

PROCTOR



Queensland
Law Society

April 2016 – Vol.36 No.3

Night shift | Indemnify, hold harmless or save harmless?
Why diversity is core business

A woman with long dark hair, wearing a red sleeveless top, a purple skirt, and black high-heeled shoes, is standing in a modern office hallway. She is looking down at a large white printer. The hallway has a light-colored carpet and a wall on the left covered in colorful sticky notes. In the background, there are more office equipment and a glass-walled area.

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Night shift	16
New legislation tackles alcohol-fuelled violence	
Indemnify, hold harmless or save harmless?	20
Is there a difference?	
Why diversity is core business	24
Positive outcomes for respect and inclusion	

Law		News and editorial	
Ethics – A discourteous path to misconduct	26	President's report	3
Professional standards – Employing lay associates	29	Our executive report	5
Your library – Ceremony launches 'In Freedom's Cause'	30	News	6-9
Back to basics – Proceedings on the Commercial List	32	In camera	10-14
Early career lawyers – Heading for the High Court?	34	Career pathways	
Alternative dispute resolution – Drafting an effective arbitration agreement	36	Diary dates	52
Workplace law – Avoiding a legal hangover	38	Conference spotlight – Mackay on show at NQLA conference	53
Family law – Court upholds assets preservation order	40	New members	54
Book review – The coronial process explained	41	Career moves	55
Succession law – Domestic violence = disintitling conduct	42	Practice management – Keep it simple ...	56
Practice and procedure – Precise view of quantum pays off	44	Outside the law	
High Court and Federal Court casenotes	46	Classifieds	57
On appeal – Court of Appeal judgments	48	Wine – Great white pointers	61
		Crossword – Mould's maze	62
		Humour – Attack of the Phone Drones	63
		Contact directory, interest rates	64



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The relationships epidemic

And why we need more judges *now*



We talk a lot about domestic violence.

And while there is every reason to highlight domestic violence as a crisis of enormous proportions, I think we sometimes forget that it is just one facet of a bigger problem – the ongoing epidemic of relationship breakdowns.

It is a safe bet that every QLS member knows someone – family, friend or client – who has experienced a divorce or separation. At best, it is an unpleasant experience; at worst, it can destroy lives.

Our family law practitioners are on hand to observe the worst of it, and I believe the one common factor in these cases is that those involved are desperate to get on with their lives, to move forward, to make a fresh start.

As you have no doubt heard, the delays in finalising Family Court matters can be substantial, sometimes stretching into years. What some readers may not appreciate is what this means when you look at it on an individual level. A number of practitioners have written in with examples of the impact of these delays – illustrating a variety of concerns.

In one matter, the judgment for a trial held in early March 2012, wasn't delivered until January this year. The practitioner wrote:

"... my understanding is that the de facto could not finance her legal proceedings, and her legal representatives were forced to wait until settlement (some four years later) before they could receive payment for their services. The de facto was also forced to wait four years before she received what she was entitled to.

"I am on the receiving end of many frustrated phone calls/conferences from clients about how long it takes to achieve anything. ... we are not responsible for the court's calendar and it is very difficult for clients to understand that. ... Clients want to 'close the book' on that chapter of their lives and move on, but court delays prevent that.

"... The inevitable result of such delays is that it is the legal practitioners get the blame for spending all the client's money without achieving anything. A quote such as 'You've charged me \$10,000 for what – nothing's happened' is commonplace in my office."

In another instance, a lesbian couple parted ways some years after deciding to have a child together by IVF. The child's biological mother then cared for the child while the other woman worked. When the relationship fell apart, the latter took the child, along with all their furniture and personal effects, and took out a domestic violence order against her former partner.

"In order to get a Family Court order for parenting which currently does not exist I attempted to bring an application under the *Family Law Act* in the ... Magistrates Court to have the hearing of the parenting arrangements simultaneously with the DVO hearing," the solicitor said. "Unfortunately the magistrate refused to allow me to file the documents and said that I should file them in the Federal Circuit Court.

"As we all know, in order to get an urgent hearing in the Federal Circuit Court it takes six to eight weeks. Consequently, without the cooperation of the other woman, which has not been forthcoming of course because she is using the DVO to protect her decision to keep our client away from the child, my client will have to wait at least another six to eight weeks on top of the already six weeks before she will see her child again. This is a four-year-old child that needs their biological mother inherently."

Pause for a moment and consider the personal stress involved in these instances – the mental anguish and damage done to relationships, such as in the last instance, between mother and child.

And this damage is being done every day to people across Australia.

In 2010 we had five Family Court judges in Queensland and now with the most recent appointment by the federal Attorney-General, Senator Brandis, we have four, so we are still one down in terms of numbers of Family Court judges compared to six years ago.

In addition to this, we have Federal Circuit Court judges who are working under incredible pressure both within the regions and within south-east Queensland.

It is quite clear that there is an urgent need for there to be appointed – just to get back to the position we were in 2010 – a Family Court judge, and to relieve the current pressure on the hard-working Federal Circuit Court bench, at least three new FCC judges.

Inevitably, justice delayed becomes justice denied. And it is justice denied in that most sensitive and vital of all areas, family relationships. It is real children who are finding that their relationships are being damaged with their parents; it's real issues with people who can't progress in their new relationships or further because their property has been tied up for a lengthy period of time, and with the squeeze on legal aid funding, particularly in relation to mediation and the like, we are seeing in Queensland people who are effectively becoming victims of a system that they would ordinarily expect and hope would deal with their issues in a timely and sensitive manner.

Bill Potts
Queensland Law Society president

president@qls.com.au
Twitter: @QLSPresident



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*The 'find a solicitor' service is only available to QLS members. For more information about getting involved in this QLS service please contact us at info@qls.com.au.

Practising certificate and
QLS Membership renewal
Opens 3 May 2016



Federal call to parties

Issues that matter in this election

With the next federal election firmly on the horizon, we have been developing a Call to Parties document that highlights Queensland issues in the federal arena which concern our members and the communities in which they serve and practise.

The document, similar in form to the one we submitted to the major political parties prior to the last state election, is based on substantial input from members of our Queensland Law Society policy committees and consultation with affected entities and key stakeholders.

Council has considered the Call to Parties document and we will send it to the federal political parties for their consideration. We will advise members of the responses when received.

We call on Queensland federal parliamentarians to respond clearly and unequivocally in regard to these priority issues. We intend to actively engage and advocate on these matters identified by our profession.

A key concern focuses on making the federal justice system more accessible to ensure that Australians receive appropriate advice and assistance, no matter how they enter the justice system.

We also seek a commitment to resolve family law disputes in a timely way through provision of more trial judges and assistance for Queensland businesses, including law firms, by reviewing regulation and reducing both red-tape and financial pressure.

I thank all members who have contributed to the development of the Call to Parties document to date and look forward to hearing the responses from our federal parliamentarians.

Thanks to so many!

It has been a busy start to the year! My heartfelt thanks go to the many sponsors, presenters, exhibitors, delegates and guests

who supported the Legal Profession Dinner (19 February), Legal Careers Expo (8 March) and Symposium 2016 (18-19 March), not to mention the many other events and functions that have filled our calendars.

You can see and read more on our major events further on in this edition of *Proctor*.

Pegasus prepares to fly

Remember that delightfully old-fashioned cliché, ‘a stitch in time saves nine’?

The words may be outdated, but the meaning is not. Preventative measures such as early intervention are important and useful for any organisation.

We have begun development of a series of initiatives that apply the concept of early intervention, support and active implementation to a number of member offerings, including corporate health, stress and mental health opportunities, practice support outreach programs, re-education and early intervention programs to support referred practitioners in going back to practice, business continuity planning tools and a value expansion to our strategic partnerships.

Collectively, we have dubbed these initiatives the Pegasus project, and I look forward to bringing you full details on how these will benefit members over coming months.

Some initiatives within the Pegasus project are being developed with funding from the professional indemnity insurance Law Claims Levy Fund. These funds are tightly controlled under the *Queensland Law Society Indemnity Rule 2005*, and are being strictly applied under section 17 of the rule for:

“(3)(iii) the investigation of and research into the circumstances that give rise to Claims and the development and delivery of risk management and early intervention educational programmes to address the underlying causes giving rise to such Claims.”

Stay tuned.



Update your details to tailor your services

This month we encourage members to log on to qls.com.au and ensure your details are up to date.

With the annual practising certificate and membership renewals running from 3 to 31 May, the necessity for current contact details is obvious. However, other information such as your area of practice enables us to tailor the information and offerings we send you in a more relevant and meaningful way.

For those who already participate in our online ‘find a solicitor’ service, the details provided are also used to assist potential clients to better connect with you.

But can she dance?

This month, we will all discover the answer to that question when I take to the stage of Brisbane City Hall for the Dancing CEOs event. No matter the answer, I am proud to have been able to put myself out there to raise funds for the Women’s Legal Service, an organisation I believe we should all support.

It is not too late to assist with financial support as donations can be made right up to and including on the evening. All the event details are at dancingceos.com.au. You can donate via give.everydayhero.com/au/amelia-hodge-dancing-ceo-s.

You can support me and fellow Dancing CEOs entrant Clarissa Rayward, along with the Women’s Legal Service, at an engaging discussion on innovation and the legal profession on 11 April. The forum will feature panellists Monica Bradley, Glen Carson and Bruce Humphrys. See eventbrite.com/e/innovation-and-the-legal-profession-a-forum-supporting-wls-tickets-23950459469 for details.

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Letters to the editor: We invite and encourage our members and others in our professional community to engage in two-way conversation with Queensland Law Society and colleagues through letters to the editor, articles and opinion pieces, and by raising questions and initiating discussions on issues relevant to our profession, Email proctor@qls.com.au.

Advocacy of 'utmost importance'

Re: The letter from Martin Punch in March *Proctor* suggesting that the advocacy role of the Society is "contrary to members' views".

The propositions put forward by Martin are simply absurd. To suggest that the only interest of the Society is self-interest is contrary to what being a member of a profession entails.

I certainly agree that in an organisation of our size there will be differences of opinion on a multiplicity of issues.

From the 15 years or so in which I have served on QLS committees as part of the advocacy function, I have never observed submissions being put forward which are anything other than a determination

to improve legislation or to defend fundamental issues of legal principle.

To suggest that the peak body of lawyers should refrain from commenting about legislation, matters of human rights and issues concerning the rule of law is, frankly, appalling.

I am proud to have been part of the advocacy function of the Society and believe it is of the utmost importance that it be maintained, strengthened and be a source of pride for our profession.

I cannot disagree more than to suggest that we must contain ourselves to self-interest only.

Peter Eardley
Brisbane

Thynne + Macartney RideWest for mental health

Thynne + Macartney is taking part in RideWest from 6-13 May to help break down barriers to accessing mental health services in rural and remote areas.

RideWest is a gruelling boutique charity bike ride from Brisbane to Longreach covering 1237km and benefiting the Royal Flying Doctor Service's mental health services.

The head of Thynne + Macartney's agribusiness group, Bill Loughnan, said: "As lawyers to rural communities we have often seen the stress caused by financial hardship, isolation and the challenges of ongoing drought, floods and fire in different rural regions. The link between stress and mental health issues is well known."

One of the firm's commercial litigation partners, Mark Winn, and agribusiness lawyer Hannah Byrne will ride on behalf of the firm, which is supporting the endeavour.

"I know people who have suffered from mental health issues and have seen the long-term impact this can have not only on the individual but on their families,"



Hannah Byrne, left, and Mark Winn

Hannah said. "I believe that by supporting and participating in events like these we can help provide more support and resources to people in the rural community who need it most."

All RideWest participants are required to fundraise \$5000 each, as well as covering all the costs of the ride including accommodation, food, support team and bike transport. To donate to Mark and Hannah's fundraising totals, see ridewest.com.au/home/riders.

USC appoints new law school head

A property law expert who arrived at the University of the Sunshine Coast (USC) 18 months ago from Melbourne's Monash University has been named as head of the USC Law School.

Professor Pamela O'Connor was appointed to the role in February after the retirement of USC's inaugural school heads, Professors Anne and Neil Rees.

Professor O'Connor, who teaches property law and administrative law and is a member of USC's Sustainability Research Centre, worked for more than 20 years in the Faculty of Law at Monash and practised law in Victoria for 11 years.

She is interested in the sustainable management of natural resources, has an international reputation for publications in property law, and has advised law reform commissions in England, Scotland and New Zealand.

"I'm looking forward to building on the practical focus of our program, and offering a broad range of law subjects to meet the diverse interests and career directions of our students," she said.

Senior Deputy Vice-Chancellor Professor Birgit Lohmann congratulated Professor O'Connor on her appointment and paid tribute to the contributions of Professors Anne and Neil Rees.



"Their work was critical to the successful establishment of our Law School in 2014 and its strong connection to the Sunshine Coast community," Professor Lohmann said.

"USC now has 200 law students and continues to receive tremendous support from the local community, with our centrepiece Law Clinic operating in conjunction with the Suncoast Community Legal Service at Maroochydore."

Briefing on new Insurance List

The Federal Court of Australia has invited practitioners to an information session on its new Insurance List for short matters.

The Chief Justice will conduct an information session to explain the list, its aims and how it is expected to run at 2.15pm, repeated at 5.15pm, on Tuesday 19 April in Brisbane. The sessions are expected to run for about an hour and will be held in Courtroom 1, Brisbane Registry, Federal Court of Australia, Harry Gibbs Commonwealth Law Courts Building, 119 North Quay, Brisbane. No RSVP is required.

The Insurance List has been established within the commercial contracts, banking, finance and insurance sub-area of the commercial and corporations national practice area. Initially, it is intended that the list will be run by the Chief Justice, beginning in Brisbane on 19 and 20 April.

More information is available at fedcourt.gov.au/law-and-practice/national-court-framework/insurance-list.

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Advocacy

Society considers 'consent' at revenge porn inquiry

Queensland Law Society, with the assistance of its Criminal Law Committee, focused on the issue of 'consent' in a submission to the Senate inquiry into the phenomenon colloquially referred to as 'revenge porn'.

On 19 February, QLS senior policy advisor Shane Budden appeared via teleconference at a public hearing on this topic, along with Pauline Wright, Dr Natasha Molt and Rebecca Griffiths from the Law Council of Australia.

The purpose of the inquiry, under the auspices of the Senate Legal and Constitutional Affairs References Committee, was to determine whether or not it was appropriate for the Federal Government to create criminal sanctions for the sharing of images of a sexual

nature without consent. This practice is becoming more prevalent, both in straight-out cases of bullying and harassment, and in association with family law proceedings, custody battles and instances of domestic violence.

In our submission (which is available on the inquiry website), we submitted that both the capacity to give consent and the limits of that consent should be mandated by statute. In particular, we argued that persons under the age of 18 years should not be able to give consent, and that any consent given within the context of a relationship should not survive the end of the relationship.

At the hearing, these points were expanded on by noting that the Internet did not have the benefit of the social mores which ordinary society has evolved to govern the rules of intimacy.

In response to questioning from the Senate committee, we noted that the concept of consent given to the sharing of images of a sexual nature not surviving the end of the relationship is not novel, in that many consents do not survive the end of a relationship.

Both the Society and the Law Council also emphasised the point that specifying that non-consensual sharing of images of a sexual nature constitutes an offence would have its own deterrent effect, particularly if accompanied by an appropriate community education program.

The committee's report, delivered on 25 February, is available at aph.gov.au > Committees > Recent reports (Senate).

Careers expo a draw for students



Queensland Law Society held its annual Legal Careers Expo on 8 March, attracting almost 500 law students and 30 exhibitors.

Students were encouraged to meet potential employers and industry representatives, as well as receiving information about graduate placements and vacation clerkships. They were also shown how to fill out job applications by a panel of human resource professionals, and heard first-hand experiences from early career lawyers.



QLS LEGAL CAREERS EXPO 16





A moving ceremony launches 'In Freedom's Cause'

The haunting strains of *The Last Post* and *Rouse* echoed through the Banco Court at the Queen Elizabeth II Courts of Law on 18 February as part of a moving ceremony to launch the 'In Freedom's Cause' exhibition and publication. *Pictured:* Bugler Alex Long.

Report and photos, page 30

Mullins joins UEL network

Commercial law firm Mullins Lawyers is the first firm in the Southern Hemisphere to join the United Employment Lawyers (UEL) legal network.

UEL is a network of lawyers and legal professionals broadly based in the United Kingdom and Europe. Among other benefits, the network facilitates discussions amongst members on common legal issues that affect business clients on a global scale.

Mullins employment and industrial relations partner Alan Strain said many clients were now doing business in the United Kingdom and Europe.

"We are also finding clients of other firms are undertaking work in Australia, Queensland in particular, and Asia and the Americas," he said. "Given the specialised nature of employment and industrial relations law, we want our clients to have access to genuine specialists and be able to reciprocate that advantage when work needs to be undertaken in our jurisdiction. This network enables us to assist clients on a global scale and provide them with direct access to local specialists we know and can trust."

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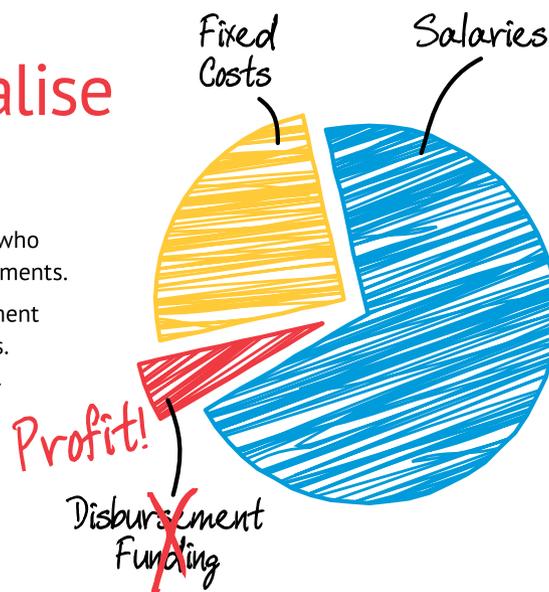
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Profession honours Morcombe lawyer

Queensland Law Society CEO Amelia Hodge emceed her first annual Legal Profession Dinner in front of more than 270 lawyers at a gala event held at Sofitel Brisbane Central's Ballroom Le Grand on Friday 19 February.

A who's who of the state's elite legal fraternity included Justice Susan Kiefel AC of the High Court, Queensland Chief Justice Catherine Holmes, Court of Appeal president Margaret McMurdo and her husband, Justice Philip McMurdo of the Supreme Court, Justice Martin Daubney, Queensland Police Deputy Commissioner Brett Pointing, Federal Court judges Andrew Greenwood and Susan Purdon-Sully, as well Society president Bill Potts and vice president Christine Smyth.

Mr Potts awarded the night's biggest prize – the QLS President's Medal – to small-town lawyer Peter Boyce OAM.

The Nambour-based solicitor was selected for his relentless, unpaid work helping and supporting the family of murdered Sunshine Coast teenager Daniel Morcombe and his tenacity in helping to secure the conviction of the teen's killer – Brett Cowan.

Mr Potts, in announcing Mr Boyce's win, said: "Peter stands as a leader in our profession and is one of the countless lawyers who selflessly toil for little or no reward in the pro bono space within their communities."

Mr Boyce, who acted for no fee as the Morcombes' solicitor throughout their nine-year-ordeal and was instrumental in questioning Daniel's killer, including smashing his alibi during a lengthy coronial inquiry that began in 2010.

Cowan, now 46, was sentenced in March 2014 to life imprisonment with a non-parole period of 20 years for murdering the young teen.

Mr Boyce's close relationship with Bruce and Denise Morcombe also prompted him to help them set up the Daniel Morcombe Foundation, an organisation dedicated to child protection.

More recently, Mr Boyce represented the family of Thomas Olive, who died at the Nambour General Hospital from a rare disorder called rhabdomyolysis after doctors failed to diagnose the condition in time to treat him. He also represented the family of six-year-old Lilli Sweet at a coronial hearing in November last year following her death at the same hospital due to a delay in administering antibiotics for an infection.

In nominating Mr Boyce for the medal, his Butler McDermott Lawyers colleague, Alan Clark, said: "Peter's involvement in coronial inquests is an enormously time-intensive and involved process. There is no doubt that the Morcombe, Thomas and Sweet families benefited greatly from not only the legal work Peter undertook for them during a difficult time."

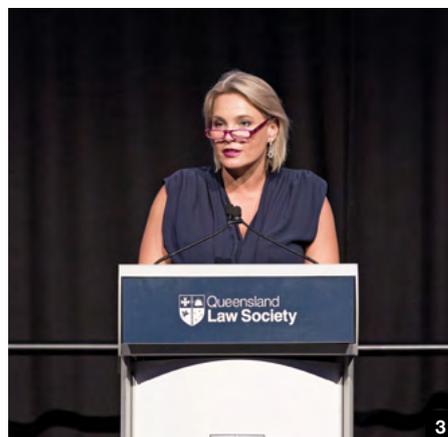
In accepting the award, Mr Boyce humbly thanked the Morcombe family for having faith in him to pursue justice for Daniel.

