

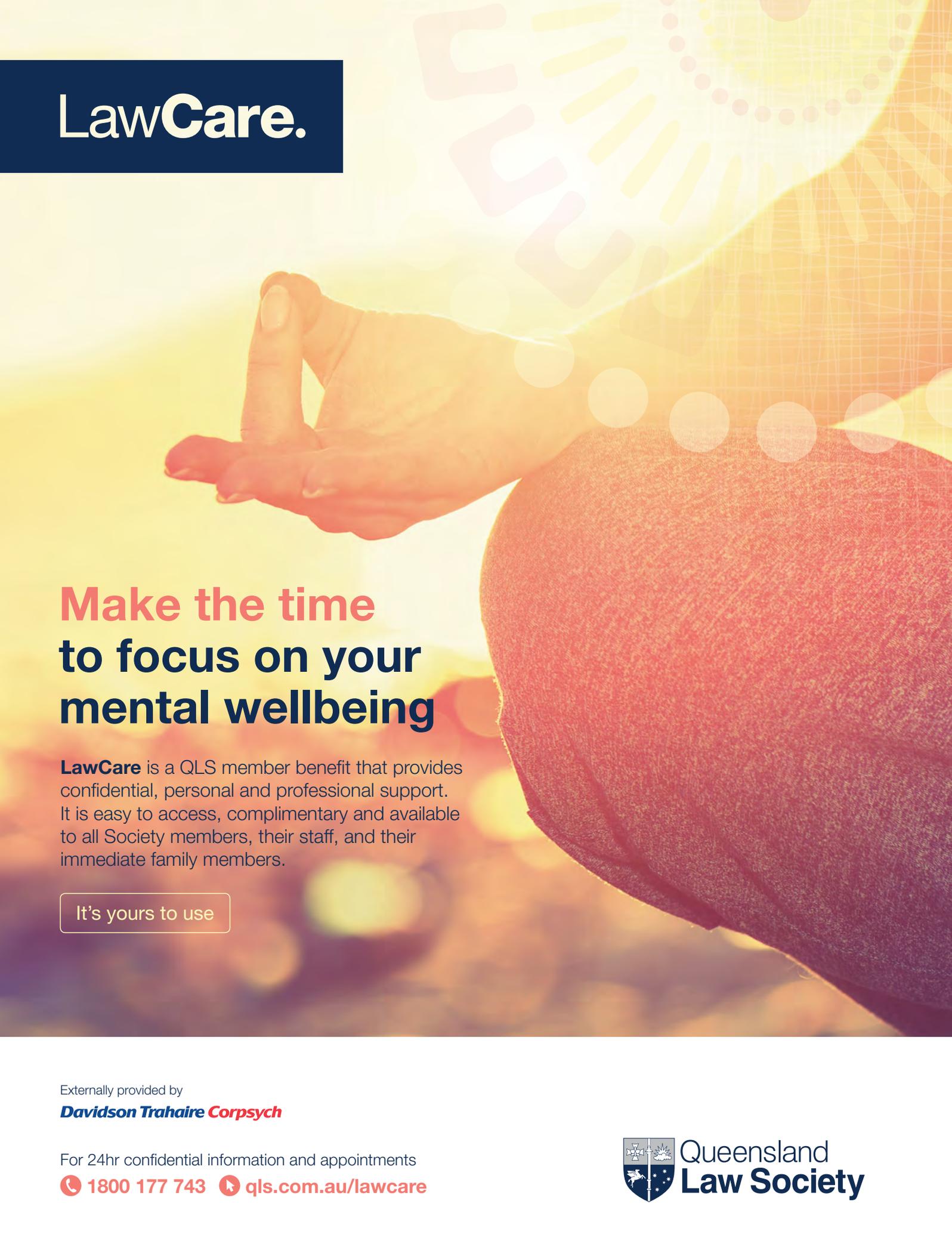
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Queensland
Law Society

April 2017 – Vol.37 No.3

How binding are standard terms? | Toward better justice for children | Family Court recognises parents under US surrogacy order | Reflections in a legal mirror



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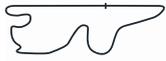
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Millennials –

'The revolution will be tweeted, liked & shared'¹

What we need to do about it, and why



In less than a decade, by 2025, it is anticipated that three out of every four people in the Australian workforce will be millennials.

QLS Symposium 2017 keynote speaker Holly Ransom grabbed the opening plenary audience with this, and other surprising facts, that really made us look up from our iPhones.

As a business owner, I was keen to find out what our workforce of mainly under-45s mean for the future of our firms?

Firstly, we heard how millennials – generally used to describe people born between 1982 and 2004 – are creating entirely new models of work and career, the like of which we haven't previously experienced. And they tweet, like and share their employment stories.

Paradoxically, millennials seek both security of employment and flexibility in that employment. When that is offered, they in turn deliver engagement, loyalty and business creativity, which generates wealth for their employers, themselves and their colleagues.

Millennials also have a strong social conscience. They need to know that what they are doing is for 'the greater good'. As Holly Ransom explained it, they have to understand the 'why' of what we all do.

So what does this mean for the firms that employ them? How will they capture their hearts, as well as their minds?

As lawyers, we already give much to our community, and those firms that actively support activities such as pro bono and volunteering are likely to attract, engage and retain the best millennial talent.

Firms that provide flexible work practices and offer staff a realistic work-life balance will also appeal to millennials, as will those that have a social conscience and engage with the community through proactive social media. A workplace culture with actual substance is essential.

It's a big ask for many firms, but as we've really known all along, engaged and happy employees are the single largest key to a successful practice.

As some 62 percent of current law graduates are women, it's no surprise that flexible work practices are critical, particularly for millennial mums.

However, I learnt recently that few firms accommodate breastfeeding mothers. Only five law firms in all of Australia have accredited breastfeeding facilities. This accreditation is delivered by the Australian Breastfeeding Association.

We anticipate that Queensland Law Society will soon join that list, as we are in the process of submitting an application to have our very own 'baby room' and breastfeeding policy accredited.

There are many breastfeeding mothers – mainly millennial – who are able to or wish to return to work quite quickly, usually with their baby. For our businesses to thrive there is a balance to be struck between accommodating the needs of our employees and the rigours and demands of our businesses. This type of initiative is an economically viable way of providing millennial practitioners with a flexible working environment.

Our QLS baby room, dubbed the 'Bub Hub', has the basics, along with a few extras. It includes a comfortable seat, table and chairs, highchair, small refrigerator, change table, small couch and a rug, along with some toys, books and appropriate decorations.

QLS is grateful to acting corporate secretary Louise Pennisi QLS, along with people and culture manager Amy Ashton, who were the primary instigators of this project. It may not be a coincidence that Louise is also vice president of the Australian Breastfeeding Association! If you would like to know more on this topic, see breastfeeding.asn.au.

Time for thanks

It's time to thank the many people who made QLS Symposium 2017 such a success. These include our many keynote speakers and presenters, the exhibitors, and the QLS staff and events team who brought this mammoth undertaking together.

Thanks also to our sponsors – including Bond University, Auscript, Brisbane BMW, Medilaw, Actionstep, ALPMA, Brisbane Capital, Bupa, de Groot's Publishing, Search ESS, GlobalX, Herron Todd White, Law In Order, LEAP, legalsuper, LexisNexis, Lexon Insurance, mlcoa, PEXA, RateSetter, Sinergy, Supreme Court Library Queensland, The College of Law, TIMG, Touchstone and Wolters Kluwer.

Most importantly, thank you to our members. It is your participation and enthusiasm that makes Symposium such a great and memorable experience.

Speaking of symposia, don't forget that the 10th Annual Gold Coast Symposium is coming up on Friday 9 June at the Surfers Paradise Marriot Resort & Spa. This year's event focuses on embracing the changing legal landscape, and will explore how we need to adapt new practices and skill sets to be better equipped for the changes to law and legal practice.

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Notes

¹ With apologies to Gil Scott-Heron.

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Issues that matter to you

– CLC funding cuts and AML/CTF regulation

There are two current issues that all practitioners should be up to speed with.

The first is the impending disaster of funding cuts to community legal centres (CLCs), with the Federal Government preparing to slash millions of dollars – around 30% – from CLC funding from 1 July.

There are real prospects of substantial reductions or cuts to the services provided by CLCs, which will only place more strain on them and an already taxed justice system. As practitioners, many of us already give freely of our time to volunteer at CLCs, but these bodies cannot function without the ancillary support and funding to keep them operating.

One might expect funding cuts to result in more self-represented litigants in the courts, but the critical result will be that more disadvantaged Australians will simply be denied their fundamental right of access to justice.

The end result is going to look like a slow-motion car crash; please speak to your local member and support efforts to reverse these cutbacks.

The second key issue for all practitioners relates to the proposal to regulate the legal profession under anti-money laundering/counter-terrorism financing (AML/CTF) legislation.

You'll find a report on this on page 12, detailing some of the opposition that has already been mounted, along with a costings survey revealing the prohibitive expenses that could be incurred.

However, the biggest issue is an ethical one, including the significant breaches of solicitor-client confidentiality that would be involved. For example, consider the scenario under which you, as a practitioner, would be required to lodge a suspicious matter report to government about your client and their transaction.

If you felt the matter was suspicious you might want to terminate the client retainer agreement. In doing this you would not be able to tell your client why because that disclosure would be tipping them off and an offence under the proposed legislation.

The current proposals are unworkable on a number of levels. QLS has continued to take a stand against more needless regulation and reporting.

Get ready for Law Week

Moving on to a topic somewhat more heartening, don't forget to mark your diaries for Law Week next month (15-21 May).

Key events include the Queensland Legal Walk on Tuesday 16 May which will raise some needed funds for LawRight (formerly QPILCH), the QLS Open Day on Wednesday 17 May, an In-Focus session on mental health on Thursday 18 May, and our annual QLS Ball on Friday 26 May.

The Legal Walk involves several communities across Queensland, including Brisbane, Toowoomba, Mackay, Townsville, Cairns, Bundaberg and the Sunshine Coast.

In Brisbane, the walk will start at 7am and follow a five-kilometre route along the Brisbane River, starting and ending at the Queen Elizabeth II Courts of Law. See qldlegalwalk.org.au for more information or to register.

QLS Open Day has become very popular with members since its introduction a couple of years ago, combining professional development sessions with the opportunity to learn more about the QLS, its services, staff and activities.

It includes the presentation of this year's QLS Equity and Diversity Awards, which recognise Queensland legal practices that promote equity in the profession, engage in inclusive and equitable workplace practices, and embrace workplace diversity in a meaningful way.

The awards, an initiative of the QLS Equalising Opportunities in the Law Committee, recognise achievement in three categories – large legal practices (20 or more practitioners), small practices (less than 20 practitioners) and a small practice initiative award. Nominations close on 14 April – see qls.com.au/diversity.

The In-Focus breakfast session will focus on mental health and mindfulness, and will be an opportunity for attendees to learn strategies to support their own wellbeing as well as that of their teams and colleagues.

Following Law Week, on Friday 26 May, the QLS Ball will be held at the Brisbane Convention and Exhibition Centre. And if the success of this event in past years is any guide, it will definitely be a night to remember!

Please update your details

Practising certificate and membership renewals are just around the corner, running from 2 May to 31 May. In preparation, we are encouraging all members to log on to their profiles at qls.com.au/myprofile and check the details to ensure they are up to date.

Accurate information will ensure a smooth renewals process. I would also ask you to keep your area of practice updated as it enables us to tailor the information and offerings we extend to you. If you participate in our Find a Solicitor service, your details are used to ensure we can better connect you with potential clients.

Matt Dunn

Queensland Law Society Acting CEO

Legal education for change in a digital age

by Tristan Lockwood and
Adrian Agius, The Legal Forecast

The legal industry is in the grip of a technological revolution.

Traditional law firms are meeting new challenges and new opportunities; new players are entering the market; practice is increasingly interdisciplinary.

Tomorrow's lawyers will require skills that are alien to the lawyers of yesteryear. So what, then, should a modern legal education look like?

For us, this question is not one about a practical versus theoretical approach (that debate rages on elsewhere). Instead, what concerns us is the growing importance of digital literacy in both understanding the law and its application in a digital world.

Where is technology intersecting with the law?

There is no shortage of instances for which digital literacy is fast becoming indispensable. These range from e-commerce and disputes over cryptocurrency, to jurisdictional disputes centred on complex computing networks, to cybercrime, intellectual property and the global information economy

Modern legal education does not, however, need to teach the mechanics of cryptocurrency (although that may be useful). There is and will remain an important role for expert witnesses in matters requiring expertise, and for IT staff in developing and maintaining legal technology systems.

Nevertheless, contemporary legal educators should be concerned to ensure their students have at least a basic understanding of digital technology in the same way that students are expected to have an understanding of mathematics sufficient to calculate the proportional flow of misappropriated trust monies (an exam favourite). In a more theoretical sense, being able to see the capacity for technology to shape the application of traditional legal concepts, or to justify a new approach where such concepts are no longer appropriate, are important skills.

What's already happening in Australia?

Several law schools have launched courses aimed at developing digital literacy. In 2015, the University of Melbourne launched a legal

innovation 'application'-building course whereby groups of students worked with non-profit legal organisations to design applications that would assist the non-profits' day-to-day operations. This year, the University of New South Wales launched a similar course. In addition to teaching digital literacy, these courses instill legal project management skills, which we envisage as increasingly essential to legal practice.

This year the College of Law is launching its Centre for Legal Innovation. Though much remains unannounced, the centre is described online as "an incubator for research and discussion on the impact of changes taking place in the legal industry".

Organisations other than law schools, particularly those driven by students and early-career professionals, are seeking to lead the way. In August last year, The Legal Forecast ran Disrupting Law in association with QUT Starters. The event brought together more than 300 students from a range of disciplines together with industry professionals.

Teams were tasked with creating a concept that would disrupt the legal industry within a 52-hour timeframe. 'Speak with Scout', the team that won first prize, launched their idea of a Facebook-integrated app that provides free, fast and personalised legal guidance and referrals via a messenger platform. According to the team, their post-competition journey in actually developing the app proved to be an invaluable practical learning experience in law, technology and enterprise.

A similar event to Disrupting Law, HackJustice, was run in New South Wales. In the wake of these events, law schools around the country have been inspired to follow suit with innovative initiatives of their own. There are promising signs that students are interested in exploring new angles to solve new legal problems, and, as in the case of 'Speak with Scout', they may define new careers by doing so.

What's happening overseas?

Legal education providers in the United States and the United Kingdom have better embraced the reality of technology's role in modern legal practice.

CodeX is a partnership between Stanford University's computer science and law faculties. The centre's research focus is the automation

and mechanisation of legal analysis. In addition, Stanford has launched a Master of Laws program in law, science and technology.

Other law schools including the University of California's Hastings School of Law and Suffolk University Law School have created legal centres dedicated to assisting startups. The focus in these universities is on improving the relevance of practical knowledge gained by students who volunteer at such centres. By servicing startup companies, students are able to develop practical legal skills while gaining commercial acumen and real-world insights into innovative ideas and business models across a variety of sectors.

What next?

The evidence suggests that the discussion is being driven from the grassroots level by students and early-career professionals and, in some cases, with shoestring budgets (consider Disrupting Law and HackJustice). This youth-led movement will gain momentum – legal entrepreneurship competitions will become the norm. The persistent evolution of mainstream legal curriculums to 'keep up with the times' will, however, require a steady stream of investment, strong leadership and a willingness to harness the creativity of students themselves.

Law schools should embrace enthusiasm among students to explore new frontiers of the law and legal practice. Introducing subjects focused on evolving areas of the law such as intellectual property, health law and global commerce is a good start. Exploring contemporary issues in traditional legal subjects equally provides students with an opportunity to develop an awareness of the ways in which technology may shape the application of the law.

Ultimately society moves forward. Whether lawyers remain relevant is a question of whether they can keep pace with that change. Law schools in this sense have an obligation to provide a legal education which is responsive to the challenges posed by digital disruption and new technologies. Given the pace of this change, the time to act is now.

Tristan Lockwood and Adrian Agius are executive members of The Legal Forecast. The Legal Forecast (thelegalforecast.com) aims to advance legal practice through technology and innovation. It is a not-for-profit run by early-career professionals who are passionate about disruptive thinking and access to justice.

Revised EFT Guidelines for trust account operations

On 17 January Queensland Law Society published revised Electronic Funds Transfer – Guidelines for Trust Account Operations (Version 3).

The guidelines make changes to the information to be included in and attached to the requisition form to be completed by the authorised signatory to a trust account when making an electronic funds transfer (EFT) from a trust account regulated by the *Legal Profession Act 2007*.

Section 38 of the *Legal Profession Regulations 2007* sets out the particulars required to be recorded for each withdrawal of trust funds by EFT. The guidelines are mandatory and apply as a condition of the authorisation given to law practices by the Society to conduct EFT transactions pursuant to paragraph 250(1)(b) of the *Legal Profession Act*.

The standard application letter required to be used by each law practice to obtain authorisation from the Society states that “suitable practices and procedures have been implemented and will be observed by the law practice in order to comply with the Guidelines”. The Society has the ability to revoke an EFT authorisation for law practices which have demonstrated continual disregard for the guidelines.

The revised guidelines came into effect on the date they were approved by the Law Society – 9 February 2017 – and should be put into effect by all EFT-authorised law practices forthwith.

QLS Update published on 8 March summarised the effect of the revised guidelines as follows:

“The security requirements have been clarified and the reference to the token ring removed and replaced with USB token and SMS code. The current practices of some financial institutions in respect of security measures has also been included.

“The EFT Transaction Summary Form has been renamed to QLS EFT Requisition Form and the guidelines now clarify that this is an optional form. However, the document used by the law practice must contain all the relevant information found on the QLS example.

“The Reconciliation Certificate has been removed and there is more emphasis on verifying the payment the next day as opposed to performing daily reconciliations.

“The material to be provided for the first EFT payment has been increased, which will allow the Society to ensure that the EFT payment has been recorded correctly.

“Clarity regarding the EFT reference number and bank transaction ID has been added. Their purpose, how they are to be recorded and the linkage they provide have been included.

“Law practices currently approved to make EFT payments are encouraged to review the new guidelines and familiarise themselves, and any staff involved in the processing or approval of EFT payments, with the changes that have been made...

“The new EFT guidelines (version 3) can be found under Trust Accounting Resources at qls.com.au.”

The impact on practitioners

Reading the guidelines is essential to develop an understanding of a trustee's obligations when dealing with trust money by EFT. For example, are you aware that you cannot complete a BPAY transaction using EFT from a trust account?

The change in the procedure prescribed by the guidelines is the form of written record to be kept by the trustee in respect of each EFT transaction. Paragraph 9.2 of the guidelines introduces a new requirement that the bank transaction ID is recorded on the transaction summary prepared by the trustee. Also, the transaction summary formerly known as an ‘EFT Trust Payment Transaction Summary Form’ is now known as an ‘EFT Trust Payment Requisition Form’.

The old form required inclusion of particulars for the payee and, if different, the name of the beneficiary of the payment. The new form does not require that information.

The new form requires the inclusion of the ‘bank transaction identification number’, being the EFT receipt number issued by the trustee's bank.

As previously required, the trustee must attach to the EFT Trust Payment Requisition Form a screenshot of the bank's website *immediately prior* to the transaction being performed to demonstrate that there are sufficient cleared funds at the bank to complete the transaction, together with an EFT receipt showing the completed transaction.

– **Michael Beirne**



Join colleagues from across the profession on **Tuesday 16 May 2017**.

Join us as we hit the streets in support of the 10th anniversary walk to fundraise for LawRight (formerly QPILCH) and celebrate the pro bono effort in Queensland.



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Law changes in more ways than one



Altering a highly regarded building takes a lot of skill and some courage to ensure the result does not destroy the ambience generated by the original spaces.

The University of Queensland Forgan Smith Building, which has been re-imagined to suit the contemporary needs of the TC Beirne School of Law and Walter Harrison Law Library, was officially opened by High Court Chief Justice Susan Kiefel on 13 March.

Her Honour noted the names of Aristotle, Socrates, Edward Coke, Francis Bacon, William Blackstone and Thomas Hobbes engraved at the entrance of the law school, and busts of Plato and Justinian inside.

"These great legal and social philosophers of the past had in common an understanding of why the law, and the study of it, is important," she said. "That importance may be considered from two perspectives: what the law provides society and how the study of law benefits the individual.

"Justinian, Plato and Aristotle understood that law is essential to good governance and the preservation of social order. Aristotle said that the administration of justice, through law, is the principle of order in political society.

"Hobbes differed from Plato and Aristotle in his conception of the true authority of

the law as independent of justice. This was not to deny its importance. Law, he said, is 'the public conscience' by which a man undertakes to be guided."

Spaces within the building are organised as three identifiable stacks, or 'pillars', each with recognisable colour and detail: knowledge (library), learning (teaching) and inquiry (research).

The principal of architects BVN, Brian Donovan, said the re-imagined school of law and law library was tailored to meet the school's strategic objectives for the teaching research of law."

"Importantly, there is now an identifiable 'heart' of the school in the triple-height arrival volume, where circulation to the various parts of the school promote opportunities for interactions between staff, researchers, students and visitors," he said.

TC Beirne School of Law head and dean of law Professor Sarah Derrington said the new facilities reflected contemporary teaching practice and the fact that the legal workplace was much more collaborative than in the past.

"It is a delight to move back into the Forgan Smith building and be able to offer interactive research spaces, break-out rooms, independent study areas and innovative learning, research and academic facilities," she said.

Inspirational Women's Breakfast

An Inspirational Women's Breakfast to support Special Olympics Australia will be held in Brisbane on 10 May. The event, at the Pullman Hotel, will feature Brazilian Beauty CEO/founder Francesca Webster as guest

speaker and former Olympic swimmer Julie McDonald OAM as master of ceremonies. See specialolympics.com.au > Give > Fundraising events for details.

Caxton seeks volunteer employment lawyers

Caxton Legal Centre has been providing a free employment law advice service since 2010.

Until last year the service was completely unfunded, and only possible due to the generosity and enthusiasm of volunteers.

Caxton now receives limited government funding for casework in employment law, but it is nowhere near enough to meet demand and, as community legal centres approach a 30% cut in Commonwealth funding, it is tenuous.

Jobwatch Victoria is now helping in Queensland by providing access to its telephone advice service, but it is limited in scope (it is unable to provide practical assistance) and cannot replace quality face-to-face advice from experienced local practitioners.

The cornerstone of Caxton's employment law service is the employment law advice clinic. The clinic runs on Wednesday evenings and is staffed almost entirely by a dedicated team of volunteer lawyers, many of whom have maintained a commitment to the service over a number of years. Demand is incredibly high, so if more lawyers volunteer more

appointments can be made available and fewer clients are left unable to access legal advice when they need it.

