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Queensland Law Society

September 2017 – Vol.37 No.8

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Toward judicial diversity

Why we need a judicial commission

I am proud of our solicitors whose intellectual rigour, technical, people and managerial skills, along with service to their communities, have led to their appointment to judicial positions.

But, there remains a disparity in the proportion of solicitors being appointed to judicial positions. Why is this a concern? Since 1938 both branches of the profession have enjoyed equal rights of appearance before the courts. In that time the solicitors' branch has seen a significant growth in advocacy and representation before all courts and tribunals in Queensland. Overall, solicitors now make the bulk of all appearances.

In addition, the diversity of our society is reflected in our numbers. With near 12,000 Queensland solicitors from a wide range of backgrounds, we are yet to see that diversity reflected in judicial appointments.

Solicitors are the integral nexus between the state, our courts and our communities in which they serve. The solicitors' branch of the profession provides extensive diversity across gender, culture and experience.

With this, I am confident our numbers on the bench can only increase and that a goal of judicial appointment ought to be a realistic aim for the career progression of a significant numbers of QLS members.

By way of example, former solicitor and now Senior Judge Administrator Justice Ann Lyons commenced her stellar judicial career in a number of tribunals before being appointed as the inaugural president of the Guardianship and Administration Tribunal in 2000. Then her Honour was appointed to the Supreme Court in 2006, and recently elevated to Senior Judge Administrator.

Justice David Thomas was a partner at Minter Ellison from 1981 until his appointment to the Supreme Court in 2013 and charged with the stewardship of the Queensland Civil and Administrative Tribunal (QCAT) as its President from 2013 to 2016, at which time he was appointed as President of the Administrative Appeal Tribunal.

Current QCAT acting President Judge Suzanne Sheridan spent some 26 years at Minter Ellison as a solicitor, partner and consultant before being appointed as a judge of the District Court in 2014.

Other solicitors who transitioned directly to judicial office include Childrens Court Judge John Robertson, District Court Judge Ian Dearden and former QLS president Chief Magistrate Judge Ray Rinaudo, President of the Land Court Fleur Kingham, and Peta Stilgoe as member of the Land Court. There are also a number of magistrates, but nevertheless our numbers on the bench, in proportion, remain small.

There is simply no reason why more talented solicitors should not be recognised as worthy judicial candidates. This cannot be due to a lack of available talented solicitors. It is simply a mind shift that has not yet properly and rightfully taken hold since the legislation was implemented in 1938.

Much has been written about the qualities that make a good judge. Expertise, understanding and application of the law are fundamental. However, and importantly, the courts themselves have recognised that justice must be for the individual.

Solicitors are the nexus between our justice system and our rich and diverse community. Their deep understanding of the individual uniquely places them in the positon of combining the necessary technical skills with an inherent cognizance of the facts and circumstances that see members of our community intersect with the justice system daily.

We could continue to speculate on why more appointments are not made to the bench from the solicitor's branch, or we could focus on improving the system and creating an environment which provides a level playing field while recognising and maintaining those essential qualities. So, it is time that we looked more closely at the selection process for bearers of judicial office. It is for that reason that Queensland Law Society continues to advocate strenuously for a judicial commission for Queensland.

While this state has been very well served by its judiciary, past and present, not even the best long and esteemed profession can escape some avoidable hiccups. We consider a judicial commission is what a modern community requires to maintain public confidence in the administration of justice and the promotion of the separation of powers.

We will be advocating for such a commission in the lead-up to the next state election in our Call to Parties document as necessary to "enhance openness, transparency and independence in all processes surrounding the judicial system".

We see the role of such a commission as formulating a list for the appointment of judicial officers from which the Attorney-General would be required to choose, with any deviation from the list to be reported to Parliament.

The proposed commission would also address the reality of 'affinity bias'. In the field of human resources, there is acute awareness of this unconscious bias, which is when the recruiter will unconsciously favour a candidate who displays similar characteristics, whether they be ethnicity, schooling, religion or other traits.

While I believe those who select our judges have performed this role to the best of their ability, it makes sense to work towards removing affinity bias from the equation by implementing a judicial commission and judicial selection process that is structured, fair and transparent.

Christine Smyth
Queensland Law Society president

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2017 COUNCIL ELECTION

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Key Election dates

Roll of Electors close
9am AEST 4 September 2017

Nomination period
4 September to 4pm AEST
19 September 2017

Nominee campaigning period
From date nomination is approved to
4pm AEST 16 October 2017

Member voting period
4 October to 4pm AEST
16 October 2017

Announcement of results
From 17 October 2017

Lead the profession

If you're ready to dedicate your experience and passion to ensuring the Society meets the needs of the legal profession, nominate for QLS Council.

SEE MORE INFORMATION ONLINE
qls.com.au/councilelection

Queensland Law Society™

You're the voice

Let's hear you make a noise

"You're the voice, try and understand it
Make a noise and make it clear."

– John Farnham, *You're the Voice*

It is election season here at Queensland Law Society, and when I went looking for inspirational quotes I could find no better advice than that of Whispering Jack.

Yes, there were many clever comments from Winston Churchill and others, but they all seemed somewhat cynical – hardly what I was looking for in a column which, I confess, is partly intended to encourage you to participate in the upcoming QLS Council election, both by voting and running!

One of the great strengths of the Society – which allows us to remain relevant and to be responsive to emergent issues in the profession – is the fact that our Council (effectively our board) is drawn from full members who actively participate in the legal profession in Queensland.

In this way the Society gets its strategic direction from the coalface – or to put it another way, we have 'real-time' leadership as opposed to that based on past (sometimes long-past) experience, as can be the case in other organisations (and indeed government).

Of course, that advantage extends to you, the voters, who must also be full members and thus constitute the most well-qualified voters just about anywhere; perhaps Sir Winston would have been a bit less cynical if he had met a few of our members!

Then again, it isn't much good having a voice if you don't know where the pulpit is, which calls to mind another quote, this one from Franklin D Roosevelt: "Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education."

With that in mind, it is important that members know how the process will work this year, which is a little different from previous years.

What's new?

On 14 July 2017 the *Legal Profession (Society) Rules 2007* (the Rules) came into effect. The new Rules now include a 14-day period from the close of nominations to the opening of the poll. During this time, QLS will publish on the QLS website the names, biographies and photos submitted by eligible candidates, in the order drawn by the returning officer in accordance with r35(2) of the Rules.

How do I nominate?

Make sure that you are a full member, and that the QLS records team has your current details on file by no later than 9am on 4 September 2017. Familiarise yourself with the QLS election resources available on our election webpage (**qls.com.au/councilelection**), which include:

- *Legal Profession (Society) Rules 2007*
- Strategic Plan 17-21
- Corporate Plan 17-18 at a glance
- position descriptions
- QLS Council charters
- key dates
- FAQs
- QLS election media protocols
- nomination form (available from 4 September 2017).

Nominate by filling out the nomination form. Nominations must be received by the returning officer by 4pm AEST Tuesday 19 September 2017. Candidates can begin campaigning as soon as they receive confirmation from QLS that their application for candidacy is accepted. Candidates are then welcome to utilise their personal networks to advocate to the profession, but note that the QLS election media protocols are to be strictly observed throughout the election.

How do I vote?

QLS members who are on the roll of electors will receive a link via their nominated email address to vote electronically during this period; full members who do not have an email address registered with QLS will be sent a voting form by post.

See the page opposite for a summary of key dates.

I urge all full members to vote, and to consider running for a Council position, or for president, deputy president or vice president. The more members who become involved in the election, the better the Society's ability to represent a broad church and advocate for good law, good lawyers, for the public good.

You're the voice – let's hear you make a noise.

Matt Dunn
Queensland Law Society Acting CEO

Queensland Law Society

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QCAT e-Mediation trial provides alternative remedies

The Queensland Civil and Administrative Tribunal (QCAT) has a strong tradition of using contemporary alternative dispute resolution (ADR) practices.

From its inception in 2009, the tribunal has employed mediation and compulsory conferencing to resolve disputes across many of its jurisdictions.

One of its most prolific areas of ADR activity is the use of mediation to resolve minor civil disputes (MCDs). These disputes include matters up to $25,000 arising from unpaid debts and consumer/trader disputes. QCAT conducts nearly 2500 MCD mediations each year across Queensland. While the upper dollar limit for such claims is $25,000, the lion's share of claims mediated are for amounts of $5000 or less, with the majority successfully resolved.

Despite the positive results through MCD mediation, QCAT has received feedback from parties that costs associated with travel, parking and lost income are unacceptable when compared to the relatively small amounts in dispute. This is in addition to further costs that may be incurred in attending a hearing should resolution through mediation not be possible.

In response to these concerns, QCAT recently chose to trial e-Mediation – the use of instant messaging application Skype to facilitate these sessions. The cost-savings assumption appears to have been proven through the trial and a number of additional benefits realised.

e-Mediation results

QCAT conducted nearly 50 mediations during the five-month trial, covering a range of dispute types and claim values. Some of the benefits realised during the trial included:

Improved settlement rates – To date, QCAT has offered face-to-face and telephone mediation. The settlement results achieved through Skype mediation during the trial period (71%) exceeded the results achieved through face-to-face and phone mediation (56%) by 15%. Anecdotally, parties report that through the Skype mediation they can access non-verbal cues while avoiding the stress associated with travelling to, and attending, QCAT for mediation. Finally, parties can participate in mediation from an environment that is familiar and comfortable to them.

Decreased costs for parties – As part of its evaluation process, the e-Mediation party survey sought information on savings in regard to travel, parking and lost wages. On average, parties reported savings of about $300 per matter. Survey results also showed the overall level of party satisfaction for Skype mediation (91%) did not vary greatly when compared to party satisfaction for face-to-face and phone mediation (92%).

Psychological benefit for parties – In some cases, parties reported benefit in being able to meet with parties while avoiding the experience of being in the same room. Several parties reported mental health issues and suggested that, while they valued the opportunity to mediate their dispute, the impact of having to meet personally with the other party would have been detrimental.

While the benefits realised through this trial have been significant, there are a number of lessons that were learnt including:

Opt-in vs opt-out – During the trial, an opt-out approach was adopted, meaning that parties had to actively choose not to participate in e-Mediation. Parties had to request an alternate form of mediation (face-to-face or telephone). Given the emerging nature of instant messaging technology, it is likely that use in the foreseeable future will be based on parties opting-in should they prefer the e-Mediation option.

Use of suitable technology – QCAT chose a relatively basic technology setup for the trial (webcam, desktop speakers and 22-inch monitor). This limited the effectiveness of sessions, particularly when there were one or more parties attending in person (with a second party on Skype). Larger monitors and more flexible web conference cameras are expected to improve the mediation experience for all parties.

Administrative support systems – The tribunal developed support documents including fact sheets and instructions regarding access to Skype. The trial highlighted areas in which these documents may be further developed. QCAT also developed an e-Mediation consent form that addressed issues such as online security. The process of sharing this form with parties and obtaining consent will also be subject to further review.

Formal evaluation of the trial has now been completed and, as noted above, the benefits to QCAT and its parties appear significant. QCAT is now in the process of implementing the recommendations arising from the evaluation report and will continue to work on improving the systems that support its delivery of this service.

For more information, please contact QCAT alternative dispute resolution manager Peter Johnstone, peter.johnstone@justice.qld.gov.au.

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Pyjamas with a purpose

Anyone visiting one of Macpherson Kelley's offices on Friday 21 July may have been surprised to find the staff in pyjamas!

For the second year running, the Macpherson Kelley Foundation teamed up with the Pyjama Foundation on National Pyjama Day to make a difference to the lives of foster children. Through raising awareness and much needed funds, the firm was assisting the Pyjama Foundation in developing the learning skills and overall wellbeing of some of the 51,000 children in foster care throughout Australia.

"We hope our efforts inspire others to get on board to help raise awareness and funding so the Pyjama Foundation's valuable work can continue," managing director Damian Paul said.

See mk.com.au/about-us/foundation for more information.

No, they weren't sleeping on the job … in Brisbane, Macpherson Kelley legal assistant Samantha Mills, principal Ralph Praeger and paralegal Samantha Duperouzel entered into the spirit of National Pyjama Day.

Appointment of receiver: Walsh Halligan Douglas, Brisbane

On 3 August 2017, the Executive Committee of the Council of the Queensland Law Society Incorporated passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, Walsh Halligan Douglas.

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

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

Brisbane lawyer sits on collaborative law body

Brisbane family lawyer Jennifer Hetherington has been appointed to the board of the US-based International Academy of Collaborative Professionals (IACP).

She is the first Australian member for several years and the only representative from the Southern Hemisphere on the international board. She will be involved in the worldwide promotion of collaborative practice, whereby separating couples agree to settle their separation issues without involving the courts and litigation.

Ms Hetherington, from Hetherington Family Law, is a QLS accredited specialist in family law.

Tough bail talk not about soft judiciary by Tony Keim

Nothing lights up talkback radio switchboards or sharpens the hatchet of newspaper editorial writers more than stories about criminals perceived to have been given a better-than-fair hearing or ruling by way of sentence from a 'soft touch' member of the judiciary.

In more than 25 years of news reporting – covering court and crime – nothing quite seemed to get my news bosses steamed as much as the perception of offenders getting a 'rap over the knuckles' or a 'get-out-of-jail-free card'.

Of course nothing about the judicial process is quite as simple as that. In truth, if journalists were given sufficient column centimetres or air-time to properly report court stories and sentences it would require up to four or five pages of a tabloid or 30 minutes of a nightly news bulletin.

No one particularly wants to invest that much time and effort into immersing themselves in the finer details of a case – no matter how controversial.

For instance, in mid-2009 I was told by court staff while in my role as a Supreme and District Court reporter for *The Courier-Mail* that so-called American 'honeymoon killer' David 'Gabe' Watson was voluntarily returning from his home in the United States to plead guilty to the manslaughter of his wife, Christina, while scuba-diving on their honeymoon in north Queensland in October 2003.

There had been saturation national coverage of the case during the five or so years since Christina's death, with most sectors of the media and talkback radio shock-jocks and their audiences demanding that Watson be charged with his wife's murder.

What seemed to be lost on casual observers up to then was that, on the best evidence police and prosecutors could assemble, all they could charge Watson with was manslaughter. Justice Peter Lyons accepted Watson's plea to the lesser charge in June 2009 and sentenced him to 4½ years' jail, suspended after 12 months.

Needless to say the ensuing outrage was brutal and aimed squarely at Justice Lyons for the perceived light sentence. I was directed – under instructions from my editorial leaders – for three days to angle my stories – which all ran either on the front page or near to it – toward the soft sentence imposed.

It wasn't until the fourth day that my chief-of-staff (now a News Limited editor) asked me what other stories I could produce to maintain the outrage generated against Watson and the bench. I informed him one story I had written was yet to be published – despite having been written days earlier. This was the actual Crown prosecution case that was laid out in full to Justice Lyons. About 15 minutes after I filed that story my chief was back on the phone saying these very telling words: "We can't publish this story. It makes Gabe Watson look innocent."

If that was not enough – when Watson was finally returned to the US after serving his prison term at Ipswich's Borallon Correctional Centre, he was charged with his wife's murder after an ongoing media campaign. But, when the case was finally brought before a US jury and the prosecution case put, those same detractors seemed to totally disappear from the moral high-ground when the presiding judge dismissed the charges based on the non-existent evidence relied upon. So bad was the prosecution case that the judge would not allow it to even be placed in the hands of the jury for consideration.

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Interestingly enough, the Queensland Director of Public Prosecutions was not even acknowledged for being the only prosecutor to convict Watson of an actual crime, unlike the US investigators.

That in a nutshell is the problem with public debate on most cases which involve so-called 'soft' court decisions – whether they be during bail, sentencing or appeal decisions. Even in the event that a judge or magistrate does get it wrong, the decisions can be rectified on appeal. Those decisions do not always happen fast enough for casual observers.

A perfect example of that was the overturning of the Queensland Court of Appeal decision in the case of wife murderer Gerard Baden-Clay by the High Court of Australia. In the months between the decisions there was blanket coverage lambasting the Court of Appeal – Queensland's highest court – and a public rally in Brisbane's King George Square before the High Court reinstated Baden-Clay's conviction and life sentence.

The most recent case to receive the so-called judicial 'soft-touch' treatment was a North Queensland magistrate's decision to release three young males accused of a violent attack on a police officer. The incident raised the usual hoary old chestnuts such as mandatory sentences and tougher bail laws.

As every criminal lawyer and police prosecutor would be aware, Queensland has rather rigorous and restrictive laws that take into consideration a raft of situations and conditions which can be imposed on an accused offender before their being released back into the community pending the outcome of criminal proceedings. The simple premise that a person is presumed innocent until proven otherwise seems to be given scant regard when debating this very basic, but deserved, right owed to all accused criminals in Queensland.

The rule of whether a person should be granted bail is set out quite clearly in Queensland's *Bail Act* (1980) and summed up even more simply on the Queensland Courts website (**courts.qld.gov.au/going-to-court/applying-for-bail**).

Courts generally grant bail unless there is a risk an alleged offender will: commit further offences, endanger another person, obstruct the course of justice or fail to appear at future court dates.

The court will ordinarily also consider the type and severity of an offence, the evidence against a person, whether the person can provide a surety (such as money or property that will be forfeited if bail conditions are breached), whether they can and will comply with conditions, or they are in a 'show-cause position' – meaning the onus of proof is on them to justify why bail should be granted.

Bail conditions themselves can be very restrictive, including living at a specific address, agreeing not to contact witnesses, abstaining from drugs and alcohol, reporting to police (in some cases daily), obeying a curfew or obtaining ongoing medical treatment (for example, psychological) or attending rehabilitation.

The fact of the matter is that judges and magistrates have the power to grant bail with all manner of restrictions to protect the community. Of course court rulings are made by human beings and from time to time mistakes will be made. Fortunately, those occasions are extremely rare and occur with nowhere near the frequency the media, radio talk-back hosts and the uninformed or misinformed lynch mob rabble would have you believe.

Tony Keim is Queensland Law Society journalist/media manager on its external affairs team.

The family way to rock 'n' roll

In mid-July Queensland family lawyers embraced two days of sustained learning at the QLS and FLPA Family Law Residential 2017, held at the Gold Coast's Sheraton Grand Mirage Resort. Three concurrent streams covered children and parenting, property/financial and essential skills for daily family law practice, with the always popular residential dinner themed to something quite different – rock 'n' roll!

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In touch with fun

On Saturday 5 August the QLS Touch Football Tournament 2017 attracted 19 teams to Finsbury Park, Brisbane, where a day of great football saw Legal Aid Queensland (*pictured top left*) take the honours in the six-a-side mixed competition. South Brisbane Touch, Thomson Geer and Herbert Smith Freehills followed in ranking order, with Legal Aid Queensland's Maggie Styles taking the player of the match title and ClarkeKann winning the lunchtime relay.

Queensland Law Society would like to thank our tournament sponsor

BRISBANE MINI GARAGE

Proper property law and more

The work of the QLS Property and Development Law Committee

by Wendy Devine
and Pip Harvey Ross

The Queensland Law Society advocacy team works closely with the Society's policy committees to advocate for good law, respond to law reform proposals and identify issues of concern for the profession.

One of our busiest policy committees, the Property and Development Law Committee, has 18 members and guests who advocate for good law in property and development. The committee considers issues arising with the sale and leasing of land in Queensland, retail shop leases legislation and forms, body corporate legislation and processes, and property development generally.

It monitors relevant legislation and court decisions to keep members updated on changes and, when necessary, advocates on behalf of practitioners on important issues.

QLS extends its thanks to the committee's chair and deputy chair, Matthew Raven and Kim Teague, for their commitment to and generous support for this committee.