He attempted to dismiss himself as being a deserving recipient of the award, saying there were many lawyers in the profession who were just as worthy he was.

However, the rousing ovation he received was proof he was a popular and praiseworthy winner.

The keynote address was given by Justice Kiefel, a Queensland appointee to the High Court.

Other award recipients on the night included Outstanding Achievements in Law to Nola Pearce and Dr Matthew Turnour.



1. President Bill Potts, Peter Boyce OAM – President's Medal 2016 recipient
2. Yvette D'Ath, Attorney-General, Minister for Justice and Minister for Training and Skills
3. Queensland Law Society CEO Amelia Hodge

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Symposium

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10



11



12

Symposium snapshots

Photographic highlights from QLS Symposium 2016, Brisbane Convention & Exhibition Centre, 18-19 March

1. Michele Sheehan, Caite Brewer, Ann-Maree David, Chris Kilpatrick, Kelly Caulk
2. Andrew Smyth, Clarissa Rayward
3. QLS president Bill Potts
4. Councillor Chloe Kopilovic, deputy president Christine Smyth
5. Cathryn Warburton, Mark Warburton, Karen Renton-Vedelago
6. Naomi de Costa, Councillor Michael Brennan
7. Emma Condon, Ben Hatten, Natalie Renouf
8. Eugene White, Bruce Doyle, Eugene O'Sullivan
9. The Helmsmen
10. Peter Carrigan, Peter Mills
11. Attorney-General Yvette D'Arth
12. Opening plenary presenter Rabia Siddique ... a spellbinding address (*and bottom of page opposite*)
13. Anne English, Councillor Elizabeth Shearer
14. CEO Amelia Hodge with the affirmative team from the Symposium debate, 'You're not a real lawyer unless you've been to court' – Danielle Keys, Rebecca Treston QC and Andrew Cardell-Ree.
15. Uditi Desai, Brian Herd
16. Professor Nick James of Bond University
17. Symposium by Night – a balmy evening and beautiful Brisbane skyline.



13



14



15



16



17

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Night shift

New legislation tackles alcohol-fuelled violence

Alcohol-fuelled violence has consistently been a hot topic in Australian media in recent times and one which the Queensland Government has indicated it wishes to confront.

In order to address the issue, the Attorney-General and Minister for Justice, Yvette D'Ath introduced the Tackling Alcohol-Fuelled Violence Legislation Amendment Bill 2015 (the legislation) into Parliament in November 2015 as part of an election commitment made by the Government to address the damage caused to society by alcohol-fuelled violence in Queensland.

Notably, the legislation sought to reduce allowable extended trading hours for most licensed premises in Queensland, amend the existing lockout provisions under the *Liquor Act 1992 (Qld)* (the Liquor Act) and introduce the concept of "3am safe night precincts" (3am Safe Night Precincts). When the legislation was introduced, it received substantial opposition from the hotel and nightclub sectors and the minority Government was unsuccessful in obtaining bipartisan support and the backing of the three independent members of Parliament. As a consequence, the general industry consensus was that the legislative changes would not be passed by Parliament.

However, in light of a public outcry over the recent death of Cole Miller in Brisbane as a result of a 'coward punch', political sentiment swayed and in the early hours of 18 February 2016 the Government struck a last-minute deal with Katter's Australian Party to support the legislation, which was then passed.

This means that from 1 July 2016, licensed venues not within a 3am Safe Night Precinct will call last drinks at 2am and venues that are within a 3am Safe Night Precinct will call last drinks at 3am. The only substantive change to the original Bill is that the 1am lockout imposed on all venues within a 3am Safe Night Precinct will now come into effect from 1 February 2017, providing these venues with time to transition to an appropriate operating model.



Changes to liquor laws aim to reduce late-night violence in Queensland. Tom Young looks at the details.

The legislation also removes the link between licensed gaming hours and alcohol consumption hours, but makes no change to the current restriction on gaming before 10am. As prescribed in the legislation, these laws will be independently reviewed in July 2018, two years after commencement.

The passing of the changes to licensing laws has come as a shock to licensees, particularly within the hotel industry, which is now grappling with the commercial impact the new legislation will have on licensed venues in Queensland.

Amendments to the *Liquor Act 1992 (Qld)*

Amongst other statutory amendments, the legislation amends the Liquor Act by:

- preventing the sale and supply of alcohol after 2am, except in the case of premises within a 3am Safe Night Precinct, which may trade until 3am (upon approved application for extended trading hours), and airports and casinos with commercial special facility licences, which may still apply for extended trading to 5am. A 30-minute grace period will continue to apply, which allows patrons to finish their drinks after last drinks are called, and licensees retain their current ability to apply for up to 12 one-off permits per year to sell or supply liquor beyond their approved liquor trading hours up to 5am.¹
- providing for the approval of existing Safe Night Precincts as 3am Safe Night Precincts in consultation with the local boards. Only 11 out of the 15 existing Safe Night Precincts have a local board, which is a prerequisite under the legislation to applying to become a 3am Safe Night Precinct. If a 3am Safe Night Precinct is declared, licensed venues currently approved for liquor trading until 3am or later will automatically be approved to sell or supply liquor until 3am from 1 July 2016.

- Venues within a 3am Safe Night Precinct that do not have approval for extended liquor trading hours but wish to trade beyond standard hours (that is, after midnight) may apply for extended hours permits for liquor trading up to 3am. The Minister may revoke a 3am Safe Night Precinct approval if the local board does not provide adequate safeguards for 3am trading, if the local board no longer wants the precinct to trade until 3am or if the Minister determines that continued 3am trading would have an undue adverse effect on health, safety or amenities.
- If the designation as a 3am Safe Night Precinct is revoked, the entire precinct is required to end trading at 2am.²
- bringing forward the existing 3am lockout time under sections 142AA and 142AB of the Liquor Act to 1am. The 1am lockout provisions apply to all liquor suppliers in a 3am Safe Night Precinct who trade after 1am, including those that stop trading at 2am. The lockout does not apply to premises located outside a 3am Safe Night Precinct.³
- prohibiting the sale or consumption of high-alcohol content and rapid-consumption drinks (for example, shots) after midnight, except at venues that specialise in premium spirits. The specific types and amounts of alcohol to be prescribed will be determined following a stakeholder consultation.⁴
- removing the ability for all commercial hotel, community club and commercial special facility licensees to apply for extended trading hours (outside of the standard 10am-10pm) for the sale of takeaway liquor so that such applications can only be made for airports and casinos with commercial special facility licences.

- The transitional provisions within the legislation prohibited, from 10 November 2015, any new applications for extended trading hours for the sale of takeaway liquor from being accepted or approved, and provided for any such applications that were undecided as at 10 November 2015 to lapse. However, these changes do not affect existing extended trading approvals for takeaway liquor. Venues that currently sell or supply takeaway liquor to midnight are able to continue to do so.⁵
- requiring licensees whose carparks are designated as part of their licensed premises to obtain approval from the Commissioner of Liquor and Gaming (the commissioner) before holding an event at which alcohol is to be consumed or supplied in the carpark. This overrides existing approvals or conditions on licences. Such carpark approvals are limited and will only apply on the day and during the specified hours stated in the commissioner's approval.⁶

Amendments to the *Gaming Machine Act 1991* (Qld)

The legislation also amends the *Gaming Machine Act 1991* (Qld) (the Gaming Act) so that gaming hours and liquor consumption hours are no longer linked. Key changes include:⁷

- Existing gaming hours are 'grandfathered' under the legislation so that venues which currently offer gaming and adult entertainment are able to continue to provide those activities for the duration of the approved gaming and adult entertainment hours in effect immediately prior to 1 July 2016, despite the winding back of liquor trading hours on 1 July 2016.
- After 1 July 2016, gaming hours may be approved for up to two hours *after* the service of liquor has ceased, allowing gaming services to continue to trade up to 5am in a 3am Safe Night Precinct and 4am outside of a 3am Safe Night Precinct. Despite questions raised in Parliament at the second reading speech, the legislation does not amend the prohibition on gaming before 10am.⁸ The Government has made it clear that it has no intention to change this regulation, nor will licences be provided that allow for pre-10am trading.

Practical considerations

Some of the practical consequences of the amendments to the Liquor Act and Gaming Act include:

- Local boards of Safe Night Precincts have to apply to become 3am Safe Night Precincts to allow their constituent licensed venues to trade until 3am (upon individual approval of extended trading hours). Such applications have to be approved by the Minister before the Minister makes a recommendation to the Governor in Council to prescribe the Safe Night Precinct as an approved 3am Safe Night Precinct. The boards of Safe Night Precincts have until 1 February 2017 to be officially prescribed as 3am Safe Night Precincts, otherwise licensees within the Safe Night Precincts will automatically have their trading hours reduced to 2am.⁹
- If a Safe Night Precinct does not currently have a local board, then one must be established in order to apply to the Minister to become a 3am Safe Night Precinct.
- The primary beneficiaries of the legislation are airports and casinos that hold commercial special facilities licences whose existing late-night trading hours, or right to apply for extended trading hours until 5am, remain intact and are not affected by the 1am lockout provisions.
- As existing gaming hours are unaffected by the legislation, other beneficiaries include venues that are already licensed to provide gaming activities until 5.30am, which will have at least a 30-minute, and up to a 1½-hour, trading advantage over other licensees who do not have extended gaming hours approvals before 1 July 2016.
- Until 1 July 2016, the Liquor Act and Gaming Act still allow licensees to apply for extended liquor and gaming hours until 5am and 5.30am, respectively. Therefore, in order to lock in late-night gaming until 5.30am and despite the fact that liquor trading hours will automatically reduce to 2am or 3am (depending on whether the venue is within a 3am Safe Night Precinct), from 1 July 2016 licensees who do not currently have approved extended trading hours may apply for extended liquor and gaming hours until 5am and 5.30am, respectively. However, the likelihood of applications being prepared, considered and approved by the commissioner between now and 1 July 2016 is low, and liquor applications not approved before 1 July 2016 will automatically be treated as applications to trade until 2am or 3am, as the case may be. This would mean extended gaming hours could only be approved until 4am or 5am. It is therefore likely that licensees who have not already lodged applications for extended trading hours will miss out on this advantage.



- Due to the legislation decoupling liquor and gaming trading hours, there will be the ability to offer gaming (upon approved application) well beyond the impending reduced liquor trading hours, which may be of some consolation to licensees who anticipate revenue losses due to reduced liquor sales.

Will the legislation achieve its purpose?

The long-term affect that the legislation will have on Queensland venues and whether a material decrease in alcohol-fuelled violence will be achieved remains to be seen. Will our state's traditional attraction of the tourist dollar dwindle further? What will be the flow-on affect for major upcoming Queensland events, such as the 2018 Gold Coast Commonwealth Games? Will the legislation survive repeal in the event of a change in government? These are questions that will likely occupy the minds of many within the industry and State Government until the 2018 review.

Tom Young is a partner at Norton Rose Fulbright Australia and leads the firm's national Tourism Focus Group.

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Notes

- ¹ Explanatory Notes, Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld), 2, 24; Tackling Alcohol-Fuelled Violence Legislation Amendment Bill 2015 (Qld) cl.62.
- ² Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld) 1RS, 2891; Explanatory Notes, Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld), 3, 16, 17; Tackling Alcohol-Fuelled Violence Legislation Amendment Bill 2015 (Qld) cl.29, 54.
- ³ Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld) 1RS, 2891; Explanatory Notes, Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld), 2; Tackling Alcohol-Fuelled Violence Legislation Amendment Bill 2015 (Qld) cl.31, 38.
- ⁴ Explanatory Notes, Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld), 4; Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld) 1RS, 2892; Tackling Alcohol-Fuelled Violence Legislation Amendment Bill 2015 (Qld) cl.43, 49.
- ⁵ Explanatory Notes, Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld), 3 – 4; Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld) 1RS, 2892; Tackling Alcohol-Fuelled Violence Legislation Amendment Bill 2015 (Qld) cl.62.
- ⁶ Explanatory Notes, Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld), 13; Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld) 1RS, 2893; Tackling Alcohol-Fuelled Violence Legislation Amendment Bill 2015 (Qld) cl.42, 62, 66.

- ⁷ Explanatory Notes, Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld), 4; Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld) 1RS, 2892.
- ⁸ *Gaming Machine Act 1991* (Qld) s235; *Gaming Machine Regulation 2002* (Qld) reg15.
- ⁹ Explanatory Notes, Tackling Alcohol-fuelled Violence Legislation Amendment Bill 2015 (Qld), 3.



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Indemnify, hold harmless or save harmless?

Is there a difference?

These common terms are familiar to anyone with contract experience, but there is still debate on the shades of legal meaning that each signifies.

Sean Gomes looks to the case law for answers.



Contract lawyers will be familiar with the terms ‘hold harmless’ and ‘save harmless’ in the context of indemnities.

However there is still uncertainty as to the meaning, effect and scope of such clauses in contracts. One example clause is:

“The Contractor shall indemnify, hold and save harmless and defend, at its own expense, the Principal, its officials, agents, servants and employees, from and against all suits, claims, demands and liability to any nature, including their costs and expenses, arising out of the acts or omissions of the Contractor or its Employees in the performance of this Agreement...”

Indemnity and save harmless

Definition of indemnify

It is appropriate to first consider the defined meaning of ‘indemnify’. Etymologically, ‘indemnity’ is derived from the Latin *indemnitas*, which means ‘harmless’. Combined with the term *facere*, which means ‘to make’, the term ‘indemnity’ collectively means ‘to make harmless’. In a comprehensive survey of dictionaries defining the term, an overwhelming majority indicates that to ‘indemnify’ means ‘to save harmless’.¹

Case law on the difference between indemnity and save harmless

In *Brental v Holmes*,² it was held that “the terms (indemnity and save harmless) are synonymous, and mean the same thing”. In *Total Oil Products (Aust) Pty Ltd v Robinson*,³ it was held that a contract of indemnity is one to “keep the other harmless

against loss”. Finally in the Australian High Court decision of *Sunbird*,⁴ Mason CJ held that “an indemnity is a promise by the promisor that he will keep the promisee harmless against loss as a result of entering into a transaction with a third party”.

Therefore on balance and looking at the terms alone, the authorities lean in favour of the interpretation that ‘to indemnify’ is to ‘save harmless’ and vice versa.

However it is well established that courts must take into account the construction of the whole clause and the contract in every case, and not be bound by the mere use of the terms ‘indemnify’ and ‘save harmless’.⁵ The proper approach is therefore to consider the whole clause and contract in every circumstance, whether or not the phrase ‘save harmless’ is used.

One objection to the view that ‘indemnify’ is synonymous with ‘save harmless’ is the principle of contractual interpretation against surplusage. The principle states that no part of a contract should be rendered meaningless or viewed as mere surplusage.⁶

Following this rule, the term ‘save harmless’ (being a different term) must have a different meaning. This was the approach in the Ontario Superior Court of Justice decision in *Stewart Title Guarantee Co v Zeppieri*. The court held that the contractual obligation to ‘save harmless’ was broader than that of mere indemnification and meant that the beneficiary of the save harmless clause “should never have to put his hand in his pocket in respect of a claim” under the agreement.⁷ This made the insurer in that case liable for the ongoing costs of defending the claim. It should be noted that the court also had recourse to not only the words

‘save harmless’ but also to the ‘business sense’ of the agreement and the reasonable expectations of the parties.

The words ‘indemnify’ and ‘save harmless’ could be viewed as a doublet which are used to reinforce and emphasise their effect.⁸ The words are therefore not ‘mere surplusage’.

Even if the above view is incorrect, it is well established law that the presumption against surplusage does not assist in interpretation of commercial contracts.⁹ The courts (English Court of Appeal) note the commercial reality of drafting reflects the constant adding to and variation from time to time without much attention being paid to overlapping or repetition. The court looks at the whole of the commercial agreement and what legal responsibilities arise from it.

Effect of a save harmless clause

In the event that a clause is interpreted to save harmless a party from potential liability, such an indemnity is called a preventative indemnity. A preventative indemnity may be enlivened before actual loss is suffered.¹⁰ This species of indemnity is immediately breached when the indemnified party suffers any loss which arises out of the failure to keep the indemnified party ‘harmless from any loss’.¹¹ The effect is to give rise to an obligation to reimburse the actual loss.¹²

Indemnity and hold harmless

Additionally, there is uncertainty as to the scope of a ‘hold harmless’ clause.

Hold harmless = indemnity?

One school of thought considers the terms ‘indemnity’ and ‘save harmless’ to be synonymous with ‘hold harmless’.¹³ In *Majkowski* (Delaware Court of Chancery),



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Vice Chancellor Strine held that “lawyers have become so accustomed to using the phrase ‘indemnify and hold harmless’ that it is often almost second nature for the drafter of a contract to include both phrases in referring to a single indemnification right. ... The phrase ‘indemnify and hold harmless’ naturally rolls off the tongue (and out of the word processors) of American commercial lawyers.”¹⁴

His Honour held that “modern authorities confirm that ‘hold harmless’ has little, if any, different meaning than the word ‘indemnify’.”¹⁵ However in footnote 55 Vice Chancellor Strine noted that the terms, while similar, could be used in subtly different contexts. He further opined that “in the abstract, the word ‘indemnify’ grants rights while the phrase ‘hold harmless’ generally limits liability”.¹⁶

Majkowski was considered by *Farstad Supply AS v Enviroco Ltd* [2008] CSOH 63 (Opinion of Hodge L at first instance) and subsequently on appeal to the Supreme Court (*Farstad Supply AS v Enviroco* [2010] UKSC 18).

In *Farstad*, the pursuers were owners of an oil-rig supply ship which was damaged by fire alleged as a result of the pursuers’ employee. The pursuers granted a third party an indemnity on terms requiring the pursuers to “defend, indemnify and hold harmless” the third party.

At first instance, Hodge L held that the words ‘defend, indemnify and hold harmless’ went beyond a mere indemnity. The owner effectively renounced any right to claim damages from the third party in the circumstances of the case.¹⁷

His Honour’s decision was initially reversed by the Inner House of the Court of Session but later endorsed on appeal to the Supreme Court. The indemnity was held by the Supreme Court to operate as an exclusion of liability clause on the circumstances of the case which created a contractual defence against any claim brought against the third party by the grantor.¹⁸

The Supreme Court additionally noted that the indemnity and hold harmless clause had a mixed quality, operating as an indemnity in some situations and as an exclusion of liability in others. For example, the clause would act as an indemnity when used to determine who was to bear responsibility for an incident which exposed third parties to liability. The ‘hold harmless’ part of the same clause would act as an exclusion of liability when used to assign liability to a contracting party.¹⁹

Indemnity ≠ Hold harmless

There is also authority which states that ‘indemnity’ is different from ‘hold harmless’. In *Queen Villas Homeowners Association v TCB Property Management* 149 Cal. App. 4th 1, 56 Cal.Rptr. 3d 528 (*Queen Villas*) the court also reviewed an indemnification requiring one party to “indemnify, defend and hold... harmless”.²⁰ Sills PJ (with whom

Moore and Fybel JJ concurred) held that ‘indemnify’ and ‘hold harmless’ are not synonymous. ‘Indemnify’ was viewed as an offensive right to allow an indemnitee to seek indemnification while ‘hold harmless’ is a defensive right not to be bothered by the other party itself seeking indemnification.²¹

Effect of a hold harmless clause

A hold harmless clause requires the grantor of that benefit to hold harmless the recipient from risks of potential loss as well as actual loss.

If an insured agrees in a contract to ‘hold harmless’ another party without any right to adjust liabilities according to each party’s contribution to the loss/liability, this may have some detrimental impact on the insured’s insurance.²²

This is because agreeing to a hold harmless clause results in an assumption of contractual liability which is typically excluded by contractual liability exclusions in insurance policies.²³

Additionally, a hold harmless clause (like an indemnity clause) may also involve a waiver of the insurer’s right of subrogation. In exercising the right of subrogation, the insurer can only exercise the rights that an insured has. To illustrate, if Party A holds Party B harmless from all liability arising out of a supply of services under the agreement, Party A cannot sue Party B for any loss caused by Party B. Likewise, due to the right of subrogation, the insurer of Party A is similarly prohibited from seeking recourse against Party B.²⁴ It is this fettering of the rights of the insurer that may have some impact on insurance coverage in a claim.

Conclusion

It is likely that ‘indemnity’ and ‘save harmless’ are synonymous. It is unnecessary and artificial, in my view, to attribute some different meaning to ‘save harmless’ to satisfy the principle against mere surplusage. Indeed, as I have argued above, using ‘save harmless’ and ‘indemnity’ in the same clause may have the effect of emphasising the intentions between the parties, which is an exception to the general principle.

There is some doubt as to the scope of the inclusion of ‘hold harmless’ in an indemnity clause. This is arguably magnified in the example indemnity clause set out at the beginning of this article, in which there is a requirement to “indemnify, hold and save harmless and defend”. Use of the phrase, ‘indemnify, hold and save harmless and defend’, without more, suggests an intention to attribute the broadest possible indemnity to a party, shielding that party against as much liability as possible, including liability at all stages of the dispute, whether defensive or offensive or not.