Volunteer lawyers provide face-to-face advice, and assist in identifying cases that have merit and clients who need further assistance because of disadvantage. Volunteer employment lawyers come from a wide variety of backgrounds, including large and small firms, unions, legal counsel in the public and private sector, and human resources.

Volunteering is a positive experience for all involved as individual volunteers build networks, increase their knowledge and enjoy the camaraderie of providing services to less advantaged members of the community. Junior solicitors are encouraged, as anyone currently working as a solicitor is eligible to volunteer.

Under the Unfair Dismissal and General Protections Advocacy Scheme, private firms partner with Caxton to provide legal representation to Caxton clients in the Fair Work Commission. Clients are offered representation under the scheme after being identified through the advice service as having merit and need. Priority is given to those clients who would find

it difficult to represent themselves because of disadvantage.

Because of the high level of demand, clients must pass a means test in order to be eligible to access Caxton's employment law service (Caxton does not apply a means test for other areas of law). Clients must be earning less than \$67,000 a year (or have been earning less than \$67,000 a year).

Typically, Caxton's employment law clients are not members of a union, or are not eligible to receive assistance from their union. Priority is given to those seeking assistance in relation to dismissal, discrimination, harassment and bullying.

If you are interested in volunteering, please contact the volunteer coordinator at Caxton Legal Centre on 07 3214 6333 or email volunteers@caxton.org.au.

If you think your firm may be interested in participating in the Unfair Dismissal and General Protections Advocacy Scheme, please contact employment lawyer Tim Murray at Caxton Legal Centre on 07 3214 6333 for more information.



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- a determination is sought from the court in relation to LPP.

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A great view of advocacy



Land Court of Queensland President Fleur Kingham provided practical advice and invaluable insight into the judicial process and the art of advocacy at the first lecture of 2017 in the QLS Ethics Centre's Modern Advocate Lecture Series on 2 March.

Her presentation on 'Maximising your impact as an advocate: A view from the bench' was very well received by a capacity

audience representing both branches of the profession and is available as a PDF from qls.com.au > Ethics Centre > Modern Advocate Lecture Series > Modern Advocate Lectures Series 2017.

Lecture two in the 2017 series will be delivered by recently retired Court of Appeal President the Honourable Margaret McMurdo AC on Thursday 11 May at Law Society House.

Appointment of receiver for Dave McHenry & Associates, Lawyers, Gladstone

On 16 March 2017, the Executive Committee of the Council of the Queensland Law Society Incorporated (the Society) passed resolutions to appoint officers of the Society, jointly and severally, as the receiver for the law practice, Dave McHenry & Associates, Lawyers.

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

Enquiries should be directed to Sherry Brown or Glenn Forster at the Society on 07 3842 5888.

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Activist's granddaughter takes advocacy path

Growing up in a family that included Australia's most prominent Indigenous land rights activist, it is little wonder Hannah Duncan has set her sights on a career advocating for the rights of others.

The 21-year-old granddaughter of the late Eddie Mabo – who was instrumental in the landmark High Court decision that characterised Australia's law on native land and title – is well on her way to achieving her ultimate ambition after graduating from Bond University.

Hannah, who studied at Bond through an Indigenous scholarship, is a member of one of the largest cohorts of Indigenous students to graduate in a single semester, with 68 students currently completing their studies at the private Gold Coast university.

With a 96% Indigenous student retention rate, Bond University performs well above Australia's average national Indigenous retention rate of 71% and national non-Indigenous retention rate of 80.8%.

Hannah was an executive member and president of Bond's Student Society for



Indigenous Awareness, and has just completed a Bachelor of Laws. She is now embarking on her Graduate Diploma in Legal Practice, also at Bond.

She said she aspired to follow in her grandfather's footsteps and is already well on her way, beginning a placement at the Administrative Appeals Tribunal in Brisbane.

"I like the area of public law and the formation of the tribunal, with its ability to help people," Hannah said. "I feel that if I work in this area, I will be able to build my skills in dispute resolution methods, such

as negotiation and mediation, to be able to give back to the community.

"I'm excited and nervous to see what is ahead but I am confident that if I work hard I will get where I need to be, and achieve my ultimate goal of making a difference."

Pathways and partnerships Pro Vice-Chancellor Catherine O'Sullivan said Hannah had been a fantastic role model in the bid to 'close the gap' between the percentage of Indigenous and non-Indigenous Australians completing higher education.

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Why we oppose AML/CTF regulation for lawyers

On 7 February, the Law Council of Australia provided its 'Response to Consultation Paper: Legal practitioners and conveyancers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime' to the Commonwealth Attorney-General's Department.

Several members of Queensland Law Society worked tirelessly over many weeks with the Law Council and other state societies to draft this response. Also, in December 2016 and January 2017, QLS conducted a survey of law firms to assess likely implementation costs of an AML/CTF regime, akin to the existing Australian scheme, being extended to legal practitioners. The results of the survey added significant weight to the submission.

The submission made clear that extending AML regulation to lawyers would raise a range of concerns including:

- threatening the operation of the doctrine of client legal privilege
- eroding client confidentiality and the concept of independent legal advice because of the operation of suspicious matter reporting and information gathering under the notice requirements of the AML/CTF regime
- creating irreconcilable conflicts of interest whereby when a suspicious matter report was required to be lodged, it would require a legal practitioner to terminate the client retainer agreement for reasons that could not be disclosed to the client under pain of the legal practitioner committing an offence
- creating a chilling effect on the client's willingness to provide otherwise protected information openly and frankly, resulting in damage to the lawyer-client relationship which will impede the legitimate and efficient delivery of legal services
- changing the role of legal practitioners in the Australian system of justice from trusted advisor to that of informant to law enforcement
- imposing dual regulation on legal practitioners (as a matter of principle as well as practice)

- increasing compliance burdens and costs associated with operating a legal practice and providing legal services.

As to the last point, preliminary, headline results from the QLS survey indicated that set-up and annual compliance costs for the AML/CTF regime for legal practices would be:

- for larger firms around \$748,000 a year
- for medium-sized firms around \$523,000 a year
- for smaller firms around \$119,000 a year.

The submission referred to the system in the United Kingdom, where the extension of the scheme to lawyers made no difference in preventing money laundering and terrorism financing but had several effects on the profession. It also looked at the scheme in Canada, which was performing well without the inclusion of the legal profession.

The submission firmly advocated that legal practitioners in Australia should not be made subject to the regulatory requirements of the AML/CTF regime.

The Society will keep members updated on the Government's response and any further developments in this area.

Recent advocacy – February and March

The beginning of the year has been a busy time for the advocacy team, having finalised 25 submissions since the beginning of February 2017:

QLS made submissions and appeared before the parliamentary Legal Affairs and Community Safety Committee on the Bail (Domestic Violence) Amendment Bill 2017. Notably, we supported the proposal to introduce a new system to alert the victim of a relevant domestic violence offence when the defendant applies for bail, is released on bail, or receives a variation to a bail condition. However, we did not support the reversal of the presumption of bail for an alleged offender charged with a relevant domestic violence offence. We raised the point that bail in domestic violence matters is already subject to quite significant scrutiny and that courts have the opportunity to refuse bail under section 16 of the *Bail Act 1980*. Further, reversing the onus of proof for bail in domestic violence matters does not take into account the complex and challenging social relationships that society is attempting to

'manage' through the justice system.

We also did not support the proposal to stay bail decisions, which would permit an alleged offender to be detained for up to three days, with one concern being that alleged offenders would be kept in watch-houses, which are not designed to hold people for such lengthy periods of time.

QLS was consulted by the Queensland Family & Child Commission on options for reform of the blue card system. An options paper has been released for public comment and can be accessed at qfcc.qld.gov.au. QLS raised with the commission the concern that some proposed options will likely have implications for legal practitioners in Queensland.

The QLS Mining and Resources Law Committee also assisted the advocacy team in making a submission to the parliamentary Infrastructure, Planning and Natural Resources Committee on the Strong and Sustainable Resources Communities Bill 2016. We were predominantly concerned with aspects of the Bill that would create inherent difficulties in its interpretation and application by government and industry, as well as aspects which did not align with fundamental principles of legislative drafting. QLS was invited to appear before the parliamentary committee at the public hearing on the Bill and discussed issues including amendments to the *Anti-Discrimination Act 1991* (Qld), particularly the language of 'discrimination' in the context of proposed section 131C, the unreliability caused by retrospective legislation, and the impact on investment opportunities in Queensland from enabling the Coordinator-General broad powers to state conditions, without providing further clarity as to how these powers would be restricted. QLS was pleased to see that several aspects of our submission were subsequently quoted in the committee's report.

QLS also contributed to the Queensland Government's ongoing review of property law in Queensland being undertaken by QUT's Commercial and Property Law Research Centre. Submissions related to the review of the *Property Law Act 1974* and the final recommendations for proposed changes to lot entitlements under the *Body Corporate and Community Management Act 1997*.

Article prepared by QLS policy solicitor Kate Brodrik with the assistance of advocacy team member Hayley Grossberg.

Careers prepared for take-off

Almost 500 students made the most of the many opportunities presented at this year's QLS Legal Careers Expo, held at the Brisbane Exhibition and Convention Centre on 1 March. With 37 exhibitors representing all sectors of the legal industry, attendees were keen to sound out possible employment openings. They also took advantage of the extremely popular Résumé Rescue service, which saw HR experts provide job-winning advice. Sessions on 'Avoiding application disasters', 'Expanding your legal career horizons' and 'Managing expectations' were also well attended.



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Another great Symposium

More than 600 delegates, presenters and sponsors came together on 17-18 March for another great QLS Symposium. Highlights of this year's event included addresses by Chief Justice Catherine Holmes, Attorney-General Yvette D'Ath and plenary speakers Holly Ransom and Gihan Perera.

Also popular were the QLS Knowledge Café, where experts dispensed advice in short interactions with delegates, and Law on the Lawn, where presenters made themselves available for one-on-one chats. Symposium by Night also drew a crowd, providing a relaxing and collegiate end to the first day.

And practitioners breathed a sigh of relief when the negative side came out on top in the Symposium debate, 'In the future there will be no need for lawyers'.



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Toward better justice for children

New committee and practice directions



Many criminal lawyers will have little contact with the Childrens Court.

The experience of judges and magistrates in this court is that many practitioners are unaware of the ways in which children are treated differently from adults in the criminal justice system. This article is the first in a series examining the Childrens Court and the youth justice system as a whole.

In mid-2016, Judge Shanahan, as President of the Childrens Court, established the Childrens Court Committee. The purpose of the committee is to establish a new case management process for Childrens Court criminal matters, supported by any necessary practice directions.

The committee is also investigating legislative, policy and practice issues that can strengthen the present youth justice system. This includes providing feedback to government from those practising in the area about potential reforms to the system.

The committee is chaired by the President of the Childrens Court and its members represent stakeholders in the youth justice system such as:

- Deputy Chief Magistrate O'Shea
- Queensland Law Society
- Office of the Director of Public Prosecutions (Queensland)
- Legal Aid Queensland
- Bar Association of Queensland
- Aboriginal and Torres Strait Islander Legal Service
- community legal centres
- Queensland Police Service
- Youth Justice Services
- Department of Justice and Attorney-General
- Child Safety Services.

The committee is considering ways to improve the effectiveness of Queensland's youth justice system by addressing delays

and reducing both the numbers of young people on remand and the lengths of remand periods.

This has culminated in the production of two new practice directions intended to improve the efficiency of the court and to reduce the time taken to finalise children's criminal cases.

Childrens Court Practice Direction 1 of 2017 applies to sentence proceedings in the Childrens Court constituted by a judge (the Childrens Court of Queensland). It is aimed at speeding up the sentencing of children who are pleading guilty. It requires practitioners to identify pleas of guilty as a matter of priority.

In matters in which a pre-sentence report is likely to be ordered, practitioners must liaise with the DPP and the court to organise an arraignment at the earliest opportunity so that the report can be ordered. Children who are remanded in custody should be arraigned by video link, if appropriate.

Positive steps to advance Queensland's youth justice system include improvements to Childrens Court processes and the establishment of a proactive committee. **James Benjamin** introduces the change process in the first of a series of articles.

Practitioners in areas visited by circuit courts must arrange for arraignments to take place by video link, if appropriate, to the nearest court with a resident Childrens Court judge well in advance of any circuit. This is so that pre-sentence reports can be prepared in time for the next visit by a circuit judge to avoid having children wait, sometimes for many months, between arraignment and sentence.

Childrens Court Practice Direction 2 of 2017 applies to all criminal matters in the Childrens Court constituted by a magistrate. Its purpose is to introduce a case conferencing process for Childrens Court matters similar to the process that already exists in the Magistrates Court pursuant to Practice Direction 9 of 2010.

Case conferencing must take place prior to the summary or committal callover. It will generally take place on the basis of the contents of the QP9 court brief, but copies of statements or exhibits may be requested. When this occurs, the documents must be delivered within 14 days, when reasonably practicable.

The practice directions also set out procedures to be followed after a case

conference has been completed. There are different procedures depending on whether the matter is to be heard summarily or committed to a higher court.

For summary matters, the prosecution and defence must advise the court of the outcome of the conference and the defendant must enter a plea. If the defendant pleads guilty, the court may proceed directly to sentence or adjourn the sentence to a later date if there is a good reason for doing so. If the defendant pleads not guilty, the matter is adjourned for at least seven weeks for trial and a brief of evidence must be made available by no later than two weeks prior to trial.

If the matter is to be committed, the prosecution and defence must advise the court of the result of the case conference and of the decision to proceed as a committal. The defence may also advise if the matter is to be committed for sentence. If this is the case, the matter is to be adjourned for four weeks. This is to allow two weeks for a partial brief of evidence to be prepared by the prosecution and a further two weeks for the defence to give notice of

intention to proceed by registry committal as required by s114 of the *Justices Act 1886*.

If the matter is not to be committed for sentence, it is adjourned for at least seven weeks, allowing five weeks for the prosecution to deliver a full brief of evidence. Following this adjournment the defence must decide whether to make an application to cross-examine any witnesses at the committal. If an application is going to be made, the practice direction sets out the procedure for the relevant correspondence between the parties and the hearing and deciding of the application.

These two practice directions mark the beginning an ongoing process of improvement of the youth justice system. The committee will continue to meet monthly to tackle a list of issues facing Queensland's youth justice system. The committee's goal is to improve the way the system deals with young offenders so that they are dealt with in a timely and appropriate manner.

James Benjamin is a Brisbane barrister and the Bar Association of Queensland representative on the Childrens Court Committee.

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How binding are standard terms?

Protections extended to small business

Recent amendments to the Australian Consumer Law extend protection against unfair standard terms from just consumers to small businesses, impacting both the drafting and litigation of many traditionally one-sided contracts such as leases, licences and credit agreements. Report by **Rob Ivessa**.



On April Fools' Day in 2010 a popular online software retailer changed its end-user licence agreement (EULA) to grant it "an option to claim for now and forever more", the "immortal souls" of users who accepted the agreement that day.

Some 7500 users accepted the EULA on that day.

It's a funny illustration of a serious question: in what circumstances are standard terms binding (incorporated into contract or otherwise)?

Whether standard terms are binding depends on:

1. whether at common law the standard terms are incorporated into a contract or agreed to, and
2. if so, whether that position is altered by a statutory protection.

Are the terms incorporated into the agreement at common law?

Whether or not standard terms are incorporated into a contract at common law depends on the mode of agreement to the terms. In very broad terms:

1. If the terms are agreed by signature then the general rule is that they are incorporated (and thus binding) unless there is misrepresentation or a non est factum mistake.¹
2. If the terms are agreed by clicking a button to indicate a formal acceptance then the position is probably as above.²

3. If the terms are otherwise said to be agreed (for example, by conduct) then:
 - a. if the terms are notified or given to the customer prior to formation of the contract and they are the usual type of terms to be expected by customers they will be incorporated into the contract and binding³
 - b. if the terms are notified or given to the customer prior to formation of the contract but they are unusual-type terms not to be expected by customers they will only be incorporated into the contract and binding if the author of the conditions has taken reasonable steps to draw recipients' attention specifically to the unusual conditions⁴
 - c. if the terms are not notified or given to the customer prior to formation of the contract they will not generally be binding.⁵

ACL unfair contract provision

Notwithstanding that a set of standard conditions may be binding at common law, one or more of the terms may be statutorily void in certain circumstances if they are unfair.

Section 23 of the Australian Consumer Law (ACL) allows individuals and (from 12 November 2016) small businesses to void a term in a contract if:

1. the contract is a consumer contract⁶ or small business contract⁷
2. the contract is a standard form contract, and
3. the term is unfair.

Section 23 applies to small business contracts entered into from 12 November 2016 and terms to pre-existing contracts that are varied from 12 November 2016 (but not the remaining unamended terms). Also, curiously, the protection extends to both parties to a small business contract (so, for example, it is possible for a large company to utilise s23 against a small business).

By s26(1) of the ACL, terms are not unfair if they:

- a. define the main subject matter of the contract (for example, the duration of the contract or the nature of the product or service being supplied)
- b. set the upfront price payable under the contract, or
- c. are expressly permitted by law (for example, a term excluding statutory warranties for recreational services).⁸

The ACL does not define 'standard form contracts' but provides, in s27(2), a list of factors that a court must take into account in determining the question of fact. In essence they are contracts in which there is an inequality of bargaining power and the general terms are provided by one party to another on a 'take it or leave it' basis. If an individual alleges that a contract is in standard form, it is rebuttably presumed that this is the case.

'Unfair' terms are defined in s24(1) of the ACL as being standard form terms that:

- a. cause a significant imbalance of the parties, rights and obligations
- b. are not reasonably necessary to protect the interests of the stronger party, and
- c. would cause a detriment to the weaker party if enforced.



A determination of whether a term would cause a significant imbalance must take into account not only the term in question but the rights of the parties under the contract as a whole to see if other clauses in the contract counter-balance the impugned clause.⁹

In *ACCC v Chrisco Hampers Australia Ltd*¹⁰ the parties and the court accepted the comments of Lord Bingham in *Director General of Fair Trading v First National Bank Plc*¹¹ as being the appropriate test for the first element of s23 ACL:

“The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. This may be the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty.”

In *ACCC v Chrisco*, the contract provided for customers to sign up for a direct debit, gradually paying off a hamper which they would receive at Christmas. The court held that a clause, which automatically rolled over customers’ direct debit payments after that year’s hamper was fully paid off to a hamper in the following year unless a fine print opt-out box was ticked, caused a significant imbalance and was ultimately unfair.

It is rebuttably presumed¹² that a term is not reasonably necessary for the purposes of s24(1)(b).

In determining if a term is unfair, the courts may take into account¹³ how transparent the impugned term is to the individual (in the context of the whole of the contract).

Section 25 of the ACL provides a list of 14 examples of unfair clauses.

The explanatory memorandum to the ACL Bill¹⁴ explains that the 14 examples fall into four categories:

1. terms that allow a party to make changes to key elements of a contract, including terminating it, on a unilateral basis
2. terms that have the effect of limiting the rights of the party to whom the contract is presented
3. terms that penalise one party for a breach or termination of the contract (reflecting the common law concept of penalties), and
4. terms that allow for a party to assign the contract to the detriment of the other party, without that party’s consent.

The remedy open if a contractual term is unfair is a declaration pursuant to s250 ACL that the term is void. The rest of the contract remains in force if it is capable of doing so.

Damages under s236 ACL and orders under s237 ACL are not open, as creating a contract that contains unfair terms is not, of itself, conduct that contravenes the ACL.¹⁵

Mirror protection: Financial products and services

Section 131A(1) of the *Competition and Consumer Act 2010* provides that the ACL does not apply to the supply of financial products and financial services.

In the case of contracts for financial products and services, s12BF of the *Australian Securities and Investments Commission Act 2001* provides similar protection to that granted by s23 of the ACL.

Notes

- ¹ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [55].
- ² *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450 at [49].
- ³ *Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd* [1998] 4 VR 559 per Ormiston JA at 561 and per Buchanan JA at 568; *Surfstone Pty Ltd v Morgan Consulting Engineers Pty Ltd* [2015] QSC 290 at [70].
- ⁴ *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163 at 170 per Denning MR.
- ⁵ Unless there is a variation to the contract or a waiver or estoppel argument for the author of the conditions; see *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450 at [52].
- ⁶ A supply of goods, services or an interest in land to an individual acquiring for personal, household or domestic use.
- ⁷ A supply of goods, services or an interest in land in which one party is a business who employs less than 20 people and the upfront price is not greater than either \$300,000, or if the contract runs over more than 12 months, \$1,000,000.
- ⁸ Expressly permitted by s139A of the *Competition and Consumer Act 2010*.
- ⁹ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at [127] – a Victorian Supreme Court single-judge appeal from a decision of VCAT made under similar Victorian unfair contract legislation.
- ¹⁰ [2015] FCA 1204 at [47].
- ¹¹ [2001] UKHL 52 ; [2002] 1 AC 481, 481 [17].
- ¹² By s24(4) ACL.
- ¹³ Pursuant to s24(2) ACL.
- ¹⁴ Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010 (Cth) [5.49]–[5.57].
- ¹⁵ *Ferne & Ors v Kimberley Discovery Cruises Pty Ltd* [2015] FCCA 2384 at [118] (in obiter).

