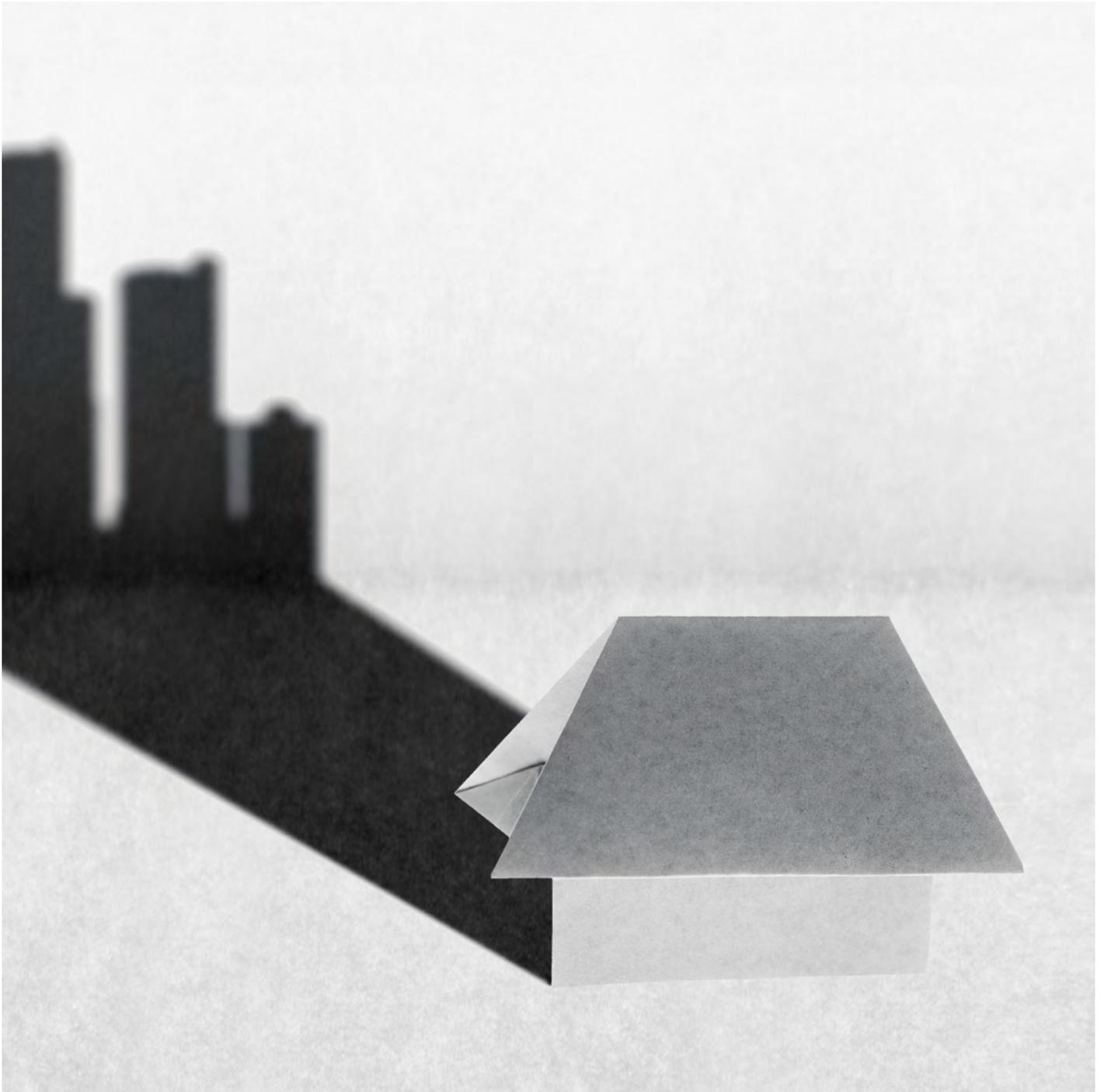


# PROCTOR



Queensland  
Law Society

August 2016 – Vol.36 No.7

According to plan? | The final countdown  
Family provision claims – from strained to estranged



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# PROCTOR

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# What a difference a decade makes

## Will only the proactive survive?

Ten years ago, Queensland Law Society joined in early discussions about a national electronic conveyancing system.

Members were no doubt excited to learn they could buy a one-gigabyte stainless steel memory stick for just \$139 through our shopping service.

*Proctor* revealed the features of the soon-to-be-released Windows XP, looked at the YouTube and Wikipedia phenomena, and included instructions on how to fill in a new research request form online.

There were some clouds – phishing, data security and spam were topics that needed to be considered.

Generally, however, the digital world looked like an exciting place that would inform and entertain us, and make our work easier.

It would appear that terms such as 'digital disruption' simply didn't exist, and probably no one had yet developed the concept of an online-only law firm with all staff working from their homes. The practice of using digital means to outsource legal work to cheaper overseas lawyers would have been in its infancy, and as far as I'm aware, the idea of a 'Webjet' for legal services was yet to come.

The thought that robots would begin to replace lawyers remained firmly in the realms of science-fiction.

Even in 10 years, a lot of things can change.

Some changes were simple, and very welcome, such as the introduction of online practising certificate and QLS membership renewals; the transition went smoothly with barely a hiccup.

Some predicted changes never eventuated – remember the push for an all-in-one Australian Smart Card?

Today, other changes have taken the shine off the rosy future that many envisaged.

Savvy clients demand more for less; others are convinced the internet gives them the knowledge to represent themselves; and the ease of email conversation produces demands for instant responses.

Everything moves faster and many find themselves facing the reality of economic survival in a world very different to what it was, even just 10 years ago.

For very many people, myself included, along with the baby boomers and even generation X, we cannot think that our skillset will always be needed and that it is impermeable to change.

Like it or not, to make a profit out of law, or even a decent living out of it, we must do it in more innovative ways.

The simple reality is that if we don't get on this bus, we'll end up under it.

So where to from here?

If you're not already onboard, the first thing you need to do is somehow find the time in that always busy schedule to sit back and take a long, hard look at your practice, how your firm practises and how you as an individual practise.

Ask yourself: Where do I want to be in 10 years? And how am I going to get there?

Along the way you need to make yourself aware of the changes occurring in legal practice. Assess whether they impact you or your firm directly. Are these innovations that you should adopt, monitor or ignore?

The only option for survival is being proactive.

Of course, your actual model for service delivery is critical, and I am indebted to Council member Elizabeth Shearer of Affording Justice for a number of astute observations in a recent paper.

She makes the point that we should develop new models of service for people who can afford to pay something, but can't afford to buy what we have traditionally had to sell.



She points out that the most common gaps in access to justice occur when people need help beyond initial advice, when the case isn't about money at all, or when the case is about a modest sum of money but the legal costs are likely to be disproportionate to that sum.

For these reasons, many who could be helped by private lawyers fall into the 'gap' – they don't engage a lawyer because they are afraid of incurring costs they cannot afford.

Ms Shearer says that firms adopting new service models are able to make a difference through the use of technology to keep overheads down, streamline processes and offer services, through the use of limited scope retainers and fixed fees, and by using a different, non-traditional style of communication about the service provided.

Your Society is also there to help. We have made a significant investment in modernising all of our systems and adapting our processes and offerings to suit this new environment. As one example, have you noticed over the last year how our webinar offerings have expanded dramatically?

Our new Practice Support Consultancy Service is gaining substantial momentum (see this month's CEO column), and we are gathering the knowledge that will help all of us survive and hopefully prosper (by, for example, attending the recent national Legal Innovation & Tech Fest in Melbourne).

Finally, there's one thing I must add. In the midst of this turmoil, we have to remain true to our professional ideals. The maintenance of our standards and ethical duties is timeless, and remains our essential obligation not only to the court and other practitioners, but to justice itself.

**Bill Potts**  
Queensland Law Society president

**president@qls.com.au**  
**Twitter: @QLSPresident**

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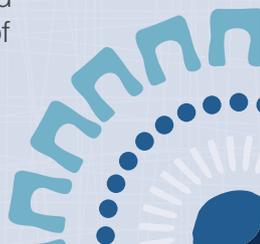
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Buy a ticket for the **Legal Profession White Ribbon Breakfast** on 17 November 2016 to raise funds for the Women's Legal Service and help to end violence against women and children.

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Every member journey is unique and these are just some examples of how members can take advantage of what QLS has to offer.

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Visit [qls.com.au](http://qls.com.au) to find out more.

# Practice support grows



In the June edition I wrote about our new QLS Practice Support Consultancy Service, which helps newly established law firms or those seeking to establish a law practice, to operate practically, efficiently and ethically.

After the completion of our initial program in Brisbane in June, I'm pleased to report that this month we will visit Townsville.

Members of the QLS Ethics Centre will then be visiting a number of firms in a rolling program to provide direct guidance as a part of this service.

After a short period of operation, our staff are encouraged by the questions being asked of them. Please note that this is a confidential consulting service. New resources are now also available through the QLS Ethics Centre website on a dedicated practice support resources page.

The service covers a variety of practice concerns, including:

- starting and structuring a law practice (but not including financial advice)
- soft skills (including identifying the client and scoping the retainer)
- guidance on appropriate management systems (for example, effective and timely communications, conflict of interest management and costs disclosure).

We have also had many questions about practice management software for law firms. As a result we are organising a practice management system comparison and guide which will be published on our website soon.

While it is not possible to visit every practice in our first year, members are welcome to submit an expression of interest in receiving a visit from our team if you intend to commence a legal practice or have established a practice within the last 12 months. Please email the QLS Ethics Centre, [ethics@qls.com.au](mailto:ethics@qls.com.au).

## Positive beginning to RAP

On 19 July our new Queensland Law Society Reconciliation Action Plan (RAP) Working Group came together for the first time.

It was a pleasure to experience their drive to create our inaugural RAP with practical and enduring benefits that will have real impact for Indigenous and non-Indigenous practitioners and the wider community.

The aim of the RAP is to create a framework which sets out practical plans of action for QLS and, in particular, our aim is to lead the profession in supporting, promoting and improving access for Queensland Aboriginal and Torres Strait Islander lawyers.

Our working group is comprised of Indigenous and non-Indigenous solicitors, magistrates, professionals and students heralding from Inala to Brisbane, Rockhampton, Townsville and Cairns, all the way to Thursday Island. *See photo, next page.*

Given the backgrounds and experience of the working group's 18 members, I believe we have an appropriately diverse and skilled team who are well up to the challenge before them.

## Indigenous Literacy Day

I met recently with writer Dr Anita Heiss, an ambassador for the Indigenous Literacy Foundation. She spoke to me about the foundation and Indigenous Literacy Day, which will be celebrated on Wednesday 7 September.

This year Dr Heiss will be assisting St Peter's Lutheran College with its fundraising activities for the foundation and on 6 September she will be talking about her new book, *Barbed Wire and Cherry Blossoms*, at Kuril Dhagun, the Indigenous space at the State Library of Queensland, again as a fundraiser for the foundation.

One of the organisation's key fundraising activities – and a fantastic way to celebrate the joy we all find in books – is the Great Book Swap. Schools, book clubs and all kinds of organisations, including law firms, can hold one of these events – all that participants need do is

swap one of their favourite books for someone else's, in return for a gold coin donation. Visit [indigenouliteracyfoundation.org.au](http://indigenouliteracyfoundation.org.au).

## Chinchilla catch-up

It was a pleasure to meet many of our regional members at the Professional Women's Network/ Chamber of Commerce Dinner in Chinchilla on 14 July. As guest speaker I was able to spread the news about female participation in the legal profession to a wider audience, pointing out that now more than half of our members (including student members) are female.

I also noted that 2000 was the first year in which more females than males were admitted to the profession, and drew a comparison to 1983 – just 17 years earlier – when for the first time 25% of the practitioners admitted were female.

One of the other key features of my address was an explanation of how we as a Society can meet the needs brought about by generational change in our profession and the innovations we are introducing to support the needs of our members in these fast-changing times.

## Policy on the agenda

On 4 August, I will be welcoming all of our policy committee chairs and deputy chairs to QLS for a session on a variety of QLS advocacy and policy-related issues. In addition, we will present the marked increase in advocacy and engagement since my commencement in this role and our successes in this space, led by our government relations division.

On this morning, we will communicate our 2016-2017 Corporate Plan and 2013-2018 Strategic Plan, and promote discussion on the implementation of our policy committees charter and on major topical policy issues. We welcome the input of all attendees to assist in shaping this very important part of our service to all solicitors in Queensland.

**Amelia Hodge**  
Queensland Law Society CEO  
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## First meeting for RAP working group



The QLS RAP Working Group and QLS staff assisting the group: *Seated, left to right*, Graham White, Tamara Freeman, QLS vice president Kara Cook, president Bill Potts, Louise Pennisi, Jayde Geia. *Standing, left to right*, Amy Ashton, Terry Stedman, Magistrate Tina Previtara, Candice Hughes, Linda Ryle, Bianca Hill and Bronwyn Neroni.



*Attending by teleconference or not present:* Shane Duffy (chair), Amelia Hodge, Leah Cameron (*inset, left*), Cassie Lang, Magistrate Jacquie Payne, Nikki Wawryk (*inset, right*), Angela Shooter and Mitch Shannon.

## Justice Kiefel to deliver Freeleagus Oration

The Queensland chapter of the Hellenic Australian Lawyers Association will host the Clayton Utz Alexander Christy Freeleagus Oration at 5pm on Friday 26 August 2016 in the Banco Court of the Supreme Court, Brisbane.

The oration, to be delivered by Justice Susan Kiefel AC of the High Court, is titled 'Legal influences – over the centuries and borders'. It will be followed by drinks and canapés in the Banco Court foyer. See <https://hal.asn.au>.

## National growth for Barry.Nilsson.

Barry.Nilsson. has announced a major expansion of its national presence, opening new offices in Adelaide and Hobart following a merger with Adelaide-based Winter Hilditch & Fotheringham (WHF), and the launch of expanded Sydney premises.

The move follows the firm's recent opening in Melbourne, providing a platform for significant growth in its key practice areas of insurance and health, family law and estate planning, and property and commercial.

In Adelaide, following the merger with WHF, Barry.Nilsson. will open its new office this month with eight legal staff, including partners Andrew Hilditch, Bronwyn Ackland and Michael Fotheringham. In Hobart, the new office will also open this month, led by partner Peter Forbes-Smith.

In Sydney, Barry.Nilsson. has celebrated the move to new and larger premises at Level 19, 60 Castlereagh St, along with the recruitment of six solicitors to its national insurance practice.

# Domestic Violence: Best practice guidelines released

Queensland Law Society has released best practice guidelines for practitioners acting for clients impacted by domestic and family violence.

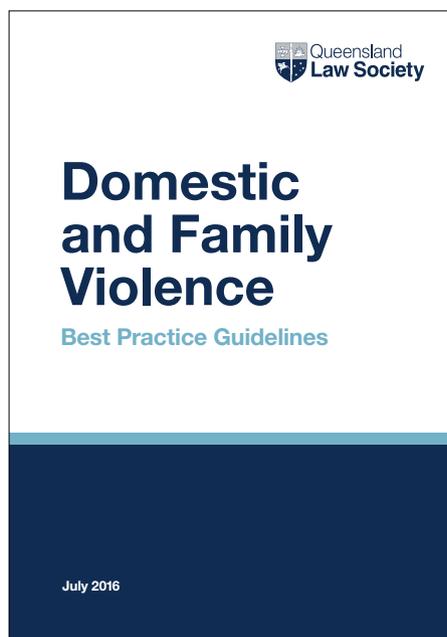
The *Domestic and Family Violence Best Practice Guidelines* were officially launched on 27 July at the Supreme Court of Queensland Banco Court, Brisbane, by the Honourable Dame Quentin Bryce AD CVO, who addressed attendees on this seminal issue for all Queensland lawyers.

The guidelines set out in a pragmatic, clear manner the practical steps practitioners can take when acting for clients affected by domestic and family violence.

Emphasised throughout is the utmost importance of practitioners being aware of, and sensitive to, *all* parties impacted by this widespread issue. This includes practitioners exercising caution around the safety and security of themselves, their colleagues and other third parties.

The guidelines emphasise other significant points, including:

- the need to communicate effectively and appropriately, and in a non-judgmental, sensitive manner
- respect for diversity as a necessary backdrop to any practitioner's approach to matters
- the empowerment both of legal practitioners and their clients, which lawyers can bring about by educating themselves on fundamental aspects at play in the context of domestic and family violence



- the ongoing provision of accurate behavioural, as well as technical, legal information
- the paramount nature of children's needs, communication and safety
- the crucial aspect of liaising with other service providers.

The guidelines also set out useful training, resources and research tools, aligning with the Society's duty to provide practical

guidance and ongoing professional development seminars to its members in implementing the principles set out in this document. These seminars will be introduced in coming months and practitioners are urged to consider attending.

The guidelines, which are available for download from [qls.com.au](http://qls.com.au), flowed from the release of the *Not Now, Not Ever – Putting an End to Domestic and Family Violence in Queensland* report released on 26 February 2015 following a Queensland Government inquiry chaired by Dame Quentin Bryce.

The report, through four of its 140 recommendations, specifically charged the Society with providing guidance to practitioners dealing with domestic and family violence in their day-to-day legal practice.

Accordingly, the QLS Domestic Violence Working Group<sup>1</sup> was established in June 2015 to consider the Society's response to the recommendations.

The group's subsequent research and consultation across a broad range of key stakeholders resulted in the Society producing the guidelines as a reference tool for practitioners.

– Julia Connelly

<sup>1</sup> Chaired by Deborah Awyzio, DA Family Lawyers Pty Ltd, with members Kara Cook, Fiona Caulley, Tracey De Simone, Bruce Dodd, Jennifer Ekanayake, Ron Frey, Hayley Grainger, David Hugall, Margie Kruger, Michelle Quigley, Anne-Marie Rice, and Nicola Davies.

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**PHILIPS**

# Female master for Christ's College

Distinguished Professor Jane Stapleton is the first female in 500 years to be elected as the Master of Christ's College Cambridge in the United Kingdom.

Professor Stapleton, from the Australian National University's College of Law, is also the first 'foreigner' to hold the post.

Professor Stapleton said the great attraction of the job for her was working in the Cambridge education model, which is self-governing and focuses on the nurturing of young minds and achieving excellence at every level.

"This is one of the great institutional dynamics that's been created for education and to be part of that, and to assist it, will be deeply rewarding," she said.

She will be joined at the college by her husband, Distinguished Professor Peter Cane, ending 20 years with the ANU that began with their joint appointment as professors to the Research School of Social Sciences.

Professor Stapleton said she didn't necessarily see her appointment as a great feminist victory.



Distinguished Professor Jane Stapleton and her husband, Distinguished Professor Peter Cane, who will join her at Christ's College Cambridge.

"Women of my generation, we tend to notch up these things all the time," she said. "It's like the first Jew, or the first person of colour, it's because there are centuries of prejudice and when this starts to crumble, there are going to be people there at the right time

who get these notches, but it doesn't mean that there haven't been hundreds of thousands of women who shouldn't have been in the running for these jobs – it's just that there's been prejudice against them."

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# Four for ethics prize

With four law students topping the 'Ethics and the Legal Profession' subject in QUT's 2015 academic year, Queensland Law Society Ethics Centre director Stafford Shepherd was honoured to be called on four times when it came to the law faculty's annual prize ceremony. Stafford presented achievement certificates for the QLS-sponsored prize to Claire Barry (*bottom left*), Rina Cappiello (*top right*), Benjamin Klæbe (*top left*) and Jessica Laing (*bottom right*).



# Invitation for Melbourne University law graduates

University of Melbourne Law School alumni in Queensland are invited to a reception in Brisbane on 7 September. The function, hosted by 1986 graduate Emma Hossack, will be attended by law school dean Professor Carolyn Evans. Email law-alumni@unimelb.edu.au for details.



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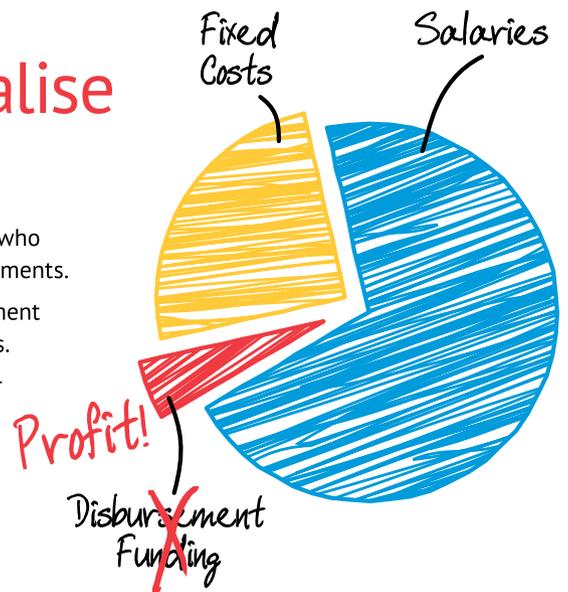
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# Human rights balancing act

A parliamentary committee report does not reach an agreed conclusion on whether it would be appropriate and desirable to introduce Queensland human rights legislation.

The report, by the parliamentary Legal Affairs and Community Safety Committee, references several of Queensland Law Society's key proponent and opponent perspectives.

We made submissions to the Human Rights Inquiry on 22 April and appeared at the committee's public hearing. Through the thorough and considered work of our Human Rights Working Group, we examined the complicating factors and uncertainties germane to human rights legislation enacted in other jurisdictions in order to inform the Queensland Government of the necessary cautions to be applied if and when it elects to follow suit.

Key points of advocacy raised at the public hearing included:

- our president's consideration that it is incumbent on the Society to provide comment and guidance on any draft legislation from the Government
- our support for evidence-based policy
- the importance of pragmatic and concrete betterment of laws for Queensland's most vulnerable citizens, regardless of the outcome of the committee inquiry

- support for a dialogue model of human rights legislation as an important step towards shaping public service delivery and culture – highlighted by working group chair and substantive author of its proponent views Dan Rogers
- uncertainty around the capacity for a broad human rights Act to address specific, currently existing gaps in the enforcement of Queenslanders' rights – raised by working group member and substantive author of its opponent views the Honourable Richard Chesterman AO RFD QC.

References in the committee's report to some of our key perspectives included:

- that Australia's international obligations are not legally binding under Australian laws unless specific Australian laws bring these into force
- that an Act would foster proactive consideration of human rights to avoid the need for remedy at later stages
- the non-government members' position that addressing human rights issues is best achieved through direct legislative change (agreeing with comments by the Honourable Richard Chesterman)
- the limitation of human rights and the risk of pursuing individual rights at the expense of upholding community peace and order.

Julia Connelly is a QLS policy solicitor.

## Four ways to promote good laws

Queensland Law Society has made several suggestions to the parliamentary Committee of the Legislative Assembly on the Constitution of Queensland and Other Legislation Amendment Bill 2016.

The Bill seeks to regulate the key mechanisms behind State Parliament's consideration and passing of laws.

Our four key points were:

Endorsement of the Bill's s26B(1) mandate that Bills be referred to a portfolio committee for examination.

Concern around the Bill's s26B(3)(d), which would allow committee examination to be curtailed where bills are 'urgent'. The kernel of our reservation about this was the lack of specific criteria determining a Bill's 'urgent' nature. We suggested a potentially worthwhile consideration was that matters of emergency to the state ought (if truly urgent) in fact readily receive bi-partisan support.

Commendation of the Bill's effecting amendment to the *Parliament of Queensland Act 2001* empowering portfolio committees to initiate inquiries of their own motion. We did note, however, that comparison with the New Zealand jurisdiction in which the House automatically adopts unanimous changes may be welcome. This is in light of

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current practice in Queensland whereby recommended changes are only put forward at the relevant Minister's discretion.

A suggestion that the fundamental legal principles set out in the *Legislative Standards Act 1992* might usefully be enshrined as fundamental provisions in a foundational document such as the Constitution of Queensland, in order to affirm the Government's commitment (particularly in a unicameral system) to the rule of law.

Julia Connelly is a QLS policy solicitor.

### Committee heeds our concern on onus of proof reversal

A Queensland parliamentary committee has agreed with serious concerns raised by Queensland Law Society over the Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016.

