



QLS PROCTOR

JUNE 2019

SUFFER THE LITTLE CHILDREN

Responding to the horrors
of youth detention

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'revenge porn'

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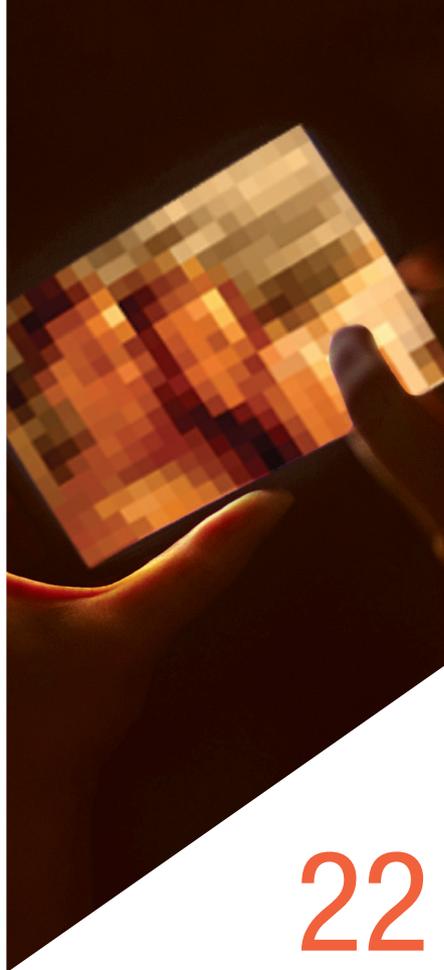
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Our duty, our courage

Standing up for justice



"Tasker Watkins also showed a different kind of courage, the kind of courage all good...[lawyers] need to show. The courage to fight the cases they should fight; and the courage not to fight the cases they should not fight. The courage to stand up to the judge when the judge is bullying or unsympathetic or even not listening properly; and the courage to stand up to the client when the client is being unreasonable or wants what he cannot get or, worse still, wants the... [lawyer] to do something he cannot do because it is in breach of his higher duty to the court and the rule of law."

– Lady Hale, *President of the Supreme Court of the United Kingdom*, 'Moral Courage in the Law' (speech, *The Worcester Lecture*, 21 February 2019) 1.

Courage comes in many forms, not all of them obvious.

I write this in the shadows of Anzac Day, the day on which our nation commemorates conspicuous courage and sacrifice of the highest order – that sort of courage is obvious to all, and difficult for we mere mortals to comprehend.

We can only be thankful that, because of the courage of the members of our defence force, past and present, we do not have to find out whether or not similar wells of resolve reside within us.

The Tasker Watkins to whom Lady Hale refers in the opening quote is Sir Tasker Watkins, a man who displayed all forms of courage. He served in the Second World War and was awarded the Victoria Cross for his heroic efforts in Normandy. After the war he had a stellar career in the law, being appointed to England's High Court and eventually retiring as Deputy Chief Justice.

The courage solicitors must display on a daily basis is not the sort that wins you medals or gets you in the papers, but in truth it is every bit as important. Our justice system depends

on us doing the right thing, and making sure our clients do too.

It means we deliver unwelcome advice to our clients without fear or favour, and resist any pressure from the client to overstate their case or fight vexatious points. It can cost us a matter (or a client) and the fees that come with it, but that is beside the point. Our intestinal fortitude in discharging our duties ethically and courageously is central to the functioning of the system.

It also means that we may have to represent unsympathetic and widely despised clients, who sometimes have done despicable things, and how we might feel about them personally (and how the rest of the world might react to our efforts) cannot affect the quality of our representation.

When I found myself at the coalface of the battle against Queensland's so-called 'Bikie Laws' (note the words 'bikie', 'outlaw' and 'motorcycle' appeared nowhere in the legislation), it wasn't because I have any love for bikies and the things they do; far from it. It also wasn't because it was a lucrative line of work; bikies are notoriously slow payers, and more difficult than most when it comes to recovering debts.

I was there because those laws were wrong, and that the rights of the people affected were the same rights that you, me or anyone else in this country should enjoy. The right to the presumption of innocence, to be able to have their day in court and to be competently defended – these things apply to all Australians at all times. We have to have the courage to stand up for people and represent them properly, regardless of what they may have done and what we personally think of them.

A perfect example is playing out in the media at the time I write this, in relation to the furore which has arisen following a tweet by Rugby Union player Israel Folau. Folau tweeted some views he holds, which – while they are reprehensible and indeed incomprehensible to many of us – flow from the tenets of his particular religion. As a result, the Australian

Rugby Union (ARU) has torn up his contract, and the National Rugby League (NRL) has also confirmed he will not have the option to pursue his career there.

Folau's comments no doubt caused great offence and hurt many in the LGBTI community and, like most of us, I find them offensive and damaging. That said, Folau will most likely now need to engage solicitors who will put aside personal feelings and views, and ensure that he can access his legal rights to the full. That takes a particular type of courage and it is a part of the way we serve our profession.

It isn't without cost, of course; the media often rail at the solicitors who represent unpopular clients, blurring the distinction between client and counsel to present the story for the public in purely good and evil terms. This means that solicitors in these cases will find themselves firmly cast as moustache-twirling villains, with the audience obediently booing and hissing as op-ed journalists and keyboard warriors stoke the flames.

We can't take that into account, of course. We stand where we always do, by our client, for their rights and in service to the administration of justice. Because we do this, because we show this kind of courage, the system works and the public can have confidence in it.

Australian Test cricketer Keith Miller – who also served in the Second World War flying Mosquito fighter-bombers in Europe – when asked about the pressure of playing Test cricket, replied in his inimitable and laconic style, that Test cricket wasn't pressure, "... pressure is a Messerschmitt up your arse".

Fair point, and courage in battle is of course a little harder than courage in the courtroom. It is just as important, however, that we show it.

Bill Potts

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Interlock expansion 'ineffective'

The Transport Legislation (Road Safety and Other Matters) Amendment Bill 2019 was introduced on 13 February 2019.

The Bill purports to amend various transport-related Acts and regulations, including the *Transport Operations (Road Use Management) Act 1995*.

Of particular concern to Queensland Law Society was the proposed changes to the alcohol interlock program in Queensland.

Currently, the interlock program applies to offenders convicted of driving under the influence of alcohol with a blood alcohol concentration (BAC) of 0.15 or higher. Once convicted, the offender must have their vehicle fitted with an alcohol ignition interlock for a minimum period of 12 months.

The Bill proposed an extension of the alcohol ignition interlock period from two

to five years, and expansion of the program to cover mid-range drink-driving offenders.

QLS was not supportive of the proposed amendments to the interlock program. The Society argued that extending the interlock period would not deter drink-driving offenders. Further, expanding the program to mid-range drink-driving offenders would create a significant and disproportionate impact on low-income earners (installation of an interlock device itself can cost more than \$2000). The amendments also pose additional issues for offenders in rural, regional and remote areas, including scarce accessibility to interlock providers and loss of income for offenders who are dependent on their vehicle for work.

The Transport and Public Works Committee tabled its report on the Bill on 5 April. The committee acknowledged our concerns, but went on to say that the extension of the interlock period to five years was in line with existing regimes in other states; and that

“extending the sit out period may increase active participation in the program”.

It referred to Department of Transport and Main Roads statistics to emphasise involvement of mid-range BAC drivers in road crashes, and found that “the current exemptions framework is sufficient to support those in regional and remote areas of Queensland”.

On the whole, the committee maintained its stance that, the more drink drivers that participate in the program, the better the road safety outcomes. The committee has recommended that the Bill be passed.

This article was prepared by members of the Queensland Law Society Legal Policy Team, including Deborah Kim and Madelaine van den Berg, with assistance from Pip Harvey Ross.

Blue card review

The Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018 (Risk Management and Screening Bill) and the Working with Children Legislation (Indigenous Communities) Amendment Bill 2018 (Indigenous Communities Bill) were referred onto the parliamentary Education, Employment and Small Business Committee on 15 November 2018.

The Risk Management and Screening Bill aimed to implement the Queensland Government's 'No Card, No Start' election commitment to introduce an automated blue card application process, which would stop applicants from beginning paid work while their blue card application was pending. The Indigenous Communities Bill sought to introduce a new blue card framework.

The Society is supportive of measures which protect the vulnerable members of our community such as children and young people, and legislative amendments which seek to promote these objectives.

In light of recent media attention surrounding the Bills and potential future amendments, QLS wrote to the Attorney-General and Shadow Attorney-General to offer our views on various aspects of the Bills.

The Risk Management and Screening Bill contemplates some expansion of disqualifying offences for issuing a blue card and further offences have been raised as part of the debate. In this regard, the Society is supportive of maintaining the broadest discretion in the application process for the deciding agency and resisting any blanket expansion of disqualifying offences without a thorough exploration of the factual circumstances of each case.

It is the Society's understanding that the Queensland Family and Child Commission made recommendations regarding the removal of the eligibility declaration process and that the 'No Card, No Start'

policy would prevent an inappropriate applicant from having contact with children under the regime. An eligibility declaration process may be warranted in certain targeted circumstances, if led by specific statutory guidelines.

Also, we raised the issue of international criminal history checks. While an individual's application ought to be thoroughly checked, QLS acknowledges the operational challenges of such a process, such as potential costs, delays, translation challenges and jurisdictional variations in offences.

The Society would welcome the opportunity to meet with the Government to discuss the blue card review further.

This article was prepared by members of the Queensland Law Society Legal Policy Team, including Deborah Kim and Madelaine van den Berg, with assistance from Pip Harvey Ross.

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The State Budget – what should be in it?



BY KERRY SAMPSON

The Queensland Budget is set to be tabled in State Parliament on 11 June.

Queensland Law Society, on behalf of the Queensland legal profession, has called on the Government to fund:

- upgrades to court technology and infrastructure, throughout all Queensland courts, to facilitate complete electronic filing and eTrials
- the creation of a Queensland Dispute Resolution Hub.

Both of these measures would provide substantial benefit to our rural and regional members and their clients.

Electronic filing in Queensland courts

Electronic filing is currently available in the Federal Court of Australia and in other state jurisdictions, but is not available in most Queensland courts. The inability for parties to file documents and conduct proceedings electronically creates inefficiencies, increases costs (for clients and for law firms) and stretches existing court resources.

Regional practitioners and clients are particularly impacted by the need to manually deliver court documents for filing and the inability to inspect court files, both of which present significant and unnecessary financial cost. Upgrades to court technology and the availability of electronic filing would put Queensland courts on a level playing field with other jurisdictions in terms of efficiency of processes so that business is kept in Queensland.

Funding for this measure is crucial to reducing costs, allowing for greater flexibility throughout the court process (including for judicial officers), and providing access to justice.

Queensland Dispute Resolution Hub

Supporting the resolution of civil disputes by alternative dispute resolution (ADR) services through the establishment of a Queensland Dispute Resolution Hub (QDRH) would alleviate existing and anticipated pressure on the courts and tribunal systems.

The benefits of ADR processes are well documented. The Department of Justice and Attorney-General's 'Annual Report 2015-2016' reported a 90% success rate for the Dispute Resolution Branch (DRB), resolving "more than 52,000 disputes" during the preceding 25-year period.¹ However, not all disputes are suitable for referral to the DRB but, importantly, may still be suitable for other ADR services.

Currently, individual dispute resolution service providers lack the collective presence required to enable the community to understand the range of alternative dispute resolution services available, to properly compare them and to determine which service would be best suited to the nature of the dispute.

The QDRH would provide a 'one-stop shop' for parties to find the right ADR service provider, whether they are a mediator, facilitator, arbitrator, court-appointed referee or expert determiner. Existing infrastructure could be utilised by 'scaling up' the existing Dispute Resolution Centre so it can operate as an 'all-inclusive' QDRH.

The QDRH would reduce burdens on courts and the Queensland Civil and Administrative Tribunal, and encourage a more integrated justice system in Queensland by making ADR services easy to navigate and improving the availability of information and access to ADR services, particularly in regional areas.

QLS hopes the Government heeds our calls for the necessary funding in its 2019-20 budget to implement both of these measures; to foster public confidence and put the Queensland justice system in strong stead for the future.

Kerry Sampson is a Queensland Law Society policy solicitor.

Notes

¹ Queensland Government, Department of Justice and Attorney-General, 'Annual Report 2015-2016', p6.



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HSF recognises work of Brisbane lawyer



Herbert Smith Freehills has announced the award of its Kathryn Everett Leadership Fellowship for Women to Brisbane Senior Associate Bianca Janovic (*above*).

The award was created in recognition of Ms Everett, a senior intellectual property partner who passed away in 2013. The fellowship recognises her unique contribution to the firm and its people through leadership roles and passions that included leading the firm's diversity initiatives and strongly supporting its pro bono program.

Ms Janovic, who works in the firm's disputes practice, is involved in complex commercial litigation, strategic reviews, regulatory investigations and pro bono work. She is co-chair of IRIS, the firm's LGBTI Network, and in 2014 won the Law Institute of Victoria's Rising Star of the Year award in recognition of her technical skills as a commercial litigator, leadership in LGBTI rights and significant contributions to Indigenous reconciliation and pro bono work.

Ms Janovic plans to use the fellowship to attend Harvard's Women's Leadership Forum: Innovation Strategies for a Changing World in Boston early next year.

QLS praises \$320m investment in youth justice reform

Queensland Law Society has praised the State Government's proposed \$320 million investment in a raft of much-needed juvenile justice reform measures, in particular the funding of a new specialist Children's Court magistrate.

QLS President Bill Potts welcomed the announcement of an additional magistrate, the building and staffing of a new and upgraded existing detention centre, and a range of community initiatives to prevent children from ever seeing the inside of a detention centre.

"QLS has been a very vocal and strong advocate for reforms in the juvenile justice system and the funding announcement is certainly a good start to protecting vulnerable and troubled children who may fall foul of the law," Mr Potts said.

"The Society particularly supports the move to provide an additional specialist magistrate and funding for various early intervention initiatives to prevent youth offending, keeping minor offenders out of court, reducing the number of youths in detention and options that divert juveniles away from the youth justice system."

The announcement comes nine months after former Queensland Police Commissioner

Bob Atkinson released his report and recommendations for a wide-ranging overhaul in the way the state deals with young offenders.

The package announced by Queensland Youth Minister Di Farmer includes:

- an additional specialist Children's Court magistrate
- community-based Queensland Police supervision for high risk youths on bail across the state's south-east
- community youth responses to crime hotspots in three locations – Brisbane, Ipswich and Cairns
- enhanced youth and family wellbeing measures for Indigenous family wellbeing services
- a transitional hub to divert young people from police custody in Mount Isa
- construction of 48 new beds and a boost in staff numbers to alleviate the serious overcrowding in existing youth detention centres.

"The Society will continue to advocate long and hard in the youth justice space to ensure focus is placed on preventing crime before it happens rather than inflicting punishment and onerous rehabilitation on children," Mr Potts said.

Courts release Family Violence Plan

The Family Court of Australia and the Federal Circuit Court of Australia have released a Family Violence Plan, which aims to provide a comprehensive set of actions to support people experiencing, or at risk of, family violence.

Family Court Chief Justice Will Alstergren acknowledged the important work of the courts' Family Violence Committee in bringing the plan to fruition, along with those who contributed to its development.

"The courts take family violence very seriously and realise that we must continually strive to do better," his Honour said. "This plan identifies clear goals, actions to be taken and timelines in relation to protection from family violence; safety at court; and information and communication."

The plan refines and updates the Family Violence Plan 2014–16. It builds on the work of the courts under the 2014–16 plan and will be used by administrative staff, decision-makers, legal practitioners, service providers and others involved in the overall family law system.

It covers areas as diverse as building layout, security screening, risk assessment, safety planning for individual litigants, and education and training of staff. It also covers the review and updating of the Family Violence Best Practice Principles, a document designed to assist judges, legal practitioners and litigants understand the legal requirements for all matters in which family violence is alleged.

A copy of the Family Violence Plan is available from the Family Court of Australia and Federal Circuit Court of Australia websites.

Walking into Law Week

Over a thousand of legal professionals across the state took to the streets on Tuesday 14 May for the annual Queensland Legal Walk. The walk kicked off Law Week and highlighted the pro bono work of the state's lawyers by raising funds for LawRight. Walkers gathered in Brisbane, Cairns, Mackay, Toowoomba and Townsville, and on the Gold Coast and Sunshine Coast, to enjoy a pleasant morning stroll with colleagues.

The next day a complimentary member mental health breakfast at Law Society House attracted a crowd eager to hear the views of expert panellists on managing and combating vicarious trauma in day-to-day practice. This event was an initiative of the QLS Wellbeing Working Group.

Thursday 16 May brought practitioners to the popular QLS Open Day, where free professional development sessions covered topics ranging from career-building to unconscious bias and insights into the life a criminal law solicitor.

Over \$117,000 raised



Mixing it, professionally

Inter-profession networking returned on 2 May when QLS early career lawyers joined their contemporaries from Chartered Accountants Australia and New Zealand for a great night at Mr & Mrs G Riverbar, Brisbane. More than 80 young professionals were on hand for this popular event.



Career moves

Bennett Carroll Solicitors

Bennett Carroll Solicitors has announced the promotion of **Alexander Fairweather** to Legal Practitioner Director. Alexander joined the firm in 2014 and has run a range of commercial, estate and litigation matters since then.

Law Essentials

Law Essentials has announced that **Rebecca Shaw** has joined the team. Rebecca has significant experience in all areas of law, with a particular passion for all things commercial.

O'Shea & Partners

Rose Maitland has joined the team at O'Shea & Partners as a senior solicitor. Rose is a commercial lawyer with experience acting for clients in a range of commercial disputes. She has also handled a large number of commercial transactions and will work in the firm's Litigation and Dispute Resolution Team.

Park & Co. Lawyers

Park & Co. Lawyers has announced the promotion of four principal lawyers, **Ivan Foo**, **Rosana Chan**, **Heeyong Kim** and **Ben Hur**.

Ivan has dedicated himself to property and commercial law, providing professional commercial services across the Queensland community, especially in the Asian community.

Rosana has more than 14 years' experience in public liability, professional indemnity, property damage and employment law. She has also been active in pro bono work at the Federal Circuit Court, providing legal advice on employment law issues.

Heeyong has superior knowledge and experience in personal injury law. He is also involved in a community group helping young Brisbane professionals in networking and assisting with achieving professional goals.

Ben has extensive experience in personal injury law, property law and commercial law. He has a broad understanding of both civil and common law jurisdictions.

Piper Alderman

Piper Alderman has announced the lateral appointment of a real estate team in Brisbane including Partner **Warren Denny**, Special Counsel **Kylie Maxwell**, Special Counsel **Lyndal Draper** and Lawyer **Alexandra Gaggin**.

Warren has more than 30 years' experience advising clients on various real estate transactions, acting across all sectors of real estate, including property development, real estate investment trusts, the fund management industry, air and sea ports, aged care, and particular service industries such as the dental industry and management rights. He is a QLS Accredited Specialist in property law and has been recognised by The Best Lawyers in Australia in Real Property Law since 2015.

Kylie has 20 years' experience in commercial and property law. Her practice includes commercial, industrial and retail leasing, property development projects, distressed asset sales, complex community titles schemes, including staged developments, and management rights.

Lyndal has over 14 years' experience in property law, advising on the purchase and sale of leased assets such as commercial buildings and shopping centres together with due diligence, negotiating the acquisition or sale contract, and settlement. Lyndal's clients include developers, large institutions, statutory trusts, and private companies.



Alexander Fairweather



Rebecca Shaw



Rosa Maitland



Ivan Foo



Rosana Chan



Heeyoung Kim



Ben Hur



Warren Denny



Kylie Maxwell



Lyndal Draper



Alexandria Gaggin



Ella Thomas



Ellen Wood



Charlie Hodgetts



Christopher De Santana



Gregory Rogers



Claire van der List



Jayleigh Sargent

Alexandra advises a range of clients on property development, sales and acquisitions of residential and commercial properties, off-the-plan development sales, distressed asset sales, business sales and acquisitions and management rights. She also acts for landlords and tenants in leasing matters.

