

PROCTOR



Queensland
Law Society

October 2016 – Vol.36 No.9

Foreign investment reforms | Hard road for CTP fraud
A closer look at our pro bono heroes | High Court revisits
promissory statements, collateral contracts and estoppel



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Good lawyers doing great work

Speak up and speak out



I refuse to shut up about my favourite topic – good lawyers doing great work – and this month I have two excellent examples for you.

First, no matter what type of law you practise, read the succession law column by deputy president Christine Smyth (page 36). It's not often that legal articles can be described as heart-warming, but this is one such instance.

I'd like to congratulate and thank Kate Do and her colleagues at the Public Trustee for a job well done.

Second, all of my Gold Coast colleagues, and many other practitioners, would know local lawyer Ross Lee.

Ross has always been a hard worker and prepared to give that little extra, such as his contributions to the Gold Coast District Law Association, including a term as president.



Of course, Ross is now president of the Robina Community Legal Centre (RCLC) and it was a delight to see his efforts and those of his centre colleagues recognised in this year's *Lawyers Weekly* Australian Law Awards as the 'Pro Bono Program of the Year' winner.

The RCLC is an initiative of the Gold Coast District Law Association and has only been open since February 2014. Since then, it has seen its clientele grow from 654 that year to a 2016 projected total of 1400.

The RCLC has not received any state or federal government funding, and relies on membership fees, community, corporate, educational and local government donations, as well as the occasional Bunnings sausage sizzle to keep going.

The centre provides advice to an average of 30 to 35 clients every Thursday clinic night at the Robina Community Centre building. In 2014, RCLC had five advice desks and attended to an average 20 clients each per evening. Due to growing demand, it now has nine advice desks each evening, clear evidence of a continuing and growing demand for access to justice on the Gold Coast.

I would like to congratulate Ross, the volunteers and RCLC team – including hardworking committee members Adeline Yap, Ian Martin and George Pharmaxis – on behalf of all members. But before moving on, I'd also like to share Ross's cheeky but pertinent parting words at the awards presentation: "Colleagues, don't go home after work and knock off a bottle of red – get along and make some friends at your local community legal centre. You'll be very glad you did."

And while we're on the subject of good lawyers doing great work, do you have a story to tell? Please let me know, and I'll do my best to see it shared with all members.

Left: Robina Community Legal Centre president Ross Lee with the *Lawyers Weekly* 'Pro Bono Program of the Year' award.

VLAD tidings

Flawed laws rushed through Parliament without public consultation are an insult to the people of Queensland.

So last month it was with some pleasure that we witnessed the arrival of legislation that will supplant the *Vicious Lawless Association Disestablishment Act 2013* and associated legislation – the 'anti-bikie' laws that became the centre of such controversy.

We are now scrutinising this proposed legislation, which incorporates key findings from the Byrne Commission and the report of the taskforce we were pleased to be a part of. No doubt we will have more to say about its content and practicality as the Bill continues through the consultation process.

Sometimes, however, I believe that we as a community don't always do a great job of thinking through the implications of new or changed laws. Perhaps we should be carefully considering how this legislation – and for that matter any legislation – will impact related services. I believe the new laws are likely to increase the volume of work for the Magistrates Courts, which are already in desperate need of further resources.

Our magistrates and judges are overworked with heavy caseloads, and there are too few appointments being made. They are at the coalface of the legal profession and deserve to have the resources required to serve justice for the community.

Bill Potts

Queensland Law Society president

president@qls.com.au

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SOLD OUT

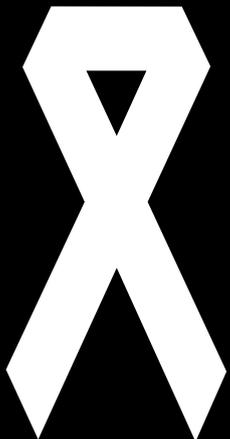
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Thursday 17 November 2016

7.15-9am
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The sold-out 2016 Legal Profession White Ribbon Breakfast supports the national day to end violence against women and children. This year's event will feature addresses by award-winning journalist Sarah Ferguson and Magistrate Colin Strofield of the Southport Specialist Domestic Violence Court.

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Our membership snapshot

Annual report profiles growth and change



Each year, our annual report provides a snapshot of Queensland Law Society membership.

In 2015-16, our total membership grew by 5.14% to 13,252, made up of 9971 full members (75.2% of members), 578 associate members (4.4%), 129 honorary members (1%) and 2574 student members (19.4%).

One of the interesting observations from the membership data is that the gender gap continues to move slowly but surely toward parity. In 2015-16, 51.7% of full members were male and 48.3% female. The previous year it was 52.8% male compared to 47.2% female.

However, male predominance has been well and truly smashed when we look at the younger generations. This year saw our first Generation Z (1995-2010) full members, with six females and four males. The gap for Generation Y (1980-94) lawyers was considerable, with 1533 males and 2626 females.

In Generation X (1965-79), there were 1815 male and 1633 female full members. And for the Baby Boomers (1946-64), males significantly outnumbered females, 1699 to 542. Finally, for the Builders (1925-45), there were 101 males compared to just eight females.

While these figures might indicate a female future, there remains much to be done to ensure that talented women practitioners are not lost to the profession as their careers progress. We are firmly focused on encouraging a future in which opportunities and career progression are equal for all our members, both male and female.

Looking at some of the other data, I was fascinated by the size and shape of our many law firms. Some 952 of our full members are sole practitioners, with another 2158 in 'micro' firms of two to five practising certificates. These practitioners represent more than a third (40.2%) of members working in law firms (this data set excludes in-house counsel, government lawyers, etc.).

A quarter of our members (25.1%) work in large firms (more than 50 practising certificates), with the remainder spread across small to medium-size firms.

It brings home the message that as a Society we work hard to satisfy the needs of large groups of members with quite disparate requirements. As you can imagine, the daily life and practice of a regional sole practitioner is poles apart from that of a solicitor with an Eagle Street mega-firm!

While it is unrealistic to expect that we can be all things to all members, this year we have striven to transform and restructure your Society to firmly focus on service excellence and business sustainability. My priority is to see that our members are provided the most relevant, valuable, efficient and effective services.

Now that our annual report has been tabled in the Queensland Parliament, I invite you to visit qls.com.au and download a copy to learn not only more about our membership but also how your Society is working to support and assist you.

CPD audit made easy – online

Last month I mentioned the handy little calendar widget created by our digital team to help members remember important trust account compliance dates.

This month I'd like to remind everyone of another helpful tool available – our online CPD audit tool.

With the annual CPD audit for 2016 now complete, it was pleasing to see that almost 30% of QLS practitioners audited for CPD compliance used the online CPD tool to record their activity.

During the audit period, an email selection notification was received from the CPD auditor updating those members on the status of their CPD compliance.

I encourage you to log on to qls.com.au and start using the tool to record your CPD activities. Go to Your QLS > Your forms > CPD History > Self Nominated – CPD Points.

Your future CPD audit could be as simple as receiving an email to say you are CPD compliant!

Our teams are looking at the possibility of developing other apps and online tools that improve our members' experience and engagement. So... watch this space.

Amelia Hodge
Queensland Law Society CEO
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Miller Harris supports maternal health



Cairns firm Miller Harris Lawyers will again support Send Hope Not Flowers this year with a lunch event on 28 October at the Pullman Reef Hotel Casino.

Send Hope Not Flowers raises funds for lifesaving maternal health programs in developing countries, particularly Papua New Guinea. The organisation says that a woman dies from childbirth complications somewhere in the world every two minutes.

This year's guest speaker is Dr Alec Ekeroma, an obstetrics and gynaecology specialist and board member of the Pacific Society for Reproductive Health. The society aims to educate and assist with neonatal care and reproductive health in Pacific island countries. It also supports the work of isolated healthcare workers and runs programs to improve on-the-ground training for local midwives and healthcare workers.

Contact Miller Harris Lawyers on 07 4036 9700 for more details or tickets.

Notices not to employ

Thomas John Cuddihy, a former employee of a Brisbane law practice, has authorised Queensland Law Society to publish that he will not attend or be present on the premises of any law practice in Queensland, other than for the purpose of taking legal advice for himself.

Set out below is a list of former employees of legal practices who are not to be employed unless the Council of the Queensland Law Society Incorporated gives its written consent to the person's employment:

Frances Ann Black; Kim Butcher; Sondra Maree Burns-James; Vanessa Melanie Clark; Thomas John Cuddihy; Margaret Dacey (also known as Margaret Rowe); Bronwyn Davidson; Michelle Wallace Dowzer (also known as Michelle Webber); Jessie Duffield; David Trevelyan Fisher (also known as Darnell David Gant); Rhonda Forde; Jack Gilroy; Lorena Se-Yoon Gower; Peta Griffiths; Caroline Grimmond; Rachel Lee Hartley; Tina Louise Heilbronn; Jodi Hitchcock; Donna Joy Hoskin; Susan Jane Howes

(also known as Susan Jane Elser); Stephen Mark Jetnikoff; Ruth Brigid Kenneally; Victoria Ann Kerr; George Latter; Linda MacDonald Andrea Joy Marolt; Barry John Matthews; Amanda Jane McKee; Christopher McVicar; Melissa Ann Mercer; Sandra Leslie Milne (also known as Sandra Leslie Wilson); Janelle Murphy; Lisa Prinz; Janette Deborah Oakhill-Young (also known as Janette Deborah Oakmill-Young); Tom Partos; Jason Reeves; Linda Robinson; Brooke Suzanne Schrader; Jan Scodellaro; Robyn Maree Spurway; Sina Vickers; Julie Antonia Villiers; Susan Joy Walker (also known as Susan Joy Webb and Susan Joy Williams); Lisa Ann White; Samantha Wynyard; Miranda Ziebell.

The following former employees of interstate law practices are not to be employed in legal offices unless the relevant interstate regulatory authority gives its written consent:

Samantha Jane Bonham (NSW); Benn Reginald Day (NSW).

Rescue bid for Atkin monument

Members of Brisbane's legal fraternity have joined a rescue attempt for a monument linked to Queensland-born Lord James Richard Atkin, whose lead judgment in the landmark case of *Donoghue v Stevenson* established the modern tort of negligence.

The monument, nestled behind the rectory of an Anglican Church in suburban Sandgate, stands over the graves of his father, Robert Travers Atkin, and his aunt, Grace I Atkin.

Supreme Court Justice Peter Applegarth and local lawyer Ray Brown are among members of a working group from the Sandgate and District Historical Society attempting to save the sandstone monument from the ravages of time and damage from a large camphor laurel tree in the grounds of an adjoining state school.

Ray said the monument, erected toward the end of the 19th Century, was in quite a poor state. Tree roots had undermined and damaged the slab on which it stands and the micro-climate created by the enormous tree had resulted in lichens and fungus getting into small cracks in the porous sandstone slab.

He said the monument was heritage-listed with the Brisbane City Council, and the council's heritage team has raised a number of concerns. The working group was consulting an arborist on whether the tree damage was likely to continue, which would prompt a



decision on possible relocation, and advice from a stonemason had also been sought.

Ray said that Robert Atkin and his wife, Mary, first moved to Queensland about 1865, taking up land near Rockhampton. However, Robert was injured in a riding accident and the couple came to Brisbane, where Robert became a journalist and politician. The future Lord James Atkin, the eldest of three boys, was born in Tank Street, Brisbane, in 1867. Although Robert was elected to the Legislative Assembly in 1868, he soon lost the seat following a challenge because he was not enrolled.

In 1871 his wife and the three children returned to Wales, due to the ill health of their youngest child. In 1872 he moved to Sandgate, while his wife and children returned in April of that year, just a month before his death. Mary Atkin and the three children then returned to Wales.

While the future of the monument is uncertain, the working group is keen to hear from anyone who would like to support its restoration. Please email Ray Brown: grb@grbrown.com.au.

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Lecture series a must for modern advocates

Queensland Chief Justice Catherine Holmes will launch the Modern Advocate Lecture Series this month, with an address on the implications for advocates' immunity following the decision in *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16.

This is an issue of importance for all involved in court work, especially junior lawyers who will need to work through the implications of this controversial concept.

The new lecture series is an initiative of Queensland Law Society deputy president Christine Smyth. It is presented by the QLS Ethics Centre with the intention of providing professional development and networking opportunities for junior members of the Bar and early career solicitors, and fostering the collegiality essential to building sustainable briefing networks.

The Society is confident that rebuilding legal professional culture, much diminished by rapid technological advances and the changing legal landscape, will go a long way towards



MODERN ADVOCATE LECTURE SERIES

addressing the inequities in briefing that limit the careers of female barristers.

The series provides an opportunity for attendees to build the professional friendships that will sustain their careers for many years, and create a peer network that will support them both in their careers and personally.

The inaugural lecture will be from 6-7.30pm on Tuesday 25 October at Law Society House. It will include a Q&A session and be followed by networking drinks. The complimentary event attracts 0.5 CPD points in Practical Legal Ethics.

Register your interest in attending the Modern Advocate Lecture Series at qls.com.au/mals. The second lecture in this series is currently scheduled for February 2017.

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Barry.Nilsson. takes professional services award

Barry.Nilsson. has been named Professional Services Firm of the Year at the 2016 Australian Insurance Industry Awards.

The award, from the Australian and New Zealand Institute of Insurance and Finance (ANZIIF), acknowledged the firm's "significant commitment to the insurance industry through professional development events and thought leadership".

Other notable factors in the award submission's success included the firm's involvement with industry associations, contributions to publications and innovations within the insurance practice area.

Barry.Nilsson. partner Richard Leahy accepted the award on behalf of the firm,



crediting it to the insurance and health law team's dedication to organisational culture and client satisfaction.

The firm has been a finalist in the last four awards, and was a finalist in the 2016 Australasian Law Awards for both Australian Law Firm of the Year and Insurance Specialist Firm of the Year.



OAM for Magistrate Braes

Queensland Governor Paul de Jersey AC presented Mareeba magistrate and QLS honorary member Thomas Braes with an Order of Australia Medal at an investiture on 10 September in Cairns. Magistrate Braes, who received the OAM for service to the community and to the law, has a 34-year legal career and has been with the Mareeba Magistrates Court since 2005.


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Charting the course of committee inquiries

Articles prepared by work experience law students **Kathryn Lohman** and **Natasha Del Piero** in collaboration with QLS policy solicitor **Julia Connelly**.

Queensland Law Society appeared before the Committee of the Legislative Assembly's public hearing on the Constitution of Queensland and Other Legislation Amendment Bill 2016 (the Bill), which has been the subject of previous submissions by the Society.

In addition to four key points raised previously (see last month's *Proctor*, page 12), the following points were canvassed:

If the *Parliament of Queensland Act 2001* was amended to provide for unanimous recommendations to be put directly to the House, the policy committee review processes could provide parties with the opportunity to resolve complex or controversial policy issues without reference to partisan issues.

E-petitions should not be a precondition for an own motion inquiry. Rather, committees should have recourse to wider community feedback, which would increase the scope of the areas the committees could inquire upon.

A threshold should be established in relation to own motion inquiries. For example, a simple majority of members could vote to bring an inquiry (without the concurrence of the non-government members).

Following its hearing, the committee's report (available from the Committee of the Legislative Assembly pages at parliament.qld.gov.au) set out these and several other significant points for which the Society advocated.

Adding courtesy to land access

Queensland Law Society, in collaboration with its Mining and Resources Committee, recently made submissions on the current Land Access Code (the code).

The submissions suggested that the code's Schedule 1 mandatory conditions extend to the observance of a 'best practice' requirement for the negotiation of conduct and compensation agreements with landholders.

We also highlighted that, acknowledging that property may also be a place of work for landholders (with time a premium to them), tenement holders should exercise courtesy when arranging the time and length of property visits. Aligning with this is the additional suggestion that the responsible person for the landholder and the tenement holder should also, to the extent possible, remain the same throughout the entire project.

We also put forward that the tenement holder should be required to provide the landholder with timelines for any expected phases of the intended program as opposed to simply a description of the program and its duration.

Another concern was on giving notices relating to mandatory conditions orally. Given that, under the code, requisite notices concern risk, loss or damage, we suggested that if oral notice is given, this should be confirmed in writing.

Resource regulations require clarification

In collaboration with our Mining and Resources Committee, Queensland Law Society made submissions on the *Mineral and Energy Resources (Common Provisions) Regulation 2016*.

These related to:

Regulation 4(a) [prescribed dealings – change to the resource authority holder's name]:

The regulation should be amended to record a change of name on the register (however, not requiring the Minister's approval as changes of name of individuals and entities are governed by others laws of the states, territories and the Commonwealth).

Regulation 15(1)(e) [caveats]:

This provision provides neither indication as to the person making a determination, nor the power conferred upon such a person, and accordingly should not be included as this process would ordinarily be undertaken by a court.

Regulation 33 [conduct of conference, specifically the presence of lawyers]:

Rather than stipulating that lawyers should not attend a conference, the regulation should provide for conference convenors to determine whether there are sufficient grounds to exclude lawyers' presence.

Regulation 38 [contract for delivery of ICSG] and regulation 39 [notice of offer or re-offer of supply of ICSG]:

The term 'indicative' in this context is vague and unhelpful, so that the proposed terminology 'indicative volume' does not allow for proper commercial negotiation in respect of the obligations by sellers and buyers of gas.

Regulation 49 [reconciliation payment]:

This uses the undefined term 'real value' in regard to reconciliation payment.

Strategies to stay ahead of the game

Last month's QLS Criminal Law Conference provided legislation updates and practical sessions to equip criminal lawyers with the knowledge and skills to thrive in daily practice. Court of Appeal president Justice Margaret McMurdo AC delivered the opening address, followed by presentations on topics including jury decision-making, deliberation and selection, managing work-related stress, forensic DNA evidence and avoiding miscarriages of justice, and cross-examination of child witnesses.



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CONFLICT IS INEVITABLE, COMBAT IS OPTIONAL. Max Lucado



Reflecting on change

At this year's QLS Property Law Conference 2016 on 8-9 September, attendees heard from the experts on how to be agile and keep ahead of change occurring within this evolving area of law. We examined the impact of digital disruption on the legal profession, property transactions with foreign investors, ethical issues, formation and disputes of electronic land contracts, and more across two days.

Thank you to our sponsors

QLS would like to thank our sponsors for their involvement with Property Law Conference 2016, particularly our silver sponsor *Electronic Search Services* and trade exhibitors.



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Networking, Gold Coast style

The Gold Coast skyline provided the perfect backdrop for a convivial evening of networking on 14 September. Hosted by the Queensland Law Society's Early Career Lawyers Committee and the Gold Coast District Law Association, the annual event was held at the SkyPoint Observation Deck in Surfers Paradise.



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Hard road for CTP fraud

Courts move to tougher penalties

With courts taking a harder line on CTP insurance fraud, **Glen Cranny** and **Callan Lloyd** look at the lessons to be learnt by both plaintiff and defendant lawyers.



Recent cases have shown a trend towards increased penalties for those who commit insurance fraud against compulsory third party (CTP) insurers, highlighting the importance of accuracy and honesty in such claims.

MAIC and CTP offences

The Motor Accident Insurance Commission (MAIC) is the statutory authority responsible for the ongoing management of Queensland's CTP insurance scheme. MAIC's functions include the development and coordination of strategies to identify and combat CTP fraud. In this capacity, MAIC criminally prosecutes those who make false claims. Criminal proceedings are taken summarily and are conducted pursuant to the *Justices Act 1886*.

The *Motor Accident Insurance Act 1994* (the MAI Act) creates MAIC and Queensland's CTP insurance scheme. The Act provides for different offences that may be committed in the course of a CTP claim, such as:

1. Section 87T – Offences involving fraud

An offence against s87T occurs where a person defrauds or deliberately misleads either MAIC, the Nominal Defendant, or a CTP insurer; or where a person attempts to do so. The maximum penalty for such offending is 18 months' imprisonment or a fine of 400 penalty units (presently \$48,760).

2. Section 87U – False or misleading information or documents

This offence arises where a person makes a false statement, or provides a false document, to either MAIC, the Nominal Defendant, or a CTP insurer. The maximum penalty for such offence is 12 months' imprisonment or a fine of 150 penalty units (presently \$18,285).

Recent case law

Sentences for offences under the MAI Act have been historically 'light on' in contrast to similar offending under WorkCover legislation or the *Criminal Code* – in years past it was not uncommon for fines to be imposed for dishonesty offences under the MAI Act.

The recent trend of increasing penalties suggests a diminishing tolerance for CTP insurance fraud, even in instances where the dishonesty simply involves the exaggeration of an otherwise genuine claim. The courts have recognised that insurance fraud has a wide and detrimental public impact, contributing to increased insurance premiums for all motor vehicle owners, and the consequent need for sentences which reflect a need for general deterrence. It can be expected too that such developments will encourage insurers to refer suspicious cases to MAIC for prosecution.

Recent case examples include:

Singleton v Murupaenga, Townsville Magistrates Court, July 2014

Murupaenga pleaded guilty to a single offence of attempted fraud contrary to s87T. She was involved in a motor vehicle accident and misrepresented the extent that her injuries had on her ability to work. There was an extensive period of offending, spanning two years, and at its highest her CTP claim was for around \$800,000. It was accepted that part of the defendant's claim was meritorious; her attempted fraud was

characterised by embellishing an otherwise legitimate claim. The CTP claim proceeded to trial, however that was abandoned after covert recordings of the claimant's activities were played during her cross-examination.

For her offending, Murupaenga was sentenced to six months' imprisonment, wholly suspended for an operational period of two years. She was ordered to pay almost \$13,000 in costs (and at that time, had an outstanding costs order against her from the civil proceedings which exceeded \$160,000).

Singleton v Cole, Brisbane Magistrates Court, February 2015

Cole was convicted after trial of one count of deliberately misleading an insurer contrary to s87T. In the course of her CTP claim she misrepresented the extent of her injuries, and their impact on her ability to work. She failed to disclose that throughout the course of her claim she was running a small business. Her claim exceeded \$800,000.

Cole was sentenced to 15 months' imprisonment, with an order she be paroled after four months of actual imprisonment. She was ordered to pay in excess of \$30,000 in costs.

Singleton v Ward, Townsville Magistrates Court, June 2015

Ward was charged with an offence of attempted fraud under s87T. In the course of her CTP claim, she claimed that she was unemployed, and unemployable, as a result of her injuries. She made various misrepresentations to medical practitioners about the extent of her injuries and symptoms. Her total insurance claim exceeded \$800,000.

Surveillance conducted on her activities revealed her working on multiple occasions, in contradiction to her claimed incapacity. The matter proceeded to trial following which Ward was found guilty.

Magistrate Smid determined that a term of imprisonment was the only suitable penalty, despite the fact that she had been genuinely injured in her accident, and (but for her dishonesty) would have been entitled to a much more significant compensation payment than she received. Ward was sentenced to two months' imprisonment, wholly suspended for nine months, and was ordered to pay costs of more than \$15,000.

Lessons for lawyers

A review of these and similar cases provides some lessons for both plaintiff and defendant lawyers alike.

It goes without saying that plaintiff solicitors should warn their clients in CTP claims that there are serious penalties – criminal as well as civil – for false or misleading behaviour in the course of their claim. Particular attention should be paid to advising clients against the temptation to inflate or exaggerate an otherwise legitimate claim.

Past cases demonstrate that discussions with medical practitioners, and claims made within statements of loss and damage, are fertile areas for false representations. With insurers commonly retaining surveillance operatives to investigate suspicious cases, plaintiff lawyers should be specifically advising their clients in this regard.