For our purposes, a ‘hold harmless’ may affect the insurer’s ability to adjust liabilities according to each party’s contribution and the insurer’s right of subrogation.

The correct approach to analysis of indemnity clauses appears to be that outlined in the Australian High Court decision of *Paribas*.²⁵

“The construction of the letters of indemnity is to be determined by what a reasonable person in the position of [the indemnified party] would have understood them to mean.

“That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to [the parties] and the purpose and object of the transaction.”

The test is objective and is to be discerned from analysis of the intention of the parties, (and their resulting rights and liabilities), and will turn on what their words would be reasonably understood to convey.²⁶

This means that a court may construe an indemnity to include holding a party harmless whether or not the clause mentions the phrase ‘hold harmless’, if the whole context of the agreement favours such an interpretation.

As an abundance of caution, due to the uncertainty of the phrase ‘hold harmless’, commentators advise avoiding use of the term altogether.²⁷

Sean Gomes is a university lawyer at the University of Queensland.

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Notes

¹ Bryan A Garner, ‘indemnify. And hold harmless; save harmless’ (2011) 15 *Green Bag* 2d 17.

² *Brental v Holmes* 1 Root (Conn.) 291. 1 Am. Dec. 44 (1791).

³ *Total Oil Products (Aust) Pty Ltd v Robinson* [1970] 1 NSW 701, 703.

⁴ *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 254.

⁵ *Erect Safe Scaffolding (Aus) Pty Ltd v Sutton* (2008) 72 NSWLR 1 at 4 (Court of Appeal) per Giles JA.

⁶ *New Valley Corp v US* 119 F.3d 1576 (Fed. Cir. 1997); *McDevitt Mech. Contractors, Inc. v US* 21 Cl. Ct. 616 (1990); *Monster Gov’t Solutions Inc v US Department of Homeland Security* DOTCAB No. 4532, 06-2 BCA 33,312.

⁷ *Stewart Title Guarantee Co. v Zeppieri* (2009) 70 CCLI (4th) 247 (SCJ).

⁸ *Doe v Boland* 698 F.3d 877 (6th Cir. 2012); *In re AP Liquidating Co* 421 F App’X 583 (6th Cir. 2011).

⁹ *Total Transport Corp v Arcadia Petroleum Ltd* [1998] CLC 90, 97 citing Devlin J in *Royal Greek Government v Minister of Transport* (1949) 83 Lloyd’s Law Reports 228, 235.

¹⁰ Sharon A Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* Sydney: Federation Press, 2014, 474.

¹¹ *Ibid.*, 475.

¹² Austbrokers Countrywide, ‘Hold Harmless – Hold Harmless Clauses and Waiver of Subrogation Rights’ at abcpro.com.au/LinkClick?fileticket=wNBC TX5h6Do=&tabid=89 (accessed 20 August 2015).

¹³ *Long v McAllister-Long* 221 S.W.3d 1 (Tenn. Ct. App. 2006), [27-29]; *Kitchens of Oceans v McGladrey & Pullen* 832 So.2d 270 (Fla. App. 4 Dist. 2002), 272 per Farmer J who held that while there is a difference between a contract of indemnity and hold harmless agreements, the practical effect is the same and subject to the same principles of law.

¹⁴ *Majkowski v American Imaging Management Services LLC* Del.Ch. 913 A.2d 572 (2006), 589.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 592.

¹⁷ *Farstad Supply AS v Enviroco Ltd* [2008] CSOH 63, [26].

¹⁸ *Farstad Supply AS v Enviroco* [2010] UKSC 18, [14], [25], [40] and [49].

¹⁹ *Farstad Supply AS v Enviroco* [2010] UKSC 18, [59] per Lord Mance.

²⁰ *Queen Villas Homeowners Association v TCB Property Management* 149 Cal. App. 4th 1, 56 Cal. Rptr. 3d 528, 530.

²¹ *Queen Villas Homeowners Association v TCB Property Management* 149 Cal. App. 4th 1, 56 Cal. Rptr. 3d 528, 534.

²² Austbrokers Countrywide, ‘Hold Harmless – Hold Harmless Clauses and Waiver of Subrogation Rights’ at abcpro.com.au/LinkClick?fileticket=wNBC TX5h6Do=&tabid=89 (accessed 20 August 2015)

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451.

²⁶ *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296 per Harman LJ.

²⁷ Ken Adams, ‘Revisiting ‘Indemnify’ ’ at *Adams on Contract Drafting* adamsdrafting.com/revisiting-indemnify (accessed 4 March 2015).

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- responds more effectively to clients' needs
- promotes problem-solving and innovation.³

These benefits arise because a diverse workforce will have the capacity to challenge pre-existing thinking via myriad identities and cultural perspectives. Diversity might flow from any number of qualities, including gender, race, disability, age or sexual preference. Diversity thrives in a workplace in which employees feel they are appreciated for being themselves. It is a move away from an expectation that people should 'fit in'. Inclusion means that people are valued for the talent and perspectives they bring to an organisation.

The Law Council is encouraging legal organisations to adopt the charter and gives them the opportunity to be listed on the council's website. As of last month, there were more than 50 adopters with their corporate logos displayed, including Queensland Law Society.

A range of strategies are being used by law firms to promote diversity. One starting point is to conduct a review of practices around recruitment, retention and promotion.⁴

Data collection about a firm's diversity and culture can reveal where attention is needed. Regular monitoring, together with targets, keeps attention focused on under-representation. It accords with the adage, 'what gets measured gets done'.⁵

Commitment from leadership is essential to achieve change.⁶ Leaders have the capacity to shift the push for diversity to a core business initiative. In the past, diversity initiatives have been separate from core business and not regarded as an organisational strategy. This has changed with organisations such as McKinsey and Company, Google, Facebook and locally based Aurizon championing diversity as a key strategic goal.⁷

Herbert Smith Freehills has been promoting diversity for many years. Danielle Kelly, its head of diversity and inclusion, Australia and Asia, says she has seen a shift towards diversity and inclusion being viewed as key to engagement and performance, and a core enabler of the firm achieving its strategic objectives.

The firm's diversity and inclusion strategy is driven by the Global Diversity & Inclusion Group, which is chaired by the CEO. At a regional level, the Australian executive drives the diversity agenda and each member has at least one diversity KPI against which he or she is measured.

Ms Kelly emphasised that harnessing the benefits of diversity requires developing an organisational culture which is inclusive and respectful. Psychological safety is paramount if people are able to bring their whole selves to work and to feel empowered to offer different perspectives to increasingly complex issues. She said that this was key to fostering an environment in which innovation and creativity could thrive.

Countering existing bias is key to improving diversity. The president of the American Bar Association, Pauline Brown, identifies "awareness, close relationships and

experience with different people" as the path to countering unconscious bias.⁸ Mahzarin, Banaji, Bazerman and Chugh identify three types of unconscious bias:

- Implicit Prejudice (judging according to unconscious stereotypes rather than merit).
- In-Group Favouritism (granting favours to people with the same background (e.g. nationality, alma mater)).
- Overclaiming Credit (managers failing to ensure that all members of a team feel their contribution has been acknowledged, rather than only one or a few members).⁹

Danielle Kelly says Herbert Smith Freehills is committed to creating institutional safeguards to counteract the effects of unconscious bias in decision-making. It is the first key commitment in the firm's Global Diversity and Inclusion Policy.

Partners and senior business leaders receive inclusive leadership training in which unconscious bias awareness is explored as a significant impediment to good decision-making (particularly around talent and promotion). Participants discuss techniques to counteract unconscious bias and are then actively encouraged to use these techniques at significant decision points (such as discussions regarding remuneration or talent).

Danielle says staff are encouraged to consider how they use language. Care is taken to avoid descriptions of candidates for recruitment or promotion being framed according to stereotypes. Also, the firm nominates someone to be on alert for homophily – the tendency to favour or connect with those people similar to oneself.

Co-CEO Mark Rigotti says: "Once systems are put in place to counteract the impact of bias, particularly at an organisational level, the quality of decision-making processes improve, which, in turn, can positively affect business performance."¹⁰

The profession is recognising the benefits of making diversity core business. Law Council president elect Fiona McLeod SC says that the council will develop an unconscious bias training package that will be available to the profession.¹¹



by Margaret Ridley

Queensland firms committed to workplace diversity have the opportunity to be recognised by nominating for one of the annual Queensland Law Society's Equity and Diversity Awards.

While a commitment to inclusion and respect are indicative of an ethically sound business, the promotion of diversity also has the benefit of being better for the bottom line.

This article appears courtesy of the Queensland Law Society Equalising Opportunities in the Law Committee. Margaret Ridley is a former legal academic working for QUT in Equity Services and a member of the committee.

Notes

¹ Law Council of Australia, *Diversity and Equality Charter*.

² emberin.com/programs-and-services/our-services/gender-diversity-strategy-workshops.

³ Hooper, Genoff and Pettifer, *New Women, New Men, New Economy, How Creativity, Openness, Diversity and Equity are Driving Prosperity Now*, 2015, Federation Press, Annandale, 137.

⁴ Ibid, 135.

⁵ Ruth Henderson, forbes.com/sites/ellivate/2015/06/08/what-gets-measured-gets-done-or-does-it/#8c8de8b7860.

⁶ dca.org.au/dca-research/building-inclusion---an-evidence-based-model-of-inclusive-leadership.html.

⁷ mld.mckinsey.com/videos/unconscious-bias-and-ingrained-beliefs#.VteUWtBvDsY; google.com.au/diversity/at-google.htm; newsroom.fb.com/news/2015/06/driving-diversity-at-facebook; aurizon.com.au/careers/diversity.

⁸ Pauline Brown, 'Inclusion (not equal to) exclusion: understanding implicit bias is key to ensuring an inclusive profession and society' [2016] 102.1, *ABA Journal* 8.

⁹ Mahzarin R Banaji, Max H Bazerman and Dolly Chugh cited in Australian Public Service Commission, (2012)6 *APS Human Capital Matters*, 3.

¹⁰ Mark Rigotti, 'Journey to diversity: How HSF will meet its global diversity targets', *Managing Partner*, 24 November 2015.

¹¹ Quoted by Nicola Berkovic, *The Australian*, 26 February 2016, theaustralian.com.au/business/legal-affairs/same-pay-central-to-draft-charter-on-gender-equity/news-story/bb20c37cb2d7d53688564d016551d299.

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A discourteous path to misconduct

by Stafford Shepherd



To be honest and courteous in all our dealings in the course of legal practice is a fundamental ethical duty.¹

In April 2013, the Supreme Court of Western Australia removed from the roll a practitioner who had been involved in a number of instances of discourteous and offensive behaviour towards a judicial officer, members of the police and court staff. The practitioner was also found to have knowingly (or alternatively, recklessly) misled the court.

In *Legal Profession Complaints Committee v in de Braekt*,² five incidents of conduct were identified as constituting professional misconduct by the practitioner. Four incidents were concerned with discourteous and offensive behaviour. The incidents included:

- persistent discourtesy and offensiveness to a magistrate
- discourteous and offensive emails to police officers
- discourteous and abusive actions directed towards a security supervisor at a court.

The tribunal found that, while the finding of misconduct relating to these incidents would not, if each were viewed in isolation, warrant the removal of the practitioner from the roll, when viewed collectively, they “demonstrated a character and course of conduct on the part of the practitioner which was

inconsistent with the privileges of practice as a member of the legal profession”.³ The tribunal noted:

“...the maintenance of appropriate relationships between legal practitioners and others engaged in the proper functioning of the criminal justice system, such as police officers and court officers was a matter of considerable importance... the practitioner’s conduct seriously undermined the reputation of the legal profession.”⁴

The Full Bench held as follows:⁵

“Discourtesy, in many instances, will be insufficient to warrant a finding of professional misconduct. Even less frequently will that discourtesy result in, or contribute to, a finding that the practitioner should be removed from the Roll. However, the importance of courtesy in the legal system, and in the relationship between the legal profession, the court system, and general public should not be understated. While a practitioner should advocate fearlessly on behalf of the interests of their client, that is not an excuse for discourtesy... Discourtesy can undermine the reputation and standing of the legal profession in our community, and the efficient function of the legal system itself.”

The Full Court agreed with the tribunal that the acts of discourtesy and the offensive nature of the practitioner’s conduct “demonstrated a persistent disregard for the duties of a legal practitioner,

the professional standards expected within the legal profession, and the need to maintain and respect the goodwill and trust reposed in the legal profession by the general public, and by those in regular contact with the legal profession, such as police and court staff”.⁶

The Full Court held that it was in the public interest, both in terms of the protection of the public, and the maintenance of the reputation and standards of the legal profession, for the practitioner’s name to be removed from the roll.

If we are discourteous or use offensive tactics, the gains (if any) will only be momentary. Such actions undermine our effectiveness in promoting our clients’ best interests.⁷ We can be “fair and tough-minded while being unfailingly courteous”.⁸ We are at our best when we are civil, courteous, and fair-minded.

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

Image credit: ©iStock.com/svedoliver

Notes

¹ *Australian Solicitors Conduct Rules 2012* (ASCR), Rule 4.1.2.

² [2013] WASC 124 (*in de Braekt*).

³ *Ibid* [17].

⁴ *Ibid*.

⁵ *Ibid* [28]-[29].

⁶ *in de Braekt*, [34].

⁷ ASCR, Rule 4.1.1.

⁸ Justice Matthew B Durrant, ‘Views from the Bench: Civility and Advocacy’ (2001), 14 *Utah Bar Journal* 35.

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Employing lay associates

Mandatory checks for law firms

All law practices are required to confirm the eligibility of potential legal staff before they are employed.

Section 26 of the *Legal Professional Act 2007* (the Act) requires that all employment by law practices of lay associates who are either disqualified persons or persons convicted of a serious offence must first be approved by Queensland Law Society.

Such people must not be knowingly employed by a law practice without approval. The Society's guidelines for applications for such approval were published in the April 2015 edition of *Proctor* (page 38).

A lay associate is defined as an 'associate' of the law practice who is not an Australian legal practitioner (s7(3)) and includes:

- "... a consultant to the law practice, however described—
- (a) who is not an Australian legal practitioner; and
 - (b) who provides legal or related services to the law practice, other than services prescribed under a regulation." (s26(7))

A person is an 'associate' in a number of scenarios (s7(1)), including an employee of a law practice who is not an Australian legal practitioner (s7(1)(c)).

It is vital to note that lay associate includes a trainee solicitor, paralegal or graduate assistant.

A disqualified person is defined as a person:

- (a) whose name has, whether or not at his or her own request, been removed from an Australian roll and who has not subsequently been admitted or re-admitted to the legal profession under this Act, a previous Act or a corresponding law;
- (b) whose Australian practising certificate has been suspended or cancelled under this Act or a corresponding law and who, because of the cancellation, is not an Australian legal practitioner or in relation to whom that suspension has not finished;
- (c) who has been refused a renewal of an Australian practising certificate under this Act or a corresponding law, and to whom an Australian practising certificate has not been granted at a later time;

- (d) who is the subject of an order under this Act or a corresponding law prohibiting a law practice from employing or paying the person in connection with the relevant practice;
- (e) who is the subject of an order under this Act or a corresponding law prohibiting an Australian legal practitioner from being a partner of the person in a business that includes the practitioner's practice;
- (f) who is the subject of an order under section 133 or 158, or under provisions of a corresponding law that correspond to section 133 or 158." (Dictionary; Schedule 2 to the Act).

And a serious offence means an offence:

"whether committed in or outside this jurisdiction that is—

- (a) an indictable offence against a law of the Commonwealth or any jurisdiction, whether or not the offence is or may be dealt with summarily; or
- (b) an offence against a law of another jurisdiction that would be an indictable offence against a law of this jurisdiction if committed in this jurisdiction, whether or not the offence could be dealt with summarily if committed in this jurisdiction; or
- (c) an offence against a law of a foreign country that would be an indictable offence against a law of the Commonwealth or this jurisdiction if committed in this jurisdiction, whether or not the offence could be dealt with summarily if committed in this jurisdiction." (Dictionary; Schedule 2 to the Act)

Many seemingly minor offences fall within this definition, including shoplifting, unlawful damage and some drug offences.

It is the observation of the Society that practitioners are unaware of the requirements of s26, which requires that, before any lay associate who falls within the purview of s26 is employed, the approval of the Society must be obtained. It is not the case that approval is obtained after employment has commenced. The employment must commence after the approval of the Society has been given.

If a staff member who falls within the provision has been employed without approval then

they must, in the terms of the section, be dismissed and not re-employed until approval has been obtained. To act contrary to this might be unsatisfactory professional conduct on the part of all concerned, including the employer.

Section 26 also requires that a lay associate who is caught by s26 must, before being employed, disclose to that law practice the facts of their disqualification or their conviction of a serious offence; see s26(5) which provides:

"A disqualified person, or a person convicted of a serious offence, must not seek to become a lay associate of a law practice unless the person first informs the law practice of the disqualification or conviction."

A conviction includes if a person has been convicted of an offence but no conviction has been recorded. (s11(1) of the Act)

The provisions of s5(2) of the *Criminal Law (Rehabilitation of Offenders) Act 1986* can exonerate a person from disclosing their criminal history in certain cases, but *do not apply* to people applying for employment as a lay associate. Section 4(1) of that Act provides:

"This Act shall be construed so as not to prejudice any provision of law or rule of legal practice that requires, or is to be construed to require, disclosure of the criminal history of *any person*." (*emphasis added*).

Further, s5(2)'s exclusion expressly does not apply when the disclosure requirement is made "pursuant to an authority conferred by ... an Act". (s5(3)) of that Act).

Section 26(5) of the Act (see above) requires the disclosure of the criminal history of the applicant for employment to the employer. It is then proper for the employer to ask for confirmation that the person is neither a disqualified person nor has been convicted of a serious offence.

Further, the applicant must disclose all convictions for a serious offence regardless of when they were incurred. A failure to comply with s26(5) may have subsequent ramifications not only on the employment of the lay associate but subsequent applications for admission by trainee graduates.

This article has been prepared by the Queensland Law Society professional leadership department. For more information, email c.smiley@qls.com.au.

Ceremony launches 'In Freedom's Cause'



sclqld.org.au

Two World War One light horsemen in full uniform greeted guests as they arrived at the entrance of the Queen Elizabeth II Courts of Law for the ceremonial launch of 'In Freedom's Cause' on 18 February.

It was a small but evocative reminder of the Queensland lawyers, students at law and law clerks who wore khaki livery and feathered slouch hats in the Great War.

The official launch took place in the Banco Court, which was filled to capacity with members of the legal profession and military, families of the featured lawyer-soldiers, and project supporters.

Introduced by Supreme Court Library Committee chair Justice Hugh Fraser, Justice John Logan RFD of the Federal Court – the project's lead instigator – gave a broad overview of how the exhibition and associated publication came to be, and provided a context for the many personal stories of courage, honour, loyalty and sacrifice featured in the exhibition and publication.

Next the audience was addressed by Queensland Chief Justice Catherine Holmes,

who elaborated on Justice Logan's theme of how World War One profoundly affected the state's legal profession, and cut short the careers of many promising young lawyers. The Chief Justice's address focused on the project's other core theme of family and community, including her own family's stories of involvement in World War One.

In welcoming the many family members of the lawyer-soldiers to the court and in reflecting on the human cost of that terrible, wasteful conflict, the Chief Justice brought both an intimacy and poignancy to the occasion.

Chief Judge Administrator Justice John Byrne AO RFD then recited the *Ode to the Fallen*, with responses from the audience. Barristers David Thomae and Keith Wylie read the names of the 10 Queensland lawyer-soldiers who died in action or from their wounds, before the haunting strains of *The Last Post* and *Rouse* echoed through the court, calling all present to consider the tragic consequences of the war.

Supreme Court Library Queensland is very grateful to the Victoria Barracks Museum for arranging the participation of light horsemen re-enactors Jed Millen and Geoff Dunn, and bugler Alex Long.

Visit sclqld.org.au for more information about this exciting new exhibition, or to buy a copy of the publication, *In Freedom's Cause: The Queensland Legal Profession and the Great War*.



1. Geoff Dunn, left, and Jed Millen in light horsemen uniform.
2. Justice John A Logan RFD.
3. From left, Justice John Logan RFD, Chief Justice Catherine Holmes, Justice Hugh Fraser and Tony Cunneen.
4. Members of the Queensland University Regiment, from left, Warrant Officer Class One Michael Clarke, Regimental Sergeant Major Colonel David Thomae and commanding officer Lieutenant Colonel Richard Peace.

with Supreme Court
Librarian David Bratchford



Non-Binding Ethics Rulings

As a service to members, the QLS Ethics Centre is now offering Non-Binding Ethics Rulings on disputes between practitioner members (or their practices) over ethical matters.

Visit qls.com.au/ethics for more information.

Proceedings on the Commercial List

A guide to Supreme Court and District Court practice



Supreme Court of Queensland

The Commercial List in the Supreme Court is regulated by Practice Direction 3 of 2002, as amended by Practice Direction 17 of 2015.