Quinn Family Law

Quinn Family Law has announced the appointment of **Ella Thomas** as an associate. Ella was admitted in 2014 and was appointed as an associate to a District Court judge. She has since worked exclusively in family law and has an interest in complex property and parenting matters, with a focus on seeking an early alternative dispute resolution pathway whenever possible.

Robertson O’Gorman

Robertson O’Gorman has welcomed **Ellen Wood** as a solicitor. Ellen started her legal career as a clerk at a commercial firm in 2016, before completing an associateship with a District Court judge in 2018, sitting predominantly in crime. Ellen will work as a solicitor across all areas of the firm’s practice, including criminal law, corporate crime, professional discipline and domestic violence matters.

Shand Taylor Lawyers

Shand Taylor Lawyers has welcomed **Charlie Hodgetts** as a lawyer in the Dispute Resolution Team. Charlie has been brought on to assist with a variety of commercial litigation matters including insolvency and debt recovery, shareholder and company disputes, property and construction, workplace and employment law and intellectual property.

Stewart Family Law

Stewart Family Law has announced the promotion of **Christopher De Santana** as a solicitor. Christopher joined the firm in October 2018 prior to his admission and has experience in commercial litigation, debt recovery and family law.

Tucker & Cowen Solicitors

Tucker & Cowen Solicitors has appointed two new staff and announced a promotion.

Gregory Rogers has joined the Litigation Team as an associate following a move from Western Australia. Gregory is a litigation and dispute resolution lawyer, who regularly assists a range of clients across various jurisdictions in commercial, corporate and employment disputes.

Claire van der List has also joined the Litigation Team as a solicitor. Claire assists in a range of commercial matters, particularly in relation to disputes arising from property and commercial transactions.

Jayleigh Sargent has been admitted and promoted as a solicitor, after joining the firm in 2015 as a legal secretary and paralegal. Jayleigh’s experience includes commercial litigation and insolvency, and assisting clients with commercial transactions.

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

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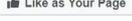






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LINKEDIN

Hillhouse Legal Partners
May 3 at 12:49 PM · 

Last night our Ben Ryan and Caitlyn Wessels attended the Young Professionals Networking Evening held with Chartered Accountants Australia & New Zealand at Mr & Mrs G Riverbar. Thanks to the Queensland Law Society for arranging another successful event. #youngprofsnetworking



Queensland Law Society, Josephine Aganon, Ted Shoesmith and 24 others
2 Comments

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Always a pleasure speaking at the **Queensland Law Society** PMC. Exciting times for QLD firms!



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TWITTER

“The Queensland Law Society has questioned the legality of new local laws on the Southern Downs designed to deter unlawful protests by animal activists. President Bill Potts says local laws may not be enforced. @LGAQ #RuRal #Vegan #farming @SouthernDowns @qldlawsociety”

@BelindaJSanders – Belinda Sanders

“ALTA is thrilled to welcome @qldlawsociety as a supporting partner for #ALTACON. It’s not too late to get on board! Check out the remaining partner opportunities.”

@ALTA - Australia Legal Technology Associations

FACEBOOK

7NEWS Townsville @7NewsTownsville · May 2

Townsville grandparents whose grandson was murdered, say new legislation for child killers is a joke. The laws change the definition of murder and have also been criticised by the @qldlawsociety. @AmeliaAdam1 #7NEWS



1:04 | 82 views

Mason Parker's grandparents on new child killer law
7NEWS Townsville weeknights at 6pm. www.7NEWS.com.au

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Following

Queensland Legal Walk 2019; great fundraiser with camaraderie, fun, fitness, for disadvantaged, marginalised. With veteran Themis @KarenDyhrberg @LawRightQLD many participants @CLC_Qld @qldlawsociety @LegalAidQld. LawRight President Matthew Jones Chief Justice Catherine Holmes



9:45 AM - 14 May 2019



FACEBOOK

Jessica Shen is feeling thankful at Queensland Law Society.

“WOW! TEN years! Thanks QLS. Glad to be a part of you. I will keep working on it 😊”



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 SHINE LAWYERS

The practical route to better advocacy

QLS teams with institute for intensive workshop

BY GRACE VAN BAARLE



In 2017, Queensland Law Society identified a need for a practical course to upskill solicitors in delivering effective advocacy in courts and tribunals.

As a result, the QLS Ethics and Practice Centre partnered with the Australian Advocacy Institute (AAI) to offer an intensive workshop covering these essential skills.

The AAI was established in 1991 and is the premier provider of structured advocacy training through the Hampel method. Devised by Professor George Hampel QC, the training follows a six-stage method:

- **Headline:** Identifying one particular aspect of the performance to be addressed.
- **Playback:** Reproducing verbatim that identified aspect of the performance.
- **Reason:** Explaining why this issue needs to be addressed.
- **Remedy:** Explaining how to improve this aspect of the performance.
- **Demonstration:** Demonstrating how to apply the remedy to the specific problem.
- **Replay:** The pupil performs again, applying the remedy.¹

The Hampel method is widely accepted as the preferred advocacy training method in Australia and the United Kingdom, and is also used in many other jurisdictions such as The Hague, Italy, Malaysia, Singapore and Hong Kong.

The teaching philosophy of AAI is based on 13 principles:

1. Competent advocacy is essential to serve the best interests of clients, community and justice.
2. Advocacy is characterised as the art of persuasion.
3. The practice must be in accordance with professional ethics and etiquette.
4. Advocacy consists of developed discipline, skills and techniques applied with such talent as each advocate has.
5. Effective courtroom communication skills are essential to advocacy as the art of persuasion.

6. Advocacy skills, techniques and discipline can be taught, learned and developed.
7. Advocacy skills are best taught and learned by the workshop method of:
 - a. instruction
 - b. demonstration
 - c. performance
 - d. review.
8. The focus of teaching is on preparation, analysis and performance.
9. The advocacy skills and techniques taught are generic and cross-jurisdictional.
10. Experience as an advocate alone is usually not sufficient. The approach to preparation, analysis and performance helps advocates to learn from their experience and develop their talent.
11. The emphasis in teaching is on:
 - a. complete familiarity with factual and legal materials
 - b. a method of analysis of those materials to produce a consistent case theory
 - c. a method of preparation for the performance of specific advocacy tasks
 - d. development of skills in legal argument, opening and closing addresses, evidence in chief and re-examination, cross-examination, written advocacy and communication skills.
12. The instructors are experienced and competent advocates, trained in the Hampel method and able to explain and demonstrate advocacy skills to the pupils.
13. The AAI is committed to the pursuit of excellence in advocacy by encouraging advocates to continue learning and equipping them with the ability to analyse their work and critically assess their performance. It also teaches them to identify members of the profession as potential instructors. It trains its instructors and continues to develop their skills in order to maintain quality and consistency in advocacy training.²

The course is a hands-on workshop limited to 32 participants held at the courts for a full day. The ratio between participants and instructors is small to ensure that all

participants receive individual attention. The instructors include judges, QCs, and senior solicitors who are passionate in assisting practitioners to learn and develop their advocacy skills and techniques. All candidates should be fully prepared both in their roles as advocate (and possibly as a witness) and in receiving feedback immediately from the instructors.

The Society substantially subsidises the cost of this course for QLS members to enable our practitioners, particularly our younger colleagues, to participate. There are four levels to the AAI course:

1. foundations
2. advanced trial skills
3. advanced witness handling
4. appellate skills.

The intention is that a practitioner can build on their skillset by advancing through the levels. The Society has recently conducted a speciality course in the family law area at the Family Court which was very well received. We are also bringing the course up to Cairns on 21-22 June 2019.

Other dates of upcoming workshops can be found at qls.com.au/solicitoradvocate. We hope to continue to bring this course to our members for many years to come.

Grace van Baarle is the Manager of the Queensland Law Society Ethics and Practice Centre.

Notes

¹ The Council of the Inns of Court, 'What is the Hampel Method?', The Inns of Court College of Advocacy (web page), icca.ac.uk/advocacy-training/what-is-the-hampel-method.

² George Hampel et al, *Advocacy Manual* (Australian Advocacy Institute, 2nd ed, 2016), xxiv-xxv.

In June...

11 Introduction to civil litigation

 Introduction | 8.30am–4.20pm | 6.5 CPD

Brisbane

For junior legal staff or practitioners seeking a refresher, this introductory course will provide you with practical guidance on how to run a civil litigation file.



12 Introduction to wills and estates

 Introduction | 8.30am–5pm | 6.5 CPD

Brisbane

Develop your skills and knowledge of the legislative framework in succession law. Receive practical guidance on estate planning, estate administration and litigation.



14 World Elder Abuse Awareness Day Breakfast

 Essentials | 7–8.40am | 1 CPD

Brisbane

Join our esteemed panel for a look at the issues surrounding elder abuse. Learn how you as a practitioner can help the elderly or vulnerable maintain their rights and freedom.



14 Entrepreneurship, Productivity & Innovation Convention (EPIC)

 Essentials | 1–5pm | Networking 5–5.45pm | 3 CPD

Brisbane

Discover the latest technologies designed to boost revenue and productivity. Hear from thought leaders and practitioners who've successfully incorporated technology into day-to-day practice.



18 Disciplinary law masterclass

 Masterclass | 8.30am–12pm | 3 CPD

Brisbane

Expand your understanding of civil standard of proof. You'll learn how to deal with evidence when acting for clients in disciplinary proceedings and you'll also hear insights from the Bench as they review the test of unreasonableness.



20 Criminal law advocacy

 Essentials | 8.30am–12pm | 3 CPD

Brisbane

Improve your advocacy skills and learn to effectively prepare and present at trial. Learn best practice principles for domestic violence, trial advocacy and procedure.



21 Legal matter management

 Essentials | 8.30am–12pm | 3 CPD

Cairns

Learn how to successfully attract and retain your clients.



21 Solicitor Advocate Course: Foundations

21–22 |  SAC | 5–7pm, 8.30am–4pm | 9 CPD

Cairns

Increase your skills and deliver more persuasive and effective advocacy.



26 Domestic and family violence workshop

 Essentials | 8.30am–12pm | 3 CPD

Brisbane

This workshop will review Queensland domestic violence laws. Covering the factors that constitute domestic violence, how these laws are used and enforced, as well as key cases and legal issues. This workshop will also cover trauma informed practice and advocacy.



27 Water allocations, licences and water access agreements

 Essentials | 12.30–1.30pm | 1 CPD

Livecast

Stay up to date with the latest developments in rural and regional property practice. Gain valuable information on water allocations, licences and water access agreements, and much more.



SOLICITOR ADVOCATE COURSE Increase your skill base for advocacy work in courts and tribunals



INTRODUCTION Understand key concepts and important aspects of a topic to better support your team



ESSENTIALS Gain the fundamentals of a new practice area or refresh your existing skillset



MASTERCLASS Develop your intermediate skills and knowledge in an area of practice

SUFFER THE LITTLE CHILDREN



BY TONY KEIM

Hundreds of caged children as young as 10, sharing prison-style common areas with pedophiles, locked up for weeks in solitary confinement and wanting nothing more than to speak to their mothers.

Such tales of horror are tragically commonplace around the globe in third world countries.

However, this bleak picture is a snapshot of today's Queensland – a bountiful and sun-drenched so-called “smart state” in which children aged 10–17 who face criminal charges are left languishing in high-security police watch houses for up to 40-days at a time, locked in cells alongside hardened dangerous criminals and sex offenders.

It is an absolute disgrace and simply outrageous to think that this practice was ever allowed to happen in the first place...

Bill Potts, QLS President

The recent ABC Four Corners program *Inside the Watch House* detailed dozens of cases revealing the appalling treatment of children in watch houses across the state – but particularly in Brisbane, where up to 70 children were being warehoused in austere and tiny concrete cells, furnished with little more than a thin foam mattress, blanket and a toilet pedestal.

Before the airing of the program, QLS President Bill Potts issued a public statement labelling the detention of children in police jail cells as a disgrace and called for an end to the practice.

“It is an absolute disgrace and simply outrageous to think that this practice was ever allowed to happen in the first place, let alone be considered an ongoing way of detaining any young child,” Mr Potts said.

SNAPSHOT

Queensland's youth justice statistics paint a very bleak picture for the state's most vulnerable people – its children – with at least one out of every 100 children aged 10 to 17 exposed to the criminal justice system.

Figures gathered by the state's Department of Child Safety, Youth and Women for 2017-18 reflect a youth justice system in crisis – with 175 of the 210 children held in detention on remand, spending on average 36 days in custody waiting for their day in court.

And of those 210 children – almost 150 ordered into custody were either Aboriginal or Torres Strait Islanders.

The *Youth Justice Pocket Stats 2017-18* show that of Queensland's **490,111** children aged between 10 and 17, **4017** were convicted of "proven offences" totalling **31,090**.

Of those crimes, **401 children** were responsible for almost **13,700** of the more than **31,000 offences**.

Types of offences recorded:

- 30% Theft and related offences (including cars 8%)
- 18% Break and enter/burglary
- 9% Property damage
- 6% Trespass
- 5% Assault
- 0.9% Robbery
- 5% Traffic and vehicle regulatory offences
- 0.7% Dangerous or negligent traffic offences
- 5% Illicit drug offences
- 8% Justice procedure offences (such as resist police)
- 5% Public order offences
- 4% Fraud
- 0.5% Sex offences
- 2.5% Other unspecified offences



36 DAYS

is the average amount of time children are left waiting in custody



"QLS is aware that overcrowding in watch houses and remand centres has been a systemic problem for many years.

"The latest figures relating to children are symptomatic of a criminal justice system under immense operational strain. We know there are many reasons for this and there are no magic or simple solutions to the problem.

Mr Potts said there was no further need for another inquiry on the topic after the *Atkinson Report on Youth Justice*, released in July last year, had already identified and recommended 77 areas for reform – the majority of which propose strategies and programs for the diversions of children away from the courts and custody.

"QLS has strongly advocated for youth justice reforms for many years and, like the Atkinson report, has placed an emphasis on the need to address myriad social issues that will prevent

children from offending in the first place, rather than correct the situation after they've offended or have been detained," he said.

"When children start their lives, none of them aspire to be criminals. We know that a majority of juvenile offending is a part of a much deeper and more complex set of problems in a young person's life.

"We also know that petty crime and factors such as broken homes, abuse, social exclusion or disadvantage, mental health problems, disability, drug abuse, truancy and a lack of opportunities or hope are strongly connected.

"In many ways, rates of juvenile offending tell us that parts of our community are broken and need to be fixed."

Mr Potts conceded it would be irresponsible and an unacceptable risk of danger to the community if potentially dangerous young

accused were simply released on bail purely due to the lack of adequate space in properly resourced child detention centres.

"However, it is totally appropriate that alternative facilities be considered, such as properly staffed and supervised halfway houses or 'youth bail houses' which have proven successful in Townsville," he said.

"Everyone wants young offenders to gain the skills and desire to be positive and contributing members of the community rather than falling between the cracks and becoming another member of the revolving door community of life-long criminals.

"If we don't start to tackle it now, when?"

In next month's *Proctor* we will take a closer look at the issue of youth justice and speak to people who deal with the issue on a daily basis.



YOUTH JUSTICE FUNDING & PROGRAMS

BY TONY KEIM

More than \$550 million in state government funding has been committed to youth justice reforms since new laws were enacted to remove 17-year-olds from the adult criminal justice system 20 months ago.

A considerable amount of funding – \$320 million – has been earmarked to expand existing detention centres and properly staff them.

However, \$230 million has been committed to programs and resourcing to better support services and access to justice initiatives, including the funding of a new Specialist Children's Court magistrate.

QLS has publicly praised the state government for investing in a raft of much-needed juvenile justice reform, but Society president Bill Potts says more funding is needed.

Child Safety, Youth and Women Minister Di Farmer said in April the state government was focused on the reduction of offence rates and prevention of juveniles ever being placed in detention.

"We can't keep doing the same thing and expect a different result – we need to invest in programs and initiatives which work," Ms Farmer said.

"For example...our Transition 2 Success program, which helps young people into the workforce or back to school, and... (many) restorative justice programs (reduce youth crime).

"There is good evidence to show that these programs work to prevent re-offending.

"Of the young people who go through Transition 2 Success programs or Restorative Justice conferencing, almost six out of 10 don't go on to reoffend."

Other initiatives to be funded during the reform process include:

- community youth responses to crime hotspots in three locations: Brisbane, Ipswich and Cairns
- enhanced youth and family wellbeing in partnership with Indigenous Family Wellbeing Services
- a transitional hub to divert young people from police custody in Mount Isa
- community-based supervision by Queensland Police for high-risk young people on bail in South-East Queensland
- eight specialist multi-agency response teams
- extension of funding for an additional Specialist Children's Court magistrate
- a Queensland Youth Partnership initiative with the retail sector to divert young people from crime
- continuing the Townsville Community Response including the High-Risk Youth Court, After Hours Youth Diversion Services and Cultural Mentoring.



EARLY INTERVENTION THE KEY

YOUTH JUSTICE REFORMS

Youth justice advocates from all sectors of government, their various agencies, academics and community interest groups are arguably united in the desire to head off juvenile crime via early intervention of children before or immediately after they enter the youth justice system.

QLS has advocated strongly for an emphasis to be placed on diversionary strategies to keep children out of courts and detention centres, and given the chance of effective rehabilitation and support programs, along with other sections of the legal community such as the Law Council of Australia.

Society President Bill Potts told *Proctor*: “The Society has campaigned long and hard for considerable reform in the youth justice space to guarantee the focus was on preventing crime before it happened, rather than inflicting punishment and onerous rehabilitation requirements.

“QLS will continue to advocate for just and workable laws that both protect the community and strike a balance between deterrence and rehabilitation of young offenders.”

Law Council of Australia President Morrie Bales, in a recent written statement, said critical problems existed in Queensland’s youth justice system which must be addressed expeditiously.

Mr Potts said the answers and measures needed to provide proper youth justice reform in Queensland had already been addressed, with the 77 recommendations made in the *Report on Youth Justice*, headed and by retired and highly respected police commissioner Bob Atkinson.

In the report, released in June last year, Mr Atkinson identified “The Four Pillars” that had to be adopted by the government’s youth justice policy to affect change.

The pillars assert that early intervention, keeping children out of the courts and custody, and reducing offending were the keys to providing the best opportunities for children who offend.

“By intervening early when risk factors associated with anti-social or criminal behaviour are evident, there is a much greater chance of preventing a child’s later involvement in the criminal justice system and improving their life outcomes,” Mr Atkinson’s report says.

“Where children offend or come to the attention of police, it is critical that a focus is maintained on keeping children out of court, by way of police diversions accompanied by non-court support options.

“If children can’t be kept out of court, all efforts should be made to keep children out of custody prior to and following an appearance in court.

“The best chance of reducing reoffending behaviour among children is delivering evidence-based interventions that address their individual risks and needs determined by assessment, and that are delivered with the right intensity and frequency.”

Key recommendations of the report include:

- continued investment in early intervention to prevent youth offending
- intervention and support for parents as early as the pre-natal stage
- greater collaboration between the Department of Child Safety, Youth and Women; the Queensland Police Service; and the Children’s Court
- more alternative and flexible schooling options for young people at risk of disengaging from education
- keeping minor offences out of the court system
- reducing the number of young people in youth detention
- options to divert young people away from the youth justice system.



HAVE YOUR SAY
#qlsproctor | proctor@qls.com.au

READ MORE

Another youth detention article is available to read at qls.com.au/youthdetention ▶



Base levy GFI rates for 2019-20 at all-time lows

On 29 April 2019 Queensland Law Society Council approved a levy model for 2019-20 with the gross fee income (GFI) rates held, for a third successive year, at all-time low levels.

The ability to deliver such low rates is in no small part due to the profession actively embracing Lexon's risk management message. While cyber-related claims have been a developing problem in recent times, the response from insured practices to our suggested risk mitigation strategies has been strong and the consequent claims cost has been relatively well contained. Further, our overall claims experience for the 2018-19 year to date has also been very good and this has, to a large extent, offset the subdued performance of our investment portfolio.