In matters in which a solicitor has cause to suspect a claim is false or embellished, that suspicion must not be ignored. As with all litigation, practitioners must exercise their own forensic judgment and not act as a 'mere mouthpiece' for the client.

Accordingly, client instructions should be considered dispassionately for their accuracy, and a claimant should be thoroughly questioned in relation to areas of concern. In extreme cases, plaintiff solicitors who assist in a false or embellished claim may attract their own criminal liability for conniving in an offence.

Those acting for insurers also play a significant role in the detection of fraudulent claims. While the MAI Act provides for a range of enforcement and investigatory powers (for example, search warrants and/or the seizure of evidence), those who engage in CTP offending are regularly caught out as a result of the prudent work by defendant lawyers.

Evidence obtained in the course of defending a CTP claim is generally crucial to a successful prosecution. This commonly takes the form of surveillance evidence commissioned by the insurer or its lawyers – still one of the most powerful types of evidence in this sort of case.

Furthermore, in instances where suspicions arise, defendant lawyers should consider requiring the claimant to provide details of their claim pursuant to s45 of the MAI Act, which provides for an insurer to require a claimant to verify information by way of a statutory declaration.

Not only might such a requirement give a dishonest claimant cause to reconsider the wisdom of continuing their claim, such a statement also assists in any subsequent criminal prosecution under the MAI Act, making it difficult if not impossible for a defendant (claimant) to later suggest they were mistaken or ignorant about the truth of matters claimed.

Concluding remarks

Offences committed in the course of CTP claims are serious, and the penalties for engaging in such action are increasing. Both plaintiff and defendant lawyers can play their part to reduce the prevalence of such offending. Knowing the CTP prosecution landscape will assist lawyers to pursue and protect their clients' interests in this evolving area of law.

Glen Cranny is a principal and Callan Lloyd a solicitor at Gilshenan & Luton Legal Practice. Gilshenan & Luton act on behalf of MAIC in prosecutions under the MAI Act.

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High Court revisits promissory statements, collateral contracts and estoppel

Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd & Anor [2016] HCA 26

The High Court's decision on this dispute reminds all practitioners that once a written contract is agreed, it is unlikely that any other promises will be enforceable. Report by **Borcsa Vass**.



On 20 July 2016, a majority of the High Court allowed the appeal in *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd & Anor* [2016] HCA 26.

The court found that there was no collateral contract or estoppel requiring Crown Melbourne Limited (Crown) to renew the leases of two tenants, Cosmopolitan Hotel (Vic) Pty Ltd and Fish and Company (Vic) Pty Ltd (the tenants), in the Crown casino complex in Melbourne.

Background

The tenants operated restaurants in the complex and had entered into five-year leases in 2005. The leases contained no option to renew but required the tenants to undertake significant refurbishment works at the commencement of the term.

Those refurbishments ultimately cost the tenants \$1.8 million and \$2.85 million, respectively. The tenants proceeded with the refurbishments based on the assumption that a further term of at least five years would be granted. The assumption was based on a

statement by Crown that, if they undertook the refurbishments, they would be "looked after at renewal time".¹

When Crown delivered notices to vacate towards the end of the five-year leases, the tenants brought proceedings in the Victorian Civil and Administrative Tribunal (VCAT) arguing that they were entitled to a renewal of their leases based on a collateral contract or estoppel.

Procedural history

At first instance, VCAT found that the statement made by Crown gave rise to a collateral contract requiring it to renew the leases, which it had breached. It also held that, if that conclusion was wrong, it would have also accepted the submission that Crown was estopped from denying the existence of the collateral contract.

In this regard, VCAT considered that an estoppel of the kind referred to in *Waltons Stores (Interstate) Ltd v Maher* (1998) 164 CLR 387 was made out, because the promise created an expectation upon which the tenants relied in entering into the leases and they suffered a detriment when that expectation was not fulfilled.

On appeal to the Supreme Court of Victoria, the court found that the statement was not promissory, which meant that it could not be the basis for a collateral contract, and that any such contract would be illusory and void for uncertainty.

It noted that in the context of commercial negotiations between parties experienced in leasing where important matters were documented, a reasonable person in the tenants' position would not have understood the statement as a promise to take any particular action.² In these circumstances, the tenants should have insisted on an offer to renew being specifically cast in those terms and reduced to writing.

The Supreme Court also considered that the estoppel claim failed because it could not overcome the first hurdle of the test in *Waltons Stores (Interstate) Ltd v Maher*, that the plaintiff assumed that a particular legal relationship existed or expected that a particular legal relationship would exist which the defendant would not be free to withdraw from.

On further appeal, the Court of Appeal decided that there was no collateral contract but that estoppel had been made out.

The High Court's decision

On appeal to the High Court of Australia, the majority³ held that the statement was not capable of giving rise to a collateral contract or founding a claim for estoppel.

In a joint judgment, French CJ, Kiefel and Bell JJ agreed with the Supreme Court's assessment of the statement not being promissory,⁴ which was vital to the statement being incorporated into a collateral contract.

Their Honours referred to *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 in which Gibbs CJ explained that a representation made in the course of negotiations may result in a collateral contract if the parties intended (objectively) for the representation to be contractually binding. It must have the quality of a contractual promise, as distinct from a mere representation.

The Supreme Court of Victoria had formed the view that a reasonable person in the parties' situation could not have understood the statement that the tenants would be "looked after at renewal time" to amount to a binding contractual promise to renew the leases for a further five years. The statement was no more than "vaguely encouraging".⁵ Both the Court of Appeal⁶ and the majority of the High Court⁷ considered that assessment to have been correct.

Importantly, Keane J noted in his judgment that, in the course of the negotiations between the parties for the initial five-year leases, a promise of a renewal of the leases had been explicitly rejected by Crown.⁸ On that background, the tenants ought to have



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confirmed whether Crown had in fact changed its position with respect to the prospect of a renewal of the leases.

As to the enforceability of the obligation which may have arisen from the statement, the High Court found difficulty not with the uncertainty of the contractual terms, but rather, the lack of them. The court noted that:

“On basic principles, there can be no enforceable agreement to renew a lease, breach of which sounds in damages, unless at least the essential terms of such a lease have been agreed upon.”⁹

Finally, on the question of estoppel, the High Court emphasised that in order to ground a claim for estoppel, a representation must be clear, precise and unambiguous.¹⁰ Additionally, the words used must be capable of misleading a reasonable person in the way that the person relying on the estoppel claims to have been misled.

Gageler and Gordon JJ dissented, finding that a collateral contract did exist requiring Crown to renew the leases.

Lessons from the decision

The different outcomes throughout the matter’s litigation history and the dissenting judgments in the High Court demonstrate how difficult it can be to determine when a representation can amount to a contractual promise or form the basis of an estoppel.

The decision serves as a timely reminder of the importance of the terms of a written contract when there is one. It is often difficult to prove that the parties intended there to be more to a contract than what is in it if they have gone to the trouble of recording their agreement in writing.

Some other general points that emerge from the High Court’s reasoning are that:

- A statement must be promissory to have contractual force.
- To form part of a contract, the parties must have (objectively) intended the representation to be contractually binding.
- The essential terms of a contract must be agreed upon before it can be binding.
- A representation must be clear, precise and unambiguous in order to found an estoppel.

Where a party intends to rely on a promise that is not part of a written contract between the parties, it is highly advisable that it be included in a written contract that has regard to the contract already on foot, prior to any steps being taken on that reliance.

Borcsa Vass is a Brisbane barrister.

Notes

¹ Despite other assurances having been allegedly made, this was the only assurance found by VCAT to have been proved. See *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2012] VCAT 225 at [118].

² *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [39] per Hargrave J.

³ French CJ, Kiefel, Bell, Keane and Nettle JJ.

⁴ At [23].

⁵ At [23] per French CJ, Kiefel and Bell JJ and at [193] per Nettle J citing *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2013] VSC 614 at [39].

⁶ *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* (2014) 45 VR 771 at [59]-[60] per Warren CJ, [179] per Whelan JA and [206] per Santamaria JA.

⁷ At [23].

⁸ At [160].

⁹ At [31] per French CJ, Kiefel and Bell JJ.

¹⁰ At [35] per French CJ, Kiefel and Bell JJ and at [142] per Keane J.

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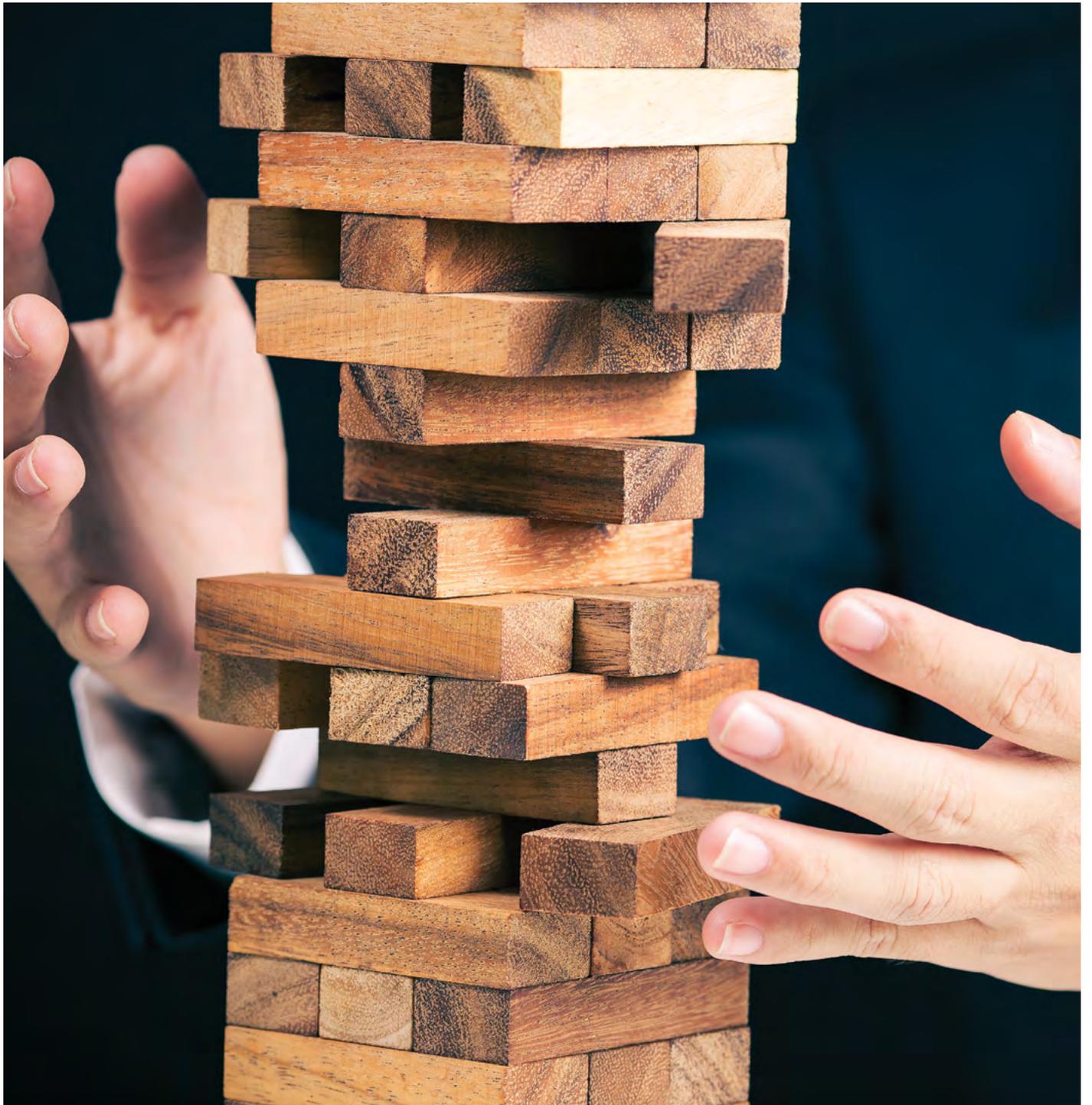
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Foreign investment reforms

The need for a balanced approach



Brett Heading and **Dr Kai Luck** consider the raft of recent changes to foreign investment rules in Australia.



On 24 November 2015, after a three-month negotiation period between the Federal Government and crossbench Senators, a number of Acts relating to foreign investment were passed by the Senate with the support of the Greens.

These were the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) (FATLA Act), the *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth) (Land Act) and the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) (Fees Act)

On 26 November, the Governor-General made the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (Regulation).

The legislation formalises various policy announcements made by the Government since March 2015 designed to “strengthen the integrity” of Australia’s foreign investment laws,¹ many of which have since been incorporated in the foreign investment policy of the Foreign Investment Review Board (FIRB).

Australia’s foreign investment laws have been the subject of widespread media attention recently, primarily due to concerns about farm sales to foreign investors and a belief that Chinese-fuelled investment has sparked ‘price bubbles’ in the residential real estate market.

However, it is important not to allow the media attention to degenerate into a ‘scare campaign’ which advocates drastic restrictions on all foreign investment. Any foreign investment reforms should strike a balance between upholding legitimate public policy concerns, such as national security and resource sustainability, and maintaining Australia’s reputation as an attractive investment destination, thereby promoting economic growth, competitiveness and productivity.

This article explores the amendments made by the FATLA Act, the Land Act, the Fees Act and the Regulation in relation to foreign investment in residential real estate, agriculture, agribusiness and commercial transactions, the foreign investment penalty regime and the imposition of FIRB application fees.

The article also examines new tax conditions which the federal Treasurer announced on 22 February 2016 would be imposed on all new foreign investment approvals, as well as the new foreign resident capital gains tax withholding regime that applies to the acquisition of taxable Australian property on or after 1 July 2016.

It is noted that, of the foreign investment reforms, the lower agricultural land and agribusiness FIRB screening thresholds and the introduction of FIRB application fees have generated the most controversy. Some stakeholders believe the screening thresholds and application fees will deter foreign investment, prejudicing Australia’s economy and threatening local jobs and the supply of affordable housing.

However, it is still too early to tell whether the amendments will have that effect.

To mitigate any possible adverse impact on foreign investment, it is important for the Government to remain open in its communication with investors and to convey the message that Australia is still very much ‘open for business’ as a leading investment destination in the Asia-Pacific.

Residential real estate

Australia’s foreign investment regime requires every proposed acquisition of residential real estate by a foreign person to be notified and reviewed by the Australian Taxation Office (ATO), which screens residential real estate investments on behalf of the Treasurer, unless it is specifically exempt.

Consistent with the Government’s intention that foreign investment in residential real estate should be permitted only when it encourages the increased supply of housing stock, the acquisition of new residential dwellings, off-the-plan residential properties under construction or yet to be built, and vacant residential land are generally approved, while established dwellings can only be purchased on a temporary basis as the primary place of residence of a foreign person in Australia.

Additionally, developers of off-the-plan residential properties of 100 dwellings or more are able to obtain pre-approval for sale of the dwellings to foreign persons.

The FATLA Act transfers all enforcement functions in relation to foreign investment in residential real estate to the ATO and requires a foreign person to apply for separate approval if the value of dwellings to be acquired under an off-the-plan residential property pre-approval exceeds \$3 million.

These reforms have received widespread support on the basis that they promote greater scrutiny of, and more effective enforcement of laws relating to, foreign investment in residential real estate without having any significant adverse impact on the level of investment activity.

However, as noted below, some stakeholders have been critical of reforms under the Fees Act which impose new FIRB application fees of \$5000 for acquisitions of residential real estate valued at less than \$1 million and \$10,000 for acquisitions valued at \$1 million or more, increasing in \$10,000 increments for each additional \$1 million in acquisition value thereafter.²

Agriculture and agribusiness

Foreign agricultural investment is widely acknowledged to advance industry competition, efficiency, productivity and international supply linkages.³

The legislation makes the following key reforms to foreign agricultural investment:

- lowering the FIRB application screening threshold from \$252 million *per investment* to a *cumulative* \$15 million for all acquisitions of interests in agricultural land by the same investor⁴ (except private investors from the United States, New Zealand or Chile, where the threshold is a non-cumulative \$1,094 million, and private investors from Singapore or Thailand, where the threshold is a non-cumulative \$50 million).⁵ The cumulative \$15 million threshold was passed despite a push by the Greens to implement a cumulative \$5 million threshold.

- Notably, an ‘interest’ in agricultural land includes an interest in a share in an ‘agricultural land corporation’ or an interest in a unit in an ‘agricultural land trust’ whose majority assets comprise agricultural land.⁶
- introducing a new \$55 million FIRB application screening threshold for an acquisition which results in a private investor holding a total ‘direct interest’ (discussed below) in an Australian entity or an Australian business that is an ‘agribusiness’⁷ (except private investors from the United States, New Zealand or Chile, where a \$1,094 million threshold applies for investments in non-sensitive businesses and a \$252 million threshold applies for investments in sensitive businesses),⁸ and
- requiring foreign persons and foreign government investors holding interests in agricultural land to register the interests with the ATO, regardless of the value of the land, in accordance with the provisions of the Land Act.⁹

However, as part of the compromise to ensure the passage of its reform package, the Government agreed to a Greens amendment which provides that the Land Act will cease to have effect if legislation establishing a register for the foreign ownership of water entitlements has not been enacted by 1 December 2016.¹⁰

Peak farming bodies, including the National Farmers’ Federation, have expressed in-principle support for the agriculture and agribusiness reforms,

arguing that they increase the scope for transparency in investments that may harm Australia’s national interests.¹¹ Indeed, the South Australian Farmers Federation previously labelled the former agricultural land screening threshold “an absolute joke”;¹² and so high that, according to the final report of the Senate committee established in 2013 to review Australia’s foreign investment laws, “a private foreign investor could acquire a property valued 97 times an average farm or a property of about 194,000 hectares without being subject to FIRB review”.¹³

However, while supportive of the agricultural land register,¹⁴ other industry groups including the Business Council of Australia (BCA) believe the new agricultural land and agribusiness application screening thresholds will have a “chilling effect” on foreign investment by increasing costs and uncertainty.¹⁵

While an appropriate definition for ‘agribusiness’ generated widespread debate during the Government’s preliminary legislative consultation process, the term is now defined in the Regulation with reference to a business carried on wholly or partly in certain classes set out in the Australian and New Zealand Standard Industrial Classification (ANZIC) Codes.¹⁶ The incorporation of the well-understood and industry-accepted ANZIC Codes in the definition promotes certainty and confidence for foreign investors, thereby reducing transaction costs.

However, some stakeholders have argued that the definition of ‘agricultural land’ in the FATLA Act (which replaces the former concept of ‘Australian rural land’) as “land in Australia that is used, or that could reasonably be used, for a primary

production business”¹⁷ is ambiguous, imposing significant compliance costs by requiring foreign investors to assess the potential suitability of land for a primary production purpose and consequently the need for an ATO notification and/or FIRB application.¹⁸

The Law Council of Australia (LCA) believes that land which is not currently used, and is not able to be immediately used in its present state, for a primary production purpose should be excluded from the definition of agricultural land.¹⁹

It has also been argued that mandatory notification should only be required for the acquisition of an interest in an Australian entity or an Australian business that is an agribusiness where a ‘substantial interest’ of 20% or more is acquired, as is the case for the acquisition of an interest in an Australian entity that is not an agribusiness (see below), rather than a ‘direct interest’.²⁰ The latter term is defined broadly in the Regulation to mean an interest of at least 10% but can include an interest of 5%²¹ or an interest of any percentage²² in certain circumstances.

Commercial transactions

The FATLA Act requires mandatory notification when a foreign person, other than a foreign government investor, proposes to acquire:

- developed commercial land with a value exceeding the applicable threshold (\$1,094 million for acquisitions by private investors from the United States, New Zealand, Chile, China, Japan or South Korea and, for other private investors, \$252 million for non-sensitive acquisitions and \$55 million for sensitive acquisitions), or



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- a 'substantial interest' of 20% or more in an Australian entity which has a total asset value or total issued securities value exceeding the applicable threshold (\$1,094 million in non-sensitive sectors and \$252 million in sensitive sectors for private investors from the United States, New Zealand, Chile, Japan or South Korea and \$252 million for other private investors).²³

The approach taken by the FATLA Act to commercial transactions has generally been viewed as fair and proportionate, promoting commercial investment consistent with Australia's national interests.

In particular, the increase in the 'substantial interest' threshold from its previous value of 15% has been welcomed on the basis that it more closely aligns Australia's foreign investment laws with the takeover provisions of the *Corporations Act 2001* (Cth), which have long been regarded as appropriately reflecting prevailing community attitudes about the point at which a corporate acquisition by a single purchaser raises public interest concerns such as competition and restrictive trade practices.

Penalties

The FATLA Act introduces civil penalty orders of up to \$45,000 for individuals and \$225,000 for companies,²⁴ as well as increased criminal penalties of up to \$135,000 (or three years' imprisonment) for individuals and \$675,000 for companies,²⁵ to supplement existing property divestment orders in the event of a breach of the restrictions imposed by the legislation on any type of foreign investment.²⁶

Further, instead of seeking a civil penalty order, the ATO may elect to issue an infringement notice to a foreign person in relation to a contravention related to residential real estate, which can result in a maximum penalty of \$10,800 for individuals and \$54,000 for companies.

Although, except in relation to company officers,²⁷ the FATLA Act does not itself contain separate penalty provisions for persons involved in a contravention of the foreign investment laws (such as professional advisors), the FATLA Act nevertheless states that such persons may face criminal and civil liability under other Commonwealth legislation.²⁸

The revised foreign investment penalty regime has been widely supported by stakeholders on the basis that it enhances the flexibility and integrity of Australia's foreign investment laws.

Application fees

The same FIRB application fees for residential real estate investments now also apply to acquisitions of agricultural land, subject to a cap of \$100,000.²⁹ Application fees of \$25,000 are imposed for acquisitions of developed commercial real estate and business acquisitions (including agribusinesses) worth up to \$1 billion, while a \$100,000 application fee applies to business acquisitions worth more than \$1 billion.³⁰

In relation to residential real estate investments, the Property Council of Australia (PCA) has noted that foreign capital provides the 'critical mass' needed for new housing developments.³¹

Given the need for *all* proposed acquisitions of residential real estate by foreign persons (not just existing dwellings) to be notified and approved under the FATLA Act, the PCA believes that foreign investors are "likely to be sensitive" to the new application fees, with the deterrent effect on investment most likely to be felt in the "mid-price point range where new supply is most urgently needed".³² As a result, new housing developments, and consequently housing affordability (particularly for first-home buyers), as well as new jobs for Australians and long-term economic growth, may be compromised.³³

However, the deterrent effect of the application fees on residential real estate investment has been questioned by other stakeholders, including the Real Estate Institute of New South Wales³⁴ and ACproperty.com.au, the largest Chinese property website in Australia.³⁵

For other forms of foreign investment, there is a risk that the application fees place Australia at a competitive disadvantage to other nations that do not charge application fees, including Japan, the United States and Canada.³⁶ By increasing transaction costs, the new fee regime may discourage foreign investment in Australia.