A matter placed on the Commercial List in the Supreme Court is subject to the supervision of the Commercial List judges¹ and is designed to effect the expeditious resolution of commercial matters.²

The Commercial List manager within the registry is responsible to the Commercial List judges for the administration and management of the Commercial List, and he liaises with the associates to the Commercial List judges.³ He is generally the first point of contact for the Commercial List.

All email and other correspondence with the Commercial List manager or an associate to a Commercial List judge should be copied to the legal representatives for the other parties unless the matter is an ex parte application.

Matters suitable for the Commercial List

A proceeding may be listed on the Commercial List if:

1. It exhibits a serious commercial element and involves a real dispute.
2. It involves issues which are, or are likely to be, of a general commercial character, or arise out of trade and commerce in general.
3. In the opinion of a Commercial List judge or the Senior Judge Administrator, it is a case which should be managed and tried on the Commercial List, for which the estimated trial time will be a relevant consideration.⁴

Without being exhaustive, proceedings which involve, or are likely to involve, any one or more of the following may be regarded as of a general commercial character, or as arising out of trade or commerce in general:

- construction of a business contract or a commercial document
- insurance and re-insurance
- provision of banking and financial services
- provision and enforcement of securities of any kind

- business and commercial agents
- exploitation of or rights to technology
- entitlement to intellectual property
- takeovers
- export or import of goods
- carriage of goods by land, sea, air or pipeline for commercial purposes
- arbitration and proceedings arising under the *Commercial Arbitration Act 2013*
- exploitation of natural resources
- conduct or operation of markets and exchanges.⁵

Applying for listing

A proceeding may be listed on the Commercial List on application to a Commercial List judge or by the Senior Judge Administrator.⁶

Prior to bringing the application, the following must have occurred:

- a. The claim or originating application has been served on the defendants or respondents.
- b. The views of the defendants or respondents as to its listing have been sought by the applicant.⁷

Kylie Downes QC explains the processes involved with the Commercial List in Queensland's Supreme Court and District Court.



The application to have the matter listed on the Commercial List (assuming that application is not contained in the originating application) and Commercial List statement should then be prepared.⁸ The statement must include the information identified in paragraph 12(b) of Practice Direction 3 of 2002 and must substantially comply with Schedule A to the practice direction.

Schedule A contains the form of Commercial List statement (or listing statement) which must be completed with information such as a statement of the nature of the case and the issues raised by it, why the proceeding should be placed on the Commercial List, and whether there are circumstances of urgency.

The Commercial List manager or associate to a Commercial List judge should be contacted to ascertain the time and date for the hearing of the listing application and the identity of the Commercial List judge who will hear it.⁹

After carrying out the steps above, the application and listing statement should be filed by email or facsimile to the Commercial List manager.¹⁰ It should not be filed in the Supreme Court Registry.

The application to list, together with the Commercial List statement, must also be served on the other parties to the proceedings, allowing at least two clear business days prior to the hearing of the listing application.¹¹

An applicant for listing should prepare a draft order setting out the directions sought on the return of the application and email the draft to the associate to the Commercial List judge who is to hear the application, and to the other party or parties, not later than 24 hours prior to the time set for the hearing. Any consent by the respondents should be endorsed on the draft. In the event of consent, a hearing may not be required.¹²

Management by Commercial List judge

The Commercial List judge who hears the listing application and places a matter on the Commercial List will designate a Commercial List judge to be responsible for the case.¹³

Generally, the designated Commercial List judge retains management of that case, including the hearing of any contested interlocutory applications and conducting

case reviews, as well as hearing and determining the trial. This is subject to any direction from time to time by the Senior Judge Administrator.¹⁴

A case review is usually a short hearing before the Commercial List judge, heard prior to 10am, for the purposes of reviewing the progress of the matter towards trial and making directions. The directions may follow the short form orders contained in Annexure B to Practice Direction 6 of 2000.¹⁵ At each review, the judge will usually allocate a date and time for the next case review.

The listing of the matter for a case review (not already set down for hearing) or an interlocutory application before the Commercial List judge (rather than on the Applications List) is usually arranged by email through the judge's associate. Again, do not file the interlocutory application at the registry because, if you do, it will be placed on the Applications List.

A Commercial List judge may give leave for an application to be brought in the Applications List.¹⁶

District Court of Queensland

The Commercial List in the District Court is regulated by Practice Direction 3 of 2010. Like the Supreme Court, the District Court has a Commercial List Manager.¹⁷

A proceeding will be placed on the Commercial List in the District Court if:

1. a Commercial List judge considers that it ought to be placed on the Commercial List. Ordinarily that will apply to defended matter of a general commercial character or arising out of trade and commerce in general, including for example disputes on:
 - a. the interpretation and enforcement of contracts and securities
 - b. partnership disputes
 - c. claims under relevant legislation, such as the *Trade Practices Act*, the *Fair Trading Act*, and the *Corporations Act*
 - d. building disputes
 - e. intellectual property disputes, and
2. the estimated trial time is 10 days or fewer (except in special cases where it may be more).¹⁸

A case on the District Court Civil List may also be assigned by the judge responsible for the Civil List in Brisbane to a Commercial List judge, and will then be regarded as included on the Commercial List.

A proceeding may be listed on the Commercial List on application, through the Commercial List manager, to a Commercial List judge or by the Civil List judge. Prior to filing a listing application, the solicitor for an applicant must contact the Commercial List manager to ascertain a date and time for the hearing and the identity of the Commercial List judge to whom the application has been allocated.

On the entering of a proceeding on the Commercial List, the Commercial List judge making the listing will designate a Commercial List judge to be responsible for the case. Thereafter, subject to any direction from time to time by the Chief Judge in consultation with the Judge Administrator, it is intended that all interlocutory applications and the trial of the proceedings be conducted, if practicable, by a Commercial List judge.

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

Photo by Cathy Taylor, cathytaylorphotographer.com

Notes

- ¹ Justice Jackson and Justice Bond.
- ² Practice Direction 3 of 2002, paragraph 1.
- ³ Practice Direction 3 of 2002, paragraphs 4 and 6. His contact details are listed in paragraph 5.
- ⁴ Practice Direction 3 of 2002, paragraph 7.
- ⁵ *Ibid.*
- ⁶ Practice Direction 3 of 2002, paragraph 8. The Senior Judge Administrator is Justice Byrne.
- ⁷ Practice Direction 3 of 2002, paragraph 9.
- ⁸ Practice Direction 3 of 2002, paragraph 12(a).
- ⁹ Practice Direction 3 of 2002, paragraph 10.
- ¹⁰ Practice Direction 3 of 2002, paragraph 11.
- ¹¹ Practice Direction 3 of 2002, paragraph 9(c).
- ¹² Practice Direction 3 of 2002, paragraph 13.
- ¹³ Practice Direction 3 of 2002, paragraph 15.
- ¹⁴ Practice Direction 3 of 2002, paragraph 16.
- ¹⁵ Practice Direction 3 of 2002, paragraph 18.
- ¹⁶ Practice Direction 3 of 2002, paragraph 17.
- ¹⁷ Practice Direction 3 of 2010, paragraph 5 contains the relevant contact details.
- ¹⁸ Practice Direction 3 of 2010, paragraph 7.

Heading for the High Court?

Take these tips on your maiden voyage



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 **Sample Reports Available**

Being involved in a proceeding heard by the High Court of Australia is a rare and momentous occasion in a lawyer's career, especially for an early career lawyer.

If you are fortunate enough to find yourself involved in a High Court proceeding, the following tips may help.

Step one: Join the club and learn the rules

Let me be clear. The High Court of Australia is a big deal. Like Harry's first train ride to Hogwarts, travelling to the High Court is the holy grail of legal pilgrimages for Australian lawyers.

Steeped in tradition, the bench comprises some of the brightest judicial minds in the country. Only the most tenacious and well-regarded counsel dare argue the cases that define our legal landscape.

But of course I do not need to tell you that none of this would be possible without the support and direction of very capable instructing solicitors. Accordingly, if at some time in the future, you are that instructing solicitor, no pressure...

But before you dive headlong into old volumes of the *Commonwealth Law Reports* to find the defining legal principle that will win your client's case – à la Dennis Denuto's inspirational "it's the vibe" submission – I recommend you first consider the following:

1. **Join the club.** Like enrolling to vote when you finished high school, in order to instruct counsel in the High Court you must first have your name entered in the Register of Practitioners.¹ Caution – do not delay in taking this step. In the weeks leading up to the hearing, the registrar will write to you asking for the names of the practitioners, both counsel and solicitors, that are entitled to, and will appear or instruct in the matter.
2. **Learn the rules.** Become acquainted with the *High Court Rules 2004* (Cth). In combination with the court's practice directions² and information sheets,³ the rules are your guiding light on matters of practice and procedure. While the process is similar, do not assume that the rules are the same as for appeals conducted in the intermediate appellate courts.

Step two: It's all in the preparation

Once special leave to appeal has been granted, the parties have filed the necessary material and the hearing date is approaching, there are some preparatory tasks you can undertake to ensure your time before the High Court goes off without a hitch. I suggest you:

1. Book one of the **practitioners' rooms** at the court. These are secure office spaces for counsel and solicitor to work at the court and for a daily hire fee will include access to the library, telephones and related facilities.
2. **Pack your materials for court.** Like any day in court, you should expect the unexpected. Your materials should include all stationery imaginable, relevant court documents from the proceedings below, the appeal book, copies of relevant authorities and submissions – and of course, a spare copy of all of the above.
3. **Research the bench.** Each justice has a profile on the High Court website.⁴ You will have significantly more credibility with counsel, your client and supervising partner, if at the lunch break you can comment on a particular justice's questions, using their name, rather than leading with "you know, the lady second from the left".
4. Call your counsel's secretary to confirm his or her **travel and accommodation** arrangements.

Once you and your counsel team are on the ground, the preparations continue:

1. Collect the keys to your practitioner room.
2. If your client is attending the hearing, give them an outline of what they can expect at the hearing and an update on counsel's preparations and strategy.
3. Attend to any last-minute research required by counsel.
4. If the matter is listed for a whole day of hearing, make lunch arrangements. For example, the canteen at the court can deliver sandwiches to the practitioners' rooms.
5. Finally, get a good night's sleep. After all, tomorrow just might be the biggest day so far in your legal career!

Louise Young provides some practical advice for early career lawyers preparing for their High Court of Australia debut.



Step three: Suit up

On the day of the hearing:

1. Suit up. This tip needs little explanation, but your first day in the High Court is probably not the day to unveil your new hot pink jacket. Conservative is key.
2. Check the court list again to make sure you are aware of any last-minute changes to the start time or courtroom.
3. If your matter is listed for hearing over more than one day, attend the registry office and complete a request for transcript form. The transcript will then be available for you to collect later that evening. This will ensure you and your counsel can reflect overnight on any key areas highlighted by the bench. If your matter is listed for one day or less, a transcript will ordinarily be available online the next business day.

4. When you get to the courtroom, be ready to check in your mobile phone, laptop, tablet and any other electronic devices with the security staff. (Yes, this does mean you will have to furiously take notes by hand.)

Step four: The aftermath

The registry will notify you several days before judgment is to be delivered. The vast majority of appeal decisions are given within three to six months of their hearing.⁵

No appearance is required to receive judgment. A copy will be emailed to you at the same time as it is uploaded to the High Court website. If necessary, the court will also make directions for the timing of submissions on costs.

After judgment is delivered you will need to take out the sealed orders. In the usual way, with your opposing solicitors' consent, provide a draft order to the registrar.

Louise Young is an early career lawyer at Ashurst and in 2015 was fortunate enough to instruct counsel in the matter of *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43.

Notes

- ¹ See hcourt.gov.au/registry/register-of-practitioners.
- ² See hcourt.gov.au/registry/filingdocuments/practice-directions.
- ³ See hcourt.gov.au/registry/information-sheets/information-sheets.
- ⁴ See hcourt.gov.au/justices/about-the-justices.
- ⁵ *High Court of Australia Annual Report 2014-2015* at p36.

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Drafting an effective arbitration agreement

Party autonomy is a foundation of arbitration.

This can be seen in the importance that attaches to the arbitration agreement, through which the parties are free to shape the arbitral process to their specific needs. First and foremost, the arbitration agreement is an agreement, so the usual practices with respect to drafting agreements apply. The arbitration agreement should be simple and direct.

There are other aspects of the arbitration agreement to consider in drafting. This article sets out a brief description of some of the necessary elements of the arbitration agreement in a commercial context. It assumes that the decision to include an arbitration agreement has been made, and outlines how that decision may most effectively be implemented.

The applicable legislation

Commercial arbitration is regulated in Australia by the uniform commercial arbitration Acts (in Queensland it is the *Commercial Arbitration Act 2013* (Qld) (the Act)) and the *International Arbitration Act 1974* (Cth). In each case, the legislation is almost entirely an adoption of the UNCITRAL Model Law on International Commercial Arbitration, with some minor amendments. Section 7 of the Act (cf Article 7 of the Model Law) sets out the definition and form of an arbitration agreement and provides, inter alia:

- “(1) An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
- (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (3) The arbitration agreement must be in writing.
- (4) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract was concluded orally, by conduct or by other means. ...”

Importantly, s8 (cf Article 8 of the Model Law) provides, inter alia:

- “(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. ...”

And s9 (cf Article 9 of the Model Law) clarifies the position with respect to interlocutory matters:

“It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant the measure.”

Since the enactment of the uniform commercial arbitration Acts, the distinction between international and domestic arbitration has become less pronounced. The Model Law effectively governs both international and domestic arbitration in Australia. The Model Law is supplemented by the rules of the administering institution or whatever rules of procedure the parties have chosen. The arbitration clause is separable from any contract in which it is contained, and can be considered operative even when the contract has been terminated.

Key features of an effective agreement

There are a number of essential requirements to an arbitration agreement, regardless of whether the relationship is domestic or international, although domestic arbitration has fewer requirements. The elements of an arbitration agreement can be seen from the Act and the Model Law:

1. The agreement must be in writing.
2. It must be an agreement to submit to arbitration all or certain disputes.
3. Those disputes must have arisen or may arise between the parties in respect of a defined legal relationship, but not necessarily a contractual relationship.

The element of writing is easily satisfied and, pursuant to s7(5) of the Act, includes electronic communication if the information contained in it is accessible so as to be useable for subsequent reference.

The second element determines the scope of the arbitration agreement. Usually, the scope should be broad enough to encompass any dispute that arises. There may be situations, however, in which the parties prefer to have only certain disputes arbitrated. In a particularly technical matter, the parties may wish to have questions that relate to the subject of the matter referred to arbitration so those disputes can be resolved by arbitrators with particular knowledge or expertise in the area. Great care will need to be exercised if that is the case – a narrow arbitration agreement creates an opportunity for further dispute if the matter is submitted for arbitration.

Once the scope is decided, there are five key aspects to arbitration that should be encompassed in every arbitration agreement – the administering institution (or whether the arbitration is ad hoc), the procedural rules of the arbitration, the number and appointment of arbitrators, the seat of arbitration, and the choice of law of the agreement.

Institutional or ad hoc arbitration?

The first decision to be made is whether the arbitration will be administered ad hoc or by an institution, such as the Australian Centre for International Commercial Arbitration (ACICA), Hong Kong International Arbitration Centre (HKIAC) or Singapore International Arbitration Centre (SIAC). There are benefits and costs to both institutional and ad hoc arbitration, which are outlined in other places.

Many institutions offer emergency arbitration processes. Those processes are designed to provide interim relief. Some institutions, such as the International Court of Arbitration (ICC), require parties to opt out of the emergency arbitrator provisions in their rules if the parties do not wish to use them, so the parties should be careful to make sure they do not find themselves bound by aspects of the arbitration of which they were unaware.

For many international transactions, once the administering institution has been chosen, some consideration should be given to that institution's model arbitration clause. The model clauses are excellent examples of simple, direct drafting and provide a strong foundation on which to place other clauses that may be necessary or relevant.

ACICA's model arbitration clause is an excellent example of simple and direct drafting. It appears below.

Hamish Cliff offers a guide to the necessary elements of an arbitration agreement in a commercial context.



The procedural rules of the arbitration

If the parties have chosen an arbitral institution to conduct the arbitration, it is prudent to also select that institution's procedural rules. It is possible to select the rules of a different institution, or the UNCITRAL Arbitration Rules. The procedural rules will govern the composition of the tribunal, the conduct of the proceeding and the award.

Number and appointment of arbitrators

The number and manner of appointing arbitrators must be considered. Most institutional rules have provisions regarding the number and appointment of arbitrators and sections/articles 10-15 of the Act and Model Law provide for a default number of arbitrators, and appointment process. That does not mean an arbitration agreement should not encompass the number and appointment of arbitrators. Simple disputes may only require a single arbitrator with no technical background to the dispute. More complex matters may require three arbitrators, some or all with technical expertise and particular qualifications. Those requirements may only be satisfied if the parties account for them in the arbitration agreement.

In the international context, parties may also wish to nominate an arbitrator who has knowledge of the cultural and legal norms specific to that party. In that case, the parties may wish to appoint three arbitrators and stipulate in the arbitration agreement that each party may select one arbitrator. If that is the case, the two appointed arbitrators will usually select a third, who will act as the chair, or presiding arbitrator.

The seat of the arbitration

The seat of the arbitration will generally determine the *lex arbitri*, which is the law of the arbitration. In domestic arbitration this is far less relevant than in international arbitration because we now have the benefit of the Model Law as a uniform *lex arbitri*. If the parties to the arbitration agreement are based in different states, it may be useful to consider which state is more arbitration-friendly, although there is little practical difference and it may be better to base any decision on the location of your client.

In the international context, the seat is a more significant decision. An arbitration-friendly jurisdiction, in which the courts are disinclined to interfere with arbitration will be preferable. However, it is important to remember the courts in the jurisdiction of the arbitration

have a supervisory role and the potential for court assistance – either in interlocutory stages if there is no provision for emergency arbitration or for the purposes of enforcement, for example – also needs to be considered.

The governing law of the agreement

It is useful to clearly state the parties' choice of the substantive law governing the contract in the arbitration agreement. Doing so avoids unnecessary disputes regarding the substantive law. In any event, even if a choice of law is not included in an arbitration agreement, such a clause should be included in every contract. This helps to avoid disputes as to the substantive law of the contract if the matter arrives at arbitration.

Additional features of arbitration agreements

Further to the aspects described above, there are a handful of additional features that are useful to consider in the context of international commercial arbitration. These aspects are relevant when the parties are in different places, speak different languages and have different perceptions of the rules of law of other nations. Accordingly, it is useful to also include the language of the arbitration and the place of arbitration.

Depending on the transaction or relationship, it may also be important, in drafting both domestic and international arbitration agreements, to consider clauses that deal with document production, evidence, experts, confidentiality, time limits and the judicial review functions of the court in the seat.

ACICA's model clause

"Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia [or choose another city]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three, or delete this sentence and rely on Article 10 of the ACICA Arbitration Rules]."

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee. Hamish Cliff is a solicitor at Bartley Cohen and an associate member of the Chartered Institute of Arbitrators.

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Avoiding a legal hangover

Employer responsibility for intoxicated employees at work events

Whether it's to network, celebrate an occasion or boost office morale, at some point there will be a workplace event at which employers will either directly or indirectly provide alcohol to their employees.

However, alcohol and employment do not always make for an agreeable cocktail. A legal minefield can await when an employee, as a result of consuming too much alcohol, behaves inappropriately either during or in connection to the event. This can leave an employer open to claims such as bullying, discrimination, sexual harassment, compensation, unfair dismissal and health and safety breaches.

This raises the question, how do you ensure everyone has a good time without the legal hangover?

Responsible service by employer or responsible choices by employee?

In the recent decision of *McDaid v Future Engineering and Construction Pty Ltd* [2016] FWC 343 (*McDaid v Future Engineering and Construction*), an employee of Future Engineering and Construction (Future), Mr McDaid, attended a work event at which alcohol was provided by Future. There were no controls over the amount of alcohol available and it was left up to employees to regulate how much they consumed.

Mr McDaid consumed a large amount of alcohol, became inebriated and began acting aggressively. The general manager of Future intervened twice, advising Mr McDaid each time to leave the function, however he refused to do so. Mr McDaid then harangued another employee about work matters and acted physically aggressively before ultimately pushing the employee into a pool.

Some time after this incident, the general manager again approached Mr McDaid and told him to leave. Both parties swore at each other and were aggressive. Mr McDaid then

initiated a physical fight with the general manager, with both parties pushing and throwing punches at each other.

Mr McDaid attended a meeting shortly after the event and took a leave of absence supported by medical certificates. At a later meeting, Mr McDaid was informed that his employment was terminated as he had provided no satisfactory responses to Future's enquiries about the night of the event. Mr McDaid brought an action for unfair dismissal.

Future's decision to dismiss Mr McDaid was upheld by the FWC, which confirmed the process was fair and that his dismissal was supported by a valid reason.