You will recall that we are seeking to avoid "nasty surprises" for the profession and it is therefore particularly pleasing that QLS Council and Lexon have been able to leave rates unchanged for a third straight year. The scheme's robust management and strong financial position means these low rates remain consistent with the long-term sustainability of the insurance scheme.

On another note, the work we do in the risk and claims management areas has been recognised, with Lexon being named a finalist in the Australasian Law Awards category for Insurance In-house Team of the Year. With other finalists coming from the commercial sector and including names such as AIG and Suncorp, it is fantastic recognition for the unique work we are privileged to be able to do for the legal profession.

Areas of law practised in Queensland

The graphic below depicts the comparative size of the areas of law (by GFI) practised by Lexon insureds over the period from 2015 to 2018.

Personal injuries work remains the largest area of activity – consistently at or about 19%. Some interesting trends are starting to emerge in other areas, with residential conveyancing continuing to diminish – dropping a full 1% from last year to 11.40% – and commercial conveyancing also reducing. This reflects the more subdued property market.

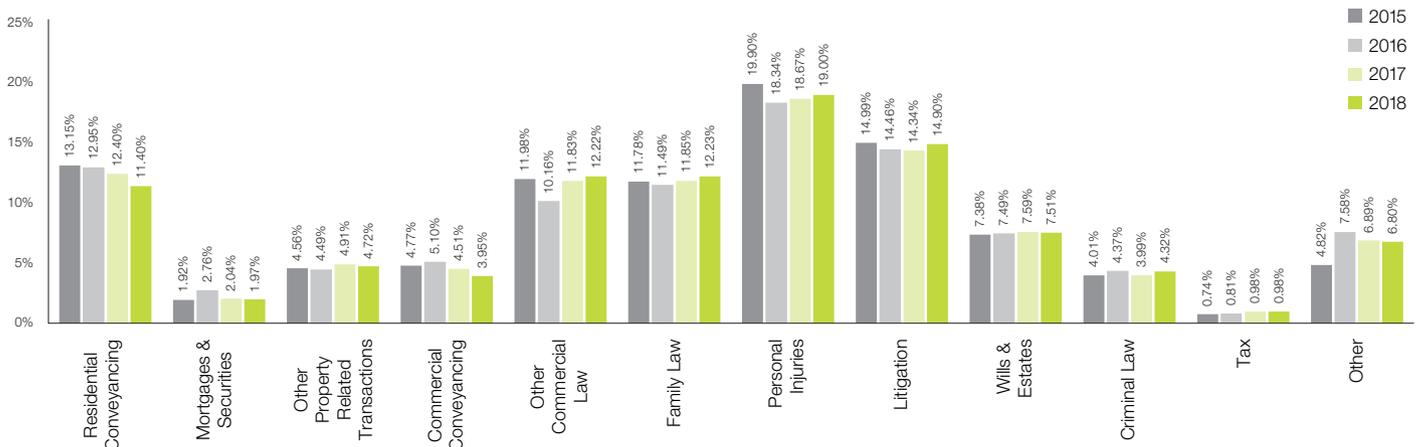
On the other hand, we have seen increased activity in both family and commercial law. Going forward, the data we collect will continue to reflect the ever-changing economic conditions.

Lexon-insured practices now generate around \$2.2 billion of annual GFI, having grown over 3.5% year on year. This is in line with the average growth rate we have seen since 2010 and suggests that the profession remains in a relatively healthy state.

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

Michael Young
CEO

The comparative size of practice areas from 2015 to 2018



Top-up insurance now available!

QLS Council has arranged with Lexon to again make top-up insurance available to QLS members who would like the additional comfort of professional indemnity cover beyond the existing \$2 million per claim provided to all insured practitioners.

This option is available at very competitive rates and practitioners have the choice of increasing cover under the Lexon policy to either \$5 million or \$10 million per claim.

This offering comes with the full backing of Lexon and ensures access to its class-leading claims and risk teams in the event you require their assistance.

Benefits include:

- Greater protection in the event of a significant loss event.
- Follow form cover.
- No need to notify a claim or circumstance twice.
- You deal with Lexon – the Queensland profession's insurer.
- Competitive pricing.
- Simplified application process.

If you are interested, please speak with the Lexon team or go to lexoninsurance.com.au for further details, including our privacy statement and important information about our ASIC class order relief.

Simplification of Conveyancing Protocol from 1 July

The release of the Conveyancing Protocol in 2006 helped practices to manage risk and has coincided with a substantial reduction in conveyancing-related claims.

Over the years Lexon has also released further practical risk packs, which include Checklists, Letters and LastChecks, to assist with the implementation of the protocol elements.

Following a consultation and review process with the profession, and with a view to making the adoption of Lexon's risk strategies as simple as possible, we are pleased to announce that from 1 July 2019 the Conveyancing Protocol will be simplified to only comprise the various Checklists, Letters and LastChecks published by Lexon from time to time. In addition, you will see that we have streamlined the Checklists and added some further Checklists and simple letters to deal with the conveyance process.

Finally, the full implementation of the tools referred to above (or comparable tools) should, in the normal course, provide a simple way to avoid a Conveyancing Protocol deterrent excess in the event of a claim.

We trust conveyancers will welcome these changes.



Did you know?

- If you are a sole principal practice and would like to access Lexon's free HelpNow program in the event of an emergency, please make sure you have in place an enduring power of attorney with a financial power or, if an ILP, an attorney for the entity. Otherwise, if a sole principal loses capacity (say in a car accident) Lexon is unable to deploy its HelpNow program unless and until a receiver is first appointed to the practice.
- Acquiring another practice or taking on a principal or legal staff from another practice may activate the 'prior practice rule'. This can affect how your levies are calculated and could mean you assume responsibility for the acquired entity's claims performance. You can find out what to look out for and ways to minimise this risk – like using the Acquisition Endorsement which was introduced for the 2014/15 insurance year – in an information sheet available on the Lexon website (lexoninsurance.com.au).
- We remind practitioners acting as directors or officers of 'outside' companies (or any other body corporate) that the Lexon policy only responds to claims arising from the provision of legal services. Practitioners who assume those roles may wish to seek appropriate advice as to whether they have, or require, directors' and officers' insurance.



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QUEENSLAND TACKLES

‘REVENGE PORN’

While Queensland Parliament this year passed a Bill to penalise those guilty of ‘revenge porn’ offences, **John-Paul Mould** and **Shane Ulyatt** suggest that the new legislation may need amendment.



BUT HOW WORKABLE IS THE NEW ACT?

Revenge porn' legislation – the *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Act 2019* – was assented to on 21 February.

The Act brings Queensland in line with other states and territories which have enacted similar legislation.¹ The Queensland Act goes further than addressing what the media has labelled 'revenge porn', as it raises more questions than it answers.

The Act essentially makes it an offence for a person to distribute or threaten to distribute an intimate image or prohibited visual recording.

'INTIMATE IMAGE'

An 'intimate image' is defined in the newly amended s207A of the *Criminal Code* (the Code).

Firstly, the definition captures a situation in which a moving or still image depicts "the person engaged in an intimate sexual activity that is not ordinarily done in public". Regrettably, none of these phrases are defined, even though s229E of the Code lists activities for another offence involving prostitution. This eerie omission raises these issues:

- The use of the word 'activity', as opposed to 'an act', which we would normally see in legislation, is obviously intentional. And there is a difference. An act is something done or a deed, whereas activity is the state or quality of being active. If the image depicts a person alone in a position of sexual restraint, arguably this is not sexual 'activity'?
- When does a person stop becoming 'engaged' in the activity? Would a post-coital image fall through the gaps?
- Does the phrase 'not ordinarily done in public' refer to the person whose image is depicted, or is an objective test applied? If it is the former, surely a person who is normally a sexual exhibitionist would have no protection under this legislation?

Secondly, both an 'intimate image' and a 'prohibited visual recording' are also defined to mean an image of "the person's genital or anal region, when it is bare or covered only by underwear". With one precondition being 'bare', literally this means that a person's genital or anal region which is covered in paint or a tattoo is not a proscribed image. Arguably ss14A and 14B of the *Acts Interpretation Act* (Qld) would resolve the issue by compelling the court to imply the best purpose of the legislation and/or resort to *Hansard* instead to avoid a manifestly absurd or unreasonable interpretation.

Thirdly, an 'intimate image' is defined to mean the bare 'breasts' of a female, transgender or intersex person. This raises two issues:

- What is the situation regarding an image which only depicts one breast? Luckily, s32C of the *Acts Interpretation Act* (Qld) provides that answer: In an Act, words in the plural include the singular.
- When is a chest a breast? The use of the term 'breasts' has been held in New South Wales as connoting a visible degree of sexual development, excluding the chest of a prepubescent female child.² Does it follow that an adult with no sexual development also falls within this category?

An 'intimate image' also includes an image that has been altered or 'photo-shopped' to appear to show any of the things referred to above. The obvious mischief in that provision arises from the situations in which, for example, a parody cartoon depicts a person's genitals with someone else's head performing a sexual activity and/or when the image is a close-up of the person's intimate region.

The prosecution obviously bears the onus of proving the image is indeed of the person alleged. What happens if the defence challenge identification? This is not matter for expert evidence, but a matter for the tribunal of fact alone. To avoid a traumatic experience for victims, and an embarrassing situation for a presiding magistrate, should there be evidentiary presumptions put in place and a reversal of the evidential onus of proof upon the defendant?

PROHIBITED VISUAL RECORDING

A 'prohibited visual recording' is also defined by the new s207A of the Code. It raises some interesting unanswered queries as well.

Firstly, why just 'visual'? If there are sound recordings of a person involved in sexual activity, for instance, surely those recordings should be afforded the same treatment?

Secondly, the definition includes a recording "in a private place or engaging in a private act, made in circumstances where a reasonable adult would expect to be afforded privacy".

'Private act' is defined as someone showering, bathing, using a toilet, engaged in an activity when the person is in a state of undress, or intimate sexual activity that is not ordinarily done in public.

However, 'private place' is defined as meaning a place where a person might reasonably be expected to be engaging in a private act.

Does it not follow, for instance, that it is no offence to distribute a recording of a person urinating on a wall in an alley next to a nightclub?

DISTRIBUTION

The new s223 of the Code now refers to distribution of an intimate image of another person when there is a lack of consent and when done in a way that would cause the other person distress reasonably arising in all the circumstances.

The term 'distribute' is defined broadly in s207A. It includes to communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not; to make available for access by someone, whether by a particular person or not; to enter into an agreement or arrangement to distribute; and to attempt to distribute.



CONSENT

Consent is defined under s227A as meaning consent freely and voluntarily given by a person with cognitive capacity to give the consent. A person under 16 years of age is taken not to have consented.

The Act is silent about whether consent of the victim must be expressed or can be implied, for example, by conduct. Is the consent of porn stars impliedly given for the distribution of images contained in their films, or for those images not contained in their films?

It is also silent about whether consent once given can later be revoked, expressly or impliedly.

DISTRESS

The Act is silent about what is relevant in determining whether someone would be 'distressed'. The South Australian legislation helpfully lists relevant factors such as the age and characteristics of the victim, whether the communication was anonymous or repeated, how widely it was circulated and the context in which it appeared. Could a person be held to be distressed if the image distributed was already published worldwide or to persons who had already seen it? Could a person be held to be distressed if the image was commercially available, but if a defendant distributed it to the person's family knowing they had not seen it?

When should the distress test be applied – at the date of distribution, upon revocation of consent or at the date of hearing?

Interestingly, s223 (3) states that it is immaterial whether the person who distributes the image intends to cause, or actually causes, the other person distress.

KNOWLEDGE

The combination of the Queensland Act's definition of consent and the absence of a person's actual distress raises a very important question: Does the person depicted in the image actually need to know of the distribution of the image at all?

Arguably, the use of the second limb imputes knowledge as a requirement – that is, how would a person be distressed in circumstances in which they did not even know about the image being distributed? On the other hand, actual distress is immaterial.



If actual knowledge by the person whose intimate image is distributed is not a requirement, this potentially proscribes any intimate image, for instance, if someone receives and redistributes on Facebook an image involving someone they have never known, a practice extremely common in this day and age. It exponentially broadens the scope of potential offenders and takes the issues well beyond the mischief of punishing jilted lovers.

The ACT and NSW equivalents are much clearer on how far their provisions extend. Sections 72C and 91P/Q respectively require that the alleged offender knows the other person does not consent to the distribution, or is reckless about whether the other person consents to the distribution.

The SA version, however, is more constrictive and realistic, requiring knowledge or constructive knowledge on the part of the defendant that the victim does not consent to the distribution of the image.

The situation is certainly not clear and requires urgent amendment.

DEFENCES

The new s223(4) of the Act provides that it is a defence to a charge of an offence if the defendant's conduct constituted the offence for a genuine artistic, educational, legal, medical, scientific or public benefit purpose, and the person's conduct was, in the circumstances, reasonable for that purpose.

This raises some interesting queries as well:

1. If the images were distributed by a lawyer relying on the 'legal' defence to distribution in a trial in an attempt to discredit a witness during cross-examination, which attempt was later held to be unreasonable, could the lawyer then be charged with the offence?
2. What is 'public': the public at large, the Australian public, or the audience to whom the images are distributed? There is no definition provided in the Act. If 'public' was limited to the audience of the image, is the test to be applied objective, subjective, or both? If the latter, could the 'public benefit' defence be raised by merely giving evidence from the audience that they indeed benefited from the distribution of the image?
3. Why is no defence specifically available to intermediaries who host and make available content, such as internet service providers or social media platform providers? Certainly they could rely on s23 of the Code if they were unaware of the content. But what would be their culpability if it was brought to their attention and they still did not remove it?

SUMMARY

This new legislation needs a lot of work to avoid potential injustices and consequences it was clearly not enacted to address. If the questions raised in this article are not addressed by further amendment, then lawyers, prosecutors and magistrates will be left trying to interpret this law in the courtroom and that situation is definitely not of public benefit!

John-Paul Mould is a Queensland barrister and Shane Ulyatt is an Associate Director at Greenhalgh Pickard Solicitors.

Notes

¹ For example, *Crimes Act 1900* (ACT), s72C; *Crimes Act 1900* (NSW), ss91P and 91Q; *Summary Offences Act 1953* (SA), s26B/C; *Summary Offences Act 1966* (Vic.), s41DA/DB; *Summary Offences Act 1923* (NT), s47(e-f); *Criminal Code* (NT), s208AB. Tasmania and WA have no statutory equivalents. See also *Criminal Code Act 1995* (Cth), s474.17.

² *Turner v R* [2017] NSWCCA 304 at [59] and [121].

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QLS advocacy in action

The elder abuse awareness campaign

BY PIP HARVEY ROSS



The Queensland Law Society elder abuse awareness trial campaign run in 2017 sparked an increase in calls to the Elder Abuse Prevention Unit (EAPU) helpline.

The trial was launched on World Elder Abuse Awareness Day, as a joint initiative between QLS and the Australian Medical Association Queensland. It provided doctors in 321 GP clinics in the North Brisbane area with resources to assist in identifying the symptoms of elder abuse. GPs were provided with referral options for patients, with a focus on the EAPU Elder Abuse helpline.

The campaign was supported by articles highlighting the campaign and issues associated with elder abuse in *Quest* newspapers. Advertising materials were posted in shopping centres, medical centres and on public transport.

The recently released EAPU 'Year in Review 2018' highlights the increase in helpline calls during the QLS campaign. The QLS trial was run concurrently with the Queensland Government's elder abuse prevention campaign. During the period of the campaigns, helpline calls increased by 62.6%. Comparatively, during the same period in 2018, the calls increased by 35.5%.

The EAPU report also provides a detailed analysis of calls received by the helpline in the 2017-18 financial year and an insight into the demographical factors of elder abusers and victims. In total, the EAPU received more than 3000 calls over 12 months.

Almost all cases of reported abuse occurred within family relationships. Significantly, 72.3% of perpetrators of elder abuse were sons or daughters of the victim and, in 45.1% of cases, the perpetrator lived with the victim. Perpetrators were almost equally male (49.4%) and female (50.6%). The most common forms of abuse reported were financial and psychological.

239 cases of abuse in consumer and social relationships (relationships without an intrinsic expectation of trust) were reported during the period. Over 40% of these related to aged care services and 27.4% involved disputes with neighbours.

The main focus of the EAPU helpline is to provide specialist advice, including information, support and referrals to anyone who experiences abuse. The helpline collects data through the narrative detailed by the caller. The data is collected and analysed to assist stakeholders to better inform policy, guide academic research and inform community education initiatives. It also forms the basis of the Queensland Government's annual Elder Abuse Awareness Campaign.

QLS will continue to support the work of the EAPU as a member of the EAPU reference group, which brings together a diverse range of stakeholders from government and non-government agencies, peak seniors groups and researchers.

The work of QLS Elder Law Committee

The QLS Elder Law Committee continues to be involved in a range of initiatives and consultations affecting older people, including advanced care planning discussions and supported elder mediation programs.

Most recently, QLS was pleased to see a number of significant changes brought about by the *Guardianship Administration and Other Legislation Amendment Act 2019*. The committee also contributed to the submission to the Queensland Government inquiry into aged care, end-of-life and palliative care and voluntary assisted dying.

As highlighted in the May edition of *Proctor*, QLS called on the federal political parties to implement the recommendations of the Australian Law Reform Commission's report, 'Elder Abuse – A National Legal Response', and other important recommendations from the 'Not Now, Not Ever' report. The QLS Call to Parties Statement urged the parties to recognise and act on the extensive evidence and research which indicate the need to take immediate action on elder abuse.

QLS is aware of the significant cost of legal assistance and the need for pro bono lawyers and community legal services to be equipped to handle cases of elder abuse, particularly in regional, rural and remote areas. The QLS Call to Parties Statement called for additional funding for legal services for people suffering elder abuse and for increased funding to services such as the Office of the Public Guardian and the Australian Aged Care Quality and Safety Commission.

QLS will continue its work to reduce elder abuse in Queensland by raising awareness and advocating for support services and protection for older Australians.

Royal Commission into Aged Care Quality and Safety

The Royal Commission into Aged Care Quality and Safety was established on 8 October 2018 by the Governor-General.

The commission is required to investigate the quality of aged care services provided to Australians and the extent to which those services meet the needs of the people accessing them, the extent of substandard care being provided, including mistreatment and all forms of abuse, the causes of any systemic failures, and any actions that should be taken in response.

Useful links:

Royal Commission into Aged Care Quality and Safety:

agedcare.royalcommission.gov.au.

Queensland Government Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying:

parliament.qld.gov.au/work-of-committees/committees/HCDSDVPC/inquiries/current-inquiries/AgedCareEOLPC.

Elder Abuse Prevention Unit:

eapu.com.au.

The commission will also consider the best way to deliver aged care services, and the future challenges and opportunities for delivering accessible, affordable and high-quality aged care services in Australia.

The QLS Elder Law Committee is compiling its contribution to the QLS submission to the Royal Commission into Aged Care Quality and Safety in conjunction with the QLS Health and Disability Law Committee and QLS Succession Law Committee.

The QLS Elder Law Committee welcomes any feedback from the membership on policy reform relating to elder law issues – email policy@qls.com.au. QLS submissions on these and related issues are available at qls.com.au/submissions.

World Elder Abuse Awareness Day Breakfast

Strengthening your understanding of elder abuse will help you to assist your older or vulnerable clients in maintaining their rights and freedom.

This month's World Elder Abuse Awareness Day Breakfast on 14 June will shine a spotlight on essential issues and the role of practitioners. Hear from an esteemed panel of experts comprising Christine Smyth, Justice Martin Daubney AM, Brian Herd and Kirsty Mackie.

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Pip Harvey Ross is a QLS legal policy clerk.

Planning your trial plan

REPORT BY KYLIE DOWNES QC AND WILL LeMASS



The preparation of an effective trial plan is not simply an administrative task. It requires the parties to make key tactical decisions as to how their case will be presented at trial.

A comprehensive trial plan is an essential part of the proper preparation of a case for trial.

