

QLS PROCTOR

MAY 2019

OUT OF THE DARKNESS

Casting a legal light on elder abuse

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Making the
right choice

CIVIL LITIGATION

Class actions
updated

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Headed in the right direction?

A quick reality check



So, where the hell are we?

As a profession, I mean, and obviously not so much geographically as in terms of our positioning to meet the challenges of the future.

I am well-placed, I think, to consider this question, since of late I have been interacting closely with our profession's present and its future, and have a pretty good feel for our direction.

For example, I attended the 2019 QLS Symposium, which again was a great success and offered up an engaging and informative program with something for everyone. I had the opportunity to catch up with many of our members and I thank them all for their time and good conversation.

I have also recently had the chance to engage with the future of our profession, both through speaking at the QUT Law Society 'meet the profession' function, and through attending the QLS Legal Careers Expo. These were both great events, and I must say I took a lot of inspiration from them. While no one is doubting the challenges that lie ahead for our profession, especially those just entering it, I have great confidence in the students and young lawyers I met during these events. I am certain they have what it takes to handle whatever the future of law throws at them!

That direct engagement with our members (and future members) is at the heart of everything we do here at QLS. I mentioned in my first column of the year that leading also involved following, and that I would need the guidance of the profession to do this job properly. That is why I am looking forward to Law Week, the annual festival of our profession.

The events of Law Week, in addition to doing a lot of good through highlighting the great work lawyers do and raising funds for good causes, give us all the chance to come together and to engage with the wider community. The Queensland Legal Walk raises funds for LawRight, and all it requires of you is a nice stroll with your colleagues (and a donation or two, of course) and other stakeholders in

our endeavours. The event is on 14 May and kicks off at 6.30am at the following locations: Brisbane, Cairns, Gold Coast, Sunshine Coast, Toowoomba, Townsville and Mackay.

For those who haven't heard of it, LawRight (formerly QPILCH) is a community-based, not-for-profit organisation which works to provide pro bono legal services for those who cannot afford representation yet are ineligible for legal aid. LawRight represents the combined efforts of Queensland Law Society, solicitors, barristers, community legal centres, students and other stakeholders, and is a vital part of our state's access to justice efforts. I urge you all to support LawRight, and what better way than an early morning stroll through the world's best climate?

Our annual QLS Open Day will also happen during Law Week, and I look forward to many members and future members taking advantage of the opportunity to pick up some free CPD points, to see how QLS ticks and engage with our staff. This interaction is invaluable, and a big part of our commitment to be both your professional partner and your partner in the profession.

We will also be highlighting the importance of mental health and wellbeing in our profession with a couple of upcoming events, the mental health breakfast on 15 May and the mental health first aid course being run on 17 May. Although I realise we talk about this a lot – and justifiably so given that this remains a significant problem for the profession – we also believe we need to take action, not just increase awareness.

That was the genesis of the mental health course, which is a blended accreditation course that has been purpose-built to address the unique needs of the legal profession. It is a very valuable course, providing the skills necessary to detect the signs of mental illness and stress, and to take early action which could prevent a great deal of trauma, and indeed save lives. Many QLS staff have undertaken the course, and have given very positive feedback on it.

One of the most important duties with which our profession is entrusted is the protection of the public, and the maintenance of the integrity of our legal system. That has been challenged in recent times by unscrupulous and unqualified people who mislead consumers into believing that they do not need a real lawyer to do legal work. That always ends in tears, financial loss and emotional trauma for the consumer.

This is why QLS has launched a campaign to encourage people to see a solicitor first. The campaign will direct people to a bespoke part of our website which will allow them to get in touch with our member solicitors quickly and easily. This campaign is the perfect example of the Society at its best – promoting the interests of members while also protecting the community. The result will be happy consumers, happy lawyers and a legal system in which the Queensland public can have confidence; I am very proud of us when we do things like this.

So based on all that, where are we? Right where we should be: in the very thick of things.

We are at the forefront of legislative reform, and we are engaging with the wider community; we are alive to the problems of mental health and are taking action to address it; we are engaging with the lawyers of the future and supporting the pro bono efforts of those who serve society's most vulnerable.

I think, too, that we are enjoying it. The members I speak to are passionate about their work, positive when they speak of it and eager to do more. We are ready for the challenges of the future and still taking care of the challenges in the present. I am proud of our efforts and proud to have the honour of leading Queensland's solicitors. We are good lawyers, producing good law, for the public good, and that's good enough for me!

Bill Potts

Queensland Law Society President

president@qls.com.au

Twitter: @QLSPresident

LinkedIn: linkedin.com/in/bill-potts-qlsresident

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Fighting elder abuse

An ongoing priority for your Society



Elder abuse is not new.

Recognition of elder abuse as a community-wide problem is, however, relatively recent.

Search online for information on elder abuse and there are some mentions in American publications in the late '80s and early '90s. In Australia, there are very few references before the late '90s.

And it is significant that back then Queensland Law Society was leading the way in drawing attention to elder abuse and seeking solutions.

On the weekend before Symposium 2000, the Society organised its inaugural Public Policy Forum – on elder abuse. In 2003, the Society was a driving force behind the Strategic Plan for the Prevention of Elder Abuse in Queensland, created by a task force formed following the forum.

The 32-page plan was the result of a two-year project examining the physical, financial and emotional abuse inflicted on elderly Queenslanders, and ways to eliminate that abuse. Then QLS President Joe Tooma said the strategic plan was a major advance in the protection of human rights, and gave long overdue recognition of a plight affecting many elderly people.

Since then QLS has continued its active role in fighting elder abuse, joining with the State Government in 2003 to launch a 'Law Information Kit' for seniors that included a brochure on elder abuse, among other topics.

In June 2010, Supreme Court Justice Ann Lyons launched the 'Elder abuse: how well does the law in Queensland cope?' issues paper jointly developed by the Society's Elder Law Section and the Public Advocate of Queensland.

Following public consultation on the issues paper, QLS developed a report for the Queensland Department of Justice and Attorney-General urging substantial law reform to address elder abuse and aged care issues.

In the report, we called for a review of s52(2) of the *Civil Liability Act 2003* (Qld) and r13 of the *Personal Injuries Proceeding Regulations 2002* (Qld). We also sought consultation with the Council of Australian Governments and state and territory governments on the introduction of uniform enduring powers of attorney.

Our other recommendations included the establishment of a specialist unit within the State Crimes Operations Command to investigate complaints of elder abuse.

Just last month the Queensland Government noted that the QLS had helped to achieve a significant increase in calls to the Elder Abuse Helpline during 2017-18 through awareness campaigns such as the QLS/Australian Medical Association (Qld branch) elder abuse reporting trial in 2017. Then President Christine Smyth said it was the Society's hope that the trial would create a robust public debate to help de-stigmatise an issue many elderly people felt uncomfortable speaking about.

Today, our work continues, and I pay tribute to our active and resourceful QLS Elder Law Committee, and the advocacy of its members, in relation to elder abuse and other issues of concern to older Queenslanders.

This month we have focused on a number of facets of the elder abuse crisis, and you will find these articles further on in this edition. It is a timely reminder that World Elder Abuse Awareness Day is next month on 15 June.

New LawCare provider

Wellbeing is a critical concern, no matter what your age, and I would like to take this opportunity to advise that we now have a new provider for the LawCare employee assistance program (EAP).

LawCare is a major QLS member benefit and a key part of the program that promotes resilience and wellbeing resources. The new provider, Converge International, has a strong understanding of the unique needs of the legal profession and already provide EAPs to three other Australian law societies.

Converge has an extensive regional presence with offices throughout Queensland, so is well-placed to provide LawCare services to our regional members.

Lawcare benefits include six hours of complimentary counselling for QLS members, their support staff and immediate family members, and access to the website portal and EAP Connect app.

Renewals reminder

Don't forget that May is renewals month for your practising certificate and QLS membership, and you can easily do this online between 1 and 31 May.

Your QLS membership offers a range of exclusive member benefits including updates on legislative changes, case notes and extensive services from your member library (the Supreme Court Library Queensland), a huge selection of professional development events, networking functions and much more.

In peak times during renewals, our phone lines and website can be slower than usual. If you log on and the system is slow, I recommend you simply try again at a different time, 24/7.

Human Rights Act

Finally, I'd like to mention a special professional development event on 27 May which will provide significant insights into Queensland's new *Human Rights Act*, including the context for its introduction, its practical application and likely role in litigation.

I'm very pleased to advise that we have Queensland Anti-Discrimination Commissioner Scott McDougall and Robertson O'Gorman Solicitors Principal Dan Rogers as the key presenters. Dan has been intimately involved in guiding our input on the new Act in his role as Chair of the QLS Human Rights Working Group.

See qls.com.au/events.

Rolf Moses

Queensland Law Society CEO

WHAT TO DO

IF YOU SUSPECT A CLIENT MIGHT BE EXPERIENCING ELDER ABUSE



Follow the 5 steps:

- 1 Identifying – screening questions
- 2 Risk assessment
- 3 Document
- 4 Safety plan
- 5 Refer

For more information on the 5 Step process
qls.com.au/stopelderabuse

For confidential advice on how to respond to the situation

Elder Abuse Helpline – 1300 651 192 (Queensland only); or
07 3867 2525 (rest of Australia). Available Monday-Friday, 9am-5pm.

If you witness violence, or are worried the older person is at immediate risk **Police – 000 (triple zero)**.

Elder abuse is often hidden from view, but this month *Proctor* shines a legal light on this societal issue to bring it out of the darkness and shadows of shame. Drawing together views from legal experts, our May feature articles delve deep into this serious, sombre and staggering issue, canvassing solutions and highlighting efforts for resolution. From proposals for discrete criminal offences and our QLS elder abuse priorities for the Federal Government to significant changes in guardianship legislation, this month's *Proctor* lays bare this distressing topic in a must-read issue.

Read more from page 18 >

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Opinion

Family Court merger off, for now

By Matthew Dunn



The stalled fate of the Family Court merger Bill in Federal Parliament shows there is always an uneasy marriage between politics and law reform.

What may be good for one may not be good for the other. In early April things came to a head in the Australian Senate when the merger Bill wasn't debated on either of the two available sitting dates before the federal election was called.

Casually it looked like little occurred, but behind the scenes there had been a protracted straining arm-wrestle for 'the numbers' to push the merger on or hold it off. In breaking the news, the Law Council of Australia said in its press release:¹

"The Family Court is a vital cornerstone of our legal system. Its work is highly specialised and it deals with some of the most difficult and complex family law matters," Mr Moses [Law Council President Arthur Moses SC] said.

"We applaud the crossbenchers who took the time to listen to our reasoning, considered this advice, and came to the decision that this was not the right way forward for Australian families and children."

Lacking vital crossbench support for the Bill at the final hurdle, the Federal Government

lost the chance to have this signature piece of its policy agenda considered before facing the polls. This outcome was a victory for the Law Council of Australia and Queensland Law Society, which had lobbied and raised concern about the model of the proposed merger and its timing in advance of the report of the Australian Law Reform Commission (ALRC) on the reform of the whole family law system. QLS had made submissions to the parliamentary committee review of the Bill and appeared at the public hearing saying:

- There was support for measures which improved the Family Court system, however, the merger would not achieve that desired outcome
- There was a significant risk that the quality and propriety of family law decisions would be compromised where determinations were made by judicial officers without family law expertise.

Despite the outcome of the next federal election, reform is coming to the family law system. Speaking to the press following the last Senate sitting days in April, both the Attorney-General and Shadow Attorney-General committed themselves to progressing reform of the family law system,² albeit in their own ways.

The impetus for this reconsideration is likely to be the ALRC report which was scheduled to be provided to the Government on 31 March 2019 and is yet to be made public. It has been heralded as the most significant reconsideration of the operation of the family law system since its commencement in 1975. Debate on a merger of the courts may also rise from the ashes in the new term of Parliament in the shape of the New South Wales Bar Association plan for a Family Court 2.0.³

So, this proposed merger of the Federal Circuit Court and Family Court is off the table for now, but change, including an alternate model for a restructuring of federal courts, is likely to not be far away on the other side of the election.

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

Notes

¹ lawcouncil.asn.au/media/media-releases/rejection-of-deeply-flawed-family-court-merger-plan-a-win-for-australian-families.

² theage.com.au/national/family-court-merger-plan-dealt-fatal-blow-before-election-20190404-p51aoc.html.

³ nswbar.asn.au/docs/mediareleasedocs/Family_Court_MR2.pdf.

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Queensland Sentencing Advisory Council
Yesterday at 22:16 · 🌐

Judges are too soft. Another criminal gets off scot-free. Parole is automatic. These are phrases that pop up in conversation and in print and digital media every day — enraging the community and being the topic choice for many talkback radio programs. But they are simply not true. Over the next six weeks, our Chair and former Judge John Robertson will explore and debunk some of the most common sentencing myths. Misconceptions we hope will help the community better understand the complexities of sentencing and the job our judicial officers have to do in ensuring justice is served. First up we tackle the belief that 'sentences are getting softer'. <https://youtu.be/ydklUBN2Qu8> #sentencingmyths #sentencing #qldsac Queensland Law Society

YOUTUBE.COM
Court sentences are getting softer
 #sentencingmyths
 Most people reach conclusions about sentencing based on media reports. But journalists have to...

10 5 comments 7 shares

TWITTER

QldSentencingCouncil @qldsac · Apr 9
 'Criminal court sentences are getting softer by the day'. bit.ly/2G0JZX2
 @qldlawsociety #sentencingmyths



0:26 280 views

14 12

“Thanks for the love @qldlawsociety. Keep an eye out for our version of Mythbusters – just like the original... except with less explosions 😊” @qldsac – QldSentencingCouncil

“This series of myth tweets is great. Keep it goin 🙌”
 @MattMurphyMM – Matt Murphy

LINKEDIN

FNQLA Far North Queensland Law Association Inc.
4 April at 16:40 · 🌐

The Queensland Law Society Council are set to launch a campaign promoting community awareness of the issue of unqualified people offering legal services, and to urge people to see a solicitor first. The aim to prevent the harm that is caused by these 'fake lawyers' — harm that affects consumers, lawyers, and public confidence in the justice system itself — before it happens. The QLS website will direct laypeople to a 'seeking advice' web page, part of their 'Find a solicitor' service, that provides information about the issue and the benefits of coming to see QLS members at the start. The more firms there are on in the referral list, the better the service and campaign will be, and the FNQLA encourages local member law firms to apply to be on the list. Practitioners can apply to be on the list via this link: https://www.qls.com.au/.../Schemes_servi.../QLS_referral_service #QLS #FNQLA

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harrisaga we spend around 40% of our time working - it's so important to get behind something you believe in! I have that with @infotrack_au representing and meeting some great folks with @mitch_burge1 at @qldlawsociety a few weeks back. #infotrackau #queenslandlawsociety

7 DAYS AGO

The Legal Forecast launches creative arm

Legal technology group The Legal Forecast (TLF) has launched a creative arm, TLF Creative.

The launch event, held in the Supreme Court of Queensland's Banco Court on 26 March, opened with a powerful didgeridoo performance by William Barton and Aunty Delmae Barton, and was said to be the first time that a didgeridoo has been played in a Queensland court.

TLF Creative's Founding Patron, Justice Philippides, delivered a keynote speech entitled 'Repositioning the Arts in your Life', which addressed the current and historical importance of art. Her Honour emphasised the role of the arts and the mental health benefits of embracing music and the arts as an expression of our humanity.

"The arts will always connect us emotionally by capturing the essence of lived experience," her Honour said.

Queensland Law Society CEO Rolf Moses presented on his musical background and the benefits of music performance, including networking, detachment and enjoyment. TLF Creative President Daniel Trigger outlined plans for the initiative in 2019 and announced the committee of talented young lawyers who will form LawchestraQ, which will perform at TLF's Disrupting Law event in August and at a gala event in December with proceeds to be donated to mental health charities.

The event, hosted by TLF co-founder and Director Angus Murray, concluded with



Left to right: Alice Chester (TLF Creative), Angus Murray, Matthew Hickey, Aunty Delmae Barton, William Barton, Justice Philippides, Rolf Moses, Giovanni Porta, Daniel Trigger, Maddie Forster (TLF Creative), Jessie Schreiber (TLF Creative).

performances by barrister Matthew Hickey and lawyer Giovanni Porta, which culminated in a didgeridoo-backed performance of *From Little Things, Big Things Grow*, accompanied by a packed gallery of the Banco Court singing along.

With more than 120 expressions of interest, the TLF Creative will begin with a 30-piece orchestra rehearsing fortnightly at the Old

Museum Building in Bowen Hills and has future plans to expand into other creative forms such as drama, visual art, dance and literature.

For more information, call Angus Murray on 0405 715 427.

Conference spotlights bribery and corruption

An international conference in Brisbane in July will focus on the 'eternal problem' of bribery and corruption.

The International Society for Reform of the Criminal Law will hold the 'Bribery and corruption: Modern approaches to an eternal problem' conference from 9 to 12 July at the Hilton Brisbane.

Topics under discussion will include the scope of the problem, corruption prevention, risk management, investigation and law enforcement strategies, legislative reform and law enforcement strategies, legislative reform and policies, international responses, evidentiary issues, ethical considerations and balancing coercive powers of the type now exercised by Australian anti-corruption and integrity agencies with individual rights.

The conference is expected to attract members of the judiciary, defence lawyers, prosecution agencies, legal policy drafters, law enforcement, corrections and government officials.

Speakers from 12 countries will include New South Wales Chief Justice Tom Bathurst, Tasmanian Chief Justice Alan Blow, retired Queensland Supreme Court Justice Roslyn Atkinson, and Canadian Justices Elizabeth Bennett, Patrick Healy and Simon Ruel.

Other expert speakers include the head of the American Bar Association's Criminal Justice Section, Associate Professor Lucian Dervan, and the heads of Australian corruption investigation agencies.

The conference will feature an interactive panel discussion focusing on ethical issues

young lawyers face daily. QLS President Bill Potts will introduce the panel consisting of the Chair of the Crime and Corruption Commission and experienced young criminal lawyers. Retired District Court judge John Robertson will be panel chair.

There are special conferences fees for practitioners with less than 10 years' experience.

For more information and registration, see isrc12019.com.

Appointment of receiver for Team Lawyers, Brisbane

On 21 March 2019, the Council of the Queensland Law Society Incorporated (the Society) passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, Team Lawyers.

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

Enquiries should be directed to Bill Hourigan or Sherry Brown, at the Society on 07 3842 5845.

Name change for McKays

McKays Brisbane has changed its name as part of the launch of a national law practice with offices in Brisbane, Sydney and Melbourne.

Now known as Cornwalls, the firm offers additional service areas, including the multi-disciplinary corporate advisory arm, Cornwalls Capital

LawLink links students with careers

A LawLink event hosted by Queensland Law Society was included in the QLS Legal Careers Expo on 25 March.

LawLink is an initiative of the QLS Equity and Diversity Committee, with the support of the QLS Reconciliation and First Nations Advancement Committee and the Reconciliation Action Plan Working Group. The student liaison program aims to build connections between the profession and First Nations law students.

First Nations students from a number of universities attended to meet CEO Rolf Moses and members of the QLS Equity & Diversity Committee and the Reconciliation Action Plan Working Group. It was an excellent opportunity for students and committee members to share their stories, particularly in relation to the many and varied experiences in the legal profession.

The students then visited the Legal Careers Expo, meeting representatives from firms



and organisations to help them plan for their next move on completion of their studies. QLS thanks the Chair of the Queensland Law Society's Equity & Diversity Committee, Ann-Maree David, and committee members Lauren Phelps, Lesley Symons and Angela Shooter for taking the time to meet with the First Nations students and speak about their career journeys.



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Take control of your career development – plan ahead

by Sheila Kushe



The new continuing professional development (CPD) year started on 1 April and finishes on 31 March 2020.

Lots of time to get your CPD points, right?

CPD is essentially professional development that improves your ability to engage in the practice of law by extending your knowledge and skills in areas that are relevant to the needs of the current practice of law and the professional standards of solicitors.

The best way to ensure that you obtain targeted professional development is by starting to plan *now*.

Have you received any feedback recently that has highlighted any potential skills development? Have you read an article or a post that has made you curious to explore more about a topic? Do you want to develop your professional network by attending a specialist legal conference? Do you need to get your principal practising certificate and therefore need to take the practice management course?

Maybe you are looking to keep up to date with the latest changes in the law by attending a hot topic event, or you want to understand more about how to develop a more profitable practice. You may be an early career lawyer who wants more of the introductory topics or essentials in a substantive law subject, or you may be a seasoned practitioner looking for a refresher in a certain topic. Perhaps you are looking to diversify your practice or are looking for a masterclass or seeking specialist accreditation which will give you in-depth training in your area of expertise.

Wherever you are in your legal career, Queensland Law Society is here to help you take the next step.

Here are four suggestions to ensure you have a targeted plan to help you meet your career goals for 2019:

1. Consider what development you need.
2. List the skills and knowledge that you want to obtain. (For example, substantive law updates? business skills? practical skills?)
3. Think about the training format that will best suit your needs. (For example, online? Face-to-face? Conference?)
4. Check out our events page (services.qls.com.au) and take advantage of what your Society has to offer.

For our 2017/2018 events, delegates gave us an average of 4.5 out of 5 stars as an overall rating.



DELEGATE RATED
2017-2018

Our events come in a variety of different formats: livecasts, workshops, lectures or conference format.

Also don't forget we have a large range of on-demand resources which you can purchase from the QLS Shop. If we don't have what you are looking for, then email us on qlslpd@qls.com.au and tell us what education and/or training you need.

Sheila Kushe is Queensland Law Society's Professional Development Manager. Sheila is also a solicitor, accredited Mental Health First Aid Australia (MHFA) Mental Health First Aid Instructor and member of the QLS Wellbeing Working Group.

In May...

17 Mental Health First Aid (MHFA) Officer Course

 Essentials | 8.30am-1pm | 4 CPD

Brisbane

Become an accredited MHFAider. This blended accreditation course has been purpose built to address the unique needs of the Australian legal profession.



21 Masterclass: Succession law

 Masterclass | 8.30am-12pm | 3 CPD

Brisbane

Explore the more intricate aspects of wills and estate law practice using scenarios and questions from past specialist accreditation assessments.



22 Masterclass: Property law

 Masterclass | 8.30am-12pm | 3 CPD

Brisbane

Extend your skills and knowledge by exploring complex property transactions using past specialist accreditation assessment content



27 Human Rights Act 2019 (Qld) – what it means for your clients?

 Hot topic | 12.30-1.30pm | 1 CPD

Livecast

Many months of advocacy has culminated in the *Human Rights Act 2019* (Qld). Tune into our panel of experts including, Scott McDougall, Anti-Discrimination Commissioner, Queensland. Learn about its context, how it impacts you and the practical application of the 23 rights.



28 Complex family law orders

 Masterclass | 8.30am-12pm | 3 CPD

Brisbane

Advance your skills and knowledge in family law practice with a specific focus on complex family law orders.



29 Rural succession law update

 Essentials | 12.30-1.30pm | 1 CPD

Livecast

Stay up-to-date with the latest developments in rural and regional succession law practice.



30 Effective file management strategies

 Essentials | 12.30-1.30pm | 1 CPD

Livecast

Create better business practices with these practical tips and tricks to better organise and manage your files.



June

04 Client focused legal research

 Essentials | 12.30-1.30pm | 1 CPD

Livecast

Learn how to conduct legal research effectively and efficiently to support the best outcomes for your clients.



07 Gold Coast Symposium

 Essentials  Masterclass  Hot topic
7am-5.35pm | 8 CPD

Gold Coast

Don't be tied down. Embrace flexibility and innovation, and stay ahead of the curve. Attend Gold Coast Symposium to ensure your knowledge and skillset are up-to-date. Take this opportunity to connect and learn with your local professional network.



07 Celebrate, Recognise and Socialise

5.35-7.30pm

Gold Coast

Build your network, socialise and connect with local and statewide colleagues over drinks and canapés at the newly renovated Star Hotel in Broadbeach.

