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Queensland Law Society

September 2016 – Vol.36 No.8

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Queensland Law Society

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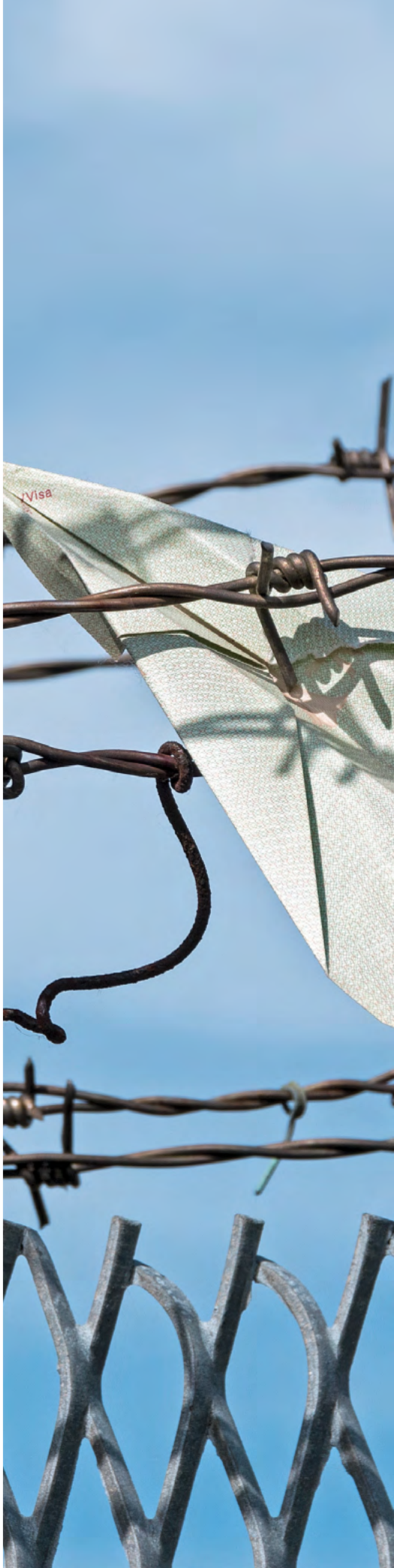

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Equitable briefing – the Queensland approach

Introducing the Modern Advocate Lecture Series

In June, the Law Council of Australia launched a new equitable briefing policy with the aim of improving the briefing of women barristers across the country.

The policy includes interim and long-term targets with the ultimate aim of briefing women in at least 30% of all matters and receiving 30% of the value of all brief fees by 2020.

It is certainly important that we support the progression and retention of women barristers, and address the significant pay gap and underrepresentation of women in the superior courts.

However, to fully understand how this policy would work, we established a working group, chaired by experienced Cairns lawyer Jeneve Frizzo, to prepare a report for QLS Council on the implications and application of the policy.

The group's members were chosen to be truly representative of the broad spectrum of the Queensland profession. QLS extends its gratitude to the working group members, including Michael Fitzgerald, Brit Ibanez, Cherrie Ludemann, Marie Sheehy and Michele Davis.

This exceptional group of solicitors undertook extensive research, analysis and review of the draft policy, and invited wide-ranging stakeholder consultation.

After careful consideration, the working group found that, while many larger and national firms had the capacity to gather data and report in the manner proposed by the draft policy, the reporting obligations would impose a significant administrative burden on solicitors in Queensland, where 46% of law firms are sole practitioners, 40.6% are micro firms (five or fewer practising certificates) and 10.7 are small firms (five to 19 practising certificates).

The group noted that the policy did not have the support of the Bar Association of Queensland and that it would be difficult for practitioners to forecast the number and type of briefs they expected in the upcoming year.

QLS Council discussed the group's findings and agreed that it could not recommend a policy requiring firms to collect data and then report on who they had briefed.

Nonetheless, the issue remains.

To progress toward a more acceptable solution, we have developed a different approach, and I am pleased to let you know about the launch of our Modern Advocate Lecture Series.

This provides early career barristers with the opportunity to engage with the solicitors' branch of the profession through a regular and informative lecture series featuring leading solicitors, barristers and jurists.

The first of these will be held on 25 October and I would like to express my gratitude to Chief Justice Catherine Holmes, who has agreed to deliver the inaugural address.

It will be held at Law Society House, and attendees will not only be informed but also earn a CPD point by attending.

Please excuse me for making the observation that, in the days before we were consumed by 'social media', relationships between solicitors and barristers were often formed through socialising, or to use an only slightly less old-fashioned term, networking.

The Modern Advocate Lecture Series includes the opportunity to network as a key component. The object is to allow all young practitioners – barristers and solicitors – to actually get to know each other face to face, to find out about their skill sets or talents, to meet and enjoy some collegiality and, importantly, to develop the relationships that will lead to helping each other through the traditional solicitor-barrister relationship.

We believe that it is a practical, concrete, muscular step toward addressing the concerns that the equitable briefing policy raises. And it doesn't create an administrative impost for our members.

Finally, I would like to pass on my thanks, and that of Council, to Jeneve Frizzo for her excellent work in steering the working group, and to QLS deputy president Christine Smyth, who created the series and who has been its prime instigator. Of course this initiative could not have occurred without the unfailing support of QLS staff members Louise Pennisi, Shane Budden and Stafford Shepherd, all of whom are working hard to bring this to fruition.

The NQ experience

Last month I had the pleasure of meeting many of our northern members when I attended the annual North Queensland Intensive in Townsville.

Whenever the opportunity permits, I like to inform our members of the composition of their area or region, and make some observations on the makeup of the local membership.

In this case, I noted that North Queensland encompasses a large area which is showcasing some of the changes in our profession. For example, it has the third highest percentage of female full members out of the regions – 52.7%.

Our North Queensland members are also very experienced, with 38.9% of members having more than 20 years of post-admission experience – the third most experienced region in regional Queensland.

One of the highlights on the Intensive was presenting 25 and 50-year pins to our long-serving members, Lucia Taylor of Purcell Taylor Lawyers and Bob Bogie of Bob Bogie & Co. (25 years), and Brian Baxter of Ruddy Tomlins & Baxter (50 years).

My thanks go to the North Queensland District Law Association for the invitation to attend this outstanding event.

Bill Potts
Queensland Law Society president

president@qls.com.au
Twitter: @QLSpresident

Legal Profession
White Ribbon Breakfast

Thursday 17 November 2016

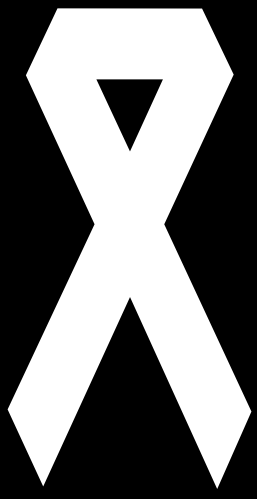
7.15-9am
Brisbane City Hall, Main Auditorium
King George Square

Please join us at the 2016 Legal Profession White Ribbon Breakfast in support of the national day to end violence against women and children.

The breakfast will feature addresses by award-winning journalist Sarah Ferguson and Magistrate Colin Strofield of the Southport Specialist Domestic Violence Court.

Purchase your tickets now.

qls.com.au/white-ribbon-day



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Women's Legal Service

Disaster awaits the unprepared

New guide will benefit all members

Welcome to spring! It's great to be enjoying the beautiful Queensland weather at this time of year, but remember that as temperatures rise, the risk of damaging storms and other potential disasters also grows.

It's easy to leave your disaster preparedness on the 'to do' list, but our members who have survived cyclones, floods and other calamities will be the first to agree that the consequences of being unprepared can be disastrous for both you and your firm.

In the near future, we will help all of our members to achieve this often-neglected task with the release of a disaster readiness guide that provides the framework for you to prepare for, survive and recover from disaster.

Cataclysmic events aren't just weather-related. You will be able to access guidance on helping your firm deal with accidental or deliberate disasters such as fire, along with readiness guides for when ill-health, injury or other problems render your practice inoperative.

For example, there are important reminders for all lawyers about having in place a current will and enduring power of attorney so that, if an injury incapacitates you, the practice can continue. Without these documents, your law practice and its financial ability can be quickly compromised, in turn presenting a serious threat to your family's wellbeing.

In the words of former United States Secretary of State Colin Powell: "There are no secrets to success. It is the result of preparation, hard work, and learning from failure."

It is gratifying to see that our efforts to assist our members in this way have been acknowledged by no less an authority than the United Nations Secretary-General's Special Representative for Disaster Risk Reduction and head of the UN Office for Disaster Risk Reduction, Dr Robert Glasser, who said: "This is a welcome initiative from Queensland Law Society and sets an example for the wider private sector in a part of Australia which is prone to a wide range of weather-related disasters. Reducing disaster risk and therefore disaster losses depends on integrating disaster risk management into everyday business practices. I hope that lawyers in Queensland will also become advocates for disaster risk reduction with their own clients and in their own communities."

The disaster readiness guide will be free for QLS members. Keep an eye out for the official release date.

Welcome to local legal innovation

Much has been said of late about digital disruption and the impact of technological innovation on legal practice. Here at QLS we have switched that terminology around and like to refer instead to digital enablers for our profession.

I recently had the privilege of sitting on the judging panel for a 'Disrupting Law' 54-hour 'hackathon' on the weekend of 5-7 August (along with QLS Ethics Centre director Stafford Shepherd and other leading professionals).

This inaugural event was an initiative of QUT Starters and The Legal Forecast, a non-profit organisation founded in 2015 by McCullough Robertson lawyer Tegun Middleton and research clerk Milan Gandhi.

It involved more than 70 students from legal and other disciplines and placed them with 12 law firm teams to brainstorm innovative ideas and then construct appropriate business models for them during the course of the weekend.

On the Sunday night, the teams pitched their ideas to a *Shark Tank*-style judging panel in front of an audience of more than 200 people.

Legal Forecast president Tegun Middleton said the event was truly inspiring and received an incredible amount of positive feedback relating to the calibre of the ideas and the quality of the presentations.

"The business models presented by the teams were outstanding," she said. "They were innovative, well thought through and all contributed toward improving access to justice or solving a very real problem within the legal industry."

These ideas included an artificial intelligence chat-bot to facilitate the provision of legal advice, a web application helping users to track critical dates in their contracts, and an account management system designed to track pro bono hours and share information between law firms and community legal centres.

Well done to all the students involved, and I hope we will be welcoming some of these innovations into our practices in the very near future!

Our calendar widget

Some time ago, QLS stopped producing a hardcopy calendar, leaving a number of members to lament the loss of reminder dates for their trust account compliance requirements.

In one of their frequent bursts of innovation, the digital team at QLS has designed and launched a widget that members can download directly into their work calendars to be reminded of these dates. Download the widget from **qls.com.au/trustaccountdates** and you will never miss an important trust account date again.

At QLS, our aim is to deliver useful practice support tools and service to our members.

Amelia Hodge
Queensland Law Society CEO
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Review tackles elder abuse in Queensland

In the wake of the *Not Now, Not Ever* report into domestic violence and the inquiry into the adequacy of existing financial protections for Queensland seniors, Curtin University has been commissioned by the Queensland Government to undertake a research project – Review into the Prevalence and Characteristics of Elder Abuse in Queensland.

With QLS Elder Law Committee chair Kirsty Mackie and QLS policy solicitor Wendy Devine, I recently attended a meeting hosted by researchers from Curtin University (WA) and the Department of Communities, Child Safety and Disability Services to explore the objects of the review, which include the following:

- to provide an evidence base to better understand the prevalence and characteristics of elder abuse in Queensland
- to summarise the Queensland-specific policy, legislative and service responses to elder abuse
- to identify best-practice prevention and service responses to elder abuse
- to identify any issues, needs and gaps around elder abuse prevention and service responses in Queensland
- to inform future elder abuse prevention strategies and service responses in Queensland
- to inform data requirements should a comprehensive state or national prevalence study proceed in the future
- to identify specific interventions for further investigation in the Queensland context.

If you would like to know more about the project or contribute to it, please contact Wendy Devine at advocacy@qls.com.au.

– Christine Smyth

Succession law, page 34

Federal Court wins international award

The Federal Court has won a prestigious international award for the best use of technology to improve court services and public access.

The award follows four Australian awards in the past two years.

The Electronic Court File (ECF) and eServices strategy was recognised as one of the top 10 court technology solutions globally by the National Association of Court Management at its recent annual conference in Pittsburgh, Pennsylvania. The Federal Court was the only non-US court to make the top 10 listing.

The criteria included interactive capabilities, access to public records, user interface, optimisation for mobile services, accessing and the 'cool' factor.

Federal Court chief executive Warwick Soden said he was thrilled to learn of the award and proud of the court's achievement.

"The ECF has brought about revolutionary change with almost all documents filed with the court now done electronically," he said. "Lawyers clearly like the ease-of-access, retrieval and convenience of our E Services – such as eLodgement – as it has freed them from the limitations imposed by paper."

25 years of the Court of Appeal

Queensland Court of Appeal president Justice Margaret McMurdo AC will deliver a public lecture titled 'The Queensland Court of Appeal: The First 25 Years' on Monday 24 October.

The Australian Academy of Law event will be held in the Banco Court at the Queen Elizabeth II Courts of Law, Brisbane. More information is available from the Events section at sclqld.org.au.

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Search warrants update under way

Draft search warrant guidelines for the execution of warrants on solicitors' premises and an accompanying discussion paper are expected to be available for stakeholder review next month.

The guidelines are being developed in a project led by Queensland Law Society and the Queensland Police Service (QPS) in consultation with Queensland Courts. They are being authored by Justine van Winden as a QLS special project with input from Glen Cranny and Leigh Rollason, members of a QLS Criminal Law Committee sub-committee.

The execution of warrants on solicitors' premises is causing problems for QPS, practitioners, their clients and the courts. The existing guidelines, most of which were formulated more than 25 years ago, are outdated and do not address technological change, including forensic imaging of electronic data, storage on multiple devices such as phones, laptops and in the cloud, and the issue of legal professional privilege.

The impact on the daily operations of a law firm and associated ethical issues are other important factors to be covered in this project.

The objective of the new guidelines will be to provide clear protocols in relation to warrant evidence or property, including hardcopy documents and forensic images, when:

- An application for a search warrant on a solicitor's premises is made.
- A search warrant is executed on a solicitor's premises.
- A claim for legal professional privilege is raised.
- A determination is sought from the court in relation to legal professional privilege.

To ensure the guidelines work effectively, QLS will discuss their potential implementation through a practice direction of the Supreme Court of Queensland.

QLS president Bill Potts, with the support of QLS Council, has raised the lack of up-to-date search warrant guidelines as a concern, evidenced in part by the number of calls about search warrants received by the QLS Ethics Centre.

"We know that practitioners are seeking guidance and these guidelines will aim to provide best practice," Mr Potts said. "This initiative fits within the strategic objective of the Society to lead the profession through the setting of professional standards, providing ethical guidance and targeted advocacy."

The project is being funded through the Law Claims Levy Fund as it addresses a key area of risk for the profession.

There are numerous other Commonwealth and Queensland Government bodies with coercive information-gathering powers. At this point, these are outside the scope of the current project, but it is hoped that one outcome will be a list of recommendations for further discussion with these authorities.

Law Council calls for immigration detention monitors

The Law Council of Australia has strengthened its call for the appointment of an Independent Inspector of Immigration Detention and an Independent Monitor for Migration Laws following leaked reports on the welfare of individuals held in detention in Nauru.

Law Council of Australia president Stuart Clark AM said last month that both offices were necessary to monitor the integrity of Australia's national security framework and ensure confidence in the safety and integrity of border protection.

"The Law Council has consistently stated that Australia retains responsibility for the health and safety of asylum seekers transferred to other countries for offshore processing and assessment under the *Convention relating to the Status of Refugees*," he said.

"This responsibility derives from the Commonwealth's common law duty of care and obligations arising under international law. Making these key appointments could limit the risk of future harm to asylum seekers held in detention without undermining Australia's border protection policies."

Showtime for DLA presidents

While the Royal National Show – the Ekka – attracts many country visitors to Brisbane in August, there's another group from regional centres that converges on the city each year at the same time – Queensland's district law association presidents.

This year's DLA presidents workshop was again well attended, with DLA presidents or their representatives participating in a full day of briefing sessions, along with a dinner and networking.

Highlights included an address by Chief Justice Catherine Holmes and sessions with expert presenters on topics as diverse as LawCare, media relations, time management and digital marketing.

The sessions also included a briefing by QPILCH director Tony Woodyatt on the organisation's role in providing legal assistance for individuals and community groups in Queensland, and an update from academics Dr Francesca Bartlett and Dr Caroline Hart, who have conducted extensive research into regional practice issues.

Feedback from this year's event was again very positive, so it's more than likely our DLA presidents will be back again at Showtime next year!

Attendees and guests at the DLA presidents workshop included, *seated*, QLS president Bill Potts, Chief Justice Catherine Holmes and QLS CEO Amelia Hodge; *standing*, from left, Justin Thomas (Ipswich and District Law Association), John Milburn (Fraser Coast Law Association), Spencer Browne (Far North Queensland Law Association), Jennifer Jones (North West Law Association), Danielle Fitzgerald (Mackay District Law Association), Michele Davis (Logan and Scenic Rim Law Association), Pippa Colman (Sunshine Coast Law Association), Rian Dwyer (Bundaberg Law Association), Kylie Devney (Gladstone Law Association), Trent Johnson (Moreton Bay Law Association), Anna Morgan (Gold Coast District Law Association), Samantha Cohen (North Queensland Law Association and Townsville District law Association), Caroline Cavanagh (South Burnett District Law Association), Emma Micola (Townsville District Law Association), Catherine Cheek (Downs and South West Law Association), Joshua Fox (Central Queensland Law Association) and QLS membership and strategic partnerships general manager Katherine Gonzalez-Cork.

CGW to host international meet

Cooper Grace Ward Lawyers (CGW) will welcome guests from law firms across the globe when it hosts the Advoc Asia AGM next month.

Advoc is a leading international network of independent law firms, with more than 90 member firms in 70 countries worldwide.

The network's Asia chapter, which includes firms from Australia, New Zealand, China, Japan, India, Israel, United Arab Emirates and South-East Asia, has met each year since 1994 in a member city. The AGM on 19-23 October will be the first year that the group has met in Brisbane.

CGW managing partner Chris Ward said the event would be a significant opportunity to discuss the trends and challenges emerging in the legal industry across our region.

"With the industry changing at such a fast pace, the chance to meet face to face with our international colleagues will be invaluable," he said. "The AGM also represents a fantastic opportunity to showcase Brisbane to an international audience."

See **event.icebergevents.com.au/advocbris2016**.

QLS welcomes class action changes

Queensland Law Society has welcomed the introduction of proposed legislative changes to class action laws to provide Queenslanders with the same legal rights as those in New South Wales and Victoria.

QLS president Bill Potts said the significant issue of having no recourse to class action in the state had deprived Queenslanders of a tool for efficient access to judicial processes.

"Class actions are often the only way that poorly resourced victims of disasters and other tragedies can uphold their rights, but for Queensland victims with a possible class action, the only option previously has been to commence those actions in other jurisdictions," he said.

"We have previously engaged on this issue with stakeholders to stop Queenslanders being seen as second-class legal citizens, and I am pleased to see the Queensland Government working with us on this important reform."

Queensland's current system forces major class actions to be lodged in the Supreme Courts of NSW and Victoria.

"There are at least six large Queensland-based class actions under way or being prepared that have been forced into NSW or Victoria," he said. "This reform is about bringing Queensland's legal system into line with other states and it is this type of excellent micro-economic reform that will bring the fiscal benefits of the litigation north.

"It will also use the expertise of judges and lawyers who have local knowledge. It is win-win for everybody and I applaud the Queensland Government on making this a priority for Queenslanders."

LAWASIA celebrates 50 years

The Law Association for Asia and the Pacific, LAWASIA, celebrated its golden jubilee last month at its annual conference in Colombo, Sri Lanka.

The 29th annual conference, from 12 to 15 August, was hosted by the Bar Association of Sri Lanka together with the LAWASIA secretariat led by secretary-general Janet Neville.

The conference was declared open by Sri Lankan president His Excellency Maithripala Sirisena at a ceremony attended by Prime Minister Ranil Wickremesinghe, LAWASIA president Prashant Kumar and other dignitaries and guests, including judges, lawyers, academics and others.

More than 650 delegates from throughout Asia and the Pacific attended the conference, which featured more than 25 concurrent streams and presentations by international speakers, including Australians Justice Julie Ward of the New South Wales Court of Appeal, NSW Land and Environment Court Chief Judge Brian Preston SC, Judge Joseph Catanzariti AM, Stuart Clark AM, Paul Murphy, Peter Fowler, Dr Gordon Hughes, Justin Dowd, Nick Burkett, Malcolm Heath and Anne Pickering.

The 11th LAWASIA moot competition was won by Singapore Management University. Next year's conference will be held in Tokyo, Japan.

Panellists at the LAWASIA real estate & transactions conference session, from left, John Wilson (Sri Lanka), Anne C. Pickering (Australia), Murad Ali Bin Abdulla (Malaysia), Kandiah Neelakadan (Sri Lanka), Vira Kammee (Thailand) and Umang Gupta (India).

LAWASIA secretary-general Janet Neville receives a thank-you token from LAWASIA president Prashant Kumar.

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Family law firms join forces

Anne-Marie Rice and James Naughton from Rice Naughton and Kieran McCarthy from Jones McCarthy have merged their firms to create the new firm of Rice Naughton McCarthy.

The three QLS accredited specialists (family law) are joined in the leadership team by partner and accredited specialist Bruce Dodd. Another two accredited specialists, four solicitors and six support staff complete the firm's complement.

Partner Anne-Marie Rice said the merger evolved because the partners shared a commitment to a compassionate, dedicated and efficient family law offering.

"We saw a compatibility in our approaches to practice and an opportunity to combine our expertise and resources to ensure we are able to provide excellent service to our clients no matter their means or the complexity of the issues," she said.

See ricenaughtonmccarthy.com.au.

Kieran McCarthy, Anne-Marie Rice and James Naughton.

Committee process key to drafting and legislating good law

Queensland Law Society has made a written submission on the Constitution of Queensland and Other Legislation Amendment Bill 2016.

We have also appeared before the Committee of the Legislative Assembly's public hearing on the Bill, which will regulate key mechanisms behind Queensland Parliament's consideration and passing of laws.

We raised four key points:

- endorsement of the Bill's s26B(1) mandate that Bills be referred to a portfolio committee for examination
- concerns around the Bill's section 26B(3)(d), allowing committee examination to be curtailed when Bills are 'urgent'. Our reservations centred on the lack of specific criteria determining a Bill's 'urgent' nature. We also suggested that a potentially worthwhile consideration was that matters of emergency to the state ought (if truly urgent) in fact readily receive bi-partisan support.
- commendation of the Bill's effecting amendment to the *Parliament of Queensland Act 2001* to empower portfolio committees to initiate inquiries of their own motion. Consistently with this, we put forward that a desirable next step might be for the *Parliament of Queensland Act 2001* to provide for unanimous recommendations to be put to the house (*cf* allowing a Minister of the Crown to decide whether to accept these).
- a suggestion that the fundamental legal principles set out in the *Legislative Standards Act 1992* might usefully be enshrined as fundamental provisions in a foundational document such as the Constitution of Queensland, rather than an Act establishing the Office of Parliamentary Council, in order to affirm the government's commitment (particularly in a unicameral system) to the rule of law.