Following the introduction of the Bill in March, we highlighted three key issues in a written submission on 27 April and before a public hearing conducted by the parliamentary Agriculture and Environment Committee in Brisbane on 3 June. These were:

Reversing the onus of proof is a breach of fundamental legislative principles and a departure from well-established rule of law principles. The presumption of innocence is a foundation principle of our justice system and the proposed removal of this presumption is unjust. A more appropriate response to the perceived issue of prosecuting offences is to ensure that prosecutors are properly funded and resourced so that prosecutors can gather sufficient evidence that an offence has been committed.

The proposal to remove the defence of mistake of fact in certain prosecutions does not pay sufficient regard to the rights and liberties of individuals under the *Legislative Standards Act 1992*. The Explanatory Notes do not set out sufficient justification for the removal of the defence. Given the significant penalties and the standard of proof imposed, it is inappropriate to exclude the defence for the convenience of prosecution.

The proposed retrospective application of certain amendments to 17 March 2016 (when the draft legislation was introduced to Parliament) have the potential to create significant complexity for determining clearing activities that are lawfully undertaken during the interim period. Retrospectivity is a breach of fundamental legislative principles and will create uncertainty for landholders affected by this legislation.

Our concerns were widely reported in print and television media around the time of the public hearing.

Since then we have welcomed the committee's report (on 30 June), in which it unanimously recommended removing the draft provision reversing the onus of proof:

"In light of the significant concerns raised ... about the proposal ... to reverse the onus of proof in relation to vegetation clearing offences and the potentially significant fundamental legislative principles issues raised by the amendment, the committee recommends ... [the proposal to] reverse the onus of proof in relation to vegetation clearing offences, be omitted."

The Society is mentioned throughout the report in relation to our submissions on this issue, the removal of the defence of mistake of fact, and the retrospective aspects of the Bill. The committee did not reach agreement on remaining issues which will be considered by Parliament later this year.

The committee's report and a copy of all submissions on the Bill are available from the committee's section of the parliamentary website at [parliament.qld.gov.au](http://parliament.qld.gov.au).

Wendy Devine is a QLS policy solicitor.

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# Early Career Lawyers Conference 2016

Last month, the Queensland Law Society Early Career Lawyers Conference provided junior solicitors with the tools needed to build successful and lasting careers. Our pinnacle event for young lawyers featured experts presenting on topics including communication, personal branding, time management, ethics and negotiation. For the first time, an interactive ‘Knowledge café’ session connected attendees with senior practitioners to examine a case study and answer questions specific to their practice area.

A Q&A panel discussion facilitated further exploration of issues encountered by early career lawyers including etiquette in the workplace and court, signing and witnessing documents, acting for family and friends, and capacity. At the end of the day, attendees enjoyed networking drinks with peers and senior colleagues.



# Financial years in succession

Many of the familiar faces from Queensland's succession law community came together on 1 July for the annual end-of-financial-year function hosted by barristers Caite Brewer, Glenn Dickson and Richard Williams. The event was held in the Hamilton Room at Brisbane City Hall.

1. Jarrod Mobbs of Barry.Nilsson., Julian Harrison of Harrisons, Fred Smith of McInnes Wilson, Supreme Court Probate Registrar Leanne McDonell, David Graham of Mitchells Solicitors and Samantha Dillon of Dillon Legal.
2. Kylie Costigan of Estate First with barrister Caite Brewer and John Sneddon of Shand Taylor.
3. Rebecca Rosser of Sheehan & Co., Adele Bentham and Bryan Mitchell of Mitchells Solicitors, and Paul Sheehan of Sheehan & Co.



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# The final countdown

Your client, end-of-life decision-making and the law



## Australians are ageing, and the way that we are dying is changing.

As medicine and medical technology advance, causes of death have shifted away from acute deaths from infectious diseases towards deaths caused by chronic degenerative illnesses.<sup>1</sup> More people are dying in hospital and residential aged care institutions than ever before, with only 14% of Australians dying at home.<sup>2</sup>

Along with these changing patterns in dying, technological advances mean that there is increasing opportunity to prolong life. These developments mean that there is an increasing likelihood that death will occur after a medical decision to provide or withdraw treatment. In this way, it is sometimes said that death is becoming 'medicalised'.

These medical end-of-life decisions take several forms, most commonly withholding and withdrawing life-prolonging measures and alleviating pain with potentially life-shortening doses of opioids. In some European countries and some jurisdictions in the United States and Canada, such decisions can also legally include the deliberate ending of life.<sup>3</sup>

There is no corresponding law in any Australian jurisdiction, yet there is evidence that, in a small number of cases, doctors may be involved in hastening a patient's death.<sup>4</sup> In rare cases, patients may make their own end-of-life decision through, for example, ceasing the intake of food and fluid.

This means that it is common for death to occur following a decision made by a doctor or someone else (possibly the patient or someone else on behalf of the patient). This also means that individuals can be influential in how they die.

This article looks at two aspects of the important issue of end-of-life decision-making – first, the relevant Queensland law; and secondly, lawful steps that individuals can take to influence the circumstances of their death. The focus of this article is on decision-making by adults, not children, as they approach the end of their lives.

Though it remains an often grey area, there are basic guidelines that practitioners should keep in mind when they assist clients preparing to make end-of-life decisions.

Report by **Lindy Willmott** and **Ben White**.



## Relevant Queensland law

### Refusal of life-sustaining medical treatment

The law here differs depending on whether the patient has decision-making capacity. Under Queensland legislation, a person will have capacity to make a decision about treatment if he or she is capable of understanding the nature and effect of decisions about the matter; freely and voluntarily making decisions about the matter; and communicating the decision in some way.<sup>5</sup>

If the adult does have capacity, he or she may choose not to receive medical treatment, even if that treatment is needed to stay alive.<sup>6</sup> It does not matter whether the reasons for making that decision are “rational, irrational, unknown or even non-existent”.<sup>7</sup>

The law is more complex if the adult lacks capacity, and is governed by the *Guardianship and Administration Act 2000* (GAA) and the *Powers of Attorney Act 1998* (PAA).<sup>8</sup>

It is possible for an adult to complete an advance health directive (AHD) in which he or she stipulates not to receive life-sustaining treatment. However, there are significant limitations set out in the PAA governing when that AHD can operate, and when its directions need not be followed by a doctor.

A substitute decision-maker can make a decision to withhold or withdraw life-sustaining treatment, but in making that decision, must comply with the general principles and the healthcare principle set out in the legislation. A substitute decision-maker could be an attorney appointed by the adult under an enduring power of attorney (EPA) or AHD, a guardian appointed by the Queensland Civil and Administrative Tribunal or a statutory health attorney.

In summary, the law in Queensland allows a person with capacity to decide not to receive life-sustaining treatment even if he or she will die as a result of that decision. In an appropriate case, such a decision can also be made on behalf of a person who lacks capacity.

### Palliative care and pain and symptom relief

The provision of appropriate pain and symptom relief forms an important component of good palliative care as a person approaches the end of their life. There is at least anecdotal evidence in Australia that health professionals

worry about legal risk when the provision of palliative care in the form of pain-relieving medication has a secondary, but unintended, consequence of hastening the patient’s death.<sup>9</sup>

Despite this concern about legal risk, at common law, health professionals will be protected under the doctrine of double effect provided their intention in providing the medication was to relieve pain and not hasten the patient’s death.<sup>10</sup> In Queensland, a lawful excuse is provided to health professionals through section 282A of the *Criminal Code*. This section provides protection if the palliative care is given in “good faith” and “with reasonable care and skill” and is “reasonable” in the context of “good medical practice”.<sup>11</sup>

In rare cases when it is not otherwise possible to alleviate intolerable and refractory symptoms, medication can be given to a dying patient that induces unconsciousness and the patient will remain unconscious until death. This practice is sometimes referred to as ‘terminal sedation’ and, while it is likely to be lawful in certain circumstances, the practice does raise certain legal and ethical issues that are still to be resolved.<sup>12</sup>

### Action taken by a person to bring about own death

Individuals may wish to bring about their own death rather than wait for the particular illness to run its course. In jurisdictions such as Australia where euthanasia is unlawful, voluntarily ceasing the intake of food and fluid is one way that this can be done.

A person who has capacity is legally entitled to stop eating and drinking.<sup>13</sup> The principle of bodily inviolability prevents him or her from being force-fed. It is also (probably) the case that it is lawful to provide palliative care to the person who has chosen to stop eating and drinking, even if providing that care has the secondary and unintended effect of hastening the person’s death.<sup>14</sup>

### Further assistance to die is not lawful

Although it may be lawful for a doctor to provide palliative treatment to a person who has chosen to end his or her life by not eating or drinking, or choosing to stop receiving life-sustaining treatment such as ventilation, the criminal law prevents health professionals (or anyone else) from procuring, counselling or aiding a suicide.

There have been numerous prosecutions of people who have assisted friends or relatives to die. The fact that the person may have been motivated by compassion and acted at the request of the dying person is irrelevant for the purpose of the *Criminal Code*.<sup>15</sup>

### Demanding ‘futile’ treatment

A final point to consider is whether it is possible to demand medical treatment when a health professional assesses it to be futile. Surprisingly, the law on this issue differs depending on whether the person has decision-making capacity. The common law applies if the person has decision-making capacity, and provides that a doctor is not under a legal duty to provide treatment that does not confer a “benefit” on an individual or is not in the individual’s “best interests”.<sup>16</sup>

Such treatment is commonly referred to as ‘futile’ treatment, and can include life-sustaining medical treatment. The guardianship legislation applies in Queensland if the person lacks capacity, and has the effect of requiring a substitute decision-maker to consent to the withdrawal or withholding of life-sustaining treatment, even if that treatment is futile. To this extent, it may be argued that a substitute decision-maker can insist that treatment be given to a person although the treating doctor may regard it as futile.<sup>17</sup>

### What clients can do

What then can your client do to navigate the emotional and practical complexities of the end of life to ensure that their death is as good an experience as is possible – that it is pain free, and happens in the way that they desire? There are no foolproof solutions here, but we suggest some strategies that may assist.

### Your client should have end-of-life discussions with their doctor

There is evidence (perhaps surprisingly) that some doctors are reluctant to talk about death and dying with their patients. This is the case even if the patient is unwell and likely to die in the foreseeable future. But if patients want to have influence over how they die – the extent to which they want to continue active rather than palliative treatment, where they die, who they want with them at the time of death – they need to discuss what is possible with their doctor.

### Your client should have end-of-life discussions with their loved ones

It is not enough for your client to have these discussions with their doctor. It is also important that the client's family knows and understands your client's preferences at the end of life. This is particularly so where your client must rely on his or her family to ensure those preferences are implemented if, for example, the client becomes so unwell that he or she loses the ability to make these decisions.

### Your client should think about formalising decisions and discussions

Discussing end-of-life preferences with loved ones is a good first step. For some families, this may be sufficient to ensure a person's death proceeds in the way he or she desires. However, there are also advantages in formalising some decisions.

If there is a family member who your client knows will carry out his or her wishes regarding treatment at the end of life, your client may want to formalise that person's role as decision-maker by appointment as attorney for personal or healthcare matters under an EPA.

Alternatively (or in addition), your client might consider completing an AHD. An AHD can be used (instead of an EPA) to appoint an attorney to make personal or healthcare decisions. It can also be used to provide direction about specific treatments that the person may wish to receive or refuse at some stage in the future when decision-making capacity is lost. The ability to make specific directions may be important to your client.

The AHD also enables your client to provide more general information, for example, about goals of treatment. This enables a person to guide others in making decisions about medical treatment. For example, a person may want to state that he or she does not want active treatment if no longer able to recognise family members.

To increase the likelihood that instructions or guidance in an AHD will be followed, there are a few things that your client should think about doing. Firstly, letting important people (including their general practitioner and family members) know that an AHD has been completed, and giving them a copy of the document in case it is needed at a later time.

Secondly, it may be useful to review the AHD periodically and, at the time of the review, indicate on the form itself that it has been reviewed (by signing and dating it). Although this is not required for the validity of the document, this practice would give a treating doctor some comfort that the wishes stated at the time of the review still represented the views of the person.

### Your client (and loved ones) should be familiar with the law

Finally, it is important for your client and his or her loved ones to be familiar with the law that operates at the end of life (described above). For the most part, it is your client (or one or more family members as substitute decision-makers) who will be making decisions about treatment. Your client and family know the person, and are in the best position to make decisions about medical treatment and to ensure that decisions are consistent with the views and wishes of your client. Of course, these decisions would also be informed by medical advice.

Sometimes, particularly where there is conflict within the family as to what treatment should be if the client loses capacity, it is also important to know who the decision-maker is. Depending on the circumstances, this person may be your client's current partner and not adult children from a previous relationship.<sup>18</sup>

There is also evidence that people still die in pain, and it is possible that, at times, insufficient pain and symptom relief is provided because of health professionals' concerns about legal repercussions. It is important to know that it is lawful to provide pain relief even if a secondary effect of the medication is to hasten death. Such knowledge can assist with advocacy on behalf of a dying patient.

## Summary

Decision-making about medical treatment at the end of life is legally, ethically and emotionally complex. Increasingly, individuals will want to have influence over end-of-life decisions, including which treatment to receive and to refuse at the end of life, and ensuring that sufficient medication is provided so that individuals don't die in pain.

There are a range of steps that an individual can take so that they experience as good a death as is possible and, as described in this article, solicitors can also play a role in achieving this outcome.

This article appears courtesy of the Queensland Law Society Elder Law Committee. Professor Lindy Willmott and Professor Ben White are directors of the Australian Centre for Health Law Research in the Faculty of Law at QUT. They have recently authored (with colleague Penny Neller) a new website to help people understand law at the end of life, called 'End of Life Law in Australia': [end-of-life.qut.edu.au](http://end-of-life.qut.edu.au).

## Notes

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- See, for example, Agnes van der Heide et al, 'End-of-life decision-making in six European countries: descriptive study' (2003) 362(9381) *The Lancet* 345.
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- For a detailed consideration of the relevant Queensland law, see Lindy Willmott, Ben White, Malcolm Parker and Coleen Cartwright, 'The legal role of medical professionals in decisions to withhold or withdraw life-sustaining treatment: Part 2 (Queensland)' (2011) 18 *Journal of Law and Medicine* 522-543.
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- Lindy Willmott, Ben White and Shih-Ning Then, 'Withholding and Withdrawing Life-Sustaining Medical Treatment' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (2nd ed., Thomson Reuters, 2014) at 578-9.
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# According to plan?

How planning strategy and controls can impact your advice to clients

There is little doubt Brisbane City Council has pursued the objectives stipulated within the statutory mechanism of the *South East Queensland Regional Plan (2009-2031) (SEQRP)*, and in particular the quantitative requirement of an additional 156,000 dwellings for the city.<sup>1</sup>

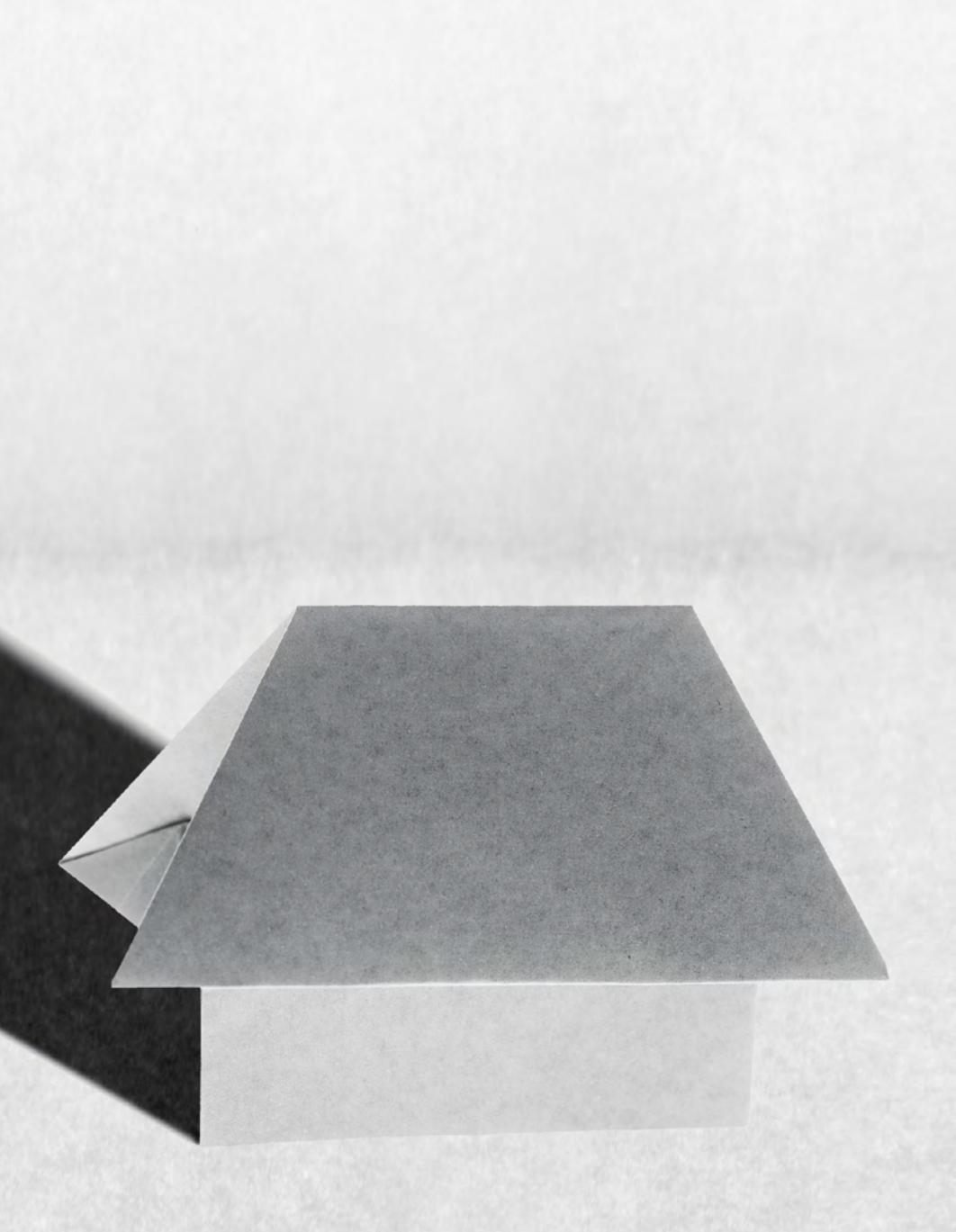
While planners have questioned its principal strategic approach of high and medium density,<sup>2</sup> the reality is that, following the recent local government elections, we are locked into this modus operandi for the next four years at least.

In order to provide clients with suitable and relevant advice, legal practitioners need to recognise and understand the role strategic planning plays with regard to planning legislation creation and interpretation. While one must keep in mind that each property is unique in its context and location, and thus advice is relative to individual instances, there are still some common denominators which impact on the advice provided by a practitioner.

An example derived from the relatively new *Brisbane City Plan 2014 (BCP2014)* and applied to an actual property situation demonstrates how such a task is undertaken.<sup>3</sup>

The example consists of seven lots – identified for our purposes as A, B, C, D, E, F and G – developed within the post-war period within an inner-city Brisbane suburb (*figure one, next page*). (Note that the exact details of location are omitted as development proposals are ongoing and to protect owners' rights).

The lots are zoned medium density and vary in size from 582m<sup>2</sup> to 718m<sup>2</sup>. The applicable neighbourhood plan under the BCP2014 permits medium density to five storeys and a maximum of 125% plot ratio (the plot ratio might be defined in this instance of permissible development area being 125% of the site size, spread over five storeys). Further, and more significantly, medium density can only occur on lots of 800m<sup>2</sup> or larger.<sup>4</sup>



**Christopher Robertson** explains the elements of Brisbane City Council town planning strategy likely to be relevant when practitioners advise clients.

From the above, two anomalies are evident. Firstly, lot sizes are all under the minimum of 800m<sup>2</sup>, even though they are zoned medium density and thus cannot in their present form be developed as medium-density individual allotments. Secondly and logically, in order for the medium-density option to be taken up, lot amalgamation must occur. Medium-density usage is achievable, but only through abandonment of the current lot constructs.

While good strategic planning correctly places density near or around public transport, employment, places of commerce and so on, one could argue that this outcome is presumptive on BCC's part. However, to fully understand such zoning, one must put this into a number of practical and feasible usage scenarios to comprehend the full implications of such an approach.

**Scenario 1:** All remains the same.

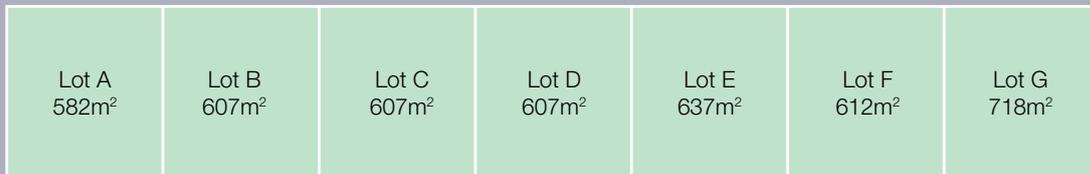
The dwellings remain and are used for low residential purposes. While adjacent properties might be developed and intrude into the enjoyment and amenity of the place, prior and continued use ensures that their current use can continue at this level, even though estranged from the designated zoning.

**Scenario 2:** The holdout. If two adjacent property owners agree to sell (for example, A and B; or A, B, C and so on) there would be no issue. An issue occurs if A and C wish to sell, but B is a holdout and does not wish to sell. In such an instance, based upon the stipulated BCP2014 codes medium density cannot be achieved while lot B remains unsold. The status quo remains, as no density increase is possible until such time as the holdout property is available.

**Scenario 3:** This scenario is more complex. For example, lot F is isolated in that lots E and G do not wish to sell, but the owner of lot F wishes to dispose of it to the highest bidder due to changes in circumstances as soon as possible. Likely the price this will sell for will be dependent on the options for development on the adjacent properties (lots E and G) and other matters such as dwelling condition and so on. In this instance a number of options and limitations exist:

**Option 1:** As medium density cannot be realised as a single lot due to size compliance requirements, is it possible to downgrade say to low-to-medium residential (LMR) to place, for example, townhouses on the site, where this type and density is possible relative to site size (street frontage requirements being met)?

## Shopping Centre



Street

Figure one: The lot plan and context.

Not according to a Brisbane City Council planners. The rationale goes something like this – while there is no guarantee medium density will occur on the site, and while it is currently being used for low residential, to allow another development to occur in isolation (that is, if lot F is developed for townhouses based on the size of the lots, lot G will never reach its full potential as medium density due to lot size and m<sup>2</sup> limitations). Thus, while only involving a small number of lots, if repeated on a Brisbane-wide

scale this might challenge the ability to deliver the stipulated 156,000 dwellings.<sup>5</sup>

**Option 2:** Compensation as per the *Sustainable Planning Act 2009* (SPA) (s95). Two elements dismiss this as a consideration. In this case the zoning has not changed between town plans (that is, *Brisbane City Plan 2000* (BCP2000) and BCP2014 have the sites overlaid with the same zoning) and thus the time limitation of 12 months is not qualified.<sup>6</sup> Further, as the

development potential along with medium-density requirements have not been amended between the town plans, in theory the development potential of medium density still exists.

**Option 3:** Use or invest as a low residential dwelling in the anticipation adjacent properties will become available for development. The reality is that, while this outcome is in theory feasible, it is dependent on others' actions, particularly

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in regard to when and if an adjacent property becomes available.

However, one further situation should also be discussed here. Supposing your client purchases the property to live, rent or as a long-term investment/asset and the dwelling (tragically) burns down or is allowed to deteriorate until it is structurally unsound, due to errant tenants, and so on, to such an extent that a new low-density dwelling is required for low residential use to continue. What then are the options?

We know from the above, that BCC has a preferred strategic medium-density outcome for the sites. Thus, the question becomes one of whether a private certifier would sign off for a new (replacement) low-density dwelling. The reality is that a new low-residential dwelling would effectively tie up the site for a considerable period of time, in the very least, until land values make it economically viable to purchase the site and demolish the replacement dwelling.

Your client would therefore have to rely on continuous use of the site for low-residential purposes. There is little doubt that SPA Chapter 9, Part 1 provides unequivocal rights to recognise the existing use of a premises (premises is defined within the Act to extend to land).<sup>7</sup> The only qualification

to this under s683 (SPA) is that the premises must be lawfully constructed. Cases such as *Benter Pty Ltd v Brisbane City Council* [2006] and *Allen & Anor v Cairns Regional Council* [2015] have well established that use might be intermittent and turn upon the contextual merits.<sup>8</sup>

However, the issue here in our example is that no material change of use is being sought, rather the question is whether, in light of the BCC's site use preference, would it pursue a medium-density outcome as zoned congruent with its strategic outcomes? Certainly in recent cases such as *Friend v BCC* [2013] not only has the BCC demonstrated a determination to pursue strategic outcomes congruent with the SEQRP, but also the courts have also been prepared to interpret planning schemes broadly.