On-demand resources

Access our popular events online, anywhere, anytime and on any device.

 qls.com.au/on-demand



HOT TOPIC Keep up to date with the latest developments in an area of practice



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



Career moves

Best Wilson Buckley Family Law

Best Wilson Buckley Family Law has announced the appointment of **Luke Steel** as Legal Partner in the firm's Brisbane office.

Luke has practised exclusively in family law in Brisbane since 2003 and has previously been named as a recommended Brisbane family lawyer by Doyle's Guide.

Ide Lawyers

Ide Lawyers has announced the promotion of **Layla King** to Senior Associate. Layla has been with the firm as a solicitor since March last year, practising in criminal law and traffic law.

Ide Lawyers has announced that **Emma-Rose Kearney**, who joined the firm in December last year, was admitted in February and is now practising in criminal law.

In Motion Legal

Brooke Schubauer has announced the launch of her media and intellectual property (IP) practice, In Motion Legal, as of 1 April.

Brooke is the former head of business and legal affairs at Entertainment One Australia (previously Hopscotch Films) and spent six years working as a media and IP lawyer in private practice in Auckland and London before moving in-house in 2010.

James Conomos Lawyers

James Conomos Lawyers has announced that **Jon Patty** has been promoted to Associate. Jon joined the firm as a research clerk in 2014 and has practised as a solicitor for the past five years. He is experienced in commercial litigation, insolvency and bankruptcy matters.

Marino Law

Gold Coast boutique commercial firm Marino Law has welcomed two new appointees.

Charles Cook has joined the family law team as an Associate following a move from Western Australia. Charles worked with boutique mid-tier firms in Perth before running his own practice, working primarily in family law, estate law, criminal and traffic law until last year.

Experienced litigator **Damien Freeman** also joins the firm as an Associate with the litigation and dispute resolution team. Damien has acted on a range of commercial and other business disputes and has previously worked in the financial services sector.

MBA Lawyers

MBA Lawyers has announced the appointment of **Michael Smith** as a Senior Associate. Michael has practised in litigation for more than 12 years and is experienced in personal injuries, commercial litigation, and building and construction matters.

Samual Makin, who has worked at the firm for the past year, has been appointed as a solicitor in the commercial department. Sam supports clients in corporate, commercial and property law matters.

McLaughlins Lawyers

McLaughlins Lawyers has announced the promotion of **Matt Kollrepp** to Associate Director. Matt has been in practice for more than 12 years and has experience in various areas, focusing mainly on commercial litigation, contract and business disputes, insolvency and bankruptcy. He has experience in managing a boutique debt recovery practice and working for the Office of Fair Trading and Competition Commission in the United Kingdom in the cartel and criminal enforcement division.



Emma-Rose Kearney



Brockie Schubauer



Jon Paity



Charles Cook



Damien Freeman



Michael Smith



Evette Jones



Alessandra Schladetsch



Susanne Randall



Mia Behlau



Emily Weir



Luke McKavanagh



Adam Saunders



Sally Southwood



Catherine Wallace



Rebekah Finlayson



Natassja Hollows



Hugh Powell

Robert Bax & Associates

Evette Jones has joined the team at Robert Bax & Associates, Clayfield. Evette is a QLS Accredited Specialist in family law and has more than 14 years' experience.

SLF Lawyers

SLF Lawyers has welcomed **Alessandra Schladetsch** to its Brisbane office. Alessandra, who has joined the litigation team as an Associate, has practised predominantly in commercial litigation and debt recovery since her admission in 2014.

SLF Lawyers has also announced the promotion of **Susanne Randall** as a solicitor in the Brisbane office. Susanne, a member of the insurance team, joined the firm in September 2018 prior to her admission.

Stone Group Lawyers

Stone Group Lawyers has appointed four new staff and announced four promotions.

Mia Behlau has been welcomed as a Special Counsel in the litigation department. She is skilled in competition and consumer law, breach of contract, insolvency, construction law, estate litigation and franchising disputes.

Emily Weir, who has been welcomed as a Senior Associate in the commercial law team, has extensive experience in intellectual property, building and construction law, and employment law.

Luke McKavanagh has joined the commercial team as an Associate. Luke focuses on franchising law, as well as providing advice on a variety of commercial issues that arise for small to medium businesses.

Adam Saunders has joined the litigation team as a lawyer providing advice in banking and finance dispute resolution.

Sally Southwood, who has been promoted to Special Counsel, has more than 20 years' experience in family law, having practised solely as a family lawyer since her admission and becoming a QLS Accredited Specialist in family law in 2005.

Catherine Wallace, who has practised as a commercial litigation lawyer for more than 12 years, has been promoted to Senior Associate. She is skilled in resolving disputes in general commercial matters, insolvency, building and construction, employment, property, intellectual property and insurance.

Rebekah Finlayson, who has been promoted to Senior Associate, has practised solely in family law since 2013, assisting clients in a range of matters including complex property and parenting disputes, spousal maintenance, child support, divorce and domestic violence issues.

Natassja Hollows has been promoted to Associate in the family law team. Before transitioning into family law, Natassja, who previously worked in criminal law, has experience in complex property settlements, parenting, de facto relationships, divorce, spousal maintenance, child support and domestic violence matters.

Travis Schultz Law

Travis Schultz Law has announced the appointment of **Hugh Powell** as an Associate.

Hugh has worked extensively in personal injury and compensation law since 2011, acting in matters involving workers' compensation, public liability and CTP claims. He also has significant experience in master and servant claims including providing advices on entitlement, liability, quantum and evidence.

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.



Exploring careers the easy way

Almost 600 law students came through the doors at this year's QLS Legal Careers Expo, held at the Brisbane Convention & Exhibition Centre on 25 March.

Attendees were able to engage with some 40 exhibitors representing law firms, professional associations, PLT providers, government, recruitment agencies and more. They could also chat with practice specialists, attend informative panel sessions on topics such as 'Where can your degree take you?', or update their CVs at the ever-popular Resume Rescue service.

The Legal Careers Expo continues to grow in size and popularity each year, and will return in 2020.



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ELDER ABUSE

THE JOURNEY SO FAR



by Mel Raassina

ELDER ABUSE, MUCH LIKE DOMESTIC AND FAMILY VIOLENCE, IS OFTEN A HIDDEN, SHAMEFUL SCOURGE IN THE COMMUNITY

It is widespread and takes many forms, such as physical, emotional, sexual and financial.

Some of society's most vulnerable – the elderly – are targets of this abuse, particularly those with diminished mental or physical capacity who rely on relatives or carers for their care.

The journey to seeing this stain wiped from society is a long one, with many taking part along the way.

The issue

This issue is still not as public as domestic and family violence, as it is often seen by the victim as shameful, particularly when it involves their children. The general consensus in the legal profession is that more awareness, education and reporting at all levels is required. The lack of reporting is currently one of the biggest issues seen with elder abuse, specifically with confusion about what elder abuse is.

Those being abused by their children, for example, assume it is not abuse but merely the child 'helping themselves' to their inheritance early – or 'inheritance impatience', as it's been coined. Society's elderly are also often afraid of being abandoned, lonely or isolated, and this can then cause them to make decisions they would not otherwise choose.



Kirsty Mackie is the Chair of the Queensland Law Society Elder Law Committee, a QLS Councillor, a University of Sunshine Coast lecturer and solicitor.

She was among the many members of the 26 QLS policy committees who contributed to the 2019 federal Call to Parties Statement, and the main driver for the elder abuse priority items.

When asked to identify the biggest elder abuse issue faced by older Australians, Ms Mackie said that it came in the form of financial elder abuse and social isolation.

"Yes, raising awareness is the most important first step, but there is no point in awareness when there is no one the victims can go to for assistance or any laws they can look to which can uphold their rights," she said.

The road so far

QLS has focused over several years on ways to raise awareness and reporting of elder abuse. These have included a 2017 trial campaign¹ with the Australian Medical Association of Queensland and the Brisbane North Primary Health Network to bring assistance to the elderly in 321 GP clinics, and also work on the Guardianship and Administration and Other Legislation Amendment Bill 2017.

Appearing at the public hearing for this Bill, QLS representatives were asked if they would support the introduction of discrete criminal offences for elder abuse. At the time, QLS had not formed a view, but has since put out two sides of the argument – both for and against – from members of the QLS Criminal Law Committee and QLS Elder Law Committee.



Vanessa Krulin is a Senior Policy Solicitor at QLS and is the staff liaison with the QLS Elder Law Committee.

She said that one of the key passions that the committee held close was strong advocacy for older persons.

“I think it is difficult for many to understand the degree to which ageism has subconsciously proliferated in society,” she said. “The members of the QLS Elder Law Committee are unwavering in their promotion of the rights of older people – whether that be in relation to self-determination and autonomy, capacity challenges and supported decision-making, elder abuse, inappropriate treatment in care facilities such as nursing homes, or the overuse of medication as a form of chemical restraint.”

Ms Krulin said that elder law practitioners were often required to assist across the full spectrum of advocacy for older persons, as the infringement on rights spans from circumstances requiring litigation to having to simply remind an institution or person that they cannot make decisions on behalf of an older person or assume that person does not have capacity simply because the person is older.

She said that important changes had occurred, such as various public awareness campaigns over the past several years, the establishment of the specialist Domestic and Family Violence Courts, and the recent passing of the Guardianship and Administration and Other Legislation Bill 2018.

“This Bill was passed on 26 March and will allow the Queensland Public Guardian to investigate potential elder abuses after the death of the adult, which is a welcome step. But there is a long way to go in relation to measures, legislative reform and resources which are needed to substantially reduce the prevalence of elder abuse.”

“**A REASON PERPETRATORS CONTINUE TO PERPETRATE IS THERE ARE LITTLE TO NO CONSEQUENCES FOR THEM.**”

However, Ms Krulin is concerned that culturally, society has a long way to still travel in this space.

Where to from here?

The QLS Legal Policy Team recently released the 2019 federal Call to Parties Statement² – a document outlining the key legal priorities for Queensland solicitors for the major parties to address. Item 11 calls for a commitment from each party to urgently implement a national and multi-faceted plan to combat elder abuse.³

Ms Krulin worked with the QLS Legal Policy Team and the QLS Elder Law Committee on the statement, as well as feedback received from leading academics, and said the entire committee would be interested to read the responses when received from the political parties.

“The section on elder abuse was carefully compiled to ensure that the receiving parties can easily make commitments to our requests with the confidence that doing so will result in the development of well-researched and evidence-based policy,” she said.

She noted that the general feeling was that these issues had been ‘talked to death’ and it was now time for the Government to rely on the evidence and take definitive steps forward to improve the widespread problem.

Ms Mackie, a key driver of the elder abuse portion of the statement, said she would like to see government-driven progress on elder abuse in the form of a more coordinated approach in advocating on behalf of older people.

“Each state is doing wonderful work progressing the rights of older people, but it needs an overarching body to drive and coordinate initiatives, research and law reform advocacy,” she said.

“The primary focus of our request in the Call to Parties Statement is to keep the Government on track in implementing the ALRC (Australian

Law Reform Commission) recommendations, plus to remind them of other very important recommendations such as ‘Not Now, Not Ever,’⁴ which also included some very powerful and useful recommendations.”

One of the key issues highlighted in the Call to Parties Statement is the inconsistency in laws affecting the elderly between Australian states and territories. With the increase of Australians owning assets across borders, meaning they may have multiple powers of attorney, this situation can get tricky for all parties.

“It can often be expensive to sort out when there is an issue or an abuse of power by an attorney,” Ms Mackie said. “For example, Victoria in 2015 imposed a criminal sanction on misuse of an enduring power of attorney. So you could get a situation when a Victorian resident, familiar with this protection, comes to Queensland expecting the same protection.”

Another key issue that has been debated by Queensland lawyers from both sides of the fence is that of criminalising elder abuse and bringing in discrete criminal offences. Ms Mackie – and many of her colleagues in the QLS Elder Law Committee – is from the camp which is advocating for the introduction of such offences and the strengthening of legislative provisions in relation to the misuse of enduring powers of attorney.

“The cost to the community of financial elder abuse is significant, with increased pressure on the health care system and social security from older people being financially abused,” she said.

“We need to focus more on prosecuting the perpetrator rather than protecting the victim. A reason perpetrators continue to perpetrate is there are little to no consequences for them.”

Ms Krulin agreed that there needed to be clearer and more accessible avenues of recourse for those experiencing one or more types of elder abuse, noting the possibility of the introduction of discrete offences.

She is also an advocate for a multi-faceted approach to increase community, government and police understanding of elder abuse and increase reporting.

“It needs to be recognised and reported, and we need substantially increased and consistent funding for community legal centres and other groups with specialist resources who can assist an older person or their supporters in upholding their rights,” she said.

Ms Mackie said the barriers she would foresee with the major political parties addressing and agreeing to these requests would be related to cost – “the cost of establishing a standalone service to combat elder abuse where there is already a number of services working with elder abuse victims.”

She maintains that one fulsome service is still the best way to go.

A long way to go

There are many parts to advocacy as it journeys towards better legal options and protections for older Australians. Many practitioners working in elder law know that it is long past time for real and tangible change.

It is the hope of those in the QLS Elder Law Committee, and many more working at the coalface, that the Federal Government and the major political parties will adopt the recommendations on issues affecting older Australians.

Ms Krulin said that the parties must develop sensible and evidence-based policies on these issues and that adequate funding must be budgeted for.

“Funding – consistent and appropriate funding – is urgently needed to ensure that those groups, such as community legal centres and the Office of the Public Guardian, who are empowered to assist, are properly resourced to effect outcomes for persons at risk and those experiencing abuse,” she said.

“A robust, persistent effort is needed from all levels of government to call out this problem and provide adequate community education that can effectively impact the necessary cultural change which is required.”

The fate of many older Australians now lies in the hands of our political parties, who must take the time to fulsomely look through the recommendations laid out by some of the most experienced practitioners in Queensland. It will be up to them to decide what priorities they focus on should they come into power when Australians hit the ballot boxes on 18 May.

Hear more on the issues surrounding elder abuse from an esteemed panel at the World Elder Abuse Awareness Day Breakfast, 14 June.

Register today at qls.com.au/events

Melissa Raassina is Media and Public Relations Advisor at Queensland Law Society.

Notes

¹ Queensland Law Society, Seniors and the Law web page, qls.com.au/For_the_community/Seniors_the_law [accessed 2 April 2019].

² Queensland Law Society. (2019), 2019 Call to Parties Statement, federal election. qls.com.au/For_the_profession/Advocacy/Federal_Election_2019 [accessed 2 April 2019].

³ Proctor, April 2019, p19.

⁴ Queensland Government. (2015), ‘Not Now, Not Ever: Putting an end to domestic and family violence in Queensland’. Report, Special Taskforce on Domestic and Family Violence in Queensland. csyw.qld.gov.au/campaign/end-domestic-family-violence/about/not-now-not-ever-report [Accessed 2 April 2019].

ELDER ABUSE: OPINION

THE QUESTION IS ‘WHY?’

by
Kurt
Fowler



‘Elder abuse’ is perhaps, as with many areas of unlawful activity, a dark area of society that is prone to being avoided or ignored. The reasons for that are wide and numerous.

However, in recent years there appears to be an acceptance in discussing its very existence. Perhaps its prevalence is misunderstood due to only relatively recent public discourse.

Of course, any physical assault of an ‘elder person’ is by its very nature alarming, whether it is at the hands of a family member or otherwise. However, one might think that the public curiously associate the term ‘elder abuse’ predominantly with financial abuse or the old-fashioned terms, stealing and fraud.

If it is accepted that elder abuse is prevalent and will be more so with an ageing population, why are prosecutions relatively infrequent? Why are prosecutions limited? What, if anything, should be undertaken by the legislature or society to prevent elder abuse is possibly more complex than the issue itself.

A call might be made for a special or distinct offence of ‘elder abuse’. Proponents of a distinct offence might understandably anticipate a criminal defence community to respond with the predictable yet arguably rational response that there is already a legislative framework that can be utilised such as, the Criminal Code, *Domestic Violence and Family Protection Act* and the powers of attorney legislation.

Before the anticipated answer is given, thought might be given to an alternate response to the suggestion that a new ‘elder abuse’ offence be introduced...and we ask why?

Why is the current legislation not being utilised? Why are criminal courts not littered with prosecutions for dishonest conduct against the elderly? Why are civil lists not delayed even further dealing with inter-family loans and property claims?

An answer to that might be that the current legislation does not adequately provide for this particular category of offending. That might be incorrect. The law does and has for years. Dishonesty is not a novel concept.

Indirectly, proponents of these new offences might be of the view that the law, as it stands, does not provide for this particular category of complainants. Is it because they are elderly, frail, suffer memory lapses or have some form of cognitive impairment? Or, is it that other special and unique category of complainant that exists in society...those who choose not to make a complaint? Is it possible that proponents of this new offence are searching for a way to take the election to formally make a complaint away from the alleged victim themselves? The law does and should do this in certain, restricted categories. Should it here?

Criminal conduct should be dealt with in a civilised community. However, balanced against that is the fundamental protection enshrined throughout any developed criminal jurisdiction, a defendant is entitled to face his accuser, be aware what the allegations are, be provided with the evidence held by the prosecution. How these competing issues balance in the area of ‘elder abuse’ is the vexed question.

Kurt Fowler is a Queensland Law Society Accredited Specialist in criminal law and principal of Fowler Lawyers. He is also chair of the QLS Criminal Law committee.

NEW PRINCIPLES FOR DECISION- MAKERS

**BILL ADDRESSES
CONFLICT TRANSACTIONS
AND MORE**



by Michele Davis

While no person expects, nor wishes, to experience a lack of capacity, the very real fact of life is that they may.

Incapacity can be long term or short term, and can impact everyone quite differently.

The question of someone's capacity to understand the nature and the effect of something is fraught with difficulty, mainly because capacity is something that is very specific to the person and the type of decision they must make.

With all this in mind, it is not doubt unsurprising that the impact of legal capacity is an area of increasing difficulty and, sadly, ripe for dispute.

In March, Queensland Parliament passed the Guardianship and Administration and Other Legislation Amendment Bill (the Bill), which included amendments to various Acts, including the *Powers of Attorney Act 1998* (Qld) and the *Guardianship and Administration Act 2000* (Qld). The Bill has provided a number of valuable changes, some of which are addressed below. While the Bill has been passed, at the time of writing the commencement date of these changes had yet to be released.

Some of the key changes include a refresh of the general principles to be followed by decision-makers, dealing with conflict transactions and the interests of a beneficiary of an adult's will.

Conflict transactions

In relation to decision making by attorneys, the Bill includes amendments to section 73 of the *Powers of Attorney Act 1998* (Qld), which deals with, and provides further clarification around, conflict transactions. In section 68(2) of the Bill, a new section referring to when an attorney may be authorised to enter into a conflict transaction provides for a principal to *retrospectively* authorise a conflict transaction. An excerpt of the new section 73(1A) is as follows:

“(1A) Despite subsection (1), if an attorney enters into a conflict transaction without obtaining an authorisation mentioned in subsection (1) for the transaction, a conflict transaction of that type or conflict transactions generally, the principal may retrospectively authorise the transaction if the principal has capacity to do so.

(1B) A conflict transaction authorised under subsection (2) is taken to be, and to have always been, as valid as if it had been entered into under an authorisation given by the principal before the attorney entered into the transaction.

(1D) To remove any doubt, it is declared that, until the conflict transaction is authorised under subsection (2) or section 118(3), the attorney has acted contrary to subsection (1).”

In section 68(4) of the Bill, further examples of conflict transactions have been provided and include situations in which the attorney lends the principal's money to a close friend of the attorney, rents the principal's house or rents it to their relative, pays their own personal expenses (including travel) from the principal's money or buys the principal's house.

The Bill also provides clarity on when a transaction is not a conflict, stating that there will not be a conflict merely because the attorney is related, is a beneficiary of the principal's will, or deals with property jointly owned with the principal (including acquiring joint property or obtaining loans or giving guarantees or indemnities in relation to that joint property).

There are like adjustments to the *Guardianship and Administration Act 2000* (Qld) in respect of the role of an administrator.

Development of principles

The Bill also sees the introduction of a new Chapter 1A for the *Powers of Attorney Act 1998* (Qld), setting out a more comprehensive set of general principles and health care principles to be applied when performing the function and exercising powers under the Act or an enduring document. Formerly found in the schedule, the new general principles are now found within a new section 6C of the Act and additionally focus on:

- **More broad human rights and fundamental freedoms**, that speak to the inherent dignity of the adult, autonomy, independence, non-discrimination, more fulsome participation in society, equality of opportunity, accessibility and equality between all persons.
- **Empowerment**, exercising the adult's human rights and fundamental freedoms encouraging decision-makers to achieve maximum physical, social, emotional and intellectual potential for self-reliance as can be achieved.



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- **Maintaining the adult's existing supportive relationships**, which bespeaks to inclusivity of those important to the adult and fostering a network of meaningful support of the adult.
- **Maintaining cultural and linguistic environments**, reflecting the importance of Aboriginal and Torres Strait Islander persons, their values and customs.
- **Privacy, liberty and security**, ensuring that privacy is respected and no deprivation of liberty is experienced.
- **Participation in decision-making is to be maximised**, ensuring the adult's right to participate in decision-making is recognised and their views taken into account, along with access to support and all information necessary for meaningful participation.
- **Performance of functions and exercise of power** is done in a way that promotes and safeguards the adult's rights, interests and opportunities in the least restrictive way. When exercising the power, the Bill further requires the decision-maker to take a structured approach to the decision-making process. In particular, the decision-maker must first recognise the adult's right to make their own decision and (where possible) provide support to the adult to make that decision. The decision-maker must then take those views, preferences and wishes of the adult into account in making the decision. If the adult cannot communicate their wishes, views or preferences, the decision-maker must consider what the adult's wishes, views or preferences may have been in relation to that decision if it's reasonably practicable to work out what those wishes or views may have been based on the adult's views as may have been expressed or demonstrated when they had capacity.

This staggered approach provides further clarity as to how decision-makers should arrive at their decision while paying tribute to the remainder of the general principles regarding maintaining dignity, autonomy and the fullest participation by the adults at the heart of the decision. For estate planners, this may encourage more fulsome consideration of whether guidelines or instructions of the adult should be included in their enduring documents to assist decision-makers to satisfy themselves that they have given effect to what the adult's likely views, wishes or preferences may have been in respect of a decision.

Presumption of capacity by court or tribunal

Section 75 of the Bill introduces a new section 111A providing that a court or tribunal is to presume that the adult has capacity until proven otherwise:

“111A Application of presumption of capacity

(1) If, in performing a function or exercising a power under this Act, the court or tribunal is required to make a decision about an adult's capacity for a matter, the court or tribunal is to presume the adult has capacity for the matter until the contrary is proven.

(2) If a declaration by the court or tribunal that an adult has impaired capacity for a matter is in force, a person or other entity that performs a function or exercises a power under this Act is entitled to rely on the declaration to presume that the adult does not have capacity for the matter.”

Interests of beneficiary under principal's will

Section 66 of the Bill introduces new sections that deal with a beneficiary's interests in the will of a principal when the beneficiary's interest in the will may be impacted by the conduct of the attorney in making decisions to sell or otherwise convert property owned by the principal in the course of their duties as attorney.

The new sections provide for some certainty for the interests of the beneficiary to remain intact (as best as can be achieved) and to avoid frustrating a gift intended by the principal to benefit that particular beneficiary. The new section also provides for the beneficiary to receive any income achieved from the proceeds and any capital gain that arises from the sale.

A common issue that arises in this context is, for example, when a beneficiary may be gifted a property in the principal's will and the attorney lawfully sells that same property which is the subject of the gift to fund the principal's move into retirement or aged care. Currently, a beneficiary (or the legal personal representative) may apply to the court for compensation for the loss of a benefit in an estate under section 107 of the *Powers of Attorney Act 1998* (Qld). With the inclusion of this new section, it is anticipated that there will be less need for an application to be made to the court under s107 to achieve the success of the gift intended in the principal's will.

The new section 61B as follows:

“61B Effect on beneficiary's interest if property dealt with by attorney

(1) This section applies to a person who is a beneficiary (*the beneficiary*) under a deceased principal's will.