Julia Connelly is a QLS policy solicitor.

Our commitment to evidence-based policy

Queensland Law Society has always advocated to government that public policy, and the laws enacted as a result, should be evidence-based.

In support of this, QLS Council has approved a policy position committing the Society to evidence-based policy.

The policy will further the Society's profile as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

The policy position will be available on the QLS website.

The key points of the policy position are:

- The Society is committed to advocating for policy and legislation which can be shown, with reference to credible objective evidence, to be necessary, just and workable.
- In order to maintain the confidence of the citizenry, laws must be well-founded, just, workable and subject to consultation. This can only be achieved by ensuring that laws arise from evidence-based policy.
- Evidence-based policy is public policy informed by rigorously established objective evidence. It is imperative that such evidence be reliable and well-founded; the outcome of the accurate collection of appropriate data, accountable and transparent analysis of that data and public and professional debate. Once validated, evidence (not mere opinion, whimsy or ideology) drives the development of good policy.
- To ensure that policy is developed in accordance with evidence, it is imperative that the evidence be applied to the proposed policy in such a way that:
  - the policy is tested to ascertain whether or not it will be effective and what the impacts of the policy will be if it is successful
  - alternatives to the policy are explored, and
  - the likely impact of the policy is considered, including its direct and indirect effects.

Wendy Devine is a QLS policy solicitor.

Society seeks fair go for labour hire employees

Queensland Law Society has made a number of recommendations to the parliamentary committee reviewing the state's labour hire industry.

On 2 December 2015 the Queensland Government referred this issue to the parliamentary Finance and Administration Committee to inquire into and report on. The committee was asked to consider a number of areas in the regulation of labour hire in Australian jurisdictions and internationally, along with effective enforcement mechanisms.

It held public hearings in Brisbane and regional centres throughout May and June, and delivered its report on 30 June. This is available from the committees section at parliament.qld.gov.au.

Our submission addressed practical issues which Society members have encountered in regard to the effectiveness of enforcing current industrial relations laws in the labour hire industry.

The essence of labour hire arrangements is that labour hire employees are generally employed on a casual basis by a labour hire business and their service essentially 'rented out' to clients of the business at a profit. While this works in short-term instances to cover absent permanent employees or for short-term or uncertain tasks, the 'need' for casual labour hire employees to work for longer periods in circumstances otherwise analogous to full-time employment is more questionable.

Most labour hire arrangements appear to retain the relationship of employment between the labour hire employee and the labour hire business, albeit of a casual nature. 'ODCO'-style contracting arrangements in the labour hire context (whereby an individual worker operates under a contracting agreement with a labour hire business and their services are let out to a client of the labour hire business) have the capacity to even more adversely affect the legal position of the worker in the triangular arrangement between the worker, business and client.

The concept of dual employment is not one which has gained traction in Australian industrial relations jurisprudence to date.

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Traditionally, courts and commissions have adopted the conventional common law orthodoxy that a casual labour hire employee has no recourse against a client of the labour hire employer. Further, the common feature in unfair dismissal application cases (generally involving long-serving casual employees) has been that the declaration of the labour hire employer that there may still be (or in fact have been) offers of assignments to the employee has been sufficient to render the application invalid on jurisdictional grounds (that is, the employment has not been terminated).

However, not only unfair dismissal cases are affected. The benefits of workplace rights under the *Fair Work Act 2009* (Cth) do not apply directly to labour hire employees (although there may be some indirect capacity to seek redress against labour hire clients through the accessorial liability provisions of the legislation).

The labour hire employee has the worst of both worlds because they may be subject to disciplinary action by the client for their performance and conduct, even though the client is not their employer.

The legal position of a casual labour hire employee is significantly more precarious than that of a casual employee directly employed by a client. We proposed the following possible options to address this situation, including:

alerting labour hire employees and ODCO-style labour hire workers to relevant issues through education programs

the development of a code, similar to the Small Business Fair Dismissal Code and checklist, which would assist in filtering meritorious unfair dismissal claims

legislatively specifying that, for the purpose of unfair dismissal claims and claims of breach of workplace rights, the acts of the client should be regarded at law as the acts of the labour hire employer

the legislative creation of direct obligations between the labour hire client and labour hire employee, particularly in the area of workplace rights.

Annmaree Verderosa is a Queensland Law Society policy solicitor.

Bond students take on international law *and* domestic violence

Bond Law students Lara Sveinsson and Marty Campbell have defeated 14 universities from across Australia to win the 2016 International Humanitarian Law Moot.

The competition is run jointly by the Australian Red Cross and the Australian Law Students' Association (ALSA) every year during ASLA's annual conference, held this year in Hobart.

Bond law students are also participating in a new initiative designed to prepare aspiring lawyers for domestic violence cases.

The project, established in a joint partnership between Bond University and the Domestic Violence Court at Southport, aims to give five law students supervised exposure to the complex legal field of domestic violence by shadowing Magistrate Colin Strofield in his role as a presiding magistrate and working with the dedicated Domestic Violence Registry.

Assistant Professor Jodie O'Leary, who coordinates the program with Assistant Professor Elizabeth Greene, said the initiative was a response to the *Not Now, Not Ever* report into domestic and family violence.

"One of the issues highlighted in the *Not Now, Not Ever* report was the need for universities to identify suitable ways to incorporate education and training around domestic violence prevention into undergraduate courses," she said. "We see the Domestic Violence Court Clinic as a way we can implement those findings, while also giving our students valuable real-world experience to prepare them for legal practice."

Magistrate Strofield said eliminating domestic and family violence required a coordinated response over an extensive period of time.

"Partnerships between universities and key stakeholders will prove invaluable as the commitment to change continues," his Honour said.

Above: DV court experience … Magistrate Strofield, *second from left*, with students Katrina Ukmar, Paula Bould and Tess Lehn.

Left: Moot winners Lara Sveinsson and Marty Campbell.

North Queensland Intensive

August 11, Townsville

A highlight of this year's event was the presentation of 25 and 50-year pins to Lucia Taylor of Purcell Taylor Lawyers and Bob Bogie of Bob Bogie & Co. (25 years), and Brian Baxter of Ruddy Tomlins & Baxter (50 years).

QLS and FLPA Family Law Residential 2016

21-23 July, Gold Coast

More than 300 delegates joined judicial officers, senior legal practitioners, academics and social scientists at the QLS and FLPA Family Law Residential at the Sheraton Grand Mirage Resort on the Gold Coast in late July. Over two days they heard the latest developments in children's and parenting matters, property-related considerations and essential skills to apply in daily practice. Attendees also enjoyed networking opportunities and soaked up the summer vibes at the Residential 'Tropicana' dinner.

QLS and FLPA would like to thank major sponsor SV Partners, along with our silver and bronze sponsors.

1. Mark Leishman, Vanessa Leishman, Raegyn Townsend, Katherine Manby, Her Honour Judge Margaret Cassidy, Anna Bertone
2. Ashleigh Metcalfe, Natalie Ellis, Kimberley Williams, Kate Pateman, Emma Donald
3. Justin Hine, Scott Richardson, Sarah Dibley, Clem van der Weegen, Joshua Williams

Character-based visa cancellation

A retrospective on changes to s501 of the *Migration Act 1958*

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Non-citizens subject to custodial sentencing have felt a substantial impact under changes to the *Migration Act*. Report by **Richard Timpson**.

The Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) received royal assent some 20 months ago.[1]

It made wholesale amendments to Section 501 of the *Migration Act 1958* (Cth) (the Act), in terms of how the Minister for Immigration and Border Protection is able to treat character-based visa cancellation for non-citizens.

This article focuses on the effect of those changes from an immigration law perspective, as well as how the new powers have operated since commencement, in the context of a significant number of non-citizens affected by them.

As a result of how Section 501 of the Act is now constructed, it is arguable that character-based visa cancellations potentially apply to a much larger cohort of non-citizens than ever before. When that reality is juxtaposed against the effect that a character-based cancellation has, the changes to the Act have had a dramatic effect on many non-citizens, as well as their family unit members, who are often left behind.

In this regard, where a non-citizen in Australia has a visa cancelled under Section 501 of the Act, the person generally faces a prohibition on being able to apply for other visas in this country.[2] Similarly, a character-based visa cancellation also results in a decision taken to have been made under the Act to refuse any other visa application (or cancel another visa held) by the affected non-citizen.[3]

Although it can be possible to seek a merits review following this type of cancellation, the review applicant is generally not able to obtain a bridging visa while that process is taking place and is held in immigration detention during the review period. Most significantly, however, a non-citizen in circumstances of a cancellation under Section 501 of the Act faces permanent exclusion from Australia.[4]

Legislative background

Prior to 10 December 2014, there existed a number of grounds under the Act through which a visa could be cancelled. Part 9 of the Act in its previous guise had been in place for a number of years and provided for visa cancellation when a non-citizen was not of good character.

In the earlier scheme, the Minister held a discretionary power to cancel a non-citizen's visa for that reason. Central to that consideration was regard to whether the non-citizen passed the "character test".[5] For the purposes of the previous incarnation of Section 501 of the Act, a non-citizen did not pass that test if the person had:

- a "substantial criminal record"[6] – which included if a non-citizen had been sentenced to a term of imprisonment of 12 months or more, or two or more terms of imprisonment (whether on one or more occasions), where the total of those terms was two years or more, or
- been convicted of an offence that was committed in relation to immigration detention[7] or
- an association with an individual, group or organisation which was reasonably suspected of, or involved in, criminal conduct,[8] or
- demonstrated certain past and present criminal or general conduct such that they were not of good character,[9] or
- where the non-citizen posed a significant risk of engaging in certain future unacceptable conduct if allowed to enter or remain in Australia.[10]

What are the changes?

The changes to the Act, in terms of how character issues are now being treated, have broadened the Minister's powers to cancel a visa on character grounds substantially. This is achieved through, amongst other things, expanding the basis on which a non-citizen will no longer be able to satisfy the character test.

To this end, the current version of Section 501 of the Act similarly provides that it is not possible to satisfy that test in circumstances in which the non-citizen has a "substantial criminal record"[11] – in this respect, while the previous 12-month custodial sentence trigger for a single offence remains, the time period for persons sentenced to two or more terms of imprisonment has been shortened from two years to 12 months or more (irrespective of whether the sentences are constructed consecutively or concurrently).[12]

In a similar fashion, although a "substantial criminal record" still applies to a non-citizen who has been acquitted of an offence on the grounds of unsoundness of mind (and as a result, has been detained in a facility or institution),[13] the changes to Section 501 have been expanded to also incorporate circumstances in which a court has found the person unfit to plead in relation to an offence, but that they committed that offence, on the basis of the available evidence, and as a result have been detained.[14]

As to other aspects of the character test in Section 501(6) of the Act not based on a "substantial criminal record", these also currently capture circumstances that include any of the following:

1. A non-citizen has been convicted of an offence that was committed in relation to immigration detention.[15]
2. There is a reasonable suspicion that the non-citizen has an association with someone else, or with a group or organisation (or membership thereof), involved or previously involved in criminal conduct.[16]
3. There is a reasonable suspicion that the non-citizen has been or is involved in conduct constituting an offence of people-smuggling or an offence of trafficking or the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern, whether or not the non-citizen (or another person) has been convicted of an offence constituted by the conduct.[17]

4. Having regard to the non-citizen's past and present criminal or general conduct such that they are not of good character.[18]
5. If the non-citizen was allowed to enter or remain in Australia, there is a risk that the person would engage in certain future unacceptable conduct.[19]
6. A court in Australia or a foreign country has convicted the non-citizen of one or more sexually based offences involving a child, or found the non-citizen guilty of such an offence, or found a charge against the non-citizen proved for such an offence, even if they were discharged without a conviction.[20]
7. The non-citizen has, in Australia or a foreign country, been charged with or indicted for one or more of the crimes of genocide, a crime against humanity, a war crime, a crime involving torture or slavery, or a crime that is otherwise of serious international concern.[21]
8. The non-citizen has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security.[22]
9. An Interpol notice in relation to the non-citizen is in force (from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community).[23]

Mandatory visa cancellation

In addition to the foregoing amendments which broaden the definition of the character test, perhaps one the most significant and controversial other changes to Section 501 of the Act was the insertion of a mandatory power for visa cancellation on certain grounds.[24]

For mandatory cancellation to occur under that power, the Minister is to be satisfied that the person does not pass the character test because of a "substantial criminal record" on the basis of what is contained in Section(s) 501(7)(a),(b) or (c) of the Act.[25] The power in Section 501(3A) also applies to a non-citizen who does not pass the character test because of the operation of Section 501(6)(e).[26]

In both circumstances, the non-citizen must also be serving a full-time sentence of imprisonment in a custodial institution for an offence against a law of the Commonwealth, a state or a territory, for the power to be enlivened. In any other case, if a non-citizen still does not satisfy the character test for reasons which fall outside the scope of Section 501(3A), a parallel power to cancel a visa on a discretionary basis is separately available to the Minister.[27]

It is important to note that the amending legislation provides that a decision made under Section 501(3A) applies whether the sentence of imprisonment on the basis of which a visa is cancelled under that power, was imposed before, on, or after the commencement date.[28]

Equally however, the Minister must not cancel the visa of a person under Section 501(3A) if they are serving a sentence of imprisonment, if before commencement but during that imprisonment, he or she considered cancelling the non-citizen's visa under Section 501(2) of the Act but decided against that course of action and since that decision no further sentence of imprisonment has been imposed on the non-citizen.[29]

The effects of the changes

Since December 2014, the amendments to the Act which go to mandatory visa cancellation have led to an upsurge in the number of non-citizens who have been immigration detained on their release from incarceration on parole or otherwise.

Statistics obtained from the Department of Immigration and Border Protection (DIBP) under the *Freedom of Information Act 1982* (Cth), show that 1072 mandatory cancellations have taken place since December 2014.[30] DIBP statistics also reveal that only 81 of the mandatorily cancelled cohort have had their visas reinstated.[31]

Although, those figures may not account for applications to revoke which have not yet been finalised, what seems to be an extremely low revocation rate is perhaps indicative of the seriousness with which the Minister's powers under Section 501(3A) of the Act should be looked at.

While many of the other changes to Section 501 of the Act will take time to filter through, the introduction of the mandatory cancellation power has had a real impact on those non-citizens who have been subject to custodial sentencing.

Although an affected non-citizen has the right to apply for a revocation of a mandatory cancellation event,[32] that particular process is taking at least a year at present with what appears to be a very low revocation rate with significant, potentially lifelong consequences for those who are not successful.

Richard Timpson is a solicitor and registered migration agent in Mackay.

Notes

1 On 10 December 2014.
2 *Migration Act 1958* (Cth) s501E (but note s501E (2)-(4)).
3 Ibid s501F(2),(3) (but note s501F(2)(b),(3)(b)).
4 If a visa applicant has previously had a visa cancelled under s501, s501A, s501B and there was no revocation of the decision under s501C or s501CA (and also see Schedule 5 cl.5001(c)(ii) and cl.5001(d)), *Migration Act 1958* (Cth) s503, *Migration Regulations 1994* (Cth) where Schedule 5 cl.5001, Schedule 2 applies.
5 *Migration Act 1958* (Cth) s501(6).
6 Ibid s501(6)(a),(7) (definition of 'substantial criminal record').
7 Ibid s501(6)(aa)-(ab), s197A.
8 Ibid s501(6)(b).
9 Ibid s501(6)(c).
10 Ibid s501(6)(d).
11 Ibid s501(7).
12 Ibid s501(7A).
13 Ibid s501(7)(e).
14 Ibid s501(7)(f).
15 Ibid s501(6)(aa)-(ab), s197A.
16 Ibid s501(6)(b).
17 Ibid s501(6)(ba).
18 Ibid s501(6)(c).
19 Ibid s501(6)(d).
20 Ibid s501(6)(e).
21 Ibid s501(6)(f).
22 Ibid s501(6)(g).
23 Ibid s501(6)(h).
24 Ibid s501(3A).
25 The 'character test' is not passed for Section 501(3A) purposes where under Section 501(6) the person has a 'substantial criminal record' due to being sentenced to death, life imprisonment or a term of imprisonment for 12 months, or more.
26 A person also fails the character test for Section 501(3A) if they have , amongst other things, been convicted of sexually based offences involving a child.
27 *Migration Act 1958* (Cth) s501(2) and s501(3).
28 *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) s32(1) – 11 December 2014.
29 Ibid s32(2).
30 As at 29 February 2016.
31 As at 29 February 2016.
32 *Migration Act 1958* (Cth) s501CA(4).

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Lexon
INSURANCE

End of financial year review

Lexon's financial performance is largely driven by outcomes in two key areas – claims and investments. 2015/16 saw another excellent claims year offset to some degree by lower investment returns.

World issues like Brexit continued the market volatility we have become accustomed to in recent years, and resulted in a smaller than expected investment gain for the year. Nonetheless, the partnership between the profession and Lexon to drive down claims continues to bear fruit and has more than offset those reduced investment returns.

In that regard, we can now report that the 2015/16 year recorded 305 claim files as at 30 June, one of the lowest numbers since our inception in 2001. This is an outstanding result for the scheme and the best form of insulation against ongoing challenges in investment markets.

Claims profile

Commercial matters drove overall claims values for 2015/16 and at 30 June represented 32% of the portfolio total. While it is still early days in the development of the 2015/16 year, we have seen an increased frequency of claims in the company and sale/ purchase of business categories.

Pleasingly, the recent trend toward lower conveyancing file numbers continued in 2015/16 with only 26% of files within this category (cf. early years of the program where this was around one third of all files). The overall value of conveyancing has similarly continued to abate, being just 25.8% of the portfolio for 2015/16. This reflects the continuing strong commitment to risk management made by insured practices and the benign nature of the current Queensland property market.

The 2015/16 year has closely mirrored the breakdown for the 2014/15 year at the same point in development – so there were no real surprises – save for one interesting reversal with a proportionate fall in family law claim values (7.6% down to 2.2%) and an increase in wills and estates (4.3% to 12.2%).

The graphic below compares the portfolio breakdown by area of work for 2015/16 with 'all years'. While overall claims values have reduced in more recent years, claims containment still remains our primary goal.

Policy enhancements in 2016/17

For 2016/17 we have introduced a much simplified policy wording (which we hope to build on next year) and also extended Innocent Party coverage to $2 million per claim.

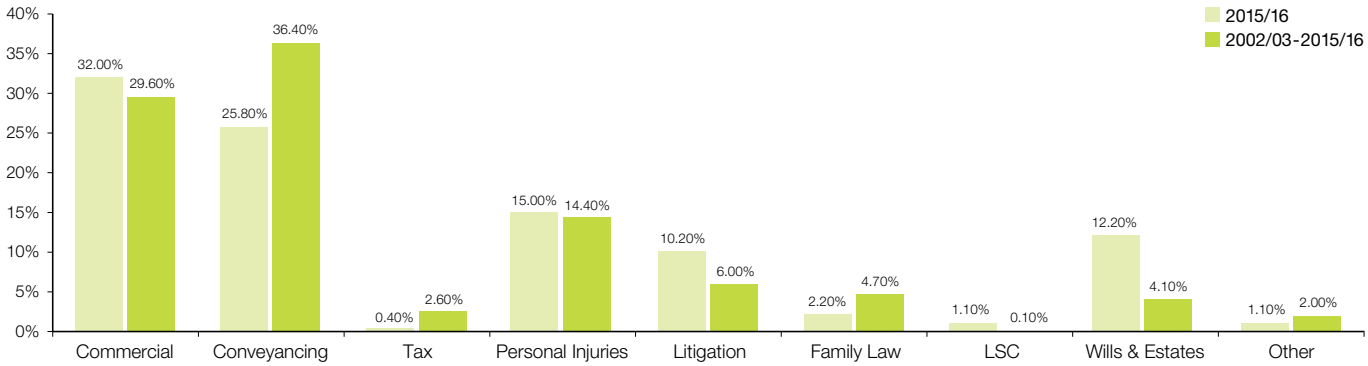
Also, in recognition of the changing environment by which legal services are provided, the 'online legal services' exclusion has been deleted. The required nexus for cover is unchanged; namely that legal services are provided (irrespective of the specific medium through which those services are provided).

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.

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

Claims cost by area of law



Solicitor's 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. While 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

While 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 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?

- Lexon has long been recognised as a leading innovator in risk management strategies. Flowing from that, we are honoured to now be partnering with a regional insurance scheme in an advisory role as they roll out their own enhanced risk program. The Lexon side of the project is being led by David Durham, the 2015 Risk Management Institution of Australasia Risk Manager of the Year, and we have no doubt that there will be some valuable learnings for us during the process which can be applied back in Queensland.
- For the 2016/17 insurance year, QLS Council arranged with Lexon to 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 was significant interest in Lexon's offering and more than 90 practices signed up in the first year. This was beyond our expectations and realised a goal of making affordable top-up cover available to all practices in Queensland.
- Lexon has in place a sophisticated reinsurance program with highly rated international reinsurers who deal with professional indemnity insurers throughout the world. Feedback from our most recent presentations to those reinsurers in April 2016 included that Lexon's "risk and claims management are second to none" and that we have the "best managed risk program [they] have seen".

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Agribusiness and the PPSA

*Carpente*r highlights del credere and agistment issues

This article highlights agribusiness issues which can arise under the *Personal Property Securities Act 2009* (PPSA), as exemplified in *Re Carpenter International Pty Ltd* (*Carpenter*),[1] and other typical PPSA security interests issues in agribusiness.

Del credere agents

Del credere is Italian for 'belief' or 'trust'. In agribusiness and other trading of commodities, a del credere agent is often used, especially if the sale is held by auction, where the buyer is not yet known, and/or the seller cannot attend in person. The agent will normally have full authority to enter into a contract of sale on behalf of the seller.

Uniquely, the del credere agent also gives a surety to the seller for the solvency of the buyer and assumes the responsibility to pay the seller if the buyer makes default on payment. As a fee for the surety given, the agent normally receives an additional commission.

Carpenter International

General facts

Carpenter was in the live cattle export business, purchasing cattle from producers (who we will call the 'sellers'). The sellers used del credere agents. Possession of the cattle was obtained almost immediately by Carpenter upon the sale and before Carpenter had made payment. Most agents and sellers did not register under the PPSA against Carpenter.

Due to space limitations, this article deals only with the cattle sales in which the sellers retained ownership of the cattle until paid in full, and the sellers had agreed to assign such rights to their agent once the seller was paid.[2]

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Some of the procedures used in the buying and selling of agricultural products, including cattle and crops, can lead to difficult situations when a party goes into administration. Report by **Charlotte Davis** and **Peter Mills**.

The sellers' 'retention of title' was a 'security interest' under the PPSA.[3] Carpenter would normally then pay seven days after the end of the month in which the sale occurred (that is, in some cases more than 20 'business days' after a sale).[4] The sale was also conditional on certain testing of the cattle to confirm they were suitable for export.