This article identifies the key features of a comprehensive trial plan and the issues which can arise in its preparation.

Timing

In the Supreme Court, the parties are required to confer for the purpose of developing a basic trial plan “[a]s early as reasonably possible in the proceeding”.¹ The conference must be attended by the parties’ counsel or solicitor responsible for the conduct of the trial.²

The trial plan must be prepared ahead of the case management conference before the Resolution Registrar under the Supreme Court’s pre-trial case management for civil litigation procedures.³

In some instances, a trial plan may be required earlier in the proceedings, for example; to assess whether the trial of a separate issue is worthwhile.⁴

Basic parameters

As a general rule, at trial there are five hours of hearing time available per day. Whilst it is a matter that varies among courts and individual judges, typically, the court will sit between 10am and 1pm, and 2.15pm to 4pm or 4.30pm.

The trial plan must program all of the submissions and evidence within those timeslots. The trial plan should address each of the following tasks:

- housekeeping and preliminary matters
- opening submissions
- for each witness:
 - examination in chief (or objections to evidence, if evidence in chief is by affidavit)
 - cross examination
 - re-examination
- closing submissions.

It is important that the parties are realistic in the time allocated to each witness. While key witnesses may occupy substantial time, witnesses on minor or formal points will often be dealt with very briefly. Ordinarily, re-examination will be brief, and can usually be allowed 5 or 10 minutes in the trial plan.

If witnesses are allocated too much or too little time, this can lead to inefficiencies at trial and require the solicitors to, at the last minute, arrange for other witnesses to come to court at short notice. Giving evidence is a stressful task, and it is not assisted by being called on to do so at an unexpected time.

Special considerations apply on the extent to which witnesses may be cross examined by multiple parties with a common interest.⁵ The parties should be aware of these principles when allocating time for cross examination in the trial plan.

Content

The Supreme Court publishes a template trial plan.⁶ This template is a helpful starting point and should be used. The template may be enhanced by the following additions:

- The template does not include a time allocation for re-examination. While re-examination will usually be brief, it ought to be factored into the trial plan.

- The template does not allow time for objections to evidence. If evidence in chief is by affidavit, an additional period should be allowed for objections.
- The template does not include a time allocation for preliminary or ‘housekeeping’ matters at the commencement of the trial. While matters of this nature should be kept to a minimum (as they should be addressed in advance of the trial), it is inevitable that there will need to be some time to address the court on administrative matters such as trial bundles and witness arrangements.
- The template is separated into days. Each day should be further separated into a morning and afternoon session.
- In preparing the trial plan, it may assist the parties to include an additional column keeping a tally of the time allocated to all of the witnesses in each day to ensure that it does not exceed five hours in total.

The Supreme Court template also requires that the parties identify the issues to which each witness’s evidence relates. So as not to complicate the trial plan, this should be done in a very brief way.

Strategic considerations

Preparation of the trial plan requires the parties to make at least three key strategic decisions.

First, the sequence of the parties’ opening submissions, evidence and closing submissions. Unlike other states,⁷ the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) does not set out a default order for addresses and evidence. The traditional order is that the plaintiff opens its case, followed by calling all of its witnesses. The defendant then opens its case, followed by its witnesses. The defendant then makes its closing submissions first and the plaintiff thereafter. There are alternative structures, including both parties opening their case

at the beginning of the trial, although any departure from the traditional approach is a matter for the trial judge.

Second, if orders of this nature have not already been made, the parties must turn their minds to whether evidence in chief should be given orally or by affidavit. In proceedings started by claim, evidence will be given orally unless there is an order to the contrary.⁸ There is a widely held view that, in cases involving witness credibility, evidence in chief should not be given by affidavit.⁹ In most cases, the trial judge is likely to benefit from seeing and hearing the witnesses give their evidence first-hand.

Third, the order of witnesses. This is a matter that trial counsel should contribute to as it involves questions of strategy and tactics, depending on the strengths and weaknesses of each witness. The order will also need to take into account any genuine witness unavailability. Experts in the same field should give evidence concurrently or consecutively, if possible.¹⁰

Disagreement

If there is disagreement between the parties on the likely duration of the trial, or readiness for trial, that may be addressed by the Resolution Registrar or the court.¹¹

When the parties cannot agree on the appropriate structure of the trial, competing trial plans may be addressed by the Resolution Registrar¹² or adjudicated by the court.¹³ However, in most cases, the parties should be able to resolve the trial plan amongst themselves.

Risks

There are two key risks to be aware of in preparing the trial plan.

First, inclusion of a witness in a trial plan, followed by an unexplained failure to call that witness, may strengthen the grounds for the drawing of a *Jones v Dunkel* inference.¹⁴ Before identifying a witness in a trial plan, the party doing so should be confident that they will call that witness at trial.

Second, if a trial plan is too ambitious and allocates too little time, the trial may not finish within the allocated days and will be adjourned part-heard. This is not only inconvenient for the court and the parties, but can create a real tactical disadvantage if the break between the adjourned trial and the resumption is significant.

Kylie Downes QC is a Brisbane barrister and member of the *Proctor* Editorial Committee. Will LeMass is a Brisbane barrister.

Notes

- ¹ Supreme Court Practice Direction 18 of 2018 at [31].
- ² *Ibid* at [32].
- ³ Available at courts.qld.gov.au/court-users/practitioners/pre-trial-case-management-in-the-supreme-court.
- ⁴ As occurred in *Byrne v People Resourcing (Qld) Pty Ltd* [2014] QSC 39 at [19].
- ⁵ *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd* (1990) 20 NSWLR 15 at 22-23.
- ⁶ Above, n3.
- ⁷ For example, *Uniform Civil Procedure Rules 2005* (NSW), r29.6.
- ⁸ UCPR, r390(a).
- ⁹ *Plumley v Moroney* [2014] QSC 3 at [50] and [51].
- ¹⁰ Supreme Court Practice Direction 18 of 2018 at [30](e).
- ¹¹ *Ibid* at [36].
- ¹² *Ibid* at [37].
- ¹³ For example, see *Wagner v Nine Network Australia* [2019] QSC 61.
- ¹⁴ The inclusion of a witness in a trial plan, and an unexplained failure to call that witness at trial, was noted in *Matton Developments Pty Ltd v CGU Insurance Ltd (No.2)* [2015] QSC 72 at [82] and [84]-[86] in the context of a *Jones v Dunkel* submission.

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Contested probate and *Larke v Nugus*

Is it law in Australia?

WITH CHRISTINE SMYTH



“Listen here love, there is a proverbial 50-foot wall between Coolangatta and Tweed Heads when it comes to practice and procedure, so your guidance note does not mean squat in New South Wales.”

That was the clear, if inelegant, submission put to me over the phone many years ago by a NSW practitioner when I asked him to provide me with a *Larke v Nugus* statement.

While there was much wrong with what he said to me – I was not his love and there was no love lost between us – I could not escape the reality that he was correct in law as to the application of the QLS guidance note, ‘Disputed Wills (Contested Probate Matters)’, in other jurisdictions.

For this and other reasons, *Larke v Nugus* requests have always been difficult to navigate. One of the stumbling blocks has been that *Larke v Nugus* was an English decision with no jurisprudential consideration here in Australia.¹ But that has now changed with the Victorian decision of *Re Gardiner* (No.3) [2018] VSC 414 (*Re Gardiner*).²

A lengthy judgment of 44 pages, *Re Gardiner* involved an application to revoke a grant of probate on the grounds of testamentary incapacity.³ It is a worthy read for an exposition on the law of revocations of grants. Relevantly here though, in oral submissions⁴ the applicants complained of a refusal to comply with a *Larke v Nugus* request “about how the ‘chain of wills’ came to be made, including requests for copies of the will files which is not in accordance with the English decision of *Larke v Nugus*”.⁵

Acknowledging that their submissions did “not relate to the issue of the prima facie case put by the applicants”,⁶ MacMillan J proceeded to analyse the application of *Larke v Nugus* in Australia.⁷ While that analysis is obiter, *Re Gardiner* is the only decision in Australia to consider the case, and as such it is now part of our common law with persuasive value in all Australian jurisdictions.⁸

Strikingly, as a starting point, citing each of the decisions⁹ that have considered *Larke v Nugus*, her Honour declared:

“upon a proper consideration of the decision, it does not stand for the proposition that the applicants have a right to issue a *Larke v Nugus* letter to the plaintiffs requesting information concerning the making of the ‘chain of wills’ and the relevant will files, or that such an application creates a corresponding obligation on the plaintiffs to respond to such an application.”¹⁰

**Hark, hark! the lark
On windswept bark
Freezes against a
sky of lead!
Now see him stop,
take one small hop,
And suddenly keel
over dead!**

Ogden Nash, *The Lark*

From there her Honour distinguished the facts upon which *Larke v Nugus* was determined, reminding practitioners that it was an appeal on costs case arising from a proceedings seeking a grant of probate of a will in solemn form primarily founded in undue influence and lack of knowledge and approval.¹¹ Central to the issue of costs were the pleadings and the decision by the defendants to insist on the original matter being tried out.¹²

The questions as to who should bear the costs involved consideration of the impact of abandoning certain pleadings, how those pleadings were entwined with remaining pleadings, and the relationship the pleadings had with the materiality of the solicitor’s evidence. That in turn involved consideration of his refusal to provide the statement sought

in circumstances in which the Law Society of England and Wales made recommendation as to what a solicitor should do when a solicitor is a material witness. Ultimately, there was no order as to costs.¹³ In the context of the matter before MacMillan J, her Honour distinguished *Larke v Nugus*:

“The facts and circumstances in *Larke v Nugus* are substantially different from the applicants’ position. The applicants are seeking to establish a prima facie case on the ground of testamentary incapacity whereas the plaintiffs in *Larke v Nugus* were seeking a grant in solemn form against a challenge by the defendants on the grounds undue influence and lack of knowledge and approval. Prima facie, the contents of the will files are of minimal or no relevance to the applicants’ ground of testamentary incapacity”¹⁴ “the recommendation by the Law Society was for a statement of evidence to be provided by the solicitor executor concerning the execution of the will, not for copies of the entire will files”¹⁵ “in Australia confidentiality to a client also continues after the client’s death.”¹⁶

While distinguishing the application of *Larke v Nugus* on the facts and the pleadings, her Honour did however note the obiter of Brandon LJ as to the duties of a solicitor when their knowledge makes them a material witness.¹⁷ That is the critical aspect. First and foremost a solicitor is an officer of the court and in most jurisdictions solicitors are required to assist the court in the efficient conduct of matters before the court.¹⁸ This is especially the case in relation to probate matters.¹⁹ “[A] grant of probate is more than just a court order: it is a judicial act and proof of the validity of the will”, and “an instrument of title that binds parties and non-parties”.²⁰

While helpful, the obiter in *Re Gardiner* as to the application of *Larke v Nugus* does not stand alone and must be considered in the context of existing decisions involving the giving of evidence in probate disputes. For example, in *Gordon v Hilton*²¹ it was found that statements by testamentary witnesses to their own solicitor in anticipation of a testamentary action are not privileged. People who are witnesses to the execution of a will are considered witnesses of

the court. Accordingly, they stand in a special position²² – “the court in its inquisitorial capacity is seeking the truth as to execution”²³ – and in that context the witnesses to the execution are there to assist the court in its search for that truth. In Queensland, section 6, of the *Succession Act 1981* provides the court extensive powers in probate matters with the power to compel attesting witnesses to give evidence through, for example, rule 637.²⁴

So then, how does the guidance note reconcile with *Re Gardiner*? There are some tensions within the guidance note in light of *Re Gardiner* which are worthy of review. Namely, the considerations as to the duty to provide a statement in the context of the type of probate challenge being made, the timing of the provision of such a statement, and importantly, the provision of will files. The QLS Ethics and Practice Centre²⁵ is aware of *Re Gardiner* and is considering the issues raised; the matter has also been referred to the QLS Succession Law Committee. The tensions

around *Larke v Nugus* requests also form part of the discussion by the Law Council of Australia in its review of the Australian Solicitors Conduct Rules (ASCR), which may result in amendment of the ASCR.²⁶

As to that NSW solicitor, no point in bashing one’s head against his brick wall – I went around it.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, and Consultant at Robbins Watson Solicitors. She is an Executive Committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, member of the QLS Specialist Accreditation Board, *Proctor* Editorial Committee, QLS Succession Law Committee and STEP, and an Associate Member of the Tax Institute.

Notes

- ¹ Note that in 1998 South Australia had a rule reflecting the *Larke v Nugus* statement requirements; however that rule was not included when South Australia adopted the Australian Solicitors Conduct Rules.
- ² Note *Larke v Nugus* was referred to in the recent decision of *Albury v Sammut* [2019] QSC 105, at [50] as being merely noted as forming part of the exchange of correspondence between the parties. No analysis was undertaken.
- ³ At [38].
- ⁴ At [42] and [108].
- ⁵ At [108].
- ⁶ At [109].
- ⁷ At [108]-[120].
- ⁸ *Lipohar v The Queen* [1999] HCA 65.
- ⁹ At footnote 65 of the judgment.
- ¹⁰ At [109].
- ¹¹ At [110] of the matter for determination was a revocation of probate due to incapacity.
- ¹² At [115].
- ¹³ At [114].
- ¹⁴ At [118]-[119].
- ¹⁵ At [120].
- ¹⁶ At [120]; note however the ‘dominant purpose’ test that now applies; and that the privilege attaching to the deceased does not apply against persons interested in the estate as beneficiaries – *Russell v Jackson* (1851) 9 Hare 387; 68 ER 558; *Re Moore* [1965] NZLR 895; see also *Uniform Civil Procedure Rules 1999* (Qld) r637 – Subpoenas.

- ¹⁷ At [116].
- ¹⁸ See Australian Solicitors Conduct Rules, in particular Rule 3: “A solicitor’s duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.”
- ¹⁹ Refer to table below
- ²⁰ At [122]; see also the writer’s *Proctor* article, June 2018, ‘Probate, proof and probity discussing *McKeown v Harris & Anor*; *In the Will of Patricia Margaret Rice* [2018] QSC 87.’
- ²¹ Supreme Court of NSW, Young J, unreported, 13 October 1995 (BC9501693); see also *Re Webster* [1974] 1 WLR 1641.
- ²² *In the Estate of Fuld deceased* [1965] p405, 409.
- ²³ *In the Estate of Fuld deceased* [1965] p405, 410 per Scarman J.
- ²⁴ Consideration of this power is outside the scope of this article.
- ²⁵ My thanks go to QLS Ethics and Practice Centre Director Stafford Shepherd and QLS Ethics Solicitor David Bowles for bringing this decision to my attention. Further thanks go to QLS Ethics Solicitor Shane Budden, Tim Donlan of Donlan Lawyers, Katerina Peiros of Hartwell Legal, Chair of Browne Linkenbach Legal Services Darryl Browne, Darlene Skennar QC and Robbins Watson law clerk Rachel Mallard for their assistance with research.
- ²⁶ Law Council of Australia Review of the Australian Solicitors Conduct Rules, February 2018.

Probate	Qld	NSW	Vic.	SA
Speed/efficacy/ minimum expense	<i>Uniform Civil Procedure Rules 1999</i> – Rule 5	<i>Civil Procedure Act 2005</i> – s59	<i>Civil Procedure Act 2010</i> – s7	
Court’s discretion of factors to consider when determining costs	<i>Uniform Civil Procedure Rules 1999</i> – Rule 700A	<i>Civil Procedure Act 2005</i> -s98 <i>Uniform Civil Procedure Rules 2005</i> – Rule 42.1	<i>Civil Procedure Act 2010</i> – s29	
Efficient conduct of civil litigation	Supreme Court Practice Direction 18/2018	<i>Civil Procedure Act 2005</i> – s57	<i>Civil Procedure Act 2010</i> Part 2.3 The Overarching Obligations; s24, s25 Part 2.4 Sanctions for Contravening the Overarching Obligations	<i>Administration and Probate Act 1919</i> –

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I would like to introduce two of our librarians, Katherine Lee and Brendon Copley, who bring a wealth of experience and expertise to our library.

Brendon Copley

Research and Training Librarian

Brendon has been with the library since 2008 and is well known to library visitors. His days are mostly spent providing research and reference assistance, and providing training to legal practitioners in the use of our online legal databases.

Brendon enjoys sharing his broad knowledge with his colleagues and with library visitors.

He also has a special interest in historical legislation and judgments – he particularly enjoys research requests that require digging around our extensive collections looking for old, obscure cases.

Katherine Lee

Legal Research and Customer Support Librarian

Katherine has been with the library for just over a year. She graduated with a Masters of Information Services (Library and Information Technology) in 2017. Her interest in law libraries began when she took a course in legal research, where she gained an understanding of legal research methodologies and legal resources.

Katherine previously worked in the Queensland University of Technology Law Library, and she is experienced in using legal research databases from CCH, LexisNexis and Thomson Reuters (Westlaw).

Katherine has a passion for education and she often facilitates legal research training sessions for legal professionals. This training and ongoing support helps QLS members make

the best use of our comprehensive range of legal information resources and services.

All of us at the library support and assist Brendon and Katherine to provide professional legal research and training services to you. Don't forget – QLS members can get up to 30 minutes of free research assistance a day and can request up to 10 free documents.

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10 tips for success



BY TIM O'CALLAGHAN

Piper Alderman Deputy Managing Partner Tim O'Callaghan recently gave the keynote address at a University of Adelaide Law School prize event.

Though directed at law students, his comments—and particularly his 10 tips for career success—offer sound advice for all early career lawyers:

1. **Specialise**—More sophisticated clients expect lawyers to be highly specialised in particular areas of law or industries.
2. **Go beyond geographical boundaries**—[Brisbane-based] lawyers who are specialists can sell their services to clients based interstate or overseas, which in turn improves their credentials.
3. **Keep learning**—Continue to study as a means of gaining that speciality.
4. **Be a law tech specialist**—Technologies such as artificial intelligence-based tools and blockchain will continue to emerge and play a role in the delivery of legal services. Most of them can be embraced in law firms to help provide a better and more efficient service. The graduate who knows how to use these technologies in a practical, commercial way will be highly sought after by law firms.
5. **Collaborate**—The law firm structure has always been designed to allow lawyers to work together. In the modern law firm, collaboration between these specialists is more important than ever.
6. **Law firms are a business as well as a profession**—Modern business requires the modern law firm to produce a useful service as efficiently as possible. This helps both the client and the law firm to be profitable.
7. **It's all about the client**—We want our clients to find that their life is easier when they come to us. This means being focused on the client's problem and finding the optimal solution in the most efficient manner. This adds value and keeps law firms relevant.
8. **Best experience for its people**—The modern law firm must be committed to providing the best possible experience of a professional service firm, not only to its clients, but to its people and to the community in general.
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10. **Look after your health and fitness**—The modern law firm understands and supports the importance of fitness and recreational activity that allows its people to recharge their batteries, so make sure that you keep up those things outside of work that interest and excite you, particularly if they keep you fit and healthy at the same time. And importantly, never be afraid to turn to people for help if you are feeling overwhelmed.

For information about the Queensland Law Society Early Career Lawyers Committee Proctor working group, contact chair Adam Moschella (amoschella@pottslawyers.com.au).

Bribery and Corruption: Modern Approaches to an Eternal Problem

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Taking unfair advantage of drafting errors



BY STAFFORD SHEPHERD

You receive a final version of a contract for signature from another solicitor, but an important clause previously agreed upon has been omitted.

The omission of the clause is inadvertent; but its omission is advantageous to your client.

Do you face an ethical dilemma? What would be your response? Do you have your client sign the contract as delivered to you? Do you seek instructions from your client to bring the inadvertent omission to the attention of the other solicitor? Do you contact the other solicitor to correct the error without recourse to your client?

Rule 30 of the Australian Solicitor Conduct Rules (ASCR) helps us in resolving this ethical conundrum. The rule states:

“A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.”

When the omission is inadvertent, there is an ethical responsibility upon us to disclose their error to the other solicitor. When the ‘final’ version of a contract contains a drafter’s error, it would be unconscionable for us to permit our client to take an unfair advantage from the mistake.

