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April 2018 – Vol.38 No.3

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A busy start to life at QLS

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# Recognising excellence

## Celebrating our profession



Recognising great lawyers, working together to achieve positive outcomes and promoting the good that our profession quietly carries out are key to our success.

This ties in with our vision of supporting good lawyers, advocating for good law, all for the public good.

Last month we did all of these things, and we also welcomed our new chief executive officer, Rolf Moses. Rolf has been associated with QLS for a number of years through his work as chair of the wellbeing working group and as a faculty member of our premier Practice Management Course. I look forward to working with Rolf to see the Society grow and reach its strategic and corporate goals.

The profession acknowledged the excellent achievements of some of our finest members at our annual Legal Profession Dinner Awards night. With such high-calibre nominations, it was difficult for our judges to decide on the winners. Nominations opened on 30 November 2017, and at close on Friday 2 February 2018, there were 75 nominations in progress across 10 award categories. From that 75, 36 were shortlisted across nine of the 10 categories.

Our 10 judges included myself as the president, QLS Council members, staff and subject-matter experts. Our new process ensured that we delivered a high level of fairness and transparency for all nominees.

I would like to once again congratulate all of our award winners and highlight our flagship awards, the President's Medal and the QLS Agnes McWhinney Award. Congratulations to Kurt Fowler and Ann-Maree David respectively. Both Kurt and Ann-Maree have a long history with the Society and the profession, and are excellent examples of the spirit that both these awards exemplify.

Thank you to the more than 300 people who attended on the night, it was a great evening to connect with colleagues from the solicitors' branch of the profession as well as other stakeholders and members of our judiciary. Alongside the dinner, we held our flagship event QLS Symposium 2018, where we saw over 450 delegates join us for two days of professional development offerings and keynote speakers.

Emeritus Professor Gillian Triggs, author and social observer Bernard Salt AM, and author and professor Gino Dal Pont provided plenary presentations at the event.

In the background, our committees and advocacy team have also been continuing their great work for good law in Queensland. We attended our first public hearing for the year for the Police and Other Legislation Amendment Bill. Thank you to Brittany White of our criminal law committee and acting advocacy manager Binari De Saram for joining me in representing the profession's views.

Our committees have worked on 44 submissions to Parliament and other enquiries this year so far. This number is likely to increase with the number of Bills being reintroduced since the last election. Thank you to our advocacy team and our policy committees for their hard work and dedication to good law for the public good.

Keep an eye on our social media channels, website and weekly *QLS Update* newsletter to stay updated with what your Society is doing for you. We have also been rolling out a suite of Facebook Live events showcasing key topics such as youth justice reforms, the new data breach reporting regime and anti-money laundering legislation which are of great use to many practitioners.

I would finally like to highlight the impact of this month's Commonwealth Games on the Queensland legal profession and court system. You will find an article in this month's *Proctor* with more information, but I would like to ask all practitioners to be patient with the courts and law firms in the area. The courts will be affected with closures and there will be limited or no criminal trials and circuits in the state for the duration of the Games.

Please be mindful that there may be firms that will close or relocate during the Games and that court closures will lead to some delays following the period. We have excellent solicitors and judiciary members in Queensland, and I have no doubt that they will continue to do the best job possible for the people of Queensland.

You can find out more via the webpage [qls.com.au/court-changes](http://qls.com.au/court-changes) or by contacting the courts directly. If you are travelling through the area, stay safe.

Please don't hesitate to contact me at any time with your feedback or even your stories about the great work being done by solicitors in your community. You can contact me via the channels below.

**Ken Taylor**  
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**A busy start  
to life at QLS**

**Last month I commenced in the role of Queensland Law Society CEO. The timing of my start couldn't have been better; it was one of the busiest weeks on the QLS calendar this year, meaning I jumped straight into the deep end of QLS life.**

In my first week I was fortunate to meet with district law association (DLA) presidents and learn about their individual member engagement strategies, challenges and plans for the future. In total, the DLAs actively engage with around 4150 members to coordinate learning, collegiality, networking, and to contribute to their local communities. They do a great job and I look forward to ensuring that QLS provides the support and services they need to continue cultivating good lawyers, practising good law in their regions. I am planning to visit a number of regional centres in due course where I will participate in parts of the CPD training program provided by QLS and the DLAs.

I also participated in QLS Symposium and the Legal Profession Dinner & Awards. More than 500 delegates attended our 58th Symposium, which commenced with an address by Chief Justice Catherine Holmes and featured plenary sessions from Emeritus Professor Gillian Triggs, Professor Gino Dal Pont and Bernard Salt AM, as well as the toast to the profession by Cameron Dick MP.

Feedback on their respective addresses has been very positive. I found all the presentations to be thought provoking and stimulating; they provided the opportunity for delegates to think about macro issues and how they translate into our daily lives.

Planning for QLS Symposium 2019 – which will be held on 9-10 March 2019 – is already underway and I am looking forward to another quality line up of speakers, panellists and contributors next year.

Attending the Legal Profession Dinner & Awards along with 370 members of the profession, including members of the judiciary and other distinguished guests,

was a highlight for me. Nine individuals and firms were recognised for their prodigious contributions to the profession in Queensland through the QLS Legal Profession Awards. The significant depth and diversity of legal talent, leadership and community contribution by solicitors in Queensland was clearly on display, making it an important event on the annual calendar and a unique way for me to round out my first week in the job.

“

**My immediate focus is to listen, learn and build relationships with stakeholders, the QLS Council, staff and members.”**

In just six days I met what felt like hundreds of QLS members, spoke with members of the QLS Council, and met most of the QLS staff, along with many other important stakeholders, supporters and contributors to the Society. For all those I met, thank you for the warm welcome and your words of support.

Needless to say it was an unusual time for me, given that I have spent the past two decades as an executive in commercial law firms. Most recently I was Director, People and Development at Norton Rose Fulbright. I was also Human Resources Director with Minter Ellison for many years. I have been fortunate enough to have been able to occupy national management roles, whilst based in Brisbane, that have also offered me unique experiences in law firm management in parts of Asia.

I have been involved in most aspects of the management of law firms, but my approach has always been through the lens of the people and human factors of the profession – which means helping

individuals, teams and organisations to be successful through the attraction, retention and development of talent. This is a focus that will continue in my role at QLS.

Over my first weeks, many people have asked me about my priorities as CEO. My immediate focus is to listen, learn and build relationships with stakeholders, the QLS Council, staff and members. I will review our progress against our corporate and strategic plans, particularly in responding to emerging market trends and issues like anti-money laundering, cybersecurity and the use of technology in the delivery of legal services. We need to ensure our key education, ethics and practice support offerings are aligned with our membership profile and the career stages of our members, and that our member offerings are innovative, commercial, accessible and valuable to meet the future needs of solicitors.

I look forward to continuing my role as a member of the QLS wellbeing working group – a group I chaired for the past four years until my appointment as QLS CEO – and continuing to deliver leadership sessions at our Practice Management Course, where I have been a faculty member for several years.

In future columns I propose to highlight key issues and opportunities for members. I hope this inclusive approach is received well by you and you find the column of interest.

This role is an exciting new beginning for me. I'm really looking forward to the challenges it will present and working with QLS Council, staff and the profession to enhance the member experience for all of you. I'm particularly looking forward to the opportunity to give back to the profession that has, throughout my career, given me so much.

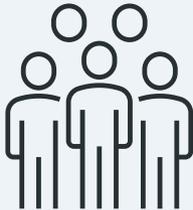
**Rolf Moses**  
Queensland Law Society CEO

# SYMP CONTINUES TO SURPRISE

Now in its 58th year, QLS Symposium is a staple of the legal calendar. This annual event sees practitioners from across Queensland converge to network and learn across substantive law streams and core topics. Here are some stats that might surprise you.



Nearly  
**100**  
presenters



Over  
delegates

**500**



Over

**1000**

cups of coffee

**25**

exhibitors



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## QLS applauds court appointments

Queensland Law Society has welcomed four appointments to Queensland courts, with members of the bench announced for the District Courts in Brisbane and Townsville, as well as the Supreme Court in Brisbane and Rockhampton.

The State Government announced in February that barrister Graeme Crow QC would be appointed to the Supreme Court, based in Rockhampton, to replace Justice Duncan McMeekin following his retirement.

In March, it announced that Federal Court Judge John Coker would fill the gap to be left by Judge Stuart Durward SC when he retires from the Townsville District Court, Michael Williamson QC would join the District Court in Brisbane, and Soraya Ryan QC would be appointed to Brisbane's Supreme Court.

QLS president Ken Taylor said that it was pleasing to see a range of appointments from city-centric to the regional areas.

"Such timely appointments allow our justice system to continue to carry out their role seamlessly," he said. "I am pleased to see local practitioners being appointed in their communities, such as Judge Coker who is well-respected both in his local community and the wider profession.

"It is also fitting to note that Judge Coker is originally from the solicitors' branch of the profession, and we are pleased to see the skill of our practitioners recognised in such appointments."

President Taylor congratulated the appointees and thanked the Government for filling the positions swiftly, noting that regional areas such as Townsville often had a high caseload and less members on the bench to share the load.

## New Queensland Judgments website

A new Queensland Judgments website has been launched by the Incorporated Council of Law Reporting for the State of Queensland and the Supreme Court Library Queensland Library Committee.

The website, [queenslandjudgments.com.au](http://queenslandjudgments.com.au), is the result of a number of years of work by QLS members associated with the two organisations and contains a complete set of the *Queensland Reports*, published in both their original format (PDF) and in a searchable online format.

Other features of the website include:

- a complete set of recent unreported Supreme Court judgments (from 2002), which is being gradually expanded as the library's full print collection of unreported Supreme Court judgments is digitised
- an appeal database, which provides current and historical data about appeals from judgments in the collection
- a new UCPR service, which seeks to identify the leading judgments on civil procedure in Queensland.

The website is currently in a beta version, and feedback is welcome. Visitors are invited to register to obtain full access to all its features.

## Land dealings and the flow-on effects for water licences

Practitioners are reminded to be mindful of the consequences of certain land dealings when advising clients who hold a water licence.

Water licences are granted under the *Water Act 2000* (Qld) and permit a land owner to take and use water on their land or to interfere with the flow of the water on, under or adjoining their land. Generally, water licences attach to the land of the holder of the water licence (the licensee).

The *Water Regulation 2016* sets out how certain land dealings affect a water licence. These dealings include:

- disposal of an entire parcel of land
- subdivision of the land
- boundary realignment resulting in a part disposal of the land
- subdivision and disposal of part of the land.

When a parcel of land to which a water licence is attached is disposed of, the licensee changes to the new owner. When there is a part disposal of the land, the attached water licence is taken to be held jointly by all owners of the land to which the licence is attached

(that is, between the original licensee and the new owner of the part of the land that was disposed of by the original licensee).

When there is a change in land ownership that results in a water licence being held jointly, licensees need to be aware that their obligations under the *Water Act 2000* (such as the payment of annual fees and providing annual water meter readings) become shared responsibilities. There may also be outstanding water licence fees owing by the original licensee that were incurred prior to the change of ownership. Licensees can contact the Department of Natural Resources, Mines and Energy to check if any fees are owed.

Your nearest contact point for water licence matters can be found by searching 'water management contacts' on the department's website, [dnrme.qld.gov.au](http://dnrme.qld.gov.au). More information on water licences is available at [business.qld.gov.au/industries/mining-energy-water/water](http://business.qld.gov.au/industries/mining-energy-water/water).