Voluntary administrators were appointed to Carpenter at 6:45pm AEST on 24 March 2015. It had about 10,000 cattle worth $15 million in its possession, none of which had been paid for. About 4500 of these cattle, and the proceeds of the other 5800 cattle (sold before the court's judgment) were the subject of the dispute as to priority under the PPSA.

Similar to steps taken in the *Hastie Group* case,[5] Carpenter's administrators filed proceedings seeking orders and directions under sections 442C and 447D of the *Corporations Act 2001* (Cth) (the CA) and/or the court's inherent jurisdiction to sell the cattle and deal with proceeds.[6]

As del credere agents had been required (as surety) to pay the sellers, the agents had also been assigned the relevant security interests and debts, and so the agents were parties to the proceedings. The agents sought to recover the cattle and the proceeds. The matter was heard in August 2015 and a decision delivered on 24 March 2016.

General outcome for sellers and del credere – register quickly and properly or lose

The decision contained an extensive discussion on many PPSA and CA points. This article can provide only a snapshot of some key rulings. In summary, the court ruled that the agents' security interest (being the same security interest assigned from the sellers) had vested in Carpenter as the agents had either failed to register, or had registered too late. This case highlights that it is critical for del credere agents to be aware of the correct processes which must be adopted under the PPSA and CA.

Some of the key rulings were:

- The agents unsuccessfully argued that they had no ability, or lawful requirement, to register on the PPSA until after all testing of the cattle had been completed, and the agents had paid the sellers (so as to be assigned the sellers' security interests). As such, they argued that section 267 PPSA and/or 588FL CA either could not apply to them, or alternatively, had been satisfied by them. The court ruled, however,[7] that the agents' ability to register arose as soon as the contract of sale was entered into.
- When Section 267 PPSA speaks of a security interest vesting in the grantor if the security interest is not perfected "immediately before" the insolvency event, it means at any time before the actual time of day that a voluntary administrator is appointed. Some agents had registered only a few hours before the voluntary administrators were appointed, and so their security interests did not vest under section 267 PPSA.
- However, under section 588FL(2)(b)(ii) CA, a party has only 20 business days within which to register its security interest, such date being from the date that the security agreement which gave rise to the security interest "*came into force*". Because of this and the effect of section 162 PPSA, this time started from the date of the sale agreement, not from the date of satisfaction of testing the cattle or the date of an agent's payment to the seller. As such, despite some agents registering (just hours) before the appointment of the voluntary administrators, their security interests vested in the grantor by virtue of section 588FL CA as the relevant security agreements came into force more than 20 business days before the registrations.
- The court declined to extend the 20 business day period under section 588FL CA, as a reason for the agent making the PPSA registration was their concern that Carpenter might default in making payment.

Other agribusiness PPSA issues

Agistment arrangements

Agistment is often used by a landowner (agistor/bailee) to permit the livestock of another (owner/bailor) to be 'agisted' (or stored) on the agistor's property. It is not a lease of the land, and so possession of the land is not to the exclusion of the landowner or others. Sometimes these are for lengthy periods of more than one year, or are for an indefinite period, based on monthly or weekly arrangements.

The terms of an agistment agreement need to be considered carefully if an owner does not want a PPS lease to arise,[8] or an agistor wants a lien over the livestock. The implications are that, if a PPS lease arises, and the owner is not properly registered under the PPSA, the owner will lose priority over its livestock.[9] In Queensland and most states, the agistor does not automatically have a lien over the livestock unless the agistment agreement expressly provides for one. The agistor will therefore normally be an unsecured creditor. Suitable terms and registration under the PPSA would solve this problem.[10]

Certainly, with larger commercial operations such as feedlots, where livestock are stored in consideration of the feedlot buying them, there is possibly a greater risk that the owner will lose priority if they provide livestock regularly to the bailee, or that there might be a storage lien under the *Storage Liens Act 1976* (which sits outside the PPSA).[11]

Crops – forward sales

Often, a large commercial buyer will wholly or partly pre-pay for future crops/produce, so as to ensure supply. Grain, grapes and spices are often bought this way. If the buyer does not properly deal with the PPSA, then they are simply an unsecured creditor and have no rights in the planted crop or its harvested produce from which they had hoped to acquire their supply.

In *Gillogly v Iama Agribusiness Pty Ltd,*[12] the issue was whether ownership in grain passed to the buyer at the time it was placed by the seller in a silo (where it was commingled with other grain not necessarily owned by either party), or when the grain was subsequently collected by the purchaser. That turned on the question of whether the grain the subject of the contract was 'ascertained' [under *Sale of Goods* laws] at the earlier or the later time. The Court of Appeal found it was only owned by a buyer when the grain was collected by it.

Beazley JA said (at [100] to [103]):

"... I am of the opinion that the goods did not become ascertained goods when they were acquired from the grower. At that time, although a quantity and a price had been agreed as between the [purchaser] and the [vendor], there was no intention that the [purchaser] was to receive those specific goods... Rather, the grain so acquired by the [purchaser] was to become mixed with other grain, not necessarily owned by either of the parties. As the goods were not ascertained, property could not pass: s21. ...

"When, therefore, did property pass in the grain sold by the [vendor] to the [purchaser]?

"In my opinion, the contract was a severable contract for the delivery of grain from time to time as and when taken by the [purchaser] from the Graincorp facility, up to the agreed quantity. I consider that the grain became ascertained each time a quantity of grain was allocated to the contract and loaded onto the [purchaser's] truck. At that point, there was specific grain, of a specific quantity, quality and price subject to the terms of the Confirmation of Sale document relating to that load. There was nothing in the agreement or dealings between the parties to evince a contrary intention, so that property passed [at that time]."

In some cases, a forward sale can also be used as a useful financing arrangement between growers and buyers, by which the grower obtains the finance (pre-payment) to grow or harvest the crop, and the buyer pays no more on delivery.

A 'forward – sale and buy-back' contract was used in *Carey v Smith.*[13] A director pre-paid $X for the crop, which funds were used to harvest the crop, as the farm had insufficient funds. The director was entitled under the contract to call on the farm to buy back the crop at a substantial uplift. The court found that despite referring to the parties as the 'buyer' and 'seller', it was 'in substance' a financing transaction, and not a 'sale' of the goods. This arrangement might have had a different outcome in Australia, as our PPSA has provisions which enable non-PMSI holders to have certain first priority where crops or livestock are the collateral.[14]

Partnerships, family arrangements, trusts, family law, succession, crop share arrangements

These arrangements often arise in relation to families/neighbours seeking to most efficiently use their capital by sharing equipment and land, as well as to create asset protection against family law claims[15] and creditors. However, the PPSA does not provide any relaxation from compliance between related entities. If the parties fail to properly document, register or update security interests, then they run the risk that their common intentions will no longer be achieved, and might possibly leave an asset exposed to claims of creditors and others.

As they often have the same accountant, related parties will have all relevant information easily available (for example, serial numbers of motor vehicles, ACN and ABN details) and a common benefit in seeing security interests properly documented and perfected.

Some of the common security interests might include:

- PPS leases of equipment for an indefinite period from a family trust to a trading entity. The amendments made to date to the PPSA and its regulations do not alter this situation.
- Loans by or to partnerships or directors intended to be secured in priority to third parties or spouses rights.
- Agistment or sale of livestock.

Key takeaways

- *Carpenter* confirms the 'register or lose it' approach that has been adopted in case law. Parties, especially sellers and del credere agents, must be aware of the registration time limitations imposed by the PPSA and CA, otherwise they risk losing their priority.
- Parties that are being assigned security interests must verify that the security interest has been registered in time in accordance with the PPSA and CA. The mere fact that the security interest has been assigned will not give the assignee extra time to register.
- Parties cannot rely on past dealings to assume that they will always be paid. As *Carpenter* shows us, when it comes to protecting security interests, parties must 'hope for the best but expect the worse'. This requires nothing other than strict compliance with the PPSA and CA.
- If your clients are unsure about the state of their security interests, and which of their business activities are exposed under the PPSA, they should take steps now rather than later to protect, as much as possible, their current interests and future interests.
- Law firms should consider recommending to clients that an audit of the clients' agribusiness affairs, particularly with reference to 'in substance' financing arrangements (between related party and otherwise) and security interests, will potentially save a lot of heartache.

This article appears courtesy of the Queensland Law Society Banking and Financial Services Law Committee. Charlotte Davis is a special counsel at Herbert Smith Freehills and Peter Mills is a special counsel at Thomson Geer. Both are members of the committee.

Notes

1 *Re Carpenter International Pty Ltd* [2016] VSC 118 (24 March 2016).

2 These are the standard terms of industry sale documents; Australian Livestock & Property Agents Association Limited (ALPA) sale documents. For an example, see clause 20 terms in the ALPA auction document.

3 See section 12 (2)(d) PPSA, and is also a PMSI – see section 14(1)(a) PPSA.

4 See par 225 of judgment.

5 *Carson, in the matter of Hastie Group Limited (No.3)* [2012] FCA 719.

6 They sought orders giving them leave to dispose of the cattle, with any sale proceeds to be dealt with in accordance with several conditions, and directions that they were justified in proceeding on the basis that Carpenter was the absolute legal and beneficial owner of the cattle.

7 By virtue of section 162 PPSA, in that a PPSA registration can evidence a past or intended future assignment of a security interest.

8 Which can be a very difficult factual and legal question. See the horse owners in *Rabobank v McAnulty & Ors* [2011] NZCA 211, who avoided loss of priority as they were not "regularly engaged in the business of bailing goods", though this must be cautiously considered in Australia given *Forge v GE International* [2016] NSWSC 52. See also discussion as to no bailment created, *Helton v Sullivan* [1968] Qd R 562 and *Sinclair v Judge* [1930] St Qd R 220,226 referred to by Jackson at par 53, *Fearnley v Finlay* [2014] QCA 155.

9 *Waller v New Zealand Bloodstock Limited*, CIV 2004-404-4093. See also *Forge v GE* [2016] NSWSC – a party is regularly engaged in [bailing goods] if it is a proper component of their business, and repetition is not an essential requirement.

10 See *Fearnley's Case* esp. per Jackson J at 60.

11 See *Fearnley's Case* per Jackson J, par 23 and 65 and his Honour's comments as to sections 12(1) and 21 and 86 PPSA.

12 [2002] NSWCA 251.

13 [2013] NZHC 2291, though contrast *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353.

14 See Part 3.2 PPSA: value provided to enable crops to be produced, or for livestock to be fed or developed. Strict time periods also apply as to when the security agreement was made so as to be able to gain the benefit of this section.

15 As certain Family Court and other court orders can be registered as a "prescribed interest" (section 148(c) PPSA), and so have priority over any unperfected security interests.

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Forty years of unlocking the law

Caxton celebrates anniversary by Kerrod Trott

This year, one of Queensland's oldest community organisations celebrates 40 years of unlocking the law for Queenslanders.

Caxton Legal Centre is as an independent non-profit organisation providing free legal advice and representation to Queenslanders who face disadvantage in accessing justice.

Generations of lawyers have dedicated their precious spare time volunteering assistance to the hundreds of thousands of clients who have passed through the centre, still affectionately referred to by many as the Caxton Street Legal Service.

On Saturday 8 October 2016, Caxton will hold a celebratory dinner at Brisbane's iconic Tivoli Theatre, including a special awards ceremony at which Chief Justice Catherine Holmes will induct some of Caxton's most outstanding and tireless volunteers and contributors into the Caxton Hall of Fame. (For tickets, see caxton.org.au.)

Where it all began

In 1976, inspired by the Fitzroy (Victoria) and Redfern (New South Wales) legal services, Noel Nunan and Lorenzo Boccabella established Queensland's first community legal service at the Baroona Community Hall.

While dealing with a myriad of minor criminal cases, family disputes, traffic offences, tenancy issues and consumer credit issues, Caxton also sought to empower people to resolve their own legal disputes through ongoing community legal education and practising preventative law. Caxton's mission was to 'demystify' the law by getting the clients involved in their own cases, encouraging self-help and participation.

From the beginning, Caxton adopted a holistic, multi-disciplinary approach to legal problem-solving, calling on volunteer social workers and financial advisers to work alongside lawyers to address the social and financial causes in civil disputes and criminal cases.

By the early 1980s, Caxton was providing legal advice to 2500 clients annually, and had started operating on weekday afternoons as well as three evenings a week.

During the late 1980s, Caxton helped establish the Tenants Union of Queensland, the Prisoners Legal Service and the Financial Counselling Service to address areas of community need identified in the course of providing free legal assistance.

In 1987, the Caxton Street Legal Service moved to Heal Street, New Farm, at which point the name was trimmed to Caxton Legal Centre or, more familiarly, 'Caxton'.

In the late 1990s, Caxton commenced a specialist legal service for older Queenslanders, combining casework, outreach, home visits, community legal education and law reform for older people with legal problems. In 2005, in conjunction with the Queensland Department of Communities, the seniors service was expanded state-wide through community legal centres (CLCs) in Cairns, Toowoomba, Hervey Bay and Townsville.

Caxton in court

Over the years, Caxton has undertaken a number of 'impact' cases in order to achieve law reform outcomes, benefit groups of litigants or simply to address lopsided power imbalances between parties. Some of the more notable cases include:

1985: 'Video victims' campaign

More than 200 clients were assisted in this case involving the sale of video package deals using unfair promissory notes. The campaign achieved national recognition and resulted in changes to the *Credit Act*.

1999: Stolen wages

Supreme Court action on behalf of Lesley Williams to recover Aboriginal 'stolen wages' led to the Queensland Government's $55 million Stolen Wages reparation process.

2003: Under-award wages to Aboriginal employees

Federal Court discrimination proceedings on behalf of two underpaid Cape York Indigenous workers was settled confidentially after they had earlier rejected the Government's blanket offer of $7000. About 4000 Aboriginal workers had previously accepted the Government offer.

2006: Deaf schoolchildren

A Federal Court appeal, in which Caxton briefed Julian Burnside QC on behalf of an eight-year-old deaf girl denied access to a full-time classroom interpreter, led to a $30 million injection of funds into the Queensland education budget for Auslan interpreters.

2007-2015: Homophobic vilification

From the Anti-Discrimination Tribunal to the Supreme Court and the High Court over eight years, this case was ultimately re-heard in the Queensland Civil and Administrative Tribunal where the complainants – who objected to homophobic vilification by a Gympie councillor and gunshop owner – were finally, and fully, vindicated.

2010-2011: Police pursuits

Representation at an inquest into the death of a Brisbane schoolgirl led to changes to the Queensland Police policy on 'hot' pursuits.

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2011-2012: Brisbane floods

Caxton recovered more than $5 million on behalf of 116 flood victims from disputed insurance claims.

Law for non-lawyers

In 1983 Caxton published a *Legal Resources Book* designed to enable access to Queensland law for non-lawyers.

The first edition was produced with the assistance of the Queensland Legal Aid Commission and was written entirely by volunteers (the list of authors reading like a 'Who's Who' of the Queensland legal fraternity).

This publication paved the way for the *Queensland Law Handbook* (QLH) and the *Lawyers Practice Manual*, which continue to attract experts in many fields of the law who contribute on a voluntary basis.

After 12 editions, the QLH is about to be launched as a free online resource. Caxton also produces many other, smaller publications and self-help kits for people with legal issues. Produced in-house on a shoestring budget, these resources are provided free in accordance with Caxton's commitment to making legal information accessible to all.

Caxton's future

Caxton continues to go from strength to strength and in recent years has significantly expanded the scope and depth of the service it is able to offer its clients. Its paid staff include 16 lawyers and four social workers dedicated to the delivery of high-quality outcomes for clients.

Caxton's director, Scott McDougall, says the success of the centre results from the "enormous reservoir of goodwill in the profession, the centre's ability to attract and retain high quality staff and a board of management that has been prepared to take the risks required to be leaders in the community".

"You won't find many organisations as nimble and agile as community legal centres," he said. "Decades of scarce resources and streamlined management have both forced and enabled CLCs to respond quickly to the emerging needs of the community. CLCs are at the forefront of innovation in the law, and the digital age presents another challenge and some exciting opportunities to make the law more accessible."

A word from Caxton volunteers

Peter Carne, Public Trustee of Queensland

Peter Carne was involved with Caxton from the very beginning, as a volunteer lawyer providing free legal advice in 1976 when Caxton was based in the Baroona Community Hall at Paddington.

"It was the first community legal centre in Queensland," he said. "To begin with, there was very strong opposition from the Queensland Law Society (QLS) and the Queensland legal profession, who saw Caxton as a challenge to the legal profession.

"Within a very short period of time, however, the QLS became a very strong supporter of Caxton. They helped Caxton make the move from Baroona Hall to Heal Street in New Farm.

"Community legal centres are far more relevant today in providing access to justice for ordinary Queenslanders."

Peter particularly praises Caxton's role in the area of elder abuse. "Can I just say that the service Caxton provides is a very important service to elderly, vulnerable people as the scourge of financial elder abuse becomes a growing problem.

"Can I also commend the important aspect of the Caxton service which is their mixed model, bringing lawyers and social workers together. This 'mixed discipline' model provides excellent service to the elderly.

"Caxton has been an outstanding success. It is an outstanding organisation that should be supported to the fullest extent."

Top left: Peter Carne.

Top right: Three generations of the McPhee family – Gwen, Emile and Judy.

Judy and Emile McPhee – generations ofvolunteering

Judy McPhee, consultant, McPhee Lawyers

Emile McPhee, lawyer McCullough Robertson and executive director, LGBTI Legal Service

When Judy McPhee began volunteering at Caxton in the mid-'90s, she often found it necessary to take her young twins, Emile and Oscar, along with her to the evening sessions.

"I lived nearby," Judy said, "and sometimes, when numbers were short of an evening, Catherine the volunteer coordinator would ring me and ask if I could help out. I usually took the kids with me. They loved it. They could sit in separate rooms and talk to each other on the phone for hours. They also 'helped' Catherine.

"I really enjoyed volunteering at Caxton. I met lawyers and other workers there who have remained friends and enjoyed the interaction with clients – especially assisting people to take their own action. Community legal centres are such an important resource to the community and deserve the support of the profession. Lawyers who worked in my firm all volunteered at Caxton."

Emile McPhee's childhood experience gave him an early interest in the law.

"While studying law at UQ, I did a 'clinic placement' subject with the consumer credit clinic at Caxton and assisted with the Caxton 2011 flood project," Emile said. "I had a fantastic time working with dedicated volunteers and getting to work closely with clients who were in awful circumstances.

"Having a full-time job and taking up the position of executive director at the LGBTI Legal Service meant that I had to pull back from my volunteering at Caxton. But, thanks to the pro bono program at McCullough Robertson, I've been able to stay well connected with Caxton.

"Caxton is an amazing place to visit, volunteer, work and be involved in.

Positive, personal and productive

Working with your PA

As a young lawyer, one of the most important relationships you will have is with your personal assistant (PA).

Your PA is an invaluable resource and can assist you with information about the firm and your team's work practices. When preparing for court or completion of a large transaction, the help from your PA in collating the final documents can be the difference between making and missing a deadline.

From our experience, and speaking to some of the best secretaries in the business, we have prepared a list of 'golden rules' for a good working relationship with your PA.

Rule 1: Quality of communication equals quality of work produced

Every junior knows that it isn't easy to follow rushed instructions. Learn from your own experiences and ensure that you don't fall into the same trap. Just like you, secretaries aren't mind readers (although sometimes they are so good at their jobs they may seem like it!).

When you first start in your new group or firm, it is a good idea to have an initial discussion about how you, and your PA, like to work and discuss and agree to a mutually acceptable work practice.

Discuss workflows and the timeframe for any turnaround task. Be friendly, clear and direct in your instructions. It is important to set realistic timeframes and have consideration for what is actually urgent.

Keeping your PA abreast of what is happening on the file, especially when you know in advance that you will need their assistance on a large or urgent task, will go a long way to ensuring work is done smoothly. Further, if deadlines change be considerate of the impact of this on others. Nobody wants to work on an urgent task through lunch only to find out that a deadline has been pushed back from 2pm to 5pm.

Dictate clearly and precisely, and use legible handwriting if making any notes on a hardcopy document. Remember that your PA will not know the substance of the matter as well as you do. Be conscious of the quality of the work you are giving your PA and the manner in which they are receiving it. If your dictation is unclear, or your handwriting illegible, it will take your PA much longer to complete the task and there is a greater risk of errors.

Explain any important document procedures and where the matter files you are working on are kept.

Rule 2: Understand your PA's role

Understand the role of your PA within the firm. Remember that the work your PA does is very important to the success of a matter. Do not undervalue their contribution and always treat your PA with respect. It is important to build a good relationship early by establishing trust, respect and loyalty. Ultimately you will be more productive and efficient for it.

Find out early on what tasks your PA is responsible for and what they can help you with. Your PA's role will likely include:

a. creating correspondence/agreements/reports/PowerPoint presentations
b. typing (handwritten amendments and dictations) and formatting documents
c. answering calls
d. booking meetings and travel arrangements
e. opening and closing files
f. filing.

Tasks that may not be within your PA's responsibility may include:

a. entering your time
b. court filing or making deliveries
c. your e-filing
d. personal matters.

Knowing what you can ask for help with will help you, and your PA, budget time and avoid any misunderstandings.

Rule 3: Take advantage of each other's experience and knowledge

Your PA will generally have been at the firm much longer than you and have a wealth of knowledge about the firm and the processes in place, as well as a broad network of relationships. Don't be afraid to ask your PA for guidance or feedback. In particular, your PA will likely be able to help you become a better operator in relation to:

a. dictation (Do you need to slow down? Are you clear?)
b. narrations for bill (Does your group have a standard format? Are there any phrases you should or should not use)
c. consistency with the firm's style guide (How should documents be presented? Should you italicise or underline?)
d. understanding the preferences of senior authors (Do they like to work late or start early? Do they prefer email or hardcopy documents and their printing single or double-sided?).

Rule 4: Maintain personal contact

Email is an excellent way to keep track of tasks and to communicate quickly or from out of the office.

However, it is not a good idea to only communicate with your PA by email. Take a moment to say good morning every day and keep your PA up to date with your whereabouts during the day. If you expect that a meeting will run over, let your PA know so that they can inform other members of the team or a client if they come looking for you.

Personal contact is particularly important when dealing with urgent deadlines. Further, for large matters it helps to schedule a quick planning or progress meeting to run over the list of items for the week so you are both aware of their status.

It is helpful to have a regular time, either five minutes in the morning or the evening, when you can let your PA know about upcoming tasks so they can plan their workload.

Rule 5: Understand that you are only one of many

Remember that your PA works for many people. As a young lawyer, be self-sufficient when appropriate, particularly with regards to filing, copying and faxing. As a rule of thumb, if it takes longer to explain the task than it

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A positive and productive relationship with your personal assistant is a key ingredient to a successful legal career. **Amy Dunphy** and **Anne Crittall*** explain why.

would take to do it yourself, it is best to do the task yourself.

Have consideration for the demands placed on your PA, and if something is urgent, try to share the workload to achieve the best result. Give thought to whether it would be better to use the firm's wider resources (if available) instead of your PA. If your firm has a word-processing team, try to send work there when you can. Your PA will not usually undertake legal research, so if your firm has a library and/or research clerks, seek their assistance (or undertake the research yourself), rather than give it to your PA.

