

# PROCTOR



Queensland  
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August 2018 – Vol.38 No.7

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# The voice of the profession

## Advocating for good law



With the financial year concluded for 2017-18, we thought it opportune to review the exceptional work that our legal policy team and our 26 policy committees have undertaken.

In the last financial year, our committees made 212 submissions for good law in Queensland.

There were 390 instances where we recorded a success in the space of policy, including attendances at public hearings – of which we appeared at 20 – participated in stakeholder consultation, contributed to publications and media, commented on policy initiatives, invited to stakeholder groups, and were quoted in the media or *Hansard* – in which we were mentioned 155 times.

Our policy committees work incredibly hard, and I would like to thank our chairs, deputy chairs, members and our legal policy team for their efforts over the last financial year. These committees are part of the great work that your Society does for the profession and the community. It truly underpins our mission of advocating for good law, supporting good lawyers, for the public good.

### Solicitors as tax collectors?

One of the key issues we have been working on and are concerned about is the recent changes to federal legislation that will see goods and services tax (GST) withheld and paid directly to the Australian Taxation Office (ATO) at the settlement of the sale of new residential premises or potential residential land. These changes have made selling property more complex, increasing administrative work for solicitors and imposing new obligations on both parties in the transaction. This legislation – *Treasury Laws Amendment (2018 Measures No. 1) Act 2018* – effectively makes solicitors tax collectors and adds more steps to the conveyancing process.

Solicitors will first need to assess whether a client must withhold GST at the settlement of a transaction, and then ensure that, at settlement, a separate cheque for the GST is handed over and paid directly to the ATO to clear the liability of both seller and buyer. The withholding process requires two forms to be lodged with the ATO, plus an ATO payment slip, all of which add to the complexity of the conveyancing process. This will likely add to the cost for our clients, and add more time to the solicitor's work.

We made several submissions on this Bill and associated materials, with little consultation time allowed and many of our concerns only partially addressed. Although we support good law and amendments to legislation for the good of Queensland and Australia, we do not support adding additional burdens and costs to Queenslanders and our members. We will continue to work with our governments on good law for Queenslanders, and fight to support our solicitors.

### Cyberattacks on firms – stay vigilant

By now, I'm sure most – if not all – solicitors are aware of recent cybersecurity incidents in our profession, particularly in conveyancing transactions and transfer of funds to and from trust accounts. These instances usually occur when an email is hacked or a scammer sends an email with someone else's signature or letterhead requesting funds to be transferred.

We have been actively assisting firms where we can on trust account issues, and pointing members of the public to assistance. We also have a dedicated page on our website around cybersecurity, and we have a page for members of the public who may have been victims of a cyberattack on a firm.

The QLS Ethics Centre has also been very active in this space, with a new QLS Cybersecurity and Scam Prevention Working

Group which will look at how we can assist members with resources, guidance and response packages. Keep up to date with the latest cybersecurity messages via our webpage, weekly *QLS Update* messages and social media.

### Claim farming – a stain on our profession

We have also been vocal about claim farming and the negative impact it has on the reputation of Queensland's legal profession. Our Accident Compensation/Tort Law Committee has been working with stakeholders including the Queensland Government and the Motor Accident Insurance Commission (MAIC) on legislative reform to make claim farming illegal in Queensland.

I urge all practitioners to be wary of dealing with non-legal firms which may be farming details, and to ensure that we are all practising with the highest of ethical standards. As solicitors, we have higher duties and must always remain above reproach in the eyes of both the public and the profession. Should you have any queries, don't hesitate to speak with our QLS Ethics Centre.

### QLS Domestic and Family Violence Committee

Our newly established Domestic And Family Violence Committee held its inaugural meeting at the end of June and I would like to thank our expert committee members for their commitment to good law and the safety of our community members.

#### Ken Taylor

Queensland Law Society President

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# Operation matters

## Planning on priorities essential for success

In my short time with the Society I have been able to spend quality time with members, staff and various other stakeholders.

This has helped me to gauge perceptions of the role the Society plays in the legal profession, and how we offer value to members and the community more generally.

Given the breadth of work we do, incorporating policy advocacy, regulation, ethics and practice guidance, education and professional learning, across a diverse and geographically dispersed membership, I have been searching for a clearer understanding of our core purpose, and therefore what the key focus of our work should be.

It is clear to me that, across all of our services, we must simply advance the interests of our members so that the community is better served and that we must demonstrate a ruthless focus on customer service – that is, serving our members, helping to create their success in order to benefit all stakeholders and the community.

We must be a Society of which our members are proud, and we must demonstrate total competence, expertise and trustworthiness in everything we do.

In line with this, I recently coordinated the development of our detailed operating plan for 2018-19, gaining Council endorsement on 21 June.

The plan, effective from 1 July, follows wide consultation and sets out our priorities and initiatives for 2018-19, with relevant links to the strategic plan.

This will, in turn, lead to the development of business unit and individual plans across our organisation.

This financial year, our five key priorities are:

1. Development of a member services capability expanding the QLS Ethics and Practice Centre offering into practice care, practice support and career advancement. The centre's name change already reflects the importance we attach to this expansion and redevelopment of services that are designed to help individuals and practices be successful.
2. Position QLS as a trusted advisor of law reform in Queensland via our many important membership policy committees and by engaging with government in areas of legislative reform important to our members and the community
3. Implementation of QLS in-house information management and business processes systems, upgrades and improvements. We must have fit-for-purpose infrastructure to deliver the best products and services to members. Currently, this is holding us back.
4. Development of a leading, accessible, technology-supported learning and development offering to members. The rapid growth in online professional development is continuing, and we must ensure we keep pace with that growth to deliver first-class learning and legal updates to our members, wherever they may be and whenever they need it.
5. Strengthening our QLS culture to be high performing for our members, to be egalitarian, collaborative and collegial, driven, but with clear and strong, inclusive leadership.

### Our RAP success

3 July marked the first anniversary of the launch of our QLS Reconciliation Action Plan (RAP) and we took the opportunity to celebrate its success with a luncheon for staff and guests.

More than 80 attendees enjoyed a tasty lunch from First Food Co., and we thank Shannon Ruska for the welcome to country and our special guest speaker, Leah Cameron, who joined us from Cairns.



In retrospect, the development of a QLS RAP has been more successful than we anticipated, blending quite seamlessly with the way we work and our culture. We have also enjoyed the educational aspects, and I would suggest that all staff have developed a greater respect for Indigenous culture and the contributions Indigenous people make to our community.

Importantly, a substantial increase in understanding has followed. This is a key part of our reconciliation journey, and I look forward to seeing what we will have achieved in another 12 months.

I would urge any firm that may still be debating the merits of creating a RAP to progress this proposal. The benefits may well surprise you.

### Minds count

QLS has long been a supporter of the Tristan Jepson Memorial Foundation (TJMF) and a signatory to the *TJMF Workplace Wellbeing: Best Practice Guidelines for the Legal Profession*. I want to pass on the news that the foundation has announced several major changes, including a new name – Minds Count – which it says represents a clear reminder to the legal profession that the mental health of every individual counts, and that every effort should be made to embed sound mental health and wellness practices in our workplaces.

Founders Marie and George Jepson have stepped down from their involvement with the foundation, handing over leadership to a newly appointed board. I congratulate executive director Marie on the great work she has done to increase mental health awareness within the profession over the last 10 years and wish the foundation the best as it continues this important mission.

**Rolf Moses**  
Queensland Law Society CEO

# A NEW MEMBER YEAR

With the renewal of practising certificates and QLS membership recently completed for Queensland solicitors, we look at who is QLS in 2018/19.

## 13,571 TOTAL MEMBERS 2017/18

77% FULL  
3% ASSOCIATE  
19% STUDENT  
1% HONORARY



51% MALE  
49% FEMALE

## WHERE ARE OUR MEMBERS?

14% OTHER QUEENSLAND

20% SOUTH EAST QUEENSLAND

61% BRISBANE

5% OTHER



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Letter to the editor

## Civility in practice

I really enjoyed President Ken Taylor's article about civility (*Proctor* July 2018) and support his comments on how to increase the incidence of civility. For my two bob's worth, I am proactive about that, using the following techniques:

- If a junior lawyer or paralegal, or indeed any staff member of another firm, extends a particular courtesy to me or shows talent or knowledge above what one might expect at that level, I always email them and acknowledge them for that and ask them to show the email to their boss. I also phone or email the boss to let them know they have an excellent staff member. It costs me nothing and spreads civility.
- If I want to use a document as a precedent and I know that document was prepared by another known lawyer (or even substantial sections of that document) I call or email that lawyer and ask permission. I find permission is never denied and it spreads civility.
- If I sense that a junior lawyer in another firm is stuck on a file or perhaps going down a wrong track, I phone a senior lawyer in that firm and politely recommend that they review that file as an education opportunity for the junior.
- If I am referring a client or acquaintance to another firm, I always tell them both that if ever they have communication difficulties or can't understand what the other is meaning, come back to me and I will speak to the other and translate and assist at no cost.
- If I see an obvious error in a lease or contract ('lessor' where it should be 'lessee' or a 'not' left out) I bring it to the attention of the drafting lawyer. It spreads civility and I don't need the argument later on.

I do these things not just to spread civility but also out of self-interest. The next time I deal with that firm it is always a more pleasant experience as civility is like a round of drinks – there is a good chance the shout will be returned!

– John Byrne, Townsville



From left, Laura Heit, Joshua McKersey, Priam Rangiah and Sangeetha Badya with coach Dominic Fawcett.

## UQ sails to fifth moot win

The University of Queensland has claimed its second international mooting title for this year after winning the 19th International Maritime Law Arbitration Moot Competition (IMLAM).

The UQ team defeated the University of Hong Kong in the grand final last month at the Federal Court of Australia in Brisbane.

The championship title follows UQ's recent win at the 2018 Philip C. Jessup International Law Moot Court Competition in Washington DC and is the fifth time UQ has won the IMLAM competition.

The winning team – University of Queensland Law Society President Sangeetha Badya, Laura Heit, Joshua McKersey and Priam Rangiah – was coached by recent graduate Dominic Fawcett and mentored by Professor Nick Gaskell.

TC Beirne School of Law Head of School Professor Patrick Parkinson said that, as host of this year's IMLAM competition, it was a wonderful opportunity to showcase the university to visitors from 28 universities and 13 countries.

"I would like to extend my sincere congratulations to Sangeetha, Laura, Joshua and Priam, and thank Dominic and Professor Gaskell for their support and guidance to the team," Professor Parkinson said.

IMLAM requires law students to develop a case based on a complex realistic scenario involving a commercial shipping dispute, and present it before a tribunal comprising experienced maritime arbitrators, members of the maritime industry, and commercial and maritime lawyers.

## TMR Property Search simplifies property due diligence

The Property Search service from the Department of Transport and Main Roads (TMR) provides advice about transport planning that may impact on a specific property.

The service provides a single electronic search against all transport projects, including railways, busways, cycleways, future passenger transport corridors, airports and state-controlled roads.

The public maps available through the State Assessment and Referral Agency (SARA) provide a comprehensive overview of all TMR approved planning.

Importantly, the Property Search service provides additional advice on planning that is in progress, a formal certificate and an appropriate contact within TMR.

More information is available at [tmr.qld.gov.au/Community-and-environment/Property-information/Property-searches](http://tmr.qld.gov.au/Community-and-environment/Property-information/Property-searches).

# Help available for trust account issues

In response to an increasing number of wilful or substantial breaches of the trust accounting requirements of the *Legal Profession Act 2007* (the Act) and its regulations, especially in newly established practices, Queensland Law Society has established a Trust Account Consultancy and a Trust Account Remedial Course.

## The Trust Account Consultancy

The Trust Account Consultancy comprises a visit by a trust account investigator to review the trust accounts and trust accounting procedures of a practice. While preference is given to newly established practices, the service is available to all.

This half-day service is neither an audit nor a trust account review. It is simply a consultancy to ensure the practice's trust accounting procedures meet the requirements of a subsequent audit or review. More information can be found at [qls.com.au/trustaccountconsultancy](http://qls.com.au/trustaccountconsultancy).

## The Trust Account Remedial Course

The constitution of the Trust Account Remedial Course can be found at [qls.com.au/tarc](http://qls.com.au/tarc).

A practitioner may be referred to the course by the Executive Committee of the Council of the Society when:

- a. the practitioner has been subject to an investigation of the affairs of their law practice because of a resolution of the Professional Conduct Committee, and

- b. that investigation of affairs has disclosed that the trust accounts of the law practice have not been maintained to the standard of a competent practitioner and that it is capable of constituting unsatisfactory professional conduct or professional misconduct

This process requires some explanation.

The Executive Committee only considers such matters as are recommended to it by the Professional Conduct Committee of Council (PCC). That committee oversees all of the Society's trust account investigations and this course. The committee consists of practitioners appointed by Council.

All law practice trust accounts are subject to investigation by the Society. When an investigation finds a law practice in wilful or substantial breach of the Act and regulations, a report of that investigation is referred to the PCC, together with the responsible practitioner's response for a direction as to what action to next take.

A substantial breach is a failure on the part of the law practice to comply with legislative provisions of the Act and/or regulations that is material in amount, frequency or impact.

Breaches may be wilful if the act is done voluntarily with either an intentional disregard of, or plain indifference to, the requirements of the Act and/or regulations.

Substantial and/or wilful breaches are sufficient to constitute unsatisfactory professional conduct and may be referred to the Legal Services Commissioner. The Society generally does not do this.

The PCC considers the nature of the breaches and if wilful or sufficiently substantial, resolves to have the practice put on short review; that is, another investigation in six or 12 months. The aim is to monitor the law practice and improve its standard of trust accounting. This process can go on ad infinitum until a satisfactory audit takes place. This has

extended to three or four consecutive short reviews without a clear audit. The number of repeat short reviews has grown.

To solve this problem of multiple reviews and to lift the standard of trust accounting in such practices, the Society has introduced the remedial course.

The Constitution provides for a referral to the course after an unsatisfactory result on the first review undertaken upon a resolution of the PCC. The PCC has decided only to refer a law practice to the Executive Committee to consider a referral when there has been two consecutive investigations because of PCC resolutions that have yielded substantial or wilful breaches of the same kind.

A practitioner at jeopardy of referral to the Trust Account Remedial Course by the Executive Committee will be given an opportunity to make submissions to the Executive Committee to consider prior to deciding on making the referral.

If a practitioner refuses to undertake the course after a referral by the Executive Committee, the Society considers that a matter that might give cause to consider if the practitioner is fit and proper to hold a principal practising certificate pursuant to s60 of the Act. In such a case, the Society might also refer the practitioner to the Legal Services Commissioner to consider whether to bring disciplinary action in respect of the substantial and/or wilful breaches.

The course costs \$1500 and is conducted by a senior member of the trust accounts investigation staff.

It is also open to the Legal Services Commission or a disciplinary tribunal to refer a practitioner to the Trust Account Remedial Course. The course is also open to any practitioner who wishes to undertake it independent of any referral. Should a practitioner be interested in the course they should contact Deborah Mok, [d.mok@qls.com.au](mailto:d.mok@qls.com.au).

# Doyle Wilson arrives in Brisbane

Doyle Wilson has opened its first Brisbane office, in Matisse Tower, 110 Mary Street, on 10 July.

The firm's directors, Andrew Doyle and Lachlan Wilson, have welcomed special counsel Jude Ellyett to the new office. Jude focuses on insolvency and commercial litigation, and has extensive experience

in advising companies, company directors and insolvency practitioners in all aspects of litigation and external administrations.

She is joined by special counsel Niall Powell, who concentrates on commercial property, commercial and retail leasing, and property management agreements.

A third special counsel, with insolvency expertise, has also been appointed and will join the Doyle Wilson Brisbane team this month.

"Our founding Brisbane team members will add three senior specialised lawyers to our ranks who will work with our clients across Goondiwindi, Brisbane and Sydney," Doyle Wilson chair Andrew Doyle said.

## Law firm named Philanthropist of the Year



Thynne + Macartney has won Queensland Community Foundation's (QCF) 2018 Philanthropist of the Year Award in the category of small and medium enterprises (SME) for its charitable support that has impacted on the local community.

It is the first time in the eight-year history of the awards that a legal firm has won.

Thynne + Macartney partner Michael Fisher was presented with the award at a gala lunch at Brisbane City Hall on 15 June.

The firm was recognised for its partnership with the Gallipoli Medical Research Foundation (GMRF). Mr Fisher said that the Queensland-based firm identified synergies with the foundation back in 2014, and its support involved financial donations in addition to pro bono work.

"We are very humble to accept this award for supporting the foundation's commitment to the veteran community," Mr Fisher said. "We chose to partner with GMRF for a few reasons, not least of all as one of our founders, Andrew Thynne, was chairman of the Recruiting Committee in Brisbane during World War I and he played an instrumental role in the beginnings of Anzac Day in Queensland.

Nominations for the 2018 awards – featuring five categories of corporate, SME, community, emerging education and higher education – were received from 53 individuals and organisations. The awards ceremony was attended by more than 640 guests.

Above: Staff from and Thynne + Macartney were joined by representatives of the Gallipoli Medical Research Foundation at the presentation.

## Online training for DV professionals

An innovative online training program from the Office of the eSafety Commissioner will arm frontline domestic and family violence professionals with the skills needed to assist women being abused, controlled or stalked through technology.

"It's essential that professionals helping women in these situations have easy access to quality training, to provide them with the confidence and skills they need to help women protect and empower themselves, and their families, online," eSafety Commissioner Julie Inman Grant said.

'eSafetyWomen – online training for frontline workers' is the first substantial training program of its kind, and is intended to complement and extend the training provided by the office's face-to-face workshop program.

The online training is a free government initiative, and consists of a series of 10 modules, covering topics such as identifying technology-facilitated abuse, steps to protect security and privacy, image-based abuse and eSafety planning.

Frontline professionals, including domestic violence and social workers, allied health and legal professionals, police and government employees who assist women experiencing domestic violence can register for training at [frontlineworkers.esafety.gov.au](http://frontlineworkers.esafety.gov.au).

## Wanting to focus on your area of law?

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# Increased scrutiny for agency and distribution agreements

by Anthony Haly and  
Stephanie Derrington



## Agency and distribution agreements are likely to attract increased competition scrutiny from the Australian Competition and Consumer Commission (ACCC).

This follows the ACCC's success in its litigation against Flight Centre and its ongoing focus on enforcing the cartel laws.

Agency and distribution agreements take many forms, and different types of agreements may be viewed in different ways under the competition laws. Practitioners should ensure that appropriate competition law advice is provided to clients in relation to these types of agreements, to ensure they understand the competition law issues and risks that a particular agency or distribution agreement may raise.

### Agreements take many forms

Agency and distribution agreements are common in many industries, however these agreements do not take a standard form. Companies naturally customise their agency and distribution arrangements to meet their particular needs, and one company may enter into a number of different types of agency agreements.

Common ways in which agency or distribution agreements vary include:

- a. the level of control the principal exercises over their agent or distributor
- b. whether the principal appoints multiple agents/distributors
- c. whether an agent/distributor in that industry acts for multiple principals
- d. the arrangements in relation to supplying goods or services. For example, the agent/distributor may buy from the principal and then on-sell to customers, or may arrange sales that are made by the principal directly to customers.

Although not as common, some agency or distribution agreements also contain complicated provisions in relation to the supply of goods or services between principal and agent/distributor. These agreements may have been carefully constructed in order to secure a perceived benefit (for example, avoiding the arrangement falling within the definition of a franchise), but this may also result in unintended competition law risks.

### Competition issues

From a competition perspective, one key question is whether the principal could be viewed as competing against their agent/distributor. This may occur when, for example, an agent sells goods or services to consumers, and the principal also sells direct to consumers.

Assessing whether a principal competes against their agent can be difficult in some circumstances. The Flight Centre case provides an illustration of this: as the case progressed from hearing through to the High Court, the judges who considered the case expressed six different views as to the nature of the services that Flight Centre supplied to consumers, which was central to the question of whether Flight Centre competed with the airlines for which it was an agent.

The terms of the relevant agency or distribution agreement will be important in considering whether an agent and principal compete with each other. Given the variety of permutations of agency and distributions arrangements, it is difficult to provide general conclusions regarding the way in which different types of agency or distribution arrangements may be viewed by a court.

If a principal and agent are found to be actual or potential competitors, then as with any other competitive relationship, the nature of their interactions should be carefully considered to assess whether it may constitute cartel conduct. It may also be appropriate to consider the other prohibitions on anti-competitive conduct.

The competition laws prohibit proposing, entering into, and giving effect to, arrangements that contain cartel provisions. Accordingly, competition law risks exist not only in respect of new arrangements, but also in respect of existing agreements and negotiations in relation to proposed arrangements.

If it is unclear whether the principal and agent compete with each other, then it may be appropriate to take a conservative approach and assume that the parties may be found to be competitors.

### Cartel conduct

Cartel conduct is considered to be the most serious type of anti-competitive conduct, and significant penalties may be imposed for engaging in cartel conduct.

Given the potential competition law issues associated with agency and distribution agreements, practitioners should ensure that their clients understand the risks associated with the particular agreement(s) in question.

This is a developing area of law, and given the ACCC's ongoing focus on cartel conduct, it is expected that further cases will be brought by the ACCC in relation to agency and distribution agreements in the future.

This article appears courtesy of the Queensland Law Society Competition and Consumer Law Committee. Anthony Haly is the Deputy Chair of the committee. Stephanie Derrington is a solicitor and Master of Law and Finance candidate at the University of Oxford.

# Our advocacy year

prepared by the QLS Legal Policy team

## August is a time to reflect on the substantial work undertaken by QLS policy committees and the Society over the last financial year.