Rob Ivessa is a barrister at North Quarter Lane Chambers, Brisbane.
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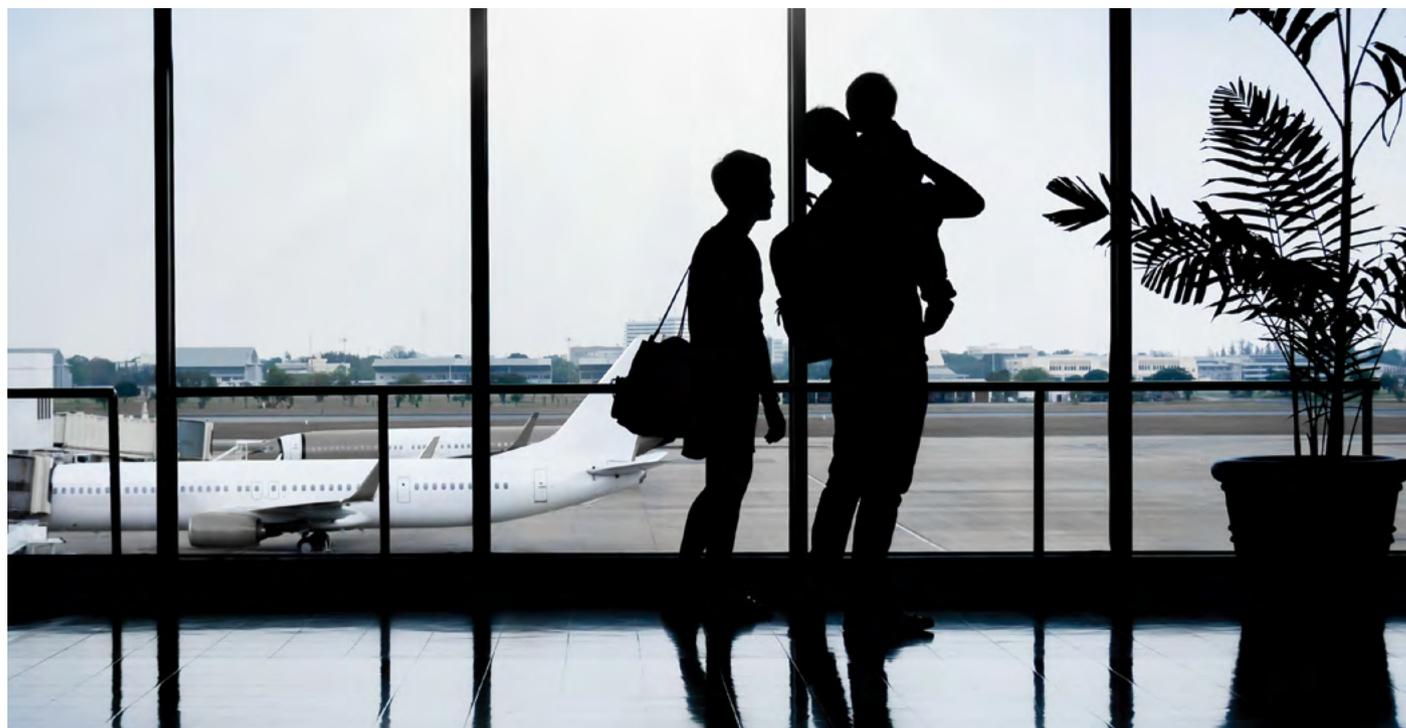
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Family Court recognises parents under US surrogacy order

Re Halvard [2016] FamCA 1051



For the first time, the Family Court of Australia has ordered the registration of a pre-birth surrogacy order made in the United States, resulting in the genetic parents being recognised as the lawful parents of the child in both the US and Australia.

It is possible to register overseas child orders in the Family Court, the Family Court of Western Australia or a state or territory Supreme Court under s70G of the *Family Law Act 1975*. One effect of registration is that the overseas order can be enforced here.

In *Re Halvard* [2016] FamCA 1051, the intended parents, Mr Halvard and Ms Fyodor, were the genetic parents of a child, X, who had been born via a surrogacy arrangement in Tennessee. Mr Halvard was an Australian citizen, Ms Fyodor an American citizen. They lived in the United States. The child X had obtained Australian citizenship.

An order made in Tennessee, made when the surrogate was 30-32 weeks pregnant declared that when X was born, Mr Halvard and Ms Fyodor were the parents and that they had custody of X.

Mr Halvard and Ms Fyodor sought to have the Tennessee order registered with the Family Court. Justice Forrest said:¹ “They want this, it is said, as they intend to travel with the child to Australia from time to time to visit members of Mr Halvard’s family who live there. They say they have also not ruled out moving to Australia to live as a family in the future. They seek to have the Orders registered so that their parent-child relationship with the child X is as lawfully recognised in Australia as it is in the USA.”

To be able to register the order under s70G of the *Family Law Act* and reg. 23 of the *Family Law Regulations 1984*, they had to show that:

1. The pre-birth order was an *overseas child order* within the definition of s4 of the *Family Law Act*.

2. A certified copy of the order and a certificate of currency were provided.
3. Reasonable grounds for believing that either of the parties or the child were ordinarily resident in, present in, or proceeding to, Australia.
4. The order was made in a *prescribed overseas jurisdiction*, as set out in schedule 1A of the *Family Law Regulations*.
5. The judge in the exercise of discretion ought to register the order.

The second attempt to register

The parents had previously sought to register the order through the Commonwealth Attorney-General’s Department, which sent the documents to a registrar of the court. The registrar, despite the regulations saying that the registrar *shall* register, declined to do so, and gave reasons. Instead of seeking a review, the intended parents instead applied direct to the court to register the order.



A recent Family Court decision has implications in the areas of surrogacy law, family law and succession law. Report by **Stephen Page**.

Step 1: Was the order an overseas child order?

The question that his Honour stated was most apt in the case was:²

“However expressed, does [the Tennessee order] have the effect of determining the person or persons with whom a child who is under 18 is to live or as to which person or persons are to have custody of a child who is under 18?”

Forrest J said³ that eight paragraphs of a preamble to the order “make it absolutely clear to which individual child the actual orders apply”, namely X. The orders provided that Mr Halvard and Ms Fyodor were to be shown on the birth certificate and that they had all parental rights and responsibilities pertaining to the child, including the right to legal and physical custody of the child and the right to make health-care decisions for the child.

His Honour said⁴ that he did “not consider the fact that the child was yet about two months from birth at the time the Tennessee Court’s Orders were made makes the Orders any less an ‘overseas child order’ within the meaning of that term, than if the Orders had been made two months after his birth”.

In doing so, Forrest J followed a decision of Ryan J in *Carlton and Bissett* [2013] FamCA 143, in which her Honour came to the same conclusion concerning an order made in South Africa before the birth of twins through surrogacy there.

Step 2: Certified copy of order and certificate of currency

Each of these was complied with.

Step 3: Proceeding to Australia

The parties and child were not resident or present in Australia. Forrest J concluded that they were *proceeding to* Australia – as that phrase meant coming to or travelling to Australia, whether that be for a visit or to live here.

Mr Halvard’s evidence was that:

1. He was an Australian citizen.
2. He had years of being ordinarily resident in Australia prior to going to the US, to further his career and meeting and marrying an American citizen.

3. Members of his family still resided in Australia.
4. X was a dual US/Australian citizen.
5. They intended to visit Australia from time to time when X was a little older.

Step 4: Prescribed overseas jurisdiction

Forrest J determined that Tennessee was prescribed in schedule 1A of the *Family Law Regulations*.

Step 5: Exercise of discretion

Forrest J held that it was proper to register the order when:

1. The Full Court of the Family Court had not listed any criteria for registration.
2. Contrary to the views of the intended parents’ solicitor, the arrangement was not a commercial surrogacy arrangement within the meaning of the *Surrogacy Act 2010* (Qld) or *Surrogacy Act 2010* (NSW). It was while generous, not commercial, and not a commercial arrangement masked as an altruistic one, and “whilst an overseas child order that came into existence as a consequence of a commercial surrogacy agreement might have difficulty attracting a favourable exercise of the discretion to register it in this Court for public policy reasons, I do not consider that applies in this matter”.⁵
3. The Tennessee order was the same type as those made under the *Surrogacy Act 2010* (Qld) and *Surrogacy Act 2010* (NSW).
4. The fact that the order under Tennessee (and South African) law could be made *before* the birth of the child but in Queensland and New South Wales can only be made *after* “is of little apparent consequence and is not, in my judgment, good reason for refusing to register the Tennessee Court’s Order in this Court”.⁶
5. Because the applicants were not seeking parenting orders, then the onerous requirements of Division 4.2.8 of the *Family Law Rules* (which require evidence from the surrogate, about the law overseas, and consideration of the appointment of an independent children’s lawyer and the obtaining of a family report) were not applicable. His Honour noted:

“The gestational carrier was a party to the proceedings in the Tennessee Court, along with both the applicants. That Court, by its Order and the preamble to its Order, was clearly satisfied that the applicants should have all parental rights, responsibilities and obligations relating to the child then being carried by the gestational carrier transferred or conferred upon them. The evidence put before that Court in support of that application clearly satisfied the Court that the Order it made was the appropriate one to make.”⁷

6. The applicants were the biological and, since the order of the Tennessee Court, the *de jure* parents of X. He lived in their day-to-day care.
7. There was no reason why they should not be entitled to the registration of the Tennessee Court’s order in the Family Court so that their parent-child relationship with the child was recognised and recognised appropriately in Australia.

Implications for practice

The making of a surrogacy order has been described by an English court⁸ as transformative in the life of a child, because it forever changes the legal relationship between parent and child.

The effect of *Re Halvard* is that transformative effect for those Australians who have undertaken surrogacy in the US can be recognised here too. That is good news for children, and another matter for succession lawyers to add to their checklists in the preparation of wills.

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Image credit: ©iStock.com/ViewApart

Notes

¹ [7].

² [14].

³ [15].

⁴ [18].

⁵ [35].

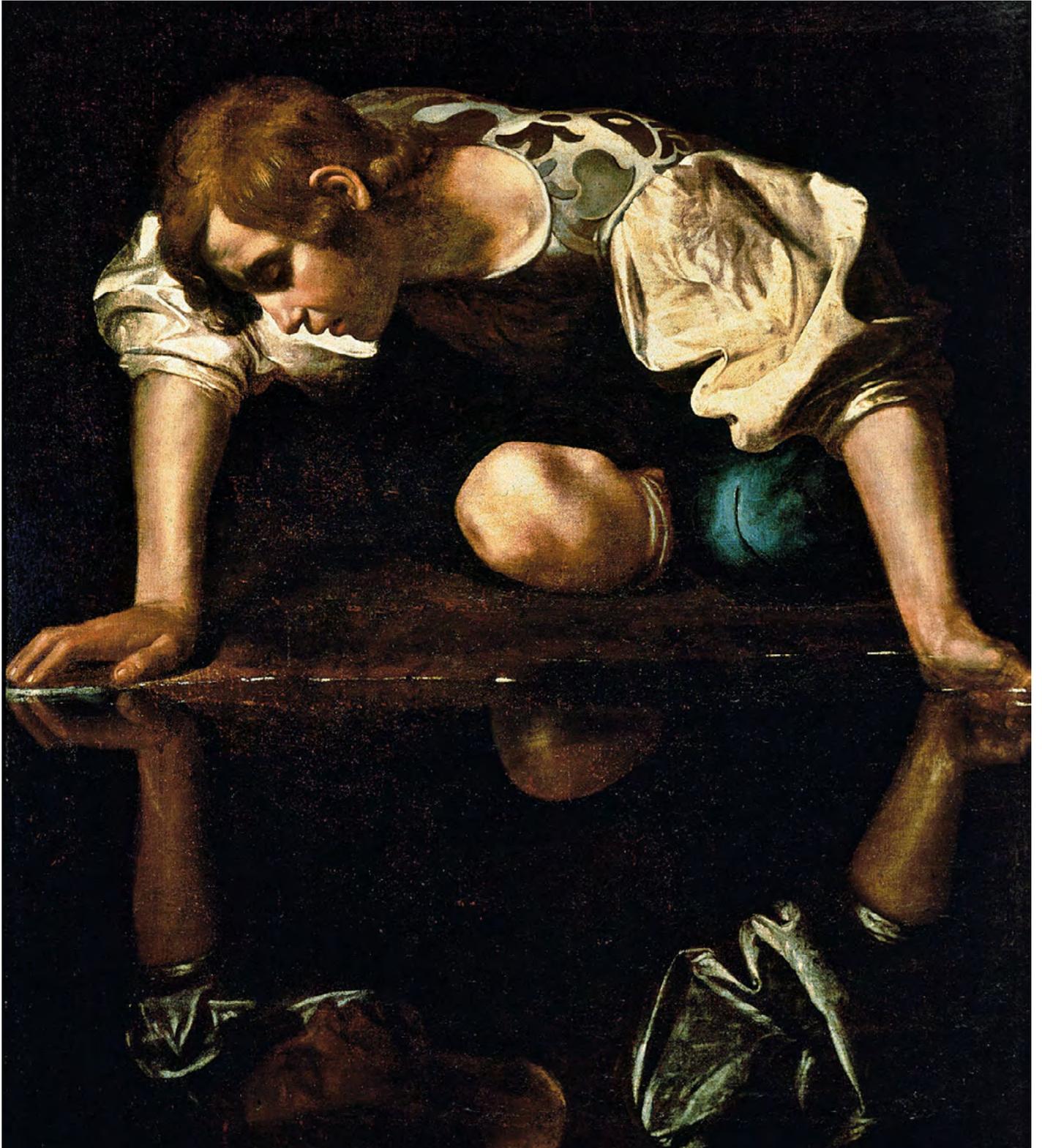
⁶ [37].

⁷ [40].

⁸ *Re X (A Child)(Surrogacy: Time limit)* [2014] EWHC 3135 (Fam), [54].

Reflections in a legal mirror

The pitfalls of self-dealing





by Bryan Mitchell

There was once a young man by the name of Narcissus.

Upon seeing his own reflection in the waters of a spring, he fell deeply in love with himself. So taken by this new found self-love, he lost the will to live. Well, so legend has it.¹

We may find it a bit odd that Narcissus should engage in this love affair with himself, but it would seem no one could stop him. At least the present law would prevent Narcissus from entering into a valid contract with himself.²

As we will see below, the rule against self-dealing not only affects the ability of a sole practitioner who is appointed as sole executor of an estate to enter into a valid costs agreement with themselves, but it also affects the various legal structures and arrangements that solicitors may have cause to review.

Leximed v Morgan

The Queensland Supreme Court decision of *Leximed Pty Ltd v Morgan* [2015] QSC 318 (*Leximed*), essentially involved a disagreement between two medical practitioners, Dr Morgan and Dr McCosker, concerning a business involving the provision of medico-legal reports.

The legal structure was not an uncommon one. Firstly, a company was incorporated by the name of Leximed Pty Ltd. Both medical practitioners were the shareholders and directors of that company. The next step was the settlement of a trust for Dr McCosker known as the McCosker Trust with Leximed Pty Ltd as the trustee. Also, another trust was settled, for Dr Morgan, known as the Medicolegal Trust and Leximed Pty Ltd once again the trustee for that trust.

The next step taken was the execution of a document described as a “partnership agreement” between Leximed Pty Ltd as trustee for the McCosker Trust and Leximed Pty Ltd as trustee for the Medicolegal Trust.

The legal proceedings involved the attempted enforcement of the “partnership agreement”.

Philip McMurdo J pointed out that a purported partnership agreement between the company Leximed Pty Ltd as trustee of one trust as one party and Leximed Pty Ltd as trustee of another trust as the other party, was no contract at all.³ More plainly his Honour said:⁴

“At common law, there must be at least two parties to a contract.”

Therefore, the attempt to enforce the “partnership agreement” failed.

New law?

The result in *Leximed* should not surprise us, as it appears to be an expression of well settled law in Queensland.

Two years prior to *Leximed*, Justice Alan Wilson (as he then was in his capacity as the president of the Queensland Civil and Administrative Tribunal), observed in the case of *LSC v Paul Ernest Bone* that:⁵

“There are added difficulties with the costs agreements. First, they purport to be between Mr Bone and himself, as executor on the one hand and estate solicitor on the other, when it is *trite law* that a person may not enter into a contract with themselves. They were, then, always void and no enforceable obligations could arise under them, and Mr Bone could not have acted in breach.”*[emphasis added]*

The following cases were referred to in support of this observation of the “trite law”:

- a. *Browne v Commissioner of State Revenue* [2002] QCA 388
- b. *Re Christie* [2004] AATA 1396.

***Browne v Commissioner of State Revenue* [2002] QCA 388**

This was effectively a case concerning a contract between A on one part and A with others on the other part. It involved stamp duty related to the sale of two pharmacy businesses. The sale price was \$3 million, and one of the sellers was also one of the buyers.

Chief Justice de Jersey (as he then was) said:⁶

“At common law, one may not effectively contract with oneself (cf. *Rye v Rye* [1962] AC 496, 510).”

His Honour pointed out that section 50 of the *Property Law Act 1974* (Qld) moderates the common law and causes to be valid a contract between A on one part and A with one or more others on the other part.

Section 50 of the *Property Law Act 1974* provides:

“50 Covenants and agreements entered into by a person with himself or herself and another or others

(1) Any covenant, whether express or implied, or agreement entered into by a person with the person and 1 or more other persons shall be construed and be capable of being

enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.

(2) This section applies to covenants or agreements entered into before or after commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to the person and 1 or more other persons, but without prejudice to any order of the court made before such commencement.”

It should be noted that section 50 does not adjust the law when it comes to a purported contract between A and A.

***Re Christie* [2004] AATA 1396**

This is a case of a contract between A & B as trustees on one part and A & B on the other part.

David and Kay Christie were both trustees of the Moreton Bay Trading Company. They also both worked in the business and derived wages. The Commissioner of Taxation argued that David and Kay were employees and so, in their capacity as trustees, were liable to pay the superannuation guarantee contribution.

In the case of a trust, the court said:

“A trust is not a legal person. A trust is a creature of equity. It is a relationship in which a person holding an interest in property or funds (the trustee) assumes obligations to manage or apply the property or funds for the benefit of others (the beneficiaries) or for a specific purpose: see, for example, *Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1997] QCA 225 per Davies JA.”

And at paragraph 25:

“A person – including a trustee – may fulfil a variety of responsibilities but he or she ordinarily has one legal personality. That means that a trustee cannot contract with himself. (*Williams v Scott* [1900] AC 499 at 501; see also *Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1997] QCA 224 per Davies JA). It stands to reason that a trustee cannot therefore employ himself, since that would require him to enter into a contract of service with himself.”

None the less, the court held that despite the common law position, due to the operation of section 50 of the *Property Law Act 1974* (Qld), there was a valid contract of employment and thus the superannuation guarantee was required to be paid.⁸

Trustee disposing to self compared with contracting with self

A trustee may not dispose of an interest in trust property to herself at common law unless the trust deed expressly permits it.⁹ So, although a trustee may dispose of an interest in property to themselves (if permitted by the trust deed) as the trustee at common law cannot contract with themselves, it would be impossible for a trustee to enter into, say, a lease.¹⁰

Authority in a trust deed permitting the trustee to contract with themselves has no legal consequence.¹¹

Anomalies in the law

The above described law, as affirmed twice by the Queensland Court of Appeal¹² and more recently in *Leximed*,¹³ appears to be well settled law in Queensland, but there have been some anomalies in the law beyond the state borders.

Senior member McCabe in the case of *Re Christie*¹⁴ took stock of the inconsistencies in law,¹⁵ as did McMurdo J in *Leximed*, and noted they were in error at law.¹⁶

We will now look at some of these inconsistent decisions.

Rowley, Holmes & Co v Barber [1977] 1 WLR 371

This is an English case in which an employee of a solicitor became the personal representative of his employer at the time of the solicitor's death. Weight was given to *Halsbury's Laws of England*, 4th ed., vol.9, 1974 at 81, which stated:¹⁷

"Where a person has different capacities, he may have power to contract in his representative capacity with himself as an individual."

Therefore in that case it was held:¹⁸

"...the office of personal representative or administrator here could... give to the applicant sufficient separate legal personality to enable him to make an arrangement, an agreement, a contract, with himself in a different capacity."

Warner v KJ Warner as Trustee of R&K Warner Family Trust [2000] NSWCC 41

This was claim for workers' compensation by Robert Warner.

The matter for determination was whether the applicant, as a trustee of the R&K Warner Family Trust (the trust), could enter into a valid contract of employment with the trust.¹⁹

At the material time, the trustees of the trust were the applicant and his wife. It was held that at common law there was a contract.

New South Wales has an equivalent provision to Queensland's section 50 *Property Law Act 1974*, being s72 of the *Conveyancing Act 1919* (NSW).

No reference was made in the case to section 72 of the *Conveyancing Act 1919* (NSW), which

would have caused the court to come to same conclusion, but for correct reasons at law.

AM Reberger & RG Reberger as Trustees of the Reberger Family Trust v Reberger [2012] NSWCCPD 16

This is another workers' compensation matter. Rodney Reberger argued he incurred an injury while employed by a particular trust.

When Rodney commenced "working for" the trust he was a trustee and his father was the other trustee. Prior to the time of the injury in question, Rodney's father had purportedly resigned as trustee leaving Rodney as sole trustee.

There was insufficient evidence to support the resignation of Rodney's father as co-trustee and it appeared he continued to be a trustee. Deputy president Kevin O'Grady found that, even at common law, there would be a contract because Mr Reberger as trustee was in a different capacity.²⁰ Deputy president O'Grady found there would be a contract in any event, in pursuance of section 72 of the *Conveyancing Act 1919* (NSW).

Sole practitioner/sole executor

The Queensland Civil and Administrative Tribunal decision in *LSC v Paul Ernest Bone* (referred to above) concerned the appointment of Mr Bone as executor under the will of one of his clients. Mr Bone was a sole practitioner. His firm was not incorporated and nor was he in partnership with any other person.

Unfortunately, there was no evidence that Mr Bone's firm had provided the necessary written warning under *Australian Solicitors Conduct Rules* rule 12.4 to his client prior to his client signing a will under which Mr Bone was appointed as executor. This was one of the reasons Mr Bone was before the tribunal.

The tribunal then turned its attention to various memoranda of accounts rendered by Mr Bone pursuant to a purported costs agreement. The tribunal did not examine whether Mr Bone in his dual capacities could provide a valid notice to himself in compliance with section 308 of the *Legal Profession Act 2007* (Qld). In a sense, nothing turned on whether the disclosure notice under section 308 was valid or not because the purported costs agreement entered into pursuant to such notice between Mr Bone as solicitor and Mr Bone as executor was held to be void.

If Mr Bone was one of two or more other executors then section 50 of the *Property Law Act* would have caused the *Costs Agreement* to be valid. Though, there still would have remained the breach under rule 12.4.

Further, if Mr Bone's legal practice had been incorporated, the costs agreement once again would have been valid.

The purpose of this article is not to suggest that a sole practitioner who is appointed

as sole executor cannot charge for legal work. Instead of the legal charges being in pursuance of a purported costs agreement, they will first need to be assessed (see section 319 *Legal Profession Act 2007*). The various difficulties associated with the assessment of such costs are outside the scope of this paper.

Conclusion

The law is that A cannot enter into a contract with A, even where A may have different capacities.²¹ This remains the law in Queensland²² and is more likely the law in Australia more generally, despite some lower court decision to the contrary in New South Wales.²³

Regrettably for Narcissus, it would still not be possible for him to enter in a contract with himself, even if he were to argue one party looks into the pool while the other is a beautiful reflection.