Key activities for the committee include:

- Working closely with the Real Estate Institute of Queensland (REIQ) on the jointly endorsed QLS/REIQ sale of land contracts. The committee regularly reviews and updates the contracts to take account of legislative change and ensure the contracts reflect best practice processes. QLS and REIQ have updated these contracts three times in the last 12 months. The latest editions include amendments to reflect changes in both the foreign resident CGT framework under the *Taxation Administration Act 1953* (Cth) and the *Fire and Emergency Services (Domestic Smoke Alarms) Amendment Act 2016.* These contracts are available online to all members at qls.com.au.
- Reviewing and finalising the jointly endorsed QLS/REIQ Commercial Tenancy Agreement, which has been reviewed by committee members in light of their practical experience and to reflect best-practice. This has been a significant project and will be a tangible new benefit for our members. The agreement is available to members at qls.com.au. The committee is also close to finalising discussions with the REIQ on a jointly endorsed business sale agreement. Keep an eye on *QLS Update* for news on the availability of this agreement.
- Participating in the broad-ranging review of property law in Queensland now under way. The Commercial and Property Law Research Centre of the Queensland University of Technology has been engaged by the Queensland Government to review the state's property laws. So far in 2016 and 2017, the committee has made nine submissions to QUT and the Department of Justice and Attorney-General providing feedback from the legal profession on the practical application of this legislation. The submissions included responses to:
  - Six detailed discussion papers reviewing each of the provisions of the *Property Law Act 1974* with a view to updating and modernising this legislation. The review has focused on the advent of e-commerce and the impact this is having on transactional practice both in the law and the business community generally. The committee has consulted with other affected QLS policy committees to provide practical, honest and useful feedback to help future-proof this legislation.
  - Recommendations to reform the *Body Corporate and Community Management Act 1997*, including reconsidering the approach to lot entitlements and considering governance issues faced by bodies corporate, including by-laws, debt recovery and scheme termination processes.
  - The 'Interim Report: Seller Disclosure' paper, which recommends that a pre-contract seller disclosure regime be introduced in Queensland.
- Preparing submissions on Bills introduced to Parliament, including those which became the *Retail Shop Leases Amendment Act 2016*, the *Land and Other Legislation Amendment Act 2017* and the *Court and Civil Legislation Amendment Act 2017*.
- Appearing at parliamentary public hearings to explain concerns about draft legislation. The chair and committee members have recently appeared before the Legal Affairs and Community Safety Committee and the Agriculture and Environment Committee.
- Keeping the profession updated generally about law reform proposals and amendments to property legislation which will affect our members' day-to-day practice.

The committee is grateful for its strong relationships with government agencies including the Registrar of Titles, Titles Office, Office of State Revenue and the Department of Justice and Attorney-General. The committee is regularly consulted on both policy and practical issues by these agencies, providing opportunities to discuss the legal profession's perspective on their impact on practitioners. It also works closely with Lexon to ensure that both QLS and Lexon provide practical and helpful support to our members in the practice of property law.

Wendy Devine is a policy solicitor and Pip Harvey Ross is a legal assistant with the QLS advocacy team.

Succession law litigation

Gaining the upper hand in 'undue influence' cases/mediation

About 140,000 people die in Australia each year.[1]

Assuming an average conservative value of $500,000 for each estate, $70 billion worth of assets pass under our succession laws from one generation to the next.

Of those 140,000 deceased estates, 90% can be expected to be processed without incident, and 8% of those estates are likely to be subject to claims under the 'family provisions' of the applicable Succession Act – that is, claims by an 'eligible person' (wife, child, etc.) seeking a larger share of the estate than that provided under the will on the grounds of need, moral claim, etc.

The remaining 2% of those deceased estates (about 2800) will involve an allegation by an aggrieved friend or relative who has benefited under a previous will but has been left out of the last will under dubious circumstances – generally involving 'lack of testamentary capacity' of the deceased at the time of his or her last will, or an allegation of 'undue influence' over the deceased by the ultimate beneficiary.

As those 2800 estates involve property to a total value of about $1.4 billion, it can be readily seen that the stakes are high and that this is a fertile area of litigation.

The dynamics of the dispute

For ease of identification, I have adopted these names:

- Your client, the plaintiff, I have named Mr Angelico ('innocent family member');
- The defendant, I have named Mr Scrooge ('shrewd, greedy opportunist).

Generally, Mr Scrooge is a child that has had a close relationship to the aged parent (usually the last surviving parent) and has been in position of close power and control of the parent's financial affairs at the later stages of that parent's life.

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by Tom Somers

The aged parent will generally be suffering from dementia or Alzheimer's disease or another similar debilitating condition prior to his or her death at the time of executing his or her last will.

Mr Scrooge will usually starve other family members of information prior to and after the death of that parent.

Often Mr Scrooge will not use the services of the parent's usual solicitor (who prepared the parent's prior will) but will engage the services of a new solicitor who is prepared to overlook the usual law society guidelines on ensuring testamentary capacity, and prepare a new will for the aged and infirm parent, in accordance with the directions of Mr Scrooge.

If the affairs of the aged parent are complex, involving a family trust or family company, Mr Scrooge will also often have himself substituted as the new trustee/appointor of that trust, and the new sole director of the family company (in lieu of the aged parent), thus giving himself total control of all assets of the parent – to the exclusion of the other siblings.

The new solicitor (engaged by Mr Scrooge) will generally be involved in the documentation and formalities in establishing those new controlling interests in the family trust/company.

In larger estates involving trusts and companies, the financial affairs of the various entities will often be interwoven with that of the deceased parent, involving substantial unpaid distributions from the trust, and tax free 'loans' to the parent in lieu of the taxable dividends. As discussed later, this can be a valuable bargaining tool in bringing Mr Scrooge to the settlement table, particularly when outstanding issues involving 'deemed' dividends and penalty taxes are identified.

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The nature of the claim

Typically, your client's claim will involve the law relating to testamentary capacity, undue influence, and breach of trust.

The law with respect to testamentary capacity is well settled, and of course involves the requirement that the testator should have an understanding of the extent of the property he is disposing and is able to comprehend and appreciate the claims to which he ought to give effect etc. See *Banks v Goodfellow* (1870) LR5 QB 549; *Shorter v Hodges* (1988) 14 NSWLR 698; and *Jee v Goodman* (2001) QSC 471 as per Holmes J.

The doctrine of undue influence in deceased estate cases is somewhat more complex.

A will may be set aside when it is the product of undue influence. However, the doctrine of undue influence is harder to make out in a context involving a will than when it is sought to set aside an 'inter vivo' transaction. In essence, collusion that destroys free agency *must be shown*. Mere suspicion is insufficient. See *Winter v Crichton* (1991) 23 NSWLR 16.

There must be clear evidence of undue influence, see *Green v Critchley* (2004) QSC 022; *Bailey v Bailey* (1924) 34 CLR 558 at 571.

Further evidence of incapacity or undue influence may be derived from the terms of the will itself. If, during a period of enfeeblement, a testator revokes prior wills and executes entirely different dispositions, the court's suspicion will be aroused (see *Bailey v Bailey* – supra at page 571).

The High Court case of *Louth v Diprose* (1992) 175 CLR 621 deals with breach of trust by persons in a position of trust, such as a carer.

There are some categories of confidential relationships from which a presumption of undue influence arises; when a substantial gift is made by one party in the relationship to the other (relationships such as solicitor and client, physician and patient, parent and child, guardian and ward, superior and member of a religious community).

Public policy creates a presumption of undue influence in cases in which the relationship falls into one of those recognised categories.

In such cases the law will make a presumption that the transaction was procured by the grantee through some unconscientious use of their power over the grantor, and the law places on the grantee the burden of supporting the transaction by which they so benefit, and of rebutting the presumption of its invalidity.

Commencing a claim and relevant time limits

As legal representative for the plaintiff Mr Angelico, you will need to act quickly, and lodge your caveat in *Uniform Civil Procedures Rules 1999* (Qld) (UCPR) Form 116 in the Supreme Court before probate is granted in respect of the offending will.

Your caveat must be supported by UCPR Form 118 Notice in Support of Caveat – the grounds stated would be:

i. lack of testamentary capacity on the part of the deceased at the time of his execution of that will; or
ii. The will dated _____ is invalid on the basis that the deceased was induced to execute that will subject to undue influence exerted on him by _____.

You must commence your court proceedings in the Supreme Court within six months of the date of lodgement of your caveat, otherwise the caveat will lapse.

Forthwith, after filing your caveat, write to the defendant's lawyer calling on them to prove the last will in solemn form within 14 days; in default you will bring your own proceedings.

Usually (in Queensland proceedings), such proceedings are commenced by way of Originating Application Form 5, seeking directions for the delivery of pleadings and a timetable for the other steps (disclosure of documents, mediation, etc.).

Your application must be supported by affidavit by your client, whereby they will dispose to the fact of the undue influence over the deceased on the part of the defendant. You should also exhibit any relevant medical evidence as to the issue of lack of testamentary capacity.

You should prepare draft direction orders in readiness for the return date of the originating application and try to work out consent orders with the defendant's solicitors.

Be sure to serve copies of the originating application and affidavit in support thereof to all interested parties, including all those beneficiaries named in the last will and the previous will that you will be now seeking to pronounce.

Importance of non-party disclosure

Such are the dynamics of the case that any relevant disclosure from the defendant will be of limited value to the prosecution of your case. To overcome that difficulty, cast your net wide in order to arrive at the truth of the situation relating to the parent's execution of the last will.

Non-party disclosure should be obtained from the following:

i. the former solicitor who prepared the prior will
ii. the solicitor who prepared the last will
iii. hospital records of the deceased three years prior and up to date of the last will
iv. medical practitioner records for treatment of the deceased up to three years prior and up to the date of the last will
v. palliative care services, three years prior to and up to the date of the last will
vi. tax records of the deceased and/or any trust/company in which they were involved, for three years prior to the date of death.

Expert reports

If the estate involves multiple entities such as family trusts and family companies, engage also a forensic accountant to examine the financial records of all entities to ascertain the whereabouts and quantum of all assets, and unravel the mysteries of the various unpaid trust distribution accounts and company loan accounts.

Also, great care must be taken to ascertain what tax liabilities, if any, are outstanding, including any deemed dividends, tax and penalties. In 2009, the Australian Taxation Office (ATO) introduced amendments to the *Income Tax Assessment Act 1936* (Cth), requiring company loans to directors to be in writing prior to the lodgement day for the relevant income year – section 109N(1)(9). Failure to comply renders such loans to be 'deemed dividends' for tax purposes, which would result in massive primary and penalty tax.

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The LARKE Letter

The new solicitor who prepared and witnessed the last will is subject to a recommendation by a law society guidance note to provide to you a letter called a 'Larke Letter', which gives details of the circumstances of giving instructions and execution of the last will.

After the preliminary opening passage of your letter, announcing that you act for your client, say this:

"In accordance with the principles in the case of *Larke v Nugus* (2000) WTLR 1033, we ask that you now make available your statement of evidence regarding the execution of the will of ___ dated ____.

The information that we require to be addressed in the statement is as follows:

1. How long you had known the deceased.
2. Who introduced you to the deceased.
3. The date you received instructions from the deceased.
4. Contemporaneous notes of all meetings and telephone calls including the indication of where the meeting took place and who else was present at the meeting.
5. How the instructions were expressed.
6. What indication the deceased gave that he knew he was making a will.
7. Whether the deceased exhibited any signs of confusion or loss of memory.
8. Whether and to what extent earlier wills were discussed, and what attempts were made to discuss departures from the deceased's earlier will-making pattern, and what reasons the testator gave for making any such departures.
9. How the provisions of the will were explained to the deceased.
10. Who, apart from the attesting witnesses, were present at the execution of the will and where, when and how this took place.
11. Whether you discussed with the deceased, the likely consequences of excluding any children as a beneficiary."

Ways to overcome deficiency in disclosure of documents by the defendant

Great care must be taken when examining the documents received pursuant to disclosure and non-party disclosure.

The new solicitor will generally not voluntarily disclose relevant documents that pertain to the receipt of their instructions for preparation of the last will because generally, if disclosed, they will reveal that their instructions came from Mr Scrooge, and not from the deceased.

To overcome this deficiency, insist that the new solicitor provide their 'time costing' records of all dealings (including telephone attendances) pertaining to the receipt of instructions relating to the last will and the execution thereof as, generally, such records will disclose nil dealings with the testator, but only dealings with Mr Scrooge.

Liability for costs by the new solicitor if complicit in the deception

In the case of *Worby v Rosser* (2000) PNLR (UK) 140, the court held that any costs incurred by the deceased estate in relation to this type of litigation is properly payable on an indemnity basis by the solicitor who prepared the last will resulting in the contested proceedings.

Their professional indemnity insurance may be liable for these costs.

Disqualification of the new solicitor

Refer to the relevant case law and law society rules dealing with disqualification of the solicitor in circumstances where they will be a material witness in the trial (for example, if they witnessed the will or drafted the will). Refer to *Chapman v Rogers* [1984] 1 Qd R 542.

Invoke that rule if appropriate via letter to the new solicitor demanding that they retire out of the case as solicitor on the record for the defendant.

Tax implications

The analysis of the tax records for the family trust and company by your expert forensic accountant may provide a valuable bargaining tool in the negotiation for settlement.

As stated earlier (under 'Expert reports'), there could be a 'deemed dividend' problem with potential ATO penalties, or there could be large amounts due to the estate from the family trust in unpaid distribution.

Preparation for mediation

You should devote all of your resources to prepare a comprehensive written submission for the plaintiff, to be used at the mediation, including a detailed chronology of all events both medical and otherwise, leading up to the execution of the will, indicating lack of 'testamentary capacity'.

The palliative care notes of the treating doctors and nurses, and hospital records will often show that the deceased was receiving large doses of morphine (pain killers) which could produce hallucinatory effects at or prior to the execution of the will.

When examining the records of the accountant and the last solicitor, be on the lookout for bogus emails of purported instructions sent by the testator to the solicitor/accountant prior to the changing of the will/company/trust – which could not have been sent by the testator/testatrix due to their parlous health.

The preparation of such a comprehensive written submission generally exposes the strength of the plaintiff's case at mediation and makes the defendant realise that an expensive trial is likely to burn up the value of the estate.

Put real pressure on the defendant to pay all of your client's costs to date on an indemnity basis and calculate those full costs prior to the mediation (including the costs and fees of your counsel and forensic accountant).

Get valuations of all relevant properties prior to the mediation and prepare a draft deed of settlement.

Your written submissions for the mediation should include a separate section as to costs such that the defendant, on the case law, will be liable to pay your costs personally (rather than such costs be paid out of the estate) on the basis that Mr Scrooge has engaged in conduct that actively and aggressively advanced his own interests and acted unreasonably in defending your client's suit against him. Refer to *Collett v Knox* (2010) QSC 132 per McMeekin J at paragraph 180. See also *Hodges*; *Shorter v Hughes* (1998) 14 NSWLR 698 at page 709.

Let the defendant's solicitor know that they also could be liable for such costs – (*Worby v Rosser* (supra) – para 9 hereof).

Preparing your client for the mediation

Warn your client that they will undoubtedly get surprises at the mediation. There will be allegations against them of unexpected things that may greatly damage their case.

Ensure that you have at least five 'killer' points to deliver at the mediation and do not reveal those points prior to the mediation; to get the best results you need to surprise the defendant.

Be polite but firm in your dealings with the defendant.

Prepare your client plaintiff on the eve of the mediation to consider coming away from the mediation 'unhappy' but with a result that they can live with.

Useful tips

Try to earn the respect of the defendant and their legal team, and make them aware that you will be a competent adversary if the matter goes to trial.

While your greatest weapon at the mediation will be that of surprise, alert your client to be aware that they will also very likely receive some surprise at the mediation, as there are always two sides to every story, and invariably your client never tells you the full version of the relevant facts.

Be aware that the conduct of such an undue influence case (that is, the proving will in solemn form) is totally different to the dynamics of that of a family provision case under the *Succession Act*.

Unlike a family provision case, which depends on the strength of the applicant being able to establish a need, or in some cases a moral claim, in an undue influence case you will win or lose it on the strength of the evidence you have gleaned pursuant to your efforts of non-party disclosure.

Also, an undue influence case differs greatly from a family provision case in that the costs of the former are such that the loser will pay the costs of both parties, whereas in a family provision case in most instances the costs of both parties will come out of the estate. That difference poses a massive financial risk to the loser of the litigation in an undue influence case.

Impress upon your client the importance and benefit of a mediation result which creates certainty in the short term rather than the risk of uncertainty that comes with a trial.

Summary

Beware of the dynamics of opportunity combined with greed, that have enabled Mr Scrooge (in collusion with his new solicitor) to embark upon a course of conduct to take advantage of the parent's impaired physical and mental conditions to substitute themself as the sole controlling entity and beneficiary of the parent's estate, to the exclusion of the other siblings.

Assume that the defendant, upon first hearing of your client's claim, will be getting competent advice and will have been informed that they are in a very strong position to defend your client's claims, based on court authorities such as *Green v Critchley*.

Thus, you will only achieve a satisfactory outcome for your client if you have solid and damning evidence such to establish lack of mental capacity/undue influence, so as to convince the defendant that it is in their best interest to settle at mediation.

Tom Somers is a Brisbane barrister.

Note

[1] Source Australian Bureau of Statistics 2011 census.

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Amendments to the *Legal Profession Act*

Directors of ILPs under administration

On 5 June 2017 assent was given to the *Court and Civil Legislation Amendment Act 2017*, a piece of omnibus legislation.

Among the Acts amended was the *Legal Profession Act 2007* (the Act). Among those amendments is the addition of a new suitability matter and a new show cause event relating to external administration of incorporated legal practices (ILPs) under the *Corporations Act 2001*. This will require immediate action by some practitioners and is a matter that, for the future, all legal practitioner directors of ILPs must keep in mind.

The amendments apply to legal practitioner directors of ILPs that are or have been subject to external administration under the *Corporations Act 2001* and who:

- are applying for the grant or renewal of a practising certificate
- have applied for the grant or renewal of a practising certificate as at 5 June 2017 and who have not received a decision about that practising certificate, and
- were legal practitioner directors of such corporations prior to 5 June 2017.

Suitability matters can be considered by Queensland Law Society (the Society) in determining whether a person is fit and proper to hold a practising certificate. Suitability issues are to be declared upon application for a grant or renewal of a practising certificate unless they have been dealt with previously as show cause events.

A show cause event is an occurrence which immediately requires the subject practitioner (that is, the holder of a practising certificate or a locally registered foreign lawyer) to show cause as to why, in light of the occurrence, they continue to be a fit and proper person to hold a practising certificate or be a locally registered foreign lawyer. Prior to this recent amendment show cause events were bankruptcy, a conviction of a tax offence or a conviction of a serious (indictable) offence.

The new suitability issue and new show cause event created by the amendment is:

"the person is or has been a Legal Practitioner Director of an Incorporated Legal Practice while the practice is or was an externally administered body corporate under the *Corporations Act.*"

It is not possible for a person to be a legal practitioner director of an ILP unless they hold a principal practising certificate. An externally administered body corporate is defined in section 9 of the *Corporations Act* to be a body corporate:

a. that is being wound up, or
b. in respect of property of which a receiver, or a receiver and manager, has been appointed (whether or not by a court) and is acting, or
c. that is under administration, or
d. that has executed a deed of company arrangement that has not yet terminated, or
e. that has entered into a compromise or arrangement with another person the administration of which has not been concluded.

This is not a reference to external intervention under the Act but rather the appointment of external administrators under the *Corporations Act.*

Of course, on the appointment of the liquidator the powers of the directors cease except so far as the committee of inspection or, if there is no committee, the creditors approve the continuance of any of those powers. See section 499(4) of the *Corporations Act 2001*.

The procedure on a show cause event is set out at ss68 and 69 of the Act. Therefore if, after 5 June 2017, a practitioner is a legal practitioner director of an ILP while it is an externally administered body corporate under the *Corporations Act* then that practitioner is the subject of a show cause event.

The practitioner must provide to the Society notice of that show cause event within seven days of it occurring and, within 28 days of the occurrence, give to the Society a statement setting out as to why they remain a fit and proper person to hold a practising certificate. Having followed this procedure there is no further obligation to disclose that event as a suitability issue.

There may be a number of show cause events in respect of the same incorporated practice. It is possible for the one corporation to be consecutively under, for example, receivership, voluntary administration and liquidation. Each would be a separate show cause event requiring individual attention.

There are provisions which extend the reach of these provisions prior to 5 June 2017. New section 784 of the Act provides that:

1. if before the commencement of the section (5 June 2017) a practitioner has applied for the grant or renewal of a practising certificate
2. that grant or renewal decision has not been made, and
3. the practitioner is or has been a legal practitioner director of an incorporated legal practice that is **or** was under external administration under the *Corporations Act*.
4. that person must, within seven days after the date of commencement (5 June 2017), give the regulatory authority a notice about that fact.

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This means if at any time after the commencement of ILPs (in Queensland 1 July 2007) the practitioner had fallen within the suitability issue it must be declared when applying for the grant or renewal of a practising certificate.

Section 785 applies as follows:

1. On commencement (5 June 2017) a practitioner is a local legal practitioner (that is, holds a QLS practising certificate of any kind) or is a locally registered foreign lawyer.
2. The practitioner is or was a legal practitioner director of an ILP that is or was under external administration under the *Corporations Act*.
3. Then the practitioner is the subject of a show cause event and must follow the procedure at s68, s69 and s193 of the Act.