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Additionally, concerns have been raised by stakeholders about the interaction between the FIRB application fees and:

- the cumulative \$15 million screening threshold for acquisitions of agricultural land, in circumstances where the acquisitions are made by 'high-volume applicants' such as private equity funds, property developers and retailers. Because high-volume applicants are likely to acquire more than \$15 million in aggregate agricultural land in a short space of time, those applicants will bear a disproportionate burden of the proposed application fees insofar as they will need to pay a fee for each new acquisition thereafter, irrespective of the value of the individual parcel of land,³⁷ and
- the 'zero dollar thresholds' which require a FIRB application to be lodged for acquisitions of any land or direct interests in Australian entities or businesses by 'foreign government investors', a term that captures not only foreign governments but also sovereign wealth funds and domestic and offshore private equity funds whose investors include sovereign wealth funds and state-owned pension funds. The need for such entities to pay an application fee for almost every proposed transaction, despite the lack of any real foreign government influence, provides a disincentive to investment despite the minimal risk to Australia's national interests.³⁸

Tax conditions

On 22 February 2016, the Treasurer announced that mandatory tax conditions would be imposed on all new foreign investment proposals notified to FIRB or the ATO (as applicable). The conditions, which apply in relation to the specific notified action as well as any assets or operations acquired directly or indirectly as a result of the notified action, require foreign investors to:

- comply, and use best endeavours to ensure compliance by associates of the foreign investor, with Australian tax laws
- provide, and use best endeavours to ensure associates of the foreign investor provide, documents or information requested by the ATO
- notify, and use best endeavours to ensure associates of the foreign investor notify, the ATO on entry into any material transaction or other dealing to which the transfer pricing rules or anti-avoidance rules under Australian tax law may potentially apply
- pay, and use best endeavours to ensure associates of the foreign investor pay, any outstanding tax debt which is due and payable at the time of the proposed action
- provide an annual report to FIRB on compliance with the tax conditions.

Additionally, where the Treasurer identifies a 'significant tax risk' in relation to a particular foreign investor and/or a proposed action, additional conditions will be imposed requiring the investor to:

- engage in good faith with the ATO to resolve any tax issues relating to the proposed action and the investment to be held
- provide information as specified by the ATO on a periodic basis, including, at a minimum, a forecast of tax payable.

On 23 February 2016, the Treasurer approved the purchase of Van Diemen's Land Company, Australia's largest dairy company, by Chinese investment company Moon Lake Investments for \$280 million. The approval was the first to be subject to the new tax conditions.

The practical operation of the new tax conditions, particularly as they apply to associates of a foreign investor, and the effect the conditions will have on foreign investment in Australia, remains to be seen.

Apart from the new tax conditions, practitioners should be aware that, pursuant to the *Tax and Superannuation Laws Amendment (2015 Measures No.6) Act 2016 (Cth)*, persons that purchase "taxable Australian property" (which includes all Australian real property and leases over real property as well as mining, quarrying and prospecting rights, interests in Australian entities whose majority assets consist of Australian real property and options or rights to acquire any such property or interests) from a foreign resident for a market value of \$2 million or more on or after 1 July 2016 must withhold 10% of the purchase price and remit that amount to the ATO. The withholding regime is intended to assist the ATO in the collection of capital gains tax by foreign residents.

Concluding remarks

Following the passage of the FATLA Act, the Land Act, the Fees Act and the Regulation, as well as the commencement of new foreign investment tax conditions and the foreign resident capital gains tax withholding regime, the Government should look to proactively and cooperatively engage with foreign investors to ensure that Australia continues to be perceived as an attractive destination for investment.

The key message should be that, while the reforms are designed to promote greater scrutiny of foreign investment, they are not intended to deter investment and the Government will work to negotiate with investors on appropriate investment structures.

Brett Heading is a partner and Dr Kai Luck is an associate at Jones Day, Brisbane. The views and opinions expressed are the personal views or opinions of the authors and do not necessarily reflect views or opinions of the law firm with which they are associated.

Notes

- ¹ Tony Abbott, Joe Hockey and Barnaby Joyce, 'Government Tightens Rules on Foreign Purchases of Agricultural Land', media release, 11 February 2015; Tony Abbott and Joe Hockey, 'Government to Strengthen Australia's Foreign Investment Framework', media release, 25 February 2015; Tony Abbott and Joe Hockey, 'Government Strengthens the Foreign Investment Framework', media release, 2 May 2015.
- ² Fees Act, ss6-8.
- ³ For a detailed discussion, see Mick Keogh and Adam Tomlinson, 'Australia has an Open Door for Foreign Investment, but Voters Hold the Keys', 11(1) *Farm Institute Insights* 1, February 2014.
- ⁴ FATLA Act, ss46-47, 52; Regulation, s52(4).
- ⁵ Regulation, s40.
- ⁶ FATLA Act, ss12(1)(f)-12(1)(g).
- ⁷ FATLA Act, ss46-47, 51; Regulation, s50.
- ⁸ Regulation, s40.
- ⁹ Land Act, ss18-30.
- ¹⁰ Land Act, ss31, 34A.
- ¹¹ National Farmers' Federation, 'Submission to the Strengthening Australia's Foreign Investment Framework – Options Paper', March 2015, 14.
- ¹² Rural and Regional Affairs and Transport References Committee, *Foreign Investment and the National Interest*, June 2013 (Senate committee report), [5.7].
- ¹³ Senate committee report, [5.9].
- ¹⁴ See, for example, Business Council of Australia, 'Submission to Exposure Draft on Implementing Foreign Investment Reforms', July 2015 (BCA submission), 5-6.
- ¹⁵ Business Council of Australia, 'Submission to the Government's Options Paper: Strengthening Australia's Foreign Investment Framework', March 2015, 3.
- ¹⁶ Regulation, s12.
- ¹⁷ FATLA Act, s4.
- ¹⁸ Law Council of Australia, 'Submission on Foreign Investment Reforms – Draft Legislation', 17 July 2015 (LCA submission), 6-7.
- ¹⁹ LCA submission, 7.
- ²⁰ BCA submission, 10-11; LCA submission, 8.
- ²¹ The 5% interest applies "if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business": Regulation, s16(b).
- ²² A direct interest is taken to mean an interest of any percentage in an entity or business "if the person who acquired the interest is in a position to influence or participate in the central management and control of the entity or business or to influence, participate in or determine the policy of the entity or business": Regulation, s16(c).
- ²³ FATLA Act, ss50-52; Regulation ss51, 52(5).
- ²⁴ FATLA Act, ss89-98.
- ²⁵ FATLA Act ss84-88.
- ²⁶ FATLA Act, ss104-111.
- ²⁷ FATLA Act, ss102-103, which deal with the liability of officers of corporations who authorise, permit or fail to prevent contraventions of the FATLA Act.
- ²⁸ FATLA Act, s83.
- ²⁹ Fees Act, ss6-8.
- ³⁰ Fees Act, ss6-8.
- ³¹ Property Council of Australia, 'Submission to the 2015 Options Paper – Strengthening Australia's Foreign Investment Framework: A Foreign Investment Regime that Supports Housing Construction and Jobs', 20 March 2015 (PCA submission), 10.
- ³² PCA submission, 9.
- ³³ PCA submission, 9-10.
- ³⁴ Phil McCarroll, 'REINSW Welcomes Changes to Foreign Investment Legislation', *Your Investment Property*, 25 August 2015.
- ³⁵ Su-Lin Tan, 'Chinese Home Buyers Cautious over Foreign Investment Rules', *Australian Financial Review*, 24 August 2015.
- ³⁶ Law Council of Australia, 'Submission in Response to the Federal Government's Consultation Paper on Strengthening the Foreign Investment Framework', 20 March 2015, 3.
- ³⁷ LCA submission, 8-9.
- ³⁸ *Ibid.*

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Case management, class actions and anti-suit injunctions

Jones v Treasury Wine Estates Limited [2016] FCAFC 59

*Jones v Treasury Wine Estates Limited*¹ (*Jones*) provides appellate confirmation that a court will utilise all tools available to protect its processes, especially when it has a strong supervisory role.

In *Jones*, the Full Court of the Federal Court granted an anti-suit injunction to restrain the applicant from seeking the taking of depositions in the United States.

The court recognised that active judicial case management will require parties to complex civil proceedings to conduct themselves in a manner that facilitates the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.²

This emphasis is evident in the Federal Court where discovery is not as of right³ and where the court has a statutory role in supervising class actions.⁴ In this context, the court will prevent a party from using foreign proceedings to deviate from these rules without the approval of the docket judge.⁵

The class action

Treasury Wine Estates Ltd (TWE) was the respondent to a class action commenced in July 2014. The allegations against TWE included misleading and deceptive conduct, and contraventions of the continuous disclosure provisions of the *Corporations Act 2001* (Cth).

Specifically, TWE was alleged to have failed to disclose to the market that its US distributors' wine inventories were materially excessive. In March 2015, Foster J made pre-trial orders for discovery with trial dates allocated in September 2016.

The American proceedings

In September and October 2015, Jones filed applications in the US District Court in California and New York seeking oral depositions of TWE executives on matters relating to the Australian class action.⁶ United States law permits the District Court, on the application of an interested litigant, to make

orders compelling a person to give testimony, make a statement or produce a document or other thing for use in a foreign proceeding.⁷

The nature of oral discovery of this kind is different from the discovery process in the Federal Court.⁸ In the US, pre-trial depositions are widespread. In Australia such procedures, while theoretically within the court's powers, are not generally utilised.⁹

The application for an anti-suit injunction

The respondent sought an anti-suit injunction to restrain the applicant from seeking the oral depositions. By direction of the Chief Justice, the application came before the Full Court of Gilmour, Foster and Beach JJ in its original jurisdiction.¹⁰

Having examined the rules for discovery in the Federal Court, the Full Court noted it did "not suggest that this Court does not theoretically have the power to order oral discovery of the US kind".¹¹ The issue was the litigants' attempt to circumvent the court's management of the proceeding by¹² "... seeking to invoke the powers of a foreign court to obtain compulsory oral discovery outside the docket judge's case management control of this class action and without his knowledge or approval".

The Full Court found¹³ that "... the applications were patently made in order to obtain the benefit of processes not usually available in this Court".

Relying on the leading case of *CSR Ltd v Cigna Insurance Australia Ltd*,¹⁴ TWE argued that an anti-suit injunction was justified either under the court's inherent power to protect its own processes once set in motion or, alternatively, because the overseas action was vexatious and oppressive.¹⁵

Given the court's characterisation of the case as an instance in which the US proceedings circumvented the court's processes, it is unsurprising that the court held that an anti-suit injunction should be granted under its inherent jurisdiction.¹⁶

The court had regard to the principle that it has exclusive control over its own proceedings¹⁷ and that Australian courts

have previously granted anti-suit injunctions to restrain the seeking of depositions under foreign law.¹⁸

Importantly, the Full Court approved the decision of Pagone J in *Pathway Investments Pty Ltd v National Australia Bank (No.2)*,¹⁹ in which his Honour restrained a plaintiff from seeking US deposition orders in a matter before the Victorian Supreme Court. The matter had been the subject of substantial court supervision, and the recourse to US procedures was without his Honour's approval.²⁰

In endorsing Pagone J's approach, their Honours suggested that an anti-suit injunction to restrain the application for oral depositions in the US was even more necessary in the present case, given the particular supervisory role of the Federal Court in a class action.²¹

The implications

The Federal Court's supervisory jurisdiction over class actions is the thread which runs through the Full Court's reasoning. Their Honours emphasised that oral depositions via a foreign court were not prima facie impermissible. The issue was that the US depositions had been sought without approval from the docket judge. This unsanctioned recourse to US procedures constituted sufficient interference with the Federal Court's processes to found an anti-suit injunction as:²²

"[w]hat is vital is that this Court's proceedings and its pre-trial processes are solely subject to supervision by this Court, particularly where one is dealing with a class action which invokes the Court's supervisory role. If orders for § 1782 depositions are to be permitted in a case, they should not be obtained by a party to proceedings in this Court without notice to the other party and without the prior knowledge and endorsement of this Court by appropriate directions. It is neither necessary nor helpful to hypothesise upon the circumstances which might warrant such endorsement. We would expect them to be exceptional."

Therefore, though a court does not generally direct the gathering of evidence,

While the exploitation of all available information-gathering tools may often be warranted, stepping beyond the processes of the court will be firmly censured. Report by **Samuel Walpole** and **Tristan Pagliano**.



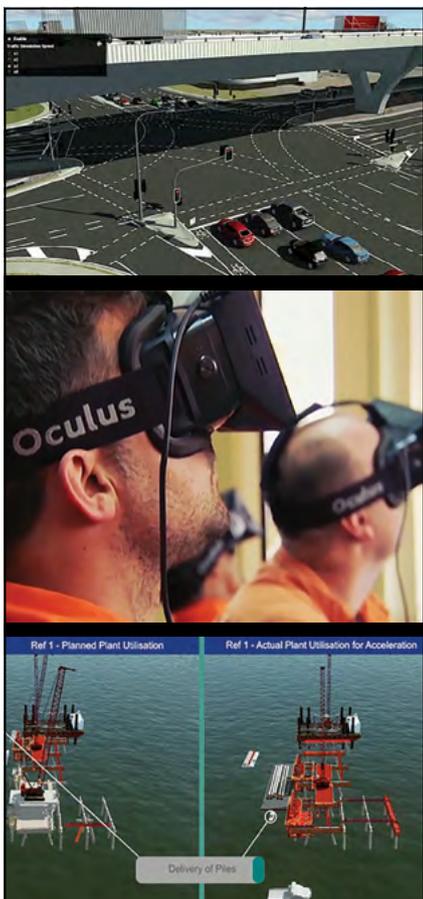
it will intervene when the gathering of such evidence would interfere with the court's processes.²³ Parties can avail themselves of procedures available in foreign courts, provided they do not seek to bypass the docket judge's overall control of proceedings.

Accordingly, *Jones v Treasury Wine Estates* provides an important reminder that, as parties seek to exploit all information-gathering tools available to them, the court will be equally resolute in ensuring its processes are protected.

Samuel Walpole is a law student and research assistant at the University of Queensland. Tristan Pagliano is a law graduate. The authors thank Jordan English and Eloise Gluer for their comments on an earlier draft, along with barrister Mark Eade, who reviewed and approved this article.

Notes

- ¹ [2016] FCAFC 59.
- ² *Ibid.*, [23].
- ³ *Ibid.*, [24]-[26], citing *Federal Court Rules 2011* (Cth) rr20.11, 20.13.
- ⁴ *Ibid.*, [30], citing *Federal Court Act 1976* (Cth), Part IVA.
- ⁵ *Ibid.*, [29].
- ⁶ See [2016] FCAFC 59, [8]-[20].
- ⁷ See 28 USC § 1782; see also [2016] FCAFC 59, [8]-[9].
- ⁸ See [2016] FCAFC 59, [24]-[29].
- ⁹ *Ibid.*, [28]-[29].
- ¹⁰ *Ibid.*, [4], citing *Federal Court of Australia Act 1976* (Cth) s20(1A).
- ¹¹ *Ibid.*, [29].
- ¹² *Ibid.*.
- ¹³ *Ibid.*, [44].
- ¹⁴ (1997) 189 CLR 345.
- ¹⁵ See [2016] FCAFC 59, [21].
- ¹⁶ [2016] FCAFC 59, [22].
- ¹⁷ *Ibid.*, [30], citing *National Mutual Holdings Pty Ltd v The Sentry Corporation* (1989) 22 FCR 209, 232 (Gummow J).
- ¹⁸ *Ibid.*, [32]-[37].
- ¹⁹ [2012] VSC 495.
- ²⁰ [2016] FCAFC 59, [35]-[37].
- ²¹ *Ibid.*, [39].
- ²² See [2016] FCAFC 59, [48].
- ²³ [2016] FCAFC 59, [52].



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A closer look at our pro bono heroes

In Dana Stabenow’s novel, *Restless in the Grave*, a character remarks:

“Once in a while, I like to polish my halo by taking on a case pro bono.”

Based on data from the Queensland Law Society annual practising certificate renewal process, shiny halos are abundant amongst the state’s solicitors, with many showing a firm commitment to helping those less fortunate.

Considerable hours of pro bono work are being performed across the whole of the state.

Pro bono work is an integral part of the legal profession to an extent unrivalled by any other profession, and the benefits of pro bono work go well beyond giving back to the community. They include increased experience and improved skills, as well as recognition outside of your firm.

These benefits have been discussed frequently by QLS and in *Proctor* (see the May 2013 edition for an example). Instead, this article focuses on the number of pro bono hours provided by the practitioners of Queensland.

This data has been collected by QLS during the last three practising certificate renewals, and there is now a body of information sufficient to show some emergent trends. By reviewing this data, we can see trends in the number of pro bono hours worked, and who performs this pro bono work.

There is a large variance in the number of pro bono hours worked by solicitors (*figure one*). Two in five solicitors provide more than 50 pro bono hours a year, with one in five clocking more than 100 hours a year.

The median number of pro bono hours worked during the last recording period was 30 hours, a value which has remained constant across the three years. This is just below the National Pro Bono Centre’s aspirational pro bono target of 35 hours per lawyer per year.

There is a small minority providing more than 500 hours of pro bono work a year. These are people who work either within the volunteer community legal centre sector or provide an additional 10 hours a week beyond their paid working hours.

Comparing the gender of pro bono volunteers against the average number of pro bono hours worked, there is a negligible difference (*table one*), with males working around four to six hours more. This difference in averages is not significant.

Table one: Average hours of pro bono worked by gender.

Survey year	2014	2015	2016
Male	71	75	73
Female	65	71	67
Difference	6	4	6

However, when the age of those providing pro bono service is considered, the differences are more noticeable (*figure two*).

In general, the average number of pro bono hours worked increases with age, peaking near the age of 60. Males between 56 and 60 provide more pro bono hours than any other sub-group; with an average of 112 hours. This is a little over 28 hours more than for females of a similar age. Males over 60 also continue to provide more pro bono hours on average than their younger counterparts.

Females on average provide more pro bono hours than males in six of the seven age brackets up to 55 years of age. The difference is an average of 7 hours 19 minutes a year. Female participation in pro bono work decreases significantly after 60, with females 71 years of age and older providing similar pro bono hours to females 26 to 30.

The survey was voluntary and the number of survey participants has varied from 2400 in 2014 to 4000 in 2016. Considering different factors such as firm size or location did not provide any significant variance.

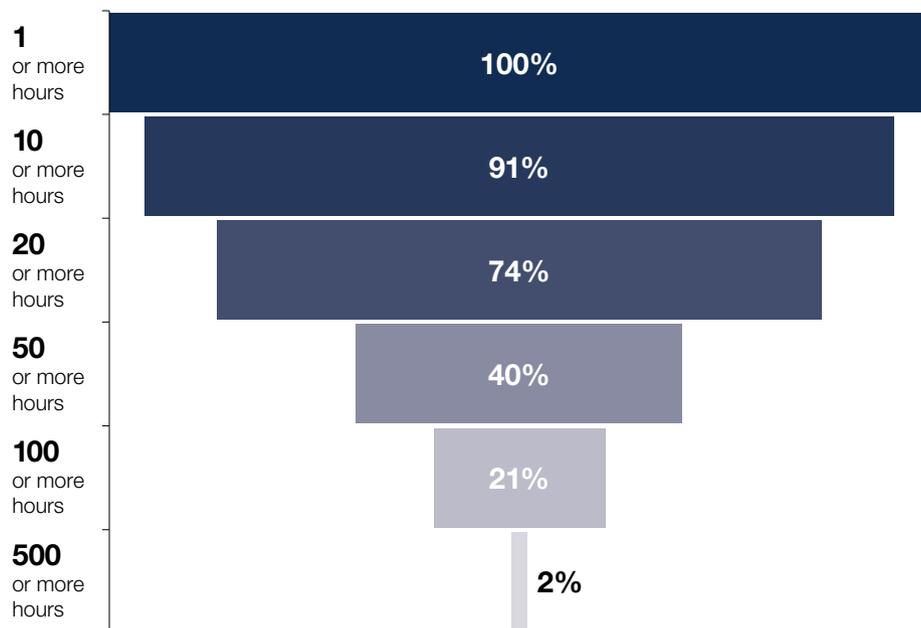


Figure one: Distribution of pro bono hours provided as a percentage of pro bono practitioners (2016).

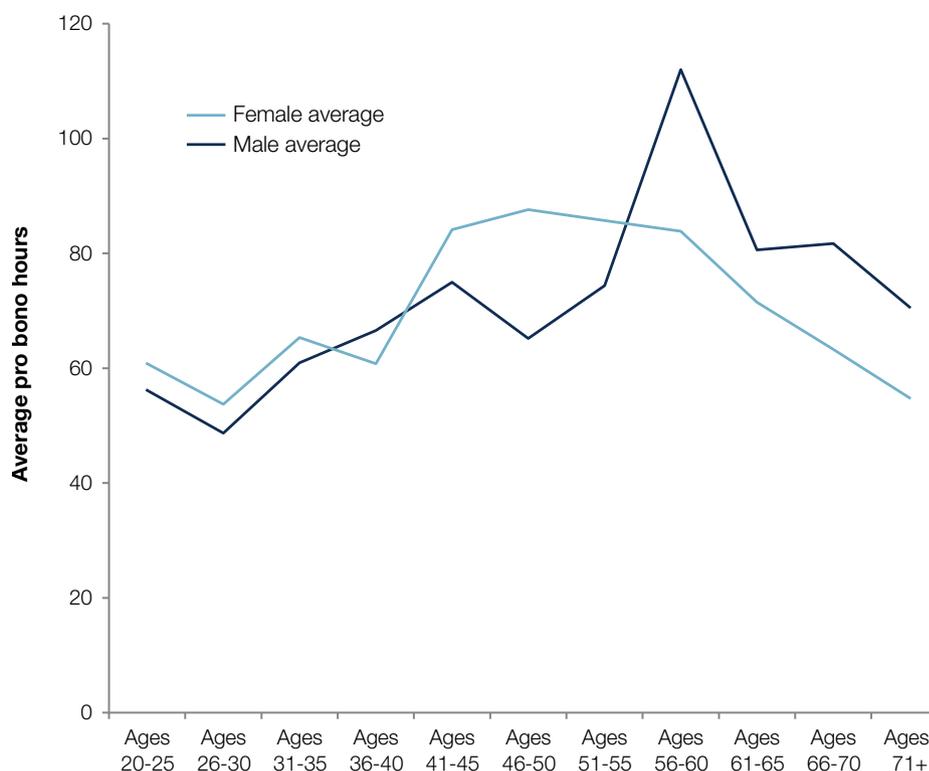
by Nigel Dearnley



Review of the data on the 1606 survey participants who provided pro bono hours in both 2014 and 2016 shows 44% had increased their pro bono hours and 42.2% had decreased their pro bono hours. The remaining 219 solicitors performed the exact same number of pro bono hours in 2016 as in 2014. This resulted in very nearly the same average value, despite significant change at the individual level. An additional two hours and 10 minutes of pro bono hours were performed when averaged across the 1606 individual solicitors.

The solicitors of Queensland provided more than 290,000 hours of pro bono work in the 2015-16 financial year. This work is both beneficial to the individuals who performed the pro bono work, the reputation of the legal industry, and of course the recipients of the work.

If you are interested in either performing pro bono work or registering your law firm to perform additional pro bono work, you can do so through the QLS pro bono scheme run in conjunction with QPILCH, call 07 3846 6317.



Nigel Dearnley is a Queensland Law Society data analyst.

Figure two: Average pro bono hours of gender by age bracket.



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Aligning personal and corporate insolvency

Practical implications of the *Insolvency Law Reform Act 2016*

Significant changes to Australia's bankruptcy and corporate insolvency regimes will take effect on 1 March 2017 with the commencement of part of the *Insolvency Law Reform Act 2016* (Cth) (ILR Act).