This article appears courtesy of the Queensland Law Society Succession Law Committee. Bryan Mitchell is the principal of Mitchell Solicitors, a QLS accredited specialist (succession law) and a member of the committee. *Image: Narcissus by Caravaggio*

Notes

- 1 Encyclopaedia Britannica, britannica.com, accessed 27 January 2017.
- 2 *Leximed Pty Ltd v Morgan* [2015] QSC 318.
- 3 *Ibid* [92].
- 4 *Ibid* [21].
- 5 *LSC v Bone* QCAT OCR213-12, 16 October 2013 at [69].
- 6 *Browne & Jeon v Commissioner of State Revenue* [2002] QCA 388 at [11].
- 7 *David Christie as Trustee for the Moreton Bay Trading Company v Commissioner of Taxation* [2004] AATA 1396; (2004) 58 ATR 1142; 2005 ATC 2009 (24 December 2004).
- 8 *Ibid* [45].
- 9 *The Law of Trusts Online*, Thomson Reuters, at paragraph 1.6110 accessed 2 June 2016.
- 10 *Ibid*.
- 11 *Ibid* at paragraph 1.6250.
- 12 *Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1997] QCA 225 and *Browne & Jeon v Commissioner of State Revenue* [2002] QCA 388.
- 13 *Leximed Pty Ltd v Morgan* [2015] QSC 318.
- 14 *David Christie as Trustee for the Moreton Bay Trading Company v Commissioner of Taxation* [2004] AATA 1396; (2004) 58 ATR 1142; 2005 ATC 2009 (24 December 2004).
- 15 *Ibid* at [26-36].
- 16 *Leximed Pty Ltd v Morgan* [2015] QSC 318 at [33].
- 17 *Ibid* [26].
- 18 *Ibid* [27].
- 19 *Warner v KJ Warner as Trustee of R&K Warner Family Trust* [2000] NSWCC 41; (2000) 20 NSWCCR 307 (6 July 2000) at [2].
- 20 *Ibid* at [80].
- 21 *Rye v Rye* [1962] AC 496, 510.
- 22 *Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1997] QCA 225 and *Browne & Jeon v Commissioner of State Revenue* [2002] QCA 388 and *Leximed Pty Ltd v Morgan* [2015] QSC 318.
- 23 *Warner v KJ Warner as Trustee of R&K Warner Family Trust* [2000] NSWCC 41; (2000) 20 NSWCCR 307 (6 July 2000) and *AM Reberger & RG Reberger as Trustees of the Reberger Family Trust v Reberger* [2012] NSWCCPD 16.

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Is pragmatism the answer for copyright reform?

Reflecting on experiences from a university library

In a time of activist cupcake baking¹ and the distraction of monkey selfies,² not to mention the extensive review and reporting on copyright and related matters undertaken over the past 20 years,³ legislative change for copyright looks to be at risk of raising more than a few eyebrows.

Existential questions abound – fair use or fair dealing? Statutory or commercial licences? In the meantime, we muddle along in the daily operation of the legislation we have.

Is it possible, when some of these questions are looked at through the lens of pragmatism, that our *Copyright Act 1968* does not fall quite so short as expected? Reflecting on experiences from a university library may assist in understanding.

University libraries

Under our copyright legislation, university libraries are relatively complex entities, having a duality of purpose as both an 'educational institution' and 'library or archive'.⁴ This can result in greater flexibility – consider section 200AB,⁵ for example – but also greater uncertainty in day-to-day copyright decisions.

This uncertainty is reflected in the modern development of a university library. It is unnecessary to expound on the disruption of the digital revolution on such institutions – this is now a fact of life.

To focus on the positive effects of digital disruption for a moment, modern university libraries have extraordinary potential to deliver enriched learning experiences. Digital preservation of artefacts, 3D modelling of collections and curation of online exhibitions are just some of the ways university libraries are modernising their collections for the benefit of their students and communities.

Copyright exceptions

The *Copyright Act 1968* includes a range of exceptions for educational institutions as well as libraries and archives. A university library is in the unique position of benefitting from both.



The diary of Refik Bey, courtesy of Fryer Library, The University of Queensland Library. Photo: Kaylene Biggs.

Section 200AB

The most recent of these exceptions, being now around 10 years old, is section 200AB.⁶ Commonly known as the 'special case' exception,⁷ this provision takes the international 'three-step test' standard delineated in the Berne Convention, and inserts it into our legislation in a relatively raw form.⁸

While this approach to legislative drafting has caused some confusion, especially in conservatively minded educational institutions, it can also be a very powerful tool, especially in light of its potential for creating access to historically significant orphan works.⁹

Consider applying this section, as it was quite recently at The University of Queensland, to the digitisation of the diary of a Turkish soldier – The Diary of Refik Bey – to see the impact it can have.¹⁰

The Diary of Refik Bey, who had fought at Gallipoli in the First World War, was donated to The University of Queensland Fryer Library in 1965.¹¹

The diary was written in Ottoman script and, due to this and its size (it is no bigger than two matchboxes), translation was impossible without digitisation.¹²

In such a case, that is, an unpublished manuscript for which the copyright owner is unable to be identified, there is no copyright exception that can be relied on to make a digital copy.

This is where section 200AB becomes relevant.¹³ Able to be used only in circumstances in which no other copyright exception is available, this provision serves to significantly empower a university library to understand and bring a significant historical artefact to the attention of a wider audience.

If this section is to be applied, however, we must take a pragmatic view of its interpretation. What, for example, does the phrase "for the purpose of maintaining or operating the library... to provide services of a kind usually provided by a library..." mean for the modern library?

Has this changed over time? Undoubtedly. Can a balance be found between respecting the legitimate interests of a copyright owner and, wherever possible, encouraging discoverability of their materials by new methods of technology? Absolutely.

With copyright reform becoming increasingly urgent, **Alicia Dodemont** considers the contribution that tertiary libraries might make.



This is not to say that we have a perfect system and that no changes are needed or should be advocated for – even a small step, such as an exception for quotation, as we have seen adopted in the United Kingdom, would provide significant practical progress within our copyright regime.¹⁴

In the meantime, however, we must use what we have. As institutions that have both educational and public responsibilities, university libraries may be well placed to lead thinking and practice in this area.

This article appears courtesy of the Queensland Law Society Technology and Intellectual Property Committee. Alicia Dodemont is a lawyer and works as copyright coordinator at The University of Queensland, where she provides advice on copyright to the university community and supports the library's role in emerging areas of open research, open online courses, Creative Commons licences and scholarly publishing platforms.

Notes

- ¹ Simon Leo Brown, 'Cooking for Copyright campaign sees librarians make vintage recipes in bid to change laws' ABC News at abc.net.au/news/.
- ² *Naruto v David Slater et al*, No.16-15469, (9th Cir., 21 March 2016).
- ³ Australian Law Reform Commission, Copyright and the Digital Economy, Issues Paper No.1P 42 (2012) 21.
- ⁴ *Copyright Act 1968* (Cth) ss135A, 48-52.
- ⁵ *Copyright Act 1968* (Cth) s200AB.
- ⁶ *Ibid.*
- ⁷ Australian Copyright Council, Special case exception: education, libraries, collections (Australian Copyright Council, 2007).
- ⁸ Australian Law Reform Commission, Copyright and the Digital Economy, Report No.122 (2014) 12.
- ⁹ *Ibid.*; Emily Hudson, 'The Copyright Amendment Act 2006: The Scope and Likely Impact of New Library Exceptions' (2006) 14(4) *Australian Law Librarian* 25-37.
- ¹⁰ The University of Queensland Library, Digitising the Diary of a Turkish Soldier (30 September 2015) web.library.uq.edu.au/blog/2015/09/digitising-diary-turkish-soldier.
- ¹¹ *Ibid.*
- ¹² *Ibid.*; The University of Queensland Library, A Soldier's Story (21 April 2015) web.library.uq.edu.au/blog/2015/04/soldiers-story.
- ¹³ *Copyright Act 1968* (Cth) s200AB.
- ¹⁴ Australian Law Reform Commission, Copyright and the Digital Economy, Report No.122 (2014) 9; Kathy Berry, UK – New private copying, quotation and parody copyright exceptions (8 December 2014) Linklaters: Technology, Media & Telecommunications News linklaters.com/Insights/Publication1403Newsletter/TMT-News-8-December-2014/Pages/UK%E2%80%9393New-private-copying-quotation-parody-copyright-exceptions.aspx.

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The subpoena, the ex-client and the lien

Two recent decisions of Brereton J in the New South Wales Supreme Court focus once again our attention on whether we can resist a subpoena to produce a client's documents if it involves a former client against whom we are asserting a lien over the documents on the basis that the client has not paid outstanding legal costs.

The two decisions are *Tyneside Property Management Pty Ltd & Ors v Hammersmith Management Pty Ltd & Ors (Tyneside Property)*¹ and *Hall v Donlon (Hall)*.²

In *Tyneside Property*, a firm of solicitors applied to set aside a subpoena for production issued at the request of its former clients seeking production of the original and copy documents described in a list of documents provided by the firm in a Supreme Court action.

The solicitors and the former clients had entered into a retainer whereby the legal practice agreed not to charge the clients until the conclusion of the matter, but reserved the right to review and change those arrangements in the future at its discretion. Subsequently the firm and the clients agreed to a new "cost plan". The former clients paid some costs pursuant to the plan, but not all of them.

The evidence did not disclose precisely how the relationship between the firm and its former clients ceased.

His Honour inferred that the firm intimated to the former clients that it would not continue to act unless their outstanding costs were paid. It seems the clients were unable to pay, or alternatively unwilling to do so, and chose to change solicitors.

The former clients applied under section 728 of the *Legal Profession Act 2004* (NSW) for an order that the file and documents held by their former solicitors be delivered up to their new solicitors.

A judge made the order subject to the clients paying the sum of \$100,000 into a trust account for outstanding costs pending assessment or agreement. This condition had not been met.

The former clients issued the subpoena, in order that their discovered documents might be made available for the inspection and use of the defendants in the Supreme

Court litigation in which they were involved. The former clients proffered an undertaking to their former solicitors that they would not access the discovered documents and that access to the documents would be restricted to their defendants.

The relevant principles Brereton J outlined were:

1. A solicitor is not entitled to resist production of documents over which a possessory lien is claimed when a subpoena for their production is issued by a third party (that is, a person or entity that is not the former client).
2. A solicitor can refuse to produce documents in response to a subpoena for production over which the solicitor has a possessory lien under a subpoena for production, issued by the former client.
3. The second proposition is subject to the qualification that, when the retainer is terminated by the solicitor, as distinct from the client, the court may, and usually will, require the production of the documents at the client's request in the interests of justice and to avoid catastrophe for the client's litigation, subject to terms preserving, so far as can be preserved, the lien – including usually security for unpaid costs (as a matter of discretion – the ability and willingness of the former client to secure the outstanding costs is an important consideration).
4. When the client terminates the retainer without just cause, then the solicitor can withhold production against the former client.
5. The solicitor is taken (in the context of the question of resisting the production of client documents) to have discharged the retainer when the solicitor says that he or she is unwilling to act further unless outstanding or further costs are paid, and the client, taking the solicitor at his or her word, then instructs another solicitor to act.
6. When the interest of a third party intervenes, the solicitor is, in any event, not entitled to resist production.³

The court concluded that this was a case in which the former solicitors discharged their retainer (this does not imply that the termination was wrongful or that they were not entitled to terminate). In addition, Brereton J held it was also a case in which it should be considered that third parties (namely the defendants to the litigation) had an interest in the relevant documents.⁴



by Stafford Shepherd

On the facts, the former solicitors were not absolutely entitled to retain the documents – that is, the documents should be produced unconditionally.

The practice of the court in such circumstances is to protect, as best it can, the interests of the former solicitors. Based on certain inferences, the court concluded that the former clients were unable to provide security. Pursuant to the undertakings proffered, the former clients themselves got slight benefit from the production of the documents, that is, they were able to satisfy their obligation to produce documents for their defendants' inspection and use at the trial but not access them.

Brereton J refused to set aside the subpoena and ordered in accordance with the undertakings given by the former clients that the requested documents be produced.⁵

In *Hall*, the former clients of a solicitor applied for a warrant for the arrest of their former solicitor for non-compliance with a subpoena to produce certain documents to the court.

The former solicitor raised three objections to explain and excuse his non-compliance with the subpoena. It is with the third ground advanced that this note is concerned. The solicitor claimed a possessory lien over the former client's documents and material for his unpaid costs.

Brereton J noted that the court would not require a solicitor to produce documents the subject of a lien when the subpoena was issued by a former client unless it fell within the exception referred to in point three above.⁶

However, his Honour noted that the solicitor didn't have a right to disregard the subpoena; the proper process to be followed in such a scenario was that, if the solicitor wished to resist production of the documents to the court, he or she should make an application to have the subpoena set aside. Alternatively, the solicitor could produce the documents to the court but oppose inspection being permitted. What is clear is the solicitor cannot simply disregard the subpoena.⁷

In Queensland (unlike New South Wales) r419 of the *Uniform Civil Procedure Rules 1999* provides that a person is excused from complying with a subpoena to produce unless conduct money sufficient to meet the reasonable expenses of complying with the subpoena is tendered when the subpoena is served or within a reasonable time before attendance under the subpoena is required.

Stafford Shepherd is director of the QLS Ethics Centre.

Notes

- ¹ [2011] NSWSC 156.
- ² [2011] NSWSC 1068.
- ³ *Tyneside Property Management Pty Ltd & Ors v Hammersmith Management Pty Ltd & Ors* [2011] NSWSC 156, [8]-[10].
- ⁴ *Ibid* [12]-[13].
- ⁵ *Ibid* [17].
- ⁶ *Hall v Donlon* [2011] NSWSC 1088, [6].
- ⁷ *Ibid*.

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Expert evidence

Practical considerations before briefing an expert

The importance of expert evidence is often underestimated by parties engaged in litigation.

In almost all proceedings, expert evidence is required to prove liability, quantum or both.

What distinguishes expert evidence from lay evidence is the ability of the expert to proffer his or her opinion to the court. Expert evidence can therefore have a significant bearing on the outcome of litigation.

This article discusses some of the key procedural rules that practitioners should consider before briefing an expert and offers practical tips to help with the selection and briefing of an expert.

Is the evidence relevant?

The first question to consider is whether the evidence is relevant; if the evidence is irrelevant, it is inadmissible. Evidence that is relevant is evidence that could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue.¹

Lay evidence vs opinion evidence

The next question to consider is whether the evidence is lay evidence or opinion evidence. The distinction is not always easy to identify. A useful guide is to consider whether the evidence involves an analysis of facts which results in a conclusory opinion. If it does, then the evidence should be provided by an expert. If the evidence is simply a statement of what the deponent heard, saw or did, then the evidence is probably lay evidence.

Of course, there are both common law and statutory provisions which govern the admissibility of opinion evidence.²

Steps to consider before briefing an expert

The rules and practice directions of both the state and federal courts outline important steps practitioners must be aware of before briefing an expert.

In Queensland proceedings, the procedural considerations surrounding expert evidence are set out in Chapter 11, Part 5 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR). Before briefing an expert, practitioners should be aware that:

- a. One purpose underlying Chapter 11, Part 5 of the UCPR is for expert evidence to be given by a single expert agreed between the parties or appointed by the court.³ If a party wishes to appoint a second expert, it must be shown that the second expert will do more than simply express an opinion which is different from the joint expert's opinion.⁴
- b. Before a proceeding is commenced, disputants may jointly agree to appoint an expert to prepare a report on an issue.⁵ If an expert is appointed this way and a proceeding is subsequently commenced, no further experts may give evidence on that issue (except with leave of the court).⁶
- c. Before a proceeding is commenced, a person may apply to the court for the appointment of an expert if "there is a dispute between [the person] and 1 or more other persons that will probably result in a proceeding" and "obtaining expert evidence immediately may help in resolving a substantial issue in dispute".⁷ If a proceeding is subsequently commenced, no further experts may give evidence on that issue (except with leave of the court).⁸
- d. Chapter 11, Part 5 of the UCPR does not apply to a person giving evidence who is a party to the proceeding, a person whose conduct is in issue in the proceeding, or evidence from persons who have treated injured persons in certain limited scenarios.⁹
- e. If the proceeding is commenced in the Magistrates Court and is a "minor claim", Chapter 11, Part 5 of the UCPR does not apply to that proceeding.¹⁰

- f. If the proceeding is commenced in the Supreme Court and the parties agree that expert evidence may help in resolving a substantial issue in the proceeding, those parties may jointly appoint an expert to prepare a report on the issue.¹¹ If the parties are unable to agree on the appointment of an expert, then the party who considers that expert evidence is necessary may apply to the court for the appointment of an expert to prepare a report on the issue.¹²
- g. Costs sanctions may follow if multiple experts are needlessly retained in relation to an issue.¹³
- h. While Practice Direction 2 of 2005 applies to expert evidence in the Supreme Court, it should be noted that Chapter 11, Part 5 of the UCPR was amended after this practice direction was implemented. Where relevant, the above points reflect the current procedural requirements for expert evidence in the Supreme Court.

While the UCPR provides no specific requirements in relation to District Court proceedings, parties should assume that the appointment of a single joint expert is to be preferred.

In Federal Court proceedings, the procedural matters surrounding expert evidence are set out in Chapter 1, Part 23 of the *Federal Court Rules 2011* (Cth) (FCR). Before briefing an expert, practitioners should be aware that:

- a. Subject to the below, parties may either apply to the court for the appointment of a joint court expert or call their own expert evidence at trial.¹⁴
- b. If a party applies for the appointment of a joint court expert¹⁵ (and the court makes an order appointing an expert), a party may only rely upon additional expert evidence if leave of the court is granted.¹⁶
- c. If a party intends to call their own expert evidence at trial, they must deliver a copy of their expert's report to all other parties and otherwise comply with the requirements of Division 23.2 of the FCR.¹⁷ Division 23.2 of the FCR otherwise requires that:
 - i. the expert's report complies with r23.13 of the FCR (which sets out the necessary contents of an expert's report), and



by Brent Reading

ii. the party briefing the expert provides the expert with “any practice note dealing with guidelines for expert witnesses”.¹⁸ The relevant practice note is called ‘Expert Evidence Practice Note (GPN-EXPT)’. In addition, a copy of the *Harmonised Expert Witness Code of Conduct* must be provided to the expert. Both documents can be downloaded from fedcourt.gov.au.

Selecting and briefing the expert

It is easy to underestimate the time required to locate, brief and ultimately receive a report in admissible form from an expert. There are several steps which can help alleviate these pressures, including:

- a. Dedicate as much time as required to locate your expert; do not settle for the first expert you find. There are several websites which contain databases of experts in Australia who opine on a range of topics. Your colleagues and barristers can also be a useful resource when attempting to locate an expert.
- b. Prepare a shortlist of experts. Once you have exhausted available sources, compile a shortlist which contains the experts’ names, their experience and potential suitability for the proceeding. Each expert’s name should also be searched through judgment databases; considerable insight regarding the expert’s suitability can be gathered if they have previously given evidence in a reported judgment.
- c. Narrow the shortlist down to two experts. Before selecting your expert, arrange a conference with both. Use this conference to explore the expert’s experience and interpersonal skills. Select the expert who you think will ultimately present as the most reliable before the court. If the expert has published articles, read them. Be sure to ask the expert whether they have given expert evidence before and the circumstances surrounding that evidence.

- d. When instructing the expert, include at least the following in the retainer letter:
 - i. a summary of the dispute, who you act for and the other parties in the proceeding (including seeking confirmation that the expert does not have any relationship to those parties)
 - ii. confirmation that the expert may be required to attend court and give evidence
 - iii. a request that all communications regarding the expert’s report be made with your office (rather than, for example, the client directly)
 - iv. confirmation of when the expert’s report is required and fee arrangements
 - v. a reference to all relevant provisions of the UCPR or FCR (it is often useful to also include a checklist for the expert which lists all formal requirements that an expert report must comply with) (see r428 of the UCPR and r23.13 of the FCR).

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee’s Proctor working group is chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and William Prizeman (william.prizeman@legalaid.qld.gov.au). Brent Reading is a Brisbane barrister.

Notes

- ¹ S55(1) *Evidence Act 1995* (Cth).
- ² See s79(1) of the *Evidence Act 1995* (Cth) and *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.
- ³ See r423(b) UCPR.
- ⁴ *D v S* [2009] QSC 446 at pg 5, per Margaret Wilson J.
- ⁵ See rr429R(1) and 429R(2) UCPR.
- ⁶ See r429R(6) UCPR.
- ⁷ See rr429S(1) and 429S(2) UCPR.
- ⁸ See r429S(11) UCPR.
- ⁹ See r424(1) UCPR.
- ¹⁰ See r424(2) UCPR. A “minor claim” is a claim for which the damages sought (including interest) do not exceed \$25,000 (see Schedule 4 UCPR).
- ¹¹ See r429G(1) UCPR. R429H sets out the requirements for the appointment of an expert pursuant to r429G(1).
- ¹² See r429G(2) UCPR. R429I sets out the requirements for an application to the court for the appointment of an expert.
- ¹³ See r429D UCPR.
- ¹⁴ See Division 23.1 and Division 23.2 FCR.
- ¹⁵ See r23.01 FCR.
- ¹⁶ See r23.04 FCR.
- ¹⁷ See r23.11 FCR.
- ¹⁸ See r23.12 FCR.

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Simple solutions to complex probate

The Supreme Court Registrar of Probate (Brisbane Registry), **Leanne McDonnell**, explains the approach practitioners should take with some of the more complex matters they may encounter.

A grant in common form is usually a straightforward process. The grant is issued on filing affidavit evidence in the court by the executor and there is no dispute as to the last or validity of the will that requires judicial intervention.

There are more difficult and complex grants that still can be issued by the registrar. These grants are only difficult because they are not everyday grants; practitioners are often unsure what to do and what documents need to be filed to persuade the registrar to make the grant.

Example 1 – Double probate

When you have obtained a grant of probate and you reserved power to another executor to obtain a grant at some time in the future, what do you do when that executor now wants to apply?

The grant that this executor is applying for is double probate, and he or she is applying as ‘the other executor’ to whom power was reserved on dd/mm/yyyy.

Procedure:

- originating application – Form 101 filed in the registry
- affidavit in support, stating the facts of the original grant and the entitlement to this grant
- original will can be referred to as already filed and proved in BS 123/2017
- certificate of death can also be referred to as being filed
- advertise notice of intention to apply – if this executor was named in the original notice, request dispensation from further advertising.

Note: The original grant is not revoked.

Example 2 – Chain of executorship (executor by representation)

If the sole executor or sole surviving executor (A) proves the will of (T) and subsequently dies after probate, having appointed an executor (B) who proves his will, the entire representation of (T) the original testator is transmitted to (B) without

the need for a fresh grant. The executor's title is proved by each subsequent grant.

Note: The original grant is not revoked.

Example 3 – Administration de bonis non (of goods unadministered)

If all to whom probate and administration was made have died and, in the case of probate, no chain of executorship exists, a grant is made to a new personal representative to enable the estate to be fully administered.

The new grant is made pursuant to the same principles which apply to Letters of Administration (*Uniform Civil Procedure Rules 1999* (UCPR) – Rule 610) and Letters of Administration with the Will annexed (UCPR Rule 603).

Procedure:

- originating application – Form 101 or Form 102 filed in the registry
- affidavit in support stating the facts of the original grant, evidence of death of the grantee, and deposing the part of the estate that remains unadministered
- in the case of the original grant being probate, depose how the chain is broken
- original will can be referred to as already filed and proved in BS 123/2017
- certificate of death can also be referred to as being filed
- advertise notice of intention to apply or provide brief reasons why it is not necessary to advertise again.