In that situation, the section provides that these are declared to be show cause events and the person must provide the requisite notices to the Society as the show cause event is taken to have occurred on commencement (5 June 2017).

Thus the obligations created by the amendments are:

1. If at any time on or after 5 June 2017 you are the legal practitioner director of an ILP while it is an externally administered body corporate under the *Corporations Act* you have suffered a show cause event and s68, s69 and s193 of the Act apply.
2. If at any time on or after 5 June 2017 you apply for the grant of a practising certificate and at any time you were the legal practitioner director of an ILP while it was an externally administered body corporate under the *Corporations Act* you must declare that as a suitability issue on the application for grant of a certificate.
3. If you hold a current practising certificate (of any ilk) or are a locally registered foreign lawyer and at any time on or before 5 June 2017 you were the legal practitioner director of an ILP while it was an externally administered body corporate under the *Corporations Act* you have suffered a show cause event and s68, s69 and s193 of the Act apply.
4. If you have applied for renewal of a practising certificate (of any ilk) for 2017/18 and at any time past you were the legal practitioner director of an ILP while it was an externally administered body corporate under the *Corporations Act* you must, if you have not yet received your practising certificate for that year, immediately advise the Society of the suitability issue. If that certificate has issued you are caught by 1 or 3 immediately above.

The Society will contact practitioners it believes are caught by the new provisions. The Society does not claim to know all practitioners who may be caught. If you are caught you must follow your obligations. Notification can be made in the first instance by letter to the general manager, Professional Standards. Inquiries should also be made to that person.

This article appears courtesy of the Queensland Law Society Professional Standards department. Email c.smiley@qls.com.au.

Elder abuse awareness campaign shines a light into the shadows

It was once the case that domestic and family violence was considered by many to be a private matter.

Such was the shame and stigma that it was a rare occasion for it to be discussed openly and publicly. This is still the case for a particular type of domestic violence which is affecting our elderly community.

Elder abuse has yet to find its way into our discourse to the same degree as spousal or child abuse. Domestic violence awareness campaigns have demonstrated that the key to dealing with widespread social issues is to create a safe and respectful environment to talk about it. Dialogue paves the way forward to finding strategies and solutions to address society's largest problems.

Queensland Law Society president Christine Smyth says that domestic violence awareness campaigns have resulted in many of those subject to spousal abuse speaking out and reporting their abusers.

"From this awareness-raising, programs have been actioned to stamp out domestic and family violence," she said.

As Australia's population grows, and society evolves and changes, elder abuse is emerging into the public consciousness as another form of domestic and family violence. Elder abuse was recognised as a form of domestic violence in the 'Not Now, Not Ever' report[1] and, until recently, had escaped focus largely due to the natural repugnancy at the thought of family members inflicting abuse on an elderly, fragile and vulnerable relative.

Fortunately, with campaigns such as the annual World Elder Abuse Awareness Day (June 15), this issue is gaining necessary attention. This year the awareness day saw the launch of an elder abuse awareness trial campaign by Queensland Law Society and the Australian Medical Association Queensland (AMAQ) aimed at raising awareness and reporting figures. Since June 15, there has been an increase in calls to touch-points for victims such as the Elder Abuse Prevention Unit Queensland, and the QLS Find a Solicitor referral service.

Community awareness of the issue has also bourgeoned, with about 400 mentions of the campaign and elder abuse across television, radio, print and online publications including social media platforms. Staff at QLS are also on high alert when speaking to elderly callers and directing them towards solicitors focused on elder abuse when they think abuse may be occurring.

As an accredited specialist in succession law, Ms Smyth sees the impact of this abuse in her day-to-day practice. With the majority of her clients being either elderly or the relatives of deceased elderly people who have been subjected to abuse in their lifetime, she said the trail of devastation left behind could continue for many years after the elderly person had passed away.

Ms Smyth and the QLS Elder Law Committee have advocated for better awareness in this area for many years, culminating in a resolution to make inroads into highlighting this issue in 2017. This centres around working with GPs and providing appropriate information tools to start a dialogue in the community about physical, financial, emotional and sexual elder abuse and neglect.

The Society recognises that legal professionals are often on the frontlines of domestic, family and elder abuse issues – whether it be by filing orders or appearing in court for the victims or perpetrators. Queensland solicitors are trusted advisers from whom their clients seek advice on a variety of matters.

Ms Smyth noted that clients will rarely see their solicitor specifically for elder abuse.

"Often the signs are subtle and not readily evident," she said. "This makes it very difficult to identify and action. But the consequences are devastating."

This year, as president of the Society, Ms Smyth was instrumental in the implementation of the trial campaign, targeting areas of Queensland from north Brisbane to Kilcoy.

When speaking about the trial, Ms Smyth said that the aim was to give a voice to the voiceless and empower those affected to seek assistance.

"It is imperative that we shine a light into the shadows cast by the scourge of elder abuse, and help those suffering to know that it is ok to speak out and seek help," she said. "We have identified that GPs are not only leaders within our communities, but oftentimes the only person an elderly person visits frequently by themselves."

With the backing of Ms Smyth and the Elder Law Committee, Society policy solicitor Vanessa Krulin coordinated the facilitation of GP packs to 321 practices, with the aim of increasing awareness of and reporting of abuse, and collecting real data on the issue.

Ms Smyth said that elder abuse was a growing issue that had to be addressed, and warned that the impacts of an increasingly elderly population would only exacerbate the issue if it was not properly dealt with.

"In 2016, the Australian Law Reform Commission (ALRC) published an issues paper[2] on elder abuse, stating that those over 65 years will make up 21% of Australia's population by 2040," she said. "If our older population will increase by 2040, issues the current generation are facing must be addressed in the coming years to avoid catastrophe in the future."

A community legal centre solicitor and chair of Queensland Law Society's Elder Law Committee, Kirsty Mackie, said that one of the biggest problems in combating elder abuse was the issue of ageism.

"The ALRC report recognised that it was essential to educate the general community on the multiple benefits of older people on our society," she said.

Anecdotally, there are many reasons why elder abuse may be grossly underreported, including fear or confusion about what is being done to the elderly person and whether or not they feel at risk of suffering further consequences if they report the abuse.

"Those suffering from abuse should feel safe and not be afraid to speak up," Ms Smyth said.

Another issue that arises is that of the perpetrators not recognising their behaviour as constituting abuse.

"Perpetrators of the abuse must become unequivocally aware that what they are doing is in fact abuse and is wrong," Ms Smyth said.

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by Melissa Raassina

Elder abuse adopts many forms, with new and increasingly complex problems arising regularly. One of biggest issues arising in the space is that of elderly clients becoming guardians to grandchildren.

Ms Mackie said that she was exposed to this issue through her work in community legal centres, as well as elderly clients suffering from other forms of elder abuse every day.

"At present, I frequently see grandparents taking on the care of their grandchildren whilst enduring significant physical, financial and emotional abuse from their own children," she said. "Almost every elder abuse case I see involves parents using the drug ice and grandparents having to step in to remove the children from an unsafe environment."

Ms Mackie said that grandparents generally had little information on their options and were often reliant on the pension, leaving them at a loss on where to go for assistance.

She has seen clients in their 80s raising school-aged children without formal parenting orders.

"Often this means that the parents are still receiving family tax benefits and parenting payments without the children in their care," she said. "This money will often pay for their drug habit, leaving the grandparents to financially support the children on their own. The grandparents are also then struggling financially along with fearing violence from their own children against themselves or the grandchildren."

Anyone can be a perpetrator of elder abuse, but Ms Smyth said that the most common offenders were adult children against their parents and that, in many cases, they might not realise they were abusing their parent.

"In the case of financial elder abuse, we often see the adult child thinking they are entitled to financial support from their parents. It can be as overt as inheritance impatience and pressure to change wills and give access to bank accounts, or it is subtle, such as taking small amounts of money from their parents as compensation for acts of familial service such as driving their parent to appointments," she said.

"The abusers honestly believe they can take petrol money or part of the pension for compensation. The elderly feel vulnerable, fear being abandoned and isolated, and so they don't speak up when this occurs."

Both Ms Smyth and Ms Mackie expressed their concerns about the lack of tangible data on elder abuse in Australia, saying that one reason was the elderly population being either too ashamed to admit they were being abused or not realising that they were the subject of abuse.

"We love our children, that is the truth of it," Ms Smyth said. "We don't want to think that they are intentionally hurting us and we don't wish to see them in trouble with the law.

"And so our elderly Australians keep the abuse quiet, or they explain it away as nothing. But the reality is that our limited data tells us 60% of financial elder abuse is perpetrated by adult children.[3]

"The GP trial program is providing the chance for us to collect some real data on elder abuse by engaging our medical professionals.

"The object of the trial is to provide their patients a referral to the Elder Abuse Hotline where they can seek help.

"The statistics gleaned from this trial – which are still being collated – will hopefully assist in better data and better advocacy on this issue.

"Obviously, there is confidentiality in the GP's office, but small indications of the trial's success through the referral services will assist us in communicating this important issue to our governments, enabling them to take targeted action."

Ms Mackie reiterated that elder abuse still occurred behind closed doors, as victims were reluctant to disclose abuse due to fear of retribution, being placed in a nursing home, breaking up the family unit, or because of reliance on the abuser and the love of the abuser.

"I have seen the reluctance to admit abuse firsthand, with a particular client waiting until she was several appointments in on a divorce matter to disclose serious and significant financial abuse from her son," she said.

"She told me she was ashamed to bring it up at the beginning as she was unsure how I would react.

"This trial is so important as it adds yet another voice to the cause of elder abuse awareness. We must have more education in our society about this issue and funding of services.

"Growing older should not be considered a disability and it should not be highlighted just once a year in June for World Elder Abuse Awareness Day. It should be a daily issue we address."

Ms Smyth said she hoped that the data gathered would assist Queensland's legal profession in urging the state and federal governments to take real action and fund awareness programs and assistance centres across the state.

"In order for change to occur, dialogue is a necessary start," she said. "We must give our elderly the language to express how they are feeling, and create an environment where they feel safe to expose the issue.

"I am pleased that our preliminary results show that we have at least started the dialogue on this issue, and I hope to see a statewide adoption of the campaign."

QLS has provided GP clinics with posters for awareness, a small card with referral services for the patients to take away with them, and a checklist the doctors can utilise to identify factors of elder abuse.

The Society is also continuing to work with important stakeholders, including the Public Advocate, on future papers around these issues. Ms Smyth extended her thanks to all involved in the campaign including members of the QLS Elder Law Committee, QLS staff, the AMAQ and Brisbane North PHN. She also thanked the QLS Council and acting CEO Matt Dunn for their support of this initiative.

Melissa Raassina is Queensland Law Society media and public relations advisor.

Notes

1 'Not Now, Not Ever: Putting an end to domestic and family violence in Queensland' (2015) Department of Communities, Queensland Government, Queensland, communities.qld.gov.au/resources/gateway/campaigns/end-violence/about/special-taskforce/dfv-report-vol-one.pdf \.

2 'Elder Abuse Issues Paper' (2016) Australian Law Reform Commission, alrc.gov.au/sites/default/files/pdfs/publications/ip47_whole_issues_paper_47_.pdf.

3 'Financial abuse of elders: a review of the evidence' (2009) Monash University, Victoria, eapu.com.au/uploads/research_resources/VIC-Financial_Elder_Abuse_Evidence_Review_JUN_209-Monash.pdf.

Lexon INSURANCE

End of financial year review

The profession's commitment to risk management delivered an excellent claims year for Lexon in 2016/17.

Our partnership with the profession has continued to drive down claims and we can now report that the 2016/17 year recorded 284 insurance files as at 30 June, the lowest number since our inception in 2001. This is an outstanding result for the scheme and combined with a stronger investment performance, has reinforced the decision made by Queensland Law Society in April 2017 to reduce 2017/18 base levy rates by 20%.[1]

Claims profile

Conveyancing drove overall claims values for 2016/17 and at 30 June represented 26% of the total. Whilst it is still early days in the development of the 2016/17 year, conveyancing costs are currently at a similar level to the preceding two years. Pleasingly, the trend toward lower conveyancing file numbers continues with only 22.5% of total files within this category (cf. early years of the program where this was around one third of all files).

Commercial claims appear to have abated somewhat and at 30 June were 30% lower by value compared to 2015/16 and at the lowest levels since 2008/09. Also impressive is that file numbers at 30 June had dropped 34% year on year.

Offsetting the above was a strong increase in litigation with claims values over $1.2m higher at 30 June than for the 2015/16 year. As file numbers in this area have decreased, the driver is the size of the claims rather than the number.

The graphic below compares the portfolio breakdown by area of work for 2016/17 with 'all years'. Overall claims values have reduced in more recent years and claims containment remains our primary goal.

Policy enhancements in 2017/18

For 2017/18 we further simplified the policy wording and included some important enhancements discussed below:

- The foreign law exclusion in the policy has been refined to permit practices to be covered for 'pre-approved' foreign law work. This constitutes an expansion of cover compared to the 2016/17 wording.

  As business becomes more international, Lexon recognises that retainers from time to time will touch upon matters involving foreign law. The policy response seeks to strike a balance by providing coverage to practices that can demonstrate sufficient experience and skill in these specialised areas, whilst at the same time protecting the insured cohort as a whole from the cost of claims that arise when practices become involved in foreign law matters outside of their competence. If you would like to seek pre-approval, please complete the application form available on our website.
- LSC coverage has been expanded to ensure that, to the maximum extent possible, it follows on from the six hours of free legal advice provided by QLS (that is, the vast bulk of Lexon's general exclusions will not apply to this aspect of cover).

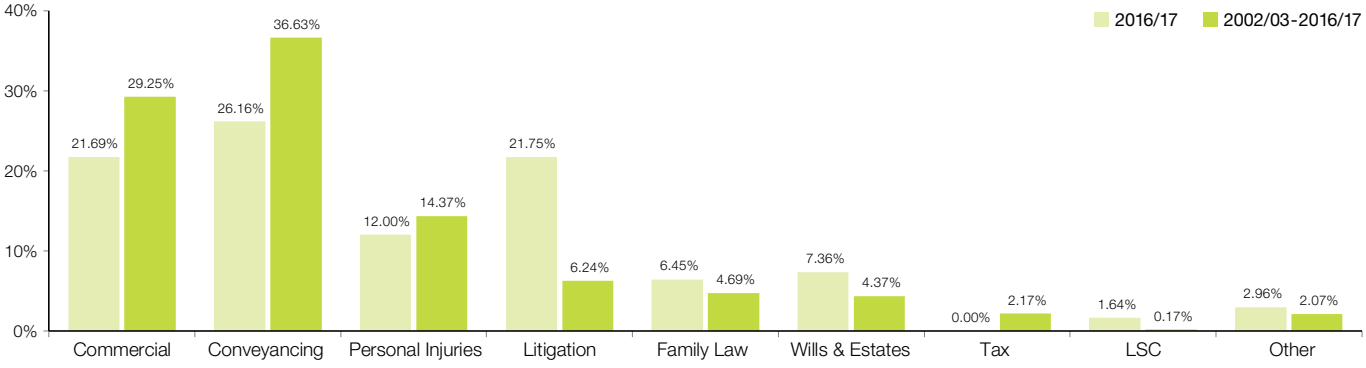
The changes to the insurance coverage are further explained in the document entitled 'Outline of Changes to Master Policy No. QLS 2017 and the 2017-2018 Certificate of Insurance', which can be found on our website.

I am always interested in receiving your thoughts, so if you have any issues or concerns, please feel free to drop me a line at michael.young@lexoninsurance.com.au.

Michael Young
CEO

[1] QLS president Christine Smyth announced on 28 April 2017 that base levy rates for 2017/18 would be reduced by 20% for each of bands 2 through 9.

Claims cost by area of law



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Solicitors' certificates

It remains a live issue that practitioners are being asked by financiers to provide certifications or warranties regarding the subject matter of (usually) property or commercial transactions.

Many of the requested certifications go beyond what a practitioner could say from within his or her own knowledge, for example, certifying that a trust was validly established when that is not within the practitioner's knowledge or providing an absolute statement that contracts are binding and enforceable.

The profession is being increasingly asked to certify matters that are inappropriate and beyond their knowledge, frequently in terms that have no qualifications. Practitioners should be vigilant to only certify matters that are within their own knowledge, retain evidence of the basis for so certifying, and caveat the certification appropriately. Whilst this is always good practice, from an insurance perspective failing to do so could potentially activate exclusions within the policy, which would be an undesirable outcome.

The Third Party Certificate LastCheck available at our website identifies a number of key concepts to manage.

Off-the-plan contracts

Whilst the number of conveyancing claims have diminished in recent times, should another property crash occur we would expect to see disgruntled purchasers seeking to exit property deals.

This risk is magnified for practitioners acting for sellers in the case of 'off-the-plan' contracts, which will often have long settlement times and may be the subject of replicated errors. Following the GFC these replicated errors resulted in several multi-million-dollar claims impacting practices throughout the state.

In late 2013 Lexon rolled out a further free in-practice workshop program to target this specific risk area. Project Stress Test (as it is known) targets sellers' transactional property work and involves the review of sample contracts followed by a practical 'hands-on' roundtable discussion with authors working in relevant areas. The program seeks to highlight the top possible failure points and allows Lexon to play devil's advocate to help practices identify and manage any gaps. This initiative represents another partnership Lexon has formed with the profession and it has been extremely well received.

Please contact Robert Mackay at robert.mackay@lexoninsurance.com.au if you are interested in being involved.

Did you know?

- For the 2017/18 insurance year QLS Council arranged with Lexon to again make top-up insurance available to QLS members who sought the additional comfort of professional indemnity cover beyond the existing $2 million per claim provided to all insured practitioners.

  Practitioners had the choice of increasing cover under the Lexon policy to either $5 million or $10 million per claim. There has been significant interest in Lexon's offering with over 150 practices signing up in this, the second year. This was beyond our expectations and realised a goal of making affordable top-up cover available to all practices in Queensland.
- We remind practitioners acting as directors or officers of 'outside' companies (or any other body corporate) that the Lexon policy only responds to claims arising from the provision of legal services. Practitioners who assume those roles may wish to seek appropriate advice as to whether they have, or require, directors' and officers' insurance.
- Lexon has entered into a consultancy agreement with a Bar association in the Asia Pacific region to replicate our program across their jurisdiction. This is further recognition of Lexon's class-leading work in claim reduction and our growing regional profile.

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Applying for payment from the Appeal Costs Fund

On 5 June 2017, the *Appeal Costs Fund Act 1973* (Qld) (the Act) was amended.

This article considers the more usual types of application which may be brought to obtain payment from the Appeal Costs Fund, taking into account these recent amendments.

Claiming payment from Appeal Costs Fund generally

The Appeal Costs Fund is a fund established under the Act.[1]

In certain circumstances as identified in the Act, a party to a proceeding, including an accused in a criminal proceeding, can claim for payment of legal costs from the fund.

Any such claim is considered by the Appeal Costs Board and, if the board is satisfied that the payment is authorised by the Act to be made from the fund and that the Act has been complied with in relation to the claim for payment, the board then issues a certificate for payment from the fund.[2] The certificate must contain certain information, such as whether the payment is to be made to the claimant or their solicitor and the amount to be paid.[3]

In addition, the board may allow such amounts as it thinks fit for the party's costs of making application to it under the Act, which amount shall be included in the certificate.[4] For this reason, a claimant should include evidence with their application of the amount spent by it in making the claim.

Payment shall not be made from the fund, except upon and in accordance with a certificate of the board.[5]

Entitlement to claim payment from the fund

In general terms, various provisions of the Act identify the circumstances in which a claim for payment can be made from the fund. The following are the provisions which are most commonly relied on.

Grant of indemnity certificate under section 15

When an appeal against the decision of a court to the Supreme Court or to the High Court from a decision of the Supreme Court on a question of law succeeds, the Supreme Court may, on application made in that behalf, grant to any respondent to the appeal an indemnity certificate in respect of the appeal.[6] The District Court has a similar power in relation to successful appeals to it on a question of law.[7]

Section 16 of the Act sets out the respondent's entitlement to be paid from the fund following the issue of the indemnity certificate under section 15. To summarise, section 16(1) enables the respondent to claim certain of the appellant's costs (if it has been ordered to pay them) as well as certain of its own costs as set out in section 16(1). However, if the respondent has been ordered to pay the appellant's costs but, for a number of reasons, does not or cannot do so, the board may direct that those costs be paid to the appellant directly pursuant to section 16(2).