This is reinforced by our fundamental ethical duties: firstly, to act in the best interests of our client (rule 4.1.1 – our client avoids the potential costs of a rectification action); secondly, to be honest in all our dealings in the course of legal practice (rule 4.1.2); and thirdly, we are to avoid actions which may compromise our integrity (rule 4.1.4).

It is also arguable that if we permitted our client to sign the contract as delivered we could also be in breach of rule 34.1.3 by using a tactic that could be said to have frustrated another person (because the client had no right to sign a document that did not reflect the parties’ agreement).

In the decision of Philip McMurdo J in *Equititrust Limited v Willaire Pty Ltd* [2012] QSC 206, a solicitor’s behaviour in not drawing to the attention of another solicitor the insertion of an amendment to an agreed settled draft was characterised as unconscionable. Also note that the solicitor criticised for the conduct had previously represented to representatives of the other party that the mortgage had been executed by the client and was to be returned.

Our duty to fearlessly represent our client is not unlimited. The client does not have the right in this situation to take unfair advantage of the obvious error to obtain a benefit which has no supportable foundation in law of fact. Indeed, for us to suggest to a client that this is an opportunity to take the benefit of the clerical omission would be not only unconscionable but a violation of our fundamental duties. It would be unprofessional to permit exploitation of the drafting error.

Judge Trager, a Federal Court Circuit judge in the United States, has decried ‘gotcha’ tactics employed by some lawyers as contributing to the low regard in which the profession is held by members of the public: *Morning Star Packing Co LP v Crown Cork & Seal Co (USA) Inc.* 303 Fed Appx 399.

This was a case in which an obvious error in drafting omitted a party to the agreement and a party was put to the expense of seeking rectification.

If confronted by this dilemma we should inform our client of the inadvertent omission and urge our client to provide instructions to us to permit us to reveal the mistake to the other solicitor. We are permitted only to follow “lawful, proper and competent instructions” (rule 8.1). We need to counsel our client as to the potential consequences of attempting to take unfair advantage of the inadvertent omission (the potential for indemnity costs in a rectification action and possibly engaging in misleading or deceptive conduct).

A client who refuses to provide instructions to permit correction of the obvious error should be informed that we cannot be a party to that behaviour and will need to withdraw from representation (we can terminate the engagement for just cause and on reasonable notice – rule 13.1.3).

Do we need the client’s instructions to inform the other solicitor of the drafting error? Rule 9 provides that any information which is confidential to a client and acquired by us during the client’s engagement must not be disclosed unless permitted by the rule. Rule 9.2.1 permits us to disclose confidential client information if “the client expressly or impliedly authorises disclosure”. The American Bar Association in *Informal Opinion 86-1518* (ABA Committee on Ethics and Professional Responsibility, Informal Op.86-1518 (1986)) has ruled:

“When the lawyer for A has received for signature from the lawyer for B the final transcription of a contract from which an important provision previously agreed upon has been inadvertently omitted by the lawyer for B, the lawyer for A, unintentionally advantaged, should contact the lawyer for B to correct the error and need not consult A about the error.”

Informal Opinion 86-1518 expressed the view that the duty of confidentiality did not preclude disclosure because the lawyer was impliedly authorised to make disclosure of information that “facilitates a satisfactory conclusion” (see Nathan M Crystal, ‘The Lawyer’s Duty to Disclose Material Facts in Contract or Settlement Negotiations’, 87 Ky LJ 1055 at 1089).

The reasoning in *Informal Opinion 86-1518* was also supported by reference to a rule that has no equivalent rule in the ASCR. Rule 4.1 of the ABA Model Rules of Professional Conduct, at the date the Informal Opinion was released, provided that a lawyer had an obligation to fulfil “reasonable client expectations”. It was said that a contract based on an obvious drafting error is not part of the client’s reasonable expectation.

Another reason advanced for implicit authority to disclose is that there is no informed decision for the client to make; the decision on the contract has already been made by the client. Mann J in *Tamlura NV v CMS Cameron McKenna* [2009] EWHC 320 (Ch) at [168] (*Tamlura*) suggests that there may be circumstances in which an implicit authorisation to disclose could arise, in that a responsible solicitor gets on with the job of implementing client instructions. His Honour said:

“He had his instructions, and on this point they had been clear for some time. They had been reinforced the day before. The responsible solicitor gets on with his job of implementing his client’s instructions, particularly bearing in mind the time pressures involved. He is not obliged to take advantage of an apparent mistake on the part of the other side, and on the facts of this case was not obliged to contact Mr Christie and Mr Vlotman to see if they wished to do so either. Had he gone along with Mrs Mares’ drafting, knowing that it might have been a mistake, it could have involved his client in a rectification action in the future (potentially based on an allegation of sharp practice), it could have involved re-drafting the circular, and it might even have involved the circular being tricky and misleading to other shareholders. If they had sought to exploit the

situation and been caught out, it might even have imperilled the transaction...But there are additional matters which demonstrate why they were not negligent in failing to go back to the client to invite him to consider taking advantage of an apparent mistake in an allotment transaction in relation to the shares in a publicly listed company. The position might have been otherwise if there had been some doubt as to whether DLA were really proposing some change in the commercial aspects, but that is not the case in this matter, and Mr Cakebread accepted that it was unlikely that this was a new proposal coming out of the blue. It was an apparent mistake, which Mr Page and Mr Aspery were entitled to correct in the fulfilment of their instructions, and that is what they did.”

Not all circumstances will suggest an implicit authority to disclose. *Tamlura* had a number of factors which pointed to such an implied authority: firstly, the instructions the solicitors held had been clear for some time; secondly, there were time constraints which required quick action; and thirdly, the drafted document, if it stood as it was, could have been seen as tricky and misleading to third parties.

Notwithstanding this view as to implicit authorisation, the better course would be to have a conversation with the client as to the risks of non-disclosure and to obtain express

authorisation. If the client provides us with the instruction to inform the other solicitor of the drafting error the dilemma disappears. If our client refuses to give us authorisation to disclose we cannot become a party to the securing of a benefit to our client which has no supportable foundation in law or fact.

We must then terminate the client engagement for just cause and provide the client with reasonable notice (rule 13.1.3). If we withdraw, should we disclose the drafting error to the other solicitor? Our duty of confidence binds us even after the engagement has been terminated.

Unless there exists an exception to the duty or we are permitted by the rules to disclose, then we are bound to retain the confidences of the client acquired during the client’s engagement.

In summary, we cannot permit a client to take advantage of an inadvertent drafting error of the other solicitor. This is consistent with the purpose of contract law, that the agreement reflects the parties’ actual agreement. It is reinforced by rule 30 and our fundamental duties.

Stafford Shepherd is the Director of the Queensland Law Society Ethics and Practice Centre.

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LawCare: For better or worse, in sickness and in health

BY NADIA STEFYN



In the legal profession, demanding workloads, conflicting priorities and long hours can be all too common, resulting in burnout, anxiety and other serious health issues.

Often, talking to a mental health professional can make all the difference in managing work and life.

One of the many benefits of Queensland Law Society membership is getting this kind of support through LawCare.

LawCare provides you, your support staff and your family with up to six complimentary counselling sessions per issue plus a range of mental health and wellbeing resources to turn to during times of stress.

But did you know LawCare isn't just for getting you through hard times? It's also available for proactive mental health and wellbeing care such as personal and professional development, mental fitness and resilience-building to pave the way for a more sustained, positive and healthy future.

To continue providing a high level of care, LawCare recently switched providers to Converge International, an organisation that's been supporting workplace mental health for 65 years.

Why the change?

As a QLS member, you should have access to relevant, dependable and confidential mental health support to help you reach your full potential personally and professionally.

Converge International offers a solid understanding of the legal profession, having worked with organisations such as the Federal Court of Australia, Law Institute of Victoria, Law Society of Tasmania, Law Society of Western Australia, Minter Ellison and Piper Alderman.

In addition, Converge has 1800 mental health and wellbeing consultants across Australia – including 250 in metropolitan and regional Queensland – ensuring all members, especially those in remote areas, have access to critical support services (including face-to-face counselling) when needed.

For those who have not yet accessed LawCare, the following information can give you a better sense of how the service can support you, your support staff and your family at home and at work.

How does counselling work?

The service involves you speaking with a counsellor either face-to-face, by phone, online or via live chat. Support is available 24 hours, seven days a week, year-round. Scheduled appointments generally occur during business hours and can be booked through the app, website or by calling the dedicated LawCare number, 1800 177 743. After-hours telephone counselling and emergency support is also available.

All Converge International counsellors are qualified professionals with extensive experience in their specialty areas. They include registered psychologists, social workers, specialist counsellors, pastoral care counsellors, careers coaches, vocational counsellors, HR specialists, management coaches, financial counsellors, and lifestyle and nutrition coaches.

Why talk with a counsellor?

Talking with a counsellor can help you identify and resolve issues that may be causing you difficulty. You may be feeling stressed or overwhelmed with work or personal commitments, and sometimes it is hard to know what to do or who to talk to, particularly regarding concerns you would like to keep private.

What happens during counselling?

Your first session with a counsellor generally lasts about one hour. During this time, you will talk about the key issues – personal or professional – that brought you to counselling.

Does counselling work?

Yes. Counselling is most effective when you decide to make the time to understand and work through issues that are preventing you from leading the life you want. Our client feedback statistics show that counselling is effective 86% of the time in assisting individuals resolve their issue. Counselling is not just about giving advice. It is about helping you to understand your situation and find answers that work for you.

Converge International counsellors use a solution-focused model, meaning it is possible to provide a goal-orientated approach to cope with most issues in a timely way, but also an opportunity to identify the issue and work out the best/effective outcomes within a short timeframe.

What can counsellors help with?

Counsellors can assist with a range of issues divided into these seven streams:

Conflict Assist: Strategies, tools and coaching to deal with difficult workplace and personal situations.

Career Assist: Career development and planning, resume and job-seeking assistance, interview skills, vocational counselling.

Nutrition and Lifestyle Assist: Specialist support with nutrition, sleep, resilience, mindfulness, addictive behaviours, retirement planning and positive lifestyle changes.

Money Assist: Money management coaching to support your financial wellbeing.

Family Assist: Counselling for family members needing support with personal and/or lifestyle concerns.

Employee Assist: Support and counselling for a broad range of personal and work-related issues.

Manager Assist: Coaching and advice to develop your leadership competencies and assist with a variety of people management issues.

Is it confidential?

Your confidentiality and privacy are very important. No details of your issues will be discussed without your permission – unless there is a duty of care issue (that is, risk of harm to self or others) or if Converge International has received a legal subpoena. General periodical reports that do not identify individual information are sent to QLS management.

In some cases, for privacy reasons, QLS members may prefer to work with mental health experts outside of their local area. Occasionally in regional areas for example, lawyers acting for mental health professionals (that is, psychologists and psychiatrists) in the legal system in their local area may have their therapeutic relationship comprised should these lawyers then require mental health support themselves. Fortunately, Converge International has an excellent national network, so members can request to work with interstate mental health experts when needed.

What will it cost?

As a QLS member, LawCare grants you access to six complimentary counselling sessions per issue. Your support staff and family members are also eligible to access this service – with six sessions per issue of their own.

How do I access support?

For 24-hour confidential information and appointments, call the dedicated LawCare number: 1800 177 743.

You may also book a confidential counselling appointment and access resources through the EAP portal:

1. Visit convergeinternational.com.au.
2. Click 'Portal Login' in the top right-hand corner.
3. Enter:
Username: converge
Password: eap.

We hope you will make the most of the support available to you!

LawCare is a QLS member benefit externally supplied by Converge International. Operating since 1960, Converge is a wholly Australian owned entity who currently supply their services to Federal Court of Australia, Law Institute of Victoria, Law Institute of Tasmania and Law Society of Western Australia among others. For more information, visit qls.com.au/lawcare.

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A matter of trust

Finally, it's out of human hands



BY BARBARA VRETTOS, THE LEGAL FORECAST

How we transact, interact and behave is underpinned by how we trust.

But as blockchain provides new opportunities to facilitate trust, do existing legal frameworks require reconsideration?

To earn an individual's trust, an individual or entity must show they are reliable and predictable. Philosopher Yuval Noah Harari places this decision to trust within the cognitive domain of human abilities.¹ Previously, machines have only competed against human physical abilities (automating manual labour) and routine cognitive abilities (for example, automating calculations).

However – radically – in the fourth industrial revolution, technologies are beginning to automate more nuanced cognitive abilities.

Blockchain technologies encroach on the human domain by industrialising the reliability and predictability that foster trust. By providing an alternative that can scale trust, at lower costs than traditional human avenues, blockchain questions established legal assumptions about how to transact and facilitate trust.

Blockchain technology, in short:

- is a digital ledger held by all participants
- records data in blocks of transactions
- uses a network to agree on information that can only be added to the ledger.

Despite reflecting similar information as databases today, it has been heralded as infrastructure for a trust revolution² – but why?

What is trust?

Economist Joseph Stiglitz stated that “it is trust, more than money, that makes the world go around”.³ Although this denotes the importance of trust, what is trust and why do we need it?

Author Rachel Botsman created a framework for understanding trust as “a confident relationship with the unknown”.⁴

Using this definition, individuals rely on people who appear reliable and predictable to establish confidence when transacting with the unknown. These individuals, intermediaries, help to bridge the trust gap with the unknown.

Trusting institutions

Prior to the first industrial revolution, the trust gaps humans encountered were significantly smaller. People lived locally and trusted locally. In small communities everyone could know each other, so people knew whom they were transacting with. Unsurprisingly, this did not scale. As we started transacting with unknown parties, we turned to intermediated trust – relying on institutions to lay the foundations for an organised industrial society. However, recent history has shaken our institutional trust.

The Global Financial Crisis (GFC) damaged trust in the financial industry. This was not an isolated incident; the recent Financial Services Royal Commission⁵ further demonstrated disillusionment in financial institutions. Similarly, Deloitte's 2018 study found that “almost half of customers [did] not trust their own financial service provider”.⁶ Nakamoto, author of the bitcoin whitepaper (published in the early stages of the GFC), suggested this was the weakness of the “trust-based model”.⁷

Institutional trust provided the blueprint of how individuals have transacted beyond their immediate community. Consequently, legislation, regulation and legal architecture are made on the basis of similar assumptions of how individuals will interact. Thus, these structures assume an array of intermediaries that can be regulated and held accountable. For example, securities exchanges mandate the role of stockbrokers⁸ and trusts require trustees for their execution.⁹

However, Botsman suggests that institutional trust does not suit the digital age. Specifically, now that individuals can transact directly with each other – seen on platforms such as Airbnb, Uber and Alibaba – rethinking the intermediated model is encouraged. This change moves away from traditional industrial trust to the disruptive era of distributed trust.

The trust shift

Distributed trust shifts from trusting institutions towards trusting individuals and networks. Blockchain, in some cases, can present an even more radical way for individuals to interact directly. Blockchain can provide a platform such as Airbnb but without a centralised server.

Bitcoin is a key example of this. The Bitcoin blockchain is for “*the first time in the history of humanity*”¹⁰ a permanent public record that is not controlled by a third party and can be reliably verified by all parties. (*emphasis added*) The Bitcoin network uses mathematical rules to provide predictability and reliability, as all information added to the ledger abides by those rules (for example, making sure money was only spent once).

Here blockchain distributed trust to a network that provided mathematical proof of a genuine transaction, rather than trusting an intermediary's opaque tick of approval. These mechanisms bridge the trust gap and enable individuals to take a 'trust leap' between the known and the unknown.¹¹ This is a key innovation that could impact how we transact with one another.

Transparency of mathematical proof does not equal trust (rather, individuals demand transparency from people they do not trust), but it does help us bridge the trust gap. This raises the question: what is the role of an intermediary in a world where blockchain can provide much of the 'trust' that traditional intermediaries provide?

Answering this question is not easy and the roles of intermediaries are neither identical nor static. Still, blockchain gives individuals and institutions license to reconsider how to facilitate trust with a new lens. This may reduce the cost of creating trust as networks and mathematical certainty can be leveraged to reduce friction and the risk of human error and greed.¹²

However, the existing legal frameworks don't fit neatly on distributed and decentralised interaction. As blockchain changes the nature of how individuals can trust and transact, we may also need to rethink the way we can achieve legal oversight and enforcement.

Conclusion

Blockchain raises the question of how should we trust each other – a decision not offered by existing frameworks. As such, a platform proposing technological trust, and the impacts this has on expensive intermediated corporate structures and embedded legal presumptions should be considered.

Barbara Vrettos is a South Australian Executive Member of The Legal Forecast. Special thanks to Michael Bidwell and Lauren Michael of The Legal Forecast for technical advice and editing. The Legal Forecast (thelegalforecast.com) aims to advance legal practice through technology and innovation. TLF is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

Notes

- ¹ Yuval Noah Harari, *21 Lessons for the 21st Century*, Penguin Random House, 2018, 20.
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- ⁵ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 'Final Report', 4 February 2019, financialservices.royalcommission.gov.au/Pages/default.aspx.
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- ⁸ *Corporations Act 2001* (Cth) s768A(1).
- ⁹ Lexis Nexis, *Halsbury's Laws of Australia* (at 30 January 2018), 430 Trusts, 'Constitution of an Express Trust'.
- ¹⁰ Botsman, above n4, 210.
- ¹¹ Botsman, above n4, 20.
- ¹² Sinclair Davidson, Mikayla Novak and Jason Potts, 'The \$29 trillion Cost of Trust', 24 July 2018, Medium, medium.com/@cryptoeconomics/the-29-trillion-cost-of-trust-be8ffbd5788d.

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WITH ANDREW YUILE AND DAN STAR QC



High Court

Native title – compensation for impairment of native title rights and interests

In *Northern Territory v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurrurru and Nungali Peoples* [2019] HCA 7 (13 March 2019) the High Court considered the proper amount payable in compensation for the extinguishment of certain native title rights. The Ngaliwurrurru and Nungali People (the claim group) held non-exclusive native title rights over land in the Northern Territory that had been extinguished by acts done by the Northern Territory. That gave rise to an entitlement to compensation under s51 of the *Native Title Act 1993* (Cth). The question in this case was the proper method of determining the compensation payable. At trial, the claim group was awarded compensation assessed at 80% of the unencumbered freehold value of the land, plus simple interest, plus compensation for non-economic (cultural) loss of \$1.3 million. On appeal, the Full Court varied the trial judge's assessment to award the claim group 65% of the unencumbered freehold value of the land but otherwise affirmed the trial judge's decision. The High Court held that the first step was to determine the value of the particular native title rights held and to deduct from the full exclusive native title rights a percentage that represented the comparative limitations of the claim group's interests, then to apply that reduction in percentage value to the full freehold value of the land as a proxy for full exclusive native title. In this case, that percentage equated to no more than 50% of the freehold value. The court also upheld the award of simple as opposed to compound interest, and upheld the award for cultural loss, also commenting on the factors to be considered in determining that award. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly; Gageler J separately concurring except as to the method for determining the economic value of the claim group's interests; Edelman J separately concurring except as to the method of valuation of cultural loss. Appeals from the Full Federal Court allowed in part.

Criminal law – statutory interpretation – meaning of 'destroys or damages'

In *Grajewski v Director of Public Prosecutions (NSW)* [2019] HCA 8 (13 March 2019) the High Court held that alteration to the physical integrity of a thing was required to show that the thing was damaged. The appellant was a protestor

who climbed into a ship loader at a coal terminal and locked himself in. The appellant put the ship loader in a position where he was at risk of harm. The ship loader was shut down because of safety concerns and remained inoperable until he was removed. The appellant was convicted of intentionally or recklessly destroying or damaging property belonging to another, contrary to s195(1)(a) of the *Crimes Act 1900* (NSW). The offence was particularised as doing damage to property causing the temporary impairment of the working machinery of the ship loader. The appellant appealed his conviction to the District Court of New South Wales, which stated a case to the Court of Criminal Appeal asking whether the facts could support a finding of guilt under s195(1)(a). The court said that they could. In the High Court, a majority held that "damage to property within the meaning of s195(1) of the *Crimes Act* requires proof that the defendant's act or omission has occasioned some alteration to the physical integrity of the property, even if only temporarily". The question stated in this case had to be answered no and the appellant's conviction quashed. Kiefel CJ, Bell, Keane and Gordon JJ jointly. Nettle J dissenting. Appeal from the Court of Criminal Appeal (NSW) allowed.