This has included:

- more than 200 submissions to public inquiries, state and federal governments and other important stakeholders advocating the QLS position on law reform proposals
- attendance by members of our 26 policy committees at 20 state and federal parliamentary hearings to further advance our submissions.

QLS thanks the volunteer members who serve on our policy committees, which are integral to the development of policies and responses to legislative amendments and consultation material. Below are some key areas of advocacy by QLS in the last 12 months.

### Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016

Until February 2018, Queensland was the only state or territory in Australia to treat 17-year-olds as adults for the purpose of the criminal justice system. QLS, headed by the Children's Law Committee, undertook a sustained advocacy campaign to have 17-year-olds removed from the adult criminal justice system and reintroduced to the youth justice system. After two decades of advocacy with partners such as the Youth Advocacy Centre and Legal Aid Queensland, a Bill to achieve this was introduced.

The passing of the Bill in September 2017, followed by the transitioning of 17-year-olds on adult community-based orders from November, were great successes for QLS and its members. QLS has been at the forefront of educating the legal profession on these historic changes.

### Guardianship and Administration and Other Legislation Amendment Bill 2018

In its submission and appearance at the public hearing before a parliamentary committee, QLS generally supported the Guardianship and Administration and Other Legislation Amendment Bill 2018, which sought to amend the *Guardianship and Administration Act 2000*, the *Powers of Attorney Act 1998* and the *Public Guardian Act 2014*.

Significant amendments to the *Guardianship and Administration Act 2000* included the insertion of 'General principles', which effectively adopt the recommendations of the Queensland Law Reform Commission report, 'A Review of Queensland's Guardianship Laws', to assist in the protection of persons who require a substitute decision maker (SDM).

However, QLS recommended that the Bill go further to ensure that a SDM must take into account other considerations that an application of the general principles may require, in other words, adopt a holistic approach to the application to ensure the person and their rights are protected.

The proposed amendments to the *Public Guardian Act 2014* sought to extend the ability of the Public Guardian to investigate a complaint or allegations that an adult with impaired capacity was subject to abuse, neglect or exploitation after the death of the adult.

The parliamentary committee has recommended that the Bill be passed. QLS will monitor future parliamentary debates.

### Labour Hire Licensing Scheme

The *Labour Hire Licensing Act 2017*, which commenced on 16 April 2018, establishes a mandatory licensing scheme to protect labour hire workers and support responsible labour hire providers. During the Bill's passage through Parliament, QLS raised a number of concerns about the proposed legislation, including that substantive features of the scheme were not included in the Act. QLS provided examples of workers who could fall within the scheme as a 'provider of labour hire services' when this may not be appropriate. Despite the objections, no significant amendments were made to the draft Bill.

QLS was, however, invited to comment on consultation papers which formed the basis of the regulation and had the opportunity to re-state its view that genuine secondments should not be captured by the scheme and should be expressly excluded in the regulation. Ultimately, the provisions in the regulation satisfied a number of QLS concerns about how the scheme would operate.

### Review of property law in Queensland

Over the past five years, QLS has responded to a range of issues papers published as part of the review of property laws in Queensland undertaken by the Commercial and Property Law Research Centre at QUT at the request of the Queensland Government.

A key recommendation from the review is to introduce a statutory seller disclosure regime in Queensland. The framework would require certain readily available information to be disclosed by way of a prescribed form before the buyer enters into the contract of sale, such as a copy of the title search, information on current zoning and pool certificate information.

In May 2018, the final report on the *Property Law Act 1974* (PLA) was published, including 232 recommendations designed to simplify, streamline and modernise Queensland's property legislation. QLS will respond to the recommendations in the final report.

### Updated REIQ contracts

QLS and the Real Estate Institute of Queensland (REIQ) have prepared new editions of the standard property sale contracts for use by members. These changes are a result of the GST withholding at settlement measures which took effect from 1 July 2018, to facilitate the signing of contracts by electronic means and to update references to legislation and notice clauses. The new editions, as well as comparison tables, are now available for download from [qls.com.au](http://qls.com.au). We acknowledge the significant work of the QLS Property and Development Law Committee in this process.

### Domestic and Family Violence Committee launch

The end of the financial year brought with it the launch of the Domestic and Family Violence Committee. The committee will focus on legal and policy issues relating to domestic and family violence throughout Queensland and Australia. QLS established the committee in recognition of the significance of this issue and to continue the work of the former Domestic and Family Violence Working Group, which led the development of the QLS Domestic and Family Violence Best Practice Guidelines. QLS welcomes the new committee and looks forward to working with expert committee members in this important area.



# Ipso facto restriction

Amendments to Part 5.3A (Voluntary Administration) *Corporations Act 2001* (Cth)



Amendments that took effect on 1 July impact on ipso facto clauses in new contracts, preventing automatic termination because the company has entered formal insolvency.  
Report by **Veena Jattan** and **Dr Colin Anderson**.

On 1 July this year, the *Corporations Act 2001* (Cth) (the Act) was amended to include what is commonly referred to as ‘the ipso facto reforms’.<sup>1</sup>

These amendments operate to prevent the enforcement of ipso facto clauses in contracts, and apply to voluntary administrations under Part 5.3A, schemes of arrangement under Part 5.1 and receiverships under Part 5.2 of the Act.<sup>2</sup> This article will, however, cover only the amendments to Part 5.3A.

### Ipso facto clauses

‘Ipso facto’ is a Latin term that means ‘by the fact itself’.<sup>3</sup> Ipso facto (IPF) clauses are commonly used by a counterparty in contracts to reserve their right to modify or terminate a contract upon a company entering formal insolvency.<sup>4</sup>

Hence, a company which is party to a contract containing a valid IPF clause is subject to the reality that the contract may be terminated automatically at the option of the counterparty, by the mere fact that the company has entered formal insolvency.<sup>5</sup>

### Amendments to Part 5.3A

The following sections were added to the end of Part 5.3A (after Division 17):

451E Stay on enforcing rights merely because the company is under administration etc.

451F Lifting the Stay

451G Order for rights to be enforceable only with leave of the Court

451GA Self-executing provisions

451H When other laws prevail – certain other Commonwealth Acts.

### Stay on enforcing rights

Despite consistent reference to the amendments as IPF reforms,<sup>6</sup> there is no reference to IPF clauses in the amendments. Rather, the amendments refer to the unenforceability of a *right* under a contract.

Section 451E(1) is the core amending provision to Part 5.3A:

#### “Stay on enforcing rights

- (1) A right cannot be enforced against a company for:
- the reason that the company has come or is under administration; or
  - the company’s financial position, if the company is under administration; or
  - a reason, prescribed by the regulations for the purposes of this paragraph, that relates to:

- the company coming, or possibly coming, under administration; or
- the company’s financial position; if the company later comes under administration; or
- a reason that, in substance, is contrary to this subsection; if the right arises for that reason by express provision (however described) of a contract, agreement or arrangement.”<sup>7</sup> (collectively, the Stay)

### Applicability of the amendments

- The amendments apply to new contracts entered into after 1 July 2018.<sup>8</sup>
- The right must be an “express provision” in a new “contract, agreement or arrangement” (collectively, contract).<sup>9</sup>
- The Stay provisions<sup>10</sup> will apply to self-executing provisions:– “a provision in a contract that can start to apply automatically.”<sup>11</sup>
- The Stay<sup>12</sup> will not apply:
  - to contracts entered into before 1 July 2018<sup>13</sup>
  - to contracts entered into before 1 July 2018, but varied or amended after 1 July 2018<sup>14</sup>
  - “to a right under a contract entered into after the company comes under administration”<sup>15</sup>
  - if the administrator, or subsequent liquidator of the company has consented in writing to the enforcement of the right<sup>16</sup>
  - to a “right contained in a kind of contract prescribed by regulations”<sup>17</sup>
  - to “kinds of rights”,<sup>18</sup> or kinds “of rights in specified circumstances”,<sup>19</sup> declared by the Minister by legislative instrument.

### Stay on enforcing rights – sections 451E(1)(a) to 451E(1)(d)

While s451E(1)(b) is self-explanatory, the intention of the legislators in 451E(1)(a) is unclear, that is, whether the words, “the company has come, or is under administration”, are intended to refer to two mutually exclusive situations.

The words, “is under administration”, within legislative context, is likely reference to an administrator having accepted his/her appointment, whereas the words, “has come under administration” appears to be reference to a state prior to the appointment of an administrator, that is, it may likely be reference to the state where a company has passed a resolution to appoint an administrator,<sup>20</sup> but an administrator has not been appointed. Unlike s451E(1)(c), there is no provision

under s451E(1)(a) for the legislators to clarify their intention via regulations. The intention will perhaps become clearer as relevant case law develops.

While the interpretation of s451E(1)(c) will not crystallise until supporting regulations are enacted, this section has the potential of affording protection to a company against the enforceability of certain contractual rights when a company has not obtained formal restructuring advice and/or appointed an administrator, but “later comes under administration.”

An attempt by a counterparty to terminate its contract prior to the appointment of an administrator could potentially be caught by s451E(1)(c) as the company could be “coming, or possibly coming under administration” (and which “later comes under administration”) at the time a counterparty attempts to terminate its contract. “The broad regulation making power”<sup>21</sup> under s451E(1)(c) “has been included as an anti-avoidance mechanism to ensure the Government can respond to possible contracts that are drafted in a way to circumvent the Stay under s451E(1)” and “negate [the IPF reforms]”.<sup>22</sup>

Similarly, s451E(1)(d) is open to very wide interpretation and application. While no guidance is provided in the legislation as to the meaning of the words “contrary to this subsection”, a holistic review of relevant parliamentary papers reveals that under s451E(1)(d) the Stay can be, and will be, extended if necessary to events occurring *prior* to a company entering administration. The Federal Government has explained that the “the Stay will apply [to contracts] that are in substance contrary to the imposition of the Stay”:<sup>23</sup>

“[s451E(1)(d)] ensures that contractual arrangements that purport to circumvent the Stay, by triggering on events that occur prior to a company entering a formal structure, will be subject to the Stay. [The regulatory powers will enable] the making of regulations which extend the Stay, to rights enforceable for reasons which are based on events occurring *before* the Stay Period begins (for example, before a company enters into or announces the relevant formal restructure). This ensures that the scope of the regulation making powers is sufficiently broad, to achieve the intended purpose of capturing all arrangements developed by parties to circumvent the operation of the Stay. If contractual arrangements trigger on circumstances not captured by the Stay, the Government will be able to use the regulation-making powers to ensure that the Stay can be extended to cover those types of arrangements.”<sup>24</sup>

Hence, a counterparty which attempts to terminate a contract prior to the commencement of administration, when a “company is coming or possibly coming under administration”,<sup>25</sup> or because of “the company’s financial position”,<sup>26</sup> and the “company later comes under administration”,<sup>27</sup> will most likely be subject to the Stay.

## Stay Period – section 451E(2)

The right<sup>28</sup> cannot be enforced during the Stay Period.<sup>29</sup> The Stay Period “starts when the company comes under administration and ends at the latest of the following”:

- a. “when the administration ends”<sup>30</sup>
- b. the date when the last of any orders extending the Stay Period ceases<sup>31</sup>
- c. “if the administration ends because of a resolution or order for the company to be wound up – when the company’s affairs have been fully wound up.”<sup>32</sup>

## The meaning of the words ‘when the company’s affairs have been fully wound up’ – s451E(2)(c)

The Parliament of Australia Bills Digest explains that the Stay Period will continue until the company’s affairs have been fully wound up.<sup>33</sup> Hence, if the second meeting creditors of the administration resolve to proceed with winding up the company, the incoming liquidator will have the benefit of the Stay Period “for the purpose of providing a better return to creditors than a standalone liquidation”.<sup>34</sup>

## No extension of Stay to ‘standalone liquidation’<sup>35</sup>

The Stay does not extend to a standalone liquidation despite the clear underlying purpose of the original drafting of s436B:<sup>36</sup> conversion from “any form of winding up to the voluntary form of procedure.”<sup>37</sup>

When a company may be technically insolvent (under s95A), but otherwise economically viable, s436B allows a liquidator to commence administration if there is some prospect of salvaging a company, and when the expected returns may exceed those from immediate liquidation.

Despite the Act providing insolvency practitioners with the ability to move from liquidation to administration, and vice versa, to take advantage of the legal tools each insolvency regime provides, the Stay does not extend to standalone liquidation. An unintended consequence of not extending the Stay to standalone liquidation will be encouragement for companies to transition into liquidation via administration so that they are afforded protection under the Stay provisions.<sup>38</sup>

## Extending the Stay Period – sections 451E(3), (4)

The Stay Period can be extended in two ways:

1. By application under s451E(3), or

The court may extend the Stay Period “if the court is satisfied that the extension is appropriate having regard to the interests of justice.” The court may grant interim orders “while the application is being considered, but must not require”<sup>39</sup> an undertaking as to damages as a condition from the applicant.

The following matters remain unclear under s451E(3):

- a. Who will have standing to make the application? An administrator or a deed administrator?
  - b. The phrase “interests of justice” has not been defined anywhere.<sup>40</sup>
2. Automatically under express provisions of s451E(4):

A right remains unenforceable against a company indefinitely after the end of the Stay Period when the reason for enforcing the right is:

- a. the company’s financial position *before* the end of the Stay Period,<sup>41</sup> or
- b. the company’s commencement of administration before the end of the Stay Period,<sup>42</sup> or
- c. a reason prescribed in the regulations that relates to circumstances that existed during the Stay Period,<sup>43</sup> or
- d. is a reason referred to in sections 451E(1)(c)-(d).<sup>44</sup>

Section 451E(4) is “aimed at preventing the ‘perverse outcome’ of an IPF clause that is stayed during administration, ‘being used against a company’ once its administration has ended because it was under administration”,<sup>45</sup> for example, when creditors have entered into a Deed of Company Arrangement (DOCA). Although the amendments do not expressly extend the Stay to a DOCA,<sup>46</sup> the broad provisions under s451E(4) seem to extend the Stay to a DOCA in the applicable circumstances.

## Lifting the Stay – application by holder of rights s451F

The Stay on a right(s) may be lifted by the court upon application “by the holder of those rights if the court is satisfied that lifting the Stay is appropriate in the interests of justice.”<sup>47</sup>

## Section 451G – Orders for rights to be enforceable only with leave of the court

While a company is under administration, if a counterparty were to “exercise, threaten to exercise, or were likely to exercise” a right under a contract, because of one or more reasons referred to in ss451E(1)(a) to (d), an administrator may apply to the court to seek an order that that “right may only be enforceable with the leave of the court” and in accordance with any terms imposed.<sup>48</sup>

Section 451G makes it clear that the amendments are not restricted to IPF clauses, and that the courts will have wide discretion to order that certain contractual rights are enforceable only with leave of the court. In particular, rights which in substance are contrary to the Stay.<sup>49</sup> The court must specify a period for which the order is to apply, having regard to the length of the Stay<sup>50</sup> and the interests of justice.<sup>51</sup> The court may grant interim orders, but must not require the applicant to give an undertaking as to damages as a condition.<sup>52</sup>

## Conclusion

As noted above, despite consistent reference to the amendments as IPF reforms, there is no reference to IPF clauses in the amendments. Instead, the amendments refer to the unenforceability of a *right* under a contract. It is clear that the amendments will not be limited to IPF clauses, rather, the word ‘right’ will be interpreted and applied very broadly to contractual termination, and/or amendment rights which are triggered by events other than, strictly, the formal voluntary administration insolvency process.

Rights will be triggered by the company “coming, or possibly coming under administration”, or the company’s “financial position if the company later comes under administration.”<sup>53</sup> The choice by the legislators to use the word ‘right’, without any reference to IPF clauses, has two likely consequences in relation to all new contracts entered into on or after 1 July 2018:

- Clauses which are atypical to IPF clauses will be caught by the amendments.
- Because the amendments are not restricted to IPF clauses, the courts will have wide discretion in imposing a Stay on rights which in substance are contrary to<sup>54</sup> the amendments.

In addition, some of the drafting in the amendments, such as the phrase ‘interests of justice’ and the operation of the Stay post-administration may, unfortunately, create uncertainties that might need to be resolved by case law.

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## Notes

- <sup>1</sup> *Treasury Laws Amendment (2017 Enterprise Incentives No.2) Act 2017* (Cth) s2, sch1 pt2. See also, Australian Government The Treasury, National Innovation and Science Agenda – Improving bankruptcy and insolvency, [treasury.gov.au/consultation/national-innovation-and-science-agenda-improving-bankruptcy-and-insolvency-laws](http://treasury.gov.au/consultation/national-innovation-and-science-agenda-improving-bankruptcy-and-insolvency-laws) (The Treasury); Australian Government Productivity Commission, Business Set-up, Transfer and Closure, [pc.gov.au/inquiries/completed/business#report](http://pc.gov.au/inquiries/completed/business#report) (Productivity Commission).
- <sup>2</sup> Reference to various legislative provisions in this article are references to various sections of the *Corporations Act 2001* (Cth) unless otherwise specified.
- <sup>3</sup> Macmillan Publishers, *Macquarie Dictionary Online* (at 12 June 2018), 'ipso facto'.
- <sup>4</sup> An ipso facto (IPF) clause will be triggered by an event of default, usually referred to as an 'insolvency event'. An 'insolvency event' may include any one of the following formal insolvency processes captured under Chapter 5: administration, a company entering into a Deed of Company Arrangement (DOCA), provisional liquidation, liquidation, receivership and schemes of arrangement. See *Strazdins and Others v Birch Carroll & Coyle Ltd* (2009) 178 FCR 300, 302-3 [17]-[19] (*Strazdins*) for an example of an IPF clause in a commercial lease agreement.
- <sup>5</sup> Some IPF termination clauses may require notice to be given first.
- <sup>6</sup> See The Treasury and Productivity Commission, above n1.
- <sup>7</sup> Section 451E(1) is subject to ss451E(5), (7) (Rights not subject to the stay) and 451F (Lifting the stay).
- <sup>8</sup> *Treasury Laws Amendment (2017 Enterprise Incentives No.2) Act 2017* (Cth) ss2, 17. Also see, Department of Parliamentary Services (Cth), Bills Digest, No.33 of 2017-18, 11 September 2017, 1 (Bills Digest).
- <sup>9</sup> Section 451E(1) (Stay on enforcing rights).
- <sup>10</sup> Sections 451E to 451G.
- <sup>11</sup> Section 451GA.
- <sup>12</sup> Section 451E(1).
- <sup>13</sup> *Treasury Laws Amendment (2017 Enterprise Incentives No.2) Act 2017* (Cth) ss2, 17. Bills Digest, above n8, 25.
- <sup>14</sup> *Ibid.* This aspect has been criticised. A consequence of this will be that counterparties will seek to vary pre-1 July 2018 contracts rather than replace them. Hence, the benefit of these amendments may not become apparent for a number of years. See Law Council of Australia, Submission No.10 to the Commonwealth Senate Economics Legislation Committee, 'An inquiry into the provisions of the Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017', 12 July 2017, 4-5; Geoff Green, Submission No.22 to the Commonwealth Senate Economics Legislation Committee, 'National Innovation and Science Agenda – Improving corporate insolvency law', 24 April 2017, 3.
- <sup>15</sup> Section 451E(5)(a).
- <sup>16</sup> Section 451E(7).
- <sup>17</sup> Sections 451E(5)(b)(i)-(ii), 451E(6)(a). The Commonwealth Treasury completed the public consultation process in relation to 'Exclusions from stay of enforcement of ipso facto clauses' on 11 May 2018. See *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* and *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations (No.2) 2018* which provide for certain types of contracts to be excluded and *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* which provides for certain types of clauses to be excluded. The Regulations and the Declaration commenced on 1 July 2018. Also see Australian Government The Treasury, 'National Innovation and Science Agenda – Exclusions from stay of enforcement of ipso facto clauses', [treasury.gov.au/consultation/c2018-t280567](http://treasury.gov.au/consultation/c2018-t280567).
- <sup>18</sup> Sections 451E(5)(c), 451E(6)(b).
- <sup>19</sup> Sections 451E(5)(d), 451E(6)(c).
- <sup>20</sup> Section 436A.
- <sup>21</sup> Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017 30.
- <sup>22</sup> *Ibid.*
- <sup>23</sup> Supplementary Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017 6.
- <sup>24</sup> *Ibid.*
- <sup>25</sup> Section 451E(1)(c)(i).
- <sup>26</sup> Section 451E(1)(c)(ii).
- <sup>27</sup> Section 451E(1)(c).
- <sup>28</sup> As described in s451E(1).
- <sup>29</sup> Section 451E(2).
- <sup>30</sup> Section 451E(2)(a).
- <sup>31</sup> Sections 451E(2)(b), 451E(3). The Stay Period may be extended upon application: s451E(3).
- <sup>32</sup> Section 451E(2)(c).
- <sup>33</sup> Bills Digest, above n8, 27.
- <sup>34</sup> Bills Digest, above n8, 27 quoting Law Council of Australia, Submission No.10 to the Commonwealth Senate Economics Legislation Committee, 'An inquiry into the provisions of the Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017', 12 July 2017, 5.
- <sup>35</sup> The term standalone liquidation refers to liquidation commenced without any other form of external administration preceding it.
- <sup>36</sup> Section 436B provides that a liquidator or a provisional liquidator of a company may appoint an administrator if he/she thinks that the company is insolvent, or is likely to become insolvent at some future time.
- <sup>37</sup> Australian Law Reform Commission, General Insolvency Inquiry, Report No.45 (1988) 35 [63] (commonly referred to as the Harmer Report). See *Re Cobar Mines Pty Ltd* (1998) 30 ACSR 125, for an example of external administration having commenced by administration, thereafter converted to liquidation by resolution of creditors, and again converted to administration to enable a DOCA with the company's creditors.
- <sup>38</sup> See also, Law Council of Australia, Submission No.10 to the Commonwealth Senate Economics Legislation Committee, 'An inquiry into the provisions of the Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017', 12 July 2017, 5.
- <sup>39</sup> Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017 31.
- <sup>40</sup> Sections 451E(3), 451F and 451G include reference to the phrase "interest to justice" with no guidance. Judicial decisions relating to ss440B (Restrictions on exercise of third party property rights) and 443B (Payments for Property used or occupied by, or in the possession of the company) provide an insight as to the manner in which the courts are balancing the competing interests of lessors, the insolvent company and the objectives of Part 5.3A. It is apparent from judicial interpretation of ss440B and 443B that the onus is on the lessor to satisfy the court that taking possession is the appropriate course: *Re Java 452 Pty Ltd (admin appted) Permanent Trustee Australia Ltd (as trustee of Advance Property Fund) v Stout and others* (1999) 32 ACSR 507 (*Java's case*) 516-517 [40]; and that leave for recovery of possession is often refused, for example, *Strazdins*, above n-, 588-589 [151]-[160]. "The Court seeks to balance the statutory objects [of Part 5.3A] with the rights of those persons dealing with the company" under administration: *Java's case* 516-518 [40]-[43]. In case of conflict, the courts are of the view that the Parliament intended that precedence must be given to the objectives of Part 5.3A, and therefore, the will of Parliament must prevail: *Telaro Pty Ltd v Burns* [2000] NSWSC 26, 27 [15], 28 [19], [23]-[24]; *Java's case*, 516 [38]. The Federal Government has documented its policy objectives of the IPF reforms very clearly. Hence, when a company is undertaking or attempting a restructure, it will be difficult for a counterparty to enforce contractual rights of termination which are contrary to the Stay provisions.
- <sup>41</sup> Section 451E(4)(a).
- <sup>42</sup> Section 451E(4)(b). Note that commencement of administration before the Stay Period includes the company having come or been under administration before the end of the Stay Period.
- <sup>43</sup> Section 451E(4)(c).
- <sup>44</sup> Section 451E(4)(d).
- <sup>45</sup> Bills Digest, above n8, 29. Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No.2) Bill 2017 31-32.
- <sup>46</sup> While this may appear to be unusual, the Stay Period is consistent with the administration moratorium period. The administration moratorium does not extend to a DOCA. See *Part 5.3A* divs 6 & 7, in particular, s435C(2)(a). Administration ends when a DOCA is executed.
- <sup>47</sup> Section 451F. See above n40.
- <sup>48</sup> Section 451G. In granting leave, the court must have regard to: the Stay Period (s451E(2)); any extensions granted in relation to the Stay Period (s451E(3)); if the enforcement of the *right* relates to the company's financial position before the end of the Stay Period (s451E(4)(a)) or having come or been under administration before the end of the Stay Period (s451E(4)(b)); and the interests of justice (s451G(b)).
- <sup>49</sup> Section 451E(1)(d).
- <sup>50</sup> Sections 451E(2)-(4).
- <sup>51</sup> Section 451G(3). See above n40.
- <sup>52</sup> Sections 451G(5), (6).
- <sup>53</sup> Section 451E(1)(c).
- <sup>54</sup> Section 451E(1)(d).