Note: The original grant is not revoked.

Example 4 – Revoked/new grants (when the grantee is still alive)

Usually the grantee has lost capacity or wants to retire from the administration. There are other reasons why a grant may be revoked.

Note: The registrar can only exercise the jurisdiction of the court with the consent of the parties.

Procedure:

- file an interlocutory application – Form 9 in the proceeding already filed. The applicant can apply for the grant to be revoked and a fresh grant to be issued.

- affidavit in support stating the facts of the first grant, the grounds for revocation and the entitlement to the fresh grant. In the case of the grantee having lost capacity, evidence of the incapacity.
- consent – Form 59 A – Consent to Registrar
- orders x 2 – Form 59
- Before the new grant will be issued and as soon as practicable after the order is made, the personal representative must return the original grant to the registry.

Example 5 – Grants, original will lost or missing

The registrar cannot make a grant of probate or letters of administration if the original will is missing.

Procedure:

- If an application for probate has already been filed, file a Form 9 application, returnable before the Applications Judge for probate of the will as contained in a copy.
- File any further affidavit material you think necessary.
- The order will generally contain the wording – limited until the original will or more authenticated evidence is brought into and left in the registry.

Example 6 – Grants ordered by the court, subject to the formal requirements of the registrar

Procedure:

- Advertise unless it was dispensed with, or provide brief reasons why it is not necessary to do so.
- If the original proceeding was a claim, file an application for probate in the usual manner, an exhibit to the affidavit in support will be a copy of the order.
- If the original will was not filed, it must be filed.

Regular succession law columnist Christine Smyth wishes to express her thanks to Registrar McDonnell for agreeing to provide the above information for *Proctor* readers.

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Taking a witness statement

10 tips to get it right

A critical aspect of a solicitor's role is to identify potential witnesses, interview them and then prepare witness statements for the purposes of litigation.

This article identifies some key ideas which a solicitor needs to consider when undertaking this task.

1. What is the purpose of interviewing this witness?

Before interviewing the prospective witness, you should have an understanding of where that person fits into the case. In other words, how is what they have to say relevant to the dispute? How are they able to assist in demonstrating that a particular fact alleged by your client or by the other side is, or is not, true? That is your focus.

For example, is the person someone who saw a particular event happen (such as another person signing a contract on a certain date)? Or was the person present at a critical meeting?

It is important to have some sense of what the prospective witness is likely to contribute to the case before you interview them. With that knowledge, you should then attend the interview with what are likely to be the relevant documents and some prepared questions which relate to the issues that you consider the prospective witness can assist with.

2. Be open to exploring other topics with the witness

Although you have identified where the prospective witness fits into the scheme of the case and you have prepared questions and identified particular documents to talk about with that person, you should be open to the prospect that the witness may be able to give evidence about other facts which are relevant to the case and, depending on their availability and willingness to assist, you should attempt to explore related issues with them to see if they can give other relevant evidence.

This means that you should listen to the answers given by the prospective witness because quite often the answers will suggest further questions that you did not expect to ask. If you do not listen to the answers given, and you simply proceed to the next question on your planned list of questions, you may

miss the opportunity to identify and obtain further critical evidence which is relevant to one of the issues in the case.

Often, witnesses can say unexpected things and it is important that you explore as much as you can about the particular topic until you reach the point where you are satisfied that no further relevant information can be given by that person about the particular issue.

3. Reinforce to the witness that they cannot talk to other witnesses

When meeting with the prospective witness, it is important that you tell them that they can only give evidence from their own recollection and that they cannot discuss their evidence with other witnesses.

4. Use the witness to identify other witnesses and other evidence

When you are interviewing a prospective witness, ensure that you are alert to learning the identity of other potential witnesses who may be able to assist your client or, at the least, who may be called by the other side. You should then speak to those other people as soon as possible and find out what it is that they will say if they are called to give evidence at the trial and if they are able to give evidence to assist your client's case.

A witness may also be able to assist in identifying other evidence such as documents which are relevant to the dispute. For example, they may tell you that a third party is in possession of a recording of a meeting. You may then consider taking steps to obtain a copy of those relevant documents, including through steps such as non-party disclosure.

5. Have a face-to-face meeting with the prospective witness if possible

It is vital that you do not ask a prospective witness to draft their witness statement themselves and email it to you. This is becoming common practice and, while it may save costs, a lay person is unlikely to know what is (legally) relevant to the case and is very unlikely to include all relevant information in the self-made witness statement. This is the case, even if you provide the witness with a list of questions to answer in their statement.

A further problem will be likely if the prospective witness is asked to draft their own statement and they need to give evidence about documents. If the person is not sitting with you and looking through each relevant document with you, it makes it very difficult to explore the content of each document with them, to ask them questions and record their answers by reference to each document. Self-evidently, you can only point to a part of the document and ask a question about it if the prospective witness is with you in person.

Once you have explored a particular document with a witness and recorded their evidence about that document, that document should be annexed to the draft witness statement and identified in the witness statement by reference to the annexure marking. This will make your task and counsel's task easier when the time comes to prepare affidavit evidence or to prepare for trial because the document the witness is giving evidence about has been identified by the witness in conference and is then identified by reference to an annexure to the witness statement, rather than a description which may be misunderstood or be ambiguous.

6. How do they know something?

When taking a witness statement and unless the witness is offering a lay opinion, a prospective witness will be making assertions of fact. It is critical that you explore with the witness how they know each fact and whether they have direct knowledge of the fact. In other words, do they know the fact because of what they saw or heard? Or some other way?

Sometimes the witness will answer that they know the fact because 'it must be so' or 'it is obvious'. Of course, such evidence will not be admissible at any hearing, although you might like to explore with the witness why they think the fact must have occurred.

Sometimes a witness will answer that they know a fact because someone else told them about that fact. That is usually not admissible evidence but you should still record that they were told about the fact by the identified witness and when that occurred. You may consider speaking to the person who told the witness about the relevant fact and calling that witness to give evidence about the fact.



Report by Kylie Downes QC

7. Assess the credibility of the witness

When you are interviewing a prospective witness and taking a witness statement, part of your role is to assess how reliable you think the person will be as a witness at any hearing. If a witness is hesitant or does not seem very sure about the facts they are giving the statement about, then this is something that you should make a note on, and it should be something that you discuss with counsel prior to pleading a case in reliance on that person's evidence or calling that witness at any trial.

Often people say things because they think that is what they are supposed to know or say, or because they do not like the other party and they want to help your client to win the case. These motivations should be identified as early as possible. Alternatively, the witness may have a faulty memory of the events in question. If the prospective witness does not have the kind of ready recollection of events that someone who is telling the truth and has a good memory usually has, then this can be an indicator that the person may not prove to be reliable at trial.

8. Put everything into the statement

When drafting the statement, you should not concern yourself too much with questions of admissibility. It is better to record everything

that a prospective witness has to say about the relevant facts and then you and counsel can decide at a time closer to trial which parts of the evidence can be adduced through this witness.

Counsel is best assisted by knowing everything that the prospective witness has to say about the relevant issues, including any evidence which the witness may give which is of no assistance to your client's case or in fact could have a negative impact on your client's case. This will affect a decision as to whether or not that witness is called at all, so it is essential that the good and the bad, the admissible and the inadmissible, make their way into the witness statement. Having said that, and above all, the witness statement should be confined to evidence which is relevant to the facts in issue in the case or, alternatively, be (at least) relevant to impugning the credibility of other witnesses in the case.

9. After the first interview

After you have spent time having one, two or three or more meetings with the prospective witness, and gone through the relevant documents with them, your task is to prepare a first draft of their witness statement. Depending on how complex the evidence of the witness is, it may be necessary for you to provide a draft of the statement to the witness, and meet with them again, to ensure that you

have captured their evidence accurately in relation to each particular issue. It is important to spend the time early in the preparation of witness statements than be engaged in the expensive, time-consuming and perhaps even embarrassing process of amending pleadings and filing affidavits of correction at a later date.

10. Get the witness to sign the statement

After the draft witness statement has reached a point where the prospective witness says that he or she would be prepared to swear to the content of that statement, you should ask the witness to sign the statement and you should witness their signature. The statement should be signed with all relevant annexures attached to it. The reason for doing this is that, for whatever reason, the witness may be unable or unwilling to give evidence by the time of trial. For example, the person may die, move overseas or decide to give (different) evidence for the other side.

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

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This month, we profile four QLS Senior Counsellors who practise in the Sunshine Coast region – Glenn Ferguson AM, Pippa Colman, Michael Beirne and Mark Bray.

Glenn Ferguson AM

What motivated you to become a QLS Senior Counsellor?

The profession has been wonderful to me and as a past president of the Society, I couldn't think of a better way of keeping involved.

What is the best part about being a QLS Senior Counsellor?

I genuinely enjoy talking to other members and while I might not always have an answer to the problem or issue, it is very satisfying (hopefully) providing some objective advice and guidance.

What do you like to do during your time off?

I like to travel and spend time with family. I also love mountain bike riding with a bunch of old blokes and when the body allows, playing old fellas' rugby in slow motion.

What is your favourite area of practice?

I practise mainly in business and immigration law now, but I was a litigator for over 20 years.

Can you provide an overview on your general experience as a QLS Senior Counsellor?

Being a QLS Senior Counsellor is a bit like a lottery. You never know what the next issue is going to be about. I have been fortunate that in the roles I have been involved in during my career I have seen nearly every type of disciplinary issue and ethical dilemma. There is often no right or wrong answer, and I see my role as guiding and suggesting a solution, not judging the issue. I find members often feel very isolated when they face a confronting issue and, in my experience, it is very important to try and resolve their issues at an early stage. There are a lot of services now available to members through the Society which can be utilised and I often encourage the member to engage.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

Remember, reputation and trust have to be earned.

What do you like about your region?

The Sunshine Coast is a beautiful place to live and practise, although I spend the majority of my time now in Brisbane, which is a world-class city.

Pippa Colman

What motivated you to become a QLS Senior Counsellor?

I was at a time in my career where I wanted to start giving back to the professional community and thought this role would be an opportunity to do that.

What is the best part about being a QLS Senior Counsellor?

One of the best parts is having the opportunity to speak with a range of solicitors who I normally would never cross paths with.

How do you spend your spare time?

I am currently in training for a couple of long-distance runs this year, so this takes up a lot of my spare time.

What is your favourite area of practice?

I practise in family law, wills and estates, powers of attorney and elder law because family is the most important thing in the world and helping families find peace can benefit the whole community.

Can you provide an overview on your general experience as a QLS Senior Counsellor?

This is my first year as a QLS Senior Counsellor and I have found it to be very rewarding to be able to give back to the

professional community and to help out fellow practitioners with any of their issues.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

To read as much case law as you can and for this to form a 'habit' so that you continue in later years to search out case law and continue to develop your knowledge.

What do you like about your region?

I love the Sunshine Coast because of the climate, lifestyle and collegiate attitude of Sunshine Coast solicitors.

Michael Beirne

What motivated you to become a QLS Senior Counsellor?

Having spent a lot of time helping colleagues, particularly younger lawyers, and having a special interest in practice issues, I wished to put that interest into practice. I care very much for my profession and my colleagues. I am grateful for the help I received during my career from experienced senior practitioners. Becoming a QLS Senior Counsellor gave me an opportunity to give back to the profession for what I have received.

What is the best part about being a QLS Senior Counsellor?

Assisting other lawyers is very rewarding and keeps the learning curve steep. What has surprised me is the number of situations I am asked to advise on that I have never encountered before. This drives me back to the books and causes me to ask myself, "What would Stafford [Shepherd] do?"

What do you like to do during your time off?

When I am not at work I can usually be found walking my dog on the beach or riding my motorcycle in the hinterland.

What is your favourite area of practice?

My favourite area of practice is insolvency and reconstruction, requiring a detailed knowledge of insolvency law and practice, commercial litigation, real and personal property, business structures, business sales, securities, business compliance obligations, in particular taxation, to name a few.

Can you provide an overview on your general experience as a QLS Senior Counsellor?

I have been surprised to learn how few of our colleagues appreciate the valuable resources the Society and its volunteers provide through its programs, including the QLS Senior Counsellor program. I am pleased to say that it appears that the number of our colleagues who are developing an interest in their professional and ethical responsibilities is growing. I believe the support QLS Senior Counsellors offer is underutilised. So often people I assist say to me that they wish they had sought help sooner. I have benefited greatly in assisting my colleagues, not only in developing a greater technical understanding of practice and ethical obligations, but simply by being given the opportunity to help others.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

Early in my career, I was well advised that a good solicitor needed not only to be an expert in their favourite area of practice but be well grounded in costs, ethics and professional practice obligations.

What do you like about your region?

I love the Sunshine Coast; its hinterland and beaches are as beautiful as anything I have seen anywhere in the world. Its people are warm, receptive and care about each other.

Mark Bray

What motivated you to become a QLS Senior Counsellor?

I have been a practitioner since 1979 and, having had many experiences working in the profession in that time, I thought I might be able to bring a practical approach to advising other practitioners who may be experiencing a problem.

What is the best part about being a QLS Senior Counsellor?

Being able to give another perspective on a problem that a less experienced practitioner may not be able to see.

What do you like to do during your time off?

Bike ride, swim and sing in a rock band.

What is your favourite area of practice?

Commercial property and leasing.

Can you provide an overview on your general experience as a QLS Senior Counsellor?

It is rewarding particularly when a lawyer who calls you is very grateful to receive some practical advice from another practitioner, knowing that the conversation is in total confidence. In some cases, we have been in a similar predicament to the one the practitioner is calling about. It puts them at ease.

If you could give one piece of advice to a solicitor just starting their career, what would it be?

If you make a mistake on a matter, accept it and take the appropriate action to attempt to rectify it, and be upfront with your client about it. If it is presented in the right way, most clients accept that we are human and are usually prepared to accept that mistakes do happen. We are not supermen and women.

What do you like about your region?

I live on 2¼ acres, eight kilometres from my office and the same distance from some of the best beaches and coffee shops in the world.

To learn more about QLS Senior Counsellors, see qls.com.au > QLS Ethics Centre > QLS Senior Counsellors. Contact details for QLS Senior Counsellors are listed at the back of each edition of *Proctor*.

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Incidents up – WHSQ cracks down

Industrial manslaughter laws under consideration

There has been a noticeable rise in the number of highly-publicised workplace fatalities in Queensland since mid-2016.

The fatal incidents at Dreamworld, a Brisbane racecourse development and on the set of a music video have ignited public outrage¹ and created the political impetus for a review of the existing workplace health and safety (WHS) regime.

In this climate, it is not surprising that Work Health and Safety Queensland (WHSQ) has taken every opportunity to show it is prosecuting employers who breach the *Work Health and Safety Act 2011* (Qld) (the Act). WHSQ head Dr Simon Blackwood has released a number of statements on the WHSQ website, including:

“Since July (of 2016), we have successfully completed 21 prosecutions in the courts, leading to fines totalling three quarters of a million dollars.

“Further, we have issued 39 infringement notices with fines totalling more than \$101,200, as well as 975 improvement notices and 284 prohibition notices.”²

He emphasised that the publication of these prosecutions was intended to highlight “the Queensland Government’s determination to punish employers who are not looking after their workers”³ and warned that “if employers aren’t prepared to play by the rules, then they are going to feel the full force of the law and face hefty fines”.⁴

This strict stance is noticeable in WHSQ’s prosecutorial ramp-up in regard to two frequent incident issues – inexperienced workers and cost-cutting measures.

Employee inexperience

A teenage worker, who was without assistance and unsupervised, was fatally injured when delivering timber poles to a construction site. The company the worker was employed by pleaded guilty to a number

of charges, including failing to provide sufficient supervision or adequate induction and training, and failing to have specific written procedures regarding the equipment the worker was using.

The magistrate fined the defendant \$180,000 and recorded a conviction in light of a previous incident for which the company had been fined in 2008. Following the decision, Dr Blackwood took the opportunity to comment that “young people need extra attention, training and direction”,⁵ and “must be encouraged to speak up when things don’t feel right and stand their ground”.⁶

Cost-cutting

A truck driver was fatally injured as a result of defective equipment, which was not repaired by the employer because they didn’t have the budget.

As in the aforementioned case, the company’s application for an enforceable undertaking was rejected and it pleaded guilty to breaching s32 of the Act. The magistrate fined the company \$60,000 but did not record a conviction. An order was made under s239 of the Act that the defendant pay a recognisance of a further \$60,000 if it offended again within the next two years.

Following the decision, Dr Blackwood warned employers that “tight budgets are no excuse for faulty machinery... Employers must not cut corners and put their staff at risk. If they do, we will come down hard on them.”⁷

New developments

Despite WHSQ’s assurances of a rigorous and effective prosecutorial scheme, the recent high-profile incidents have also sparked a renaissance of the debate about whether serious WHS breaches should be prosecuted under criminal legislation.

This dispute stems from the ‘Roben’s model’ of the Act, which favours imposing broad strict liability duties on employers, enforced by offences and penalties for breaches. While this model has been effective in preventing incidents, the adequacy of the Act’s financial penalties and complications when prosecuting corporations in the most

serious of cases has raised the question of whether it is a model that is appropriate in *all* circumstances.

There have been calls for Queensland parliamentarians to support an industrial manslaughter provision of the kind implemented in Part 2A of the Australian Capital Territory’s *Crimes Act 1900*. Proponents argue that the laws would appropriately equalise the treatment of negligent acts causing fatalities in the workplace with similar conduct causing fatalities outside of work, for instance, negligent driving. The type of laws imposed would directly target any individuals found responsible for creating the negligent safety systems.

Finally, there is the view that “including a serious crime such as manslaughter into OHS laws could encourage the community to view these laws as ‘serious’ provisions”, reinforcing the vital nature of WHS duties on employers.⁸

Opposition leader Bill Shorten, in his former role as national secretary of the Australian Workers’ Union, voiced support for the offence as a better deterrent to corporate negligence and reckless safety habits.⁹ An industrial manslaughter provision has also been routinely campaigned for by Queensland’s trade unions.¹⁰

Deputy Premier Jackie Trad said the Queensland Government was considering the introduction of industrial manslaughter in response to appeals from workplace advocates and victims’ families. However the consideration of this offence was unlikely to progress until investigations around the recent incidents had concluded.¹¹

What can you do now?

Employers need to be aware that toughening WHS systems and enforcement legislation will be an agenda item for the Queensland Government this year. Noting the recent prosecutorial trends in this area, employers must take every opportunity to ensure:

- employees are adequately trained and receive sufficient supervision
- that detailed work procedures are both in place and enforced



Andrew Ross looks at the proactive response taken by Work Health and Safety Queensland in the wake of recent tragedies.

- equipment and vehicles are regularly maintained and replaced as necessary
- employees are aware that serious fatal WHS incidents can potentially lead to criminal liability under the state's manslaughter provisions.

Finally, it is important to keep abreast of new developments in Queensland's evolving WHS landscape, particularly as the public and political appetite to put negligent employers on the legal chopping block appears to be high.

Andrew Ross is a senior associate at Sparke Helmore Lawyers.

Notes

¹ abc.net.au/news/2016-11-25/dreamworld-safety-audit-whitewater-world-improvement-urged/8056814; abc.net.au/news/2017-01-24/film-media-union-to-look-at-safety-after-bliss-n-eso-shooting/8205968.

² [worksafe.qld.gov.au/news/2016/national-logistics-company-fined-\\$200,000-for-cyclist-death](http://worksafe.qld.gov.au/news/2016/national-logistics-company-fined-$200,000-for-cyclist-death); [worksafe.qld.gov.au/news/2016/\\$180,000-fine-is-a-stark-reminder-for-employers-taking-on-young-queenslanders](http://worksafe.qld.gov.au/news/2016/$180,000-fine-is-a-stark-reminder-for-employers-taking-on-young-queenslanders); [worksafe.qld.gov.au/news/2016/brisbane-transport-company-fined-\\$60,000-after-driver-killed-by-faulty-truck](http://worksafe.qld.gov.au/news/2016/brisbane-transport-company-fined-$60,000-after-driver-killed-by-faulty-truck).

³ [worksafe.qld.gov.au/news/2016/national-logistics-company-fined-\\$200,000-for-cyclist-death](http://worksafe.qld.gov.au/news/2016/national-logistics-company-fined-$200,000-for-cyclist-death).

⁴ [worksafe.qld.gov.au/news/2016/national-logistics-company-fined-\\$200,000-for-cyclist-death](http://worksafe.qld.gov.au/news/2016/national-logistics-company-fined-$200,000-for-cyclist-death).

⁵ [worksafe.qld.gov.au/news/2016/\\$180,000-fine-is-a-stark-reminder-for-employers-taking-on-young-queenslanders](http://worksafe.qld.gov.au/news/2016/$180,000-fine-is-a-stark-reminder-for-employers-taking-on-young-queenslanders).

⁶ Ibid.

⁷ [worksafe.qld.gov.au/news/2016/brisbane-transport-company-fined-\\$60,000-after-driver-killed-by-faulty-truck](http://worksafe.qld.gov.au/news/2016/brisbane-transport-company-fined-$60,000-after-driver-killed-by-faulty-truck).

⁸ Tasmanian Law Reform Institute, 21 June 2005, 'Criminal Liability of Organisations', Issues Paper No.9. *Note:* The body ultimately did not support the introduction of an industrial manslaughter provision.

⁹ CCH Australia, The Safety Conference Sydney 2004, OHS commentary, [49-071].

¹⁰ See abc.net.au/news/2016-10-07/cfmeu-calls-for-change-to-law-after-brisbane-racetrack-deaths/7914564.

¹¹ news.com.au/national/breaking-news/qld-considers-industrial-manslaughter-laws/news-story/509bfd05fe7bebf2c8a6abf52062f1f.

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QSI: New DV sentencing statistics

with Supreme Court
Librarian David Bratchford



sentencing.sclqld.org.au

The Queensland Sentencing Information Service (QSI) is a free online resource provided by the library to assist with the administration of the criminal justice system.

It is the leading source of sentencing statistics, transcripts and related information in Queensland, and is available free of charge to eligible subscribers. QSI helps achieve consistency in sentencing by making it easy to search, locate and compare sentencing information.

New data on domestic violence offences

QSI now displays separate statistical graphs for offences declared to be a 'domestic violence offence' under either s564(3A) of the Queensland Criminal Code or s47(9) of the *Justices Act 1886*.