(2) The beneficiary has the same interest in any surplus money or other property (*the proceeds*) arising from a sale, mortgage, charge, disposition of, or other dealing with, property under the powers given to an attorney under an enduring power of attorney as the beneficiary would have had in the property sold, mortgaged, charged, disposed of or otherwise dealt with, if the

sale, mortgage, charge, disposition or other dealing had not happened.

(3) The beneficiary is also entitled to—

(a) any money or other property that is able to be traced as income generated by the proceeds; and

(b) any capital gain that is generated from the proceeds.

(4) This section applies even if the beneficiary is the attorney who sold, mortgaged, charged, disposed of or otherwise dealt with the property.

(5) This section applies subject to any order made by the court under section 61D(1).”

As there can be some risk that the acknowledgment or tracing of the property afforded by the operation of s61B could result in an unfair or disproportionate advantage or disadvantage, a new section 61D affords the beneficiary, the personal representative of the principal's estate or the personal representative of the principal to apply to the court to confirm or vary the operation of the new s61B.

The operation of the new section 61B encourages further discussion with clients when undertaking their estate planning to ensure that all appropriate outcomes are canvassed when considering and drafting a gift to a beneficiary in a will coupled with the operation of this new section. It is not uncommon for a property to be subject to a sentimentality rather than a value when being intended as a gift, and as such it is necessary to consider the possible outcomes of the operation of s61B and the crafting of the relevant clause in a will.

Some of these changes will provide some much-needed clarity around common areas of dispute and I am hopeful that they achieve the desired certainty that brought about the changes in the first place. These changes are significant for many, particularly those lawyers who practise in this area and are advising clients on the impact of conflict and the unintended consequences of dealing with property gifted in wills. The changes also highlight the need for any person either advising on or being advised on enduring documents that the law will constantly evolve and change, and these important documents cannot be set and forgotten about.

The changes listed above are, of course, not an exhaustive list. All practitioners should read the full Bill and watch for the commencement date of the changes.



ELDER ABUSE: OPINION

ELDER ABUSE CRIMINAL LAWS IT'S TIME

IT IS BEYOND STRANGE THAT:

- > Persons in a position of trust or, what the law describes as having a fiduciary duty to someone else, can be charged with a criminal offence and go to jail, for example, directors of corporations under section 180 of the *Corporations Act 2001* (Cth).
- > Yet a family member in a similar position of trust, that is, holding an enduring power of attorney for someone either cannot be, or is not, charged with any criminal offence for breaching that duty.
- > Persons unknown to us can break into our home, steal our belongings and be charged with a criminal offence and go to jail.
- > Yet a family member holding an enduring power of attorney for their mum or dad can break into their online bank account, take their money and not face any criminal sanctions.
- > Despite the existence of specific statutory offences relating to the misconduct of enduring powers of attorney in various pieces of legislation, to my knowledge, and that of the Australian Law Reform Commission in its 'Elder Abuse Report' of 2017 (p365),¹ no enduring power of attorney has ever been prosecuted for any such offences.
- > Financial abuse or coercion of a family member by another family member is buried in the definition of 'domestic violence' in the Queensland *Domestic and Family Violence Protection Act 2012*, leading to its irrelevance and obscurity in the prevailing euphemistic theme of family violence.

Elder abuse engenders pervasive community outrage about which, you would think, the law should be naturally concerned. Elder financial abuse by family members, for example,



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by Brian Herd

constitutes the most significant form of elder abuse and is, on all accounts, burgeoning. If the United States of America is anything to go by, last year in that country it was estimated to have cost older people some \$2.9 billion. It is a major social evil. Given its impact is usually on vulnerable people and in the context of the above factors, we need to seriously question the effectiveness of the current law in addressing it.

I agree that law, such as criminal law, can never eradicate harmful conduct. However, it can be effective in two ways in reducing peoples' egregious behaviour: first, in raising the consciousness of the community that certain conduct which might have been seen previously as simply bad behaviour deserves the sobriquet, 'criminal', and second, in providing a real disincentive for that behaviour.

If you accept that, then there is an initial need to question the efficacy and effectiveness of the current criminal law as set out and defined, for example, in Queensland's *Criminal Code Act 1899*. You might think that much abusive conduct would fall under the rubric of some existing criminal offences. Matching some abusive types of conduct to a crime might be portrayed as follows:

- A son taking money from his mum's bank account for his own purposes – crime – stealing?
- A daughter isolating her mum from contact with the family – crime – deprivation of liberty?
- A son neglecting the mum for whom he is the full-time carer – crime – failing to supply the necessaries of life?

Looked at more closely however, the traditional criminal offences are ineffective in actually catching the illicit abusive conduct. Why? Let's take stealing as an example. To prove stealing you have to establish three elements, namely:

1. A person took something belonging to someone else.
2. The taking was without their consent.
3. The taker intended to permanently deprive the owner of what was taken.

The problem for the prosecution in these cases is proving elements two and three. To an

allegation of stealing, many offending children will counter with the familiar mantra – "Mum said I could have it" or "I said I'd give it back to mum when she needed it". The problem in many cases is that 'mum' may have lost her capacity to give her version. Case closed.

Ironically, the civil law itself gives a hand up to the elder abuser in the criminal context. The recent case of *Berghan v Berghan* (2017) QDC 47, is a good example of this. In the District Court judgment, Judge Everson DCJ described the defendant son of elderly parents as a person who cynically abused their generosity and shamelessly sponged off them.

His Honour was referring to an amount of \$286,471.09 which had been provided by the elderly parents to the son, Mr Berghan, at his request over 13 separate tranches. Apparently, Mr Berghan told his parents on each occasion that he would pay them back and look after them in their old age. When the parents duly requested the return of the money, the defendant advised them that it was a gift and didn't have to be returned. In doing so, he was taking advantage of the common law presumption of advancement, that is, that an advance of money from a parent to a child is presumed a gift unless the parent can prove otherwise.

In finding for the defendant, his Honour found that there was no obligation on Mr Berghan to repay his parents because of another presumption of law, namely, that, in their dealings with each other, families do not have the intention to enter into a legal relationship unless there is evidence to the contrary.

While his Honour's decision was overturned unanimously on appeal, his Honour's words strike at the heart of the problem with elder abuse. The law is not contemporary and relevant enough to capture the conduct that is elder abuse. Other comparable countries, however, are doing so.

In 2015 in the United Kingdom, a new 'serious criminal offence' was introduced in its *Serious Crimes Act 2015* described as "coercive or controlling behaviour in a family relationship". It addresses conduct which is "designed to make a person subordinate or dependent by

isolating them...exploiting their resources... depriving them of needs for independence...".²

The purpose of the provision is indeed to attack the nature of the conduct and to create a criminal offence specifically designed to attack it as opposed to relying upon age-old criminal offences.

In the United States, elder abuse has been identified as a specific form of criminal conduct which is not caught by the conventional legal regime. As a result, in many states there are criminal offences known as "exploitation of an elderly person". What this does is capture more than what stealing captures. It catches the shameless sponging, the cynical abuse or the taking advantage of an elderly parent.

The current government interest and community campaign to address the scourge of elder abuse is to be applauded. However, much of the public discourse is concentrated on awareness raising and support for the victims of elder abuse.

Too little attention is given to the conduct of the perpetrators. Their actions are not just bad behaviour requiring assignment to a 'clear thinking room'. They need to starkly understand it is criminal. For this purpose we need to give the law the tools to raise their awareness of the seriousness of their conduct. The law is inept and inert in conveying its message. It inoculates the wrongdoers from consequences – we need elder abuse criminal laws.

It's time.

Brian Herd is the head of elder law services at CRH Law.

Notes

¹ 'Elder Abuse – A National Legal Response' (2017), Australian Law Reform Commission, alrc.gov.au/publications/elder-abuse-report.

² 'Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework' (2015), Home Office, United Kingdom. assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf.



Making the right choice



R v Doyle and advising clients
whether to give evidence





The decision of a client to give, or not give, evidence in a criminal trial is significant. **Callan Lloyd** looks at the potential consequences.

An important task for a criminal defence lawyer is advising their client whether they should give evidence at their trial.¹

Generally, practitioners are today more likely to advise defendants to give evidence than they have been in years gone by. It is sometimes suggested that today's juries are more worldly, and more likely to expect to hear what the defendant has to say.

Nevertheless, there may be quite valid reasons to advise a client against giving evidence in their trial. This can include where:

- The practitioner wants the jury to solely focus on perceived weaknesses in the prosecution's case, rather than feeling a need to choose between the complainant's and the defendant's versions of events.²
- By giving evidence the client will expose themselves to cross-examination, which may involve unfavourable matters coming out that otherwise wouldn't, or where such matters will receive greater emphasis than would otherwise be the case.
- A client has trouble expressing themselves, are prone to losing their temper, are themselves too nervous to give evidence, and/or are expected to generally perform poorly as a witness.

So long as the client's rights and the basis for the practitioner's advice are appropriately explained, and the client reaches their own decision, the above reasons are valid considerations.

In certain matters however, and despite the general right to silence, a client can be significantly disadvantaged by not giving evidence in their trial. This article will largely focus on the 'traps' that can arise if a client does not give evidence. The Court of Appeal's decision in *R v Doyle*³ is illustrative of such circumstances.

The right to silence

No discussion about advising clients whether to give evidence could be divorced from an acknowledgment of the right to silence, and related principles. In *R v Dah*, White J described the general position as follows:

"No adverse inference may be drawn from the defendant's failure to give evidence,

...the onus of proof lies upon the prosecution, ...the defendant is presumed innocent until the prosecution adduces sufficient evidence to reach a conclusion of guilt beyond reasonable doubt and...the failure to give evidence does not strengthen the prosecution case or supply additional proof against a defendant or fill gaps in the evidence..."⁴

As detailed below, the general protections associated with the right to silence become less clear when a prosecution case is circumstantial, and there are relevant facts known only to the defendant.

R v Doyle: The facts

A car was being driven through Deception Bay. It contained the driver, a front-seat passenger, and two children. A man driving a white Toyota Avalon failed to give way to the first car, and so the passenger leaned over and blasted the horn at the Avalon. The driver of the Avalon, apparently enraged by the honking, then embarked upon a vicious road-rage attack.

The attacker twice rammed the first vehicle, then overtook it, and stopped and got out to approach the other driver. The other driver (no doubt in great fear for his safety and that of his passengers) sped away. The attacker returned to his car and pursued the other vehicle, reaching speeds up to 140km per hour. The ramming continued, and then the Avalon smashed through a fence and into a brick wall. Undeterred, the attacker continued, emerging from the Avalon brandishing a sword.

Thankfully, the original driver and his three passengers escaped. The attacker fled the scene before police arrived. Witnesses provided a general description of the attacker. Police discovered that the Avalon's registered owner was a Mr Doyle. A few hours later, he was located around 1500 metres from the scene of the crash. Mr Doyle's appearance matched the general description of the attacker that the witnesses provided. Further, a fingerprint taken from the Avalon matched Mr Doyle's (though it was impossible to say when the fingerprint had been deposited). Mr Doyle was charged and took the matter to trial.

R v Doyle: The trial

There was no challenge by defence to the fact that the road-rage offences occurred (but Mr Doyle's plea of not guilty asserted

he did not commit the offences). Further, Mr Doyle's counsel formally admitted that his client was the registered owner of the Avalon, and that his fingerprint had been left on the Avalon vehicle. Accordingly, the only matter in dispute was the identity of the offender.

The prosecution's case on identity was a circumstantial one. It relied upon these matters:⁵

- Mr Doyle was the registered owner of the vehicle, and his fingerprint was located in the vehicle.
- He matched the gender and skin-tone described by those who witnessed the attack.
- Mr Doyle was located hours later in the area.
- The involvement of his car, and his presence in the area on the same night, calls for an explanation by him. He had not provided one. There was (the prosecution argued) no innocent explanation on the evidence.

Mr Doyle did not give evidence. During the trial, his counsel contended that there were innocent explanations available and that the prosecution could not establish his guilt beyond reasonable doubt – importantly, in a circumstantial case, if there is any reasonable possibility consistent with innocence which cannot be excluded beyond reasonable doubt, the jury are required to acquit the defendant.⁶

With this in mind, the defence argued that there were two hypotheses open which were consistent with innocence. First, that Mr Doyle may have lent his car to family members or friends, and secondly that he may have sold his car but the change in ownership had not yet been registered.

In summing up the trial judge directed the jury as follows:

"If the evidence presented raises an inference that the accused was the driver and the man with the sword, that inference that it was him may be strengthened by the accused's decision not to offer any evidence as an explanation. And it may strengthen it but only if any additional facts that could offer an innocent explanation for the use of his car at that time and his later presence in the street would, if those facts existed, be peculiar within the knowledge of the accused. It is in those circumstances that the absence of an explanation from him may strengthen the case against Mr Doyle." (emphasis added)

It might be considered that direction has a tendency to whittle away Mr Doyle's right to silence.

Mr Doyle was convicted by the jury. He appealed and contended that it was not appropriate for the trial judge to invite the jury to draw an adverse inference from his decision not to give evidence.⁷ It was also contended that the trial judge's direction "foreclosed proper consideration by the jury of a reasonable hypothesis consistent with the appellant's innocence, namely that somebody other than the appellant used his car and committed the offences".⁸

Drawing of an adverse inference

In rejecting the defendant's first argument, the Court of Appeal relied on the High Court's decision of *Weissensteiner*,⁹ which provides an exception to the principle that no adverse inference should be drawn from an accused's exercise of their right to silence.

The exception allows the jury to consider if the prosecution case is 'strengthened' by the defendant's decision not to give evidence, though it only applies when the defendant is 'peculiarly' in possession of additional facts, and decides not to give evidence about them.

Considering the hypotheses argued by Mr Doyle's counsel, Sofronoff P (who delivered the lead judgment) said:

"Each of these theories has three features. First, if true, each is a matter that only the appellant knows about. Second, for the Crown to exclude these theories, it would have to do something that is very difficult or impossible – to prove a negative, namely that the car had not been lent or sold. Third, absent any evidence from the appellant, there was no evidence at all to support these theories.

"It is precisely in such a case that a jury is entitled to take into account an accused's failure to give evidence and a judge is entitled to tell a jury how to take that failure into account..."¹⁰

President Sofronoff clarified what use the jury could make of the defendant's election not to provide an explanation:

"...in circumstances in which the jury might expect that, if there was an innocent explanation for the facts that give rise to an incriminating inference, then the accused would know what that explanation might be and would offer it and so *the accused's failure to offer any explanation strengthens the inference urged by the prosecution.*"¹¹ (*emphasis added*)

His Honour also made it clear that the jury nevertheless had to be told that:

- The accused was not bound to give evidence.

- The onus remained on the prosecution to prove guilt beyond reasonable doubt.
- The accused's decision not to offer an explanation did not of itself prove anything.¹²

A reasonable hypothesis consistent with innocence

The Court of Appeal rejected the defendant's second argument, which was that the trial judge's direction had foreclosed proper consideration of a reasonable hypothesis consistent with innocence.

President Sofronoff's decision emphasises that the Crown's obligation in a circumstantial case is to exclude only each *reasonable* hypothesis consistent with innocence. His Honour stated that "reasonable does not mean logically open in theory";¹³ an alternative hypothesis must rest upon something more than a theoretical possibility or mere conjecture, it must be based upon evidence.¹⁴ In rejecting the appeal, Sofronoff P concluded that Mr Doyle's "...decision not to give evidence foreclosed any other rational conclusion but that the appellant was guilty".¹⁵

In considering *R v Doyle* and the impact of the defendant's decision to not give evidence, practitioners will recall a converse issue arising in *The Queen v Baden-Clay (Baden-Clay)*.¹⁶

In *Baden-Clay*, it was held that the defendant's decision to give evidence had the effect of limiting the available hypotheses which were open. Mr Baden-Clay was of course convicted at trial of murder after giving evidence that he did not kill his wife. He was successful in the Court of Appeal (where his conviction was reduced from murder to manslaughter). On further appeal in the High Court, Mr Baden-Clay maintained that the hypothesis of an unintentional killing was open on the evidence. The High Court rejected that submission, reinstating the jury's verdict to convict Mr Baden-Clay of murder. The court held that:

"The evidence given in the present case by the respondent narrowed the range of hypotheses reasonably available upon the evidence as to the circumstances of the death of the respondent's wife. Not only did the respondent not give evidence which might have raised the hypothesis [of an unintentional killing], the evidence he gave was capable of excluding that hypothesis."¹⁷

Accordingly, while *R v Doyle* demonstrates that the decision *not* to give evidence may foreclose the availability of a hypothesis consistent with innocence, so too can the defendant's decision to give evidence at trial.

Conclusion

There are many competing considerations which impact upon a practitioner's advice to a client to give evidence, or to not give evidence, in a criminal trial.

It is clear that a client's right to silence will not always mean that the client will not be disadvantaged if they do not give evidence, particularly in a circumstantial case. If on the facts of the case the jury might conclude that, if there was an innocent explanation, the accused would know what that explanation is and would offer it, the jury will likely be entitled to conclude that the accused's decision not to give evidence strengthens the inference urged by the prosecution.

Further, close attention needs to be given to what hypotheses might be available in a circumstantial case; in particular, whether a decision by the client to give evidence, or to not give evidence, will impact the availability of any such hypothesis.

No doubt advice given to clients in this regard should be well documented, and the client's decision and reasons for giving evidence, or not doing so, should be reduced to written instructions that are signed before the client is called upon to make their election.



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Notes

¹ While advising clients whether to call evidence from other witnesses is naturally a related topic, it is outside the scope of this article.

² While, in theory, this concern should be addressed by the bench book direction 'Defendant Giving Evidence', practitioners may maintain a degree of scepticism of the jury's willingness to follow that instruction.

³ *R v Doyle* [2018] QCA 303.

⁴ *R v Dah* [2004] QCA 419, [86] (White J).

⁵ The full list of factors is included at paragraph [9] of the decision, an abbreviated list is included for simplicity.

⁶ *Shepherd v The Queen* (1990) 170 CLR 573, 578.

⁷ *R v Doyle* [2018] QCA 303, [11] (the defendant's first argument) – in fact, there was only a single ground of appeal, though Sofronoff P distilled a "second string to [Doyle's] bow" from the submissions made.

⁸ *R v Doyle* [2018] QCA 303, [27] (the defendant's second argument).

⁹ (1993) 178 CLR 217.

¹⁰ *R v Doyle* [2018] QCA 303, [24] – [25]; a passage with which Fraser JA, and Douglas J agreed.

¹¹ *Ibid* [21].

¹² *Ibid* [20].

¹³ *Ibid* [29].

¹⁴ *Ibid*.

¹⁵ *Ibid* [33].

¹⁶ *R v Baden-Clay* (2016) 258 CLR 308.

¹⁷ *R v Baden-Clay* (2016) 258 CLR 308, 326, [54].

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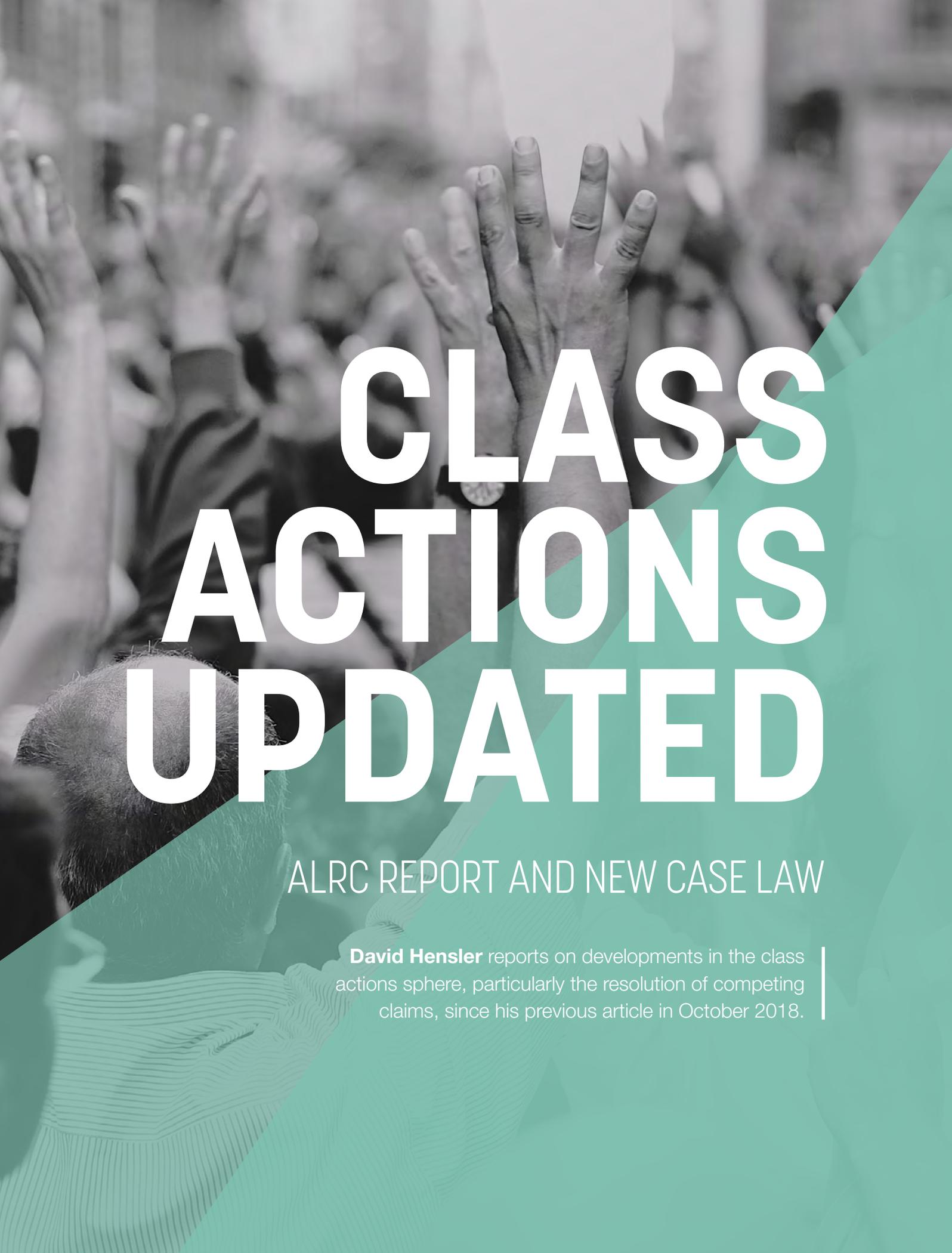
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CLASS ACTIONS UPDATED

ALRC REPORT AND NEW CASE LAW

David Hensler reports on developments in the class actions sphere, particularly the resolution of competing claims, since his previous article in October 2018.

There has been significant growth in class actions in Queensland, with seven actions now before the Supreme Court representing areas such as property development, shareholders' concerns, water quality and ratepayers' rights.

Queensland Chief Justice Catherine Holmes told delegates in her opening address at QLS Symposium in March that she could see class actions placing very significant pressure on court resources, and said that almost all of the Brisbane Trial Division judges not constituting a specialist court or managing a major list had been assigned a class action for management.

Since discussing the resolution of competing claims in the October 2018 edition of *Proctor*,¹ the Full Court of the Federal Court has considered the issue.

Also, the Australian Law Reform Commission (ALRC) has delivered a final report² with recommendations respecting the resolution of competing class actions as part of its wider inquiries.