# Good faith in Australia

Good intentions are just the beginning

Since its inception in Australian contract law, good faith has been a controversial and complicated subject.

The law has progressed considerably since *Renard Constructions*<sup>1</sup> and *Burger King*,<sup>2</sup> arguably reaching a point of manageable practicality. This article summarises the current state of the law on good faith and gives practical guidance on its operation.

Good faith, as both an express and implied term,<sup>3</sup> requires conduct that supports the contractual bargain, the usual obligations of which are:<sup>4</sup>

- a. acting honestly (the undisputed central element to good faith)
- b. acting with fidelity to the bargain, that is, co-operating to achieve the contractual benefits
- c. not acting to undermine the bargain entered into or the substance of the contractual benefit bargained for

- d. acting reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

The proper focus of good faith is the quality of a party's conduct (the *performance* of contractual obligations or *exercise* of contractual powers) and not the outcome of the conduct.<sup>5</sup> It does not import a tortious duty to exercise reasonable care and skill or to produce a reasonable outcome. If an act is carried out honestly and in good faith, an unfortunate outcome is likely irrelevant.

In the case of *Virk*,<sup>6</sup> the Full Court considered the good faith requirement to act reasonably. Pizza Hut franchisor YUM! was sued by several franchisees after it exercised its contractual power to reduce the price of the franchisees' pizza. The reduction was part of a new strategy to reverse diminishing profits, but it had a seriously detrimental effect on the financial performance of the franchisees.

YUM! was found to have acted honestly and with great care, having modelled potential outcomes, considered its strategy in similar

markets and tested the strategy on a small scale. On appeal, the franchisees argued that the reduced sale prices and the methodology used to determine the price were objectively unreasonable. The Full Court of the Federal Court, finding against the franchisees, determined that reasonableness was not akin to a tortious obligation of due care and skill but was concerned with the quality of the decision-making.

Good faith imposes a lower standard of conduct than a fiduciary duty as it does not require a contracting party to prefer the interests of the other contracting party, or to subordinate its self-interest.<sup>7</sup> If an act is permissible by the law of fiduciary duties, it will likely accord with good faith.<sup>8</sup> A party may reasonably promote its legitimate interests.<sup>9</sup>

The following characterisations of conduct are said to fall below the standard of good faith:<sup>10</sup>

- a. capriciousness
- b. dishonesty
- c. unconscionability
- d. arbitrariness
- e. conduct for purposes at odds with the object of the contract.



Patrick Doneley looks at the concept of good faith and its place in commercial contracts.

When considering a breach of good faith, a practitioner should firstly identify conduct of this nature on the evidence (called a negative application of good faith). If it cannot be identified, a court may determine that there is no evidence of a breach.<sup>11</sup> But this approach is not conclusive as good faith may impose positive obligations, such as an obligation to disclose certain information.

The obligations of good faith will not require the same acts by all contracting parties in all cases. Their practical form is determined by the contractual, commercial and factual context.<sup>12</sup> Consider the cases of *Macquarie International*<sup>13</sup> and *Clarence Property*.<sup>14</sup> Both cases concerned almost identical express clauses requiring the parties to act in the utmost good faith:

- a. in the performance of their respective duties
- b. in the exercise of their respective powers, and
- c. in their respective dealings with each other.

In both cases, one party sought to rely on the third of these obligations as the source of an obligation to disclose certain information.

In *Macquarie International*, the parties had entered an agreement to develop a hospital precinct, each developing adjacent hospitals. It was held that one party breached good faith when it failed to disclose changes to its planning processes that threw into serious doubt the other party's planned development of its hospital.

In *Clarence Property*, it was held that the failure to disclose both the appointment of a director that gave rise to a potential conflict and the employment of one employee from the other party were matters outside the parties' respective dealings with each other and did not breach good faith. The different outcomes at first instance of these two cases demonstrate that applying good faith cases by analogising facts is difficult and risky. Practitioners should focus on the legal principles.

An express good faith clause in a contract will likely be sufficiently certain so as to be enforceable. Such a clause will be construed having regard to the terms of the contract and the circumstances known to the parties at the time when it was entered into.<sup>15</sup>

Generally speaking, there are two types of express good faith clauses:

- a. *general clauses*: requiring adherence to good faith in every aspect of the contract throughout (or during a specific part of the contract (that is, dealings between the parties)). Such clauses may carry many unexpected implications. See the above cases of *Clarence Property* and *Macquarie International* by way of example.
- b. *narrow clauses*: attached to the performance of a certain obligation (that is, negotiation in a dispute) or contractual power (that is, termination of the contract). The operation of such a clause can be determined with relatively more certainty.

An example of a narrow clause can be found in *United Group Rail*.<sup>16</sup> The parties contractually agreed to "meet and undertake genuine and in good faith negotiations with a view to resolving the dispute or difference." The Court of Appeal held that such a clause may prohibit the following conduct:

- a. threatening a future breach of contract (with no entitlement) to force another party to accept a settlement that is less than what it genuinely recognises as due

- b. pretending to negotiate, having decided not to settle what is recognised to be a good claim, in order to drive the other party into an expensive dispute that it believes the other party cannot afford, and
- c. if a party recognises, without qualification, that a claim or some material part of it is due, fidelity to the bargain may well require its payment.

Good faith is not implied by law into every commercial contract.<sup>17</sup> The question of when it will be remains unresolved,<sup>18</sup> but if a long-term contract requires co-operation and trust, or the relationship between the contracting parties is unbalanced, authority suggests that good faith may be implied by law.<sup>19</sup>

The usual test for terms implied by fact into complete contracts is uncompromising and good faith will rarely satisfy it.<sup>20</sup> While the test is less strenuous if the contract is incomplete,<sup>21</sup> good faith has rarely been considered in such circumstances.

Some appellate authorities have suggested the courts will not imply good faith in dealings between commercial leviathans.<sup>22</sup> The difficulty in defining what is and is not a commercial leviathan adds an unnecessary complication to the application of the usual principles for implication of a term. Furthermore, holding such leviathans to a lower standard contradicts the values of honest and fair dealing through

which good faith has arisen in the common law.<sup>23</sup> Caution should be taken when relying on such authority.

Good faith will not be implied into a contract when it would be inconsistent with an express term.<sup>24</sup> Some legislation requires parties to act in good faith and cannot be contracted out of, for example, franchising agreements subject to the Franchising Code of Conduct.

When trying to contract out of good faith, an 'entire agreement' clause on its own will not be of assistance. Modifying the clause relied on in *Vodafone*,<sup>25</sup> which was held to be one of the reasons good faith was excluded, the following clauses in conjunction may be effective:

To the full extent permitted by law and other than as expressly set out in this Agreement the parties exclude all implied terms (including those arising through the express terms of this agreement), conditions and warranties of good faith, fair dealing and reasonableness.

This agreement contains the entire agreement of the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct by the parties with respect to its subject matter.

In *Solution 1*,<sup>26</sup> the contract stated that Optus' right to terminate the contract was

within its "absolute discretion". As good faith infringed upon the way in which a party may exercise its discretion, good faith could not be implied into the exercise of the power.

There is a movement at a judicial level to reconceptualise good faith as an organising principle, overcoming any issue in implying such terms.<sup>27</sup> In effect, courts would be tasked with construing a contract in a way that conforms to the standard of good faith and performance will be evaluated accordingly.<sup>28</sup> The commercial contracts being drafted today may be interpreted tomorrow in accordance with this technique.

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Patrick Doneley is a lawyer on the litigation and dispute resolution team at AJ & Co Lawyers. The author gratefully acknowledges the assistance of Alex Moriarty, Partner – litigation and dispute resolution, in the preparation of this article.

AJ & Co Lawyers acted for the successful applicant at first instance, Clarence Property Corporation Ltd, in the case mentioned in this article, *Clarence Property Corporation Ltd v Sentinel Robina Office Pty Ltd* [2018] QSC 95. The matter is currently subject to an appeal.

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## Notes

- <sup>1</sup> *Renard Constructions (ME) Pty Ltd v Minister of Public Works* (1992) 26 NSWLR 234.
- <sup>2</sup> *Burger King Corporation v Hungry Jack's Pty Limited* [2001] NSWCA 187.
- <sup>3</sup> *Clarence Property Corporation Ltd v Sentinel Robina Office Pty Ltd* [2018] QSC 95, [51]. The matter is currently subject to an appeal.
- <sup>4</sup> *Paciocco v Australian and New Zealand Banking Group Limited* [2015] FCAFC 50; (2015) 236 FCR 199, [288]. See also *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268; Sir A Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 Law Quarterly Review 66.
- <sup>5</sup> See *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* [2017] FCAFC 190, [174].
- <sup>6</sup> *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* [2017] FCAFC 190.
- <sup>7</sup> *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* [2015] FCAFC 127; 237 FCR 534, [149].
- <sup>8</sup> See, for example, the approach of Justice Jackson in *Clarence Property Corporation Ltd v Sentinel Robina Office Pty Ltd* [2018] QSC 95.
- <sup>9</sup> *South Sydney District Rugby League Football Club Ltd v New Ltd* [2000] FCA 1541; (2000) 177 ALR 611, [394].
- <sup>10</sup> *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* [2017] FCAFC 190, [164]. Consider also *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* [2007] FCA 1066, [143]-[147].
- <sup>11</sup> See, for example, *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* [2017] FCAFC 190.
- <sup>12</sup> *Paciocco v Australian and New Zealand Banking Group Limited* [2015] FCAFC 50; (2015) 236 FCR 199, [290]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 [137]; *Masters Home Improvement Australia Pty Ltd v North East Solutions Pty Ltd* [2017] VSCA 88, [99].
- <sup>13</sup> *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 (*Macquarie International*).
- <sup>14</sup> *Clarence Property Corporation Ltd v Sentinel Robina Office Pty Ltd* [2018] QSC 95 (*Clarence Property*) (currently subject to an appeal).
- <sup>15</sup> *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, [137].
- <sup>16</sup> *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177 (*United Group Rail*).
- <sup>17</sup> *CGU Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193, [132]; see also *Androvitsaneas v Members First Broker Network* [2013] VSCA 212, [108].
- <sup>18</sup> *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* [2015] FCAFC 127, [122].
- <sup>19</sup> *GEC Marconi Systems Pty Ltd v BHPJ information Technology Pty Ltd* [2003] FCA 50; (2003) 128 FCR 1, [920]; *Alstom Ltd v Yokogawa Australia Pty Ltd (No. 7)* [2012] SASC 49, [581]-[594]; *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187; (2001) 69 NSWLR 558, [163]; *Bamco Villa Pty Ltd v Montdeen Pty Ltd* [2001] VSC 192, [162]; *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310, [120]; *Meridian Retail Pty Ltd v Australian Unity Retail Network Pty Ltd* [2006] VSC 223, [211]; *Lockhart v GM Holden Ltd* [2008] QSC 257, [62]; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum N L* [2005] VSCA 228, [4].
- <sup>20</sup> See *Commonwealth Bank of Australia v Barker* [2014] HCA 32; (2014) 253 CLR 169; *BP Refinery (Westport) Pty Ltd v Hastings Shire Council* [1977] HCA 40; (1977) 180 CLR 266; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596; *Codeffa Construction Pty, Limited v State Rail Authority of New South Wales* [1982] HCA 24; 149 CLR337; *Roxbury v Rothmans of Paul Mall Australia Pty Ltd* [2001] HCA 68; (2001) 208 CLR 516, [161]; *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541; (2000) 177 ALR 611; *Saxby Bridge Mortgages Pty Ltd v Saxby Bridge Pty Ltd* [2000] NSWSC 433.
- <sup>21</sup> *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410; *Hawkins v Clayton* [1988] HCA 15; (1988) 164 CLR 539, 573.
- <sup>22</sup> *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum N L* [2005] VSCA 228, [4].
- <sup>23</sup> *Paciocco v Australian and New Zealand Banking Group Limited* [2015] FCAFC 50; (2015) 236 FCR 199, [287] & [292].
- <sup>24</sup> *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187; (2001) 69 NSWLR 558, [169]-[173]; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15, [191]-[192]; *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288, [64], aff'd (2006) 149 FCR 395 on other grounds; *Ingot Capital investments v Macquarie Equity Capital Markets* [2007] NSWSC 124; (2007) 63 ACSR 1, [594]; *Solution 1 Pty Ltd v Opus Networks Pty Ltd* [2010] NSWSC 1060, [63].
- <sup>25</sup> *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15, [198] (*Vodafone*).
- <sup>26</sup> *Solution 1 Pty Limited v Opus Networks Pty Limited* [2010] NSWSC 1060 (*Solution 1*).
- <sup>27</sup> Justice J Allsop, 'Conscience, Fair-dealing and Commerce – Parliaments and the Courts' (2015) FedJSchol 17; *Paciocco v Australian and New Zealand Banking Group Limited* [2015] FCAFC 50; (2015) 236 FCR 199, [289]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825, [1009] per Edelman J.
- <sup>28</sup> Justice J Allsop, 'Conscience, Fair-dealing and Commerce – Parliaments and the Courts' (2015) FedJSchol 17, [38].

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# Documents mentioned in pleadings, particulars and affidavits

## Making use of UCPR rule 222

### Rule 222 of the *Uniform Civil Procedure Rules* (UCPR) provides a party with an opportunity to ask for documents mentioned in another party's pleadings, particulars or affidavits.

The obligation to provide those documents in response to such a request differs from the duty of disclosure which arises pursuant to rule 211 UCPR and encompasses documents that conceivably fall outside the operation of rule 211.<sup>1</sup>

As rule 222 appears in Chapter 7, Part 1 of the UCPR, rules 225 (regarding the consequences of nondisclosure) and 227 (regarding production and admissibility at trial) will apply to documents produced (or not) under rule 222.

The rationale of rule 222, and its analogues in other jurisdictions such as rule 20.31 of the *Federal Court Rules* (FCR), is that access to documents mentioned in pleadings, particulars and affidavits should be given because it can be assumed that, by their mention, those documents are relied on by the party mentioning them, or at least are regarded by that party as material to its case.<sup>2</sup>

### The obligation created by rule 222

Rule 222 provides:

"A party may, by written notice, require another party in whose pleadings, particulars or affidavits mention is made of a document—

- (a) to produce the document for the inspection of the party making the requirement or the solicitor for the party; and
- (b) to permit copies of the document to be made."

The obligation under rule 222 extends to documents of which mention is made in pleadings, particulars or affidavits, the object being to give the opposite party the same advantage as if the document referred to had been fully set out where reference to it appears.<sup>3</sup> It does not extend to documents referred to in an exhibit to an affidavit,<sup>4</sup> and it does not extend to allowing the document to be subjected to forensic examination, for example, to test whether it is genuine.<sup>5</sup>

A direct allusion to the document is necessary for it to be produced pursuant to the obligation under rule 222; an inference or implied reference to a document is insufficient.<sup>6</sup> The rule is directed to where specific reference is made to a document. If it is impossible to identify a reference to a specific document and there is ambiguity as to whether any document actually existed, the rule has no operation.<sup>7</sup>

Thus, the phrase "after having the benefit of our and counsel's advice" in an affidavit has been held insufficient to enliven the obligation with respect to the advice because it does not make mention of a document, even if one may well infer that some of the advice may have been in writing.<sup>8</sup>

And the phrase "did decide, by resolution, what rates and charges are to be levied..." in a pleading has been held insufficient to enliven the obligation with respect to the resolution because resolutions are typically made orally or by a show of hands, and while a resolution may be made in writing, the pleading did not clearly and unambiguously refer to any writing.<sup>9</sup>

Rule 222 has been held not to override the protection of legal professional privilege.<sup>10</sup>

The fact that the mentioned documents are no longer in a party's possession or control does not necessarily relieve that party of the obligation to produce them under rule 222. On an application for the production of mentioned documents, there is a discretion to order their production even if they are not in the possession or control of the party who is ordered to produce them.<sup>11</sup>

There are two reasons for this. First, the rule does not expressly say that, to be produced, the mentioned documents must be in the possession or control of the party who has referred to them – compared with rule 211, which does say that. Second, it is only fair that the party seeking the mentioned documents should not be denied the advantage of their production merely because they are no longer in the possession or control of the party who mentioned them.

### Rule 20.31 FCR

Rule 20.31 FCR creates similar obligations to rule 222 UCPR. It provides:

"(1) A party (the first party) may serve on another party (the second party) a notice

to produce, in accordance with Form 39, for the inspection of any document mentioned in a pleading or affidavit filed by the second party.

(2) The second party must, within 4 days after being served with the notice to produce, serve the first party with a notice:

- (a) stating:
  - (i) a time, within 7 days after service of the notice, when the document may be inspected; and
  - (ii) a place where the document may be inspected; or
- (b) stating:
  - (i) that the document is not in the second party's control; and
  - (ii) to the best of the second party's knowledge – where the document is and in whose control it is; or
- (c) claiming that the document is privileged and stating the grounds of the privilege.

(3) If the second party does not comply with paragraph (2)(a) or (b) or claims that the document is privileged, the first party may apply to the Court for an order for production for inspection of the document."

Much of what we have said about rule 222 UCPR applies to rule 20.31 FCR,<sup>12</sup> except that under the FCR, if a document is not in the mentioning party's control, the other party appears to have no recourse to seek an order for production from that party. In those circumstances, an order for non-party discovery under rule 20.23 may be the appropriate course.

### Practical application

When drafting pleadings or affidavits, care needs to be taken not to refer to documents that would not otherwise be required to be disclosed by your client in the proceeding and which may contain or reveal information which is damaging to your client's case. For example, the phrase "in making this affidavit, I have had regard to the books and the records of the company" is a common paragraph which one often sees but which may lead to a party being required to provide those books and records or permit access to them.

When drafting affidavits or pleadings, ensure that any quotation from the document referred to is an accurate representation

**Kylie Downes QC** and **Hamish Clift** discuss the operation of rule 222 of the UCPR, which offers an opportunity to seek documents referred to by another party.



of what is contained in the document as, following a request for production of that document, the reference to the content of the document can be checked readily.

When in receipt of a pleading or affidavit, consider whether any documents are referred to within those documents and whether a request should be made for their production. Such a request should only be made if there is utility in obtaining the document. Such utility may exist if the documents requested assist in preparing a responsive pleading or affidavit, or assist in confirming the allegation in the pleading or evidence in the affidavit at a stage prior to disclosure.

Kylie Downes QC is a Brisbane barrister and member of the Proctor Editorial Committee. Hamish Clift is a Brisbane barrister.

