Nickel on the basis of the statement of claim delivered pursuant to the consent order, and not of that statement of claim as it might be amended or some differently pleaded statement of claim – where grounds 2 and 3 contend that the primary judge erred in a number of respects in treating “Queensland Nickel’s potential rights of indemnity and potential equitable security interests” as requiring or permitting the refusal of leave – where the appellants do not challenge the correctness of the legal principles which informed the conclusions stated by his Honour – where their point is that the conclusions ought not to have been reached in the absence

of factual findings – where the difficulty with this argument is that the appellants have not pleaded any factual matters relevant to the pleaded negations on which findings might have been made – where there is no pleading, for example, that Queensland Nickel incurred liabilities other than in the due administration of the joint venture or that it incurred them improperly or in breach of trust – where in effect, the appellants hypothesise circumstances which might affect the right of indemnity and resultant charge or lien in various ways, and suggest that his Honour ought to have taken the approach that some or all of the circumstances might exist and that, in combination, they might wholly negative any right to indemnity – where it is unpersuasive that such an approach should have been taken in the absence of a pleading of such circumstances – where in summary, the evidence before the primary judge not only justified a conclusion that Queensland Nickel did have a right to indemnity in a very substantial amount but also did not permit a conclusion that the value of the joint venture property held by Queensland Nickel exceeded that amount – where in these circumstances, it was appropriate for his Honour to conclude that the appellants did not have any reasonable prospects of proving the pleaded negations or of establishing an unconditioned right on their part to the entirety of the joint venture property as claimed – where it is not understood that the appellants propose that where any proprietary claim is made against a company in liquidation which cannot be the subject of a proof of debt, the court must exercise the discretion under s500(2) in favour of the grant of leave – where the nature of the claim does not displace the need for the court to assess whether there is a serious question to be tried with respect to an applicant’s entitlement to the relief claimed – where, here, the primary judge was not satisfied by the appellants that there was a serious question to be tried as to the declaratory relief claimed negating any beneficial interest in, or

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right of indemnity in respect of, the joint venture property on the part of Queensland Nickel – where this ground of appeal does not mount a successful challenge to the exercise of the discretion by the primary judge – where that is not to say that a differently framed statement of claim which eschewed such negations might not warrant a grant of leave to proceed.

Appeal dismissed with costs.

Burragubba & Ors v Minister for Natural Resources and Mines & Anor [2017] QCA 179, 22 August 2017

General Civil Appeal – where the appellants were registered native title claimants under the *Native Title Act 1993* (Cth) (the NTA) – where the National Native Title Tribunal (NNTT) had determined that the grant of mining leases over land the subject of the native title claim could be done as a ‘future act’ under the NTA – where the appellants sought judicial review of the NNTT determination – where the first respondent decided to grant three mining leases to the second respondent under the *Mineral Resources Act 1989* (Qld) (the MRA) – where, in making the decision, the first respondent concluded that native title proceedings had been ‘resolved’, without consulting the appellants, although the judicial review proceedings were reserved pending judgment – where the MRA sets up a scheme for objections to the grant of a mining lease to be made within a limited time and for those objections to be considered by the Land Court – where the appellants had not lodged an objection under the MRA scheme – where the primary judge concluded that the MRA provided a comprehensive code for affording procedural fairness and had excluded the common law right to procedural fairness – whether the MRA excluded the common law right to procedural fairness – whether the first respondent was referring to the native title claim being ‘resolved’ in the sense of being extinguished or in the sense that the grant of a mining lease could be done as a ‘future act’ under the NTA – whether the first respondent was obliged to consult with the appellants before concluding that the grant of a mining lease could be done as a ‘future act’ under the NTA – where an essential element of the appellants’ argument is that the Minister should have heard from them, because he was considering “new information”, being something “not arising from the Land Court process” – where, however, the question cannot be decided at that level of abstraction – where it is necessary to have an understanding of the content and ultimate relevance of that information to assess whether, in fairness to the appellants, the Minister should have asked them about it – where the content of the information within the departmental documents is unknown and was not proved to have been adverse to the appellants’ interest or in any way influential – where the documents may have advised the Minister that native title had been extinguished, that it had not been extinguished, or that no conclusion could be made one way or the other – where throughout the hearing before the primary judge, it seems that nothing was said about attachments 9 and 10 until

oral submissions, in reply, by the appellants’ counsel – where it is apparent then why the content of attachments 9 and 10 was not proved at the hearing before the primary judge – where the complaint which was then made by the appellants, although not in this court, was not that the Minister had denied them natural justice by considering those documents; rather, it was that he had decided to grant the leases, notwithstanding the judgment being reserved in the ADJR proceeding, without giving the appellants an opportunity to say whether he should do so – where to return to the appellants’ present argument, its immediate difficulty is that the content of the ‘new’ material, attachments 9 and 10, is unknown – where on the balance of probabilities, it cannot be inferred that it was adverse to the appellants – where the essential premise of the appellants’ argument is not established and consequently it cannot be accepted – where the appellants failed to prove that there were facts or circumstances which required the Minister, acting fairly, to consult them before making his decision.

Appeal dismissed. Costs.

Bond v Chief Executive, Department of Environment and Heritage Protection [2017] QCA 180, 22 August 2017

Application for Leave *Sustainable Planning Act* – where Mr Bond was the chief executive officer and managing director of Linc Energy Limited (Linc Energy) – where Linc Energy carried out an underground coal gasification plant on land at Chinchilla, which caused the land to suffer environmental harm and contamination – where Linc Energy therefore had obligations to rehabilitate or restore the land – where the respondent issued an environmental protection order (EPO) to the applicant – where the applicant applied to the Planning and Environment Court to have the EPO declared unlawful and was unsuccessful – where the applicant seeks leave to appeal against that decision on the grounds that the primary judge erred in law when dismissing the application – where the case involves important questions of general application as to the proper interpretation of the *Environmental Protection Act 1994* (Qld) – where leave to appeal is granted – where an application for review of the decision to grant the EPO was made within the nominated 10-day period – where the application for review stated that the decision was unreasonable and should have allowed for a period longer than 10 days within which to apply for review – where the application for review relied on there being special circumstances – where s521 allows the administering authority to extend the 10-day period in special circumstances – where the applicant alleges that an assessment of whether there are special circumstances must occur before an EPO is issued and failure to make such an assessment led to a breach of procedural fairness and makes the EPO invalid – where the *Environmental Protection Act* requires standard criteria to be considered before an EPO is issued – where the administering authority is required to balance the standard criteria and the affected party’s interests –

where the applicant’s case relies on the brevity of s521 and depends on the proper statutory construction of the *Environmental Protection Act* – where the proper course of construction is to read the words of a definition into the enactment and then construe the enactment – where the objects of the Act surround environmental management – where there were no clear words that would constrain the rights of the affected party by an EPO after it was issued – where to prohibit the consideration of special circumstances after an EPO was issued would constrain the affected party’s rights – whether proper construction of the *Environmental Protection Act* restricts the time in which to determine special circumstances – whether the issue of the EPO was valid – where the period within which to apply for a review of an EPO is a minimum of 10 business days from when the recipient “receives notice of the [EPO] or the administering authority is taken to have made the decision” – where s360(1)(e) requires that an EPO be served on the recipient – where service can be achieved by one of the ways specified in s39 of the *Acts Interpretation Act 1954* (Qld), that is by delivering the document to the recipient personally, or by “leaving it at, or by sending it by post, telex, facsimile or similar facility to, the address of the place of residence or business of the person last known to the person serving the document” – where, however, if served by post, s552(1) has the qualification that it may only be done by “properly addressing, prepaying and posting the document as a letter”, in which case service is taken to have been effected “at the time at which the letter is posted” – where for the purposes of s521(2)(a), it is proper service that is the receipt of notice, thus triggering the commencement of the period within which to apply for a review – where what follows from the foregoing is that service and actual receipt of the document are not necessarily the same thing – where within 10 business days of the EPO being served on Mr Bond an application to review the decision was lodged – where thus his application was within the time set by s521(2)(a)(i), s521(3) was not engaged, and therefore a review decision had to be made by 23 June 2016 (10 business days from 8 June 2016), failing which s521(10) provided that a decision would be taken to have been made, confirming the original decision – where no review decision was made by 23 June 2016, and s521(10) deemed a confirmatory decision to have been made that day – where a proper construction of s521 is that: (a) prior to an EPO issuing, the administering authority is not obliged to enquire of the recipient if there are “special circumstances” for the purposes of s521(2)(a), but it may do so; and (b) the determination that there are “special circumstances” for the purposes of s521(2)(a) does not have to be made prior to issuing an EPO, but it can be, and may also be made in the period of 10 business days referred to in s521(2)(a)(i); and (c) once a longer period has been allowed under s521(2)(a)(ii), further periods may be allowed if there are “special circumstances” which warrant that – where the grounds attacking the EPO must fail – where in the circumstances, as that ground was

dependent upon success on other grounds, there is no need to deal with the remaining ground, based on alleged errors in law in relying upon discretionary matters as a basis for dismissing the application.