The Federal Court appellate decision

The primary judge, Lee J, had to case manage three competing open class actions, each involving different law firms and litigation funders – the Webb, Perera and McTaggart proceedings. All were commenced within a short time of each other and involved substantially the same claims.³ (Two of the claims also involved officers of the respondent company.) The decision of Lee J to be considered by the court was:

- “(a) [F]irst, that only one proceeding should continue as an open class action on a long-term basis;
- “(b) [S]econd, that the Webb Proceeding should be the open class action in preference to the Perera Proceeding and the McTaggart Proceeding;
- “(c) [T]hird, in respect of the Perera Proceeding and the McTaggart Proceeding...there was power in the circumstances to permanently stay those proceedings as an abuse of process; and

“(d) [F]ourth, that in all of the circumstances it was appropriate to exercise the power of a permanent stay over any of the other alternatives propounded by the parties, whether a temporary stay pending later declassing or class closure, immediate declassing or immediate class closure.”⁴

Both Perera and McTaggart sought leave to appeal, which was granted as “the applications raise important matters of principle in relation to how the Court should deal with competing class actions”,⁵ and “[the Court] cannot say that the primary judge’s decision is not attended with sufficient doubt either as to the source of the relevant statutory or other power that his Honour used to justify a permanent stay of the two proceedings or as to its manner of exercise”.⁶

Each appellant argued his or their open class action should proceed, and offered various proposals for dealing with the other two.⁷ Webb argued that his proceeding should continue as an open class with the others either stayed, adjourned or declassified.⁸ The respondent, GetSwift, sought a stay of all but one of the proceedings, but was indifferent as to which one proceeded.⁹

The court said of the procedure adopted by Lee J:

“When all three proceedings came before his Honour on 13 April 2018, detailed evidence was adduced and submissions were made as to the approach to be taken to resolve the issue of the competing class actions, the powers of the Court in this regard and the comparative merits of the competing proposals. Further argument spanned three further hearings, with additional submissions and materials being filed. We would not condone such a complex, elaborate and expensive exercise in other cases when the issue of competing class actions needs to be dealt with. But we mean no criticism of his Honour in the present context given the

novelty of some of the legal and forensic issues raised. But, in future cases these questions require to be dealt with less elaborately and more efficiently.”¹⁰

The court considered the “relevant options and applicable legal principles” to deal with the potential overlap between competing class proceedings as follows.

Consolidation

It was not doubted that the court had power to consolidate competing class actions.¹¹ The court considered that it was unlikely, however, that a consolidation order would be made absent agreement between the parties because:

“[F]or a consolidation order to be made in competing funded class proceedings, a mechanism would need to be determined for resolving such issues, including so as to achieve equity between the group members in each of the proceedings. In circumstances where the litigation funders may be jointly and severally liable (at least indirectly) for adverse costs, it may not be possible for consolidation to occur without assurances that each funder has adequate finances or insurance arrangements to meet any order which might be made in respect of the consolidated proceedings. Amongst other things, each litigation funder is likely to require sufficient information to form a view as to the co-funder’s financial position and in particular its capacity to meet any order for adverse costs.”¹²

Declassing under s33N(1) of the *Federal Court of Australia Act 1976*¹³

The court noted that the primary judge considered that, if the interests of justice so dictated, s33(N)(1)(c)¹⁴ of the *Federal Court of Australia Act 1976* (FCA) could be invoked to declassify a competing class action.



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As Lee J had put this option aside, the court did not have to finally determine the issue. It did, nonetheless, respectfully disagree with his Honour's view. Although, for the reasons stated, the court considered it was not without doubt, the better view, it said, was that the text and context of s33N(1) required "consideration of the comparator of whether it is in the interests of justice that the proceeding be determined in numerous *individual* non-representative proceedings",¹⁵ and the "inquiry is not whether the common issues might be more efficiently resolved by way of some other *representative* proceedings".¹⁶ (*court's emphasis*)

The court also doubted Lee J's view that s33ZF¹⁷ (general power of the court to make orders) provided a separate basis for a declassifying order.¹⁸

The 'wait and see' approach

The court thought that in some circumstances a 'wait and see' approach may be appropriate, but not "where there are multiple open class proceedings, numerous group members signed up in each of the proceedings to different funding arrangements, and the prospect of a common fund application being made in each of the proceedings".¹⁹

Class closure

As to this option, the court said that in appropriate circumstances the court had power under s33ZF(1),²⁰ and its inherent power, "to make a class closure order that eliminates the existence of overlapping group members in two or more competing class actions".²¹

Staying proceedings

The primary judge held that the court had power to stay a proceeding which constituted an abuse of process, and surveyed the relevant authorities. From this he observed that abuse of process could take many forms; the categories of instances were not closed; and that care needed to be exercised when permanently staying a proceeding.

Further, he made reference to the concept of a stay being ordered, absent an express finding of abuse of process, utilising either the implied powers of the court, or potentially, s33ZF(1) of the FCA.²² The court noted that Lee J made reference to Foster J's comments in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2016) 243 FCR 474 (at [97]-[146]) where that judge said:

- "(a) Notions of justice and injustice must reflect contemporary values if the courts and the administration of justice are to continue to enjoy the confidence of the public.
- (b) Abuses of procedure usually fall into one of the following three broad categories:
- (i) The court's procedures are invoked for an illegitimate or improper purpose;

- (ii) The use of the court's procedures is unjustifiably oppressive to one of the parties or vexatious; or
 - (iii) The use of the court's procedures in the manner contemplated would bring the administration of justice into disrepute.
- (c) The onus of proving an abuse in any given case rests upon the party alleging abuse, and that onus is a heavy one."

The court endorsed these propositions advanced by Foster J.²³ It accepted that the legislative intent, as reflected in the language of the provisions, was to permit multiple proceedings.²⁴

The court agreed with the appellants' argument that, because Part IVA of the FCA doesn't guarantee that a respondent won't be subject to more than one proceeding, it cannot be argued that Part IVA is intended to ensure that a respondent is not to be vexed by multiple suits or the costs of defending multiple suits.²⁵

Webb and GetSwift argued that a stay may be granted to "prevent misuse of [the courts'] procedures in a way which, although not inconsistent with the literal application of procedural rules of court, would nevertheless be 'manifestly unfair to a party to litigation ... or would otherwise bring the administration of justice into disrepute among right-thinking people...'"²⁶

The court identified the following as the issues to be resolved:

1. The source of the power to stay.
2. If there was a power to stay, should it have been chosen over the available options?
3. If a stay was appropriate, should the Webb proceedings have been the preferred choice?²⁷

The court accepted that, notwithstanding competing class actions are actively case managed, they may still be productive of delay; increase legal costs; waste court resources; and result in unfairness to respondents.²⁸ Accordingly, in the proper administration of justice, a court may stay one or more competing class actions by reason of:

- its inherent power
- its express and implied powers to manage the cases before it in the interests of justice and the parties, and consonant with the overarching purpose to facilitate the just resolution of disputes as prescribed by s37M of the FCA,²⁹ or
- its equitable jurisdiction.

While the court did not doubt that a court could stay proceedings as an abuse of process if they gave rise to unjustifiable oppression or would bring the administration of justice into disrepute, contrary to the

primary judge, it did not consider the continuation of the Perera and McTaggart proceedings would give rise to such findings.³⁰

Having concluded that the court had the power to stay, the question became whether this was the appropriate option. The court said:

"In deciding whether to exercise the power to grant a stay the primary judge took into account all the circumstances of the case, including the position with respect to each of the three open class actions, the relevant interests of justice, the interests of the respondents concerning having to deal with multiple class actions over the same matter, the interests of the applicants and group members (including the position of many of them as continuing shareholders in GetSwift), and the broader interests of ensuring that class actions are run expeditiously and in a cost efficient manner. His Honour also considered the available alternative remedies, being declassing and class closure."³¹

The court opined that "[r]easonable minds may differ as to whether the facts of a given case justify the imposition of a permanent stay, but appellate review of such a decision depends upon demonstrating material *House v The King* error".³² It could discern no such error.³³

Having decided that Lee J had not erred in staying two of the claims, it remained to be considered whether it was the Webb proceeding which should have been permitted to continue. After discussing the submissions and evidence put forward by the parties,³⁴ the court said:

"The primary judge's decision to prefer the Webb Proceeding was an exercise of discretion which involved evaluating competing criteria, and his Honour had put in place a process to choose between the competing class actions on the basis of such criteria. Where such an evaluative exercise is involved, upon which reasonable minds might differ and where there is no one correct conclusion, it is not enough that we may have a preference for a different view to that taken at first instance. Error must be shown."³⁵

The court held no error was shown.³⁶

The decision highlights the fact that resolving competing class actions will remain a difficult proposition (absent any legislative intervention) as illustrated by the court's comments "...that there is no one right answer to the case management questions that arise when dealing with competing class actions. There cannot be a 'one size fits all' and different judges will give take (*sic*) a different view of some of the incommensurable and conflicting considerations that may arise. It should also be kept in mind that there is no 'silver bullet' solution to the case management problems

of competing class actions and each of the 'solutions' can be said to have some or other problem."³⁷

The ALRC report

The Australian Law Reform Commission has examined the issue of competing class actions, and has made a number of proposals:³⁸

1. Amend Part IVA of the FCA to give the court express statutory power to resolve competing class actions.³⁹
2. To give effect to the preceding recommendation, amend the Class Actions Practice Note (GPN-CA) to provide a further case management procedure for competing class actions by introducing key interlocutory steps as suggested.⁴⁰ (In Queensland, Practice Direction Number 2 of 2017 is concerned with representative proceedings.)
3. The GPN-CA should, amongst other requirements, specify a deadline by which all competing claims must be lodged.⁴¹
4. The GPN-CA should also be amended to provide criteria for when it is appropriate to order class closure during the course of a representative proceeding and the circumstances in which a class may be reopened.⁴²
5. The Supreme Courts of those states and territories with representative action procedures⁴³ should consider becoming parties to the 'Protocol for Communication and Cooperation between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings'.⁴⁴ This recommendation focuses attention on the need to address multi-jurisdictional cases (as exemplified by *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 (29 August 2018); see generally the discussion of forum shopping at [4.123]-[4.132]).
6. The Federal Court should have exclusive jurisdiction with respect to securities class actions arising under Part 9.6A of the *Corporations Act 2001* (Cth) and s12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth).⁴⁵
7. All class actions should be initiated as open class proceedings.⁴⁶
8. As a matter of public policy, only one class action with respect to a dispute should be permitted to continue. (albeit with a power to permit otherwise in exceptional cases).⁴⁷
9. The court should choose the proceeding that best advances the claims and interests of group members in an efficient and cost-effective manner, having regard to the stated preferences of group members, as the one to go forward.⁴⁸
10. Part IVA of the FCA should be amended to provide the court with an express statutory power to make common fund orders on the application of the plaintiff or the court's own motion.⁴⁹

Should the ALRC's recommendations be accepted and implemented, there is no doubt that the class action legal landscape will be significantly reshaped, at least at the federal level.

Whether Queensland authorities see the need to make any changes remains to be seen.

David Hensler is a non-practising member of the Queensland Law Society.

Notes

¹ 'Class actions – Resolving competing claims', *Proctor*, October 2018 Vol.38 No.9 David Hensler. The following correction should be noted. Points 5 and 6 at page 19 should be elided and read, '5. If the proceedings are open class, then leave them constituted as such, and adopt a wait and see approach. (The proceedings will be left to progress to a joint trial. This approach is predicated, however, on an assumption that the overlap between group members in the competing classes will be resolved by one means or another before the matter reaches trial.)

² Australian Law Reform Commission, 'Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders', Report 134 (2018).

³ *Perera v GetSwift Limited* [2018] FCA 732 (23 May 2018). Lee J

⁴ *Perera v GetSwift Limited* [2018] FCFCA 202 (18 November 2018)[5].

⁵ *Ibid* [10].

⁶ *Ibid* [11].

⁷ *Ibid* [3].

⁸ *Ibid* [40].

⁹ *Ibid* [41].

¹⁰ *Ibid* [33].

¹¹ Such power being derived from s33ZG(c)(iv) of the *Federal Court Act 1976*; the court's inherent power; or the power under r30.11 of the *Federal Court Rules 2011* (Cth) to consolidate, including to facilitate the objective enshrined in s22 of the FCA (The requirement to determine a matter completely and finally). S33ZG(c)(iv) provides that, except as otherwise provided by Part IVA, nothing in the part affects consolidation of proceedings. There is no Queensland equivalent to s33ZG(c)(iv) of the FCA. Consolidation in Queensland is dealt with in Rule 78, *Uniform Civil Procedure Rules 1999* (UCPR), as part of provisions dealing with multiple proceedings – Rules 78-81.

¹² *Perera v GetSwift Limited* [2018] FCFCA 202 (18 November 2018) [50],[51].

¹³ *Civil Proceedings Act 2011*, s103K(1).

¹⁴ S33N(1)(c) reads: "The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part [IVA] where it is satisfied that it is in the interests of justice to do so because: the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members." For Queensland see *Civil Proceedings Act 2011*, s103K(1)(c).

¹⁵ *Perera v GetSwift Limited* [2018] FCFCA 202 (18 November 2018) [60]. (emphasis in original)

¹⁶ *Ibid* [61].(emphasis in original).

¹⁷ *Civil Proceedings Act 2011*, s103ZA.

¹⁸ *Perera v GetSwift Limited* [2018] FCFCA 202 (18 November 2018) [65].

¹⁹ *Ibid* [66].

²⁰ *Civil Proceedings Act 2011*, s103ZA.

²¹ *Perera v GetSwift Limited* [2018] FCFCA 202 (18 November 2018) [70].

²² S33ZF(1): "In any proceeding (including an appeal) conducted under this Part [IVA], the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding." For Queensland, see *Civil Proceedings Act 2011*, s103ZA.

²³ *Perera v GetSwift Limited* [2018] FCFCA 202 (18 November 2018) [73].

²⁴ *Ibid* [84]. (S33(C)(1) of the FCA provides that a representative proceeding may be commenced by one or more of those persons [who meet the criteria in subsection (1)] as representing some or all of them. For Queensland, see *Civil Proceedings Act 2011*, s103B(2).

²⁵ *Perera v GetSwift Limited* [2018] FCFCA 202 (18 November 2018)[85].

²⁶ *Ibid* [111] (citation omitted).

²⁷ *Ibid* [116].

²⁸ *Ibid* [118]-[119].

²⁹ See the philosophy and the overriding obligation of the parties and the court expressed in Rule 5, UCPR, which is of similar import.

³⁰ *Perera v GetSwift Limited* [2018] FCFCA 202 (18 November 2018) [135]-[157].

³¹ *Ibid* [164].

³² *Ibid* [165]. *House v The King* 55 CLR 499. Here the High Court held that it is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion, for example, if the judge acts upon a wrong principle, if he or she allows extraneous or irrelevant matters to guide or affect him or her, if he or she mistakes the facts, or if he or she does not take into account some material consideration.

³³ *Ibid* [166]-[187].

³⁴ *Ibid* [198]-[240], [243]-[272].

³⁵ *Ibid* [241].

³⁶ *Ibid* [242].

³⁷ *Ibid* [274].

³⁸ Australian Law Reform Commission, above n2 90-128, [4.4-4.152]. See also, Victorian Law Reform Commission, 'Access to Justice-Litigation Funding and Group Proceedings' Report, (March 2018) 81-86, [4.66]-[4.96]. (Efficiency and multiple class actions)

³⁹ *Ibid* 107-113, [4.63]-[4.92].

⁴⁰ *Ibid* 114-115, [4.93].

⁴¹ *Ibid* 115-116, [4.99]-[4.104].

⁴² *Ibid* 94-96, [4.19]-[4.26].

⁴³ *Civil Proceedings Act 2011*, Part 13A, sections 103A-103ZC (Qld); *Civil Procedure Act 2005*, Part 10, Div.2, ss155-176 (NSW); *Supreme Court Act 1986* Part 4A ss33A-33Y (Vic).

⁴⁴ Australian Law Reform Commission, above n2 123-124, [4.133-4.136].

⁴⁵ *Ibid* 126-128, [4.146]-[4.152].

⁴⁶ *Ibid* 90-94, [4.4]-[4.18].

⁴⁷ *Ibid* 107, [4.63].

⁴⁸ *Ibid* 119, [4.108].

⁴⁹ *Ibid* 96-99, [4.27]-[4.35].

Access to witnesses and fairness to an opposing party

by Stafford Shepherd



Our civil system for determining disputes contemplates that each party to the proceeding will marshal the evidence that the party intends to lead to either establish the action or cause, or to defend the allegations.

To better secure an open adversary system, there are certain fundamental principles to which we adhere when dealing with witnesses of fact. These are:

- There is no property in a witness of fact.¹
- Either side to a proceeding can approach a person thought to be able to give relevant evidence as to the matters in dispute, and it is for that person to determine the extent to which he/she will cooperate in providing information prior to the hearing.²
- There is no obligation on a person possessing information relevant to litigation to disclose it otherwise than in accordance with a direction of the court.³
- No potential witness is obliged to give a statement prior to trial to the solicitor for any party to the litigation.⁴
- If no statement is given, the only course open to the parties to the litigation is to have that person called to the witness box, pursuant to a subpoena if necessary.⁵
- A potential witness may, of course, provide a statement to each side in the litigation – there is no obligation on the witness to do so, it is a matter of free choice.⁶
- A potential witness may inform the solicitor for the other party to the proceeding what has been told to the other solicitor.⁷
- The mere fact that a potential witness has given a statement to one side does not mean that he/she is prevented from telling either the world at large or the other side what information he/she has provided.⁸

These principles arise “because the court has a right to every man’s evidence. Its primary duty is to ascertain the truth.”⁹

We are not obliged to disclose to an opponent the existence of a witness who could assist the opponent’s case as against our own client.¹⁰ But we cannot “prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings”.¹¹

We will not breach Rule 23.1 of the Australian Solicitors Conduct Rules 2012 (ASCR) simply by telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed, or by advising about relevant obligations of confidentiality.¹²

As noted in *Deacon v Australian Capital Territory*¹³ a solicitor “whilst not permitted to obstruct or hinder or dissuade a witness from coming forward or cooperating with enquiries, would not be acting unlawfully merely by advising the witness that he or she is not obliged to come forward or respond to enquiries”¹⁴ unless the prospective witness or witness is required by statute or court order to do so.

A person who has information that may be of relevance to a proceeding is not obliged to confer with us. If the prospective witness or witness chooses not to assist, then we should respect that decision.

In *In re Disciplinary Action against Dvorak*,¹⁵ an attorney was held to have unlawfully obstructed another party’s access to evidence by attempting to dissuade a witness from providing particular information to the court.

The attorney represented a husband in a bitter child custody dispute. The attorney had written a letter to a witness who had given evidence at a deposition that the witness had defamed her client by making false and malicious statements. The attorney stated that if the witness failed to correct those statements her client would commence a defamation action against the witness.

The statements made by the witness were privileged and could not serve as the basis for a defamation action. The court held that a lawyer would violate the rule not only when denying access to a witness completely, but also when attempts were made to dissuade¹⁶ a witness from providing particular information to the court.

The attorney was also found to have used tactics that went beyond legitimate advocacy by writing to the witness’ employer primarily for the purpose of embarrassing the witness.¹⁷ The letter sought preservation of any documents relevant to the custody action and that they be removed from the public domain.

The witness had used her employer’s computer to complete a questionnaire from the independent child representative. The letter also contained a statement that the employee had provided false information. It was that statement which was held to have been designed to embarrass.¹⁸

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

Notes

- ¹ *Harmony Shipping Co. S.A. v Saudi Europe Line Ltd* [1979] 1 WLR 1380, 1384 (per Lord Denning MR) (*Harmony*).
- ² *Commonwealth Bank of Australia v Cooke* [2000] 1 Qd R 7, 12 (per Williams J).
- ³ *Ibid.*
- ⁴ *Ibid.*
- ⁵ *Ibid.*
- ⁶ *Ibid.*
- ⁷ *Ibid.*, 12-13.
- ⁸ *Ibid.*, 13.
- ⁹ *Harmony*, 1384.
- ¹⁰ *New South Wales Bar Association v Thomas (No.2)* (1989) 18 NSWLR 193, 205 (per Kirby J: “Thus the failure or refusal to call an available relevant witness, done for tactical reasons, may be entirely proper”).
- ¹¹ Rule 23.1 ASCR.
- ¹² Rule 23.2 ASCR.
- ¹³ (2001) 147 ACTR 1 (*Deacon*).
- ¹⁴ *Deacon*, [111].
- ¹⁵ 611 N.W.2d 147 (N.D. 2000) (*Dvorak*).
- ¹⁶ Compare Rule 23.1 ASCR where the term “discourage” is used.
- ¹⁷ See Rule 34.1.3 ASCR.
- ¹⁸ *Dvorak* at 151.

Child homicide Bills flawed

by Pip Harvey Ross



Queensland Law Society has raised serious concerns about a number of significant criminal justice law reform proposals.

These include a Bill introduced by the Queensland Government proposing changes to the definition of murder in the Criminal Code and, in a Private Member's Bill, the introduction of an offence of child homicide with a mandatory sentencing framework.

The proposed reforms follow the release of the recent Queensland Sentencing Advisory Council (QSAC) report which reviewed sentencing for child homicide offences in Queensland. If either of these reforms proceed, it would be the most significant amendment to the unlawful killing provisions in the Criminal Code in decades.

The QSAC report

On 25 October 2017, the Attorney-General and Minister for Justice Yvette D'Ath made a reference to QSAC on the penalties imposed on sentence for criminal offences arising from the death of a child. The review was launched in response to a number of tragic, high-profile child homicide cases in Queensland.

On 21 November 2018, QSAC released its final report into sentencing for criminal offences arising from the death of a child. It determined that sentencing for manslaughter cases involving the direct use of violence against a young child was inadequate and did not reflect the unique and significant vulnerability of child victims.

It made two significant recommendations:

Recommendation 1: A new aggravating factor for child homicide sentences should be introduced. *The Penalties and Sentences Act 1992* (Qld) should be amended to include a requirement that, in sentencing an offender for an offence resulting in the death of a child under 12 years, courts must treat the defencelessness of the victim and their vulnerability as an aggravating factor.

Recommendation 2: A review of the treatment of the new aggravating factor for sentencing purposes should be undertaken. The review should consider the effectiveness of the proposed reforms to the *Penalties and Sentences Act 1992* (Qld).

The major political parties in Queensland have taken different approaches in response to the recommendations.

The Criminal Code and Other Legislation Amendment Bill 2019: On 12 February 2019, the Attorney-General introduced this Bill, which seeks to amend the *Criminal Code Act 1899* (Qld) (Criminal Code) to expand the definition of murder to include reckless indifference to human life and to increase the maximum penalty for failure to supply necessaries from three years' imprisonment to seven years' imprisonment and to reclassify the offence as a crime.

The Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019 (Private Member's Bill): On 13 February 2019, the Member for Toowoomba South David Janetzki, introduced this Private Member's Bill which proposes to introduce a mandatory minimum non-parole period of 25 years' imprisonment for the murder of a child under the age of 18 years and a new offence of child homicide which includes a mandatory non-parole period of 15 years' imprisonment.

Both Bills were referred to the parliamentary Legal Affairs and Community Safety Committee for consultation. QLS made a submission on both Bills and appeared before the committee at the public hearing on the Bills on Monday 25 March 2019, represented by President Bill Potts, Criminal Law Committee member Ken McKenzie and Legal Policy Manager Binari De Saram.

In response to the Government Bill, we raised three key concerns. First, that in the absence of cogent evidence and data indicating that the current definition of murder is not appropriately adapted to achieving its objectives, QLS is not in a position to support an amendment. Potential issues with the proposal to widen the definition of murder include: a lack of need, overlap with the assessment of manslaughter and unduly complicated legal concepts and trial directions.

We raised similar issues with the increase of the maximum penalty for failure to provide necessaries of life from three to seven years, thereby altering the classification of the offence from a misdemeanour to a crime. QLS considers that an increase to maximum penalties should be grounded in cogent evidence based on research and data, which has not been provided in this case.

The Government Bill also seeks to include the offence of 'failure to provide necessaries of life' within the serious violent offence regime. All offences currently listed in the regime require positive action, as opposed to this offence, which is omission-based conduct. As such, in the absence of evidence, it is the view of QLS that the current regime and sentencing discretion process adopted by courts is capable of appropriately dealing with defendants.

QLS submitted that, while maintaining objection to certain aspects of the Bill, it is our view that if Parliament is minded, the Government Bill be passed.

In response to the Private Member's Bill, we raised other concerns, particularly on the proposal to introduce a standard non-parole period of 25 years for the murder of a child and 15 years for child homicide.

We maintained our long-standing objection to mandatory sentencing and standard non-parole schemes. Our submission also highlighted a previous report from the QSAC which discouraged the adoption of standard non-parole periods and the risk of disproportionate impact on vulnerable offenders with a mental illness or intellectual impairment. Similarly, we opposed the introduction of a mandatory sentence for child homicide, as proposed in the Private Member's Bill. In circumstances where judicial discretion is fettered by the mandating of a sentence, the court is unable to impose a sentence that is transparent and just in all of the circumstances. A mandatory sentence, by definition, prevents a court from fashioning a sentence appropriate to the facts of the case.