The ILR Act represents the Government's efforts to strengthen and streamline the current regulatory framework for personal and corporate insolvency. Not only are the reforms intended to increase efficiency and decrease costs, it is hoped the ILR Act will also enhance perceptions around the conduct of insolvency professionals by creating a more robust framework for discipline and registration.

The ILR Act makes notable inroads towards modernising this area of law – despite not encompassing the Government's more recent proposals for reform.¹ Given the significance of the Act's desired outcomes it is relevant to consider its practical implications and the extent to which further reform is necessary.

Why do we need new insolvency laws?

Regulation of the insolvency profession has been the subject of various reviews in the last two decades.² In 2010 the Senate Economics References Committee explored the key deficiencies of the insolvency system and put forward 17 recommendations.³ It was thought that changes to the current framework were necessary in order to promote a high level of professionalism and competence in the industry. This is likely due to the various high-profile cases of professional misconduct.

The Government put forward further recommendations for reform in 2011 – despite the fact that the Senate inquiry had not resulted in any legislative change.⁴ Draft Bills were published in 2013 and 2014 but never received royal assent.

Accordingly, the introduction of the ILR Act reflects the first real attempt to deliver on any of the recommendations arising from the numerous reviews. The ILR Act, in particular, reflects the recommendation arising from the Senate inquiry that the framework for regulating personal insolvency professionals should be applied to corporate insolvency professionals.

Purpose of the ILR Act

The ILR Act aims to improve communication and transparency between stakeholders and improve confidence in the profession. It will align key areas relating to corporate external administrations and personal bankruptcies and, in doing so, increase efficiency in insolvency administrations.⁵

The objectives of the ILR Act are achieved by introducing a new Insolvency Practice Schedule (IPS) into two Acts, the *Corporations Act 2001* (Cth) (Corporations Act) and the *Bankruptcy Act 1966* (Cth) (Bankruptcy Act), which, for the most part, contain corresponding rules in respect of the registration, regulation and discipline of registered trustees and registered liquidators. The IPS (Bankruptcy) and IPS (Corporations) will be inserted as Schedule 2 at the end of each corresponding Act.

A set of Insolvency Practice Rules (IPR) will accompany the ILR Act as a legislative instrument. Until those rules are published, it may be difficult to determine the true extent of the changes brought about by the legislation. Given the ILR Act's impending commencement date, the IPR should be released in the near future.

The ILR Act was due to commence on 1 March 2017, however, the Government has announced that some of the provisions will not come into effect until 1 September 2017 in order to allow the industry time to prepare

for the changes. Accordingly, the provisions of the ILR Act dealing with insolvency administration processes will not commence until 1 September 2017. The reforms relating to registration and discipline will commence on 1 March 2017 as planned.⁶

Key changes to corporate insolvency

The IPS (Corporations) introduces key changes to the current corporate insolvency framework as summarised below.

Registration of liquidators

The ILR Act refines the process for registration of corporate insolvency practitioners, aligning it with the existing process for personal insolvency practitioners.

Under the ILR Act:

- an application for registration as a liquidator must be determined by a committee convened by the Australian Securities and Investments Commission (ASIC), a registered liquidator and a person appointed by the Minister (rather than just ASIC determining the application).
- The committee must make a decision within 45 days of interviewing the applicant as to whether they satisfy the criteria for approval as a registered liquidator.
- The criteria to be assessed against includes the applicant's qualifications, conduct and fitness, and whether the applicant holds appropriate insurance.
- Corporate insolvency practitioners are no longer registered for life and must renew their registration every three years.
- ASIC will now have the power to place conditions on the registration of a liquidator.



Changes in the areas of bankruptcy and corporate insolvency are a positive step for the insolvency profession and its reputation. Report by **Emma Hardy**.

Offences

The ILR Act introduces strict liability offences and maintains some of the offences in the current legislation. A registered liquidator commits an offence under the ILR Act if he or she fails to:

- maintain adequate and appropriate insurance
- lodge an annual return
- notify ASIC of certain events which could impact on the liquidator's ability to perform his or her role
- notify ASIC if information included in an annual return is inaccurate.

Discipline

The Companies Auditors and Liquidators Disciplinary Board (CALDB) currently has jurisdiction to determine the appropriate disciplinary action for offending practitioners. Under the ILR Act, CALDB will no longer have jurisdiction over liquidators. Rather, ASIC will be empowered to:

- suspend or cancel a liquidator's registration in certain circumstances
- direct a liquidator not to accept any further appointments if the liquidator has outstanding lodgements
- issue a show-cause notice to a registered liquidator and refer the liquidator to a committee consisting of ASIC, a registered liquidator selected from a prescribed body and a person appointed by the Minister (previously ASIC would refer the matter to CALDB)
- take action on the decision of the committee as to whether the liquidator's registration ought to be cancelled, suspended or continued.

It is also relevant to note that industry bodies may notify ASIC if they suspect legitimate grounds exist for taking disciplinary action against a registered liquidator.

Co-regulation

The ILR Act dictates that ASIC must work with the Inspector-General in Bankruptcy in exercising its powers under the Corporations Act.

External administrations

The Senate inquiry found that excessive fees and a lack of disclosure around remuneration of insolvency practitioners contributed to the distrust in the profession. In an attempt to combat this, the ILR Act introduces rules about the rights of practitioners to claim remuneration.

Under the ILR Act:

- Remuneration of external administrators (other than provisional liquidators and liquidators in a winding-up by ASIC) is to be set by a remuneration determination.
- If a determination has not been made, a default amount will apply for necessary work properly performed
- The maximum default amount is \$5000.
- Remuneration determinations will be made by the members in a members' voluntary winding-up, or, in most other cases, the creditors or a committee of inspection.
- An external administrator will be prevented from directly or indirectly deriving a profit or advantage from a transaction unless the creditors have provided prior consent to the transaction.

Funds handling

The ILR Act ensures that fund-handling procedures are in place, and empowers persons with a financial interest in the external administration of the company to seek directions from the court as to the way in which funds of the company should be handled.

Record keeping and information requests

In order to address the information asymmetry between creditors and external administrators, the ILR Act imposes greater obligations on external administrators in respect of record keeping and lodging annual returns with ASIC.⁷ ASIC now has the ability to direct a practitioner to provide certain information and books. This will assist ASIC to proactively monitor practitioners.

Creditors are empowered to seek information from a practitioner and can also request that a creditors' meeting be held during an administration. Members of a company can also make a reasonable request for information to an insolvency practitioner.

Meetings

In an attempt to reduce regulatory costs associated with unnecessary meetings and administration, the ILR provides for:

- the removal of the compulsory initial meeting in a creditors' voluntary winding-up
- the removal of the current requirement for annual meetings and reports in a creditors' voluntary winding-up
- the removal of the need for a final meeting in a creditors' voluntary winding-up
- creditor resolutions to be passed without holding a physical meeting.

Notably, an external administrator must convene a meeting if directed to do so by certain creditors or by ASIC. It is likely the IPR will deal with meetings concerning companies under external administration.

Review of external administration

Creditors, ASIC or the court may appoint a reviewer to review and comment on the external administration in terms of the reasonableness of the remuneration and costs incurred during the process.

Assignment of rights

An insolvency practitioner will be able to assign their statutory rights to commence proceedings under the Act. Prior to doing so, the practitioner must provide the creditors with written notice of the assignment.

Key changes to bankruptcy

The IPS (Bankruptcy) introduces a set of rules for the registration and discipline of trustees and the regulation of the administration of regulated debtor's estates. The rules are almost identical to that of the IPS (Corporations) with references to ASIC in the IPS (Corporations) substituted with references to the Inspector-General in the IPS (Bankruptcy). The offences and penalties are the same in both IPSs.

Further reforms

On 29 April 2016 the Government released a paper on improving bankruptcy and insolvency laws as part of the National Innovation and Science Agenda.⁸ That paper proposed three significant reforms designed to encourage entrepreneurship and provide creditors with a greater protection. It is proposed that:

- the current default bankruptcy period be reduced from three years to one year
- directors be afforded a 'safe harbour' from personal liability for insolvent trading if the company is undergoing a restructure
- ipso facto clauses be made unenforceable if a company is undertaking a restructure.

Submissions in response to the paper closed on 27 May 2016. If the proposed amendments receive a positive response, further reforms are likely to follow.

Given part of the ILR Act is set to take effect early next year, the IPR will need to be released shortly to allow the insolvency profession and consumers to ascertain the true extent of the reforms. While the reforms are intended to achieve regulatory costs savings and increase efficiency, practitioners may consider it burdensome to comply with a further legislative instrument. Even so, the ILR Act reflects a positive step forward for the insolvency profession and its reputation.

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). Emma Hardy is an associate at MinterEllison.

Notes

- ¹ The proposals are discussed in: Australian Government, *Improving Bankruptcy and Insolvency Laws Proposal Paper*, National Innovation and Science Agenda, ACT, April 2016.
- ² See, for example, the following review papers: Parliamentary Joint Committee on Corporations and Financial Services, *Corporate insolvency laws: a stocktake*, The Committee, Canberra, June 2004; Corporations and Markets Advisory Committee, *Rehabilitating large and complex enterprises in financial difficulties*, The Committee, Sydney, October 2004; and Corporations and Markets Advisory Committee, *Issues in external administration*, The Committee, Sydney, November 2008.
- ³ Senate Economics Committee, *The regulation, registration and remuneration of insolvency practitioners in Australia: the case for a new framework*, the Senate, Canberra, September 2010 (the Senate inquiry).
- ⁴ McClelland R (Attorney-General) and Bradbury D (Parliamentary Secretary to the Treasurer), *Reform package to modernise and harmonise insolvency*, media release, 14 December 2011.
- ⁵ Hawke A, *Second reading speech: Insolvency Law Reform Bill 2015*, House of Representatives, *Debates*, 3 December 2015.
- ⁶ The Treasury (2016) *Insolvency Law Reform Act*. Retrieved from <http://kmo.ministers.treasury.gov.au/media-release/076-2016>.
- ⁷ The Parliament of the Commonwealth of Australia, *Explanatory Memorandum, Insolvency Law Reform Bill 2015*.
- ⁸ *Supra* note 1.

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Fair game

FWO pursues individuals in accessory liability claims

The Fair Work Ombudsman is pursuing a growing number of individuals, including external advisors, involved in alleged breaches of the *Fair Work Act*. Report by **Sara McRostie**.



The number of proceedings brought by the Fair Work Ombudsman (FWO) under the accessorial liability provision of the *Fair Work Act 2009* (Cth) (the Act) is on the rise.

Where a corporation is alleged to have contravened the Act, the message is clear that the FWO will look very closely at anyone within the business who is 'knowingly involved in' the alleged contravention, as well as its external advisors.

In the past year, 46 of the 50 matters prosecuted by the FWO sought orders against accessories.¹ This prosecutorial ramp-up has seen the FWO 'widen the net' of those it considers should be held responsible for a contravention.

What is the law?

Section 550 of the Act extends liability stemming from an employer's breach of certain provisions (known as civil remedy provisions) to individuals who were involved in the contravention.

Section 550(2) of the Act provides that a person is *involved* in the contravention if they:

- aided, abetted, counselled or procured the contravention
- induced the contravention, whether by threats, promises or otherwise
- were in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention, or
- conspired with others to effect the contravention.

The FWO commonly uses s550 to prosecute directors and company officers who are involved in running the employing entity that committed the alleged contravention. More recently, the FWO has extended the target pool to include others such as HR advisors, managers, recruiters and external professional advisors.

The Ombudsman has justified this 'long-arm' approach by arguing that these advisors may be personally facilitating breaches by failing to caution clients or employers to fulfil obligations.²

External professional advisors

Earlier this year, the FWO commenced proceedings against an external professional advisor in respect of its alleged involvement in the underpayment of two employees of its client.

The FWO is prosecuting accounting firm EZY Accounting 123 Pty Ltd and its operations manager under s550 for involvement in an alleged contravention of the Act by its client. It is alleged the accounting firm's client underpaid two foreign workers at its Melbourne CBD Japanese restaurant by \$9549. EZY Accounting provides payroll services to the restaurant operator. This is the first time the FWO has commenced proceedings against an external professional advisor for accessorial liability under the Act.

Head contractors and franchisors

Accessories can also be other businesses in a position of power within the same supply chain as the employing entity, such as a head contractor or franchisor. The FWO will look up the supply chain where businesses use multi-tiered sub-contracting arrangements.

The matters of *FWO v AI Hilfi* and *FWO v AI Basny*³ concerned a trolley supply chain, at the top of which sat a large supermarket. The employer of the underpaid employees sat at the bottom of the chain and the trolley-collecting company sat in the middle of the chain as the intermediary. Penalties of \$94,050 were ordered against the former owner and general manager of the trolley collecting company. The supermarket entered into an enforceable undertaking with the FWO on the basis it had an "ethical and moral responsibility" for all persons involved in its business.⁴

Claims by employees

Affected employees may also use s550 to commence proceedings against alleged accessories to a contravention. In *Cerin v ACI Operations & Ors*,⁵ an applicant employee was successful in arguing that both his employer and HR manager were involved in breaches of the Act, by failing to provide him with the correct notice of termination of employment.

In this case, the employer was ordered to pay the employee a penalty of \$20,400 and the employer's HR manager was ordered to pay the applicant a penalty of \$1020.

A high bar

The FWO and courts will look to the degree of knowledge the individual had at the time of the contravention to establish if there was a sufficient connection and involvement in the breach. Mere knowledge of general non-compliance or suspicions about compliance will not be sufficient to meet the threshold in s550. To prove accessorial liability, the alleged accessory must have been "knowingly concerned in, or a party to" a contravention.

In *FWO v Oz Staff Career Services Pty Ltd & Ors*,⁶ an HR manager was held to be accessorially liable for altering the employment records of cleaning staff in an effort to conceal illegal wage deductions. Importantly, Burchardt J held that the HR manager was "intimately connected" with the fraud and conscious that the altered records were both misleading and unlawful.

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

Notes

¹ Natalie James, address to the AHRI Employee Relations/Industrial Relations Network NSW forum, 'An adviser's responsibility: the Fair Work Ombudsman's approach to accessorial liability', 27 July 2016, from fairwork.gov.au/about-us/news-and-media-releases/speeches.

² Ibid.

³ See joint penalty decision *Fair Work Ombudsman v AI Hilfi* [2016] FCA 193.

⁴ See 'Who's trolley now?', *Proctor* May 2015, p16.

⁵ [2015] FCCA 2762.

⁶ [2016] FCCA 105.

Setting aside a deed of company arrangement

Part 2: How to bring the application

Standing

The following can make an application terminating or otherwise in relation to the validity of a deed of company arrangement (DOCA) under the *Corporations Act 2001* (Cth) (the Act):

- under s445D – a creditor, the company, the Australian Securities and Investments Commission (ASIC), or any other interested person¹
- under s445G – the administrator of the DOCA, a member or creditor of the company, or ASIC²
- under s447A – the company, a creditor of the company, the administrator or deed administrator, ASIC, any other interested person³
- under s600A – a creditor of the company.⁴

The applicant for an order under ss445D, 445G or 600A must be a creditor when the application is filed.⁵ It has been held that the same position applies for applications under s447A.⁶

Who is the respondent to proceedings?

The DOCA may contain particular provisions about who is to conduct any defence. The company in administration is usually the first respondent. Any sponsor or other party to the deed should also be named as a respondent and served with the application.

The administrator should also be a respondent to the application; however, it is good practice to write to the administrator and invite them to consent to the order of the court, leaving it to the directors and

sponsors to conduct the defence to the application. Any other interested persons should also be served or notified so that they have the opportunity of appearing on the application to protect their interests.

Do you seek to impugn the administrator personally?

This will depend on the facts, bearing in mind the possibility of an adverse costs order and also that an administrator is not expected to pursue a wide-ranging inquiry into the public interest or commercial morality of the company's behaviour.⁷

At the second meeting of creditors, the administrator needs to express their opinion as to whether they consider a proposed DOCA is in the interests of creditors.

While your client may disagree with the administrator's opinion, if given in favour of the DOCA, more will usually be required before attacking the administrator personally.

Which court?

The Federal Court and the Supreme Court have jurisdiction to make the orders sought.⁸ In practice, unless the applicant is a Commonwealth body such as ASIC, applications are usually brought in the Supreme Court. Like all applications, the applicant will need to consider the appropriate forum, taking into account the location of the parties, including the company and the administrator.

Timing

An application to set aside the DOCA should be brought promptly – within days or weeks, not months. If there is significant delay in bringing an application, the court may decline to exercise its discretion to set the deed aside.⁹

The termination or avoidance, in whole or in part, of a deed of company arrangement does not affect the previous operation of the deed.¹⁰ Similarly, an act done under a resolution as in force before an order is made under ss600A is valid and binding on and after the making of the order as if the order had not been made.¹¹

Therefore, if your client is considering making a challenge to the DOCA, you should write to the administrator immediately and ask them to undertake not to carry out the DOCA until your client decides their position and their application is determined by the court. If agreement is not forthcoming, the court has power to make interim orders.¹²

Material required

Have regard to the *Corporations Proceedings Rules*¹³ if you intend to file in the Supreme Court, or otherwise the *Federal Court (Corporations) Rules 2000* (Cth). Use Corporations Act Form 2 for the originating process (Form 3 if you need to commence an interlocutory process). A supporting affidavit is required (unless the court directs otherwise).¹⁴

As well as setting out the facts relied on for relief, the affidavit must annex a copy of an ASIC search of the subject company. You should also ask for a written signed consent from the administrator (in Form 8) to their appointment as liquidator in the event your client succeeds. If they do not provide this, obtain consent from another registered liquidator.

In the second of two articles, **Kylie Downes QC** and **Janelle Payne** examine the practical considerations associated with an application to set aside a deed of company arrangement.



Service on ASIC

The application does not fall within the list in Rule 2.8 *Corporations Proceedings Rules*, which lists certain types of applications of which ASIC must be notified, for example, application for reinstatement of the registration of a company. However, if you consider that ASIC may have a particular interest in the outcome, ASIC should be notified.

Practical effect of order

Section 446B and Reg 5.3.A.07 *Corporations Regulations* have the effect that, if the court terminates a deed of company arrangement under s445D, then the company is taken to have passed a special resolution that it be wound up voluntarily. The administrator can then become the liquidator, if they consent. If a DOCA is set aside by the court under s600A or relief given under s447A, the court will need to make further orders, such as an order placing the company into liquidation. As noted, termination does not affect the previous operation of the DOCA.

Costs

Generally, costs will follow the event.¹⁵ However, because the appointment of an administrator is based on a decision that the company is or is likely to be insolvent, an applicant may not recover their costs in practical terms. For these reasons, the applicant will usually seek an order that its costs be costs in the winding up unless there was another party, for example a sponsor, who actively opposed the application.

As always, an applicant should be mindful of the risks of an adverse costs order if it does not succeed. In some rare cases, even though the applicant did not succeed, the court has made no order as to costs where it was still reasonable for the applicant to

bring the application, for example, if there was deficiency in the administrator's conduct but the court declined to exercise its discretion to set aside the DOCA.¹⁶

Generally, there will be no order for costs in favour of the administrator if they do not take an active part.¹⁷

Practical considerations

Before deciding whether it is worthwhile commencing proceedings, it should be remembered that the administrator is generally entitled to be indemnified out of the company's property for debts and liabilities they have incurred as administrator, as well as their own remuneration.

This means that it can be the case that the costs of fighting about the DOCA can dissipate whatever return might otherwise have been available to creditors.

A final word on discretion

Even if the court is satisfied that one of the grounds has been made out, it retains a discretion as to whether or not to terminate the DOCA. Therefore, as always, ensure that your client is fully frank in its conduct and material.

Kylie Downes QC is a Brisbane barrister and member of the Proctor editorial committee. Janelle Payne is a barrister from Burnett Lane Chambers.

Notes

¹ s445D(2).

² s445G(1).

³ s447A(4).

⁴ s600A.

⁵ *Hoath v Comcen Pty Ltd* (2005) 53 ACSR 708; [2005] NSWSC 477 at [12].

⁶ See *Re Beechworth Land Estates Pty Ltd (admin apptd) and Others (No.3)* (2015) 298 FLR 233; (2015) 106 ACSR 495; [2015] NSWSC 733 at [88].

⁷ *ASIC v Midland Hwy Pty Ltd (admin apptd)* (2015) 110 ACSR 203; [2015] FCA 1360 at [79], considering *Federal Commissioner of Taxation v Wellnora Pty Ltd* (2007) 163 FCR 232; [2007] FCA 1234.

⁸ Section 58AA *Corporations Act*. The Family Court also has jurisdiction but this is invoked less often.

⁹ *Khoury v Zambena Pty Limited* (1997) 23 ACSR 344; (1997) 15 ACLC 620 (an application under ss600A, 447A, 445G and 445D was filed 13 months after the meeting; Young J stated at 353 in obiter that a month appears to be about the maximum time for entertaining an application to set aside a deed).

¹⁰ s445H.

¹¹ s600E.

¹² See for example, s600D for interim orders under ss600A, 600B, 600C.

¹³ Which can be found in Schedule 1A to the *Uniform Civil Procedure Rules 1999* (Qld).

¹⁴ Rule 2.4(1) of the *Corporations Proceeding Rules*.

¹⁵ *Promoseven Pty Ltd v Prime Project Development (Cairns) Pty Ltd (subject to a deed of company arrangement)* [2014] QCA 24 at [11].

¹⁶ For example, *Deputy Commissioner of Taxation v Pddam Pty Ltd* (1996) 19 ACSR 498 at 513; *Khoury v Zambena Pty Ltd* (1997) 23 ACSR 344 at 354 upheld in (1999) 217 ALR 527; [1999] NSWCA 402 at [87]-[88] and [114]; see also *TNT Building Trades Pty Ltd v Benelong Developments Pty Ltd (Administrators Appointed) (No. 2)* [2012] NSWSC 884.

¹⁷ For example, *TNT Building Trades Pty Ltd v Benelong Developments Pty Ltd (Administrators Appointed) (No.2)* [2012] NSWSC 884 at [17].

A tale of good lawyers doing great work

Just the other day I heard, yet again, another bad lawyer joke – “How many lawyer jokes are there? Just one, all the rest are true!”

Lawyer jokes are rife about how bad we supposedly are, but how often do we acknowledge and celebrate the work of our profession?

The matter of *Public Trustee of Qld v Mrs X* [2016] QSC 179 struck me irresistibly as a poignant example of good lawyers doing great work, in this instance Kate Do and her amazing efforts on behalf of the Public Trustee.

For a short judgment, the matter had a long and difficult journey to ensure that an indigent, illiterate wife and mother living in a Middle Eastern country would receive the beneficial entitlements of her husband's modest estate.

In terms of estates \$196,000 is not a particularly large sum, but to a destitute family living in a remote village, it is a fortune. The names of the deceased, his wife and the country in which she resided have been redacted for security reasons.

Mr X migrated to Australia in 2001, leaving his wife and children behind in the Middle East. Mr X lived and worked in Victoria and was granted a permanent visa in 2005 but sadly died intestate, in a motor vehicle accident in Queensland in 2006. His estate primarily consisted of the life insurance component of a superannuation policy.

Over the course of the years that the estate was administered, many questions needed to be resolved. First, what was the status of the deceased's overseas marriage under the *Marriage Act 1961* (Cth). It was so recognised.² Then the question of which intestacy laws applied – Victoria.³

Under Victorian laws the deceased's spouse received the estate. She lived in a remote village in the Middle East; she was illiterate and her thumb print was her only signature. She did not have a postal or residential address.