Leave to appeal granted. Appeal dismissed. Costs.

Criminal appeals

R v Robertson [2017] QCA 164, 4 August 2017

Sentence Application – where the applicant pleaded guilty to attempted arson and other offences – where the applicant was sentenced to two years and six months' imprisonment on the count of arson and concurrent periods of imprisonment for the other offences – where the applicant submitted that the sentencing judge erred in relying on an inference that the offending was more serious than it was – where the applicant submitted the sentencing judge erred in imposing the sentence on the basis that the applicant "torched" her ex-landlord's house – whether the sentencing judge mischaracterised the applicant's offending – where it would appear that when one considers the whole of the sentencing remarks, the judge concluded that the proper characterisation of the applicant's behaviour was that she attempted to set fire to the landlord's house not intending to destroy it but reckless as to the consequences of her dangerous, irrational behaviour – where the sentencing judge carefully set out in his sentencing remarks the factors which led him to the conclusion that the applicant's offending was a serious example of the offence of attempted arson – where the applicant submitted that the sentencing judge erred by imposing a parole release date without alerting defence counsel that he was considering such a measure – where the applicant submitted that this resulted in a failure to afford natural justice to the applicant whose counsel could have made submissions as to why parole was not necessary – whether the sentencing judge was required to alert counsel that he was considering imposing a parole release date – where the sentencing judge's approach to the appropriate penalty in this case was entirely orthodox – where in this case the sentencing judge set a parole release date for the applicant much earlier than might ordinarily be expected and set out his reasons for doing so which were based on the evidence and submissions before him – where the applicant submitted that the sentencing judge erred in not applying the principle that a sentence of imprisonment is a last resort – where the applicant submitted the sentencing judge erred in not considering wholly or partly suspending the sentence – where the applicant submitted the sentencing judge erred in suggesting a period of actual imprisonment was required to send a message to the community denouncing the applicant's behaviour – where the applicant submitted the sentencing judge erred in failing to consider that the need for specific deterrence was not high – whether the sentencing judge considered all of the sentencing options available to him – whether the sentencing judge took into account

that a sentence of imprisonment should be imposed as a last resort – where there can be no sensible suggestion that the sentencing judge did not consider all of the sentencing options available to him before imposing the sentence he did which implicitly took into account that a sentence of imprisonment should only be imposed as a last resort – where the applicant submitted that the offending in the cases referred to at first instance were more serious than the applicant's offending – whether the head sentence was manifestly excessive – where in the context of comparable cases it can be seen that, the present case was not as serious as those herein referred to – where it had a number of exacerbating factors – where, however, there were a number of factors which made this offending less serious than the offending described in the cases referred to – where the offending was not pre-planned and there was no suggestion that any materials were taken to the premises for the purpose of setting fire to the property – where the applicant placed a phone book lit with accelerant on the tiled floor of an isolated room in a house that she knew was unoccupied, reckless as to potential consequences of her behaviour but without any intention to destroy the residence or harm any person – while the conduct was serious it was considerably less serious in nature than that in the cases in which a sentence not much longer was imposed – where it was committed by a person without a relevant criminal history with good prospects of rehabilitation.

Application for leave granted. Appeal allowed. Appeal allowed only to the extent of replacing the 2½ years' imprisonment for attempted arson with a term of two years' imprisonment. The sentences imposed upon the applicant are otherwise affirmed.

R v Gazzara [2017] QCA 168, 11 August 2017

Application for Extension (Conviction); Sentence Application – where the applicant/appellant pleaded guilty to dangerous operation of a motor vehicle causing grievous bodily harm on 22 August 2016 – where the applicant/appellant was sentenced on 24 October 2016 – where the applicant/appellant filed a notice of application to extend the time within which to appeal his conviction – where the notice of application explained that the applicant/appellant mistakenly believed he had been convicted in October, rather than when he was arraigned in August – whether the applicant/appellant should be granted leave to appeal – where the application for an extension of time was not opposed by the Crown and is granted – where the applicant/appellant submitted the plea of guilty was not a true acknowledgement of guilt – where the appellant submitted that a miscarriage of justice would occur if the plea of guilty was not set aside – where the appellant received legal advice prior to entering his plea of guilty – where the appellant's counsel and solicitors had access to all evidence supporting the charge before advising the applicant to plead guilty – where the appellant gave written instructions of the plea of guilty – where the appellant submitted at the appeal hearing that a new expert report obtained in a civil proceeding

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should be accepted as fresh evidence which requires a retrial – whether a substantive miscarriage of justice would occur if the new report was not accepted – where the report did not exist until 3 November 2016, some months after the guilty plea was entered and a month after the sentence hearing – where it cannot be the case that the opinion could have been called at the ‘trial’ – where the report does not establish a foundation for setting aside Mr Gazzara’s plea of guilty – where it does not establish that when Mr Gazzara entered the plea that he was not in possession of all the relevant facts, one of which was the speed at which he was driving, the speed limits both actual and advisory, and the fact that he did not slow down at the point when he embarked upon the manoeuvre to pass another truck on the outside of the bend – where the fact that it might be later discovered that some expert has expressed a view, which may or may not be correct, as to the significance of the speed, does not affect the quality of the guilty plea – where it remains a guilty plea which fits the description in *Meissner v The Queen* (1995) 184 CLR 132 – where the applicant was sentenced to three years’ imprisonment, suspended after six months for an operational period of four years – where the applicant was also disqualified from holding or obtaining a drivers’ licence for three years – where the applicant’s counsel contended that the head sentence of three years, the operational period and the disqualification period were manifestly excessive

– where the sentencing judge used a number of cases to characterise the applicant’s conduct as “fraught with risk” and with “devastating”, and “profound implications for the victim” – where it is common for an operational period to be longer than the period of imprisonment – where the sentencing judge imposed the disqualification period to protect the community and support rehabilitation – where the applicant objects to the disqualification period because of the adverse effects it will have on rehabilitation – where the applicant shows remorse and has job prospects requiring a driver’s licence – whether the disqualification will hinder rehabilitation – whether the operational period of the suspended sentence was excessive – whether the head sentence was excessive – whether the sentence as a whole is manifestly excessive in all circumstances – where it is unable to be concluded that the sentence in Mr Gazzara’s case is beyond the range available in the exercise of the sentencing discretion – where a three-year disqualification period is difficult to justify in terms of protection of the community or necessary for the purposes of rehabilitation, and has the potential to be unhelpful to rehabilitation particularly in the sense that it will keep Mr Gazzara out of his proven form of employment for longer than would otherwise be necessary – where for the purposes of punishment, deterrence and denunciation are served by that sentence, together with the operation period of the suspended sentence, such that a disqualification period longer than about two years can be seen to lack proper purpose.

Time to file the appeal is extended to 16 December 2016. Application for leave to adduce further evidence is refused. Appeal against conviction dismissed. Application for leave to appeal against sentence granted and allowed. Vary the order that the applicant be disqualified from holding or obtaining a driver’s licence for a period of three years and instead order the applicant be disqualified from holding or obtaining a driver’s licence for a period of two years from 24 October 2016. Order that the portion of the disqualification that had not expired when the appeal against conviction was lodged on 16 November 2016 shall take effect from 17 November 2016. Otherwise confirm the sentence imposed on 24 October 2016.

R v Elfar & Golding [2017] QCA 170, 11 August 2017

Sentence Applications – where the applicants were convicted of the importation into Australia of a commercial quantity of a border-controlled drug, cocaine – where the applicant Elfar was sentenced to 30 years’ imprisonment with a non-parole period of 20 years – where the applicant Golding was also sentenced to 30 years’ imprisonment but with a non-parole period of 18 years – where another participant in the import venture, Sander, was sentenced to 30 years’ imprisonment with a non-parole period of 16 years – where Elfar and Golding seek leave to appeal against their sentences on the grounds that they are manifestly excessive and do not reflect the principle of parity between all