In citing *SDW Projects Pty Ltd v Gold Coast City Council*, his Honour Robertson DCJ noted:

"It is well-established that in performance-based schemes such as this one, the Acceptable Solutions do not prescribe limits, or to put it another way, are not proscriptive of other solutions which may satisfy the outcomes contemplated by the Performance Criteria." (*Friend v BCC* [2013] QPEC 77 at 30<sup>9</sup>)

Significantly, one must acknowledge that *Friend v BCC* demonstrates that planning options are not all a one-way street or the sole prerogative of government. With the current performance-based planning systems, private land owners and their advisors also have the ability and opportunity to stand outside the prescriptive planning requirements in which options for land use might be pursued, so long as the broad strategic outcomes are adhered to, in conjunction with the performance criteria.

However, it appears it is only in such recent cases as *Norfolk Estates Pty Ltd v Brisbane City Council* [2016], in which the community (as submitters) also acted as respondents, that the BCC was inclined to place its strategic pursuits into the background.<sup>10</sup>

In any event, in the above case such enthusiasm could be tempered by recognising that in the first instance BCC provisionally considered offering two storeys above the zoned limit, which again still underpins its preferential strategic SEQRP outcomes.<sup>11</sup>

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In returning to our example above, while the eventual outcome it is argued would depend on the contextual circumstances of each situation, allotment and what had occurred on it, it would be a brave private certifier who would sign off on a low-density residential dwelling in medium-density zoning, based solely on continuous use without referring the application to the relevant local government for an opinion. In the very least, based on the BCC approach noted in Scenario 3, Option 1 above, there would be a preference for a low-density dwelling not to be placed on the site. Such a preference might require recourse to the courts to enforce a continuous use claim.

Strategic considerations therefore become paramount when advising your client. Sale of the site would be dependent on the intentions of adjacent sites, or left until such a time that it could be taken up to achieve medium density, thus in the short term becoming a burden to your client. After all, not all land holdings or land banking are profitable ventures.

However, two further integrated points are worth considering here. Firstly, while the above example was not a result of any planned rezoning due to a neighbourhood plan being undertaken, it is worth noting that when neighbourhood planning is occurring over an area, advice to owner clients is

essential to enable any reaction, where necessary, to occur to prevent clients from being placed in a disadvantaged position, even though prima facie it might seem advantageous, as exemplified above.

Secondly, in such circumstances one must challenge any proposed rezoning methodology as a strategic planning process first, relative to its context, prior to it becoming a statutory planning mechanism. In addition, one must challenge whether such rezoning is the best option for achieving the strategic objectives of the SEQRP and town plan, as well as understanding the direct and indirect implications on your client, as an affected land owner.

The question becomes one of how and in what way does one advise a client? A good start is to understand the options within planning methodology and structural application of this process in light of outcomes.

While acknowledging that the new regional plan is on its way, within the contemporary planning context of the SEQRP the primary planning issues are derived from addressing the envisaged population growth.<sup>12</sup> Further, as noted above, in following good planning practice there is little doubt that sites adjacent to shopping centres need to ensure they are taken up with greater density of some sort to reduce private vehicle travel,

employment and so on. This is a strategic-based planning point (planning 101) that is hard to challenge.

However, within the BCP2014 currently there are inconsistencies in how this approach is undertaken and applied, leading to stakeholder confusion and dissatisfaction. For example, if we contrast our treatment of lots A to G above with the South Brisbane Riverside Plan in the BCP2014, even noting that the neighbourhood plan is inner city and adjacent to the Central Business District, it provides a range of density options (storey height and ground floor area) being achieved based on the area size, rewarding greater density with greater land amalgamations (for example, in the Musgrave precinct (South Brisbane riverside neighbourhood plan/NPP-002), a site of less than 1200m<sup>2</sup> can be developed to five storeys while a site between 1200m<sup>2</sup> and 2500m<sup>2</sup> can accommodate eight storeys).<sup>13</sup>

In contrast, the sample site has one zoning option. It is argued that designating these sites at the lower zoning of low-medium density, and providing the capacity of lot amalgamation to achieve higher density (that is, 607m<sup>2</sup> LMR and 800m<sup>2</sup> MD) would not only ensure quicker take-up of development options and provide greater opportunity for owners as well as increase in dwelling numbers, but would also provide a consistency of planning mechanisms



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within the BCP2014 that would currently appear to be in abeyance or used sparingly.

To a high degree the above synopsis mimics argument that the abandonment of plot ratio in preference for building envelopes has led to the pursuit of lot amalgamation as a key to obtaining greater density and intensity of development in preference to quality of development.<sup>14</sup>

Such a consideration is paramount when one considers that, as stated under Theme 2 (G) of the BCP2014 Strategic Outcomes, it says: "Brisbane provides housing choice which allows people to live in close proximity to their place of work and support their local economies, services and businesses."<sup>15</sup>

While noting this theme has two criteria ('housing choice' and 'close proximity') read broadly (as a theme) it would seem 'choice' is the pivotal word and is selectively adapted and applied in varying contexts. Strategic planning therefore is not an all-encompassing means to an end. Like all other processes it has options to be considered and applied in different contexts, which in turn need to be reconciled with the client's objectives.

Chris Robertson is a consultant on urban planning matters and developments. He holds an LLB and a master's degree in urban and regional planning, and is completing a doctorate in urban planning and law.

Notes

- <sup>1</sup> *South East Queensland Regional Plan 2009-2013*. Queensland Government, 2009. Located at [dilgp.qld.gov.au/resources/plan/seq/regional-plan-2009/seq-regional-plan-2009.pdf](http://dilgp.qld.gov.au/resources/plan/seq/regional-plan-2009/seq-regional-plan-2009.pdf). Accessed April 2016. In particular refer to page 17 for Brisbane quota of dwellings.
- <sup>2</sup> For challenges of high density as a solution to population growth, refer to the much attributed and often quoted or paraphrased in general publications term by Brendon Gleeson of 'faith-based planning'. See, for example, 'Three Reasons Why Apartments may not Deliver on Density', *Michael Yardney's Property Update*. 22 June 2015. Located at [propertyupdate.com.au/three-reasons-apartments-may-deliver-density](http://propertyupdate.com.au/three-reasons-apartments-may-deliver-density). Accessed August 2015.
- <sup>3</sup> *Brisbane City Plan 2014*, Brisbane City Council, 2014. Located at [eplan.brisbane.qld.gov.au](http://eplan.brisbane.qld.gov.au). Accessed April 2016.
- <sup>4</sup> While there are general zoning stipulations within the BCP2014 (for example, 6.2.1.3 Medium density residential zone code), each neighbourhood plan might have its own zoning compliance requirements.
- <sup>5</sup> Discussion between planning representative and BCC senior town planner 2-3 February, 2016.
- <sup>6</sup> Refer SPA, s92(2).
- <sup>7</sup> Refer to SPA, s682.
- <sup>8</sup> *Benter Pty Ltd v Brisbane City Council* [2006] QPELR 451 and *Allen & Anor v Cairns Regional Council & Anor* [2015] QPEC 28.
- <sup>9</sup> *SDW Projects Pty Ltd v Gold Coast City Council* [2007] QPELR 24 and *Friend v BCC* [2013] QPEC 77.
- <sup>10</sup> *Norfolk Estates Pty Ltd v Brisbane City Council & Body Corporate for Kirribilli Apartments Community Titles Scheme and Ors* [2016] QPEC 9.
- <sup>11</sup> Saunders Havill Group, 2014, 'Town planning report: material change of use multiple dwelling (13 units) 140-142 Oxlade Drive, New Farm', 23 September.
- <sup>12</sup> 'Review of the South East Queensland Regional Plan', Department of Infrastructure, local Government and Planning. Located at [dilgp.qld.gov.au/planning/regional-planning/review-of-the-south-east-queensland-regional-plan.html](http://dilgp.qld.gov.au/planning/regional-planning/review-of-the-south-east-queensland-regional-plan.html). Accessed April 2016.
- <sup>13</sup> BCP2014, 'South Brisbane Riverside Neighbourhood Plan Code'. Located at [eplan.brisbane.qld.gov.au](http://eplan.brisbane.qld.gov.au). Accessed April 2016. Refer to tables 7.2.19.4.3.B—Maximum building height and 7.2.19.4.3.C—Maximum site cover.
- <sup>14</sup> Discussion with Juergen Hanisch (Urban Potentials) and the author. April 2016.
- <sup>15</sup> BCP2014, 3.4.1 Strategic Outcomes (g). Located at [eplan.brisbane.qld.gov.au](http://eplan.brisbane.qld.gov.au). Accessed April 2016.

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# All the law's a stage

## And buy my CD

Creativity and the legal profession can happily co-exist – said no one ever, except **Timothy Edwards**.



### Many Australian law schools seem to impose an 'extra-extracurricular' mentality on their students.

They tell you that, in order to get the graduate job you want, you need to do a lot of things that are entirely unrelated to that job.

Today's time-poor law students are consequently pressured to participate in competitions, sign up for political societies and university law societies, take part in law reporting, participate in musicals, and for all I know, knit things.

They're told that the best firms want a balanced person – someone who can be exciting outside of the law, as well as within its budget-driven confines.

Obviously, this mentality creates pressure. But this isn't another article about that; this is an article about inconsistency and opportunity.

### Inconsistency

The abovementioned 'extra-extracurricular mentality' is, in my view, a misrepresentation of the profession in 2016. Why? Because those law students who are not ultimately driven to pursue alternative careers as Master Chefs and Australian Idols, and who *do* get their desired job, will more often than not abandon most or all of their extracurricular commitments soon after commencing full-time work.

That includes the extracurricular commitments that they actually enjoyed – not just the ones that they didn't. When it comes to doing 'other things', university and the profession are polar opposites.

### Opportunity

Full disclosure: I play guitar and sing with a band, and the primary reason I have a music career at all is that my current firm supported my first few bar gigs to a humbling and selfless extent. They turned up in droves, spent unreasonable amounts of money at the bar, and requested *Khe Sanh* incessantly and obnoxiously. Apparently, venue owners don't care if acoustic artists forget the words

to their own songs if that acoustic artist's colleagues are putting the owner's kids through college.

So I am certainly not saying that law firms do not and cannot support creative endeavours. I am not even saying that the demands of the job make it impossible for ambitious lawyers to pursue creative endeavours (it doesn't make it easy, sure, but you can't have two cakes and eat them both).

Creative opportunities actually exist for lawyers! That's not the problem. There is no systemic suppression of creativity in our industry. However, there is an ignorance of it. We need to become more willing, as a profession, to acknowledge and accept the opportunities for creative lawyers to shine.

### Benefits

Why are these apparently present, but often-ignored, opportunities important? The short answer is 'wellbeing'.

Creative expression, for those who are so inclined, can have a significant positive impact on self-esteem and mental health. Artistic activity can use large portions of the brain that are rarely (if ever) used at the same time.

Oh, and it feels good, too. Runners famously get runner's high after a jog, and artists of all kinds can get the emotional equivalent after a rehearsal or performance (and, in some cases, runner's high as well). There have been band rehearsals which have prevented me from yelling at clients, co-workers and cats alike.

We do not belong to a profession that can afford to turn its nose up at anything that might improve our collective mental health.

### Solutions

So if creative opportunities exist, and they're a good thing, what can the profession do to encourage them?

Lawyers – give it a go. If you are at all creatively inclined, use it. Try it again. You won't regret it. You *can* play music, act, draw, paint, sculpt, model, plan events or play sport while meeting budget. It's likely that your firm

will even help you. But you need to step up and make it known that it's what you want to do. It'll enrich you, improve your mental health, and if it involves a guitar, it'll help with the opposite sex, too.

Firms – admittedly, you are doing a lot better than you used to. But you still have a long way to go. Encourage the creative pursuits of your employees and create platforms for them to develop and broadcast their creative talents. Put on talent shows, start a social club, and advertise creative opportunities in your firm newsletter. Give everyone the benefit of the doubt. Let them do 'other things'.

QLS is playing its part, too. It has a law revue now (which has now been excellent for two years in a row, by the way – I'm biased, but buy a ticket next year, anyway). Things like this are important. Laughing releases endorphins, and most lawyer-musicians secretly want to sing songs from Disney and Pixar soundtracks anyway.

### Buy my CD

On first impression, other lawyers rarely believe that I'm also a musician. The opposite is also true – musicians rarely believe that I'm also a lawyer (on first, second or third impression). That's telling. Lawyers are not typically seen as creative souls, but so many of us are.

We need to get better at noticing and then taking opportunities to express ourselves. There *is* room for non-legal creativity to exist alongside the law, and creative pursuits *can* exist alongside a high-powered workload and budget. So let's take advantage of that.

Buy my CD.

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee's Proctor working group is chaired by Greer Davies (GDavies@mcw.com.au) and Hayley Schindler (h.schindler@hopgoodganim.com.au). Timothy Edwards is a solicitor at HopgoodGanim Lawyers.

# Practical, personal guidance

The QLS Senior Counsellor experience

As a junior lawyer, Dr Matthew Turnour consulted QLS Senior Counsellor Max Lockhart, a managing partner at Flower and Hart, about a practice problem he faced.

"Both the way he handled the problem and the way he handled me was very encouraging, both professionally and personally, and I formed a very positive view then of both senior counsellors and their role," Matthew said.

"Over the years in practice, many people within the firm have relied on myself and the QLS Ethics Centre for guidance, so it was logical that as I became more senior in practice, I would think about whether I should offer myself to serve in this way."

Today Matthew is chair of Neumann & Turnour Lawyers, an internationally acknowledged expert on law reform, chair of the QLS Not-for-profit Law Committee, and a QLS Senior Counsellor.

He said the breadth of issues that arose in advising as a QLS Senior Counsellor was extraordinary.

"Rarely is there just one issue," he said. "Embedded in a set of facts presented can be issues around the scope of the retainer, appropriate pricing for services, duties to the court, and how to manage contests of fact between the solicitor and the client."

"Sadly, sometimes the issues involve the professionalism of the other side of the transaction/litigation. Sometimes the advice is simply pragmatic and draws upon experience more than technical knowledge. Sometimes the solicitor just needs assistance to sort out the legal from the ethical issues."

He said that on a number of occasions he had met with early and mid-career lawyers, and those about to enter the profession, to talk with them about employment, partnership offers and whether or not they should continue with their current employment.

"Perhaps one of the major take-outs for senior practitioners is how frequently more junior practitioners leave firms because of the way they have been treated in situations where the firm could easily have ameliorated the problem if they had acted early," he said.



## About QLS Senior Counsellors

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- whether a notification should be made to a professional indemnity insurer
- acting as an intermediary between QLS and a practitioner wishing to remain anonymous.

QLS Senior Counsellors are appointed by QLS Council for a term of three years. The appointment can be renewed for a further three years. See [qls.com.au/ethics](http://qls.com.au/ethics) (login required).

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# Privilege claims under the UCPR

Remember, it's a balancing act

The mechanism for challenging privilege claims under r213 *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) is a potentially useful tool in litigation.

This rule sets out the way in which a claim of privilege may be challenged and how such a challenge should be responded to. The purpose of this article is to analyse the elements of r213 and provide practical tips on invoking the rule and stating a privilege claim. This article focuses on claims of legal professional privilege.

Rule 213 of the UCPR provides:

## "213 Privilege claim

(1) This rule applies if—

(a) a party claims privilege from disclosure of a document; and

(b) another party challenges the claim.

(2) The party making the claim must, within 7 days after the challenge, file and serve on the other party an affidavit stating the claim.

(3) The affidavit must be made by an individual who knows the facts giving rise to the claim."

## Challenging privilege claims

### *Reviewing the list of documents and identifying claims to challenge*

The starting point in considering whether to challenge a privilege claim, and which privilege claims to challenge, is to examine your opponent's list of documents having regard to the issues in your client's case. Your opponent ought to deliver a list of documents over which privilege is claimed, as required by rules 214(1)(a) or 217(3)(c) of the UCPR.

If there are numerous privilege claims in your opposition's list of documents, challenging all of the claims may be unreasonable when it would be too onerous for the disclosing party to respond, particularly in light of the short timeframe for compliance (seven days).

The court may look unfavourably on such a blanket challenge. It is prudent to carefully review the list of documents and make a focused challenge (if any).

In reviewing the list of privileged documents to determine which claims to challenge, you should have regard to the issues in dispute and, in particular, the types of documents that may assist your client's case. Of course, which documents you choose to challenge (if any) depends on the facts, but the following are general matters that you may wish to consider:

- the title or description of the document (if included)
- the sender and recipient of communications and creators of documents
- the purported and actual capacities in which persons act
- the dates of documents relative to key events and allegations in the pleadings, including when litigation was reasonably anticipated.

Once you have reviewed the list of documents and identified potentially challengeable privilege claims, you may wish to distil the claims into categories of similar documents. For example, all internal communications between employees of a party may be grouped together as a category.

If you have identified numerous claims to challenge, you may also choose a smaller number of representative documents in each category to challenge (while reserving the ability to challenge the other claims if warranted). This will reduce the burden on the other party and, ultimately, the court. The outcome of the challenge in respect of these documents may assist to determine the validity of the party's claims to privilege over other similar documents.<sup>1</sup>

### Issuing the challenge

It is sufficient for a party to initiate the challenge under r213 in correspondence. In order to alert the other party to the challenge, it is suggested that you expressly identify that the challenge is made pursuant to r213 and alert your opponent to the deadline for compliance.

A convenient way in which to set out the claims challenged is in a table or schedule that identifies the details of each document. For ease of future reference, you may wish to

give each document a label (for example, a number or letter). This will avoid the need to continually describe the document in full or refer to the lengthy document ID in cases of electronic disclosure.

## Responding to the challenge

### Timing of the response

On receipt of a challenge, you have seven days in which to file and serve an affidavit stating the claim.

If there are numerous claims challenged, then it is unlikely that you will be able to provide an affidavit within that timeframe.<sup>2</sup> Accordingly, if you do not consider you can comply within seven days, it is prudent to write to the other side as soon as practicable to explain why you do not expect to comply and request an extension of time.

In order to reduce issues in dispute, you may wish to consider seeking instructions to waive privilege over certain claims that are challenged, if appropriate in the circumstances.

### Identifying the appropriate deponent

The next step is to identify the appropriate deponent of the affidavit.

Rule 213(3) states that the "affidavit must be made by an individual who knows the facts giving rise to the claim". In *International Entertainment (Aust) Pty Ltd & Churchill & Ors* [2003] QSC 247, McMurdo J was of the view that a solicitor who gave evidence on information and belief from others was not a person who knew the facts giving rise to the claim within the meaning of r213.<sup>3</sup>

For claims of legal professional privilege, the test depends on the dominant purpose for which the communication was made or the document was prepared.<sup>4</sup> The dominant purpose is a question of fact<sup>5</sup> and is "a matter to be objectively determined but the subjective purpose will always be relevant and often decisive".<sup>6</sup>

Therefore, the state of mind of the creator of the document, sender of the communication or the person who called the document into existence may be relevant (for example, where a solicitor commissioned a technical report).<sup>7</sup> The identity of the party with the



## Challenging claims to privilege and being able to respond to such challenges is important for litigators. Report by **Kylie Downes QC** and **James Byrnes**.

relevant purpose might not be that of the person who prepared the document or sent the communication, particularly in cases involving entities that are not natural persons.

Generally, the ideal deponent of the affidavit is the sender or creator, given the relevance of the creator's purpose for making a document and the requirement to know the facts giving rise to the claim. If the creator or sender is unavailable, the next best source of information may be another person involved in the creation of the document or a recipient of the communication.

In circumstances in which there are numerous documents with various senders/creators who may not be available to give evidence, it may be permissible to identify one deponent to make the affidavit based on information provided by the senders/creators as to the purpose of each communication, although there is a risk that this may not comply with r213 (depending on the quality of the evidence given by the deponent). In *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2013] QSC 82, Boddice J accepted the affidavit of in-house counsel, which had in part been based on responses to his enquiries.<sup>8</sup>

An appropriate deponent may then be someone who has first-hand knowledge of the surrounding circumstances and is familiar with the documents, although that person may not necessarily be a sender/creator of all documents, nor a party to all communications. It is recommended that, when possible, the deponent be a person who was a party to a significant proportion of the communications over which privilege is claimed.

From a practical point of view, you may wish to consider the following deponents:

- first, a solicitor (if he/she has sufficient first-hand knowledge). This is to protect potential witnesses in the substantive dispute from premature, and potentially damaging, cross-examination and protect substantive witnesses from the stress of giving evidence, or
- secondly, an in-house lawyer. In many instances, in-house counsel will be involved early in disputes, thereby having sufficient knowledge of the surrounding circumstances. Indeed, the involvement of in-house counsel may be the basis for the claims of privilege; or

- finally, another person involved in the communications or creation of the documents.

In selecting a deponent, it is important to bear in mind that the deponent may be subject to cross-examination in any subsequent application for disclosure.<sup>9</sup> Therefore, the deponent should be someone who is expected to perform well as a witness.

### Content of the affidavit

It is suggested that, when relevant, the affidavit deal with matters such as the following:

- the deponent's background (including qualifications and eligibility to undertake legal practice, if applicable) and his/her involvement in the dispute and any legal advice
- the background to the dispute and why, and at what point, litigation was reasonably anticipated
- the surrounding circumstances in which legal advice was sought, and given, and documents created
- the personnel involved (particularly parties to communications challenged) and the roles of personnel, as well as their relevant qualifications.

The above matters will show the deponent's standing to give the affidavit in compliance with r213 and provide context to the more particularised descriptions of the privilege claims, as well as setting the scene.

The affidavit should also state each of the privilege claims. A convenient format to state each claim is in a schedule or table in the affidavit. This will enable the deponent to explain the dominant purpose and identify the relevant limb of privilege in a column corresponding to each claim.

In describing the claims, you should take care not to divulge too much information so as to waive privilege in the documents or enable the other party to guess the substance of the communications. It may be prudent to include a statement in the affidavit that the deponent does not intend to waive privilege and does not have authority to do so (unless privilege is expressly waived).

When stating the privilege claims, the onus rests on the party asserting the claim of privilege to show that the claim is proper.<sup>10</sup> This will take

more than merely asserting privilege. Rather, the facts verifying the claim should be set out.<sup>11</sup>

An affidavit that is not compliant with r213 does not, of itself, deny a proper claim for privilege and, following an application, the court may require a compliant affidavit to be produced if there is no substantial injustice to the other party or it may exercise its discretion to review the documents to determine the validity of the privilege claims.<sup>12</sup>

In practice, the more fulsome the statement of the privilege claim (taking care not to disclose too much information), the more compelling the claim will be. There is a risk, however, that the more information you provide, the more fodder you give to your opponent for cross-examination or the more likely you are to expose the substance of the privileged communication. Therefore, a balancing act is required.

Once finalised, the affidavit should be filed and served.

Kylie Downes QC is a Brisbane barrister and member of the Proctor editorial committee. James Byrnes is a Brisbane barrister.

### Notes

- <sup>1</sup> Counsel for the parties adopted a similar approach in *Fletcher & Ors v Fortress Credit Corporation (Australia) II Pty Limited & Ors* [2014] QSC 303 at [31].
- <sup>2</sup> Note the comments of P McMurdo J in *Fletcher* at [37] regarding the enormity of the task of strict compliance with r213 in that case.
- <sup>3</sup> See [11].
- <sup>4</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 73.
- <sup>5</sup> *Hartogen Energy Ltd v Australian Gaslight Co.* (1992) 36 FCR 557 at 568.
- <sup>6</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [172].
- <sup>7</sup> See *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332 at 338 (Batt JA); *Hartogen* at 568 and 569.
- <sup>8</sup> *Bowen Central Coal Pty Ltd v Aquila Coal Pty Ltd* [2013] QSC 82 at [28] and [29].
- <sup>9</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [52].
- <sup>10</sup> *Grant v Downs* (1976) 135 CLR 674 at 689.
- <sup>11</sup> See, for example, *Wedmaier v Meldrum* (unreported, Queensland Supreme Court, 9 September 1991).
- <sup>12</sup> P McMurdo J ordered that a compliant affidavit be sworn within a certain time in *Churchill* (refer to [13] and [14]). P McMurdo J inspected documents in *Fletcher* (refer [40] to [43]).