A bank account was opened for the purposes of transferring the money to her. Unfortunately, the Commonwealth Bank refused to transfer the money to that particular country.⁴

This set off a complex process of establishing a reliable means of ensuring the wife received her entitlements. The material before the Supreme Court identified the herculean efforts that Kate Do went to in order to have the money paid to the wife, including extensive attempts to communicate with the chief consular officer in Australia for that country.⁵

However, that office was non-responsive and in those circumstances the court declared such payment “was not a viable option”⁶ under the *Public Trustee Act 1978* (Qld). Kate Do then attempted to have the money paid to a lawyer in that country to accept on behalf of the wife⁷ and in doing so brought an application before Chief Justice Holmes for direction.

This process involved complex communications with the Australian embassy in the country to have the authority documents explained to the wife to achieve this end. Through that process, information was passed back that the funds would not be distributed to the wife, as it was said payment to females in that country was not permitted.

That, along with other information, led the Public Trustee to lose confidence “that the money paid into the lawyer's account would reach the deceased's family”.⁸

Further enquiries were made, and a different Middle Eastern lawyer was sourced, a Ms Y, to represent the wife. Ms Y was dual qualified in the United States and the Middle Eastern country. Her curriculum vitae was impressive and impeccable,⁹ with a particular emphasis on representing women and children in local and national courts.

She set out in her affidavit a complex process by which she would facilitate the payment to the wife. This was complicated by the fact that the wife could only sign by thumb print and so the option of the wife opening her own US bank account was unavailable. Ultimately, a viable plan was put before the court for the process of Ms Y ensuring that the funds would reach the wife.¹⁰ Only then was the court satisfied that the process would result in the wife receiving her beneficial entitlements and so directed “that Ms Y's receipt will be a sufficient discharge to the Public Trustee”.¹¹

What makes this matter so heartening is the tireless efforts of the solicitors to ensure an unknown, impoverished, illiterate lone woman would receive her entitlements under Australian law. Congratulations to all involved.

Where do financial sanctions apply?¹²

This matter left me wondering, however, that with estate administrations increasingly involving the transfer of money to overseas beneficiaries, how many countries are there where sanctions might exist in relation to international money transfers from Australia?

Quite a few! Australia has previously been a member of the United Nations Security Council (UNSC), which has implemented sanction regimes in relation to a number of countries. In addition to those of the UNSC adopted by Australia,¹³ we have also autonomously issued sanctions against a variety of countries.¹⁴

'It is a pleasant world we live in, sir, a very pleasant world. There are bad people in it, Mr. Richard, but if there were no bad people, there would be no good lawyers.'¹



with Christine Smyth

Generally Australian law prohibits, without a sanctions permit, dealing with 'assets' that are owned or controlled by a 'designated person or entity' of the country where the sanction law applies, or making 'assets' directly or indirectly available to a 'designated person or entity' for the country where the sanction law applies.

'Asset' is generally defined broadly to include an asset of any kind, whether tangible or intangible, movable or immovable.

There is specific legislation which applies for each UN sanction that Australia has adopted. This table (*below*) lists the

sanctions regimes, and whether the regime includes financial sanctions.

So if your estate administration involves a distribution of an estate asset to one of these countries, your client will need to be aware well in advance in order that they may plan for the difficulties that will lie ahead in giving effect to the distribution.

The list of nations on which sanctions are imposed is subject to change and practitioners should always cross-check the current status of any country in matters of this kind.

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.

Country	Do financial sanctions/asset restrictions apply?
Central African Republic	Yes, legislation.gov.au/Details/F2014C01373
Crimea and Sevastopol	Yes, legislation.gov.au/Series/F2015L00390
Democratic People's Republic of Korea (North Korea)	Yes, legislation.gov.au/Series/F2006L05741
Democratic Republic of the Congo	Yes, legislation.gov.au/Series/F2008L01031
Eritrea	Yes, legislation.gov.au/Series/F2010L00573
Former Yugoslavia	Yes: Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) List 2012 legislation.gov.au/Details/F2012L00477
Guinea-Bissau	No
Iran	Yes: Charter of the United Nations (Sanctions – Iran) Regulation 2016 legislation.gov.au/Details/F2016L01181
Iraq	Yes: Charter of the United Nations (Sanctions – Iraq) Regulations 2008 legislation.gov.au/Series/F2008L01033/
ISIL (Da'esh) and Al-Qaida	Yes: Charter of the United Nations (Sanctions – Al-Qaida) Regulations 2008 legislation.gov.au/Series/F2008L01023
Lebanon	Yes
Libya	Yes
Russia	Yes
Somalia	Yes
South Sudan	Yes
Sudan	Yes
Syria	Yes
Ukraine	Yes
Yemen	Yes
Zimbabwe	Yes

Notes

- ¹ Charles Dickens, *The Old Curiosity Shop*.
- ² *Public Trustee of Qld v Mrs X* [2016] QSC 179 at [6].
- ³ At [7].
- ⁴ At [9].
- ⁵ At [10]-[11].
- ⁶ At [11].
- ⁷ At [12].
- ⁸ At [15].
- ⁹ At [17].
- ¹⁰ At [19]-[23].
- ¹¹ At [24].
- ¹² My thanks and gratitude to QLS policy solicitors Louise Pennisi, Wendy Devine and Julia Connelly for their assistance in undertaking this extensive research.
- ¹³ See dfat.gov.au/international-relations/security/sanctions/pages/sanctions.aspx, and the *Charter of the United Nations (Dealing with Assets) Regulations 2008*, legislation.gov.au/Details/F2015C00761.
- ¹⁴ *Autonomous Sanctions Regulations 2011*, legislation.gov.au/Details/F2013C00777.

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DartLaw legal practice director Richard Dart said the new service was "eminently useful" for sole practitioners and smaller firms who often struggle to afford such resources.

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Confidences – a question of succession



by Stafford Shepherd

Rule 9.1 of the *Australian Solicitors Conduct Rules 2012* (ASCR) provides that we must not disclose any information which is confidential to a client and acquired by us during the client's engagement to any person except as permitted in rules 9.1.1, 9.1.2 and 9.2 ASCR.

The duty of confidence continues after the client engagement ends.¹ If the client dies, the duty to maintain confidences endures. The policy reasons for this are articulated by Chief Justice Rehnquist, who delivered the majority judgment in *Swidler & Berlin and James Hamilton v United States*:²

"...there are weighty reasons that counsel in favour of posthumous application. Knowing that communication will remain confidential even after the death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."

Client legal privilege is seen as a subset of client confidential communications.³ It is not as broad as the duty of confidentiality, nor does it rest in our conduct rules. The privilege is seen as a fundamental right. The privileged communications are protected from compulsory disclosure unless ousted by statute or waived.

Similar to our duty of confidence, the client legal privilege is not ousted by reason of the client's death. The confidences and the privilege vest in the client's personal representatives.⁴ As Lord Lindley states in *Bullivant v Attorney-General for Victoria*:⁵

"The mere fact that a testator is dead does not destroy the privilege. The privilege is founded upon the views which are taken in this country of public policy, and that privilege has to be weighed, and unless the people concerned in the case of an ordinary controversy like this waive it, the privilege is not gone – it remains."

It is for the personal representative or successor in title to waive any confidences or privilege. If a personal representative or successor in title to an interest of the deceased client in specific property chose to waive the confidence or privilege then it is our duty to disclose to that person all relevant information, including notes of the deceased client's instructions.⁶

Hodson LJ in *Schneider v Leigh*⁷ emphasised that client legal privilege is the privilege of the client. His Honour qualified this statement by stating that "the privilege enures for the benefit of successors in the title to the party to an action, at any rate, where the relevant interest subsists".⁸

What of a client's bankruptcy? How does bankruptcy affect the assertion of client legal privilege? In *Warrell and Anor v Woods*,⁹ Finn J noted that:

- at common law a person is entitled to preserve from compulsory disclosure the confidentiality of statements and other materials that have been made or brought into existence for the sole purpose of seeking or being furnished with legal advice or for the sole purpose of preparing for existing or contemplated litigation
- while the entitlement can be overridden by statute, it is presumed that Parliament would only do so clearly by express words or by necessary implication.¹⁰

The prevailing view is that a trustee appointed to administer the affairs of a bankrupt client is not entitled to assert that client's legal professional privilege unless permitted by statute.¹¹ The privilege is a personal right of the client and remains with the client.¹²

In *R v Dunwoody*,¹³ McMurdo P held:

"Whether legal professional privilege remains with the bankrupt is perhaps not beyond doubt. Legal professional privilege is essentially a concept personal to the bankrupt, [footnote omitted] it is not property. It can only be removed by statute where there are the clearest words or by necessary implication."¹⁴

Where a corporate client enters into liquidation, the liquidator is the successor in title to the privilege and may waive the privilege.¹⁵ The reason for this approach as compared to the position of a bankrupt client is that the agent which controls the client legal privilege is the company's board of directors, when the company is solvent. Such power passes to the liquidator on insolvency because its function is more analogous to the agency that has ceased.¹⁶

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

Notes

- ¹ *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 49 (Richardson J) ('*Gartside*').
- ² (1998) 524 US 399, 407.
- ³ Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013), 337.
- ⁴ *Gartside*, 49 (Richardson J).
- ⁵ [1901] AC 196, 206.
- ⁶ *Gartside*, 44 (Cooke J).
- ⁷ [1955] 2 QB 195.
- ⁸ *Ibid*, 203.
- ⁹ (1999) 90 FCR 264.
- ¹⁰ *Baker v Campbell* (1983) 153 CLR 52.
- ¹¹ Dal Pont, above n 3, 388.
- ¹² *Re Steele; Ex parte Official Trustee in Bankruptcy v Clayton Utz (a firm)* (1994) 49 ALR 716, 725.
- ¹³ [2004] 149 A Crim R 259.
- ¹⁴ *Ibid* 267-268.
- ¹⁵ *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447, 455.
- ¹⁶ See the reasoning in *Commodity Futures Trading Commission v Weintraub* (1985) 471 US 343, 356-7.

More certainty in seeking security for costs

Allied Environmental Solutions Pty Ltd v North Burnett Regional Council [2016] FCA 713

Security for costs – *Federal Court Act 1976* s56 – *Corporations Act 2001* s1335 – whether applicant able to satisfy adverse costs order – whether applicant’s impecuniosity caused by respondent – whether application for security for costs is oppressive

In *Allied Environmental Solutions Pty Ltd v North Burnett Regional Council* [2016] FCA 713 Gleeson J examined several issues arising on an application by the respondent (the council) for orders that the applicant (Allied) provide security for the council’s costs.

Background

Allied claimed damages in the proceeding for breach of contract and under s236 of the *Competition and Consumer Act 2010* (Cth). The contract was entered into in July 2006 and was for the provision of waste management services. The dispute primarily concerned the duration of the contract and whether the council breached its contractual obligations by refusing to obtain services from Allied after about 30 June 2014. Central to the dispute was the meaning of a letter sent from the council to Allied in November 2012 (the extension letter).

The parties submitted to a process of expert determination in relation to their dispute. In January 2016 the expert made a determination in the council’s favour. The proceeding made essentially the same claim as was the subject of the expert determination.

On 19 May 2016 the council brought an application under r19.01(1) of the *Federal Court Rules 2011*, or in the alternative s1335(1) of the *Corporations Act 2001* (Cth), for orders that the applicant provide security for the council’s costs.

By consent, Gleeson J made an order on 30 May 2016 requiring that two questions about the extension letter and its effect be determined separately. Council’s application for security for costs was then confined to the costs of determination of the separate questions.

Legislation

Section 56 of the *Federal Court Act 1976* (Cth) confers power on the court to make orders for security for costs.

Rule 19.01(1) of the *Federal Court Rules* permits a respondent to make an application to the court for security for costs and associated orders. The application must be accompanied by an affidavit stating the facts on which the order for security for costs is sought: r19.01(2). Rule 19.01(3) sets out the matters that should be stated in the respondent’s affidavit. Those matters include: “(a) whether there is reason to believe that the applicant will be unable to pay the respondent’s costs if so ordered.”

Section 1335(1) of the *Corporations Act* also confers power on the court to make orders for security for costs.

Issues

Gleeson J referred to *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189 in relation to the established guidelines which the court typically takes into account in determining an application for security for costs. Of the principles set out in that case, her Honour regarded the following as being of particular relevance to the case at hand:

- a. When an application is based on a contention establishing that there is reason to believe that the other party to the litigation will be unable to pay the costs if unsuccessful, once the respondent has discharged the onus of proving reason to believe, the onus shifts to the party against whom the order is sought to establish why an order for security should not be made.
- b. Relevant considerations are:
 - i. the prospects of success
 - ii. the quantum of the risk that an adverse costs order would not be satisfied
 - iii. whether the applicant’s impecuniosity was caused by the respondent’s conduct the subject of the claim
 - iv. whether the claim for security for costs is oppressive, in the sense that it is being used to deny an impecunious applicant a right to litigate.

It was accepted for Allied that the council had met the threshold test in relation to there being a reason to believe that Allied would be unable to pay the costs of the litigation if unsuccessful. Council did not dispute that Allied had reasonable prospects of success, although it noted that the expert determination went against Allied. Accordingly, Gleeson J defined the issues between the parties on the question of whether Allied should be ordered to provide security as:

1. whether Allied could satisfy an adverse costs order
2. whether the court should decline to exercise its discretion to make an order on the basis that Allied’s impecuniosity was caused by the council
3. whether the court should decline to exercise its discretion to make an order on the basis that it would stultify the proceeding.

Analysis

Referring to the decision in *Health Information Pharmacy Franchising Pty Ltd v Khoo* [2010] FCA 438 at [5], Gleeson J said that in deciding the council’s application founded on Allied’s asserted impecuniosity, there was no practical difference in deciding whether to make an order either under s56 of the *Federal Court Act* or under 1335(1) of the *Corporations Act*.

It was submitted for Allied that Allied would be in a position to meet a costs order from future profits, and that the figures in the 2015 tax return coupled with the ongoing viability of the business were sufficient to satisfy the court that an adverse costs order could be met. It was argued in that respect that, although the 2015 profit was only about \$2000, the expenses included more than \$108,000 in legal costs of the proceeding. A facility had been arranged from another company in the group of companies of which Allied was a member, so that the legal costs would not be a continuing expense.

Gleeson J found, however, that the evidence for Allied was insufficient, and that its ability to meet an adverse costs order was uncertain.



Report by Sheryl Jackson.

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Her Honour described the affidavit evidence of Mr Mayes, which was filed for Allied concerning the financial prospects of Allied over the next couple of years, as “very thin”. She noted in particular that Mr Mayes, who was both a director of Allied and an accountant employed by Allied, as well as being the accountant for the relevant group of companies, did not go so far as to express a personal belief that Allied could meet an adverse costs order. Further, he did not express a view that the 2015 income tax figures provided a sound basis for a conclusion about Allied’s ability to meet an adverse costs order, and nor did he express any view about the likely profits of Allied for the financial year ended 30 June 2016.

On the question of whether the court should decline to exercise its discretion to make an order on the basis that Allied’s impecuniosity was caused by the council, Gleeson J noted the distinction drawn in the decision in *Australian Battery Distributors Pty Ltd v Robert Bosch (Australia) Pty Ltd* [2015] FCA 1164 at [39]-[42] between circumstances in which an applicant’s impecuniosity has arisen because the respondent has not acted to ensure that the applicant *obtained* assets, and one in which an applicant’s existing state of impecuniosity is caused by a respondent who has deprived the applicant of existing assets. Her Honour said that a more cautious approach was required in the former situation.

Her Honour accepted that it was nevertheless arguable that Allied’s impecuniosity was caused or contributed to by the council’s alleged wrongdoing, since it appeared that Allied was reliant on a single contract to earn profits and it was required to find an alternate source of income when that contract was terminated.

Gleeson J concluded, however, that it could not be said that an order for costs would stultify the action. In this regard her Honour noted that the deponent for Allied had not given evidence to the effect “though he was plainly in a position to do so”. Her Honour noted that Allied was a member of a group of companies as described in the evidence filed on its behalf, and stated that in such circumstances (at [32]): “I do not accept that the nominal paid up capital of the shareholders of Allied provides a sufficient evidentiary basis for a conclusion that an order

for security for costs would have a stultifying effect.” As the shareholders of Allied were three individuals, including Mr Mayes, her Honour indicated that evidence should have been given about their respective financial positions.

In the light of these findings, Gleeson J concluded that the court should exercise its discretion to order security for costs.

Quantum

The estimate of recoverable party and party costs provided on behalf of the council was for \$107,134.30, covering the costs of the application for security for costs, discovery and evidence preparation and trial preparation, the costs of a two-day hearing on the separate questions, and accommodation, travel and miscellaneous expenses. In the absence of any criticism of this evidence on behalf of Allied, the court ordered Allied to provide security for costs in the round sum of \$105,000.

Comment

The decision may fairly be regarded as quite favourable to a party seeking an order for security for costs. Such an application is commonly opposed on the basis that the applicant’s impecuniosity was caused by the respondent’s conduct the subject of the claim. The court’s approach in this case suggests that this ground will have limited persuasive value unless the applicant is able to show that the respondent’s conduct has deprived the applicant of pre-existing assets.

The decision also suggests that a party will need to adduce strong evidence in relation to its ability to satisfy an adverse costs order, once the party seeking security has met its evidentiary burden in that regard, in order to persuade the court to exercise its discretion by refusing to make the order sought.

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.

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High Court and Federal Court casenotes

High Court

Administrative law – migration – procedural fairness – data breach

Minister for Immigration and Border Protection v SZSSJ; Minister for Immigration and Border Protection v SZTZI [2016] HCA 29 (27 July 2016) concerned judicial review of decisions and processes of the Department of Immigration following a data breach in 2014. The department accidentally published a document that contained embedded information disclosing the identities and personal information for 9258 applicants for protection visas who were in detention at the time. There was a risk that the information might be disclosed to entities seeking to harm the applicants. The department notified affected individuals and created an 'International Treaties Obligation Assessment' (ITOA) process, which assessed the effect of the data breach on individual applicants against non-refoulement and other obligations. In an ITOA, the department was to assume that the information had been accessed by authorities in the country in relation to which the applicant feared persecution. Depending on the ITOA result, the case might be referred to the Minister to consider exercising certain non-compellable powers under the *Migration Act 1958* (Cth). Those factual circumstances were interpreted by the court as incorporating a decision by the Minister to consider exercising his personal powers; the ITOA represented an inquiry by the department to assist the Minister in that consideration. The respondent argued they had not been conferred procedural fairness in the ITOA process, in that they were not provided with the full details of who might have accessed the information and the full contents of a report on the data breach. Also at issue was the jurisdiction of the Federal Circuit Court of Australia (FCCA). The court held that the ITOA formed part of a statutory process as it was an enquiry to assist the Minister in the exercise of his powers. That meant that the FCCA had jurisdiction. It also followed that there was an obligation to provide procedural fairness as the statutory scheme did not suggest otherwise. However, the court held that the respondents in this case had, in fact, been provided with procedural fairness given that the department assumed the worst case disclosure scenario, and the respondent had been given a chance to comment. French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ jointly. Appeal from the Full Federal Court allowed.

Contract law – contract terms – penalties – unconscionable, unjust or unfair terms

In *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28 (27 July 2016) the High Court held that late payment fee provisions

in contracts for consumer credit card accounts were not unenforceable penalties at common law and were not unconscionable, unjust or unfair under statutory consumer protection regimes. Mr Paciocco held two credit cards with ANZ and was required to pay a late fee of \$35 (later \$20) if he did not pay a minimum amount each month by the due date. At first instance, Gordon J (then of the Federal Court) held that the fees were penalties and unenforceable, but that they did not contravene the statutory regimes. The Full Federal Court overturned her Honour's finding on the penalty claim and upheld the finding on the statutory claim. The High Court affirmed that a sum may not be stipulated for payment on default if it is a threat to the person required to pay, or if the purpose or effect of requiring payment is to punish the defaulting party. The critical test or policy is whether a sum is extravagant and unconscionable in comparison to the greatest loss that could conceivably be proved to have followed from the breach. That is, to be a penalty, the sum must be plainly excessive or out of all proportion to the interests of the party in whose favour the alleged penalty stands. In deciding that point, the interests of the parties must be considered in the whole of the circumstances of the contract. In this case, Mr Paciocco's expert gave evidence that the maximum cost to the bank of default of each payment was around \$3. The bank's expert gave evidence that, taking into account other parts of the bank's business, including enforcement, covering bad debts and regulatory capital, the maximum cost of failure to pay might be between \$5 and \$147. The High Court held that it was legitimate to take into account all of the circumstances and interests of the bank, beyond the individual customer. Those circumstances were complex and difficult to reduce to a figure. In those circumstances, the fees were not plainly excessive or out of proportion to expenses incurred by, or the interests of, the bank. Accordingly, the fees were not penalties at common law. Nor were they unjust, unfair or unconscionable. Mr Paciocco could choose not to enter the contract, could leave at any time, and could avoid the fees by paying on time. He knew the terms, which were standard. There was no oppression, unfairness or imposition of unfair bargaining power. French CJ, Kiefel J, Gageler J and Keane J each writing separately; Nettle J dissenting (on the penalty ground). Appeal from the Full Federal Court dismissed.

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Federal Court

Administrative law – where the AAT gives oral reasons at the time of decision and written reasons later – degree of permissible departure in later written reasons from earlier oral reasons

In *Negri v Secretary, Department of Social Services* [2016] FCA 879 (5 August 2016) the court (Bromberg J) set aside a decision of the Administrative Appeals Tribunal (AAT). The applicant sought a disability support pension under the *Social Security Act 1991* (Cth). Her claim was rejected by a Centrelink officer, then on internal review, and then again at the Social Security Appeals Tribunal. The applicant then sought merits review at the AAT. The AAT also rejected her claim, giving ex tempore oral reasons. The applicant requested written reasons under s43(2A) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). The applicant later filed a notice to appeal in the Federal Court. On that same day, the AAT delivered its written reasons.

An interesting and significant question which arose was: what were the AAT's reasons? The court had to consider whether it was to have regard to the AAT's oral reasons only, its written reasons only, or both sets of reasons. The applicant submitted that the written reasons substantially departed from the earlier oral reasons, and that the court should only have regard to the oral reasons.

The court found at [10] that based on s43 of the AAT Act, the reasons for the decision were not themselves the 'decision'. When providing written reasons as requested under s43(2A), the AAT was permitted to elaborate on its oral reasons and to improve their expression, "as long as they are 'reasons for [the Tribunal's] decision'" (at [11]).

As to whether something passed from permissible elaboration to impermissible departure, Bromberg J explained at [27]: "A decision is a sum of conclusions. The ultimate conclusion will usually be based on intermediate conclusions. Each conclusion is arrived at by a process of reasoning, that is, a progression along a path from premise to conclusion through a process of induction or deduction. The reasons given by a decision-maker should expose or explain the decision-maker's reasoning. That is the function of reasons for decision. In requiring the Tribunal to give reasons for its decision, s43(2) of the AAT Act requires an exposition of the Tribunal's reasoning for its decision. Section 43(2A) requires that, upon request, the reasoning of the Tribunal be exposed or explained in writing. As I have said,

with Andrew Yuile and Dan Star



the reasons or explanation given in writing may be different to that given orally. Different reasons, as between those provided orally and those later provided in writing, are not necessarily demonstrative of different reasoning. As long as the reasoning remains consistent, there can be no objection to the provision of a more-elaborate exposition of the same reasoning that was orally explained. What is not permissible is altered or new reasoning. The Tribunal is not permitted to substantially divert from the reasoning upon which its decision was made, but is permitted to explain that reasoning differently and, in doing so, is required to address the matters specified in s43(2B)."