The amount payable from the fund under section 16 cannot exceed $15,000.[8]

How to claim payment under section 16

Section 5 of the *Appeal Costs Fund Regulation 2010* (the regulation) provides that, to claim payment from the fund under an indemnity certificate issued by a court (under section 15 of the Act), a claimant must complete and lodge an application in the approved form along with the following documents:

1. the indemnity certificate
2. a copy of any court order relied on
3. any order of the registrar stating the amount at which a costs statement has been assessed, for part or all of the costs claimed
4. an itemised bill of costs for any other costs claimed
5. a copy of a receipt, or other documents, evidencing any payment of costs, by or on behalf of the respondent, relied on
6. if payment of an appellant's costs is claimed under section 16(2) of the Act – sworn evidence of the respondent's failure to pay the appellant's costs
7. sworn evidence of any other facts relied on.

Section 8 of the regulation enables the board to require a claimant to provide any additional evidence it considers reasonably necessary to consider the claim. Although it is not stated in the regulation, it assists if a claimant can include all relevant costs agreements entered in relation to the matter as this assists the board in assessing whether the costs are being properly claimed and are reasonable.

Abortive proceedings and new trials – section 22

Section 22 operates in one of the following circumstances:

1. Any civil or criminal proceedings are rendered abortive by the death or illness of the judge, master, magistrate or justice before whom the proceedings were had or, in the case of proceedings had before the Industrial Court on appeal, of any member of that court or by disagreement on the part of the jury if the proceedings are with a jury.[9]
2. An appeal on a question of law, or on the grounds there was a miscarriage of justice, against the conviction of a person (the appellant) convicted on indictment, succeeds and a new trial is ordered.[10]
3. The hearing of any civil proceeding is discontinued and a new trial ordered for a reason not attributable in any way to the act, neglect or default of any of the parties or their legal representatives, and the presiding judge, magistrate or justice grants a certificate to any party stating the reason why the proceedings were discontinued and a new trial ordered, and that the reason was not attributable in any way to the act, neglect or default of any of the parties to the proceedings or their legal representatives.[11]

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Kylie Downes QC explains the types of application which can be made for payments under the recently amended *Appeal Costs Fund Act 1973*.

4. The hearing of any criminal proceeding is discontinued and a new trial ordered for a reason not attributable in any way to the act, neglect or default of the accused or the accused's legal representatives, and the presiding judge, magistrate or justice grants a certificate to the accused stating the reason why the proceedings were discontinued and a new trial ordered, and that the reason was not attributable in any way to the act, neglect or default of the accused or the accused's legal representatives.[12]

Subject to falling within one of the four circumstances above, any party to the civil proceedings or the accused in the criminal proceedings or the appellant, as the case may be, who either:

1. pays or is ordered to pay additional costs, or
2. on whose behalf additional costs are paid or ordered to be paid

by reason of the new trial shall be entitled to be paid from the fund the costs the board considers *have been thrown away or partly thrown away by the person or on the person's behalf in the proceedings*.[13] The emphasised words were introduced by the recent amendments to the Act. They limit the costs which can be claimed and so claimants should focus their attention, and the documents lodged with the claim, on costs which have been thrown away, including justifying why the costs claimed have been thrown away.

A (replacement) section 22(3) was introduced by the amendments and clarifies what 'costs thrown away' means. It provides that costs thrown away in relation to proceedings include costs that are reasonably incurred before, but are wasted when:

a. the proceedings were rendered abortive
b. the conviction is quashed, or
c. the hearing of the proceedings is discontinued.

How to claim payment under section 22 of the Act

Section 6 of the regulation provides that, to claim payment from the fund under section 22 of the Act, a claimant must complete and lodge an application in the approved form along with the following documents:

1. a copy of any order or transcript evidencing a fact mentioned in section 22(2)(a) of the Act
2. a copy of any order, for a new trial, mentioned in section 22(2)(b) of the Act
3. if the order does not show it was made on an appeal on a question of law, a copy of any transcript showing that fact
4. any certificate granted under section 22(2)(c) of the Act
5. an itemised bill of costs for all costs relating to the claimant of the original trial and of the new trial that identifies each cost of the original trial thrown away or partly thrown away
6. a copy of any order to pay additional costs of a new trial
7. a copy of a receipt, or other documents, relied on to show the payment of any additional costs of a new trial
8. sworn evidence of any other facts relied on.

Section 8 of the regulation enables the board to require a claimant to provide any additional evidence it considers reasonably necessary to consider the claim. Again, although it is not stated in the regulation, it assists if a claimant can include all relevant costs agreements entered in relation to the matter as this assists the board in assessing whether the costs are being properly claimed and are reasonable.

Conclusion

If you are acting for a client who wishes to claim payment from the fund, you need to:

1. Ensure that each of the elements of the particular section of the Act, being the section which your client wishes to rely on to assert an entitlement, are met and that your client can prove this through the provision of documents (such as an indemnity certificate, order, transcript) and an affidavit in which you or your client depose to the facts required to be established by the section.
2. Ensure that your client is not claiming more than their entitlement under the Act or the regulation. For example, take the time to identify (and perhaps even justify) the costs thrown away within the meaning of section 22(3) of the Act rather than just submitting a claim for all costs which leaves the board to identify those costs which are costs thrown away for itself.
3. Ensure that each of the documents identified in the regulation are completed (if applicable) and provided to the board via the Department of Justice and Attorney-General.
4. Ensure that you also provide a costs agreement entered with your firm and, if applicable, any costs agreement between your firm and any counsel.
5. Ensure that you include any documents associated with the cost of preparing the claim for payment from the fund, including any bill issued by a costs assessor.
6. Respond promptly to any requests from the board for more information or documents.

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

Notes
1 Sections 4 and 5 of the Act.
2 Section 14.
3 Section 9 *Appeal Costs Fund Regulation 2010*.
4 Section 5(6) of the Act.
5 Section 14(1).
6 Section 15(1).
7 Section 15(2).
8 Section 16(3) of the Act; section 14(1) *Appeal Costs Fund Regulation 2010*.
9 Section 22(2)(a) of the Act.
10 Section 22(2)(b).
11 Section 22(2)(c)(i).
12 Section 22(2)(c)(ii).
13 Section 22 (2).

Performance management in the public sector

Obligations for the employers

The Queensland Government is by far the state's largest employer with more than 212,000 employees – and with so many employees, an effective performance management process is vital.

Public sector employees are regulated by both the *Public Service Act 2008* (Qld) (PS Act) or *Industrial Relations Act 2016* (Qld) (IR Act), with the *Fair Work Act 2009* (Cth) also applying to Queensland Government-owned corporations. The legislation sets out requirements on government agencies throughout the performance management process, including around the dismissal of employees. However, case law has also strongly influenced what constitutes an effective performance management process, with public sector employers required to try to improve employee performance before considering termination.[1]

Interestingly though, when it comes to termination, the Fair Work Commission in *Mr Robert Etienne v FMG Personnel Services Pty Ltd* [2017] FWC 1637 (*Etienne v FMG*) has determined that formal documentation is not always necessary to prove that an employee's dismissal was fair. So what does (or does not) constitute an effective performance management process?

The legislation

The PS Act provides the grounds under which a public sector manager can take disciplinary action when an employee has performed his or her duties carelessly, incompetently or inefficiently.[2] It also outlines examples of the types of disciplinary action that can be taken, such as termination, transfers and redeployment, if such action is considered reasonable in the circumstances.

From an employee perspective, the PS Act and IR Act provide important protections from arbitrary dismissal due to process obligations and good faith performance management. If an employer dismisses an employee under the PS Act and/or the IR Act for incompetence, they are required to prove they genuinely believed the employee was incapable of doing their job and there were grounds for believing this.

In doing so, decision-makers must observe two principles – the hearing rule and the rule against bias. The rules require that the employee has been given notice of performance issues and has had a reasonable opportunity to address these issues, as well as that the decision-maker has not been biased in deciding to dismiss the employee.

Ensuring the process is fair

There is solid case law confirming that public sector employers are required to try to improve the performance of their employee before considering termination. Although most workplaces have either scheduled performance review processes during probation or fixed review periods to monitor the performance of employees, it is imperative that such monitoring is not confined solely to a probation or review period.

Performance management should be an ongoing process and employers must demonstrate a high degree of transparency in addressing issues as they arise by having regular discussions with employees. Not only does this minimise legal risk, it assists employees to understand their employer's expectations, reinforces policies and procedures, and reduces attrition.

Additionally, a common issue is the adequacy and formality with which performance management is conducted. Along with the above procedural requirements, employers should ensure they maintain proper records and accurately document each step throughout any disciplinary process.

A lack of a structured and documented training process (and in some cases documented mentoring or performance improvement process) may prevent an employee from fully understanding the employer's performance expectations. Without evidence of structured and documented training, and performance appraisal, a tribunal may also determine that the employer has not provided adequate feedback or instruction to the employee.

Why formal documentation is 'useful'

Although not involving a public sector employee, *Etienne v FMG* is relevant from a case law perspective as it highlights that in some limited circumstances the absence of a formal written warning may not be required to prove a dismissal was fair.

In this case, the employer, FMG Personnel Services, dismissed an inventory controller who was believed to be "incapable of perceiving or achieving an acceptable level of work performance". FMG was criticised by the applicant for not formally warning him or creating file notes regarding his dismissal.

FMG attempted to assist Mr Etienne through one-on-one informal training before he was placed on an informal performance improvement plan, which FMG believed was the best method of improving his performance. Over the course of a year, FMG consistently communicated its expectations to Mr Etienne and assisted him in trying to achieve them. Eventually, FMG commenced a formal documentation process.

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Andrew Ross looks at fair and effective performance management in the public sector.

The Fair Work Commission found that "while useful from an evidentiary perspective, performance management need not occur in a formal documented manner in order for an employer to rely on it as the basis for the termination of an employee's employment on the grounds of poor performance".

The case demonstrates that failure to show formal documentation is not necessarily detrimental to employers if they have evidenced communication of expectations and have given the employee an opportunity to improve performance.

Conclusion

The Queensland Government already supports a formal documentation approach in a number of its policies, directives and procedures that manage conduct and performance issues.[3] While not absolutely necessary, formal documentation presents many benefits to both the employer and employee (as outlined above) and it seems unlikely that this won't continue to be a key feature of the Government's performance management process for these reasons.

To this end, and in light of the new IR Act providing public sector employees with the ability to pursue a broader range of claims, including adverse action and bullying claims, lawyers should ensure their clients understand the importance of following performance management systems in order to best protect themselves and ensure a fair capability dismissal. Also, with *Etienne v FMG* on appeal, it may very well be that the stance on formal documentation changes.

Andrew Ross is a senior associate at Sparke Helmore Lawyers. The author gratefully acknowledges the assistance of Kate Archibald in the preparation of this article.

Notes

[1] The performance management process for public sector senior executives and CEOs under employment contracts varies from the performance management process for other public sector employees.

[2] *Public Service Act 2008* (Qld) s187.

[3] See forgov.qld.gov.au/cape-resources.

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Your library's vision is to be Queensland's leading legal information service. To achieve that, we rely on a group of dedicated staff members with a unique mix of professional and technical expertise.

One of our key services is providing access to judgments and sentencing information produced by the Queensland courts. This month I would like to introduce two staff members from the judgments services team – Kerry Smith and Georgie Berkman – who share a strong commitment to providing high-quality judgments services to our customers.

Kerry Smith

Judgments services supervisor

Kerry has been with the library for more than 12 months. She was recently promoted to the position of judgments services supervisor, overseeing the day-to-day operations of the judgments services team and providing customer support during peak periods.

Kerry drives continuous improvement of our judgments services by monitoring and analysing usage of the judgments databases, researching developments in case law and legislation, and contributing specialist advice to judgments services projects. She is also responsible for drafting Queensland Sentencing Information Service (QSIS) case summaries and managing special requests for QSIS access which fall outside the standard eligibility requirements.

As a qualified solicitor, Kerry brings more than 12 years' legal experience to the role. She has qualifications in law, criminology and criminal justice, and is undertaking a Masters in Information Studies.

Georgie Berkman

Judgments services officer (criminal)

Georgie joined the library in April this year as one of our judgments services officers, maintaining our electronic judgments databases and training new QSIS users.

Georgie is a qualified solicitor with a background in criminal law. She has worked as a case lawyer for the Office of the Director of Prosecutions, preparing case files and appearing at numerous sentence hearings in the higher and lower courts. Georgie's prosecutions experience and interest in justice and fairness give her a keen understanding of the demands on practitioners to provide current and accurate information in time for court. With this in mind, Georgie contributes to the current awareness bulletins published in the announcements section on the QSIS home page.

Georgie's practical experience as a criminal lawyer gives her insight into QSIS training needs. She also has teaching experience, having tutored adults and children in several fields. Georgie is available for one-on-one or group QSIS training sessions on Mondays, Tuesdays and Fridays.

For more information or to book QSIS training, contact us at qsis@sclqld.org.au or on 07 3008 8711.

Queensland Sentencing Information Service (QSIS)

Access to QSIS is regulated by s19(2) of the *Supreme Court Library Act 1968*. Australian legal practitioners and law practices (as defined by the *Legal Profession Act 2007*) which prosecute offences or provide legal services to defendants in the area of criminal law are eligible to subscribe to QSIS. Visit **sclqld.org.au/qsis** for details on access.

Upcoming lectures

Selden Society lecture four

Join us for lecture four of the Selden Society 2017 lecture program: **'Notable trials—the trials of Oscar Wilde', *presented by the Honourable Alan Wilson QC***.

5.15 for 5.30pm, Thursday 19 October
Banco Court,
Queen Elizabeth II Courts of Law
Level 3, 415 George Street, Brisbane

Registration opens later this month – register by 12 October.

Visit **legalheritage.sclqld.org.au/lecture-four—the-trials-oscar-wilde** for details.

Building Judge Hercules

Blending the science of analytics with the art of law

Jurist Ronald Dworkin opined that the role of the judiciary is to look beyond the law to uncover its underlying principles.

In his 1986 text, *Law's Empire*,[1] Dworkin created 'Judge Hercules' as the embodiment of his idealistic version of a lawyer with legal skills sufficient to surpass the traditional limitations of human decision-making.

In the contemporary context, alarmists argue that the rapid development of technology-driven processes foreshadows the impending obsolescence of lawyers. To the contrary, the authors argue that the use of data analytics allows lawyers to embody Judge Hercules by enabling a decision-making process that combines the best of both technological and human capabilities.

Growth of analytics

Global internet traffic has increased from an average of about 100 gigabytes a day in 1992 to an astronomical 26,600 gigabytes a second today.[2] At the same time, the increasing capacity of computer processors to digest big data has made data analytics more viable.

Data analytics is now capable of extracting and categorising information to identify patterns and trends. From neuroradiology to chess, data is fast becoming a new commodity with tangible value.

Interestingly, the growth of data analytics in chess serves as a useful parallel for the purposes of forecasting the role of analytics in the legal profession. Garry Kasparov, arguably the greatest chess player of all time, advocates for a future punctuated by the increased use of artificial intelligence.[3]

Despite his prestigious title as a grand master, in 1997 Kasparov suffered a controversial loss against IBM's early chess computer, Deep Blue. The defeat prompted Kasparov to spend years studying the relationship humans have with technology. As a result, Kasparov formed the belief that the integration of humans and computers has enormous benefits for complex decision-making, both in and beyond chess.

Kasparov argues that computers are undeniably better calculators and data processors whereas humans hold superior analogical thinking, pattern recognition and executive decision-making capabilities. According to Kasparov, "we should look for the way of combining human skills and machine skills. And that, I believe, is the future role of humanity… to make sure [we] will be using this immense power of brute force of calculation for our benefit".[4]

Kasparov believes that technology provides a "steady hand" to assist us in mitigating the damage caused by the weaknesses of the human condition, including fatigue, distraction and cognitive biases. At the same time he argues that there is irreplaceable value in human intuition and its potential to complement complex data analytics.

The analytics-empowered practitioner

Data analysis in the legal context (legal analytics) is extremely powerful and provides the ability to aggregate enormous volumes of data and form sophisticated prediction models. Legal analytics enables lawyers to automate processes and subsequently reduce the time and cost of manual work. Obvious examples of the court's growing reliance on legal analytics include:

a. the Federal Court's Practice Note on Technology and the Court[5]
b. recent decisions requiring parties to perform discovery with the assistance of data analytics and automated filtering[6] (eDiscovery)
c. smart contracts (see 'Blockchain 101 – cracking the code', *Proctor*, November 2016, page six).

However, the court's progressive approach to analytics prompts the question – will technology make lawyers redundant?

Wisconsin v Loomis

The answer lies in reconciling the growing schism in the profession between those who view the law as an industry ripe for automation and those who retain the traditional view of the law as an art form.

Recently in the United States, the Wisconsin Supreme Court considered the role automated prediction should play in determining the likelihood of recidivism. In *Wisconsin v Loomis*,[7] Loomis was alleged to have been involved in a drive-by shooting. The court was required to rule on whether the use of an analytics tool in initial sentencing had violated Loomis' constitutional right to due process.[8]

At trial, an analytics tool called the Correctional Offender Management Profiling for Alternative Sanctions[9] (COMPAS) had been utilised. The role of COMPAS is to determine whether an offender is likely to reoffend by referencing the behaviour of past offenders in similar circumstances. COMPAS operates by taking information provided by a defendant and comparing it with publicly available data to build predictive models based on historical correlations. In Loomis' case, COMPAS indicated that, based on available metrics and data, Loomis posed a 'high risk' of reoffending[10] if released.

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by Angus Murray and Daniel Owen, The Legal Forecast

Ultimately the court held that COMPAS was an acceptable assistive tool and could be utilised as long as disclosure was provided beforehand. The rationale for the court's decision was that the COMPAS risk assessment protocol did not 'predict' a specific likelihood that an individual offender would reoffend. COMPAS *informed* the court's decisions but it did not take their place.[11]

The court concluded that it was not the place of COMPAS or any other analytics software to take the place of the judiciary, but rather to enrich their capacity to make a full evaluation and determination.[12]

Becoming Hercules

The process-driven aspects of law are, and have always been, capable of disruption. However, the *art* of issue spotting, effective communication, sensing untold client needs, testing witnesses and the finesse of distinguishing precedents all remain uniquely human elements of the profession.

Blending the *science* of analytics with the *art* of law is a brilliant fusion that, properly integrated, will facilitate decision-making capabilities previously thought unreachable.

Who would have guessed that Dworkin's Judge Hercules would be a cyborg?

Angus Murray is a national director and Daniel Owen is a Queensland executive member of The Legal Forecast. Special thanks to Michael Bidwell of The Legal Forecast and Tegan Childs of Ramsden Lawyers 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 Richard Dworkin, *Law's Empire*, (1986) Harvard University Press.

2 Cisco, 'The Zettabyte Era: Trends and Analysis', (7 June 2017) Cisco, cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/vni-hyperconnectivity-wp.html.

3 Elena Holodny, 'One of the greatest chess players of all time, Garry Kasparov, talks about artificial intelligence and the interplay between machine learning and humans', (24 May 2017) *Business Insider*, businessinsider.com/garry-kasparov-interview-2017-5#XHgxRtYDPLj238Ch.99.

4 Ibid.

5 Federal Court Chief Justice Allsop, 'Technology and the Court Practice Note (GPN-TECH)', (25 October 2016) Federal Court of Australia, fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-tech.

6 *Redpath Contract Services Pty Ltd v Anglo Coal (Grosvenor Management) Pty Ltd* [2017] QSC 149.

7 *Wisconsin v Loomis*, 2016 WI 68 (WI, 2016).

8 Ibid at [7].

9 Ibid at [4].

10 Ibid at [16].

11 Ibid at [74].

12 Ibid at [71]-[73].

Clarity for trusts, stepchildren and de facto partners

Changes under the *Court and Civil Legislation Amendment Act 2017*

Queensland Law Society has tirelessly advocated for reforms to the *Trusts Act 1973* (Qld), and championed clarity around the stepchild relationship for family provision applications relating to de facto relationships within the *Succession Act 1981* (Qld).

On 5 June, the omnibus *Court and Civil Legislation Amendment Act 2017* (Qld) (Amendment Act) was passed, amending more than 30 separate Acts including the *Trusts Act 1973* (Qld) and the *Succession Act 1981* (Qld).

So, what exactly does this Amendment Act do, and what does it mean for how we practise law?

For succession law, there have been a number of omissions and insertions for the *Succession Act 1981*, the most important being the insertion of s15B[1] – the effect of the end of a de facto relationship on a will – and the amendments to s40A[2] – the meaning of a stepchild.