Practitioners are urged to bring the above-mentioned consequences to their client's attention before the clients deal with land to which a water licence is attached.

## Nine decades leading the law

Queensland Law Society will celebrate its 90th anniversary this month.

While we trace our origins more than 50 years earlier, Queensland Law Society in its current form came into existence on 1 April 1928, after the *Queensland Law Society Incorporation Bill* was passed in December 1927 by the Queensland Parliament. Much has changed in the intervening 90 years – from a membership of 312 at the end of the first year, to now more than 10,000 members, we have seen the solicitors' branch of the profession move from strength to strength. We look forward to many more years advocating for good law, supporting good lawyers and working for the public good.

## CGW reappoints managing partner

Cooper Grace Ward has announced the reappointment of managing partner Chris Ward for another four-year term.

Mr Ward first took on the role in 2005 and under his leadership the firm has achieved significant market recognition, including being named best professional services firm and best law firm (revenue under \$50m) in the 2017 Financial Review Client Choice Awards.

Cooper Grace Ward has also announced the appointment of four new members to its executive team – James Rimmer as director of marketing & business development (formerly APAC head of business development at Ashurst), Damon Graham as director of information technology (formerly APAC IT service delivery manager at EY) and Laura O'Hare as technology & innovation project lead (formerly best practice manager at MinterEllison). The firm's finance manager, Evelyn Fong Chong, has been promoted to chief financial officer.

## Commonwealth Games court closures

Practitioners are reminded that the 2018 Commonwealth Games on the Gold Coast this month will lead to significant disruption to Queensland courts.

Queensland Law Society president Ken Taylor has urged solicitors to stay informed of court closures, changed arrangements and local solicitor offices which may close or relocate for the duration of the Games.

"The key aspect of this to note for all Queenslanders is that during the Commonwealth Games period of 4-15 April 2018, no criminal trials or circuits will be conducted in District Courts throughout Queensland," he said.

"Also, the Supreme Court in Brisbane will not conduct criminal trials and there will be reduced criminal sittings circuits and criminal trials across the state.

"There will be no hearings involving police in Queensland's Magistrates Courts, and specific courts will operate only with arrest court or domestic violence court. Coolangatta and Beaudesert Magistrates Courts will be non-operational.

"We must also recognise the impact these closures will have on the hard-working judiciary of our state. A backlog will exist, and we must appreciate the extra time some cases will take following the closures."

See [qls.com.au/court-changes](http://qls.com.au/court-changes) for updates.

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# Cybercrime trust account deficiency obligation

Queensland Law Society has obtained the advice of senior counsel on practitioners' obligations in respect to trust account deficiencies that are the result of the disbursement of trust funds in accordance with fraudulent instructions (cybercrime).

The Society has arrived at this position:

- a. A law practice holding trust monies in its trust account must only disburse the funds in accordance with the instructions of the person for whom the law practice holds the funds.
- b. If a law practice disburses funds other than in accordance with the instructions, then the law practice has, in breach of trust, misapplied trust funds and is under an obligation to restore the trust funds.
- c. The person who created the fraudulent instructions had no actual or apparent authority to give those instructions. That the fraudulent instructions appeared to have come from somebody with authority

does not mean the instructions were sent with authority (an imposter does not derive authority by virtue of a successful impersonation). Nor does the use of an external email system cloak the imposter with apparent authority.

- d. Therefore, the law practice has disbursed funds other than in accordance with the instructions of the person for whom the law practice holds the funds and is obliged to restore the funds.

The obligation to restore the funds will arise regardless of whether there has been an offence under section 259 of the *Legal Profession Act 2007* (LPA).

It does not necessarily follow that a legal practitioner who is principal or employee of the law practice will have contravened section 259 of the LPA and committed an offence by causing a payment from trust funds in reliance upon the fraudulent instructions.

A significant issue with respect to any allegation of an offence by the legal practitioner would be whether the legal practitioner has a reasonable excuse for the purposes of section 259 of the LPA.

It is likely that genuine and reasonable reliance by a legal practitioner upon fraudulent instructions would be a reasonable excuse for the legal practitioner having caused a deficiency for the purpose of s259 of the LPA. But that would only mean that the practitioner would escape criminal liability. A practitioner is obliged to restore the deficiency.

Further guidance can be obtained from the Society's Cyber security webpage at [qls.com.au/cybersecurity](http://qls.com.au/cybersecurity), including a first response checklist for law firms subject to a cyber incident.

## The MEDICO -LEGAL Mind

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Professor David A F Morgan OAM

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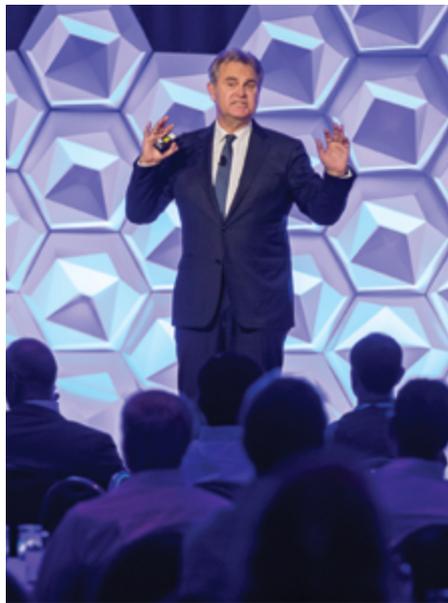
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# QLS Symposium 2018

Another sensational QLS Symposium last month brought delegates up to date in their key areas of professional learning but, just as importantly, it also reminded them of an essential quality of their profession.

As one attendee put it: "The collegiate nature of the event and the camaraderie and meeting new colleagues and catching up with existing colleagues. We are so busy we don't do this enough!"

While delegates also praised the comprehensive professional development program, bookended by insightful keynote addresses, the decision to combine QLS Symposium with the annual Legal Profession Dinner & Awards was welcomed too, bringing all of the QLS award presentations together at the one event.

This year the Society's premier award, the President's Medal, went to criminal defence lawyer, Kurt Fowler.

Kurt, admitted in 1995, leads the Caboolture-based team at Fowler Lawyers and has built a reputation based on experience, discretion and professionalism. With a Bachelor and Master of Laws, Kurt is also a QLS accredited specialist, and was recognised as the highest achiever in his year. He was subsequently appointed chair of the QLS committee overseeing this program. Kurt is also chair of the QLS criminal Law committee and member of the Moreton Bay and Sunshine Coast Law Associations.



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This year's QLS Agnes McWhinney Award, named after Queensland's first admitted female solicitor, was presented to Ann-Maree David, who is passionate about life-long learning and has devoted her career to professional development. Ann-Maree led the Society's CLE program for eight years and established the Queensland campus of the Australian College of Law. She is also the president of Australian Women Lawyers, vice president of the Women Lawyers Association of Queensland and chair of the QLS equity and diversity law committee.

This year the QLS Innovation in Law award was presented to Stretten Masons Lawyers, a south-east Queensland-based firm founded by directors Jeremy Stretten and Craig Mason. Working mainly with small to medium-size businesses, they pride themselves on their progressive and innovative attitude.

Both the Community Legal Centre (CLC) Member of the Year award and the Equity Advocate Award were presented to Terrence Stedman, a descendant of the Kamilaroi people.





Terence was a qualified plumber and gas fitter before working as a prison officer and as Commissioner of the Queensland Corrective Services Board. He joined the legal profession later in life and began a 10-year career as a solicitor with the South West Brisbane Community Legal Centre.

This year the Equity and Diversity Award for a large legal practice went to Maurice Blackburn Lawyers, while Miller Harris Lawyers took the small legal practice award, for the third time!

The inaugural Queensland First Nations Lawyer of the Year was presented to Leah Cameron, the current recipient of the Attorney-General's Indigenous Legal Practitioner of the Year Award and the owner of Marrawah Law, Queensland's only Supply Nation certified Indigenous legal practice. Leah's business employs more than 75% Indigenous staff. Leah was a finalist in the Cairns Business Women's Club Awards and AIM Leadership Awards in 2016/2017.

The other inaugural First Nations award, for the Queensland First Nations Legal Student of the Year, was won by Nareeta Davis. Nareeta, while enjoying the challenges of working in insolvency for 24 years, always wanted to be a solicitor. This dream has nearly been achieved, and Nareeta will be admitted as a solicitor this year and while pursuing a Masters Degree in Applied Law.



# Protecting legal rights: Every lawyer's business

## Fundamental principles disappear from new legislation

The QLS Advocacy team is made up of policy solicitors and support staff who coordinate the Society's 27 hard-working policy committees.

This places the team in a unique position to observe developments across a number of policy areas.

Many of these developments cause us concern due to their effect on the rule of law and other well-established legal principles, and because they have been replicated in several pieces of legislation such that we now consider that they are trends.

We often discuss these trends at team meetings, at policy committee meetings, in our submissions, at public hearings and with government representatives and other stakeholders. We have recently had cause to collate these trends.

A keynote speaker at last month's QLS Symposium was Emeritus Professor Gillian Triggs, who is acutely aware of breaches of the rule of law that take place within Australia, including those intentionally enshrined in legislation. However, given that much of our work is state-focused, we considered it useful to provide Professor Triggs with a snapshot of recently introduced Queensland legislation which contains provisions that threaten to erode established rights and liberties.

This 'snapshot' includes legislation which:

- abrogates the right to claim privilege against self-incrimination
- reverses the onus of proof
- enables the exercise of judicial power by authorities
- excludes legal representation
- imposes unjustifiably severe penalties
- allows an overreach of inspectorate powers
- imposes mandatory detention offences
- is drafted to respond to a specific instance or incident, rather than being a measured policy response
- imposes broad powers of entry, seizure of information and compulsion.

To think that this legislation only targets serious criminal activity, or is limited to an area in which there is a serious risk to community safety,

is erroneous. These provisions are finding their way into legislation that has an effect on people's lives and their livelihoods. Examples include legislation regulating land access rights,<sup>1</sup> schemes established to monitor the safety of building products<sup>2</sup> and the supply of labour,<sup>3</sup> and operational processes for the Commonwealth Games 2018.<sup>4</sup>

The objects of these Acts, and their explanatory notes, often provide little or no justification for the erosion of these rights. The normative effect of passing this type of legislation is significantly underestimated. Passing just one piece of legislation which unjustifiably erodes a right shifts community and political expectations and paves the way for similarly objectionable provisions to be replicated in other pieces of legislation as 'model provisions'. This is done in spite of genuine concerns raised by stakeholders such as QLS.

QLS opposes the erosion of rights, and the imposition of unfair penalties, without appropriate justification. We advocate for evidence-based policy which ensures that the rule of law is respected and that laws are fair, balanced and ultimately upheld.

QLS has made submissions in respect of several pieces of recent legislation which have introduced wide powers of entry and requirements to provide documents and information, without a warrant or consent in some cases, and despite that fact that doing so may incriminate the person. Such compulsion will deprive the person of the right to claim privilege against self-incrimination and lead to derivative use of evidence.

These provisions were placed in the following Bills introduced in 2017:

1. Labour Hire Licensing Bill 2017
2. Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017
3. Work Health and Safety and Other Legislation Amendment Bill 2017
4. Land, Explosives and Other Legislation Amendment Bill 2017
5. Tow Truck and Other Legislation Amendment Bill 2017.