Whether the AAT's written reasons departed from its oral reasons to the point of revealing new reasoning was a question of degree (at [28]). The court made the following general statements at [30]:

"(1) Am I to have regard to the Tribunal's oral reasons only, its written reasons only, or both sets of reasons? The answer is, both.

(2) In the latter case which (if any) is to have predominance? The answer is that I will presume, consistently with the certification appearing after the Tribunal's written reasons, that they are the reasons for the subject decision. If I am satisfied, however, that a written reason is not a reason for decision – if, for example, it is clearly inconsistent with the reasoning of the Tribunal (as made apparent by the oral reasons) sufficiently to reveal new or substantially-altered reasoning – I will ignore the written reason and rely upon the oral reason.

(3) If one is to have predominance what is the role of the other? The oral reasons will be relevant in assessing any submission that the written reasons are not, in fact, the reasons for decision of the Tribunal. Where a written reason is found not to have been a 'reason for decision' of the Tribunal, any corresponding oral reason assumes primary significance. It seems to me that oral reasons may also be used, with caution, to clarify an ambiguity in the written reasons."

In this application, the court held that the oral and written reasons could stand consistently, although the AAT "flirted dangerously with impermissible alteration to its reasoning" (at [62]).

Various alleged errors of law were rejected. However the appeal to the Federal Court was allowed because the AAT erred by failing to deal with a clearly-articulated submission upon which strong reliance was put (at [86]-[105]).

Associations and clubs – corporations – declaratory relief sought pursuant to s21 of *Federal Court of Australia Act 1976 (Cth)* – whether subject matter justiciable

Members' rights and remedies – whether conduct of the association's affairs in connection with applicant's senior counsel application and appointment process was oppressive to, unfairly prejudicial to or unfairly discriminatory against the applicant

In *Walker v New South Wales Bar Association* [2016] FCA 799 (12 July 2016) the court (Besanko J) dismissed an application for declarations and an order pursuant to s233 of the *Corporations Act 2001 (Cth)* against the New South Wales Bar Association (the association) and certain office holders of the association.

The litigation concerned the rejection of the applicant's appointment to senior counsel. The applicant was a barrister and a member of the association. She predominantly acted as a mediator. The association was a company limited by guarantee, governed by a constitution. The association is responsible for the appointment of senior counsel in NSW, governed by the principles in the Senior Counsel Protocol (the protocol). The applicant applied to become senior counsel in 2014 and 2015, but was unsuccessful. As to her application in 2014, the applicant was told that her application was not considered because the Senior Counsel Selection Committee (the selection committee) determined that it was not within the protocol. As to her application in 2015, the applicant was told that her application was considered on its merits and that she did not have sufficient support. The protocol included (in clause 4): "Appointment as Senior Counsel should be restricted to practising advocates, with acknowledgment of the importance of the work performed by way of giving advice as well as appearing in or sitting on courts and other tribunals and conducting or appearing in alternative dispute resolution, including arbitrations and mediations".

The applicant sought various declarations to the effect that a person can still be a senior counsel despite their practice being wholly or substantially as a mediator (at [6]). The court refused to grant a declaration under s21 of the *Federal Court of Australia Act 1976 (Cth)*. The issues concerning the applicant's unsuccessful application for appointment as senior counsel did not relate to the rules of the association's constitution but rather to the terms of the protocol and what was said by the applicant to be its proper construction (at [69]). The applicant did not have any contractual rights in relation to the protocol and she had no property rights affected by the construction of the protocol (at [78]). To show that the matters

she raised were justiciable, the applicant relied on their effect on her livelihood or the damage to her reputation or both. The court at [79] held that the matters regarding the construction of the protocol were not justiciable. There were two related reasons for this conclusion. First, the protocol was not a document that created legal rights and duties; it was a policy document. Second, there was not a relevant threat to livelihood or damage to reputation. Senior counsel had an ability to charge higher fees and appointment was a public identification of an ability to provide outstanding service and the rejection of an application no doubt led to "disappointment, even great disappointment". Nevertheless, it was not any economic interest or potential economic interest which was sufficient to justify the court's intervention, particularly having regard to the policy nature of the protocol.

The court also rejected the applicant's allegations of oppressive conduct under ss232 and 233 of the *Corporations Act 2001 (Cth)* in connection with the applicant's senior counsel application and the appointment process. The selection committee fulfilled its obligation to interpret the protocol as it considered appropriate and did not try to decide its intention by some other process (at [98]). The applicant alleged that the association did not amend the protocol to properly reflect the intention of the Bar Council to allow appointment to senior counsel despite an applicant acting predominantly as a mediator. However, the court held that the selection committee's approach was not unfairly prejudicial or unfairly discriminatory to the applicant (at [101]). Even if the association's conduct had amounted to oppression, the court observed at [104] that the applicant may not have been affected in her capacity as a member, because any junior counsel with a full unrestricted practising certificate was entitled to apply for appointment to senior counsel, not just members of the association.

Dan Star is a barrister at the Victorian Bar and invites comments or enquiries on 03 9225 8757 or email danstar@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au.

Court rules on 'substantial and significant time'

with Robert Glade-Wright



Children – Full Court holds that alternate weekends, special days and holidays amount to 'substantial and significant time'

In *Ulster & Viney* [2016] FamCAFC 133 (28 July 2016) Ainslie-Wallace & Ryan JJ dismissed the father's appeal against Judge Bender's order allowing the mother to relocate from Melbourne 85 kilometres away to Gippsland, where she had obtained work. From separation the children spent alternate weekends and Thursday nights with the father and two hours with him on alternate Mondays to coincide with the children's piano lessons in which he was "keenly involved" ([43]) until the mother relocated two months later without notice. The father withheld the children, negotiating an interim order for six nights a fortnight (the mother returning to Melbourne), but at the final hearing a year later, his time was limited to alternate weekends, alternate Fridays (after school to 7pm), special days (Jewish holidays) and school holidays.

While the whole court disagreed that "daily routine" under s65DAA(3) requires seeing the children every day (as argued for the father) the majority rejected his contention that the final order was not an order for "substantial and significant time". Strickland J dissented, saying (at [5]):

"It is beyond doubt that the time the children are to spend with the father is 'extremely limited' and pales in comparison with the ... time they enjoyed with him prior to separation and under the interim orders. The magnitude of that change and its effect on the relationship between the children and the father is amply described by the family report writer... :

'... Such a proposal entails the children moving from seeing [the father] six nights per fortnight to only two. This is a high magnitude change. The children and [the father] enjoy a strong ... relationship which would be eroded and compromised if their time with him is reduced to such an extent. This would entail a significant loss for them which would not be in their interest.'

Property – wife wins appeal against decision that advances secured by mortgages in favour of husband's father retrospectively were loans

In *Bircher and Anor* [2016] FamCAFC 123 (15 July 2016) the Full Court (Strickland,

Murphy & Hogan JJ) allowed the wife's appeal against Judge Demack's order where the pool was \$185,171, \$165,493 of which was superannuation so that the parties were "effectively litigating over ... \$20,000" ([16]) due to a ruling that \$64,467 held in a solicitor's trust account was not an asset but a debt payable to the husband's father in repayment of two loans he was found to have made to the husband during the marriage (secured by mortgages retrospectively). The Full Court (at [46]-[47]) examined evidentiary inconsistencies between husband and father, and between advance terms and mortgages, saying (from [56]):

"... we do not regard it as sufficient to find that 'the loan was real and the interest properly sought' without making a finding as to the terms of the loan and the evidence accepted by her Honour which sustains that finding. While ... conversations between ... husband and [father might have been] 'recorded ... with ... great ... particularity' in the [father's] affidavits it is not clear ... how ... inconsistencies between the accounts given by the [father] (many of which, inadmissibly, purport to give evidence of what was in the husband's mind ...) are dealt with. (...)

[58] ... it is not to the point that the interest that '[the father] sought to enforce is a reasonable amount and that it is reasonable, given that he loaned this money in 2001/2002, that there be interest ... owing'. (...)

[60] Her Honour also does not address the fact that the husband (i.e. the borrower) does not ... depose to the terms of the agreement ... [or] to the rate of interest or how it might be calculated ... (...)

[62] (...) In essence, the wife asserted that the existence of the mortgages was a recent invention or that they were created so as to deny her a property settlement ... That issue was not ... 'neither here nor there' as her Honour found at [35]; it was central to the wife's case."

Property – not just and equitable to make a property order sought by husband's estate when 'financially destitute' wife was in poor health with dependent adult children – *Stanford* applied

In *Paxton* [2016] FCCA 1689 (7 July 2016) a property application filed by the husband who then died was continued by his estate under

FLR 6.15(3). The wife sought to remain in the home. Judge Wilson said (at [6]):

"Both parties agreed that the ... home would have to be sold if any division of property ... were to be ordered. ... [T]he wife is in very poor health ... financially destitute ... has no apparent prospects of employment and the adult son of the marriage, himself mentally infirm, lives with the wife and she cares for him. Any sale of the ... home will occasion very considerable hardship to the wife. Conversely, the husband is dead."

The court also referred (at [18]) to the wife's evidence that her 29-year-old daughter (who also lived with her) "suffered from ... cerebral palsy ... had learning difficulties ... had not worked since leaving school and received social welfare benefits", and that "it was likely that her children would continue to depend upon her well into the future having regard to their physical and intellectual difficulties".

Judge Wilson at [34] cited *Stanford* (2012) 247 CLR 108 in which "[t]he High Court held that it had not been shown that, if the wife had not died, it would have been just and equitable to have made an order under s79" (relying on ss79(2) and 79(8)(b)(ii)); also citing *Bevan* [2013] FamCAFC 116 in concluding that it was not just and equitable to make a property order. Applying *Stanford*, the court said ([58]) that it was "wholly erroneous for Mr Paxton ... as his late brother's personal representative to proceed ... on the premise that the husband had (or Mr Paxton now has) the right to have the former matrimonial asset divided between the wife and the estate". The court added ([65]) that "[i]n *Stanford* the court addressed the error made at first instance where the court did not take into account the consequences to the surviving spouse if a property settlement order was made".

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).

Court of Appeal judgments

1-31 August 2016

with Bruce Godfrey



Civil appeals

Re Tracey [2016] QCA 194, 2 August 2016

Case Stated – Public Trustee – Queensland – where the Public Trustee does, and may, hold assets on trust for adults under a legal disability – where the Public Trustee holds those assets on trust pursuant to the following types of trusts: a trust established by court order, expressed to operate until further order; a trust established by court order, not expressed to operate until further order; a trust established under s43(6), s44 or s59 of the *Public Trustee Act 1978* (Qld); a trust established by settlement or agreement, including private settlements and agreements – where the Public Trustee will often also manage other assets for the same adult as his/her financial administrator pursuant to an order made under the *Guardianship and Administration Act 2000* (Qld) – where it is usually beneficial for the Public Trustee to manage all the adult's assets as administrator – where the Public Trustee believes that in such cases it would be for the adult's benefit if the Public Trustee could terminate the adult's trust pursuant to the rule in *Saunders v Vautier* (1841) 4 Beav 115 [49 ER 282] and hold the adult's assets as administrator – where the Public Trustee would not be required to approach the court for orders terminating the adult's trust – whether the Public Trustee of Queensland, as administrator for all financial matters of an adult under a legal disability may, without an order of the court, terminate a trust established: by court order (whether or not expressed to operate until a further order); under ss43(6), 44 or 59 of the *Public Trustee Act 1978* (Qld); or by settlement or agreement – where no reasonable basis appears for drawing a distinction in the present context between orders expressed to operate “until further order” and orders without that expressed qualification – where it is “wholly inappropriate” (*Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 205) to confine a jurisdiction conferred upon a court by implying limits which are not found in the statutory text – where the term ‘financial matter’ is defined in the *Guardianship and Administration Act* to mean “a matter relating to the adult's financial or property matters” and to include “a matter relating to” any one or more of 16 examples – where the most relevant example is paragraph (c) (“receiving and recovering money payable to the adult”) – where understood in the context of s33(2), this example seems apt to refer to the exercise of a power by an administrator to receive trust moneys beneficially owned by an adult who is under such a disability as precludes the adult from giving a valid discharge to the trustee – where at any time after the court

sanctions a settlement or orders payment to an adult with impaired capacity, the court retains jurisdiction to review the appointment of an administrator is consistent with the conclusion that s33(2) does not extend to empowering an administrator to invoke the rule in *Saunders v Vautier* to terminate a trust created by an order of a court without a further order of the court – where questions 3, 4 and 5 raise the questions whether the Public Trustee as administrator for all financial matters of an adult under a legal disability may, without a court order, bring about the termination of a trust under ss43(6), 44, and 59 of the *Public Trustee Act* which, but for the adult beneficiary's legal disability, the adult could terminate under the rule in *Saunders v Vautier* – where under s33(2) of the *Guardianship and Administration Act*, the Public Trustee as administrator for all financial matters of the adult under legal disability is empowered to terminate the trust with reference to that rule – where question 6 concerns private trusts established by settlement or agreement – where in the circumstances identified in question 6, s33(2) would appear to empower an administrator appointed for all financial matters to exercise the power of revocation conferred by s31(2), but it is not necessary to decide that question – where upon no reasonable construction of s31(2) does it qualify the power of a *sui juris* beneficiary who is absolutely entitled to the trust property to terminate the trust under the rule in *Saunders v Vautier* – where such circumstances being properly described as a ‘financial matter’, the better construction of s33(2) is that it does give the administrator the same power as the beneficiary would have had, but for his or her legal disability, to terminate the trust – where neither the beneficiary (whether or not legal capacity has been regained), nor, it follows, the administrator would possess the power to terminate the trust while there remains in place a court order establishing the trust in question.

Answers to questions in the case stated:
Q1 – No. Q2 – No. Q3 – Yes. Q4 – Yes.
Q5 – Yes. Q6 – Yes. (Brief)

O'Keefe & Ors v Commissioner of the Queensland Police Service [2016] QCA 205, 19 August 2016

General Civil Appeal – where each appellant was either stood down or suspended from their duties as police officers – where each of the appellants sought a statement of reasons pursuant to s32 of the *Judicial Review Act 1991* (Qld) – where the Commissioner of the Queensland Police Service obtained relief in the Trial Division that the appellants were not entitled to make a request for a statement of reasons in respect of their standing down or suspension by virtue of Item (1) of Class 3 of

Schedule 2 of the *Judicial Review Act* – where the appellants appealed against the decision of the Trial Division, alleging that the decisions to stand down or suspend were not decisions made “in relation to the investigation of persons for corruption under the *Crime and Corruption Act 2001*” – where it is further submitted that there was no evidence of an “investigation of persons for corruption under the *Crime and Corruption Act 2001*” – whether, upon a proper construction of Item (1) of Class 3 of Schedule 2 of the *Judicial Review Act*, the decision to stand down or suspend each appellant was a decision in relation to the investigation of persons for corruption under the *Crime and Corruption Act 2001* (Qld) (CC Act) – where it is considered that an investigation of a complaint, information or matter involving police misconduct or a referred complaint, information or matter involving corrupt conduct undertaken by the commissioner in order to discharge the applicable statutory responsibility, would constitute an investigation of the person or persons concerned for corruption under the CC Act – where it is under the CC Act because that Act expressly requires the commissioner to deal with the complaint by investigating it – where the definition of police misconduct in the CC Act includes conduct that does not meet the standard of conduct the community reasonably expects of a police officer – where having regard particularly to that aspect of the definition and the reference to direct conflict between the alleged conduct and the functions of a police officer, it is considered that each stand down notice evidenced that the conduct detailed in it was the subject of an investigation into alleged police misconduct on the part of the officer to whom the stand down notice was addressed.

Appeal dismissed with costs.

RCR O'Donnell Griffin Pty Ltd v Forge Group Power Pty Ltd (Receivers and Managers Appointed) (in liq) & Ors [2016] QCA 214, Orders delivered ex tempore 24 June 2016; Reasons delivered 26 August 2016

General Civil Appeal – where the first respondent (Forge) contracted with a third party company to construct a power station – where Forge subcontracted with the appellant (RCR) to provide electrical work (subcontract) – where pursuant to the subcontract RCR provided two unconditional bank guarantees to which Forge could have recourse where it “remains unpaid after the time for payment” – where Forge became insolvent and the second and third respondent receivers and managers were appointed in February 2014 – where there was an outstanding progress payment from Forge to RCR of about \$4.2 million – where on 22 April 2014 RCR, Forge and the third party

entered a deed of novation (deed) discharging the subcontract but not affecting “any accrued rights, obligations, claims or liabilities” between RCR and Forge under the subcontract before the novation date – where the deed further provided that Forge was to return the bank guarantees or cause them to be cancelled or unenforceable except to the extent that Forge considered it may have a claim against RCR or Forge believed RCR would pursue a claim against it – where on 21 May 2014 the receivers informed RCR that Forge “has or may have an outstanding claim” – where on 3 June 2014 the receivers caused Forge to appoint a superintendent pursuant to cl.20 of the subcontract, who on the same day certified that RCR should pay Forge about \$2.5 million in liquidated damages for delay – where the receivers subsequently informed RCR of their intention to make demand upon one of the bank guarantees to satisfy the liquidated damages certified – where RCR commenced proceedings in the Trial Division contending that because the subcontract had been discharged the superintendent’s appointment was invalid and, consequently, there was no accrued right to payment preserved by the deed entitling Forge to call upon the guarantees – where RCR alternatively contended that Forge was precluded from having recourse to the guarantees by either a contractual or equitable set off of the debt due to RCR – where the primary judge found in favour of Forge –

where RCR contends that the primary judge erred in his construction of the subcontract and the effect of the deed – whether on the correct construction of the subcontract and deed, Forge, since the date of novation, has been entitled to demand payment of the bank guarantees – where by cl.5.2 of the subcontract in this case, the security was subject to recourse “where [the Principal] remains unpaid after the time for payment” – where cl.5.2 was not in terms which referred to a belief, or grounds for a belief, that money remained unpaid – where because recourse to the security was permitted only where in fact money remained unpaid, it was necessarily implied that recourse was not permitted, and that the principal should not attempt to have recourse to the security, where there was not money which remained unpaid to it – where there was thereby a negative stipulation which could be the basis for an injunction restraining Forge from making demand on the bank guarantees – where RCR was not seeking an interlocutory injunction from the primary judge – where it was seeking a final resolution of the question of Forge’s entitlement to have recourse to the guarantees – where a court hearing an interlocutory injunction would have been alert to the risk that if the principal was to be enjoined from having recourse to the security, pending resolution of the dispute as to whether it was entitled to do so, the benefit to the principal of the security could be substantially diminished – where cl.34.7 of the

general conditions, by which the superintendent (if any) was to certify, as due and payable to the principal, liquidated damages for delay – where the primary judge was correct in saying that a cl.34.7 certificate was necessary to establish a liability to pay liquidated damages for delay – where the court is unable to agree that after the novation date Forge remained entitled to appoint a superintendent to enable certification under cl.34.7 – where Forge’s liquidated damages claim could be said to arise from RCR’s “performance of the Subcontract before the Novation Date” – where the existence of that nexus was an essential condition for the preservation of a right, obligation, claim or liability under cl.4.1 of the deed – where, however, it was not a sufficient condition: the right, obligation, claim or liability had to have accrued in the relevant sense – where the appointment and supervision of the superintendent in the present case involved a further performance of the subcontract, specifically of the promises by Forge within cl.20 – where because Forge had a right to liquidated damages only upon certification by the superintendent, it could become entitled to those damages only by a further performance of the subcontract – where the parties agreed within the deed of novation that the subcontract would not be further performed and therefore there was no accrued right or claim to such damages nor any accrued obligation or liability to pay them – where it follows that Mr Austin,



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the superintendent, was invalidly appointed, because his appointment could be effected only by a further performance of the subcontract – where his purported certification for liquidated damages was of no effect, so that the second question should also have been answered in the negative – where it follows that the only amount which Forge claimed was unpaid to it, being the sum purportedly certified as liquidated damages for delay, had at no time been payable, so that according to cl.5.2 of the general conditions, Forge was not entitled to make demand for payment under either of the guarantees.

Appeal allowed. Orders of 17 August 2015 be set aside. Each of the questions referred be answered in the negative. Declare that the first respondent has not been and is not entitled to call upon or seek to have recourse to the 2014 guarantee or the 2016 guarantee. Remit the balance of the claim to the Trial Division.

Costs. (Brief)

Commissioner of the Australian Federal Police v Hart & Ors; Flying Fighters Pty Ltd v Commonwealth of Australia & Anor; Commonwealth of Australia v Yak 3 Investments Pty Ltd & Ors [2016] QCA 215, 29 August 2016

General Civil Appeals – where Hart, an accountant, engaged in systematic tax fraud, by running a number of tax avoidance schemes in which he involved his clients – where companies associated with Hart, Flying

Fighters Pty Ltd, Nemesis Australia Pty Ltd, Yak 3 Investments Pty Ltd and Bubbling Springs Olive Grove Pty Ltd, acquired various assets – where in May 2003, the Commonwealth was granted a restraining order over property of the companies, Flying Fighters, Nemesis, Yak and Bubbling Springs, under s17 of the *Proceeds of Crime Act 2002* (Cth) (POCA) on the basis that the interest of each company in the property was under Hart's effective control – where in May 2005 Hart was convicted of nine offences of defrauding the Commonwealth, in contravention of s29D of the *Crimes Act 1914* (Cth) with the restrained property forfeited to the Commonwealth on 18 April 2006, under s92 POCA – where the Hart companies applied for orders under s102 POCA directing that their interests in the forfeited property be transferred to them, or that they be paid an amount equal to the value of their interests – whether the court has power to order transfer of property without declaring its value – whether the court had power to make the transfer of property conditional on compliance by the applicants with other orders – whether the power was properly exercised – where s102(3) sets out what would be described as one of two alternative sets of conditions which an applicant must satisfy before a discretion arises to make an order under s102(1) – where s102(3)(a) deals with two separate questions, one relating to the use of property (use test) and one relating to the source of property

(source test) – where it is convenient first of all to note that s102 confers a discretion on a court – where it is appropriate to note is that the discretion is one to order the return of forfeited property, or to declare that an amount is payable by the Commonwealth to the applicant, equal to the value of the applicant's interest in the forfeited property – where the section is thus remedial or beneficial – where ordinarily, such a provision should be construed “so as to give the fullest relief which the fair meaning of its language will allow”: *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 – where the use test raises quite different questions from the source test – where the former seems primarily directed to the “thing or object” in which a person might have an interest, and which might be used in or in connection with the commission of an offence; and the latter primarily to a person's interest in the property, a matter to which questions of derivation, or realisation from unlawful activity, are likely to be directed – where it is concluded that the source test is not satisfied simply because a person's interest in property is a consequence of the combined effect of unlawful activity, and other matters which do not involve unlawful activity – where on 6 May 2013, his Honour made further orders including an order that the Hart companies pay to the Commonwealth the sum of \$1.6 million, less, in effect, the sale proceeds of 6 Merriwa Street, Sunnybank, and the property at Doonan's Road, Grandchester;




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and upon such payment, Hangar 400 was to be vacated, the Commonwealth was to remove caveats lodged with respect to Hangars 400 and 101, and three aircraft, L-39 VH-SIT, CAP 232 VH-SHI, and T-28 VH-AVC, were to be transferred to Fighters – where the primary judge gave brief ex tempore reasons on 6 May 2013, but they do not deal with the question whether the order for payment of the sum of \$1.6 million should have been made – where it is difficult to identify clearly the purpose the primary judge had in mind when dealing with the sum of \$1.6 million in paragraphs [853] and [854] of his reasons, and in his references to that sum in the orders of 6 May 2013 – where since his Honour did not make a declaration as to the value of the assets, the references could not have been directed to their value – where in the present case, since Merrell no longer held the charges, and the Commonwealth did not have any assignment of the debts which would entitle it to enforce them, the charges had no practical effect – where it would follow that the determination of the nature and extent of the interest of the Hart companies as being diminished by \$1.6 million dollars was erroneous; and so were orders made to give effect to such a determination – where the orders made on 6 May 2013 should not have required the Hart companies to pay \$1.6 million to the Commonwealth – where the CDDP made an application under s141 POCA for a declaration that any property “recovered from forfeiture” by the Hart companies pursuant to their application under s102 of the POCA is available to satisfy any PPO made against Mr Hart – where the difficulty about the correct approach to s141 arises in the present case from the circumstances in which the application was made – where at that time, and at the time of the hearing, any property to which the application might relate had been forfeited, and accordingly had vested absolutely in the Commonwealth – where as a result, the restraining order had been discharged on 18 April 2006 – where the question of effective control is to be determined at the date of the determination of the application under s141 – where there was no discretion to exercise, there being no suggestion that any of the forfeited property was subject to the effective control of Mr Hart when the application was being determined.