#### Notes

- <sup>1</sup> Discovery procedure in the Federal Court is different from disclosure in Queensland courts, with no discovery of documents without a court order – see, generally, Part 20 of the FCR.
- <sup>2</sup> Per Holmes J (as her Honour was then) *Century Drilling Ltd v Gerling Australia Insurance Co Pty Ltd* [2004] 2 Qd R 481 at 484 to 485.
- <sup>3</sup> Per Douglas J in *Balnaves v Smith* [2008] 2 Qd R 413 at 415, referring to, among others, *Mataray Pty Ltd v Brookfield Breeding Co. Pty Ltd* [1992] 1 Qd R 91 at 96-97.
- <sup>4</sup> *Century Drilling Ltd v Gerling Australia Insurance Co Pty Ltd* [2004] 2 Qd R 481 at 485.
- <sup>5</sup> *Mataray Pty Ltd v Brookfield Breeding Co. Pty Ltd* [1992] 1 Qd R 91 at 97.
- <sup>6</sup> *Balnaves v Smith* [2008] 2 Qd R 413 at 415.
- <sup>7</sup> Per Mackenzie J in *Lilypond Constructions Pty Ltd v Homann* [2006] 1 Qd R 411 at 414.
- <sup>8</sup> *Balnaves v Smith* [2008] 2 Qd R 413.
- <sup>9</sup> *Amos v Brisbane City Council* [2012] QCA 206.

<sup>10</sup> Per Douglas J in *Balnaves v Smith* [2008] 2 Qd R 413 at 416, referring to *Rubin v Expandable Ltd* [2008] 1 WLR 1099.

<sup>11</sup> Per Williams J (with whom Shepherdson and Ambrose JJ agreed) in *Mataray Pty Ltd v Brookfield Breeding Co. Pty Ltd* [1992] 1 Qd R 91 at 96 referring to *Rafidain Bank v Agom Universal Sugar Trading Co. Ltd* [1987] 1 WLR 1606.

<sup>12</sup> In that regard, see the recent decision of Besanko J in *Apotex Pty Ltd v ICOS Corporation (No.2)* [2017] FCA 589.

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– *Petition by Kevin O’Doherty written in Richmond Prison to the Lord Lieutenant of Ireland, 20 November 1848.*

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Atkin’s first encounter with a doctor was in 1867, when Dr Kevin O’Doherty attended his birth in Brisbane. Twenty years earlier O’Doherty had been transported to Tasmania for his advocacy of Irish nationalism. By 1867 he was a leading surgeon in Brisbane, and, like his friend Robert Atkin, an advocate of liberal democracy. He was one of the first presidents of the Queensland Medical Society and carried out extensive honorary work at Catholic hospitals. As an MP he introduced Queensland’s first *Public Health Act*, championed the improvement of public health, and as an opponent of the trafficking of Kanakas sponsored the Bill to stop their recruitment. He was a member of Queensland’s Parliament until 1886, when he returned to Ireland and was elected to the House of Commons in that country. Soon after that, political differences in Dublin led him to return to Brisbane.

In his lecture, Justice Keane will chart O’Doherty’s extraordinary life.

## About the speaker

Justice Patrick Keane AC is a graduate of the University of Queensland (Bachelor of Arts 1973, Bachelor of Laws with first class honours 1976) and Oxford University (Bachelor of Civil Law with first class honours 1977). He was admitted to the Queensland Bar in 1977 and in 1988 he was appointed Queen’s Counsel.

He was Solicitor-General for Queensland from 1992 to 2005 and served as a judge of the Court of Appeal, Supreme Court of Queensland (2005-2010) before joining the Federal Court of Australia. He was appointed to the High Court of Australia in March 2013. At the time of his appointment he was Chief Justice of the Federal Court of Australia.

Justice Keane was appointed a Companion in the General Division of the Order of Australia in 2015.

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# Making due enquiry as to testamentary capacity

by Stafford  
Shepherd



The affidavit supporting probate application (Form 105) requires that, if the cause of death or other evidence suggests a lack of testamentary capacity, the deponent of the affidavit is either to swear or affirm that:

- to the best of the deponent's knowledge, information and belief, the deceased had testamentary capacity at the time of executing his or her will, or
- if the deponent is aware of any circumstances which might give rise to any apparent doubt as to testamentary capacity, those circumstances must be disclosed.

The deponent executor has an obligation to make due enquiry as to whether the

deceased had testamentary capacity at the time of execution of the will, if the cause of death or other evidence may suggest a lack of testamentary capacity.

A client cannot be expected to realise the whole scope of this obligation without the aid and advice of the solicitor.

As officers of the court, we have a duty to carefully investigate the issue of testamentary capacity before a deponent swears or affirms the prescribed Form 105 affidavit. A solicitor cannot simply allow the client to make whatever affidavit the deponent thinks fit, nor can the solicitor escape the responsibility of careful investigation or supervision.<sup>1</sup>

If the client will not give the solicitor the information needed or insists on swearing or affirming an affidavit which the solicitor knows to be imperfect or which the solicitor has reason to think is imperfect, then the

solicitor's proper course is to withdraw and terminate the retainer.<sup>2</sup>

To knowingly permit a client to swear a false affidavit, or to knowingly submit a false affidavit to the court would be unethical conduct by the solicitor and can lead to disciplinary sanction.<sup>3</sup>

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

#### Notes

<sup>1</sup> *Myers v Elman* [1940] AC 282, 322 (per Lord Wright).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Rajasooria v Disciplinary Committee* [1955] 1 WLR 413, 413 (per Lord Cohen PC); *In Re Davies* (1983) 14 Times L.R. 332, 333 (per Lord Justice A. L. Smith; see also Australian Solicitors Conduct Rules 2012, rules 14.2, 19.1, 19.2 and 20.1.

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# Your legal career – the early years

## Our favourite tips for survival

Emma Gillespie offers some top tips on surviving your years as an early career lawyer.



### As early career lawyers, we are armed with a university degree but minimal hands-on experience.

It can be difficult juggling full-time work, reading new cases and learning the ropes, but it's important to remember that you're not in this alone.

Every lawyer has had their first year. Every lawyer has doubted their ability, made an error, or missed a deadline. You can survive your early career years and work towards a long and rewarding legal career. Here are some top tips to help do just that.

### Communicate with your boss, your colleagues and your family

**Communicate with your boss:** If you make a mistake, don't sit and wait for the problem to get bigger. When the problem gets bigger, it will cost more time to rectify it. It can be difficult making that initial approach, but it will only make it worse if you don't deal with it head on.

It will consume your work and your home life, and the problem will seem bigger and more daunting. But fixing the problem straight away will be appreciated by everyone in the long run. Don't be afraid – bite the bullet. You'll feel better for it and avoid matters spiralling out of control.

#### **Communicate with your colleagues:**

Your co-workers know what you're going through better than anyone else. They know the clients, they know your boss and they know your work environment. If you feel like you're in this on your own, they might be feeling that way too.

Arrange to go for a drink after work, set up a team lunch, get a coffee on your way to work – find a way to communicate with your co-workers. Even if you're working in a micro or boutique firm and don't have many colleagues, you can still find a way to connect and communicate.

A great way to do that is by networking. You'll meet other people in the same position and you'll start to make referral networks. The Queensland Law Society Early Career Lawyers Committee works hard to bring ECLs together – make the most of these events and get in touch with your colleagues.

**Communicate with your family:** Your family know you better than anyone else, but they might not be able to understand what you're dealing with if they're not involved in the legal profession. Communicate your stress and let them help you de-stress when you're away from the office.

### Check your work

Each employer will approach early career lawyers differently. Some will throw you in the deep end and send you to court on your first day. Some will ease you into it gently and start you with the basics. As an early career lawyer, you're expected to make mistakes while you're still learning. But employers and clients don't appreciate it if you make the same mistake twice. Slow down and check your work – check for spelling mistakes, correct names and dates of birth, and check that you're sending an email to the right email address before you click 'send'. Take a breath, pause, and double-check your work before it is finalised.

### Don't be afraid to seek guidance

Not all lawyers are great teachers. If you come across a boss or a co-worker who can coach and mentor you through your early years, make the most of this. The senior members of our profession are a great source of learning and knowledge. So, ask them questions – you're not expected to know everything and there's no such thing as a stupid question.

The same goes for seeking guidance when you've been given a new or different task. When you pick up a new file, you should always read the file front to back. Then, if you have any questions – ask. Everyone is busy,

but it's important you get the information right the first time because fixing the problem later will cost you and the firm more time. Repeat the task back to the person who has given it to you. Clarify anything you need clarified then and there, and then get stuck into it.

### Be mindful and enjoy a work-life balance

You don't have to work 12-hour days to be a 'good' lawyer. Find a healthy release outside work. For some, it could be exercise; for others it could be a new Netflix show, or a trip to the movies. Find what works for you, but exercise your body and your mind. Having a cheat meal is fine, but you need to keep exercising too. Team sports are great for this; they give you an insight into what your mates in different industries are going through at the same level.

Queensland's Mental Health Week this year is 6-14 October. Challenge yourself to work towards an equal work-life balance by that week. Set yourself a goal – it might be leaving on time at least one night a week, taking your lunch break away from your desk, or going for a walk out of the office on your break. Whatever it is, big or small, start taking steps towards a healthy work-life balance.

As early career lawyers, we can often feel out of our depth. Feeling overwhelmed and lacking the confidence to speak up about it can increase your stress levels. Remember, everyone was an early career lawyer at one point. Why don't you ask your boss about their horror stories from when they were an articled clerk? It's a great ice-breaker and a light-hearted way to reassure yourself that everyone does make mistakes.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and Adam Moschella (Adam.Moschella@justice.qld.gov.au). Emma Gillespie is a lawyer at Phillips Family Law.

# Elder abuse – it's criminal



with Christine Smyth

If you are not a criminal lawyer, generally when a client consults many of us think in terms of civil remedies.

This is especially the case in elder abuse and succession law matters. However, we may be ignoring avenues of redress available within the criminal law that would serve to provide appropriate remedies and protections for the complex situations our clients face.

This month's column outlines a few of these provisions.<sup>1</sup> It is important that, if a client considers pursuing these avenues, they must receive advice in concert with an expert criminal lawyer.

There are a number of reasons. In some circumstances, when criminal charges are pursued, it may result in a stay of civil proceedings.<sup>2</sup> Also, criminal offences require a higher standard of proof, with the criminal justice system involving complex, specialised rules of evidence.

## Wills and powers of attorney

Increasingly, clients complain of missing wills, powers of attorney (POAs), or the dubious nature of the documents. Some provisions which may assist include the following.

### Make or revoke POA

Section 26 of the *Powers of Attorney Act 1998* (Qld) makes it an offence to "dishonestly induce the making or revocation of power of attorney". The maximum penalty for breach of this provision is 200 penalty units, which currently translates to a fine of \$25,230. 'Dishonest' has its ordinary, common meaning, which includes an intention to defraud or achieve an end by reason of a statement that is knowingly incorrect and has a dishonest intent. 'Induce' includes to offer a promise, a threat, or a benefit. It can include things other than money, such as a promise to do an act or omission to benefit another person.

### Criminal Code 1899 (Qld)

**Concealing** – S399(c)<sup>3</sup> This makes it an offence to defraud or conceal the whole or part of a testamentary document. The penalty for this offence is 14 years' imprisonment.

Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. ... Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world."

– Eleanor Roosevelt, United States First Lady 1933 to 1945.

**Stealing** – S398<sup>4</sup> If the thing stolen is a testamentary instrument, it exposes the perpetrator to 14 years' imprisonment.

**Damage** – S469<sup>5</sup> Willfully and unlawfully destroying or damaging a will exposes the perpetrator to 14 years' imprisonment.

**Forgery** – S488<sup>6</sup> It is an offence to forge and/or utter a document. Where that document is a testamentary instrument, the penalty is 14 years' imprisonment. Where it is a POA the penalty is seven years' imprisonment.

**Extortion** – S415 It is an offence for a person to demand money or a benefit by reason of a threat or menace. So, for example, if a person is threatened into making changes to their will or POA then this provision may be breached. The minimum penalty for this provision is 14 years' imprisonment.

**Fraud** – S408C It is an offence for someone to use another person's property by dishonestly applying it to their own benefit. The penalty for breach of this provision is five years' imprisonment. For example, when a POA is misused this provision may apply. The penalty increases where it involves sums more than \$30,000 (up to 14 years' imprisonment),<sup>7</sup> and from \$30,000 to \$100,000 (up to 20 years' imprisonment).<sup>8</sup>

## Crimes against the person

The *Criminal Code* contains a number of provisions for the prosecution of perpetrators of abuse, generally and specifically related to elderly people. These include particular

offences of violence such as assault (s340); when the assault involves a person who is 60 years old or more, under s340(1)(g) the penalty is seven years' imprisonment.<sup>9</sup>

One aspect of elder abuse, namely neglect, is addressed in the *Criminal Code* offence, 'failure to supply necessities' (s324). This offence imposes a duty on someone who has charge of another person unable to provide themselves with the 'necessaries of life' to provide those necessities. This duty only arises when a person has the 'charge' of another (for example, when a person is the primary carer of an older person). Hence these provisions, while technically applicable to neglect by a carer of an older person, will not have any application to other types of abuse.

## Conclusion

The difficulty with these offences is that they are often committed privately, within a family group, and behind closed doors where the only witnesses are frightened, isolated, or lacking capacity to make or sustain a complaint.

The defences most often raised include consent or a gift. In the case of injury to the person, the reason often proffered is harm by accident. For these reasons it is important to keep an open mind to the possible avenues of redress and consult with an experienced criminal lawyer to identify a resolution pathway that best suits your client. When the adult does not have capacity, it may be necessary to involve the office of the Adult Guardian.

Christine Smyth is Immediate Past President of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, QLS Specialist Accreditation Board, the Proctor Editorial Committee, STEP, and an associate member of the Tax Institute.

### Notes

<sup>1</sup> The references here are non-exhaustive; many other provisions across numerous pieces legislation may apply.

<sup>2</sup> This is due to the complexity of giving evidence.

<sup>3</sup> This provision applies whether the testator is alive or dead.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> S408C(2)(d).

<sup>8</sup> S408C(2A)(a).

<sup>9</sup> R v Laing [2008] QCA 317.

# Access denied!

## Court considers union workplace entry powers

The Federal Court is considering whether union officials need to hold *Fair Work Act* entry permits when exercising rights under s81 of the *Work Health and Safety Act 2011* (Qld) (WHS Act).

This issue is a key focus in the ongoing case of *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCA 553 (Sunshine Upgrade case).

### Facts

Between 8 March and 17 April 2018, several Construction, Forestry, Mining, Maritime and Energy Union (CFMMEU) officials appeared at a highway upgrade worksite on the Sunshine Coast in Queensland (the site), stating they had “health and safety concerns”.<sup>1</sup>

All but one of the union officials possessed a right of entry permit issued under the *Fair Work Act 2009* (Cth) (FW Act). However, when the site’s management requested the production of these permits, the union officials refused on the basis that s81(3) entitles them to a right of entry (as ‘representatives’), meaning that they didn’t need to show their right of entry permit.

Site management claimed that the need to make multiple police callouts and subsequent trespass arrests meant significant managerial and labour time was lost, delaying the highway upgrade project and resulting in financial losses.

The Australian Building and Construction Commissioner (ABCC) sought interlocutory injunctive relief to restrain CFMMEU officials from exercising rights pursuant to s81 unless they held an entry permit and could produce that permit. The ABCC’s case is based on the construction of s81 as being subject to the production, upon request, of union officials’ right of entry permits, under s497 of the FW Act.

Underlying the ABCC case is the interaction of a Commonwealth Act and a state Act – the ABCC’s case is that the FW Act s494 is applicable to the exercise of WHS rights by the CFMMEU under s81.

### Section 81 of the WHS Act

The relevant section states:

“Resolution of health and safety issues

- (1) This section applies if a matter about work health and safety arises at a workplace or from the conduct of a business or undertaking and the matter is not resolved after discussion between the parties to the issue.
- (2) The parties must make reasonable efforts to achieve a timely, final and effective resolution of the issue in accordance with the relevant agreed procedure, or if there is no agreed procedure, the default procedure prescribed under a regulation.
- (3) A representative of a party to an issue *may enter the workplace for the purpose of attending discussions with a view to resolving the issue.* (emphasis added).

In the Sunshine Upgrade case, union officials were seeking entry to the workplace under s81(3) of the WHS Act. The officials claimed the entry to the workplace was for the purpose of attending discussions directed at resolving health and safety issues.

Ordinarily, where a representative wants to trigger s81(3) and enter the workplace for the resolution of health and safety issues, they need to comply with clause 23 of the *Work Health and Safety Regulation 2011* (Qld) as a first step.

Clause 23 requires that:

- “(2) Any party to the issue may commence the procedure by telling each other party—
- (a) that there is an issue to be resolved; and
  - (b) the nature and scope of the issue.
- (3) As soon as parties are told of the issue, all parties must meet or communicate with each other to attempt to resolve the issue.”

Workplace Health and Safety Queensland guidance material on issue resolution provides that “entry by a representative of a party [under section 81(3)] can only occur once the issue resolution procedure has been enlivened”.<sup>2</sup>

This means that, if union officials are seeking entry to a site pursuant to s81(3), they must first communicate with relevant parties about the nature and scope of the health and safety issue.

### Interlocutory findings

The presiding Federal Court judge, Collier J, found that the ABCC’s injunction application should be allowed. Her Honour acknowledged the clear and important purpose of the CFMMEU is to enhance workplace safety, which is exacerbated by the dangers of construction sites. However, the requirement for those union officials attending a workplace under s81 to produce an entry permit under the FW Act is not a large burden to bear – particularly considering that six of the seven union official respondents possessed entry permits.

Her Honour accepted the ABCC’s submission that a union official’s entry permit acts as proof of his/her identity and their eligibility to exercise certain powers under the WHS Act. This important purpose clearly outweighs any difficulties associated with the union officials’ production of the permits.

Although the substantive hearing is yet to come, the implication of the interlocutory orders imposed by her Honour is that it appears union officials must have a FW Act permit to enter worksites under s81(3).

### Where the law stands now and where it is heading

The ABCC is also seeking substantive relief, including declarations of contravention of the FW Act and penalties. This issue is yet to be resolved, though some guidance may be provided by the Full Court of the Federal Court’s decision in *Australian Building and Construction Commissioner v Powell*<sup>3</sup> (Powell).

An ongoing Federal Court matter prompts a close look at s81 of the *Work Health and Safety Act 2011* (Qld) relating to right of entry permits for union officials. Report by **Carlie Holt**.



While *Powell* concerned the *Occupational Health and Safety Act 2004* (Vic.) (OHS Act), the relevant provisions and facts in dispute are analogous to the Sunshine Upgrade case and Queensland's WHS Act.

In *Powell*, a union official without an entry permit was invited to a worksite by a health and safety representative. The official believed he was not exercising a right to enter under the state OHS Act and as such, did not consider he needed a FW Act entry permit. The official was asked by site management to produce his entry permit or leave the site. The official refused, saying he was assisting the health and safety representative and not attending as a union official under the FW Act.

Section 494(1) of the FW Act states that an official of an organisation must not exercise a "State or Territory OHS right" – which includes a "right to enter" – unless the official

is a permit holder. Section 497 states that, when an affected employer requests the production of an entry permit from somebody seeking to exercise a "State or Territory OHS right", the permit holder must comply.

The court found that the OHS Act did confer a right to enter, and then turned its mind to whether the FW Act right of entry provisions work in connection with rights of entry provisions conferred by the OHS Act, or if it is restricted to rights of entry conferred to union officials in their capacity as union officials. The court found that the former applied.

The *Powell* decision suggests that a union official entering a workplace under state health and safety legislation can only enter a workplace with an entry permit. Therefore, considering s497 of the FW Act, they must produce their entry permit when requested by the occupier of the premises.

This position reflects a legal state of affairs that is seemingly applicable to s81(3) entry rights. This will likely influence the substantive proceedings in the Sunshine Upgrade case and provide clarity as to whether union officials are required to produce their entry permits when entering a site for *any* entry under the WHS Act.

Carlie Holt is a Partner at Sparke Helmore Lawyers. The author gratefully acknowledges the contribution of Andrew Ross, Mason Fettell and Lachlan Thomas in the preparation of this article.

#### Notes

- <sup>1</sup> [2018] FCA 533 at [9].
- <sup>2</sup> [worksafe.qld.gov.au/\\_\\_data/assets/pdf\\_file/0011/109100/issue-resolution-fact-sheet.pdf](https://worksafe.qld.gov.au/__data/assets/pdf_file/0011/109100/issue-resolution-fact-sheet.pdf).
- <sup>3</sup> [2017] FCAFC 89; (2017) 251 FCR 470.