Section 15B is a new section inserted under s15A of the Act. It provides for the effect of the end of a de facto relationship on a will and says that the ending of a testator's de facto relationship revokes:

- a disposition to the testator's former de facto partner made by a will in existence when the relationship ends[3]
- an appointment, made by will, of the former de facto partner as an executor, trustee, advisory trustee or guardian[4]
- any grant, made by will, of a power of appointment exercisable by, or in favour of, the testator's former de facto.[5]

This inserted section also provides that the ending of a testator's de facto relationship does not revoke:

- the appointment of the testator's former de facto partner as trustee of property left by the will on trust for beneficiaries that include the former de facto partner's children,[6] or
- the grant of a power of appointment exercisable by the testator's former de facto partner only in favour of children of whom both the testator and the former de facto partner are parents.[7]

These insertions and amendments have certainly provided clarity in relation to how a de facto relationship operates in terms of a will, and how certain dispositions in a will upon the end of a de facto relationship are revoked.

In relation to the amendments of s40A,[8] these alterations focus primarily on clarifying when a stepchild relationship ends in relation to family provision applications. The amendments incorporate other means of spousal relationships extending to civil partnerships and de facto partners. Section 40A(2) and (3) are omitted, with a new s40A(2) and (3) inserted. The new s40A(2) now provides for the relationship of a stepchild to stop upon:[9]

- divorce of the deceased and the step-parent
- termination of a civil partnership between the deceased and the step-parent
- ending of a de facto relationship between the deceased and the step-parent.

Also, the new s40A(3) now provides clarification as to when a relationship between a stepchild and a step-parent does not stop. These circumstances include:

- if the step-parent dies before the deceased person when the marriage, civil partnership or de facto relationship between the deceased and the parent subsisted when the parent died,[10] and
- when the deceased person remarried, entered into a civil partnership or formed a de facto relationship after the death of a stepchild's parent, if the marriage, civil partnership or de facto relationship between the deceased person and the parent subsisted when the parent died.[11]

The legislature provides an additional subsection in relation to the definition of 'termination' of a civil partnership under s40A(4).[12] This definition is to take the same meaning as under s14(1)(b) or s19 of the *Civil Partnerships Act 2011* (Qld).

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with Christine Smyth

In relation to the *Trusts Act 1973*, there are a number of amendments, some relating to the power to delegate trusts. However, one of the most important amendments impacting the way in which practitioners carry out their work is that of s67.[13] This section is best recognised as the creditors' notice in relation to the protection of trustees by means of advertisements during notices of intention to apply for a grant of representation, be that probate or letters of administration.

This amendment omits s67(1)(a) and (b), and inserts new paragraphs that a trustee or executor may give notice by advertisement in a publication approved by the Chief Justice under a practice direction, or a newspaper circulating throughout the state, and sold at least once each week.[14] These amendments remove the requirement to calculate the 150 kilometres between a deceased's last known address and Brisbane, and removes the requirement for publication to occur within a newspaper approved for the area of the deceased's last known address.

Other amendments to the *Trusts Act* relate to achieving consistency within the *Powers of Attorney Act 1998* (Qld) by removing the requirement that the delegation of the administration of a trust is to be made by power of attorney executed as a deed.

I encourage all to consider this Amendment Act and the clauses that give rise to amendments to the *Trusts Act* and *Succession Act* so that you may become familiar with the updates in the legislation.

Notes

1 *Court and Civil Legislation Amendment Act 2017* (Qld), s246.
2 Ibid, s247.
3 *Succession Act* s15B(1)(a).
4 Ibid, s15B(1)(b).
5 Ibid, s15B(1)(c).
6 Ibid, s15B(2)(a).
7 Ibid, s15B(2)(b).
8 *Court and Civil Legislation Amendment Act 2017* (Qld), s247.
9 *Succession Act*, s40A(2)(a),(b),(c).
10 Ibid, s40A(3)(a).
11 Ibid, s40A(3)(b).
12 Ibid, s40A(4).
13 *Court and Civil Legislation Amendment Act 2017* (Qld), s252.
14 *Trusts Act 1973* (Qld), s67(1)(a),(b).

The author expresses her gratitude to solicitor Chelsea Baker of Robbins Watson Solicitors and QLS policy solicitor Vanessa Krulin, who assisted in writing 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.

Accepting instructions from joint clients

by Stafford Shepherd

The intention of this note is to flag some points for consideration when accepting instructions from joint clients.

At the outset it is important to identify who is the client. The glossary of terms in the *Australian Solicitors Conduct Rules 2012* (ASCR) defines client in these terms: "With respect to the solicitor or the solicitor's law practice… a person (not an instructing solicitor) for whom the solicitor is engaged to provide legal services for a matter."

It is to this client that we owe a number of ethical obligations, including but not limited to:

- serving the best interests of a client in any matter in which we represent the client[1]
- delivery of legal services competently, diligently, and as promptly as reasonably possible[2]
- providing clear and timely advice to assist a client to understand relevant legal issues and to make informed choices[3]
- following a client's lawful, proper, and competent instructions[4]
- maintaining a client's confidences[5]
- avoiding conflicts between duties owed to current and former clients[6]
- avoiding conflicts between duties owed to two or more current clients.[7]

Identifying where our duties are owed and to whom may not always be straightforward.

In accepting instructions from an 'agent', we need to satisfy ourselves that we have been instructed to act as we must be certain that we have the necessary authority.[8]

If instructions come to us from a third party who purports to represent the interests of a 'client', we need to satisfy ourselves that the 'client' indeed wishes us to act.

To be satisfied that we hold instructions, we need to either see the 'client' personally or obtain written confirmation from the 'client' (including when the 'client' is a corporate entity of any resolutions appointing us to act) or taking such steps that the circumstances may require to be satisfied that we can act for the 'client'.[9]

On many occasions we are called upon to represent two or more persons whose interests appear the same in a 'joint engagement'. Although the interests of the joint client appear the same, the ethical obligations are owed to each client separately. For example, when we act for a married couple or domestic partners in a transaction, we must be certain to obtain the authority of each partner to undertake the engagement.

Even if satisfied that there is authority to create a solicitor-client relationship, we need to remember that such authority "is not the same as authority thereafter to give instructions in the performance of the relationship".[10]

The risks that arise are well illustrated by *Legal Services Commissioner v Mines*,[11] in which the practitioner acted on the sale of property for domestic partners and, acting on the instructions of the female partner, drew from the settlement monies a sum of money and released those funds to her without instructions of both sellers. As the tribunal noted: "A solicitor in the circumstances of Mr Mines facing two clients who were themselves personally at odds and with a known obligation jointly and severally… was to treat each with equal care and not as a single unit".[12]

It has been said that "a solicitor's contract of retainer is with each and every client; the duties of the solicitor are owed and must be discharged to each of them. *It must follow that a solicitor is entitled to communicate with and take instruction from only one of several clients if he has the authority of the other clients to do so…* from the point of view of [the solicitor] the authority must be actual, whether express or implied, or apparent; but in each case the authority must emanate from the alleged principals, not the alleged agent."[13]

It has also been held that when we accept joint instructions we have a duty of disclosure to all.[14]

In summary:

1. Identify the client.
2. Joint clients should not be treated as a single unit.
3. Make certain you have authority to act.
4. Clearly stipulate your authority to receive instructions.
5. Make certain joint clients are aware of all information.

Stafford Shepherd is director of the QLS Ethics Centre.

Cyber crims target funds transfers

The Queensland Law Society Ethics Centre has warned of recent incidents in which cyber criminals divert payments to and from solicitor trust accounts.

The attackers access a firm's email system, often without leaving any sign of the intrusion. The attackers then monitor email until a party is due to deposit funds to a specified account, at which point the request email is intercepted and the account number changed.

The diverted funds may be money paid by clients to the solicitor's trust account, or money being disbursed from trust. Almost $700,000 in funds has been diverted in this way in recent attacks.

Once the criminals become aware that the intrusion has been detected, the final stage can be a mass email to everyone on the firm's contact list attaching documents containing malware links.

Firms are urged to avoid using email to communicate bank account numbers. If there is no other choice, confirm transfer instructions and account numbers by direct contact with clients.

Practitioners should also know and follow good password and cybersecurity practices. Visit the QLS Ethics Centre page at **qls.com.au** for more guidance.

Notes

1 Rule 4.1.1 ASCR.
2 Rule 4.1.3 ASCR.
3 Rule 7.1 ASCR.
4 Rule 8.1 ASCR.
5 Rule 9 ASCR.
6 Rule 10 ASCR.
7 Rule 11 ASCR.
8 Rule 8.1 ASCR requires us to act on the client's lawful, proper, and competent instructions.
9 Sheikh Amed Jaber Al-Sabah v Ali & Ors [1999] EWHC 840 (Ch) at [48] Ferris J.
10 Vukminca v Betyounan [2008] NSWCA at [48].
11 LPC 002/10.
12 Ibid at page 4.
13 Farrer v Messrs Copley Singletons (A Firm) [1997] EWCA CW 2127 at pp 20-21, emphasis added.
14 Perry v Eduoin WE, Independent April 1 1994 cited by Charles Hollander QC and Simon Salzedo QC in Conflicts of Interest (4th edition).

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Conditions imposed on father not appropriate for Hague Convention

with Robert Glade-Wright

Hague Abduction Convention – mother ordered to return child to NZ – conditions imposed on father set aside

In *Arthur & Secretary, Department of Family & Community Services and Anor* [2017] FamCAFC 111 (29 June 2017) the mother, who retained the parties' child in Australia after a visit, was ordered by the Family Court of Australia to return the child to New Zealand under the *Family Law (Child Abduction Convention) Regulations 1986* (Cth). The Full Court (Bryant CJ, Thackray & Austin JJ) dismissed the mother's appeal against that order but allowed the father's cross-appeal against conditions imposed in a subsequent order.

The conditions were ([60]) that the father (who in 2013 was granted supervised contact in NZ) pay for the mother's rental accommodation in NZ for two months (and bond), undertake to pay her NZ$535 a week until she began receiving welfare payments, pay all child support obligations in Australia and NZ, and undertake to provide his employer with a copy of an existing protection order and not use any firearm until further order of the NZ Family Court.

The husband argued that the conditions were ultra vires or made without considering his meagre financial position, frustrating the return order.

The Full Court said ([69]) that reg.15(1) conferred the power to impose a condition the court considered "appropriate to give effect to the Convention", citing ([76]) an English case *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021 at 1025 in which Butler-Sloss LJ said that "conditions or undertakings should operate only until the courts of the country of habitual residence can become seized of the proceedings brought in that jurisdiction", "must not be so elaborate that their implementation might become bogged down in protracted hearings and investigations", and "courts must be careful not … to usurp … the functions of the court of habitual residence".

The Full Court concluded ([94]):

" … [H]is Honour erred in failing to recognise that the conditions would result in the child not being returned to the country from which she was wrongfully removed, and that they therefore did not satisfy the requirement that they be 'appropriate to give effect to the Convention'."

Property – long separation under same roof – wife bought land five years after parties separated finances – judge erred in finding contributions by husband

In *Zaruba* [2017] FamCAFC 91 (12 May 2017) the Full Court (Bryant CJ, Thackray & Murphy JJ) heard the wife's appeal against a property order made by Moncrieff J of the Family Court of Western Australia. The parties separated their finances in 1988, divorced in 1996, but lived separately under the one roof until 2005. The wife gave birth to twins in 1996 to another man, moving out with her children in 2005.

In 1993 she bought land at Mindarie (a Perth suburb) for $74,000 paid by a friend, Mr S. A home was built in 2004 using $125,500 from her mother and another $146,000 from Mr S, the wife and children moving there in 2005. The Mindarie property was at trial worth $1m. Moncrieff J adopted an asset-by-asset approach, assessing the husband's contributions as 10% ($100,000). The Full Court said ([12]) that the husband made no financial contribution to the property and ([15]) that an asset-by-asset approach was proper but considered ([27]) that "it was not open … to conclude that it was just and equitable to make any order altering the wife's interests in Mindarie". The court added ([28]-[29]):

" … [W]e … are unable to see any evidentiary basis for his Honour's finding that the husband had made 'non-financial and indirect' contributions to Mindarie in the period between its purchase … and the wife's departure …

… [D]espite finding that … [he] had performed 'some parental responsibilities' for the [wife's] children … we are unable to see how that should translate into the husband acquiring an interest in a property to which the wife herself made virtually no financial contribution."

Allowing the wife's appeal, the court declared that she held her interest in Mindarie to the exclusion of the husband.

International commercial surrogacy – order for twins to live with sperm donor and his former male partner

In *Adair & Anor and Bachchan* [2017] FCWA 78 (22 June 2017) Duncanson J of the Family Court of Western Australia heard an undefended application under Part 5 of the *Family Court Act 1997* (WA) in respect of twin children aged four by Mr Adair and his former de facto partner, Mr Bonfils. While their relationship ended before the children were born, they remained close friends who lived together as "housemates". The twins were born pursuant to an international commercial surrogacy arrangement entered into by Mr Adair and the birth mother in India.

The court found ([10]-[19]) that the surrogacy was documented; the children were conceived with sperm from Mr Adair and an egg from an anonymous donor; both applicants were in India for the birth, spending three weeks there before bringing the children to Perth; the children were issued with birth certificates in Delhi naming Mr Adair as father and the mother as 'NIL'.

The children obtained citizenship by descent from Mr Adair and became Australian citizens in 2013 (prior to which DNA testing found him to be the genetic father of the children). An opinion was adduced from an advocate in New Delhi that Mr Adair and the surrogate were legally competent to make the contract and that she would have no enforceable right after giving birth. The agreement recorded ([27]-[30]) that the surrogate gave informed consent and was to be paid in rupees the equivalent of $3858 for a normal birth or $4458 for caesarean birth.

The court said ([36]-[39]) that while Mr Adair was the primary carer of the children he had been diagnosed with a terminal illness so "wishes to ensure that the children are cared for and loved by someone as he had hoped to do", Mr Bonfils being that person and the children having a close relationship with both applicants. Neither was a parent ([58]) but they were held ([59]) to have standing as "persons concerned with their care, welfare or development" (ss88 and 185 *Family Law Act*). The court ([62]-[64]) took into account the considerations of s66C (the FCA's equivalent of s60CC FLA) and was satisfied ([71]) that the orders sought were in the children's best interests.

It was ordered that the applicants share parental responsibility and that the children live with them, the birth mother to be served with the order.

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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Federal Court casenotes

with Dan Star QC

Consumer law cases

In trade or commerce?

In *Hi-Rise Access Pty Ltd v Standards Australia Limited* [2017] FCA 604 (30 May 2017) the Federal Court gave its judgment on a separate trial as to whether certain alleged representations were made and, if made, whether those representations were made "in trade or commerce". The defendants denied that any of the representations were made "in trade or commerce" as required by s18 of the Australian Consumer Law (ACL) in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

The key question before the court was whether activities of the peak Australian standards body in developing, publishing and promoting Australian standards is "in trade or commerce" within the meaning of s18 of the ACL. The court (Murphy J) dismissed the proceeding on the basis that the relevant activities of Standards Australia were not, by their nature, of a trading or commercial character and its conduct was therefore not "in trade or commerce" (at [7]).

Justice Murphy summarised his reasons at [6]: "I have found that the impugned statements conveyed some of the alleged representations, but I am not persuaded that they were made 'in trade or commerce'. The evidence shows that Standards Australia operates in a quasi-government role in conjunction with the Commonwealth Government to facilitate the development of Standards and to promote the benefits of Standards and standardisation in the public interest. In my view it does not do so in pursuit of trading or commercial objectives. I consider that Standards Australia's activities in developing, publishing and promoting Standards are directed to the interests of the Australian community because of the economic, regulatory, safety and other benefits that flow from standardisation. It is uncontentious that Standards Australia earns significant income through royalty payments from SAI Global Limited (SAI), the company to which it has granted a worldwide licence to publish, distribute and sell Standards and related products. However, in my view the evidence does not support the conclusion that Standards Australia's relevant activities were designed to increase sales of Standards for the commercial benefit of either itself or SAI."

The court discussed the applicable principles for the requirement that misleading or deceptive conduct, or conduct that is likely to mislead or deceive, occurs "in trade or commerce" (at [131]-[142]). The leading authority (which was discussed by the court) is still *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 (at [135]).

Also referred to was the case law concerning whether the relevant conduct may relate to the trade or commerce of a party other than the representor (at [161]-[165]).

Some cases on representations to the public

There is a well-established distinction as to the different principles to be applied to a case of misleading or deceptive conduct involving representations to specific individuals or the public (or a segment of the public).

A series of Federal Court cases have addressed and applied the principles falling into that latter category when the public is involved. These include the following:

REA Goup Limited v Fairfax Media Limited [2017] FCA 91 (13 February 2017) (Murphy J): The case concerned advertisements promoting a mobile phone application of the defendant's subsidiary (Domain Group) to the effect that Domain has the "#1 property app in Australia", "the most property listings in Sydney", "the best property listings in Melbourne" and that the Domain app is "Australia's highest rated property app".

Director of Consumer Affairs Victoria v Gibson [2017] FCA 240 (15 March 2017) (Mortimer J): This case concerned the conduct of Belle Gibson (and her corporate entity) in relation to her claims of being diagnosed with brain cancer and also statements about their charitable donations. Although the case proceeded as an undefended matter, it is an interesting and high-profile application of the principles for contravention of ss18 and 29 of the ACL as well as s29 (unconscionable conduct). Note: The declarations of contravention ultimately made by the court are found in its subsequent judgment, *Director of Consumer Affairs Victoria v Gibson (No.2)* [2017] FCA 366 (7 April 2017).

Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liquidation) (No.2) [2017] FCA 709 (23 June 2017) (Beach J): This case involved false and misleading representations in the supply of services to consumers seeking recognition of their prior learning to gain qualifications. The court also determined claims of unfair contract terms (ACL ss23-24), unsolicited consumer agreements (ACL ss74-79 and 86) and unconscionable conduct ACL ss21-22). As occurred in the *Gibson* case, the respondents did not appear at the trial in *Get Qualified*. Nonetheless, once again there was a detailed analysis of the facts in accordance with the applicable key principles for these claims.

It is apparent from the first and last mentioned cases that there is continuing debate about whether, in a s18 case with the public, it is necessary for the applicant to show that a significant proportion of the relevant class of persons were misled or were likely to be misled by the relevant conduct. See the view of Muphy J in the *REA Group* case at [19] and by Beach J in the *Get Qualified* case at [42]. In the latter, Beach J explained: "... in determining whether a contravention of s18 of the ACL has occurred, the focus of the inquiry is on whether a not insignificant number within the class have been misled or deceived or are likely to have been misled or deceived by the respondent's conduct. There has been some debate about the meaning of 'a not insignificant number'. The *Campomar* formulation looks at the issue in a normative sense. The reactions of the hypothetical individual within the class are considered. The hypothetical individual is a reasonable or ordinary member of the class. Does satisfying the *Campomar* formulation satisfy the 'not insignificant number' requirement? I am now inclined to the view that if, applying the *Campomar* test, reasonable members of the class would be likely to be misled, then such a finding does not necessarily carry with it that a significant proportion of the class would be likely to be misled. A finding of a 'not insignificant number' of members of the class being likely to be misled is conceptually speaking an additional requirement that needs to be satisfied." (Note: Beach J's references to *Campomar* are to *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at [102]-[103].)

Finally in the context of cases involving the the public, it is worth noting the Full Court's decision from early in the year in *Crescent Funds Management (Aust) Ltd v Crescent Capital Partners Management Pty Ltd* [2017] FCAFC 2 (12 January 2017) (Greenwood, Edelman and Markovic JJ). It is an illustration of the arguments arising in defining what is the relevant class of consumers in a misleading or deceptive conduct claim under the *Australian Securities and Investments Commission Act 2011* (Cth).

Reliance in the case of omissions

In *470 St Kilda Road Pty Ltd v Robinson* [2017] FCA 597 (30 May 2017), the court held that a statement that to the best of the person's knowledge and belief he had made all reasonable inquiries before making the statutory declaration, was misleading or deceptive or likely to mislead and deceive (at [73]-[74]).