Appeals by the Commonwealth parties dismissed. Parties to attempt to agree on, and submit to the court, a form of order to give effect to these reasons and costs, with any failure agreement to be dealt with by written submissions on set dates. (Brief)

Criminal appeals

R v Thompson [2016] QCA 196, 5 August 2016

Sentence Application – where the applicant was convicted on his own plea of one count of trafficking methylamphetamine and cannabis and 19 counts of supplying a dangerous drug, in addition to four other indictable offences and 13 summary offences – where the applicant

was sentenced to 4½ years’ imprisonment for trafficking to be suspended after serving 18 months for an operational period of 4½ years, two years’ imprisonment for each count of supply with a parole eligibility date coinciding with that suspension, lesser concurrent terms of imprisonment for the other indictable offences and convicted but not further punished for the summary offences – where the sentencing judge was not made aware that the applicant had served three days of pre-sentence custody with respect to the offences – where the sentencing judge was not made aware that four of the counts of supplying a dangerous drug were relied on by the Crown, in part, as particulars of the trafficking offence – whether the period of three days of presentence custody should have been declared as time already served pursuant to s159A of the *Penalties and Sentences Act 1992* (Qld) – whether concurrent terms of imprisonment for the supply counts that were relied on, in part, as particulars of the trafficking offence should have been imposed – whether there was a failure to take account of the applicant’s early pleas of guilty – whether the sentencing discretion ought to be re-exercised – where count 1 on the Supreme Court indictment alleged that the applicant unlawfully trafficked in methylamphetamine and cannabis between 8 September 2014 and 18 September 2014 – where counts 2 to 5 alleged that the applicant unlawfully supplied cannabis on 12 and 16 September 2014 – where count 6 alleged that the applicant unlawfully supplied a dangerous drug (LSD) on 13 September 2014 – where each of counts 2 to 6 were therefore alleged to have been committed during the period of trafficking alleged in count 1 – where count 6 is of no relevance to the applicant’s point because it concerned a drug that was different to those alleged in count 1 – where, however, it was accepted by the Crown at the hearing of this application that the supplies alleged in counts 2 to 5 were relied on, in part, as particulars of the trafficking offence and it was therefore inappropriate to impose sentences on those supply counts, but each attracted concurrent terms of two years’ imprisonment with a parole eligibility date of 13 August 2017 – where the imposition of sentences of imprisonment on counts 2 to 5 was an error and it must be corrected – where it is common ground that the applicant was in custody with respect to the subject offences for this period and the Crown concedes that the sentence ought be “corrected” by making a declaration pursuant to s159A of the *Penalties and Sentences Act 1992* (Qld) – where the sentencing of the applicant to terms of imprisonment on counts 2 to 5 of the Supreme Court indictment and the failure to make a declaration of pre-sentence custody (or otherwise take that period of custody into account) meant that the sentencing process was affected by two errors, with neither the fault of the sentencing judge.

Application for leave to appeal granted. Appeal allowed. Set aside the sentences imposed on counts 2 to 5 of the Supreme Court indictment and order that the applicant be convicted and

not further punished. Declare the three days of pre-sentence custody as time served with respect to the sentences of imprisonment otherwise imposed and for no other reason.

R v McDonald [2016] QCA 200, 16 August 2016

Sentence Application – where the applicant pleaded guilty to one count of knowingly possessing child exploitation material and one count of distributing child exploitation material – where the applicant was sentenced to 12 months' imprisonment for the possession count, to be released on probation for three years at the end of that term, and to 3½ years' imprisonment on the distribution count, to be partially suspended after 12 months for an operational period of five years – where the distribution count was based entirely on the applicant's admissions to police – whether the applicant was sentenced on a more serious factual basis than the evidence supported – whether the sentencing judge gave the applicant sufficient credit for the admissions made in relation to the distribution count – where it does appear that the sentencing judge failed to make sufficient allowance for the applicant's special cooperation, early pleas of guilty and remorse – where also, it should not be overlooked that the applicant had led a productive life, had no previous convictions and had demonstrated a level of insight into his offending.

Application granted. Appeal allowed. Sentence imposed for count 1 at first instance is varied by reducing the term of imprisonment to nine months, sentence imposed for count 2 at first instance is varied by ordering that the term of imprisonment be suspended after serving a period of nine months' imprisonment. Otherwise the sentences imposed at first instance are otherwise confirmed.

Gerhardt v McNeil [2016] QCA 207, 23 August 2016

Application for Extension of Time s118 DCA (Criminal) – where in October 2014 the applicant was convicted and fined for two contraventions of s83(1)(b) of the *Building Act 1975* (Qld) (Building Act) in the Magistrates Court – where a subsequent appeal to the District Court was dismissed in November 2015 – where in April 2016 the court delivered reasons in an unrelated matter, to which the applicant was a party, construing s83(1)(b) Building Act in a different manner to that adopted in the courts below – where in May 2016 the court delivered reasons in another proceeding, arising from the same factual scenario giving rise to the subject convictions, finding that the applicant did not contravene s83(1)(b) Building Act – where the court's judgments demonstrate the applicant did not contravene s83(1)(b) Building Act but his convictions remain on the record of the courts below – where the applicant applies for an extension of time within which to apply for leave to appeal against the judgment of the District Court – where the respondent contends that, notwithstanding

the judgments of this court, the applicant has not satisfactorily explained his delay in seeking leave and, in any event, the principle of finality dictates that the convictions should remain undisturbed – whether the application should be allowed – where there is an undesirable inconsistency between the subject judgment of the District Court and this court's May judgment – where there is a determination by this court of the applicant's innocence of the charges of which he was convicted, yet his convictions stand – where it is desirable that this tension between the records of two courts be remedied – where the respondent's argument in characterising the present case as one arising from "a change in the law" misstates the position – where the argument identified no judgment which had interpreted s83(1)(b) as the courts in the present case did – where the earlier judgments decided that, contrary to the respondent's view and practice, s83(1)(b) did not require the issue of a preliminary approval in cases such as the present one. There was therefore no "change in the law" – where the unusual circumstances of the present case should result in the time being extended, the appeal being allowed and the convictions being set aside – where there is not only the prejudice to the applicant from the convictions standing and the lack of any prejudice from setting them aside: there is also the very unusual circumstance of the conflict of two judgments, one holding that the applicant committed these offences and the other, the May judgment of this court, holding that he did not.

Extend time within which to apply for leave to appeal. Grant leave to appeal. Allow the appeal and set aside the orders of the District Court. Set aside the convictions of the applicant in the Magistrates Court on 1 October 2014 and any further order made against the present applicant in that proceeding. Costs.

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 scqlqld.org.au/caselaw/QCA. For detailed information, please consult the reasons for judgment.

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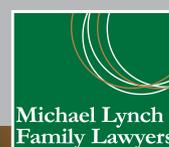


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This month ...

Webinar: How to Manage Illness and Injuries in the Workplace

Online | 12.30-1.30pm

As any organisation will agree, managing employees is a daily challenge, and that challenge is significantly increased when employees are ill or injured. Navigating the complexity of applicable legislation, the diversity of claims, and managing the emotional state of the employee requires a specific focus and expertise. In order to avoid potential liability under legislation, employers need to be aware of their obligations and the risks involved in managing such situations. So whether you employ staff or advise clients who employ staff, this webinar will provide valuable guidance in this challenging area of practice.



1 CPD POINT

FRI
7
OCT

Practice Management Course – Medium and Large Practice Focus

Law Society House, Brisbane

8.30am-3.45pm, 8.30am-4.45pm, 8.30am-2.30pm

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

The Society's PMC features:

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



10 CPD POINTS

THU-FRI
13
TO
14
& FRI
21
OCT

Masterclass: Self-Managed Superannuation Funds

Law Society House, Brisbane | 9am-12.30pm

Australia's self-managed super fund (SMSF) sector continues to grow as more and more Australians take control of their investment for retirement. This masterclass will keep you up to date and provide practical guidance in this highly regulated and constantly changing area of practice. It will include:

- the ATO's common errors within SMSFs
- tips and traps when creating borrowing trusts
- a discussion on the proposed changes to the superannuation regime in this year's Federal Budget
- a Q&A session for delegates to ask their questions.



3 CPD POINTS

TUE
11
OCT

Introduction to Family Law

Law Society House, Brisbane | 8.30am-4.45pm

Aimed at legal support staff with less than three years' experience, this introductory course provides practical guidance on the frequent processes and tasks associated with family law matters. Join us for an interactive and guided tour through:

- defining key terms and concepts relevant to family law
- identifying legislation, regulations and policies relevant to family law
- drafting divorce applications and financial statements
- dealing with difficult situations that commonly arise in family and domestic violence matters.

This course is based on the nationally accredited diploma-level unit, 'BSBLEG510 Apply legal principles in family law matters', which is offered by Queensland Law Society as self-paced study.



6.5 CPD POINTS

TUE
18
OCT

Essentials: Drafting Family Law Orders

Law Society House, Brisbane | 8.30am-12pm

This half-day workshop is an ideal opportunity to refresh your knowledge on the fundamentals of drafting exceptional family law orders. Learn practical tips from the experts on perfecting the art of drafting family law orders in both property/financial and children's matters, tips and tricks that will set you up for drafting success, and insider knowledge for mastering s79A applications for when it's not successful.



3 CPD POINTS

WED
12
OCT

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Core CPD Webinar: Time Interruption and Ethical Conduct

Online | 12.30-1.30pm

The life of a legal practitioner is a busy one. With good intentions we sit down to undertake tasks but are frequently interrupted. This session will examine the ethical risks we face by constant interruption – from colleagues, email, social media and the general cut and thrust of each working day.



1 CPD POINT

Personal Injuries Conference 2016

Hilton Brisbane | 8.20am-5.20pm

Now in its 16th year, the QLS Personal Injuries Conference continues to provide an opportunity for personal injuries practitioners and accredited specialists to update their knowledge and skills, obtain seven CPD points and network with peers.

2016 also marks the introduction of the National Injury Insurance Scheme and this year's conference will include a focused session on the new scheme with presentations from Queensland and New South Wales industry experts. Our presenters will also address specialist personal injuries topics with practical sessions on how to negotiate ethically, how to manage a multi-generational team, and how to draft an effective pleading.



7 CPD POINTS

Introduction to Conveyancing

Law Society House, Brisbane

8.30am-5pm, 8.30am-4pm

Aimed at legal support staff with less than three years' experience, this introductory course provides delegates with the key skills to:

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

The course is based on the nationally accredited diploma-level unit, 'BSBLEG512 Apply legal principles in property law matters', which is offered by Queensland Law Society as self-paced study.



10 CPD POINTS

TUE
18
OCT

Core CPD Webinar: Client Experience Excellence

Online | 12.30-1.30pm

In a competitive market where differentiators are hard to identify and leverage, client experience excellence is a key to profitable practice. How do you know if you are delivering service at the level that clients now demand? This session will provide you with practical hints and tips to help you:

- define what matters most to clients based on their view of exceptional service
- identify key service principles, skills and capabilities required to optimise client relationships
- appreciate the wider implications and risks of average or poor client experience delivery
- understand the basis upon which gains of 20-35% in revenue are achievable with a focus on service.



1 CPD POINT

THU
27
OCT

FRI
21
OCT

Support Staff Webinar: Australian Legal System Basics

Online | 12.30-1.30pm

Aimed at legal support staff with less than three years' experience, this introductory webinar will provide staff with an overview of the main sources of Australian law, how law is made and the relevant institutions, the law courts in Australia, and the key differences between civil and criminal proceedings.

The course is based on the nationally accredited Certificate IV level unit, 'BSBLEG413 Identify and apply the legal framework', which is offered by Queensland Law Society as self-paced study.



1 CPD POINT

FRI
28
OCT

TUE-WED
25
TO
26
OCT

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Conveyancing Conference 2016	25 November
Specialist Accreditation Christmas Breakfast with the Chief Justice	2 December



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New QLS members

Queensland Law Society welcomes the following new members, who joined between 6 August to 7 September 2016.

- Sarah Armstrong**, High Power Exploration Inc
Fiona Auld, Maurice Blackburn Pty Ltd
Nicola Baker, Freestone Law
Kaitlin Bakker, HW Litigation Pty Ltd
Jodie Bell, non-practising firm
Tanja Bilic, Pearson & Associates Solicitors
Rachel-Lea Blake, Moray & Agnew
Lisa Bonin, William A Cook Australia Pty Ltd
Melissa Bostock, Virgin Australia Airlines Pty Limited
Aaron Bradford, McInnes Wilson Lawyers
Belinda Breakspear, McCullough Robertson
Hannah Brown, Gadens Lawyers – Brisbane
Michael Byrnes, MRH Lawyers
Aysha Campiutti, JBS Australia Finance Pty Ltd
Shannan Casey, Piper Alderman
Rhys Casey, King & Wood Mallesons
Matthew Cavanagh, Qatar Investment Authority
Betty Clancy, Go To Court
Rachel Clutterbuck, Miller Sockhill Lawyers
Timothy Cunningham, D.M. Wright & Associates
Crystal de Silva Samarasinghe, non-practising firm
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Miranda Gillespie, MacDonnells Law
Erin Gilmore, Condon Charles Lawyers
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Belinda Hapgood, Belinda Hapgood
Sam Harvey, non-practising firm
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Elliott Joo, Chand Lawyers
Guy Lawton, Hollingworth & Spencer
Thao Le, non-practising firm
Huiming Lin, Asahi Legal Practice
Michelle Lo, Carter Capner Law
Stuart Lowe, Mullins Lawyers
Emily Lucas, Shine Lawyers
Melanie Lunn, McMahon Clarke
Linda Macpherson, QPILCH
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Louise Nixon, Lander & Rogers
Sarah O'Keefe, Piccardi Legal
Joanne Parisi, MacDonnells Law
Rhonda Penny, Queensland Law Practice Pty Ltd
Anna Pham, Mahoneys
Yee Ting Phiong, Tonio Lawyers
Megan Piccardi, Piccardi Legal
Kate Purcell, Purcell & Associates
Craig Ricato, non-practising firm
Lachlan Rieck, Australian Law Partners
Sebastian Sapuppo, James Varitimos
Jessica Schaffer, Thynne & Macartney
David Shields, New Way Lawyers
Melissa Sinopoli, MacDonnells Law
Alexander Sloan, Piper Alderman
Jeffrey Smith, JW Smith & Associates
Shannon Smith, Breen Smith
Boneka Somers, McInnes Wilson Lawyers
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Michelle Chadburn



Victoria Limerick

Career moves

Colin Biggers & Paisley

Colin Biggers & Paisley has announced the appointment of **David Giacomantonio** as a partner in its insurance team. David has more than 20 years' experience in all facets of insurance litigation, with a focus on general liability, casualty, sports liability, property and professional indemnity.

Fuller & White Solicitors

Brittany White and **Kate Fuller** have launched their own legal practice, Fuller & White Solicitors, as of 8 August. The practice is based in Cleveland and services the eastern Brisbane region. Brittany and Kate are experienced solicitors focusing on criminal law, traffic law, domestic violence and child protection matters.

Griffith Hack

Intellectual property law firm Griffith Hack has welcomed **Sheree O'Dwyer** to its Brisbane office as an associate. With experience in intellectual property law, information, communications and technology law, and commercial and competition law, Sheree works with a range of clients on contentious and transactional matters as well as managing domestic and international trademark portfolios.

Kennedy Spanner Lawyers

Kennedy Spanner Lawyers has welcomed **Scott Webb** to its insurance litigation team. Scott, a former police officer, has a legal career of more than 13 years with extensive experience in insurance law.

McKays

McKays has announced the arrival of principal **Robert King**, a highly experienced lawyer in employment, workplace and safety law. Robert focuses on advice and litigation in workplace matters, including employment and contractor agreements, managing ill and injured employees, restraint of trade and breaches of confidential information, dismissal and general protections claims. He is also an experienced workplace trainer.

Mullins Lawyers

Mullins Lawyers has announced the appointment of three partners in the first quarter of FY16-17.

Stuart Lowe, who has been promoted from special counsel to partner, joined the firm in 2008 and is the lead advisor on the retirement village and aged care industries. He is a skilled property lawyer and advises clients on commercial and retail leasing, sale and acquisition of commercial and retail properties, and compulsory acquisitions.

Sam McIvor, who joined the firm as a partner from 1 July, is a lead partner in the employment and safety team, bringing significant experience in all aspects of employment law, including employment relations, industrial relations and health and safety.

John Siong joined the firm in late August and is a lead partner and registered migration agent in the migration practice. John is a native speaker of Mandarin and Cantonese, having grown up in mosaic communities in Brunei. He has more than 18 years' experience in migration law and a strong track record with complex migration matters.

NB Lawyers

NB Lawyers has announced the promotion of **Michelle Chadburn** to senior lawyer in its employment law and workplace relations team. Michelle will continue her focus on representing clients in unfair dismissal and general protections matters, sexual harassment and restraint of trade.

Waller Hallam Family Lawyers

Waller Hallam Family Lawyers has welcomed **Victoria Limerick**, who has practised exclusively in family law since her admission. Victoria strengthens the firm's core practice areas of property and financial matters, and asset protection.

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.

The matter and the money

How to talk confidently and concurrently about both

The essence of ‘Getting paid: Start with file opening’ was that responsibility for slow or poor payment by clients rests mainly with producers and principals.

In fact, we observed that only two out of 16 causes were down to the client. We then proposed some simple steps that should always lead to improvement.

And yet, even in firms that work hard on building structure and rules around credit control, we continually run into producers who are really challenged by talking with clients about money.

While there are signs of improvement, many firms still don’t quite get the balance right. They put effort into rules, policies and follow-up, but little into training and coaching in better conversations. Which leads into the purpose of this article...

We think that we’ve pretty much nailed why many producers don’t do money conversations well.

Money conversations aren’t what I’m here for

Firstly, they avoid them. They do this because they see matter conversations as *normal*. It’s what they are trained in. And mostly, if they are reasonably confident/competent with the particular law, there is little to fear.

But money conversations are different. They can involve higher risks and greater potential for conflict. They aren’t seen as *normal*. They aren’t seen as a key part of *what I’m here for*. And if producers hold out for long enough, they can actually make these conversations the credit controller’s problem rather than their own.

And that’s the problem. So our first challenge is to coach/train our producers to see money and matter as important parts of the one conversation – that is, treating *both as normal*.

Interestingly, clients have much the same feelings. Mostly, they like talking with their responsible lawyer about their matter. That’s normal. But when they get phone calls from a stranger they’ve never met demanding payment for outstanding invoices, that’s *not normal* and is often uncomfortable.

So if we can train our producers *and* our clients that talking about matter and money concurrently is *normal*, then we can kill two birds with one stone. Everyone just accepts it as the way things are.

And remember, who is a client most likely to be guided by about money? The person who they trust to run their matter. It’s not only the best approach; it’s also the easiest approach.

Exactly how am I supposed to do this?

The second reason for underperformance in money conversations is the lack of a robust framework that producers can rely on to help them get the job done. As mediators are wont to say – if all else fails, *trust the process*.

PRELACS

We recommend an approach called PRELACS. It’s a standard process to follow when looking to extract commitment from clients regarding payment. It doesn’t matter whether you’re talking about unpaid past accounts, or payments in anticipation of future costs; it’s all the same using PRELACS.

We are also presuming here that these guidelines are directed at the lawyer responsible, but working with agreed money management delegation from the partner.

P = plan

Firstly, if you are working on a matter regularly, you should be right across the essence of the fees agreement, particularly if you weren’t the person who did the deal. Before ringing your client about the matter, go through their accounting information in your practice management system and know what is going on.

At a minimum, you should be across unpaid invoices, current WIP, the likely next steps on the matter, and any additional money due in trust. Ideally, you should also be across the *whole of client* financial relationship – in other words, do the payment issues relate to more than one matter? If so, talk with a partner and develop an agreed plan of attack.

Important: Detail is king. If you are going to talk about money, you need to be highly specific about invoice numbers, actual amounts, dates issued, and even be able to email copies through instantly if required. Being very specific means you mean business. Being vague gives your client excuses to avoid doing anything.

R = ring

Yes, ring. Don’t email. Don’t text. Email and texts are too easily ignored. The good thing about ringing is that you can engage with your client on a two-way basis. Moreover, you have them captive unless they are rude enough to hang up. It is very hard for people to stonewall in a phone conversation – provided you have planned well.

Remember also that if you have *planned* your conversation well, you will start positively about the matter and then seamlessly slide into ‘Now Geoff, while I’ve got you on the phone, we need to work out how we can tidy up a couple of your unpaid invoices... I’ll just take you through them...’.

Our July feature, 'Getting paid: Start with file opening', which first appeared in *Proctor* 10 years ago, got the ball rolling on the disciplines around discussing money with clients.

Dr Peter Lynch now further explores how to have these conversations more effectively.



Different people adopt slightly different styles. You can email in advance and say that you are going to ring at a specific time to talk about matter and accounts – to put the client on notice. Or, you can simply ring and move more subtly from matter into money, but with a follow-up email on what has been agreed. I generally prefer the latter. But no matter what, the primary communication must be oral.

E = explain

Yes, clients usually are contractually obliged to pay you anyway, but their enthusiasm about payment can be greatly increased if contextualised around the matter, what's happened, what has changed, where it's going, and so on. So rather than just talk figures, consider saying: "Invoice 1234 for \$5500 covered our <insert here> as we agreed and invoice 5678 for \$7700 was for the <insert here> as we agreed as well. We really do need to get those tidied up so that we can confidently move to <insert here> and get to where you need to be." Explain confidently.

L = listen

Your clients will have all manner of reasons why they haven't paid. These may involve progress on the matter, didn't receive the invoices, wasn't what we agreed, I'm worried about where this is going, and so on. It is essential that you listen intently and make notes. Treat every reason as an opportunity to be reframed as a solution. It nearly always works.