# Family provision claims – from strained to estranged

‘If you cannot get rid of the family skeleton, you may as well make it dance.’<sup>1</sup>

In the formative years of family provision legislation the issue of estrangement was a rarity.

In fact, from 1900 to 1975 there were merely two reported decisions in which this was a factor.<sup>2</sup> Coincidentally, the *Family Law Act* (Cth) came into effect in 1975, bringing about no-fault divorce.

Nowadays, we have a broad range of family structures, from the classic nuclear to single-parent families, to blended families, and even families in which grandparents are parenting their grandchildren. So it is not surprising to see an increase in allegations of estrangement in response to claims for provision.

These modern-day dynamics were recently played out in the decision of *Parker & Or v Australian Executor Trustees Limited* [2016] SASC 64.<sup>3</sup> (*Parker*)

Estrangement is relied upon to demonstrate a rift in the relationship with the deceased which “operates to restrain amplitude in the provision to be ordered”,<sup>4</sup> often with a view to establish disentitling conduct on behalf of the applicant. It frequently involves a degree of blame and shame on both sides, with the intent of creating an environment in which early family relationships are dissected in the spotlight of hindsight, the objective being disproving the claim. This was the case in *Parker*.

*Parker* involved a deceased’s estate worth \$1,692,250.<sup>17</sup> The deceased was survived by his five adult children, but made no provision for three of them and limited provision for two, opting instead to leave the bulk of his estate to a charitable trust bearing his name.

He was reported to have instructed the estate planning specialist employed by Australian Executor Trustees that certain of his children “were not getting a f\*\*\*\*\*g cent”.<sup>5</sup> Despite being warned of a potential claim for provision, and “consistent with his general behaviour of being obstinate”,<sup>6</sup> he did not change his instructions.

It is a farming case involving the usual elements of rural family life and a domineering “volatile... often irritable and bad tempered”<sup>7</sup> father “who was not a loving parent towards his children”,<sup>8</sup> being verbally, physically and financially abusive<sup>9</sup> toward them, and being especially “selfish with money”.<sup>10</sup>

The estrangement came about as a result of a marital separation and ultimate divorce from his wife, with the testator taking the view that his three youngest children “left him”<sup>11</sup> when his wife left him in 1976. One child, Alec, being merely 19 years old at the time, worked his father’s farms, sacrificing his education and opportunities for the paltry sum of \$10 a week, supplemented by casual work on other farms and later relying on social security to support his family.

His sister, Vicky, who was 21 at the time of the parents’ separation, remained in the local area and kept in limited contact with the deceased testator. The remaining three children had limited contact with their father. Despite his treatment of them, all children maintained some degree of contact and were courteous towards him at family functions and celebrations,<sup>12</sup> surprisingly able to do so “without any hostility or rancour”.<sup>13</sup>

These factors provided the perfect backdrop for the court to succinctly revisit the law and its elements with respect to the two-stage test examined in the seminal case of *Vigolo v Bostin* (2005) 221 CLR 191 at 5.<sup>14</sup> In determining the first stage, the court rearticulated the meaning of ‘proper’ and ‘adequate’ as set out in *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 476 and *McCosker v McCosker* (1957) 97 CLR 566 at 571.<sup>15</sup>

Importantly, the court highlighted the importance of a conclusion being made on the basis of its “own general knowledge and experience of current social conditions and standards”, reciting *Goodman v Windeyer* (1980) 144 CLR 490 at 502, with adequacy “not to be decided in a vacuum or by simply looking at the question of whether an applicant has enough upon which to live”.<sup>16</sup>

The court summarised the importance of consideration of estrangement in these types of matters with the following:

“Estrangement of a child and parent should not ordinarily result, on its own, in the child not being able to satisfy the jurisdictional requirement. However it is a factor that can be taken into account. The Court should take into account the whole of the circumstances regarding the relationship. It is for the Court to evaluate all the relevant circumstances, including a period of estrangement and the circumstances of that estrangement, when considering the jurisdictional questions.”<sup>17</sup>

The court ultimately awarded increased provision for Vicky and Alec, and allocated provision for the three other children, David, Sandra and Julie, who were not originally provided for.<sup>18</sup>

Contrast the circumstances of *Parker* with the case of *Revell v Revell* [2016] NSWSC 947 (*Revell*).

*Revell* involved an estate worth about \$10 million, with the deceased leaving legacies to his adult son and daughter of \$1.5 million each, and the residue to his fourth wife of 22 years. His 60-year-old son brought a claim for further provision which included \$800,000 to open a wine bar.<sup>19</sup> While not estranged, their relationship was strained, with the testator describing his son as “a parasite”.<sup>20</sup>



with Christine Smyth

The family history is a rags-to-riches story, borne out of the tragedies visited upon the testator during World War II and his relocation to Australia where he built his fortune. The court considered the plaintiff had “A Fortunate Life”,<sup>21</sup> that the deceased was “generous to his son, more so than most fathers”,<sup>22</sup> with the court viewing the plaintiff as “A Father’s Disappointment”.<sup>23</sup>

The plaintiff was successful working in the food and wine industry. However, he had suffered the vicissitudes of life, including the breakdown of his marriage and financial difficulties.<sup>24</sup> The court considered the community standards<sup>25</sup> and the relationship with adequacy<sup>26</sup> earlier, noting: “The ties that bind began to loosen – understandably, naturally and inexorably. There comes a time when the problems of the son cease to be those of the father.”<sup>27</sup>

There was evidence the testator considered making no provision,<sup>28</sup> but instead took the advice of his solicitor to make provision for his son and prepared a written statement as to his reasons.<sup>29</sup> While the court noted the limitations of the statement,<sup>30</sup> it assisted the court in identifying the “careful nature” with which the testator considered his duties to provide.

In reaching its conclusion, the court referenced the words of Professor Rosalind Croucher, describing the case as being one that fell within “a cohort of independent self-sufficient 50 and 60 year olds, wanting to get more of the pie from their parents, notwithstanding that the parent had made a conscious decision that they had already had enough”.<sup>31</sup> Chiding that “there was a mildly delusional quality about the plaintiff’s expectations and aspirations for the future”,<sup>32</sup> the court ultimately dismissed the claim, with costs.<sup>33</sup>

There is very little research on the topic of estrangement. In one publication, *Stand Alone*, by a United Kingdom organisation dedicated to supporting people estranged from their family members, it was reported that “80% of people surveyed referenced that they themselves had cut contact with a family member, implying at least 5 million people in the UK have made the choice to no longer be in contact with a member of their family... almost one third of the UK population are familiar with the concept of cutting contact with a family member.”<sup>34</sup>

A study undertaken in the United States<sup>35</sup> identified that around 7% of adult children reported estrangement from their mother and 27% estrangement from their father. In Australia, the number of children affected by divorce is around 41,000 to 42,000 a year,<sup>36</sup> and this does not take into account children from unmarried couples.

Accordingly, estrangement is likely to become a more significant element in family provision claims. This is especially the case when many estate planning clients remain inured to salient advice about their responsibilities to make proper provision.<sup>37</sup>

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

#### Notes

- <sup>1</sup> George Bernard Shaw, *Immaturity*
- <sup>2</sup> Para 2.9, *Family Provision in Australia* 4th Edition, John de Groot, Bruce Nickel, LexisNexis Butterworths, citing *Re Joliffe* [1929] St R Qd 189; *Scales’ case* (1962) 107 CLR 9.
- <sup>3</sup> See also *Wright v Wright* [2016] QDC 74.
- <sup>4</sup> *Wheatley v Wheatley* [2006] NSWCA 262 per Bryson JA cited *Wright v Wright* [2016] QDC 74 at [49].
- <sup>5</sup> At [97].
- <sup>6</sup> *Ibid.*
- <sup>7</sup> At [9].
- <sup>8</sup> *Ibid.*
- <sup>9</sup> At [61] and at [66].
- <sup>10</sup> At [9].
- <sup>11</sup> At [12].
- <sup>12</sup> At [62] [67] and [79].
- <sup>13</sup> *Ibid.*
- <sup>14</sup> At [19].
- <sup>15</sup> Referring to *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463.
- <sup>16</sup> At [26].
- <sup>17</sup> At [30] reciting *Burke v Burke* [2015] NSWCA 195.
- <sup>18</sup> At [116].
- <sup>19</sup> At [15].
- <sup>20</sup> At [24]-[25].
- <sup>21</sup> Heading to paras [10]-[12].
- <sup>22</sup> At [11].
- <sup>23</sup> Heading to paras [23]-[29].
- <sup>24</sup> At [14] & [19].
- <sup>25</sup> At [30]-[32].
- <sup>26</sup> At [33]-[36].
- <sup>27</sup> At [24].
- <sup>28</sup> At [26].
- <sup>29</sup> At [27]-[30].
- <sup>30</sup> At [29].
- <sup>31</sup> At [30] “which were adopted by Hallen J in *Penfold v Predny* [2016] NSWSC 472 at [6]”.
- <sup>32</sup> At [22].
- <sup>33</sup> At [39].
- <sup>34</sup> [standalone.org.uk/wp-content/uploads/2013/08/StandAlonePrevalenceRESEARCH3.pdf](http://standalone.org.uk/wp-content/uploads/2013/08/StandAlonePrevalenceRESEARCH3.pdf).
- <sup>35</sup> Silverstein M & Bengston VL (1997). Intergenerational solidarity and the structure of adult child-parent relationships in American families. *American Journal of Sociology*, 103(2), 429-460.
- <sup>36</sup> [abs.gov.au/ausstats/abs@.nsf/Latestproducts/3310.0Main%20Features122014?opendocument&tabname=Summary&prodno=3310.0&issue=2014&num=&view=](http://abs.gov.au/ausstats/abs@.nsf/Latestproducts/3310.0Main%20Features122014?opendocument&tabname=Summary&prodno=3310.0&issue=2014&num=&view=).
- <sup>37</sup> Thank you to my associate solicitor, Michele Davis, for bringing these cases to my attention, assisting me with research and being a great soundboard in the writing of this article. Thank you to my paralegal, Chelsea Baker, for assisting with research into family estrangement studies and keeping me in good supply of tea and chocolate while I wrote this column.

# Hard bargaining, or pushing your luck?

How turning down a settlement offer can lead to a costs order

by Sara McRostie



**Proceedings in the Fair Work Commission have an important distinction when it comes to costs – the general rule is that parties must bear their own.**

This is to free parties from the risk of having to pay the costs of an opposing party in commission proceedings if they are unsuccessful at hearing. There are limited exceptions to this general rule under s400A and s611(2) of the *Fair Work Act 2009* (Cth) (the Act). Case law makes it clear there are hurdles that must be overcome to meet the requirements of these sections for a party to bear the opposing party's costs.<sup>1</sup>

Hard bargaining or reasonably refusing a settlement offer is not enough to trigger this exception, yet authorities have established that the unreasonable refusal of a settlement offer can potentially provide the circumstances to meet these requirements.

## Section 400A costs – a lower bar?

Section 400A allows the commission to order costs against a party in an unfair dismissal matter if they have caused those costs to be incurred, for instance, by acting unreasonably or because of an omission in connection with the conduct or continuation of the matter.

Unlike the limited exceptions under s611(2), s400A captures a broad range of conduct, including failing to discontinue an unfair dismissal application and failing to agree to terms of settlement that could have led to the application being discontinued.

The power to award costs under s400A is not intended to prevent parties from hard bargaining or robustly pursuing or defending an unfair dismissal claim.<sup>2</sup> However, the commission has recently exercised its discretion to award indemnity costs under s400A when the applicant has unreasonably rejected a settlement offer.

## Unreasonable refusal

*Colin Ferry v GHS Regional WA Pty Ltd T/A GHS Solutions* [2016] FWC 3120

The commission ordered Mr Ferry to pay indemnity costs of \$13,875.50 to his former employer for unreasonably refusing a \$3000 offer to settle his unfair dismissal claim.

The settlement offer came following a conciliation conference and was made on the basis that it was “without prejudice save as to costs”. In the letter, the employer expressly advised the self-represented applicant of its intention to rely on the offer as to costs if the applicant's claim was unsuccessful.

The applicant didn't tell the employer directly that he refused the offer, but communicated his decision in an email to the commission and didn't make a counter-offer.

The applicant's unfair dismissal claim was unsuccessful at hearing and the employer then made an application for costs under s400A.

The commission said that s400A of the Act should not prevent parties from “hard bargaining”, nor compel them to accept the best, or near best, offer from the other party.

In this case it was found that the applicant did not reasonably assess the prospects of his case. The applicant had received the employer's witness statements, supporting documents and outline of submissions by the time the offer of settlement was made. Under those circumstances, the commission was satisfied the applicant had sufficient information to realise that his case was weak, despite being a self-represented litigant with no legal experience.

The applicant's refusal to accept the offer went beyond hard bargaining and the continuation of the proceedings in wilful disregard of known facts was deemed delinquent conduct by the applicant.

*Steven Post v NTI Limited T/A NTI* [2016] FWC 1059

The employer in this matter was also successful in recovering indemnity costs under s400A. In this case Mr Post, who was self-represented, rejected multiple offers ranging from five weeks' pay to the equivalent of the six-month statutory limit on compensation, which the commission can order in unfair dismissal matters.

The application for an unfair dismissal remedy was dismissed by the commission on the basis that the applicant had engaged in serious misconduct. The applicant then

lodged an appeal, which was also dismissed by a full bench of the commission, before a final attempt at judicial review proceedings in the Federal Court that he later discontinued.

The employer applied for costs under s400A and, in the alternative, s611 of the Act, for the costs incurred by responding to the substantive unfair dismissal remedy application (not the subsequent applications).

In allowing the employer's cost application, the commission said the applicant was either unwilling or unable to objectively assess the merits of his application. The applicant's rejection of each offer was held to be reckless conduct because, on the facts known to the applicant, he should have appreciated that he had a hopeless case. In these circumstances, the commission ordered the applicant to pay the employer's costs from the date the first settlement offer was made.

## Reasonable refusal

*Thaer Barkho v Dairy Country Pty Ltd* [2016] FWC 1059

In contrast, an employer's application for indemnity costs under s400A was dismissed in this matter on the basis that it was perfectly reasonable for the applicant to reject the employer's offers.

At conciliation, the employer made an offer that was “final and not to be repeated”, only to make the same offer two more times. The employer then increased its offer, and repeated the increased offer. The commission said the employer's approach encouraged the applicant to reject the offers.

In these circumstances, the commission was not satisfied that the applicant's rejection of the several offers made by the employer was unreasonable or an omission of the applicant.

Sara McRostie is a partner at Sparke Helmore Lawyers. The assistance of lawyer Matthew Giles in preparing this article is gratefully acknowledged.

### Notes

<sup>1</sup> *Church v Eastern Health* [2014] FWC 810.

<sup>2</sup> *Steven Post v NTI Limited T/A NTI* [2016] FWC 1059 at [153]; *Thaer Barkho v Dairy Country Pty Ltd* [2016] FWC 3111 at [9].

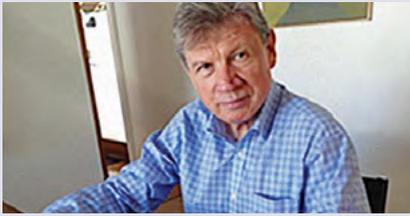
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# Confidentiality, competency and the retainer – an ethical teaser

I act for an elderly client who is charged with indictable offences. I have seen the client on a couple of occasions.

At each interview the client has said that he and his mates have weapons which could cause damage to the police. I am concerned. I think that the client is an angry man. He seems frustrated; on occasions he appears agitated and sometimes seems to be confused.

Can I disclose my concerns? Can I terminate my retainer? Should I be concerned about his competency?

## Imminent physical harm exception

When considering the possibility that a client may harm themselves or others, we must recall that our duty of confidentiality is absolute, unless we can identify a permitted exception under Rule 9.2 of the *Australian Solicitors Conduct Rules 2012* (ASCR) to disclose such information. The obligation of confidence arises in contract, equity and under the ASCR – it aims to ensure we preserve the client's confidences, so that we can render effective legal services to the client.

Our duty of confidentiality must be distinguished from the evidentiary rule of client legal privilege. The ethical rule is wider and applies without regard to the nature or sources of the information or the fact that others may share the information.

We owe the duty of confidentiality to every client, without exception, and whether or not the client is a continuing client or casual client. This duty survives the professional relationship, and continues indefinitely after we have ceased to act for the client. Generally we should not disclose having been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure.

Rule 9.2 does provide a permitted exception; we can disclose information for the purpose of preventing imminent serious physical harm to our client or to another person. This is an exceptional situation; we need to be satisfied that imminent serious physical harm is going to occur and needs to be prevented.

We must remember that, if we do exercise the discretion to disclose, we should not disclose more information than is required. In assessing whether disclosure of the confidential information is justified to prevent imminent serious physical harm, we should consider a number of factors, including:

- a. the likelihood that the potential injury will occur and its imminence, and
- b. the circumstances under which we have acquired the information.

How and when disclosure should be made under this sub-rule will depend on the circumstances. If confidential information is to be disclosed under this exception, then we should prepare a written note as soon as possible, which should include such things as the:

- a. the date and time the disclosure was made
- b. the grounds relied on to make the disclosure
- c. the details of the harm the disclosure was intended to prevent
- d. the identity of the person to whom the disclosure was made
- e. the content of the disclosure and how it was disclosed.

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by Stafford Shepherd

## Termination of the retainer

In deciding whether we can terminate our retainer, we should have regard to any written retainer that may exist between us and the client. Many retainers expressly permit termination where a client no longer has trust and confidence in us. Trust and confidence is a two-way street; the client must have trust and confidence in our representation, and we must have trust and confidence in the information that the client is providing to us.

Before accepting a retainer, or during a retainer, if we have suspicion or doubts about whether we may be assisting a client in a dishonest, fraudulent, criminal or illegal act, we should make enquiries about the client, and about the subject matter and objectives of the retainer.

Rule 13.1 sets out default rules for when a client's matter can be terminated in the absence of express grounds. An engagement can be terminated:

- by mutual consent
- the client can discharge us, or
- we can terminate the retainer for *just cause and on reasonable notice*.

Generally we should complete the task undertaken, unless there is a justifiable cause for terminating the relationship. It is inappropriate for us to withdraw on capricious or arbitrary grounds.

No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal, and how quickly we may cease acting will depend on the circumstances. When the matter is covered by statute, or rules of the court, these must be taken into account. The governing principle is that we should protect the client's interest to the best of our ability and should not desert the client at a critical stage of a matter or at a time where withdrawal would put the client in position of disadvantage or peril. The client should be given sufficient time to retain and instruct a replacement lawyer.

If there is a serious loss of trust and confidence, the circumstances may exist to withdraw: we must have a reasonable cause for the withdrawal, for example, if we are deceived by our client or the client refuses to accept or act upon the reasonable advice or recommendations we make on a significant issue; or the client is persistently unreasonable or uncooperative in a material respect; or we are facing difficulty in obtaining adequate instructions from the client. However, we should not use the threat of withdrawal to force a hasty decision upon the client on a difficult question: See *R v Nerbas* [2012] 1 Qd R 362.

## Capacity

Our relationship with a client presupposes the client has the requisite ability to make decisions about his or her legal affairs and to give us competent and proper instructions (Rule 8 ASCR).

A client's ability to make decisions may depend on such factors as age, intelligence, mental and physical health. A client's ability to make decisions may change over time. A client may be capable of making some decisions but not others.

If we believe a person may be incapable of giving instructions, we should decline to act on such instructions. If the matter is before a court we have a professional obligation to bring the matter to the court's attention. This obligation arises from our position as an officer of the court, not from the retainer (see *Goddard Elliott v Fritsch* [2012] VSC 87). Incapacity will not, necessarily, terminate the retainer (*Blankley v Central Manchester & Manchester Children's University Hospitals NHS Trust* [2014] EWHC 168 (Queen's Bench affirmed by the Court of Appeal in *Blankley v Central Manchester and Manchester Children's University Hospital NHS Trust* [2015] EWCA Civ 18)).

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

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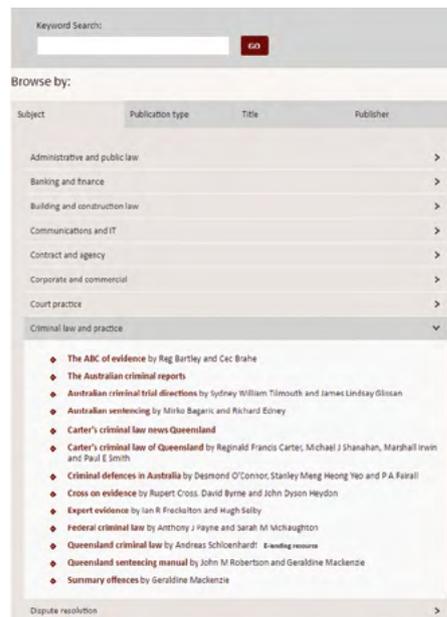
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# Maintenance roadblock on way to \$16.5m 'wish'

with Robert Glade-Wright



**Maintenance – High Court upholds discharge of interim order – inferred wife could call on her brothers to pay her \$150,000 from father's estate**

In *Hall v Hall* [2016] HCA 23 (8 June 2016) the High Court dismissed the wife's appeal against an order of the Full Court (FCA) discharging Dawe J's interim maintenance order that the (property developer) husband pay the (medical practitioner) wife interim maintenance of \$10,833 per month ([15]). The wife had deposed that she owned two luxury motor vehicles and an interest in her father's estate of an unknown value.

Since the order, an affidavit filed in opposition to a subpoena for production of the will disclosed that the father expressed a "wish" that the wife receive from a group of companies (in which he held shares which he left to the wife's brothers) \$16,500,000 on the first to occur of a number of events, including divorce, and that she receive \$150,000 a year until the date (if any) of that payment ([20]).

Upon the Full Court allowing the husband's appeal on the ground that the wife's estate interest was a financial resource, the wife appealed to the High Court. French CJ, Gageler, Keane, Nettle & Gordon JJ (Gordon J dissenting) said (at [31]-[32]):

"... Accepting that ... the annual payment ... would have been voluntary, the Full Court found that the wife would have received [it] if she had requested it ... In drawing that inference ... the Full Court noted that the Group was controlled by the wife's brothers and that there was no evidence that the wife had requested [them] to comply with their father's wish once she became aware of ... the will. The Full Court saw nothing in the evidence to suggest that any such request, if made, would have been denied. The fact that her brothers had provided her with luxury motor vehicles indicated that the wife had a good relationship with them."

Upon dismissing the appeal with costs, the majority said (from [45]):

"The Full Court's finding that the wife would have received the annual payment of \$150,000 ... if she had asked her brothers was well open on the evidence. ( ... )

[48] True it is that the wife had not received any payment from the time of their father's death. The reasons for that were wholly unexplored in the evidence. That evidentiary gap was within the power of the wife to fill. It was within [her] power ... to lead evidence to provide some explanation. Again, her failure to do so allows the inference to be drawn that such explanation ... would not have assisted her case. ( ... )

[55] Whether a potential source of financial support amounts to a financial resource of a party [under s75(2)(b) FLA] turns in most cases on a factual inquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it."

**Property – initial contributions adjustment upheld on appeal but not judge's finding that wife's earning capacity was unaffected by marriage**

In *Wah & Golay* [2016] FamCAFC 67 (7 April 2016) the Full Court allowed the wife's appeal against a property order but left undisturbed the assessment of contributions as 87.5:12.5 where of a net pool of \$3.9m the husband's initial contributions were \$2.4m and the wife's \$280,000. Rees J had made no s75(2) adjustment, finding that the wife's earning capacity was unaffected by the eight-year marriage.

Murphy J (with whom Ryan and Aldridge JJ agreed) said that it was found that "the wife would have \$500,000 with which to house and support herself" ([25]) but had "little if any prospect of gainful employment" and that he was "unable to see where her Honour ha[d] given any consideration to ... s75(2)(d) (wife's commitments enabling her to support herself) ([26]) or the fact that the wife was receiving sickness benefits (s75(2)(f)) or that a reasonable standard of living was to be considered too (s75(2)(g)) ([27]).