QLS also opposed the introduction of a separate offence for child homicide, as we regard the current offences of murder and manslaughter as sufficient. We noted that when appropriate, a maximum life sentence is available for the offence of manslaughter.

The parliamentary committee was due to report in mid-April, after our publication deadline. We will be watching closely when Parliament votes on the two Bills later this year.

Pip Harvey Ross is a QLS legal policy clerk. This article was prepared under the supervision of solicitors on the QLS Legal Policy Team and with the assistance of Legal Policy Manager Binari De Saram.

Consent orders and judgments in state and federal courts

Parties frequently reach agreement on interlocutory or final orders to be made in a proceeding.

This article deals with the practice that should be adopted by practitioners to obtain court orders to reflect their agreement. This article does not deal with the special rules for consent orders in appeals and costs assessments which differ, at least in the state courts,¹ to the general position set out below. Also, in the Federal Court and Federal Circuit Court there are different rules for consent orders in family and property settlement matters² and appeals from tribunals such as the Administrative Appeals Tribunal,³ which are also beyond the scope of this article.

State courts

The most relevant rules in the *Uniform Civil Procedure Rules 1999* (UCPR) are rules 30(6) and 464, which deal with consent adjournments, and rule 666, which deals with other consent orders and judgments.

Consent adjournment of registrar

The simplest consent order is the consent adjournment. Rule 30(6) UCPR applies to proceedings commenced by originating applications, and rule 464 UCPR applies to all applications, including applications in a proceeding. These rules provide that, if the parties consent to an adjournment of the hearing of an application, the registrar can move the hearing to another date. The rules do not appear to accommodate ancillary orders such as costs orders.

The approved form for adjourning applications commenced by originating application is a Form 11.⁴ There is no specific approved form for adjournments of an application in a proceeding, and in those circumstances the procedure below should be adopted.

There is also a specific form if the parties want to consent to refer the matter to an alternative dispute resolution process such as mediation.⁵ In those circumstances, Form 34 should be used.

Consent orders of registrar

Where there is no specific rule, and no specific form, the parties should execute a Form 59A Request for Consent Order of Registrar.

The usual practice is to set out the order the parties want the court to make in Form 59. That document is generally exchanged in an editable form, such as a Microsoft Word format, so that if the party receiving the proposal wants to suggest changes this can be done quickly.

Once the form of order is agreed, both solicitors execute Form 59A, which attaches the agreed Form 59. Either the same form or (more usually) counterparts are signed. Those counterparts are then compiled and filed in the court.

The manner of filing of the request and the supporting material that is required is set out in practice directions in each court.⁶ In each court, the practice directions say that the parties should file Form 59A, together with two copies of the proposed order. The parties should supply two copies of the order in addition to the copy that is physically affixed to each Form 59A. It may be necessary to file an affidavit if some further factual prerequisite exists for the making of the relevant order. However, in the case of discretionary directions of a purely procedural nature, the consents themselves will usually be sufficient.

If no hearing is set down in the near future, the parties can simply file the Form 59A, or the counterparts if they were executed separately. However, when the matter is listed for hearing, the process is more complex.

The registries generally insist on receiving original signed Form 59A requests for consent orders, before consent orders are sealed. There does not appear to be a mandate in the UCPR for the registrar to hold original signed copies. Indeed, there is no requirement in the UCPR for signatures. All that Rule 666 requires, in order for the registrar's jurisdiction to be enlivened, is that "the parties consent in writing"⁷ to the order and that the "consents must be filed in the registry".⁸

However, documents can only be filed electronically if that method "is approved by the principal registrar of the court in which the document is to be filed".⁹ Requests for consent orders are not approved to be filed electronically.¹⁰ Therefore, the document must be filed personally or by post.¹¹

To alleviate this, the registrars of the state courts will generally receive electronic or facsimile copies of Form 59A and attached Form 59, and will (if the orders are acceptable) vacate or adjourn dates as required, but generally will not seal the order until the originals are filed.

If the parties have reached agreement before a hearing and want to avoid an appearance, they should call the relevant registry, confirm the best email address for the submission of consent orders, then (with the other party's consent) email the collated Form 59A requests and the orders to the relevant address, copying in the other parties. The email should request confirmation whether the orders will be made without the need for an appearance and should say that the parties intend to file original consent orders in due course. Parties should never assume an appearance is no longer necessary until they are given this advice by the court.

The parties should take care to note the limitations on the registrar's discretion. In each court, the practice direction sets out the types of matters for which a registrar will not make a consent order. These include things like interlocutory injunctions, which require undertakings to be given in open court. There is a statement in each practice direction that the registrar will not make an order which they "would not routinely make without submission, authorities or detailed evidence or explanation".¹² For example, adding parties to a proceeding will generally be referred to a judge.

Final orders

Rule 666 empowers the registrar to enter judgment. Form 59A can still be used to evidence the consent of the parties, however the Form 59 that is usually attached to requests for orders on interlocutory applications should be replaced with a Form 58, which is more appropriate for final orders and judgments. The same process set out above in respect of filing original requests applies.



by Kylie Downes QC and Maxwell Walker

It will be a question for the registrar whether they exercise their discretion to enter judgment or refer the matter for the consideration of a judge. However, on the face of rule 666, the registrar has the same power to enter judgment as the court constituted by a judge where the judgment is consented to by the parties.

It is important to recognise when an agreement between the parties calls for judgment to be entered, rather than an order to be made.¹³ In that event, the appropriate course is to enter judgment using a Form 58, through the registrar if possible. A judgment entered by consent by a registrar has the same effect as a judgment of the court.¹⁴

Federal Court and Federal Circuit Court

In the Federal Court, the procedure is less prescriptive.

The *Federal Court Rules 2011* provide that “[a] Judge may make an order in accordance with the terms of a written consent of the parties by initialling or otherwise annotating the consent and placing it on the Court file”.¹⁵

The parties can email a form of orders signed by both parties to the registry. Ideally both signatures should be on the one document, which can be achieved by one party sending a scanned copy of the executed order to the other parties, which can be printed and countersigned, then rescanned and sent to the court. The court may consider counterparts or correspondence if this process is not possible.

There is no prescribed form for the form of order itself, but it should include the court header and footer. Parties should check with the registry to determine the appropriate email address, particularly if the matter is listed for hearing, or whether the consent should be lodged through E-Lodgement, which is a method suggested in the court’s Technology and the Court Practice Note.¹⁶

If the matter is already listed for hearing, orders can be sent directly to the judge’s chambers, copying in the registry. Again, parties should not assume that an appearance is not necessary until this is confirmed by the court. Because the relevant rule allows the court to make any ‘order’ by consent and ‘order’ is defined to include a final order,¹⁷ the same process allows the court or registrar to enter judgment or other final orders by consent without an appearance.

The registrar’s powers are in Schedule 2 of the *Federal Court Rules*.¹⁸ The power to make orders on the papers by consent is specifically granted to registrars.¹⁹ Once the signed order is filed, the recipient at the court will determine whether a registrar or a judge should consider them.

The *Federal Circuit Court Rules 2001* are similar to the *Federal Court Rules*, and the process for obtaining orders is the same as the Federal Court for general federal matters. Parties can apply for a consent order by filing a draft consent order signed by each party.²⁰ If a registrar has power to make the order, the registrar can make the order in the terms of the draft.²¹ The powers of registrars in the Federal Circuit Court is contained in Rule 20.00A. If the registrar cannot make the order, it would be referred to a judge.

If a matter is listed for hearing in the Federal Circuit Court, consent orders can be submitted by email to the judge’s chambers, preferably copying in the registry. The requirements for this process are set out in a Notice to Litigants and Legal Practitioners²² on the Federal Circuit Court website. The same formal requirements set out above for the Federal Court should be adopted. Although the word ‘judgment’ is not used in the relevant rule, the better view is that the rule allows the court or a registrar to enter a final orders or judgment by consent,²³ and accordingly the process above can be used for final orders as well as interlocutory orders.

Notes

- ¹ See rules 762, 764 and 788 UCPR regarding consent orders on appeal in state courts, and rule 707 UCPR regarding consent orders in relation to the award of costs.
- ² *Federal Circuit Court Rules 2001*, Rule 13.04A.
- ³ Administrative and Constitutional Law and Human Rights National Practice Note (ACLHR-1), [11].
- ⁴ The forms can be obtained from courts.qld.gov.au/about/forms?root=84820.
- ⁵ *Civil Proceedings Act 2011* (Qld), s42(2).
- ⁶ Supreme Court Practice Direction 4 of 2010, [6(p)]; District Court Practice Direction 2 of 2010, [6(o)]; Magistrates Court Practice Direction 17 of 2010 [4(j)].
- ⁷ Rule 666(1)(b).
- ⁸ Rule 666(2).
- ⁹ Rule 967(3).
- ¹⁰ Some documents can be e-filed in the Magistrates Court, but this does not include requests for consent orders. See the Queensland Courts website, courts.qld.gov.au/court-users/practitioners/electronically-filed-documents (accessed on 18 March 2019), and Approval 1 of 2018.
- ¹¹ Rule 967(1).
- ¹² Practice Direction 4 of 2010 in the Supreme Court, 2 of 2010 in the District Court and 17 of 2010 in the Magistrates Court.
- ¹³ *Deputy Commissioner of Taxation v Acimovic* [2016] QDC 244 at [11].
- ¹⁴ Rule 666(4).
- ¹⁵ *Federal Court Rules 2011*, Rule 39.11.
- ¹⁶ Technology and the Court Practice Note, [4.14].
- ¹⁷ *Federal Court Rules 2011*, Rule 39.11 and Schedule 1 definition of ‘order’.
- ¹⁸ *Federal Court Rules 2011*, Rule 3.01.
- ¹⁹ *Federal Court Rules 2011*, Sch 2, paragraph 218.
- ²⁰ *Federal Circuit Court Rules 2001*, Rule 13.04(1).
- ²¹ *Federal Circuit Court Rules 2001*, Rule 13.04(4).
- ²² Information Notice titled ‘Communicating with Judges’ Chambers’ published on 1 June 2011.
- ²³ Notably, Rule 13.04 is in Part 13 which is titled ‘Ending a proceeding early’, and other rules in that part such as Rule 13.03B(2)(d) appear to treat a judgment as a type of order for the purposes of the rules.

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

Executor's commission

From privilege to pains and trouble

“You are not obliged to accept the role of personal representative”¹ is advice I typically give my personal representative (PR) clients.

Often their response is confusion as they seek to reconcile that advice with their own sense of responsibility. On the one hand they consider the appointment a privilege, on the other they know it is a heavy responsibility which will impact their daily life.

Generally, their sense of duty to the deceased, family and friends prevails and they accept the role. Nevertheless, these days most estates carry a level of complexity not experienced by previous generations. That complexity can and does cause significant disruption to the lives of the PR.

From managing complex assets in multiple jurisdictions, to family relationships peppered with bitterness and conflict, to the prospect of litigation at every turn, in many cases actual litigation, the position of a PR is not merely time-consuming, it is a heavy burden, fraught with personal distress and great risk. It is therefore not surprising there is an increase in PRs seeking commission for their pains and trouble in the administration of an estate.

In last month's *Proctor* I wrote about Chapter 15, Part 10 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR)² in the context of estate administration disputes and the passing and filing of accounts. This month I address the second portion of Part 10 – the law and process of applying for commission.

The law – entitlement to claim

Section 68 *Succession Act 1981* (Qld) gives power to the Supreme Court to authorise the payment of commission. Although s68 is couched in discretionary terms, there is clear case authority that PRs are entitled to the payment of commission when they have discharged their obligations and responsibilities in the administration of an estate and/or trust.³

The award of commission is usually made with reference to the size of the estate and the 'pains and trouble' incurred in the estate administration by the executors; 'pains' applying to the responsibility and consequent worry undertaken, and 'trouble' covering the work done.⁴

Application for commission

An application to the court for an order that commission be assessed and paid is complex and expensive. For this reason, the court recognises and encourages agreements between PRs and beneficiaries to save the costs and time of making such an application. An application can be avoided if all beneficiaries are of full age and provide their consent to the amount paid.

Where no agreement can be reached, or the beneficiaries are unable to consent because they are minors, or they lack capacity and their attorney does not consent, it may be necessary to make an application to the court under Part 10. The mechanics of the application process are set out in rules 657C to 657F UCPR.

Rule 657C identifies the right of a trustee⁵ of an estate to make an application for commission. It itemises the information that must be deposed to in an affidavit and filed in support of the application.

Rule 657E outlines the matters that the court may take into account, which includes any estate account assessment.

Many practitioners would be aware that it is customary for the courts to allow commission as a percentage of entries in the estate accounts. However, application of a percentage rate does not govern the performance of the task when assessing the quantum of executors' commission – it simply provides guidance. On this point, the New South Wales Supreme Court recently said:⁶

“To focus unduly on the application of percentage rates that might be perceived to be those that have been, or should be, 'ordinarily' or 'usually' applied is an invitation to error. They can be a useful guide to decision making, and their utility is not to be discounted because of a need to adapt them to the facts of the particular case, but they are no more than a guide...

“...If and to the extent that reference is made to 'ordinary' or 'usual' rates, as a compendious way of referring to accumulated experience, care needs to be taken to place that reference in the context of a determination of what is 'just and equitable' for the executor's 'pains and trouble'. Whatever intermediate calculations are made by reference to the categories, an assessment of remuneration that is 'just

and reasonable' requires the ultimate, resultant dollar amount to be weighed in the balance...

“...The concept of a 'just and reasonable allowance' likewise counsels caution against an application of standards of reasonableness that might be applied in other areas of law, such as on a quantum meruit claim (a claim of right) at common law. In the application of the court's probate and equitable jurisdiction, discretionary in character, regard must be had to a range of factors (including the summary nature of the jurisdiction, the size and nature of the deceased's estate, the terms of any will and the rights of beneficiaries) rather than taking refuge in standard rates of remuneration that may guide a common law claim in contract or restitution.”

The task remains one of assessment of an allowance for the “pains and trouble” taken by a PR who applies for commission. Essentially, the court will place a value on the pains and trouble of the PR by considering the facts of each particular case, the work done by the PR, and what is a reasonable allowance for that work with reference to the estate accounts.

For these reasons, quantification of an allowance for commission is notoriously difficult. Accordingly, while not necessary a court may under r657D require the applicant to pass and file estate accounts⁷ before determining commission.

Planning

There is an old adage: Those who fail to plan, plan to fail. To that end, if commission is granted, either by the court or by agreement, it is important to advise PRs from the outset to seek independent financial advice about the prospect of receiving commission, as it is typically treated as taxable income in the hands of the PR.⁸

If the PR is in receipt of a government benefit, the benefit may be affected. Alternatively, if the PR is a high-income individual, the award of commission may affect their taxation rate. Note also that s114 of the *Trusts Act 1973* (Qld) provides that executor's commission is deemed to be a testamentary expense.



with Christine Smyth

For these reasons, but more particularly for ensuring evidence gathering to support r657E factors, practitioners are recommended to advise their PR clients about commission at the outset. That way their client may properly plan whether they will seek commission. Conversely, if you are acting for beneficiaries, advising them of the prospect of commission can equally prepare and forearm them for the process.

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 'Personal representative' is defined in *Acts Interpretation Act 1954* – Schedule 1: "[P]ersonal representative of a deceased individual means the executor (whether original or by representation) or administrator of the individual's estate." See also s5 *Succession Act 1981* (Qld) where it is defined to mean "the executor, original or by representation, or administrator of a deceased person".
- ² Referred to in this article as Part 10.
- ³ RS Geddes, CJ Rowland and P Studdert, *Will, Probate and Administration Law in New South Wales* (1996) [86.02]; see also *Re Lack* [1983] 2 Qd R 613, 614 (McPherson J); and Section 101 of the *Trusts Act 1973* (Qld), which provides that the court may authorise a person to charge remuneration for their personal services in carrying out their trustee's duties.
- ⁴ *In Re Allan McLean (Deceased)* [1911] 31 NZLR 139 at 144; *Luck v Fogaerty* (Unreported, Supreme Court of Tasmania, Zeeman J, 22 March, 1996) 2; *Re Gowing: Application for Executor's Commission* [2014] NSWSC 247 at para 77.

- ⁵ See r644, which sets out certain definitions particular to this part. There, 'trustee' includes a personal representative of a deceased individual.
- ⁶ *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247 at paragraphs 54, 61 and 62.
- ⁷ Refer to the April 2019 edition of *Proctor* (pp38-39) for guidance on the process of filing and passing estate accounts.
- ⁸ See Australian Taxation Office interpretive decision 2014/44.

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Facing up to difficult conversations

by Prathna Tiwari



Difficult conversations – we all have them, we all dread them, yet we rarely, or never, stop to reflect on why these conversations are just so difficult.

What makes us procrastinate, and often simply avoid them? It was not until I attended a recent Queensland Law Society event at which lawyer, mentor, and corporate facilitator Melinda Fisher (Midja) spoke on this all too relevant topic that I paused to reflect on the daily struggle of having difficult conversations.

As young lawyers there is an added complexity as to why conversations are difficult and why we avoid having them. I reached out to Dr Alice Chang, psychiatrist and Chair of the Early Career Psychiatrist Committee, Royal Australian and New Zealand College of Psychiatrists, who kindly offered some insight into why the conversations young lawyers are having are difficult and how we can overcome those difficulties.

She advised that, to be able to analyse why a conversation appears difficult, we first need an insight into the internal issues causing us to view the conversation as difficult. Dr Chang says it is our own prejudices that stop us from having frank conversations. There is a constant fear of what the other person will think of us and how they will view us.

Speaking specifically about the difficulties young lawyers encounter when having conversations with supervisors, she says the pastoral relationship we share with supervisors is a major reason why these conversations appear so hard.

As young lawyers, some of the common fears we have include the fear of being judged, the fear of been deemed weak or vulnerable, or the fear of being marked as incompetent. These fears are heightened in the pastoral relationship scenario because your supervisor is the one person you are trying to prove your competency and strengths to.

Dr Chang said that law, more than any other profession, was a career in which it was perceived that we needed to be ultra-confident at all times. Any sign of

vulnerability was seen as a weakness instead of a natural trait. While this may not necessarily be true for all firms or law in the 21st Century, this image is well known and perhaps well accepted.

So how do we overcome these prejudices that are so ingrained in our minds and maybe to some extent in our industry? How do we get to a point where we have the conversation regardless of the perceived or actual fear? Dr Chang's recommendation can be summarised in two questions you should first ask yourself:

1. What are the dangers of *not* having the conversation?

That is, could not having a conversation about the matter you're struggling with or your file load worsen the situation? Is the danger of having the conversation simply that you fear being judged?

2. Are those dangers realistic?

If 'yes', the conversation must be had regardless. If 'no', what then is the harm in having the conversation?

The primary risk of having the conversation that we are likely to identify is the danger of being judged as weak, incompetent or inadequate.

But what we all forget (rather naively) is that, as young lawyers, a good and practical supervisor/mentor will not expect us to have all the answers. They will expect inadequacies from us.

After all, we are young lawyers lacking in experience. Why else would our initial practising certificate have a key requirement of being 'supervised'? It is important to recognise that it is a 'normal' trait to be weak, have questions, and not be competent in all areas.

However, Dr Chang also acknowledges that not all supervisors are capable of difficult conversations. Some are simply not suited to these conversations, and that is an assessment we need to make. If you conclude that your supervisor is unsuitable, you need to actively seek out someone else to have the conversation with.

To that end it is useful for a young practitioner to have a strong network of both junior and senior colleagues who you can have difficult conversations with. Try asking a colleague for their opinion. Often you will

find that the issue you want to discuss is neither unique nor frivolous, but something others have encountered.

If you do not walk away with tips on how to deal with the situation, you should walk away with tips on how to have that difficult conversation or, at the least, with the confidence that it is not an uncommon issue. Therefore the conversation will seem far less difficult.

Lastly, I asked Dr Chang for some practical tips for difficult conversations. These included:

1. Structure the conversation – it will assist if you can take notes into the meeting.
2. Have a few goals in mind – ascertain what you want to achieve.
3. Be upfront about your expectations – there is no point beating around the bush.
4. Do not be afraid to discuss the influence of the issue on your wellbeing – how something is making you *feel* is as much part of assessing the problem as the tangible effects of the issue itself.

Having reflected on Dr Chang's advice and all that I took away from Midja's seminar, I probably can't say that difficult conversations are any easier.

However, what I can now do when I procrastinate over a difficult conversation is justify its importance to myself. This insight may not instill confidence, but it definitely helps in taking away some of the hesitation once I realise that the dangers of not having the conversations are real and justifiable.

As lawyers, we are all well trained to assess and advise on the cost vs benefit analysis. The decision to have a difficult conversation is simply that. When it is unlikely that the cost of having the conversation will outweigh the benefit, the difficult conversation must be had.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Adam Moschella (amoschella@pottslawyers.com.au). Prathna Tiwari is an associate at O'Connor Law, Cairns.



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The 2019 Supreme Court of Queensland Oration will be held on Monday 13 May at 5.30pm and presented by Her Excellency the Hon Margaret Beazley AO QC, Governor of New South Wales, from 2 May 2019.

2019 Selden Society lecture series – sclqld.org.au/Selden

The first Selden lecture for 2019 – the annual Lord Atkin lecture – will be presented by Professor Paul Brand on Thursday 23 May at 5.30pm, on 'Rhetoric and reality: the making of English medieval legislation'.

Lectures will be held in the Banco Court, Queen Elizabeth II Courts of Law.

\$145K text message ruled admissible

with Robert
Glade-Wright



Property – wife's SMS held admissible against her case that \$145,000 advance from father-in-law was husband's debt

In *Phe & Leng* [2019] FamCAFC 17 (8 February 2019) the Full Court (Alstergren CJ, Strickland & Watts JJ) dismissed the wife's appeal against a property order where Le Poer Trench J found that the husband's father was owed \$145,000. The wife alleged that that sum was the husband's debt alone, having been deposited into an account the husband controlled. It was found that it was the parties' debt as the wife in a text message to the husband's sister said that she would "return" the money to the husband's parents if her child "M can come back to Sydney".

On appeal, the wife argued that her text message was inadmissible, being a settlement negotiation within the meaning of s131 of the *Evidence Act 1995* (Cth). The Full Court disagreed, saying (from [28]):

"His Honour put to the wife that the message represented an acknowledgment by her that the loan (in Taiwanese dollars) existed...[T]he wife said the message was...an attempt to... get the husband and his family to return the parties' eldest child to Australia. (...)

[30] ...[T]he wife contended...that his Honour should not have allowed the message to have been adduced...because it was a communication made in connection with an attempt to negotiate the settlement of a dispute (...)

[36] The broader view...is that [the exception in] s131(2)(g)...applies where the existence or the contents of otherwise privileged communication contradicts or qualifies existing evidence or an inference from that evidence and the court is otherwise likely to be misled unless the communication is adduced. (...)

[49] ...[W]e conclude it was likely that the primary judge would have been misled into accepting the wife's evidence had the message been excluded.

[50] Thus s131(1) of the *Evidence Act* does not apply to exclude the message because s131(2)(g) was enlivened and the wife was not entitled to claim privilege."

Children – interim coercive order for mother to return and stay in a place where she had not been living was in error

In *Mareet & Colbrooke* [2019] FamCAFC 15 (7 February 2019) the mother left the

father after a four-month relationship. She was pregnant with the parties' child when moving from the Northern Territory (where the father worked) to Queensland via 'Town F' in New South Wales where her family lived. She alleged stalking and harassment by the father. The child was born in Queensland. The mother signed a lease and moved her possessions there, also enrolling her four-year-old child from a former relationship in kindergarten. A judge of the Federal Circuit Court on the father's application ordered the mother to return with the child to the 'H Region' in NSW to spend time with the father at a contact centre. The mother appealed.

Ainslie-Wallace J (with whom Ryan and Aldridge JJ agreed) allowed the mother's appeal, saying (from [14]):

"While it is undisputed that the *Family Law Act*...provides the power to enjoin a party to relocate (or not relocate), such an injunction should rarely be made...[S]uch an injunction can be avoided if the court gives adequate consideration to alternate forms of access...