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three co-offenders – where the importation was a complex, well planned, international operation – where Elfar and Golding sailed a yacht (the *Mayhem*) to meet another vessel (the *Edelweiss*) to exchange 400 kilograms of cocaine – where Elfar was in control of the *Mayhem* and Sander was captain of the *Edelweiss* – where Elfar and Golding moored at a marina in Queensland and were arrested by the Australian Federal Police (AFP) – where the Crown submitted that Elfar's participation was more serious than that of Golding and Sander because Elfar provided the *Mayhem* and communicated with the *Edelweiss* in the months leading up to the importation – where the applicants submitted that there were no material differences between the offenders' criminal histories – where the applicants submitted that there was a lack of parity with the sentence in relation to Sander – where the sentencing judge found that Elfar, and to a lesser extent, Golding, had both participated in planning and executing the importation – where both applicants knew the scale of the importation but lacked insight into the seriousness of the offending – where Sander was engaged because of his seamanship skills and had no criminal history – where the sentencing judge had found that while all offenders were motivated by financial gain, only Sander cooperated with the administration of justice during the trial by minimising delay and by not calling unnecessary evidence – where in addition, Sander had a number of character references – whether the sentencing

judge exercised the sentencing discretion in accordance with the parity principle – where there are parts of the sentencing remarks which make it plain that the sentencing judge did consider the issue of parity, even though her Honour did not specifically mention authorities such as *Postiglione v The Queen* (1997) 189 CLR 295 – where the parity principle proceeds on the basis that equal justice requires that like should be treated alike but if there are relevant differences, due allowance should be made for them – where there are particular differences which separate Elfar from Golding – where the sentencing judge treated the sentences for Elfar, Golding and Sander, and in particular in relation to the non-parole periods, in a way which properly reflected the factors which distinguished one from the other – where the sentencing judge was right to recognise those distinguishing features by differing non-parole release dates – where, further, as between Elfar and Golding there can be little doubt that Elfar had the greater involvement, in that he made the *Mayhem* available and had a longer, earlier and more intense connection with those on the *Edelweiss* than Golding ever had in his communications with Triplett – where the differing non-parole periods as between Elfar and Golding are explicable – where both parties conceded that the breadth of the sentencing discretion in cases of this kind is wide – where the applicant submitted that *R v Thompson* [2007] NSWCCA 83 supported a head sentence of 20, rather than 30 years'

imprisonment – where the Crown advanced a number of cases which demonstrate the range of sentences in cases of this kind extends well beyond 20 years' imprisonment – whether in all the circumstances, the sentences are manifestly excessive – where a review of the authorities advanced on behalf of the Crown demonstrates that counsel for Elfar and Golding was right to concede that the breadth of the sentencing discretion in cases of this kind is such that the actual sentences imposed could not be said to be manifestly excessive.

The applications for leave to appeal against sentence be refused.

R v Hill [2017] QCA 177, 22 August 2017

Sentence Application – where the applicant was sentenced on eight counts on an indictment and 19 summary offences, with the most serious offences being burglary and stealing, for which he was sentenced to imprisonment for three years, and the dangerous operation of a vehicle with a circumstance of aggravation – where the sentencing judge proceeded on the basis that the circumstance of aggravation relied upon, in respect to the dangerous operation of a motor vehicle, was that the applicant was adversely affected by an intoxicating substance – where the circumstance of aggravation was a prior conviction for dangerous operation of a motor vehicle – where the respondent concedes that an error in proceeding on the basis that the circumstance of aggravation was that the applicant was adversely affected by

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an intoxicating substance would be an error of the kind which would make it necessary for this court to exercise the sentencing discretion afresh – where although it is possible that the sentencing judge proceeded on a correct understanding of the circumstance of aggravation, it is far from clear that he did, and the sentencing remarks suggest that he proceeded on the basis that the applicant accepted that he was affected by alcohol or drugs – where the sentence imposed was cumulative upon the applicant's existing term of imprisonment – where account needed to be taken of the totality principle – whether a lengthy sentence cumulative upon the expiry of the applicant's current sentence would be 'crushing' in all the circumstances – where a sentence which is to be served cumulatively upon the expiry of the applicant's current term of imprisonment must be a real punishment in all the circumstances, so as to reflect his criminality and the need for personal deterrence and protection of the community – where however, having regard to the period of pre-sentence custody which cannot be declared and which is being served because of the relevant offending conduct, any additional sentence should not be more than is necessary to punish the applicant in all the circumstances.

Leave to appeal against sentence granted. Appeal allowed. Set aside the sentences of three years' imprisonment imposed on Counts 1 and 8 on the indictment and impose in lieu thereof sentences of two years' imprisonment.

Set aside the parole eligibility date of 15 February 2018 and fix instead a date of 15 December 2017.

***R v Hughes* [2017] QCA 178, 22 August 2017**

Sentence Application – where the applicant pleaded guilty to a 25-count indictment where the most serious charge was trafficking in a dangerous drug – where the applicant was sentenced to imprisonment for four years on the trafficking count and other concurrent sentences – where pursuant to the *Drugs Misuse Act 1986* (Qld), s5(2), the applicant was ordered to serve 80% of that sentence before being released on parole – where s5(2) of the *Drugs Misuse Act* was repealed after the applicant was sentenced – where the applicant appeals on the ground that the sentence is manifestly excessive – where the applicant refers to the sentences of similar offenders who were involved in the same drug-trafficking scheme but were sentenced after s5(2) of the *Drugs Misuse Act* was repealed – where the respondent submitted that issues of parity are not relevant – where the applicant claims to have made substantial efforts and successful attempts to rehabilitate – whether the sentence was manifestly excessive – where in both written and oral submissions Ms Hughes struggled to identify an error in the sentencing judge's remarks – where the sentencing judge's remarks were reasonable and had a proper foundation – whether, if the application were allowed, the applicant would be subject to s5(2) of the *Drugs Misuse Act* as it stood at

the time of the original sentence – where there is no doubt that the provision was in force at the time Ms Hughes was sentenced – where given that that s5(2) has since been repealed, an issue not addressed by the parties to this appeal is whether this court, if the application were granted, would be obliged to sentence Ms Hughes as the law stood at the time she was originally sentenced, applying s5(2) or as the law currently stands, without s5(2) – where the sentence that can be imposed in lieu of the one under appeal is "some other sentence ... warranted in law and [which] **should have been passed**": s668E(3) *Criminal Code* (Qld) – where the words highlighted make it clear that the new sentence has to conform with the law as it was at the time of the original sentence – where even if the application for leave to appeal was allowed, this court would be bound to apply s5(2) as it applied in November 2016.

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. For detailed information, please consult the reasons for judgment.

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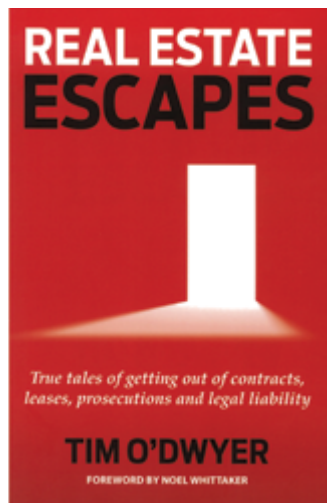
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Tall but true tales of legal escape



Title: *Real Estate Escapes*
 Author: Tim O'Dwyer
 Publisher: For Pity Sake Publishing Pty Ltd
 ISBN: 9780995363212
 Format: paperback/184pp
 RRP: \$24.95

Many property lawyers will already be familiar with the work of Queensland lawyer Tim O'Dwyer through his articles for newspapers and magazines, including his columns in *Australian Property Investor*.

Now, many of these writings have been compiled into a new book, *Real Estate Escapes*, which is billed as "true tales of getting out of contracts, leases, prosecutions and legal liability".

The 11 chapters bear titles such as 'Auction escapes', 'No escape for estate agents', 'Landlord and tenant escapes', and 'Great (unsuccessful) escapes'. Each contains between two and six individual items, usually of two to three pages, which can be read independently of each other. This means it's quite appropriate to simply open the book at random and read an item, flip to another item, and repeat the process. The problem is, once you start, it's hard to stop!

Tim is very much a storyteller, and each item sits neatly as a tale of real estate adventure,

or misadventure, with the players (buyer/owner/agent), the legal issue and the outcome neatly and succinctly described. Each also ends with an encompassing moral, such as, "Buyers who want out of a contract must have done their best to satisfy any escape clause," and "Don't believe what you read on sign boards."

The topics are many and varied – from a Gold Coast apartment dweller who comes to grief when she purchases a unit in a nearby building to obtain "unobstructed ocean views" to a property seller facing commission claims from two real estate agencies; and from the agent who failed to mention that the house for sale was the scene of a triple murder to the 'successful' auction bidder who loses out when he pops outside for a cigarette.

These stories have plenty of appeal for the general reader, for anyone buying or selling, for real estate agents, and of course lawyers. They are as entertaining as they are educational, and anyone who reads this book will be looking forward to Tim's *Real Estate Escapes 2*, which is in the pipeline.

– John Teerds



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New QLS members

Queensland Law Society welcomes the following new members who joined between 31 July and 30 August 2017.