Criminal law – jury directions – *Prasad* directions

In *Director of Public Prosecutions Reference No. 1 of 2017* [2019] HCA 9 (20 March 2019) the High Court held that jury directions commonly known as *Prasad* directions are contrary to law and should not be administered. The case concerned an accused who was arraigned on an indictment of murder. A plea of not guilty was entered and a jury empanelled. At the end of the Crown case, the defence sought a *Prasad* direction, which allows for the jury to be informed that they are allowed at any time after the close of the prosecution case to return a verdict of not guilty without hearing more. Over the Crown's objection, a lengthy *Prasad* direction was given. The jury considered the direction but asked to hear more. After the close of the defence case, but before final addresses, the jury was reminded of the direction. After considering again, the jury returned a verdict of not guilty without hearing more. The Director of Public Prosecutions referred a point of law to the Court of Appeal, asking whether *Prasad* directions are contrary to law and should not be administered. A majority of the Court of Appeal held that there was no reason in principle to hold that such directions should not be given. The High Court unanimously upheld the appeal.

The court held that a jury does not have a common law right to return a verdict of not guilty any time after the close of the Crown case. To give a *Prasad* direction was inconsistent with the division of functions between the judge and the jury (for example, because it might suggest to the jury that the judge considers acquittal to be appropriate, or because it leaves the jury without the benefit of the prosecution's final address and the judge's summing up). It is a matter for the jury to decide if guilt beyond reasonable doubt has been established, assuming that the evidence at its highest is capable of sustaining a conviction. A jury cannot make that decision until the end of the case. The court therefore held that *Prasad* directions are contrary to law and should not be administered. Appeal from the Court of Appeal (Vic.) allowed.

Criminal law – jury directions – lies in complainant's evidence – application of the proviso

In *OKS v Western Australia* [2019] HCA 10 (20 March 2019) the appellant had been charged with four counts of indecently dealing with a child under 13. The trial took place nearly 20 years after the alleged offending. The central issue at trial was the credibility and reliability of the complainant's evidence. The complainant admitted to telling lies to police in her earlier accounts of events, and further lies were asserted by the defence. In the course of summing up, the trial judge directed the jury that they should not reason that just because the complainant had been shown to have lied, all of her evidence was dishonest and could not be relied on. The jury returned verdicts of guilty on one count and not guilty on the other (two counts were withdrawn). On appeal the Court of Appeal held that the direction given was a wrong decision on a question of law but held that the conviction should stand because there had not been a substantial miscarriage of justice (the proviso). The High Court unanimously upheld the appeal. The court held that it was open to the jury, if it accepted that the complainant had lied, not to accept the balance of her evidence as making out the offences. The direction effectively prevented the jury from reasoning in that way or was apt to lessen the weight that the jury might properly give to a finding about the complainant's lies. The jury's assessment of her credibility was wrongly circumscribed. On the proviso, the High Court said that the only gauge of sufficiency of the evidence for the Court of Appeal was the verdict. But it could not be assumed that the

misdirection had no effect on that verdict, in circumstances where the misdirection precluded the jury from adopting a process of reasoning, favourable to the appellant, that was open to it. The conviction had to be quashed and a new trial ordered. Bell, Keane, Nettle and Gordon JJ jointly; Edelman J separately concurring. Appeal from the Supreme Court (WA) allowed.

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

Federal Court

Administrative and migration law – legal unreasonableness by failure to exercise statutory discretion – s473DC of the Migration Act 1958 (Cth)

In *DP117 v Minister for Home Affairs* [2019] FCAFC 43 (15 March 2019) the Full Court allowed an appeal and set aside the decision of the Federal Circuit Court which had dismissed the appellant's application for judicial review of a decision of the Immigration Assessment Authority (IAA). The IAA affirmed a decision by the Minister's delegate to refuse the appellant a Safe Haven Enterprise Visa (SHEV).

The issue in the appeal was whether the primary judge erred in not accepting the appellant's contention that the IAA had acted unreasonably by failing to consider whether to exercise its discretion under s473DC of the *Migration Act 1958* (Cth) to obtain information from the appellant, whether by way of an interview or in writing, for the purposes of its review of the decision made by the Minister's delegate to refuse the appellant an SHEV.

Relevantly, although the delegate refused to grant the appellant an SHEV, the delegate accepted that the appellant had been tortured and sexually assaulted by Sri Lankan officials on at least two occasions. The IAA took a different view on the issue of the sexual assaults and inconsistencies in the appellant's claims apart from those referred to by the delegate. The IAA did not accept that the appellant was a victim of sexual assault as claimed by him.

To the Federal Circuit Court the appellant submitted that the IAA acted unreasonably in not exercising its discretion under s473DC, in circumstances where the IAA made adverse findings against him based on material which was before the delegate, but which the delegate herself had not relied on. In particular, the appellant complained that he should have been interviewed by the IAA and given an opportunity to comment on or explain supposed inconsistencies and this was relevant to the issue whether or not the sexual assault had occurred as claimed by him.

Griffiths and Steward JJ noted an "important concession" by the Minister that the IAA had in fact failed to consider the exercise of the power under s473DC in relation to the issue whether or not the sexual assaults had in fact occurred or in relation to the relevant inconsistencies (at [44]). The joint judgment held that the IAA's failure to consider whether or not to exercise

its power under s473DC in respect of either the issue of the sexual assaults or the relevant inconsistencies was legally unreasonable (at [45]-[47]). They stated at [48]: "It is necessary to now determine whether or not the IAA's error in not considering the possible exercise of its power under s473DC in respect of the two relevant matters is material and involves jurisdictional error (see *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 92 ALJR 780 (*Hossain*) and *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 (*SZMTA*))." Griffiths and Steward JJ held there was jurisdictional error which was material.

Mortimer J agreed on the result but gave separate reasons for judgment. Her Honour's approach differed on the following points of principle: (1) legal unreasonableness and procedural fairness (at [78]-[95]); (2) procedural fairness and materiality (at [96]-[107]); and (3) how to express the test for legal unreasonableness (at [108]-[112]).

In relation to the second of those issues, in contrast to the approach of the joint judgment at [48] set out above, Mortimer J said at [106]: "However, as the law currently stands, I do not understand that the *ratio* of the decisions in *Hossain* and *SZMTA* require that where an exercise of power has been found to be legally unreasonable (a ground not addressed in either of those decisions), the supervising court must conduct a separate assessment of 'materiality', before being able to characterise the error as jurisdictional in character."

Legal professional privilege – holder of legal professional privilege of government advice – whether waiver of privilege by evidence given during hearing

In *Australian Workers' Union v Registered Organisations Commissioner* [2019] FCA 309 (7 March 2019) Wheelahan J refused leave to the Australian Workers' Union (AWU) to uplift and inspect documents produced in answer to a subpoena that were the subject of a claim for legal professional privilege (LPP) at common law. The documents were produced by the Secretary of the Department of Jobs and Small Business (department) in answer to a subpoena issued by the AWU.

Wheelahan J determined this dispute while the main proceeding was part-heard before another judge (Bromberg J). The main proceeding was the AWU's claim for relief on grounds, including that the decision of the Registered Organisations Commissioner (the commissioner) to conduct an investigation under s331(2) of the *Fair Work (Registered Organisations) Act 2009* into certain donations alleged to have been made by AWU was affected by jurisdictional error, because the decision was made for an improper political purpose.

The documents in dispute were communications for the purpose of legal advice relating to the two letters from Senator Michaelia Cash to the commissioner that were sought to be relied on by the AWU to support its claims in the main proceeding.

The issues before the court were: (1) who was the holder of LPP in the disputed documents (at [13]-[35]); and (2) did Senator Cash or her chief of staff (Mr Davies) effect a waiver of that privilege (at [36]-[62]).

The first issue involved an analysis of who was the holder of privilege in documents that were emails from government lawyers to a Minister's office. That was relevant in order to determine whether (if she did) Senator Cash waived LPP. Possible holders of the privilege were Senator Cash (who was the relevant Minister at the time that legal advice was sought and obtained), Ms Kelly O'Dwyer (who was the relevant current Minister), the office of the Minister or the Commonwealth of Australia. Wheelahan J stated that the identification of the holder of the privilege required that a natural person, or an entity with a legal personality such as the Crown, be identified (at [34]). The court held that the Crown was the holder of the privilege because at the time the letters were prepared and sent, Senator Cash was exercising a function of one of the Queen's Ministers of State for the Commonwealth (at [35]).

The second issue concerned which servants or agents of the Commonwealth had authority to waive privilege. The question of implied waiver also arose in circumstances where the Commonwealth was not a party to the proceeding, and nor were Ms O'Dwyer, Senator Cash or Mr Davies, with the latter two having attended court and given evidence as a result of the coercive process of a subpoena (at [54]). Wheelahan J held that the evidence of each of Mr Davies and Senator Cash did not give rise to an implied waiver of LPP (at [56] and [66] respectively).

Further, his Honour explained at [61] that Senator Cash did not have authority to waive privilege: "...On the evidence such as it is, I would infer that the current Minister is entitled to exercise control over the privileged content of the six documents as an incident of her authority as Minister responsible for administering the *Fair Work Act*, and the *Fair Work (Registered Organisations) Act*. It follows that with that authority, she might waive or authorise the waiver of privilege in the documents. There may be others within the Commonwealth who have authority to waive the privilege. However, on the state of the evidence I am not satisfied that Senator Cash, who no longer holds a portfolio with responsibility for the relevant legislation, had authority in fact to waive privilege in the six documents. Senator Cash did not give evidence on behalf of the Commonwealth: she gave evidence as to events to which she was a witness, and as to her own state of mind. In that respect, she was not in the same position as a party witness. The mere fact that Senator Cash is a Minister of the Crown does not permit me to draw a reasonable and definite inference that Senator Cash had any authority to waive privilege in the six documents..."

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Court of Appeal judgments

1-30 April 2019



WITH BRUCE GODFREY

Civil appeals

Garmin Australasia Pty Ltd v B & K Holdings (Qld) Pty Ltd [2019] QCA 54, 5 April 2019

General Civil Appeal – Further Order – where the Garmin appeal was allowed in part – where Garmin had appealed against the primary judge’s refusal to grant summary judgment against the respondent, B & K Holdings (Qld) Pty Ltd, or, in the alternative, against her Honour’s refusal to strike out part of the defence – where the appellant was unsuccessful in its principal argument but successful in its alternative argument – whether either party should have part or all of its costs at first instance – whether either party should have part or all of its costs of the appeal – where Garmin ought to have succeeded at first instance on its alternative application (to strike out the bailment defence), but it was rightly (although for the wrong reason) refused summary judgment, its primary application – where B & K Holdings did not explicitly concede that Garmin ought to succeed in its appeal against the refusal to strike out its bailment defence, but it did not actively argue the point, either in its written outline or at the hearing of the appeal – where the point did not occupy very much of Garmin’s written argument, and it did not feature to any large extent in oral argument – where the chief concern was whether summary judgment should have been granted – where Garmin was unsuccessful in the principal matter of argument. The appellant is to pay 50% of the respondent’s costs of the appeal.

Delta Pty Ltd v Mechanical and Construction Insurance Pty Ltd [2019] QCA 62, 12 April 2019

General Civil Appeal – where the issues in this appeal concern the question whether a policy of insurance issued by the respondent (Mecon) covers claims made by the appellant (Delta) arising out of breach of contract by Delta’s subcontractor, Team Rock Anchors Pty Ltd (TRA) – where Delta argues that TRA’s defective work impacted upon all four retaining walls in a way that amounted to property loss, liability for which is insured under the Mecon policy – where Delta and a third party subcontractor settled claims between them concerning breaches of

subcontract by way of an assignment by the subcontractor to the appellant of rights under a policy of insurance issued by the respondent – where the appellant as the assignee insured for losses suffered in connection with breaches of subcontract by the subcontractor – whether the subcontractor was legally liable so as to engage the insurance policy – where upon the proper construction of the Mecon policy, Delta as assignee could not succeed in its claim for an indemnity if it did not establish that the settlement deed rendered TRA liable to pay the settlement amount – where giving effect to the expressed objects of the deed, the repeated acknowledgments in it of TRA’s liability to pay the settlement amount, and the reference in cl.2.3 to TRA’s represented lack of financial capacity to meet any substantial part of that liability as the explanation for Delta’s agreement to cl.2.2, the deed should be construed as rendering TRA unconditionally liable to Delta for the settlement amount and as precluding Delta from enforcing that liability except by and to the extent of any recovery by Delta as the assignee of TRA’s right to an indemnity under the Mecon policy – where, upon the proper construction of cl.5.00 in s2 of the Mecon policy, the settlement deed rendered TRA “legally liable” to pay Delta the settlement amount of \$2,581,179.18 – where TRA’s assumption of liability for the settlement amount should be assessed upon the footing that it was reasonable for TRA to settle upon the basis that it inevitably would be found liable for serious and extensive breaches of subcontract which caused Delta substantial loss – where the settlement amount was an objectively reasonable amount for the purposes of a settlement that rendered TRA legally liable to Delta such as to attract the indemnity in cl.5.00 of the Mecon policy – where the trial judge rejected Delta’s claim for the additional reason that TRA’s claimed legal liability under the settlement deed to pay the settlement amount was not a legal liability to pay “in compensation of...Property Loss” as a result of an occurrence within the meaning of cl.5 of s2 of the policy – where the postulated threat to the excavation was not in truth that a failure in the retaining wall would damage the excavation; it was that the deficiencies in the ground anchors would result in damage to the retaining wall and the excavation – where

the only defect was in the construction of the rock anchors – where, as the trial judge concluded, movement of any retaining wall was not damage independently of damage to the wall or some other tangible property, and the “significant lateral movement” caused by TRA’s breaches of the subcontract was not of itself capable of amounting to property loss within (a) of the definition in the policy – where Delta’s argument fails for another reason – where in relation to damage to property which is repaired the compensation would appear not to extend beyond the cost of the repair and perhaps any residual loss in the value of the damaged property – where the buttressing and supporting of the four retaining walls by the backfilling of soil and proper installation of rock anchors was required to compensate Delta for the consequence of TRA’s breach of contract that in relation to all four retaining walls the rock anchors did not meet the specification – where the damages claimed by Delta were for the economic loss it suffered as a result of that breach of contract – where even if the movement of SW1 itself amounts to damage to property or Delta can rely upon the argued loss of function in SW1, the vast majority of the claimed damages could not be regarded as compensation of any such damage to SW1 alone – where against the possibility that Delta might establish one of its grounds of appeal Mecon filed a notice contending that the trial judge should have made other findings that support the rejection of each of Delta’s claims – where Mecon contended that it was not liable to indemnify TRA by reason of its breach of or non-compliance with cl.10.08 of the policy – where Mecon sufficiently pleaded its argued case that the employees failed to comply with cl.10.08(d) because they knowingly installed numerous rock anchors which were shorter (many substantially shorter) than the design length, in circumstances in which they knew of the resulting risk of lateral wall movement and consequential damage from the installation of ground anchors not being installed in accordance with the design requirement for anchor length – where it was not in issue that TRA’s breaches of the subcontract caused the SW1 wall to undergo significant lateral movement and consequential damage to the site and surrounds – where it was Delta’s own case that this was property

loss for which TRA became legally liable to compensate Delta, in respect of which Mecon was required to indemnify TRA under cl.5.00 – where acceptance of Mecon’s case that TRA’s employee courted the risk of that same property loss therefore establishes that the breach of cl.10.08(d) exposed Mecon to TRA’s claim under the policy – where Mecon established an entitlement to avoid paying TRA’s claim – where it is not an issue that all of the costs claimed by Delta under cl.5.03 were incurred more than six years before the commencement of the proceeding – where the issue is whether the cause of action arose when Delta incurred those costs or at the later time (within the six-year period) when Mecon refused to indemnify Delta – where Mecon’s obligation to pay Delta the costs described in cl.5.03 arose at the time when Delta incurred those costs, so that Delta’s cause of action arose at that time – where Mecon’s contention that Delta’s claim under cl.5.03 was time-barred is upheld. Appeal dismissed with costs.

Vickers v Queensland Building and Construction Commission & Ors [2019] QCA 66, 16 April 2019

General Civil Appeal – where the appellant was the director of two construction companies, Midson Construction (NSW) Pty Ltd and Midson Constructions (Qld) Pty Ltd – where the New South Wales company was placed into liquidation and the appellant was sent a notice of reasons for a proposed cancellation of his builder’s licence, pursuant to s56AF and s56AG of the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act) – where the appellant contends that their company was not a construction company for the purposes of s56AC(7) of the QBCC Act – where it is submitted that the words of the statute confine the definition of a “construction company” to a company which actually undertakes activities with respect to “buildings” constructed on land within the State of Queensland – where it is contended that ss9 and 35 of the *Acts Interpretation Act 1954* (Qld) (AIA) operate to confine the carrying out of building work and building work services to activities conducted in Queensland – where it was submitted by the Queensland Building and Construction Commission contended that the purpose of QBCC Act was the protection of the public – where the purpose of the legislation is stated to be to prevent the failed companies re-emerging as ‘phoenix’ companies following cancellation of a licence – whether the definition of a construction company in New South Wales is covered under the QBCC Act – where the principles applicable to statutory construction require a consideration of the text of the relevant provision, in the context of the whole statute – where the plain words of s56AC(2) QBCC Act apply to a construction company, of which the person was a director or secretary, which has carried

out building work or building work services either in Queensland or any other state of Australia, where the company has gone into liquidation or been wound up, and three years have not gone by – where there is no limit which constrains the “building work or building work services” to activities carried out only in Queensland – where insofar as Midson Qld is concerned, its licence is not jeopardised because its cancellation would only occur if the appellant does not stop being a director: s56AG(3) *QBCC Act* – where Midson Qld would not suffer much at all if the appellant ceased as a director, as he could still assist the company provided he was not an “influential person for” the company – where it follows that the definitions of “building work” and “building work services” when used in s56AC *QBCC Act* are not affected by the appellant’s contended construction of the definition of “building” as being confined to a building physically located in Queensland – where nothing on the face of those definitions would suggest that limitation, but in any event the clear words of the phrase “in this or another State” negates that approach – where there is no relevant ambiguity in the words s56AC such as might warrant recourse to extrinsic material under s14B(1) of the AIA – where references to extrinsic material are sufficient to demonstrate, were it in doubt otherwise, that the legislature’s intention was that a company failure outside Queensland could trigger the withholding of a licence or the cancellation of a licence in Queensland – where the appellant contends that that s56AC *QBCC Act* is constitutionally invalid – where the primary judge concluded that s56AC of the *QBCC Act* was constitutionally valid – where the appellant contended that the addition of the words “in this or another State” in s56AC(7) of *QBCC Act* was too remote from the “peace, welfare and good government” of Queensland to be within power – whether there is a sufficient connection between the subject matter of the legislation and the State of Queensland – where the Queensland Parliament may enact legislation with extra territorial operation, provided there is a sufficient connection between the subject matter of the legislation and the state – where Part 3A of the *QBCC Act* does not regulate conduct in another state, but rather identifies simply that an individual or company’s conduct in another state will have a consequence in the State of Queensland – where the consequence is that the company or person might not be able to be granted a licence, or a licence which they hold might be subject to cancellation depending on the circumstances – where Part 3A does nothing more than regulate one aspect of granting licences by the commission – where so much is recognised, at least, by the fact that Part 3A applies notwithstanding any other provision in Part 3 which sets out the licensing scheme relating to the building industry in Queensland – when s56AC *QBCC*

Act is examined, the identification of the construction company, whose liquidation or winding up triggers the identification of an excluded individual or excluded company, is a company that carries out building work or building work services in Queensland or in any other state of Australia – where relevantly to this case, it is that company’s insolvency which triggers the operation of s56AC(4) or (6) – where therefore, the substantive provisions of Part 3A are engaged by insolvency, wherever that occurs in Australia – where that necessarily includes Queensland – where thus, it is not interstate insolvency which is at the heart of the provisions, but rather the simple fact of insolvency – where to the extent that there is any extraterritorial element, therefore, it is slight or indirect, but nonetheless well within the concept of “a remote and general connection between the subject matter of the legislation and the State”. Appeal dismissed. Costs.