[15] Her Honour regarded the issue...as a 'relocation case'...Clearly however, the child's residence was never in the H Region in [NSW]. ...Her Honour's characterisation... led her to make significant errors of law.

[16] In particular, her Honour gave no consideration to making orders that the father travel to the D Region in Queensland to see the child. Nor did she turn her mind to the interests of the mother's older child who had been enrolled at pre-school [there]...Instead, her Honour took the view that the mother should be compelled to return.

[17] This order...one directly affect[ing] the mother's right of freedom of movement, in the circumstances of this case was wrong at law. Secondly, her Honour's...order which bound the mother to the H Region of [NSW] from which she could not leave is patently erroneous.

[18] ...[H]er Honour's order...[also] took no account of the financial and other burden on the mother consequent on the move..."

Financial agreements – Section 90B agreement was no bar to a spousal maintenance application by wife as it did not comply with s90E

In *Barre & Barre & Anor* [2018] FCCA 97 (19 January 2018) the wife applied (inter alia) for interim periodic spousal maintenance

in proceedings filed by her under s90K(1)(d) of the *Family Law Act* (material change in circumstances relating to a child) for the setting aside of a financial agreement made by the parties in 2005 under s90B before their marriage. Subsequent to their agreement the parties had two children, aged 11 and 5 at the time of the hearing. The husband opposed the application.

Judge Kemp said (from [37]):

"...[T]he Court does not accept that the...agreement excludes either party's right to make an application for spousal maintenance.

[38] The husband says that, while the actual words 'spousal maintenance' are not referred to as excluded, inferentially they were, as they were not specifically included within the terms of the...agreement as being an excluded item (...)

[39] The husband, further, says that such an outcome, being no ability to apply for spousal maintenance, would be consistent with the fact that the...agreement was entered into... where both parties were in employment, apparently able to adequately support themselves...and intended to continue to do so in the future. The Court does not accept that submission. While the...agreement contemplated the parties having children, it was silent as to the impact of having children on each of their earning capacities. (...)

[44] ...[I]n *Boyd* [2012] FMCAfam 439 Brown FM...considered...s 90E and stated:

'Essentially, the legislature requires that any...financial agreement specify which portions of any lump sum or property order conferred thereunder are for either spousal or child maintenance, so that the social security implications of such an order or agreement is apparent.'

[45] The wife referred to that decision and submitted that as the...agreement did not comply with s90E...that was 'the end of the matter' and the wife's spousal maintenance rights were, clearly, preserved." Judge Kemp agreed.

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).

To tweet or not to tweet?

by Jessica Wat, The Legal Forecast



Social media has become a ubiquitous presence in our daily lives.

It has changed the way people access news, influenced global politics, made seemingly normal individuals famous, and changed our lives irrevocably. While social media has been beneficial for many and opened up the world for them, what many people don't know is the ways in which you could be held accountable for your comments, shares and posts.

Who owns your content?

Posting content on social media is as easy as counting to three, but once that cute photo of your dog or your dream-worthy vacation shot goes live, do you really own it anymore?

At its most basic level, yes, you do. Copyright laws extend to online content, meaning that when you create something, from art to photography, literature or music, you own the copyright to it automatically and can take steps to prevent others from claiming it as theirs.

Nonetheless, your general rights will vary from platform to platform – reading the terms and conditions carefully is always helpful. On sites like Facebook, Twitter and Instagram, terms and conditions include licencing terms which give the platforms scope to reuse user-generated material and allow other people to retweet or share your content and display it in a hashtag search and on the newsfeed, all without infringing on your copyright or paying you.

However, if someone downloads your photo and uses it on their own feed or website without your permission, you may have grounds to seek legal action. On the other hand, users can even be caught by reposting photos taken of themselves without crediting the photographer. Many celebrities have faced lawsuits from photographers for utilising their photographs, even when the paparazzi photos were unsolicited by the celebrity themselves.

Think before you tweet

Social media makes it easier to express our thoughts, but in the heat of the moment unkind things posted on social media can be construed as defamatory or slanderous.

Ignorance is no defence in litigation. A throwaway comment by a firm or individual could cost them both their reputation and financially.

For example, following a recent incident in Washington DC in which a teen wearing a MAGA (Make America Great Again) hat faced off with a Native American activist, many celebrities, news outlets and internet users were quick to express their outrage and attack the teenager, Nick Sandmann, on social media and other online outlets.

Nevertheless, subsequent videos showed the situation in context, revealing that Sandmann neither incited the disrespect nor propagated the racism he allegedly displayed online.

Since the initial clip went viral, Sandmann and his family and school have received threats and online abuse. Now, his family believe they have reasonable grounds to sue for emotional distress and defamation. They have hired a high-profile lawyer and are gearing up for libel and slander lawsuits against public figures and media outlets such as *The New York Times*, *The Washington Post*, *The Guardian*, HBO, Jim Carrey and presidential hopeful Elizabeth Warren, to name but a few.

Think before you retweet

Retweeting, re-posting or sharing content that is libellous or simply untrue can leave you just as exposed to lawsuits as the original poster. This amounts to further distribution or publication, and is just as serious as if the retweeter had made the original statement and was responsible for that material.

You may also be liable for copyright infringement if you share someone else's work without their permission. Works like photographs, videos, music, writing or art is automatically copyright protected, meaning that if you use someone else's photo on a post or include music on a video upload, you might be liable to pay up.

Tagging the original creator of the work does not necessarily give you the legal licence to reuse that content. In this day and age, when images can get posted and re-posted so easily, original attribution can often be lost. You might not only illegally re-post an image; you could even give credit to the wrong brand or person. This includes using video clips from movies or YouTube without a licence, re-posting pictures or charts, sharing copyrighted songs, or quoting copyrighted writings without permission.

Conclusion

Social media can be a powerful tool for grassroots activism and calling out systemic injustices, but a single misinformed post is capable of snowballing into an online witch-hunt with reputations at stake and lives irrevocably impacted.

Indeed, you may be liable for simply posting, sharing, liking or repeating defamatory remarks. Information shared online may be permanently recorded, so even if you deactivate an account or delete a post, the information may still be archived or remain on old versions of websites.

This article's purpose is not to dissuade you from using social media outright, but rather prompt you to ask yourself what you really want to share with the world when it comes to your beliefs, thoughts, photos and other aspects of your personal life.

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

High Court and Federal Court casenotes

with Andrew Yuile
and Dan Star QC



High Court

Constitutional law – implied freedom of political communication

In *Unions NSW v State of New South Wales* [2019] HCA 1 (29 January 2019) the High Court found that the *Electoral Funding Act 2018* (NSW) (EF Act) impermissibly burdens the freedom of political communication implied into the Commonwealth Constitution. In *Unions NSW v New South Wales (No. 1)* (2013) 252 CLR 530 and *McCloy v New South Wales* (2015) 257 CLR 178, the High Court considered the implied freedom and provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (EFED Act). The EF Act replaced the EFED Act, but generally retained the earlier scheme, which capped political donations and electoral expenditure. The court was asked in this case to consider two aspects of the EF Act. First, s29(10) of the EF Act reduced the amount that third-party campaigners were permitted to spend on electoral campaigning from \$1,050,000 to \$500,000, less than half the amount applicable to certain political parties. Second, s35 of the EF Act prohibited third-party campaigners from acting in concert with others to incur expenditure above the relevant cap. It was accepted that both provisions in dispute burdened the implied political freedom (the first question in assessing validity against the implied freedom). NSW argued that the purposes of the EF Act was to prevent the drowning out of voices in the political process by the distorting influence of money, which was a purpose compatible with maintenance of the constitutionally prescribed system of representative and responsible government (the second implied freedom question). A majority of the court was prepared to assume the correctness of this proposition to focus on the third question for validity and held that the s29(10) cap had not been demonstrated to be reasonably necessary for the identified purpose. It was therefore invalid. The majority held that it was not necessary to answer the question about s35 in those circumstances. Kiefel CJ, Bell and Keane JJ jointly; Gageler J, Nettle J and Gordon J each separately concurring; Edelman J separately concurring as to s29(10) but also finding s35 invalid. Answers to Questions Stated given.

Constitutional law – inconsistency of laws

In *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2 (6 February 2019) the High Court considered whether provisions of the *Work Health and Safety (National Uniform Legislation) Act* (NT) (NT Act) were inconsistent with

Commonwealth civil aviation laws and invalid to that extent. The respondent operated a business in Alice Springs providing hot-air balloon rides. In July 2013 there was an incident as a passenger was boarding the balloon basket which resulted in her death. The appellant filed a complaint against the respondent alleging breach of the NT Act for failing to ensure that the health and safety of persons was not put at risk from work carried out as part of the conduct of its business. The complaint was dismissed by the NT Court of Summary Jurisdiction on the basis that the subject matter of the complaint was within a field covered by the Commonwealth aviation regulatory scheme. On an application for certiorari, a single judge of the NT Supreme Court quashed the decision. The Court of Appeal allowed an appeal, holding that the Commonwealth aviation law was a complete statement of the relevant law and the NT law was indirectly inconsistent with it. By majority, the High Court allowed an appeal from that decision. The majority stated that the Commonwealth laws did not lay down a legislative framework covering all aspects of the safety of persons who might be affected by operations associated with aircraft, including on-ground operations. In some instances, the Commonwealth laws operate within the setting of other laws. The NT Act was such a law. The Commonwealth laws did not contain an “implicit negative proposition that it is to be the only law with respect to the safety of persons who might be affected by operations associated with aircraft, including the embarkation of passengers”. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly. Gageler J separately concurring. Edelman J dissenting. Appeal from the Court of Appeal of the Supreme Court (NT) allowed.

Migration – procedural fairness – s438 notifications

In *Minister for Immigration and Border Protection v SZMTA; CQZ15 v Minister for Immigration and Border Protection; BEG15 v Minister for Immigration and Border Protection* [2019] HCA 3 (13 February 2019) the High Court considered the implications of procedural fairness where material was withheld from Administrative Appeal Tribunal (AAT) review applicants. In each case, individuals applied for protection visas that were refused. Each visa applicant sought review by the AAT. Under s418 of the *Migration Act 1958* (Cth), the Secretary of the department gave to the AAT documents relevant to the review. The Secretary notified the AAT that s438 applied to certain documents. Section 438 applies where it would be contrary to the public interest to reveal the documents, or the documents were given to the department in confidence. Where

s438 applies, the AAT can have regard to the information and can also disclose some or all of it to the review applicant. In these cases, the review applicants had not been told of the existence of the s438 notification. In each case the notification was invalid to at least some extent. The review applicants sought judicial review arguing that they were denied procedural fairness. The High Court unanimously held that procedural fairness requires the disclosure to the review applicant of the fact of a s438 certificate. The failure to disclose the certificates to the review applicants was therefore a breach of procedural fairness. Similarly, an invalid notification on the part of the department was also a breach. However, to be a jurisdictional error, the breach had to give rise to “practical injustice”. The majority held that materiality, whether of a breach of procedural fairness or otherwise, is essential to the existence of jurisdictional error. Materiality is an ordinary question of fact for which the applicant bears the onus of proof. The majority held that a breach will be material only if compliance could realistically have resulted in, or if there was a realistic possibility of, a different decision. In each case, the majority held that materiality had not been made out. Bell, Gageler and Keane JJ jointly; Nettle and Gordon JJ jointly dissenting. Appeal from the Federal Court in SZMTA allowed; appeals from the Full Federal Court in CQZ15 and BEG15 dismissed.

Constitutional law – territories – inconsistency of territory law

In *Williams v Wreck Bay Aboriginal Community Council* [2019] HCA 4 (13 February 2019), the High Court considered the extent to which the *Residential Tenancies Act 1997* (ACT) (RTA) was capable of operating in the Jervis Bay Territory (JBT) concurrently with the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) (Land Grant Act). The Wreck Bay Aboriginal Community Council (Council) has power under the Land Grant Act to grant leases over “Aboriginal Land” in the JBT. Section 46 of the Land Grant Act also says that it does not affect the application to Aboriginal law of a law in force in the JBT to the extent that that law is capable of operating concurrently. The RTA operates to require that all residential leases in the ACT (and the JBT, as ACT laws apply generally in the JBT) contain a set of standard terms. One of the standard terms requires that premises be maintained in a reasonable state of repair. The RTA also renders void terms of leases inconsistent with the standard terms. A dispute arose between the appellant and the Council as to whether the Council was obliged to maintain premises in a reasonable state of repair. The Council argued that such an obligation would

impair the operation of the Land Grant Act. The appellant argued that the RTA terms could be complied with alongside the Land Grant Act. At first instance, the ACT Supreme Court agreed with the appellant's position; the Court of Appeal allowed an appeal. In the High Court, a majority of the Court held that the provisions of the Land Grant Act, considered as a whole, did not provide (implicitly) that the terms and conditions of leases granted under that Act are to be the only terms and conditions applicable to those leases. The provisions of the Land Grant Act did not purport to provide a complete statement of the law governing the rights and obligations under leases, to the exclusion of generally applicable laws. The majority held that the RTA does not apply to Aboriginal land in the JBT only to the extent that the RTA prohibits subletting. Kiefel CJ, Keane, Nettle and Gordon JJ; Bell J and Edelman J each separately concurring; Gageler J dissenting. Appeal from the Supreme Court (ACT) allowed.

Criminal law – summing up to jury – commenting on facts

McKell v The Queen [2019] HCA 5 (13 February 2019) concerned the role and comments of a judge in summing up to a jury. The appellant was tried with a co-accused on drug-related charges. He was the movements manager of a company that transported freight under bond from cargo terminal operators at the airport to freight-forwarding agencies. The charges were concerned with three consignments of goods and \$400,150 that police found in cash in a tin box in the appellant's home. The appellant's case was he had no knowledge of the contents of the consignments. He also gave evidence that the money in the tin box came from gambling large amounts of money in cash. He also held a number of online betting accounts which showed substantial wins and losses. In his summing up, the trial judge made several comments that formed the subject of complaint on appeal. First, the judge commented that the first consignment may well have contained drugs, the importation of which was the responsibility of the appellant as part of "an organisation of great sophistication". No suggestion to that effect had been made by the prosecution and it was at odds with a pre-trial ruling about the use of the evidence. Second, the judge suggested a text message sent by the appellant showed he was knowingly involved in importing drugs. And finally, the judge made critical comments on the online betting accounts and the use made of them by the appellant's counsel. The appellant was convicted. He appealed his conviction arguing that the summing up occasioned a miscarriage of justice. A majority of the Court of Criminal Appeal dismissed that appeal. The High Court held that the summing up was "so lacking in balance as to be seen as an exercise in persuading the jury of the appellant's guilt. The statements were unfair to the appellant and gave rise to a miscarriage of justice.". The court said that while a trial judge had a discretion to comment on facts, it "should be exercised with circumspection". Comments should be limited to what is necessary to help the jury with a fair and accurate statement of the case presented by each party. They should not contain the judge's opinion of the proper determination of a disputed fact.

Bell, Keane, Gordon and Edelman JJ; Gageler J separately concurring. Appeal from the Court of Criminal Appeal (NSW) allowed.

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Federal Court

Administrative and constitutional law – seeking access to correspondence between former Governor-General, Sir John Kerr and the Queen

The subject matter of the litigation in *Hocking v Director-General of the National Archives of Australia* [2019] FCAFC 12 (8 February 2019) was originals of correspondence received by, and contemporaneously made copies of correspondence sent by, the former Governor-General, Sir John Kerr, or his Official Secretary, to and from The Queen by means of her Private Secretary. It was an agreed fact that the records comprised letters and telegrams and certain attachments to that correspondence (such as newspaper clippings and letters). The period of the correspondence was 15 August 1974 to 5 December 1977, that is leading up to and after the dismissal of Gough Whitlam as Prime Minister of Australia. Further agreed facts were that the documents were deposited by Mr David Smith, in his capacity as Official Secretary to the Governor-General with the National Archives of Australia with an instruction that they were to remain closed until after 8 December 2037 (that is, 60 years after the end of the Sir John Kerr's appointment as Governor-General (at [42]-[43]).

The trial judge dismissed the appellant's proceeding seeking judicial review of a decision to deny access to the documents under Division 3 of Part 5 of the *Archives Act 1983* (Cth).

Both the trial judge and the Full Court did not examine the records in question. As Allsop CJ and Robertson J explained at [8]: "The proceedings concern only the legal correctness of the decision of the Archives that the records were not a 'Commonwealth record' as defined in s3(1) of the *Archives Act* on the basis that the records were not 'the property of the Commonwealth'. The proceedings do not concern whether the records should be made available as a matter of public interest or whether or not a ground of exemption under s33 could be made out. It is clear that the records relate to the history and government of Australia."

The Chief Justice and Robertson J dismissed the appeal (at [84]-[107]). Justice Flick dissented, stating at [110]: "It is with great diffidence that concurrence cannot be expressed with the conclusions reached by the primary Judge or the majority. The conclusion of the majority that these documents 'remain...the property of the person then holding the office of Governor-General and not the property of the Commonwealth' (at para [102]) is, with great respect, a conclusion which is not self-evidently correct. It is, with respect, difficult to conceive of documents which are more clearly 'Commonwealth records' and documents which are not 'personal' property. The documents include correspondence between a former

Governor-General of this country, written in his capacity as Governor-General, to the Queen of Australia in her capacity as Queen of Australia, concerning 'political happenings' going to the very core of the democratic processes of this country."

Consumer law – meaning of good faith in the unwritten law – cl.6 of the Franchising Code of Conduct

In *Australian Competition and Consumer Commission v Geowash Pty Ltd (Subject to a Deed of Company Arrangement)* (No.3) [2019] FCA 72 (8 February 2019), Colvin J held that the respondent, a company offering carwash franchises, engaged in misleading conduct (ss18 and 29(1)(h) of the Australian Consumer Law (ACL)) and unconscionable conduct (s21 of the ACL). Further, the court held that the respondent did not act in good faith towards franchisees in contravention of cl 6 of the Franchising Code of Conduct (code). It is a contravention of s51ACB of the *Competition and Consumer Act 2010* (Cth) to contravene the code.

Of particular interest is the court's analysis of what is the nature and extent of the relevant obligation under the code to act towards the franchisees with good faith. Clause 6(1) of the code states: "Each party to a franchise agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in respect of any matter arising under or in relation to: (a) the agreement; and (b) this code."

As the court noted at [688], the cl.6 good faith obligation applies in all instances and the unwritten law is deployed to give meaning to the term 'good faith', but is not to govern whether there is a good faith obligation. The court considered the extrinsic materials underlying cl.6 of the code (at [697]-[706]) and the case law on the unwritten law as to good faith in contractual dealings (at [706]-[721]). The latter involved an analysis of the cases of *Renard Constructions; Alacatel; Garry Rogers Motors; Burger King, Topseal Concrete Services; Overlook Management; Macquarie International Health Clinic; Strzelecki Holdings; Paciocco; YUM! Restaurants*; and *Ultra Tune* ([722]-[746]). After doing so, Colvin J summarised the current state of the unwritten law as to the meaning of good faith for the purposes of cl.6(1) of the code at [746] as follows:

- "(1) the term 'good faith' imports a normative standard to be observed by the parties in dealings as to matters to which the standard is applied;
- (2) the normative standard embraces an obligation to act honestly and with fidelity to the bargain concluded between the parties;
- (3) the normative standard also embraces an obligation to act co-operatively in matters related to performance;
- (4) the standard does not require a party to subordinate its legitimate interests to those of the counterparty, but it does require due regard to the legitimate interests that both parties have in the performance of the contract they have made;

- (5) conduct which is dishonest, capricious, arbitrary or motivated by a purpose which is antithetical to the evident object of any provision of the franchise agreement or the Code that governs the conduct being scrutinised or conduct which is otherwise motivated by bad faith will not meet the standard;
- (6) where the scrutinised conduct, viewed in the particular context, is objectively unreasonable then the unreasonableness may form part of the basis for a conclusion that there has been a lack of good faith, but objective unreasonableness is insufficient of itself to amount to a lack of good faith; and
- (7) the quality of the scrutinised conduct is to be evaluated having regard to the circumstances of the particular parties, particularly their sophistication, commercial power and the relative significance for each party of the subject matter of the conduct.”

Applying the principles to the case, Colvin J held that the respondent breached cl.6(1) of the code by failing to act towards four of its franchisees in good faith concerning its charging practices (at [15] and [751]-[765]).

Industrial law – costs under s570 of the *Fair Work Act 2009*

In *Liu v Stephen Grubits & Associates (No.2)* [2019] FCAFC 24 (12 February 2019) the Full Court dismissed an appeal in which it was contended that the Federal Circuit Court of

Australia did not have power to make a costs order in relation to a matter under the *Fair Work Act 2009* (Cth) (FW Act). The joint judgment of Reeves, Kerr and Lee JJ depended on a construction of s79 of the *Federal Circuit Court of Australia Act 1999* (Cth) and provisions as to costs in Part 4.2 of the FW Act. The Full Court said at [18]: “The logic of the appellant’s argument would be that costs could be awarded in FW Act matters by the Federal Court or any eligible State or Territory court but not by the Federal Circuit Court. To describe that result as anomalous would be an exercise in understatement (apart from constituting a result which means that the legislative intention as revealed by the EM must have miscarried).”

Practice and procedure – legal professional privilege – whether lawyer lacked professional detachment from the firm and from the subject matter of the claim for privilege

In *Martin v Norton Rose Fulbright Australia Ltd (No.2)* [2019] FCA 96 (11 February 2019) Charlesworth J determined an interlocutory application challenging claims for legal professional privilege (LPP) on multiple bases. The context was litigation between a former staff partner of a law firm against the law firm. The applicant challenged the law firm’s claims of LPP.

One issue of interest was the applicant’s submission that the relationship between the law firm and its lawyers lacked a necessary feature of independence, such that the privilege claim in respect of any communications passing between them could not be maintained, whatever their

purpose. Charlesworth J rejected this argument (at [150] to [214]). Charlesworth J stated at [188]: “The proposition that a lack of professional detachment on the part of an adviser will deny the entitlement to privilege must be rejected for a more fundamental reason: the privilege is that of the client, not that of the lawyer. Carried to its logical conclusion, the criterion of independence, as conceptualised by Brennan J in *Waterford* and Branson J in *Rich*, could not be fulfilled in circumstances where the personal interest of the lawyer obviously conflicted with the interests of the client. A lack of independence of that kind may cause the lawyer’s advice to be partial, incomplete or wrong and subject the lawyer to disciplinary sanction. But it is difficult to comprehend why, for the purpose of the common law of privilege, the lack of independence should deprive the relationship as one of lawyer/client and even more difficult to comprehend why the client’s privilege in the communication constituting the advice should be lost.”

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Civil appeals

[Brisbane City Council v Klinkert \[2019\] QCA 40, 12 March 2019](#)

Application for Leave *Planning and Environment Court Act 2016* (Qld) – where the council refused building work, namely the demolition of a house – where the house was an inter-war house – where the house was said to be a strong contributor to the character of the street – where the house was subject to the City Plan 2014 – where the issues turned on statutory interpretation – whether the development complied with the Demolition Code, effective on 19 May 2017 – whether, if the development complied with the May 2017 Code, s60(2)(a) of the *Planning Act 2016* (Qld) mandated approval of that application – where in September 2015, the council resolved to amend its planning scheme, including the Demolition Code and its supporting Planning Scheme Policy (PSP) – where the council publicly notified the amendments to both the Demolition Code and the PSP between 17 October 2016 and 25 November 2016 – where the amendments did not however come into effect until 1 December 2017 – where prior to those amendments taking effect, the respondent lodged the development application, the subject of the appeal below – where that development application, lodged on 30 June 2017, was refused by the council on 15 August 2017 – where the assessment manager determines whether the assessment benchmarks in the original code have been met, after giving weight to the contents of the amended code, if the assessment manager determines to give weight to that amended code – where the giving of weight, if appropriate, does not mean s60(2)(a) requires that an assessment manager must decide to approve the development application only if it complies with the assessment benchmarks in both the original code and the amended code – where in carrying out a code assessment of a properly made application, the assessment manager may not replace the assessment benchmarks in the original code with those in the amended code – where, further, to the extent that an amendment is given weight, that weight must be afforded, having regard to the prohibition on a local characterising instrument, in its effect being, inconsistent with the effect of a specified assessment benchmark – where it is in the public interest that an assessment manager have the ability to give weight to such amendments, if considered appropriate, whilst ensuring that properly made applications are ultimately assessed in accordance with the assessment benchmarks in operation at the time of the properly made application – where

the primary judge correctly concluded that s60(2)(a) of the *Planning Act 2016* (Qld) required the respondent's application to be approved by the assessment manager once it was determined there was compliance with the relevant assessment benchmarks in operation at the time of the application. Leave to appeal granted. Appeal dismissed. Costs.