Amber Acreman, David Burns Lawyers

Joel Akhurst, Credit Suisse

Aarti Arora, Caldwell Solicitors Pty Ltd

Michael Barber, Hetherington Family Law

Renae Barrett, Hickey Lawyers

Elliot Boddice, Fisher Dore Lawyers

Jeremy Bouton, Minter Ellison

Patrick Broe, Allens

Kate Buchanan, Allens

Yen Bui, DGT Costs Lawyers

Emily Burns, McInnes Wilson Lawyers

Aysecan Chami, Just Lawyers

Katharine Clark, Anderson Fredericks
Turner Pty Ltd

Nardine Collier, Collier Lawyers

Dougald Coulson, Allens

Phoebe Courtney, Delaney & Delaney

Margaret Crowther, ATSI Legal Service (QLD) Ltd

John Dalton, Sparke Helmore

Amy Detheridge, Allens

Terrence Doyle, T.M. Doyle

Mitchell Dunk, Sciacca's Lawyers

Clare Eichmann, Lever Law

Kieran Farr, Hickey Lawyers

Leanne Foo, Stephens & Tozer

Jennifer Franklin, Franklin Family Law

Heath Gleig-Scott, Holman Webb Lawyers Brisbane

Amy Goldberg, Cuthbertson & Co. Lawyers

Amy Goodwin, Bytherules Conveyancing Pty Ltd

Liana Hanley, Southern Gold Coast Lawyers

Michelle Harrington, Harrington Legal

Melissa Harris, Clubs Queensland

Belinda Hennessy, Allens

Toni Hennessy, Hede Byrne & Hall Lawyers

Christopher Hogarth, Monkey Conveyancing Pty Ltd

Taryn Hokin, Quinn & Scattini Lawyers

Anthony Hunkin, Garland Waddington

Mya Hunt, Department of Defence – RAAF
(Defence Legal)

Danielle Hurda, Bamerry Lawyers

Gabriel Hutchinson, Butler McDermott Lawyers

Jessica Illing, Carter Capner Law

Nastassja Jakeman, Allens

Alexandra Jeanes, Kroesen & Co. Lawyers Pty Ltd

Sean Jones, Andrew Douglas Solicitors

Lisa Kahurangi Neha, Roston Carlyle Lawyers

Georgina Kay, Turner Freeman

Zach Kelly, Antigone Law Pty Ltd

Agnes Kemenes, NB Lawyers

Elisa Kidston, LawRight

Clair King, Celtic Legal

Nicholas Korpela, Greenhalgh Pickard Solicitors

Winnie Law, Public Trust Office

Christine Lea, Fox and Thomas Pty Ltd

David Lee, non-practising firm

Josiah Lee, Law QLD Injury Claims Solicitors Pty Ltd

Natalie Lineham, Sia & Sia Lawyers

Jessica Lipsett, Corney & Lind Lawyers

Melita Lloyd, Martinez Lawyers

Molly Luscott, Anderson Telford Lawyers

Kaynisha Mahalingam, non-practising firm

Luca Masinello, Allens

Simone Matthews, Institute for Urban
Indigenous Health

Shane McDowell, non-practising firm

Nina McGrath, Retail Food Group (Australia)

Dean McNulty, Queensland Building
and Construction Commission

Patrick Meehan, Cockburn Legal

Teneille Meyer, Macpherson Kelley

Thi Nguyen, Russells

Clara O'Loughlin, Allens

Andrew Owens, Owens & Associates

Deepal Raniga, The Women's Legal Service Inc

Takara Raymond, Norton Rose Fulbright

Kelsea Read, NR Barbi Solicitor Pty Ltd

Kimberley Rekers, Cronin Litigation Lawyers

Charlotte Roache, YHC Lawyers

Quintin Rozario, Delta Law Pty Ltd

Nicole Rustin, Rustin Lawyers

Nathan Rutherford, Rees R & Sydney Jones

Shayne Savage, MacGregor O'Reilly

Fiona Sears, Mullins Lawyers

Maggie Shelton, Allens

Justin Sibley, Williamson and Associates Lawyers

Sidney Sneddon, Allens

Paul Spoto, Hall Payne Lawyers

Fiona Stumpo, Insurance Australia Group Ltd

Georgia Taylor, Stinchcombe & Haney Legal

Alec Teevan, Allens

Tanushree Venaik, Allens

Cristina Vitanzi, Logan Legal Centre

Yu Wang, Park & Co Lawyers

Darren White, West 12th Pty Ltd

Anna White, Corrs Chambers Westgarth

Peter Williams, McCullough Robertson

Robert Winter, Robert John Winter

Ya Hui Wong, Shimizu Kokusai Law Office

Career moves



Annabel Myatt



Rachel Lusic



Sam Davidson



Thomas Christie



Drew Nelson



Tracy-Lynne Geysen



Peter Webb



Amy Honan



Tarah Tosh



Sonaaz Farhadi-Fard



Maggie Keating



Jeremy Brown

Best Wilson Buckley Family Law

Annabel Myatt has been appointed as a solicitor at Best Wilson Buckley Family Law's Toowoomba office. Annabel has been employed by the firm since February 2015 in varying capacities and was admitted to practice in October last year.

Carroll Fairon Solicitors

Carroll Fairon Solicitors has welcomed Rachel Lusic as an associate. Rachel brings to the team knowledge and experience in family law, estates and litigation, with a client-focused approach.

Clifford Gouldson Lawyers

Clifford Gouldson Lawyers has announced the appointment of Sam Davidson as head of its intellectual property (IP) section. Sam joined the firm in 2013 and has practised exclusively in IP since then. She assists clients with all aspects of IP advice and protection, including trade marks, brand development, and licensing and infringement work.

CNG Law

CNG Law has announced its opening as a new firm with directors Thomas Christie, Drew Nelson and Tracy-Lynne Geysen. The firm has offices in the Brisbane CBD,

Springwood and Camp Hill, and focuses on employment law, wills and estates, commercial litigation, and residential and commercial property transactions, along with family law, animal law and criminal law.

Dore & Webb Lawyers

Dore & Webb Lawyers has announced the appointment of Peter Webb, a QLS accredited specialist in family law, as a director and principal of the firm, concurrent with Michael Connolly's exit from the firm. The firm name has altered from Connolly Dore Lawyers to Dore & Webb Lawyers and continues to practise from its offices in Gympie and Noosa.

Michael Lynch Family Lawyers

Michael Lynch Family Lawyers has announced the appointment of Amy Honan and Tarah Tosh as directors. Amy is a QLS accredited specialist in family law and, with more than 10 years' family law experience, successfully represents clients across the full spectrum of family law matters.

Tarah is also a QLS accredited specialist in family law with more than 15 years' experience in all facets of family and relationship law, including complex property matters involving family company and trust structures, and valuation issues.

Ramsden Lawyers

Ramsden Lawyers has announced the appointment of senior associate Sonaaz Farhadi-Fard and Maggie Keating.

Admitted in 2010, Sonaaz has extensive knowledge in personal and corporate insolvency, building and construction disputes, contractual disputes, estates disputes, consumer law disputes, debt recovery matters and enforcement proceedings.

Maggie, who completed her Juris Doctor at Bond University and Graduate Diploma of Legal Practice in 2016, was admitted in May this year.

The Fold Legal

Jeremy Brown has been promoted to associate in the Brisbane office of The Fold Legal. Jeremy has been with the firm for five years and focuses on financial services regulation, consumer law, trade practices, and corporate and commercial transactions, including business and portfolio sales and acquisitions, shareholder arrangements, business structuring, succession planning and capital raising.

The Honourable Concetto Antonio Sciacca AO

13 June 1947 – 21 June 2017

Con Sciacca AO, the founding partner of Sciacca's Lawyers Pty Ltd, passed away on 21 June.

The following is an extract from a eulogy by the Hon. Santo Santoro at Con's state funeral on 30 June.

Con was always great company. He uplifted those who he met. He enriched the lives of those he touched. He gave more than he ever received. And he made our society a better place.

Con's parents instilled in him a deep love of Australia and a belief that he could achieve anything he set his mind to.

Con belonged to many people and many places. *First* he belonged to his Sicilian roots. He came from a little town, at the foot of Mount Etna. And, he never forgot where he came from.

Second, he belonged to his dear family. To Con his family was everything. Con's love for his family was at the core of his existence and everything else was secondary to that love. Con and his first wife, Tina, brought into the world two beautiful children – Zina and Sam – both of whom gave him countless quantities of joy. He remained so proud of them both up until the very end.

Con never really overcame the unimaginably sad loss of Sam, but Sam's spirit was already close to Con on this earth and they are now together in heaven. Zina meant everything to Con – especially after the death of Sam – and he was deliriously happy when she delivered to him his beloved granddaughter, Graziella. Zina loved and cared for her father unconditionally. In later years, Con found much happiness in his second wife, Karen, and his stepsons, Nick, Dan and their extended family. They gave so much happiness to Con and he made them happy by giving so much back to them.

Third, he loved his Australian Labor Party. Con was one of the greatest numbers men that Australian politics and the Australian Labor Party has ever produced. There never was any malice in him. He fought hard, he took no political prisoners, but he never was mean spirited or petty.



Con believed that Labor was the political motor force for achieving fairness and equity in Australia. He was fiercely loyal to his ALP family, fiercely proud that he lived as a Labor man, a believer in the Labor cause and a life member of the Labor Party.

Fourth, he belonged to his beloved AWU. He believed that unions were essential for the protection of the poorest paid and the most socially vulnerable. He used his considerable legal skills to get the best possible deal for the low-paid workers he and the AWU represented. And he and Bill Ludwig were always a very formidable duo. Con loved Bill, who he regarded as a spiritual Godfather... and Bill loved Con.

Finally, he belonged to his beloved electorates of Bowman and Bonner. He was elected to the House of Representatives between 1987 and 1996 and again between 1998 and 2004. He was the ultimate man of the people, and he knew instinctively what they were thinking.

He was also a great parliamentarian and Minister of the Crown. As Minister for Veterans' Affairs, he organised the wonderfully successful 50th anniversary celebrations of the end of World War II. Con's work on the Australia Remembers campaign is legendary, and is the standard against which all other national celebrations of our nation's achievements should be judged. Hundreds of politicians, political and union leaders, lawyers and judges and business people owe their beginnings and their advancement in their chosen professions to Con.