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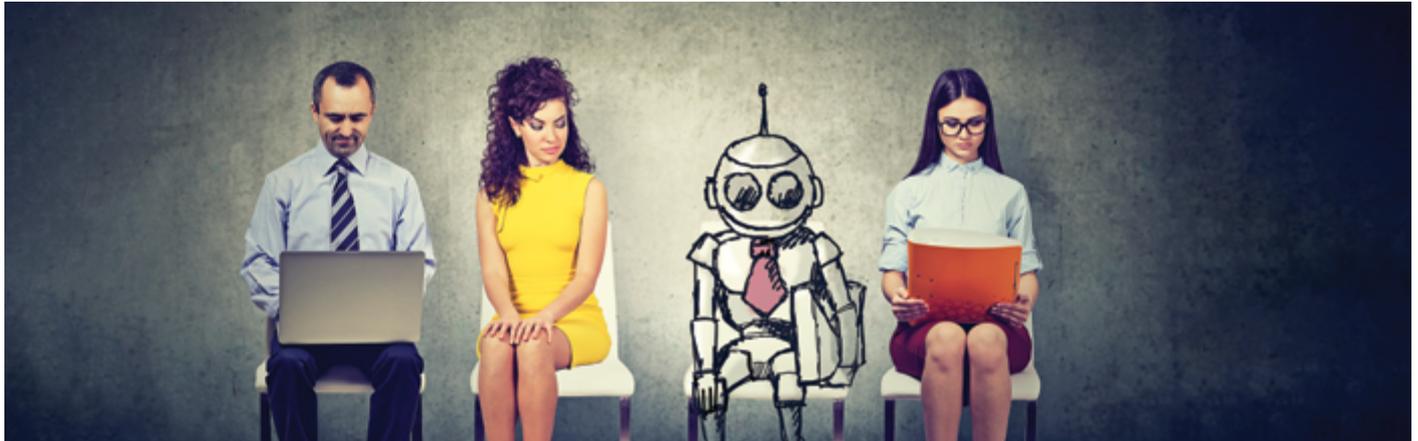


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# Dispute with a neighbour?

Soon there'll be a chatbot for that!



On 18-20 May, The Legal Forecast and the Department of Justice and Attorney-General (DJAG) partnered to host Hackcess to Justice, a 'hackathon' aimed at resolving neighbourhood disputes before they reach the legal system and create a burden on the courts.

The weekend involved teams of law students, technology students and young professionals working with mentors from DJAG to develop an innovative solution to the issue of neighbourhood disputes.

Hackcess to Justice was a first for both The Legal Forecast and DJAG. It was held in the Queen Elizabeth II Courts of Law over the weekend, a venue providing competitors with inspiration for their hard work and an idea of the impact their solutions could have on the legal system they were competing within. Hackcess to Justice was also the first hackathon held with a state Justice Department and provided employees of DJAG with the opportunity to step outside their roles and consider how the system could be improved and innovated for the benefit of the citizens it serves.

## Neighbourhood disputes

Neighbours are an accepted part of life in Australia, and they provide a valuable source of local support, particularly in times of need.

However, they can also be the cause of nuisance and distress. As relationships break down, neighbourhood disputes often arise.<sup>1</sup>

This is particularly heightened by changing relationships between neighbours in recent years, as increased mobility and privatisation mean that neighbours are often strangers living in close proximity. Increased density and development caused by a growing population also mean that neighbours are closer than ever.

Neighbourhood disputes arise as a result of a number of issues, which can range from nuisance and boundary problems to physical abuse and damage to property. The majority of neighbourhood disputes arise as a result of private nuisance, caused by noise, domestic animals, odours and boundary problems.

The most common issue is noise, while the least common is physical abuse and threats.<sup>2</sup> These issues can have major impacts on the lives of those affected, causing anxiety and stress, damaging relationships with neighbours, and often creating considerable expense.

The legal system provides a number of services to assist with resolving neighbourhood disputes. These include the Dispute Resolution Branch, which provides free mediation, the Queensland Civil and Administrative Tribunal (QCAT), which resolves disputes on a range of matters, and the Commission for Body Corporate and Community Management, which conciliates and adjudicates disputes in body corporates.

However, these services often struggle to deal with the significant volume of neighbourhood disputes that require assistance every year. Even dealing with inquiries regarding

neighbourhood disputes creates a significant burden, with QCAT receiving about 9000 phone inquiries a month, requiring a service which costs some \$80,000 a year to provide.<sup>3</sup>

## The hackathon

Hackcess to Justice was created by The Legal Forecast and DJAG as a way for these significant issues to be considered by fresh minds, and for an innovative solution to be developed and implemented to reduce this burden and provide neighbours with improved access to justice.

The format of a hackathon was chosen based on its previous success in other events hosted by The Legal Forecast, such as Disrupting Law. A hackathon creates an intensive environment in which competitors have only two days in which to create a viable, innovative solution and present it before a panel of judges. Often what is needed to solve an issue such as neighbourhood disputes is the combination of time pressure and competition, as well as the assistance of expert mentors, to create an innovative solution.

The weekend began with an opening ceremony, in which QCAT President Justice Daubney and DJAG Deputy Director-General Jennifer Lang offered inspirational speeches on the potential impact the solutions could have on the justice system. Competitors then met their team members and mentors and began brainstorming.

The next two days consisted of long hours considering the problems caused by neighbourhood disputes and the ways in which they could be solved. Whilst the tension was high, creativity and innovation



by Mollie O'Connor, The Legal Forecast

also abounded, with many brilliant solutions being generated in that intense environment.

The weekend culminated in a closing ceremony, in which teams pitched their ideas to a panel of judges, which included a magistrate, and the Deputy-Director General of DJAG. The winning solution, Neighbourly Justice, was a chatbot service that provided information to neighbours seeking advice. This service will significantly reduce the number of phone inquiries QCAT receives and allow for disputes to be resolved before reaching the legal system.

### Where to now

One of the main critiques of legal hackathons is that, while they create innovative solutions, these solutions are not developed or implemented after the weekend.<sup>4</sup> Hackcess to Justice has attempted to do just this, with the winning team working with DJAG for one

month to develop their solution and have it implemented within the legal system.

This is a fantastic outcome for access to justice, as individuals dealing with neighbourhood disputes will be able to seek assistance with minimum expense and effort, and dispute resolution services will have their burdens lessened.

While hackathons are not the be-all and end-all of innovation, they do provide an important first step, and from Hackcess to Justice hopefully more innovation will occur in this space so that the legal system can be improved for the betterment of all.

Mollie O'Connor is a Queensland executive member of The Legal Forecast (TLF). Special thanks to Michael Bidwell and Benjamin Teng of The Legal Forecast for technical advice and editing. The Legal Forecast ([thelegalforecast.com](http://thelegalforecast.com)) aims to advance legal practice through technology and innovation. TLF is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

### Notes

- <sup>1</sup> Lynda Cheshire and Robin Fitzgerald, 'From Private Nuisance to Criminal Behaviour: Neighbour Problems and Neighbourhood Context in an Australian City' (2015), *Housing Studies* 30:1, 100-122, 100.
- <sup>2</sup> The Australian Community Capacity Study, Wave 4 (2012).
- <sup>3</sup> Queensland Civil and Administrative Tribunal Annual Report 16/17.
- <sup>4</sup> Ken Grady, 'Let's Redirect Energy in Meetups, Hackathons and Conferences to Progress' (2018) Medium – The Algorithmic Society, [medium.com/the-algorithmic-society/lets-redirect-energy-in-meetups-hackathons-conferences-to-progress-51cf170aa5b](https://medium.com/the-algorithmic-society/lets-redirect-energy-in-meetups-hackathons-conferences-to-progress-51cf170aa5b); Andrew Dibden, 'Can you hack it?' (2018) [linkedin.com/pulse/can-you-hack-it-andrew-dibden/](https://www.linkedin.com/pulse/can-you-hack-it-andrew-dibden/).

# The MEDICO -LEGAL Mind

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# High Court and Federal Court casenotes

## High Court

### **Negligence – personal injury – assessment of damages – future losses**

In *Amaca Pty Limited v Latz; Latz v Amaca Pty Limited* [2018] HCA 22 (orders 11 May 2018; reasons 13 June 2018) the High Court held that damages to be awarded to Mr Latz should include amounts he would have received under his superannuation pension, but not his age pension. Mr Latz is 71 and has been diagnosed with terminal malignant mesothelioma. When diagnosed, he had retired from the public service and was receiving both a superannuation pension under the *Superannuation Act 1988* (SA) and an age pension under the *Social Security Act 1991* (Cth). He brought proceedings against Amaca, for whom he had worked installing asbestos fencing some 40 years earlier. Amaca did not dispute liability. Mr Latz argued that, but for his illness, he would have continued to receive both the superannuation pension and the age pension for the remainder of his pre-illness life expectancy – around 16 years. A majority of the Full Court of the SA Supreme Court held that the value of both pensions were compensable losses. It also reduced the amount of damages to account for a reversionary pension that would be awarded to Mr Latz's partner on Mr Latz's death. Amaca appealed against the inclusion of the pensions as compensable losses; Mr Latz appealed against the reduction. A majority of the High Court upheld the inclusion of damages for the superannuation pension as part of compensation for loss of earning capacity. 'Loss of earning capacity' has been described as a capital asset – capacity to earn money from the use of personal skills. Damages are awarded for loss of earning capacity, to the extent the loss has been or may be productive of actual financial loss. Superannuation benefits, like wages, are the product of the claimant's capital asset. Had the injury presented during his working life, the superannuation loss would be compensable. There was no reason in principle for a different result because the injury caused earlier presented after his retirement. However, the compensation should be reduced to account for the reversionary pension. The court unanimously held that an amount for the age pension should not be included in the award for damages. It was not a result of or linked to a person's capacity to earn; it is not a form of property; and is not compensable. Bell, Gageler, Nettle, Gordon and Edelman JJ jointly; Kiefel CJ and Keane J jointly dissenting. Appeal from the Full Court of the Supreme Court (SA) allowed in part.

### **Procedure – stay of proceedings – leave to amend – stay until costs paid – effective end of proceedings**

In *Rozenblit v Vainer* [2018] HCA 23 (13 June 2018) the High Court allowed an appeal from a decision to stay proceedings until costs orders had been paid. The appellant brought

proceedings alleging that the respondent fraudulently transferred shares owned by the appellant. He sought leave to amend his claim by three separate summonses. The first two summonses were refused with costs to be paid immediately. The appellant was unable to pay the costs ordered because he had very limited means. On the third occasion, the respondents sought an order under Order 63.03(3)(a) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic.), which allows for a stay to be ordered when costs have been ordered and those costs have been fixed but remain unpaid. The primary judge granted the application for leave to amend on condition that the proceedings be stayed until the costs were paid. The judge was aware that this would effectively end the proceedings. The appellant unsuccessfully appealed to a single judge of the Supreme Court and then the Court of Appeal. The High Court unanimously overturned the primary judge's decision. The court noted the grave consequences of the stay order. Generally, a person is entitled to submit a bona fide claim for determination. When a stay is sought based on unpaid costs, the circumstances of the case and the costs orders, as well as the actions of the parties, would be relevant. A stay should be granted when it is the only practical way to ensure justice between the parties. In this case, the appellant had been prevented from pursuing a claim honestly made and there were insufficient grounds for the making of the order. There remained fair and practical ways to ensure justice between the parties. Kiefel CJ and Bell JJ jointly concurring; Keane J separately concurring; Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Vic.) allowed.

### **Administrative law – appeal from Supreme Court of Nauru – migration**

In *CRI028 v The Republic of Nauru* [2018] HCA 24 (13 June 2018) the High Court allowed an appeal from the Nauru Supreme Court. The appellant was born in 'K District', an area of the Punjab. In 2004 he moved to Karachi (where his wife and child remain). In 2013, the appellant fled to Christmas Island and was transferred to Nauru. He applied for recognition as a refugee or a person owed complementary protection. The application was refused by the Secretary of the Department of Justice and Border Control of Nauru. The Refugee Status Tribunal (RST) accepted that the appellant had a well-founded fear of persecution, but affirmed the refusal on the basis that the appellant could relocate to K District. The RST's reasoning focused on whether K District was a "home area" of the appellant. In the alternative, the RST purported to consider reasonableness of relocation, but did not consider the fact that the appellant had a wife and child. The Nauru Supreme Court dismissed an appeal. The High Court held that the RST was distracted by the enquiry about whether K District was the appellant's home area. It failed to consider

reasonableness of relocation having regard to all of the appellant's circumstances, in particular his wife and child. Gordon and Edelman JJ jointly; Bell J separately concurring. Appeal from the Supreme Court (Nauru) allowed.

### **Defamation – capacity to defame – publication**

*Trkulja v Google LLC* [2018] HCA 25 (13 June 2018) concerned whether Google defamed the appellant by publishing search engine results conveying that he was a criminal. The appellant alleged that Google defamed him by publishing images, text and autocomplete searches in its search engine that conveyed imputations that he is a "hardened and serious criminal in Melbourne" and had links with other criminals. Google brought a summary judgment application on three bases: (i) that it did not publish the allegedly defamatory material; (ii) that the matters in issue were not defamatory of Mr Trkulja; and (iii) that Google was entitled to immunity from suit. The primary judge rejected these grounds. On appeal, the Court of Appeal upheld the second ground, finding that the search results were not capable of bearing the defamatory imputations. The High Court said that whether words or images are capable of carrying a defamatory imputation is a question on which reasonable minds can differ, and a defamation pleading should only be disallowed with great caution. The court held that at least some of the search results had the capacity to convey to an ordinary reasonable person that Mr Trkulja was somehow associated with the Melbourne criminal underworld. The results therefore had the capacity to convey one or more of the defamatory imputations. The Court of Appeal had erred in finding that the appellant's claim had no real prospect of success. The High Court was also critical of some of the Court of Appeal's reasoning with respect to the question of publication, the test for the conveying of the imputation, and findings of fact and law made. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly. Appeal from the Supreme Court (Vic.) allowed.

### **Criminal law – trial by judge alone – adequacy of reasons**

In *DL v The Queen* [2018] HCA 26 (20 June 2018) the High Court held that the reasons given by the trial judge were not inadequate and dismissed an appeal from conviction. The appellant was charged with persistent sexual exploitation of a child under s50(1) of the *Criminal Law Consolidation Act 1935* (SA). That sub-section created an offence where an adult person, "over a period of not less than 3 days, commits more than 1 act of sexual exploitation of a particular child under the prescribed age". The appellant was tried by judge alone and convicted. On appeal, one of the grounds raised by the appellant was that the trial judge's reasons were inadequate. In the High Court, the issue was whether the trial judge's reasons failed to identify and disclose the reasoning leading to the finding that there had been two or more acts of



with Andrew Yuile  
and Dan Star QC

sexual exploitation. The complainant had alleged a number of acts of sexual exploitation over several years. The complainant's evidence was central to the Crown case. The appellant drew attention to inconsistencies in the complainant's evidence and said it was not reliable. The trial judge described the complainant as having given evidence "in a forthright and convincing manner", as "a straightforward man", and as "a man endeavouring to tell the truth". The judge found he "was describing real events that happened to him and was not led by the suggestions of others". While there were inconsistencies in his evidence, the judge accepted that the complainant was a reliable witness as to the core allegations. A majority of the High Court held that the trial judge had ultimately concluded that the appellant sexually assaulted the complainant on numerous occasions over some years, which meant that the elements of the offence had been proved. The judge's findings on credit were an acceptance that the complainant was truthful and reliable about all of the sexual acts that he had described. The reasons were sufficient to identify and disclose the reasoning leading to a finding of two or more acts of exploitation. Kiefel CJ, Keane and Edelman JJ jointly; Bell J and Nettle J separately dissenting. Appeal from the Supreme Court (SA) dismissed.

#### **Criminal law – parole – s74AAA of the Corrections Act 1986 (Vic.)**

In *Minogue v Victoria* [2018] HCA 27 (20 June 2018) the High Court held that s74AAA of the *Corrections Act 1986* (Vic.) did not apply to the plaintiff. In 1986, the plaintiff and a group of others placed a stolen car with an explosive in the vicinity of public buildings in Melbourne, including the police complex and the Magistrates' Court. The car exploded and killed Constable Angela Taylor. The plaintiff was convicted of Constable Taylor's murder as a part of a joint enterprise in which the particular parts of the accused could not be proved. He was sentenced to life imprisonment with a non-parole period of 28 years. The non-parole period ended on 30 September 2016. On 3 October 2016 the plaintiff applied for parole. On 20 October 2016, the parole board decided to consider the application. On 14 December 2016, s74AAA was inserted into the Act. That section provides that the board must not make a parole order in respect of a prisoner "convicted and sentenced" to a term of imprisonment "for the murder of a person who the prisoner knew was, or was reckless as to whether the person was, a police officer" unless the board is satisfied that the prisoner is in imminent danger of dying or is seriously incapacitated. On 20 December 2017, s127A was inserted into the Act. That section provides that s74AAA can apply to a person even if they have become eligible for parole or had asked for parole to be considered. Questions of construction and constitutional law were posed for the High Court, essentially concerning whether s74AAA could apply to the plaintiff. The High

Court held that s74AAA could apply to the plaintiff even though he had applied for parole. The laws relating to parole could change and there was no accrued right to parole or the completion of an application. Section 74AAA is not limited to persons convicted of offences with an element that the accused know or be reckless as to whether the deceased was a police officer. Section 74AAA applies wherever the circumstances provided for in the section are present. On its proper construction, s74AAA applies to a prisoner sentenced on the basis that the prisoner knew, or was reckless as to whether, the person murdered was a police officer. In this case, the plaintiff was not sentenced on that basis, as revealed by the sentencing remarks. The offence committed was indiscriminate and no particular person or class of persons was targeted. Section 74AAA therefore could not apply to the plaintiff. That conclusion also rendered it unnecessary to answer the constitutional questions raised by the case. Kiefel CJ, Bell, Keane, Nettle and Edelman JJ jointly; Gageler J and Gordon J separately concurring. Answers to questions in Special Case given.

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#### **Federal Court**

##### **Appellate jurisdiction – consumer law – trade marks – the nature of an appeal**

In *Alci Goods Pty Ltd v Moroccan Oil Israel Ltd* [2018] FCAFC 93 (22 June 2018) the issues before the Full Court were (1) should a trade mark proceed to registration (see s41 of the *Trade Marks Act 1995* (Cth)) and (2) did the manner in which the appellant sold some hair care products constitute misleading or deceptive conduct and false or misleading representation (see ss18 and 29(1)(a) of Schedule 2 to the *Competition and Consumer Act 2010* (Cth)).

In relation to the trade mark question, the issue between the parties was whether the word mark 'MOROCCANOIL' was capable of being registered as a trade mark. The Full court held that the trial judge erred in not concluding that the trade mark was not to any extent inherently adapted to distinguish the designated goods or services from the goods or services of others (Allsop CJ at [16] and Perram J at [163]-[165]). The requirements of s41(6) of the *Trade Marks Act 1995* were not satisfied and the mark was not registrable.

On the misleading conduct and representations issues, the appellant succeeded in showing that the trial judge erred on the "the Natural Claims". Contrary to the trial judge, the Full Court held that the use of the word "NATURALS" on the packaging of the hair care products was not a representation that the products were made either wholly or substantially from natural ingredients

and that the appellant did not thereby engage in conduct that was misleading or deceptive or likely to mislead or deceive (Allsop CJ at [11], Perram J at [91] and Markovic J at [169]). However the appellant failed in its challenge to overturn the trial judge's findings on the "the Performance Benefits Claims" (that is, claims as to the performance of the products based on its packaging) (Allsop CJ at [12] and Markovic J at [169]; cf different reasons of Perram J at [112]).

Of likely relevance to future appeals in a wide range of legal areas, Allsop CJ and Perram J analysed the nature of appellate review where findings concern matters of impression (such as misleading or deceptive conduct). In their separate judgments, their Honours gave considered statements regarding appellate review including the High Court's reasons in *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; 331 ALR 550 at [43] (*Robinson Helicopter*). Perram J explained at [54] that "it is clear the High Court was not intending to overrule *Warren v Coombes* or *Fox v Percy*" and "...it is clear the quoted passage in *Robinson Helicopter* is concerned with findings of fact involving the credibility of witnesses. To the extent that *Robinson Helicopter* has been applied to questions of impression in intellectual property cases, it has, with respect, been misunderstood..."

The clear authority of judgment of Allsop J (as he then was) in *Branir Pty Ltd v Owston Nominees (No.2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 as to how the court in the exercise of its appellate jurisdiction should approach the review of findings was confirmed. Perram J said at [52] "...There is a line of cases, however, beginning with the reasons of Weinberg J in *Eagle Homes Pty Ltd v Austec Homes Pty Ltd* [1999] FCA 138; 87 FCR 415 which suggests that to review a finding involving an evaluative standard requires the appellate court first to find that the finding in question is 'plainly and obviously wrong' (at [119]). This was an obiter dictum but in my view it is not correct and should not be followed. It is contrary to *Branir*..."

Allsop CJ agreed at [2] with Perram J's reasons about appellate review. The Chief Justice referred to his own judgment in *Branir* and explained it should be followed and not wrongly paraphrased by the use of the phrase (as done in some cases) of an error that is "plainly and obviously wrong": at [10]. At [6]: "...the test of 'plainly and obviously wrong' is not semantically or substantively the same as that which was said in *Branir* at 437-438 [28]-[29]." Further at [9]: "A test of 'plainly and obviously wrong' (whatever its precise content) is blunt and lacks nuance. It invites the setting of a standard of appellate review higher than it should be, by its formulaic false simplicity and false clarity."

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# Unit trust controlled but not owned not 'property'

with Robert  
Glade-Wright



## Property – unit trust controlled by husband but owned by his 99-year-old father not 'property'

In *Harris & Dewell and Anor* [2018] FamCAFC 94 (25 May 2018) the Full Court (Strickland, Murphy & Johnston JJ) dismissed an appeal against Rees J's property settlement by the wife, who argued that the asset pool should include units of the E Unit Trust which were controlled by the husband although his 99-year-old father was sole unit holder. The shares of the corporate trustee (FPL) were owned by the father (67%) and husband (33%). The director of FPL was a solicitor who acted on the husband's instructions.

Rees J had found that the husband controlled the trust, but that the units were not property but a financial resource of the husband. Rees J ([66]) cited *Stephens* [2007] FamCA 680 in which Finn J said that "no earlier authority...[has held] that control alone without some lawful right to benefit from the assets of the trust is sufficient to permit the assets...to be treated as property of the party who has that control".

The Full Court said (from [67]):

"...[P]roperty...of a trust can be treated as property of a party for s79 purposes where evidence establishes that the person or entity in whom the trust deed vests effective control is the 'puppet' or 'creature' of that party. (...)