Table one

359E(1)	Unlawful stalking
359E(1)(3)	Unlawful stalking with violence, possession of a weapon, or contravening a court order
359E(1) & 564(3A)	Unlawful stalking with violence – domestic violence offence
359E(1)(3) & 564(3A)	Unlawful stalking with violence, possession of a weapon, or contravening a court order – domestic violence offence

Table two

339(1)(3)	Assault occasioning bodily harm while armed/in company
339(1)(3)(4)	Assault occasioning bodily harm while armed/in company with a circumstance of aggravation
339(1)(4)	Assault occasioning bodily harm with a circumstance of aggravation
339(1)(3) & 564 (3A)	Assault occasioning bodily harm while armed/in company – domestic violence offence
339(1)(3) & 47(9) <i>Justices Act</i>	Assault occasioning bodily harm while armed/in company – domestic violence offence
339(1)(3)(4) & 47(9) <i>Justices Act</i>	Assault occasioning bodily harm while armed/in company with a circumstance of aggravation – domestic violence offence
339(1)(4) & 47(9) <i>Justices Act</i>	Assault occasioning bodily harm with a circumstance of aggravation – domestic violence offence

By collating this sentencing data in separate statistical graphs, any sentencing trends arising from a domestic violence offence can be tracked, monitored and compared with the average sentencing outcome for a similar offence that has not occurred in a domestic violence situation.

To access the graphs, look for the link in QSI that displays the relevant combination of legislative provisions. For example, for the offence of 'stalking' under the Queensland Criminal Code, various graphs are available on QSI. (*table one*)

For some offences, there are graphs for both types of domestic violence offence declarations. In the instance of 'assault occasioning bodily harm while armed/in company' there is sentencing data available for both a s564(3A) type declaration and for a s47(9) *Justices Act* type declaration. (*table two*)

Domestic violence offence declarations are still in the early days of use by the Queensland justice system so the QSI graphs currently only contain a small amount of data. Over time, as more data is incorporated into

QSI, these separate graphs will become increasingly valuable as a comparative sentencing analysis resource in the area of domestic violence.

QSI access

Access to QSI is regulated by s19(2) of the *Supreme Court Library Act 1968*. Australian legal practitioners and law practices (as defined by the *Legal Profession Act 2007*) which prosecute offences or provide legal services to defendants in the area of criminal law are eligible to subscribe to QSI.

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Capitalisation of pension 'asset' rejected

with Robert Glade-Wright



Property – court erred in accepting capitalisation of wife's TPD pension pursuant to s90MT(2) where no splitting order made

In *Welch & Abney* [2016] FamCAFC 271 (22 December 2016) the Full Court (Murphy, Aldridge & Kent JJ) allowed the wife's appeal against Austin J's treatment of her non-commutable total and permanent disability pension (TPD pension) as an asset with a present capital value of \$972,959. The wife began receiving her TPD pension after the parties separated in 2011. At first instance, the net pool was \$2,797,777, but this included the TPD pension at its capital value. The Full Court observed at [20]-[21]:

"The practical effect of the orders for the husband included that he received the entirety of his 40 per cent entitlement of \$1,119,111 in cash or other tangible property capable of immediate conversion into lump sum cash or its equivalent (...) and the wife received or retained net tangible (non-superannuation) property worth \$368,608 in an overall entitlement of \$1,678,666. (...)"

The Full Court said (at [6]):

" ... We consider that the trial judge fell into error in the following respects:

- a. By adopting, as the present value of the TPD pension, the capitalised amount determined pursuant to s90MT(2) of the Act. This value (or, more accurately 'amount') is mandated solely for the purpose of a splitting order of a superannuation interest being made. No splitting order was made by his Honour and that decision is not the subject of any challenge on this appeal.
- b. By disregarding the evidence of the single expert as to the TPD pension entitlement being considered in a similar manner to earnings from employment, and that expert's evidence as to the different nature of the TPD pension entitlement from normal superannuation interests.
- c. As a consequence of (a) and (b), ignoring the imposition of taxation upon the TPD pension and making orders which leave that substantial burden entirely with the wife.
- d. As a consequence of (a) and (b), ignoring contingencies operative upon the TPD pension and making orders which leave those contingencies entirely with the wife, and conversely, relieve the husband of any impact of them."

Property – trial judge erred in approach to wife's case that husband's domestic violence made her contributions more arduous

In *Maine* [2016] FamCAFC 270 (22 December 2016), the Full Court (Ryan, Murphy and Kent JJ) allowed the wife's appeal against Judge Vasta's order that the parties' assets be divided 65% to the wife and 35% to the husband. The Full Court said (from [47]):

"The wife argued at trial that her contributions were made more arduous by reason of family violence ... by the husband. His Honour refers to those allegations ... and ... to the decision of the Full Court in *Kennon* ...

[48] His Honour appears to accept that family violence, as defined within the Act, occurred. His Honour ... makes a ... finding that there was no 'evidence that illustrates how such conduct has made the contributions by the wife more arduous'.

[49] We consider that this finding by his Honour is erroneous. It ignores ... direct evidence given by the wife in her affidavit not challenged substantively in cross-examination and not the subject of any adverse finding by his Honour. The wife gave direct evidence that family violence had made the household tasks and care of the children 'more difficult' ... In addition, given the wife's detailed evidence of the history of the husband's drunken violence and abuse over a period of about 20 years; the fact that no finding contrary to that evidence was made; and his Honour's findings [as to the husband's 'propensity to irrationally verbally, and sometimes physically, abuse the wife'] ... we are, with all respect, unable to understand how it was not, in any event, an inescapable inference that the wife's contributions – in particular her s79(4)(c) contributions at the very least – were made 'more onerous'.

Marriage – court lacks jurisdiction to declare foreign marriage valid where wife was a minor

In *Eldaleh* [2016] FamCA 1103 (21 December 2016) McClelland J heard the husband's application for a declaration that the parties' marriage in the Middle East in 2016 was valid pursuant to s88D of the *Marriage Act 1961* (Cth). The wife was 16 years old at the time of marriage and 17 at the time of the hearing.

The court said (from [3]):

"Section 88D of the *Marriage Act* ... relevantly provides:

(2) A marriage to which this Part applies shall not be recognised as valid in accordance with subsection (1) if:

(b) where one of the parties was, at the time of the marriage, domiciled in Australia--either of the parties was not of marriageable age within the meaning of Part II;

[4] Under ... s11 ... subject to s12, 'a person is of marriageable age if the person has attained the age of 18 years'.

[5] Paragraph (b) of s88D(2) refers to 'where one of the parties was, at the time of the marriage, domiciled in Australia' ... 'Domiciled' takes its meaning from the *Domicile Act 1982* (Cth) ... which, at s10, relevantly provides:

'The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country.' (...)

[7] Although the courtship and marriage of the applicant and Ms Eldaleh took place in the Middle East, it was acknowledged that the applicant was, at the time of the marriage, domiciled in Australia.

[8] ... [T]he applicant being domiciled in Australia, s88D(2)(b) ... applies and the marriage is not valid if either of the parties was not of marriageable age, that is 18 years of age."

The court (at [10]) referred to s12(1) which provides that "[a] person who has attained the age of 16 years but has not attained the age of 18 years may apply to a judge or magistrate in a State or Territory for an order authorising him or her to marry a particular person of marriageable age despite the fact that the applicant has not attained the age of 18 years" and said (at [11]-[12]):

"However, it is clear that the section is directed toward a **prospective** marriage, rather than facilitating any retrospective authorisation or validation of a marriage.

As such, no mechanism is available under the *Marriage Act* by which the Court can validate the ... marriage ... "

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).

High Court and Federal Court casenotes

High Court

Electoral law – parliamentary elections – disqualification under the Constitution

In *Re Culleton [No.2]* [2017] HCA 4 (3 February 2017) the High Court (sitting as the Court of Disputed Returns) held that Senator Rodney Culleton was incapable of being chosen as a senator at the 2016 federal election. Senator Culleton was convicted of larceny by the NSW Local Court, in his absence, prior to the election. However, under the *Crimes (Sentencing Procedure) Act 1999* (NSW), a sentence of imprisonment cannot be imposed on an offender in their absence. The offence for which Senator Culleton was convicted carried a possible jail term of up to two years. A warrant for his arrest was therefore issued. Before the warrant could be executed, Senator Culleton stood for election as a Senator for Western Australia and was elected. After the election, the warrant was executed and Senator Culleton was brought before the local court. The court annulled the conviction and re-tried the matter. The court dismissed the charge without conviction, but ordered Senator Culleton to pay compensation. The question was whether, at the time of the election, s44(ii) of the Constitution applied. That section renders a person incapable of being elected if they have been convicted and are under sentence, or subject to be sentenced, for an offence with a penalty of one year's imprisonment or more. The High Court held that s44(ii) applied. The annulment operated only prospectively, meaning that at the time of the election, Senator Culleton had been convicted and was subject to sentence. That was so even though the conviction was in his absence. The Senate vacancy thus created was to be filled by a special count of the ballot papers and votes distributed accordingly.

Kiefel, Bell, Gageler and Keane JJ jointly; Nettle J separately concurring. Answers given to questions referred.

Tax law – land tax – amendments and refunds for overpayments

In *Commissioner of State Revenue v ACN 005 057 349 Pty Ltd* [2017] HCA 6 (8 February 2017) the respondent had overpaid land tax between 1990 and 2002 because a property had been assessed twice by an error on the part of the commissioner. The respondent had paid the tax as assessed. The error was discovered in 2012 and the respondent sought to have the commissioner amend the tax returns and issue a refund. The commissioner refused, on the basis that the power to amend was discretionary and there was no utility in the amendments, because the respondent could not get the relief sought, because the *Land Tax Act 1958* (Vic.) precluded proceedings for refunds more than three years

after the payments. The respondent brought judicial review proceedings (for mandamus) to compel the commissioner to amend the assessments and provide the refund. That was refused at first instance but granted by the Court of Appeal. The High Court allowed the appeal. It held that the amounts paid were properly 'tax paid': assessments made at the time imposed a legal obligation to pay, which had been fulfilled. The objection and appeal provisions in the Act were a 'code' that did not allow for refunds or recovery of payments outside that regime. The taxpayer here had lodged no objections to the assessments, and was out of time to apply for the refund. There was no other basis for appeal or review. That reading of the refund provision was also supported by extrinsic materials and the purpose of the Act – to provide certainty in revenue for the state. Further, the commissioner had a discretion, but not a duty, to exercise the power to amend the assessments. Given that the refund could not be granted, there was no utility in the commissioner granting the amendments. It was within power to refuse to do so. For that reason, there was also no basis for the Court of Appeal to describe the actions of the commissioner as "conscious maladministration".

Bell and Gordon JJ jointly; Kiefel and Keane JJ, and Gageler J separately concurring. Appeal from the Supreme Court (Vic.) allowed.

Constitutional law – Ch.III judicial power – 'matter' under the Constitution – corporations law

In *Palmer v Ayres; Ferguson v Ayres* [2017] HCA 5 (10 November 2016 (orders) and 8 February 2017 (reasons)) the High Court upheld the constitutional validity of s596A of the *Corporations Act 2001* (Cth). Section 596A allows a court, on application by an "eligible applicant" (here a liquidator), to order that an officer or provisional liquidator of a corporation be summonsed for examination about the corporation's examinable affairs. Clive Palmer and Ian Ferguson were summonsed to be examined about the affairs of Queensland Nickel. After the examinations took place, Mr Palmer and Mr Ferguson sought a declaration from the High Court that s596A was invalid because it conferred non-judicial power on a federal court. It was sufficient for the plurality dealt with two aspects of that argument. First, the plurality held that conferral of jurisdiction under s596A involved a 'matter' because that term included controversies that might come before the court in the future. Section 596A gave a right to examine a person, to establish and then enforce potential rights to relief against potential wrongdoers. Further, an order for examination had an immediate effect on the rights and liabilities of the parties to the order. Second, the plurality held that examination was a procedure directed at the future exercise of judicial power, in aid of anticipated adversarial proceeding, analogous to other pre-trial procedures. That was

sufficient to bring the section within a conferral of judicial power. Other arguments of the plaintiff did not need to be addressed.

Kiefel, Keane, Nettle and Gordon JJ jointly; and Gageler J separately concurring. Answers to questions reserved given.

Town planning – statutory interpretation – compensation – land reserve for public purposes

In *Western Australian Planning Commission v Southregal Pty Ltd; Western Australian Planning Commission v Leith* [2017] HCA 7 (8 February 2017) the High Court held that compensation payable under the *Planning and Development Act 2005* (WA) was payable only to the person who owned land affected by a reservation, and not to a subsequent owner. Under a planning scheme made under the Act, land was reserved for public purposes. At the time, people other than the respondents owned parts of the lands reserved. The respondents subsequently bought the land and applied to develop it. The applications were refused, because of the reservation. The respondents sought compensation under s173 of the Act. However, s177(1) provided that compensation was not payable until the first sale of the land after the reservation, the refusal of an application for development or the approval of a development on unacceptable conditions. Section 177(2) provided that compensation was payable only once, to the owner of the land at the date of reservation where the claim was on first sale or the owner of the land at the date of the application where the claim concerned a development application. The question was whether compensation could be claimed by a subsequent owner of the land or only the owner at the time of the reservation. A majority of the High Court held that only the original owner was entitled to claim compensation. That followed from the language of the sections and the Part as a whole; analysis of an earlier decision relating to very similar provisions, in *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30; extrinsic materials; and the purpose of the section. Compensation was payable only once, on the trigger set out in s177(1). Here, because the first sale had taken place, the occurrence of one of the other events in s177 (1) could not trigger a further compensation claim.

Kiefel and Bell JJ jointly; Gageler and Nettle JJ jointly concurring; Keane J dissenting. Appeal from the Court of Appeal (WA) allowed.

Andrew Yuile is a Victorian barrister, ph (03) 9225 7222, email ayuile@vicbar.com.au. The full version of these judgments can be found at austlii.edu.au. Numbers in square brackets refer to paragraph numbers in the judgment.

with Andrew Yuile and Dan Star SC



Federal Court

Consumer law – approach to the meaning of statutory unconscionable conduct – whether knowledge of officers and employees can be aggregated and attributed to a corporation to find the corporation acted unconscionably

Commonwealth Bank of Australia v Kojic [2016] FCAFC 186 (21 December 2016) was an appeal from orders that the Commonwealth Bank of Australia (the bank) pay damages consequent upon a conclusion that the bank had engaged in conduct that was unconscionable contrary to ss51AB and 51AC of the *Trade Practices Act 1974* (Cth) (the TPA). The Full Court (Allsop CJ, Besanko J and Edelman J) allowed the appeal.

The primary judge (Mansfield J) found the bank liable for unconscionability under the TPA in relation to a mortgage over property (and borrowings) in which Kojic purchased a half interest. The conclusion of the primary judge rested on the aggregation of the knowledge of two of the bank's officers. The primary judge held that although no individual of the bank had acted unconscionably within the meaning of ss51AB and 51AC of the TPA, the bank had acted unconscionably because the knowledge of two of its officers could be aggregated and then attributed to the bank.

The Full Court held that the primary judge erred in aggregating knowledge of the bank's officers. Justice Edelman gave the leading judgment on this issue (with whom Allsop CJ generally agreed at [62] and [65], as did Besanko J at [78] and [81], subject to some of their own comments).

Relevantly, Edelman J held that the primary judge's decision to aggregate the knowledge of the two bank employees rested on a misunderstanding of the decision of the High Court in *Krakowski v Eurolynx Properties Limited* (1995) 183 CLR 563 (*Krakowski*). The decision in *Krakowski* received detailed consideration by Edelman J (at [119]-[142]). Justice Edelman canvassed subsequent cases in which Australian courts have correctly and incorrectly applied the majority decision in *Krakowski* (at [143]-[149]). In concluding, Edelman J said at [153]: "Although this is not such a case, it is possible that there could be examples where a corporation acts unconscionably even though no individual has acted unconscionably. For instance, in a case where no individual has the knowledge required to establish wrongdoing, it might be difficult for a corporation to avoid a finding that it has acted unconscionably if it puts into place procedures intended to ensure that no particular individual could have the requisite knowledge. The same might be true if a corporation's procedures were such that those formulating them were reckless about serious consequences..."

In addition, the Full Court disagreed with the primary judge's conclusion that the bank acted unconscionably even if one combined the knowledge of the bank's officers as the primary judge did. On this aspect of the appeal, Allsop CJ gave the leading judgment and examined the meaning of unconscionable conduct in the statutory sense (at [53]-[61]; with whom Besanko J agreed at [71] and Edelman J agreed at [84]-[85]). The task is not limited to finding "moral obloquy" or some other synonymous definition or rule. In summary, there is an evaluation based

on the notion of business conscience according to legislative norms and values and made against as assessment of the circumstances. Chief Justice Allsop examined the evaluation process by reference to his earlier judgment in *Paciocco v ANZ Banking Group Ltd* (2015) 236 FCR 199 (which at [55] in *Kojic* he noted was regarded as correct by certain members of the High Court in *Paciocco v ANZ Banking Group Ltd* [2016] HCA 28).

Bankruptcy and insolvency – appeal against making of a sequestration order – whether hearing of the creditor's petition ought to have been adjourned

In *Culleton v Balwyn Nominees Pty Ltd* [2017] FCAFC 8 (3 February 2017) the Full Court (Allsop CJ, Dowsett J and Besanko J) dismissed an appeal against a sequestration order made against the appellant's estate under s43 of the *Bankruptcy Act 1966* (Cth).

The appeal raised various grounds of appeal, all of which were dismissed by the Full Court. Of general interest were the grounds that the primary judge (Barker J) erred by failing to grant an adjournment of the creditor's petition.

Before the primary judge, the appellant as a self-represented litigant requested the adjournment in order to obtain legal representation for the purpose of establishing that the bankruptcy proceedings constituted an abuse of process. The adjournment was refused and this argument was not seriously pursued on appeal. Rather, the appellant (who was legally represented in the appeal) argued that the primary judge should have granted an adjournment in order to allow him to obtain legal representation for the purposes of proving his solvency.

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Accordingly, the Full Court referred to the principles relevant to determination of an adjournment application in the context of the hearing of a creditor's petition and on appeal of such a discretionary decision (at [35]-[39]). In considering the question of an adjournment of the hearing of a creditor's petition, the court observed that it was fundamental to keep firmly in mind the public interest nature of bankruptcy jurisdiction (at [40]).

After citing authorities demonstrating the centrality of the question of solvency to the jurisdiction of bankruptcy, the Full Court said at [45]: "The centrality of the question of solvency or insolvency might, in a given case, be why an adjournment is not granted when solvency is asserted. If material before the Court gives rise to the inference that further time to prove solvency is unlikely to be of utility, there may be a risk of further prejudice to creditors generally if there is delay in making the order. On the other hand, if the evidence reveals the real possibility that there is further material that may prove the debtor is solvent, attention should generally be given to the question whether some time or opportunity should be afforded to the debtor. Whether it is afforded will depend upon all the circumstances."

The appellant's request for an adjournment was raised in the context of (but not as the requested reason for) the adjournment (at [47]). The question of the appellant's solvency was not an abstruse legal issue and the facts concerning it were likely to have been known by the appellant (at [49]). The Full Court held that there was no error in the primary judge's view that the material did not warrant an adjournment (at [53]).

More generally, the Full Court stated at [52]: "Section 37M makes clear that a central consideration to the overarching purpose is the just determination of proceedings. The just determination of a creditor's petition requires solvency to be addressed if the issue is raised on the material before the Court. If an adjournment is sought to obtain legal representation in order to help substantiate an assertion of solvency that has some bona fide and real basis, consideration should be given to the legitimacy and utility of time and legal assistance for proof of that matter. This is not to fetter any approach. It is not to pander to recalcitrant debtors. It is not to say any assertion will lead to an adjournment. Each case must be dealt with on its merits. But it is to be recognised that insolvency, not judgment execution or debt collection, is the essence of an application for a sequestration order. An assertion of solvency with some real and bona fide foundation is not a collateral question. It goes to the heart of the jurisdiction; though it is for the debtor to prove: s52(2)(a). How a judicial officer deals with a request for more time to prove solvency will depend on the circumstances of the particular case. But it should be approached recognising the importance of the question to the exercise of the Court's jurisdiction."

Administrative law and migration law – procedural fairness – requirement to inform applicant of critical importance of his employability as affected by his disability

In *BRK15 v Minister for Immigration and Border Protection* [2016] FCA 1570 (22 December 2016)

the court (Gilmour J) held that the decision of the Assistant Minister for Immigration and Border Protection (the Minister) under s501(1) of the *Migration Act 1958* (Cth) to refuse to grant the applicant a protection visa application constituted a denial of procedural fairness and jurisdictional error.

The Minister's decision under s501(1) was based on the view that the applicant's criminal history, limited personal support and disability reduced his employment prospects, leading to an unacceptable risk of reoffending. Prior to denying the application, the Department of Immigration and Border Protection (the department) afforded the applicant the opportunity to disclose any information that might be relevant to deciding whether to grant a protection visa. In this regard, a letter from the department specifically mentioned that information concerning the applicant's disability might be appropriate.

The court held that the department's request for information was insufficient to afford him procedural fairness (at [47]). The applicant was not to know that the Minister would connect "in the central and critical way she did" information concerning his disability and the risk of his reoffending. In this context, Gilmour J commented that procedural fairness requires a decision-maker to "advise of any adverse conclusion which would not obviously be open on the known material" (at [48]).

Dan Star SC 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.

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Court of Appeal judgments

1-31 December 2016

with Bruce Godfrey



Civil appeals

Mortimer v Lusink & Ors [2017] QCA 1,
31 January 2017

General Civil Appeal – where the appellant, the testator’s daughter, was refused an application for an extension of time within which to apply for provision from the estate – where it is alleged on appeal that the primary judge reached his conclusions by the application of principles or considerations applicable to the grant of final relief, rather than those applicable to the exercise of the discretion under s41(8) of the *Succession Act 1981* (Qld) (SA) – where it is further alleged that the primary judge made factual errors arising from misapprehensions of the evidence – where the primary judge relied on a principle that it was necessary for an applicant to establish an entitlement to final relief, instead of whether or not an applicant has established an arguable case for final relief – where it was relevant for the primary judge to have enquired into whether the appellant’s claim was one that was clearly unlikely to succeed or was one that would probably fail – where it was noteworthy that in other jurisdictions, intermediate courts of appeal have held that under the comparable statutory provision, the relevant enquiry is as to whether or not an arguable case has been made out by the applicant for relief – where his Honour did not, however, undertake such an enquiry – where his Honour did not address the issue of whether the appellant’s case was clearly unlikely to succeed, nor did he enquire into whether it would probably fail – where his Honour expressed no view as to whether there was an arguable case – where in undertaking the assessment that he did make, his Honour appears to have conflated the concept of a substantial case for relief under s41(8) SA with the concept of a prima facie case for a substantial award by way of final relief – where the evidential factors leads irresistibly to a conclusion that the financial resources available to the appellant are insufficient to meet her needs now and into the future – where in all the circumstances, the discretion under s41(8) SA ought to be exercised in the appellant’s favour – where at the hearing of the appeal, the parties were in agreement as to the form of the orders that ought be made by this court in the event that the appeal is allowed.