This case shows that it may be acceptable for an employer to place at least some degree of personal responsibility on the shoulders of the employee to manage their behaviour when consuming alcohol, even if the employer has provided unlimited access to alcohol.

When considering if there was a valid reason for Mr McDaid's dismissal, Commissioner Williams said: "How much alcohol someone drinks is a choice they make and with that choice comes consequences."¹ Luckily for Future, the court viewed the actions of its general manager as self-defence.

The FWC's treatment of Mr McDaid can be seen to contrast with the sentiments of FWC vice president Hatcher in *Keenan v Leighton BAJV* [2015] FWC 3156 (*Keenan*) in mid-2015. In this case, an unfair dismissal remedy was granted to an employee who abused fellow employees and was sexually inappropriate toward various female colleagues, after consuming alcohol paid for by Leighton but served at a bar and later available for self-service.

Vice president Hatcher outlined that it "is contradictory and self-defeating for an employer to require compliance with its usual standards of behaviour at a function but at the same time to allow the unlimited service of free alcohol at the function",² and that it "becomes entirely predictable that some individuals will consume an excessive amount and behave inappropriately".³

While Leighton's failure to have any manner of control over the service of the alcohol at the event was noted as a contributing factor,⁴ the FWC focused on the finding that Mr Keenan's supervisor had only provided a basic reminder of Leighton's behaviour policies before the event and that there were no significant ongoing consequences resulting from Mr Keenan's behaviour.

Interestingly, however, in *McDaid v Future Engineering and Construction*, the FWC did not place the same emphasis on the policies Future had in place before the event, and it appears Future only provided a very brief reminder to workers of their expectations before the event.

The FWC's findings in each of these cases suggest there are no clear-cut rules for the division of responsibility when a worker is consuming alcohol provided by the employer. What is clear is that employers should ensure employees are reminded of their obligations in line with the applicable codes and policies, and to ensure any incident is investigated and appropriate action taken.

Vicarious liability: What if the party kicks on?

Ultimately, despite Leighton receiving criticism for the uncontrolled manner of supplying alcohol at the event, Mr Keenan's sexually inappropriate behaviour was found not to be the vicarious responsibility of Leighton because his treatment of a female employee at an upstairs bar – removed from the workplace event – was "not in any sense organised, authorised, proposed or induced" by Leighton.⁵

Despite this finding, employers should not just assume they are not responsible for interactions between employees because an event occurs at a time or place that an employer has not specifically organised or sanctioned.

In *Ewin v Vergara (No.3)* [2013] FCA 1311, Ms Ewin's employer was ordered to pay \$476,163 in compensation to her under the *Sex Discrimination Act 1984* (Cth) for incidents of sexual harassment by a colleague employed through a labour hire arrangement. This order was made despite

Laura Regan discusses the obligations of employers relating to alcohol consumption at a work-related function.



a finding that the incidents occurred at a bar after work, not during or after a sanctioned function, and then in a hallway near the workplace after a workplace function.

In concluding that these occurrences did occur at a 'workplace', Justice Bromberg outlined that a workplace is "not just the usual place of work, but also a place at which the participants work or otherwise carry out functions in connection with being a workplace participant".⁶

As such, interactions between Ms Ewin and her colleague that occurred in a taxi, at a local hotel and in the hallway leading into the office after a workplace function, were considered to have taken place within a workplace due to the combination of work-related events that led Ms Ewin and Mr Vergara to be present.

Employers should be mindful of the factually specific analysis of how the employees came to be present at the 'workplace' that will occur when the FWC is deciding if the employer is vicariously liable for their employee's actions.

The Federal Court's wide interpretation of what constitutes a workplace could have far-reaching consequences for workplace events, even when an employer is no longer providing the alcohol, such as the event that 'kicks on' beyond the sanctioned party or even just the casual after-work drink between colleagues and/or clients.

What are the lessons for the workplace social event?

While there are no hard-and-fast rules for differentiating when an employer's responsibility starts and stops if an employee has had too much to drink (whether on the work tab or otherwise), here are some suggestions on what you can do to help keep your employees safe and minimise your legal risks.

- Prevention is better than the cure – ensure your event's purpose is explained, have clear policies and codes of behaviour in place, and ensure that employers and employees are both familiar with them well before the event.

- If alcohol is to be provided, ensure that an exact end time is communicated and even consider booking planned rides home in advance to signal the end of the event.
- Ensure that the events have suitable managers acting in a supervisory capacity and be wary of the quantities of alcohol being consumed and the method of service.
- Be sure that a venue where a function is taking place models the behaviour required and that is set down in the policy.
- Regardless of the purpose or location of the event, supply food and non-alcoholic drink alternatives.
- Don't assume responsibility lies solely with the worker or employee without first investigating. As was the case in *Ewin v Vergara (No.3)* [2013], the 'workplace' may extend further than you think.
- Note the fine line between behaviour that warrants dismissal and that which warrants other sanctions, such as suspension. In *Keenan* it was considered that banning Mr Keenan from future events could have been an appropriate consequence.

And if an incident does occur, there is no guaranteed hangover cure for either an employee, who may face dismissal, or an employer, who may find themselves exposed to possible claims of bullying, adverse action, discrimination, and workers' compensation. Both parties should tread carefully before assuming responsibility lies elsewhere.

Laura Regan is a senior associate at Sparke Helmore Lawyers. The assistance of Emily Smith in preparing this article is gratefully acknowledged.

Notes

- ¹ *McDaid v Future Engineering and Construction* at [52].
- ² *Keenan v Leighton BAJV* at [133].
- ³ *Ibid.*
- ⁴ *Keenan v Leighton BAJV* at [137].
- ⁵ *Keenan v Leighton BAJV* at [101].
- ⁶ *Ewin v Vergara (No.3)* at [38].

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Court upholds assets preservation order

with Robert Glade-Wright



Financial agreements – interim injunction to preserve assets until determination of agreement's validity upheld

In *Teh & Muir* [2015] FamCAFC 224 (2 December 2015) the Full Court (Finn, Strickland & Ryan JJ) heard an appeal by 36-year-old Ms Teh. The appellant and her son arrived in Australia in January 2010 on a temporary visa and began living in the respondent's home. The respondent was 85-year-old Mr Muir. On 19 February 2014 the parties made a financial agreement under s90UC of the *Family Law Act* (FLA) which provided that upon the breakdown of the parties' relationship "[a]ll properties shall be divided equally ... [r]egardless of whose party's name [sic] on the title of the assets" ([8]). By 15 April 2014 the respondent had moved into a nursing home and on 29 May 2014 Ms Teh issued proceedings to enforce the agreement. The respondent filed his response by case guardian (his daughter). His case was that the parties "had never been in a de facto relationship and that at the time the financial agreement was signed he did not have the mental capacity to allow him to enter into ... a binding agreement" ([12]). He sought an order that the agreement be set aside and that the proceeds of sale of his home be paid to him.

Ms Teh appealed Dawe J's interim orders that half the proceeds be paid to the respondent (the balance to be held in trust) and that she be restrained from drawing from any bank account except for her daily needs, arguing that "because there was ... a binding financial agreement the ... judge had no jurisdiction to make the orders" ([26]). The Full Court dismissed the appeal with costs, Ryan J (who agreed with Finn and Strickland JJ) saying in separate reasons that by s31(1)(aa) "the primary judge was invested with jurisdiction to determine the various challenges made by the respondent to the validity of the Part VIIIAB financial agreement" ([63]). Ryan J continued (at [69]):

"However, s 34 of the Act confers general power on the Court to make orders (including interlocutory injunctions) ... as appropriate provided the Court has jurisdiction (which it has). By way of example, it has been held that s 34 is a statutory source of jurisdiction to make an *ex parte* 'Anton Piller' order in appropriate cases in aid of the Court's jurisdiction in substantive proceedings properly invoked (*In the Marriage of Talbot*

[1994] FamCA 129) ... It follows that the primary judge had power to make the various injunctions under challenge."

Property – dismissal of wife's application for leave to proceed 16 years out of time set aside

In *Slocomb & Hedgewood* [2015] FamCAFC 219 (12 November 2015) the Full Court (May, Ainslie-Wallace & Johnston JJ) heard the wife's appeal against Judge Donald's dismissal of her application for leave to bring proceedings out of time under s44(3) FLA.

The parties were married in 1989, had three (now adult) children and were divorced in 1995. In 2013 the wife filed property proceedings with an application for leave to proceed. Before the divorce the wife's solicitor wrote to the husband saying that the assets consisted of the home with a net equity of \$15,000, furniture valued at \$10,000 and a car (\$12,000) and proposed that the wife receive certain furniture and the car in return for the transfer of her interest in the home to the husband. The wife kept and sold the car but said (which the husband denied) that she did not receive all the agreed furniture. The husband continued to live in the jointly owned home (the equity in which was now \$300,000).

The Full Court (at [18]-[24]) considered the wife's evidence that since separation "the husband overall made very little contribution to the children's financial needs"; "he continues to have the benefit of living in the house but has also paid the outgoings ... "; about \$20,000 was owed for school fees; and the wife was first advised of the time limit by her current solicitor in January 2013.

The Full Court said that the primary judge "accepted that the wife had a *prima facie* case and that hardship would be caused if leave were not granted" ([33]) but refused leave due to delay on her part and prejudice to the husband. The court cited authority, saying (at [45]) that "the husband ha[d] been equally inactive in protecting his rights ... [and] took no steps to complete the agreement or institute proceedings", concluding at [48]:

"... the only prejudice to the husband was the possibility of a hearing in relation to property settlement where the parties' main asset is jointly held ... The conclusion of the judge in relation to delay

demonstrated an error of law affecting the proper exercise of discretion. The prospect of the parties' legal position remaining as it is seems unjust."

Property – husband's 'secretive' transfer of home to children of his first marriage set aside

In *Tabussi (As Executor of the Estate of the late Mr Tabussi Senior (Deceased) & Ors* [2015] FCWA 108 (8 December 2015) a terminally ill husband secretly transferred the matrimonial home ("the Suburb N property") to the children of his first marriage. After learning of the transfer his wife of 35 years issued proceedings but the husband died before he was served. The wife sought an order that the transfer be set aside under s106B FLA (transaction to defeat claim) and property orders. The husband's children opposed the application, arguing that the court would not have made a property order had the husband not died as the parties had not separated. The parties each had adult children but no children together. At the start of the relationship the husband owned the Suburb N property and the wife a farm ([24]-[25]). They formed a trucking business, kept some assets separate but also bought property together. The wife nursed and cared for the husband after he was diagnosed with cancer ([57]).

Duncanson J (at [85]) cited authority relevant to s106B, concluding ([91]) on the evidence (that the husband was "secretive", "did not tell the wife about the transfer" and "instructed the second respondent not to do so") that the section was satisfied. The court added ([93]) that it was "not necessary for the parties to have been separated for [a s79] application to be made". The transfer was set aside and a property order made.

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

The coronial process explained by Steven Jones

Title: *The Australasian Coroner's Manual*
Author: Hugh Dillon and Marie Hadley
Publisher: The Federation Press
ISBN: 978182879898
Format: Hardback/240pp
RRP: \$99

The Australasian Coroner's Manual is a well-researched and comprehensive, introductory guide to the coronial process as it applies in both Australia and New Zealand.

It is a very readable volume co-authored by Hugh Dillon, a NSW State Deputy Coroner and magistrate, and academic lawyer Marie Hadley.

The manual's focus is to provide practical advice to newly appointed coroners, as evidenced by a collection of sample documents and further reading lists at the conclusion to the book. However, this does

not prevent a lawyer, instructed to act for a party in a coronial inquest, from learning from the chapter on how inquests are conducted and another chapter providing tips on effective advocacy in the jurisdiction.

The exercises, case studies, checklists and tools peppered throughout the book afford re-enforcement of the key concepts.

Relatives of people who have died unexpectedly or from unexplained deaths want answers. The Coroner's Court, as an independent judicial office, is a hybrid of the inquisitorial and adversarial legal systems, where many of the rules of evidence do not apply. It is tasked with providing closure to these relatives, and one of the important threads running through the book is the need for advocates appearing in proceedings before the court to behave with sensitivity both towards the deceased and the bereaved.

Despite its compactness, the book covers a range of topics including the diversity in a multicultural society of funeral rites and practices which maybe encountered,

the personal challenges a coroner may experience given the emotive nature of the work, and how the analysis of accidents can identify how further deaths might be prevented through the identification of systemic failure or human error.

The manual highlights the fact that an inquest is not just limited to establishing the cause of death in an individual case, but the Coroner has a 'death prevention' role by making recommendations to improve public health and safety.

The chapter on autopsies is particularly informative and provides an invaluable guide as it covers attitudes to autopsies by faith, suggested ways to respond to objections to autopsies being conducted, and the sensitive issue of organ retention.

I would commend this book to anyone involved in the aftermath of unexpected and unexplained death be they lawyer, police officer, or medical practitioner.

Steven Jones is a Brisbane barrister and mediator.

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Domestic violence = disentitling conduct

Adult son refused claim for provision

‘Violence does, in truth, recoil upon the violent, and the schemer falls into the pit which he digs for another.’¹

The dialogue on domestic violence is often framed in the context of adult partners. However, what is not widely known is the level of domestic violence perpetrated by children upon their parents.

On 28 February 2015 the Queensland Government announced the release of the ‘*Not Now, Not Ever*’ report into domestic violence,² section 5.5 of which addressed the prevalence and character of elder abuse, particularly noting that “the perpetrators of elder abuse may be different... with an increase in reporting of children, grandchildren, other relatives, and carers as the abusers”.³

It also noted that victims of elder abuse “are overwhelmingly women, comprising 68% of reported cases, while the gender of perpetrators is evenly distributed between men and women”.^{4,5}

And in May 2015 the Wesley Mission made a submission to Victoria’s Royal Commission into Family Violence, noting that a surprising 13% of reported domestic violence cases involved adolescent perpetrators.⁶

It is in this environment the West Australian matter of *Christie v Christie* [2016] WASC 45⁷ was determined.

The plaintiff was the only survivor of the deceased’s five children. However, the deceased excluded him from her \$900,000 estate, instead leaving it to a variety of other relatives. He was 68 years old and it was accepted he was “destitute, had no assets and his future prospects were bleak. The only issue between the parties was whether or not the plaintiff had engaged in disentitling conduct such as to justify the deceased omitting him from her will.”⁸ This case therefore “raises squarely the so-called ‘disentitling conduct’ provision of s6(3) [of the *Family Provision Act 1972* (WA)]”.⁹ The equivalent Queensland provision, s41(2) of the *Succession Act 1981*, is similarly worded.

The son’s evidence was that it was his mother’s attitude towards him and her difficult character that caused their relationship to deteriorate.¹⁰ However, there were several affidavits filed alleging that the son was physically violent towards his mother. He staunchly denied the allegations, making no concessions.

In cross examination, “it was put to him he was in fact a violent person who had indeed abused the deceased. The plaintiff denied each and every allegation put to him. His evidence was to the effect that any witness who gave evidence that he had abused his mother was simply mistaken.”¹¹

There was also evidence of him engaging in other violent behaviour, that he had been convicted of one offence and was “the subject of a violence restraining order”.¹² Having regard to the nature and quality of the evidence, there was consideration of the hearsay aspect of the evidence of domestic violence.

There was a submission that the evidentiary exception under s21A of the *Family Provision Act 1972* (WA)¹³ required direct quotes of what was said by the deceased, not merely a summary. The court rejected this approach as being “far too narrow a construction on the section”.¹⁴ However, it did impact upon the weight given to the evidence, with the court noting, in a conciliatory tone, that the statements had been made many years before.¹⁵

While the plaintiff maintained his position of not having committed violence towards his mother, there was evidence, in his favour, that the plaintiff suffered bipolar disorder and that this provided an explanation as to his behaviour. The court rejected this evidence¹⁶ as the plaintiff himself did not provide evidence of the disorder, did not provide any medical evidence of the disorder, and did not provide evidence of the impact of the disorder on his behaviour. As such the court rejected the proposition that his violent behaviour “could be explained by his medical condition”.¹⁷

Ultimately the court was satisfied the plaintiff “was physically violent”¹⁸ towards his mother and, in so finding, turned to the question of whether it was a basis to deny his claim. In considering this, the court lamented the paucity of cases on disentitling conduct, though noting the few that do exist¹⁹ involve domestic violence. Ultimately the court denied his claim, and in doing so made a clear and strong statement:

“Violence against women is never acceptable. It is at odds with a basic tenant of civilised society... A person who is violent towards a testator cannot simply expect to be provided for in a will or if not provided for to come before the court and receive a proportion of the estate. The acts of violence reap their own reward. That is exactly what has happened in this case.”²⁰

Whether this decision identifies a shift in judicial thinking across the board remains to be seen. It does, however, provide guidance to solicitors and their clients as to the evidential aspects they might consider when taking instructions for a will and dealing with a claim on an estate, when domestic violence is a feature.

To that end, it is important to note that, in Queensland, the definition of domestic violence is very wide, having regard to the criteria pursuant to section 8 of the *Domestic and Family Violence Protection Act 2012*. It is not just physical abuse, as was the case in the WA matter; it includes emotional, psychological, economic abuse and behaviour that is threatening or coercive.²¹

Registry of Births Death and Marriages update – civil partnership certificates

On 3 December 2015, the Relationships (Civil Partnerships) and Other Acts Amendment Bill 2015 was passed in State Parliament. From 22 March when the Act commenced, ‘registered relationships’ became known as ‘civil partnerships’ and the *Relationships Act 2011* was renamed the *Civil Partnerships Act 2011*. The most significant change under the Act is the reintroduction of civil partnership declaration ceremonies.



with Christine Smyth

The Registry of Births Death and Marriages is working towards the development of forms and processes, and the communication of these processes.

Importantly, for those persons who had their relationship 'registered' through the *Relationships Act* – they can now apply for a new certificate. The certificate will note their union as a 'civil partnership' rather than 'registered relationship'.²²

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, *Proctor* editorial committee, STEP and an Associate member of the Tax Institute. Christine recently retired from her position as a member of the QLS Succession Law Committee, but remains as a guest.

Notes

¹ Arthur Conan Doyle, *The Adventures of Sherlock Holmes*.

² Referred to as the Bryce Report.

³ At page 138.

⁴ At page 139.

⁵ My thanks to Matt Dunn, Queensland Law Society government relations principal advisor for providing me research on domestic violence reports.

⁶ rcfv.com.au/getattachment/7D0F942F-AC81-4FC0-B47C-BF19382F9CDB/Wesley-Mission-Victoria.

⁷ My thanks to barrister Caite Brewer for bringing this case to my attention.

⁸ At [3].

⁹ At[2].

¹⁰ At[6]-[7].

¹¹ At [9].

¹² At [11].

¹³ The equivalent Queensland provision is s92 (2)(a) *Evidence Act 1977*.

¹⁴ At [20].

¹⁵ *Ibid*.

¹⁶ At [33].

¹⁷ *Ibid*.

¹⁸ At [35].

¹⁹ Citing *Murphy v Stewart* [2004] NSWSC 569; see *cf Killiner v Freeman* [2000] NSWSC 263.

²⁰ At [37].

²¹ My thanks to Robbins Watson associate family lawyer Rebecca Gee for briefing me on the definition of domestic violence.

²² My thanks to QLS policy officer Louise Pennisi for providing this information.



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Precise view of quantum pays off

Lanai Unit Holdings Pty Ltd v Malleson Stephen Jacques [2016] QSC 2

Security for costs – implications of delay in bringing application – whether security may extend to pre-proceedings costs – methodology for evidence presentation relating to quantum – discretionary considerations

In *Lanai Unit Holdings Pty Ltd v Malleson Stephen Jacques* [2016] QSC 2 Jackson J considered a range of significant issues arising on an application for security for costs.

Facts

The proceedings involved a claim for damages for negligence, or under s82 of the then *Trade Practices Act 1974* (Cth) for contravention of s52 of that Act.

The defendant applied for security for costs. The application was brought under rules 670 and 671 of the *Uniform Civil Procedure Rules 1999* (Qld)(UCPR) and s1335 of the *Corporations Act 2001* (Cth).

The defendant relied on the ground, as provided for by both r671 of the UCPR and s1335 of the *Corporations Act 2001*, that the plaintiff was a corporation and there was reason to believe the plaintiff would not be able to pay the defendant's costs if ordered to pay them.

The plaintiff did not dispute that an order for security should be made. However, there was a dispute as to the stage of proceedings to which security for costs should be ordered, and about a number of issues impacting on the amount of security that should be ordered.

Analysis

Implications of delay in bringing application

In relation to the delay by the defendant in seeking security for costs, the plaintiff relied on *Buckley v Bennell Design and Constructions Pty Ltd* (1974) 1 ACLR 301, 309 and cases which followed it. In that case Moffitt P stated:

“The primary reason why the application should be brought promptly and pressed to determination promptly is that the company, which by assumption has financial problems, is entitled to know its position in relation to security at the outset, and before it embarks on any real extent on its litigation, and certainly

before it is allowed to or commits substantial sums of money towards litigating its claim.”