The last years of Con's life were very difficult for him and his family. Con dealt with his difficulties and his challenges with great courage, stoicism, dignity and always great faith.

Con was part of a huge extended family and his beloved granddaughter, Graziella, was the apple of his eye and a second heartbeat in his chest. Her constant presence around Con motivated him to fight his illness.

Con was a man for all seasons and all people. Con was complex and unique. He was loving, loyal, welcoming, helpful and a mentor. An enormous tree fell in the forest of humanity when Con left this earth. There is a big void. A void in our hearts and our society that a great man is no longer part of our social fabric. But let us be thankful that 57 years ago Salvatore and Vincenzina Sciacca decided that lemon tree pruning should cease and the Australian dream beckoned. For without that fateful decision, our lives and Australia would have been poorer and a much less colourful place. Miss you greatly, Con and we will never forget you.

– Jason McAulay, Sciaccas Lawyers Pty Ltd

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6 Succession and Elder Law Residential 2017

6-7 | 8.30am-5pm, 8.45am-2pm | 10 CPD

Surfers Paradise Marriott Resort & Spa

This two-day, two-stream 'must attend' event is for any solicitor practising in succession or elder law. In the Life stream, hear from experts on how to plan in life to avoid pain after death. The Death stream canvasses an array of topics with practical insight on how to manage common – and not so common – challenges.

PLE ✓ PM&BS ✓ PS ✓ SL ✓

17 Essentials: Advising Small Business Owners

8.30am-12.30pm | 3.5 CPD

Law Society House, Brisbane

This half-day practical seminar offers legal practitioners or those diversifying their practice a refresher on the fundamentals of business law. Gain the knowledge and skills necessary to counsel small business owners regarding startup advice, with a particular focus on structuring and tax considerations, business growth phases, obtaining investment from investors, and exiting a business.

SL ✓

19 Practice Management Course – Sole Practitioner and Small Practice Focus

19-20, 27 | 8am-5pm | 10 CPD

Law Society House, Brisbane

Master the art of strategic business management with this 3-day course. Increase your knowledge of attracting and retaining clients in the new law environment, managing business risk, trust accounting and ethics. Designed by a team of experts, the course provides the practical skills and expertise crucial for your next challenge.

PLE ✓ PM&BS ✓ PS ✓ SL ✓

20 CQLA & QLS Conference 2017

20-21 | 8.30am-5pm, 8.45am-12pm | 10 CPD

Empire Apartment Hotel, Rockhampton

Queensland Law Society and the Central Queensland Law Association have partnered to present the inaugural CQLA & QLS Conference 2017. Receive updates on key practical areas, and the opportunity to connect on all things trust accounts, practice support and ethics. Strengthen the way you practise, grow your professional network and earn 10 CPD points.

PLE ✓ PM&BS ✓ PS ✓ SL ✓

24 Essentials: Big Data for Small Law Practices

12.30-1.30pm | 1 CPD

Online

This core CPD webinar provides the practical tips about what data you can and should be capturing, and how it can be used to improve the efficiency of your practice.

PM&BS ✓

26 Modern Advocate Lecture Series, 2017, Lecture four

6-7.30pm | 0.5 CPD

Law Society House, Brisbane

The highly regarded Modern Advocate Lecture Series deals with practical advocacy relevant to junior practitioners. The fourth and final lecture for 2017 will be delivered by Justice Roslyn G Atkinson AO. Networking drinks and canapés will be provided after the presentation.

PLE ✓

27 Personal Injuries Conference 2017

8.30am-5.05pm | 7 CPD

Brisbane Convention & Exhibition Centre

The QLS Personal Injuries Conference featuring a keynote address from the Honourable Ian Callinan AC, covers key issues for both plaintiff and defendant solicitors. It offers a choice of two streams to either refresh your knowledge of need-to-know essentials or explore more complex topics.

PLE ✓ PM&BS ✓ PS ✓ SL ✓

31 Essentials: Acting Against a Self-Represented Litigant

12.30-1.30pm | 1 CPD

Online

This webinar is targeted at all practitioners who may need to act against a self-represented litigant now or in the future, and explores the recently updated Self-Represented Litigant: Guidelines for Solicitors (August 2017).

PS ✓ SL ✓

Earlybird prices and registration available at

qls.com.au/events

Save the date

1 Nov	Masterclass: Insolvency Law
2-3 Nov	Toowoomba Roadshow: Law on the Range
9 Nov	2017 Queensland TJMF Lecture
9 Nov	Masterclass: Disciplinary Law
10 Nov	Essentials: Navigating Leases for Client-Focused Results

14 Nov	Essentials: Immigration Law Update
16 Nov	2017 Legal Profession Breakfast
21 Nov	Essentials: MS Outlook
23 Nov	Cairns ECL Movie Night: <i>Justice League</i>
28-29 Nov	Introduction to Conveyancing

Practical guidance for members

The QLS Senior Counsellor experience

QLS Senior Counsellors provide confidential guidance to practitioners on professional or ethical issues.

The service has been operating for more than 20 years and today there are 47 highly experienced practitioners across Queensland who can assist with professional or ethical issues and career advice.

This month, we profile three QLS Senior Counsellors in Brisbane – Justin McDonnell, Elizabeth Shearer and Martin Conroy.



Justin
McDonnell

Justin McDonnell is a partner in the Brisbane office of King & Wood Mallesons, and a past chair of the Queensland Law Society Litigation Rules Committee.

What motivated you to become a QLS Senior Counsellor?

I had seen other senior practitioners become QLS Senior Counsellors and I thought it was a natural step, given my age.

What is the best part about being a QLS Senior Counsellor?

In practice, I tend to find that people use you as a sounding board for issues or concerns that may arise, so I enjoy similar exchanges as a senior counsellor.

What do you like to do during your time off?

Reading and being told what to do by my wife and young daughter!

What is your favourite area of practice?

Commercial litigation, although a young lawyer that I used to work with has just been made legal counsel for Château Lafite Rothschild in Bordeaux, France. Now that is a dream area of practice!

Can you provide an overview on your general experience as a QLS Senior Counsellor?

The benefit of talking issues through with someone. Often, given the stresses of our profession, it is useful to be able to talk to someone not from your firm (and, indeed, whom you may not know).

If you could give one piece of advice to a solicitor just starting their career, what would it be?

Be open-minded. Often you strike young lawyers straight out of university who have determined they will be M&A or banking and finance lawyers, and that preconception sometimes weighs them down in later choices (they might be really good litigators!).



Elizabeth
Shearer

Elizabeth Shearer is the legal practitioner director at Affording Justice, a Council member at Queensland Law Society and chair of the QLS Access to Justice Committee.

What is the best part about being a QLS Senior Counsellor?

I enjoy listening to the practitioners who consult me about the issues they face, and then helping them problem solve to find a solution. Usually there are a number of ways to deal with the situation, and it is good to work through the pros and cons of each of them and come up with an answer that is right for the person who has to take the next step.

What do you like to do during your time off?

On weeknights, I like nothing more than some trashy TV. On weekends, I like to spend a couple of hours reading what used to be the weekend newspapers, but now I read online. I have joined a choir, so enjoy the rehearsals and performances for that, especially Brisbane Sings when I get to be one of a five to six-hundred voice choir.

What is your favourite area of practice?

I really enjoy general practice. Sometimes I think that general practice is getting to be a bit of a lost art, so I am on a campaign to keep it going. I would say I specialise in problem-solving, rather than one area of law.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

I was in practice for about 20 years before I heard about 'imposter syndrome' – the feeling that everyone else knows more than you do and that eventually people are going to find out that you are not as smart and capable as they think you are. I wish I had known this was a common experience when I was starting out. So my advice would be, don't be discouraged or feel overwhelmed by what you don't know; you have skills that you can use to work through novel problems.



To learn more about QLS Senior Counsellors, see qls.com.au > QLS Ethics Centre > QLS Senior Counsellors. Contact details for QLS Senior Counsellors are listed at the back of each edition of *Proctor*.

Martin Conroy

Martin Conroy is the managing director of Australian Law Group.

What motivated you to become a QLS Senior Counsellor?

I accepted the role of QLS Senior Counsellor as I believe senior practitioners have a responsibility to assist their fellow practitioners and have an obligation to give something back to the profession.

What is the best part about being a QLS Senior Counsellor?

Knowing you may have helped a practitioner and may have alleviated the stress for them. Law is a stressful profession, and clients can be and often are difficult and only hear what they want to hear.

What do you like to do during your time off?

Reading, golf and walking.

What is your favourite area of practice?

Probate and succession.

Can you provide an overview on your general experience as a QLS Senior Counsellor?

It is a very rewarding role within the profession. You encounter your professional colleagues often when they are in desperate situations and/or require reassurance that they are looking at the issue appropriately.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

Remember you are an officer of the court and you must always act ethically, bearing that in mind. Be prepared to listen and do not assume you have all the answers.