Appeal allowed. The orders of the Supreme Court be set aside and in lieu thereof it is ordered that: (a) It is directed that the applicant’s application for provision out of the deceased’s estate shall be heard notwithstanding that such application was instituted within nine months after the death of the deceased; (b) By consent, all amounts received by the second, third and fourth respondents from the first respondent, less any amounts paid by them for reasonable legal fees and expenses

incurred in responding to this proceeding, shall be repaid to the first respondent forthwith and be held by him as executor of the executor of the estate of the deceased pending the determination of the applicant’s application for provision out of the estate of the deceased; (c) By consent the proceedings are discontinued as against the second, third and fourth respondents upon such payment.

Procedural orders. The first respondent pay the appellant’s costs of the appeal, including the application to adduce further evidence, and her costs of the application below. The first respondent be granted a certificate under s15 of the *Appeal Costs Fund Act 1973* (Qld) including for his own costs of the appeal.

Chandra v Queensland Building and Construction Commission [2017] QCA 4,
3 February 2017

Application for Leave *Queensland Civil and Administrative Tribunal Act* – where the respondent had previously made findings of unsatisfactory conduct against the applicant – where the respondent determined that the applicant had also engaged in professional misconduct because of his repeated unsatisfactory conduct – where the Queensland Civil and Administrative Tribunal ordered that the applicant’s licence as a building certifier under the *Building Act 1975* (Qld) be cancelled – where the tribunal ordered that the applicant never be re-licensed and imposed a pecuniary penalty – where the applicant appealed against the decision that he never be re-licensed and challenged the pecuniary penalty – where the appeal tribunal affirmed the decision but vacated the pecuniary penalty order – where the tribunal did not find that a less severe, available order would not provide sufficient and appropriate protection for the public – where the tribunal’s concluding statement in paragraph 64 was instead that “the best protection for the public in this case is that Mr Chandra never be allowed to hold a licence again” – where the tribunal did not apply the correct test – where in every case of professional misconduct it might be said that a permanent ban supplies the best protection for the public, but that is not a justification for a permanent ban where a less severe order is appropriate to meet the legislative purposes – where authorities suggest that a permanent ban should not have been imposed in this case unless the tribunal was satisfied that the licensee was probably permanently unfit to hold the licence – where the tribunal made no such finding – where a less severe order of the kind proposed by the applicant (an order that precluded the applicant from applying to be re-licensed for a specified period of time determined by the tribunal, thereafter leaving it to the respondent to decide if the applicant then satisfied the statutory criteria

for holding a licence) would appear to sufficiently and appropriately protect the public against the risk of further misconduct by the applicant – where the judicial member concluded instead that the applicant’s “own failure to propose an equally effective but less onerous available option” indicated that “there realistically isn’t one” and that his failure was “also indicative of an inability to come to grips with the magnitude of the risk he poses now and in the foreseeable future” – where those conclusions did not explain why an order along the lines proposed in the applicant’s extensive submissions was not appropriate and sufficient to protect the public – where the judicial member also observed that, in the absence of “some evidence of positive and lasting change or sign of reasonable prospects of, or even a genuine willingness to accept and reduce the risks proposed by, his professional shortcomings, the Tribunal was entitled to take a ‘better safe than sorry’ approach” – where that observation affirmed the tribunal’s erroneous approach of adopting the most severe penalty without explaining why a less severe penalty would not provide the required protection of the public – where the tribunal’s findings engender a reasonable concern about the applicant’s suitability to hold the licence but they do not establish that he was unlikely ever to rehabilitate himself – where in these circumstances, while the seriousness and repetition of the applicant’s conduct merited a severe sanction, including deprivation of the licence for a substantial period, to further the dominant legislative purpose of protecting the public, it was not open to impose a permanent ban for the subject conduct – where absent a finding that it was likely that the applicant would remain unfit to be licensed for the rest of his working life, the protection of the public could be secured by a severe sanction, falling short of a permanent ban, that precluded the applicant from applying to be re-licensed for a substantial period, when he would be required to satisfy the respondent that he was then a suitable person to be licensed – where the respondent applied for leave to cross-appeal against the appeal tribunal’s decision to vacate the pecuniary penalty order – whether it was open to the appeal tribunal to set aside the tribunal decision imposing the pecuniary penalty – where those reasons depend in part upon the effect of the permanent ban which has been overturned – where the judicial member clearly found that as a result of the order that the applicant must never be re-licensed by the respondent, the applicant had lost his livelihood, and that this occurred at a time “when his employability in another field must be problematic” – where there was no finding to that effect made by the tribunal – where there was no evidence that the applicant had lost his livelihood or that his employability in another field was problematic



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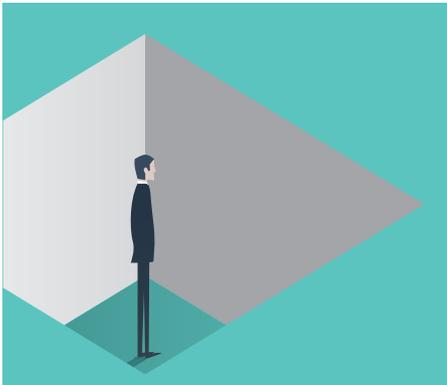
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– where the parties’ submissions in the appeal tribunal were to the contrary effect – where there were no facts found by the tribunal or agreed between the parties that could justify the inference drawn by the judicial member – where leave to appeal should be given because the appeal tribunal’s order vacating the penalty involved an error of law and the public interest is served by the restoration of the order imposing the penalty. In relation to the application for leave to appeal by Chandra.

Leave granted. Appeal allowed. Set aside Order 1 of the appeal tribunal and instead it is ordered that Suresh Chandra is not permitted to apply to be licensed or re-licensed by Queensland Building and Construction Commission (QBCC) before 21 November 2018. Costs. In relation to the application for leave by the QBCC: Leave granted. Appeal allowed. Set aside Order 2 of the appeal tribunal. Costs.

Ure v Robertson [2017] QCA 20,
28 February 2017

General Civil Appeal – where the appellant filed a claim in March 2007 and the respondent filed a counterclaim in September 2010 – where the appellant provided a list of documents in March 2015 without obtaining an order of the court – where r389 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) provided that if no step was taken in a proceeding for two years, a new step could not be taken without an order of the court – where r371(2)(d) of the UCPR empowered the court to declare a step taken in breach of the UCPR to be effectual – where it is common ground that by 20 March 2015 no step had been taken in relation to either the claim or the counterclaim for more than two years – where by that date r389(2) of the UCPR therefore operated in relation to all parties to the proceeding and prevented them from taking a new step without obtaining an order of the court – where on 20 March 2015, the solicitors for Mrs Ure and the other defendants by counterclaim provided a list of documents on behalf of the second and third defendants by counterclaim – where they took that step without obtaining an order of the court as they were required to do by r389(2) – where the respondent applied for an order dismissing the claim for want of prosecution and declaring ineffectual the delivery of the list of documents – where the primary judge dismissed the claim and counterclaim for want of prosecution – whether the delivery of the list of documents constituted a step having been taken within the meaning of r389(2) UCPR – where the evident intention of r389 UCPR is that a stay should be imposed on proceedings in certain circumstances and to require any person who seeks to lift the stay to approach the court to seek an order – where the policy is to ensure that proceedings which are significantly delayed come to the attention of the court so that they can be dealt with appropriately: see *Thompson v Kirk* [1995] 1 Qd R 463 – where the construction of r389 for which the appellant contends would defeat that intention – where the proper construction of r389(2) is that the ‘last step’ contemplated must be the last effectual step, namely a step which was effectual because it was regular when taken, or a step which, although irregular when taken, has since been declared to

be effectual under the rules – where if the court is approached by a party seeking to re-enliven proceedings after two years have passed before the step is taken the appropriate order, assuming the court is persuaded to exercise its discretion, would be an order pursuant to r389(2) authorising the step to be taken – where if the step has already been taken in breach of r389(2) then the appropriate order would be an order under r371(2) (d) declaring the step to be effectual, perhaps together with an order nunc pro tunc under r389(2) permitting the step to be taken – where this approach treats the step as irregular but not effectual – where r371(1) does not make regular that which is irregular – where that depends on the exercise of the discretions authorised by r371(2) – where it follows that the primary judge made no error when he concluded that the proceeding was to be regarded as having been stayed by operation of r389(2), notwithstanding the fact that the list of documents was served on 20 March 2015 – where the appellant suggests the primary judge erred in not finding, and attributing significance to, the fact that the delay in the prosecution of the claim was stalled and frustrated by the respondent – where there is no merit in this complaint – where the primary judge did not mistake the facts – whether the discretion of the primary judge miscarried.

Appeal dismissed with costs.

Criminal appeals

R v MCJ [2017] QCA 11, 10 February 2017

Appeal against Conviction – where the appellant was charged on a 13-count indictment with one count of maintaining a sexual relationship with a child with a circumstance of aggravation, three counts of indecent treatment of a child under 12 in his care, five counts of indecent treatment of a child under 12 and four counts of rape – where the appellant contended that the judge failed to adequately give a direction in terms of *Robinson v The Queen* (1999) 197 CLR 162 – whether there was a misdirection or non-direction – where the circumstances relied on by the appellant in some instances are entirely lacking in substance and the balance, at worst, give rise to potential arguments about credibility and reliability – where even considered collectively they do not give rise to a perceptible risk of a miscarriage of justice so as to have required reference to them in the warning which was in fact given in this case – where a note the complainant had written was an exhibit at trial – where the appellant submits the jury was not properly directed as to how it could use the evidence of the note – whether the jury was properly directed – where it would have been difficult for the jury to comprehend the distinction between them having regard to “the tenor of the note” but not using the note’s content “as evidence that any particular thing had happened between” the appellant and complainant – where it is unnecessary to resolve whether it was permissible for the jury to use the evidence about the note and its content as circumstantial evidence in proof of the alleged sexual relationship between the appellant and complainant – where there was another legitimate pathway for the admission into evidence and the use of the note in such a way

– where that pathway was s93A of the *Evidence Act 1977* (Qld) – where regrettably that provision was not referred to the trial judge – where had it been, his Honour would likely have given a less obscure direction, unconcerned by the vague parameters of the above discussed common law principles – where the note was admissible as evidence of that fact pursuant to s93A and the jury was entitled to use its content as tending to establish that fact – where the direction in dispute has had to be considered on the basis the jury may have regarded it as allowing the evidence about the note to be used as circumstantial evidence in proof of the alleged sexual relationship between the appellant and complainant – while that use was permissible the dilemma remains that the direction said so little about the parameters of such a use – where a significant omission was the absence of explanation of circumstantial reasoning apposite to the use of the note – where accepting it was permissible for the jury to use the evidence about the note as tending to establish there had been a relationship involving sexual behaviour, the evidence only tended to establish that fact as a matter of inference, that is, as circumstantial evidence – where the only direction given of relevance to circumstantial evidence was a standard direction in the introductory phase of the summing up dealing with the drawing of inferences – where this was not a case requiring a special direction of the kind apt to a case based substantially on circumstantial evidence, however, it at least required an explanation of the need to be satisfied the note's reference to "the things we do" was to physical sexual interaction between the appellant and complainant and to exclude the possibility it was a reference to some lesser form of interaction, such as the showing of pornography or discussions about sexual topics such as dildos – where such a direction would have explained those examples of lesser interaction arose from the evidence, in that the complainant told her mother the note was a reference to the showing of pornography and the appellant told his wife he and the complainant had discussions including about a dildo – where it is reasonably possible the jury regarded the note as tending to confirm the complainant's account that the appellant had maintained a sexual relationship with her – where unfortunately the real risk which cannot be discounted here is that the jury may have used the note as evidence tending to prove the sexual relationship between the appellant and complainant as alleged by the prosecution without reaching a specific view as to whether the note's reference to "the things we do" was to physical sexual behaviour or something less than that – where the jury may not have appreciated if it was possibly the latter then the note could not be used as evidence in proof of the charge of maintaining a sexual relationship with a child – where it is reasonably possible that the failure to direct of the need to be satisfied the note's reference to "the things we do" was to physical sexual interaction between the appellant and complainant, and not some lesser conduct, may have resulted in the impermissible use of the note in a way which affected the verdicts – whether a miscarriage of justice occurred.

Appeal allowed. Convictions on counts 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13 and 15 of the indictment

be quashed. The appellant be retried on those counts on the indictment.

R v HBO [2017] QCA 18, 24 February 2017

Appeal against Conviction – where the appellant was convicted of seven counts of sexual offending against his stepdaughter – where the most serious offence was an attempted rape for which he was sentenced to 4½ years' imprisonment – where the offences were allegedly committed in certain broadly defined periods, the earliest commencing in 1989 and the latest ending in 1994 – where there is no issue that a *Longman* direction (*Longman v The Queen* (1989) 168 CLR 79) was required in the present case – where the trial judge was obliged to inform the jury that the delay in the making of the complaint had disadvantaged the defendant because the evidence of the complainant could not be adequately challenged, either by cross examination or by contradictory evidence, after the passage of about 25 years – where having identified those effects of the delay on the fairness of the trial, the trial judge was required to warn of the danger in convicting in this case without the jury scrutinising the complainant's testimony with great care and considering the circumstances which were relevant to that evaluation of her testimony – where what was said in that respect could not be criticised – where the question is whether a warning in those general terms was sufficient in the present case because of a risk that, unassisted by the trial judge's instruction as to what were those circumstances, the jury might convict without that required scrutiny of the evidence – where the jury was bound to follow the trial judge's instructions and, in particular, to heed the warning within this instruction about the complainant's testimony – where unless "the circumstances relevant to its evaluation" must have been plain to the jury, the warning could have been sufficient only if those circumstances were identified by the trial judge – where this was not a case where the circumstances relevant to the evaluation of that testimony were so obvious that they could not be overlooked – where the relevant circumstances were the passage of 20 to 25 years from the alleged events, the young age of the complainant at the time, the absence of any complaint notwithstanding the complainant's close relationship with her mother and twin brother, the circumstance that many of the events were said to have occurred as she slept or after she had awoken, the antipathy of the complainant towards the appellant from his having been unfaithful to her mother, the coincidence of the timing of her learning of that fact and her complaint to police and the complainant's explanation for going to the police when she did – where without those circumstances being identified by the trial judge as necessary considerations, what was said was insufficient to instruct the jury of the required scrutiny of the complainant's testimony.

Appeal allowed. Appellant's convictions of 11 March 2016 quashed. Retrial ordered.

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

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Career moves



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Rachel Tierney



Kate Avery



Renée Eglinton

Baker McKenzie

Baker McKenzie has welcomed **Ian Innes** to its Brisbane office as special counsel. Ian is an experienced litigator and dispute resolution lawyer, with a focus on insolvency and restructuring. In that practice Ian acts for insolvency practitioners, financiers, debtors and creditors. He is also highly experienced in energy and resources disputes and administrative law litigation, and has successfully dealt with challenges involving major project approvals, along with international asset recovery work.

Barry Nilsson

Barry Nilsson has announced the appointment of Asian law expert **Angie Todd** as special counsel. Angie is qualified to practise in both Australia and Hong Kong and has eight years of international family law experience in the Chinese administrative region. Her expertise includes working in cross-border divorce, global asset tracing, and the international relocation and removal of children. She is also a trained collaborative practitioner and a former vice chair of the Hong Kong Family Law Association.

Best Wilson Buckley Family Law

Best Wilson Buckley Family Law has announced the opening of an office in Ipswich.

Amity Anderson has been appointed as legal partner and will lead the new office. Amity has practised exclusively in family law for the past nine years and takes a keen interest in property settlements, financial agreements and spousal maintenance.

Alecia Connor has been appointed as an associate, and is a founding member of the Ipswich office. Alecia has practised in family and de facto relationship law for the past five years.

Lynn Armstrong has been appointed a senior associate in Best Wilson Buckley Family Law's Toowoomba office. Lynn has practised in family law for more than 10 years and takes particular interest in child protection matters and domestic violence cases.

Broadley Rees Hogan

Broadley Rees Hogan has announced two appointments to its commercial litigation and dispute resolution team.

Associate **Alicia Dark** has worked in commercial litigation with a focus on commercial dispute resolution, insolvency and building and construction law since her admission in 2011.

Solicitor **Lachlan Amerena**, who has worked as an associate to Supreme Court Justice North, will focus on commercial litigation, as well as disputes in building and construction and planning and environment.

Carroll Fairon Solicitors

Carroll Fairon Solicitors has announced the appointment of **Fraser Murray** as associate. Fraser has close to 13 years' experience in family law, after a decade served as an associate in the family law courts and then private practice as a family lawyer. Fraser is based at both the Brisbane and Sunshine Coast offices.

The firm has also announced the appointment of **Amanda Gleeson** as solicitor. Amanda practises in property law, including leases, conveyancing and property transfers. She also practises in wills and estates.

CDI Lawyers

CDI Lawyers has announced the appointment of special counsel **Andrew Shields**.

Andrew has extensive experience in both private practice and in-house roles, and regularly advises on termination of construction contracts, the *Subcontractors'*

Charges Act, Building and Construction Industry Payments Act (BCIPA) matters, as well as court and tribunal disputes.

He is an accredited adjudicator and mediator, and was recently appointed secretary of the Gold Coast Central Chamber of Commerce.

Couper Geysen – Family and Animal Law

Senior solicitor **Kylie Drage**, who has joined Couper Geysen – Family and Animal Law, has practised since 2010 in areas that include family law, domestic violence, criminal law and child safety matters. She also has experience with wills, enduring powers of attorney and advanced health directives.

Gilshenan & Luton Legal Practice

Gilshenan & Luton Legal Practice has welcomed **Rachel Tierney**, who represents clients in a range of matters including assault, fraud, traffic, and sexual and drug-related offences. She is also experienced in domestic violence and child protection matters.

kare lawyers

Kate Avery and **Renée Eglinton** have joined forces to commence kare lawyers, a plaintiff personal injuries law firm.

Kate, who has more than 18 years' experience in all aspects of this practice area, was previously a senior associate at boutique plaintiff and insurance firms. She is a QLS accredited specialist (personal injuries) and sits on the QLS advisory committee for personal injuries specialist accreditation.

Renée is an expert in accident compensation law and has almost 25 years' legal experience, including senior roles as a partner at a national law firm, working at WorkCover Queensland as in-house principal lawyer, and most recently as special counsel at an insurance law firm.



Marino Law

Marino Law has strengthened its family law and litigation divisions with the appointment of **Abbi Golightly** as a partner and **Mark Steele** as a senior associate.

Abbi is a QLS accredited specialist (family law) and joins the firm with more than 13 years' experience in all areas of family law.

Mark, who has joined the litigation team, focuses on insolvency law, debt recovery, commercial litigation, dispute resolution and commercial tenancy disputes. Prior to his admission and role at a top-tier international firm, Mark spent 15 years in the funds management and banking sector.

p&e Law

p&e Law has announced the appointment of **Tanya Knauer** as a senior solicitor in its planning and environment practice

based in its Cairns office. Tanya has more than 23 years' experience in planning and environment and government law, advising government clients, developers and individuals on a broad range of legislation.

Rose Litigation Lawyers

Rose Litigation Lawyers has announced the appointment of **Billy Fitzgerald** as a partner. Billy leads the firm's Brisbane office and practises exclusively in litigation, insolvency, restructuring and debt recovery.

Small Myers Hughes

Gold Coast firm Small Myers Hughes is proud to announce the addition of two new partners.

Jodie Mills and **Craig Nicol** have worked at the firm for more than 15 years and bring the number of partners to five, all of whom are accredited specialists in their fields of practice.

Jodie is a chartered tax adviser and accredited specialist in tax law with a focus on business and tax transactions. She is a member of The Tax Institute and regularly presents at its Young Tax Professional series on the Gold Coast.

Craig is an accredited specialist in family law and co-editor of *The Family Law Book*. He has been recognised as a recommended family law expert in *Doyles Guide*.

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06 Masterclass: Succession Law

8.30am-12pm | 3 CPD

Law Society House, Brisbane

Designed for succession lawyers with five years+ PAE who want to apply and extend their advanced skills and knowledge, this masterclass explores various aspects of wills and estate law practice using scenarios and questions from past specialist accreditation assessments. It will include a detailed examination of factual scenarios, as well as access to a panel of accredited specialists who will provide expert advice and feedback on delegate questions.



11 Webinar: Introduction to Property Contracts

12.30-1.30pm | 1 CPD

Online

Aimed at junior legal staff who assist with conveyancing transactions, this webinar will discuss the essentials of property transactions and the different types of property contracts, as well as fundamentals of the standard REIQ terms of contracts for houses and residential land and for residential lots in a community titles scheme. This webinar will explain important legal terminology and provide you with practical tips.



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26 Webinar: Introduction to Trust Accounting

12.30-1.30pm | 1 CPD

Online

Designed for junior legal staff, this webinar will give you the confidence to identify and manage trust accounting issues by providing you with an overview of key trust accounting principles, which affect your day-to-day responsibilities.



27 Practice Management Course – Sole practitioner and small practice

27-29 | 8.15am-4.20pm, 8.30am-4pm,
8.30am-2.50pm | 10 CPD (full attendance)

Law Society House, Brisbane

Consisting of comprehensive study texts, three days of face-to-face tailored workshops, and five assessment tasks, the Society's Practice Management Course (PMC) equips aspiring principals with the skills and knowledge required to run a successful practice.

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- tailored workshops
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- superior support.



Earlybird prices and registration available at

qls.com.au/events

Save the date

3 May	Webinar: Electronic Signatures	18 May	In Focus: Mental Health
5 May	QLS Rockhampton Intensive	24 May	Introduction to Wills and Estates
11 May	Core: Cybersecurity and Minimising Data Breaches	25 May	In Focus: Search Warrant Guidelines
11 May	Modern Advocate Lecture Series, 2017, Lecture two	26 May	QLS Annual Ball
17 May	QLS Open Day	30 May	Webinar: Legal Project Management
17 May	Equity & Diversity Award Presentation	31 May	Masterclass: Taxation Law

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CELEBRATE YOUR PROFESSION

Here are some of the events on offer.

17 May | QLS Open Day

Visit Law Society House for a half-day of **complimentary professional development sessions** delivered by award winning lawyers. Both members and non-members are invited to come along, gain CPD points, and find out more about QLS.

Open Day concludes with the **2017 Equity and Diversity Awards**, where we recognise practices who promote equity in the profession.

See page 35 for nomination information

18 May | In Focus: Mental Health

Join us for a **complimentary special breakfast presentation** to understand more about mindfulness and the positive impact it can have on you and your teams.

Our presenters will provide you with practical mental health strategies to improve your productivity and look after your own mental health at work, and that of your colleagues.