The first three Bills were introduced into Parliament, referred to a committee for

consideration and then ultimately passed with the provisions remaining, despite QLS and other bodies raising these issues during the inquiry stage. The last two Bills have been reintroduced into the new parliament with substantially the same provisions, again, despite our submissions.

Considering these issues in more detail, we turn to section 4(3)(e) of the *Legislative Standards Act 1992* (Qld) which requires that legislation should generally confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer. However, under the Land, Explosives and Other Legislation Amendment Bill 2017 and now the Land, Explosives and Other Legislation Amendment Bill 2018, an authorised officer is granted a blanket right to enter land, including leasehold land, based on a reasonable belief that any term or condition of a "trust, lease, licence, permit or reservation applying to the land" is not being complied with.

QLS voiced concern about the breadth of the concept 'reasonably believes' and the lack of specificity around which 'term' might give rise to the exercise of this power. Some terms are more significant than others and entry to a place will not be required to determine compliance with some terms. No warrant would be required to exercise these powers and there is no requirement to obtain consent or give notice. This provision would override a landholder's contractual rights under the relevant trust, lease, licence, permit or reservation.

Under another proposed provision in that Bill, which replicated provisions in the *Work Health and Safety and Other Legislation Amendment Act 2017*, the *Labour Hire Licensing Act 2017* and the *Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017*, an authorised officer would be entitled to enter a place on the basis that the place was 'open for business' in lieu of obtaining the consent of the occupier.

The schemes established under this legislation are broad in application and will potentially affect a wide range of businesses and individuals. What is evident from these extraordinary powers is that those persons affected will likely be caught 'off guard' given the nature of the legislation.

prepared by the QLS Advocacy team

For example, an investigator or authorised officer may enter a business or onto private land in circumstances where an individual may not know his or her rights and where the opportunity to obtain legal advice will be limited. It may surprise members of the public and indeed the legal profession to learn that in some cases the extensive powers of entry granted to ‘authorised persons’ are wider than those afforded to a police officer in that there is no requirement for a warrant.

As noted above, flowing on from the exercise of these broad powers is a requirement that the relevant person comply with directions from the authorised officer, including providing evidence and information in circumstances where doing so may incriminate the person.

This amounts to an abrogation of the right of a person to claim privilege against self-

incrimination and, in QLS’s view, any breach of such a fundamental right should be necessary and proportionate in the achievement of a legitimate aim. This does not appear to be the case in respect of the aforementioned Bills.

We are concerned that, if legislation of this nature continues to be routinely introduced, key fundamental rights will disappear within our justice system. There is a significant risk that this will occur without the acknowledgement, and thus sanction, of the community.

When these Bills were ultimately debated in Parliament, our concerns about the abrogation of rights were largely not considered or addressed by members. Parliamentary committee reports, irrespective of their constitution (by Government and non-government members) similarly gloss over concerns raised during this process.

### The inaugural Protecting Legal Rights Conference, page 42

Members of the QLS Advocacy team include acting advocacy manager Binny De Saram, acting principal policy solicitor Wendy Devine, and senior policy solicitors Vanessa Krulin, Natalie De Campo and Kate Brodnik.

#### Notes

- <sup>1</sup> Land, Explosives and Other Legislation Amendment Bill 2017, now reintroduced as the Land, Explosives and Other Legislation Amendment Bill 2018.
- <sup>2</sup> Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017.
- <sup>3</sup> Labour Hire Licensing Act 2017.
- <sup>4</sup> Police Powers and Responsibilities (Commonwealth Games) Amendment Act 2017.

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# Linc insolvency in environmental context



On 9 March 2018 the Court of Appeal handed down its decision in *Longley & Ors v Chief Executive, Department of Environment and Heritage Protection & Anor; Longley & Ors v Chief Executive, Department of Environment and Heritage Protection* [2018] QCA 32.

The matter arose from the administration of Linc Energy and its coal seam gas project at Chinchilla. The leading judgment, written by McMurdo JA, is an important decision with respect to two topics:

- a. The effect of a disclaimer by a liquidator pursuant to the *Corporations Act 2001* (Cth) on obligations under an Environmental Protection Order (EPO); and
- b. The operation of the roll-back provisions in Part 1.1A of the *Corporations Act* (and s5G in particular) in the context of the disclaimer and the EPO.

The decision regarding costs which flows from the outcome of those topics also provides useful guidance to practitioners. The court confirmed that Campbell JA's judgment (with whom McColl JA agreed) in *BE Australia WD Pty Ltd (subject to a deed of company arrangement) & Ors v Sutton*<sup>1</sup> was the proper judgment to be applied in such cases.

## The facts

Prior to its liquidation, Linc infamously operated an underground coal gasification project at Chinchilla. The project was operated under licences issued to it under the *Mineral Resources Act 1989* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) and environmental authorities issued under the *Environmental Protection Act 1994* (Qld).

On 13 May 2016, shortly before the appointment of the liquidators, who were the appellants, Linc was issued with an EPO by the first respondent, the chief executive of the Department of Environment and Heritage Protection, pursuant to s358 of the *Environmental Protection Act*. The EPO was issued on the ground that it was to have Linc comply with the general environmental duty created by s319 of that Act.

The EPO required Linc to undertake certain work at the Chinchilla site, as well as not undertake certain other activities, and Linc was required to retain and maintain any infrastructure on the site necessary to ensure compliance with the EPO and ongoing management of environmental risks and site rehabilitation. The EPO indicated, relevantly, that it was issued "in respect to the activities" of Linc at the site in Chinchilla, and its requirements (save for certain audit requirements) required Linc to be on that site.

On 30 June 2016 the liquidators gave notice disclaiming the land and licences under which it operated the project. As a result of the disclaimer notice, the liquidators said Linc was relieved from the requirements of the EPO, because they were liabilities in respect of the disclaimer property, pursuant to s568D of the *Corporations Act*. The chief executive contended that Linc was bound by the EPO regardless.

The liquidators then applied for a direction under s511 of the *Corporations Act* seeking that they would be justified in causing Linc not to comply with the EPO or any other such order that might be issued. The Attorney-General intervened in support of the chief executive.

At the trial, the chief executive and the Attorney-General argued that Linc was obliged to meet requirements of the EPO notwithstanding the disclaimer, and that the liquidators were obliged to cause Linc to do so. The trial judge agreed,<sup>2</sup> holding that there was a direct inconsistency between the disclaimer provisions of the *Corporations Act* and the duties created by the EPO and the *Environmental Protection Act*. That inconsistency was resolved by the roll-back provisions in part 1.1A of the *Corporations Act*, such that the EPA provisions prevailed. Justice McMurdo, with whom Gotterson JA and Bond J agreed, reached a different view.



by Hamish Clift

## The disclaimer

In short reasons agreeing with McMurdo JA, Bond J considered that the appeal required answers to three questions.<sup>3</sup> Two of those questions usefully frame the issues in the appeal and provide a convenient framework to this case note. The first was, should Linc's liability to comply with EPO be characterised as a liability in respect of property which the liquidators had disclaimed by the disclaimer notice?<sup>4</sup>

Justice McMurdo answered that question in favour of the liquidators. His Honour held that the liabilities under the EPO were liabilities in respect of disclaimed property. To understand why, it is useful to set out the relevant disclaimer sections.

### 568 Disclaimer by liquidator; application to Court by party to contract

- (1) Subject to this section, a liquidator of a company may at any time, on the company's behalf, by signed writing disclaim property of the company that consists of:
- land burdened with onerous covenants; or
  - shares; or
  - property that is unsaleable or is not readily saleable; or
  - property that may give rise to a liability to pay money or some other onerous obligation; or
  - property where it is reasonable to expect that the costs, charges and expenses that would be incurred in realising the property would exceed the proceeds of realising the property; or
  - a contract;
- whether or not:
- except in the case of a contract—the liquidator has tried to sell the property, has taken possession of it or exercised an act of ownership in relation to it; or
  - in the case of a contract—the company or the liquidator has tried to assign, or has exercised rights in relation to, the contract or any property to which it relates.

### 568D Effect of disclaimer

- (1) A disclaimer is taken to have terminated ... the company's rights, interests, liabilities and property in or in respect of the disclaimer property, but does not affect

any other person's rights or liabilities except so far as necessary in order to release the company and its property from liability.

- (2) A person aggrieved by the operation of a disclaimer is taken to be a creditor of the company to the extent of any loss suffered by the person because of the disclaimer and may prove such a loss as a debt in the winding up.

Importantly, Justice McMurdo noted<sup>5</sup> that the requirements of an EPO will not have the requisite connection with property, such that its requirements would be liabilities in respect of property under s568D, in every case. His Honour went on to say:<sup>6</sup>

"Once the land [and licences] had been disclaimed, there was no activity which could be carried out by Linc to which the general environmental duty could attach, and for which this EPO could have operated in the pursuit of its stated purpose. The connection between the disclaimed property and the liabilities under the EPO is thereby clear and immediate: the liabilities under the EPO were premised upon Linc's carrying out activity which it could not and would not carry out, once the land and the [licences] had been disclaimed.

"...

"Linc's continued enjoyment of the disclaimed property depended upon meeting the ongoing obligations under the EPO. Once the effect of the loss of the land and [licences] upon Linc's activity on the site is considered, then having regard to the purpose and terms of this EPO, there is a connection by which they are liabilities in respect of the disclaimed property in the terms of s568D. That connection is starkly illustrated by the requirements of the EPO that Linc retain and maintain infrastructure. ... Performance of that requirement is now impossible..."

## The roll-back provisions

The second question posed by Justice Bond was, did the provisions of Part 1.1A of the *Corporations Act* operate so that the disclaimer notice could not be taken to have terminated Linc's liability to comply with the EPO as and from the date the notice took effect?<sup>7</sup>

Justice McMurdo indicated<sup>8</sup> that the conclusion reached regarding the EPO meant that consideration of Part 1.1A was not necessary. Nonetheless, his Honour held<sup>9</sup> that s5G of the

*Corporations Act* did not operate to disapply relevant provisions of the Act because, on their proper construction, neither s5G(11) nor s5G(8) could be applied to avoid any inconsistency between the relevant provisions of the *Corporations Act* and the relevant provisions of the *Environmental Protection Act*. Accordingly, s109 of the *Constitution of Australia* operated to resolve the inconsistency in favour of the *Corporations Act*.<sup>10</sup>

## Conclusion

This is an important case for insolvency practitioners, particularly those who work with mining, energy and resources companies. Although the outcome regarding the disclaimer and EPO is limited to the facts of the case, given the EPO was connected with the Chinchilla property, the principles explained by McMurdo JA provide substantial insight into how the disclaimer provisions operate in the context of obligations created by the *Environmental Protection Act* and by an EPO. The decision also confirms the ascendancy of the Commonwealth insolvency regime and the proper approach to costs.

Hamish Clift is a Brisbane barrister.

### Notes

<sup>1</sup> (2011) 82 NSWLR 336; [2011] NSWCA 414, in particular at [213] and [214].

<sup>2</sup> *Linc Energy Ltd (in Liq): Longley & Ors v Chief Executive Dept of Environment & Heritage Protection* [2017] QSC 53, [182].

<sup>3</sup> At [151] to [154].

<sup>4</sup> At [152].

<sup>5</sup> At [103].