[68] Control is not sufficient of itself. What is required is control over a person or entity who, by reason of the powers contained in the trust deed can obtain, or effect the obtaining of, a beneficial interest in the property of the trust. ... [I]t is in that sense that Finn J speaks of 'some lawful right to benefit from the assets of the trust'. (...)

[71] The husband did not have powers vested in him, or in any entity which he controlled or would do his bidding, that permitted of that result for him. The evidence was certainly to the effect that the current director of the trustee FPL... would likely do the husband's bidding. However, the trustee does not have ultimate control over the vesting of trust property. That...has at all times rested with, and currently rests with, the father."

## Property – declaration that farm was owned by mother-in-law's company on trust for wife's company due to a family agreement set aside

In *Camden Pty Ltd & Laue and Ors* [2018] FamCAFC 91 the Full Court allowed an

appeal by the farm's owner (Camden P/L run by the husband's mother) due to the Family Court of Western Australia's failure to apply case law as to an intention to create contractual relations.

Walters J held ([44]-[45]) that an agreement was made "partly orally and partly by conduct" for its transfer to Barkers P/L run by the late husband who farmed it with the wife. A transfer was signed but not registered, but the husband's mother was to receive a monthly stipend for life, the husband to pay all debt.

The Full Court ([53]) cited *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8 at [25]:

"...[T]he word 'intention' ['to create contractual relations']...is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties."

And *Secola v McCann (No.2)* [2011] WASC 342 at [18]: "If the parties' intention is equivocal, evidence of subsequent conduct may be adduced to establish whether an agreement was concluded."

The Full Court ([55]) said that the following factors did *not* point to an intention to create legal relations:

- That any agreement was never reduced to writing.
- The husband always felt he had a moral obligation to maintain his mother after his father's death.
- The parties' businesses had historically been operated independently and only became entwined after the death of the husband's father.
- The "agreement" was reached in a social context and did not involve any lengthy or serious discussions.
- Property B was Camden's only income-producing asset and the "agreement" resulted in it being transferred outside of Camden.

## Children – denial of relocation to NZ upheld – judge's reference to *Morgan & Miles* 'checklist' was not in error

In *Molloy & Reid* [2018] FamCAFC 89 (11 May 2018) the Full Court (Thackray,

Murphy & Aldridge JJ) dismissed the mother's appeal against Tree J's refusal of permission for her to relocate to New Zealand. An order was also made for equal shared parental responsibility and that the children live with the mother, but spend time with the father four nights per fortnight (with an extra night for the eldest child).

The Full Court said (at [16]):

"After reciting paragraphs 79 to 81 from *Morgan & Miles* [2007] FamCA 1230...and without making any further comment about their content, his Honour...discussed each of the identified issues, determination of which he had earlier said was 'likely to substantially impact upon the outcome'..."

The court continued (at [27]-[29]):

"The essence of the argument here was that the judge had led himself into error by focusing on the 'checklist' of issues... supplied by Boland J in...*Morgan & Miles*. The mother's summary of argument went so far as to assert that his Honour had relied on *Morgan & Miles* 'as the basis of his decision-making'...where neither party had referred to the case in argument.

[28] Relying on...*Deiter* [2011] FamCAFC 82 counsel for the mother drew attention to what were said to be dangers associated with judges having regard to 'checklists' which place 'glosses' on an already complicated statute, thereby 'obscuring' the law. It was argued that...the primary judge had 'let the checklists control the outcome'...

[29] We accept that the Full Court in *Deiter*...commented adversely on the way a magistrate had applied the 'checklist' in *Morgan & Miles*, but nothing said by the Full Court there proscribed efforts by trial judges to paraphrase the law in the way Boland J had done in the earlier case. Indeed, it might reasonably be said that careful paraphrasing of legislation can illuminate the law and demonstrate that it has been correctly understood. The difficulty the Full Court saw in *Deiter*...was not that the magistrate had regard to the 'checklist' in *Morgan & Miles* but...that he may have misunderstood the nuances in one item on the list and hence misapplied what Boland J had said."

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# Court of Appeal judgments

1 to 30 June 2018



with Bruce Godfrey

## Civil appeals

### *Palmer v Turnbull* [2018] QCA 112, 5 June 2018

Miscellaneous Application – Civil – where the applicant sues the respondent for defamation in respect of the publication of words spoken at a press conference in China – where leave to appeal had to be sought as the appeal was filed out of time – where leave was opposed only on the grounds that the substantive appeal must fail – where the applicant seeks leave to appeal against the strike out of paragraph 3 and paragraph 7(a) of the applicant's further amended statement of claim – where the applicant ultimately sought to rely on the presumption that Chinese law does not differ from local law – where the respondent contends that the applicant was obliged to plead the applicable Chinese law and as such failed to plead a material fact – whether the applicant was required to plead Chinese law – whether an imputation could not be distilled further or lacked precision – where the effect of *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 is that where the foreign law is the *lex causae* by application of Australian choice of law rules, a plaintiff is not required to plead the foreign law to make it justiciable and establish a cause of action – where, however, if a plaintiff seeks to rely on foreign law or otherwise wishes to rely on a forensic advantage in the foreign law, the plaintiff is required to plead the foreign law in its statement of claim – where in the absence of such a pleading it will be presumed that the foreign law is the same as local law – where the majority decision in *Zhang* supports the proposition that where the *lex loci delicti* is a foreign law, it is presumed that it is the same as local law, relevantly in this case, the same as the law in Queensland, and it does not need to be pleaded nor proven as a matter of fact unless the plaintiff sees a forensic advantage in relying on the foreign law and intends to rely on it as differing from local law – whether in considering the applicant was obliged to plead foreign law as a material fact and relying upon *Zhang* as supporting that obligation where the applicant had disavowed the position in the r445 *Uniform Civil Procedure Rules 1999* (Qld) letter and any reliance upon foreign law advantage, the primary judge erred – where as to paragraph 7(a) of the further amended statement of claim his Honour considered that in the circumstances of the publication, “the ordinary reasonable reader, looking at the publication as a whole, could take the view that it did have that meaning of fraud, rather than a more innocent meaning” – where his Honour did not err in determining that the imputation was too imprecise and should be struck out – where “fraudulent” can carry a number of meanings and taking money out of Queensland Nickel is not of itself necessarily fraudulent and could be fraudulent on a number of different bases – where the basis of the fraud which is associated with the taking of the money

is not apparent from the pleading – where the phrase could be productive of confusion and should be further clarified by the applicant, as was found by his Honour.

Leave to appeal granted. Appeal allowed in part. Order 1 of the primary judge insofar as it strikes out paragraph 3 of the further amended statement of claim set aside. Otherwise, appeal dismissed.

### *Nerinda Pty Ltd v Redland City Council & Ors* [2018] QCA 146, 29 June 2018

Planning and Environment Application and Appeal – where on an appeal by submitters from the council's approval of a development application, the Planning and Environment Court refused a development application on the basis of conflict with the relevant planning scheme – where a draft new planning scheme, which essentially replicated the existing planning scheme, had been made publicly available for inspection by the time the council approved the application, but was not in force, including by the time of the appeal – where the council led expert evidence, and argued, that its planning scheme provisions were deficient, due to population growth, and supported approval of the development application on public interest grounds, despite the conflict – where the Planning and Environment Court found there was significant force in the expert evidence discrediting the contemporary planning for the area, but found that the evidence, and the council's arguments, were diluted by the fact of replication of the existing scheme in the new draft scheme, and that it was a matter for the council to address perceived deficiencies in its scheme, not the court – whether the Planning and Environment Court erred in law in giving weight to the draft planning scheme under s495(2)(a) of the *Sustainable Planning Act 2009* (Qld) or, by inference, under the *Coty* principle (*Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117) – whether the Planning and Environment Court erred by failing to perform the role imposed on the court by ss326 and ss329 of the *Sustainable Planning Act*, standing in the shoes of the council in its capacity as the assessment manager (in contrast to its role as the planning authority) – where relevantly, at the time the application for development approval was made and decided by the council, and at the time of the hearing of the appeal, the planning scheme in force was the *Redlands Planning Scheme 2006* – where by the time the council approved the application, a draft planning scheme, the *draft Redlands City Plan 2015*, had been made publicly available for inspection, but had not been adopted by the council, or approved by the Minister, or notified in the Gazette – where the draft planning scheme therefore was not in force and had no operable effect – where a draft planning scheme has no legal effect, unless and until it is promulgated as a planning scheme under the Act – where there is therefore no legislative authority

to take a draft planning scheme into account in assessing a development application – where there is however common law authority, derived from the decision in *Coty (England) Pty Ltd v Sydney City Council*, which established a principle, recognised in Queensland, that it is possible to give some weight to planning decisions that are in train but which do not yet have the force of law, but as Thomas J observed, in *Lewiac Pty Ltd v Gold Coast City Council* [1996] 2 Qd R 266 at 271, it is possible to give too much weight to such a factor, and that is the error that has been made here – where it appears from specified paragraphs in the decision that the draft scheme was given a status it does not have under the legislation; and that it was afforded weight under the Act, rather than in terms of application of the *Coty* principle (or on some other basis) – where there is no reference in the decision to *Coty*; but even if it could be inferred that his Honour proceeded on the basis of that principle, there has been a misapplication of it – where the primary judge erred in proceeding on the basis that s495(2) permitted him to give weight to the draft planning scheme – where even if it be reasonable to infer his Honour did not proceed on that basis, but rather by application of the *Coty* principle he has misapplied that principle – where on the application of the *Coty* principle the draft planning scheme may have been significant if it heralded a new planning policy, or a shift in planning policy that warranted refusal of the proposed development – where in circumstances where it replicated the planning scheme provisions in force, which the experts and the council said revealed a planning deficiency in light of population growth, it is difficult to see why the draft scheme would be of much significance at all – where the question to be determined was whether, despite the conflict with the planning scheme provisions in force (and replicated in the draft planning scheme) there were sufficient grounds (being matters of public interest) to justify a decision approving the development – where the misapplication of principle (in either case, whether in terms of s495(2)(a) or the application of the *Coty* principle) affected, in what could have been a material way, the primary judge's consideration of that question – whether, in light of the expert evidence, which his Honour accepted was of “significant force”, and the position of the council, in its capacity as the assessment manager, both strongly supporting the development proposal, and also being “critical and damning about its own current scheme” – there were sufficient public interest grounds to approve the proposed development, notwithstanding the conflict with the 2006 scheme.

Application for leave to appeal granted. Appeal allowed. The order made by the Planning and Environment Court on 8 September 2017 is set aside. The matter is remitted to the Planning and Environment Court to be determined according to law.

*Actron Investments Queensland Pty Limited v DEQ Consulting Pty Ltd & Anor* [2018] QCA 147, 29 June 2016

General Civil Appeal – where the appellant purchased a commercial lot in a community titles scheme which included a corporate headquarters/warehouse – where the floor was a floating concrete slab – where the first respondent (through the second respondent) issued a Form 15 Compliance Certificate – Design under the *Standard Building Regulation 1993* (Qld) by reference to the *Building Code of Australia* (2006) – where this form was relied upon and used by the building certifiers as conveying the engineering opinion that the anticipated loads would be resisted by the floating concrete slab without undue settlement – where the building certifier was entitled to rely on the Form 15 for this purpose – where the floating slab subsided due to marine clays in the subsurface shrinking and swelling, and settlement occurred because of the consolidation of compressible marine clays – where the appellant claimed damages against the first respondent pursuant to s82 *Trade Practices Act 1974* (Cth) (TPA) for misleading and deceptive conduct in contravention of s52 TPA – where the appellant claimed damages against the second respondent for being “a person involved in the contravention” in terms of s75B of that Act – whether the settlement of the floating slab was “undue” – whether the first respondent’s communication of the Form 15 was misleading conduct in contravention of s52 TPA – whether the second respondent possessed the knowledge required to render him liable as a party to the first respondent’s contravention – where the only element of s52 TPA in issue in the appeal is the requirement that the alleged conduct be misleading – where Mr Henry (a director of DEQ and a registered engineer), who was described in the Form 15 as a competent person, certified that the items described in the form (the structural elements detailed on the nominated DEQ drawings include the floating slab) “will comply with the Standard Building Regulation” – where consistently with the incorporation in the BCA of AS3600, that Australian Standard is nominated in the form as one of the Australian Standards forming the ‘Basis of Certification’ – where thus the issue of the Form 15 conveyed Mr Henry’s certification that the floating slab will comply with AS3600 – where the issue of the Form 15 was misleading because the anticipated settlement would be “undue”, the evidence demonstrates that this was in fact Mr Henry’s own opinion, and there was no reasonable basis for a competent person in Mr Henry’s position to reach the contrary opinion – where the effect of Mr Henry’s evidence is that he thought there would be excessive settlement but that a client determined whether or not the expected settlement was “undue” settlement – where consistently with Mr Henry’s notes on the plans, his reports, and his oral evidence (when the irrelevant consideration of his client’s suggested expectations is disregarded), a competent person in Mr Henry’s position could not reasonably have concluded that the expected settlement was not “undue” – where an anticipated requirement to embark upon the admittedly expensive and disruptive exercise of releveling or replacing a concrete slab, perhaps as soon as after only one quarter of its intended design life and no later than after three-eighths of

its design life, could not reasonably be regarded as a probability of structural failure which is “acceptably low throughout its intended life” for the purposes of the third paragraph of cl.2.1.1 of AS3600 – where there is no apparent basis for an opinion that settlement of that extent and with those substantial structural effects so early in the building’s design life is not “undue” settlement in the context of the application under the BCA of cl.16.2.1 of AS3600 – where in the result, the issue of the Form 15 was seriously misleading as to the implicit compliance with AS3600 – where its misleading character was not altered by the mere possibility that the building certifier might discover that the anticipated settlement would be undue by examining the first report and the notes on the plans – where DEQ engaged in conduct that was misleading for the purposes of s52 of the TPA by giving the Form 15 to DDS – where there being no other issue concerning the elements of s52, it follows that DEQ should be found to have contravened that section – where pursuant to s82(1) of the TPA, Actron is entitled to recover the amount of loss or damage it suffered by the contravening conduct by action against DEQ or any “person involved in the contravention” – where the probabilities strongly favour a finding that Mr Henry knew that the Form 15 would convey to the building certifier that it was Mr Henry’s own opinion that the anticipated settlement was undue – where Mr Henry possessed the knowledge required to render him liable as a person involved in DEQ’s contravention.

Appeal allowed. Set aside the order made in the trial division that the proceeding against the second and third defendants is dismissed. Remit the matter to the trial division for further consideration. Direct the parties have leave to make written submissions about costs in accordance with the practice direction.

*Legal Services Commissioner v Sheehy* [2018] QCA 151, 29 June 2018

General Civil Appeal – where the respondent is a legal practitioner – where the respondent acted for one of two sellers under a contract for the sale of land – where settlement did not occur on the due date – where the respondent’s client agreed to an extension of the date for settlement but the other seller did not – where the solicitor for the other seller wrote to the buyer’s solicitor, copied to the respondent, electing to terminate the contract – whether the contract could be terminated at the election of one, but not both, of the sellers – where for this contract the reasoning in *Lion White Lead Ltd v Rogers* (1918) 25 CLR 533 was applicable: “[t]he time for performance having arrived and an actual fundamental breach having occurred, [Mr Brander was] entitled to say ‘I will not proceed further. There is nothing to compel me.’” – where put another way, Mr Brander as a joint promisee was not required to refuse to accept something less than the performance which the contract required of the buyer – where therefore, Mr Brander was able to terminate the contract upon the basis of the buyer’s failure to settle on 13 February 2009, regardless of the wishes of Mrs Brander – where Mr Brander’s termination was valid and effective, before the balance price was paid to the respondent’s trust account – where the respondent received into her trust account the balance purchase price for the land on behalf of her client and the other seller in circumstances

where the other seller had sent correspondence electing to terminate the contract – where the respondent had instructed the buyer’s solicitor that her client was agreeable to accepting the balance purchase monies to be paid into the respondent’s firm’s trust account – where the buyer’s solicitor transferred the balance purchase price to the respondent’s trust account – where the Queensland Civil and Administrative Tribunal dismissed an application that the respondent be disciplined for her conduct of that conveyancing matter – whether the judge constituting the tribunal referred to the correct test under s418 of the *Legal Profession Act 2007* (Qld) – whether the respondent’s conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner – where the judge said that “[t]he sellers owed each other reciprocal duties of good faith and fair dealing not to do anything unreasonable to scuttle a genuine sale transaction” and that “[f]undamental breach or not, the husband cannot unilaterally jeopardise the sale without good cause” – where the legal basis for those observations was not explained by the judge – where more particularly, the judge did not explain why he disagreed with Mr Purcell’s analysis based upon *Lion White*, that Mr Brander could terminate the contract, except on the basis that “the Sellers were [not] willing and able to settle on the 13 February 2009” – where the term “unsatisfactory professional conduct” is defined by s418 of the *Legal Profession Act 2007* (Qld) (LPA) – where the judge did not refer to s418 and it fairly appears that he did not apply that definition in his analysis of the respondent’s conduct – where the respondent may have thought that Mr Brander’s termination was of no effect; but it is clear that she did nothing which involved a proper assessment of that question – where she conducted no research, had apparently not encountered the problem previously and sought no advice from another practitioner – where instead, she simply went ahead in the belief that the interests of her own client would be best served by doing so – where a reasonably competent legal practitioner would have known or ascertained that she was not entitled to take steps to complete the contract over the objection of Mr Brander, which she did by calling upon the buyer to settle by paying the price to her trust account and by necessary implication from that conduct (if not expressly) releasing the buyer’s solicitor from his undertaking which had been given for the benefit of both Mr and Mrs Brander – where by her conduct, she effectively induced the buyer’s solicitor to act in breach of his undertaking to hold the transfer documents on behalf of both sellers – where her conduct fell short of the standard of competence and diligence to be expected of a reasonably competent legal practitioner.

Appeal allowed. Decision of the Queensland Civil and Administrative Tribunal dated 8 August 2017 be set aside. Declare that the respondent has engaged in unsatisfactory professional conduct as alleged by the appellant. The respondent be publicly reprimanded for that conduct. The respondent pay a penalty in the sum of \$1000. The respondent pay the appellant’s costs of the appeal.

## Criminal appeals

*R v Webb* [2018] QCA 102, 1 June 2018

Appeal against Conviction – where the appellant was charged with two counts of using electronic communication with intent to procure a person the appellant believed was under the age of 16 years to engage in a sexual act (counts one and three) and one count of grooming a child under 16 by exposing, without legitimate reason, a person the appellant believed was under the age of 16 years to indecent matter (count two) – where the appellant was an adult registered to use the social networking application Grindr – where a female police officer was also registered to use Grindr under the fictitious identity of a 14-year-old boy called “Mack” – where the appellant used Grindr and text messages to communicate with Mack – where Mack sent the appellant messages informing the appellant that he was 14 years old – where the appellant and Mack exchanged messages discussing a potential sexual encounter (count one) – where the appellant sent Mack an image showing an erect penis in underpants (count two) – where the appellant and Mack exchanged further messages arranging a place to meet (count three) – where the appellant gave evidence that he believed Mack to be aged 18 years old – where the jury acquitted the appellant on counts one and two but convicted him on count three – whether it was open to the jury to reject the appellant’s evidence that he believed that Mack was aged 18 – where the appellant’s evidence was not so compelling, that the jury

was bound to accept it, nor was it so strong as to require the jury to be left in doubt on the question – where it was open to the jury to reject his evidence and to satisfy, on the criminal standard, that this element, and thereby the charge, was proved – where the appellant submitted that the evidence suggested no fact or circumstance, between the occasion the subject of count two and that the subject of count three, by which the jury, if in doubt as to count two, could have been in no doubt as to count three – where counts two and three concerned messages sent on the same day – whether anything significant occurred between the times of counts two and three from which the jury might have become satisfied, beyond a reasonable doubt, that the appellant believed Mack was aged under 16 years when the jury was not so satisfied as to the appellant’s belief at the time of count two – whether there is a way by which the different verdicts on counts two and three can be reconciled – where count one concerned events two days prior to those the subject of counts two and three – where the facts the subject of count three occurred at a different time, although on the same day as those the subject of count two – where prior to the sending of the image, Mack had consistently referred to his age as 14 and that he was at school and sexually inexperienced, and despite all of those indications, the jury was not persuaded of the appellant’s belief at the time of the earlier offence on the same day – where there was nothing that was significant in what occurred by the time of the second of those offences (count three) from which the jury might have become satisfied, beyond a reasonable

doubt, about his belief – where the only issue was whether the appellant believed that Mack was under 16 – where this ground of appeal should be accepted, resulting in the conviction being set aside and a verdict of acquittal being substituted – where an accused can be criminally responsible under s218A(1) of the *Criminal Code* (Qld) when in fact the other person is under the age of 16 years, or where the accused believes that the person is under the age of 16 years – where s218A(9) and s218B(8) provide that it is a defence to a charge under s218A and s218B respectively to prove that the accused believed on reasonable grounds that the person was at least 16 years – where Mack was not in fact under 16 years old – where the basis of the appellant’s charge was the appellant’s belief about Mack’s age, not Mack’s true age – where the trial judge directed the jury that the appellant had a defence if he could prove that he believed on reasonable grounds that Mack was at least 16 – whether the trial judge misdirected the jury about the defence provided by s218A(9) and s218B(8) – where the judge directed the jury, correctly, that the prosecution had to prove that the appellant believed that Mack was under the age of 16 – where he ought not to have directed the jury about the defence under s218A(9) because, as this court held in *R v Shetty* [2005] 2 Qd R 540, that defence could be relevant only where the prosecution case was that, in fact, the person was under the relevant age – where the jury was thereby misdirected – where it can now be seen clearly that the jury could not have been satisfied both that the appellant had the requisite belief under s218A(1) and a belief under s218A(9)



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– where that did not occur to either counsel at the trial and it cannot be assumed that it would have occurred to the jury, who would have disregarded the direction under s218A(9) – where it is possible that at least some of the jury may have been confused about what constituted the one question upon which the outcome depended.