Rule 6: Give and receive constructive feedback

Remember your relationship with your PA may last for many years, and it is important to get off to a good start and check in to see how the relationship is working. Feedback should always be constructive and delivered in a respectful way.

Before making any administrative change, seek your PA's feedback and input. Your PA will be aware of the impact on them and others, and can often explain why the current process is used.

Rule 7: Maintain a collegiate atmosphere

Your relationship with your PA can be very fulfilling, and one of mutual respect and appreciation. Saying thank you and sharing the odd joke can make the work day much more pleasant.

**The authors would like to acknowledge and thank their PAs who have been lifesavers on more than one occasion.*

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee's Proctor working group is chaired by Greer Davies (GDavies@mcw.com.au) and Hayley Schindler (h.schindler@hopgoodganim.com.au). Amy Dunphy is a senior associate and Anne Crittall is a lawyer at MinterEllison

‘But I changed my mind…’

When a verbal settlement agreement is binding

When is a binding agreement reached during settlement negotiations? **Sara McRostie** provides the answer.

It is important for lawyers and their clients to understand at what point a binding agreement is reached in a negotiation, as the Fair Work Commission will hold parties to a verbal settlement agreement.

This was recently reinforced by the commission when it refused to allow an applicant to renege on a verbal settlement agreement reached at an unfair dismissal conciliation conference.

Verbal agreement to settle

In *Csontos v QT Hotels & Resorts Pty Ltd* [2016] FWC 3632, Mr Csontos had made an unfair dismissal application after he was dismissed by QT Hotels & Resorts Pty Ltd (QT) after just over six months of employment as a chef.

The commission conducted a conciliation conference in line with its usual dispute resolution processes. The parties participated via telephone and neither was legally represented, although Mr Csontos was assisted by an interpreter.

QT made a verbal offer to settle the matter on terms that included a payment of $1000 to Mr Csontos. Mr Csontos accepted the offer.

Later that day, the commissioner’s associate drew up the written terms of settlement and emailed them to the parties for signing. QT signed the deed and returned it to the commissioner’s associate. It also paid Mr Csontos $1000, however Mr Csontos did not sign the deed.

The matter was then listed for a subsequent telephone conference, at which time Mr Csontos said the money paid to him was inadequate and, unless he was paid $3000, he would like to have a hearing.

Application to dismiss

QT applied to have Mr Csontos’ unfair dismissal application dismissed, arguing that the matter was at an end because the parties had entered into a binding verbal settlement agreement. Mr Csontos’ position was that he had verbally agreed to the terms of settlement, which included payment of $1000 to him, but that he had not considered the matter finished until he signed the written terms of agreement.

What constitutes a binding settlement?

This dispute centred on the legal effect of the verbal agreement between Mr Csontos and QT. The key issue was whether the parties intended to be bound by the verbal agreement which was reached during the conciliation conference, or whether the parties intended for the agreement to be put in writing and signed.

In considering whether the parties’ verbal agreement was a binding contract, the commissioner considered the three classes of negotiations described by the High Court in *Masters v Cameron* (1954) 91 CLR 353. The High Court described the classes as:

1. The parties have agreed on all terms and intend to be immediately bound to perform those terms, “but at the same time purpose to have the terms of their bargain restated in a form which will be fuller or more precise but not different in effect”.
2. The parties have agreed on all terms and intend no departure from, or addition to, that which the agreed terms express or imply, “but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document”.
3. The parties do not intend “to make a concluded bargain at all, unless and until they execute a formal contract”.[1]

In the first two classes, the High Court said there was a binding contract. The third class was not a binding contract. In allowing QT’s application to dismiss Mr Csontos’ unfair dismissal claim, the commission said that the agreement made by the parties could not be categorised in the third class described by the High Court. The evidence highlighted that QT considered it had reached a binding agreement and Mr Csontos understood that he had reached a verbal agreement during the conference.

In the circumstances, the commission found that Mr Csontos verbally entered a binding settlement agreement at the conference and, as a result, the cause of action for unfair dismissal relief no longer existed.

A binding settlement does not have to be in writing

The commission reinforced that a binding settlement agreement does not have to be made in writing and can be reached entirely by spoken words or conduct engaged in by the parties.[2]

Frivolous or vexatious finding not necessary

Section 587 of the *Fair Work Act 2009* (Cth) provides the commission with a broad discretion to dismiss an application. Subsections 587(a), (b) and (c) provide a non-exhaustive list of reasons for it to dismiss an application, including if the application is frivolous or vexatious, or has no reasonable prospects of success.

Section 587 does not limit the commission’s power to dismiss an application for other reasons. In *Rebecca Tomas v Symbion Health*,[3] Commissioner Gooley said:

“In this matter I find that section 587 empowers Fair Work Australia to dismiss an application for relief in circumstances where the parties have reached a binding agreement settling a claim and one party reneges on that agreement and seeks to have their claim determined. It is not necessary to make a finding that the application is frivolous or vexatious or that the application has no reasonable prospects of success as section 587 provides Fair Work Australia with a broad discretion to dismiss an application.”

Conclusion

Parties must be clear in a negotiation if they do not intend to make a concluded bargain until they sign a deed. If the parties fail to do so, the legal effect of the verbal agreement will be that the parties have settled the matter.

Sara McRostie is a partner at Sparke Helmore Lawyers.
The assistance of Mason Fettell in preparing this article is gratefully acknowledged.

Notes

1 91 CLR 353 at 360.

2 *Csontos v QT Hotels & Resorts Pty Ltd* [2016] FWC 3632 at [39].

3 [2011] FWA 5458 at [59].

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CRICOS# 00120C

Setting aside a deed of company arrangement

Part 1: The options open to a creditor

Notification that a company has been placed into administration is never good news for its creditors.

If the voluntary administration regime is used properly, there is a possibility that creditors will receive a better return than in a winding up, especially if the directors, shareholders or third party put up a proposal, known as a deed of company arrangement (DOCA).

However, in other cases, it might appear that a DOCA is being used to avoid scrutiny of past transactions, or that a DOCA is not in the interests of all creditors. This article outlines the options open to a creditor.

What is a DOCA?

The *Corporations Act 2001* (Cth) (the Act) includes a voluntary administration regime to enable financially distressed corporations to be reorganised so that the company can recover and continue to trade with some or all of its past liabilities dealt with. The appointment of administrators under Pt 5.3A of the Act has significant consequences on the rights of the company's creditors.[1]

Following an administrator's appointment, there is a strict process for the administrator to investigate and report on the position of the company and convene meetings of creditors in order to decide the company's future. The first meeting must be held within eight business days after the administration begins.[2]

The second meeting is required to be convened within about 15 to 30 business days after the administration begins (the precise number of days depends on the application of s439A to the facts of the case and whether an extension or more than one is granted under s439A(6)).[3]

As part of his or her role, the administrator will explore with directors the possibility of entry by the company into a DOCA to compromise the debts due by the company. There are few restrictions on the arrangements that can be proposed.

At the second meeting, the creditors must decide whether the DOCA (if any) be accepted, the administration end, or the company be wound up.[4] In some cases, the proposed DOCA will be more attractive than a winding up. However, in others, particular creditors may receive preferential treatment under the DOCA, loans to directors or distantly-related entities can surface, or creditors who are only owed a small amount (employees, small contractors) take a sudden and surprisingly staunch view that the DOCA be accepted. In those circumstances, there can be a suspicion that such creditors do not have genuine debts or that the company is 'stacking votes'.

Before the second meeting

Some particular considerations when evaluating the report to creditors by the administrator[5] and the DOCA are:

- Does it genuinely appear that the company is insolvent?
- Has the administrator conducted his or her investigation as fully and frankly as time permits and is there adequate analysis in the report to creditors?
- Has there been any false or misleading information given to creditors or the administrator? Is there any such information contained in the administrator's report?
- Is there anything significant that your client knows about the company that has been omitted from the report?
- Do the claimed debts appear genuine? Inspecting the proofs of debt may reveal transactions or issues that require further investigation.
- Are there potentially voidable transactions which will not be investigated or recovered further if the DOCA is executed?
- Have all matters and information been disclosed to creditors which might possibly be considered relevant for an informed exercise of their vote such as:
  - the true relationship between the company (or its directors or members) and particular creditors or sponsors of the deed
  - any collateral motives for executing the DOCA or any benefit flowing to any persons as a result of the DOCA
  - whether the sponsor of the DOCA stands to receive any benefit directly or indirectly.
- Is the DOCA oppressive to one or more creditors, or does it discriminate between creditors? If so, is there a legitimate commercial justification for it doing so?

Voting on the DOCA

If the DOCA has not been passed, a concerned creditor should write to the administrators about any additional information or investigations they think are needed. It is possible to request adjournment of up to 45 days, but this does require the consent of the meeting.[6]

If the creditor does not consider the DOCA to be in its interests, it should vote against the DOCA. However, the creditor might be outvoted, with the result that its debt is compromised against its wishes.[7] The creditor should always request a poll so that the court can later assess how the vote came to be passed.[8]

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In the first of two articles, **Kylie Downes QC** and **Janelle Payne** examine the options open to a creditor when seeking to set aside a deed of company arrangement.

After the vote

As well as considering the matters identified above before the second meeting of creditors is held, further matters to consider after the resolution has been passed are:

- Were the provisions of the *Corporations Act* complied with, for example, requirements as to notices of meetings? If not, does any injustice or detriment flow from the non-compliance?
- Which creditors voted in favour of the DOCA and what is their relationship to the company? Examine each of the creditors and their debts. Obtaining company searches of the creditors may reveal a previously unknown connection.
- Did any related creditors vote in favour of the DOCA? If so, would the resolution have been passed if their votes were disregarded?
- What is the benefit to creditors if the DOCA is set aside and the company is wound up instead? What about the effect on employees?
- Can it be shown that the DOCA is contrary to the interests of creditors as a whole, or prejudicial to the interests of creditors who voted against the resolution?

Terminating or setting aside deeds – statutory provisions

There are a number of ways that a DOCA can be brought to an end by the court.

Section 445G – Non-compliance with Part 5.3A

The court has power, under section 445G, to declare either a DOCA or a provision of a DOCA void if it was not entered into in accordance with Part 5.3A. However, the court's power is discretionary. The DOCA may be upheld in any event if no practical benefit would be conferred on any creditor by setting aside the DOCA.[9]

Section 445D – When Court may terminate deed

There are four main grounds on which a DOCA is generally terminated under s445D of the Act. They are:

- if effect cannot be given to the deed without injustice or undue delay
- if the deed, or something done under it, would be oppressive, unfairly prejudicial to, or unfairly discriminatory against, one or more of the creditors
- if the deed, or something done under it, is contrary to the interests of the creditors of the company as a whole
- if the deed should be terminated for some other reason.

The DOCA can also be terminated if false or misleading information was given to the administrators or creditors,[10] or contained in the report or statement to creditors,[11] or if there was a significant omission from the report or statement to creditors that can reasonably be expected to have been material to the creditors in their decision.[12] Additionally, the DOCA can be terminated if there is a material breach of it.[13]

Even if the court is satisfied that one of the grounds under s445D(1) has been made out, it retains a discretion as to whether or not to terminate the DOCA.

Section 447A – Ending administration for abuse

Section 447A provides the court with power to set aside the resolution, set aside the DOCA and to order a winding up.[14] In exercising such a power under s447A, the court can apply by analogy any one or more of the principles applicable to s445D.[15]

Section 600A – Setting aside a resolution at a meeting of creditors

Section 600A empowers the court to set aside a resolution at a meeting of creditors if the vote of a related creditor determined the outcome of the vote and the passing (or non-passing) is contrary to the interests of the creditors as a whole or prejudices the interests of creditors who voted against the resolution. A related creditor is defined as a person who, when the vote was cast, was both a related entity and a creditor of the company. Related entity has the extensive meaning given in section 9 of the Act.

In Part 2, we will consider the procedural aspects of bringing applications to the court under these sections of the Act.

Kylie Downes QC is a Brisbane barrister and member of the Proctor editorial committee. Janelle Payne is a barrister from Burnett Lane Chambers. She was junior counsel for the ultimately successful creditor in *Promoseven Pty Ltd v Prime Project Development (Cairns) Pty Ltd* [2015] 2 Qd R 317.

Notes

1 See, for example, s440B.
2 *Corporations Act*, s436E.
3 s439A.
4 s439C.
5 Provided under s439A(4) and which will include an opinion as to whether it would be in the creditors' interests for the company to execute the DOCA.
6 See Reg 5.6.18.
7 s444D(1) – for the positon of secured creditors and lessors see ss 444D(2), (3).
8 Reg 5.6.21.
9 For example, *Deputy Commissioner of Taxation v PDDAM Pty Ltd* (1996) 19 ACSR 498.
10 s445D(1)(a).
11 s445D(1)(b).
12 s445D(1)(c).
13 s445D(1)(d).
14 *QBI Corp Pty Ltd v Plantation Rise Pty Ltd* (2010) 77 ACSR 573; [2010] QSC 102 (Wilson J at [42]–[46]); *ASIC v Midland Hwy Pty Ltd* (ACN 153 096 069) (Admin Apptd) (2015) 110 ACSR 203; [2015] FCA 1360 at [64]–[66] referring to *DCT v Woodings* (1995) 13 WAR 189.
15 *ASIC v Midland Hwy* (2015) 110 ACSR 203; [2015] FCA 1360 at [69].

‘Will It Your Way’ comes our way

‘I never put off till tomorrow what I can possibly do – the day after.’[1]

On Friday 8 July the Public Trustee of Queensland launched the ‘Will it Your Way’ campaign to educate the public on the importance of having a will.

Established in July 2013, Will It Your Way is a registered charity[2] that encourages young Australians to make a will. Several Queensland Law Society Succession Law Committee members[3] attended in support of the event, along with many other solicitors. They learnt that it is not only young people who forget to make a will; many solicitors, busy with the legal affairs of their clients, often overlook making their own wills.

It was a timely reminder that having a will – and updating it – is especially important in the context of life-changing events, but more so now in the wake of implications arising from *McIntosh v McIntosh* (2014) QSC 99 and *Brine v Carter* [2015] SASC 205[4] in respect of claims on superannuation death benefits.

If you haven’t done your will, and you are ‘the chef that never cooks the dinner’,[5] QLS has many well-credentialed succession solicitors who can assist with your estate planning. Use the accredited specialist search function under the Find a Solicitor tab at qls.com.au.

Probate, powers of attorney and delegations

Can a person with a grant appoint an attorney to undertake property transactions?

Recently a member raised a query about the ability of an absent executor to appoint an attorney to attend to matters in an estate administration, in particular dealing with real property.

The issue revolves around the decision of *In the Will of Bob Wild (dec’d)* [2003] 1 Qd R 459; [2002] QSC 200 in which the court determined that a person appointed as an enduring power of attorney can obtain a grant on behalf of an incapacitated person who is nominated as an executor in a will.

And so the question arises, can a person with a grant appoint an attorney to act in their stead? In answering this question, it is notable that at common law the appointment of executor under grant is non-delegable. It is also notable that the *Powers of Attorney Act* does not include such delegation in its list of excluded special personal matters. And so there seems to be uncertainty.

However, the *Trusts Act 1973* assists. In Section 5, the definition of ‘trustee’ includes “a personal representative”, which it defines as “the executor, original or by representation, or the administrator for the time being of the estate of a deceased person”. And Section 56 of the *Trusts Act* provides “notwithstanding any rule of law”.

Having regard to the combined effect of these provisions, an executor can appoint an attorney to act. However, for the purposes of dealing with land, the question arises as to the type of attorney – whether it is an enduring or general appointment?

In that context the writer sought the views of the Registrar of Titles, who kindly provided her response as follows:

The Titles Registry’s practice is the same for both executors and other types of trustees. The term trustee is used in that context for convenience. Of course, this position does not cover all possible scenarios that may arise where a trustee is delegating the execution of their trusts by a power of attorney.

1. It is the Titles Registry’s understanding that, at common law, the appointment of an executor or other trustee is non-delegable. Accordingly, a trustee is not permitted to delegate unless authorised to do so by the trust instrument or statute (in Queensland the *Trusts Act 1973*). In reflection of the above, it is the Titles Registry practice to only register a power of attorney granted by a Queensland trustee in their capacity as trustee where:
   a. The trustee is expressly authorised to appoint an attorney by the trust instrument (usually the Will or trust deed);
   b. The delegation falls within the scope of section 56 of the *Trusts Act 1973*.
2. It is the Titles Registry’s understanding that Section 56(1) of the *Trusts Act 1973* is limited and only permits a trustee to delegate the execution of their trusts to a person resident in the State of Queensland if he or she:
   a. Is out of the state or is about to depart from the state; or
   b. Is or may be about to become, by reason of ‘physical infirmity’, temporarily incapable of performing all duties as a trustee.
3. It is also generally the Titles Registry’s practice to only register a trustee’s power of attorney made by way of a general power of attorney under the *Powers of Attorney Act 1998*, not an enduring power of attorney. The reasoning behind this practice is best explained by the Queensland Law Reform Commission in their discussion paper, *A Review of the Trusts Act 1973 (Qld)* (page 384).
4. The application of the decision in *Re Wild* [2003] 1 Qd R 459 has been raised with the Titles Registry on a number of occasions. In light of the seeming incompatibility between the above law and some of the reasoning in *Re Wild* [2003] 1 Qd R 459 the Titles Registry does not consider it has authority to extend the application beyond what was actually decided in that case, namely that an attorney appointed under an enduring power of attorney made under section 175A of the *Property Law Act 1974* can apply for a limited grant of probate on behalf of a sole executrix and beneficiary.
5. The Titles Registry’s practice requirements are outlined in Part 16 (Request to Register a Power of Attorney or Revocation of Power of Attorney) of the *Land Title Practice Manual*. However, it may assist the profession to be aware of the following common issues which often require a requisition notice to be issued:
   a. The terms of the power of attorney being too general and not specifically identifying that it is granted in the principal’s capacity as trustee. For example a power of attorney may be requisitioned for clarification where the power of attorney does not contain words such as “John Smith as personal representative of the estate of Jane Smith” or “as trustee for the Smith Trust”.

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with Christine Smyth

b. Item 1 of a Form 16 (Request to Record Power of Attorney) not identifying that it is granted in the principal's capacity as trustee and the "as trustee" option being struck out. Item 1 should include words such as "John Smith as personal representative of the estate of Jane Smith".
c. The statutory declaration by the donee of a power of attorney required by section 56 (7) of the *Trusts Act 1973* not being deposited.
d. Item 3 of a Form 16 (Request to Record Power of Attorney) not identifying that it is pursuant to section 56 of the *Trusts Act 1973* or pursuant to a clause in the trust instrument.
e. The trustee attempting to delegate powers that they do not have under the trust instrument. For example a power of attorney purporting to give the attorney power to enter into a conflict transaction where the trust instrument does not authorise conflict transactions.

The Registrar of Titles acknowledges views can differ in respect of the application of S56 of the *Trusts Act 1973* and welcomes the considered views of the profession on this issue. If you would like to share your views, please direct them to QLS policy solicitor Wendy Devine at advocacy@qls.com.au.

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

Notes

1 Oscar Wilde.
2 See willityourway.com.
3 My thanks to Sarah Doblo, Chris Herrald, Rob Cumming and Caite Brewer for feedback on this event.
4 For a detailed analysis of these decisions, see 'Super, Personal Representatives and conflicts of Interest', by Christine Smyth and Katerina Peiros, published in the NSW Law Society Journal, August 2016 (lawsociety.com.au/resources/journal/LSJOnline/index.htm) and The Tax Institute Journal *Taxation in Australia* published April 2016 (taxinstitute.com.au/titaxinaustralia/successful-succession-super-personal-representatives-and-conflicts-of-interest).
5 My thanks to Michele Davis for the quote.
6 My thanks to Wendy Devine for providing notes of the meeting to assist with this commentary.

Domestic violence can affect anyone, regardless of age, gender or wealth, where they live or their cultural background.

Not Now, Not Ever Putting an End to Domestic and Family Violence in Queensland Taskforce Report – 2015

Domestic and Family Violence Best Practice Guidelines

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Queensland Law Society

Consistency in sentencing

with Supreme Court Librarian David Bratchford

sentencing.sclqld.org.au

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Thursday 22 September
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Level 3, 415 George Street, Brisbane

RSVP by 15 September to events@sclqld.org.au

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Discourteous and offensive behaviour

by Stafford Shepherd

To be honest and courteous in all of our dealings in the course of legal practice is a fundamental ethical duty.[1]

In April 2013, the Supreme Court of Western Australia removed a practitioner from the roll who had been involved in a number of instances of discourteous and offensive behaviour towards a judicial officer, members of the police and court staff. The practitioner was also found to have knowingly (or alternatively, recklessly) misled a court.

In *Legal Profession Complaints Committee v in de Braekt*,[2] five incidents of misconduct were identified as constituting misconduct by the practitioner. Four incidents were concerned with discourteous and offensive behaviour. The incidents included persistent discourtesy and offensiveness to a magistrate, discourteous and offensive emails to police officers, and discourteous and abusive actions directed towards a security supervisor at a court.

The State Administrative Tribunal of Western Australia had found that while the finding of misconduct relating to these incidents would not, if each were viewed in isolation, warrant the removal of the practitioner from the roll, when viewed collectively, they "demonstrated a character and course of conduct on the part of the practitioner which was inconsistent with the privileges of practice as a member of the legal profession".[3] The tribunal noted:

"… the maintenance of appropriate relationships between legal practitioners and others engaged in the proper functioning of the criminal justice system, such as police officers and court officers was a matter of considerable importance… the practitioner's conduct seriously undermined the reputation of the legal profession."[4]

The Full Bench held as follows:

"Discourtesy, in many instances, will be insufficient to warrant a finding of professional misconduct. Even less frequently will that discourtesy result in, or contribute to, a finding that the practitioner should be removed from the Roll. However, the importance of courtesy in the legal system, and in the relationship between the legal profession, the court system, and general public should not be understated. While a practitioner should advocate fearlessly on behalf of the interests of their client, that is not an excuse for discourtesy… Discourtesy can undermine the reputation and standing of the legal profession in our community, and the efficient function of the legal system itself."[5]

The Full Court agreed with the tribunal that the acts of discourtesy and the offensive nature of the practitioner's conduct "demonstrated a persistent disregard for the duties of a legal practitioner, the professional standards expected within the legal profession, and the need to maintain and respect the goodwill and trust reposed in the legal profession by the general public, and by those in regular contact with the legal profession, such as police and court staff".[6]

The Full Court held that it was in the public interest, both in terms of the protection of the public, and the maintenance of the reputation and standards of the legal profession, for the practitioner's name to be removed from the roll.

If we are discourteous or use offensive tactics, the gains (if any) will only be momentary. Such actions undermine our effectiveness in promoting our clients' best interests.[7] We can be "fair and tough-minded while being unfailingly courteous".[8] We are at our best when we are civil, courteous and fair-minded.

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

Notes

1 Rule 4.1.2 *Australian Solicitors Conduct Rules 2012* (ASCR),
2 [2013] WASC 124.
3 Ibid, [17].
4 Ibid.
5 Ibid, [28]-[29].
6 Ibid, [34].
7 Rule 4.1.1 ASCR.
8 Justice Matthew B Durrant, 'Views from the Bench: Civility and Advocacy' (2001) 14 Utah Bar J 35.