Dan Star QC is a senior counsel at the Victorian Bar, ph (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 June to 31 July 2017

with Bruce Godfrey

Civil appeals

Noffke v Oceanside Management Pty Ltd t/as Broadwater Apartments [2017] QCA 156, 21 July 2017

Application for Leave *Queensland Civil and Administrative Tribunal Act* – where a tenancy agreement between the applicant and respondent was terminated by order of the Queensland Civil and Administrative Tribunal (QCAT) on the basis of excessive hardship associated with the applicant's ill-health – where, in a separate application, QCAT ordered compensatory payment to the respondent from the applicant's rental bond pursuant to s350(2) of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (RTRAA) – where an application by the applicant for leave to appeal this order to the QCAT Appeal Tribunal (the tribunal) was dismissed – where the applicant contends that s350(2) RTRAA does not apply to an application made because of excessive hardship by a tenant – where, before the tribunal which heard Oceanside's application and in written submissions to the tribunal, the applicant contended, correctly, that he was not liable to pay reasonable costs incurred in reletting the premises under clause 7 of the lease – where clearly, a termination by order of QCAT made under s343 RTRAA was not a circumstance that triggered the clause and a break-lease fee was not payable by the applicant under it – where it is relevant to the interpretation of this section that Chapter 5 RTRAA contains not only the provisions for termination for excessive hardship on the application of a tenant, but also provisions for termination for excessive hardship on the application of the lessor if the lessor would suffer such hardship were the tenancy agreement not terminated – where given the framework which permits an excessive hardship termination application by a tenant or a lessor, the question to be resolved may be refined to whether or not s350(2) RTRAA applies both to an application made because of excessive hardship by a tenant and to an application made because of excessive hardship made by a lessor – where there are features of the language in which the section is enacted which indicate that it applies only to a lessor's application – where firstly, the conditional clause which introduces the section refers to "the termination order made" – where the definite article relates the order to a termination order to which s350(1) RTRAA applies, that is to say, a termination order made on an application that has been made other than by a tenant – where secondly, the expression "as well as issuing the warrant of possession" in using the definite article, relates the warrant of possession to one issued under s350(1) RTRAA – where as noted, such a warrant is issued only on the application of a person other than the tenant – where so construed, s350(2) RTRAA is a provision which authorises orders, including an award of compensation to a tenant, where a termination order is made on a lessor's application because of excessive hardship, and where, concurrently, a warrant of possession is issued against the tenant under s350(1) RTRAA – where, in conclusion, the discretion to make orders, including orders by way of compensation, conferred by s350(2) RTRAA is one that is not applicable to the circumstance where a termination order is made on the application of a tenant because of excessive hardship.

Leave granted. Appeal allowed. Set aside the orders of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal. Substitute therefor, the following orders: The appeal to the Appeal Tribunal is allowed; The order of the tribunal be set aside to the extent of $519.70; In substitution therefore, it be ordered that the said amount of $519.70 be paid to the applicant. Order that the respondent refund to the Residential Tenancies Authority the sum of $519.70 paid to it pursuant to the orders of the tribunal.

Rose v Tomkins & Ors [2017] QCA 157, 21 July 2017

General Civil Appeal – where the testatrix was in a de facto relationship – where the testatrix and her de facto partner both had their own respective children – where the testatrix and her partner held their residential home as joint tenants – where the testatrix and her partner gave instructions that they both wished their half-share in the residence to pass to their respective children after both of them died – where instructions were given to sever the joint tenancy – where the testatrix's will gave her partner the right to occupy the home until he died or remarried, at which stage the residence would form part of the testatrix's residuary estate – where, as the primary judge described it, clause 6 "made a clumsy right to reside in the home in favour of Mr Tomkins provided he paid the rates and an insurance policy on the house and kept it in repair, and provided that he did not marry or enter into a de facto relationship" – where the current rectification power in s33 of the *Succession Act 1981* (Qld) is a broader power than existed under the provision it replaced – where the appellant was required to satisfy the court that the will did not carry out the testator's intentions because the terms of the will did not give effect to her instructions – where the intention must be examined as at the date of the will, not the date of death – where the testatrix's will gave a half-share in her residuary estate to her children and the other half-share to her partner's children – where it was not known whether the testatrix's partner's will mirrored hers – whether there was clear and convincing proof that the will did not carry out the testatrix's intentions because it failed to give effect to her instructions – where it cannot be disputed that, by clauses 6 and 7, Ms Jones' children did not receive the entirety of her half-share of the house after both she and her partner died (or the earlier expiration of the right to reside), but only a one quarter interest in the remainder of the house with the other quarter interest being gifted to Mr Tomkins' children – where in the circumstances of the present case, the will did not carry out Ms Jones' intentions because it did not give effect to her instructions that her half-interest go to her children – where the will was only capable of achieving the result that her children received a half-interest in the event that her partner's will was (and remained) in the same terms – where the will as drafted was not capable of guaranteeing that a half-interest pass to them – where it is evident that Ms Jones' instructions were to safeguard her children's inheritance without qualification – where the appellant's submission that the will as drawn did not give effect to, nor was it capable of giving effect to, Ms Jones' instructions is correct, in that Ms Jones' children did not receive her half-share of the house but only a one-quarter interest in the remainder of the house – where in the circumstances of the present case, the will did not carry out Ms Jones' intentions because it did not give effect to her instructions that her half-interest go to her children – where the will was only capable of achieving the result that her children received a half-interest in the event that her partner's will was (and remained) in the same terms – where the will as drafted was not capable of guaranteeing that a half-interest pass to them – where it is evident that Ms Jones' instructions were to safeguard her children's inheritance without qualification – where that is consistent with the advice given to her by her solicitor to sever the joint tenancy – where the appellant argued that upon the appeal succeeding, the appellant succeeded on a question of law – where there is no jurisdiction under the *Appeal Costs Fund Act 1973* (Qld) for the Court of Appeal to grant an indemnity certificate to an appellant (only to a respondent) – where as such, the appellant seeks an order similar to those made in matters where a respondent does not appear.

Orders: The will of CHERYL MARIE JONES deceased dated 20 May 2015 be rectified as follows: In clause 6(d), deleting the words "then it shall form part of my residuary estate" and inserting the following words in their stead: "Then my interest in the property shall be transferred absolutely to those of my sons PETER JOSEPH JONES and PAUL EDWIN JONES who survive me and if more than one in equal shares as tenants in common." The respondents pay the appellant's costs of and incidental to the appeal, but limited to the amount the respondents recover pursuant to the certificate below. The respondents be granted a certificate under s15 of the *Appeal Costs Fund Act 1973*.

Criminal appeals

R v Hyde [2017] QCA 148, Orders delivered ex tempore 30 June 2017; Reasons delivered 11 July 2017

Appeal against Conviction – where the appellant was convicted of 11 counts of sexual offending against two female complainants who were sisters, including maintaining a sexual relationship with each and specific counts of rape and sodomy

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– where both complainants gave evidence of frequent sexual offending – where there was some evidence that the appellant was living in Sydney during a period of the alleged frequent offending occurring in Brisbane and would only visit Brisbane occasionally – where each complainant gave evidence of a single specific instance in which both complainants were assaulted simultaneously which was largely consistent with the other but contained some discrepancies – where the appellant submitted that the evidence of each complainant was in some respects inconsistent with her preliminary complaint – where the events were said to have occurred more than 11 years before the initial complaints – where the frequency of the offending alleged by each complainant, was remarkable – where each complainant referred to occasions of the most serious sexual offending at times when other persons were present in the appellant's house – where it was certainly necessary for the jury to carefully consider whether all of this could have happened so often, over a period of some years, and with no complaint by either girl to her mother or anyone else – where it was also necessary for the jury to consider, as was argued by defence counsel, whether the complaints had been fabricated because of the complainants' resentment towards the appellant for having had an affair with their mother – where however, the jury was given a *Longman v The Queen* (1989) 168 CLR 79 direction as well as a *R v Markuleski* (2001) 52 NSWLR 82 direction – where the various matters argued for the appellant were substantial arguments to the jury – where they were not arguments which required the jury to acquit the appellant on these counts – where in a case such as this, it is well recognised that the jury has advantages which are not enjoyed by the appellate court and it is not established here that the jury misused them – where in conclusion it was open to the jury to convict on each of these 11 charges and the first ground of appeal must be rejected – where the prosecution's closing address relied upon the distressed condition of one of the complainants while she was giving evidence as corroborative of her account – where the appellant submitted that the prosecutor had misled the jury, in the absence of a warning by the judge, by inviting them to reason that the complainant's apparent distress made her account more likely to be true – where the distressed condition of the complainant was not the subject of evidence but was merely an observation of her demeanour while giving evidence – where the prosecution and defence closing addresses were clear about their respective arguments about the complainant's demeanour – where the distressed condition of the complainant was not the subject of evidence; rather it was the complainant's apparent condition as she was giving evidence, upon which the prosecutor relied – where there was no evidence which called for a decision by the judge as to whether it was relevant, or a direction as to how, as a piece of evidence, it might be relevant – where there was no miscarriage of justice from the absence of any direction, or further direction, by the judge on this question and the second ground of appeal must be rejected – where the defence case included specific claims of concoction by the complainants – where the trial judge, in summing-up, said that there was "no real suggestion or substantial suggestion" of the complainants concocting their evidence together – where the trial judge's direction, in context, was referring only to the incident in which both complainants alleged that they had been simultaneously assaulted – where the defence alleged fabrication in cross-examination of each complainant and the case must have been understood as an allegation that they had concocted the story together – where the trial judge's comments seriously misstated the defence case and had a real potential to undermine it – where in fairness to the judge, this was a direction taken from the then terms of the Benchbook and with the agreement, or without the objection, of counsel – whether a miscarriage of justice occurred – where in Queensland, that doctrine has been abolished by s132A of the *Evidence Act 1977* (Qld), which provides that in a criminal proceeding, similar fact evidence must not be ruled inadmissible on the ground that it may be the result of "collusion or suggestion" and that "the weight of the evidence is a question for the jury…" – where an argument that they had fabricated their stories carried with it the implication that they had concocted their stories together – where, in particular, that is how the defence argument should have been understood in respect of the occasion on which they said that they had been abused by the appellant at the same time – where although there were some differences in their versions of what occurred on that occasion, there were many similarities – where the argument that they had each fabricated their evidence should not have been understood that, quite independently of each other, they had fabricated very similar versions of this occasion – where, yet, that was the effect of what they were told by the judge, in the statement in question, about the defence case – where part of the argument of defence counsel was that C had made up her story about what had happened to her and A, and having done so, C influenced A to make a similar complaint – where in support of that argument, counsel referred to an unusually good memory by C and a poor and vague memory by A – where that was a particular process of concoction which the jury had to consider – where the judge did remind the jury of the defence argument that "these two girls are making it up", but other than in the passage of which complaint is made, said nothing about concoction between them – where regrettably it is concluded that by this statement by the judge, the jury might have misunderstood the defence argument and that this could have affected the verdicts – where the respondent does not argue that the proviso should be applied in the event that this ground of appeal is established.

Appeal allowed. Set aside the verdicts of guilty in the District Court. Order a new trial on those charges.

R v Elfar; R v Golding; R v Sander [2017] QCA 149, 11 July 2017

Appeals against Conviction – where the Australian Federal Police (AFP) received information from the United States Drug Enforcement Agency (DEA) that a ship was sailing from South America containing narcotics, and had a planned rendezvous with an Australian vessel, the *Mayhem of Eden*, at an identified location – where AFP surveillance identified two ships about a quarter of a nautical mile apart near the location identified by the DEA

– where the *Mayhem of Eden* was tracked back to a location at the Scarborough Marina – where two men were observed leaving the vessel, each with a large, heavy duffel bag – where one of the men, Golding, subsequently took the bags into a hire car, which was stopped and searched by the AFP – where the AFP officer cut open the duffel bag and it was found to contain blocks of cocaine – whether the AFP officers suspected, on reasonable grounds, that a thing relevant to an indictable offence was in the car – whether the AFP officers suspected, on reasonable grounds, that it was necessary to exercise the powers under s3T *Crimes Act 1914* (Cth) to prevent the drugs from being concealed, lost or destroyed – where the duffel bag was opened in non-compliance with s3U *Crimes Act 1913* (Cth) because it was cut open without giving the persons apparently in charge of the car the opportunity to open it – where the fact that the information had been provided by this source, a leading drug law enforcement agency, was relevant to the weight which is to be given to it – where it was detailed, progressively supplied information as to the timing and precise location of the rendezvous of the vessels – where that information was then supported by two vessels, the *Mayhem* included, being found at a time and at a location which was consistent with the most recent information from the DEA – where after the vessels had apparently met, the *Mayhem* immediately sailed back to Australia – where Elfar and Golding were then seen leaving the *Mayhem*, within an hour of berthing, carrying large heavy bags – where in these circumstances, a reasonable person could at least suspect that the bags within the vehicle contained drugs which had been illegally imported – where there was a reasonable suspicion held by Mr Watt (police officer) that the drugs were in the car – where once that is accepted, there was clearly a risk that the drugs could have been "concealed, lost or destroyed" by the police officers losing track of the car – where there was, at the least, a reasonable ground for a suspicion by Mr Watt that it was necessary to exercise the power to stop and detain the car, and to search the car for the drugs – where the bag which was in the boot was cut open by Ms Barrett without giving an opportunity to the person or persons apparently in charge of the car to open the bag – where those persons were Golding and Triplett, each of whom was then handcuffed and sitting on the side of the road – where as the prosecution agrees, they could have been given an opportunity to open the bag, and therefore, the bag was opened in non-compliance with s3U – where it did not follow that this non-compliance required the evidence of what was found in the bag to be excluded – where Ann Lyons J concluded that there was a clear non-compliance, but that, having regard to the probative value of the evidence, it should not be excluded in the exercise of what can be described as a *Bunning v Cross* (1978) 141 CLR 54 – where it is conceded, both in the written and oral submissions of counsel for the appellants, that if the vehicle was lawfully stopped and searched, this non-compliance with s3U alone could not have justified the exclusion of the evidence – where the *Mayhem of Eden* was searched, and cocaine seized, pursuant to a warrant – where the appellant contended that the evidence of the search and seizure should have been excluded because of events which preceded it – where members of the AFP Operational Response Group (OR Group) were directed to board the *Mayhem of Eden*, by forced entry, shortly after the car carrying Golding was stopped and searched – whether the OR Group leader held a reasonable suspicion that there were narcotics on the *Mayhem of Eden* – where Elfar, who had been arrested at Kippa Ring, informed the AFP just prior to the OR Group's forced entry that he had a key to the vessel but where that circumstance was unknown to the OR Group – where that was unknown to Detective Superintendent Baker or any of the OR Group before the group went on board – whether Elfar was a person 'apparently in charge' of the *Mayhem of Eden* for the purposes of s203D(2) *Customs Act 1901* (Cth) – where Ann Lyons J held there were circumstances of urgency, which precluded the provision of that opportunity and which required the vessel to be forcibly entered – where her Honour referred to the need to secure the drugs to ensure they were not lost or destroyed, noting that they could have been tipped overboard had another offender been on the vessel – where there was no error in that reasoning – where each of the appellants was examined purportedly under the *Australian Crime Commission Act 2002* (Cth) (the ACC Act) after he had been charged – where the High Court in *X7 v Australian Crime Commission* (2013) 248 CLR 92 held that the ACC Act did not authorise the compulsory examination of a charged person about the subject matter of that charge – where Elfar and Golding submitted that there had been a fundamental alteration of the accusatorial judicial process of a criminal trial by reason of the unauthorised examination – whether the fact of the unauthorised examination resulted in a miscarriage of justice – where Elfar and Golding further submitted that they suffered a specific prejudice because they could not give evidence without running the risk of further prosecution if the evidence diverged from that given during the ACC examination – where neither Elfar nor Golding provided any indication of what exculpatory evidence he might have given at the trial but for the suggested impediment – whether a miscarriage of justice occurred – where Sander further submitted that his right of election to testify in his own defence had not been decided according only to the strength of the evidence presented against him – where Sander adduced evidence of his instructions to his lawyers at trial, which included a statement that he understood that if he gave evidence which was inconsistent with that which he gave before the ACC examination, he could be charged with perjury – where Sander did not provide evidence as to the content of any exculpatory evidence which he could have given at trial – whether a miscarriage of justice occurred – where in an application for a stay of a criminal proceedings, the court must prospectively assess the risk of prejudice to the defendant from the irregularity which has occurred – where the refusal of a permanent stay in the cases which have been discussed is irreconcilable with the first submission for the appellants, because if the inevitable effect of the irregularity would be a "failure of process which departs from the essential requirements of a fair trial", constituting a miscarriage of justice, a stay would have to be granted – where neither appellant now claims that his evidence to the ACC was untrue, inaccurate or incomplete – where neither offers any indication of what exculpatory evidence he might have given at the trial, but for the suggested impediment from his ACC examination – where prior to the trial, a defendant's unwillingness to disclose his defence might be justified – where now there has been a trial, which has been duly conducted and the appellant must demonstrate an injustice by revealing the content of the case (if any) which he might have asked the jury to consider – where the absence of that evidence is unexplained; in particular, it is not suggested that the disclosure of a case to this court, which was not put to the jury, could now expose either appellant to an offence by that case being inconsistent with his evidence to the ACC – where it follows that neither of these appellants has proved that by his evidence given to the ACC, he was unfairly deprived of the chance of an acquittal – where the appellant Sander was arrested and his ship was searched and seized beyond the outer edge of the contiguous zone of Australia – where s184A and s185 of the *Customs Act 1901* (Cth) provided the authority to board the ship and detain Sander – whether s51(xxix) of the *Constitution* requires some nexus or connexion between Australia and the "external affairs" which the law seeks to regulate – whether s184A and s185 of the *Customs Act 1901* (Cth) nevertheless satisfied any such requirement in s51(xxix) if it existed – whether s184A and s185 of the *Customs Act 1901* (Cth) are beyond the legislative power of the Commonwealth under s51(xxix) of the *Constitution* – where in a pre-trial application, Sander challenged the validity of these acts on the basis that those provisions of the *Customs Act* were invalid because they were unsupported by any head of power under s51 of the *Constitution* – where that application was dismissed upon the basis that the arguments for the invalidity of these provisions were inconsistent with several decisions of the High Court – where in this court, counsel for Sander accepts the correctness of that decision according to those decisions, particularly *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 and *XYZ v The Commonwealth* (2005) 227 CLR 532 – where it is accepted that according to these authorities, this court is bound to hold that each of these provisions of the *Customs Act* was valid as an enactment within the scope of the external affairs power – where provisions were engaged only in circumstances which included the location of the ship being outside the outer edge of the contiguous zone of Australia – where the statutes under consideration in *Polyukhovich* and *XYZ* at least regulated the conduct of Australian citizens or residents (although in the former case, not limited to conduct at a time that the person was a citizen or resident) – where however, there was a relevant connection in the case of these provisions, because their operation depended upon a reasonable suspicion of the use of the ship in support of, or in preparation for a contravention of the *Customs Act* or certain provisions of the *Criminal Code* (Cth): namely s72(13), which prohibits the importing or exporting of unmarked plastic explosives and Division 307, which proscribes the importing or exporting of border-controlled drugs or plants – where the provisions of the *Customs Act* therefore had a relevant and sufficient connection with Australia because they facilitated the prevention, detection and investigation of offences under Australian law.

Appeals against conviction dismissed.

R v Stamatov [2017] QCA 158, 28 July 2017

Sentence Application – where the applicant was convicted of trafficking in dangerous drugs, mainly steroids – where he was sentenced to three years' imprisonment, with a parole release date after six months had been served – where he submitted that a distinction should be made between steroids and other dangerous drugs, such as methamphetamine, in Schedule 1 of the *Drugs Misuse Act 1986* (Qld) – where the sentencing judge concluded he was not permitted to make

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such a distinction – whether it is permissible to distinguish between the harmfulness of steroids and other Schedule 1 drugs, particularly methamphetamine, for the purpose of sentencing for the offence of trafficking – where in the present case, the intent of Parliament, as reflected in the enactment of the 2014 amendments which included numerous steroids in Schedule 1, and as reflected in the explanatory notes to the amending legislation, is that penalties for offences involving those steroids are to be "similar to those applying to other dangerous drugs such as methamphetamine and ecstasy" – where three substantial reasons exist as to why the sentencing judge in this case was entitled to conclude that he should not attempt to determine whether a distinction should be drawn between steroids and other Schedule 1 dangerous drugs, particularly methamphetamine, for the purpose of sentencing for the offence of trafficking – where the first is the need to respect the legislative intent associated with the inclusion of various steroidal substances in Schedule 1, and the stated purpose of the relevant 2014 amendment – where the second is the need to defer to a legislative assessment of relative harmfulness, including an assessment that the evils associated with certain steroids justified their classification with other Schedule 1 drugs so as to attract the same maximum penalty – where the third is the practically impossible task of reaching any informed view about the relative harm of steroids and other Schedule 1 drugs in the absence of a suitable and reliable evidentiary base – where the reasons for determining the first ground of this appeal do not contain a statement of general principle that under the Queensland legislation it is never relevant to consider the harmfulness or relative harmfulness of the drug in question – whether the sentencing judge determined that "exceptional circumstances" had to be shown before a sentence not involving actual imprisonment could be imposed for trafficking in a Schedule 1 drug – whether determining that "exceptional circumstances" had to be shown fettered the sentencing discretion – where in saying "the circumstances are not exceptional" the sentencing judge was capturing in simple language the fact that the circumstances in combination did not justify a sentence which did not include a period of actual custody – where the language is also open to the interpretation that the judge, in reliance upon the submissions of defence counsel that "certainly [*R v Ritzau* [2017] QCA 17] confirms the principle that wholly suspended sentences are available in exceptional circumstances", erred in concluding that exceptional circumstances had to be shown – where the considerations are finally balanced – where it is concluded that the sentencing judge was led into error by counsel in this regard – where however, that conclusion does not result in the applicant not being required to serve a period of actual custody – where his good prospects of rehabilitation and the favourable matters said about his character, work ethic and assistance to others, should be reflected in his being required to serve less than one third of the term of imprisonment in actual custody – where an appropriate period of actual custody is six months.