Jackson J noted that this statement has been repeated or paraphrased on subsequent occasions. However, to the extent that it says that the plaintiff is “entitled” to know its position, his Honour regarded it as too strong. He emphasised that the powers under r670 and s1335 were discretionary and should not be fettered by statements that a party is “entitled” to know its position.

Jackson J also declined to accept in unqualified terms the submission for the defendant that delay is to be disregarded if there is no suggestion that the plaintiff has taken steps or incurred costs on the basis that it reasonably thought that security would not be pursued. His Honour referred in that context to the decisions in both *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* (2008) 67 ACSR 105, 122 [57] and *Christou v Stanton Partners Australasia Pty Ltd* [2011] WASCA 176, [23], as authority that a plaintiff is not usually required to prove or adduce evidence that time has been expended or costs incurred which would not have been expended or incurred had the plaintiff had earlier notice. He again emphasised that it was all a matter of discretion.

Having summarised the progress of the proceeding in relation to time periods identified by the plaintiff, Jackson J found there was some unexplained delay by the defendant in prosecuting the question of security with the plaintiff's solicitors in respect of one of those periods. As the evidence did not permit any proportionate amount, he concluded it was appropriate to take that delay into account as part of the overall assessment of the amount of security to be ordered for past costs.

Pre-proceedings costs

The security sought by the defendant extended to past costs incurred before the proceeding was started. The plaintiff argued that those costs were not recoverable on assessment and not properly the subject of security.

Jackson J noted there are a range of circumstances in which plaintiffs give notice of their intention to make a claim before starting a proceeding. Professional costs and disbursements may be incurred for steps taken on behalf of a prospective defendant to prepare for a notified claim, entailing work that is necessary to be done in defence of the claim.

Jackson J regarded those costs as costs which may be recoverable as costs of the proceeding awarded under s15 of the *Civil Proceedings Act 2011* (Qld) and UCPR r681. He found no reason in principle to exclude those costs from an order for security for costs made under UCPR r671 and s1335 of the *Corporations Act 2001* (Cth).

Support for this conclusion was found in the decision of Davies J in *Pathway Investments Pty Ltd v National Australia Bank Limited* [2012] VSC 97 in relation to the Victorian legislation as to costs. In that case her Honour said that the power to order security for costs extended to pre-proceedings costs that are necessary and proper and allowable on taxation. Jackson J agreed with this approach.

Jackson J observed in this context that delay up to the start of a proceeding will not ordinarily be held against a defendant, since the plaintiff determines when a proceeding is started, subject to any statutory restrictions that may apply.

Methodology

The evidence presented by the defendant relating to the quantum of security for costs sought included an affidavit by an experienced litigation solicitor as to the past and future work that would be done in defence of the plaintiff's claim, broken into the hours spent in the various tasks at the successive stages of interlocutory steps and preparation for trial of the proceeding. That affidavit had been provided to an expert costs assessor, who had prepared a report as to the likely recoverable costs based on the work described in the solicitor's affidavit.

Jackson J referred to authorities in which the court had accepted the same methodology for the presentation of evidence relating to quantum (*Pathway Investments Pty Ltd v National Australia Bank Limited* [2012] VSC 97; *DIF III Global Co-Investment Fund L P v BBLP LLC* [2015] VSC 484), and concluded that this methodology should be accepted.

His Honour noted that on an application for security for costs, the task was to set a sum that is “sufficient” under s1335 of the *Corporations Act 2001* (Cth) or “appropriate” under UCPR r671, and regarded it as important to distinguish between the evidence required for an application for security for costs and evidence required on an assessment of costs: see at [38]-[43]. On an application for security for costs a “broad brush” assessment was



This recent case brings clarity to a number of issues relating to security of costs. Report by **Sheryl Jackson**.

required, rather than a determination of an amount with mathematical precision.

Other discretionary considerations

In relation generally to the quantum of security to be ordered, Jackson J referred to the “discernible trend” in the cases to discount the amount sought.

His Honour acknowledged that there may be other discretionary factors which may be engaged indirectly in determining the quantum of security. This would encompass, for example, questions as to whether a particular amount would prevent the plaintiff from being able to proceed because it could not provide that amount, or whether the defendant’s impecuniosity was caused by the defendant. His Honour continued (at [45]):

“But when these or other potential discounting questions are not raised, in my view, there is no reason to start from an assumption or predilection that the amount of security should not be an amount ‘sufficient’ or ‘appropriate’ to pay the assessed costs. Where there is a range of amounts, there is no reason to opt for the bottom of the range, per se. It is a matter for the exercise of discretionary judgment.”

Jackson J also noted that the trend to discount quantum may reflect the idea that the proceeding may end short of the costs of all the steps for which security is sought.

However, in his Honour’s view, these considerations could be met by staged orders for security, even though that may involve the parties in further applications and costs of those applications at a later stage.

Orders

Jackson J rejected the submission for the plaintiff, relying on a number of points raised in affidavit evidence of an expert costs assessor engaged by the plaintiff, that the amounts applied for by the defendant should be discounted by 40%. However, the amount sought by the defendant was discounted in recognition of some points raised in that evidence, to allow for “further uncertainties”, and to exclude the amounts itemised in the expert’s report for care and consideration and the costs of the application for security for costs.

Security for costs was ordered to the end of the mediation stage, and in the sum of \$450,000.

Comment

The judge’s approach to the various issues arising in this case issues may fairly be regarded as favourable for an applicant seeking security for costs. The rejection of any general approach by which the amount sought by the defendant is discounted is particularly noteworthy.

In the context of the methodology to be adopted as relevant to establishing quantum, the view that it is not necessary to support an application for security for costs with the level of precision necessary on an assessment of costs is consistent with the approach commonly adopted in Queensland.

Nevertheless, it is apparent that the report provided by the expert costs assessor engaged by the defendant did provide extensive detail in relation to the amount sought for past costs and for future costs broken into predicted stages of the proceeding, up to the first day of trial. It is suggested that the provision of this level of precision will assist defendants in relation to the quantum of security to be awarded. It may well have assisted in persuading the judge in this case to reject the submission for the plaintiff, by reference to its own expert evidence, that the amount of security sought by the defendant should be discounted by 40%.

Sheryl Jackson is an adjunct associate professor at the QUT School of Law. The Queensland Law Society Litigation Rules Committee welcomes contributions from members. Email details or a copy of decisions of general importance to s.jackson@qut.edu.au. The committee is interested in decisions from all jurisdictions, especially the District Court and Supreme Court.

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High Court and Federal Court casenotes

High Court

Insurance – joinder of third party insurer – ‘matter’ and federal jurisdiction

In *CGU Insurance Limited v Blakely* [2016] HCA 2 (11 February 2016) the High Court upheld a decision to join a third-party insurer to determine the insurer’s liability to indemnify a defendant. Liquidators of Akron Roads Pty Ltd commenced proceedings under the *Corporations Act 2001* (Cth) against directors of Akron seeking recovery of money paid in breach of director’s duties. The directors claimed on a professional indemnity insurance policy with CGU. CGU denied that the policy applied. The liquidators of Akron sought to join CGU to the proceedings against the directors, seeking a declaration that CGU was liable to indemnify the directors in respect of any judgment obtained. CGU argued that the Court had no jurisdiction to join it as there was no “matter” or controversy between the liquidators and CGU – the declaration sought was contingent and hypothetical. Further, the claim offended privity of contract principles as the liquidators were not parties to the insurance contract. (CGU also disputed it was liable under the policy.)

The court held that there was a sufficient dispute between the liquidators and CGU for there to be a “matter”, for a declaration to be sought and for CGU to be joined: (i) CGU had denied liability under the policy, which denial was not accepted by the directors or liquidators; (ii) if the court was to find for the liquidators in their claim against the directors and to find that the insurance policy applied, CGU would be liable to pay money to the directors; and (iii) the liquidators would have a priority claim on any payout under the *Corporations Act* (or the *Bankruptcy Act 1966* (Cth)). The court also held that the whole of the proceedings were in federal jurisdiction, as the claim depended on liabilities arising under federal laws. French CJ, Kiefel, Bell and Keane JJ jointly; Nettle J concurring. Appeal from Court of Appeal (Vic) dismissed.

Migration – offshore detention – executive and legislative power – act of state

In *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 (3 February 2016) the High Court held that the Commonwealth’s involvement in the detention of the plaintiff in Nauru

was valid. The plaintiff claimed that laws authorising the Commonwealth to give effect to arrangements for offshore detention on Nauru, including to detain her, were invalid because they transgressed the limits on executive detention set down in *Lim v Minister for Immigration* (1992) 176 CLR 1 and were not supported by a head of power. Further, any Nauruan law relied on by the Commonwealth was invalid under the Constitution of Nauru. The Commonwealth argued that the *Lim* limit did not apply as the detention was in fact being imposed by Nauru under its laws (and the court could not enquire into the validity of those laws); the executive’s action was authorised by s198AHA of the *Migration Act 1958* (Cth); and the *Lim* limits, if they did apply, were not transgressed in this case.

French CJ, Kiefel and Nettle JJ held (Keane J concurring) that the detention was imposed by Nauru, under its laws, and not by the Commonwealth. *Lim* does not apply to the Commonwealth’s participation in such action offshore. Further, s198AHA was valid and authorised the Commonwealth’s action. Bell and Gageler JJ, writing separately, held that the Commonwealth was detaining the plaintiff, that the Commonwealth’s action was authorised by s198AHA (which was valid), and that the *Lim* principles applied to the situation, but were not breached in this case. Gordon J dissented, finding that the Commonwealth was detaining the plaintiff, that the *Lim* principles applied, and that the Commonwealth’s actions went beyond the *Lim* limits. The court unanimously held that it could not examine the constitutional validity of the Nauruan laws. Answers to Special Case given.

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Federal Court

Administrative law – the conundrum of whether a decision was of an administrative or of a legislative character – a decision not to vary or revoke certain rules

In *Applied Medical Australia Pty Ltd v Minister for Health* [2016] FCA 35 (5 February 2016), the court dismissed an application for judicial review by a manufacturer and supplier of medical devices for surgical procedures

(Applied Medical). The main decision that was the subject of judicial review was a decision by the Minister’s delegate to reject an application to lower minimum group benefits applying for a sub-group in the *Private Health Insurance (Prostheses) Rules 2015* (No.1) (Cth).

Applied Medical sought review under both s5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s39B of the *Judiciary Act 1903* (Cth). An initial issue considered by the court (Robertson J) was whether the impugned decision, and a failure to decide, were administrative decisions made under legislation. After considering many authorities, Robertson J concluded at [35] that “while the making of the *Private Health Insurance (Prostheses) Rules* is to be characterised as legislative, as also would be varying or revoking those Rules in whole or in part, deciding to grant or deciding not to grant an application under s72-10(2) [of the *Private Health Insurance Act 2007* (Cth) is of an administrative character . . .” Further, deciding not to act under s333-20 of the *Private Health Insurance Act 2007* to vary the list in the *Private Health Insurance (Prostheses) Rules* was held to be of an administrative character (at [42]-[48]).

Accordingly, there was jurisdiction for Applied Medical’s application for judicial review of administrative action. However, the court rejected the various grounds of review including the allegation that there had been an improper exercise of discretionary power in accordance with a rule or policy without regard to the merits of the particular case. In this context, Robertson J said at [112]: “Once the repository of a discretionary power has considered an application for the non-application of the policy or a change in policy and has given a reason, other than the bare restatement of the policy, for rejecting that application, it is difficult to conclude that the discretionary power has been exercised inflexibly in the relevant sense”.

What was relevant to the court’s general rejection of the grounds of judicial review was that the minute of the Minister’s delegate was not to be regarded as a formal statement of reasons (see at [19]-[20] citing observations of the High Court in *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50 at [25] and [72]).

with Andrew Yuile and Dan Star



Competition law – allegation of attempt to induce cartel conduct – consideration also of ss2A, 44ZZRJ and 44ZZRD of the Competition and Consumer Act

In *Australian Competition and Consumer Commission v Australian Egg Corporation Limited* [2016] FCA 69 (10 February 2016), the court (White J) dismissed the ACCC's claims that various contesting respondents attempted to induce egg producers represented at a meeting on 8 February 2012 to make an arrangement, or enter into an understanding, to limit the supply of eggs in contravention of s44ZZRJ of the *Competition and Consumer Act 2010* (Cth) (the CCA).

The respondents were an industry association – the Australian Egg Corporation Ltd (AECL), its managing director (Mr Kellaway), a public company (Farm Pride Foods Ltd), its former managing director (Mr Lendich) and another egg-producing company and its managing director (who was also the chairman of the AECL). In particular, the ACCC's case was that between 19 January and 8 February 2012, the respondents took action to address concerns with oversupply of eggs and its effect on prices by encouraging certain egg producers to make an arrangement or arrive at an understanding to limit their egg production. The "purpose condition" or "cartel condition" in issue was preventing, restricting or limiting goods within the meaning of s44ZZRD(3) of the CCA.

One of the respondents, Mr Lendich, signed a statement of agreed facts containing admissions with the ACCC that was presented to the court at the commencement of the trial. The court ruled that it would hear the submissions concerning the settlement between the ACCC and Mr Lendich after the determination of the liability aspects of the proceeding against the remaining respondents (at [14]-[27]).

The AECL and Mr Kellaway argued that the CCA did not apply to them. After considering authority and evidence relevant to s2A of the CCA, the court rejected this defence. Justice White held: (i) the AECL is not an agency or emanation of the Crown in the conventional sense (at [97]-[157]); (ii) the AECL is not an "authority of the Commonwealth" within the meaning of s2A of the CCA (at [158]-[167]); and (iii) the AECL carries on a business such that s2A abrogates the immunity even if it was

otherwise applicable (that is, had AECL been an agency or emanation of the Crown or an authority of the Commonwealth) (at [168]-[181]).

As to whether the contesting respondents attempted to induce a contravention of s44ZZRJ of the CCA, the ACCC presented a circumstantial case relying upon documents and cross examination of such witnesses called by the respondents. The ACCC did not call Mr Lendich as a witness. Proof of an attempt to induce a contravention of s44ZZRJ required the ACCC to establish both a physical and mental element (at [68]). The court held that the ACCC established conduct which, looked at generally, could be characterised as a form of affirmative action directed towards the inducement alleged (at [379]). However, the ACCC failed to prove that the contesting respondents had the intention of inducing a proscribed arrangement or understanding (at [380] and [403]). The ACCC's case was strongest against AECL and its managing director (at [404]). In relation to the AECL, White J held: "I accept the submission made by reference to *Trade Practices Commission v Service Station Association Ltd* [1993] FCA 405; (1993) 44 FCR 206, that trade associations and their officers may legitimately encourage their members to examine their profitability and to make production and pricing decisions in order to maintain profitability. Conduct of that kind, at least when directed to the decisions of industry participants in their own businesses and without any suggestion of cooperative action, does not amount to cartel conduct, or even an attempt to induce cartel conduct."

Note: The editor appeared as lead counsel for the third respondent in this proceeding.

Industrial law – penalty under the Fair Work Act to be paid to the aggrieved person prosecuting rather than the Commonwealth

In *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4 (22 January 2016) the Full Court overturned the primary judge's orders that penalties under the *Fair Work Act 2009* (Cth) (FW Act) be paid to the Commonwealth and instead ordered that the penalties be paid to the appellant.

The appellant was employed as an organiser for the respondent (the union). The primary judge found that the union contravened s351 of the FW Act in respect of three

adverse actions taken against him. Her Honour ordered that the union pay the appellant \$3000 as compensation for distress and humiliation ([2015] FCA 27) and, subsequently, ordered that he be compensated \$36,984.16 less tax for loss of income caused by the termination of his employment. In a separate judgment, the primary judge ordered that penalties of \$20,000, \$10,000 and \$15,000 be imposed on the union, such penalties to be payable to the Commonwealth ([2015] FCA 338).

Under s545 of the FW Act, the court can make an order it considers appropriate including but not limited to injunctions, compensation and reinstatement. A court may make a pecuniary penalty in addition to one or more orders in s545: s546(5). Relevantly, s546(3) of the FW Act allows the court to order that a penalty or part of a penalty be paid to the Commonwealth, a particular organisation or a particular person.

The Full Court (Tracey, Barker & Katzmann JJ) held that the power to order penalties in s546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant (at [101]). The primary judge erred in ordering the penalties to be paid to the Commonwealth and not to the appellant. In particular, the primary judge erred in finding that the appellant should not receive payment of penalties because it would deliver a "windfall" to him. The Full Court expressly agreed (at [99]-[100]) with the following passage by Gray J in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [45]: "The notion that the order to pay a penalty to the initiating party could produce a windfall is a false notion. If the true purpose of such an order is taken into account, and the order is not regarded as compensatory in any way, any notion of a windfall disappears."

Dan Star is a barrister at the Victorian Bar and invites comments or enquiries on (03) 9225 8757 or email danstar@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au. Numbers in square brackets refer to a paragraph number in the judgment.

Court of Appeal judgments

1-29 February 2016

Civil appeals

Pittaway v Noosa Cat Australia Pty Ltd & Ors [2016] QCA 4, 2 February 2016

Application for Leave s118 *District Court of Queensland Act (Civil)* – Contracts – where the applicant and the respondent entered into two linked agreements, the Shed Agreement, where the applicant would build a shed for the respondent, and the Boat Agreement, where the respondent would build a boat for the applicant – where the applicant contended that he built the shed, but that the respondent did not pay the full amount for it, nor did they build the boat as required by the agreements – where the applicant started proceedings against the respondent in respect of damages for breach of contract – where orders were made in the District Court – where the applicant did not comply with those orders – where the respondent made an application to dismiss proceedings for want of prosecution under r280 of the *Uniform Civil Procedure Rules 1999* (Qld) – where that application succeeded – where the applicant seeks leave to appeal from the order dismissing the proceedings – whether an appeal is necessary to correct a substantial injustice – whether there is a reasonable argument that there is an error to be corrected – where Noosa Cat questioned whether the applicant was a qualified builder at the time of the work – where beyond asserting that there was no builder's licence, and maintaining that stance in argument, Noosa Cat took no step to establish that there was no licence – where search results from the Queensland Building and Construction Commission (QBCC) revealed that the applicant held an Open Builder's Licence from 30 August 2003 onwards; that covered the period when the shed was built; the search results stated that the records for that licence class were "at least 10 years old and cannot be displayed" – where on an application to strike out for want of prosecution under r280 UCPR, the question of assessing the prospects of success is but one factor of many that must be weighed in the balance – where the assessment can only be provisional as such an application is not the trial and will not be attended by the level of evidence that a trial involves – where the court must be careful not to let the application become a trial, nor to treat the differences in evidentiary detail as one might on a trial – where in this case there was a detailed pleading which was verified on oath – where the primary judge's approach to the affidavit material placed undue emphasis on the absence of a blow-for-blow response, and thereby her Honour fell into error – where her Honour found that Noosa Cat had suffered prejudice relevant to the application to strike out: "I do not accept ... that Noosa Cat has suffered no prejudice." – where the only prejudice identified was the incurring of legal costs, as otherwise Noosa Cat did not

contend that it could not have a fair trial – where it is only the prejudice caused by the relevant delay that is to be taken into account – where the primary judge did not correctly address the question whether or not the delay has resulted in prejudice such that there was an inability to ensure a fair trial.

Application granted. Appeal allowed. Orders made on 19 December 2014 set aside. Respondent's application filed 17 September 2014 refused. Costs.

Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd [2016] QCA 19, 12 February 2016

General Civil Appeal – Environment and Planning – where the respondent sought to further develop a property it purchased at Eli Waters on the Fraser Coast – where the council's development decision notice approved the proposed "Material Change of Use – Relocatable Home Park incorporating 209 home sites, manager's residence and office and communal facilities (over 50's lifestyle resort)", subject to the conditions set out in its Attachment 1 – where neither the site plan nor the proposal description referred to the number of bedrooms in the proposed dwellings – where the applicant gave the respondent an infrastructure charges notice for three bedrooms – where the primary judge declared that the approved development was for two-bedroom relocatable dwellings – where the applicant sought leave to appeal on the ground that the primary judge had made an error of law – where the primary judge construed the development approval with reference to extrinsic evidence – where the respondent failed to exercise a right of appeal under s478(2) of the *Sustainable Planning Act 2000* (Qld) – where the primary judge considered the merits of a development proposal – where the primary judge granted declaratory relief – where the primary judge failed to give adequate reasons for exercising the discretion to grant declaratory relief – whether the primary judge erred in law in using declaratory powers under s456 of the *Sustainable Planning Act 2000* (Qld) – where obiter comments in *Weston Aluminium Pty Ltd v Environment Protection Authority* (2007) 82 ALJR 74 did not mean that in this case the respondent, by calling proposed dwellings with three potential bedrooms two-bedroom dwellings in material attached to its development application which was not, expressly or impliedly part of the development approval, prohibited the council from determining the dwellings had three bedrooms for the purposes of assessing the relevant infrastructure charges under s635 and s636 – where the approval was for neither two-bedroom nor three-bedroom dwellings but for "home sites" – whether the future building work allowed by the development approval was for two-bedroom plus study or MPR dwellings or three-bedroom dwellings was not part of the

terms of the council's development approval – where the respondent's only avenue of appeal from the council's infrastructure charges notice lay under s478 – where once the council issued the infrastructure charges notice, the respondent's pursuit of its application for declarations rather than an appeal under s478 appeared to be an inappropriate attempt to circumvent the limited nature of the statutory appeal process – where this was an improper use of the declaratory power under s456.