Appeal allowed. Set aside the conviction. Substitute a verdict of acquittal on count three on the indictment.

*Commissioner of Police v Flanagan* [2018] QCA 109, 5 June 2018

Application for Leave s118 DCA (Criminal) – where the respondent was convicted by a magistrate of the offences of common assault pursuant to s335 of the *Criminal Code* (Qld) and deprivation of liberty pursuant to s355 of the *Criminal Code* (Qld) – where the offences arose as a result of the respondent's conduct while he was on duty as a police officer – where the respondent sought to be excused from criminal responsibility by relying on the defence pursuant to s24 of the *Criminal Code* that he had an honest and reasonable but mistaken belief – where the magistrate found the prosecution disproved the respondent acted on an honest and reasonable but mistaken belief – where the respondent appealed against his convictions to the District Court – where the District Court judge overturned the convictions on the basis the trial had miscarried because the magistrate failed to determine whether the respondent was lawfully exercising a power under the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) – where the applicant seeks leave from the Court of Appeal to appeal against the District Court judge's decision – whether the District Court judge erred by concluding it was necessary for the prosecution to prove the force used in assaulting and detaining the complainant was more than reasonably necessary to deal with the offence – whether the District Court judge erred in acting contrary to s223(1) of the *Justices Act 1866* (Qld) by not conducting the appeal as a rehearing – where clearly the respondent could not be convicted of the offences if his conduct was lawful under the PPRA – where the magistrate erred in proceeding on the assumption (induced by defence counsel's concession) that the issue of whether the respondent's use of force was reasonably necessary for the purpose of s615 of the PPRA was to be determined on the true state of affairs at the time of the respondent's conduct – where that error led to the magistrate, wrongly, failing to consider whether the respondent's conduct was lawful because of the operation of the PPRA – where in other words, whether the prosecution had proven that the respondent was, at the relevant time, not possessed of lawful authority under the PPRA to act as he did – where several provisions of the PPRA were referred to before the magistrate as a basis for the lawfulness of the respondent's conduct, the only provision relied upon before this court concerned the power in s52 of the PPRA – where s52 applies only where a police officer "reasonably suspects" a particular state of affairs to exist, namely, that an offence has been committed, is being committed, or is about to be committed – where furthermore, while s52 renders it lawful for a police officer to exercise the power therein on the holding of the relevant suspicion, as was held in *Whitelaw v O'Sullivan* [2010] QCA 366, the exercise of a

power under the PPRA is constrained by s615 of the PPRA – where the primary judge did not err in finding that s615 operated to make lawful the use of force in the exercise of a power under the PPRA arising on a relevant reasonable suspicion, notwithstanding that the suspicion, as it transpired, was a mistaken one – where the primary judge erred in the approach her Honour took in remitting the matter of whether the respondent's conduct was lawful pursuant to the PPRA to the Magistrates Court rather than determining the issue on the evidence before her – where this court is able to and should determine that controversy on the uncontested findings made by the magistrate – where the degree of satisfaction required for the holding of a belief differs from that sufficient to give rise to a mere suspicion, the primary judge erred in finding that, had the magistrate embarked on the two-step process under s615 of the PPRA, he may have reached a different conclusion as to the respondent's guilt – where the error was in failing to appreciate that, given the uncontested findings, the prosecution had satisfied the magistrate that s24 of the *Criminal Code* had been excluded beyond reasonable doubt, including on the implicit basis that the magistrate found that the respondent did not himself think the force used by him was reasonably necessary in the circumstances – where in that regard, the magistrate rejected, as not credible, the respondent's evidence that he "thought" he needed to respond by pointing the gun and handcuffing Mr Povey – where the rejection of the respondent's evidence as to whether he thought he had to use the force he used provided an insurmountable obstacle to the reaching of a different conclusion as to whether the force used was reasonably necessary for the purposes of s615 of the PPRA – where there was, however, a second fundamental error made by the primary judge in concluding that the matter should be remitted – where it concerned her Honour's determination that there "was certainly, in my mind at least, evidence available to the magistrate to support a finding of suspicion, and, in fact, one that would support a finding of reasonable suspicion" – where the "evidence" to which the primary judge alluded was set out in her reasons and the respondent urged this court to have regard to those matters – where however, a careful consideration of the "evidence" referred to by the primary judge reveals that her Honour took a view of the evidence that contradicted or was inconsistent with the unchallenged factual findings of the magistrate – where given the uncontested findings made by the magistrate, the conclusion that the respondent acted in the lawful exercise of a power under the PPRA is not open – where given the magistrate's rejection of the respondent's evidence as to what he thought the circumstances he was facing appeared to be (that the vehicle was stolen and that there was a weapon), there was no basis upon which it was open to find that the respondent held a reasonable suspicion such as to give rise to a power under s52 of the PPRA, nor to support a finding that the force used was reasonably necessary – where in the circumstances, the uncontested evidence reveals no basis for setting aside of the convictions.

Grant leave to appeal. Appeal allowed. Set aside the orders of the District Court allowing the appeal and instead order that the appeal to the District Court be dismissed.

*R v Gibb* [2018] QCA 120, 12 June 2018

Appeal against Conviction and Sentence – where the appellant was convicted of one count of burglary by breaking while armed and in company and one count of armed robbery in company with personal violence – where the appellant contended that the trial judge had misdirected the jury – where the appellant submitted that the trial judge erred by directing the jury that further opening the already partly opened garage door could constitute 'breaking' – where s419(1) of the *Criminal Code* (Qld) creates the offence of burglary and includes those subsections containing aggravating circumstances with which the appellant was charged: gaining entry by a break, being armed with an offensive weapon and being in company – where s418(1) defines 'break' – where a person who "...opens, by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window...or other thing, intended to close or cover an opening in a dwelling...is said to break the dwelling..." – where although that definition might appear wide enough to encompass the appellant's actions in lifting the already ajar garage door, a different conclusion has been reached in respect of an identical definition in s400 of the *Criminal Code* (WA) – where in *Halley v The Crown* (1938) 40 WALR 105, the Full Court of Western Australia noted the common law approach: in *R v Smith* (1827) 1 Mood CC178 it had been held that a defendant who had opened wider a partly opened window could not be said to 'break' a building – where a similar approach, it was held, should be taken to the *Criminal Code* definition – where the logic is not explicit, but it seems to be that one cannot open something which is already in an open state – where *Halley* was followed by the Court of Criminal Appeal of Western Australia in *Galea v The Queen* (1989) WAR 450; there it was held that a man who further opened a door which he found ajar had not committed a breaking – where the point does not appear to have been considered in any Queensland case, but there is no reason to conclude that the interpretation given to the same words in the appellate decisions from Western Australia is "plainly wrong" – where the words used in s418(1) should, accordingly, be given the same meaning: a person who pushes or lifts an already opened door or window does not 'break' the relevant dwelling or premises – where consequently, the trial judge ought to have directed the jury that the aggravating circumstance of entry by means of a break was not made out – where nevertheless, the jury must have been satisfied that the appellant was guilty of entering with the aggravating circumstances that she was in company with another and armed, an offence of which she could have been found guilty on the indictment – where s668F(2) of the *Criminal Code* gives the court the power to substitute a different verdict in a case such as this – where the appropriate course here is to exercise that power and to substitute a verdict of guilty of burglary while armed and in company, without the aggravating circumstance of breaking – where it is necessary to resentence the appellant on the burglary charge with the aggravating circumstances of being armed and in company – where it is implicit in the trial judge's finding that the appellant lured Mr Cummings to the garage where he was immediately assaulted by Birch that his Honour found that the entry was made

with the intention of committing such an assault – where the seriousness of that offence is very little diminished by the fact there was no breaking involved – where s668F(2) says the court may substitute a different verdict “instead of allowing or dismissing the appeal” – where, however, the High Court in *Zaburoni v The Queen* (2016) 256 CLR 482, concluding that this court should have acted under s668F(2) to substitute a verdict, observed “The correct order for the Court of Appeal was to allow the appeal and substitute a verdict of guilty of the alternative offence and impose sentence for it” – where the High Court then proceeded to make the orders it said should have been made, allowing the appeal and substituting a verdict of guilty of a lesser offence – with the benefit of that guidance, then, it would seem that, notwithstanding the phrase ‘instead of’ used in s668F(2), the appeal on count one should be allowed.

Appeal against conviction on count one is allowed. Verdict on count one is set aside and a verdict of guilty of burglary while armed and in company is substituted. The appellant is sentenced to four years’ imprisonment on count one. It is declared that she has already served 829 days of that sentence in pre-sentence custody and the parole eligibility date is fixed at 7 March 2018. The appeal against conviction on count two is dismissed. Leave to appeal against the sentence on count two is refused.

#### *R v Leach* [2018] QCA 131, 22 June 2018

Appeal against Conviction – where the appellant was compulsorily examined by auditors from the Australian Tax Office (ATO) – where subsequent investigations by the ATO led to his examination being included as part of a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP) – where the appellant was subsequently charged with Commonwealth tax offences and also a count of fraud under the *Criminal Code* (Qld) for misappropriating funds held in a solicitor’s trust account on behalf of an estate – where money from a trust account was used to repay ATO – where the appellant applied for a permanent stay on the grounds that the release of his compulsorily obtained examination to the CDPP was unauthorised – whether the primary judge erred in law in not granting a permanent stay of the prosecution, or in not making orders to ensure that the prosecution proceed without any advantage from the compulsorily obtained evidence – where these considerations give rise to the issue of statutory interpretation raised by this appeal – where the question is whether the legislation implicitly authorises the disclosure to and use by the DPP of the content of a s353-10 examination (*Taxation Administration Act 1953*) for the purpose of a consideration of charges against the examinee, for the purpose of the formulation of such charges, for use in the preparation of the prosecution case in relation to such charges and as evidence at a criminal trial to prove the guilt of the examinee – where evidence obtained by means of a statutory power to compel the giving of answers, under a statute that abrogates the privilege against self-incrimination, from a person who has not been charged, and which is evidence that, upon the person’s being charged, would disclose defences or explanations of transactions by the accused which he or she may raise at

a trial, and possibly evidence or information that would tend to show that documents or transactions, apparently regular on their face, in fact tend to support the charges, ought not be disclosed to a prosecutor and cannot be used by a prosecutor against the examinee – where the reason why such material ought not be disclosed is that its use would contravene what Hayne, Bell and Kiefel JJ were later to identify in *X7 v Australian Crime Commission* (2013) 248 CLR 92 as the “fundamental principle” – while in *X7* and in *R v Seller* (2015) 89 NSWLR 155 the *Taxation Administration Act 1953* expressly prohibited the use of the material as evidence, it was the common law which prohibited use of the material at all by the prosecutor – where these authorities leave open the question, and it is doubted, whether an Australian legislature could validly pass a law to alter the criminal process so as to compel a person to give self-incriminatory evidence for the executive to use in order to formulate a criminal charge against that person and then as evidence to secure that person’s conviction – where the cases do make clear is that legislative authority for such a course of action requires the plainest manifestation in an Act – where consistently with the decisions of the High Court in *X7* and *Lee v The Queen* (2014) 253 CLR 455, the decision of the New South Wales Court of Criminal Appeal in *Sellers* and the decision of the Full Court of the Federal Court in *Deputy Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, the disclosure to the DPP of the evidence given under compulsion in this case, and its subsequent use by the DPP to prepare for the appellant’s prosecution and its admission as evidence at the appellant’s trial, conflicted with the “fundamental principle of the common law” that the onus of proof rests on the prosecution and conflicts with its “companion principle” that the prosecution cannot compel an accused to assist it – where in each of *X7* and *De Vonk* the appellants had already been charged when it was sought to question them – where in each case it was held that questioning about the subject matter of existing charges was not authorised by the legislation – where in *Sellers* and *Lee* the appellants were questioned before they had been charged – where the material so obtained was not to be available to the prosecution when charges were later laid – where these consequences followed because the prosecution of criminal charges faithfully in accordance with the fundamental principle identified by the High Court in *X7* leaves the accused with no role to play in his or her own prosecution – where a fairly conducted criminal prosecution leaves the accused freedom to make certain choices, a freedom that is guaranteed only if the principle is adhered to – where the use of the material obtained in this case distorted this usual process because the appellant “could no longer determine the course he would follow at his trial according only to the strength of the case that the prosecution proposed to, and did, adduce in support of its case that the offence charged was proved beyond reasonable doubt” – where the consequence is “inescapable” – where the express objects of Division 355 and the general language of s355-50 do not give rise to a necessary implication that the fundamental principle identified in *X7* has been abrogated – where for tax-related offences there is no indication that the objects of the legislation, as expressed in s355-10 or as

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implied by the text of Division 355 itself, would be defeated if the general language of s355-50 were read as not permitting the use by the prosecution in this case of the evidence obtained from the accused about the subject matter of what later became the charges against him and, as I have said, no such submission was advanced by the respondent on appeal – where it is also observed that this appeal was argued upon the common assumption between the parties that the expression “related to a taxation law” in s355-50 was apt to refer to the charges in this matter – where the court heard no argument about the validity of that assumption – where because of the conclusion that has otherwise been reached, it is not necessary to consider that particular issue, which can await another occasion.

Appeal allowed. Convictions quashed. Retrial ordered.

*R v Verhagen; Ex parte Attorney-General (Qld)* [2018] QCA 142, 29 June 2016

Sentence Appeal by Attorney-General (Qld) – where the Attorney-General appeals against the respondent’s sentence – where the Attorney-General submits that the sentence was manifestly inadequate – where the respondent was found guilty by a jury of one count of trafficking in dangerous drugs, one count of possessing dangerous drugs, and one count of possessing property obtained from trafficking – where the respondent was sentenced to three years’ imprisonment in respect of the trafficking count, and one year imprisonment in respect of each

of the possession counts – where the respondent’s periods of imprisonment were suspended by the sentencing judge after six months were served – where the offences related to a synthetic cannabis product – where the respondent sold the dangerous drug in the course of his legitimate business as a tobacconist – where the drug was declared a dangerous drug under Schedule 2 of the *Drugs Misuse Act 1986* (Qld) from 5 April 2013 – where the respondent was found to have knowledge that the drug was an illegal drug at the time of the trafficking – where the trafficking was for monetary benefit – whether the aggravating and mitigating features were appropriately reflected in the sentence – where the respondent had shown limited cooperation with authorities – where the respondent had attempted to conceal the sales of the dangerous drug – where the respondent had not plead guilty, and instead was subject of a trial – where the respondent had no prior convictions, was of good character and work history, and would experience financial hardship as a consequence of incarceration – where the respondent’s conduct involved persistent and systematic sales of illegal products over a period of 11 months under the guise of his legitimate tobacconist business, in circumstances where he had been aware for some months that the sale of the product was illegal – where the respondent pursued that conduct motivated by greed in order to receive the benefit of significant profits – where in addition to that conduct, the respondent conducted the operation specifically knowing of its illegality and with the level of sophistication designed to disguise the existence of that

business from law enforcement authorities – where even when detected he evidenced no remorse, making limited admissions of matters likely to be established by the police and deliberately lying as to the magnitude of his illegal conduct – where such conduct was deserving of the imposition of a substantial period of imprisonment – where offenders who engage in the unlawful business of trafficking in dangerous drugs purely for commercial profit, and not because they had a drug addiction of their own to fund, require particular deterrence – where the sentence of three years’ imprisonment manifestly failed to reflect the serious nature of that offending – where that failure was of a magnitude to constitute a sentence so out of range as to give rise to an inference that the sentencing discretion has miscarried in the present case.

Appeal against sentence allowed. The sentences below be set aside. The respondent be sentenced to 4½ years’ imprisonment on count three of the indictment, and 12 months’ imprisonment in respect of each of counts four and five of that indictment. The sentence of imprisonment on count three of the indictment be suspended after the respondent has served 20 months’ imprisonment, for an operational period of five years.

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](http://sclqld.org.au/caselaw/QCA). For detailed information, please consult the reasons for judgment.

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# Career moves



Alexander Fairweather



Angela O'Neill



Mark Kenney



Ben Hall



Lara Radik



Amy Heselwood



Tom Pepper



Tom Rynders



Adelaide Davies



Jacob Redden



Belinda Hughes



Jason Lewis

## Bennett Carroll Solicitors

Bennett Carroll Solicitors has announced the promotion of **Alexander Fairweather** to associate. Alexander, who joined the firm in 2014 and was admitted in 2016, runs a variety of commercial and litigation matters, including a growing portfolio of real estate agencies and franchise businesses.

## Broadley Rees Hogan

Broadley Rees Hogan has announced the promotion of **Angela O'Neill** to associate in the commercial dispute resolution team. Angela practises in commercial litigation and succession law.

## Carter Newell

Carter Newell has announced the appointment of two partners and promotion of three staff.

New partner **Mark Kenney**, a member of the construction and engineering team, has particular expertise in large-scale infrastructure projects, with a focus on providing advice in front-end construction projects, including contract negotiation. Insurance expert **Ben Hall** has also been appointed to the partnership and will lead the firm's growing Melbourne office.

**Lara Radik**, who focuses on workplace and industrial relations and workplace health and safety, has been promoted to special counsel, while **Amy Heselwood**, an experienced litigator who acts in matters before the Federal and Supreme Courts, has been promoted to senior associate.

**Tom Pepper**, a member of Carter Newell's financial practice focusing on professional indemnity, directors' and officers' insurance and management liability insurance, has been promoted to associate.

## Creevey Russell Lawyers

Creevey Russell Lawyers has announced the promotion of senior associate **Tom Rynders** to partner and that of **Adelaide Davies** to associate. Tom, who was admitted in 2009, is a QLS accredited specialist in personal injuries. Adelaide joined the firm in 2013 as a paralegal.

## Gilchrist Connell

Gilchrist Connell has promoted six lawyers, representing each of its five offices, including **Jacob Redden** in Brisbane.

Jacob, who has been promoted to senior associate, was a '30 under 30' finalist in 2017 and 2018, and contributes to access to justice with legal volunteering.

## Hughes & Lewis Legal

**Belinda Hughes** and **Jason Lewis** have joined forces to form Hughes & Lewis Legal, a new insurance law practice.

Belinda has focused on workers' compensation and public liability law for the last 12 years, both as a lawyer within WorkCover Queensland, and then as an external panel lawyer contracted to WorkCover.

Jason has worked in the compensation field since 1998, helping insurers in workers' compensation and compulsory third-party claims (both in private practice and in various in-house roles with both WorkCover Queensland and Suncorp Insurance).



Liam Davis



Eva Vico



Ben Wood



Emma Murray



Goran Gelic



Xavier Milne



Daniel Dash



Kayleigh Whittaker



Annalise Thompson



Mark Askin



Valerie Blacker



Maria Capati



Renée Kinman



Ying Tay



Peter Mills



Michael Mayes



Marcelle Webster

## McCullough Robertson

McCullough Robertson has welcomed three new partners, two special counsel and seven senior associates.

The three new partners are **Liam Davis**, **Eva Vico** and **Ben Wood**.

Liam, who began his career in the firm's graduate program in 2009, has become a recognised native title and cultural heritage expert, with further experience in environmental law and resources regulation.

Eva focuses on project developments, including structuring, joint venture agreements, development management agreements and other project delivery arrangements, strata and community title documents, negotiation and advice on commercial, industrial and retail leasing, agreements for lease and licensing agreements.

Ben, who joined the firm in 2000, is a recognised equity capital markets practitioner with a focus on IPOs and secondary capital raisings. He also works in the 'start up' space, advising on seed capital, Series A funding/venture capital, crowd funding and related document suites as well as regulated takeovers and schemes of arrangement.

**Emma Murray** (commercial and tax) and **Goran Gelic** (construction and infrastructure) have been promoted to special counsel, while **Xavier Milne** (litigation and dispute resolution), **Halie Beaumont** (estates), **Kara Meziniec** (planning and environment), **Joel McAndrew** (property,

planning and finance), **Naomi Benton** (corporate advisory), **Andrew Bukowski** (commercial and tax group) and **Emile McPhee** (property, planning and finance) have been promoted to senior associate.

## NB Lawyers

NB Lawyers has welcomed **Daniel Dash** to the commercial law team as an associate and announced the promotion of **Kayleigh Whittaker** to senior lawyer.

Daniel has acquired extensive experience advising business owners and directors in a range of commercial law matters including business sales, share sales, contracts, and business restructures. Kayleigh has worked with NB Lawyers since 2016 and will continue to focus on building the property law practice as well as assisting in commercial and employment matters.

## O'Reilly Workplace Law

**Annalise Thompson** has joined O'Reilly Workplace Law as a lawyer. She has worked exclusively in employment law since admission in 2015 and is committed to assisting businesses in spotting and managing potential risks. Annalise has represented clients in matters before the Fair Work Commission, including unfair dismissal and general protections claims and many Federal Court and Federal Circuit Court proceedings.

## Piper Alderman

Piper Alderman has announced 17 promotions across the firm, including seven new partners.

Five of the new partners are in the Brisbane office, doubling the Brisbane partnership to 10 and including three female partners, which takes the percentage of female partners to 23% of the national partnership.

New partner **Mark Askin**, a member of the real estate team, focuses on the acquisition, disposal and development of commercial, industrial and retail properties. He also has extensive experience in retail, commercial and industrial leasing, acting for both landlords and tenants in most Australian states.