Criminal appeals

R v Le [2019] QCA 57, 9 April 2019

Sentence Application – where the applicant pleaded guilty to one count of possessing the dangerous drug cannabis in a quantity in excess of 500 grams – where the applicant was sentenced to 2½ years’ imprisonment, to be suspended after the applicant had served eight months imprisonment, for an operational period of three years – where the applicant was relatively young, with no prior criminal history – where the offending was an isolated incident – whether the sentence was manifestly excessive – where the applicant filed an application for leave to adduce evidence at the application for leave to appeal – where the evidence was a report by a clinical psychologist – where the applicant contended the new report went to his culpability for his offending – where a report by another psychologist was tendered at sentencing – whether the applicant should be allowed to adduce the new psychologist’s report on appeal – where the opinions expressed by Dr Hatzipetrou do not constitute new evidence – where they are no different to the opinions expressed in the material placed before the sentencing judge – where consideration of the sentencing remarks supports a conclusion that there was no misapplication of principle in the imposition of a sentence of imprisonment requiring actual imprisonment – where there was also nothing in the sentence itself which supports a conclusion that the sentencing judge erred in a way supportive of a conclusion there was an error warranting the intervention of this court. Application for leave to adduce evidence refused. Application for leave to appeal granted. Appeal dismissed.

R v Ireland; Ex parte Attorney-General (Qld) [2019] QCA 58, 9 April 2019

Sentence Appeal by Attorney-General (Qld) – where the respondent pleaded guilty to an offence of assault occasioning bodily harm of a three-year-old girl – where the offence took place shortly before, but in the same sequence of events as, conduct for which the respondent was convicted of the unlawful killing of an 18-month-old boy – where the respondent had been baby-sitting the siblings – where the respondent was sentenced to eight years, six months’ imprisonment for the unlawful killing – where, more than two years later, the respondent was sentenced to six months’ imprisonment for the assault occasioning bodily harm – where the sentencing judge ordered that the sentences be served concurrently and the parole release date be extended by two months – whether, by ordering that the sentences be served concurrently, the sentencing judge imposed a sentence that was manifestly inadequate – where at the sentencing hearing, the Crown contended for a sentence of between nine and 18 months’ imprisonment, but conceded it would be open and proper to sentence at the lower end because of totality – where it was also properly acknowledged by the Crown prosecutor that it was open to the sentencing judge, if the sentence was not to be ordered to be served cumulatively, to alter the parole eligibility date, although it was contended the circumstances warranted the imposition of a cumulative period of imprisonment – where those concessions having been made by the Crown, there is no basis upon which to conclude that the exercise of the sentencing discretion to impose a concurrent sentence of imprisonment, involved a misapplication of principle – where further, a review of the comparable authorities supports a conclusion that a concurrent sentence of six months’ imprisonment was within a proper exercise of the sentencing discretion for an offence of assault occasioning bodily harm involving bruising inflicted by a single blow by the offender’s hand – where no misapplication of principle having been established, there is no warrant for intervention by this court. Appeal dismissed.

R v PBD [2019] QCA 59, 12 April 2019

Sentence Application – where the applicant pleaded guilty to one count of grievous bodily harm – where the applicant was sentenced to 12 months’ detention to be released after serving 50% – where s162(2) of the *Youth Justice Act 1992* (Qld) requires the sentencing judge to consider referring the offence to the chief executive for a restorative justice process to assist in imposing an appropriate sentence – whether the sentencing judge considered the referral under s162(2) of the *Youth Justice Act* – where the requirement to give consideration

to undertaking this process is mandatory but it was not considered – where as a consequence, there has been an error of law in the applicant’s sentencing process – where the result is that leave to appeal should be granted and the sentencing discretion must be exercised afresh – where having regard to the circumstances of the offence and the other matters to which reference has been made, the judge’s omission to consider resort to the process permitted by s162(2) leads nowhere. Application for leave to appeal against sentence granted. Appeal dismissed.

R v Ferri [2019] QCA 67, 18 April 2019

Appeal against Conviction – where the appellant was convicted of one count of dangerous operation of a vehicle causing grievous bodily harm – where a police record of interview with the appellant contained inculpatory and exculpatory statements – where the prosecution sought to tender the record subject to excising certain exculpatory statements on the basis that they were inadmissible hearsay – where counsel for the appellant at the trial and on the appeal objected to this course and submitted that, if the prosecutor wished to tender the record of interview as evidence against the accused, he had to take the good with the bad and was obliged to tender the whole record – where the prosecutor frankly admitted to her Honour that he was “not familiar with that law...to be honest” – where the trial judge ruled that the exculpatory statements should be excised – whether the trial judge erred by not ordering that the whole record be admitted – where if the Crown wishes to tender a record of interview, or other statements by an accused, it is not entitled unilaterally to choose to tender only those parts of the statement that happen to help its case – where nor is it a matter for a trial judge to censor such evidence – where in general, subject to the exclusion of irrelevant statements and the exclusion of statements that would be unfair to the accused to allow into evidence and, perhaps some other categories, the whole statement must be tendered – where the exclusion of this evidence materially prejudiced the appellant’s chances of acquittal and resulted in an unfair trial – where the appellant sought to argue at trial the defence of automatism under s23(1) (a) of the Criminal Code on the basis that he was not conscious or was in a trance – where there was some evidence in support of that defence – where the prosecutor submitted that it was not enough for the appellant to raise the defence and that some evidence of his condition at the time of the offence supported by medical opinion was required before automatism could be properly raised – where the trial judge, on the basis of the prosecution’s submission, directed the jury not to consider the possibility that the appellant was not conscious – where the trial

judge redirected the jury to consider whether automatism was caused by involuntary or spastic movement only – whether a trial judge has the power to prevent even a weak defence case being considered by a jury – whether the trial judge erred by preventing the defence case from being considered by the jury – whether the trial judge erred by failing to redirect the jury consistent with the case for automatism put by the defence – where having succeeded in excluding from evidence the appellant’s attempts to impress upon his police questioners that, being in a trance-like state, being unable to hear his wife’s shouts, he had lost control of the car just before it veered away, the prosecutor then submitted to the jury that the appellant had not told police during the interview that he had lost consciousness – where he submitted that this failure constituted a significant inconsistency in the appellant’s account because he must have had difficulty repeating his story correctly – where the necessary evidence to falsify this submission having been ruled out on the prosecutor’s application, defence counsel was effectively gagged and unable to falsify the prosecutor’s false submission – where a submission that a defence should be rejected because it is a false defence is a powerful one if there is something to support it – where here there was something to support it but only because the evidence to controvert the submission had been excluded at the instigation of the prosecutor – where even if that evidence had rightly been excluded, this submission was misleading because the prosecutor knew what the jury did not, namely that the appellant’s account had been consistent throughout – where it was an improper submission and it should not have been made. Appeal allowed. Conviction be quashed. A retrial be ordered.

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

Leave to proceed fails for want of jurisdiction



WITH ROBERT GLADE-WRIGHT

Property – granting of application for leave to proceed out of time filed after respondent's death during case set aside for want of jurisdiction

In *Simonds (deceased) & Coyle* [2019] FamCAFC 47 (26 March 2019) Ms Coyle instituted a de facto financial cause in May 2017. Two months later her partner (Mr Simonds) died after filing a response in which he alleged that separation occurred in October 2013, such that the application was out of time. In May 2018 (10 months after her partner's death) Ms Coyle filed an amended application for leave to proceed. Judge Egan found that separation did occur in October 2013 but under s44(6) of the *Family Law Act* granted Ms Coyle leave to continue the proceedings against the respondent's estate under s90SM(8). The executors' appeal to the Full Court (Strickland, Murphy & Kent JJ) was allowed unanimously and Ms Coyle's property application was dismissed. Strickland J said (from [25]):

"...[H]is Honour did not have jurisdiction under s39B(1)...to entertain the Amended Initiating Application filed by the de facto wife...because there was no financial de facto cause instituted.(...)

[27] His Honour...failed to deal at all with the question of whether he had jurisdiction. Without addressing that issue his Honour simply proceeded on the basis that despite the death of the de facto husband, he could grant leave to the de facto wife to institute proceedings for property settlement(...)

[30] His Honour has also sought to grant leave 'nunc pro tunc'. That is a rule of practice and procedure to regularise the records of the court, and it cannot create jurisdiction where there is none. In other words, if there was no jurisdiction to entertain the [amended] application filed on 25 May 2018, the court still did not have jurisdiction at the time his Honour made the orders."

Property – negative pool although husband was to retain business with annual turnover of \$4m – treatment of his director loans

In *Keating* [2019] FamCAFC 46 (21 March 2019) the Full Court (Ainslie-Wallace, Ryan and Austin JJ) allowed the wife's appeal against a property order made by Judge Baumann (as

his Honour then was). Non-superannuation assets of \$1,784,854 were valued at a deficit of \$804,805 net of the husband's director loans relating to his failed tax venture. His business still traded, with an annual turnover of \$4 million. At first instance, contributions to non-super were assessed at 70:30 favouring the husband due to his initial contribution of the business; contributions to superannuation (\$710,824) being assessed as equal. No adjustment was made under s75(2).

The pool being assessed at a negative value, it was ordered that the wife receive her possessions, a super split of \$119,000 and half of any payment to the husband as the result of a pending class action relating to the venture. The wife appealed, arguing that the trial judge did not engage with her argument that the husband's director loans were not matrimonial debt. Ainslie-Wallace & Ryan JJ said ([23]-[24]):

"...[H]is Honour went no further than to say that the wife was 'aware' that the investment scheme was unsuccessful...Whether or not she was aware that the scheme had failed was irrelevant. The issue was whether she knew of and supported the husband's investment in the scheme to the extent that she should shoulder half of the resulting debt. In the result, his Honour's decision to fix both parties with responsibility for the debt was made.

[24] His Honour's finding that the wife was 'aware' that the investment scheme failed falls considerably short of engagement with the reasons why the wife said she ought not to be fixed with joint responsibility for the debt. The same applies to the finding that the debt 'actually exists'. Although parties would ordinarily be expected to take the good with the bad, there was no active engagement by the primary judge with the wife's case that the husband should bear sole responsibility for the debt and why."

Children – father's contravention application was met by mother's application for variation of parenting order – which should be heard first

In *Maddax & Danner* [2019] FamCAFC 38 (5 March 2019) a parenting order was made in 2016 in respect of a child, now aged 9. Subsequent to that order the father appealed, filed a parenting application which was

summarily dismissed and withheld the child in Germany after a holiday, causing the mother to apply for a return order under the Hague Child Abduction Convention. The father returned 13 months after the mother and child and filed an application alleging 100 contraventions by the mother, who applied for variation of the order.

Judge Turner adjourned the contravention application for 16 weeks, sought a family report and suspended the father's time with the child. The father appealed, arguing that the court erred in not dealing with his contravention application before suspending his time and adjourning the case.

In dismissing the appeal, Murphy J said (from [21]): "...An...adjournment is a procedural order and...discretionary. ...

[22] ...[T]he father's argument seems to suggest that adjourning his contravention application involved an error of principle... that her Honour was bound to deal with his... application on that day and, it seems, in priority to any other application. (...)

[48] It will be observed [from s70NBA(1) of the *Family Law Act*] that an inquiry into the variation of parenting orders can take place irrespective of whether a contravention is established or not. That is in my view important. It places the best interests of children as central not only to parenting orders but also to a consideration of how asserted or established contraventions might be dealt with. (...)

[52] The powers given to the Court in applying [the] principles [enunciated in s69ZN(6) and (7) as to 'principles for conducting child-related proceedings'] are referenced as mandatory duties contained in s69ZQ. In particular the Court must 'decide which of the issues in the proceedings require full investigation and hearing and which may be disposed of summarily' and 'decide the order in which the issues are to be decided'...

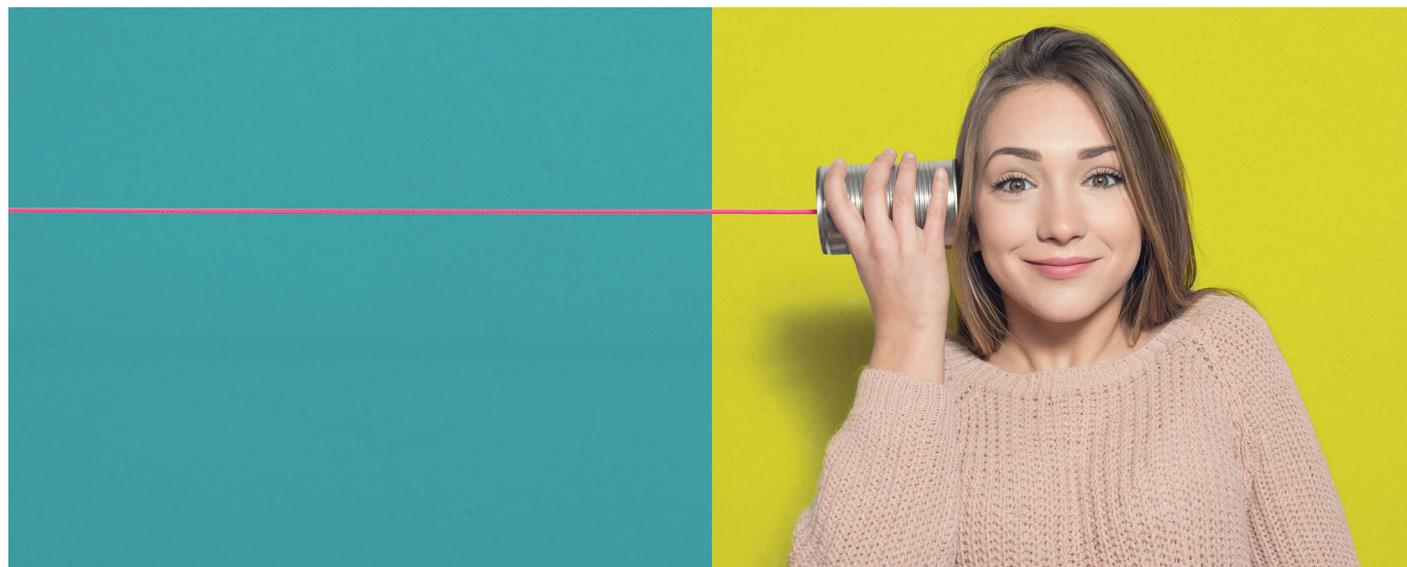
[53] The assertion by the father that her Honour erred, as a matter of principle, by adjourning his contravention application must be rejected.

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

The power of positive communication

Key tips on building employee engagement

BY GRAEME MCFADYEN



In professional services it is the people who create value for their organisations through the provision of their personal services and their client rapport.

Any improvement in the quality of services delivered by their people is likely to improve organisational performance. There is a direct and positive correlation between the quality and level of services delivered by people and their level of engagement with the organisation.

International human resources consulting company Aon found that, to create superior organisational performance, a staff engagement score greater than 65% was necessary, at which point the engaged employees are not only motivated to deliver better services but also keen to promote the company and develop closer relationships with customers.

Organisations which achieve engagement levels greater than 65% are described as 'best employers', as their positive cultures significantly enhance employment satisfaction, which in turn leads to higher productivity and better organisational performance.

In a study of 1600 organisations in 2012, Aon found that organisations which had a level of engagement higher than 65% outperformed other companies in revenue growth, profit and total shareholder return. Aon found that, on average, best employers achieved total shareholder returns 29% greater than other employers.¹

The average level of engagement in Australian organisations in 2018 was found to be just 60%.² So how can we improve employee engagement?

Numerous surveys have found that the most effective people motivators in the legal workplace (and this includes partners as well as employed staff) are recognition, acknowledgement and promotion.³ Positive communication is fundamental in expressing recognition and acknowledgement. Communication, according to a study by the Australian Institute of Management,⁴ achieves the following positive outcomes:

1. It provides purpose so employees better understand how their efforts contribute to the whole organisation.
2. It eliminates confusion which causes feelings of disengagement.
3. It builds workplace culture by creating an environment of respect and understanding.
4. It creates accountability with clarity of roles and responsibilities.

For the above reasons it is very important that law firm managers seek every opportunity to convey a positive message to the team.

Law firm employees rely on the quality of internal communications to assess both their standing in the organisation and the organisation's overall performance in the market. A monthly email from the managing partner or CEO advising how the firm performed against its fee budget last month with a special mention of strongly performing teams is a good start.

Other areas of interest would include staff movements, organisational change and anything of immediate interest involving the firm. Such updates keep staff informed and create an interactive workplace. One of the consequences of high levels of engagement are high levels of interest in an organisation's performance. Taking your staff into your confidence expresses trust.

An important part of the communication process is to demonstrate a willingness to listen to staff. This can be readily achieved by providing a confidential staff survey that seeks feedback as to what they would like to change to improve client service in particular, and the general office environment as a whole.

Once complete, it is recommended that you reveal all suggestions and then identify which you will adopt and why. It may take two or three surveys to prove to your staff that you take the survey process seriously and that you are prepared to be accountable for implementing or not implementing particular actions. Once you have demonstrated your bona fides in this regard, you will start to enjoy high levels of confidence by the staff.

Recognising that actions are also a critically important communication medium, it is important that law firm management ensure that behaviours within the firm are

entirely consistent if they are serious about to developing a more productive culture. Examples of how this may occur follow.

- Walk the talk. Your values define acceptable behaviours at all levels. There can be no exemptions and anyone engaging in persistent, serious breaches needs to be exited to demonstrate that such conduct is unacceptable. Decisive leadership by the managing partner in managing the sometimes errant (and often highly visible) behaviours of partners is critical.
- Don't wait for a formal appraisal session to let somebody know that their conduct is unacceptable. If somebody's behaviour is inconsistent with your values make sure they know it.
- Recruit for fit against the values of the firm. If implemented properly this will produce a significant improvement in staff interactions, reduce internal tensions and seriously enhance the quality of the work environment.
- Carefully analyse the language of the firm to see if it inadvertently promotes class distinctions. For example, some firms absent-mindedly use the generic description 'professionals' to describe their legally qualified staff. The inference is that somehow the professionally qualified staff within HR, marketing, finance and IT are somehow less deserving.

- Look for opportunities to celebrate successes. Circulate good news stories and ensure heroic performances by support staff especially are publicly acknowledged and celebrated.

Conclusion

Positive communication in all forms can do much to enliven law firm environments, leading to improved culture, higher levels of engagement and improved firm performance. To achieve this it is necessary to consider the content of all communications and actions carefully to ensure that negative communications and behaviours are minimised, if not eliminated altogether.

Graeme McFadyen has been a senior law firm manager for more than 20 years. He is Chief Operating Officer at Misso Law and is also available to provide consulting services to law firms – graeme@misso.edu.au.

Notes

- ¹ '2018 Trends in Employee Engagement', Aon plc.
- ² Ibid.
- ³ 'How Do You Motivate Employees?', Frederick Herzberg in 'HBR's 10 Best Reads On Managing People', *Harvard Business Review* 2011.
- ⁴ 'How to encourage effective communication in the workplace?', AIM, October 2018.

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Even the sportsmen had to be put down

Solicitor Paul Richards, who was admitted in 1973 and retired in 2015, has captured many of the stories, anecdotes and yarns from his work with Indigenous clients in a new book, *Adventures with Agitators*.

Paul began a personal involvement with Aboriginal and Torres Strait Islander peoples in 1968 and was involved in helping to start the Aboriginal Legal Service in 1972. His career involved battles on behalf of Indigenous clients in the justice system across a broad range of legal issues.

The book launch, held earlier this year, was supported by many Indigenous leaders. The following extract, 'Even the sportsmen had to be put down', is reproduced with Paul's permission.