<sup>6</sup> At [106] and [109]. Those conclusions were based on an analysis of the disclaimer provisions at paragraphs [43] to [58] which considered and followed the decision in *Willmott Growers Group Inc v Willmott Forests (Receivers and Managers appointed) (in liquidation)* (2013) 251 CLR 592; [2013] HCA 51.

<sup>7</sup> At [153]. The final question, at [154], concerned the proper direction to be made as a result of the answers to the preceding questions.

<sup>8</sup> At [111] to [112], [115] and [131].

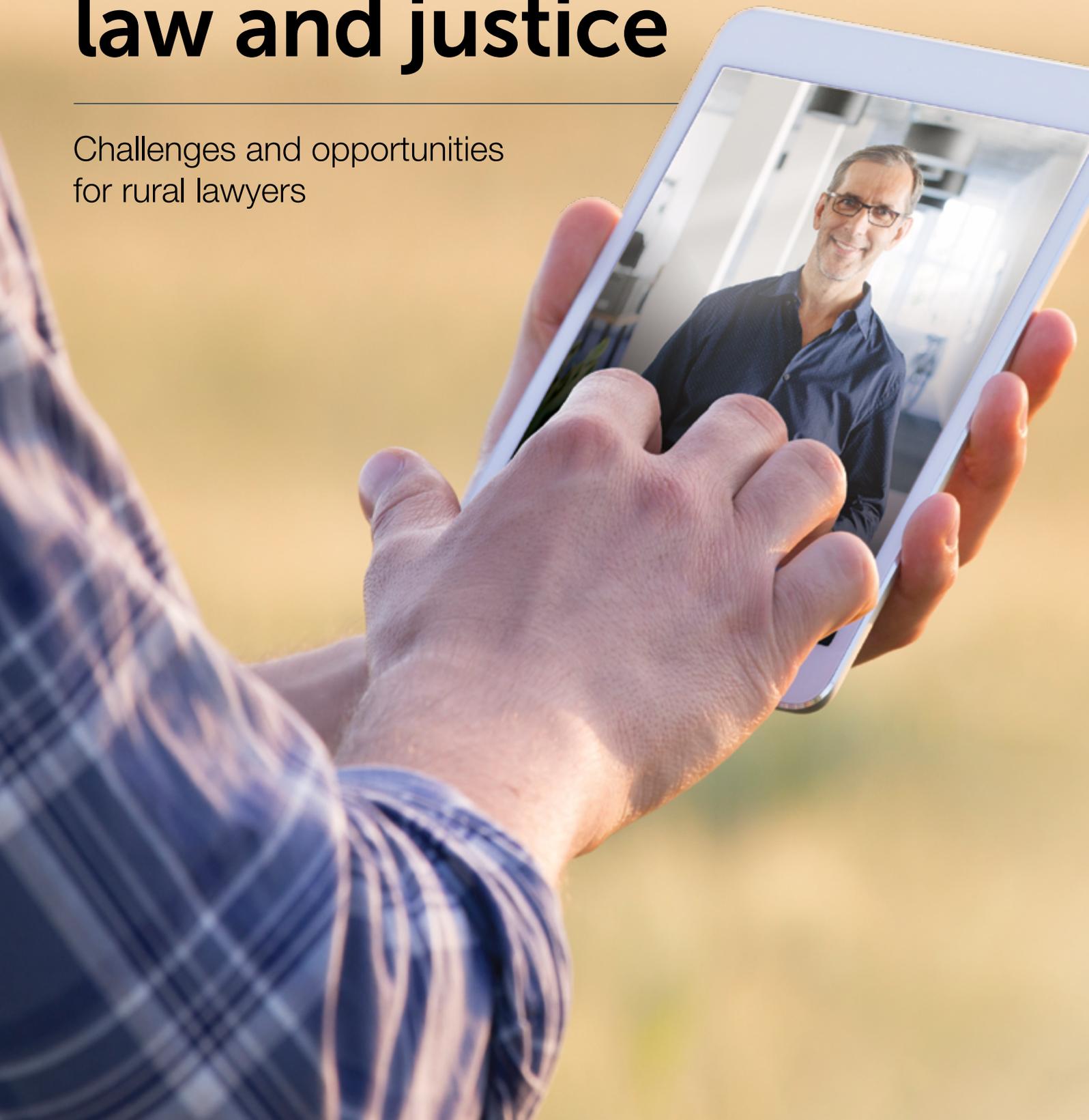
<sup>9</sup> Following an analysis and approval of Barrett J's reasons in *HIH Casualty and General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation (2003) 202 ALR 610; [2003] NSWSC 1083*.

<sup>10</sup> At [131].

# The regional route to online law and justice

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Challenges and opportunities for rural lawyers





Through conversations with regional lawyers, members of the judiciary and policy-influencers, **Caroline Hart** and **Adrian Hallewell** have gained insight into the challenges and opportunities that accompany using information technology (IT) to access law and justice in regional and rural Queensland.<sup>1</sup>

### The use of information technology in law firms is no longer a novel concept.

Increasingly, firms are investing in software systems, subscriptions and smart phones to maximise access to legal knowledge and institutions of law and justice.

With a new generation of lawyers comfortable with technology and quickly identifying opportunities to mix law with enhanced software and applications, accessing 'the law' will continue to change.

One of the biggest users of technology in recent years, has been government. Australian governments across all jurisdictions are using information technology to provide services, motivated not least of all by significant cost savings.

From the perspective of regional lawyers, two key questions emerge from this changing environment: First: what are the challenges that need to be navigated around? And second: what are the opportunities to be taken advantage of?

This article, based on the experiences of those involved in accessing these institutions, gives an insight into how some lawyers are gaining a competitive advantage by offering better legal services to their clients through increased access to information, reduced travel costs and embedding efficiencies into their practice management systems. These lawyers have also successfully worked around many of the barriers and impediments, as described below.

### Why government is increasingly using technology

The most comprehensive examination of access to justice has been the Productivity Commission's *Inquiry into access to justice arrangements*, carried out in 2014.<sup>2</sup>

The commission's final report stated that use of technology heralds, "the end of the quill pen ... Technology is widely recognised as

having the capacity to generate time and cost savings for the courts and their users."<sup>3</sup>

The report also identified that, although investment in information technology can bring about both savings and improvements in access to justice through "case management software, elodgement facilities, electronic trial technologies and technologies to assist selfrepresented litigants",<sup>4</sup> that investment has been uneven across jurisdictions, with the availability, quality and use of technology varying widely between and within jurisdictions.<sup>5</sup> The commission's conclusion was that increased reliance on information technology would need further investment by the courts to have a net positive result.<sup>6</sup>

In conversations, many regional lawyers indicate they already access a full range of government information technologies. These include using the Supreme Court website for research and other sites for efilng, conveyancing, party searches, register searches, local government searches, tracking judgments through courts and videoconferencing. These lawyers noted that examples of "particularly good websites" were those belonging to the Office of Fair Trading, and the New South Wales Courts (which – compared with Queensland Courts – allow for efilng, and online access to filed documents).

### Increased access to information

Regional lawyers interviewed said that the use of information technology provided greater opportunities for accessing information, including for legal research on government websites such as those of the courts. In some cases this function was considered more informative and useful than commercial subscription databases. The technology was also considered a benefit for viewing progress on matters tracking through the courts. As one lawyer, a principal in a private regional practice, said:

"The Queensland Courts website – ecourt – you can look at any matter – Supreme Court,

District Court – and see any matter. You can look at the list of documents – claim, defence, reply ... if any interlocutory or affidavit. The list is useful and should be in the Magistrates Court. With the Federal Circuit Court, you can see the content of the document. Other jurisdictions don't have that access to those documents."

Many lawyers provide a similar service to their clients, allowing them to view progress on their own matters, using client portals available through practice management software.

### Reduced travelling commitments

Geographic isolation has long been identified as a major problem for regional lawyers, and information technology is recognised as the most effective method of dealing with the problem and extending geographic reach.

For example: "The Federal Court is well set up. Efilng is intuitive – and offers great advantages to regional legal practitioners. It's much easier. You can do it from your office. With the National Electronic Conveyancing – you can be in a regional location and do a conveyance between a remote location and a regional location."

Technology also provides benefits for certain aspects of trials, as noted by this regional magistrate: "Video links are very common in the regional Magistrates Court. We do six video links to the prisons ... It occupies the day. We link to the Children's Detention Centre. We get clear pictures, and there are multiple screens in the court. It is compatible with the physical submission."

However, limitations on access to the NBN emphasise the inequitable access to the technology. Many advantages are yet to be gained. The reality for the regional lawyer is that their need for the NBN is greater than that of their metropolitan counterparts who can still access legal services physically.

## Improved efficiencies for legal practice

Technology offers regional lawyers opportunities for improved efficiencies, and it is considered worth overcoming any hesitancy towards its use, as noted in this conversation with a regional lawyer: “At first, I said: ‘Do we have to do this?’ But I’ve overcome the hurdle: the quickness! You can do it in the morning, file in the afternoon and send it to the other party’s solicitor. Before you had to sign, copy, send to a town agent. It was a week’s turnaround – not the same day.”

Overcoming any ‘hesitancy’ is seen as important – not least of all to maintain consistency of knowledge comparable to that of lawyers’ clients. Rural clients, it was noted, may have superior knowledge and confidence in using technologies compared to their legal advisors, and this may reflect negatively on regional lawyers.

A national policy-influencer provides this example: “The extent that Queensland farmers use software ... This will create a gap between clients and their legal advisors. These aren’t just young farmers. They are using robotic tractors to till the land. The NBN was to bridge that gap. It’s affordable internet access at a reasonable speed. I assume in my comments that the National Broadband Network is available.”

The comment on access to the NBN is noted, however!

## Disadvantages of IT use

Regional lawyers also noted disadvantages associated with the use of information technology. These included:

- increased costs and fees
- strict compliance requirements for lodging electronically (over and above physical lodgement)
- the poor quality of some technologies used by government that were not intuitive, user-friendly or integrated, as well as websites that were not updated, or relied on out-dated programs
- poor protocols on instructions for using the technologies
- the absence of support from government staff for using the technologies
- the inability to share technologies available to other professions
- the ‘de-humanising’ aspect of the technologies
- the potential for inequitable access to law by those with reduced means.

Most of the lawyers successfully using technology identified the need for training as the best way to improve confidence and competence in dealing with governments’ use of technology. For lawyers who were part

of larger law firms, this training was provided in-house. Sole practitioners were identified (in particular) as potentially being disadvantaged unless they expressly sought out this training.

## Approach of the judiciary

One member of the judiciary provided valuable insight into a range of problems and issues faced by government use of technology, including compromising evidence and quality of court processes, and the need for court protocols: “Technical problems in courts are an issue. Therefore, we are careful about the nature of the quality. The quality can influence what the IT does allow. It can influence the evidence being given. If there are IT problems, judges will adjourn.”

## The judiciary as champions of IT

Conversations with regional lawyers and the judiciary also noted that a ‘top-down approach’ emanating from the senior judiciary as champions for the positive use of information technology would have an impact on its uptake within the legal profession generally.

One member of the judiciary recognised their power in being able to influence the entire legal profession: “While some judges are strong advocates of the use of IT, most judicial officers are fence-sitters. They need to have the benefit explained to them, to see it, before they will use IT.”

And this comment from a national policy influencer: “Courts are at the top of the food chain. The courts can have an impact on the profession. When courts shift to running all court business using information technology, then the legal practitioners will need to change. We are engaging with the profession. If you wish to survive you must be prepared to use information technology.