A testing time for defamation limitation

State of Queensland v O'Keefe [2016] QCA 135

Limitation of Actions Act 1974 s32A – extension of limitation period in defamation actions – applicable test – circumstances arising after expiration of limitation period

In *State of Queensland v O'Keefe* [2016] QCA 135 the Queensland Court of Appeal considered an appeal against the decision of the primary judge, who had extended the limitation period for commencing a defamation proceeding.

On 13 August 2013 the respondent, a constable of the Queensland Police Service, was stood down from duty pending consideration whether a charge of misconduct in relation to public office under s92A of the *Criminal Code* (Qld) should be brought against him. That action was recommended in a briefing note about the respondent's involvement in the investigation of a traffic accident, which was published on the same date by an inspector working in the internal investigations branch of the Queensland Police Service to a superior officer. The respondent was subsequently charged with misconduct, and also suspended without remuneration.

A copy of the briefing note was provided to the respondent in June 2014 when he was suspended from duty. At that time his solicitor regarded the contents of the briefing note to be defamatory of the respondent, but also thought it apparent that the note was published on an occasion of qualified privilege. When the respondent's solicitor received the criminal brief of evidence on 22 August 2014 it became clear to him that there were no factual or legal bases for potentially damaging statements made about the respondent in the briefing note, so that a defence of qualified privilege may not succeed.

The respondent's solicitor made written submissions in February 2015 to the Director of Public Prosecutions as to why the prosecution should not proceed. In May 2015 the Director of Public Prosecutions decided that an indictment would not be presented against the respondent.

The respondent's solicitor sought advice from counsel in July 2015 about the defamation claim. On 20 August 2015 the respondent obtained an order in the District Court extending the time for him to bring a claim for defamation against the applicant until 3 September 2015.

The applicant applied for leave to appeal that order.

Legislation

Section 10AA of the *Limitation of Actions Act 1974* (Qld) (the Act) provides that an action on a cause of action for defamation must not be brought after the end of one year from the date of publication of the matter complained of.

Section 32A of the Act provides:

> 32A Defamation actions
>
> (1) A person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period for the cause of action.
>
> (2) A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period mentioned in section 10AA to a period of up to 3 years from the date of the publication.
>
> (3) A court may not order the extension of the limitation period for a cause of action for defamation other than in the circumstances specified in subsection (2).
>
> (4) An order for the extension of a limitation period, and an application for an order for the extension of a limitation period, may be made under this section even though the limitation period has already ended.

Grounds of appeal

The applicant relied on alleged errors of law made by the primary judge as warranting the grant of leave to appeal. It was alleged the primary judge was in error in:

a. failing to find that the respondent had not shown that it was not reasonable in the circumstances for the respondent to have commenced the action within one year of the date of the publication, and

b. considering circumstances that arose after the expiration of the limitation period as determining whether it was not reasonable for the respondent to have commenced the action within the limitation period.

Was the correct test applied?

The primary judge had concluded that it was not until the full brief of evidence was provided to the respondent's solicitor in late August 2014 "that the prospective action could be viewed in a manner that took into account not only the alleged defamatory matter in the briefing note but also the basis for the assertions which were made in the full brief of evidence", so that an assessment could properly be made as to the likelihood of a defence of qualified privilege being successful.

Accordingly, he was satisfied that it was not reasonable for the respondent to have commenced an action in relation to the alleged defamatory matter in the briefing note within one year from the date of publication.

The court examined the decisions in *Noonan v MacLennan* [2010] Qd R 537 and *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, in which the nature of the test which must be applied by the court under s32A(2) of the Act was considered. It regarded it as clear from those authorities that the test under s32A(2) – whether it was not reasonable in the circumstances for the plaintiff to have sued within the limitation period – was an objective one, so that it was not satisfied by showing that the plaintiff believed that he or she had good reason not to sue.

The court found it to be apparent from the reasons of the primary judge that his conclusion was substantially influenced by the fact that the respondent's solicitor did not receive the full brief of evidence relating to the criminal charge until late August 2014, after the limitation period had expired, and that it was at that time that the solicitor changed his view about qualified privilege. Mullins J (with whose reasons Philip McMurdo JA and Douglas J agreed) said (at [26]-[27]):

"The primary judge considered the position adopted by Mr O'Keefe's solicitors during the limitation period in the light of what was disclosed after the limitation period in the full brief of evidence, when the focus should

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Report by Sheryl Jackson.

have been on the circumstances that applied during the limitation period, in order to evaluate whether it was not reasonable for Mr O'Keefe to have commenced the claim for defamation within that one year period."

The court was satisfied that the primary judge had made a "fundamental error of law" by not applying the objective test mandated under s32A(2) of the Act to the circumstances that applied to the respondent within the limitation period, and that this made the case an appropriate case for leave to appeal to be granted under s118(3) of the *District Court of Queensland Act 1967* (Qld).

Did the respondent satisfy the objective test?

It was not in dispute that the Court of Appeal was in a position to decide, on the basis of the material adduced before the primary judge, whether or not the respondent had, in fact, satisfied the objective test under s32A(2) of the Act.

Referring to *Houda v State of New South Wales* [2012] NSWSC 1036 the court accepted that not every person facing a criminal charge linked to the defamatory statement will be able to show that it was not reasonable to have commenced the proceeding for defamation within the limitation period, while the criminal charge was extant.

However, in view of the overlap between the criminal charge facing the respondent during the limitation period and the alleged defamatory statements in the briefing note, along with the additional pressure facing the respondent of suspension from duties as a police officer without remuneration, the court found that it was objectively justifiable for the respondent to focus on the criminal charge and responding to his suspension, rather than any civil claim for defamation. Accordingly he had discharged the onus under s32A(2) to show that it was not reasonable for him to have commenced the proceeding for defamation before the expiry of the limitation period.

Length of extension

The primary judge had extended the limitation period until two weeks after the order granting the extension. In all the circumstances, the court found this to be an appropriate exercise of the discretion as to the length of the extension to be granted.

Orders

The court granted the application for leave to appeal, and dismissed the appeal. The applicant was ordered to pay the respondent's costs of the application for leave and the appeal.

Comment

One of the matters to bear in mind when considering whether to recommend an application for leave to appeal relates to the potential costs consequences.

As the orders made in this decision highlight, in order to obtain the benefit of a costs order, an applicant must do more than establish that an error of law has been made by the primary judge, and obtain leave to appeal.

In the usual course it is to be anticipated that the costs of both the application for leave and the appeal will follow the outcome of the appeal.

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

High Court and Federal Court casenotes

High Court

Criminal law – jury directions – attempted murder – self defence – consent

In *Graham v The Queen* [2016] HCA 27 (20 July 2016), the High Court held to be correct the trial judge's directions to the jury as to an alleged "consensual confrontation" and possible honest and reasonable but mistaken belief as to fact. The appellant had been convicted of attempted murder and unlawful wounding with intent to maim. The offence arose out of a confrontation in a shopping centre between the appellant and another man (Mr Teamo). Both men were members of rival motorcycle clubs. Teamo drew a knife and the appellant drew a gun, shooting Teamo and an innocent bystander. At trial, the appellant alleged self defence. A necessary element of self defence is that the accused responded to an assault, defined as an attempt or threat of force without consent. In his closing, the prosecutor suggested that the confrontation was "consensual" and thus self defence could not be made out, as any threat of force from Teamo was made with consent and thus not an assault. Counsel for the appellant did not directly address the consent point in closing. The trial judge made only passing reference to the prosecutor's submission in the charge, and the appellant's counsel did not seek a redirection. On appeal, the appellant argued that the judge's direction failed to deal properly with the consent point and as to mistake of fact: the appellant had argued that even if Teamo did not have an intention to assault the appellant, the appellant was honestly and reasonably mistaken about that fact. The High Court held that it was unclear how the confrontation could have been treated as consensual by any reasonable jury. Consent was not a real issue in the case. The judge's direction on the point (and on other aspects of self defence) was adequate. There was also no need for a direction on honest and reasonable mistake: based on the case at trial, there was no material which engaged the possibility of the defence. French CJ, Kiefel and Bell JJ jointly; Gordon J concurring; Nettle J dissenting. Appeal from the Court of Appeal (Qld) dismissed.

Contract law – collateral contracts – estoppel – statements in negotiations

In *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26 (20 July 2016), the respondent had entered into a five-year lease with Crown. The lease provided that, prior to the end of the lease term, Crown was to state to the respondent whether (a) the lease would be renewed, and on what terms; (b) the respondents could continue in the property on a monthly tenancy; or (c) the respondents were required to vacate. Crown gave notice to vacate. The Victorian Civil and Administrative Tribunal (VCAT) found that Crown had stated, pre-contract, that the respondent would be "looked after" when the time came to consider renewal of leases (the statement). VCAT found that the statement created a collateral contract, by which Crown would give a notice to renew the lease, on terms that would be decided later. In the alternative, VCAT found that the statement founded an estoppel. A single judge of the Supreme Court overturned both findings; the Court of Appeal agreed but remitted the matter for further argument on the estoppel point. The High Court held that the statement was too vague to amount to a collateral contract – the reasonable person would see it as no more than "vaguely encouraging". Further, there could be no enforceable agreement unless at least the essential terms of the lease had been agreed. There was no basis for findings about what Crown might have done and what might have been accepted by the respondent: the terms of any agreement were unresolvable speculation. The estoppel argument also failed for lack of clarity and because there was insufficient material to show that the statement had been relied upon to the respondent's detriment. The court discussed, but did not decide, a question that arose as to whether the argued estoppel was promissory or proprietary, whether the thresholds for each are different, and whether there is a unified doctrine of estoppel. There was also some reference to whether VCAT's findings in relation to the collateral contract and its terms were questions of law or fact; however, an application for special leave to argue that the appeal from VCAT was incompetent for lack of a question of law was refused. French CJ, Kiefel and Bell JJ jointly; Keane J and Nettle J separately concurring; Gageler J and Gordon J separately dissenting. Appeal from the Court of Appeal (Vic) allowed.

Andrew Yuile is a Victorian barrister, phone 03 9225 7222, email ayuile@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au.

Federal Court

Evidence and pleadings – claim of privilege against self-exposure to a penalty or self-incrimination – whether relieved from pleading a defence – extent to which the claim for privilege needs to be supported by evidence and submissions

In *QC Resource Investments Pty Ltd (In Liq) v Mulligan* [2016] FCA 813 (15 July 2016) the court (Edelman J) considered the claim of the respondent (Mr Mulligan) to be relieved from pleading to extensive parts of a statement of claim by reason of his asserted claim for the privilege against self-exposure to a penalty and self-incrimination. The court ordered Mr Mulligan to provide to the applicants an affidavit setting out in relation to each allegation for which he maintained a claim for privilege, the particular pleading rule or rules within the *Federal Court Rules 2011* (Cth) from which he sought a dispensation, and the basis upon which he apprehended that compliance with the rules would tend to incriminate him or expose him to a penalty.

The applicants, QC Resource Investments Pty Ltd (QCRI) and its liquidators, brought proceedings seeking declarations that Mr Mulligan had breached his duties as a director of QCRI (ss180(1) and 181(1) of the *Corporations Act 2001* (Cth)) and permitted QCRI to trade while insolvent (s588G(2) of the *Corporations Act*). The applicants did not seek any civil penalties. Mr Mulligan refused to plead to 92 paragraphs of a statement of claim on the basis that if he was required to plead, he *might* be exposed to a penalty in other, unspecified litigation which had not been threatened or commenced. He submitted that the six-year time limit for ASIC to bring penalty proceedings against him had not expired (s1317K of the *Corporations Act*), and that ASIC had not informed him that it would not bring penalty proceedings.

The court at [19]-[25] considered the authorities for two different circumstances in which the privilege against exposure to a penalty arises. At [21] Edelman J observed that the decision of Deane J in *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat & Livestock Corporation* (1979) 42 FLR 204 was referred to with approval by the High Court in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 335-

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with Andrew Yuile and Dan Star

336 "for the distinction between (i) refusing discovery in a mere action for a penalty, and (ii) requiring objection to particular documents in an action which was not for a penalty (the result of which might be used to establish a party's liability to a penalty in other proceedings)". For the second circumstance, "something more" is required to justify the dispensation from pleading rules, depending on all the circumstances of the case and upon the rules of pleading from which dispensation is sought. Edelman J stated at [24] "it is not enough simply to allege that there is a possibility of ASIC commencing penalty proceedings. It is necessary to descend to the detail of each claim for privilege."

Orders were made giving Mr Mulligan the opportunity to bring an application to relieve him from the rules of pleading supported by affidavit evidence and submissions explaining the reasonable grounds for each claim (at [41]).

Practice and procedure – civil penalty and criminal proceedings on foot – primary judge refused to stay civil proceeding until conclusion of criminal proceeding – no error by the primary judge in his discretionary judgment warranting leave to appeal

In *Construction, Forestry, Mining and Energy Union v Australian Competition and Consumer Commission* [2016] FCAFC 97 (19 July 2016) the Full Court (Dowsett, Tracey and Bromberg JJ) dismissed an application for leave to appeal from the orders of the primary judge (Middleton J). Middleton J had refused an application to stay part of the ACCC's proceedings against the first applicant (the CFMEU) until certain criminal proceedings were concluded against two of its officers (Setka and Reardon): *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2016] FCA 504.

The respondent (the ACCC) commenced proceedings against the CFMEU, Setka and Reardon seeking declarations, injunctive relief, pecuniary penalties and other relief under the *Competition and Consumer Act 2010* (Cth) (the CCA) and Australian Consumer Law (the ACL). It was alleged that the CFMEU contravened s45E(2) of the CCA and s50 of the ACL at a meeting where they threatened Boral (a concrete supplier) to cut off its concrete supply to Grocon (a construction company), and Setka and Reardon were knowingly concerned in or party to the s50 contravention. The ACCC also alleged that the CFMEU contravened s45D(1) of the CCA by instructing shop stewards and organisers not to allow Boral to supply concrete to construction sites.

Subsequently, Setka and Reardon were charged with blackmail under s87 of the *Crimes Act 1958* (Vic). The relevant meeting in which the conduct occurred that gave rise to the blackmail alleged in the charge-sheet (the April meeting conduct) was the same meeting that the ACCC relied on for alleging the contraventions of s45E of the CCA and s50 of the ACL. By consent, Middleton J ordered a stay of the ACCC's proceedings for relief in respect of the April meeting conduct. That left as the remaining part of the ACCC's proceeding the alleged contravention of s45D of the CCA, being a claim which was brought only against the CFMEU. The trial of the s45D allegation is listed to commence in the Federal Court in late September 2016 while the committal hearing for the blackmail charges against Setka and Reardon are listed in the Magistrates' Court of Victoria in early November 2016.

In dismissing the application for leave to appeal, the Full Federal Court gave close consideration to the decisions of the High Court in *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5; (2015) 255 CLR 46 and the Victorian Court of Appeal in *Zhao v Commissioner of the Australian Federal Police* (2014) 43 VR 137. The Full Federal Court observed at [23]: "The reasoning of both the High Court and the Court of Appeal in *Zhao* recognised that a potential prejudice for an accused is that evidence given by that person in a civil proceeding would reveal or telegraph information to the prosecutor about the accused's defence in the criminal proceeding. The potential to advantage the prosecutor was regarded by the Court of Appeal as an infringement of the privilege against self-incrimination and the right to silence. The High Court relied upon a different but related foundation. As the Court noted at [18], by reference to the fundamental principle of the common law as explained in *Lee v The Queen* (2014) 253 CLR 455 at [32]–[33], the prosecution is to prove the guilt of an accused person and cannot compel a person charged with a crime to assist in the discharge of its onus of proof."

The applicants relied on the principle in *Zhao* to argue that the Crown must prove its case in the blackmail proceedings without the compelled assistance of an accused and, without the stay, the applicants were forced to make an "invidious choice" (at [28]-[31]). However, the Full Court found that *Zhao* was distinguishable and there was no basis for concluding that an invidious choice was actually faced by Setka and Reardon (at [36]). The primary judge (whose findings were not challenged) found that he had been given no indication as to whether Setka and Reardon would be giving evidence in the s45D proceeding; indeed, the primary judge was unsatisfied that the CFMEU would seek to compel their evidence (at [34]-[35]). The Full Court stated at [36]: "... the mere *possibility* that Setka and Reardon might desire to clear their names or assist the CFMEU does not establish that they are confronted by an invidious choice".

Further, the applicants were unable to show appealable error by the primary judge's conclusion that the conduct of the CFMEU in defence of the s45D proceedings would not be imputed to Setka and Reardon and, accordingly, there was no risk of prejudice in the criminal proceeding by better informing the prosecution (at [39]-[41]).

The Full Court also held that there was no basis for thinking that Setka and Reardon would be burdened by a need to participate in the s45D proceeding to the detriment of the conduct of their defences in the blackmail proceeding (at [42]).

The Full Court did hold reservations about the primary judge's reasoning on the issue of whether a jury in the blackmail proceeding may be contaminated by the findings and declarations that may be made in the s45D proceeding (at [45]). However, it did not follow that an error was established sufficient to overturn a discretionary judgment or sufficient to warrant the grant of leave to appeal (at [47]). The applicants were also unable to identify any specific error in the primary judge's approach or findings in respect of the potential prejudice to the CFMEU in the s45D proceeding (at [50]-[54]).

Despite agreeing with the applicants that the primacy of a criminal proceeding needs to be taken into account in the balancing process, the Full Court held that there was no risk to the fair and efficient conduct of the criminal proceeding by dismissing a stay in the s45D proceeding (at [59]-[61]).

Finally, there was no error in the approach of the primary judge that the applicable principles governing the exercise of his discretion to stay civil proceedings are not relevantly different in the case of a civil proceeding brought by a regulator (at [61]). The Full Court stated at [62]: "An interest ought not be given less weight merely because it is held or being pursued by a public body in the public interest, rather than in the protection or preservation of the rights of private plaintiffs."

Migration – refugees – misunderstanding resulting in no opportunity to present evidence on an issue to the tribunal – adequacy of the standard of interpreting before Federal Circuit Court also in issue – appeal from the Federal Circuit Court allowed

In *MZAMP v Minister for Immigration & Border Protection* [2016] FCA 804 (15 July 2016) the court (Rangiah J) allowed an appeal from the Federal Circuit Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal, now the Administrative Appeals Tribunal, quashed the decision of the tribunal and ordered the tribunal to decide the application according to law.

The first and second appellants, who are husband and wife, are citizens of Malaysia and applied for protection visas. Their claims for protection were based on their Tamil ethnicity and Hindu religion. Among other claims, the first appellant claimed to fear persecution by Malaysian police because he had a tattoo of a spider web on his neck which resembled a tattoo of a Malaysian criminal gang. He claimed that he would be persecuted by police as a person suspected of involvement with that gang. Their application for protection visas was rejected by the delegate of the Minister for Immigration and Border Protection.

The appellants applied to the tribunal for a review of the delegate's decision, which affirmed the decision of the Minister's delegate. Relevant to the claim that the first appellant would be persecuted by Malaysian police as a suspected member of criminal gang, the tribunal found that his tattoo was not a gang tattoo and would not be perceived as a gang tattoo by Malaysian authorities.

As litigants in person, the appellants applied to the Federal Circuit Court for judicial review on various grounds. One of those grounds was that the tribunal failed to provide an adequate opportunity to obtain evidence after the tribunal's hearing concerning gang tattoos. The Federal Circuit Court found there was no jurisdictional error and dismissed the application.

The appellants then appealed to the Federal Court (again, as litigants in person). While some grounds were dismissed, the appellants succeeded on two grounds in the Federal Court.

First, the Minister conceded that the Federal Circuit Court erred by failing to consider the first appellant's evidence to that court about his discussion with a tribunal case officer about providing the tribunal with information about Malaysian gang tattoos (at [4], [41]). That was evidence in the first appellant's affidavit to the effect that he had contacted the tribunal and told a case officer that he could not access websites in relation to criminal gangs and tattoos from immigration detention and the tribunal's case note did not reflect the full contents of the conversation by omitting this. Assuming that the appellants were denied procedural fairness, that denial could have made a difference to the outcome of the application before the tribunal (at [45]). The Federal Court accepted the Minister's submission that the Federal Court was in as good a position as the Federal Circuit Court to decide for itself whether the tribunal fell into jurisdictional error by not providing the appellants with an adequate opportunity to provide information about gang tattoos (at [46]-[47]).

Noting that the first appellant's evidence was not the subject of cross-examination by the Minister and was not inherently improbable (at [48]-[50]), Rangiah J held: "I accept that the first appellant made it known to the Tribunal's case officer that he wished to provide the Tribunal with information about criminal gangs and tattoos. I accept that the first appellant was led to think that the Tribunal would contact him if it required information about criminal gangs or tattoos and would give him an opportunity to provide that information. The Tribunal did require that information, but contrary to that representation, he was not contacted and was not given that opportunity. The Tribunal is taken to have had constructive knowledge of the representation made by its case officer: *Xiang Sheng Li v Refugee Review Tribunal* (1994) 36 ALD 273 at 285 (Moore J)" (at [51]).

Further, Rangiah J held at [62]: "In circumstances where the first appellant, through the misunderstanding of the Tribunal's case officer, was unfairly denied an opportunity to present further evidence, he was denied a real chance to be heard: cf *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 at [45]-[48] (Kiefel, Bell and Keane JJ). The Tribunal failed to comply with its statutory obligation. This was a jurisdictional error: see *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 106 at [58] (French CJ)."

Second, the Minister conceded that the Federal Circuit Court erred by failing to decide whether there was a denial of procedural fairness in the hearing before the Federal Circuit Court (not the tribunal) because of the inadequacy of the standard of interpreting for the appellants (at [4], [79]). However, the Minister submitted that if the Federal Circuit Court had ruled on the argument it would have been rejected and the Federal Court should do so (at [80]). Rangiah J referred to the authorities on when poor or incorrect interpreting in a hearing before the tribunal can amount to a denial of procedural fairness. There may also be a denial of procedural fairness in a proceeding before the Federal Circuit Court where the standard of interpreting has been inadequate (at [85]). In the circumstances before the Federal Court, Rangiah J would have remitted the matter back to the Federal Circuit Court to be heard again on the interpreting issue, however the tribunal's decision was being set aside on other grounds (at [89]). Finally, without deciding, Rangiah J doubted the Minister's submission that any unfairness before the Federal Circuit Court had been "cured" by a hearing in the Federal Court (at [90]).