**Valerie Blacker**, who works in dispute resolution, has a focus on funded litigation matters and is responsible for a number of large complex matters involving contractual disputes, representative actions, building and construction, and professional negligence.

**Maria Capati** joined the firm in 2013 as a senior associate and was promoted to special counsel in 2016. She focuses on acting for transport companies and has experience in advising Australia's largest transport operators and state associations on major government public passenger service contracts in Queensland, New South Wales, Victoria, South Australia, Tasmania and Western Australia.



Helle Beaumont



Kara Meziniec



Joel McAndrew



Naomi Bernton



Andrew Bukowski



Emile McPhee



Lillian Rizio



Josh Steele



Lucy Kenny



Lauren Black



Michael Sing



Paul Armit



Rhiannon Saunders



Jacqui Lee Long

Lillian Rizio practises in all forms of dispute resolution with a primary focus on corporate and commercial disputes. She acts for a vast range of clients, including litigation funders, large companies and financial institutions.

Josh Steele focuses on public and private acquisitions and equity capital market transactions, particularly for the energy and resources sectors and SME growth companies. Josh also regularly provides general corporate and commercial advice.

Other Queensland promotions for Piper Alderman include that of dispute resolution practitioner Lucy Kenny to special counsel and the elevation to associate of dispute resolution team members Ryan Eather, Alexander Sloan and Genevieve Yates.

### Plastiras Lawyers

Plastiras Lawyers has welcomed Lauren Black as a solicitor. Lauren focuses on property and commercial law, assisting a range of clients including property developers, health professionals and SMEs.

### Rostron Carlyle Rojas Lawyers

Rostron Carlyle Rojas Lawyers has announced three promotions, including that of Michael Sing from special counsel to partner.

Michael, who joined the firm four years ago, has extensive experience in commercial litigation and dispute resolution, as well as in commercial and property transactions for foreign investors.

Associate Renée Kinman, who has been promoted to senior associate, is a QLS accredited specialist in family law and assists clients in resolving parenting and financial disputes. She also has experience in estate planning, administration and litigation.

Ying Tay, who has been promoted to associate, works in the firm's property and commercial practice with a focus on property transactions ranging from leasing, commercial property and acquisitions of businesses to development sites.

### Thynne + Macartney

Thynne + Macartney has appointed two senior practitioners.

Special counsel Peter Mills is a recognised expert on the *Personal Property Securities Act* (PPS) and how it operates with other laws, both in Australia and overseas. He provides advice on compliance and enforcement under the PPS, and advises creditors and liquidators of insolvent companies.

Michael Mayes has been appointed a senior associate in the banking and project finance group. He has experience advising banks, financial institutions and private lenders in a range of transactional banking and finance matters.

### Tucker Cowen

Tucker Cowen is pleased to announce the promotions of Marcelle Webster to special counsel and Paul Armit to associate.

Marcelle joined the firm in 2008 and practises principally in commercial litigation, employment and IR law.

Paul has been with the firm since 2016 and has furthered his experience in complex commercial litigation and in the conduct of complex trusts and estate litigation, appearing in all state courts, the Federal Court and Family Court.

### WGC Lawyers

WGC Lawyers has announced the appointment of Rhiannon Saunders and Jacqui Lee Long to the team of directors.

Practising in commercial litigation, Rhiannon assists her clients with a variety of complex body corporate disputes, contractual disputes (including debt recovery issues) and insolvency matters. Her legal interests also extend to governance and risk management, particularly in respect of not-for-profit organisations.

Jacqui heads up the firm's estate/succession law department practising exclusively in estate law and advising a diverse range of clients in estate planning, administration and litigation.

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

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### 11 QLS Touch Football Tournament 2018

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Join Queensland Law Society and the legal profession for a day of footy and fun. Get your firm together and join this hotly contested tournament by entering teams of 6-14 players (must include at least three females). Spectators welcome!

### 17 Mackay workshop

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You asked, we listened. QLS is coming to Mackay to present a full-day professional development workshop. Hear from subject matter experts and finish the day with a regional roundtable discussing issues affecting the local profession.

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### 17 Mackay – Celebrate, recognise and socialise

5.05-7pm

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### 21 Hot topic: *Re Cresswell* – death and reproductive technology

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*Re Cresswell* [2018] QSC 142. Join us for an in-depth look at this landmark case, and engage with our diverse panel of experts as they review the decision and its implications.

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### 23 Practice Management Course: Medium and large practice focus

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# Basic entitlements – the National Employment Standards

by Robert Stevenson



In my last column, I spoke about the *Fair Work Act* National Employment Standards (NES) being the foundation of the hierarchy of employment law instruments.

This is because these standards apply to all employees regardless of level and income and cannot be contracted out of. I want to spend a little bit of time explaining these standards as the starting point for any consideration of employee rights.

There are 10 standards relating to:

- maximum weekly hours
- requests for flexible working arrangements
- parental leave
- annual leave
- personal/compassionate leave
- community service leave
- long service leave
- public holidays
- notice of termination/redundancy pay
- Fair Work information statement

*Maximum weekly hours* – The standard provides that an employer must not request or require a full-time employee to work more than 38 hours a week unless the additional hours are reasonable. An employee may refuse to work unreasonable additional hours and the NES contains a list of factors to be considered in deciding whether additional hours are reasonable. Award-covered employees are also subject to award requirements for overtime and penalty rates. For award-free employees, these hours can be averaged by agreement over a period of up to 26 weeks. It is common for employment contracts with award-free employees to include specific provision for working additional reasonable hours.

*Requests for flexible working arrangements* – Employees (including casuals) with more than 12 months' service can make a request to change their working arrangements because of their circumstances if the employee:

- is the parent, or has responsibility for the care of a child of school age or younger (which includes a part-time work request by parents returning to work after taking parental leave)
- is a carer within the meaning of the *Carer Recognition Act 2010* (Cth)
- has a disability
- is 55 or older
- is experiencing violence from a member of their family or provides care and support to an immediate family member or a household member who requires that support because they are experiencing domestic violence.

Possible types of flexible working arrangements may, for example, include a reduction in hours, non-standard start or finish times, working from home or job-sharing arrangements.

The employee must make the request in writing and set out details of the change sought and reasons. Employers are required to respond in writing within 21 days stating whether the request is agreed to or refused.

Employers can only refuse a request on reasonable business grounds and must include details of the reasons for refusal in their response to the request. The *Fair Work Act* contains an inclusive list of what might be reasonable business grounds, including cost, ability to change the working arrangements, practicability, significant loss of efficiency/productivity and significant negative impact on customer service.

Employees do not have an automatic right to challenge a refusal but may be able to bring action under the *Fair Work Act*'s discrimination and general protections provisions and dedicated discrimination legislation.

If an employer can't agree to the request that is made, discussions should be had with the employee to see whether any compromise arrangement can be reached. If there is a change, then both parties should be clear about how long that change will operate for (and this should be done in writing). If the change is to be permanent, then the employment contract should be changed by agreement.

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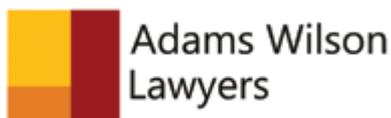
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### Missing wills continued

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# A humble saviour for the wine industry?

with Matthew Dunn



I have a fond memory of the wine cask – a silver bag pegged precariously to an old Hills Hoist in a ramshackle grass-and-concrete backyard, and set in revolving motion by the spin of an eager law student.

*Goon of Fortune* was the name for the liquid version of TV's *Wheel of Fortune*.<sup>1</sup> But like the show, the cask is almost just a memory, an anachronism from a less sophisticated age.

The reputation of the wine cask no longer rides high as it once did, and is relegated to packaging of 'bulk plonk' in the common imagination. It is still possible to source 10-litre casks (Brown Brothers still make them), affectionately known as a 'Walrus', but few would admit to having bought one in the last 20 years.

Pity.

Pity because the wine cask is a great Australian invention and it could well be the packaging of tomorrow – the saviour the wine industry didn't know it needed.

The cask itself was the brainchild of South Australian winemaker Thomas Angove AM (grandson of estate founder D. William Angove). Tom took the idea of using a plastic bag in a box to transport wine, a technique which had previously only been used for battery acid in garages and workshops. In 1965 he patented his invention, although at that time there was no tap, but the package was supplied with a peg to seal the corner after it had been snipped.

In 1967, Leicester-born Australian inventor Charles Malpas invented the revered plastic tap for the Penfolds Wines 'Tablecask' product and the modern cask took its shape.

The rest is history. The new packaging was ideal for bulk wine and it has stayed at the economic end of the market ever since. However, our prejudice for bottles as the packaging of choice for quality wine has only grown stronger, with even cask-quality cleanskins now only coming in glass.

But, there is no reason to only put lesser wine in the cask. *New York Times* opinion writer Tyler Colman made the case for casks in 2008.<sup>2</sup> He said casks were the practical and environmentally responsible future of the wine industry.

For any wine which is not intended to age, the cask has a number of advantages:

- Casks are free of cork taint.
- Casks permit any quantity of wine to be poured without oxidising the portion left.
- Cask wine should last at least a month after the seal is broken.
- Light doesn't affect a cask wine.
- Transport of wine casks generates significantly less carbon emissions than heavier glass bottles.

Colman pointed out that in the United States wine is largely made on the west coast but drunk on the east coast. He said that if the 97% of wines made in the US to be consumed within a year were transported in casks, two million tons of greenhouse gas would be reduced, or the equivalent of 400,000 cars.

So in a future where we want easy access and storage of environmentally friendly wine to 'drink now', the humble cask puts forth a compelling case.

## Notes

<sup>1</sup> Seven Network gameshow running from 1981 to 2004.

<sup>2</sup> [nytimes.com/2008/08/18/opinion/18colman.html](http://nytimes.com/2008/08/18/opinion/18colman.html).

**The tasting** Three 'premium' cask offerings were examined for the benefit of readers.



The first was the **Hardys Reserve Shiraz NV 3ltr**, which was brick red in colour and had a nose of white pepper and a slight hint of vanilla amid the stewed fruit. The palate was smooth, round and supple, yet there was little tannin but some noticeable acid backbone. There was a note of vanilla but an absence of concentration of flavour.



The second was the **Yalumba Winesmiths 2017 Shiraz 2ltr**, which was brick and crimson red in colour and had the nose of currants. The palate was light with some tart fruit on the attack with a following note of spice and leather.



The third was the **DeBortoli Reserve Premium Shiraz 2017 2ltr**, which was purple red and had a nose of simple currant. The palate was tart fruit sitting on a layer of spice and saddle. There was an absence of tannin but a more approachable softness.

**Verdict:** The three offerings were equally approachable and ideal as winter mulled wines.

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

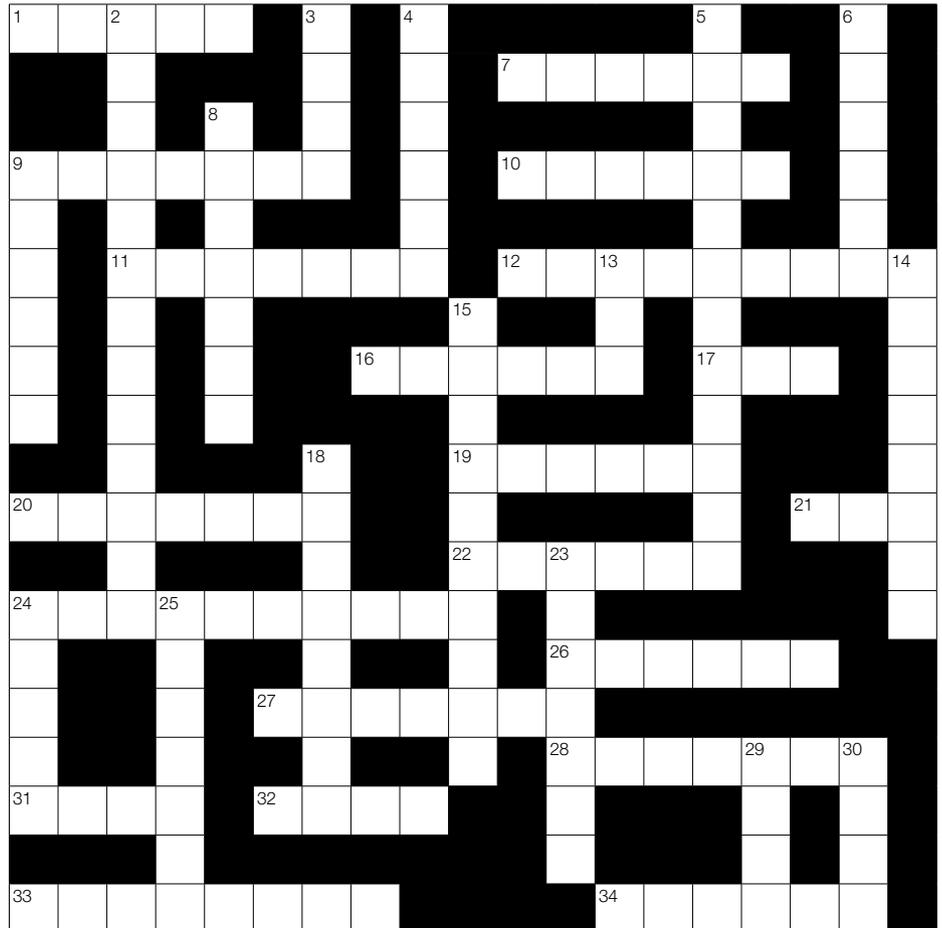
# Mould's maze

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



## Across

- 1 High Court of Australia (HCA) case enunciating the test involving summary termination of an action, *General ..... Industries v Commissioner for Railways* (NSW). (5)
- 7 Eye surgeon sued for medical negligence, who then sued *The Daily Telegraph* in defamation, both cases HCA appeals. (6)
- 9 Statutory instrument introduced by a parliamentarian who is not a part of the Cabinet, ..... member's Bill. (7)
- 10 Contractual defence involving unlawful conduct at common law, and otherwise 'illegitimate pressure'. (6)
- 11 Former HCA justice sued by her sister seeking a family provision order in regard to the estate of their late mother. (7)
- 12 Fraud, undue influence, unconscionability, and mistake are all factors ..... against the enforceability of a contract. (9)
- 16 HCA case providing that an employee does not have the right to continuous employment, *Automatic Fire Sprinklers Pty Ltd v .....* (6)
- 17 Master of Laws. (Abbr.) (3)
- 19 HCA case involving whether a restaurant had breached its duty of care by failing to provide any security for patrons, ..... *Palace Pty Ltd v Moubarak*. (6)
- 20 Legal research database. (Abbr.) (7)
- 21 Stock market device giving the owner the right, to sell an asset at a specified price by a predetermined date to a given party, ... option. (3)
- 22 HCA case abolishing the rule of landlord tortious immunity for defective premises causing injury, *Northern Sandblasting Pty Ltd v .....* (6)
- 24 Marital intercourse, dwelling under same roof, society and protection, support and recognition in public are all factors to ..... *vita*. (Latin) (10)
- 26 Terms of settlement. .... of order. (6)
- 27 Warning given in relation to a person's right to remain silent. (US) (7)
- 28 The 'honest ..... test' was used to determine whether a director had breached their duty of care to shareholders. (7)
- 31 Dispense justice or punishment. (4)
- 32 *Jago v District Court of NSW* involved whether a court should order a permanent .... of proceedings. (4)
- 33 The *Trade Practices Act (Cth)* is now found in the Australian ..... Law. (8)
- 34 Formally cancel. (6)



## Down

- 2 Former rugby league player who sued for defamation over a naked photograph. (13)
- 3 Lodge in a court registry. (4)
- 4 The prosecution's burden of proof in a criminal case, a '..... thread' in *Woolmington v DPP*. (6)
- 5 A floating charge ..... into a fixed charge. (12)
- 6 Doctrine preventing a party from bringing claims which should have been pursued in former court proceedings, ..... estoppel. (6)
- 8 HCA case concerning the occupier's duty to a trespasser, *Australian Safeway Stores Pty Ltd v .....* (7)
- 9 Civil order conferring the right to search premises and seize evidence, Anton ..... (6)
- 13 A criminal trial cannot continue with less than ... jurors. (3)
- 14 HCA case involving the tests to be applied when assessing the validity of amendments to enable expropriation of company shares, ..... *v WCP Ltd*. (8)
- 15 Post-judgment civil seizure of property. (10)
- 18 Edwin Moynahan and Tony Moynihan QC (but not Martin Moynihan AO) were both judicial appointments to the ..... Court. (8)
- 23 Contractual term involving retention of title, ..... clause. (7)
- 24 Lacking jurisdiction, ..... *non judice*. (Latin) (5)
- 25 HCA case endorsing the 'control test' of employment, ..... *v Brodribb Sawmilling Company Pty Ltd*. (7)
- 29 Federal Court case involving misleading and deceptive conduct, .... *Company of Australia Inc. v .... Bell Pty Ltd*. (4)
- 30 A statute that comprehensively deals with one area of law. (4)

Solution on page 52

# Show time!

## Sugar is sweeter when your parents pay

by Shane Budden



As I write this, my children are busily planning their expedition to the Royal Brisbane Show, better known as the Ekka, or the Show, or – to parents – the GFC, since attending the Ekka these days costs more than a royal wedding while delivering a slightly higher volume of animal waste.

This is ironic for people of my generation (*note*: my generation does not have a letter, as the alphabet had not been invented) as we recall the Show as actually being fairly cheap fun. Granted, a lot of this was because our parents were paying, but there was also some value if you worked at it.

For younger readers, who never look up from their phones, even if they are lying on the hood of the car which has just hit them because they have wandered onto the M1 while playing Candy Crush and Facebooking their scores to their friends (one of whom is probably driving the car with their eyes glued to their phone), and so have never heard of the Show, I should explain.

The Show is a big gathering held every year around flu season, designed to allow country folk to show off their fine produce and to allow city folk to be exposed to a variety of flu strains which they would otherwise not encounter unless they swam naked across the Ganges and then slept in a medical waste dump. I strongly suspect that the Show is underwritten by Big Pharma and major tissue manufacturers.

The chief attraction for young kids is the showbags, which contain samples of various types of junk food which cannot be sold in shops due to health and safety regulations, and the sorts of toys that break if the atmospheric pressure varies by a tenth of a percent. They are called showbags because calling them 'toxins and rubbish' bags would make them hard to market.

In any event, as I said there was value once upon a time, and we generation nothings felt that the showbags best represented this value. We spent countless hours going through lists of showbag contents (which were helpfully printed in the newspaper, directly opposite a whole-page ad for Carboolic Smoke Balls and Vicks VapourRub) to see which one represented the best value, as determined by overall sugar content.

Now, every member of my nameless generation who read that last line and said 'Sunny-boy Bag' raise your hand; thought so! As we all know, a primary school child could probably survive for months on the contents of a Sunny-boy bag alone, although nobody can be sure because the bags rarely lasted a week. The result of this was that we all returned to school from the Show with our blood running at around 85% sugar, which may explain why so many teachers got 'the flu' around that time.

The point is that the bags had value because they were very cheap, which the companies could do because the contents were largely sugar in all three of its physical states – liquid, frozen and gooey. The only non-sugar items in these bags would usually be something like a yo-yo that functioned in either the up or the down position, but not both, and a couple of surplus comic books with titles like 'Mathematics Man: Crime Equals Zero with this Algebraic Hero!' and 'Martha Ritter, Undercover Knitter'.

This all started to change when big corporations realised that some of our parents were leaving the Show with money in their wallets, and decided that they should put a stop to this. They went about this via the time-honoured approach of taking something we kids already liked and producing a cheap and breakable version.

For example, I recall my excitement when the first Spider-Man bag hit the Show, complete with a cheaply-reproduced copy of a comic I already owned, a plastic Spider-Man mask through which I could neither see nor breathe, and an actual pair of web-shooters just like Spidey's.

OK, so they were a little different in that they shot suction-cup plastic darts that would not stick to the walls, so they fell off a lot, but they certainly did less harm to me than the sugar-filled bags (and would probably have been more nutritious had I happened to eat them).

The important thing is that these new bags – there were versions for all the popular super heroes: Batman, Superman, Martha Ritter – delivered all this quality for a mere five times the price of the other bags, thus achieving their main purpose of getting the rest of our parents' money.

This is a tradition that continues to this day, with showbags now – at least, based on price – containing both the materials and instructions necessary to construct your own functioning nuclear reactor, including the uranium.

On a slightly more serious note, the Show actually is a good day out with the family, especially if you avoid the showbag pavilion and actually look at the animals and produce that are the reason for its existence. We'll be there this year, looking at (and also aromatically detecting) puppies, cows, horses and a variety of animals that my suburban kids would otherwise not see. It is a vital lifeline between country and city, and worthy of our support.

Our society is defined by these traditions, and I hope we can keep them alive – the tradition of wonder in the eyes of children, the tradition of encountering new and different things, and my most dearly held Show tradition – the tradition of my parents paying for it.



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## Crossword solution

### From page 50

**Across:** 1 Steel, 7 Rogers, 9 Private, 10 Duress, 11 Gaudron, 12 Vitiating, 16 Watson, 17 LLM, 19 Adeels, 20 Austii, 21 Put, 22 Harris, 24 Consortium, 26 Minute, 27 Miranda, 28 Lunatic, 31 Mete, 32 Stay, 33 Consumer, 34 Revoke.

**Down:** 2 Ettingshausen, 3 File, 4 Golden, 5 Crystallises, 6 Anshun, 8 Zaluzna, 9 Piller, 13 Ten, 14 Gambotto, 15 Attachment, 18 District, 23 Romalpa, 24 Coram, 25 Stevens, 29 Taco, 30 Code.

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