“It is incumbent upon the judiciary to champion the use of information technology, law societies to provide training and promote information technology use, and courtroom staff to provide support and acceptance.”

## Senior legal practitioners as champions of IT

Similarly, in private practice, the use of information technology is considered a commercial decision made by law firm owners. The decision as to the extent of use of information technology may also be related to the level of confidence partners and principals have with technology.

This employed lawyer in a regional law firm spoke of the impact owners have on the uptake and use of information technology, particularly in regard to decisions made by partners who are ‘old school’: “We don’t generally use videoconferencing because most clients are from the region or metropolitan location. We

have clients from all over Australia and the world. Skype is not used. We do visits on demand at rural locations. We go to the metropolitan locations. The partners are more comfortable. This was a decision of the partners.”

## Conclusions

There are significant benefits for regional lawyers from the use of information technology as a means for accessing justice, including increased access to court and research information, reduction in travelling commitments and improved efficiencies for legal practice.

However, there are also challenges and disadvantages associated with its use, as confirmed in the Productivity Commission report, and these prompt the need for better resourcing of courts and a more supportive approach to lawyers from court administrative staff.

As described in this article, many regional lawyers are better positioning themselves around the barriers, to gain the benefits of the use of technology, by:

- accessing training
- overcoming their hesitancy and unfamiliarity
- championing or encouraging the use of new technologies amongst staff.

Of course, there remain key barriers beyond the control of lawyers – most notably the inequitable access to the NBN, government policies and cultures that do not support the use of the technologies, and poorly developed and maintained websites and portals. Savings acquired by government through the use of technology may be invested in this much needed infrastructure and service standards.

Caroline Hart is Associate Professor (Law) at the School of Law and Justice, University of Southern Queensland, a director of the National Rural Law and Justice Alliance, and a member of the Downs and South-West District Law Association. Adrian Hallowell is the founder and principal of Hallowell Law, Toowoomba, and vice president of the Downs and South-West District Law Association.

Caroline would like to thank all of those who participated. All interviews were carried out by her in accordance with national standards of research ethics.

### Notes

<sup>1</sup> This article is based on research and findings published in an article by Caroline Hart, ‘Better justice?’ or ‘Shambolic justice?’: Governments’ use of information technology for access to law and justice and the impact on regional and rural legal practitioners (2017), *International Journal of Rural Law and Justice*, 1–22.

<sup>2</sup> Productivity Commission, ‘Access to justice arrangements, productivity commission inquiry’ (Report No.72, Vol.1, 5 September 2014).

<sup>3</sup> *Ibid*, 19.

<sup>4</sup> *Ibid*, 573.

<sup>5</sup> *Ibid*, 575.

<sup>6</sup> *Ibid*, 578.



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# Are clones people too?

Technology raises unprecedented legal questions

## Humans are now creating, or at least replicating, sentient creatures.

On 24 January 2018, Chinese researchers published a paper in which it was revealed they had successfully cloned two monkeys.<sup>1</sup>

Scientists such as the late Stephen Hawking have suggested that humanity is on the cusp of creating technological sentience in artificially intelligent machines.

As we come to an age where our technological creations possess the ability to think, feel and experience, we must consider how we can incorporate these sentient creations and replications into our legal system.

## What are clones?

Reproductive cloning is the process of carbon-copying the DNA of a single individual, which can theoretically produce an indefinite number of copies from a single donor. The technique used to create these clones is not new, and other researchers have imitated this process in primates prior to this year.

In 2013, researchers in America successfully cloned human skin cells to create early stage human embryos.<sup>2</sup> However, unlike the monkeys, these human embryos were destroyed after their stem cells were extracted as it would have been illegal to allow the embryos to develop. The law in Queensland mirrors this approach, permitting cloning for all purposes other than that of creating a new human individual.<sup>3</sup> As the recent research out of China marks the first time that primates have ever been reproductively cloned, there is not much standing in the way of researchers doing the same with human embryos, provided the law progresses to permit it. This begs the question, how will clones and other sentient technology engage with our legal system?

## Rethinking what is capable of possessing a 'legal personality'

The entire premise of legal personality rests on whether the entity in question has 'capacity'.<sup>4</sup> It is arguable that clones and artificial intelligence (AI) will have the capacity to acquire autonomy; the capacity to learn through interaction and experience; and capacity to adapt their behaviors and actions to their surrounding environment. According to their 'things' legal personality on the basis of capacity raises both ontological and epistemological arguments.

One may argue that legal personality can only be attributed to humans, as only humans have an innate sensitivity to the meaning of their rights and obligations. From an ontological perspective, it can be said that the rights and obligations afforded to humans are an expression of the 'human condition'.<sup>5</sup>

Therefore, giving AI and clones legal personality humanises them, and makes them the same as natural persons afforded this right. These philosophical standpoints can be countered with the argument that companies are recognised to have legal personhood.<sup>6</sup>

While companies can enter contracts and be sued, they only have the rights which allow them to contribute to society to the extent to which they are practically applicable. Although a company has 'capacity', it doesn't have the right to freedom against torture, for example – a right only granted to human beings with human dignity.

## Unnatural lifeforms with human dignity

A natural human is described as existing in or deriving from nature as opposed to being caused by humankind.<sup>7</sup> The rights afforded to us are a development of the concept of human dignity and humans as having the capacity to reason, differentiating us from all other living creatures.<sup>8</sup>

However, clones and AI represent a new age of human tech whereby we can *build* our potentially intellectual and emotional peers. The same dignity would arguably be possessed by a clone. If "all human beings

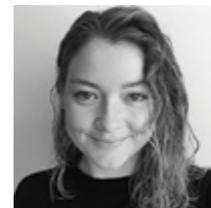
are born free and equal in dignity",<sup>9</sup> in themselves, clones would not be an affront to human dignity. While this is speculative, it raises the issue of whether a clone as an unnatural-born human would be considered to have 'human dignity' as has shaped our laws based around capacity and legal personhood.

So where does AI fit into the concept of dignity? Immanuel Kant first asserted the idea that to have dignity means to be autonomous;<sup>10</sup> that is, autonomous individuals have their own independent will. Machine learning makes it possible for AI to be autonomous from their producer.

The issue is complicated because the autonomous nature of humans gives rise to liability for our actions. Take for example, an autonomous self-driving vehicle that causes an accident. Should the car be held liable for its negligence as opposed to its driver? If this is the case, we may also conclude that the vehicle should be granted the right to vote, acquire property, enter contracts, or even sue one of us.

The autonomy and capabilities of AI will make it increasingly difficult to logically attribute their actions to a recognised legal personality.<sup>11</sup> This issue is arguably more relevant for a cloned individual. Clones are not going to be lifeless zombies, nor do they need to be programmed to operate autonomously as is required of AI.

The monkeys cloned in China were not programmed to think, feel and perceive. Rather, they are a product of their own condition. They resemble that of a natural born monkey, as will human clones – living entities with their own distinct will and independent existence. Therefore, if clones were not given legal personhood, who would be liable for their actions?



by Josephine Bird, the Legal Forecast

## Moving forward

There is real difficulty in applying existing law to unprecedented technology. It is unlikely that legislators will rush to develop statutes that grant clones legal personhood any time soon. However, the complexity of the questions raised by our use of AI and cloning touches on every legal and social construct. The resolution of such value-laden questions will require continued debate, an attempt to reach consensus, and a little societal soul searching.

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

### Notes

- <sup>1</sup> Lui et al, 'Cloning of Macaque Monkeys by Somatic Cell Nuclear Transfer' (2018), *Cell*.
- <sup>2</sup> Tachibana et al, 'Human Embryonic Stem Cells Derived by Somatic Cell Nuclear Transfer' (2013) 153(6) *Cell* 1228.
- <sup>3</sup> *Research Involving Human Embryos and Prohibition of Human Cloning for Reproduction Act 2003* (Qld).
- <sup>4</sup> The Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws', Report No.124 (2014) 42 [2.30].
- <sup>5</sup> Charlotte Cameron, 'Regulating human enhancement technologies: The role of the law and human dignity' (2010) 17 *JLM* 807, 809.
- <sup>6</sup> *Corporations Act 2001* (Cth) s124(1).
- <sup>7</sup> Edwin Dickinson, 'The Analogy between Natural Persons and International Persons in the Law of Nations' (1917) 26(7) *The Yale Law Journal* 564, 567.
- <sup>8</sup> Roberto Andorno, 'Human Dignity and Human Rights as a Common Ground for a Global Bioethics' (2009) 34 *Journal of Medicine and Philosophy* 223, 227.
- <sup>9</sup> Universal Declaration of Human Rights (UDHR), art. 7.
- <sup>10</sup> James Rachels, 'Kantian Theory: The Idea of Human Dignity' [1986] *The Elements of Moral Philosophy* 1.
- <sup>11</sup> Nathalie Nevejans, 'European Civil Law Rules in Robotics' (Research Paper PE 571.379, Policy Department C, European Parliament's Legal Affairs Committee, 2016) 16.

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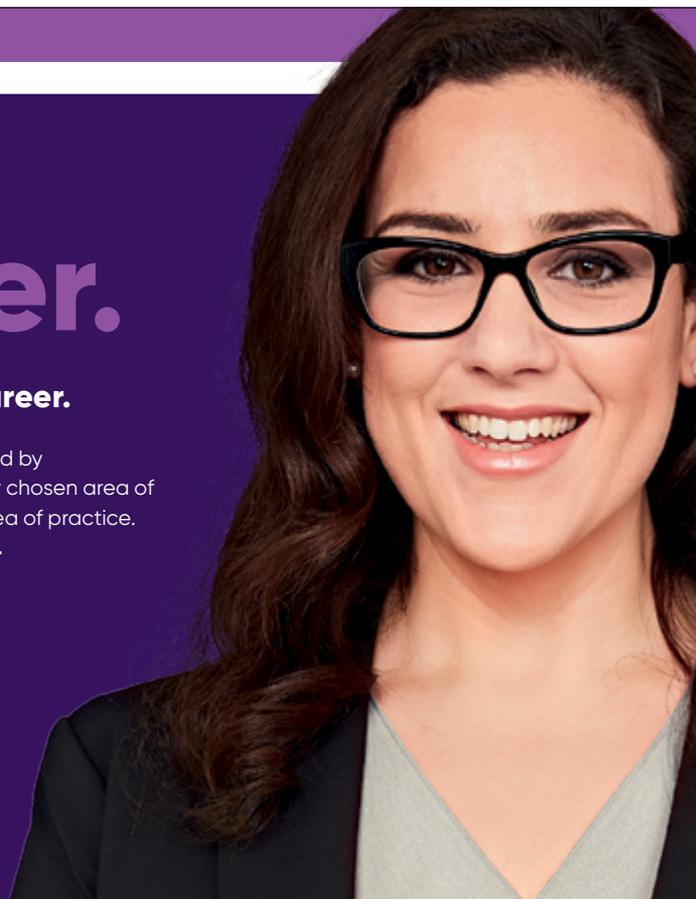
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# What's new in trust accounting

The QLS Trust Account Investigation team provides an update on recent changes in trust accounting.

In the last 18 months there have been several important developments in trust accounting.

Here are the interesting ones you should know about:

## Abolition of the prescribed deposit account (from 1.1.17)

The abolition of the prescribed deposit account, an outcome for which Queensland Law Society had long advocated, means that law practices now maintain all general trust monies in the one bank account. This eliminates the possibility of law practice trust accounts being overdrawn due to funds being held in the prescribed deposit account.