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Court of Appeal judgments

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with Bruce Godfrey

Civil appeals

Rosen v Legal Services Commissioner [2016] QCA 190, 22 July 2016

General Civil Appeal – where on 3 August 2015 the Queensland Civil and Administrative Tribunal found the appellant, Warren Rosen, guilty of unsatisfactory professional conduct by breaching Rule 4 of the *Legal Profession (Solicitors) Rule 2007* (Qld) – where it also made orders concerning a complaint against Mr Rosen brought by Ms Dawn Holling for compensation, which was to be heard on the papers – where on 3 September 2015 the tribunal ordered Mr Rosen to repay Ms Holling $9170.17 in legal services fees, and to pay $7500 in compensation – where by the time the matter was heard in this court, it was clear that Mr Rosen had appealed as of right under s468 *Legal Profession Act 2007* (Qld) from the order of 3 September and was seeking an extension of time to appeal from the order of 3 August – where in effect, this court treated his misconceived application as one for an extension of time to appeal from the order of 3 August – where between 1 October 2006 and 30 June 2007, he acted for Mr McKee in relation to a property settlement between Mr McKee and his first wife – where on or about 16 April 2011, he accepted instructions from Ms Holling, who had become Mr McKee's second wife, to represent her in an application for a property settlement against Mr McKee – where the former client obtained an injunction preventing the appellant from acting for the complainant – where the appellant alleges there was no confidential information the complainant did not already know, the former client waived confidentiality, and the complainant instructed him to contest the application for an injunction – where in light of Mr McKee's evidence, he might reasonably conclude that there was a real possibility the confidential information gained by Mr Rosen when he acted for Mr McKee could be used to Mr McKee's detriment if Mr Rosen continued to act for Ms Holling in the current litigation (Rule 4.2) – where so much was rightly identified by the federal magistrate in granting the injunction and in the tribunal's reasons – where Mr Rosen accepted instructions from Ms Holling on 16 April 2011 to represent her in the dispute over property with Mr McKee – where he soon after advised Mr McKee that he was acting for her, explaining that he did not believe he was in possession of confidential information as Mr McKee would have to disclose it in the property settlement proceedings in any event – where Mr McKee was self-represented – where in circumstances where Mr McKee was self-represented, was told by Mr Rosen that confidentiality was not a problem, and as soon as he obtained independent legal advice to the contrary objected to Mr Rosen appearing for Ms Holling, all within about two months, there has been no waiver of confidentiality by Mr McKee through delay – where in continuing to act for Ms Holling he breached Rule 4 – where his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent Australian legal practitioner – where the proceedings before the federal magistrate, the tribunal and this court unfortunately suggest he lacked insight in the past and still lacks insight into his professional shortcomings in this regard – where the appellant was ordered to repay the complainant's legal service fees as well as pay compensation for an adverse costs order made against her in the application for an injunction – where the complainant was the appellant's client and entitled to make a complaint under s429 *Legal Profession Act* – whether the complainant was entitled to a compensation order under Part 4.10 *Legal Profession Act* – where these provisions make clear that Ms Holling was entitled as a complainant to apply for compensation for the fees she paid to Mr Rosen up to and including the determination of the injunction application – where she suffered pecuniary loss from Mr Rosen's conduct, both in paying him legal fees he was not entitled to as he could not then ethically act for her, and in paying Mr McKee's costs of his successful application for an injunction which he should never had to bring.

Application for an extension of time to appeal is refused with costs. The appeal is dismissed with costs.

Hayes & Ors v State of Queensland [2016] QCA 191, 29 July 2016

General Civil Appeals – where the appellants each worked as managers in a government department – where a large number of workers, together with their union, made complaints against the appellants – where the complaints were investigated by the department and later rejected – where the appellants allege there was a lack of support in the workplace after the complaints were made – where the appellants each suffered psychiatric injury – where the trial judge concluded that no duty of care was owed to the appellants because the basis for their complaints was an investigation by their employer – whether the trial judge erred in concluding that no duty of care arose in the circumstances – whether or not a duty of care did arise in any of the four cases with which this court is concerned is a question of fact to be determined in accordance with the tests outlined by *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 – where of the difficulties both with the statements of claim below, and the judgment below, is that they do not recognise that, in cases of this nature, whether or not there is a duty owed, and what the content of that duty is, can only be determined after a detailed factual enquiry separate from, and preliminary to, an enquiry as to breach – where in 2006 or 2007 Julie Johnson became a casual residential care officer – where the force of Ms Johnson's personality can be gauged from the fact that she was apparently the moving force behind the 2009 complaints – where these seemed very significant and were found to be groundless – where in early January 2009 Ms Johnson and other RCOs made allegations against Ms Hayes and others in the management team at Maryborough – where the complaints involved 26 complainants who made over 200 allegations against nine managers of bullying and harassment – where Ms Johnson was very active in making and prosecuting the 2009 complaints and was described as a ringleader, which was appropriate – where from early January 2009 the department was aware of the complaints at the highest level – where it must have been obvious to the respondent from the number of detailed complaints made that this investigation process would take some time, months, to complete – where it was the evidence of Ms Kill, the Acting Director-General and Ms Pamela Steele-Wareham, the Regional Executive Director and stationed at the Maryborough office, that the subject matter of the complaints seemed significant and serious, that is the complaints did not appear to be vexatious – where on 13 January 2009 the Deputy Director-General of Disability Services Queensland sent a memo to many staff, including Ms Hayes – where this email informed staff that he had requested Ms Wareham provide direct support to all staff and monitor workplace practices and decision-making, "including the behaviour and conduct of managers and staff" – where the memo went on to say, "It is important to reinforce for all managers and staff that behaviour in the workplace, including all interactions with others, is consistent with the Departmental Code of Conduct." – where in a context where there had been complaints about the managers' treatment of RCOs, the admonition to managers and staff to comply with the Departmental Code of Conduct was most obviously interpreted as an admonition to the managers – where the general flavour of the memo was not even-handed, but one which contained a significant element of presumption that there was something in the complaints made – where the memo did not indicate support for the managers but, to the contrary, involved this element of implied criticism – where Ms Wareham sent an email to all the appellants except Ms Harris – where the email concerned Ms Wareham's attendance at an Industrial Relations Commission conference and included: "Each of you is requested not to discuss these current matters with any RCO or other staff… Should staff wish to meet as a group via Union or other meetings to discuss these matters you are requested not to participate." – where these were remarkable directions which had the effect of

isolating the appellants within the workplace and taking away obvious sources of support to them through the difficult times which lay ahead – where there was no justification for the requirements advanced during the trial – where the managers could not discuss matters openly, and were well aware of the injustice of the restriction, and the lack of support and confidence in them that it indicated on the part of the respondent – where Ms Wareham met with members of the AWU and some large number of RCOs at a hotel on 16 January 2009 – where Ms Hayes was aware of this and aware that Ms Wareham had organised the meeting – where Ms Hayes was told that when she returned from the meeting Ms Wareham said, of the complaints made against the management team, "there's got to be something in it because there's so many complaints" – where it cannot be seen that any duty arose towards Ms Hayes before the 2009 complaints were made – where, however, once the 2009 complaints were made, the department was well aware that there would be a substantial, serious and protracted dispute and investigation – where it was a large government department and had, or ought to have had, enough sophistication to reasonably foresee by 5 January 2009 that if support were not offered to Ms Hayes in the difficult circumstances which lay ahead, she might suffer more than just distress, but psychiatric harm – where the department breached the duty it owed Ms Hayes – where there was no support offered to her except to offer the free departmental counselling service – where the emails of 13 and 14 January 2009 were unsympathetic to the position of the managers and the email of 14 January, in particular, imposed restrictions which were unreasonable and likely to cause the managers to be isolated from, and unsupported by, their workmates and professional organisation – where it is clear from the comment of Ms Wareham which was repeated to Ms Hayes (so many people would not complain if there were not something in the complaints) that Ms Wareham was not impartial as to the veracity of the complaints – where she took the view that the managers must have behaved wrongly – where it cannot be seen that there was any safe basis to conclude on the evidence below that the matters which were in breach of the respondent's duty to Ms Hayes caused her injury – where the factual case which Dr Byth considered as causing injury was so different and so much more extensive than the matters which constitute the breach of duty in this case that it would be unsafe to conclude that the breaches were even a substantial cause of the injury suffered or that, to look at it in another way, Ms Hayes would not have suffered the injury she did had those matters which constitute a breach of the respondent's duty not occurred – where Ms Palmer was transferred to Maryborough in 2007 and was put in charge of rostering the RCOs for which she had particular expertise – where speaking of her entire relationship with Ms Wareham in 2009, Ms Palmer said that Ms Wareham did not once ask how she was, or how she was coping – where she inferred she did not care – where this does not seem an unreasonable inference on the evidence in all four cases – where although the respondent was aware through 2008 that Ms Johnson's behaviour was a source of stress to Ms Palmer in the workplace, it was not reasonably foreseeable before January 2009 that Ms Palmer might suffer psychiatric illness (as opposed to stress or upset) because of this continued unhappiness – where however shortly after the 2009 complaints were made a duty did arise – where Ms Palmer proved breach – where central was Ms Palmer's removal from her substantive position without any of the explanation or support which Ms Kill regarded as necessary – where perhaps even more damaging was the humiliating circumstances which then ensued in the workplace: Ms Palmer had no substantive work to perform, or after February 2009 some substantive work, but nothing like a proper workload – where it is not possible to say that the matters which amounted to a breach of the respondent's duty caused the appellant's psychiatric injury – where there was simply no attempt to put the case established by Ms Palmer to Dr Byth – where Ms Harris held the same position as Ms Johnson – where the respondent breached its duty to Ms Harris – where the respondent took no steps to identify that she was the subject of complaints by the RCOs, notwithstanding she brought her fears to Ms Wareham's attention on numerous occasions – where the decision not to tell Ms Harris that a complaint had been made against her was not something that was done deliberately as a strategic part of the investigation, or for some other reason, it was simply carelessness on the part of the respondent – where once Ms Wareham did discover that Ms Harris was the subject of

complaints she did not remove her from her position so that she could be protected from working with the RCOs every day – where there was no attempt during evidence at the trial to address with Dr Byth whether or not the matters which were proved as breaches, and which were justiciable between these parties, were sufficient to have caused, or have significantly contributed to, Ms Harris' psychiatric condition – where Dr Byth's evidence as to the effect of more support (whatever he understood by that) in the workplace does not inspire confidence that, had support been provided to Ms Harris in the workplace, she would not have suffered the injury she suffered – where Ms Greenhalgh began work in the department as an RCO in 1994 – where it is difficult to see that in all the circumstances it was reasonably foreseeable that Ms Greenhalgh would suffer psychiatric illness, rather than just unhappiness, a sense of injustice and stress in the workplace if support were not provided to her – where the significant distinction between her case and the cases of Ms Hayes and Ms Palmer is that she did not lose her substantive position while the investigation was carried out – where in fact she was moved to a new role which she had sought and was thus somewhat insulated from the workplace conflict – where in that respect her case also contrasts with that of Ms Harris who, because she was not moved, spent a considerable time working in stressful circumstances with those who had lodged serious complaints against her.

Each appeal dismissed with costs.

The Proprietors – Rosebank GTP 3033 v Locke & Anor [2016] QCA 192, 29 July 2016

General Civil Appeal – where it appropriate to deal first with an issue raised by the Bench as to this court's jurisdiction to hear an appeal from the tribunal pursuant to s108(1) of the *Building Units and Group Titles Act 1980* (Qld) (BUGTA) – where that provision confers a right of appeal to "the Court" from an order made by a tribunal under s107 on a question of law – where the term 'Court' is defined by s7 of BUGTA to mean "the Supreme Court", with no further definition being provided as to that term – where there is no reason to read the *Supreme Court of Queensland Act 1991* (Qld) as meaning anything other than the court as constituted and defined by the 1991 Act, including the Court of Appeal – where the appellant was a residential body corporate governed by the *Building Units and Group Titles Act 1980* (Qld) within the Hope Island Resort – where the appellant passed a by-law which permitted the expenditure of body corporate funds on primary or secondary thoroughfare assets adjacent to the body corporate's common property – where the appellant subsequently passed a motion approving expenditure from its sinking funds on an upgrade of land located on the primary thoroughfare – where a tribunal under the Act determined the by-law and motion to be invalid – where the appellant submitted that the tribunal erred in failing to apprehend that the appellant's by-law making power was a valid source of the body corporate's powers, authorities, duties and functions under the Act – where the appellant submitted that a by-law could be made under s30(2) of the Act authorising improvements to the primary thoroughfare if it promoted the use or enjoyment of the lots and common property of the appellant – whether the s30(2) by-law making power authorises the making of a by-law that is inconsistent with the Act – whether the by-law and motion are valid – where the by-law making power conferred by s30(2) is of a broad nature, as opposed to the power conferred by s38 which is specifically concerned with a body corporate's power of disbursement of moneys from its funds – where s38 is the sole source of the disbursement power under BUGTA – where as a matter of statutory construction, the general must yield to the specific – where the s30(2) by-law making power is to be construed having regard to the disbursement power under s38(3) in respect of administrative funds and s38(6) in respect of sinking funds and the limitations imposed by those provisions – where the general by-law making power to make a by-law for "use and enjoyment of a lot or common property" cannot be used to confer a power on a body corporate which is broader than or contradicts the disbursement power in s38 of BUGTA and is thereby inconsistent with s38 of BUGTA – where it is clear that the power to effect improvements under s37(2)(g) of BUGTA is conferred in respect of "common property" – where in its outline, the appellant frankly identifies by-law 15 as authorising the appellant to "make *improvements* on land adjacent to, but not part of, its common property" – where it is also apparent from the terms of the by-law that the "use and enjoyment" "promoted" by the expenditure contemplated by the by-law

is that arising from *improvements* to the assets of another body corporate located "adjacent to lots of common property within the Scheme or immediately outside but adjacent to the Scheme Land" – where by-law 15 is in effect a by-law authorising expenditure on "improvements" to assets of another body corporate – where given the power to disburse money for improvements to a body corporate's own common property is constrained by s37 (in that either the cost of improvements may not exceed the prescribed amount, or the resolution to make improvements must be unanimous or be considered in general meeting to be essential for the health, safety or security of users of the common property and approved by a referee), it is difficult to see that a wider power to expend money on improvements was contemplated for property that is not common property – where it could hardly have been the legislature's intention that a body corporate would be conferred with a power to effect improvements to the assets of another body corporate which was broader than that conferred on it under s37(2)(g) – where a by-law under s30(2) cannot extend the disbursement power beyond the limitations in s38(3) and s38(6) nor be inconsistent with it.

Appeal dismissed with costs.

Criminal appeals

R v Cruz [2016] QCA 183, 15 July 2016

Sentence Application – where the applicant pleaded guilty to importing a marketable quantity of a border-controlled drug, cocaine, and possessing a dangerous drug, cannabis – where the applicant was a Brazilian citizen with poor English skills – where the applicant encountered difficulty communicating with his lawyers due to a language barrier – where the applicant signed an agreed statement of facts without understanding the entirety of the document – where the prosecution tendered a statement of facts at the sentencing proceeding – where it explained that, as a result of information received, Queensland police executed a warrant at the Surfers Paradise apartment of the applicant's co-offender, SDB, in the presence of SDB and the applicant – where cocaine was located with potential street value in excess of $2.6 million – where SDB was sentenced under s13A *Penalties and Sentences Act 1992* (Qld) – where, had the applicant understood the statement of facts, he would have contested important factual matters – where the applicant's solicitors failed to take instructions as to his role in the offending and explain how this differed from the prosecution case with the assistance of an interpreter – whether there was a miscarriage of justice – where the applicant's contention that he thought he was bringing in a modest quantity of drugs for the use only of SDB, the applicant, and SDB's Australian friends, seems unlikely, given that, even on his version, he was bringing in two substantial suitcases provided by SDB – where even on his version, his role in the importation warranted a stern penalty by way of general deterrence, involving a substantial period of imprisonment – where the sentencing judge particularly referred in his sentencing reasons to the fact that, according to SDB, the applicant was to be paid $50,000 for his role and moved the cocaine internally within Brazil – where the judge also found that the applicant took the suitcases to SDB's Gold Coast apartment after importing the drugs – where it can be inferred that his Honour accepted the prosecution submission that the applicant was more than a courier – where the applicant strongly denies those matters and maintains he was no more than a courier – where his lawyers did not provide this court with any statement of facts taken from him by way of instructions, covering highly relevant matters such as his role in Brazil before the importation and at the Gold Coast after the importation – where it was incumbent on his lawyers to carefully take instructions as to his role in the offending and to explain to him of and how that differed from the prosecution case, with the assistance of a competent Portuguese interpreter – where this did not happen – where his lawyers did not directly inform the court of his significant physical disability arising from scoliosis – where they did not provide any medical report to support his mother's claims or investigate how the scoliosis might impact on his time in prison – where had the judge accepted the applicant's version of the offending which he gave to this court he would have been sentenced to a slightly lesser term of imprisonment – where there is a real prospect that there has been a miscarriage of justice in that the applicant has been denied an opportunity to put his version of the offending before the sentencing court because of his difficulty in effectively communicating in English with his lawyers – where the matter should be remitted to the

Trial Division so that these issues can be fully explored at a new sentence hearing.

Application to adduce evidence granted. Application for leave to appeal against sentence is granted. Appeal allowed. Sentence imposed is set aside and the matter is remitted to the Trial Division for sentence.

R v Liu [2016] QCA 186, 18 July 2016

Sentence Application – where the applicant was convicted on his own plea of one count of dangerous operation of a vehicle causing death – where the applicant was sentenced to two years' imprisonment, suspended after three months, and with an operational period of three years – where the applicant contended that the sentencing judge erred in adopting, on a plea of guilty, a starting point of six to eight months actual imprisonment prior to consideration of mitigation – whether the exercise of the sentencing discretion miscarried – where it is to be noted that the applicant did not contend that the head sentence was outside the proper scope of a sound exercise of a discretion – where the respondent's contention that the applicant's reading of the sentencing judge's remarks is erroneous is accepted – where nowhere in his Honour's remarks did he state that the exercise of the discretion began from any particular starting point – where his Honour's reference to "ordinarily" may be understood, as the respondent submitted, as highlighting that the court had made a proper consideration of and made substantial allowance for, the relevant mitigating features, as well as the early plea of guilty, to explain the justification for a suspension after only a short period of custody, that is at one eighth of the head sentence.

Application for leave refused.

R v GAX [2016] QCA 189, 22 July 2016

Appeal against Conviction – where the appellant was convicted of one count of indecently dealing with a child under the age of 16 years who was his lineal descendant – where the complainant gave evidence that the appellant, her father, lay in bed with her and that his fingers were down near where her underwear was supposed to be – where the complainant's mother and sister also gave evidence of finding the appellant in bed with the complainant – where the mother had made a notation on the calendar on the following day to mark the date on which the incident occurred – where there were some inconsistencies between the accounts of the complainant, the mother and the sister – whether, considering the whole of the evidence, it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the offence – where the conviction on count three can be accounted for by the fact that the complainant's mother and sister found the appellant in a compromising position with the complainant in bed, with the covers over them, and the complainant's underpants down – where the relatively minor inconsistencies between their versions of events rather tends to suggest that they did not collude and that they were, nevertheless, describing the same occasion – where the evidence given by the mother that she had made an asterisk on the calendar on the following day to mark the date when she had caught the appellant sexually abusing their daughter was capable of acceptance by the jury and added credibility and reliability to the complainant's evidence in relation to count three – where the appellant was acquitted of two similar charges – where the complainant's evidence on these charges was vague and uncertain and not supported by any corroborating evidence of other witnesses – whether the verdict of guilty was inconsistent with the two verdicts of not guilty – where the difference in the strength of evidence on count three readily accounts for the difference in the verdicts – where the different verdicts tend to suggest that the jury faithfully followed the careful instructions given to them by the trial judge to consider each count separately – where the different quality of the evidence for count three and the support given by the evidence of two other witnesses provides a rational basis for convicting on count three notwithstanding the acquittal on the other two counts – where it also shows that the verdict of the jury should not be set aside on the ground that it was unreasonable or could not be supported having regard to the evidence.

Appeal against conviction dismissed.

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.

Future tax debts remain out of pool

with Robert Glade-Wright

Property – exclusion of future tax debt from pool upheld but error found in treatment of debt under s75(2)

In *Rodgers* [2016] FamCAFC 68 (4 May 2016) the parties had run a successful tourism business. The wife was to retire from the business and the husband (who was to retain it) appealed to the Full Court (Thackray, Ainslie-Wallace & Murphy JJ) against Crisford J's rejection of his argument at trial that the future tax debts of an entity the parties controlled should be deducted from the $4.9m pool. They were to arise as a result of Division 7A loans of $1.5m which, if forgiven, would trigger a large tax liability ([11]). The Full Court said ([15]):

" … [T]he husband contended that … $517,000 should be adopted as the liability … in … recognition of the fact that the postulated figures contained differing assumptions … [and that] that figure 'is less than the number that will probably … be paid' … [implying] that if the liability was to be taken up by her Honour … the quantum of that liability could not have been precisely ascertained, even if the calculated amounts of the potential liability were confined by the assumption that the inter-company loans would not be forgiven and the tax consequently crystallised."

Finding no error of law in Crisford J's exclusion of the debts from the pool, the Full Court cited *Campbell & Kuskey* (1998) FLC 92-795 and said ([41]) that "[l]iabilities that are vague, uncertain, unlikely to be enforced and the like might be treated differently because those circumstances might, in the circumstances of the particular case, render it unjust and inequitable for liabilities to be deducted". In allowing the appeal, the Full Court did find error in the trial judge's decision to make a s75(2) adjustment in the wife's favour, saying ([80]-[82]):

"The evidence before her Honour did not allow her to arrive at a present-day value of the future taxation. Conversely, it was clear that none of the calculated sums would be payable immediately or in the future in any such sum. … [T]he evidence is a long way short of providing the 'actual figures' of which the Court spoke in *Clauson* [(1995) FLC 92-595] … [W]e cannot see that her Honour's reasons pay due regard to these significant issues. Her Honour's reasons do not reveal either a consideration of the impact in real terms of the mooted contributions assessment or any attempt to give numerical meaning either to the 'impost' or the 'management' of the taxation to which she refers…"

Child support – repayment to husband of funds he settled under a child support trust for fees of school the child did not attend refused

In *Bass & Bass and Anor* [2016] FamCAFC 64 (29 April 2016) the Full Court (Strickland, Murphy and Kent JJ) dismissed the husband's appeal against Aldridge J's refusal to order the refund of $300,000 by a child support trust (CST) under a consent order on the ground that the money was settled by him for the fees for a private school which the (intellectually disabled) child did not attend. Murphy and Kent JJ (with whom Strickland J agreed) said ([19]) that by the consent order "[t]he husband achieved … his … intention of eliminating any … child support for the child". The court continued ([26]) that "importantly the trial judge made reference to the consent orders providing … for the CST to be wound up on 31 December 2015 … and that upon the winding up of the CST 'the trustee shall hold any residual corpus in the CST for the child absolutely'", agreeing ([28]) "with the conclusion reached by the trial judge … that the CST did not fail by reason of failure of purpose [in that] the CST had several purposes which he identified".

The court (at [34]) cited a statement from *Scott and Ascher on Trusts,* approved by Gummow and Hayne JJ in *Byrnes v Kendle* [2011] HCA 26 that "it is necessary, when dealing with the creation of a trust and its terms, to speak not of the settlor's intention but of the settlor's manifestation of intention", saying ([44]) that "[n]o express term [of the CST] provides for any residue to revert to the husband, nor does any express term allude to any such outcome".