26 May | QLS Annual Ball

This year we'll be continuing our Law Week celebrations through to the following week, at the **biggest social event of the year** – the QLS Annual Ball.

Gather your colleagues and join us at the Brisbane Convention & Exhibition Centre's Boulevard Room, for an exciting night of fun, entertainment and a delectable three-course dinner.

Register and find out more

 qsl.com.au/lawweek

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Professional development the NQLA way

Samantha Cohen invites you to enjoy a perfect mix of professional development and relaxation at the 2017 Offermans Partners North Queensland Law Association Conference.



Hamilton Island, in the heart of the Great Barrier Reef, is the ultimate getaway.

Part of the Whitsunday group of islands, Hamilton Island is not just a tourist destination but also a thriving community. The island has coral and marine life just off its spectacular beaches and is teeming with wildlife in its hinterland.

Offering renowned restaurants, and water and land activities, the island has something for everyone and is the ideal place to take the family. Which is exactly what the North Queensland Law Association (NQLA) encourages you to do!

Next month, Hamilton Island will host the 2017 Offermans Partners North Queensland Law Association Conference. The conference is from 18 to 20 May at the Hamilton Island Yacht Club, which boasts spectacular views out past the surrounding islands to the sea.

The conference will kick off on Thursday 18 May with the Lexis Nexis Sunset Welcome Drinks, which will be held by the main pool beachside overlooking pristine, white sandy beaches.

The following morning will start with the NQLA's SEA-PD (CPD by the sea) breakfast at the Outrigger Marquee and a panel discussion featuring Justices North, Henry and Brown of the Queensland Supreme Court, Judge Morzone QC of the District Court, Andrew Philip QC and Tim Mathews QC. This panel historically requires active participation and this year will be no different as delegates work their way through the 'Tribulations of Hamilton Law'.

The conference will then reconvene at the Hamilton Island Yacht Club where it will be opened by Chief Justice Catherine Holmes, followed by a plenary session delivered by Debbie Kilroy of Sisters Inside.

Delegates will then divide into three streams; – litigation, commercial and family law. Stream highlights include Judges Coker and Willis of the Federal Circuit Court discussing the most prominent family law cases over the

past 12 months and an analysis of common interlocutory applications presented by barristers Douglas Campbell QC, Nicholas Andreatidis and Sean Kelly.

In the commercial stream, barrister Anthony Collins will be considering deathbed gifts in the 21st Century followed by barrister Craig Wilkins and Offermans Partners principal Michael Brennan looking at insolvency practitioner liability under Queensland environmental legislation.

Afternoon session highlights include Stephen Pyman's paper on drafting construction contracts to deal with requirements under BCIPA, QBCC amendments and recent decisions. In the family stream, Dr Carolyn Quadrio will present on mental health and parenting issues in family law assessment and in the commercial stream Mark Metzeling will discuss brand protection and good will.

The afternoon will close with a plenary session presented by barrister Elizabeth Raper, 'Discrimination, bullying, harassment and adverse action: Appropriate protections or political correctness gone mad?'

The conclusion of day one will see delegates back for another Hamilton Island sunset, this time for a cocktail party on the beautiful Bommie Deck of the yacht club. This cocktail event provides delegates with a chance to dress up and enjoy canapés, drinks and entertainment as they are spoilt for choice with sunset or marina views.

Day two of the conference commences with the plenary session, 'Human Rights in North Queensland – Travels in Time and Place', presented by Bill Mitchell. Streams commence again with a panel discussion on the latest developments in criminal law by Chief Judge O'Brien and Judges Harrison and Dick of the District Court. The final core CPD topics will be then be delivered in three streams for barristers, senior solicitors and early career lawyers.

Delegates will then go back to their streams to enjoy presentations by Kylie Downes QC on witness preparation, Jordan Miller and Damian Carroll on compulsory acquisition, and in the family law stream a double session

with barristers Michael Fellows, Viviana Keegan and Alex Raeburn presenting a paper titled 'War of the Roses – managing clients whose preference is to go to war'.

The last session of the conference will see Mathew Raven, chair of the Queensland Law Society Property Law Committee, presenting a paper on key issues which can arise for developers or buyers of apartments off the plan. In litigation, barrister Justin Gregger will present a paper on disappointed beneficiaries and the limits of the duty owed by will drafters.

With the conference ending at lunch, this provides delegates with the opportunity to try the great food available on the island and catch up with colleagues, spend time with family and enjoy all that the island has to offer. Book an activity or wander through the local village shops while enjoying the marina views.

Saturday night will see the conference conclude with the Auscript After Party held on the Frangipani Lawn beachside. A more casual affair with a festival-like feel, wile away the hours mingling with colleagues and speakers, helping yourself to the various food stations, having a drink and listening to the live band.

The Sunday is free to relax, unwind and recover, and just enjoy the beautiful surroundings.

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

Samantha Cohen is principal of Cohen Legal and president of the NQLA.

New QLS members

Queensland Law Society welcomes the following new members who joined between 10 February and 8 March 2017

Cassandra Adomi-Braccesi, S.R. Wallace and Wallace
Shaheen Afzal, Queensland Building and Construction Commission

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Susan Arbon, Twohill Lawyers

Amy Arbuckle, McCullough Robertson

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Catherine Banks, QPILCH

Michelle Beatty, Virtual Legal

Danielle Blond, Qld Health – Princess Alexandra Hospital

Alison Blyth, Outside Legal Solutions

Samantha Boardman, Maurice Blackburn Pty Ltd

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Updating practice systems

A practice idea that might make a big difference



This is a very fast changing environment, but there are some new resources which may help to take the mystique out of selection.

There's nothing quite like competition to rattle the cage, and it has come with a fair old rush in the practice system market.

There is now a published guide that can help in the selection process on the NextLegal website (nextlegal.com.au/newpms).

This provides information on functionality, workflow, document management, trust and accounting, cloud/hosting options, and so on...

Our April 2015 *Practice Tip* (dcilyncon.com.au/we-need-a-new-practice-system-or-do-we) argued the case that disenchantment with a current system is often as much to do with lack of firm discipline and commitment in training and resourcing as it is with functional weaknesses of the actual system. If you are in the market, give that one another look.

So here's just a quick reminder of some of the key issues in play...

Some vendors have highly trained and well-resourced sales teams. Try to think beyond polished sales pitches. They may not be the best indicator of the strengths of one product versus another.

In our view, the best reference for a particular system is a detailed discussion with a couple of seasoned users (they are usually happy to help). They can advise on pluses, minuses, service issues and any unforeseen costs.

Before starting the selection process, try to have some clarity on the functionality you would like as standard in your practice in three years' time – and give strong weighting to the features that you'll need. Some systems have an *open* design – which means they can easily and compatibly talk with other packages – (for example, CRM, specialist accounting) which in a fast-moving development environment can be an advantage. Is this a feature you will need?

Do a complete financial analysis – sometimes called *total cost of ownership*. This includes hardware, precedents, data cutover from your old system, monthly costs per user, training (in our experience, you will generally need more than the quoted allowance), special reporting features, and so on.

Also, some system pricing is structured so that front-end costs are very low. The market is very competitive. You can get high functionality for quite low upfront *and* ongoing per user costs. But you won't understand what is high or low until you shop around. Some independent assistance may help

Finally, if you are intending using a cloud-based system, check the fine print of the user agreement very closely regarding ownership of your data. Remember, in the cloud, you don't physically control your data on site. And if you decide you've made the wrong choice and want to change supplier, the last thing your business needs is a protracted brawl about just who owns your data.

Take these few tips on board and see what the market has to offer.

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

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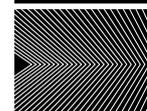
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Try camping, armed with a muscat

with Matthew Dunn



Easter often falls during the month of April, and many people enjoy venturing into the great outdoors for an Easter break.

However, the challenge of out-of-home living and a lack of refrigeration need not be an impediment to wine being the star of the holiday.

French gastronome Jean Brillat-Savarin wrote that “a meal without wine is like a day without sunshine”, and too often intrepid Queenslanders heading off on an Easter camping trip miss out on both wine and sunshine – but at least we can do something about the wine.

The first challenge of outdoor-ism is usually a lack of refrigeration. Sparkling wines, for example, need to be chilled and present very undesirably when lukewarm – if there is no refrigeration leave the Krug, Salon or Chandon at home. The same predicament faces sparkling burgundies, other sparkling reds and botrytis-style dessert wines. The increased temperature brings out cloyed sweet flavours and emphasises some of the wilder volatile elements.

Dry white wines can be another story. The mostly cringe-worthy practice of putting ice-blocks into white wine now seems to be receding, but for those with a taste for nostalgia, it is possible to buy little ice bricks in the shape of ice cubes to swill in your NZ savvy B (or single malt for the lion-hearted).

However, with white wines it is quite possible to enjoy some at close to room temperature. While those with high levels of fragrant flavour elements – such as sauvignon blanc, riesling or gewürztraminer – can be difficult wines to take camping because they tend to need lower temperatures to keep them in check, more restrained varieties such as chardonnay and pinot grigio can usually withstand being served a little bit warmer.

In fact a good chablis or white burgundy is better at red-wine temperatures than chilled. Reaching for a white wine with more body and less perfume is the best ticket when looking for something to accompany your campsite meals.

Red wines can also present an issue, but a little careful choice can result in good results. While reds are generally served at higher temperatures than whites, not all are good in the Queensland heat.

Most of our venerable wine writers tell us to serve reds at room temperature, but this can be misleading. Often they are writing for European markets where room temps are normally around 18 to 20°C. This is why it can be a good idea to give a full-bodied red five to 10 minutes in the fridge before ordinary serving to bring it down a few degrees.

On camping missions, experience has shown that monster reds quickly become overwhelming. A good trick is to look for a lighter red such as an Italian or Spanish variety, or to seek out a shiraz viognier blend rather than the full McLaren Vale shiraz onslaught. In this case, the viognier lightens the load and fills out the shiraz in a way which works at warmer temperatures.

While much overlooked at home, camping trips are made for fortified wines. One family's tradition is to take a bottle of the ‘camping muscat’ to enjoy with friends around the campfire after night settles in. Port would work well too, but the raisin heaven of good Victorian muscat usually brings out the stories and gets people talking. Such nights make for both a good time away and good memories.

The tasting Three camp-ready wines were subjected to consideration.



The first was the **Flametree Margaret River Chardonnay 2015**, which was gold in colour and was juicy peaches and grapefruit on the nose with an underlining hint of buttery malo. The palate was a bit frisky with a distinct acid cut that flows through to ripe fruit flavours but not at all cloyed. A longer-term proposition but with a cut back to a mostly dry finish it would camp well.



The second was the **Boireann 2015 Granite Belt Shiraz Viognier**, which was a dark brooding brick red and had a nose of tart red summer fruits and white pepper. The palate was smooth with the rich ripe flow of red berry fruit, a little pepper hiding presently in the mid palate and some floral power from the viognier on the back palate. The initial attack comes to a crescendo as it lengthens.



The last was the **El Candado Pedro Ximenez Sherry Jerez de La Frontera**, which was a dark toffee brown and had a nose of pure raisins and some rancio notes. The palate was sweet, strong and all raisins as it filled ever corner of the mouth with hints of spice and coffee but mostly fruitcake in a glass. A very strong contender for campfire star-gazing enabler.

Verdict: The three wines were made for Easter camping but the sentimental favourite was the Boireann, parochially Queensland and top-flight nationally.

Matthew Dunn is Queensland Law Society acting CEO and government relations principal advisor.

Mould's maze

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

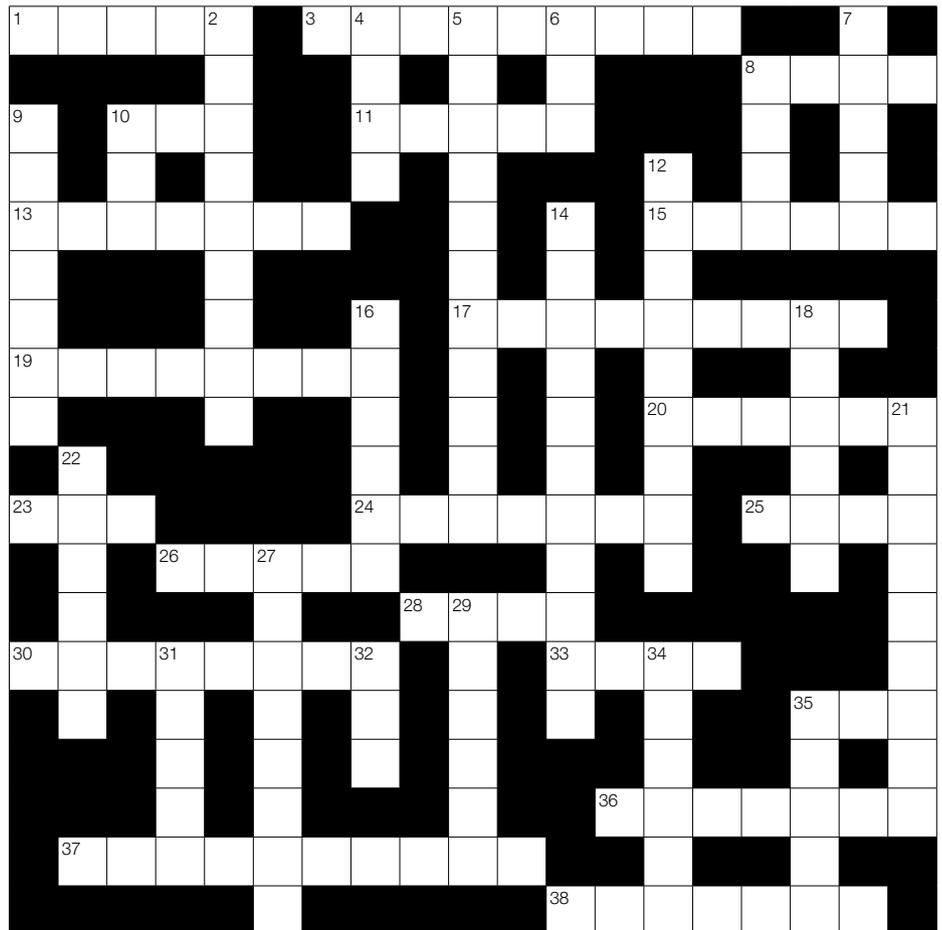


Across

- 1 Pre-trial hearing after committal involving cross-examination of prosecution witnesses where the defendant would otherwise be prejudiced. (5)
- 3 Fictional legal property. (9)
- 8 Terminate a contract of employment. (Slang) (4)
- 10 Within ... months of an offender being convicted of a serious drug offence, and a certificate being issued, the state can apply for a confiscation order. (3)
- 11 An appellate court will often a matter back to the court of first instance in the event an appeal is successful. (5)
- 13 Title retention clause. (7)
- 15 A direct brief excludes engagement of solicitors. (6)
- 17 Criticism of a witness if a matter is raised in a trial which has not been raised previously, recent (9)
- 19 A traversing an indictment alleges that even admitting all of the statements in the count are true, they are not sufficient to make the accused guilty of a crime. (8)
- 20 There is a statutory presumption of equal parental responsibility. (6)
- 23 Represented, gone in to (Slang) (3)
- 24 A mercantile agent who undertakes to make good any loss incurred regarding payment, del (7)
- 25 Adjudge. (4)
- 26 Annul or cancel, as in a conviction or a subpoena. (5)
- 28 Notice given under s20(6) of the *Criminal Practice Rules* (Qld) that the DPP will not be proceeding with a complaint, No bill. (4)
- 30 Maxim whereby the very improbable facts of an accident imply the negligence of the defendant, res ipsa (Latin) (8)
- 33 The rule in dat quod non habet provides that no-one can pass to another a better title than they have themselves. (Latin) (4)
- 35 A Magistrates Court may be constituted by ... or more justices of the peace. (3)
- 36 The touchstone of occupational regulation is to practise. (7)
- 37 Preventative clause denying responsibility for loss or damage. (10)
- 38 Legislative instrument. (7)

Down

- 2 Jurisdiction exercised by the Court of Chancery to aid a claimant at common law prior to the Judicature Acts. (9)
- 4 Wrongful death proceeding, a Campbell's action. (4)



- 5 'Spend time with and with' is the current terminology for parental contact (11)
- 6 Body empowered to consider reviewable decisions made under Commonwealth legislation (Abbr.). (3)
- 7 Physical or objective element of a crime, reus. (Latin) (5)
- 8 Conduct a matter on a 'no win, no fee' basis. (Slang) (4)
- 9 Felonious or fraudulent intent, animus (Lat.) (7)
- 10 Christian name of solicitors Harvey, Jackson, Jazayeri, Marsh and Nguyen, and footballer Thaiday. (3)
- 12 Attachment order. (9)
- 14 The presumption of does not apply to in-laws, so the law presumes a resulting trust instead. (11)
- 16 Contravention. (6)
- 18 The only deaf solicitor in Queensland employed at Porta Lawyers, Kathryn (6)
- 21 Semi-independent polities constituting the British Empire prior to the enactment of the Statute of Westminster. (9)
- 22 A person who leaves goods in the custody of another. (6)
- 27 v *Jackson Lalic Lawyers* held that advocate's immunity does not extend to negligent advice given by a lawyer concerning settlement of proceedings or signing consent orders. (8)
- 29 Discount or refund. (6)
- 31 Employers or drug addicts. (5)
- 32 Decision listing the factors relevant to the appointment of an Independent Children's Lawyer. (Two words) (3)
- 34 Cardinal case involving expert evidence, v *Sprowles*. (6)
- 35 Criminal equivalent of tortious conversion. (5)

Solution on page 64

Disrupting technology

Disassembly not a bad place to start

by Shane Budden



We live in an era of massive technological development which, apparently by law, we must refer to as ‘disruptive’, even if the technological development in question is a solar-powered piano accordion.

That such a device would not disrupt anything that an ordinary piano accordion would not also disrupt (that is, almost any pleasant listening experience) is beside the point – if it is new and technological, it is disruptive, especially if it has Bluetooth.

It is also automatically regarded as a good thing, even if it is clearly and obviously something which is the opposite of good (bad). For example, as I write this Dubai is beginning to trial an autonomous drone (no, it isn’t Ian Chappell; it is a flying taxi) which will be available to ferry passengers about the place.

This may seem like a good thing in Dubai, where the consumption of alcohol is frowned upon (and as the frown usually has some form of automatic weapon underneath it, it is the sort of frown you take fairly seriously). In Australia, however, where the consumption of alcohol has achieved the same overall popularity as breathing, things may get a little more complicated.

For a start, the AI controlling the drone will need to be able to understand the instructions of the customer – and of all the AI research I have read about in the last 10 years, I know of no-one in Silicon Valley who is currently teaching computers to speak aardvark (NB: ‘speaking aardvark’ is the scientific term that top language scientists use to describe the language of people who have been drinking long enough to go beyond the ‘somewhat intoxicated’ level and approach the ‘Boris Yeltsin’ stage. If you don’t know why it is called ‘speaking aardvark’, say the word *aardvark* slowly and loudly, and you will understand. Also, your co-workers will think you are drunk, but never mind, if you are reading this they probably thought that anyway).

AI may be able to decode dozens of computer languages, hundreds of dialects and even a Donald Trump press conference, but let’s see it make sense of someone who has spent all day at the races in a sponsor’s tent.

Indeed, this is before we factor in the well-known ‘humour delusion’ effect alcohol has, whereby people who have been drinking assume everything they say is hilarious despite it being about as funny as the Book of Revelations (it is due to this effect that I have concluded that Adam Sandler has a chronic alcohol problem). It remains to be seen what the autonomous drones will make of destination requests like “Mars!” and “The fires of Mount Doom!” followed by hysterical laughter and proclamations of undying love.

A further complicating factor is the propensity of almost all humans of the male version, when left unsupervised around electronic devices, to pull them apart to see how they work (and in the process render them forever inoperable).

Ask any married woman and I am pretty sure she will tell you her house is full of devices which once performed useful functions, but have since been converted into expensive paperweights because their husband started fiddling with them (the devices, not the women).

I realise I am being sexist, but the truth is that women generally adopt the policy of not pulling apart things they do not know how to put back together; to be fair, men adopt this policy as well, but it is rendered ineffective by the delusion that they know how to put *everything* back together.

If you don’t believe me, consider this: there is a TV show hosted by former *Top Gear* presenter James May called *The Re-assembler*, which is simply film of James May putting things back together (which, presumably, he first took apart). I would wager whatever audience this show has (I am betting me plus about 10 others) is 90% male.

The point is that with actual taxis, the driver is there to stop the passenger from doing something stupid like pulling the radio out or attempting to de-cab while the cab is travelling at 90kph along the freeway.

In a driverless flying drone, however, the lack of supervision will result in flying taxis parked in backyard swimming pools because the passenger attempted to pull the guidance system apart and re-wire it to go via the kebab shop or Maccas drive-through on the way home.

Which leads me to another reason why drone taxis won’t work – mankind’s propensity to take useful technology that promises many positive outcomes, and turn it into something which makes the world a much worse place.

I am not taking about nuclear weapons or Pokémon Go – which I concede are very bad things – but in fact television itself. Television initially had great potential for humankind – education, public awareness, storm warnings – and in fact Philo Farnsworth battled RCA for 10 years to claim responsibility for the invention of TV. Given that we mostly use television to encourage gambling addiction and notify the public when a celebrity burps, Farnsworth is probably suing RCA in the afterlife to get them to admit they invented it.

If drone manufacturers adopt the same high standards as television producers, drones will end up being used to dump radioactive waste on random households (in fact, much of what television delivers is probably worse for our health than radioactive waste, but I couldn’t think of a physical substance as damaging as reality TV).

Even if they don’t do that, people will probably do something similar, given that we all now carry phones with more computing power than the Apollo space missions, but use it largely for telling people we have never met what we had for breakfast or letting them know that a cat who can’t spell has gotten hold of junk food.

I could say much more on the evils of technology and TV, but I am out of space. Plus, if I don’t get the TV remote back together before my wife gets home, she’ll kill me...

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Crossword solution from page 62

Across: 1 Basha, 3 Blackacre, 8 Sack, 10 Six, 11 Remit, 13 Romalpa, 15 Access, 17 Invention, 19 Demurrer, 20 Shared, 23 Bat, 24 Credere, 25 Deem, 26 Quash, 28 True, 30 Loquitor, 33 Nemo, 35 Two, 36 Fitness, 37 Disclaimer, 38 Statute.

Down: 2 Auxiliary, 4 Lord, 5 Communicate, 6 AAT, 7 Actus, 8 Spec, 9 Furandi, 10 Sam, 12 Garnishee, 14 Advancement, 16 Breach, 18 OBrien, 21 Dominions, 22 Bailor, 27 Attwells, 29 Rebate, 31 Users, 32 ReK, 34 Makita, 35 Theft.

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