## Introduction of the Trust Account Consultancy program

The Trust Account Consultancy program is a complimentary service for newly established law practices across Queensland.

The program involves a QLS trust account investigator providing a one-on-one consultation with the law practice to assist the practice to comply with its trust accounting obligations.

The one-on-one consultation is aimed at:

- assessing the law practice's existing procedures
- answering specific concerns of the practice on trust accounting issues
- providing guidance to the practice to enable it to improve its record management or procedures in relation to trust accounting.

The benefits of the program are:

- streamlined trust account processes
- improved internal controls and risk management
- improved accuracy and completeness of trust account records.

## Introduction of the Trust Account Referral Course

The Trust Account Referral Course was introduced to provide legal practitioners, whose actions are capable of constituting unsatisfactory professional conduct or whose fitness to practice has been called into question, with additional awareness of their trust accounting obligations.

Legal practitioners may be referred or recommended to complete the course by the Queensland Civil and Administrative Tribunal, the Legal Practice Committee, the Legal Services Commission, or the Queensland Law Society Council or its Executive Committee.

This one-day course is led by one of the Society's trust account experts, who delivers specialised training in trust accounting, and explains the competencies expected of solicitors when handling trust money.

## Review of the *Legal Profession Regulation 2007*

The Queensland Government asked Queensland Law Society to undertake a review of the *Legal Profession Regulation 2007* in early 2017.

The Society, via its Trust Account Investigation team, made ten recommendations to the Queensland Government, of which nine were accepted, resulting in the *Legal Profession Regulation 2017* which commenced on 1 September 2017. A summary of the changes to the regulations is shown in the online table that accompanies this article at [medium.com/qldlawsociety](https://medium.com/qldlawsociety).

Over the last 18 months the Trust Account Investigation Unit has also:

- undertaken more than 1200 investigations of law practices (Investigation of Affairs – 363; Trust Account Compliance Reviews – 787; and Trust Account Consultancies – 83)
- received and responded to more than 7700 queries (3100 emails and 3600 phone calls) from law practices, external examiners and clients of law practices. Over 99% of queries were responded to on the same day as they were received
- updated all resource material on the Society's trust account resource page, including a re-write of the guidelines in relation to trust account operations in relation to PEXA (Property Exchange Australia) and electronic funds transfer (EFT).

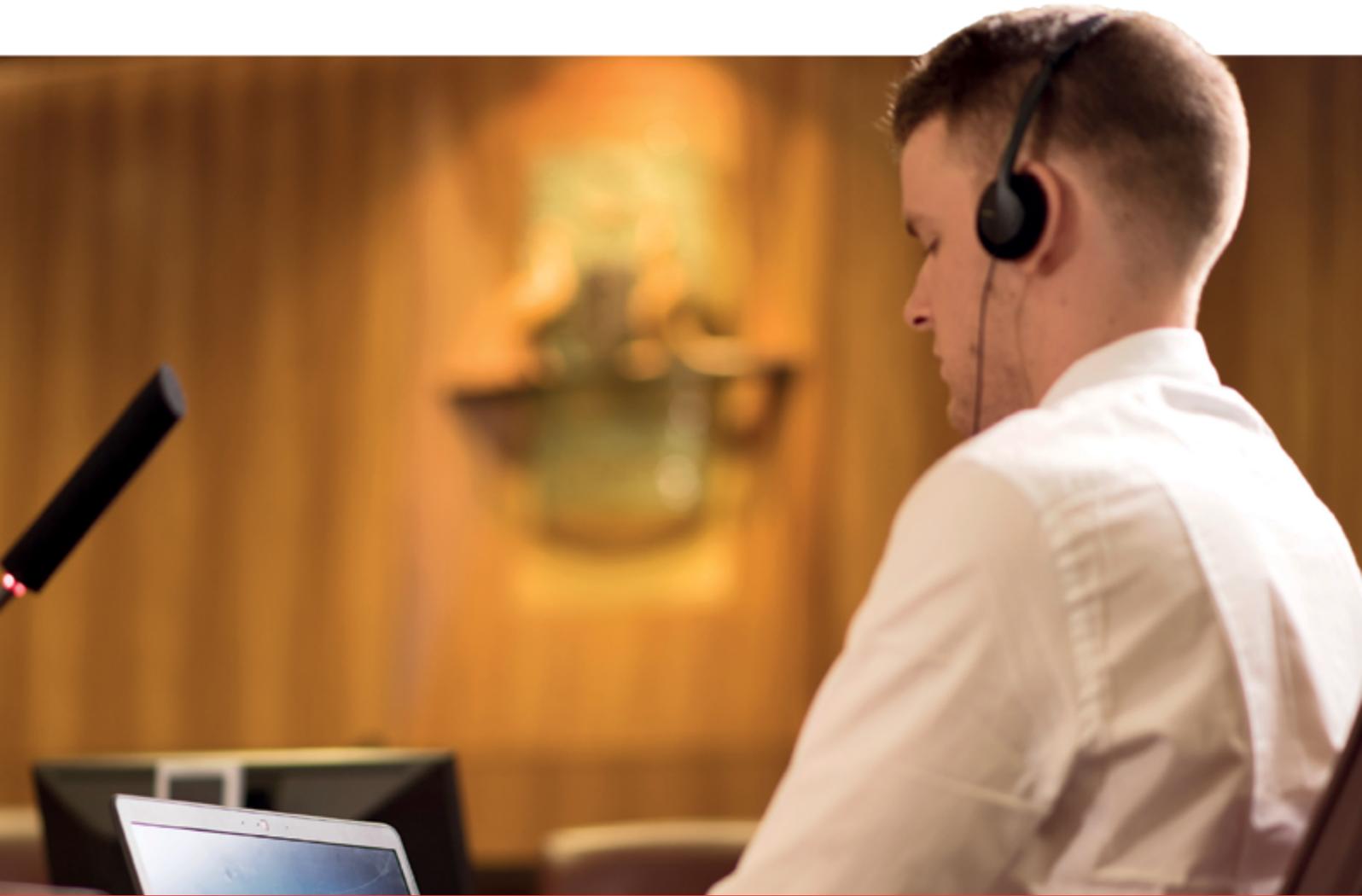
If you have any trust account questions, please contact us on 07 3854 5908 or email [managertai@qls.com.au](mailto:managertai@qls.com.au).

This article and table summarising changes to the *Legal Profession Regulation 2017* that commenced on 1 September 2017 are available at [medium.com/qldlawsociety](https://medium.com/qldlawsociety).

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# Protection of confidentiality in the state courts

## Orders to restrict access

Unlike other Australian states and the Federal Court of Australia, Queensland does not have a comprehensive legislative scheme dealing with suppression and non-publication orders.<sup>1</sup>

Such orders are therefore generally sought via the inherent power of the court, which is exercised for the purpose of administering justice.<sup>2</sup>

A legislative basis for such applications may be found in s8 of the *Supreme Court of Queensland Act 1991*, and cognate legislation for the District and Magistrates Courts.<sup>3</sup> While the legislation provides that the business of the court is to be conducted in open court (s8(1)(b)), subject to any Act the court may, if the public interest or the interests of justice require, by order limit the extent to which the business of the court is open to the public (s8(2)).

### The balance of open justice and confidentiality

The principle of open justice has been described as “one of the most fundamental aspects of the justice system in Australia”.<sup>4</sup> Accordingly, information may not be “withheld from the public merely to save a party or witness from loss of privacy, embarrassment, distress, financial harm, or other ‘collateral disadvantage’”,<sup>5</sup> nor merely for the sake of public decency or morality.<sup>6</sup>

However the principle of open justice is itself subject to the paramount duty of the court to secure that justice is done.<sup>7</sup> The principles of open justice must not be taken further than is required to secure the interests of justice, and that may require confidential or commercially sensitive material to be protected.<sup>8</sup>

If justice cannot be done at all if it has to be done in public, such as when the subject-matter of the litigation would be destroyed (as in the case of trade secrets), the principle of open justice must yield, but this turns “not on convenience, but necessity”.<sup>9</sup>

The relevant principles were identified in *J v L & A Services Pty Ltd (No.2)* [1995] 2 Qd R 10 at 44 as follows:

- “1. Although there is a public interest in avoiding or minimising disadvantages to private citizens from public activities, paramount public interests in the due administration of justice, freedom of speech, a free media and an open society require that court proceedings be open to the public and able to be reported and discussed publicly.
2. The public may be excluded and publicity prohibited when public access or publicity would frustrate the purpose of a court proceeding by preventing the effective enforcement of some substantive law and depriving the court’s decision of practical utility...
3. The permitted exceptions to the requirement of open justice are not based upon the premise that parties would be reasonably deterred from bringing court proceedings by an apprehension that public access or publicity would deprive the proceeding of practical utility, but upon the actual loss of utility which would occur, and the exceptions do not extend to proceedings which parties would be reasonably deterred from bringing if the utility of the proceedings would not be affected...
4. No unnecessary restriction upon public access or publicity in respect of court proceedings is permissible.
5. Different degrees of restraint are permissible for different purposes. [Exclusion] of the public or a substantive restraint upon publicity is not permissible unless abstractly essential to the practical utility of a proceeding; for example [proceedings] for the legitimate protection of confidential information...”

Suppression and/or non-publication orders are frequently made in commercial proceedings in Queensland courts, and often they are not the subject of dispute between the parties to the proceeding.

Such orders are commonly made in the following types of proceedings:

- a. Proceedings seeking to restrain the misuse of confidential information. The utility of the relief sought would

be destroyed if the information was released into the public domain.

- b. Applications by a voluntary administrator to extend the period to convene a second meeting of creditors. Often, an extension is required because negotiations are ongoing with potential purchaser/s of the company’s business, which negotiations are confidential.
- c. Applications by liquidators or trustees for approval of their remuneration. Such applications must be accompanied by detailed affidavit material explaining the work undertaken. Often it is necessary for the applicant to refer to work that is ongoing, such as an ongoing sales process. That process will often be confidential.

When drafting the order, it is important to consider its scope and any appropriate limits that should be imposed (for instance, such as a time limit). Any intrusion into the principle of open justice should go no further than is necessary to protect the confidential or commercially sensitive material.

### Restricting access to affidavit

A common form of order is that an affidavit of a named deponent be placed into an envelope and marked ‘Not to be opened except pursuant to an order of the Court’ (or similar wording to that effect).

If you propose to seek such an order, you should bring to court an envelope which is large enough to hold the affidavit (or several envelopes if necessary) bearing a label with the words referred to in the proposed order.

If an affidavit of a deponent is only confidential in part, or particular exhibits only are confidential, you should consider having the deponent swear or affirm two affidavits, one which is the open one and the other which contains or exhibits the proposed sealed material. By doing this, the order protecting the confidential material will go no further than is necessary.

If the written outlines of counsel refer to the confidential affidavit evidence, then it may be necessary for the outlines to also be placed into an envelope and marked ‘Not to be opened except pursuant to an order of the Court’.

In the February edition of *Proctor* **Kylie Downes QC** and **Philippa Ahern** considered the basis on which the Federal Court will make orders restricting the dissemination of confidential or commercially sensitive material. This month they consider how such orders are made in Queensland proceedings.