Leave granted. Appeal allowed with costs. Orders imposed at first instance set aside. Instead the respondent's amended application filed to the Planning and Environment Court is dismissed.

Bradshaw v Griffiths [2016] QCA 20, 12 February 2016

General Civil Appeal – Easements – where the respondent owned a large cattle property called Stuart Downs – where the respondent subdivided this property creating Laurel Downs – where the respondent kept Stuart Downs but sold Laurel Downs – where before the subdivision, there was a gravel road (Road A) leading from the respondent's homestead and cattle yards, down through what became Laurel Downs, to the nearest public road – where the appellant purchased Laurel Downs many years later – where the respondent continued to use Road A by informal agreement with the appellant – where the respondent constructed a new gravel road (Road D) some time later, which also went through Laurel Downs – where for the next 22 years the appellant permitted the respondent to transport cattle via Road D, using it for that purpose about five times a year – where the appellant and the respondent fell out – where the appellant denied the respondent permission to cross Laurel Downs – where the respondent started proceedings seeking a statutory right of user for Roads A and D pursuant to s180 of the *Property Law Act 1974* (Qld) – where the respondent succeeded in obtaining those orders from the trial judge – whether an easement should have been granted – whether only one easement should have been granted, rather than both – where critical to the trial judge's conclusion that both easements should be granted, is that if Road A but not Road D could be used, "Mr Griffiths would have to widen at least the road between the homestead and the new yard in order to accommodate B-double trucks" and that road "would still be an inferior road for transporting cattle from the new yard" – where his Honour did not find that denial of access to Road D was significant in terms of its denial for purposes other than transportation of cattle out from the new yards – where his Honour did not find that there was any burden in respect of widening the road between the new yards and the old yards – where evidence points directly to the fact that use of Road D is not reasonably necessary in the interests



with Bruce Godfrey

of the effective use of Stuart Downs – where once it is found that the widened road between the new yards and the old yards is a suitable road for B-double transport of cattle, which can then link with Road A, the case ceases to be one of Road D being “reasonably necessary in the interests of the effective use” of Stuart Downs – where the preference for Road D in that circumstance becomes mere desirability or preference, and does not meet the test under s180 – where the appeal succeeds in relation to the easement granted over Road D, but fails otherwise.

Appeal allowed. Orders granting a statutory right of user in respect of Road D and compensation set aside. Parties to submit a revised order in accordance with these reasons. Leave to make submissions on costs. (Brief)

Gambaro Pty Ltd as Trustee for the Gambaro Holdings Trust v Rohrig (Qld) Pty Ltd; Rohrig (Qld) Pty Ltd v Gambaro Pty Ltd [2016] QCA 21, 12 February 2016

General Civil Appeal – Further Orders – where the court dismissed the plaintiff’s application for summary judgment and allowed an appeal by the defendant against an order dismissing its application to strike out the plaintiff’s statement of claim – where the plaintiff applied for the grant of an indemnity certificate – where the defendant’s appeal succeeded on a question of law – where the power to grant an indemnity certificate is discretionary – where the question of law upon which the appeal turned was novel – where the plaintiff’s position was fairly arguable – whether the court should exercise its discretion to grant an indemnity certificate – where notwithstanding that the primary judge’s decision involved the acceptance of submissions advanced by Gambaro, this is an appropriate case in which to exercise the discretion to grant an indemnity certificate.

Pursuant to the *Appeal Costs Fund Act 1973* (Qld) the respondent to Appeal No 6996/15 be granted an indemnity certificate in respect of that appeal.

Campaigntrack Victoria Pty Ltd v The Chief Executive, Department of Justice and Attorney-General & Ors [2016] QCA 37, 26 February 2016

Application for Leave *Queensland Civil and Administrative Tribunal Act* – where a claim was lodged against the claim fund under the *Property Agents and Motor Dealers Act 2000* (Qld) (*PAMDA*) – where dispute whether the claim was made within time – where tribunal allows extension of the 14-day period referred to in s473(5)(b) of *PAMDA* – whether tribunal has power to extend the period pursuant to s61 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) – where the appeal tribunal concluded that the time period stated in s511(1)(a)(i) (read together with s473(5)(b))

did not set out a “procedural time limit” and that the requirement under consideration was “substantive and mandatory” – where in the present statutory context, the time within which to make an application for an extension of the time stated in s472 is a matter governing the procedure by which a claim against the fund is processed, heard and decided – where the provisions impliedly state that a claimant may make an application to extend time within a certain period, and say nothing about whether the tribunal may allow an extension of that time in a deserving case – where any time limit contained in s511(1)(a)(i), when read together with s473(5) (b), is procedural – where s61 of the *QCAT Act* does not require the tribunal (or indeed anyone else) to comply with it – where s61 *assumes* the existence of a time period of the kind provided for in the relevant provisions of *PAMDA*, and allows for its extension in certain circumstances – where clear words would be required to provide that the application must be made within 14 days, after which there is no scope to extend the time to make an application for an extension of time or to waive the 14 day procedural requirement – where this is not a case in which the relevant provisions, either expressly or by necessary intendment, create a time limit beyond which no application for an extension of time may be made – where the provisions are not inconsistent and, as a result, the operation of s61 was not excluded.

Leave granted. Appeal allowed. Set aside the orders made by the appeal tribunal. Return the matter to the tribunal for reconsideration (with procedural declarations, directions and orders). Procedural orders on costs.

Boon v Summs of Qld Pty Ltd [2016] QCA 38, 26 February 2016

General Civil Appeal – where three fingers of the appellant’s left hand were cut when he came in contact with the extended blade of a Leatherman knife held by an employee (Mr Summerfeldt) of the respondent – where the respondent would be vicariously liable for the employee’s alleged negligence, and liable for alleged negligence on its own part in failing to appropriately supervise or give instructions to the employee with respect to the use of the knife – where the appellant claimed damages in the Supreme Court for personal injury caused to him by negligence on the part of the respondent and of the employee, together with interest and costs – where judgment was given in favour of the respondent, ordering the appellant to pay the respondent’s costs of the proceeding on the standard basis – where the appellant filed a notice of appeal on 16 June 2015 – whether the respondent is liable in negligence – where the appellant’s principal challenge to the analysis of risk is centred upon the trial judge’s statement at paragraph 74 of the reasons that the appellant had failed to establish that a reasonable person

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in Mr Summerfeldt's position would have foreseen that using a sharp knife to peel an orange during lunch would have involved a risk of injury to persons nearby, including the appellant – where the conduct of Mr Summerfeldt in rising from a crouched position with a knife in his hand, the knife having a long, sharp blade which was unsheathed exposed the appellant to the risk of injury – where there was a foreseeable risk that a passer-by such as the appellant might have been struck by the blade of the knife; that Mr Summerfeldt ought reasonably to have known, at least, of that risk; and that the risk was not an insignificant one – where the last conclusion is fortified by the admitted fact that the location where the incident occurred was frequently traversed by workers – where these intermediate conclusions compel an ultimate conclusion that Mr Summerfeldt acted negligently and that his negligence caused the appellant's injury – where it is open to this court pursuant to the powers given to it by r766 of the *Uniform Civil Procedure Rules 1999* to make an award of damages based on the findings of fact at first instance, adjusted as this court considers appropriate – where the appellant submits that \$700 per week after tax inadequately reflects the income he would have earned during this period – where the adoption of averages for 12-month periods assumes an employment pattern from 5 June 2012 with periods of substantial intermittent non-employment – where such a pattern does not sufficiently recognise a potential substantial period of continuing full-time employment at Downer EDI after that date.

Appeal allowed. Order set aside. In lieu thereof, order that there be judgment for the plaintiff in the amount of \$215,286.11. Direct submissions on costs.

Criminal appeals

R v Leslie [2016] QCA 15, Orders delivered *ex tempore* on 2 December 2015; Further order and reasons delivered on 9 February 2016

Sentence Application – where the applicant pleaded guilty to one charge of arson – where the applicant was sentenced to three years' imprisonment, suspended after five months, with an operational period of three years – where the five months took into account 23 days of pre-sentence custody, which was declared pursuant to s159A of the *Penalties and Sentences Act 1992* (Qld) – where the applicant set fire to the Housing Commission unit in which he lived, attempting to kill himself – where the applicant did so by pouring 200ml of acetone into a cupboard near the bathroom, and up the wall, then lighting it – where the unit was one of about 15 brick units in a Housing Commission block – where the fire was contained to the inside and doors of the cupboard – where there was smoke damage to the walls and ceiling, resulting in \$3519.21 worth of damage – whether the sentence was manifestly excessive – where there is force in the contention that the particular circumstances of Mr Leslie's combination of mental illness and physical disability amount to exceptional circumstances that warranted a non-custodial sentence – where

Mr Leslie was only 19 when he offended and there were no previous offences of this kind, or any of note at all – where the circumstances of the offending involved a dwelling, it was not pre-meditated, it was an attempt at suicide, relatively little damage was caused, and the method (use of 200ml of acetone) suggested a lower level of recklessness, far removed from the sort of circumstances in *R v FN* [2005] QCA 113 – where the combination of the serious depressive condition and the aftermath of the severe burns leads to the conclusion that a custodial sentence was inappropriate – where a psychiatrist's recommendations for future treatment were focused on that occurring in the community, not in custody – where the sentencing judge did not provide any reasons why he opted for suspension, rather than parole – where Mr Leslie's age, his history of self-harm and suicide attempts, his depressive illness, the recommendations for his treatment, and the need to preserve his prospects of rehabilitation, make him an obvious candidate for supervision rather than a suspended sentence.

Application for leave to appeal granted. Appeal allowed to the extent of setting aside the order at first instance that the sentence is suspended after five months with an operational period of three years and instead it is ordered that the applicant's parole release date is fixed at 17 December 2015. The sentence at first instance is otherwise confirmed. Application to adduce further evidence refused.

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R v Shipley [2016] QCA 23, 12 February 2016

Appeal against Conviction – where the appellant was charged with unlawful possession of the dangerous drug methylamphetamine and the dangerous drug cannabis – where the allocutus was administered in respect of both grounds on 2 March 2015 – where the administration of the allocutus proceeded upon a ruling made by another judge of the trial division on 10 December 2014, in reliance of s600(2) of the *Criminal Code* (Qld), which directed that pleas of guilty be entered to the counts on the indictment notwithstanding that the appellant pleaded not guilty to them upon arraignment – where the ruling was made in circumstances where the appellant pleaded guilty to the charges in accordance with the registry committal procedure governed by s114 of the *Justices Act 1886* (Qld) where the appellant filed a notice to appeal against the convictions on 9 March 2015 – whether s600(2) of the *Criminal Code* (Qld) applies to circumstances where a person has been committed for sentence upon a registry committal – whether the decision directing that pleas of guilty be entered to the charges on indictment SUP37/14 is wrong in law – where the language in which the conditioning clause in s600(2) is cast is clearly expressed – where it speaks of the procedure for which ss104(2) and 113(1) of the *Justices Act* provide in which the defendant is addressed by the justice in terms of s104(2)(b) and, in answer to the question put, responds by saying that he or she is guilty of the charge – where s114(5) is clearly expressed – where it speaks prospectively, not retrospectively – where s114(5) operates with effect that a person who is committed for sentence under the registry committal procedure is a person who has been committed by a justice for sentence for the purposes of s600(1) – where it is true that s600(2), interpreted conformably with the unambiguous language in which it is expressed, has no application to pleas of guilty under the registry committal procedure – where had the legislature been minded to ensure that s600(2) applied to the procedure, then it could have amended it accordingly when the provisions for the procedure were enacted.

Allow the appeal. Set aside the convictions recorded on 9 March 2015. Set aside the order made on 10 December 2014 that pleas of guilty be entered to the charges on indictment SUP37/14 notwithstanding the appellant's pleas of guilty made on 24 November 2014.

R v Duckworth [2016] QCA 30, 17 February 2016

Appeal against Conviction – where the appellant was convicted of one count of rape – where the appellant appeals against conviction – where the trial judge gave a jury direction as to alleged lies told by the appellant – whether the trial judge erred in directing the jury that they could use alleged lies against the appellant as evidence of consciousness of guilt – whether the conviction was unsafe and unsatisfactory – where the trial judge directed the jury that the following categories of alleged lies in the appellant's police record of interview were capable of probative use: that he "got into an empty bed"; that he "had no awareness" of the complainant being in

the bed with him; and that he "never spoke to his two friends about [the] allegations", or had no memory of having done so – where the jury was directed that, if satisfied in accordance with the test explained to them by her Honour, such evidence might "strengthen the Crown case". – where prior to the addresses of counsel, the trial judge discussed with counsel which of the alleged lies should be the subject of a direction in accordance with *Edwards v The Queen* (1993) 178 CLR 193 – where the evidence of the conversations alleged between Mr Foster and the appellant in the hotel room as well as the conversation alleged between them in the car were expressly referred to in the summing-up – where the question whether, by reason of this evidence, the appellant's answers to police (to the effect that he had not spoken to his two friends about the allegations or had no memory of having done so) might have been deliberately untrue and, therefore, revealing of a guilty mind, was then left to the jury for their assessment – where the jury should not have been invited to consider the third category of alleged lies for probative use – where to be capable of use by the jury in that way, the alleged lies needed to be deliberate, material to the case, and explicable only on the basis that the truth would implicate the accused – where it can fail to be seen how the appellant's answers to the police officer's questions that he did not remember any discussions with Mr Foster some five weeks later could properly be regarded as admissions against interest or that it could safely be concluded by the jury that the only explanation for his answers was that the appellant "knew that the truth would implicate him in the offence". – where it was entirely plausible that the appellant did not remember the conversations with Mr Foster because of his heavy drinking and the passage of time – where the alleged lies in this category should not have been left to the jury as potentially incriminating to the appellant; at best for the prosecution, they were only capable of being used by the jury in the assessment of his credit – where the feature that the appellant's counsel in the court below chose not to ask for a direction on s24 of the *Criminal Code* (Qld) did not relieve the trial judge from the responsibility of directing the jury as to any excuse or defence that fairly arose on the evidence – where the trial judge failed to direct the jury that the appellant's state of intoxication was relevant to the jury's consideration whether he had an honest belief that the complainant was consenting – where this problem was further compounded by the feature that the trial judge had in unequivocal terms told the jury that the appellant's intoxication was quite irrelevant to the question of criminal responsibility, albeit in connection with the discussion concerning s23.

Appeal allowed. Conviction be set aside. There be a retrial.

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 scql.org.au/qjudgment/summary-notes. For detailed information, please consult the reasons for judgment.

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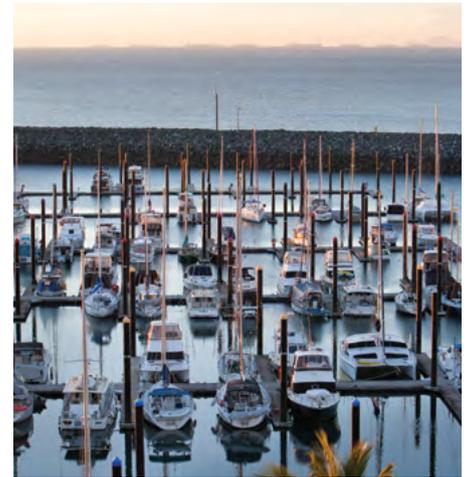
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Mackay on show at NQLA conference

by Kristy Dobson



In the heart of the tropics, on the banks of the blue waters of the Pioneer River, Mackay is north Queensland's 'Sugar Capital'.

It is the gateway to a region that offers visitors an appealing tropical city, some 31 uncrowded beaches washed by the calm waters of the Coral Sea, a string of green wooded islands that lead to the Whitsundays and the Great Barrier Reef, and a hinterland of rainforest national parks that are home to colonies of reclusive platypuses.

Next month, Mackay will host the 2016 Offermans Partners North Queensland Law Association Conference. The conference will be held beachside, at the Mackay Surf Lifesaving Club, which boasts gorgeous beach and island views from all three conference rooms.

It will kick off with the LexisNexis Welcome Drinks, to be held poolside at the Clarion Hotel, overlooking the beautiful Mackay Marina on Thursday 26 May.

The following morning will start with Sea-PD (CPD by the Sea) – a panel discussion featuring Justices McMeekin and Henry of the Supreme Court, Judge Morzone QC of the District Court, Andrew Philp QC, Tim Matthews QC and Anthony Collins.

Day one of the conference will continue with delegates being split into three streams covering commercial, family and litigation law. Highlights of the streams include Judge Coker of the Federal Circuit Court discussing applications by grandparents, an advocacy refresher led by Justice North of the Supreme Court,

with barristers Viviana Keegan and Tracy Fantin, and in the commercial stream a debate with a hypothetical comparing a share sale agreement with a business sale agreement, with solicitors and accountants on each team.

Plenary sessions will be delivered by Justice McMeekin discussing 'Law in the 21st Century', followed by a paper by Robert Anderson QC titled 'Think before you speak or type' analysing the crossover between social media and defamation.

The conclusion of day one of the conference will be celebrated in style at the #MackayPride Night Under the Stars in the Mackay City Heart. Held under the fig and mango trees, in Mackay's city heart, this event will be a classy affair with canapés, drinks and live music.

Queensland Chief Justice Catherine Holmes will open day two of the conference, followed by a paper from barrister Michael Copley QC. The final core CPD topic will be delivered on Saturday in three streams for barristers, senior solicitors or early career lawyers. Saturday morning will close with topics in each of the three streams, including presentations on 'Doomsday Prepping: How not to be a cautionary tale' in a commercial law context, preparing for interim applications in family law presented by barristers Janice Mayes and Michael Fellows, and a criminal law update presented by Judge Harrison of the District Court with barristers Paddy Cullinane and Joshua Trevino.

The conference will conclude with the JD Dowling Chambers Beach Party in front of the surf club, as a way to unwind from the conference, and mingle with

fellow delegates and speakers. Anyone for a game of beach cricket?

After the conference is over, Mackay is your oyster. More than just a mining services town, Mackay boasts countless restaurants, delightful cafes and an enviable art gallery. The Bluewater Trail offers spectacular views of Mackay via a pedestrian path that links the Botanic Gardens tracing the river and terminating at the seashore.

A recent redevelopment of the Mackay City Heart has transformed the main streets of Mackay, which now offer more alfresco dining, public art installations, together with the restoration of some heritage facades which has added new zest to the city's commercial district.

Otherwise, access to the Whitsunday Islands is only two hours away, or even closer are a number of national parks in the Pioneer Valley.

If you're after a different experience altogether, the clear natural pools of Finch Hatton Gorge are home to platypus colonies and a guided diving experience is certainly a unique opportunity.

Half an hour in the other direction is the Sarina Sugar Shed, a miniature working sugar mill and distillery where you can gain an insight into the sugar industry, sample crushed cane juice and purchase a selection of sauces, ginger beer, or liqueurs.

Registration is now open. For program details, please visit nqla.com.au. For other enquiries, please email president@nqla.com.au.

Kristy Dobson is a senior solicitor at McKays, and president of the NQLA.

New QLS members

Queensland Law Society welcomes the following new members, who joined between 11 February and 8 March 2016.

Dana Paterson, Ellem Warren Lawyers
David McManus, Shine Lawyers
Max Russ, Go To Court
Don Hettiarachchi, Shine Lawyers
Andrew Phillips, Suncorp Group Limited
Renee Wallerstein, P&E Law
Benjamin McTaggart, Bell Legal Group
Katrina Peters, Kelly Legal
Anjuli Sumer, Brian Shepherdson
Danielle Britton, Finemore Walters & Story
Joanne Choy, Freeman Lawyers
Salwa Marsh, White & Case
Katrina Smith, Legal Aid Queensland
Rachel Kramer, Bosscher Lawyers Maroochydore Pty Ltd
Ki Nah, Park & Co Lawyers
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Morgan Reid, Ingwersen & Lansdown
Matthew Rodgers, RBG Lawyers
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Dominic Monsour, Go To Court
Fabio Toso, non-practising firm
Samantha Khoo, Sierra Legal Pty Ltd
Nikki Parker, Brisbane City Legal Practice

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Georgia Harvey, Gall Standfield & Smith
Renee Hochstrasser, Dwyer Law Group Pty Ltd
Serena Nicholls, Griffith University – Law School
William Ash, Hall Payne Lawyers
Carley McNeil, Worcester & Co.
Wayne Davis, Axia Litigation Lawyers Pty Ltd

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Kane Wolski, Moray & Agnew
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Career moves



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Leanne Dorricott



Rhys Lloyd-Morgan



Leith Sinclair



Mahoney Smith



Tom Gardiner



Angela Fortt



Rosana Chan

Best Wilson Buckley Family Law

Emily Myatt has been appointed as junior solicitor at Best Wilson Buckley Family Law's Toowoomba office. Emily was admitted to practice in 2014 and is undertaking a Masters in Applied Law (Family Law). She volunteers for the Toowoomba Advocacy and Support Centre, and is a member of the Toowoomba Contact Centre Committee.