Murphy J referred (at [28]) to Rees J's finding that "there [wa]s no evidence that she had an earning capacity before the marriage" and that she "earned a small amount ... during the marriage for a year or so" and said as to s75(2)(k) that he was "unable to see how her Honour's finding that the wife's earning capacity was unaffected by the relationship was open to her on the

evidence" ([30]) given that the wife's taxable income (in 2003 which "embraced the first seven months of the parties' cohabitation") was \$56,900, then \$14,300 in the first full tax year of the marriage, whereafter the wife was a full-time homemaker ([29]).

Murphy J held ([49]) that the nil adjustment under s75(2) should be increased to 7.5 per cent or about \$294,000, giving the wife about \$786,000 as ([51]) "the relationship ... had a detrimental impact on her capacity to earn income" and "[h]er current standard of living is markedly poorer than the husband's and ... than that enjoyed by the parties during their relationship".

**Publication of proceedings – father allowed to use family consultant's report in his domestic violence case**

In *Miller & Murphy* [2016] FCCA 974 (2 May 2016) Judge Brown granted Mr Miller's application to use in domestic violence proceedings the report of a family consultant that contained a child's account of an altercation between the parties that was inconsistent with that of the wife in those proceedings. The court (at [43]-[45]) considered s121(1) of the *Family Law Act* which prohibits the dissemination to *the public* or a *section of the public* by any means any account of proceedings arising under the Act which identify a party to the proceedings or a person who is related to, or associated with, a party to the proceedings, saying that the question arising is whether if the report is released it would represent "dissemination to the public".

The court cited in *Re Edelsten; ex parte Donnelly* (1998) 18 FCR 434 in which Morling J considered that the reference to *the public* in section 121(1) should be read widely and refer to "widespread communication with the aim of reaching a wide audience". The court concluded that if in the case at hand the report were released, it would be read "potentially [by] defence counsel for Mr Miller, the police prosecutor and the presiding magistrate" which "cannot be considered to be a wide audience".

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

# Counsel in the costs equation

*Pott v Clayton Utz* [2016] QDC 39

## *Legal Profession Act 2007* (Qld) s339 – notification of application for costs assessment – implications – meaning of ‘taken to be a party’ – whether barrister may be directed to itemise bill

In *Pott v Clayton Utz* [2016] QDC 39 Reid DCJ was required to construe what his Honour described as the “somewhat unusual” wording of s339 of the *Legal Profession Act 2007* (Qld) (the Act).

### Background

The respondent acted for the applicant’s husband, and then for his estate, in legal proceedings from 2004. It engaged senior counsel, Mr Thompson QC (senior counsel), and junior counsel, Ms Fitzgerald (junior counsel), to act for the deceased and the estate in those proceedings.

The applicant, who was the executor of her husband’s estate, disputed various items in the bill rendered by the respondent and sought an assessment of those costs. There was no dispute between the respondent and either counsel, but some of the applicant’s objections related to work undertaken by counsel and claimed in the respondent’s bill as disbursements.

On 2 April 2015 Reid DCJ made orders under s339 of the Act, including a direction that the applicant effect service of copies of all documents filed in the proceedings on both counsel, an order requiring the applicant to serve any application in relation to the adequacy of itemisation within a stipulated timeframe, and various orders in relation to the future conduct of the matter: *Pott v Clayton Utz* [2005] QDC 66.

In the course of his judgment, Reid DCJ expressed the view that any determination in respect of many of the items to which the applicant objected, including items related to fees of both junior and senior counsel, should be done in a preliminary hearing before the matter was referred to assessment. His Honour regarded such issues in this case as involving issues of credit which were beyond the scope of an assessor’s duty. Reference was made in this regard to the observations of McGill SC DCJ in *Paroz v Clifford Gouldson Lawyers* [2012] QDC 151.

On 30 April 2015 the applicant filed an application seeking orders requiring that some of the costs amounts claimed by the respondent be further itemised by breaking them into single claims for particular amounts, and also requiring that both counsel “properly itemise” certain invoices for their fees so as to allow assessment under the Act.

### Issues

The application did not come before the court until 15 December 2015. At that time the applicant sought an order amending the application filed on 30 April so as to seek orders requiring the respondent to procure the proper itemisation of counsels’ fees, rather than ordering counsel to provide them. The principle issue before the court was whether the proposed amendments should be permitted.

The court was also required to determine the form of the orders designed to allow the application that the respondent provide further itemisation of its costs, and to regulate the hearing of the ‘*Paroz v Clifford Gouldson*’ issues.

### Legislation

Under r375(1) of the *Uniform Civil Procedure Rules 1999* (UCPR) the court may allow or direct a party to amend a document in a proceeding, including an application, “in the way and on the conditions the court considers appropriate”.

Section 339 of the *Legal Profession Act 2007* (Qld) provides, so far as is relevant:

#### “339 Persons to be notified of application

- (1) The applicant for a costs assessment must, under the Uniform Civil Procedure Rules, give notice of the costs application to any other person the applicant knows is 1 of the following—
  - (a) a law practice to whom the legal costs have been paid or are payable;
  - ...
  - (2) A person given notice of the costs application under subsection (1)—
    - (a) is entitled to participate in the costs assessment process; and
    - (b) is taken to be a party to the assessment; and
    - (c) if the costs assessor so decides, is bound by the assessment.”

### Analysis

It was not in dispute that both senior and junior counsel were each a law practice to whom the legal costs had been paid or were payable, within the meaning of that term as used in s339(1)(a) of the Act. Accordingly, once they had been given notice in accordance with the direction of the court, s339(2) of the Act then applied to both counsel. There was, however, a dispute as to the implications that flowed from this.

It was submitted for the respondent and for junior counsel that, though both counsel were “taken to be a party to the assessment”, this did not make them parties to the application for itemisation and the court did not have jurisdiction to make orders directly against them. Senior counsel expressed his view to the same effect in an email to the applicant’s solicitors that was provided to the court. He advised in that email that he did not appear and was not represented because he regarded it as unnecessary for him to do so until such time as he was ordered to be a party to the proceeding.

Reid DCJ noted that persons given notice under s339(1) of the Act had various entitlements as a result of s339(2). His Honour suggested, as examples, that counsel might seek a review of any assessment relating to their fees, or appeal from orders relating to such a review. His Honour also regarded the process set in place by s339(2) as including



Can a court seek itemisation of the fees charged by counsel, if they are not technically a party to the proceeding? Report by **Sheryl Jackson**.

what he had earlier referred to in his earlier judgment as "*Paroz v Clifford Gouldson*" issues, since in his view natural justice required an entitlement to participate not just in the assessment by the assessor but in ancillary matters relating to that process.

In considering the rationale for these entitlements, Reid DCJ said that a determination by an assessor concerning counsel's fees may have consequences for a barrister, such as the impact of an adverse finding on their professional reputation, and a weakening of their position in any subsequent negotiations with their solicitors about whether they should repay some part of their fees to the solicitor. There was also a potential for an assessor or the court to exercise the power under s343 of the Act to ask the registrar to refer a matter to the Legal Services Commissioner to consider disciplinary action.

His Honour concluded, however, that s339 of the Act did not have the consequence that a person served with a notice of a costs application under ss(1) is a party to the proceeding. In that regard, his Honour said (at [24]):

"But in my view the provisions of s339 do not mean the assessor of a bill between a client and a solicitor can direct a barrister to repay fees to the solicitor or the client. They are not a party in that sense."

Reid DCJ then considered whether the fact that a barrister was "taken to be a party to the assessment" with the attendant rights, and could face consequences of the kind referred to above, meant that barristers could also be required to provide further itemisation of their invoices. On that question, his Honour concluded (at [27]):

"...the provisions of s339(2) empower the court to make orders against a party given notice as required by s339(1)(a), as here occurred and so taken to be a party to the assessment, if such orders are needed to ensure the effective exercise of the jurisdiction to assess legal costs."

Reid DCJ was accordingly satisfied that the application as filed on 30 April 2015, which sought to have counsel "properly itemise" a number of identified invoices, was in an appropriate form, and that the court had the power to make the orders requested. His Honour emphasised, however, that the issue of whether further itemisation should in fact be ordered was a matter to be subsequently determined.

His Honour viewed it as inappropriate to make the respondent responsible for providing this information. Accordingly, he dismissed the application to amend the application filed on 30 April 2015 in a way which would require the respondent to procure the proper itemisation of counsel's invoices.

Reid DCJ proceeded to make a number of directions for the further conduct of the matter, including orders for written submissions in relation to the application of 30 April 2015, and orders to facilitate the identification of outstanding issues which should be tried by the District Court before the appointment of a costs assessor.

### Comment

As Reid DCJ observed in the course of his judgment, the conclusion that s339(2) enables the court to direct a barrister given notice under ss(1) to provide a proper itemisation of their fees is consistent with the consumer protection purpose of division 7 of part 3.4 of the Act, in which the provision is placed.

It means that an appropriate avenue is available to a client in circumstances in which a barrister has failed or refused to include in an invoice provided to solicitors sufficient particulars to enable the client to decide whether to challenge the solicitor's claim to those fees as a disbursement.

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



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# High Court and Federal Court casenotes

## High Court

### Tort – negligence – duty to take precautions – appellate review – causation

In *Robinson Helicopter Company Incorporated v McDermott* [2016] HCA 22 (8 June 2016) the High Court considered the correctness of the findings of the primary judge, that a safety inspection procedure in a manual for a helicopter made by the appellant was adequate. The judge's conclusion followed from factual findings about the likely cause of a loose bolt connected to a helicopter flex plate and a disturbed torque strip, and whether the manual provided sufficient instruction to enable detection of bolt defects at inspections. The Court of Appeal reversed the decision, on the basis of a different finding about the cause of the loose bolt and the torque strip. The High Court reaffirmed that an appellate court is to conduct a "real review" of the evidence and is required to make factual findings of its own if it concludes that the primary judge erred. But the court should not interfere with the primary judge's findings unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony", or are "glaringly improbable" or "contrary to compelling inferences". The High Court found that the evidence supported the primary judge's findings and that judge's reasons were consistent, contrary to the Court of Appeal decision. Further, even if the Court of Appeal findings had survived, the respondent had failed to make out causation. French CJ, Bell, Keane, Nettle and Gordon JJ jointly. Appeal from the Court of Appeal (Qld) allowed.

### Family law – spousal maintenance – making or discharge of interim maintenance orders

See this month's family law report, page 35

### Constitutional law – Section 109 – inconsistency between Commonwealth and state laws

In *Bell Group N.V. (in liquidation) v Western Australia* [2016] HCA 21 (16 May 2016) the High Court held that the *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) (Bell Act), which dealt with the administration of the property of the Bell Group, was inconsistent with the *Income Tax Assessment Act 1936* (Cth) and the *Taxation Administration Act 1953* (Cth) (the Tax Acts) and invalid pursuant to s109 of the Constitution. Under the Bell Act, the liabilities of creditors of the Bell Group were assessed as proved or not by an authority created under the Act. The authority was given an absolute discretion to determine, and to recommend to the governor, the quantification of any creditor's

liability, the amount to be paid or the property to be transferred to a creditor, and the priority to be given to any payment or transfer. Any surplus vested in the state. All rights of creditors outside the Bell Act were extinguished. The Governor had a further discretion to accept the authority's recommendation. The court held that the Bell Act altered, impaired or detracted from the rights of the Commonwealth under the Tax Acts, which provided for debts to be paid to the Commonwealth and for priority to be given to those debts. The Bell Act further altered, impaired or detracted from the rights and obligations of the liquidator under the Tax Acts. The Bell Act was invalid in its entirety, as it could not stand without the impugned sections, nor could those sections be read down. French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ jointly; Gageler J separately concurring. Answers to Special Case given.

### Criminal law – sentencing – appeals – use of additional material on appeal

In *Betts v The Queen* [2016] HCA 25 (15 June 2016) the High Court considered the circumstances in which new material could be considered by an appellate court conducting an appeal on sentence. The appellant had pleaded guilty to two charges and was sentenced. He appealed from the sentence on four grounds, and provided the court with a folder of new material in case the Court of Appeal came to re-sentence him. Two of the four grounds were upheld, but the appeal was dismissed on the basis that no lesser sentence was warranted. In its decision, the Court of Appeal did not take into account the new material. The High Court noted that while the Court of Appeal has power to receive new evidence to avoid miscarriages of justice, it requires appellants to establish proper grounds before it will consider receiving such evidence. At the same time, it is generally accepted that evidence of an offender's rehabilitation since the first sentence can be taken into account. Here, the appellant's case before the sentencing judge was different to – and inconsistent with – that on appeal. The High Court held that the appellant had made his forensic choices at first instance and there was nothing in the new material that suggested the Court of Appeal's rejection of the new evidence occasioned a miscarriage of justice. French CJ, Kiefel, Bell, Gageler and Gordon JJ jointly. Appeal from the Court of Appeal (NSW) dismissed.

### Constitutional law – Section 80 – trial by jury – whether state law allowing for trial by judge alone applicable

In *Alqudsi v The Queen* [2016] HCA 24 (15 June 2016) the High Court considered whether state criminal procedure laws allowing for trial by judge alone in indictable matters can be used in a trial of a Commonwealth indictable offence. Mr Alqudsi was charged on indictment with offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). All offences under that Act are specified to be tried on indictment. Mr Alqudsi applied for a trial by judge alone, which the *Criminal Procedure Act 1986* (NSW) allows for in trials of indictable offences, in certain circumstances. The matter was removed to the High Court to consider whether that procedure was available in light of s80, which relevantly provides that "The trial on indictment of any offence against any law of the Commonwealth shall be by jury". The court held that s80 does not allow for exceptions. The Commonwealth can specify when an offence is triable summarily or on indictment, but where an offence is tried on indictment, then s80 "admits of no other mode of trial" but trial by jury. State procedural laws allowing for trial by judge alone are not picked up and applied in those circumstances. Kiefel, Bell and Keane JJ jointly; Gageler J, and Nettle and Gordon JJ, concurring separately; French CJ dissenting. Answer given to case stated.

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

## Federal Court

### Practice and procedure – appeal from stay order – whether fair and proper notice of change of argument involving a serious and grave allegation against a person – discussion of obligations in ex parte applications

In *Rumsley v Vegas Enterprises Pty Ltd* [2016] FCAFC 84 (13 June 2016) the Full Court (North and Reeves JJ, Siopis J agreeing) set aside a stay order made by the primary judge (Gilmour J) in relation to a debt appropriation order made under s53 of the *Federal Court of Australia Act 1976* (Cth) and the *Civil Judgment Enforcement Act 2004* (WA). The Full Court held that the appellant, a legal practitioner, had not been provided with a reasonable opportunity to respond to allegations that were made for the first time at the stay application hearing before the primary judge and which had not been foreshadowed in submissions. Those allegations



with Andrew Yuile and Dan Star

were that the appellant had failed to disclose information to the deputy district registrar which was material to the grant of the ex parte appropriation order he had sought and obtained (at [2] and [10]). The appellant and his counsel were not put on notice that the alleged material non-disclosure was relied upon as the primary ground for an urgent order staying the order made by the deputy district registrar (at [12]). The primary judge, in granting the stay, held at [13] that the appellant, particularly as an officer of the court, was required to make disclosure of certain information to the deputy district registrar.

Justices North and Reeves referred at [20] to the principles relevant to the obligations imposed on a person to make full and fair disclosure to a court when seeking to have the court make an order ex parte. Their Honours stated at [21] that failing to make disclosure of a material fact is tantamount to misleading the court and, from the perspective of a lawyer, such conduct is contrary to his or her duty of honesty and candour to the court.

Accordingly North and Reeves JJ considered at [22] that the allegation against the appellant on which the stay order was granted by the primary judge was of “the most serious and grave character”. They continued: “[w]e consider it was of such seriousness and gravity that fairness and justice dictated that [the appellant] should have been given notice of it ... and given a reasonable opportunity to prepare a response to it”. Their Honours rejected the argument at [23] that proper notice of this ground for the stay application was provided as the allegation had been made soon after the hearing began before the primary judge. They also rejected at [24] the contention that the appellant had been represented by experienced counsel who did not seek an adjournment and proceeded to make submissions in opposition to the stay application. Justices North and Reeves explained that “it is clear from the transcript of the hearing that [the appellant’s] counsel was taken by surprise and said so openly at the beginning of his submissions to the primary Judge. In those circumstances, we fail to see how the capacity of counsel to contend such a surprise situation can justify it being created in the first place” (at [24]). Further, the competing imperatives of urgency and fair and proper notice could have both been accommodated, for example, through interim stay orders and short adjournments (at [25]). On the issue of whether there had been a material non-disclosure, it was sufficient that the appellant had suffered the “prerequisite ‘practical injustice’”, referring at [26] to *Re Minister for*

*Immigration and Multicultural Affairs; Ex parte Hieu Trung Lam* (2003) 214 CLR 1 at [37]-[38] per Gleeson CJ.

Justice Siopis agreed that the appeal should be allowed. He also discussed at [32]-[41], without deciding, whether there was a difference in principle between duties of disclosure in ex parte applications made before final judgment and applications by a judgment creditor made in the absence of a judgment creditor for orders in aid of execution upon a final judgment.

**Practice and procedure – case management principles – observations on the breadth of ss37M, 37N and 37P of the *Federal Court of Australia Act 1976* – appropriateness of an order requiring a party to explain the relevance of earlier findings in judgments to current proceedings**

*Mitsub Pty Limited v McGraw-Hill Financial Inc* [2016] FCA 559 (20 May 2016) concerned an order made at a directions hearing by Rares J requiring the chief executive officer of the respondents to identify, after personally reviewing the files in the proceeding and a number of other proceedings in which the respondents has been involved, whether the respondents contended that certain findings previously made in other proceedings involving the respondents in relation to certain ratings methodologies should apply in this proceeding.

There were eight current representative proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) in relation to ratings given to structured finance products. Previous Federal Court judgments considered aspects of the finance modelling used to assign ratings to structured finance products.

The respondents argued at [7] that there was no power in the court to make the order proposed by Rares J or, if there was, it should not be made. Justice Rares discussed at [8] the court’s substantive case management powers such as those in Part VB of the *Federal Court of Australia Act*. His Honour said at [9] that: “[p]rovisions such as Pt VB have the purpose of ensuring that the conduct of civil proceedings, as French CJ, Kiefel, Bell, Gageler and Keane JJ said in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 323 [56], “is firmly in the hands of the Court”.

Rares J said at [11]: “Of course, I have not come to any clear view or understanding of these matters, and there is no evidence about them, in any of the current proceedings before me. Rather, I am seeking to understand how best to give appropriate directions in the future to enable the Court to deal with the real

issues, many of which have superficially, at least, some common features. As Sheppard J (with whom Burchett J agreed on this point at 434) said in *E I Du Pont de Nemours & Co v Commissioner of Patents* (1987) 16 FCR 423 at 424, judges have power ‘to make, and continue to make, such directions as seem to them best suited properly and adequately to manage and direct the cases in their lists’. He said that the Court had a duty to make appropriate directions, even if necessary, against the will of the parties, that were adequate for and suited to the needs of the case. That inherent or implied power of the Court is reinforced by Pt VB and authorities such as *Expense Reduction* 250 CLR 303. I considered that it would be informative and important to understand, having regard to Jagot J’s finding about what S&P [the respondents] knew or ought to have known concerning what she found was the common knowledge of the issues concerning the use of the Gaussian copula in ratings modelling, what, if any, bearing her Honour’s finding and the two Central Bank reports, might have on the preparation of the eight current proceedings for trial.”

The affidavit was required by the chief executive officer of the respondents in order to ensure that that person with ultimate responsibility for the decision to litigate the relevant issues gave the explanation (at [13] and [15]). Rares J was motivated by the fact the specific issues in the eight proceedings had the potential to absorb a significant amount of court time and resources in both case management and subsequent trials.

The court concluded at [71] that the order was made solely for the purpose of case management, and was neither punitive nor based on a prejudgment of the complex matters potentially in issue.

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

# Court of Appeal judgments

1-30 June 2016

with Bruce Godfrey



## Civil appeals

*Palmer St. Developments Pty Ltd & Anor v J & E Vanjak Pty Ltd & Anor* [2016] QCA 138, 3 June 2016

General Civil Appeal – where the first respondent transferred money to the first appellant in exchange for shares in a restaurant business – where the respondents alleged that the appellants made false representations and breached the terms of the share sale agreement – where the trial judge found that both parties abandoned the contract – where the trial was not conducted on the basis that abandonment of the contract was in issue – where the issue of abandonment was not pleaded by either of the parties – whether the trial judge erred in considering whether the parties abandoned the contract – whether the evidence below was otherwise properly considered – where the trial judge thought that there was no point in according natural justice to the parties because he assumed there was nothing they could say if asked – where to reason that natural justice need not be accorded to a party or parties, because there is nothing which the court can imagine they could say, is fundamentally incorrect – where the court ought not imagine what a party may or may not say; the court ought to hear the parties on matters which affect their interests – where had the appellants been heard, they may well have opposed the course proposed on the basis that the proceeding and trial had been conducted on another basis – where the respondents to this appeal lodged no notice of contention or cross appeal in relation to the way the trial judge dealt with the pleaded claims – where examination of the evidence below reveals that the respondents did call evidence which would, if accepted, entitle the first respondent to have succeeded at trial on the pleaded case as to misleading and deceptive conduct – where it is not possible for this court to make findings on the evidence, for the result of that case depends upon assessments of credit.

Appeal allowed. Judgment below is set aside. Matter is remitted to the District Court for retrial by a different judge. Costs. (Brief)

*Eaton v TriCare (Country) Pty Ltd* [2016] QCA 139, 3 June 2016

General Civil Appeal – where the appellant was employed in an administrative position at the respondent's nursing home at Point Vernon between June 2007 and March 2010 – where, from April 2009, the appellant worked under a

Ms Jane Harrison, the manager of the nursing home – where the appellant alleged that as a result of her excessive workload and Harrison's aggressive and belittling conduct she suffered a psychiatric illness – where the appellant commenced proceedings in the District Court alleging negligence by the respondent as vicariously liable for Harrison's conduct – where the appellant contends the trial judge perceived the claim to be of an intentional tort by Harrison and negligence by the respondent, leading his Honour into error in determining the existence of a duty of care by the respondent – whether the trial judge misunderstood the appellant's case at trial – whether, consistent with the factual findings of the trial judge, the respondent owed the appellant a duty of care – where it appears that his Honour did not identify any fact or circumstance, other than his finding that the risk of a psychiatric illness was not reasonably foreseeable, which would explain why the alleged duty of care was not owed – where there was no circumstance, such as the imposition of an undue burden upon the respondent, which made it unreasonable that a duty should be imposed in the case of a predictable risk – where the respondent did become subject to a duty to take reasonable care to avoid the risk of a psychiatric injury to the appellant – where the appellant alleged numerous instances of Harrison acting towards her in a way that was aggressive, belittling, harassing or otherwise unreasonable – where the trial judge generally accepted the appellant's evidence and concluded that Ms Harrison regularly conducted herself in an unreasonable manner – whether, on the findings of the trial judge, the respondent breached its duty of care – where on the findings of the trial judge as to the behaviour of Ms Harrison towards the appellant, through Ms Harrison, breached its duty – where, based on the expert evidence of two psychiatrists, the trial judge accepted that the combination of the appellant's workload and the conduct of Harrison brought about the appellant's psychiatric illness – where the trial judge did not accept a submission from the respondent that the psychiatrists' evidence could not be relied upon because his Honour had not accepted all of the factual premises adopted by the psychiatrists – where the respondent filed a notice of contention asserting that the trial judge erred – whether the trial judge erred with respect to the finding of causation – where according to the evidence of each psychiatrist, the stressors in the appellant's workplace during the Harrison period were causative of her condition at

the time of the trial – where in the opinion of each psychiatrist, it was unlikely that the appellant would work again – where the trial judge agreed with the respondent's schedule of damages, calculating loss of future earning capacity to age 65 and allowing a discount of 35% for contingencies – where the appellant argues the discount was excessive – whether the trial judge's assessment of damages should be disturbed – where there was no single correct rate of discount: this was a discretionary judgment.

Appeal allowed. Judgment of the District Court be set aside. There be judgment for the appellant against the respondent in the sum of \$435,583.98. Costs.