## Closing the court/restricting access to the transcript

If the content of the affidavit material is such that the court decides that it should be sealed as referred to above, then it may also be necessary to seek an order that the court be closed (for the minimum time required) and that access to the transcript be restricted to the parties' legal advisers (again, only to the extent necessary).

If it is necessary to cross-examine on or make oral submissions about the commercially sensitive or confidential affidavit material, an order sealing the affidavit material will not prevent the publication of the confidential information if cross-examination and oral submissions take place in open court and are recorded in a transcript to which access is not restricted.

However, you should only seek an order for the closure of the court, and restricted access to the transcript for the period that the confidential information will be addressed, and not otherwise.

## Restricted disclosure between parties

Disclosure is a significant intrusion into a litigant's privacy and confidentiality.<sup>10</sup> Some protection is given by what is commonly described as the 'implied undertaking', which binds the recipient not to use that disclosure for any purpose other than that for which it was given, unless it is received into evidence.<sup>11</sup>

In *Tri-Star Petroleum Company & Ors v Australia Pacific LNG Pty Ltd & Ors* [2017] QSC 136 at [60], Bond J stated that a court may impose a more onerous obligation than the implied obligation "... if it is persuaded by the party asserting the need for that course that the case involves exceptional circumstances such that the implied obligation provides insufficient protection. If it is so persuaded, the court will then consider whether the course proposed by that party will strike the fair balance between its confidentiality concerns and the needs of the other litigant to have access to the documents concerned."<sup>12</sup>

Queensland courts have power to relieve a party to a proceeding of the duty of disclosure to any specified extent under r224 of the *Uniform Civil Procedure Rules 1999* (UCPR). They may also

order that delivery, production or inspection of a document or class of documents for disclosure not be provided, or be deferred: r223(3). These rules confer power on the court to make orders, such as those made in *Ex parte Fielder Gillespie Ltd* [1984] 2 Qd R 339, which accommodate parties' confidentiality concerns by making orders for restricted disclosure.<sup>13</sup>

In *Ex parte Fielder Gillespie Ltd* [1984] 2 Qd R 339 the applicant sought production of disclosed documents, which was resisted on the basis of their confidentiality. McPherson J (as his Honour then was) noted at 341 that "confidentiality is not itself a valid basis for resisting inspection". Nevertheless, in order to maintain confidentiality in what was alleged to be a secret process, his Honour made orders limiting the persons entitled to inspect the documents on behalf of the applicant; permitting the applicant only to take one copy of the documents, which was required to be kept securely; and prohibiting the applicant from communicating the contents to anyone other than the applicant's solicitors and counsel, or using them for other purpose than the purpose of the proceeding.<sup>14</sup>

## Restricting access to the court file

Both parties to proceedings, and non-parties such as media organisations, may obtain copies of documents from court files pursuant to rr980 and 981 of the UCPR.<sup>15</sup> However, this is subject to any court order restricting access to the file or document (r981(3)).

In *Ex parte the Queensland Law Society Incorporated* [1984] 1 Qd R 166 at 168, McPherson J said that any power that the court has to order that a file or document not be open to inspection "would be exercisable only where necessary for the purpose of protecting the administration of justice in a particular case".

In *Caltabiano v Electoral Commission of Queensland & Anor (No.3)* [2009] QSC 186, Atkinson J fashioned orders restricting access to the court file so that they went no further than required, in order to give effect to the principle of open justice.<sup>16</sup>

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

### Notes

- <sup>1</sup> For instance, the *Court Suppression and Non-Publication Orders Act 2010* (NSW); *Open Courts Act 2013* (Vic.); Part 8, *Evidence Act 1929* (SA). In May 2010, the Standing Committee of Attorneys-General endorsed model legislation harmonising suppression and non-publication orders, and Ministers agreed to consider implementing these provisions in their respective jurisdictions. This legislative scheme has not been enacted in Queensland.
- <sup>2</sup> In *Ex parte the Queensland Law Society Incorporated* [1984] 1 Qd R 166 at 170, McPherson J (as his Honour then was) stated that the only inherent power that a court possesses is "power to regulate its own proceedings for the purpose of administering justice".
- <sup>3</sup> Section 126 of the *District Court of Queensland Act 1967* and s14A of the *Magistrates Courts Act 1921* are in the same terms.
- <sup>4</sup> 'Electronic Publication of Court Proceedings Report – April 2016', Supreme Court of Queensland, at paragraph 22.
- <sup>5</sup> *J v L & A Services Pty Ltd (No.2)* [1995] 2 Qd R 10 at 45 per Fitzgerald P and Lee J.
- <sup>6</sup> *Scott v Scott* [1913] AC 417 at 435 per Viscount Haldane LC.
- <sup>7</sup> *Scott v Scott* [1913] AC 417 at 437–438 per Viscount Haldane LC; followed in *John Fairfax & Sons v Police Tribunal* (1986) 5 NSWLR 465 at 471 per Mahoney JA, with whom Glass JA agreed.
- <sup>8</sup> *Harman v Secretary of State for the Home Department* [1983] AC 280 at 308.
- <sup>9</sup> *Scott v Scott* [1913] AC 417 at 437–438; *John Fairfax & Sons v Police Tribunal* (1986) 5 NSWLR 465 at 472.
- <sup>10</sup> *Harman v Secretary of State for the Home Department* [1983] AC 280 at 308.
- <sup>11</sup> *Hearne v Street* (2008) 235 CLR 125 at 154–155 and 157 per Hayne, Heydon and Grennan JJ, with whom Gleeson CJ agreed on this point (at 131). The "implied undertaking" is more accurately described as a substantive legal obligation arising from the circumstances in which the material was generated and received.
- <sup>12</sup> See also *Seeker Aircraft America Inc v Seabird Aviation Australia Pty Ltd & Anor* [2013] QSC 121 at [13].
- <sup>13</sup> *Integrated Medical Technology Pty Ltd & Anor v Gilbert & Ors* [2015] QSC 124 at [106].
- <sup>14</sup> The basis for such orders was also considered in *Magellan Petroleum Australia Pty Ltd v Sagasco Amadeus Pty Ltd* [1994] 2 Qd R 37 and *Digi International Inc v Stallion Technologies Pty Ltd* (2001) 53 IPR 529, and more recently in *Integrated Medical Technology Pty Ltd & Anor v Gilbert & Ors* [2015] QSC 124 at [103]–[106].
- <sup>15</sup> Requests to search and copy court documents may be made via the court website: [qld.gov.au/law/court/court-services/access-court-records-files-and-services/apply-to-search-and-copy-court-documents](http://qld.gov.au/law/court/court-services/access-court-records-files-and-services/apply-to-search-and-copy-court-documents).
- <sup>16</sup> *Caltabiano v Electoral Commission of Queensland & Anor (No.3)* [2009] QSC 186 at 4–5, 7.

# Constructing a mobile home gift

Assumptions are the termites of... instructions.<sup>1</sup>

## My aunty and her husband are the epitome of baby boomers.

With caravan in tow they embrace the 'adventure before dementia' lifestyle with gusto, travelling the coastal highways and byways, setting down in all manner of mobile home parks up and down the east coast.

It is an image of retirement that is not unfamiliar. However, the recent decision of *In the Will of Thomas Henry Finch (dec'd)* [2018] QSC 16 (*Finch*) challenges traditional notions of mobile homes, also referred to as relocatable homes, while providing a comprehensive examination of the law in relation to rectification and construction.

*Finch*, delivered on 13 February 2018, is a decision of Justice Lyons SJA. It traverses 20 pages and is the result of an application pursuant to Divisions 4 and 5 of the *Succession Act 1981* (Qld) seeking rectification and construction of a will.

The issues raised were:<sup>2</sup>

1. extension of time for rectification – s33(3).
2. whether to grant the application for rectification – S33(1).
3. if so, construction of the offending clause.
4. if not, construction of the offending clause.

In 2012 the testator, Mr Finch, provided instructions for a new will to a then trainee solicitor. Mr Finch's instructions included providing notations on the side of a previous will, where one notation stated "House – Joy Maree Bazley".<sup>3</sup>

Instead of the term 'house' being used in the will, the relevant clause read: "Any real property owned by me at the date of my death to my Daughter JOY MAREE BAZLEY".<sup>4</sup>

At the time of making the will the testator owned an interest in what was later discovered to be a relocatable home on the Gold Coast. At his death the testator did not own any real property,<sup>5</sup> but he did still hold his interest in the relocatable home, although he was residing in a retirement village/nursing home in Toowoomba.

The nursing home was a leasehold interest which ceased on death. So the question before the court was the status of both of these interests in the context of the gift to the testator's daughter.

Granting leave to proceed, her Honour considered the rectification and construction matters. As with all litigation, cases rise and fall according to the evidence and in these matters "different rules apply in relation to the admissibility of evidence with respect to the application for rectification and the application for construction".<sup>6</sup>

Accordingly, the rectification application called for an analysis of the application of section 33C – Use of evidence to interpret a will, and its relevance to the application for rectification under s33, the issue there being that s33 falls under Division 4 – Powers of court, whereas s33C falls under Division 5 – Interpretation of wills.<sup>7</sup>

In determining that the 'armchair rule' applied in both rectification and construction matters,<sup>8</sup> the court noted that the 2006 amendments were in effect the first "significant attempt"<sup>9</sup> to codify the general rules of construction and they did not "detract from any existing means of interpretation".<sup>10</sup> Further, "there can be no doubt that the provisions of s33 and s33C added to the principles that then existed as to the admissibility of evidence" and "that the 'armchair rule' ... has not been altered".

With that, her Honour explained that what the court "first must determine in relation to the rectification application is to identify the instructions and intention of the deceased ... then determine the effect of the Will and compare the two and ascertain whether the Will gives effect to the instructions or intentions."<sup>11</sup>

Her Honour then identified the four-stage process of applications for rectification.<sup>12</sup> Through that process, she considered the circumstances of the solicitor's use of the term 'real property' in the will. Her Honour found that the use of that term did not give effect to the testator's instructions and so the circumstances of s33(1)(b) had been made out.

In respect of the construction application, the court was asked to consider if the testator had two homes that could fit within his instructions of leaving "my house" to his daughter. The issue here was whether both properties could be characterised as the testator's house. Having regard to section 33I, her Honour found that, while the provision provides for the inclusion of a leasehold interest as an interest of land,<sup>13</sup> the sublease terminated on death and "therefore no proprietary interest in the unit remained",<sup>14</sup>

and as such the entitlement was a "debt recoverable by the estate".<sup>15</sup> Ultimately, her Honour declared that upon a "proper construction of the Will ... the deceased's relocatable home ... passes under the gift"<sup>16</sup> to the testator's daughter.

A striking feature of this matter was the evidence as to the nature of the testator's home – importantly, it was not real estate but a chattel on a leasehold. The deceased's daughter and his solicitor both gave evidence they had visited the testator at the property and there was very little, if no indication, that it was a relocatable home.