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Mind over matters

Combatting stress and promoting high performance through mindful meditation

It has been reported that lawyers working in law firms have lower psychological health and wellbeing than other professionals.¹

This statistic is no surprise given the pressures of high workloads, the urgency and complexity of matters, and the challenge of meeting our clients' expectations.

As leaders in the legal profession, we must openly acknowledge the stress of legal practice and take a proactive approach to improve employees' psychological health and wellbeing.

The psychological health of employees, its impact on the workplace, and the practice of mindful meditation as an intervention strategy, are discussed in this article.

Workplace stress and its effects

In its simplest form, stress can arise from anything that disrupts an employee's physical or mental wellbeing. In a workplace, it often occurs when an employee performs activities outside their perceived capability or when they face extraordinary demands.

According to the American Institute of Stress, up to 90% of all health problems are stress related.² These problems range from depression and anxiety disorders to susceptibility to infection and cancer caused by a decline in the immune system.³

From a workplace perspective, stress-related illnesses can result in or contribute to absenteeism, presenteeism,⁴ workers' compensation claims, low morale, and employee turnover.⁵ Stress also decreases an employee's ability to solve complex problems and undermines attempts to resolve conflicts constructively.⁶

Mindfulness and meditation

Mindfulness generally means to pay careful attention to the present moment, not thinking about the past or the future. It is described as a "non-elaborative, non-judgmental, present centred awareness in which each thought, feeling or sensation that arises in the attentional field is acknowledged and accepted as is".⁷

There are many forms of mindful meditation. However, the most straightforward method, without the need for extensive tuition, is the practice of using the breath as the focus to stay in the present moment.

In this context, the instruction is to sit comfortably with eyes closed and direct attention to the sensations of breathing, simply noticing it, paying attention to it, and being aware of it. When thoughts, emotions, feelings or sounds occur, accept them and allow the recognition of them to come and go without judging or getting involved. If attention wanders, becoming caught up in thoughts or feelings, gently bring one's self back to the sensation of breathing.⁸

It is this practice that is said to increase employees' ability to be fully present in the moment and to see things as they are, free from judgment.⁹ From a scientific perspective, mindful meditation is thought to reduce stress by reducing the physical symptoms of stress, thereby reducing the employee's reaction to environmental stressors and therefore altering, in a positive way, the employee's belief about their ability to manage stressors,¹⁰ even at the beginner level of practising mindful meditation.¹¹

How mindful meditation benefits the workplace

Reducing employees' stress will have a positive impact on those workplace factors that are directly linked to stress.¹²

A mindful meditation intervention to reduce employees' stress is also low in cost, because it does not require extensive expert tuition.

As mindful meditation focuses on improving employees' ability to manage stress from an internal viewpoint, irrespective of the external environment, it also reduces or eliminates the need to change existing human resource systems or practices.¹³

Further, while it originated from Buddhist and Hindu religions,¹⁴ it is a secular practice, therefore acceptable to all employees, irrespective of religion or background.¹⁵

Mindful meditation develops employees' skills in focused attention and seeing things as they are, without preconceptions or judgment. These skills are readily applied to the practice of law.

Further, enhancing employees' capacity to relax and deal with stress effectively will arguably improve their ability to solve complex legal problems and resolve conflict effectively.¹⁶

Learnings from other jurisdictions

The benefits of mindful meditation have been recognised within legal communities in other jurisdictions, particularly in Europe and in the United States. The skill of mindful meditation is being taught all at levels, from law students to senior members of the judiciary.¹⁷

If Australia is to maintain the quality of its legal profession and promote it as a satisfying career path, then it needs to seriously consider implementing a similar coordinated approach.

In the meantime, there is an opportunity for law firms to set themselves apart from their competitors by incorporating mindful meditation into their current management of their most valuable assets, their employees.

This article appears courtesy of the Queensland Law Society Wellbeing Working Group. Belinda Winter is a partner at Cooper Grace Ward Lawyers and a member of the group. *Disclaimer:* The author is currently enrolled in an online postgraduate wellness course at RMIT, rmit.edu.au/wellness.

Mindful meditation is likely to be the simplest and most cost-effective way to promote stress relief in legal offices, as **Belinda Winter** explains.



Notes

- ¹ Dr Marianna Papadakis, 'Lawyers have lowest health and wellbeing of all professionals, study finds' (20 November 2015), *Australian Financial Review*, afr.com/leadership/lawyers-have-lowest-health-and-wellbeing-of-all-professionals-study-finds-20151117-gl1h72.
- ² G. Vani, 'Managing Stress through Wellness Interventions: A Study of Select Software Companies of Hyderabad' (2013), 2 *Review of HRM* 323.
- ³ Bonita C. Long, 'Stress in the Workplace' (ERIC Publication No.ED414521, Educational Resources Publication Centre, 1995), ericdigests.org/1998-2/stress.htm.
- ⁴ Carol Cancelliere, David J. Cassidy, Carlo Ammendolia and Pierre Cote, 'Are workplace health promotion programs effective at improving presenteeism in workers? A systematic review and best evidence synthesis of the literature' (2011), 11(1) *BioMed Central Public Health* 395.
- ⁵ Above, n3.
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Debt recovery, or problem escalation?

A practice idea that might make a big difference



Avid readers of this column (I live in hope) will be familiar with my pieces on competent retainer management.¹

In the last year, I've encountered an increase in small practitioners who take their eyes off their aged debtors lists to suddenly discover they have a serious cash flow problem. Now, the best way to deal with this problem is to avoid it in the first place – so read the articles mentioned in the footnote.

But if it's too late and you're already there, you need to avoid making the situation even worse through knee-jerk formal recovery actions. So I tell my clients that unless you can answer *yes* to the vast majority of the following questions, you may well end up with a counterclaim, or in the Legal Services Commission, or have your claim thrown out for lack of evidence or process.

1. Is there is a valid client agreement in place?
2. Was the work done as per the scope in the client agreement?
3. Where the actual work done was greater than the anticipated original scope, is there *clear evidence* of client's authority to increase the scope and the related price?
4. Is the person/entity you are proposing to sue the same entity on the client agreement?

5. Was the matter free from elements of arguable misconduct in its handling – that is, something that the client can potentially turn against you (so the bigger problem is not them owing you money, but you being pursued by the LSC)? (Think intemperate language, serious delay, persistently broken promises, conflict, breach of confidentiality) and following this...
 6. Are you confident that the client won't be looking for retribution or an escape from payment because the matter and/or your relationship didn't finish as they would have liked?
 7. Have you given the client proper notices that the debts are due and:
 - a. provided copies of all relevant invoices
 - b. provided appropriate written reminder/follow-up letters
 - c. been clear about due dates/time being of the essence, and the potential consequences of non-payment (that is, action without further notice)
 - d. made reasonable attempts to speak with the client about payment?
- (Unless you do all of No.7, you will find that your claim may be lost/held up through lack of proper process. If the debt is quite old, it isn't realistic

to just rely on notices given six months ago before commencing proceedings now – the question will always be asked, *has your process been reasonable?*)

8. Are you satisfied that the client has the capacity to pay anyway?
9. Is the sum owing worth the effort and the angst? And finally,
10. Before taking action, have you reviewed the file history to ensure that none of the complications/problems listed above are seriously in play?

Thinking of your own collection and recovery processes, how did you go in your yes answers?

There will always be special cases where one or two of the problems above may be in play but you still have good recovery prospects – but overall, a yes to all the questions will keep you out of a lot of trouble and stop you burning a lot of unproductive time and effort.

Dr Peter Lynch

p.lynnch@dcilyncon.com.au

Note

¹ See, for example, dcilyncon.com.au/the-matter-and-the-money, and the 'Getting paid' practice management article at qls.com.au > For the profession > Practice support Resources > Practice management resource bank > Practice management articles (member login required).

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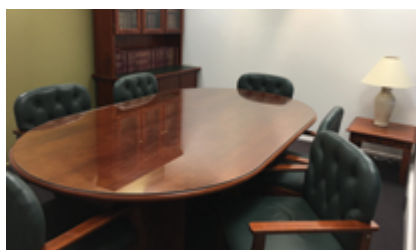
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Time for an Italian summer?

with Matthew Dunn



As the days grow warmer, we say goodbye to the heavy reds of winter and turn our thoughts toward a summer of fresh whites.

This spring try some frisky Italian varieties, sourced locally and quite good.

Australian wine has long been dominated by French grape varieties and our talented winemakers have found ways to express Australian stories with a French twist. The father of Australian wine, James Busby, brought with him predominantly French grape varieties in his great vine ark from the old world to the new colony and shaped wine in New South Wales. Swiss vigneron practised their arts in Victoria and German settler winemakers flourished in the newly created South Australian wine fields.

In all of these great beginnings, the Italian traditions and grape varieties were either demure or not present. Later, Italian wine culture and local varieties were to come with the immigrants of the pre and post-war years. Family winemaking turned into commercial enterprises in many areas, including on the Granite Belt amongst the orchards.

The rise of these new winemakers also brought new varieties and traditional understanding of their handling. Today the King Valley in Victoria and the Granite Belt are leading in production of traditional Italian varieties (the Granite Belt has cleverly elevated these and other more unusual grape varieties to cult status as 'strange bird' offerings).