*Farrar v Julian-Armitage & Anor* [2016] QCA 141, 3 June 2016

Application for Leave s118 DCA (Civil) – Further Order – where the court ordered the applicant to pay the respondent's costs on the standard basis in an amount fixed by the court unless the parties agreed – where the parties did not agree as to costs – where the parties prepared an itemised cost statement and objections for the purpose of the court to fix costs – where the court held an itemised cost assessment is not preferable where costs are to be fixed – where the court fixed the amount of the respondent's costs in accordance with r687(2)(c) of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the court gave directions about the length and deadlines for filing of written submissions – where the solicitors for the respondents filed a written submission in time, although its two paragraphs read like evidence rather than a submission – where the respondents' solicitors later filed an unheralded further submission, over a month after the deadline for the filing of their submission in reply – where it was not limited to the two pages fixed for a reply and even exceeded the five pages fixed for the initial submission – where the respondents' submission concluded by seeking an extension of time for the making of the submission – where remarkably, no explanation at all was given for the delay, the excessive length or the failure to have made proper submissions in the first place – where the extension should not be given and the late submission should not be taken into account – where this was, overall, a moderately demanding matter in the context of the appellate jurisdiction – where the materials exhibited to the affidavits filed by the parties' solicitors show that after this court's dismissal of the application Gregg Lawyers, solicitors for the respondents, referred their file to and obtained a short-form cost assessment from cost consultant GR Ryan, totalling \$60,655.40

– where it is important to appreciate there are features of Mr Ryan’s assessment which suggest his task did not involve particular scrutiny of what costs were necessary or proper in the context of assessing party-party costs – where Mr Ryan’s assessment assists the court’s understanding of the work performed, the assessment total materially exceeds a realistic estimate of the amount of the recoverable costs.

Applicant to pay the second respondent the respondents’ costs fixed at \$45,000.

*Bulsey & Anor v State of Queensland* [2016] QCA 158, 14 June 2016

General Civil Appeal – Further Orders – where the appellants were successful on appeal for damages for assault, battery and false imprisonment – where the parties disagree on the amount and rate of interest and costs that should follow – where the appellants made pre-litigation, UCPR and Calderbank offers lower than the court-awarded damages when interest is taken into account – where the appellants seek indemnity costs – where the appellants abandoned a claim for malicious prosecution – whether the appellants suffered progressive loss – whether the respondent demonstrates another order for costs is appropriate – whether the appellants’ costs should be awarded on the District or Supreme Court scale – whether any costs order needs to be adjusted to allow for abandonment of

the claim for malicious prosecution – whether the order previously made should be varied to allow for the costs of the appeal on the indemnity basis – where the significant loss occurred at the time of the accrual of the causes of action – where it is just that any award of interest reflect the fact that the significant harm was suffered in 2004 at the time of the accrual of the causes of action – where the issue to award standard or indemnity costs turn principally on the effect of the various offers made – where there were 10 such offers made – where some were pre-litigation, some under the UCPR, some “Calderbank offers” (*Calderbank v Calderbank* [1975] 3 WLR 586) – where the respondent’s offers can be largely ignored with no submission that they are in any way relevant – where the offers appeared to be, at best, commercial offers and did not involve a realistic assessment of the likely damages – where the default position is that the plaintiffs are each entitled to costs of their whole proceedings on the indemnity basis – where given that the plaintiffs each made pre-litigation offers that were less beneficial than the orders eventually obtained, the respondent faces a near insurmountable task in discharging the onus the rules place on it – where there is no good reason why the costs should not be on the indemnity basis – where generally speaking the respondent’s submission is right, actions falling within the District Court’s

monetary jurisdiction should be brought in that jurisdiction and costs awarded on the scale appropriate – where good reason will need to be shown by a plaintiff to justify obtaining costs on a higher scale – where generally the case should involve some unusual feature or complexity in the evidence or the assessment of damages – where the issues involved the liberty of the subject and the limits on the police in the exercise of their powers and the involvement of the state’s superior court was entirely appropriate – where it is appropriate that the discretion be exercised to permit costs on the higher scale – where there clearly must be an adjustment for the fact that on the seventh day of the trial the first appellant abandoned the claim for malicious prosecution – where by that time considerable costs had been incurred by the respondent in defending the claim – where the respondent points out that the parties were not given leave to make submissions as to the costs of the appeal – where a party has consistently offered to settle proceedings from before their commencement on a basis less beneficial than that eventually achieved and has been forced to appeal to vindicate their rights, there would need to be very significant considerations to deny them their costs on the indemnity basis – where the respondent submitted that “only special or unusual features would warrant a departure from the usual order that costs of an appeal be assessed on a standard basis even though



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a *Calderbank* offer has been made” – where that is not the law – where the decision of the High Court in *Stewart v Atco Controls Pty Ltd (No.2)* (2014) 252 CLR 331 is contrary to it – where after appeal the pre-trial offer to settle was not only renewed but substantially moderated with a very significant compromise offered – where the respondent’s claim to have behaved reasonably in rejecting the appellants’ offers cannot be accepted given the eventual outcome of the case – where the costs of preparation of the appeal were incurred by both sides because of the respondent’s intransigent attitude to the appellants’ claims.

First appellant be awarded pre-judgment interest in the sum of \$69,493. The second appellant be awarded pre-judgment interest in the sum of \$30,403. The respondent be ordered to pay 80% of the appellants’ costs of trial on the indemnity basis. Parties have leave to make submissions on the costs of the appeal. Order previously made by this court be varied by deleting paragraph 1 and in its place order: “Allow each appellant’s appeal with costs on the indemnity basis.”

#### *Kynuna v Attorney-General for the State of Queensland* [2016] QCA 172

General Civil Appeal – where the appellant was a serious danger to the community in the absence of an order pursuant to Division 3 *Dangerous Prisoners (Sexual Offenders) Act 2003* – where the appellant was released on a supervision order but contravened the terms of that order by committing a sexual assault – where the appellant sexually assaulted a nurse after he placed her hand onto his genitals and held it there until she pulled it away – where, at the time, the appellant was admitted to hospital and was hypoxic – whether the primary judge erred in categorising this contravention as a serious sexual offence under the Act – where the appellant was released on a supervision

order but having breached that order, most recently by his offending against the nurse, the primary judge could not release him on a supervision order unless satisfied under s22 on the balance of probabilities that the adequate protection of the community can, despite his contravention or likely contravention, be ensured by the proposed order – where otherwise the judge was required to rescind the supervision order and make a continuing detention order – where the offending against the nurse must have been disturbing for the unfortunate complainant who was conscientiously performing her difficult duties in the early hours of the morning – where the appellant, however, has been appropriately punished: he was sentenced to 12 months’ imprisonment suspended after four months with an operational period of 18 months – where he has remained in custody, either serving that sentence or under the Act, since he committed the offence, a period of about 20 months – where the judge rejected the appellant’s submission that the risk of his sexual reoffending was not a risk of serious sexual offending under the Act – where after referring to *Attorney-General (Qld) v Phineasa* [2013] 1 Qd R 305, his Honour concluded that forcibly placing the nurse’s hand on the appellant’s genitals was likely to cause significant psychological harm – where his Honour was therefore finding that, in terms of this court’s analysis in *Phineasa*, the appellant’s offence against the nurse was a serious violent offence as it was likely to cause her significant psychological harm – whilst not diminishing the repugnant nature of the offence, there was no evidence that it caused the complainant significant psychological harm and no evidence from which the judge could infer this – where the appellant’s offending against the nurse was no more likely to cause significant psychological harm than the equally inappropriate and unpleasant offending in *Phineasa* – where the judge erred in finding the offence against the

nurse was a serious sexual offence under the Act – where error means that this court must re-exercise its discretion to determine whether the appellant should be released on a supervision order under s22 – where psychiatrists Dr Grant and Dr Beech both thoroughly reviewed the appellant’s case – where they concluded that his risk of re-offending by way of serious sexual offence involving violence or against a child could be very significantly moderated by a supervision order of the kind to which he was previously subject – where the psychiatrists did identify a real risk that the appellant could re-offend by committing a relatively low level sexual offence, but this does not make a supervision order inappropriate – where the carefully structured supervision order proposed is likely to ensure that any such offence will be quickly detected and his immediate return to custody would follow before any escalation to more serious offending.

Appeal allowed. Order of the primary judge set aside. Instead it is ordered that, being satisfied to the requisite standard that Gregory David Kynuna is a serious danger to the community in the absence of an order pursuant to Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), that Gregory David Kynuna is released from custody on 23 June 2016 and from that time is subject to the requirements set out separately in these reasons until 23 June 2026. (Brief)

#### Criminal appeals

*R v Onyebuchi; Ex parte Commonwealth Director of Public Prosecutions* [2016] QCA 143, 7 June 2016

Sentence Appeal by Director of Public Prosecutions (Cth) – where the Crown appeals against sentence – where the respondent pleaded guilty to one offence of importing a commercial quantity of a border-controlled drug – where the respondent was sentenced

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to seven years' imprisonment with a non-parole period fixed at 3½ years – where the border-controlled drug imported was methamphetamine with a pure weight of 791.9 grams, 41.9 grams over a commercial quantity – where the estimate of value of the imported drug was between \$673,000 and \$2.02 million – where, at sentencing, the Crown provided a table of comparative cases – where the appellant argues that the respondent's offending was objectively and subjectively more serious than the comparative cases relied upon by the trial judge – whether the sentence imposed was manifestly inadequate – where the severity of a sentence should therefore reflect not only the requirement for general deterrence but also the salient features of the relevant importation, including the quantity of the drug, the offender's involvement in the importation and the anticipated reward – where by reference to the comparatives and in light of the role played by the respondent in the importation, the sentence imposed is manifestly inadequate – where her Honour's careful sentencing remarks do not reveal any specific error of principle – where however, the sentence imposed is not of such a severity as is appropriate in all the circumstances, in particular it does not sufficiently reflect the respondent's level of culpability.

Appeal allowed. Order that the sentence imposed below be set aside. In relation to Count 1, the respondent is convicted and sentenced to imprisonment for a period of nine years with a non-parole period of 4½ years fixed. The sentence of imprisonment is to commence on 26 October 2015 with the court declaring that time spent in pre-sentence custody, 505 days, be imprisonment already served under the sentence. (Brief)

*R v Brown; Ex parte Attorney-General (Qld)* [2016] QCA 156, 14 June 2016

Sentence Appeal by Attorney-General (Qld) – where the respondent was sentenced to

nine years of imprisonment on each of six counts of rape and two counts of sodomy which were the major offences – where the respondent was sentenced to lesser periods of imprisonment, to be served concurrently, for 23 other offences of assault with intent to rape, further counts of rape, procuring a sexual act by coercion, using electronic communications to procure a child under 16, indecent treatment of a child under 16, possessing child exploitation material and distributing child exploitation material – where no serious violent offence declaration was made – where the parole eligibility date was fixed at four years – where the respondent made contact with each of five complainants through social media and requested nude photographs or sex in exchange for money – where the major offences were committed in three episodes against three separate complainants – where all three episodes involved multiple or prolonged rapes as well as some actual violence by choking, two episodes involved threats and the last episode was committed while the respondent was on bail – whether the sentence was manifestly inadequate – whether a discretionary declaration of a serious violent offence should have been made or, if not, the respondent's parole eligibility date should have been delayed to a date later than the halfway mark – where the cases do not strongly support the conclusion that the sentencing judge in the present case fell into error in his Honour's conclusion that a sentence of nine years was appropriate as the head sentence for the major offences, reflecting the criminality of the offending for all the offences – where the cases do not support the sentencing judge's conclusion either – where analysis of the three major multiple episodes of offending shows that the head sentence of nine years in the present case was a lenient sentence, even allowing for a considerable reduction in what would otherwise have been the accumulation of separate periods of imprisonment for

the major offences and the other offences, because that would have produced a crushing overall sentence – where nevertheless, with some diffidence, the conclusion is reached that his Honour's exercise of discretion has not been shown to have miscarried to the requisite degree of satisfaction – where manifest inadequacy is not justified because the result arrived at below is markedly different from other sentences – where interference is only justified where the difference is such that there "must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons": *R v Margaritis; Ex parte Attorney-General (Qld)* (2014) 244 A Crim R 317 – where even taking into account the threats to slit the throat of or stab AJW, the offences were not more than usually serious examples and did not contain features justifying that the respondent serve 80% of the sentence before parole eligibility – where s160D(3) of the *Penalties and Sentences Act 1992* (Qld) empowered the sentencing judge to fix a parole eligibility date either before or after the halfway mark – where it is sometimes said to be a "general and flexible practice" or "common practice" in this state to fix a parole eligibility date for an offender who makes an early plea of guilty and with other mitigating factors – where however, the statutory framework in a case like the present is one in which any period less than half is a reduction of the normative period provided for eligibility for parole under s184(2) – where in the present case, the aggravating features of note were that the respondent committed the 2014 and 2015 offences while on bail and that, viewed overall, his offending conduct showed an established continuing pattern of offending using the methodology described above – where the need for protection of the public from such conduct by him is reinforced, in addition to those aggravating features, by the medical evidence which bears upon his capacity to change his

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behaviours and thereby be rehabilitated – where the Attorney-General, by supplementary written submissions, sought to argue that the respondent's autism spectrum disorder was a factor in aggravation of the sentence that might otherwise be imposed – where that contention was not advanced before the sentencing judge – whether the Attorney-General should be permitted to raise that argument on the appeal – where since *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 it has been accepted that an Attorney-General's appeal under s669A of the *Criminal Code* is to be conducted on the principles governing an appeal against an exercise of discretion set out in *House v The King* (1936) 55 CLR 499 – where other principles have been articulated by this court as to matters that are to be taken into account or not taken into account in the exercise of the court's powers – where one principle is that it does not assist the administration of justice when cases are relied upon as comparable cases by the appellant in an Attorney-General's appeal against sentence that were not placed before the sentencing judge by the prosecutor – where the appellant should not be permitted to raise the autism spectrum disorder argument in this appeal – where the appellant did not submit that this court should not follow its earlier statements as to contentions not advanced before the sentencing judge – where this conclusion says nothing about whether it would be a proper submission or contention to make in some other case on sentence.

The sentences on counts 10, 11, 14, 22, 24, 25, 26 and 27 be varied to the extent that the parole eligibility date should be fixed at five years and four months.

*Archer v Simon Transport Pty Ltd* [2016] QCA 168, 21 June 2016

Application for Leave s118 DCA (Criminal) – where the applicant laid a complaint under the *Justices Act 1886* (Qld) that, contrary to s32 of the *Work Health and Safety Act 2011* (Qld) (WHS Act), the respondent failed to comply with its duty under s19(1) of the WHS Act and this failure exposed an individual to a risk of serious injury – where a District Court judge upheld the decision of the Industrial Magistrates Court striking out the complaint for want of jurisdiction on the basis that the complaint was insufficiently particularised – where the complaint set out the ways in which the employer failed to comply with its duty and measures which should have been taken to obviate the identified risks – whether leave to appeal should be granted – whether the complaint was adequate to invoke the jurisdiction of the Magistrates Court – where in contradistinction to the complaint in *NK Collins Industries Pty Ltd v President of the Industrial Court* [2014] 2 Qd R 304, this complaint set out the hazard identified and the risks engendered by the hazard to the employee – where it set out the ways in which the employer failed to comply with s19 and s32 of the WHS Act and then set out the measures which should have been taken to obviate the

identified risks – where it therefore set out the relevant acts or omissions alleged to constitute the offence – where in doing so, the complaint dealt with all the matters it was required to traverse and could not therefore be said to be void or a nullity – where it did not fail to invoke the jurisdiction of the Magistrates Court – where it may be that the complaint could be amended or further particularised under s48 of the *Justices Act 1886* (Qld) – where in its present form it is valid at law.

Application for leave to appeal granted with costs. The order of the District Court is set aside and, instead, the appeal to that court is allowed with costs. The decision of the Magistrates Court is set aside and, instead, the application to strike out the complaint is refused. The matter should be remitted to the Magistrates Court for hearing in accordance with law.

*R v Clark* [2016] QCA 173, 24 June 2016

Sentence Application – where the applicant pleaded guilty to one count of trafficking in a dangerous drug, and to two summary charges of possessing a dangerous drug, and possessing a pipe that was used in the connection with the use of a dangerous drug – where the applicant was sentenced to four years' imprisonment and, pursuant to s5(2) of the *Drugs Misuse Act 1986* (Qld), was ordered to serve a minimum of 80% of that term – where the summary charges attracted a sentence of one month imprisonment each, to be served concurrently with the trafficking sentence – where the applicant was identified through a covert police operation that brought to light that the applicant was dealing in methylamphetamine at a street level – where the applicant has two children and a good work history – where the applicant had a clean criminal history until 2013 when she was charged with the possession of dangerous drugs and was further charged over the following two years with drug-related charges – where the applicant alleges that she started using drugs as a result of the death of her infant child to sudden infant death syndrome – where the applicant had previously performed "unsatisfactorily" as described in a probation report, by failing to attend counselling and using drugs while on probation – where the sentencing judge concluded that the applicant's prospects of rehabilitation were low – where the applicant contends that the sentencing judge should have ordered a partially suspended sentence – where the applicant contends that the sentencing judge should have set the head sentence at three years, suspended after 12 months, with an operational period of three years – whether the sentence was manifestly excessive – where it is important to note that the sentencing court can only suspend a sentence if it is "satisfied that it is appropriate to do so in the circumstances": s144(2) *Penalties and Sentences Act 1992* (Qld) – where further, the sentencing court must not suspend a sentence if it is satisfied "having regard to the provisions of this Act" that "it would be appropriate in the circumstances

that the offender be imprisoned for the term of imprisonment imposed” – where the sentencing judge was plainly of the view that the prospects of rehabilitation were limited – where it was open to reach that conclusion, given the limited steps taken towards that end, and the failure to respond in a meaningful way to the probation order – where the sentencing judge was entitled to conclude that it was not appropriate to suspend the term of imprisonment – where Ms Clark did not respond at all well to supervision under the probation order, so one would doubt that she would respond well to ungoverned suspension – where s5(2) is engaged where an offence of trafficking in a Schedule 1 drug results in a sentence to a term of imprisonment, no part of which is suspended – where by its plain words s5(2) does not depend on issues of parole or probation – where the legislature has evidently taken the view that offenders who traffick in Schedule 1 drugs and receive a sentence to a term of imprisonment, must serve a minimum of 80% of that term unless the offender is a candidate for a suspended sentence – where the authorities relied upon below, and before this court, support the selection of four years as the start point, before any discounts for the guilty plea and matters in mitigation are taken into account – where the sentencing judge discounted that to three years in recognition of the fact that s5(2) of the *Drugs Misuse Act* would have the effect of compelling that 80% of the period of imprisonment must be served – where that was an appropriate

exercise of the sentencing discretion, consistent with the established proposition that “a sentencing judge is accorded as much flexibility as is consonant with the statutory sentencing regime in determining the appropriate sentence”: *Nguyen v The Queen* [2016] HCA 17 – where there is such a requirement, it is appropriate to sentence at the lower end of the available range – where the application of the policy behind s5(2) has evident difficulties – where consider an offender who receives a sentence of a term of imprisonment, and is to serve 80% under s5(2) – where if that offender shows demonstrable rehabilitation while in prison, that will have no effect on the period of actual custody served, no matter how worthy the conduct and no matter how strong the rehabilitation – where one would be forgiven for thinking that cannot be in the community’s best interests – where there is an inescapable tension created by s5(2) – where that can be demonstrated by considering the factor central to the issue of whether s5(2) applies in any given case, that is, whether the offender’s circumstances warrant suspension of the sentence – where an offender is charged it is obviously in that offender’s interests to demonstrate as clearly as possible, by the time of the sentence, that steps to rehabilitate have been taken, and if not successfully so, then with sufficient promise of success as to warrant suspension – where in other words, from the defence point of view it would be of great assistance, in attempting to persuade a

court of the appropriateness of suspension, to be able to demonstrate that rehabilitation is under way and a rehabilitation regime is in place – where that may lead, depending on the particular case, to the conclusion that it may be in the offender’s interest to delay the sentencing hearing so that there is a greater, or surer, opportunity to obtain such evidence – where s13 of the *Penalties and Sentences Act 1992* (Qld), and longstanding authority, recognise the importance of an early guilty plea in sentencing – where to maximise the chance of achieving suspension of part of the sentence the offender may have to delay the plea – where, however, if the offender’s legal representatives bring about, participate in, or encourage, such delay, it may be a breach of their duty to the court – where then again, if the court enforced that duty in a way that unfairly deprived an offender of the chance to demonstrate sufficient rehabilitation such as to deny the engagement of s5(2), there is a risk that the court will be seen as an arm of the legislature’s policy – where policy matters such as that reflected in s5(2) are not matters for the court.

Application for leave to appeal is refused.

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/qjudgment/summary-notes](http://sclqld.org.au/qjudgment/summary-notes). For detailed information, please consult the reasons for judgment.

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# The water's fine!

## Jump right in to the REIQ/QLS pool safety clause

by Kevin Johnson



At the first glance buyers, sellers and even their legal representatives might be a little confused by the 'Pool Safety' section of the QLS/REIQ Contract for Houses and Residential Land.

If there is a pool on the land, or on adjacent land, and the answer to question 2 under the heading 'Pool Safety' in the reference schedule is 'No' then the buyer can terminate the contract if a Pool Safety Certificate has not issued by the Pool Safety Inspection Date.

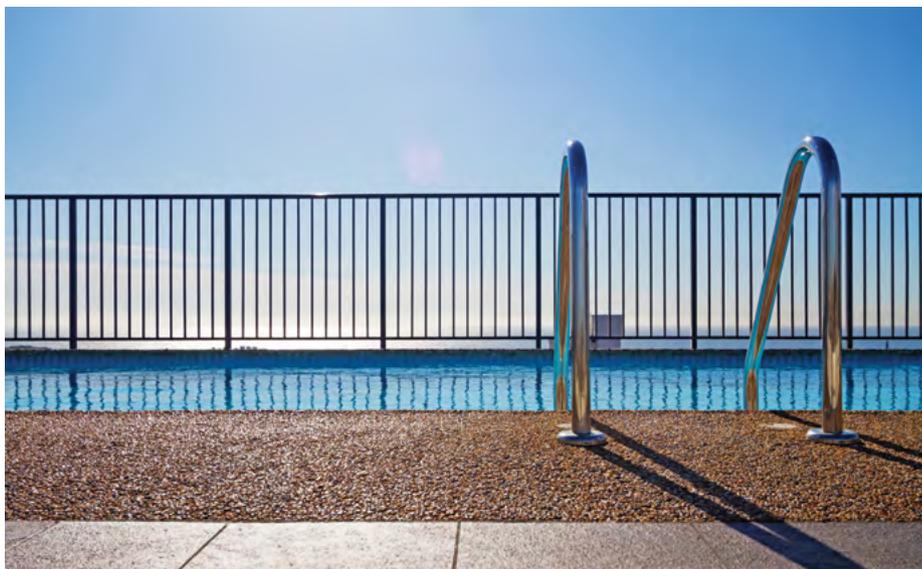
Question 2 asks: (...) is there a Compliance or Exemption Certificate for the pool at the time of contract? If the question is not answered (that is, if neither radio button has been checked) then the answer is deemed to be No.

Occasionally a practitioner will see that the fields labelled Pool Safety Inspector and Pool Safety Inspection Date have been left blank, even though there is a pool on the property and the answer given to question 2 is an express No or deemed No.

The first impression formed may be that the contract is *not* subject to inspections or the issue of any certificate. After all, in relation to the finance and the building and/or pest inspection conditions, it is the insertion of the amount to be borrowed, name or class of financier, finance date and building and/or pest inspection date which actually engages the conditions. If the relevant fields are blank, then the unmistakable result is that the contract is *not* subject to finance or *not* subject to a building and pest inspection. But it appears this is not so in relation to the condition as pool safety.

For one thing, there are no marginal notes in the reference schedule saying that if the blanks are not filled in then there is no pool safety condition. Each of the building and pest inspection and finance fields in the reference schedule do have marginal notes providing that blanks in the fields mean no conditions.

A blank space left as to Pool Safety Inspection Date where that field appears in the reference schedule does not mean that there is in fact no such date. The definition of the expression 'Pool Safety Inspection Date' in clause 1.1(2)(z) provides that either the date expressly stated in the reference schedule is that date; otherwise it will be the earlier of the building and/or pest



inspection date or two business days before settlement. Once again, a significant deeming provision is taking effect which is easy enough to miss if you are not looking for it.

The Pool Safety Inspector as defined can be anyone authorised to give a certificate under the *Building Act 1975*. He or she can be nominated, a class of persons specified perhaps, or the item in the reference schedule left blank such that any authorised person will do. There is just no basis to think that if the parties leave this field blank, then the important condition cannot be engaged. (Different considerations apply to the finance condition where a seller who is told that the buyer wants the contract to be subject to loan approval by 'any bank or credit union' *might* think that the buyer clearly does not have any very clear prospect of borrowing.)