Colin Biggers & Paisley

Collin Biggers & Paisley has appointed Megan Kavanagh as partner in its Brisbane office. Megan is an employment litigator and has experience defending claims in industrial, discrimination and human rights, workplace health and safety, and civil jurisdictions.

Corrs Chambers Westgarth

Corrs Chambers Westgarth has announced 11 promotions to special counsel, including four in its Brisbane office.

Georgina North joined the workplace relations Brisbane team in 2011. Prior to Corrs, she practised in international employment law in the United States and was a partner at Seyfarth Shaw LLP in Los Angeles. She advises employer clients from industries including energy and resources, education and health, and state and local government.

Joining the intellectual property, technology and competition Brisbane team in 2011, James Cameron has experience in intellectual property and technology law. His experience covers commercial, intellectual property, biotechnology, health and competition law matters.

Leanne Dorricott commenced with Corrs in 2006 as a senior associate. She previously worked in London at BBC Worldwide in corporate practice, and performed consulting work in employment law. She has also worked as a human resources and industrial relations lawyer.

With more than eight years' experience in commercial real estate and infrastructure, Rhys Lloyd-Morgan acts for clients on major projects including large-scale rail infrastructure, terminal, warehouse and other developments, and the large-scale sale, purchase and leasing of real-estate assets.

Creevey Russell Lawyers

Family lawyer Leith Sinclair has been appointed senior solicitor at Creevey Russell Lawyers. She has presented papers on impaired capacity, surrogacy, adoption, family violence, civil partnerships, and financial agreements, including some used in undergraduate degrees.

DibbsBarker

Mahoney Smith has been appointed a partner at DibbsBarker. She focuses on real-estate advice and transactions, and works across sectors including commercial, industrial, retail and residential. Mahoney previously worked in hospitality and tourism sectors, and has advised on several acquisitions and sales of islands in the Whitsunday region.

Fisher Dore

Fisher Dore has appointed Tom Gardiner as a solicitor. Tom previously worked in criminal defence, commercial law and civil litigation, and has experience in both federal and state jurisdictions. He has also worked as a District Court judge's associate.

Mackey Wales Law

Angela Fortt has been appointed as an associate in Mackey Wales Law's litigation and dispute resolution department. She has more than 10 years' experience in all areas of general and commercial litigation, including contract and leasing disputes, bankruptcy and insolvency, debt recovery, building and construction disputes, employment law and estate disputes.

Thynne + Macartney

Thynne + Macartney has welcomed Rosana Chan as a senior associate in the professional indemnity and risk management team. She has 10 years' experience in defendant insurance litigation and advice, with a background in the mining, engineering, construction and property industries.

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A practice idea that might make a big difference



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This isn't hard to imagine. If you gave an identical fact situation and legal question to 10 partners practising in the same area, they would all draft differently – in style, format, language and length, although the differences in substance generally would be minor. And each would be convinced that their style was right.

It's also easy to see how rotations expose young lawyers to this variability.

Having said all that, it really is disheartening for people who think they've just got on top of their firm's style only to be attacked by new oceans of red biro (or tracked changes).

Obviously firms which invest in good quality style and language guides combined with training can solve part of this because everyone is obliged to comply with the guide, including partners (theoretically).

But most unsophisticated firms don't have these resources. So what can they do to reduce young lawyer confusion without concurrently reducing the quality of work?

We believe the key is to distinguish between *substance* and *style*. Now, clearly, some people just write dreadfully and they need significant remedial work. We get that. But once lawyers are reasonably past this stage, and understand the firm's preferences for (say) brevity and common language, then reviewing their drafts ought to mainly be about *substance*.

So here's a tip. Instead of reading sequentially and marking up from the first word, consider stepping back and first quickly scanning the essential arguments from start to finish. Are they all there? Are they clearly made? Is the advice sound? If all of that is there, and the style differences amount to no more than minor personal irritations, then consider just saying *good work!*

The problem with detailed edits without an initial overview is that you regularly make changes which become visibly unnecessary and convoluted the further you go, and in some cases this means multiple resubmissions – which could have been avoided.

Yes, there is a bit of personal vanity involved (*my style is the only style!*) but our exercise in paragraph three suggests this vanity may be misplaced. Clearly there *are* many clear, valid, and utterly coherent – but different – writing styles.

So if you're looking for more productivity and less dismay (you *and* your young lawyers) consider stepping back a bit before unleashing the red biro and do a scan of the overall substance first.

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Great white pointers

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Not everyone knows that white wines can be as long-lived as reds, and that Australia has some great aging whites just waiting to be explored.

Red wine gets better with age. This is one of the first things people learn when they become interested in wine and the thing wine educators wished people would forget. The truth is that some red wines get better with age, if kept the right way. But the same goes equally for white wines and that is something most people interested in wine never remember. In fact, great aging whites like Hunter semillon and great rieslings can outlast most reds and still look handsome gold when many red wines have turned to brown.

The taste for aged wine started in Roman times. The Romans' greatest wine, Falernian, came from the slopes of Mt Falernus near the border of Latium and Campania. This strong wine was usually rested for 15 to 20 years in clay amphora before being served. Falernian from the famous 'Opimian vintage' of 121 BC was

even said to have been served at a banquet in 60 BC to mark Julius Caesar's conquests in Spain. There were two kinds of Falernian, dry and sweet, but the common and most important factor was that it was white wine.

Sadly, with the fall of Rome the practice of aging wines was lost for well over a thousand years. It only really started in earnest when wealthy English wine collectors put their claret down to rest. To this day the French still call the fascination with aged wine the 'Gout Anglais', but the love of aged white wine seems to have entered a dark age.

The main preservative in white wine is acid (sometimes sugar as well in very sweet wines). Australia has been blessed with some excellent aging white wine varieties which are high in acid and mature beautifully for decades.

Probably the greatest Australian long-lived white is Hunter semillon, or Hunter riesling as it used to be called before the days of truth in advertising. Venerable Hunter semillon is hefty and commanding, and has often been confused with great aged white Burgundy.

True riesling, or Rhine riesling as it used to be called, can be equally long-lived and powerful, especially from the Eden and

Clare Valleys in South Australia (think Watervale and Polish Hill) or Tasmania.

Chateau Tahbilk marsanne is a mainstay for great longevity and wondrous development with unforeseen honeysuckle bursting forth in later life. The marsanne's old-country stablemate, roussane, can also grow into something impressive, especially out of the Yarra Valley, and it is a pity it does so infrequently.

The wily charm of Chamber's gouais does not even meet the eager tastebuds of the market until 10 years after harvest and deserves to be more sought after.

Houghton White Burgundy, originally created in 1937 by the legendary Jack Mann, was heavily comprised of the long-lived chenin blanc and was said to repay those who kept it handsomely. Today, the blend relies on other more fragrant varieties and is said to be more for the now, but an interesting experiment would be to make a direct comparison.

While some aging whites are well known and others less so, they all make for great nights of friendly tasting; comparing older bottles against newer ones to see how the seasons and time work their magic together.

The tasting Three white wines of power, finesse and aging substance were subjected to scrutiny.



The first was the Glaetzer-Dixon Family Winemakers Uberblanc Tasmanian Riesling 2015, which was pale mineral straw with flecks of green. The nose was a clash of citrus and floral mock-orange blossom. The palate was masterfully structured for a young wine, with vibrant acidity of youth that led into citrus fruit zing underscored with an intense minerality and a final cut back to a very dry finish. A happy future awaits, a keeper.



The second was the Tyrrell's Wines Single Vineyard HVD Hunter Semillon 2010 which was the lightest translucent yellow and had a nose of oak that seemed almost buttery and a flinty grin. The palate broke with an initial burst of warm fruit cut back by acid that changed as the mid palate rolled on, developing strong undertones of white stonefruit that lingered. A mere pup at six years of age.



The last was the Tahbilk Marsanne 2004, which was mellow gold in colour. The nose was citrus and florals such as honeysuckle – akin to walking down the path of an English cottage garden in spring. The palate was floral but quickly gave way to rich ripe yellow peach with a body of young acid carrying the wine out into the next five years or more.

Verdict: The favourite was the marsanne, not because of its decade of careful curation in the cellars of chez Dunn, but because at 12 years old, a good year in a bottle seemed to be able to last forever.

Matthew Dunn is Queensland Law Society government relations principal advisor.

Mould's maze

By John-Paul Mould, barrister
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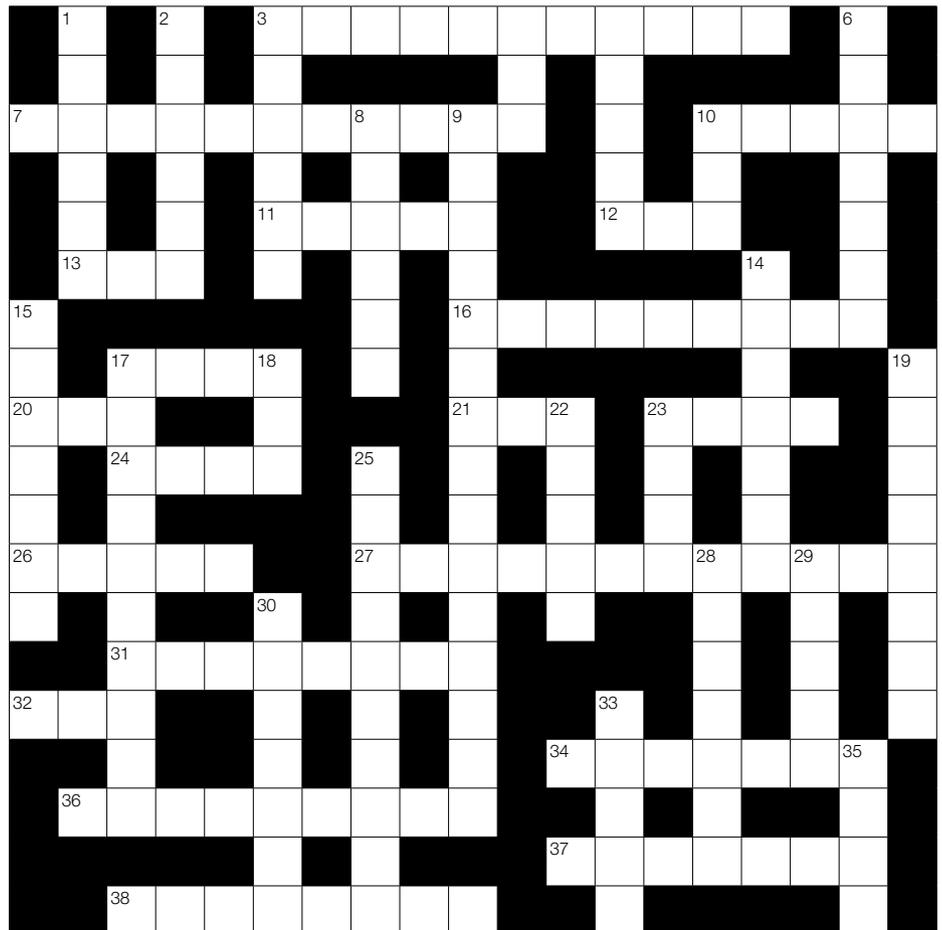


Across

- 3 Alternative dispute resolution involving an independent third party whose decision the contending parties agree to accept. (11)
- 7 Carbohydrate-deficient testing is used in parenting matters to determine the level of previous alcohol consumption of a party. (11)
- 10 An approval of legal aid funding. (5)
- 11 Antonym of liability. (5)
- 12 Requests made of employers lodged by a trade union on behalf of employees, ... of claims. (3)
- 13 Persons of common ancestry. (3)
- 16 Often referred to as an implied trust, this trust arises because equity presumes an intention to create it. (9)
- 17 Items capable of division in a property settlement are collectively called the (*Jargon*) (4)
- 20 Child support decision involving liability of a payer to contribute to school fees, ... *v Ferguson*. (3)
- 21 High Court decision involving the purchase of a winning Golden Casket ticket and the passing of Douglas J who heard the case before the issue of costs was determined, ... *v Holmes*. (3)
- 23 A jury is a tribunal of (4)
- 24 Standard business sale contract approved by the Queensland Law Society. (*Abbr.*) (4)
- 26 Criminal defence for being elsewhere at the material time. (5)
- 27 An industrial design is a type of this property. (12)
- 31 Tortious action involving wild animals for which liability is strict. (8)
- 32 Specific performance will only be ordered where the property in question is ... generis. (*Latin*) (3)
- 34 Damages awarded for loss of amenity. (7)
- 36 In domestic agreements the parties are presumed not to have intended to create legal (9)
- 37 Procedural court appearance. (7)
- 38 Type of encumbrance. (8)

Down

- 1 A pleading which is vexatious, scurrilous or unparticularised is liable to be out. (6)
- 2 High Court decision involving the dismantling of a discretionary trust in a family law proceeding, *v Spry*. (6)
- 3 Antonym of rescind. (6)



- 4 Started, as in a hearing. (*Jargon*) (3)
- 5 Final court hearing. (5)
- 6 An alternative to consent orders for a property settlement is a financial agreement. (7)
- 8 The Queen. (*Latin*) (6)
- 9 Written questions submitted to a party as a discovery device. (15)
- 10 Order restricting media publication. (3)
- 14 A court that presides in multiple locations. (7)
- 15 Damages award issued by a court when a wrong has occurred but no recoverable loss flowed from it. (7)
- 17 waste arises from a tenant's neglect to repair or take reasonable care. (10)
- 18 A company in the process of being wound up will have 'in ...' following its name in court documents. (3)
- 19 Privilege attaching to defamatory comments said in Parliament. (8)
- 22 A plaintiff's formal response to a defence. (5)
- 23 Lodge a document in the court registry. (4)
- 25 A trust created when a creditor has lent money to a debtor for a particular purpose which, if inappropriately spent, can be traced and returned to the creditor. (10)
- 28 Agreement. (7)
- 29 Beyond power or authority, vires. (*Latin*) (5)
- 30 Heir. (7)
- 33 Legal principle, belief or doctrine generally held to be true. (5)
- 35 The Court determines, inter alia, approval of cultural heritage management plans, the grant of mining tenures and decisions concerning water licences. (4)

Solution on page 64

Attack of the Phone Drones

A catalyst for my latest get-rich-quick plan

by Shane Budden



I have to admit I am not exactly a big user of social media, in the same sense that Donald Trump is not exactly a big user of hairbrushes.

I am aware of it, but not fully cognisant of how it all works, much the same as dogs are aware of cars without being fully cognisant of the relationship between the second law of thermodynamics and the operation of internal combustion engines.

Part of the reason I am not much into social media is the same reason I am not into performing brain surgery – I don't know how. Most of the reason, however, is that it seems to take up an awful lot of time which could be spent more productively (by which I mean drinking beer). It certainly takes up all the time that people used to divert to watching where they were going and not crossing the street when cars are coming.

For example, I regularly see people weaving down the Queen Street Mall at a snail's pace, staring at their phone as if it was displaying the meaning of life, the grand unified field theory and next week's lotto numbers all at once, utterly oblivious – the people that is, not the phones – to their surrounds.

I would not be surprised if someone soon walks into the fountain at the top of the Mall (although I will be disappointed if I miss it). I am also sure that I will soon notice someone with his or her head against a wall, motionless except for their pumping feet and texting thumb, relentlessly and cluelessly attempting to walk through the

wall like one of those toy robots which has cornered itself, or US foreign policy.

I do wonder exactly what updates these people are posting – I assume it goes something like this:

Walking down the street

Walking down the street

Ran into somebody

Walking down the street

Walking down the street

Ran into somebody – man, nobody watches where they are going anymore! (this last post would get 1000 likes instantly).

My observations in this regard have led me to conclude that, if there is one thing that unites all humanity, more so than any religious, spiritual or political philosophy, it is the shared delusion that we are capable of using a smartphone and walking at the same time.

Indeed, people manage to hold to this belief even if they have looked up from updating their status on a site I will call, in the interests of doing my bit for climate change by recycling old jokes, Bacefook, to find themselves soaking wet and standing on the wharf at Moreton Island, despite having just popped out for sushi.

I am sure that if Jesus were still around today, his Bacefook update would regularly be, "Dang! Just looked up and I am in the middle of Bass Strait again!" (Moses would then post a comment boasting that he could do it without getting his feet wet.)

If all these people did was occasionally fall into the fountain at the top of the Mall (excluding Jesus, who presumably would stride right across), I wouldn't have a problem – indeed, I could watch them for hours.

Unfortunately, these Phone Drones often cause serious harm, by which I mean they get in my way, often making me come close to spilling my coffee. OK, so that's not as big a crime as, say, insider trading, but it is a lot more annoying to the person in the street

(or Mall, as the case may be) all the more so because I don't, if you want to get technical about it, actually know what insider trading is.

Thankfully, we live in a litigious world, especially those who live in America, and I am sure it won't be long before a Phone Drone is sued by someone in New York claiming \$14.50 for dry-cleaning, \$5 for a replacement cup of coffee and \$23 million for pain, suffering and mental stress associated with having a pastel-brown coffee stain on a navy shirt, which in New York is a fashion faux pas punishable by deportation. This would be quickly followed by a class action against Bacefook on behalf of the helpless victims of Phone Drone Syndrome (if this becomes a real thing, consider that term trademarked).

Because of this, I think we can expect to see Phone Drones wearing shirts printed with the message, "Bacefook values careful walking; please call 555-Bacefook". This leads to my sure-fire idea for you to make a fortune in the tech market. If you are sceptical of that claim on the basis that if I really had a sure-fire idea to make a fortune, surely I would simply go off and do it and not tell anyone else, you are far too smart to be wasting your time reading this.

Anyway, the idea is that you make an 'app' – which I believe to be a 'script', or possibly a 'cookie' – which causes smartphones to yell, "Look up idiot!" every 15 seconds (NB: you do not have to use the term 'idiot' – you could use an equivalent term, such as 'moron' or 'Kardashian').

This should sell in the millions, because every millennial on the planet needs it and there are apparently a lot of them. Naturally, I provide this idea as a free service to QLS members, and all I ask in return is your gratitude, expressed as 10% of everything you make. Oh, and in case you are reading this on your phone, LOOK OUT FOR THE FOUNTAIN!

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1800 177 743

Lexon

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Room bookings

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Crossword solution from page 62

Across: 3 Arbitration, 7 Transferring, 10 Grant, 11 Right, 12 Log, 13 Kin, 16 Resulting, 17 Pool, 20 Mee, 21 Orr, 23 Fact, 24 REIQ, 26 Alibi, 27 Intellectual, 31 Scierter, 32 Sui, 34 General, 36 Relations, 37 Mention, 38 Easement.

Down: 1 Struck, 2 Kennon, 3 Affirm, 4 Ran, 5 Trial, 6 Binding, 8 Regina, 9 Interrogatories, 10 Gag, 14 Circuit, 15 Nominal, 17 Permissive, 18 Liq, 19 Absolute, 22 Reply, 23 File, 25 Quistclose, 28 Consent, 29 Ultra, 30 Legatee, 33 Tenet, 35 Land.

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Interest rates

For up-to-date information and more historical rates see the QLS website
>> qls.com.au under 'Knowledge centre' and 'Practising resources'

Rate	Effective	Rate %
Standard default contract rate	2 March 2016	9.55
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 January 2016 to 30 June 2016	8.00
Federal Court – Interest on judgment debt for half year	1 January 2016 to 30 June 2016	8.00
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 January 2016 to 30 June 2016	6.00
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 January 2016 to 30 June 2016	8.00
Court suitors rate for quarter year	To 31 March 2016	1.34
Cash rate target	from 2 Mar. 2016	2.00
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2016	8.00

Historical standard default contract rate %

Mar 2015*	Apr 2015	May 2015	Jun 2015	Jul 2015	Aug 2015	Sep 2015	Oct 2015	Nov 2015	Dec 2015	Feb 2016	Mar 2016
9.8	9.8	9.7	9.7	9.55	9.45	9.45	9.45	9.45	9.45	9.45	9.45

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

*Note: The rate printed in the February and March 2015 editions of Proctor was not shown as updated due to production deadlines.

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Filed on behalf of:
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This form is to be used by a party to a financial case, such as property settlement, maintenance, child support or financial enforcement.

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(b) The information in the financial statement and any attachments to it which are within my personal knowledge are true. Where I have given an estimate in this financial statement, it is based on my knowledge and is given in good faith. All other information given in this financial statement and any attachments is true to the best of my knowledge, information and belief.
(c) I have no income, property or financial resources other than as set out in this document or any affidavit filed by me under Rule 13.05(2).

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Your signature _____ Place _____ / /2016
Date

Before me (signature of witness) _____ Full name of witness (please print)
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This financial statement was prepared by:
 the applicant the respondent lawyer

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