There is a marked benefit for the consumer in these new varieties. They present a real and very interesting option for change from the usual but also for the consumption of refined wines to boot. For the drinker of this season, there are a number of cracking Italian white wine varieties with vim, vigour and the promise of spring.

From our local region, and of particular note, are wines listed in the most recent release of the *Halliday Wine Companion 2018*:

- Golden Grove's vermentino 2016 was highlighted, lauded and awarded a hefty 95 out of 100 points (it is also now making a sparkling vermentino).

- Both Ballandean Estate and Heritage Estate did very well with their fiano from 2016.

In addition to vermentino and fiano, arneis and garganega are starting to appear as locally produced commercial wines. Add to this list the mainstay of fashion pinot grigio, being the Italian style of the French pinot gris.

The Italian style which comes through in almost all of this wines is generally lighter, leaner and spritzier than the French or Australian style. Light bright fruit, lime acid crisp flavours and a certain zing that goes with food appear commonly in the new Italian wines.

Spring is a time of transition from the heavy dark days of winter to the heat of the summer sun – why not celebrate the change with some fresh Italian wines?



The tasting Three wines were subjected to close scrutiny.



The first was the **Golden Grove Granite Belt Vermentino 2016**, which was pale dry season grass with the slightest tinge of haunting green-like almost forgotten rain. The nose was crisp green apple served on a slice of local granite boulder. The palate was spritzzy and fresh with a refreshing twist of lime and crisp green Stanthorpe apple.



The second was the **Ballandean Granite Belt Fiano 2016**, which was the colour of light yellow sunlight of a September afternoon. The nose held slightly sweeter notes of peach and rockmelon with a hint of citrus to round out the fruit salad. The palate held the melon flavour but balanced in with a cut of lime to bring fruit notes to the fore.



The last was the **Corte Giara Pinot Grigio Delle Venezie 2016 IGT**, which was palest of pale yellow tinge in a glass. The nose was an appealing mixture of confection fruits and the earth from whence they came. The palate was bracing with frisky acid cut through, an almost oily texture in the mouth, much forward fresh fruit and the haunting presence of the land lurking in the middle.

Verdict: The prima donna of spring was roundly the Golden Grove; it ran a fine line of zest and power and called out for a little baked salmon.

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

Mould's maze

By John-Paul Mould, barrister
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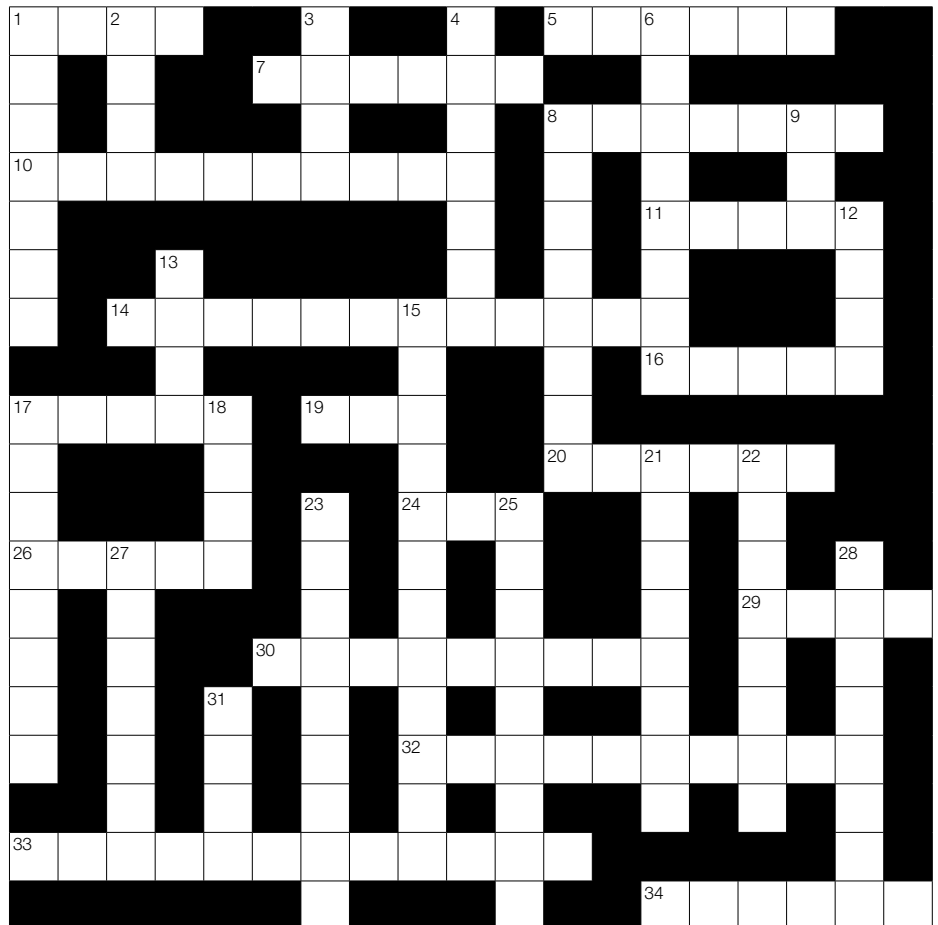


Across

- 1 The *Emblems of Queensland Act 2005* (Qld) provides that our "State arms" is to contain "Chief a's head caboshed in profile muzzled". (4)
- 5 A judicial officer is not criminally responsible for anything done or omitted in the exercise of their functions, albeit in excess of authority, under this section of Queensland's Criminal Code. (6)
- 7 Cancel whole or part of a statute. (6)
- 8 The test for whether a reasonable cause of action is disclosed in the context of striking out pleadings was posited by the High Court in *Steel Industries Inc. v Commissioner for Railways*. (7)
- 10 A document that governs how shared facilities of a volumetric lot are accessed, maintained and funded, building statement. (10)
- 11 Outright ownership, title. (5)
- 14 A person who inherits upon the termination of a life estate. (12)
- 16 Final hearing. (5)
- 17 Section-four of the Constitution of Australia disqualifies a candidate for election to the Commonwealth Parliament who has dual foreign citizenship. (5)
- 19 Schemes introduced by the *Body Corporate and Community Management Act 1997* (Qld) to better administer group titles. (Abbr.) (3)
- 20 System by which each case is allocated to a particular judge who will then preside on it through to completion. (6)
- 24 An exclusive ... by-law may be attached to a lot only if the body corporate passes a resolution without dissent. (3)
- 26 Temporary insurance policy, note. (5)
- 29 Mock hearing. (4)
- 30 Trespass involves actual possession whereas conversion involves a right to possession. (9)
- 32 Police inducement of an offence. (10)
- 33 Once a native title determination is filed, the Federal Court sends a copy of it to the registrar so the application can be tested. (12)
- 34 Legal instruments created for the purpose of appointing representatives of the Crown, letters (6)

Down

- 1 Management action that is a 'mere ' is not characterised as unreasonable for the purposes of section 32(5) of the *Workers' Compensation and Rehabilitation Act 2003* (Qld). (7)
- 2 Right of proprietary possession securing a debt owed by the owner of the property. (4)



- 3 Consider or adjudge. (4)
- 4 Queensland's official badge is "on a roundel Argent a Cross Azure surmounted with a Royal Crown". (7)
- 6 A newsagent has a defence of dissemination under the *Defamation Act 2005* (Qld). (8)
- 8 Acquired a property by a higher offer despite the vendor having made a prior verbal agreement with another purchaser. (8)
- 9 Section 32CA of this statute distinguishes the meaning of 'must' from 'may'. (Abbr.) (3)
- 12 A leasehold is a chattel (4)
- 13 The interests of children are paramount when a court considers parenting orders. (4)
- 15 Money outlaid on behalf of another. (12)
- 17 To be foreseeable, a risk must not be 'far-fetched or'. (8)
- 18 A defamation action cannot be brought without leave after the end of one from the date of the impugned publication. (4)
- 21 Disobedience to a court order or its authority. (8)
- 22 Inter alia, alpacas, donkeys, mules, turkeys and sewer rats are animals under the *Exhibited Animals Act 2015* (Qld). (8)
- 23 A plaintiff can no longer be awarded these damages for defamation in Queensland. (9)
- 25 A traffic ticket is an notice. (9)
- 27 Conferring or bestowing power, authority or property. (7)
- 28 To prevent a caveat lapsing, a caveator must commence proceedings within days of receiving notice from a caveatee to do so. (8)
- 31 A valid marriage requires the exchange of prescribed under Section 45 of the *Marriage Act 1961* (Cth). (4)

Solution on page 60

Why 2017 is a sexy little number

And we still await the end of law as we know it

by Shane Budden



2017 is an auspicious year, and not just because 2017 is a sexy prime (this is a real thing, and not in the least bit sexy as normal human beings who don't understand maths would regard it; look it up next time you are so bored that attempting to catch a bowling ball on your forehead begins to appeal – say, when you are at dinner with barristers).