[Hanson & Anor v Goomboorian Transport Pty Ltd & Ors \[2019\] QCA 41, 12 March 2019](#)

General Civil Appeals – where the appellants' daughter took out a term life insurance policy naming the appellants as equal beneficiaries – where cover ceased because the appellants' daughter died suddenly – where the appellants' daughter had paid 95 monthly instalments on the policy by the time cover ceased – where the appellants' daughter had been a habitual gambler and had stolen money from the respondents – where the appellants' daughter had paid for four out of the 95 monthly premiums using stolen funds from the second, third, sixth, and tenth respondents – where the appellants were each paid just over \$713,550 following their daughter's death as the sum insured under the term life insurance policy – where the trial judge found that the stolen monies which were used to pay for the last premium were monies held on trust by the appellants' daughter for the third and sixth respondents – where the trial judge found that, because cover was provided on a month-by-month basis under the policy, the third and sixth respondents had a right to any benefits which might flow from the insurance cover of the final premium, including the proceeds which were paid out to the appellants following their daughter's death – where the trial judge declared that the proceeds of the policy were received by the appellants as trustees for the third and sixth respondents – where in the proceeding, the respondents claimed an array of declaratory relief including a declaration that the proceeds of the Asteron policy were received by Dorothy and Norman (the parents of the deceased) as trustees for the second plaintiff – where other declarations sought related to other property alleged to have been acquired with money sourced from the stolen funds – where much assistance has been gained in deciding these appeals from a number of observations made by Lord Millett in *Foskett v McKeown* [2001] 1 AC 102 on the process of tracing, its rules, and how it is applied, particularly with regard to tracing the proceeds of a life insurance policy – where as noted, the trial judge cited Lord Millett's description of the process of tracing at paragraph 67 in his reasons – where according to Lord Millett's analysis, premiums are traced

into the policy, that is to say, the bundle of rights to which the policyholder is entitled in return for the premiums – where those rights, which his Lordship noted may be "very complex", constitute a chose in action which he summarised as the right to payment of a debt payable on a future event and contingent upon the continued payment of further premiums until the happening of the event – where under the policy issued by Asteron, the right to be paid was conferred by clause 5.1 – where it was a right to have Asteron pay the sum insured, less certain payments that had been made, if the insured died while covered under the policy – where the content of this right was, of course, dependent on other provisions of the policy, notably for present purposes, those relevant to the nature of the cover and to the amount of the sum insured – where there are a number of provisions in the policy document which informed the nature of the cover or covers given under it – where clause 2.2 stipulated that in order to start and retain the cover, the premiums payable must be paid as provided in section 8 – where pursuant to section 4, cover "commences on the commencement date", 30 October 2006, "and will end on the earliest" of the dates set out in the section, namely date of cancellation for non-payment, date of payment in full of the sum insured, date of reduction of the sum insured to nil, the expiry date or date of the insured's death – where these provisions characterise the cover provided by the policy as singular in nature – where it was a cover that, subject to payment of the first premium, began on the commencement date and, subject to payment of premiums, continued until the earliest of the dates specified in section 4 occurred – where specifically, it was not a series of sequential covers in which each cover was for a month, or a year – where both the singular nature of the cover and the dependency of the amount of the sum insured upon continuity in payment of the premiums are factors which strongly favour attribution of the right to have Asteron pay the insured sum to all of the monthly premiums that were paid – where to adopt the language of clause 2.2, it was the payment of these premiums which together caused cover to start and to be retained from that point until the date of Norma's death – where there are difficulties in attributing this right solely to the final monthly premium that was paid – where to attribute in that way would require identification of a chose in action that arose upon payment of the final premium – where had the policy provided for successive monthly covers, the identification of such a chose in action would have been open – where by virtue of the clauses to which have been referred, the cover was singular

– where for these reasons, the conclusion of the primary judge that the proceeds of the policy are attributable to the premium paid on 1 September 2014 only is unable to be agreed with – where the proceeds of the policy are attributed to all of the premiums paid – where consistently with these reasons, the appeals should be allowed. Appeals allowed. Order 2 set aside, declare that the proceeds of the Asteron Life Policy were received, and are held, by the appellants as trustees to the following extent only and in the following proportions: (a) as to 1/95th, for the tenth respondent; (b) as to 2/95ths, for the second and tenth respondents; and (c) as to 1/95th, for the third and sixth respondents. Other orders set aside. Costs of the appeal. Leave granted to make written submissions to the second, third, sixth and tenth respondents to secure payment and written submissions on costs at first instance. (Brief)

Commissioner of State Revenue v Harrison
[2019] QCA 50, 26 March 2019

Application for Leave *Queensland Civil and Administrative Tribunal Act 2009* (Qld) – where the applicant applies for leave to the Court of Appeal to appeal a decision of the QCAT Appeal Tribunal – where the identification of an error of law is not sufficient, of itself, to warrant a grant of leave – where leave will be granted where a substantial injustice has been sustained or an important principle

arises – where the applicant applies on the sole basis that the appeal raises issues of public importance – where the respondent and his wife have three adult children – where the respondent was the registered owner of three residential properties other than his own residence – where he was assessed as liable for land tax in each of the 2014 and 2015 years calculated on the aggregate value of the three properties – where the QCAT Appeal Tribunal found the value of the properties should not be aggregated for the purposes of land tax calculation – where the respondent contended that each property was held by him as trustee for one of his children – where the QCAT Appeal Tribunal found that each child had agreed to rent each property from their father on the basis that their parents would make mutual wills leaving each property to the relevant child – where the Appeal Tribunal found in favour of Mr Harrison on the basis that a constructive trust has arisen either as a result of representations or the formation of a common understanding converted then to an interest by the Harrison children acting to their detriment – where the application by the commissioner for leave to appeal is made under s150(2) *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) – where this court then only has jurisdiction to hear an appeal on a question on law – where exercise of the jurisdiction is at the discretion of the court; the commissioner

must obtain leave – where the commissioner submits that on the facts found by the tribunal and adopted by the Appeal Tribunal, the legal conclusion that constructive trusts had arisen was wrong – where that is a matter of law – whether the legal questions as framed actually arise from the decision of the Appeal Tribunal is another matter, but not one needed to be decided given that leave would not be granted to appeal in any event – where revenue statutes give rise to special considerations – where it is hardly a “substantial injustice” that the state has not recovered what is, in context, a modest sum from Mr Harrison – where the submission that the appeal raises issues of public importance with respect to “the administration of the *Land Tax Act*” is rejected – where there was no argument before this court about the construction of any provision of the *Land Tax Act 2010* (Qld) – where the submission that the appeal raises issues of public importance with respect to “the state revenue and the incidence of land tax” is rejected – where the case raises no issue as to the construction of any provisions in the QCAT Act or any question as to the rights of review of either the commissioner or a citizen of decisions made concerning land tax liability – where the submission that the case raises issues of public importance with respect to the land tax liability of persons who enter into agreements to “devise...land by will” is rejected – what the case is about is whether a constructive

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trust arose as a result of the specific and unique dealings between Mr Harrison and various members of his family – whether a constructive trust arose on the facts as found by the Tribunal in its original jurisdiction involves the application of principles which have been the subject of analysis in various decisions of the High Court of Australia – where in the particular circumstances of this case, the Appeal Tribunal may have erroneously applied those principles to the facts – where obviously there is no danger that the decision of the Appeal Tribunal will throw doubt on the jurisprudence established by the High Court’s decisions – where no issue of general principle arises in relation to any of the Queensland legislation relevant to the Appeal Tribunal’s decision – where the respondent is a barrister and he seeks an order for costs entitling him to recover not only out-of-pocket expenses but also professional costs – where there has been a difference of judicial opinion as to whether the *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 exception applies to enable a self-represented barrister to claim professional costs. Application refused. Written submissions on the question of whether the *Chorley* exception applies to enable the respondent to claim professional costs.

[Traspunt No.4 Pty Ltd v Moreton Bay Regional Council \[2019\] QCA 51, 26 March 2019](#)

Application for Leave *Sustainable Planning Act 2009* (Qld) – where Traspunt No.4 Pty Ltd (Traspunt) owns two pieces of freehold land at Rothwell, within the area of the Moreton Bay Regional Council – where Traspunt applied to clear vegetation to create firebreaks on each boundary of some land – where the primary judge allowed the clearing of firebreaks on some boundaries but not others – where the primary judge held that residential housing was infrastructure – where the primary judge held that the work was to protect infrastructure and

was therefore essential management – where the landowner argues that fences were being maintained by a firebreak and that therefore the work was essential development – where in the usual way, this court has heard full submissions on the merits of the proposed appeals – where the submissions raise many legal questions for the court’s determination, including several which were not argued in the Planning and Environment Court and even some which were not raised in the parties’ original submissions here – whether residential housing was infrastructure under the *Sustainable Planning Act 2009* (Qld) (SPA) – whether the maintenance of infrastructure under the SPA included the construction of a firebreak – whether the work was essential development or assessable development – where Traspunt’s difficulty is that the residential housing which is relevant to this case would not constitute infrastructure on the ordinary meaning of the word, and it is not within the specific terms of the definition – where the word does not include residential housing as it is used in paragraph (a) of the definition of ‘essential management’ in Schedule 26 of the *Sustainable Planning Regulation 2009* (Qld) (SPR) – where the adjoining ‘residential development’ was not ‘infrastructure’ within paragraph (a) SPR, so that the work proposed for the northern and eastern boundaries was not, upon the basis of that paragraph, ‘essential management’ – where the new argument for Traspunt about ‘essential management’, which is based upon paragraph (e) SPR of the definition of that term, relates only to Traspunt’s case about the southern and western boundaries – where consequently, the council has demonstrated that there was an error of law in the conclusion that the work on the northern and eastern boundaries was essential management as defined, so that it was not assessable development – where the SPA provided that development

might be made assessable development by a planning scheme – where, clearly, work could be made assessable development by a planning scheme where that had not happened by a regulation made under s232(1) SPA – where that would be subject to s232(2) SPA, under which a regulation might prescribe development that a planning scheme could not declare to be (amongst other things) assessable development – where there was no such limitation here – where if this work was essential management, the consequence was that it was excluded from what the regulation prescribed to be assessable development – where it is only in that way that a regulation made under s232(1) or (2) might effectively prescribe land to be exempt development – where absent a prescription of that kind, it was open to the council to provide, by the planning scheme, that this was assessable development – where, therefore, his Honour erred in concluding that the planning scheme had no effect in prescribing this as assessable development – where Traspunt argues that it is by paragraph (e) SPR of the definition of ‘essential management’ that the work on the southern and western boundaries was excluded from what was prescribed to be assessable development – where this was not an argument which was made to the primary judge – where importantly, it was paragraph (a) of the definition which specifically referred to clearing work for a firebreak, whereas paragraph (e) made no reference to a firebreak – where paragraph (e) applied only if it is considered that infrastructure, constituted here by fences, would be ‘maintained’ by a firebreak – where Traspunt’s argument should not be accepted – when read in the context of the definition as a whole, the maintenance of infrastructure, which is the subject of paragraph (e), would involve work which is done to the infrastructure itself – where if the maintenance of infrastructure included the construction

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of a firebreak to protect infrastructure, there would be a considerable overlap between the two categories in paragraphs (a) and (e), and an unavoidable tension between the two where the infrastructure is a fence – where consequently, the judge’s finding that the work on the southern and western boundaries was not essential management should stand – where the case should be remitted to the Planning and Environment Court, for two reasons – where the first is that, because the work on the northern and eastern boundaries is to be approved, consideration should be given to any appropriate conditions of that approval, which is not a subject of any submission in this court – where the second is a complication coming from the fact that, although the council was the ‘assessment manager’ for this application, the chief executive administering the *Vegetation Management Act 1999* was a ‘concurrency agency’ for it – where this matter was the subject of written submissions which this court received after the hearing, and from which it now appears to be common ground that the chief executive was a concurrency agency. On the application by Traspunt No.4 Pty Ltd: (a) Grant leave to appeal. (b) Dismiss the appeal. On the application by Moreton Bay Regional Council: (a) Grant leave to appeal. (b) Allow the appeal. (c) Set aside the order numbered 1 made by the Planning and Environment Court on 15 December 2017. (d) Remit the proceeding to the Planning and Environment Court for further consideration and orders. (e) Otherwise dismiss the appeal. Written submissions on costs.

Criminal appeals

R v Smith [2019] QCA 33, 1 March 2019

Sentence Application – where the applicant was convicted of the manslaughter of an infant – where the applicant was sentenced to a term of nine years’ imprisonment with a

declaration that it was a serious violent offence (SVO) – where the infant died as a result of either the application of significant shaking or blunt force trauma – where the applicant pleaded guilty – where the applicant showed no remorse and denied that he caused the infant’s death prior to his plea of guilty – where the applicant had a history of cruelty and violence towards the infant – where the applicant refused to allow the infant’s mother to take the infant to a doctor after the fatal injuries were inflicted – where the applicant had no relevant criminal record – where the applicant was a heavy user of dangerous drugs and alcohol – where the applicant did not complete high school and was unemployed – where the sentencing judge imposed the term of imprisonment before considering the question of a SVO declaration – whether the sentencing judge erred by fixing the term of imprisonment without regard to the SVO declaration later made – where the sentencing judge erred by deciding the term of imprisonment independent of the SVO declaration – where the reasons as a whole demonstrate that the judge did fix the sentence for nine years without regard to the SVO declaration which he went on to make – where the facts and circumstances of the offence were relevant both to the term of imprisonment and the question of the SVO declaration – where the error by the judge was to decide those two matters independently of each other – where notably, after his Honour said that he would impose the sentence of nine years, he went on to add that there were two things, not already mentioned by him, which he had also considered in fixing that term: the plea of guilty and the applicant’s denial to police of his responsibility for the death where at the same time, his Honour did not add the fact that he would make a SVO declaration – where it follows that the judge erred in the exercise of the sentencing discretion and, unless the view is taken that

no different sentence should be ordered, it is for this court to re-sentence him – where the facts and circumstances of this offence are very distressing and the case calls for a heavy sentence – where it is not demonstrated that, for an offender who has pleaded guilty and who has no significant criminal history, a term of nine years and a SVO declaration is warranted – where the term of nine years gives recognition to the seriousness of this crime and its consequences, but to require the applicant to serve at least 80% of that term before being eligible for parole would be excessive – where it is considered appropriate to set a parole eligibility date somewhat later than the halfway mark which would otherwise apply – where the outcome should be that which is proposed by counsel for the applicant, namely that the applicant be eligible for parole after serving five years of his nine-year sentence. Grant leave to appeal. Appeal allowed. Vary the sentence imposed on 19 January 2018 for count one of the indictment by setting aside the declaration that this was a serious violent offence and by ordering that the parole eligibility date be 4 March 2020.

R v Strbak [2019] QCA 42, 12 March 2019

Sentence Application – where the applicant pleaded guilty to manslaughter – where the manslaughter was of the applicant’s four-year-old son – where the particular basis for the applicant’s criminal responsibility was disputed – where the applicant admitted guilt on the basis that she failed to provide the necessaries of life by failing to seek medical treatment for her son – where the applicant did not admit that she applied the blunt force trauma that caused her son’s death but the primary judge found so – where the case that the applicant inflicted the fatal injuries was entirely circumstantial – where there was also circumstantial evidence that another inflicted the fatal injuries – where that other person gave a s13A statement – whether the primary

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judge erred by making a finding of fact that the applicant inflicted the fatal injuries – whether the primary judge erred by reasoning that the probability of the case against the applicant was affected by the relative probability of the case against another person – whether the primary judge erred by failing to approach the evidence of a s13A witness with the required degree of circumspection – where the court’s powers in the exercise of this jurisdiction are conferred by s668E(3) of the *Criminal Code* (Qld), which provides that if the court is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, the court shall quash the sentence and pass such other sentence in substitution for it, and in any other case shall dismiss the appeal – where in this court, there is recent obiter dicta that an appeal against sentence is an appeal in the strict sense, in which the court will not interfere with a judge’s finding of fact unless it concludes that the finding was not reasonably open or that it was the product of legal error: *R v Carrall* [2018] QCA 355 – where the point was apparently not the subject of argument in that case and, in the present case, it was ventilated but counsel for the applicant accepted that it was necessary to demonstrate that the critical finding here was not “rationally or reasonably open” – where the scope for this court’s interference with a factual finding may be more extensive – where the judge concluded that there was “no compelling case that Scown inflicted the fatal injuries” and that by contrast, the circumstantial case against the applicant was a strong one – where his Honour said that the case against Scown was weakened by the compelling circumstantial case against the applicant – where his Honour said that he was conscious of the seriousness of concluding that the applicant had inflicted injuries to her son, which included the fatal abdominal injuries, but that he was satisfied that the prosecution had proved its case on the balance of probabilities – where in this case, the prosecution was required to prove the critical fact on the balance of probabilities – where this was the standard of proof although, according to s132C *Evidence Act 1977* (Qld), the judge was to have regard to the consequences of the finding for the applicant – where there is no demonstrated error in the judge’s critical finding – where it was supported by the circumstantial case with the elements as detailed by the judge, and also by Scown’s testimony that he had not inflicted the injuries – where all of this made it much more probable than the only other realistic possibility, that Scown had done so – where there is no basis for interfering with the exercise of the sentencing discretion. Application for leave to appeal refused.

R v Quagliata [2019] QCA 45, 19 March 2019

Appeal against Conviction – where the appellant was charged with one count of trafficking and three counts of supply – where the appellant was convicted on all counts of the indictment – where the trial judge sentenced the appellant to six years’ imprisonment on the trafficking count, with a declaration that he had already served 22 days in pre-sentence custody – where on

each of the three supply counts, the appellant was convicted and not further punished – where the particulars for those counts were presented on alternative bases – where it was alleged that the defendant was engaged in carrying on the business of unlawfully trafficking a dangerous drug either directly or in partnership with others – where it is appropriate to pause in the identification of the relevant aspects of the conduct of the case at trial, to observe that the particulars were inadequate – where the inadequacy of the particulars did not form a ground of appeal, but the text of the particulars was one of the exhibits given to the jury and, as will appear, many of the inadequacies contained in the particulars were reflected in the directions given to the jury, and complaint was made on appeal about the directions in this respect – where there were 20 events which constituted the evidence for all counts on the indictment – where the trial judge did not identify which events were relevant to each alternative case as particularised – where the primary judge erred in failing to direct the jury as to the evidence relevant to each alternative – where the relevant substantive directions by the trial judge were entirely reduced to writing by him and provided to the jury – where the related oral component of the directions comprised reading the relevant aspect of the written directions to the jury and providing brief oral elaboration of the written directions – where the directions identified that the Crown case identified the alternative cases advanced by the Crown as (a) the appellant was the person who actually committed the acts constituting the offence; (b) the appellant was one of a number of persons who actually committed the acts constituting the offence; and (c) the appellant was a party in the sense of aiding other principal offenders in the way contemplated by s7(1)(b) or (c) of the *Criminal Code* (Qld) – where, however, the directions suffered from the same vice which was inherent in the particulars, namely they ignored the existence of any dividing lines between the Crown’s alternative cases – where the appellant was correct to submit that the directions failed to require the jury separately to consider each alternative and that they made no attempt separately to identify the evidence or issues which were referable to each alternative – where the only answer of the respondent to this point was to rely on the proviso – where this error was compounded by the way in which the directions dealt with the Crown’s reliance on “common unlawful purpose” – where curiously, despite the fact that the particulars were specifically provided to by the jury and their significance reinforced by the trial judge, the directions made no mention at all of the notion of “partnership” – where presumably that was because of an unstated intention to encompass any requisite directions within the directions on “common unlawful purpose” – where at all events, the primary judge introduced his oral recitation of the written direction he had given by the reminder that the term was “used twice in the particulars, as you will have noticed.” – where the direction did not identify what the alleged common purpose actually was, nor does it invite the jury to consider whether they

found it to be have been proved – where more importantly, this direction was erroneous for the reasons explained in *R v Palmer* [2005] QCA 2 and *L v Western Australia* (2016) 49 WAR 545 – where the respondent did not address those cases in its argument on appeal – where the respondent’s submission that the jury was told about the meaning of common unlawful purpose and being a party to an offence in a way consistent with the provisions of s7 of the *Criminal Code* (Qld) is rejected – where it must be accepted, of course, that an appellant does not establish error in a jury direction simply by pointing to the use of the phrase “joint criminal enterprise” in the directions given by the trial judge – where in this context, an appellant must establish that the direction, taken as a whole, invited the jury to convict the appellant otherwise than by reference to s7 of the *Criminal Code* (Qld) – where that was what the directions did – where the form of the directions was such that the appellant lost the chance of the jury having a clear identification of: (a) the alternative bases which they could consider on which criminal responsibility for trafficking could be attributed to the appellant; (b) for each alternative basis, the extent to which, if at all, it was necessary for the jury to be persuaded that there was some form of identified partnership or common purpose; and (c) for each alternative basis, the evidence which was admissible on that case and how it related to establishing the basis on which criminal responsibility for trafficking could be attributed to the appellant, as contemplated by s7 of the *Criminal Code* (Qld) – where that point made in (c) was significant because on the identified alternative that the appellant was the person who actually “directly” committed the acts constituting the offence, the evidence of the acts done and things said outside the appellant’s presence would seem to have been inadmissible – where perhaps of greater concern, so far as the point made in (c) is concerned, is that the form of the particulars, their reinforcement in the directions, and the directions concerning “joint criminal enterprise” and “common unlawful purpose”, operated to give rise to the real possibility that the jury regarded evidence of having such a purpose as a sufficient basis in and of itself for attribution of criminal responsibility for trafficking to the appellant – where this is not a proper case for the application of the proviso. The conviction on count 1 of the indictment should be quashed. There should be a re-trial of count 1 of the indictment. Otherwise: (i) the appeal should be adjourned to permit the appellant and the respondent to file and serve submissions as to the orders which should be made in relation to counts 2, 4 and 5 of the indictment; (ii) each party must file and serve written submissions as to those orders within seven days of the date of these reasons; and (iii) the determination on the question of the orders which should be made in final disposition of the appeal will be made on the papers.

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.

Leadership, profitability and culture



Graeme McFadyen examines the relationship between law firm leadership, profitability and culture.

“The most powerful predictor of law firm profitability is the quality of the partners’ leadership skills.”¹

McBassi & Co, the authors of this definitive conclusion, used an extensive online survey of United States law firms in which all firm employees were invited to respond to around 80 questions. Their responses led to the conclusion above.

The authors identified that three of the top five strongest factors predicting overall law firm success were the following ‘leadership events’:

1. **Partner leadership skills** – accessibility, sharing knowledge, providing regular feedback and inspiring confidence.
2. **Inclusiveness** – partners and managers collaborate with staff and invite input.
3. **Managerial skills, in descending order of importance** – accessibility, providing regular feedback and inspiring confidence.

Encouragement of further learning and innovation were ranked 4 and 5. Surprisingly, partner communications was ranked only ninth in the scheme. Given the extent to which 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 higher ranking would be expected, as there can be no doubt that the quality and regularity of internal communications are critical in defining the wellbeing of the workplace environment.

Curiously, there seems to be a presumption by McBassi that any partner is equipped to be a leader. Yet we know that many managing partners struggle to ‘inspire confidence’, identified above as a pre-requisite for true leadership.