Client: I'm worried about the matter.

Response: OK, let's work through your options going forward from here, but in the meantime, we still need to deal with payment for the work we have already done.

Client: I haven't received the invoices.

Response: OK, are you at your desktop now? I can shoot across copies as we speak and you'll have them in a few seconds.

And so on...

A = acknowledge, alternatives, agree

Acknowledging client issues and concerns isn't mumbo jumbo or touchy feely. It is sensible, practical, courteous, and outcome (payment) directed. Enemies pay slower.

Once the issues around payment have been canvassed, work through the practical payment alternatives like how, when, how much, how often. Be scrupulously detailed. 'I'll try to pay this week' isn't good enough.

Agree on the specifics of current payment – viz, '\$4400 into our account XYZ through BPAY by COB this Thursday; I'll send a note to our accounts people so they can keep an eye out for it.'

And take the opportunity to resettle payment terms needed for all future invoices. Remember, these conversations aren't just about collections; they are a form of training for future behaviour.

C = confirm

This is normal practice in any 'negotiation' – that is, when you have worked through and agreed what is happening, read it back to the client and ask for affirmation... 'Geoff, I appreciate that. I'm just going to read back my understanding of where we are at so you can confirm that's what we've agreed.'

If you follow the process, people will nearly always agree. Moreover, because the agreement is so specific, there is a high chance they will actually deliver. Generally, I would send through a very brief confirmatory email outlining the specific agreement.

S = shift

This is the essence of matter and money conversations. You settle the money. You shift back to the matter. You positively say 'So when we have all that tidied up, the next step (on your matter) is...'. You end on a positive note, but you link continuation with the agreed payment.

Conclusion

The profession is about two things, the practice of law and the business of law. To perform well on the business side, our practitioners need training and coaching to become confident. Some are naturals, most aren't. The goal is to coach capabilities so that our producers come to see matter and money conversations as normal, *and* for them to also train their clients to see things similarly.

Some readers will say 'Hell, I haven't the time for all this carry-on'. Our responses to that are:

1. Once the routine becomes a habit, it involves hardly any discernible additional time or effort.
2. Without an agreed process, your credit management is little more than a lucky dip.
3. Your clients will be happier (fewer unwanted end-of-matter surprises).
4. If you don't have a process something like what we have suggested, your cashflow is almost certainly weaker than it ought to be.

50 years on, the enjoyment continues

After more than a half century of practice, Peter Duell's commitment is an inspiration for all lawyers.

Peter Duell will notch up his 51st year of practice as a solicitor on the 7th of this month.

And even after a half century of legal experience, he continues to practise with the same enthusiasm and vigour as the day he was admitted.

The young Peter Duell actually wanted to work in his local post office. He was making what he felt to be a substantial amount of money at the time and loved the work.

However, his father had different plans. Peter was to commence his law articles and work for a pittance (as articled law clerks did) at his father's firm, Duell, Roberts & Kane Solicitors.

Stanley Duell was a wills and estates lawyer with a plan for his son to follow in his footsteps. Peter duly commenced his articles in 1960 and was admitted in 1965. He clearly remembers the Chief Justice, Sir Alan James Mansfield, on the day of his admission saying to them all: "Congratulations gentlemen, you are now qualified to look in books."

Not 2½ years later his father died suddenly, leaving Peter on his own with less than three years of experience. He decided to take a



massive risk, dive into the deep end and open his own firm, ST Duell & Son.

Peter says the law was practised very differently when he was running his own firm. He has watched the development of technology and all the changes resulting from that. He has watched the legal industry grow from the time he knew every practising solicitor in Brisbane to now, when there are thousands of solicitors in the Brisbane CBD alone.

He acted for his clients in all areas of law, including criminal, family and civil matters, and all the while continued to be drawn to the area of wills and estates. Peter says that his work in the area of estate law continues to interest him and for that reason he enjoys what he does.

His ability to relate to his clients and explain matters to them in a way that resonates with them also makes him an excellent mediator for property, estate and elder law matters. To top that off, he also started volunteering at Legal Aid the year after his admission and continues to contribute to Legal Aid to this day.

The people who work with Peter are always astonished at his ability to remember in great detail every matter he has ever worked on. He continues to be a great mentor to students and budding lawyers, and his door is always open to discuss matters with his colleagues.

Peter is regularly asked when he plans on retiring, and his response is: "The day that I wake up and say I am no longer enjoying what I am doing, is the day that I will retire."

Peter's commitment to practice is an inspiration for all of us.

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However, wine can be more than just the beverage of celebration; if chosen well it can also make the perfect gift for that landmark event.

Some wines are synonymous with moments of celebration and many cultural formalities are linked closely to consumption.

A good example of this intimate intertwining of wine and celebration is the ubiquitous role Champagne or sparkling wine plays at weddings. Wedding receptions usually, at least, start as a structured party with formalities, such as wedding speeches that usually end in a toast to the bride, groom and others (if not to express joy at the end of bad oratory).

Despite many preconceptions of weddings, a reception without wine would be a day without sunshine.

Other landmark events are often marked by wine. Some people put away special bottles of wine for their children to be consumed on their 18th or 21st birthdays – often from a birth year. This charming practice, high on symbolism, marks a rite of passage to adulthood, but can present difficulties.

First, many wines will not be in good shape 18 or 21 years after vintage, especially in the absence of quality cellaring. Second, not every 18 or 21 year old has a taste for fine aged McLaren Vale shiraz or hefty first growth Bordeaux.

Anniversaries are often marked with special wines. Some folks will plan to steal away to a favourite restaurant and accompany their meal with a choice wine. Sometimes a bottle of fine wine will remind a couple that their anniversary is something special.

Equally, and potentially more appropriately, a cheap and unlikely wine selection may not be a comment on the quality of the relationship, but a reminder of where and when that relationship began. Imagine a couple celebrating each and every year for 40 years with a reminder of the wine they drank on “their impoverished first date? (By the way, Ben Ean is no longer with us, but Barossa Pearl made a welcome return in 2014!)

Wine and celebration are interlinked in our society. So, too, the gift of wine can be both a great compliment and a gift of future pleasure, but there are a few things to keep in mind:

Champagne and white sparkling wines are made to be drunk in celebration and not put down to mature. If instant joy is required, there is probably no better gift than good quality fizz.

Not every wine is suitable for ageing and price is not always a good guide to longevity. If your expected keeping horizon is between five and 10 years, then look for a quality Barossa or McLaren Vale shiraz or a Margaret River cabernet sauvignon blend. If the keeping horizon extends to 10 or more years, consider premium shiraz from McLaren Vale, semillon from the Hunter Valley with a screw cap, marsanne from Chateau Tahbilk, or perhaps a fine Australian fortified wine like a Para liqueur or rare Rutherglen muscat.

Keep the recipient in mind, and never give a wine which will be in better shape in 20 years than the recipient. A more youthful and vigorous wine can be just as rewarding, and not everyone has the patience or time for extended cellaring.

Good news for Morris

PS: In the August column I discussed the imminent closure of Morris Wines in Rutherglen. Happily it is now reported that Casella Family Brands has stepped in to save the whole concern. The Riverina-based Casellas are the owners of the Yellowtail label, sold everywhere, but they also have an interest in preserving fine wine labels, owning the Barossa’s Peter Lehmann and Brand’s Laira in the Coonawarra region.

The tasting

Two specimens from Riversands, Queensland’s most westerly winery on the banks of the Balonne River in St George, were considered.



The Riversands Ellen Meacle Merlot 2013 was cherry red in colour and had the very pleasant nose of granite stone mixed with soft berry fruits. The palate was an easy and seamless mix of plummy fruit, some structuring tannins and a framework of granite-edged crispness. A very pleasant wine deserving of its gold medals at the Australian Small Winemakers Show.



The Riversands Western Rivers Run Shiraz 2013 was crimson red brick colour and possessed an intriguing nose of savoury earthy notes upon a bed of crushed red fruits. The palate was poles apart from the archetype of South Australian shiraz, with flavours of cherry fruits and the savoury impact of leather and earth giving a soft impression despite sitting on some undercurrents of tannins. More Hunter than Barossa, but a very pleasurable shiraz from a climate that is little explored and unfamiliar to mainstream wine drinkers.



Matthew Dunn is Queensland Law Society government relations principal advisor.

Mould's maze

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

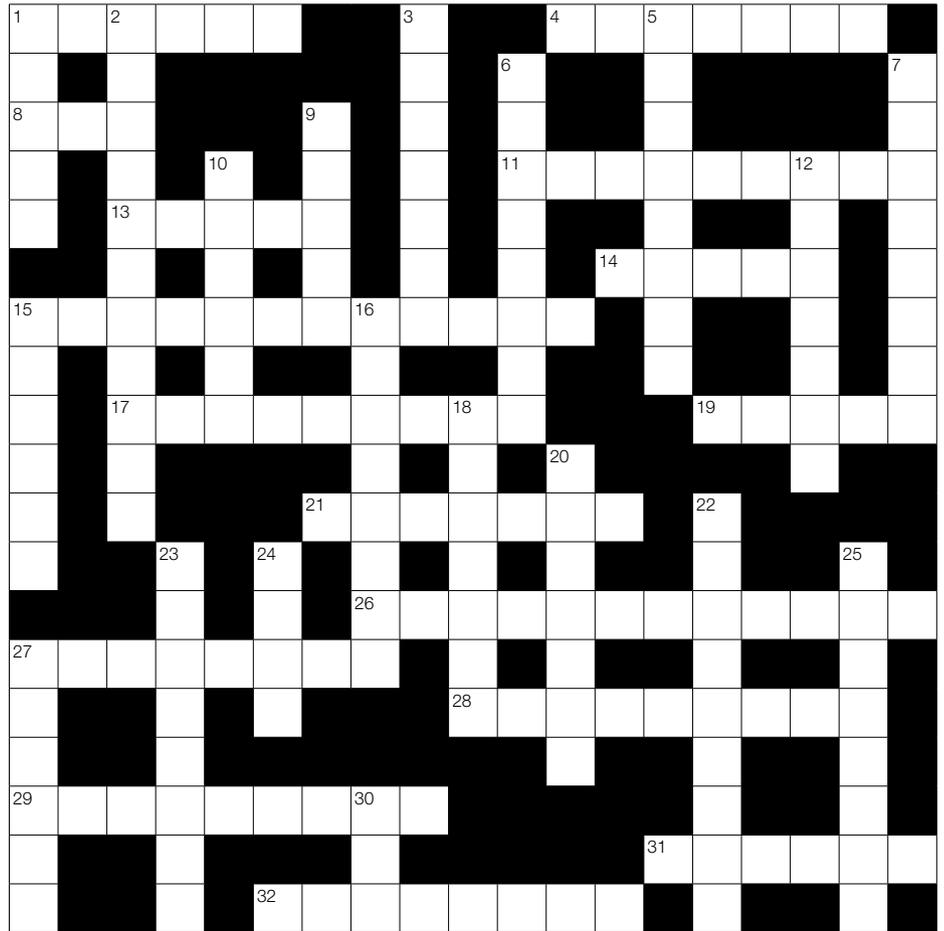


Across

- 1 Possession of freehold land. (6)
- 4 High Court case involving liability for a hepatitis A outbreak in harvested molluscs, *Graham Barclay Pty Ltd v Ryan*. (7)
- 8 Former NSW Supreme Court judge whose report pioneered reforms to civil liability in Australia. (3)
- 11 Making a higher offer for a house than someone whose offer has already been accepted and thus acquiring the property. (9)
- 13 Revoke a bequest because the property is not in existence at the time of death. (5)
- 14 A beneficiary in a will who is not directly related, 'stranger in'. (5)
- 15 Date from which a de facto relationship usually commences. (12)
- 17 Contract in which all or part in the required performance has not been done. (9)
- 19 High Court case involving a plaintiff employee who developed schizophrenia from witnessing another employee having been electrocuted, *Mount Isa Mines v*. (5)
- 21 Metaphor for a law school created by Karl Llewellyn, Bush. (7)
- 26 Specie of damages that are unfixd. (12)
- 27 Warrant committing a person to prison. (US; archaic.) (8)
- 28 Incontrovertibly established cf. casuistic. (9)
- 29 A beneficiary retains the balance of a deceased estate. (9)
- 31 House of Lords case involving the reasonable foreseeability of harm of an errant cricket ball *v Stone*. (6)
- 32 Offence involving using words of conduct inciting treason. (8)

Down

- 1 High Court judgment involving Mason J's famous calculus of negligence, *Wyong Shire Council v*. (5)
- 2 Challenge of witness credibility; charge of a public official for misconduct in offence. (11)
- 3 Sum required to validate service of a subpoena, money. (7)
- 5 Residual effects of an injury. (8)
- 6 Of no value, force or effect. (8)
- 7 Adjective pertaining to requesting evidence or information, usually describing a letter. (8)
- 9 Interlocutory civil process aimed at identifying issues by raising facts or authenticity of documents with the opponent, Notice to (5)



- 10 It appears to be; a word introducing obiter dictum in a judgment. (French) (6)
- 12 Sign the back of a cheque to effect its assignment. (7)
- 15 The principles which form the norms of international law that cannot be set aside, *jus*. (Latin) (6)
- 16 Rule of interpretation whereby a provision 'no dogs allowed' would mean that cats are allowed, *inclusio unius est exclusio*. (Latin) (8)
- 18 Contractual clause in a sale of goods contract under which the purchaser retains possession but the vendor retains title until certain conditions are fulfilled. (7)
- 20 A tenant in common owns an share in property. (7)
- 22 Tort involving wrongfully enticing an unmarried woman to consent to sexual relations based upon misrepresentation. (Archaic) (9)
- 23 Offence involving putting forged money into circulation. (8)
- 24 High Court case involving nervous shock developed by a teetotaler plaintiff who was mistakenly accused by police of drink-driving, *v New South Wales*. (4)
- 25 High Court case concerning wrongful birth/life, *Cattanach v*. (8)
- 27 The principle that a contract can only form upon unqualified acceptance of an offer, the image rule. (6)
- 30 The symbol of authority of the Usher of the Upper House of our Federal Parliament, the Black (3)

Solution on page 64

Changing cars on life's highway

There's a bonus – free rocks!

by Shane Budden



It has become apparent to me that, at some point in the next year, my wife and I will need to purchase a new car.

Not that there is anything seriously wrong with our old car, either mechanically or in appearance – at least from the outside.

Unfortunately the inside has been subject to the wear and tear of two young children and, more recently, a dog which has begun showing signs that he shares DNA with horses (or possibly griffins). He has grown from a pup that could have been mistaken for a small rat, one that all the other rats picked on, into a dog that occasionally – in his enthusiasm to meet people – knocks over pot plants, the people he is meeting, and the odd SUV.

Suffice to say that his effect on the interior of the car has been sub-optimal, and it is clear that it has been subject to forces never dreamed of by its designers. I am sure it did not occur to them that my children would, from a very young age, collect especially interesting rocks, sticks and shiny things which might appear to the untrained eye to be rubbish, but when examined carefully by experts prove in fact to be *shiny* rubbish. This means that every trip to the park added around 30kg of weight to the car in sticks and rocks jammed into seats, headrests and the like.

You might think that I could simply throw these away, but that just shows you don't have children (or you have, and you have suppressed the memories in the interests of preserving your sanity). These items need to be carefully collected and stored until you are sure the kids have forgotten them, and *then* thrown away – which will be the cue for the kids to remember them and demand you produce what has now become their favourite rock/stick/Kit-Kat wrapper.

In any event, combined with the enthusiastic exploration of the back seat by Gigzi the wonder dog/horse/griffin, being used as an earthmover has not exactly improved the aesthetic appeal of our car nor – I suspect – its resale or trade value, in the same way that

Donald Trump has not exactly improved the image of the Republican Party. Hence (or perhaps thus) I will soon be in the market for a new car.

I can only presume that my recognition of the need for a new car on largely aesthetic reasons is an indication of a burgeoning (and let's face it, seriously overdue) maturity on my part, because back in my student days aesthetics played little part in vehicle selection.

When I bought my first car I took my Dad with me, as he knew stuff about cars and I, as a law student, knew stuff about the QIT campus club. A typical car inspection would play out along these lines:

Me: It's brilliant! Let's buy it!

Dad: That's a ride-on mower.

Me: What's the mileage?

I ended up with a 1979 Ford Escort, which had three main points of appeal – it had an engine so simple it would never break down, and if it did it could be repaired by the cleverer members of the mollusca phylum, or possibly even Eddie McGuire; Bodie and Doyle drove an Escort in *The Professionals*; and one of my mates also had one, so he at least would not give me rubbish about it (this was only partially successful, as my mate decided to pay out on me about the colour; this is how guys express friendship, another reason it surprises and scares me that my gender somehow got control of the planet. Also, young people note that I said 'pay out on me'; a lot of you say 'pay me out', which is a grammatical nightmare, and using it will get you sacked, at least if I have anything to do with it).

The Escort was a great car, in that it could go a long way on \$2 worth of fuel, and had a stereo loud enough to drown out any engine noises which might otherwise be concerning or indicative of mechanical issues. I can still remember the number plate, 772 PRX. My friends called it 'The Prix car' although I suspect in their heads they used different spelling; I will understand at this point if some readers doubt these guys were my friends.

Bottom line (clearly a term I use here somewhat disingenuously) is that I did not give much thought to the way the car

looked when I bought it, nor throughout my entire ownership of it. From the day I got it until the day I cleaned it up (with the help of my then girlfriend – am I a great date or what?) before trading it in, it would have been hard to swear in a court of law that the car had a carpet or even a floor. At any given time it would have football boots, cricket gear, unwashed jerseys and things my friends had left in there (and which I threw out long ago, which will teach them to make cracks about my car); every student I knew had a car in a similar (or worse) state and none of us regarded it as detracting from the car's overall value.

Back then, if the car ran and had a stereo – even if the stereo had chewed up a Doors tape you had borrowed from a friend and refused to release the tape under any circumstances, not that this ever happened but if Mal is reading this it might clear something up for him – it was perfect, as long as the radio still worked (because back then they played good songs on the radio).

Once the driver's door started to come off during a trip to Lismore but I was able to temporarily repair it with a stick, until such time as I could repair it properly (with a more sturdy stick); this event did not, at that time, indicate any problem with the car as far as I was concerned.

Now, however, I will probably have to get another car because I am not keen on the way the old one is looking, plus one of my Indigo Girls CDs is stuck in the player and won't come out (possibly the CD player will demand the release of Mal's Doors tape before cooperating).

In any event, I'll let you know how I go unless a better idea for a column presents itself, and if anyone is looking to put in a gravel driveway, I have enough rocks to give you a good start.

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Crossword solution from page 62

Across: 1 Seisin, 4 Oysters, 8 Ipp, 11 Gazumping, 13 Adeem, 14 Blood, 15 Cohabitation, 17 Executory, 19 Pusey, 21 Bramble, 26 Unliquidated, 27 Mittimus, 28 Apodictic, 29 Residuary, 31 Bolton, 32 Sedition.

Down: 1 Shirt, 2 Impeachment, 3 Conduct, 5 Sequalae, 6 Nugatory, 7 Rogatory, 9 Admit, 10 Semble, 12 Indorse, 15 Cogens, 16 Alterius, 18 Romalpa, 20 Aliquot, 22 Seduction, 23 Uttering, 24 Tame, 25 Melchior, 27 Mirror, 30 Rod.

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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	3 October 2016	9.25
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 Sept 2016	0.955
Cash rate target	from 3 August 2016	1.5
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2016	8.00

Historical standard default contract rate %

Sep 2015	Oct 2015	Nov 2015	Dec 2015	Feb 2016	Mar 2016	Apr 2016	May 2016	June 2016	July 2016	Aug 2016	Sep 2016
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	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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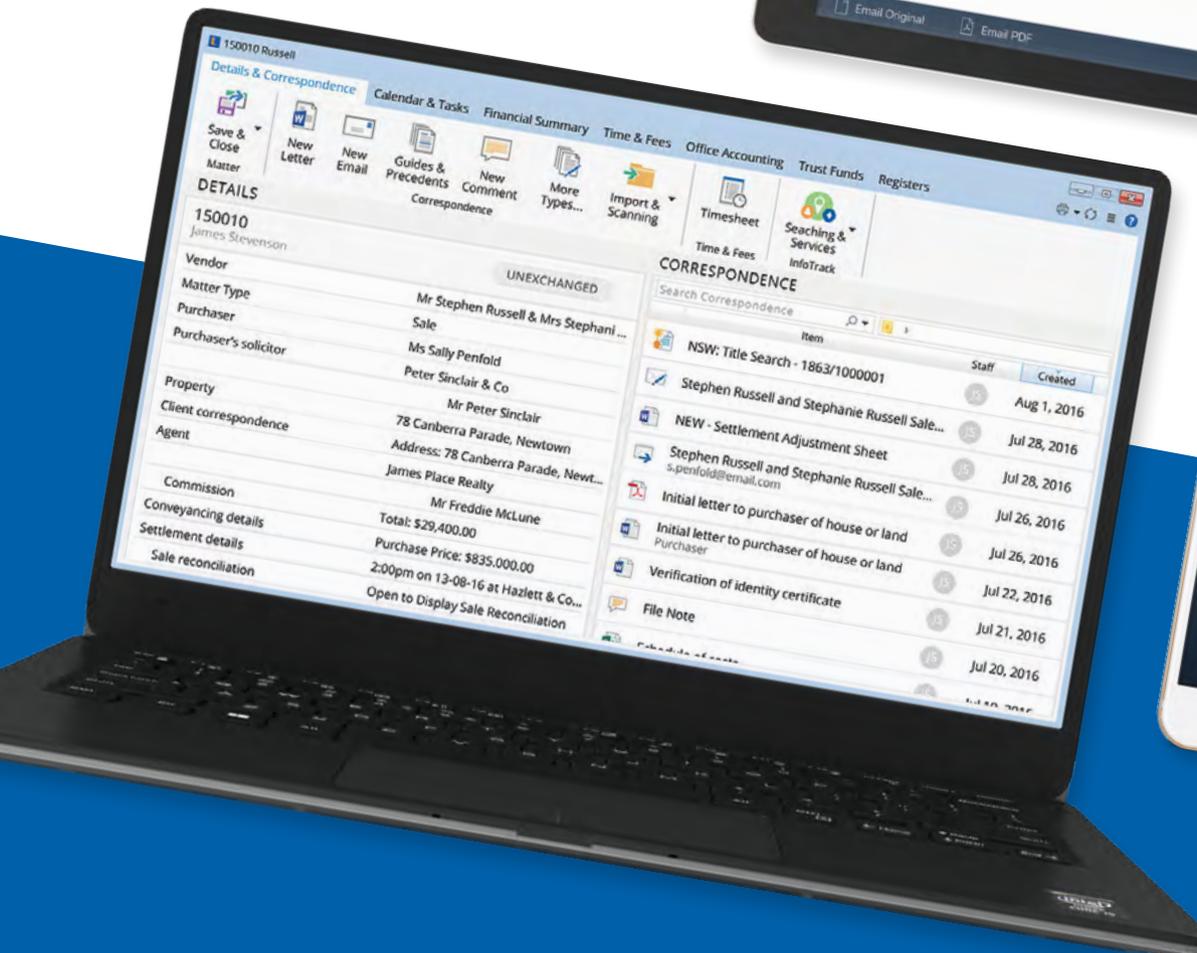
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