Leave to appeal against sentence granted. Appeal dismissed.

R v Sridharan [2017] QCA 160, Orders delivered 24 July 2017; Reasons delivered 28 July 2017

Appeal against Conviction – where the appellant was tried and convicted of extortion of his former employer – where the appellant had written letters to his former employer, alleging a series of breaches of laws and demanding the payment of money – where the appellant asserted that certain documentary exhibits in the trial had not been duly proved – where the respondent submitted that the appeal had to be allowed on a different basis, that there was a miscarriage of justice because the appellant may not have been fit to plead and stand trial – where a psychiatrist reported that the appellant had a disorder which limited his capacity to competently reflect on evidence and other relevant material or indeed upon the basis of the charge – where the appellant was unrepresented – where a court of criminal appeal is obliged to allow an appeal if there is a real and substantial question to be considered about the accused's fitness – whether a miscarriage of justice occurred – where the appellant had been sentenced to 18 months' imprisonment with immediate parole, but had breached his parole and spent approximately nine months in custody at the time of hearing the appeal – where in her sentencing remarks, the trial judge said that during the trial she had been concerned about his capacity to think about the evidence, other than that relating to the Attorney-General's consent, but that her Honour had not been aware that the appellant's incapacity "had gone as far as this" – where s613(1) of the *Criminal Code* provides that when an accused person is called upon to plead to the indictment, and it appears to be uncertain whether the person is capable of understanding the proceedings of the trial, so as to be able to make a proper defence, a jury is to be impanelled to decide whether the person is capable – where that did not occur in the present case, because of what appeared, or more relevantly did not appear, to be the case at that point in time – where the possible unfitness and unfairness of the trial might have been revealed had the appellant been legally represented – where the fact that the process under s613 was not followed does not matter in the present context – where in *Eastman v The Queen* (2000) 203 CLR 1, Hayne J said that once a court of criminal appeal is armed with material suggesting that the accused may not have been fit to plead, the court is obliged to consider whether there was a miscarriage of justice regardless of whether the parties to the proceedings at trial raised the question or whether there was any cause for the trial judge to raise it – where the appellant lacked a sufficient capacity to understand the bases of the charge and the effect of the evidence in the proof of the charge, thereby depriving him of a sufficient capacity to assess how, if possible, he should defend the charge – where it is sufficient to say he may not have been fit to plead and stand trial – where consequently, the respondent is correct in saying that the appeal must be allowed upon the ground that there was a miscarriage of justice – where the court was informed that the appellant had been in custody for approximately nine months by the time of the hearing of the appeal – where in those circumstances, the respondent did not seek an order for a re-trial.

Appeal allowed. Conviction set aside.

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.

New QLS members

Queensland Law Society welcomes the following new members who joined between 11 and 30 July 2017

Chelsea Baker, Robbins Watson Solicitors
Victoria Bauer, Corrs Chambers Westgarth
Chito Boamah, non-practising firm
Joshua Boorman, Boorman Lawyers
Bianka Bosnjak, Newman Family Law
David Chung, Creo Legal
Conrad Comino, Comino & Associates
Nicola Coskinas, Avant Law Pty Ltd
Joshua Dunbar, Anderssen & Company
Emma Harman, Barry.Nilsson. Lawyers
Amy Holland, Spranklin McCartney Lawyers
Robert Johnstone, Kovac Johnstone Lawyers
Anes Kovac, Kovac Johnstone Lawyers
Rohini Lasanth, Timpson Immigration Pty Ltd
Ruby Mackenzie-Harris, ClarkeKann
Victoria Mercer, Birch & Co
Johanna Moore, Rennick Lawyers Pty Ltd
Kenneth Osborne, K M Splatt & Associates
Tarryn Rea, Madsen Law
Jason Walsh, Colin Biggers & Paisley Pty Ltd
Bohan Wang, X & W Development Pty Ltd
Qi Wang, A Ace Solicitors
Ying Yip, Fenson & Co. Lawyers
Peter Zufic, McCarthy Durie Lawyers


Aisling Clifford


Andrew Persijn


Katherine Hayes


Greg Stirling


Murray Shume


Sarah Dewar


Miranda Klibbe


Daisy Whyte


Jack Collings

Career moves

Barry.Nilsson.

Barry.Nilsson. has welcomed senior associate **Aisling Clifford** to the firm's Melbourne office. She is an accredited specialist in family law (Vic.) and focuses on assisting private clients with complex property matters, financial agreements, parenting matters and allegations of serious abuse, and child support disputes.

Carter Newell

Carter Newell Lawyers has announced the promotion of three Brisbane members of its insurance team.

Special counsel **Andrew Persijn** acts in a wide range of professional indemnity matters with experience in the real estate and property industry, while special counsel **Katherine Hayes** has a focus on cyber-risk and the financial sector, acting for clients in the Australian, Asian and UK insurance markets.

Senior associate **Greg Stirling** acts in a range of complex and high-value professional indemnity claims, with significant experience in policy interpretation and coverage disputes.

ClarkeKann Lawyers

ClarkeKann Lawyers has announced the promotion of **Matthew Armstrong** to senior associate in its property and projects team, and that of **Ashlee Miller** to associate in its employment, industrial relations and safety team.

Matthew has been on the team since 2012 and has experience in property development, sales and acquisitions, commercial leasing, body corporate advice and retirement living.

Ashlee joined the firm in 2016 and advises companies on a range of industrial relations and employment law issues, including enterprise bargaining, minimum entitlements, unfair dismissal, general protections and transfer-of-business issues.

Cook Legal

Cook Legal has announced the appointment of solicitor **Sarahjane Robertson**. Sarahjane has extensive experience in domestic violence matters, having previously worked at the Women's Legal Service Queensland and as a police officer interstate. She is also a qualified mediator.

Cooper Grace Ward

Cooper Grace Ward has announced eight promotions, including six associates elevated to senior associate and two lawyers promoted to associate.

Senior associate **Gabrielle Honey** focuses on corporate law, advising clients on mergers and acquisitions, compliance and corporate governance, competition and consumer law, and intellectual property and technology law. Her experience includes representing clients in investigations by regulatory bodies and assisting Australian and international clients with debt and equity capital raisings.

Senior associate **James McKeon** focuses on mergers and acquisitions, capital raising, securities law and corporate advisory. He works with a range of clients including large listed and unlisted Australian and international companies, high net worth individuals, not-for-profit entities and middle-market enterprises across a range of industries.

Senior associate **Hayley Mitchell** practises in estate and trust disputes, estate administration, estate planning for complex structures, superannuation succession planning and business succession. She has experience in providing advice involving executor's duties, beneficiaries' rights, problematic and contentious estate administration, and matters involving attorneys.

Senior associate **Murray Shume** advises clients on income tax, international taxation, capital gains tax, employee share schemes, non-commercial losses, GST and payroll tax issues. He also practises in resolving tax disputes with the Australian Taxation Office (ATO) and various state revenue authorities. Murray has experience litigating tax matters in the Administrative Appeals Tribunal, Federal Court and Queensland Civil and Administrative Tribunal.

Senior associate **Sarah Dewar** provides advice and acts for clients in disputes with the ATO and Office of State Revenue, and in a range of customs disputes. Her experience includes representing taxpayers in disputes involving income tax, international tax, GST, payroll tax and stamp duty.

As a senior associate in the litigation and dispute resolution team, **Miranda Klibbe** works with large corporate clients and private

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Matthew Armstrong


Ashlee Miller


Sarahjane Robertson


Gabrielle Honey


James McKeon


Hayley Mitchell


Katrina Gillies


George Dingle


Angela Brookes


Louise Ridley


Bettina Sorbello


Susan Talbot


Jeremy Cotter


Kiah Gant


Lauren Finlayson


Dash Paudyal


Ruth Nean


Bianca Stafford

clients on a variety of litigated matters. She has particular expertise in handling commercial litigation arising from property and contractual disputes, and a strong interest in property litigation.

Katrina Gillies is now an associate in the family law team, where she provides practical advice to assist in the early resolution of disputes involving property, parenting and financial matters.

Corporate and commercial team associate **George Dingle** advises businesses and their stakeholders on a range of issues and transactions with a focus on intellectual property, technology and capital raising.

DibbsBarker

DibbsBarker has announced the promotion of 10 lawyers, including five in Brisbane.

New partner **Angela Brookes**, who joined the Brisbane office in 2008, focuses on insurance law with an emphasis on workers' compensation, public liability and product liability matters. Her clients include state, national and international insurers, self-insurers and large corporations. Angela has expertise in personal injury and product liability litigation, with experience representing clients in settlement conferences, mediations and coronial inquests, and acting on behalf of international corporations in claims brought under the product liability provisions of the Australian Consumer Law.

New special counsel **Louise Ridley** works primarily in the defence of workers' compensation claims and gained in-house experience at two major insurers before joining the firm. Special counsel **Bettina Sorbello** also focuses in insurance defence work, particularly workers' compensation and product liability matters.

Also in Brisbane, **Susan Talbot** (banking, insolvency and disputes) and **Daisy Whyte** (insurance) have been promoted to associate.

Griffith Hack

Griffith Hack has announced the promotion of **Jack Collings** to associate. Jack works with local and international clients on contentious trade mark, copyright and patent matters. He recently assisted in Trade Marks Office opposition and non-use removal proceedings, and Federal Court proceedings in relation to trade mark infringement and contravention of the Australian Consumer Law.

Jensen & Co Lawyers

Jensen & Co Lawyers has announced that **Jeremy Cotter** has joined the firm's partnership. Working as a solicitor with the firm since 2013, Jeremy has extensive experience in construction and commercial law.

LGM Family Law

LGM Family Law has announced the promotion of **Kiah Gant** to associate. Kiah has worked in family law for more than 10 years, and practised exclusively in family law since joining the firm in October 2015. She has particular experience in conducting complex parenting and property settlement matters.

McInnes Wilson Lawyers

McInnes Wilson Lawyers has announced two appointments to the Brisbane office's family law practice.

Lauren Finlayson, who has practised exclusively in family law since admission, has joined the firm as a senior associate, while **Dash Paudyal** has joined as an associate. Dash has more than five years' experience in family law, as well as domestic violence and criminal matters.

MBA Lawyers

MBA Lawyers has announced the promotion of **Ruth Nean** to associate in its commercial and property team. Ruth joined the firm 2014 and was admitted in December 2015. She will continue her focus on commercial and property matters, body corporate, management rights and project development.

Miller Harris Lawyers

Miller Harris Lawyers has announced the promotion of **Bianca Stafford** to associate. Bianca provides advice to clients in relation to all aspects of wills and powers of attorney, with a strong background in drafting wills, administering deceased estates and helping clients navigate through disputes over wills and powers of attorney.

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Sarah Moran


Andrew Rankin


Lucy Kenny


Lachlan Lamont


Kelly Fraser


Bridget Young


Toni Myers


Anna Stock


Tegan Childs


Damian Riggall


Hannah Byrne


Jessica Carroll

O'Reilly Workplace Law

Sarah Moran has joined O'Reilly Workplace Law as a senior lawyer. Sarah has previously worked at a leading Australian law firm and in in-house roles with public companies and government organisations. She has broad commercial experience advising in all areas of employment law, including employee entitlements, enterprise agreements, redundancy, unfair dismissal, discrimination, confidential information, privacy and post-employment restraints.

Piper Alderman

Piper Alderman has announced two appointments and three promotions for its Brisbane office.

Partner Andrew Rankin, who has more than 20 years' experience, has joined the Brisbane office as a member of the national corporate team. Andrew works regularly with domestic and international clients on mergers and acquisitions, capital raisings, competition law and Australian regulatory compliance matters. He advises private and publicly listed companies, and has particular experience in acting for those in the financial services, healthcare, aged care and agribusiness sectors.

Lucy Kenny has joined the Brisbane office as a senior associate in the national commercial litigation team, practising in general commercial litigation and dispute resolution, with a focus on complex and large-scale disputes. She has acted for a range of clients, including large companies, financial institutions, professionals and insurers, and has experience of all stages of litigation, and in both bringing and defending claims.

Piper Alderman has also announced the promotion of commercial litigation team member Lachlan Lamont to senior associate. Lachlan has expertise in advising clients on commercial disputes and regularly acts in large-scale litigation, including contractual disputes, class actions and litigation-funded claims.

Also promoted were commercial litigation associate Kelly Fraser and property associate Bridget Young.

Ramsden Lawyers

Ramsden Lawyers has announced two promotions and an appointment.

Toni Myers has been promoted to senior associate in the corporate law department, focusing on mergers and acquisitions, capital raising, IPOs, ASX matters, private equity transactions, and general corporate and compliance work.

Anna Stock has been promoted to senior associate in the family law team. Since her admission in 2010, Anna has practised exclusively in family law, with experience in all family law areas and an aptitude for sensitive parenting matters in which children are placed at risk.

Tegan Childs has joined the firm's litigation team. Tegan is a 2016 Bond University law graduate who was admitted in November and has experience in a variety of litigious matters, including defamation, insolvency and contract disputes.

Thynne + Macartney

Thynne + Macartney has announced three promotions to associate.

Damian Riggall has four years' experience in his focus area of professional indemnity and insurance litigation. He represents professionals in disputes involving allegations of negligence, including architects, engineers, solicitors, barristers, residential caretakers, real estate agents and financial advisers. He also acts for registered health practitioners with respect to disciplinary inquiries. Damian also acts in employment practices claims including unfair dismissal, adverse action remedy and other workplace disputes.

Hannah Byrne has more than seven years' experience, including four years with the firm's agribusiness team. Hannah focuses on carbon trading and regularly advises landowners on how to establish and maintain a carbon offsets project on their land. She also helps farmers and graziers protect their interests when negotiating with mining, gas and petroleum companies, negotiating leases, agistment agreements and share-farming agreements, buying and selling rural properties, and rural business succession planning.

Jessica Carroll has more than five years' experience advising on large commercial litigation and dispute resolution matters such as disputes related to commercial contracts, Australian Consumer Law, trade practices, negligence, bankruptcy and debt recovery. Jessica also has a background in Land Court proceedings, having advised and acted on behalf of both mining corporations and statutory bodies in relation to appeals against financial assurance decisions, applications to stay administrative decisions and objections to proposed mining leases.

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

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In September ...

Brisbane Online Regional

Practical Legal Ethics | Practice Management & Business Skills | Professional Skills | Substantive Law

07 Essentials: Are You Board Ready?

12.30-1.30pm | 1 CPD

Online

Designed for all practitioners who are aspiring (or new) board members, this webinar helps you identify and understand the fundamental questions you should ask yourself – before you take the next step.

PS

08 Criminal Law Conference 2017

8.30am-5.15pm | 7 CPD

Brisbane

Queensland Law Society welcomes an impressive roster of judicial officers, QCs and accredited specialists to the 2017 program to inform you on recent cases and legislative updates, arm you with valuable insights from the Bench, strengthen the way you draft submissions and negotiate, and future-proof your professional toolkit.

PLE PM&BS PS SL

13 Essentials: Native Title

9am-12.35pm | 3 CPD

Law Society House, Brisbane

This half-day workshop is designed for lawyers seeking an overview or refresher on the basics of native title and of Aboriginal and Torres Strait Islander cultural heritage law. Topics covered include the Native title claims process and future acts regime, and statutory obligation and available strategies to avoid (or minimise) harm to cultural heritage.

PS SL

14 Property Law and Conveyancing Conference 2017

14-15 | 8.30am-5.25pm Thu, 9am-12.30pm Fri | 10 CPD

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19 Masterclass: BCIPA

8.30am-12.45pm | 3.5 CPD

Law Society House, Brisbane

Queensland Law Society's annual BCIPA professional development event is an opportunity for adjudicators and construction lawyers to keep abreast of the latest developments in this niche area of practice. Save the date and check our website for the latest details.

PM&BS PS SL

Earlybird prices and registration available at
qls.com.au/events

20 Essentials: Managing Conflict – To Act or Not to Act

12.30–1.30pm | 1 CPD

Online

The management of conflicts of interest and conflicts of duty is something all solicitors need to keep front of mind. Are you confident that you are identifying conflicts and also managing them in accordance with the *Australian Solicitors Conduct Rules 2012*?

PLE

21 Practice Management Course – Medium and Large Practice Focus

21-23 | 8am-5pm | 10 CPD

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Master the art of strategic business management with the QLS Practice Management Course. Increase your knowledge on attracting and retaining clients in the new law environment, managing business risk, trust accounting and ethics. Designed by a team of experts who know legal practice, the course provides the practical skills and expertise crucial for your next challenge.

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28 Masterclass: Insolvency Law

8.30am-12.30pm | 3.5 CPD

Law Society House, Brisbane

Providing practical and innovative legal solutions to troubled entities is a challenge for any lawyer. Queensland Law Society's annual insolvency law professional development event continues to provide an opportunity for insolvency lawyers and other insolvency professionals to enhance their knowledge in this complex field. Save the date and check our website for more details.

SL

Save the date

4 Oct	Essentials: Civil Litigation
5 Oct	Essentials: Advanced Healthcare Directive
6-7 Oct	Succession and Elder Law Residential 2017
12 Oct	Essentials: Franchising Law
17 Oct	Essentials: Advising Small Businesses
19-20, 27 Oct	Practice Management Course – Sole Practitioner and Small Practice Focus
20-21 Oct	CQLA & QLS Conference 2017
24 Oct	Essentials: Using 'Big Data' in Law
26 Oct	Modern Advocate Lecture Series, 2017, Lecture Four
27 Oct	Personal Injuries Conference 2017
31 Oct	Essentials: Acting Against Self-Represented Litigants

Are you up to date with the minimum wage?

Practical suggestions to keep your workplace on track

This month we introduce Your legal workplace, a new bimonthly column by **Rob Stevenson** to assist smaller firms in complying with basic workplace laws.

As lawyers, we can be so committed to servicing our clients' needs that we can fail to keep up with our own legal obligations as employers, with potentially expensive results.

A basic requirement is to make sure we are paying our employees the minimum wages required by law. The Fair Work Commission (FWC) sets a minimum wage for private sector employees which is subject to any applicable industrial award. In the legal services industry, this is the *Legal Services Award 2010.*

The commission decides each year whether minimum wages will increase and by how much, with effect from the start of the new financial year. This year, the commission has decided to lift minimum wages by $22.20 a week to $694.90 ($18.29 an hour) from $672.70 ($17.70 an hour). Part-time and casual rates will increase proportionately. A summary of the commission's decision can be found at **fwc.gov.au**.

These increases flow on to the industrial award and you should check the FWC website for pay rate revisions to the *Legal Services Award 2010* and ensure the appropriate increase is passed on for employees being paid minimum award wages, with effect from the first pay period after 1 July 2017. Employers can subscribe to electronic award updates from the commission, and the Fair Work Ombudsman also has online pay-checking resources at **fairwork.gov.au/pay**.

If you are paying employees more than the applicable award rates, the increase can generally be absorbed, but it is advisable to have specific contractual agreements with employees in the form of an 'off-set' or 'annualised salary' clause. It is also important to check periodically (at least yearly) that employees are receiving at least as much as they would for all award entitlements (including overtime and penalty rates). Only trainees, junior employees and employees with a disability can be paid less than the minimum rates, and then only if specified in the award.

A failure to apply the minimum wage increase can result in a claim for back pay (covering up to the last six years) and the imposition of a penalty for breaching the industrial award (up to $10,800 for individuals and $54,000 for corporations), and also has potential professional conduct implications.

The other change that occurs each year from 1 July is an adjustment in the income level for statutory unfair dismissal claims, which may be relevant when considering terminating the employment of a professional staff member. This year, the unfair dismissal high income threshold has increased to $142,000 (excluding superannuation and non-guaranteed amounts, for example, bonuses) from 1 July and the maximum compensation available for unfair dismissal has increased to $71,000.