It is auspicious (which is also a real thing, albeit not exactly what I am after here, but I use it because I like it and I am fairly sure no one will look it up) because 50 years ago I was born, despite the accompanying photo which, I concede, looks as if I were born prior to photographic technology being perfected.

It was a good time to be born, because it meant that when I graduated from high school it was during a rare period when we weren't involved in a major war which required drafting people into the army; also, Bob Hawke had not yet come up with his brilliant idea of getting more poor people into university by making it ridiculously expensive to go there.

You might think that would be like attempting to cure homelessness by doubling the rent, but you don't have the trained mind of a politician who once held a world beer-drinking record (and who may well have spent time using the above bowling ball-themed cure for boredom prior to coming up with the policy).

In any event, the fortunate happenstance of being born in 1967 meant that I graduated university (as far as anyone can tell) without a HECS debt, as opposed to students these days who emerge from university with a bill that looks like Bronwyn Bishop's travel claim.

In fairness to Hawke, his plan was a complete success, as long as his goal was the world's best-qualified dole queue and university chancellors so rich they will be able to heat their homes well into the next century by burning \$50 notes dipped in caviar. Also, you will probably never again be the only person in your street with an Australian law degree, even if your street is on the West Antarctic Ice Sheet.

My point is that 1967 was a great year to be born, as the music was great and the competition wasn't; for example, look up a list of famous people born in 1967 and you'll find candidates like Kurt Cobain – famous for having a musical career despite having no actual musical talent – and South African Test cricketer Daryl Cullinan.

Sure, being a Test cricketer is pretty cool, but Cullinan is mostly remembered for curling up into a ball on the floor and shivering at the mere mention of Shane Warne's name – so even 20 years of writing a humour column for which I am not paid and which maybe 10 people read looks good from the class of '67.

2017 is also an important year because it is the 30 anniversary of computer geeks telling me that lawyers will be replaced by robots. I first heard this from a mate back in 1987, who had then completed a degree in applied science computing (and went by the enigmatic name of 'The Wah').

He assured me that in five years' time there would be no lawyers left, and the computer industry in general agreed – leading me to think that a good motto for the computer industry would be 'Computer geeks: confidently predicting the imminent demise of the legal profession for 30 years'.

Not that much has changed in that regard – you can't heave a virtual rock in cyberspace without hitting Richard Susskind or one of his disciples doing a hearty rendition of 'the sky is falling' and rubbing their hands with glee over the end of law. If we were allowed to heave real rocks I suspect the problem would go away, but Susskind doesn't spend a lot of time in the real world – but then again, who does?

Certainly, my kids spend a great deal of time in virtual worlds, even though my wife and I have strict regulations around electronic devices and collect the iPads, iPods, iPhones and everything else with an 'i' in front of it and put them away after a certain time, to the extent that if your name is Ian and you were at our house around 6.30pm you'd probably end up stuffed in a drawer.

It doesn't matter though – except perhaps to Ian – because it is very difficult to detect and neutralise all the internet-enabled gear in the house, which probably includes my daughter's Shopkins and the rock my son found at the park two years ago and refuses to remove from his room.

So with my son's birthday coming up, we are on the lookout for a non-internet enabled toy; he has suggested an Xbox, because he feels our sub-optimal grasp of technology will not alert us to the fact that an Xbox can probably remotely control the International Space Station if you got hold of the password – and given that the password is probably something like 'NASA 7', this shouldn't be too hard.

Given that these days we have internet-connected coffee-makers, paper and nappies (no, I do not want to know how they work), I don't expect my search to be easy, but I will try hard to find a toy that can't find the internet; if the International Space Station turns up at your local Maccas and orders a happy meal, you'll know how I went.

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Crossword solution from page 58

Across: 1 Bull, 5 Thirty, 7 Repeal, 8 General, 10 Management, 11 Clear, 14 Remainderman, 16 Trial, 17 Forty, 19 CTS, 20 Docket, 24 Use, 26 Cover, 29 Moot, 30 Immediate, 32 Entrapment, 33 Registration, 34 Patent.

Down: 1 Blemish, 2 Lien, 3 Deem, 4 Maltese, 6 Innocent, 8 Gazumped, 9 AIA, 12 Real, 13 Best, 15 Disbursement, 17 Fanciful, 18 Year, 21 Contempt, 22 Exempted, 23 Exemplary, 25 Expiation, 27 Vesting, 28 Fourteen, 31 Vows.

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Interest rates

For up-to-date information and more historical rates see the QLS website qls.com.au under 'For the Profession' and 'Resources for Practitioners'

Rate	Effective	Rate %
Standard default contract rate	1 July 2017	9.30
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 July to 2017 to 31 December 2017	7.50
Federal Court – Interest on judgment debt for half year	1 July 2017 to 31 December 2017	7.50
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 July 2017 to 31 December 2017	5.50
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 July 2017 to 31 December 2017	7.50
Court suitors rate for quarter year	1 April 2017 to 30 June 2017	0.795
Cash rate target	from 3 August 2016	1.50
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2017	7.50

Historical standard default contract rate %

Sep 2016	Oct 2016	Nov 2016	Dec 2016	Jan 2017	Feb 2017	Mar 2017	Apr 2017	May 2017	June 2017	July 2017	Aug 2017
9.35	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.25	9.30	9.30

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

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9-10 March 2018

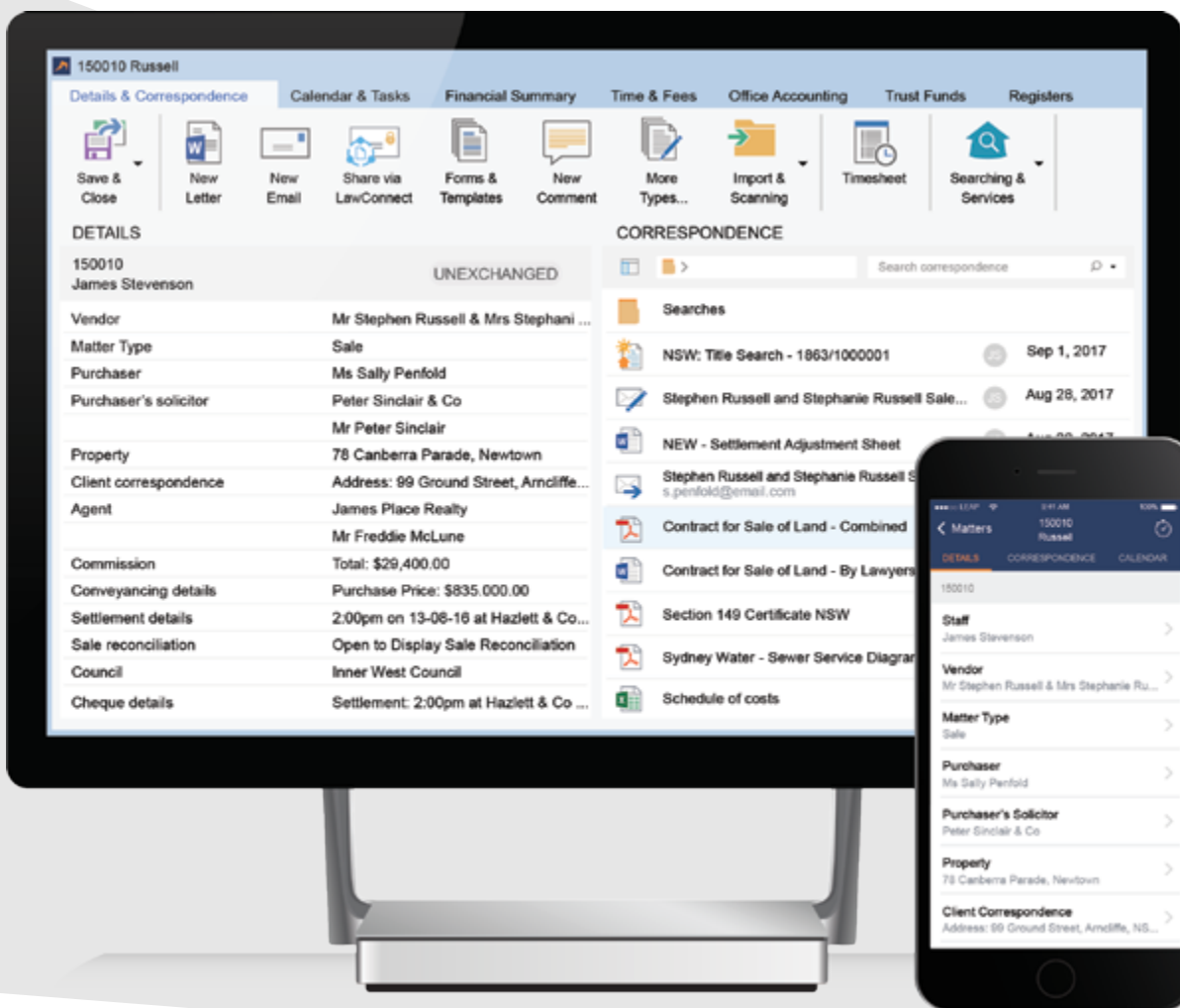
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