Daniel Goleman² has a very clear view on the subject. Goleman believes that “the most effective leaders are alike in one crucial way: they all have a high degree of what has come to be known as emotional intelligence (EI)”.³

Goleman’s research found that, as expected, intellect and cognitive skills were major drivers of performance however, “when I

calculated the ratio of technical skills, IQ, and emotional intelligence as ingredients of excellent performance, emotional intelligence proved to be twice as important as the others for jobs at all levels.”⁴ Moreover, the higher the rank of the executive, the more EI showed up as the reason for their success. And fortunately, EI skills can be learned.

Goleman notes that self-awareness and empathy are the two strongest traits of EI. So, courtesy of these two elements, Goleman is saying, in effect, that the most effective leaders are those who have the strongest relationship with their colleagues and, therefore, he is saying that team effort trumps insight and intelligence as the single most important issue in terms of effective leadership. So leadership is a culture issue!

Although Goleman’s work was published in 1996, his conclusions were substantially re-confirmed in a 2015 article in *Forbes* magazine.⁵ The author said that, after critically analysing a substantial database of management performance assessments, he concluded that while extraordinary leaders represented only 10% of the executives measured, their respective company’s profits were, on average, more than double the profits of the other 90% of companies.

He attributed this to their ability “to inspire people to perform at a higher level and thereby increase organisational productivity and profits”. So once again it’s all about culture, which is entirely consistent with Goleman’s conclusion that good leaders are those who can inspire greater performance from their teams.

Jim Collins, in his management classic *Good to Great*,⁶ reaches a similar conclusion. His ‘Level 5’ executives, the best performers, “channel their ego needs away from themselves and into the larger goal of building a great company”,⁷ which depends on a consistent and reliable team effort across the organisation.

Finally, there is a question about whether the challenge of leadership changed markedly when the future was more uncertain. It did. In a November 2017 article in *Academy of Management*,⁸ the authors noted that the assessment of the capabilities

of the CEO by their subordinates was “strongly moderated” by uncertainty in the commercial environment.

This more critical assessment means that it is all the more important for the managing partners and CEOs to focus on maintaining the confidence of their teams when the commercial landscape is subject to considerable uncertainty, such as is occurring in the legal industry now.

Winning this confidence is best achieved by regular communication to all from the managing partner or CEO advising how the business is performing and, in particular, emphasising the contributions of the entire team in delivering that performance.

Conclusion

You can see then that there is a well-established relationship between leadership, profitability and culture. If your firm is not performing as well as it should, then perhaps you need to reassess the leadership credentials of the team. Since the necessary personal skills can be learned, there is no reason why a lot more firms cannot enjoy superior leadership.

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 ‘Leadership and Law Firm Success’, McBassi & Co study, 2008.
- ² ‘What Makes a Leader?’, Daniel Goleman, *Harvard Business Review*, June 1996.
- ³ *Ibid*, p1.
- ⁴ *Ibid*, p7.
- ⁵ ‘Great Leaders Can Double Profits’, Jack Zanger, *Forbes* magazine, January 2015.
- ⁶ *Good to Great*, Jim Collins, Random House, 2001.
- ⁷ *Ibid*, p21.
- ⁸ ‘Does Leadership Matter? CEO Leadership Attributes and Profitability Under Conditions of Perceived Uncertainty’, by David Waldman, Gabriel Ramirez, Robert House and Phanish Puranam, *Academy of Management*, November 2017.

Margaret Geraldine Jones

26.1.1954 – 19.2.2019

Margaret Jones had a private conviction, which marked her as an exceptional practitioner and a person: That all doors open to courtesy.

For the family and friends of Margie, that may appear to be a trite observation, self-evident in her warmth and kindness.

In the occasional bear-pit of family law, it was something else again.

Margie commenced her career as a solicitor at the Australian Taxation Office before quickly deciding that she was better suited to private practice. She then worked for John Clarke in Beaudesert, enjoying her time in the country and making many lifelong friends.

A stint on the Sunshine Coast followed before Margaret commenced work at Howard Gill and Brown in Brisbane, where she remained for many years before establishing her own practice, Margaret Jones Solicitor, in 1998, which was later to become Jones McCarthy.

Courtesy and restraint were Margie's hallmarks, in a jurisdiction where even good practitioners can abandon themselves to bile and brinkmanship as the rigours of the game turn them sour.

Intemperate letters, vexatious applications and scandalous material never left Margie's office. They weren't needed by someone who knew the law and ensured she was across the facts. She was clear and purposeful in the way that she conducted her practice, her pride and joy that she grew from humble beginnings as a sole practitioner.

Margie expected her staff to act in a similar fashion. Anyone doubting this should ask Kirstie Day, who was Margie's last articulated clerk and fortunate to benefit from her endless patience and hours of redrafting with a well-used red pen.



Paul Doolan once said that he had never seen any lawyer who could read and interpret a balance sheet as well as Margie could. It is fair to say that it was the mark of an experienced practitioner in Brisbane family law circles to know this, to know that they couldn't put one over her, and moreover to know that they would look the fool if they mistook her restraint for abashment.

Those who didn't appreciate this found their work well and truly cut out for them.

Margie was a pragmatic lawyer. She didn't see the need to write a 10-page letter for something that could be said in two pages. Preparation was the key. An affidavit had to be to the point and "punchy" to get the judge's attention.

It didn't matter the type of matter or client, Margie was a perfectionist and gave every client her best. She rarely raised her voice, but was heard through the walls on one occasion trying to persuade a particularly difficult client in a loud and exasperated voice that it wasn't in her children's best interests to run over their father.

Another of Margie's killer apps was the ability to know when "the troops", as she called them, needed to let off steam, break bread and partake of the odd beverage or two. Again, she led from the front, taking a brandy and dry with us at Jorge on George as it then was on a Thursday afternoon, or Irish Murphy's if a Friday steak sambo was required. In the latter years, a quick Friday lunch at the Grosvenor became the norm, during a respectable incarnation of that establishment.

We also remember with fondness the generosity of Margie. There were bonuses for hard work, second Christmas parties when the first was deemed unsatisfactory by her, and morning teas at the office to mark people's birthdays (more often than not including her favourite passionfruit Shingle Inn cake) or the visit of new babies. There were the Family Law Residential dinners where the Jones McCarthy crew would stake their claim and have the world come to the 'fun table' in the middle; the office Christmas parties that could end up late in a bar, at a pool table or around a piano. The culture that Marg nurtured was a strong one that kept and reunited many of her co-workers together over nearly 20 years. Margie often phoned Kirstie Day at short notice after her retirement to Eumundi in 2010 with a request to "summon the troops" to catch up the next day because she was back in town.

Margie was a role model for young solicitors. We all learnt from her the importance of composure and the need to take one's work and profession seriously, but yourself less so.

Margie remained close to her staff after retirement and continued to provide invaluable support for those she mentored. She was intelligent, confident and hard-working. She exuded class, style and grace. Words are a poor means to describe the loss we feel, but we are grateful for the privilege of having worked with a model professional, and a kind, genuine person.

– Kieran McCarthy, Kirstie Day
and Dianne Smith

Basic entitlements – family and DV leave

by Rob Stevenson



A National Employment Standard (NES) for family and domestic violence leave came into effect from 12 December 2018.

This entitlement supplements the existing personal/carer's leave entitlements under the National Employment Standards. Award-covered employees have had these entitlements since 1 August 2018 but the effect of the NES is that *all* private sector employees are entitled to five days of unpaid family and domestic violence leave each year. This includes part-time and casual employees. More generous arrangements exist for Queensland public sector employees.

The NES operates as a minimum standard, so more generous arrangements in employer policies or enterprise agreements will continue to apply.

Family and domestic violence is defined in the NES as being violent, threatening or other abusive behaviour by a close relative of an employee that seeks to coerce or control the employee and causes them harm or to be fearful. The term 'close relative' is defined broadly in the *Fair Work Act 2009* (Cth) and includes someone who is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

The NES provides that this leave can be taken if:

- an employee is experiencing family and domestic violence, and
- they need to do something to deal with the impact, and
- it is impractical for that to be done outside ordinary work hours.

Examples include arranging for the safety of the employee (including relocation), attending urgent court hearings or accessing police services. An employee may also be able to take carer's leave to support a household member experiencing domestic violence.

The NES leave does not accumulate from year to year but is available in full at the beginning of employment and each 12 months. The leave can be taken as a single bloc or separate periods of one or more days, or otherwise as agreed between the employer and employee. Unpaid family and domestic violence leave does not break an employee's period of continuous service but does not count as service when calculating accumulated entitlements such as paid leave.

The same notice and evidence requirements apply as for personal/carer's leave. So, an employee taking this leave should notify their employer as soon as possible (which may be after the leave has started) of the need for, and duration of, the leave. An employer can ask an employee for reasonable evidence of the need for the leave. This might include documents issued by the police, court or family violence support service or a statutory declaration. Employers must also take reasonably practicable steps to ensure information provided by the employee, including about the need for the leave, is treated confidentially.

Employers should obviously be sensitive to their employees' personal situations and handle these matters in an empathetic and reasonable manner. Confidential information, counselling and support for people impacted by domestic and family violence is available at the 1800 RESPECT website – 1800respect.org.au, the national sexual assault, domestic and family violence counselling service.

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QLS
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And now the Game of Rhones

with Matthew Dunn



Wine is coming to Melbourne.

This month the last instalment of pop culture mash-up 'Game of Rhones' comes to the Fitzroy Town Hall, signalling both the new-found celebrity of Rhone wines and the pulling power of the ultimate chapter of a somewhat popular TV show.

Rhone wines are now 'a thing'. This became apparent when my father, visiting from Hipster Hobart, proudly produced a bottle of Cotes du Rhone wine, citing the bottle-shop attendant as saying "this is what the kids are into".

Some further investigation confirmed his testimony when my own Brisbane hipster boutique bottle-shop attendant explained that 'Rhone' is taking off as people explore beyond South Australian grenache and better imports arrive here.

Rhone wines are probably the best gateway to French wines for palates raised on antipodean red wines – Rhone reds being based in the holy trilogy of grenache, shiraz and mourvedre (usually called GSM in Australia). But what makes the Rhone unique is that some of its appellations permit the blending of red and white grapes in red wine, including the sublime shiraz/viognier blend and the signature Chateauneuf-de-Pape, with up to 13 grape varieties inhabiting the same bottle.

As to origin, Rhone wines come broadly from a 200km stretch of the Rhone river valley in south-east France, stretching from the city of Vienne in the north to the environs of the former papal enclave of Avignon in the south. The northern wines tend to be shiraz based and the southern wines tend to be grenache based.

Like most French wine, the appellation system of the Rhone is built on strict hierarchy, with levels of ever-increasing stricture and uniqueness of origin. The base level red is the standard Cotes du Rhone from across the southern Rhone, requiring little more than at least 15% shiraz and/or mourvedre, and at least 11% alcohol.

The next level is Cotes du Rhone Villages, which is from only certain authorised localities, mostly in the south, but requiring at least 50% grenache and 20% shiraz and/or mourvedre, and with at least 12% alcohol.

The penultimate level is Cotes du Rhone Villages appended with the name of one of 18 authorised villages. These are the contenders for promotion to the top category but not quite there yet. The proportions are the same for the general Villages, but with at least 12.5% alcohol.

The top level are the 17 village Crus sold by their locality name alone. In the north this includes the powerful shiraz of Cote-Rotie and Cornas, and the unique shiraz and marsanne/roussanne blends of Saint-Joseph, Crozes-Hermitage and Hermitage. In the south, all is led by Chateauneuf de Pape and followed by the promoted strong wines of Gigondas, Rasteau, Vacqueryras and, most recently in 2016, Cairanne. The Rhone dynamically promotes localities in a way almost never seen in the hallowed vineyards of Bordeaux or Burgundy.

Rhone wine has been a perennial favourite since a memorable Christmas nearly 20 years ago. My uncle, a wine importer, had proudly sourced some good Cote du Rhone for Christmas lunch and told us young ones to have at it. This we did and soon he was forced back to the cellar to source reinforcements. Later his son, more familiar with boxed wine, remarked on the replacements. My uncle went ashen and with much chagrin seized all remaining bottles realising he had served us his \$200 Cote-Roties instead of his \$15 Cotes du Rhones. An easy mistake to make, but sadly no Christmas has been quite the same since.

The tasting Three examples of the Rhone style were examined



The first was the **Santa Duc Les Vieilles Vignes Cotes du Rhone 2015**, which was the colour of dark brick red with a crimson edge. The nose was hints of allspice, white pepper and currants. The palate was big, bold and fruity, with grenache forward showing leather and anise mixed with a burst of tannin and alcohol heat.



The second was the **Saint Damien Vieilles Vignes Cote du Rhone Villages Plan de Dieu 2015**, which was purple tinged with deep red. The nose was a charming mix of talc and brown strap leather. The palate was richer, ripe and a smooth velvety leather tone which changed in the mid palate to savoury nutmeg into an earthy broad bean. Astringent but fine, bold yet somehow elegant.



The last was the local **Yangarra Estate Vineyard 2016 McLaren Vale GSM**, which was purple red with a depth of inky colour. The nose was the heady scent of anise-flavoured furniture polish. The palate was a rich, fruity bomb with shiraz red fruits moving to mint and dark chocolate in the mid palate then the grenache heat welling in the retreating long palate. A very different creature.

Verdict: The preferred wine was the Plan de Dieu, for its elegance and its drive, despite some flavours not usually seen in Australian wines.

Matthew Dunn is Queensland Law Society policy, public affairs and governance general manager.

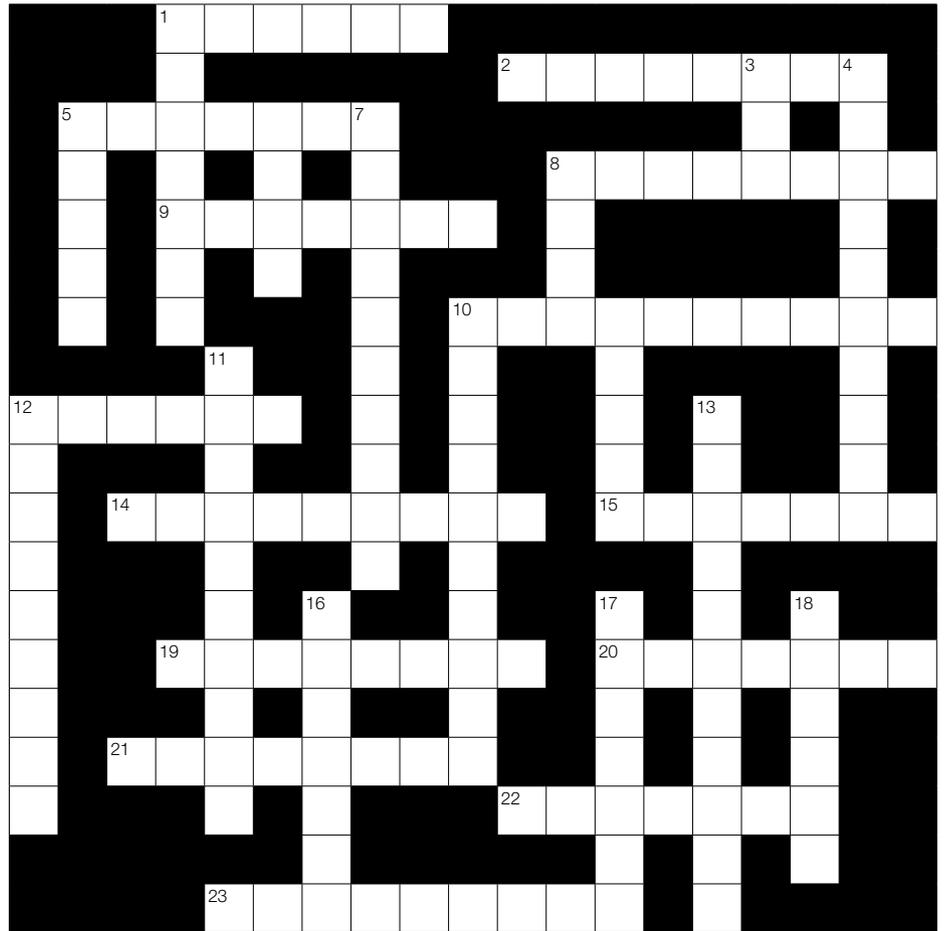
Mould's maze

By John-Paul Mould, barrister
and civil marriage celebrant
jpmould.com.au



Across

- 1 High Court of Australia (HCA) case which ruled that the indefinite detention of a stateless person was lawful, *Al-Kateb v* (6)
- 2 Obtained protection against copying a production method. (8)
- 5 With other conditions remaining the same, *paribus*. (Latin) (7)
- 8 The Spice Girls were successfully sued by an Italian manufacturer for misrepresentation by conduct. (7)
- 9 On 21 February 2019 the Criminal Code was amended to make it an offence for a person to distribute or threaten to distribute an image. (8)
- 10 A decision is persuasive at a sentence hearing. (10)
- 12’s Rule provides that an agreement to accept part payment of a debt never satisfies the whole debt. (6)
- 14 Female judge of the Federal Circuit Court in Queensland. (9)
- 15 Instant communication is an exception to the postal rule: *Ltd v Miles Far East Corporation*. (7)
- 19 A punctuation mark consisting of three dots. (8)
- 20 Equality before the law. (7)
- 21 Levy a distress. (8)
- 22 North Lane is adjacent to the Commonwealth Law Courts. (7)
- 23 The separation of powers doctrines involves the *trias politica* model of legislative, judicial and branches of government. (9)



Down

- 1 HCA case holding that defamation proceedings should be undertaken in the place where the communication is received, *Dow Jones & Co Inc v* (7)
- 2 A system of withholding income tax. (Acronym) (4)
- 3 Under the *Termination of Pregnancy Act 2018* (Qld), the consent of two medical practitioners is required to perform the procedure after twenty-... weeks of pregnancy. (3)

- 4 Queensland Court of Appeal case which held that the tort of unlawful interference with a business is not accepted in Australia. (10)
- 5 HCA case in which the trial judge was asleep during proceedings, *v R*. (5)
- 6 Proportionate, *pro* (Latin) (4)
- 7 The procedures under the *Uniform Civil Procedure Rules 1999* (Qld) that apply to ‘minor claims’. (10)
- 8 One purpose for providing particulars in a pleading is to avoid taking the opposition by at trial. (8)
- 10 An agreement between countries covering particular matters, less formal than a treaty. (10)
- 11 Political ideology involving the notion of a general government with regional governments. (10)
- 12 Majority (of a court). (9)
- 13 The common law is an legal system by virtue of its self-referential nature. (11)
- 16 HCA case concerning unconscionable conduct, *Louth v*(7)
- 17 Judicially determine a child’s paternity. (7)
- 18 The Engineers’ Case rejected the doctrine of reserved when interpreting s51(xx) of the Constitution. (6)

Solution on page 64

Bye-bye barbecue

For 20 years you served me well

by Shane Budden



The world is full of ideas, some of which are good and some of which are just the opposite (bad).

Good ideas include the scientific method, penicillin and TimTams; bad ideas cover reality TV, Manchester City Football Club and almost anything Scott Morrison or Bill Shorten say on the campaign trail.

I mention that last as we are in the throes of an election campaign, which – even though I write this in March, before any of it has happened – I am confident it will feature the two increasingly desperate leaders flinging policy thought bubbles out at an ever-increasing rate.

This happens every election and the offerings get crazier the further along we get; I expect many of us can remember Mark Latham blurting out something about Medicare Gold, which in the dying stages of the election campaign seemed to have expanded to the point where elderly people would be carried to the doctor's office in gilded litters fitted with plasma TVs. I would not be surprised if Shorten and Morrison end up promising to individually visit every Australian home, make us all tea and then clean our barbecues.

That last bit is a touchy subject for me at the moment, because it has become clear that my barbecue is on its last legs. This is of course a significant tragedy in a man's life, not as bad as the age-related disintegration of a favourite footy jersey, but certainly more serious than the VCR chewing the part of the wedding video where his wife's Aunt Gladys recited her favourite passage of the Bible and dedicated it to the happy couple (especially if she happened to quote from Revelations, which isn't exactly a laugh a minute).

My parents gave my wife and I the barbecue as an engagement present, and although it technically belongs to both of us, we both know it is really mine, just as every one of the estimated 1374 pieces of crockery her relatives gave us is really hers. This makes the barbie around 20 years old – meaning it has been with us far longer than, say, the dog, while being much less likely to pee on the deck.

My friends and I have had some great times around that barbie, or at least my male friends. We are all enlightened, non-sexist,

Alan Alda-style guys, married to strong proud feminist women who take no rubbish from us, but there are limits. When people come over for a barbie the men surround the barbecue itself, and the women stay inside in the air-conditioning. This is partly because that is what tradition dictates, but mostly because women are too smart to stand around a hot, smoky barbecue in the scorching Queensland sun; it is no real surprise they live longer than us.

I realise that there are some people who do not invest in a deep emotional connection with what is essentially an inanimate, non-sentient item that burns meat and sets fire to the house if you are not careful, and that most of these people are women. My wife is one (of those people, I mean) (also, a woman); she seems to think we should just simply throw out the barbie and get a new one, which seems to me a bit heartless, and probably gives me some idea of what will happen to me if I ever manage to set the house on fire.

She does have a point though; the barbie is down to one burner and, when in operation, makes a sort of roaring sound that is either gas escaping or the noise barbecues in the wild make when they wish to signal to the rest of the herd that they are in danger.

So we need a new barbecue, and once the old one is buried in consecrated ground and the eulogies said, we'll have to get one, but it turns out that this is no longer as simple as it once was. In my day, the primary quality most of us looked for in a barbie was a place to rest a beer, and if it happened to also cook meat that was just super.

Nowadays, it seems that the idea of a barbie simply cooking steak and sausages is considered barbaric, a bit like having a car that uses leaded petrol, or a profile on Myspace. They come with wok burners, smokers, rotisseries and anti-lock braking systems, seemingly. One we looked at would probably not fit in our kitchen, and in any event we would not need to use it unless the entire population of Tasmania just happened to drop by.

There are also these strange little mutant oblate spheroid-styles that look suspiciously like something China has sent to spy on us, or perhaps an alien spacecraft. If I had to choose I would say the spacecraft, because I doubt that China ever eavesdrops on my

BBQs. It isn't that I don't think they would, it is just hard to see what use they would make of two hours of me and my mates arguing over who is better, Mark Knopfler or Eric Clapton (Knopfler) and whether or not Michael O'Connor could step off both feet (yes).¹

Unfortunately I am going to finish on a bit of a downer this month.

As I write this, I am awaiting word of when the funeral of a mate of mine will be held. 'Cookie', as everyone knew him, was 48 when he passed away from the alcohol abuse that had ruined his once-promising life.

Like so many people in society, Cookie had mental health issues that were never treated, except by his own fatal self-medication. Even his close mates didn't pick up early on, because he was high-functioning and capable of being a successful salesman despite drinking in the shower before work; by the time we realised, it was far too late.

It speaks very poorly of our society that he never had any referral to health care professionals during his illness, but did spend some time in prison. It seems we find it far cheaper to jail our mentally ill than treat them.

This means that we have to look out for each other, so I urge that you do that; keep an eye on your mates and your peers, and mention it if you think they are struggling. Better to have an uncomfortable conversation than attend an uncomfortable funeral, so look out for each other – and let our politicians know that we can, and must, do better on mental health. Future generations will judge us on how we treat our most vulnerable; I wonder what score they'd give us right now?

GET HELP: If you need crisis support, please call Lifeline on 13 11 14.

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

Notes

¹ In the interests of fairness I point out that some of my friends have different answers to these questions, because some of my friends are wrong. I am not going to go into their views, as my feeling is that if they wish to put forward wrong views on issues of import, they can always go to the Bar.

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Crossword solution

From page 62

Across: 1 Godwin, 2 Patented, 5 Ceteris, 8 Scooter, 9 Intimate, 10 Comparable, 12 Pinnel, 14 Spelleken, 15 Entores, 19 Ellipsis, 20 Isonomy, 21 Distrain, 22 Quarter, 23 Executive.

Down: 1 Gutnick, 2 Paye, 3 Two, 4 Deepcliffe, 5 Cesan, 6 Rata, 7 Simplified, 8 Surprise, 10 Convention, 11 Federalism, 12 Plurality, 13 Autopoietic, 16 Diprose, 17 Filiate, 18 Powers.

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