This reinforces the importance for employers of making a decision on whether to retain an employee before the deemed statutory probation period ends. This period is 12 months for employers with fewer than 15 employees and six months for employers with 15 or more employees.

Rob Stevenson is the principal of Australian Workplace Lawyers. rob.stevenson@workplace-lawyers.com.au

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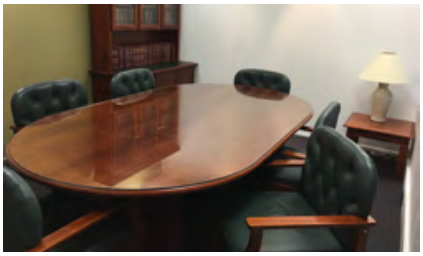

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Missing wills

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Would any person or firm holding or knowing the whereabouts of the original Will of the late **JOHN FRANCIS STEPHENS** born in 1932 or 1933 in Sydney, New South Wales and formerly of Lae, PNG who died on 15 March 2017 in the Cairns Hospital, Cairns, please contact Kathleen Conroy of Gadens on 07 3231 1557 or kathleen.conroy@gadens.com

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Would any person or firm holding or knowing the whereabouts of a Will of the late **JAYSON RITCHARD SPENCER** born 14 November 1973, please contact Cobb Law Pty Ltd on (07) 5526 4441 or peter@cobblaw.com.au.

Would any person or firm knowing the whereabouts of a Will of the late **Michael Joseph Pryszlak** of Joskeleigh, Queensland, 29/06/1957-19/07/17, please contact Nerissa Lesniak 0499 969 282.

ANGELO VALLE DOB 17/02/1939
Would any person knowing the whereabouts of a Will of the above (formerly of PNG but last known address, 43 Merthyr Road, New Farm 4005; date of death 17 July 2017) please contact Steven Grant of Merthyr Law on 07 3029 1600 or email directly to: steven.grant@merthyrlaw.com.au

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Would any person or firm holding or knowing of the whereabouts of a Will of the late **HENRI FRANK ROSE** late of Edenvale Nursing Home, 1 Glen Eden Drive, Gladstone who died on 21 November 2016 please contact South Geldard Lawyers, PO Box 560, Rockhampton Qld 4700, telephone 07 4936 9100, facsimile 07 4922 2014 | admin@southgeldard.com.au

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Missing wills continued

Would any person or firm knowing the whereabouts of any original will of **Darren James Irvine** late of 111 Kenna Street, Aspley, Queensland who died on 2 June 2017 at The Prince Charles Hospital, Chermside, Queensland, please contact Ron Lawson Lawyer. Telephone: (07) 3325 3807 / 0417 731 042 or Email: ron@ronlawsonlawyer.com.au.

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Shiraz – the god of many faces

with Matt Dunn

Beguiling and intriguing, modern Australian shiraz has many faces and flavours as it ranges across a wide swag of this big country.

Shiraz is Australia's wine – perhaps not in origin but certainly by adoption. The National Vintage Report for 2017 shows that the Australian crush of shiraz exceeded that of any other grape. The top five were:[1]

- 500,938 tonnes of shiraz
- 361,043 tonnes of chardonnay
- 279,041 tonnes of cabernet sauvignon
- 125,487 tonnes of merlot
- 107,423 tonnes of sauvignon blanc.

Shiraz is the undisputed king of reds in Australia and its vines grow widely, from the Coal River Valley outside Hobart in the south to Queensland's South Burnett region in the north. Shiraz grows from Australia's east coast to the west coast, and just about everywhere in between.

While shiraz is almost ubiquitous, it is by no means homogenous.

The character of the shiraz produced can be affected by many things – sometimes intervention by the winemaker, but mostly by the climate of the growing region. Enhancing its many faces are distinct traits that distinguish Australian shiraz from particular regions. Broadly, it is apparent that there are three main sub-themes – cool climate shiraz, hot dry climate shiraz and hot humid climate shiraz.

Cool climate shiraz is exemplified in products from traditional pinot noir growing regions such as the Yarra Valley, Mornington Peninsula and Tasmania (particularly the Tamar Valley and Coal River Valley sub-climates).

This style of shiraz is generally lighter in body, lower in alcohol and more integrated in flavours. White pepper on the nose and palate is a strong flavour identifier of a cooler clime variety, also with potentially less tannic backbone. This style is sometimes referred to by the French name of syrah to differentiate it from the more classic shiraz of South Australia (New Zealand producers almost always call their shiraz wine syrah to indicate the lighter style).

Hot dry climate shiraz is the muscular, rich, powerhouse of shiraz legend. This style largely comes from the iconic South Australian shiraz dens of McLaren Vale and the Barossa Valley. It is high in alcohol, dense, tannic and weighty in youth, showing deep ambrosia with aging. Classic examples of this style include most of the Penfolds range, Henschke Hill of Grace, Rockford Basket Press or Torbreck RunRig. Flavour identifiers for this style include dark chocolate, menthol and plum.

Hot humid climate shiraz is a very different animal and often disappoints those used to the hot dry climate style. Coming largely from the Hunter Valley and sites north to the South Burnett of Queensland, this style produces a wine mid weight in body and alcohol.

Classic Hunter shiraz is a mighty delight for those familiar with the style. Notable examples include Mount Pleasant Maurice O'Shea, Tyrrell's Vat 9 or Brokenwood Graveyard Vineyard. Flavour identifiers for the humid shiraz are often earthy flavours of leather, tobacco and savoury spice.

Australian shiraz is far more than one-dimensional and comes in a variety of styles and flavours. Some regions produce a mixture of the three classic sub-themes with varying flavour elements. Despite the mix, all Australian shiraz is a national obsession and unique to this wide brown land.

Note

[1] wineaustralia.com/market-insights/national-vintage-report.

The tasting

Three examples of the many faces of shiraz were perused.

The first was the **Eagles Rest 2011 Hunter Valley Shiraz**, which was the colour of damson plum with a fine tinge of sepia. The nose was redolent with black pepper, oak and red capsicum. The palate was leather, earth and warm red fruits. The apparent oak was well integrated with the nutmeg savoury spice.

The second was the **Kay Brothers Basket Press McLaren Vale Shiraz 2014**, which was deep purple red in colour. The nose was rich summer fruits, black pepper, plums and oak. The palate was dense and dry with a core of rich sweet red fruits and mid palate of dark chocolate and menthol lift. A long-lived wine still in infancy.

The last was the **Coldstream Hills Reserve Shiraz Yarra Valley 2012** with a dark black red colour at its five years of age showing a creeping ring of sepia. The nose was vibrant white pepper and red currants. The palate was smooth, supple with an oak frame on red fruits of the forest and cherry. The mid palate of savoury notes rises with a flourish of white pepper. A sophisticated wine, yet so different to the others.

Verdict: The three options were all the same variety, but all so dissimilar that a preferred option was hard to pick. However, the Coldstream Hills was one polished contender.

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

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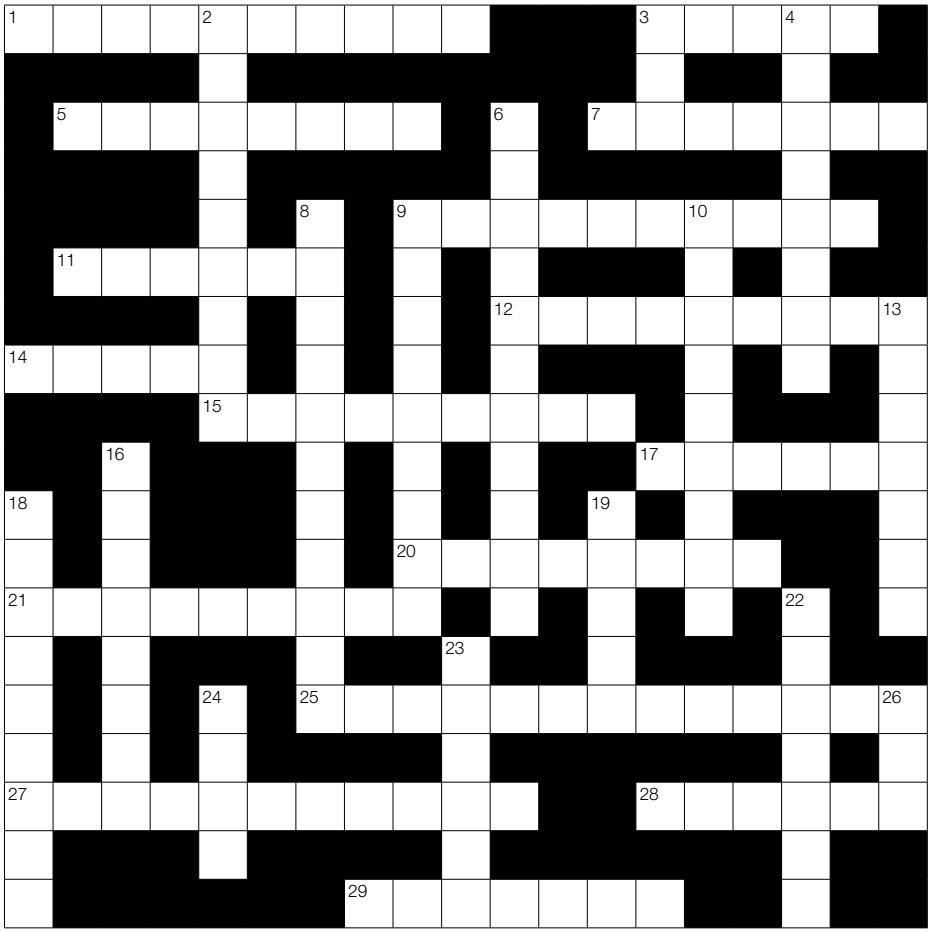
Mould's maze

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



Across

1 Procedural orders. (10)

3 High Court decision involving judicial encouragement to juries which cannot reach an unanimous verdict. (5)

5 A party's right to request a court to make a determination. (8)

7 Support or approve; sign a negotiable instrument with the intention of making it transferable. (7)

9 Remedy in which a court undoes a transaction when a plaintiff's consent has been vitiated. (10)

11 A matter that is still under consideration by a court, sub …… (Latin) (6)

12 A witness who provides initial evidence to police about an offence. (9)

14 An accused who is not required to provide bail, or an animal or person that has escaped confinement, at …… (5)

15 Seizure of property to enforce payment of a debt. (9)

17 Counterfeit coin or note or worthless cheque. (6)

20 The magnitude of a risk, the probability of its occurrence, the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities of a defendant is known as the negligence …… (8)

21 The public sector forms part of the …… arm of government. (9)

25 An order vesting a bankrupt's property in an official trustee to be used to pay off their debts (13)

27 Evidence favourable to the prosecution. (11)

28 Uphold a lower court's decision on appeal. (6)

29 A person acting as a buyer on behalf of someone else. (7)

Down

2 Evidence that is deliberately created instead of being spontaneous or natural. (9)

3 Gaol. (Jargon) (3)

4 Sentence or discipline involving infliction of pain, …… punishment. (8)

6 The reasonableness of statutory insurance payments made by the Queensland Building and Construction Commission is not …… in debt recovery proceedings against a builder. (11)

8 Basic requirements for a reasonable lifestyle. (11)

9 Scope of an inquiry, terms of …… (9)

10 Actions per quod …… involve injuries to an employee rendering them unable to perform their duties of employment. (Latin) (9)

13 The system of land title whereby registration basically guarantees indefeasibility. (7)

16 The constitution, statutes, common law and customs of a single nation-state, …… law. (8)

18 A stay temporarily suspends the …… of a court order or judgment. (9)

19 A fine; to deprive of by deceit. (5)

22 The principle that only the parties to an agreement can be bound by it or enforce it. (7)

23 The number of members of a body required to be present to transact business legally. (6)

24 A person not possessed of sufficient intelligence or discretion to distinguish between right and wrong to the extent of being deemed criminally responsible, …. incapax. (Latin) (4)

26 Abbreviation used to indicate that a case had a different name or parties in a previous court, sub …. (Latin) (3)

Solution on page 56

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I took a '70s odyssey

And ended up with an internet-enabled dog

by Shane Budden

Sometime back in the 1970s, my dad took me to see *2001: A Space Odyssey*, because it had all of the things I looked for in a film back then, in that it was about space and a future where moon trips were regular occurrences.

I was unconcerned about plot development, acting abilities and believable characters. My view back then was, basically, throw in some spaceships and a few lasers and the rest would take care of itself (it is fair to say that a good 90% of movies released these days would have been better off following this formula; indeed, the movie *Titanic* could be immensely improved by having a spaceship crash into the boat in the first five minutes, preferably with everybody responsible for the release of *Titanic* on board, because *Titanic* is such a bad movie it is hard to believe Adam Sandler was not involved somehow).

It turned out to be quite fortunate that I wasn't too interested in plots, because if *2001* had a plot it was not evident to me, nor has it become so in re-watchings as an adult or even after reading the book (a tome which makes Stephen Hawking's *A Brief History of Time* look like *The Very Hungry Caterpillar*).

As near as I can figure, some monkeys find a big black stone, then we go into space, and astronaut Dave has computer problems which eventually turn him into a foetus, which may or may not destroy the world. Given that I usually end up on the floor in a foetal position, whimpering, whenever I deal with computer problems – especially if tech support is involved – I guess the plot may have made more sense than I thought.

Of course, in a development that will surprise no one, Dave cures his computer problem by turning the computer off; had he known enough to simply switch it back on, things may have turned out better for him.

For anyone who thinks that it is unlikely that a movie with a plot like that could be released, let alone be successful, I need to point out that the '70s was a very strange time. It was a time of hope – hope that the Cold War would end, hope that we would soon have a base on the moon, hope that all the hippies and earth-mothers would stop claiming to be able to understand the meaning of life through the use of certain illegal substances and for God's sake take a damn bath; hope that, above all, one day this sentence would end.

It was also a time of rejecting authority, and the way things had always been done – rejecting conformity, conservatism and (this may have been due to the use of illegal substances) movies that made sense.

This was particularly the case here in Australia, with the release of a series of movies that were about as easy to follow as the plot of *Twin Peaks* on a television with no sound. If you don't believe me, you can determine for yourself – write down the following titles – *The Adventures of Barry McKenzie, Alvin Purple, Picnic at Hanging Rock* and *Petersen* – and take the list down to the video shop, and then remind yourself that there are no video shops anymore because we all download films. Also, burn that list, because if people find it on you they will think you are weird.

It should go without saying for any regular readers that I have not yet embraced the whole downloading films thing, in the same way that I have not yet embraced poking myself in the eyes with burning sticks. When I was a kid – certainly back when I saw *2001* – we waited some years to see a movie in Australia, because the stone tablets on which the films were then chiselled had to be shipped out from the United States on barges pulled by flying dinosaurs; now of course kids download movies, often it seems before the films are actually made.

I have concerns about downloading pretty much anything these days, because we finally have wi-fi and I now have to be concerned about all the things in the house that are wi-fi enabled and may be able to connect to the internet – a list of things that, at last count, included everything; even the dog has a chip.

In fact, it would explain a lot if he were inadvertently downloading stuff over wi-fi, especially the way that, every now and again, he attacks the rug on which he sleeps with the sort of ferocity usually displayed by judges on reality TV shows – despite the fact that the rug has never harmed him in any way that I have seen. If he is secretly watching *X-Factor* or *The Voice* via his ID chip, it would explain such acting out, as well as why he has the mental agility of Vegemite.

Our wi-fi came with our invitation to join the NBN, which reminded me of my dad's invitation to join the army back during Vietnam, because it came with the same options: 'Yes, I will happily join' and 'Yes, I would rather have my ears chewed off by rabid weasels but I will still happily join'.

Actually dad had a third option, 'Yes, I will go to jail until I am ready to pick one of the other options', but the NBN doesn't let you off that lightly. I know many people claim that they have not noticed a difference since switching to NBN, but to be fair, I have noticed that since joining, there has been a noticeable change – our internet is a lot slower, it occasionally drops out, and even the dog is complaining. I must say that even though I don't know much about technology, these seem like sub-optimal developments.

I imagine one day we will have 'entertainment' downloaded directly into our brains – which I hope comes *after* the implementation of self-driving cars.

Direct-to-brain TV and movies will probably mean I will no longer be able to avoid watching *Game of Thrones*. I know young people may not believe this, but I have so far managed to live my life quite happily without having to know what 'winter is coming' means, or why Boromir or whatever his name is cares so much about it. I suppose I can live with that, but if I start seeing episodes of *The Voice* float in front of me, I'm going looking for some hot sticks.

Queensland Law Society

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Crossword solution from page 54

Across: 1 Directions, **3** Black, **5** Standing, **7** Endorse, **9** Rescission, **11** Judice, **12** Informant, **14** Large, **15** Distraint, **17** Stumer, **20** Calculus, **21** Executive, **25** Sequestration, **27** Inculpatory, **28** Affirm, **29** Nominee.

Down: 2 Contrived, **3** Bin, **4** Corporal, **6** Justiciable, **8** Necessaries, **9** Reference, **10** Servitium, **13** Torrens, **16** Domestic, **18** Execution, **19** Mulct, **22** Privity, **23** Quorum, **24** Doli, **26** Nom.

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 2 November 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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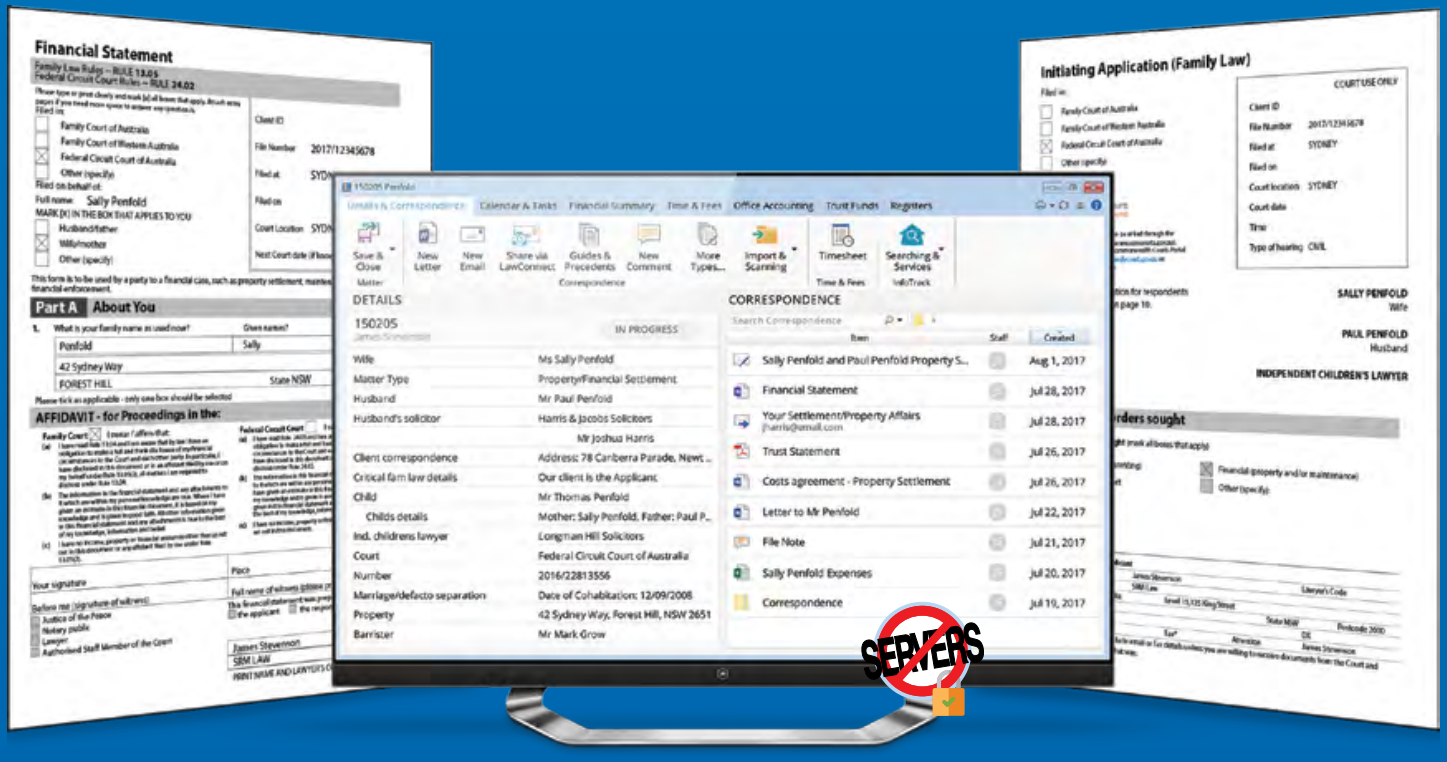

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