As noted above, the absence of a Pool Safety Certificate in prescribed form 23 and endorsed for the purposes of sections 246AA and 246AK of the *Building Act 1975* entitles the buyer to terminate – if the buyer wishes to do so – or waive the benefit of the condition.

And yet this is qualified. The buyer must act reasonably. Will there be instances where the inspector has expressly stipulated that no safety certificate has been issued due to shortcomings relating to safety, yet the buyer cannot, *acting reasonably*, terminate? The answer to this must be, yes.

The words of the provision that the buyer must act reasonably have to be given some effect. It can be that relatively minor non-compliance with the relevant parts of the Queensland Development Code will mean that a safety certificate cannot be issued. In these circumstances the inspector must issue a form 26 Notice of non-compliance endorsed for the purpose of s246AB of the *Building Act 1975*.

Suppose such a certificate is issued specifying omitted or defective fencing and access prevention features which will cost \$10,000 (on a reasonable estimate) to rectify. By any measure this surely indicated significant issues, but if the purchase price is \$1,000,000, the costs of rectification only represent 1% of that price. There is ample scope to argue about reasonableness of termination in these circumstances. Yet any differences will require a visit to the District Court to resolve by way of declaration. The Magistrates Court will not have jurisdiction to make a declaration of right one way or the other. The costs involve mean inevitably that one party must simply give in to the other in practice.

All that the prudent and diligent practitioner can do is be aware of the mechanics of the relevant provisions of the contract, advise carefully about these and point to the significant cost to the client in taking an uncompromising view of contractual rights and obligations, given the vagaries of the 'reasonableness' tests.

Kevin Johnson is a solicitor employed by the Department of Human Services.

# Victor Asoyo

Gadens

## Current position?

I am currently employed as a banking and finance lawyer at Gadens and became a partner from 1 July.

## Career path?

I worked in hospitality and various odd jobs, and as an international student representative at Adelaide University. I worked for Murray Shaw QC, Grope Hamilton and Minter Ellison in Adelaide, and moved to Brisbane to work for Dibbs Barker. I also had a brief stint at the University of Queensland.

## Why did you decide to practise law?

For various reasons, but primarily to follow in my father's footsteps. He was a prosecutor at a fairly young age and my grandfather was a clerk in the Kenyan colonial courts. I also have a degree in biochemistry but was not game to undertake further studies in the sciences, hence opted to continue to pursue the legal career.

## What's your most memorable moment in the law?

My admission ceremony.

## What is the most useful piece of advice you've received?

The true test of character is how one (or a society) treats those most in need.

## What motivates you to continue your legal practice?

The challenge of finding a solution and building relationships.

## What is the greatest joy in your work?

Achieving a positive outcome for a client, thinking outside the square, and my team.

## What would you like to be doing in 10 years' time?

Still practising and having other business interests.

## What legal issues are you most concerned about?

Digital disruption in the legal industry and the lack of basic work for junior lawyers to get experience as a result of outsourcing.



## What activities unrelated to work do you enjoy?

Rugby sevens (I assisted in managing the Kenya sevens team for their Australian leg) and community service.

## How do you manage your work/life balance?

Make time for life outside work and particularly for my family.

## Is there anything you would like to add?

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Carla Franchina



Rachael Field



Jonathan Crowe



Kate Galloway



Victor Asoyo



Damian Roe



Amity Anderson



Richard Hanel



Robbyn Lamb

# Career moves

## Best Wilson Buckley Family Law

Carla Franchina has joined Best Wilson Buckley Family Law's Brisbane office as a solicitor. She has practised exclusively in family law since her admission in 2013.

## Bond University

Bond University's Faculty of Law has announced the appointment of three senior legal academics collectively covering diverse fields that include family law, legal philosophy and legal education.

Professor **Rachael Field**, a national leader in legal education, dispute resolution, family law and women in law, brings to Bond the National Wellness Network for Law, which she founded and coordinates. Her research into mediation and domestic violence, legal education and law student success, and wellbeing, is widely recognised. It contributed to her recognition as 2013 Queensland Woman Lawyer of the Year.

Professor **Jonathan Crowe** is known for his work on legal philosophy, ethical theory and public law, and has more than a decade of experience teaching constitutional law, legal theory and public international law, particularly

international humanitarian and human rights law. He is president of the Australian Society of Legal Philosophy and serves on the Queensland International Humanitarian Law Committee of the Australian Red Cross.

Assistant Professor **Kate Galloway** is a researcher and commentator in legal education and property law, and has a decade of experience teaching land law, public law, public international law and Indigenous law. She is associate editor of the *Legal Education Review*, serves on the QLS Equalising Opportunity in the Law Committee and was a founder of the Australian Legal Education Associate Deans Network.

## Carter Newell

Carter Newell has announced the promotions of **Beau Mollinger** to senior associate and **Joseph Brighouse** to associate

Beau is a member of the construction and engineering team, focusing on contract disputes and construction litigation, tribunal matters and adjudications, complex indemnity assessment and loss adjustment for material damage and industrial special-risk insurance claims, subrogated recovery actions and public liability claims.

Joseph, a member of the financial lines insurance team, has acted for a range of professionals, including real estate agents, commercial property managers, financial advisors and marine engineers in both pre-court and litigated claims. Joseph also has advised national and international insurers on indemnity issues.

## Gadens

Gadens has expanded its Brisbane partnership with the appointment of five new partners.

**Joseph Shaw**, who began with Gadens in 2010 as a solicitor, has broad experience across commercial litigation, enforcement and recovery actions, and restructuring. With his work primarily focusing on litigious matters and restructuring and turnarounds, he has successfully acted for a number of high-profile banks, financial institutions, and insolvency practitioners.

**Kimberley Arden** focuses on banking and finance litigation and dispute resolution, insolvency, and corporate recoveries and restructuring. After starting with the firm as a summer clerk in 2007, Kimberley has been appointed as a partner in the litigation and corporate recovery services team.



**Natasha Hood**, who has been with the firm for more than 14 years, has wide experience in large commercial and retail property transactions, contract and document drafting, and associated negotiations and advice. A partner with the property and commercial services team, she has a large portfolio of retail and commercial clients across Queensland, New South Wales and Victoria.

**Peter Coggins**, who joined Gadens in 2008, has practised in professional indemnity, D&O, ISR, EPL, public and product liability, marine, and heavy motor insurance. He focuses on financial services and construction professional negligence claims.

**Victor Asoyo** has been at the firm for six years and provides advice to a range of financial institutions, primarily in banking, but extending to a number of ASX 100-listed companies. His experience includes real estate, hotel and leisure, and securities and corporate finance, and his mentorship of junior legal professionals.

### HopgoodGanim Lawyers

HopgoodGanim Lawyers has announced the promotion of 14 practitioners across its Brisbane and Perth offices, effective from 1 July.

These include the appointment of **Damian Roe**, from the resources and energy team, as a partner.

The lawyers promoted to senior associate are **Amity Anderson** (family law), **Olivia Williamson** (planning & environment), **Andrew Vinciullo** (litigation & dispute resolution), **Kathleen Coggins** (family law), **Sasha Sarai** (family law), **Claire Bruggemann** (insurance & risk), **Luke Dawson** (corporate advisory) and **Richard Hanel** (corporate advisory).

The associate promotions are **Robyn Lamb** (planning & environment), **Fraser Bax** (family law), **Elizabeth Harvey** (resources & energy), **Melissa McGarrity** (insurance & risk) and **Verity Stone** (ICT & intellectual property).

### Keating Law

**John Keating** is excited to announce that he has started his own firm, Keating Law, which practises in the areas of property and conveyancing, commercial and litigation, deceased estates and family. John began his legal career in 2008 as a paralegal and says commencement of his own practice is a long-held goal now achieved.

### Kelly Lawyers

Kelly Lawyers has welcomed **Lauren Nolan** and **Shannon Bownds** to the firm. Lauren, who has extensive experience in family law and wills and estates, has been appointed an associate. Shannon joins the firm as a solicitor and has worked exclusively in family law since her admission. Both are members of the firm's family law team, and also practise in property, estate and commercial litigation matters.

### MacDonnells Law

MacDonnells Law has announced a record number of top-level promotions.

The 132-year-old firm has promoted five senior associates – **Joanne Parisi**, **Melissa Sinopoli** and **Miranda Gillespie** to partner, and **Donna Patane** and **Gerard Meade** to special counsel.

Litigation lawyer Joanne Parisi has 12 years' experience in advising all manner of clients, including small to large business, local governments and not-for-profits, on avoiding and resolving commercial disputes, and acting for lenders in debt recovery matters.



Mitchell Downes



Vavaa Mawuli



Tanya Straguszi



Rene Flores



Anna Morgan



Jessica Baker



Tanya Spinka



Stephen Gibson



Belinda Breakspear



Louise Horrocks



Kirby Jukes



David McKewin

Melissa, who was also recently appointed as practice group leader of the firm's statewide commercial team, has a strong background in commercial and corporate advisory, with wide experience in business acquisitions and disposals, securities advisory, corporate reconstructions, and shareholder disputes.

Fellow commercial lawyer and property expert Miranda practices primarily in property, leasing and commercial law, and has advised and acted on behalf of developers, government authorities and major private and public companies.

Intellectually property expert Donna, a registered trademarks attorney, has more than a decade of experience advising companies, government, start-ups, not-for-profits, and individuals on their IP needs, including copyright, social media and technology, brand protection and enforcement.

Building and construction expert Gerard is an accredited probity services provider (procurement) and practises exclusively in building and construction law. His client base includes leading building, construction and property development contractors, as well as government bodies, major civil and building contractors, consultants, project managers, engineers and superintendents.

## Mahoneys

Mahoneys has appointed **Mitchell Downes** as a partner in its Brisbane office. Mitchell commenced with the firm in 2009 in the litigation and dispute resolution team. He practises exclusively in commercial litigation, with a focus on corporations and insolvency. His other litigation experience includes property, construction and body corporate and management rights.

## Maurice Blackburn

Maurice Blackburn Lawyers has announced six new principals, including two from Queensland, in its latest round of legal promotions. Eleven of the 41 lawyers promoted nationwide work in Queensland.

New Queensland class actions principal **Vavaa Mawuli** graduated from Bond University in 2004 and spent the early part of her career working in regional and remote areas in the Northern Territory, providing advice and representation to Aboriginal people charged with criminal offences.

From a third-generation farming family in Gordonvale near Cairns, newly appointed principal **Tanya Straguszi** heads up the firm's far north Queensland branch. She graduated from the James Cook University Cairns campus and joined Maurice Blackburn in 2012. Under her stewardship the Cairns office has grown to include two major practice areas – wills and industrial deafness.

**Rene Flores**, who arrived in Australia as a child refugee from El Salvador, completed his degree at James Cook University. He is a passionate road safety advocate and is now a senior associate in Maurice Blackburn's Townsville office.

Lawyer **Anna Morgan**, who has built a strong local profile as president of the Gold Coast District Law Association and as an adjunct teaching fellow at Bond University, has been promoted to senior associate in the Southport office. Anna also has a degree in psychology.

Seven other Queensland staff have been promoted to associate positions: **Jessica Baker** (Brisbane), **Karla Deane** (Brisbane), **Melissa Meyers** (Rockhampton), **Rachel Smith** (Brisbane), **Sarah Webb** (Caboolture), **Stephanie Francis** (Brisbane) and **Tanya Spinka** (Brisbane).

## McCarthy Durie Lawyers

McCarthy Durie Lawyers (MDL) has announced the appointment of **Stephen Gibson**, a QLS accredited specialist (property law), as a director. Stephen has been with the firm for eight years in the commercial law department. MDL has also announced that Toogood Solicitors principal **Andrew Taylor** has joined its Brisbane office, together with his commercial team.

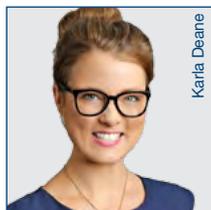
## McCullough Robertson

McCullough Robertson has named three new partners for the start of the new financial year, all of whom began their career at the firm in junior positions.

**Belinda Breakspear**, who started with the firm more than 12 years ago as a vacation clerk, is an intellectual property lawyer with a special interest in trademarks. She assists start-up businesses and publicly listed companies with intellectual property disputes, passing off claims and the protection, commercialisation, management and enforcement of intellectual property rights.

**Louise Horrocks**, who started as a lawyer in the commercial group more than eight years ago, focuses on resources and energy transactions, corporate restructures and transaction taxes. She advises on unregulated mergers and acquisitions, disposals and establishing new ventures with advantageous stamp duty and capital gains tax outcomes.

**Kirby Jukes**, who has practised in the firm's finance team for more than six years, acts for major banking clients in commercial real estate, development and construction financing. She advises on project and term financing and restructuring, security reviews and assessments, stamp duty compliance and enforcements and recoveries.



Karla Deane



Melissa Meyers



Rachel Smith



Sarah Webb



Stephanie Francis



Mark Foy



Rebecca Gee



Sandra Camilleri

### McKays

David McKewin has been appointed as a principal at McKays, where he leads the firm's taxation and revenue team. David advises on major taxation matters and regularly assists accounting and legal firm.

### Nexus Law Group

Nexus Law Group has appointed Mark Foy as a consulting principal in the Queensland office. Mark, who has worked with a number of top-tier firms, has acted for developers on real estate transactions and due diligence, including fuel service centres, residential high-rise projects and development of new retail centres.

### Robbins Watson

Robbins Watson Solicitors has announced the promotion of Rebecca Gee to senior associate. Rebecca is the sole solicitor on the management committee for the Domestic Violence Prevention Centre, and recently joined the QLS Family Law Committee. She has extensive experience in Australia and the United Kingdom in property settlement and children's matters, divorce and domestic violence.

### Thynne + Macartney

Thynne + Macartney has announced that Sandra Camilleri has been promoted to senior associate in its business advisory & dispute resolution team. Sandra focuses on commercial litigation, including contractual, competition and consumer law, and company disputes. She also has experience in banking and finance litigation, insolvency matters and intellectual property law.

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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# New QLS members

Queensland Law Society welcomes the following new members, who joined between 8 June to 5 July 2016.

- Gemma Abbey**, Hartnett Lawyers  
**Maria Aravena Gutierrez**, Monaco Solicitors  
**Nicole Aylward**, Shannon Donaldson – A Division of Shine Lawyers  
**Madison Bailey**, McCarthy Durie Lawyers  
**Rachel Barnes**, Allan Dick 888 Law  
**Robyn Bartlett**, P&E Law  
**Russell Baxter**, Russell J. Baxter  
**Megan Beattie**, Gleeson Lawyers  
**Brendan Beavon**, Russo Lawyers  
**John Bingham**, Law At Work  
**Jane Binstead**, Department of Environment & Heritage Protection  
**Kris-Anne Birch**, Hall Payne Lawyers  
**Mark Bolster**, Bolster & Co.  
**Annastasia Bousgas**, G B Lawyers  
**Dilys Bradbury**, non-practising firm  
**Andrew Brown**, Brown & Associates Commercial Lawyers  
**Grace Brunton-Makeham**, McBride Legal  
**Peter Carne**, The Public Trustee of Queensland  
**Stephen Cerni**, King & Wood Mallesons  
**David Chambers**, Kemp Law  
**William Chan**, Monadelphous Group Ltd  
**Kelvin Choy**, Herbert Smith Freehills  
**Josephine Chyi**, Brio Legal  
**David Clarke**, David S Clarke & Associates  
**Nardine Collier**, Collier Lawyers  
**Claudia Combe**, de Groot's Wills & Estate Lawyers  
**John Davis**, Macdonald Law  
**Katrina de Lange**, Toll Holdings  
**Leanne Dearlove**, Meridian Lawyers  
**Jordan den Dulk**, Department of Defence – Army  
**Johanna Denbigh**, non-practising firm  
**Carlos Dias**, BHP Billiton  
**Aurora Djuric**, non-practising firm  
**Timothy Eakin**, Eakin McCaffery Cox  
**Alexandra Feros**, Allens  
**Danielle Fitton**, P&E Law  
**Maria Forgione**, G8 Education Limited  
**Kimberley Forman**, Shand Taylor Lawyers  
**Harold Foxton**, International Aerospace Law and Policy Group  
**Suzannah Fraser**, Allens  
**Jessica Friedman**, Norton Rose Fulbright
- Cheryl Furner**, Qld Health – Corporate Legal Unit  
**Paris Galea**, Rouse Lawyers  
**Kerryn Gaskell**, Moray & Agnew  
**Julie George**, non-practising firm  
**Peter Gill**, Mackay Sugar Limited  
**Alison Gordon**, SEQWater  
**Matylda Gostylla**, Sparke Helmore  
**Keith Graham**, Grahams Lawyers  
**Paul Grant**, Delphi Partners  
**Tiffany Jo Gutierrez**, Stockland  
**Jessica Haddley**, O'Reilly Workplace Law  
**Louise Hill**, Inland Legal  
**Margaret Horlock**, Margaret Horlock Commercial and Succession Lawyer  
**Edward Howard**, Speakman Lawyers  
**Katie Howson**, Herbert Smith Freehills  
**Alice Husband**, CRH Law  
**Aamena Hussein**, BT Lawyers  
**Michelle Jenkins**, Minter Ellison  
**Lauren Johnson**, Harrisonslaw  
**Danielle Jones**, Dillon Bowers Lawyers  
**Deborah Keir**, Porta Lawyers  
**Anna Ko**, Littles Lawyers  
**Salvatore La Spina**, Office of the Public Guardian  
**Bernadette Lara**, Nautilus Law Group  
**Brett Ledingham**, Chien & Ledingham Lawyers  
**Hoi Lee**, CTI Capital Management Limited  
**Margaret Lessing**, Small Myers Hughes  
**Tamika Little**, Small Myers Hughes  
**Jason Liu**, Colin Biggers & Paisley Pty Ltd  
**Yuri Matsuura**, Swift Legal Solutions Pty Ltd  
**Stephen Matulewicz**, Commonwealth Director of Public Prosecutions  
**Peter McCormack**, Hynes and McCormack  
**Emily McMullen**, John Henderson  
**Shani Mitchell**, James & Co Lawyers  
**Deborah Mitchell**, Administrative Appeals Tribunal  
**Leon Monaco**, Monaco Solicitors  
**Judith Morris**, Judy Morris & Associates  
**Catherine Moynihan**, Office of the Public Guardian  
**Peter Newington**, Certus Legal Group  
**Zhan Ng**, Worcester & Co.  
**Bradley Nicholl**, RFGA Management Pty Ltd
- Andrew Paloni**, Australian Institute of Marine Science  
**Lindi Pearson**, CLH Lawyers  
**Vladimir Pejovic**, Q-Comp – Legal Services Unit  
**Ian Perkins**, LawLab Pty Limited  
**Nguyen Pham**, Lawler Magill  
**Nicholas Potter**, Streten Masons Lawyers  
**Jessica Preston**, Moray & Agnew  
**Darryl Quigley**, Daryl Quigley Partners Lawyers  
**Geoffrey Roberson**, Aston Reid Lawyers Pty Ltd  
**Kerrie Rosati**, DGT Costs Lawyers  
**Samuel Ryall**, Just Us Lawyers  
**Bernadette Saliba**, Minter Ellison  
**Daniel Sampson**, Cohen Legal  
**Navid Sedaghati**, Navid Sedaghati Lawyers  
**Harry Simon**, Harry Simon  
**Rebecca Simpson**, Allens  
**Bhavana Singh**, non-practising firm  
**Warren Strange**, Knowmore Legal Service  
**Zhy Wei Tan**, Emmanuel Lawyers  
**Alexander Tees**, Alexander Tees  
**Nicholas Testro**, King & Wood Mallesons  
**Scott Thackeray**, Queensland Indigenous Family Violence Legal Service  
**Wylie Thorpe**, Holding Redlich  
**David Thorpe**, Allens  
**Martyn Tier**, TressCox  
**Emma Treherne**, Adams Wilson Lawyers Pty Ltd  
**Sonja van der Steen**, Mills Oakley  
**Roslyn Vickers**, SK Lawyers  
**Peter Weeks**, Borrello Graham Lawyers  
**Gregory Wildie**, Power & Cartwright  
**Amelia Williams**, Norton Rose Fulbright  
**Erika Williams**, non-practising firm  
**David Wolff**, Walters Solicitors  
**Louise Woolley**, Birch & Co  
**Christina Zhong**, Littles Lawyers

*Additional new members who joined during the 2016-17 practising certificate renewals process will be included next month.*

# Celebrating equity and diversity

To celebrate the success of this year's Queensland Law Society Equity & Diversity Awards, each winning firm was invited by the Equalising Opportunities in the Law Committee to submit a short article on their achievements. Here are their responses.

## Clayton Utz

*Winner, Large Legal Practice Award*

**Clayton Utz has put diversity and inclusion at the heart of its business, supporting the firm's focus on its two key assets – its people and clients.**

Key diversity and inclusion initiatives include flexible working – supported by a new progressive policy and a dedicated national flexibility manager, a national LGBTI program, and a domestic violence policy. From 1 July, the firm has also made superannuation contributions on a component of an employee's unpaid parental leave, helping to address gender disparity in superannuation balances at retirement.

Clayton Utz chief executive partner Rob Cutler, who also serves as the firm's Diversity Council chair, said he was particularly proud of the firm's progress on gender equality and flexible working, and would continue to drive change through targeted initiatives.

"As lawyers, we have an important role to play in promoting diversity, equality, respect and inclusion in society," he said. "That has to start with our own firm. We're committed to gender equality and gender pay equity, and we're making excellent progress with the initiatives we've put in place to support this.

"The next step for us is taking this success and applying what we've learnt to drive our broader diversity and inclusion agenda, focusing on embracing inclusion as much as recognising difference to bring about more positive change within our workplace."

Clayton Utz's efforts to promote and embed diversity and inclusion are having a positive impact. The number of employees who remain with Clayton Utz for more than a year after returning from parental leave, for example, has increased – a reflection of the firm's enhanced flexible work policy, parental leave policy and scheme, and continued on-the-job support for working parents.

Clayton Utz was recently awarded the 2016 Pride in Diversity Australian Workplace Equality Index Awards Achievement Award, and in 2015 was named an Employer of Choice for Gender Equality by the Workplace Gender Equality Agency.

## Miller Harris Lawyers

*Winner, Small Legal Practice Award*

**Miller Harris Lawyers has implemented a range of initiatives to promote equity and diversity in the workplace and has enjoyed a positive impact on business performance as a result.**

"The diversity of thought and opinion that comes from employing people from a range of different backgrounds is a key strength of our business and provides us with a competitive edge," partner Melissa Nielsen said. "Supporting and encouraging diversity ensures that as a firm we embrace new ways of doing things and continually challenge and improve the way we work.

"We are also conscious of the evolution of our workplace over time. More and more people are seeking flexible working arrangements and we have adapted our policies with this in mind to ensure we attract and retain high-calibre people.

"Of our team of over 30 people, 42% are currently employed on flexible working arrangements. It's a two-way street. Our team certainly go the extra mile when needed and we're accommodating in return.

"I have personally benefited from the firm's commitment in this area through a flexible return to work following parental leave on a number of occasions."

All three of the firm's senior associates are also currently employed on flexible working arrangements while caring for young families.

## Harrington

## Family Lawyers

*Winner, Small Legal Practice Initiative Award*

by Stephen Page

**We humans are a pretty diverse bunch. We come in all shapes and sizes – and have all kinds of relationships.**

As family lawyers, we have been told stories that we couldn't imagine. We have been shocked at horrific stories of domestic violence, mainly by men towards women. All of us are entitled to be treated with dignity and should be treated equally before the law.

The law, as we know, does not always treat people equally. Discrimination continues under the law. When I took my oath of office back in 1987 I was determined to make sure that not only would I act for clients, but I would try and help make the world a better, fairer place.

In 2007 as part of that commitment, I started writing the Australian Gay and Lesbian Law Blog, the first of its kind in Australia. The blog now has a life of its own. I would never have imagined it would be included in the Australian Archives or that it would have had over 350,000 hits. The blog has helped lift both my profile and that of the firm. Through a convoluted process (too long for this article) it helped me become an international representative on the Assisted Reproductive Technologies Committee of the American Bar Association.

Each of us think that we are individuals who are weak and powerless. Each of us can choose to be strong, and sometimes the results amaze us and everyone around us. Embracing and nurturing our differences can achieve extraordinary and unimagined results.