Children – family violence allegations should not be ignored at interim hearing because they are contested – discharge of earlier supervision order set aside

In *Salah* [2016] FamCAFC 100 (17 June 2016) the Full Court (May, Ainslie-Wallace & Cronin JJ) allowed the mother's appeal against Judge Dunkley's interim order that a consent order made a month earlier that due to family violence she alleged against him the father's time with the children be supervised be discharged. The Full Court cited authority as to a court's approach to contested allegations at an interim hearing, including ([39]) *SS & AH* [2010] FamCAFC 13 in which Boland and Thackray JJ said that "[a]part from relying upon the uncontroversial or agreed facts, a judge will sometimes have little alternative than to weigh the probabilities of competing claims" and that "it is not always feasible when dealing with the immediate welfare of children simply to ignore an assertion because its accuracy has been put in issue".

The court continued ([41]-[45]): "The difficulty … is that his Honour … having determined that he could not make any findings, ignored the allegations and found the presumption of equal shared parental responsibility applied. His Honour's comment 'given no other evidence' suggests that his Honour required corroboration or objective support for the mother's allegations in proof of them. To so suggest is an error. Family violence often takes place in private in circumstances where no corroboration is available. (…) His Honour was in error in … failing to pay any heed to allegations which he had earlier regarded as 'significant' and in failing to consider those allegations in the context of an interim hearing."

The court added ([61]): "The … circumstances of the making of the recent consent orders, while not determinative of the issue were, in our view important factual background to the issues before his Honour and were worthy of consideration by him. That his Honour did not consider them is, in our view an error."

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

Low price vs low cost – the strategic trap

As part of the emerging NewLaw dialogue, there is a groundswell of opinion that low prices, and in particular fixed low prices, are the new *must haves* in law firm competition. But that's only half the story…

Some 30 years ago, Michael Porter's *generic competitive strategies* were all the rage. Broadly speaking, you had to be effectively differentiated, or have a competitively low operating cost, or be focused (which means focused on a particular industry or industry segment). Whether those boundaries remain distinct or are now blurred in an advanced digital environment is a topic for another conversation.

But, an enduring trap which has always flowed from the generic strategies approach is the misguided substitution of *low price* for *low cost.* Low cost is achieved by reviewing all the firm's input costs at all stages of the value chain, and working out how to do things for less – thus creating better (and more competitive) value for customers.

In the legal profession we see all manner of online delivery options, process workflows, substitution of paralegals for lawyers, and the massive shift to the microfirm structure in which fixed clerical support and fixed rentals no longer apply.

These things ENABLE competitively lower (and/or fixed) prices. It is the dog wagging the tail. But low prices in the absence of these cost reductions just mean low profit. It is the tail wagging the dog – and the losses can rack up pretty quickly.

How can people fall into this trap? It's actually quite easy. Instinctively, good marketers and communicators easily fall in love with the idea of creating a *fighting brand* that will *shake up the profession.* Unfortunately, great intuitive marketers also tend to be impatient. They can visualise where they see their new baby going and just want to get the idea to market. Their marketing brain totally dominates their strategic brain. And so they launch their new product, service, brand or business before building in the cost improvements.

This is exacerbated by the golden rule of back-office development – that is, if you think a particular reengineering will take two months, allow eight. Which means – substituting slick systems for labour is initially very expensive – costs which our budding marketer may not want to commit to.

So if you've been seduced by the popular literature on the imperative of low or fixed prices, ask yourself a few key questions before you get started, like:

- Is low pricing a prime reason why my target market wants to deal with me anyway?
- If I'm going to reduce prices, what are the essential costs in the value chain that I can cut to support proposed price cuts?
- Do I have the patience and the budget to fund the back-office improvements I need to make anyway?

Answer those key questions honestly and you'll at least be on the right track regarding competitive pricing.

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

This month ...

Practice Management Course – Sole Practitioner and Small Practice Focus

THU-FRI 1 TO 2 & FRI 9 SEP

Law Society House, Brisbane
8.30am-4.30pm, 9am-4pm, 8.30am-4.45pm

Consisting of comprehensive study texts, three days of tailored face-to-face workshops, and five assessment tasks, the Society's Practice Management Course (PMC) equips aspiring principals with the skills and knowledge required to be a successful practice principal. The Society's PMC features:

- practical learning with experts
- tailored workshops
- interaction, discussion and implementation
- leadership profiling
- superior support.

PLE PM&BS PS

10 CPD POINTS

Insolvency Intensive 2016

TUE 6 SEP

Law Society House, Brisbane | 8.30am-12pm

Providing practical and innovative legal solutions to troubled entities is a challenge for any lawyer. Insolvency lawyers and professionals face this challenge on a daily basis and know all too well the need to be up to date and focused in this highly specialised area of practice. Queensland Law Society's annual Insolvency Intensive continues to provide an opportunity for insolvency lawyers and other insolvency professionals to enhance their knowledge in this niche area of practice. This intensive offers an array of topics to suit those needs.

SL

3 CPD POINTS

Property Law Conference 2016

THU-FRI 8 TO 9 SEP

Pullman Brisbane King George Square
8.30am-5pm, 9am-2.35pm

Join us for the 2016 Property Law Conference to hear from experts and experienced property law practitioners on a range of issues, including digital disruption, electronic land contract formation and disputes, E-Conveyancing in practice and foreign investor property transactions.

The conference will provide you with practical tips and advice on property transactions through a SMSF, town planning and environmental law, and off-the-plan developments. Day 1 will close with the popular 'hypothetical' panel session which will explore a plethora of issues including titling, leasing, community/building management statements and GST, followed by networking drinks.

PLE PM&BS PS SL

10 CPD POINTS

In Focus: Child Protection Reforms

TUE 13 SEP

Law Society House, Brisbane | 12.30-2pm

Child protection is everyone's responsibility. Following a highly publicised inquiry and a strong, ongoing political focus on protecting the most vulnerable members of the community, a number of significant developments are occurring in the child protection space from 1 July 2016.

So what is changing? What do you need to do to prepare? How will these developments impact on your day-to-day practice?

Join our panel of experts as they explore the new developments and explain how to implement these pivotal changes into your carriage and management of all children's matters from 1 July 2016.

SL

1.5 CPD POINTS

Masterclass: Disciplinary Law

THU 15 SEP

Law Society House, Brisbane | 8.30am-12pm

Disciplinary law is an area of practice lawyers are often left to navigate by themselves as they become more experienced.

Join our experts to explore:

- a summary of recent decisions in disciplinary law
- a guide to reducing, navigating and surviving delays in disciplinary proceedings
- self-incrimination privilege, costs in disciplinary proceedings, and other tips and traps in an interactive Q&A session with the experts.

SL

3 CPD POINTS

Criminal Law Conference 2016

FRI 16 SEP

Law Society House, Brisbane | 8.30am-5.20pm

The Criminal Law Conference is tailored to deliver practical and relevant professional development for criminal lawyers. This year's sessions will inform you on recent cases and legislative updates, guide you on how to manage work-related stress, and update you on the steps underway in Brisbane courts to manage risk and ensure people's safety.

Our presenters will also discuss your responsibilities in the Court of Appeal and the implications of the new *Mental Health Act 2016*, and lead practical sessions on DNA and forensics, cross examination of child witnesses, and jury selection, deliberation and decision-making.

Afterwards, make new connections over networking drinks.

PLE PM&BS PS SL

7 CPD POINTS

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

Webinar: Advising about Statutory Demands – Risky Business?

TUE 20 SEP

Online | 12.30-1.30pm

The recent case of a Victorian solicitor found to have given negligent advice concerning a Statutory Demand highlights that this is an area fraught with danger for practitioners. This webinar will provide you with a thorough consideration of the practices and procedures concerning Statutory Demands and equip you to confidently advise your clients.

SL

1 CPD POINT

Support Staff Webinar: Social Media, Career and Business Risks

THU 22 SEP

Online | 12.30-1.30pm

With a generation that has grown up online, communicating using social media is commonplace. However, it is important to be aware of the connection between work life and "private" social media use. This session is designed for legal support staff, setting out for them what the firm's obligations are and how their online activity can affect their legal practice, clients and ultimately their own careers.

PM&BS

1 CPD POINT

Core CPD Workshop: Technology for Lawyers

TUE 27 SEP

Law Society House, Brisbane | 1-4.30pm

If you want to learn how to use the latest online and mobile technology to enhance your daily legal practice, don't miss this event!

Designed specifically for lawyers and particularly those who may not be 'early adopters', this workshop will show you how to be more connected and more productive. Barrister and technology guru Philippe Doyle Gray will share his top tips on incorporating the latest apps and online tools into your practice. The session will also include detailed guidance on digital security measures for preventing unauthorised access to, and use of, information.

PLE PM&BS PS

3 CPD POINTS

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

Essentials: Sale and Purchase of a Business

WED 28 SEP

Law Society House, Brisbane | 9am-12.30pm

Designed for junior lawyers with up to five years' experience and seasoned practitioners seeking a refresher, this Essentials workshop is an ideal opportunity to gain practical knowledge on the fundamental issues relating to a purchase of a business. The workshop will look at:

- the key elements of a business
- important terms of a business sale agreement
- due diligence essentials
- how to transfer the business.

PS SL

3 CPD POINTS

In Focus: Get Ready for the New Planning Laws

THU 29 SEP

Law Society House, Brisbane | 12.30-2pm

This interactive and informative session will give you important information as well as practical hints and tips to effectively prepare for the commencement of the *Planning Act 2016* and its associated legislation, which is expected to take effect mid-2017. The session will also provide you with an outline of the key changes in the approach, what will remain the same, the all important transitional provisions and the jurisdiction of the Planning and Environment Court.

SL

1.5 CPD POINTS

Can't attend an event?

Purchase the DVD

Look for this icon. Earlybird prices apply.

Save the date

Personal Injuries Conference	21 October
Succession and Elder Law Residential	4-5 November
Conveyancing Conference	25 November
Specialist Accreditation Christmas Breakfast with the Chief Justice	2 December

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Career moves


Andrew McCormack


Zoe Adams


Katherine Marshall


Carla Franchina


Jasmin Sears


Shaun Creighton


Jessica Haddley

Best Wilson Buckley Family Law

Best Wilson Buckley Family Law has announced several promotions and an appointment.

Andrew McCormack, who has been promoted to senior associate, has practised exclusively in family law since 2005 and is a QLS accredited specialist.

Zoe Adams has been promoted to associate. She has also practised exclusively in family law since her admission and now works in the firm's Brisbane office.

Katherine Marshall has been promoted to the role of senior solicitor. Katherine joined the firm earlier this year, having previously practised in commercial litigation, building and construction law, estate planning, corporate law and personal injury law.

Carla Franchina has also been promoted to a senior solicitor position. She has practised exclusively in family law since her admission in 2013.

John Patterson has been appointed as a solicitor with the firm, having previously worked in energy and resources, workplace relations and commercial litigation.

Broadley Rees Hogan

Broadley Rees Hogan has welcomed **Jamie Robinson** as a consultant leading the employment and work health and safety team. Jamie has more than 25 years' experience in all aspects of employment and work health and safety law, with particular expertise in award and statutory compliance, performance management, industrial relations, workplace behaviour risk management and disputes.

Cook Legal

Cook Legal has announced the appointment of **Stephanie Ewart** as a consultant solicitor. Stephanie has more than 20 years' experience in domestic violence and family law, and was most recently employed as principal solicitor at Women's Legal Service Queensland, a position also previously held by Cook Legal director Kara Cook and consultant solicitor Tamara de Kretser.

Creevey Russell Lawyers

Creevey Russell Lawyers has announced the appointment of **Alexandria Geokas** as a member of the firm's litigation team. Alexandria has experience in building disputes, competition and consumer law, tax disputes, personal and corporate insolvency, shareholder disputes, corporations law, contractual disputes and negligence claims for economic loss.

Garland Waddington

Garland Waddington has announced the promotion of **Micaela Chomley** to associate. Micaela has developed the firm's family law service from small beginnings into a busy and productive core-service offering for the firm, and has a particular interest in collaborative law.

Marino Law

Marino Law has announced the promotion of **Andrew Taylor** to senior associate. Andrew practises in front-end commercial and property law matters, and also has extensive experience in litigation and insolvency (both corporate and personal). He is also an experienced mediator.

McInnes Wilson Lawyers

Jasmin Sears has joined McInnes Wilson Lawyers as a solicitor in the plaintiff medical law team. She has five years' experience in plaintiff litigation, with a background in personal injuries.

Moulis Legal

Moulis Legal has announced the appointment of **Shaun Creighton** as a partner. Shaun is a commercial and intellectual property lawyer with significant experience in ICT contracting and in the commercialisation and protection of intellectual property rights. He has worked previously is his own firm and as in-house legal counsel with organisations such as Airservices Australia, the Australian Sports Commission and the Melbourne 2006 Commonwealth Games Corporation.

O'Reilly Workplace Law

Jessica Haddley has joined O'Reilly Workplace Law as an associate. Jessica has practised exclusively in employment law and has wide experience advising clients on matters affecting employment relationships, including terms and conditions of employment, termination and redundancy, workplace discrimination and harassment, as well as managing ill and injured employees.

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John Patterson


Jamie Robinson


Stephanie Ewart


Alexandria Geokas


Micaela Chomley


Andrew Taylor


Alice Drummond


Julian Barclay


Amy Zipf


Gordon Stünzner


Clare McCormack


Dane Grauf

Ramsden Lawyers

Ramsden Lawyers has announced two promotions and an appointment.

Alice Drummond has been promoted to partner in the family law team. Alice is a QLS accredited specialist (family law) who is trained in collaborative law with a strong emphasis on resolving issues in property division, spousal maintenance, child support, parenting disputes, child protection and divorce.

Julian Barclay has been promoted to associate in the corporate team. Julian is entering his fourth year with Ramsden Lawyers and for the past two years has focused on mergers and acquisitions, capital raising, initial public offerings, ASX matters, private equity transactions, and general corporate and compliance work.

Amy Zipf has joined the firm's corporate law division. Amy has experience in general commercial law is now focusing on corporate law.

South Geldard Lawyers

South Geldard Lawyers have welcomed **Gordon Stünzner** and **Clare McCormack** as partners.

Gordon has been with the firm since 2012 and is a member of the commercial and agribusiness team. He has a background in banking and finance which is invaluable to his rural and commercial clients.

Clare is a QLS accredited specialist (family law) and joined the family law team in April 2014. She practises exclusively in family law across the full spectrum of complex property settlements and parenting matters.

Taylor David Lawyers

Taylor David Lawyers is pleased to announce the promotion of **Dane Grauf** to senior associate. Since joining the firm in 2011, Dane has advised insolvency practitioners on unfair preference claims, security issues and trustee indemnity disputes. He is experienced in advising directors and shareholders of financially distressed companies, including on director duties and business and trust structures.

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.

New QLS members

Kylie Anderson, Department of Communities, Child Safety and Disability Services
Bonita Bates, Bridge Brideaux
Donna Bath, Curtain Bros Papua New Guinea Limited
Mohammed Burney, Qatar Financial Centre
Jessica Burstow, Generation Conveyancing
Debra Canning, Pharmacis Canning Lawyers
Jessica Cannon, Cannon & Co Law
Angela Carroll, Aboriginal & Torres Strait Islander Women's Legal Service NQ Inc
Catherine Challenger, Challenger Legal
Derek Chew, Stolar Law
Courtney Coyne, Minter Ellison
Jeffrey Crowther, Whitehead Crowther Lawyers
Erica Davis, University of Queensland – Research Legal Services
John Donaghy, Australian Services Union
Alexander Fairweather, Bennett Carroll
Michael Fletcher, Minter Ellison
Dharma Gan, Essen Lawyers Pty Ltd
Hayden Griffiths, Streten Masons Lawyers
Jonathon Hanson, MurphySchmidt Solicitors
Thomas Hatcher, Woods Hatcher
Stephen Higgins, Hodgson Lawyers
Scott Jury, Antigone Legal
Elisa Kidston, Queensland Public Interest Law Clearing House Incorporated
Emma Kime, Rees R. & Sydney Jones
Rowan King, Queensland Police Service
Anna-Britt Kjellgren, non-practising firm
Stephen Knight, Minter Ellison
Genevieve Kop, DCL & Associates Pty Ltd
Constance Lee, SungDo Lawyers
Elvina Li, McMahon Clarke
David McGrath, Hall Payne Lawyers
Regina Michaletos, redchip lawyers Pty Ltd
Maylene Mole, Ron Lawson Lawyer
Daniel Moore, Oncore Legal Services Pty Ltd
Victor-David Murray, Murray Tutt Legal
Jake O'Donnell, Strategic Lawyers
Rhian O'Sullivan, Minter Ellison
Hilary Palmer, Walker Lawyers
Prenisha Rampersad, Law Elements Pty Ltd
Terri Reynolds, DibbsBarker
Adrian Rich, Minter Ellison
Joshua Roberts, non-practising firm
Naomi Sherrington, Gary S. Rolfe Solicitors
Keeghan Silcock, non-practising firm
Cady Simpson, Pine Rivers Community Legal Service
Tyler Smith, Buckland Allen Criminal Lawyers Pty Ltd
Tanya Standley, The Law Shack
Joanne Stevenson, Clayton Utz
Amelia Sturton, Salvos Legal Humanitarian
Anna Taylor, Results Legal
Dylan Torv, non-practising firm
Hanh Trang, Jefferies International Limited
Stephanie Walker, Caxton Legal Centre Inc
Luke Weston, The Law Shack
Philip Whitehead, Whitehead Crowther Lawyers
Tracey Wood, Billabong International Limited

The following full members joined during the renewals process with an effective date of 1 July 2016

Mariam Abdel-Malek, Woolworths Limited – Legal Division
Jocelyn Aboud, University of Queensland
Garry Andrews, Andrews Law
Bernice Anning, DL Legal
Justine Ansell, Holding Redlich
Andrea Aparicio Lopez, McCarthy Durie Lawyers
Jessica Ashton, QIMR Berghofer Medical Research Institute
Scheryn Aspinall, Duffield & Associates Solicitors
Shaun Backhaus, Short Punch & Greatorix
Lani Bajracharya, Norton Rose Fulbright
Paul Baker, Jeffrey Nevell Solicitor
Elizabeth Baker, Queensland Alumina Limited
Elisha Bale, Moray & Agnew
Natalee Barr, Cooper Grace Ward
Adam Bartels, GRT Lawyers
Axel Beard, DJP Lawyers
Juan Blanco, HopgoodGanim
Katherine Bland, Carter Newell Lawyers
William Bligh, Downer EDI Mining Pty Ltd
Callun Blurton, Holman Webb Lawyers Brisbane
Barbara Bogiatzis, Department of Transport and Main Roads
Nichale Bool, Anderson Fredericks Turner Pty Ltd
Robyn Bourne, Noble Law Pty Ltd
Jennifer Brennan, Linklaters
Benjamin Brett, One QSuper Pty Ltd
David Brotchie, Board of Professional Engineers
Taylah Bruce, Slater & Gordon
Catherine Bub, Slade Waterhouse Lawyers Pty Ltd
Simone Butschle, Mackay Regional Community Legal Centre Inc
Carol Calderbank, BT Lawyers
Charlotte Campbell, Maurice Blackburn Pty Ltd
Miranda Campbell, Beven Bowe & Associates
David Castelino, Herbert Smith Freehills
Benjamin Chahoud, Sparke Helmore
Emily Chalk, DLA Piper Australia
Pranil Chandra, Meridian Lawyers
Maudie Chan-Polley, Everyday Lawyers Pty Ltd
Jun Choi, Impact Homes
Olivia Clark, Wotton + Kearney
Shallice Cockram, Pine Rivers Community Legal Service
Klaire Coles, Legal Aid Queensland
James Collins, Meridian Lawyers
Nicholas Coundouris, Stone Group Lawyers
Kirsty Crawford, Small Myers Hughes
Megan Creaser, Logan Legal Centre
Nina Crew, Colin Biggers & Paisley Pty Ltd
Amber Crowley, Legal Aid Queensland
Margaret Crowther, Townsville Community Legal Service Inc
Christopher Cull, Clayton Utz
Alana Daly, Aboriginal Family Legal Service Southern Queensland
Timothy Dangerfield, McCullough Robertson
Fabiano Deffenti, Fabiano Deffenti
Kylie Denman, non-practising firm
Manbir Deol, non-practising firm
Roxann Di Pietro, BHP Billiton Limited
Andrea Diaz Rivas, Mullins Lawyers
Boba Djordjevic, Go To Court
Kamaljit Dosanjh, Allen & Overy
Nicholas Douglas, Legal Aid Queensland
Melany Dowse, McInnes Wilson Lawyers
Alice Doyle, Goodstart Early Learning Ltd
Christian Dreyer, Macpherson Kelley
Alexander Durrant, Nundah Community Support Group Inc
Patrick Elliott, Returned & Services League of Australia (Queensland)
Judith Ellyett, Linton Pitt Lawyers
Jacob Elsworthy, BHP Billiton Limited
Andrew Evans, Creevey Russell Lawyers
Nathan Farr, Fedorov Lawyers
Samuel Firmin, Aejis Legal
Alister Fitzgerald, Field QL Pty Ltd
Alita Flannery, Central Queensland Community Legal Centre Inc
Mark Fleming, non-practising firm
Dominique Fordyce, Sparke Helmore
Sara Forgione, Bar Association of Queensland
Dishni Galkotuwe Yasamana, non-practising firm
Richard Galloway, Journey Family Lawyers
Trafford Gazsik, Impact Homes
Kerrod Giles, HopgoodGanim
Andrew Gills, Men's Legal Service Limited
Elisha Goosem, Carter Newell Lawyers
Robert Graham, Dimension Data Australia Pty Ltd
Benjamin Gray, AdventBalance
Paris Gray, Macpherson Kelley
Aozhang Gu, Hallett Legal
Xin Zhe Ha, non-practising firm
Cameron Hagan, Creevey Russell Lawyers
Daniel Hallam, Waller Hallam Family Lawyers
Jemima Harris, Lexvoco Pty Ltd
Nicola Harris, Strand Conveyancing Queensland Pty Ltd
Sheena Haselden, Power & Cartwright
Jasjot Hayer, Central SEQ Distributor-Retailer Authority
Bridget Heinius, K&L Gates
Lorrae Hendry, Stephenson Harwood
Rachael Herbert, Denton Wilde Sapte
Samuel Heymans, David Grant & Associates
Jane Hibberd, Latham & Watkins
Alexander Hill, Norton Rose LLP
Vinh Ho, McCarthy Durie Lawyers
Aram Hoare, AdventBalance
Madelaine Hogan, Pinsent Masons Services Limited
Katherine Hogan, Keating Lehn Solicitors
Susan Hogarth, Refugee and Immigration Legal Service Inc
Anna Homan, Fair Work Ombudsman
Laura Hulett, Herbert Smith Freehills
Kassandra Humphries, Ferrier & Co
Nicolas Humzy-Hancock, Shine Lawyers

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Queensland Law Society welcomes the following new members, who joined between 6 July to 5 August 2016.