BOOK EXTRACT

I was so outraged that I 'lost it' when I appeared for a Cherbourg Rugby League footballer who came up for sentence for disorderly conduct a few days before the grand final between Cherbourg and Kingaroy.

The establishment in the white town of Kingaroy felt a degree of superiority over the black town of Cherbourg and that extended to the sports arena. But during play rules applied equally.

My client had been in a minor scuffle in the Murgon pub, forgotten about next day by those involved in it. The usual penalty was \$20 and one month to pay (this was about 1980 when petrol was \$0.15 per litre; it is now about \$1.50 per litre). The magistrate fined him \$100 with no time to pay.

I was flabbergasted, as this was grossly inconsistent with sentencing standards. I took the client into the interview room outside the court and asked the police to wait while I completed the appeal and bail forms in the court registry (probably about fifteen minutes). One sneering cop replied, "No. Mr Richards, we've got the warrant already

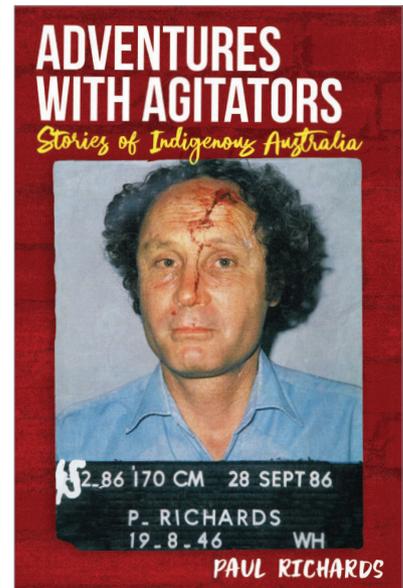
and the car is waiting to get him to Boggo Road Jail in Brisbane. You won't get him back for the game on Saturday."

How could they have got a warrant typed and a car on standby within moments of the court finishing unless they'd known what the magistrate was going to do, especially given it was such a substantial departure from the standard penalty? My belief is that the magistrate and the police had planned this in the Kingaroy RSL. That was the town where the magistrate was based and the club where he was known to go drinking.

I was so furious that I shoved my hand in my pocket and pulled out \$100 (just by chance I had it there, as someone had paid me that day). I shoved it at the police, angrily saying, "Here, take the f***ing money." They had to let him go. But, as I was leaving the court, a cop handed me a summons for allegedly using obscene language in a public place, namely the interview room, at the moment I gave him the money. I referred that to my own solicitor (as you do), who happened to be Wayne Goss, and he later informed me that the summons had been withdrawn. The interview room was, of course, not a public place and in the circumstances the words used were not obscene.

It was a great game of football that weekend. My client starred in a walkover by Cherbourg. But, listening to the Kingaroy radio, you would have thought their team was doing much better than it was. As the game went on, I was getting drinks from the bar. To get to the bar, I had to go through the police lines. The police had to stay near the bar to watch out for any trouble. On each successive visit, I very much enjoyed asking them who they thought was going to win the game. At first, they confidently said Kingaroy would win. As the game progressed, they became more dismissive and I became more assertive of Cherbourg's dominance. I think I became even cheekier as the day went on.

In 2015, that footballer became the mayor of Cherbourg, Arnie Murray. No official complaint was made, the problem being who to complain to. Premier Bjelke-Petersen was the local Member of Parliament, based in Kingaroy. There was no Crime or Misconduct Commission or anything similar in those days.



Title: *Adventures with Agitators*

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And who would have cared for an aggrieved Aboriginal person anyway? We could complain to the police, about the police, or we could complain to the local Member of Parliament about the police doing what he would have told them to do.

The ALS [Aboriginal Legal Service] frequently wrote letters of complaint to the police commissioner. I used to joke that we could paper the walls of the office with the letters of reply, dismissing the complaints in a standard format. As for an appeal? Well, the fine was paid, the conviction insignificant and the prospects of success in proving conspiracy would be difficult and expensive.

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Big and beguiling, beware the Amarone

WITH MATTHEW DUNN



If Romeo was banished from Verona today, he would probably find himself among the vines in the rich volcanic hills of Valpolicella behind the city making the rich red wine Amarone.

He'd probably feel much better about it all than he did in Mantua. Not a good end for a classical tragedy, but the red wines of Valpolicella have a certain magic to them that beguiles.

Valpolicella is the declared region of hills behind Verona and to the east of Lake Garda where wines have been made for centuries, if not millennia. Likely commencing in the region with the ancient Greeks, then Romans, then Venetians, winemaking runs deep like the roots of the vines over the gravels of the district. Winemaking in the Greek style of drying the grapes to concentrate flavours still provides the great wines of the region. But whereas the Greeks prized sweet wines, the greatest wine of Valpolicella these days is the powerful dry red wine, Amarone.

**There is no world without Verona walls
But purgatory, torture, hell itself.**

*William Shakespeare,
Romeo and Juliet*

Amarone is a wine that sits amongst the greatest of Italy, like the Brunello de Montalcino of Tuscany or the Barolo of Piedmont. It is a super-rich, almost porty, dry red wine which engages all the senses at once. The wine is made largely from the local red hero grape Corvina and some other permitted blending stock.

The ripe grapes are picked in October and dried on straw mats, often said to be kept in the loft over winter and then slowly fermented in Spring. The ripeness of the fruit, the desiccation of the grapes and the length of time risks the outbreak of botrytis on the grapes, but the winemaker's chief concern is not to concentrate sugars but flavours, and the skins need to be watched carefully to ensure they remain in good shape.

The fermentation of the grapes can be very slow in the absence of the usual volume of

water and this too risks spoilage as well as the extremely high levels of sugar fermenting out to between 15% and 16% alcohol. Maturation comes in oak for at least two years before spending some time in bottle.

The name Amarone means 'the great bitter' and the resulting wine is not sweet, given it has been fermented to dryness, but comes with a port-like richness of flavour and an intensity of tannin and extract that exceeds the biggest of McLaren Vale or Barossa Shiraz in the best years.

Hefty, like some of the biggest of red wines, its long process and manual handling brings along an admirable price. My venerable father once asked for a 'red' in a tourist restaurant in Venice without looking at the wine list and was presented with a 187ml bottle of Amarone, which he drank heartily and agreed that the local wines were quite good.

Upon receiving the bill, he noticed his little bottle was the same price as three of our three-course meals. Far from a lesson learnt, he seemed as if the unique wine had left him star-crossed and the whole experience was perfect. Beware the Amarone, it is beguiling.

The tasting Two wines were explored to compare the great and the good of Valpolicella.



The first wine was the Zenato Valpolicella Classico Superiore DOC 2016, which was cherry-red tinted glass. The nose was blackcurrant with white pepper and, upon breathing, showed some ripe tomato-like fruit. The palate was earthy with saddle, oak, capsicum and savoury tones on a backbone of tannin. A very handsome wine with good potential to go a few more years.

Verdict: The Amarone stood head and shoulders above the Classico and also above most other reds of the last few years. A truly great big red.



The second was the Azienda Agricola Vivani Amarone della Valpolicella 2012, which was deepest darkest opaque brick red. The nose was funky to start like porcini. The palate was a sublime tour de force commencing with a chewy tannin bite on the attack, moving in the mid palate to blackberry jam and other dark fruits of the forest and lingering into the distance with a dark chocolate finish. All this was wrapped in a porty cloak, but without the heat of the spirit and without the trace of sugar or sweetness beyond the purity of the fruit. If ever there was a wine for quiet contemplation and dedicated enjoyment, this was it.

Matthew Dunn is Queensland Law Society Policy, Public Affairs and Governance General Manager.

Mould's maze



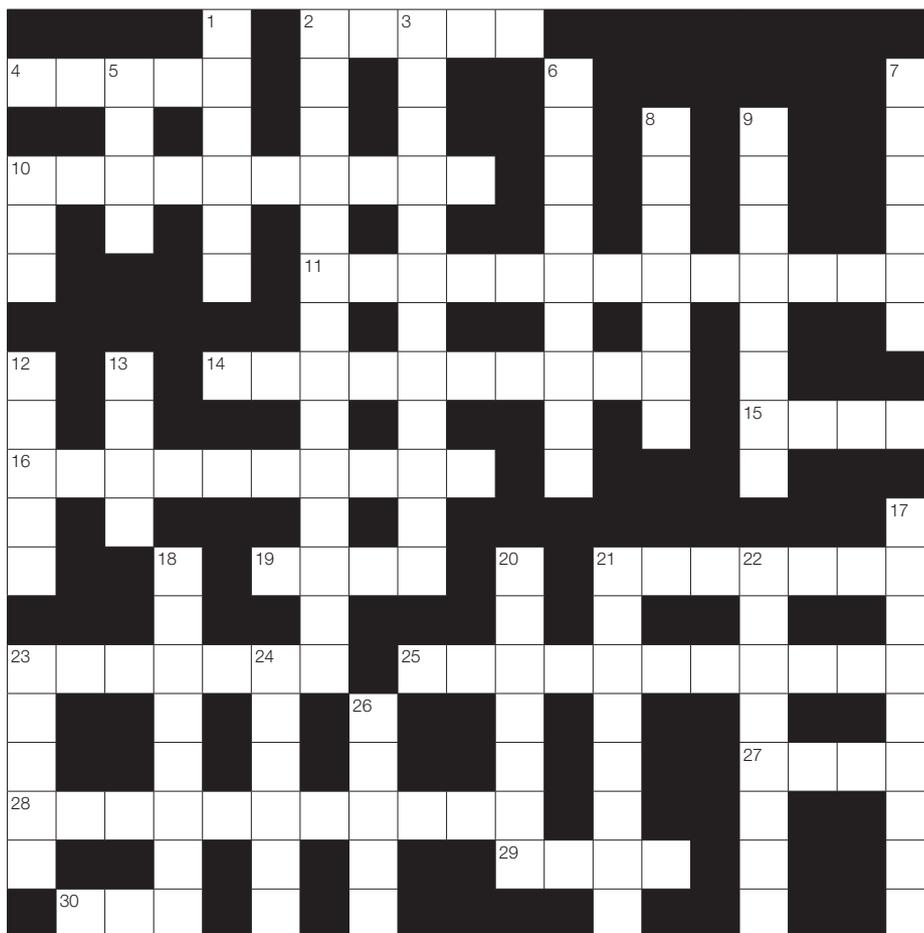
BY JOHN-PAUL MOULD, BARRISTER AND CIVIL MARRIAGE CELEBRANT | JPMOULD.COM.AU

Across

- 2 Statement on an affidavit recording when, where and before whom it was sworn. (5)
- 4 Pertaining to punishment. (5)
- 10 Agreement between states less formal than a treaty. (10)
- 11 Term used for a breach of an order in family law proceedings. (13)
- 14 Official record of testimony. (10)
- 15 An agreement that requires no consideration. (4)
- 16 Procedural orders. (10)
- 19 Usual number of members of juries in ancient Greece, hundred. (4)
- 21 High Court of Australia (HCA) case involving how compensation should be assessed for an injured person who is not conscious of their pain and suffering, v *Collins*. (7)
- 23 According to the '..... exception', a solicitor who is self-represented in proceedings is entitled to professional costs ordered in the solicitor's favour. (7)
- 25 Pertaining to marriage. (11)
- 27 Compensation, such as for a personal injury. (4)
- 28 Alternative to an oath. (11)
- 29 Brisbane barrister, Geoffrey (4)
- 30 In 2004 Nicholas McAllister was acquitted in New Zealand by a jury who delivered a verdict in this many minutes. (3)

Down

- 1 John Grisham novel, *The* (6)
- 2 Standing, the substance of dispute, a real and substantial controversy, ripeness and mootness are all issues of (14)
- 3 A bond securing performance of good behaviour by an accused. (12)
- 5 The largest ever jury pool was thousand for the Colorado trial of James Holmes. (4)
- 6 Judicial majority. (9)
- 7 Lodging documents in a court registry. (6)
- 8 Mandatory retirement age for High Court justices. (7)



- 9 A examination involved a mother being brought before a magistrate to determine the name of her child's father. (Arch.) (8)
- 10 Gaol, the '...'. (Jargon) (3)
- 12 HCA constructive trust case, *Muschinski v* (5)
- 13 Hans Kelsen propounded the idea of a theory of law. (4)
- 17 The Carboloc Smoke Ball claimed to cure this medical condition. (9)
- 18 The main purpose of a party providing particulars to a pleading is to avoid at trial. (8)
- 20 A down fee required for the allocation of a trial date. (7)
- 21 Former lawyer Chris Fydlar won an Olympic gold medal in this sport. (8)
- 22 Star of *Murder, She Wrote*, Angela (8)
- 23 HCA case involving a tired trial judge, v *R*. (5)
- 24 Free from obligation or liability. (6)
- 26 A jury of 12 people is often called a petty or jury. (French) (5)

Solution on page 56

Operation dog-walk

Did I forget to tell you about my hernia?

BY SHANE BUDDEN



Several times a week, I walk our dog, presumably because I am keen to have another hernia operation.

This is because walking our dog is like walking an armoured personnel carrier being driven by an inebriated and intellectually unremarkable Neanderthal with a bag over his head.

Our dog makes inexplicable, unpredictable and sudden changes in direction and acceleration resulting in thousands of pounds of force being transferred, via the lead, to my legs, groin, stomach and – if I fall over – head.

I have heard people say that walking a dog is relaxing, but I suspect these people have poor vision and have mistakenly attached their dog leash to a more docile, more intelligent and sensible pet, such as a goldfish or sack of potatoes.

Those of you skilled in Sherlock Holmes-like deductive reasoning (and who can read) will have worked out, from my use of the phrase ‘another hernia operation’ that I have had at least one hernia operation; also, I have probably mentioned it before in a sincere effort to keep you up to date with my fascinating life, and to reach my word count.

I realised I would need a hernia operation when I was driving home from the gym and coughed, causing a strange bulge in my lower abdominal area (notice I have the decorum to avoid use of the word ‘crotch’ lest it offend someone). Some people might have been puzzled by this sensation, but I was able to fall back on my medical training – which includes having seen every episode of *M*A*S*H* at least twice and having watched countless American movies set in the ‘60s about surfers trying to get out of the draft during the Vietnam War by failing the medical, which always involves turning one’s head and coughing – and was able to self-diagnose a hernia.

When I got home my wife suggested that, even though she happily conceded that I was quite the *M*A*S*H* fan, it might be worth getting an actual doctor to have a look. She also wanted to get me into the hands of professional medical care because she knew that, like all guys, left to my own devices I would probably assume that it was just

a cramp and do nothing until the need for action was made obvious by some subtle sign, such as my legs falling off.

This meant I had to engage in one of the most futile activities this side of trying to explain the rules of noughts and crosses to Fraser Anning: making an appointment with a doctor.

I have no idea why anybody does this, because experience tells us that if the receptionist says that our appointment is at, say, 3.30pm, the only thing of which we can be certain is that we will not see the doctor at 3.30pm. My suspicion is that when you phone the doctor, the doctors all crowd around the phone listening in and snickering, and one will whisper: “Tell them I am free at 3.30pm. I’ll be at the dealer getting the dashboard muffle on the Merc shampooed!” and then they all laugh like fiends.

I dutifully turned up the appointed time, and of course waited the approximate length of the Menzies Government to see the doctor. It wasn’t as bad as it sounds, because there were several issues of *Time* and *The Bulletin* from the 1950s, so I could catch up on the latest news from before I was born. I learnt a lot, and my tip would be to keep your eye on this young bloke by the name of Whitlam, I think he could be PM one day.

When I did get in to see the doctor, he quickly agreed with my diagnosis but suggested we get a sonogram just to be sure. My only previous experience with sonograms was when my wife had them during her pregnancies, which caused me to become concerned that he might think I was pregnant (certainly my belly is larger than it used to be).

I mentioned this to the young lady who did the sonogram, making sure to use the light, jokey tone we professional humour writers use to ensure people know we are making a joke; she dismissed my concerns using the gentle, calm tones the medical profession uses when they are dealing with someone they think should not be allowed anywhere near the scalpels. She confirmed I had a left lower inguinal hernia which ‘spontaneously reduces’.

“Like my bank account since I had kids!” I joked, adding “Ha-ha!” so that she could see that I was making another hilarious joke.

“No, not like a bank account,” she said, pushing the scalpels further along the bench and taking the bandage scissors out of my reach for good measure.

I went back to the doctor who read the letter from the sonogram lady to me out loud, and charged me for another visit before sending me to a general surgeon. The surgeon made me lie on the bench and cough, and quickly advised me that I indeed had two hernias. This undermined my confidence in the sonogram and made me wonder if the pregnancy option was again on the table, but I was not silly enough to try and make jokes with the medical profession again.

The surgeon then took me through the procedure, explaining to me that he would make a small, precisely-targeted incision in my wallet and remove several thousand dollars, some of which my health insurance might repay assuming there was any money left in the fund after the medical insurer’s Aspen Research, Wine and Cheese Conference (OK, so he didn’t say the last bit but I feel it was clearly implied).

We then worked out a date for the surgery, which he assured me was nothing to be worried about and that I would be back at work after a couple of days, and that a hernia operation was basically a mild flu without the phlegm. When I was finalising things with his receptionist she warned me that the surgeon was well-known for being somewhat over-optimistic in his views on hernia surgery recovery, and that I might want to take his recovery advice with several tablespoons of salt.

I know you are all dying to see how the operation turned out (spoiler alert: I wasn’t pregnant) but I have run out of space, although on the plus side it looks like I will get two columns out of the one idea, so everyone (by which I mean me) is a winner. Also, I apologise for not writing about last month’s election, like everyone else, but that would probably have involved research, and I specialise more in almost-true speculation and baseless innuendo, which some unkind people call lies.

© Shane Budden 2019. Shane Budden is a Queensland Law Society ethics solicitor.

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Crossword solution

From page 54

Across: 2 Jurat, 4 Penal, 10 Convention, 11 Contravention, 14 Transcript, 15 Deed, 16 Directions, 19 Five, 21 Skelton, 23 Chorley, 25 Matrimonial, 27 Bote, 28 Affirmation, 29 Gunn, 30 One.

Down: 1 Client, 2 Justiciability, 3 Recognisance, 5 Nine, 6 Plurality, 7 Filing, 8 Seventy, 9 Bastardy, 10 Can, 12 Dodds, 13 Pure, 17 Influenza, 18 Surprise, 20 Setting, 21 Swimming, 22 Lansbury, 23 Cesan, 24 Exempt, 26 Petit.

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Now settling large scale, multi-lot developments electronically through PEXA Projects, the team at McCullough Robertson efficiently completes the property settlement process online for its developer clients.

Kristan Conlon, Partner at McCullough Robertson, shares how this aligns with the firm’s business approach.

“At McCullough Robertson, we continually strive to improve efficiency during property settlements, and deliver greater value for our clients. To this end, it is important we are at the forefront of industry changes and embrace technology early.”

“A single project overview dashboard and the ability to complete bulk actions across multiple lots has led to a reduction in resources required to complete settlements.”

“Beyond the time and cost savings of e-Conveyancing, the complimentary lodgment gap cover offered by PEXA provides our clients with an additional layer of protection to ensure no loss is suffered as a result of any dealings lodged before the transfer registers. This is a unique point of difference that cannot be provided to our clients at no additional cost in a paper-based system,” explains Kristan.

Initially using this specialised technology in New South Wales, and having observed the benefits in Queensland, it was a logical step for McCullough Robertson to use it more broadly in the two states.

“The technology provides our developer clients the opportunity to take advantage of the many benefits that electronic settlements provide, including receiving settlement proceeds promptly in most cases.”

Following the engagement of this technology to assist efficiency and deliver value, we asked Kristan to look ahead to what’s to come in Queensland.

“There is no doubt that this is just the start of change in the industry. With the success of e-Conveyancing to date and the introduction of additional service providers, it seems inevitable that the rate of electronic settlements will continue to grow rapidly.”

“A fully paperless system for electronic settlements will see the state progress in leaps and bounds – it is our hope that in less than 24 months’ time this will be a reality and Queensland will be leading the way.” concludes Kristan.

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