# This month ...

## Essentials: Drafting Pleadings and Particulars

Law Society House, Brisbane | 8.30am-12pm

Do you have a mountain of evidence before you? Don't know where to start when considering what is relevant? Designed for junior solicitors with up to five years' experience in the legal profession, this Essentials workshop will equip you with practical and relevant tools in drafting pleadings and particulars in civil litigation matters.

Finesse your preparation skills, consider the concepts of relevance and weight when drafting pleadings and particulars for a civil proceeding, get the keys to a responsive pleading, and explore the do's and don'ts of pleading in the Federal Court vs Queensland courts.

Throughout the session you will also be provided with practical examples to assist you to put theory into practice.

This is your opportunity to benefit from the expertise of our guest presenters, Queensland barrister and author David Topp, special counsel Nola Pearce, and Queensland barrister Fiona Lubett. Don't miss out!



3 CPD POINTS

## Essentials: Drafting Statements and Affidavits

Law Society House, Brisbane | 1-4.30pm

So you want to present your client's (or a third party's) version of events to the court – do you use a witness statement or an affidavit? What material should be included and excluded? What should you always do (and never do) when interviewing and drafting?

Following on from our intensive workshop on pleadings and particulars, this essentials workshop will continue to build your drafting toolkit and take a closer look at the where, why and how of witness statements and affidavits.

Join our expert presenters Queensland barrister and author David Topp, and special counsels Brett Heath and Nola Pearce for this practical workshop. Refresh your knowledge on the fundamental building blocks, step through the things you need to consider when choosing between an affidavit and a witness statement, and explore the tips and traps in gathering, preparing and shaping evidence.



3 CPD POINTS

WED  
**3**  
AUG

## Support Staff Webinar: Top 40 Legal Terms

Online | 12.30-1.30pm

Understanding basic legal terminology is essential for legal support staff to improve their ability to communicate and work effectively with supervisors, clients, colleagues and third parties. This webinar will provide a beginner's guide to 40 basic legal terms applicable to contract law, litigation, conveyancing, criminal law, wills and estates and general legal practice.



1 CPD POINT

TUE  
**9**  
AUG

## Regional: North Queensland Intensive

Rydges Southbank Townsville | 8.30am-5pm

Register for the North Queensland Intensive to receive updates in substantive law, develop your essential skills, and interact with experienced presenters and local colleagues. This one-day event is the perfect opportunity for regional practitioners to learn from the experts without the need to travel far from home.

Full-day or half-day registrations are available.



7 CPD POINTS

THU  
**11**  
AUG

## In Focus: QLS Domestic Violence Best Practice Guidelines

Law Society House, Brisbane | 12.30-2pm

Following the official launch of the *QLS Domestic and Family Violence Best Practice Guidelines* by the Honourable Dame Quentin Bryce AD CVO on 27 July, join us for a fundamental professional development event for all legal practitioners working with victims and perpetrators of domestic and family violence.

Our expert panelists will lead a discussion on the five principles set out in the guidelines and offer practical advice for implementing the guidelines in your practice.



1.5 CPD POINTS

TUE  
**16**  
AUG

Earlybird prices and registration available at  
[qls.com.au/events](https://qls.com.au/events)

## BCIPA Intensive 2016

Law Society House, Brisbane | 10am-2.45pm

The *BCIPA Intensive 2016* is a specially designed half-day seminar for adjudicators and construction lawyers. This year's program features practical and valuable sessions on the big issues currently facing the industry, including recent significant case law and legislative changes, how to amend construction contracts to ensure compliance with the *Building and Construction Industry Payments Act 2004* (BCIPA) and the Queensland Building and Construction Commission (QBCC), the impact of the new small business unfair terms legislation that comes into effect on 12 November 2016, and an interactive Q&A session with tips on how to avoid the common traps.

Queensland Law Society is a QBCC Adjudication Registry Approved Provider.



4 CPD POINTS

## Government Lawyers Conference 2016

Law Society House, Brisbane | 8.30am-5.05pm

2016 marks the 10th anniversary of our Government Lawyers Conference. This is a key event in the public sector calendar, providing substantive law and core CPD sessions tailored for government lawyers and advisors.

This year's conference will focus on current and emerging issues, and legal updates in the areas of disciplinary law and human rights.

Delegates will hear commentary on privacy jurisdiction, the recent review of the industrial relations framework, and get an introduction to the United Nations *Guiding Principles on Business and Human Rights*. A range of strategies will be discussed during the program to manage external legal services providers and improve in-house team communication.

The event will wrap up with a panel discussion around the unique ethical responsibilities of legal practitioners within the public sector.



7 CPD POINTS

## Can't attend an event?

### Purchase the DVD

Look for this icon. Earlybird prices apply.



TUE  
**23**  
AUG

## Webinar: Rules of Expert Evidence

Online | 12.30-1.30pm

Cases often turn on the veracity and strength of an expert's evidence. Choosing and managing the right expert, gathering and presenting their evidence, and knowing how and when to challenge your opponent's expert evidence are all skills that can make or break your client's case. Join barrister Steven Hogg for a valuable and engaging refresher on the rules of evidence, a practical discussion on the application of those rules to experts, and tips for making the most of their evidence.



1 CPD POINT

TUE  
**30**  
AUG

## Masterclass: Competition and Consumer Law

Law Society House, Brisbane | 9am-12.30pm

Competition and consumer law compliance issues touch and concern all organisations. So whether you advise small businesses or large corporate entities, it is important to be abreast of all developments in this constantly evolving area of practice. This masterclass will provide an opportunity for you to hear from industry experts on the following pertinent emerging issues:

- misuse of market power: A discussion of section 46
- small business contracts: A new regime
- an update to the story so far: A summary of recent significant cases
- proportionate liability under section 18 of the Australian Consumer Law.



3 CPD POINTS

WED  
**31**  
AUG

## Save the date

Insolvency Intensive	6 September
Property Law Conference	8-9 September
Criminal Law Conference	16 September
Personal Injuries Conference	21 October
Succession and Elder Law Residential	4-5 November
Conveyancing Conference	25 November

# Email etiquette – do you get it?

Reply, ignore or delete? Don't blow away friends and clients



'Bloody emails', I hear you say, as you bin another one.

Most of the time, I'm with you. Yes, our email can feel a bit out of control, but we need to think before we act...

The basic menu of actions is to read/save; read and reply/save; glance and ignore; delete.

1. Just doing read/save is a weakness of the legal profession. For example, we tell our clients "I need XYZ documents emailed to me by COB tomorrow". They duly comply and we see that as an end to it.

Clients, though, will be wondering, "Did he get them/Were they OK? Is everything under control?"

The point is that it isn't enough for us to know things are under control – we have to confirm it. So we say, "Thanks for dealing with this so promptly... all in order and greatly appreciated". It takes 10 seconds.

'Thank you' not only signifies completion of the task at hand, but it also gives your clients another reason to like you. And a personal touch when signing off – like "Enjoy your weekend" – is even better. The general rule is – make 'thank you' the end communication (either can say it).

2. Non-matter emails from our network need thoughtful attention. My general rule here is: Is the sender communicating at a personal level? In other words, my colleague says, "Hey Pete – saw this pp45/6 today's AFR and thought right up your alley". His motives are neither here nor there. We should say thanks in these situations as a basic courtesy. (It makes good business sense as well.) Broadcast emails, even from friends, are different. You *can* ignore them. So – I would say, if a friend *personally* asks you to a golf day, you should reply, but if you are simply on a list from their mail server, there is no discourtesy in not replying.

3. We can also be more efficient dealing with emails we don't want from people we don't know. The general goal is to fix the problem in the system so it is fixed permanently.

Set your spam filters at the level you are comfortable with (you or your systems people). Review the junk files every couple of weeks. Check on unintended filtering. Adjust the levels as necessary.

Never just *delete* – ideally *unsubscribe*, and/or label as 'Junk' and 'Block Sender'.

Finally, the key message is, don't allow your *understandable* impatience with emails from strangers to adversely influence how you respond to friends and clients. And once more for the road with friends, colleagues and clients, the cycle is complete when someone says 'thank you'.

**Dr Peter Lynch**  
p.lynych@dcilyncon.com.au

## Do you have clients in need of Migration assistance?

- Appeals to the AAT, Federal Circuit Court and Federal Court
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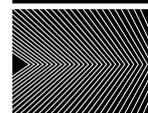
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# Vale Morris

with Matthew Dunn



## Madden Morris is a strapping 21-year-old lad with the world at his feet.

Heir to a 157-year winemaking dynasty, he recently graduated with a winemaking degree and plans to join his father as the sixth generation of his family to carry on the family tradition of winemaking at Rutherglen.

"It all really comes back to me carrying on tradition," he said in an interview with the ABC in May this year. However, a month later Madden and many Australian wine lovers were shocked to hear that his heritage, Morris Wines, is to be shut down by its current owner, Pernod Ricard Australia.

The Morris family began winemaking in 1859 when George Francis Morris established a vineyard and winery on his property, Fairfield, near Rutherglen in north-eastern Victoria. Morris, a former English bank clerk and Bristol émigré, made his money on the Victorian goldfields at Beechworth and set about making full-bodied red wines on his estate.

He exported three quarters of his production to England, where his wines were much fancied as "ferruginous Burgundy" – a health tonic tasting as if it contained iron.

By 1885 Morris had 200 acres of vineyard and was the largest wine producer in the Southern Hemisphere. Tragedy struck in the 1890s with the phylloxera louse destroying vineyards in Rutherglen, and in 1897 GF's son, Charles Hughes Morris, established a new vineyard close to the original estate and sold his prize-winning horse, Fairfield, to develop the property.

The original Fairfield estate was sold in 1917 and the Morris family continued to make wine in Rutherglen. Charles Hughes Morris was succeeded by his son, Charles Tempest Morris, and in turn by his son, Charles Henry 'Mick' Morris. Mick was widely recognised as the pioneer of the durif grape variety in Australia and created a unique product for Rutherglen in addition to the tradition of fine liqueur muscats.

In 1970 one branch of the family wanted out of the wine business and the Morris operation was sold to corporate interests. Throughout the arrangement, the Morris family stayed on to manage and make wine. Today Morris is owned by Pernod Ricard, which also owns Jacobs Creek, Wyndham Estate, Richmond Grove and Gramps.

Madden Morris could have expected to continue as a custodian of an important part of Australia's liquid heritage. But it was

not to be, and in late June Pernod Ricard announced the closure of Morris, saying that it was not a sustainable operation, due to the ongoing decline in the consumption of fortified wines.

The assets of the operation are to be sold separately before the end of 2016 (buildings, vineyards and reserve stocks of fortified wines, including the benchmark muscats). All staff will lose their jobs and the cellar door is anticipated to close on the 31 January 2017. Pernod Ricard plans to keep the Morris brand for some future use.

Max Allen, writing in *The Australian*, criticised the decision saying: "What rot. Sure, the fortified wine market as a whole has been in steady decline for many years, especially in the cheap, bulk, flagon-and-cask end. But sales of premium fortified wines – like the great muscats that Morris excels at – are holding steady, even improving."

Icons of Australian wine are more than mere brands. If Morris was a building, it would be heritage listed and ownership would come with obligations to conserve and improve. UNESCO recognises cultural heritage as more than monuments and collections of objects. Why can't we protect our liquid heritage?

Get in and save what you can. I'm stocking up.

## The tasting Three Morris offerings were examined.



The Morris Sparkling Shiraz Durif NV, was deep purple black with a rich fine bead. The nose was rich, ripe purple blackberries sitting on a little oak barrel in the summer sun with a touch of black pepper. The palate was a little delicious mix of toasty oak and blackberry fruit. Obvious fruit sweetness was cut back almost immediately by the drying tannins and acid to a long and persistent finish.



The Morris Classic Liqueur Muscat was brown-red and toffee in colour. The nose was flaming alcohol and caramel over a raisin-laden Christmas pudding. The viscous mouthfeel had all the flavour to the fore. Heavy with fruit sweetness built on layers of raisin and caramel.



The Morris Old Premium Rare Liqueur Muscat was the colour of an impenetrable long black fresh from a steaming mocha pot on the stove. The nose was drunken sultana, cinnamon and the warmth of winter porridge fruits. The mouthfeel luscious rolled around the tongue. The long flavour commenced sharply, with bracing youthful acidity followed by a complex strong mid palate of chocolate box, ripest raisin and spices: cinnamon and nutmeg. The undeniable sweetness came to a crescendo in the start of the mid palate but dropped away to a dry lightness and enduring strength of resounding flavour. A truly benchmark wine.

# Mould's maze

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

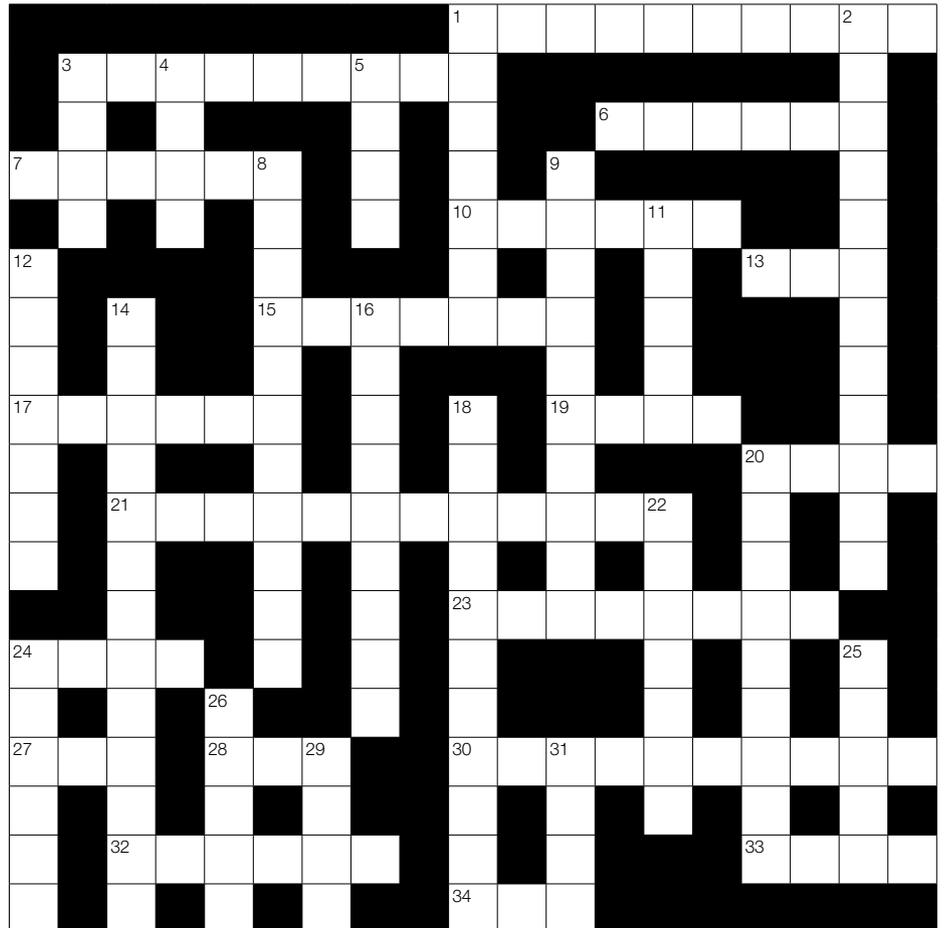


**Across**

- 1 A creditor who brings bankruptcy proceedings against another. (10)
- 3 Cancel; perform a legal duty. (9)
- 6 A form of nuisance. (6)
- 7 Doctrine in which there is no allodial title. (6)
- 10 Appellate decision of multiple judges made by the court acting collectively and unanimously, per ..... (6)
- 13 A plaintiff's personal injuries are assessed using the ... 5 Guidelines. (Abbr.) (3)
- 15 General damages, ..... damages. (US) (7)
- 17 A plaintiff may receive an ..... of an ISV assessment in the case of multiple injuries. (6)
- 19 Surname of Queensland solicitors Andrew, Matthew, Joanne, Peter, Katherine and Anne-Maree. (4)
- 20 After-acquired title, estoppel by ..... (4)
- 21 Defence based on implied or express acceptance of a defendant's breach of contract. (12)
- 23 Rule of statutory interpretation adopting a purposive approach found in Heydon's Case (8)
- 24 Rating that applies to psychiatric injuries (Abbr.) (4)
- 27 On 1 July 2015, the Migration Review Tribunal, the Refugee Review Tribunal and the Social Security Appeals Tribunal were amalgamated with this tribunal. (Abbr.) (3)
- 28 An employer's counterpart to a strike, lock... (3)
- 30 Application brought to commence Family Court proceedings. (10)
- 32 Jury list, juror summons. (6)
- 33 Easement by which the water that falls on the roof of one house is allowed to fall on the land of another, right of ..... (4)
- 34 Commence civil proceedings. (3)

**Down**

- 1 John Grisham novel and movie starring Julia Roberts as a law student, ..... *Brief*. (7)
- 2 Unlawful intrusion on property, for example, by a footing. (12)
- 3 Agreement for which absence of consideration will not prevent enforcement. (4)
- 4 Medical certificate to support excusal from court, .... and conscience letter. (Scottish) (4)
- 5 Family Court case concerning the contributions by a step-parent. (4)



- 8 Lease requiring the lessee to improve the property. (11)
- 9 Comparable authorities. (10)
- 11 Foreign national. (5)
- 12 A series of equal payments at regular intervals, for example, a pension payment. (7)
- 14 Family law alternative dispute resolution process by which a party's lawyer cannot continue to act for them in the event of subsequent litigation. (13)
- 16 Trespasser of land. (9)
- 18 Accessories to a crime. (11)
- 20 Regulations and rules are examples of ..... legislation. (9)
- 22 Annexure. (7)
- 24 A defendant need not plead to a ..... for relief. (6)
- 25 The New South Wales equivalent to the 'man on the Clapham omnibus', 'the man on the ..... tram'. (5)
- 26 Charge on an indictment. (5)
- 29 Defamation is both a crime and a ..... (4)
- 31 Irrational argument, ....dixitism. (4)

**Solution on page 64**

# My words of wisdomness

## Calculatedly, a column of nerdlyness

by Shane Budden



One of the downsides of being a lawyer – even one like me – is that you cannot avoid having to know stuff about the law, unless you practise in certain American jurisdictions or The Haig.

Because of this, I am still required to read judgments – a bit of a shock to the system for my graduating class of lawyers, as we rarely read any judgments in law school. This was partly because the important bits were underlined in various journal articles, but mostly because a certain fellow student (whom I will not name in the interests of not being sued) had a habit of going through the reading list and hiding the reports containing precedent cases in various places around the library to ensure that he was the only one who could find them.

In his defence, I should say that this student was also well known for his collegiality and friendly disposition, at least around assignment time when he would visit his fellow students and engage in conversation while simultaneously scanning and memorising the books they were researching for the assignment.

This was an impressive skill and would no doubt have won him the institute medal had the rest of us not cottoned on to it and started scattering random case reports on our desks in order to confuse him. Some people would even leave partially-typed drafts replete with made-up words, just to see if he would blurt them out in a tutorial, wearing the erroneously smug look of someone who thinks they have just said something clever in Latin but who has in fact announced in poorly-accented Italian that they have a fish in their trousers.

I mention made-up words because I have noticed a lot of them cropping up lately, even in judgments. Just this week (the week I am writing this, not the one in which you are reading it) I have encountered the words ‘conflictingly’ and ‘calculatedly’, which appear to be part of a new trend in the English language in which people can’t be bothered finding a decent way of saying something and just throw ‘-ly’ on the end of a word and hope for the best.

It is similar to the way many young people can’t think of the noun they want, so throw ‘ness’ on

the end of an adjective; I shudder to think what would happen if young people applied this to poetry.

*“Shall I compare thee to a summer’s day?”*

*Unlikely; your beautifulness is like way greater.”*

Shakespeare would be rolling in his grave if someone hadn’t stolen his head (I did not make that up, scientists do indeed believe grave robbers – not the humorous kind, apparently – stole Shakespeare’s skull, although it may just be that they needed it for an impromptu production of *Hamlet* at his wake; if you happen to have a 400-year-old skull hanging around the house, it is probably worth contacting the British Museum).

Of course, judgments are often filled with words that refer to things that don’t exist – for example, ‘reasonable man’ – or that no one understands, like ‘mere equity’.

My view, however, is that if we are going to make up words, they should be words that we need, not just ugly versions of words that already exist. ‘Conflictingly’, for example, sounds nowhere near as good as ‘incongruously’, despite the fact that they mean the same thing – at least for all you know; ‘calculatedly’, on the other hand, sounds so obviously made up that I don’t even care if it really is a word – and don’t get me started on people using ‘disoriented’ instead of ‘disorientated’.

*(Note to word nerds: I am well aware that both words are permitted by the English language, but if you care to do some serious research on the etymology of words and the history of Germanic languages such as English, you will discover that ‘disoriented’ just sounds really stupid.)*

I was concerned that I was having a grumpy old codger moment, so I consulted my friends on these new words and the problem in general, and they agreed that this was a serious issue; that’s one of the great things about getting old – your friends are grumpy old codgers too, and willingly support you in bursts of confected rage about things which don’t really matter.

I considered writing an outraged letter to my local MP, but just at that point my editor mentioned that my column was about three weeks late, and I realised that this issue met the rigorous journalistic standards of my

column, which are that I was confident I could bang on about it for close on 1000 words – and here we are.

Of course, I am not the sort to simply notice a problem and do nothing about it, like the NSW Origin selectors, who continue to pick the same slow-moving holes in defence who couldn’t beat Queensland the previous year; I decided to come up with some new words we really have a need for, such as:

**Acronymrod:** Meaning a person who inappropriately and excessively uses acronyms (“I’m OMW to QCAT to TCB WRT DPP BAU V LSC.”)

**Uncounter:** Refers to those people who line up in the 12 items or less line with about 34 items and then try to pretend that they thought they only had 12 items and simply miscounted, despite the fact that even the NSW forward pack can count to 12 (if they work together and are allowed a couple of chances).

**Brutile:** A combination of brutal and futile, referring to the ridiculously angry and pointless comments people post online when protesting about the outcomes of reality TV shows.

**Obligaton:** Any of the sub-atomic particles theoretical physicists are obliged to invent to make string theory workable, and which they often claim to have seen although nobody who is not directly getting paid millions of dollars to find these particles has ever seen one (“Look! There’s one behind you! Oh, it sped off just as you turned around; that’ll be \$200 million please.”)

**Blook:** A contraction of ‘boy look’ meaning the way a man can look for a set of keys for 30 minutes without success, after which his wife will find the keys in five seconds or less; biologists who study men think this is also related to the way a man cannot tell the difference between a made and unmade bed. My wife put this one in, but of course I didn’t notice.

I am sure you are aware of any number of words we need to have and I invite you to send them in (proctor@qls.com.au) just in case I can’t think of an idea for my next column – and for the record, I am well aware that the name for an opinionated columnist who gets upset over trivial things is a Budden.

© Shane Budden 2016. Shane Budden is a Queensland Law Society ethics solicitor.

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## Crossword solution from page 62

**Across:** 1 Petitioner, 3 Discharge, 6 Public, 7 Tenure, 10 Curiam, 13 AMA, 15 Hedonic, 17 Uplift, 19 Dunn, 20 Deed, 21 Acquiescence, 23 Mischief, 24 Pirs, 27 Aat, 28 Out, 30 Initiating, 32 Venire, 33 Drip, 34 Sue.

**Down:** 1 Pelican, 2 Encroachment, 3 Deed, 4 Soul, 5 Robb, 8 Emphyteutic, 9 Precedents, 11 Alien, 12 Annuity, 14 Collaborative, 16 Disseisor, 18 Accomplices, 20 Delegated, 22 Exhibit, 24 Prayer, 25 Bondi, 26 Count, 29 Tort, 31 Ipse.

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## Historical standard default contract rate %

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9.55/9.45	9.45	9.45	9.45	9.45	9.45	9.45	9.45/9.55	9.55	9.55/9.60	9.60	9.35

**NB:** A law practice must ensure it is entitled to charge interest on outstanding legal costs and if such interest is to be calculated by reference to the Cash Rate Target, must ensure it ascertains the relevant Cash Rate Target applicable to the particular case in question. See [qls.com.au](http://qls.com.au) > Knowledge centre > Practising resources > Interest rates any changes in rates since publication. See the Reserve Bank website – [www.rba.gov.au](http://www.rba.gov.au) – for historical rates.

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