Luke Ingham-Myers, IM Lawyers
Jennifer Jackes, K&L Gates
Katie Jacklin, Macpherson Kelley
Alexandra Jeanes, Piccardi Legal
Sebastian Jennings, Go To Court
Avi Kaye, PricewaterhouseCoopers
Julie Kefford, Aboriginal & Torres Strait Islander Women's Legal Service NQ Inc
Emma Kendall, DLA Piper Australia
Nathan Kershler, Affinity Lawyers
Brian Kirkup, DibbsBarker
Cybele Koning, Caxton Legal Centre Inc
Nicholas Korpela, Salvos Legal Humanitarian
Sarwan Kovacevic, The Uniting Church in Australia Property Trust (Q.)
Jenna Lawry, MBA Lawyers
Jennifer Leach, Chris Sheath & Associates Solicitors
Abigail Lee, Fenson & Co. Lawyers
Delmar Leong, Ebenezer Legal
Jessica Ling, Queensland South Native Title Services
Melita Lloyd, Shafston International College
Shea Low, Hartnett Lawyers
Georgia MacGinley, McCullough Robertson
David Martell, Priority Legal Services (Qld) Pty Ltd
Michael Mason, Streten Masons Lawyers
Danny Maxwell, Mantra Group
Olwen McClintock, Ergon Energy Corporation Limited
Greer McGowan, Queensland Rail
Bruce McGregor, Mullins Lawyers
Lucinda McPhee, Clayton Utz
Christie Mead, John Holland Group Pty Ltd
Carl Miller, Allan Dick 888 Law
Aimee Mundt, Kemp Strang
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The regional path to career success

Working in regional and remote areas offers young lawyers a unique training ground that big cities can't provide. The depth of experience they gain is likely to resonate throughout their careers.

Tanya Straguszi, who was born and bred in far north Queensland, was recently promoted to principal with Maurice Blackburn Lawyers Queensland, as well as leader of the firm's Cairns office.

Tanya, who comes from a third-generation sugarcane farming family at Gordonvale, completed her law degree at James Cook University on her hometown campus. She is very proud of her regional roots.

"More professional people are choosing to stay in regional areas like Cairns, which shows there are more opportunities to grow your career outside of capital cities," Tanya said.

Working in smaller centres means a diverse caseload, with a variety of clients. Direct community contact can also be made with a broader range of people, institutions and organisations than in a big city. Tanya has run high-profile cases against the region's biggest hospital, major employers and even the State Government. She lists as a highlight an inquest into a regional hospital death.

"We pushed for change at that inquest and we saw improvements in policy and procedure as well as a large funding boost for equipment to improve patient care," she said. "This can be a very rewarding job."

In a smaller office there are opportunities to operate on a higher level, with increased contact with journalists, extensive personal contact with referrers, and a chance to genuinely participate in the local community.

"You have the chance to develop these skills outside of the courtroom that are so important to the job," Tanya said. "Building relationships in regional communities and learning how to work with the media is becoming more key to the role, and, at times, can even assist in the strategic direction of a case."

Recently appointed Maurice Blackburn Queensland principal Vavaa Mawuli also credits her experience in regional positions as shaping the kind of lawyer she has become today and the work that she seeks out.

Vavaa Mawuli

Tanya Straguszi

She left Bond University in 2003 and after two years working at the Aboriginal Legal Service in Sydney, headed to the Northern Territory.

"It was about having a bit of an adventure to start with, but it became such a valuable lesson in life and in the law," Vavaa said.

Her main focus was criminal law at the North Australian Aboriginal Justice Agency, moving between offices in Darwin, Katherine and Nhulunbuy, while also appearing in circuit courts in remote communities. She worked in a busy practice providing advice and representation to local people, mostly in criminal law, but also advising on the ramifications of the Federal Government's intervention legislation.

"Living and working in remote Aboriginal communities sharpened my focus on the social and economic inequalities that divide our community," Vavaa said. "Day to day I was advocating for my clients to be afforded the same basic rights and freedoms that other people in Australia enjoy."

The experience led her to a larger social justice practice at Maurice Blackburn and she is now heading up the national firm's Queensland class actions department.

"I could never accept a legal system where socio-economic disadvantage would deny a person access to justice," she said. "While class actions aren't the entire answer, they do give everyday people who would not otherwise be able to take on powerful wrongdoers individually, the ability to come together to seek a fair outcome for wrongs committed against them."

The Queensland firm's managing principal, Rod Hodgson, is also a lawyer with regional experience.

"Leadership, energy and great ideas can come from any geographic region," he said. "I was fortunate to be given an opportunity to lead a regional practice from my mid-20s and the experience was superior to anything comparable in a capital's CBD."

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A toast to springtime

with Matthew Dunn

When spring is in the air and our thoughts turn to the outdoors, perhaps we should consider some intriguing alternatives to the usual wine suspects.

During winter, we knew it was time to reach for the heavy wines – the big, bold reds – and hearty comfort food as overnight temperatures in Queensland hit single digits.

Now, however, all things wintry must come to an end and we turn to the new season with its opportunities to relax with friends outdoors and engage in the sociable delights of a garden party.

Wine is an integral social lubricant in many Australian social events and, chosen well, can complement the occasion perfectly. As most outdoor social engagements focus on the afternoon, the big red wines may prove too stultifying for consumption in the Queensland sun, bringing on sleep rather than engagement with new friends. A better choice is likely to be crisp, cool white wines which will refresh and enliven the occasion.

A choice of a sparkling and a still wine is usually a good step.

Options for sparkling wines are much greater than you might think. Most sparkling wines ape Champagne, following a traditional mix of chardonnay and pinot noir grapes, made bubbly by some process and given a dash of residual sweetness for good measure.

The better examples are made by the 'traditional method', meaning they are fermented once in a tank and then a second time in the bottle you buy and clarified prior to being shipped.

The ubiquitous Champagne style is a good start, but by no means the only choice. A host looking for something a little different might like to choose a tipple that will both intrigue and delight guests. A couple of good options could be prosecco or blanquette de Limoux.

Prosecco hails from northern Italy in the regions surrounding Venice. Its fully sparkling form is called spumante (that's prosecco spumante, not to be confused with asti spumante from the other side of Italy in Piedmont). It is primarily made from the glera grape variety and is aromatic and youthful. Often it has a little residual sugar but plenty of natural acid to keep the wine crisp and light. Prosecco helps make good conversation rather than being the conversation.

Another useful choice for your wine toolkit is blanquette de Limoux, which is a sparkling wine from southern France in the foothills of the Pyrénées. The area has a long tradition of making sparkling wines dating back to 1531, a date which precedes Champagne, and is the true origin of wine with bubbles.

In Limoux they make two styles of sparkling – a crémant style which is more 'international' and the blanquette form in the traditional way, comprising predominantly the local mauzac grape with its unique crisp apple flavours. Again, good levels of acid and crisp flavour bring on the conversation.

Choosing a still white wine is a science unto itself and subject to the whims of fashion perhaps more than anything else in the wine world. Pinot gris is slowly encroaching on the grassy nectar from over the ditch, although Marlborough sauvignon blanc remains instantly recognisable and a safe familiar social friend for many.

For something different and with a little more intrigue, a French Touraine white can be just as good under the sun and be just that little bit special, too.

Celebrate springtime – go forth into the garden and drink lively crisp white wine with friends.

The tasting

Three wines were assembled for a garden of earthly delights.

The **Ruffino Prosecco DOC Extra Dry NV** was a light yellow colour and possessed a hurricane of medium bead bubbles. The nose was white peaches and nuts. The palate was spritz with lemony acid zing that cut the residual sugar on the stonefruit mid palate to a perfectly dry finish of lime.

The **Fleur de la Vallée Blanquette de Limoux AOC 2013** was a vibrant yellow colour with a most remarkable slow, ponderous, large bead floating up haphazardly like a helium balloon lost from a child's birthday party. The nose was lime and crisp green apple in stark contrast to the nuts and toast of other French fizz. The palate had surprising spritz given the absence of alacrity in the bubbles. Its flavour was a lovely mix of crisp apple and granite dryness giving a refreshing result.

The **Loire Sauvignon Blanc La Promesse Touraine AOC 2014** was a pale yellow akin to new world examples but the nose signalled a complete departure from the familiar scent of cut green grass and gooseberries. The complex nose was greengage plum with a hint of minerality and the merest whisper of cricket pitch. The palate too showed a very different side to sauvignon blanc where the persistence of the minerally quality remained but was now paired with a fresh lime acidity. A revelation for those wary of the style from over the ditch.

Verdict: The prosecco was quickly quaffed with requests for more and the blanquette was a new favourite. A clear preference was too hard to discern.

Matthew Dunn is Queensland Law Society government relations principal advisor.

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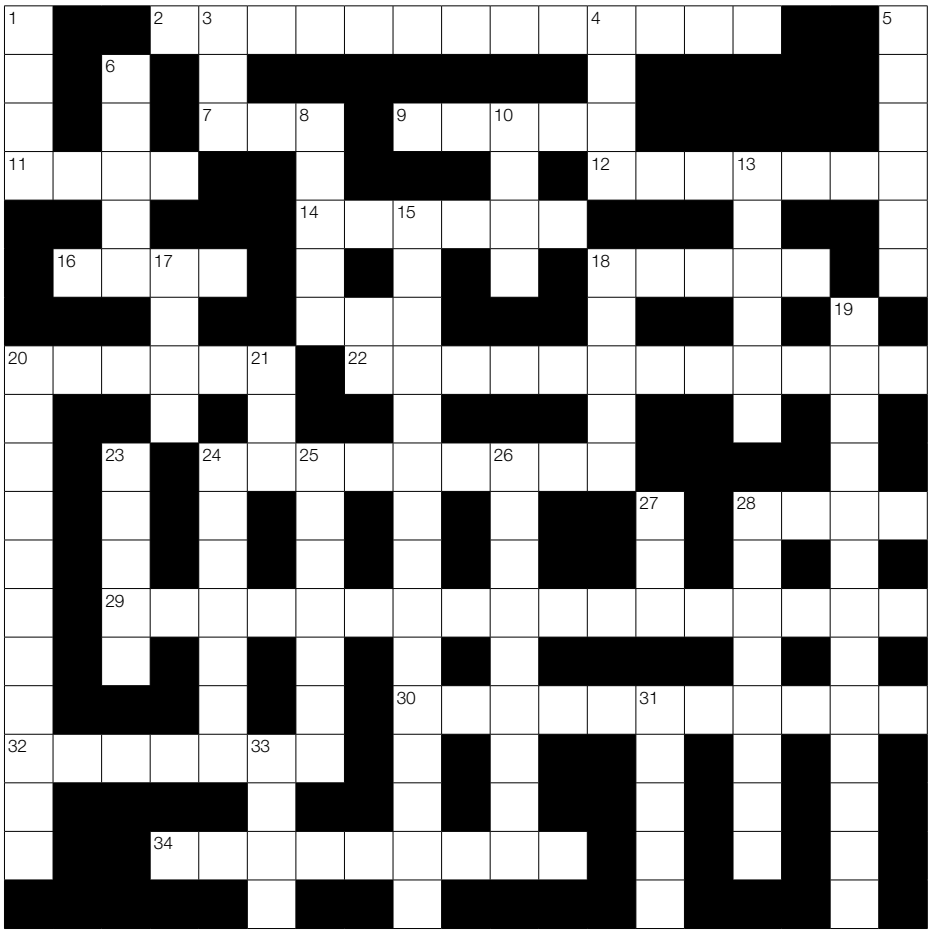
Mould's maze

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



Across

2 Third party evidential confirmation. (13)

7 Systematic legal investigation or examination of a transaction, … diligence. (3)

9 Jetsam to which flotation devices are attached to assist retrieval. (5)

11 The rule in …. *v Harbottle* forbids shareholders from bringing an action in their own right on behalf of a company. (4)

12 Introductory text in a convention, Act or contract. (French) (7)

14 A wasted court appearance will often attract an award of 'costs …… away'. (6)

16 'The court wishes to be advised', placed at the end of a judgment to indicate it was not made ex tempore, *cur. ad.* …. . (Latin) (4)

18 A subpoena ….. tecum requires a person to bring a document to court. (5)

20 Equitable doctrine invoked when the intended purpose of a charitable trust is impossible, impracticable or illegal. (French) (6)

22 The principal registrar of a state Supreme Court. (12)

24 Minimum document required to instruct a barrister in our southern states. (9)

28 1714 English Act that required a tumultuous mob to disperse within one hour of a magistrate reading a proclamation to do so, breach of which carried the death penalty. (4)

29 Touchstone of equitable relief. (17)

30 Rule that provides if parties have embodied their agreement in a final document, parol evidence is not admissible. (11)

32 Dissolution of marriage. (7)

34 Trust created by operation of law, either by presumption or automatically. (9)

Down

1 Hyperbolic representation upon which legal reliance cannot be enforced. (4)

3 The central criminal court in London, … Bailey. (3)

4 An order given an earlier date or effect, *nunc pro* ….. (Latin) (4)

5 Date referred to in originating process, first ……. (6)

6 Equal, used in particular to describe preference of creditors, pari …… (Latin) (5)

8 Defend, ….. an appearance. (5)

10 Robe. (4)

13 High Court case involving whether a police officer was liable for trespass when serving a summons, …… *v Dillon*. (6)

15 In interpreting legislation there is a presumption against ……. (15)

17 Statutory action brought by the dependents in a wrongful death claim, …. Campbell. (4)

18 An artist's right to receive a royalty on resale of their original works, ….. de suite. (French) (5)

19 The defence of provocation requires the impugned act to be …… to the provocative act. (13)

20 Revision of a reported case containing corrections. (11)

21 Legislation concerning qualification for an age pension. (Abbr.) (3)

23 Pattern of criminality, ….. operandi. (5)

24 Senior barrister in England, Wales or Canada. (7)

25 A ……. offence is one similar to or constituent of the offence charged. (7)

26 Blackmail. (9)

27 The … rank rule mandates that barristers must accept work in a field in which they profess competence. (3)

28 Doctrine which expands the pool of a bankrupt estate by allowing the trustee to 'claw back' payments made prior to the date of bankruptcy, …… back. (8)

31 Qualifying or amending clause. (5)

33 Indirect interference with goods gives rise to an action on the …., but not an action in trespass. (4)

Solution on page 64

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Why self-delusion is a bad thing

And guess what's worse than an unstoppable killing machine!

by Shane Budden

The capacity for self-delusion amongst humans is much like the universe – if not limitless, certainly large enough that you wouldn't want to paint it.

For example, Donald Trump apparently considers himself something of a slick and cool-looking dude, despite the fact that his hair looks as if it is a partially-completed basket woven from dried roadkill by kindergarteners who got stuck into the red cordial one Friday afternoon.

Of course, he might claim that the fact that he is married to an ex-model backs up his belief in his own attractiveness, but then he probably has convinced himself that she would love him even if he were one of the homeless people he would apparently employ building a wall to keep America free of, at last count, everybody in the world.

I mention Donald Trump partly because – going by TV stations and newspapers – all media outlets are obligated by law to mention him a couple of times a day, and we here at *Proctor* are behind in our Trump count and don't want to be sued, but also because at the time of writing Trump has a chance of becoming President of the United States.

That is something of a concern because Donald appears to possess a somewhat ambivalent relationship with sanity; not saying he is crazy, largely because – as I mentioned earlier – I don't want to be sued, but if elected he could well be the first President to believe the Pokémon Go creatures are real (and then he would build a wall to keep them out).

Who leads the United States is a very important thing, because it also comes with the job of Leader of the Free World (of which we are a part, although my kids might dispute that at bedtime).

This is important because it is the only part of the job of President in which the President can actually do anything. Sure, the title 'President of the United States of America' sounds impressive (except on Twitter, where it's called POTUS, which sounds more like a disease involving an unattractive skin condition) but the President really can't do much domestically.

Since any initiative requires the support of both legislative houses, Bills that start off with noble aims such as gun control or tax reform end up as short amendments agreeing to change all the bullet points in presidential memos from round ones to square ones.

As Leader of the Free World, however, the President can do a lot of things with very little permission, such as go to war. Presidents have generally put a fair amount of thought into that sort of thing over the years, but with Trump one suspects that he could end up going to war with, say, Greenland, simply because Vladimir Putin dared him to do it.

Many Americans are of course hopeful that Trump's rival, Hillary Clinton, will become the next President, based on the fact that she did the job for eight years when her husband was elected and it seemed to work out quite well. No-one is quite sure what she would do if elected, however, as nobody has yet made it through any of her speeches without falling asleep.

The point is that we can see that self-delusion can be a bad thing, and it is true even if you are not President of the United Sates. For example, pretty much everyone you have ever met would claim to be an excellent driver, and would maintain that claim even if they were parked in a shopping centre food court at the time. Even though spending five minutes on our roads would convince any rational person that human beings are not capable of operating motor vehicles, we all continue to insist that we are excellent at it.

This delusional belief in our driving abilities is even more concerning given that a recent poll has shown that many young people believe they can text and drive at the same time without creating a problem. Now, I can accept that they can text and drive without having any overall effect on their driving abilities, but that is because young people are to driving what Donald Trump's hairdresser is to style. Most young drivers could be replaced by blindfolded six-month-old Labrador pups without any noticeable effect on driving ability and road rule compliance.

This is why I think that robot cars cannot get here fast enough, even if they are the sorts of robots regularly portrayed on film by Arnold Schwarzenegger. The Terminator may have been an unstoppable killing machine with state-of-the-art weaponry and peerless night vision, but for sheer destruction it could never match a young driver.

I realise that I am generalising here and that there are many young drivers who are careful, attentive and rational, but I don't spend much time on the planet Vulcan and can only go by the ones I see here on Earth.

So roll on robot cars, I say, and let young people go back to concentrating on the important things in life such as updating their relationship status and reminding each other that winter is coming. In fact, the only downside I can see is that the AI in the cars might become advanced enough to start playing Pokémon Go and end up in my lounge room, where a friend of ours found a Pokémon on Saturday while showing my children this game and scaring the bejeebers out of them at the same time.

I must congratulate the makers of this game for convincing my children, after years of me telling them otherwise, that there are monsters under the bed and in cupboards; this has definitely made bedtime *way* more 'fun'. On the plus side, if I can find a way to make them appear out of the fridge it might stop the kids from spoiling their dinner.

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Crossword solution from page 62

Across: 2 Corroboration, **7** Due, **9** Lagan, **11** Foss, **12** Chapeau, **14** Thrown, **16** Vult, **18** Duces, **20** Cypres, **22** Prothonotary, **24** Backsheet, **28** Riot, **29** Unconscionability, **30** Integration, **32** Divorce, **34** Resulting.

Down: 1 Puff, **3** Old, **4** Tunc, **5** Return, **6** Passu, **8** Enter, **10** Gown, **13** Plenty, **15** Retrospectivity, **17** Lord, **18** Droit, **19** Proportionate, **20** Corrigendum, **21** SSA, **23** Modus, **24** Bencher, **25** Cognate, **26** Extortion, **27** Cab, **28** Relation, **31** Rider, **33** Case.

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 September 2016	9.35
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 July 2016 to 31 December 2016	7.75
Federal Court – Interest on judgment debt for half year	1 July 2016 to 31 December 2016	7.75
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 July 2016 to 31 December 2016	5.75
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 July 2016 to 31 December 2016	7.75
Court suitors rate for quarter year	To 30 September 2016	0.955
Cash rate target	from 3 August 2016	1.5
Unpaid legal costs – maximum prescribed interest rate	from 1 January 2016	8.00

Historical standard default contract rate %

Aug 2015	Sep 2015	Oct 2015	Nov 2015	Dec 2015	Feb 2016	Mar 2016	Apr 2016	May 2016	Jun 2016	Jul 2016	Aug 2016
9.45	9.45	9.45	9.45	9.45	9.45	9.45/9.55	9.55	9.55/9.60	9.60	9.35	9.35

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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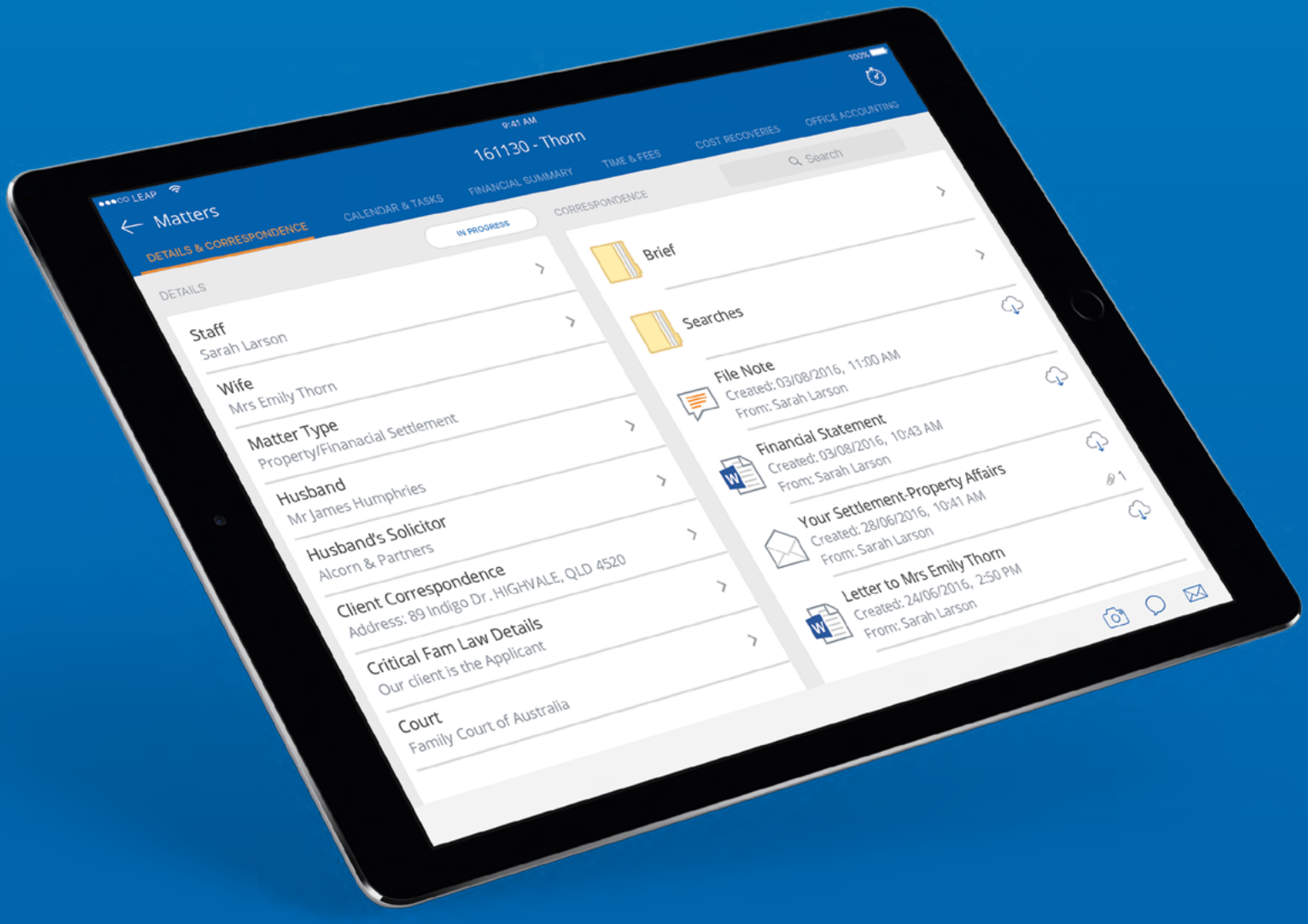

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