Interestingly, her Honour observed that it was "no doubt unusual for a house not to be attached to a parcel of land and be relocated particularly when it did not have wheels or look at all like a caravan or mobile home. Furthermore it was a substantial dwelling which consisted of two bedrooms, two bathrooms and included wraparound verandahs. It also cost in excess of \$400,000 when purchased in 2007 and is situated in a residential estate in a suburban street."<sup>17</sup>

Ten years ago those type of relocatable homes may have been uncommon; however, much has changed in a decade and they have gained in significant popularity. Technically identified as 'manufactured homes', they are governed by the *Manufactured Homes (Residential Parks) Act 2003* (Qld). They are commonly transacted, with the transactions involving the sale of the house as a chattel and the assignment of the lease between the real property owner/park manager, seller, and purchaser.<sup>18</sup>

They are increasingly popular with retirees for a number of reasons<sup>19</sup> including exemptions from stamp duty,<sup>20</sup> no exit or entry fees, no body corporate fees, lifestyle security and safety, to name a few. In a 2013 manufactured homes survey<sup>21</sup> it was identified that, at that time, there were some 14,000 home sites in registered parks across Queensland with an estimated 24,200 people living in manufactured homes.

About 88% of occupants are aged 65 plus. While the majority of manufactured homes transact for less than \$100,000, there is a steady increase in price and prestige, with newer parks including golf courses, restaurants, medical facilities and waterside locations. For example, at the time of writing



with Christine Smyth

this column, my firm undertook a conveyance of one such high-end relocatable home which transacted for more than \$600,000. While that is currently unusual, we are regularly engaged to assist in the conveyance of these homes, with average prices of around \$300,000.<sup>22</sup>

With the survey identifying some homes selling for as much as \$1.25 million,<sup>23</sup> it is likely that practitioners will increasingly encounter these types of properties in will instructions. To that extent, this decision has brought to our attention that what we once thought as 'usual' cannot be assumed.

Christine Smyth is immediate past president of Queensland Law Society, a QLS accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, QLS Specialist Accreditation Board, the Proctor editorial committee, STEP, and an associate member of the Tax Institute. The author gratefully acknowledges the research assistance provided by Robbins Watson property lawyer Brittney-Anne Battelley.

Notes

- <sup>1</sup> To adapt a quote originally by Henry Winkler.
- <sup>2</sup> At [18].
- <sup>3</sup> At [11].
- <sup>4</sup> At [13].
- <sup>5</sup> At [8].
- <sup>6</sup> At [33].
- <sup>7</sup> At [28]-[34].
- <sup>8</sup> At [36].
- <sup>9</sup> At [34].
- <sup>10</sup> Ibid.
- <sup>11</sup> At[38].
- <sup>12</sup> At [47].
- <sup>13</sup> At [61].
- <sup>14</sup> At [62].
- <sup>15</sup> Ibid.
- <sup>16</sup> At [63].
- <sup>17</sup> At [49].
- <sup>18</sup> Which can only occur by way of written agreement, in accordance with Section 44 *Manufactured Homes (Residential Parks) Act 2003* (Qld).

<sup>19</sup> At page five, 'Manufactured Homes Survey Report 2013', [hpw.qld.gov.au/SiteCollectionDocuments/ManufacturedHomesSurveyReport2014.pdf](http://hpw.qld.gov.au/SiteCollectionDocuments/ManufacturedHomesSurveyReport2014.pdf).

<sup>20</sup> See s138 & s146 *Duties Act 2001* (Qld).

<sup>21</sup> 'Manufactured Homes Survey Report 2013'.

<sup>22</sup> At page five, 'Manufactured Homes Survey Report 2013'.

<sup>23</sup> Ibid.



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# 'Undivided loyalty' – the perception and the reality

by Stafford Shepherd



## Consider the following situations:

- A suburban solicitor has represented a husband and wife in a cottage conveyance. Now the couple have separated, and it is not amicable.
- A medium-sized Brisbane firm has represented a community organisation and several of its local branches. Now there is a dispute between the organisation and one of its branches that may lead to litigation.
- A regional solicitor negotiates a contract for the sale of a business between two of her biggest clients; a year later they accuse each other of negotiating in bad faith.

Each of these situations could create a conflict for us – impairing the loyalty to a particular client. The consequences of permitting a conflict to arise could be an action for professional negligence or breach of retainer and an unwanted disciplinary investigation. Rule 11 of the *Australian Solicitors Conduct Rules 2012* (ASCR) is concerned with the management of conflicts concerning current clients.

Whether practising as a sole practitioner, a member of a medium-sized practice or a national or international practice, our lives are replete with potential conflicts of duties. We must learn to identify the situations and to anticipate potential problems. Some basic rules may help:

1. Do not think of a *conflict* of duties, but of *potential* duties. Look at what we are being asked to do from the point of view that there is – or could be – a conflict in duties, rather than from the perspective that there is not.
2. Think not of conflict, but rather of 'impaired loyalty'. Although the fundamental ethical duties in Rule 4 ASCR and the concurrent conflict rule in Rule 11 ASCR do not use these words, they encapsulate what is a core responsibility to "act in the best interests of a client". Our question should be: "Is there any way, through my representation, in which my loyalty to the client may be impaired?"
3. We need to remember, that although a large percentage of conflicts may never eventuate, it is not possible to predict the one that will. The only way for us to protect the interests of all clients – and our own – is a basic rule – we must avoid conflicts before the duties owed to two or more clients collide (Rule 11.1 ASCR).

When clients ask us to represent them in the same or related matters, then we need to openly and fully explain how our primary responsibility of loyalty will be impaired. This disclosure must be meaningful and comply with Rule 11 ASCR. At a minimum, we must advise each client of:

- the intention for us to act for another client at the same time in the same or a related transaction, and
- obtain each client's informed consent to so acting (this means each client must understand the actual and reasonably foreseeable adverse consequences of the representation – including any impairment to our duty of confidentiality).

We should:

- ensure all our communications to our clients are in writing, explaining the impact upon them of concurrent representation
- obtain the consent of each client in writing
- address what happens to solicitor-client confidences in such concurrent representation situations
- spell out specific ramifications arising from multiple representations in an 'if/then' format
- address the ground rules of what will happen in the event of a conflict arising, including withdrawal and the additional costs a client will have.

Agree with the clients in advance how confidential information will be treated. The best position would be to agree – as part of your retainer – that, among multiple clients, there shall be no confidences or secrets. Also spell out to the client that if he or she insists on revealing to us a confidence, then the consequence is that we must withdraw.

Remember, our client's 'informed consent' cannot cure all conflicts. If we adopt these steps, then our client will know and appreciate the risks arising from concurrent representation.

## Review of the Australian Solicitors' Conduct Rules

On 1 July 2012 the *Australian Solicitors Conduct Rules 2012* commenced in Queensland. During 2016 and 2017 the Law Council of Australia's (LCA) Professional Ethics Committee undertook a review of the ASCR. The LCA has released a consultation

paper entitled 'Review of the Australian Solicitors' Conduct Rules'. The review paper can be found [qls.com.au/Knowledge\\_centre/Ethics/Review\\_of\\_the\\_Australian\\_Solicitors\\_Conduct\\_Rules](http://qls.com.au/Knowledge_centre/Ethics/Review_of_the_Australian_Solicitors_Conduct_Rules).

The QLS Ethics Centre, on behalf of the Ethics Committee and the Queensland Law Society, invites members and interested parties to provide submissions with respect to the consultation paper by 31 May 2018. In particular, the committee seeks comments on the review of Rule 9 (Confidentiality) and Rule 11 (Conflict of duties concerning current clients). Submissions may be lodged at [ethics@qls.com.au](mailto:ethics@qls.com.au).

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

## Modern Advocate Lecture Series

To foster collegiality in the legal profession and promote engagement between solicitors and barristers, the Modern Advocate Lecture Series was developed. Featuring notable members of the judiciary and legal profession, each presentation in our highly regarded series deals with practical advocacy relevant to the junior ranks of the profession. Remaining lectures for 2018 are listed below.

### Lecture two

Thursday 10 May  
Law Society House, Brisbane  
*Di Fingleton*

### Lecture three

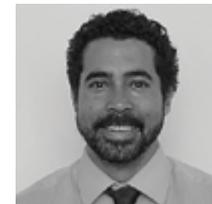
Wednesday 25 July  
Law Society House, Brisbane  
*Justice Andrew Greenwood,  
Federal Circuit Court of Australia*

### Lecture four

Thursday 25 October  
QUT Gardens Theatre foyer  
*Chief Justice Susan Kiefel AC,  
High Court of Australia*

# Building rapport with First Nations clients

David Wenitong discusses the major considerations for practitioners when working with First Nations clients.



## The quality of our communication is the key in developing rapport with First Nations clients.

Quality communication has two parts. Firstly, it simply means being able to break the complexities of the legal system down into plain English and effectively provide information and advice to clients in a way the client will understand. Doing so will enable you to elicit the right information from your client.

Secondly, when building effective communication and rapport, it is imperative that practitioners have an awareness and understanding of the issues that have affected, and continue to affect, First Nations peoples.

In building rapport, an understanding of cultural nuances can help to build better relationships and trust with clients to illicit the right information.

In order to communicate effectively, it is important to avoid situations of 'gratuitous concurrence'. To put it simply, this is when a client will agree with what you say, whether they truly agree or understand what you are saying, because that is what they think you want them to say.

Diana Eades defines it as "habitually agreeing with the questioner (gratuitous concurrence) to avoid conflict or mask lack of comprehension".<sup>1</sup>

We need to remember and be aware that the style of communication that we use in our everyday conversations, and the way we are taught in schools and universities, are question-and-answer based. This is not necessarily a universal style in many cultures.

Having been educated in and working in the legal system that intrinsically comes from European tradition, our styles of communication are far removed from the traditional styles of communication used by First Nations peoples which focus more strongly on narrative and storytelling.

Also, in looking at cultural nuances, the concept of 'shame' will be relevant in some situations when taking instructions. The term 'shame' is much broader in its use than the

European definition of the term. It often arises from being singled out from the group or from particular circumstances or events.

In some cases clients may seem disengaged, or reluctant to speak openly about a situation. It is important for practitioners to understand that what they may be interpreting from a client's body language and responses could just be a result of the interview situation and embedded cultural norms.

Building rapport with your clients means acknowledging that First Nations peoples can have different communication styles and taking the time to understand that. Moving forward, it is important for the legal community to have awareness and understanding of the issues First Nations peoples have gone through.

As a member of the QLS Reconciliation and First Nations Advancement Committee, I am happy to help raise our voices and visibility in the legal system, and advocate for positive changes for First Nations peoples.

This article appears courtesy of the QLS Reconciliation and First Nations Advancement Committee. David Wenitong is an Aboriginal solicitor with the Aboriginal and Torres Strait Islander Legal Service (ATSILS), working in Central Queensland primarily in family and civil law. David has also worked as a court support officer with ATSILS and Youth Justice.

The committee's focus includes considering and reviewing legislation and foreshadowed amendments, discussing its impact on potential stakeholders, and proposing any suggested amendments to address problems. The committee also provides a forum to consider practical problems and to promote the dissemination of information to members to advance reconciliation in the wider Queensland community.

### Note

<sup>1</sup> Eades D, *Aboriginal English and the Law*, Continuing Legal Education Department, Queensland Law Society 1992, ch.3-5.



## Inaugural First Nations awards

This year saw the inaugural First Nations award categories included in the Queensland Law Society Legal Profession Awards on 9 March.

A very impressive field of applicants were nominated for the two First Nations awards, with Leah Cameron taking the honours as Queensland First Nations Lawyer of the Year and Nareeta Davis as Queensland First Nations Legal Student of the Year.

It was also pleasing to see Terrence Stedman, a Kamilaroi man from the Tingha area of New South Wales, take out two awards – the Equity Advocate Award and Community Legal Centre Member of the Year.

# Guns and judges: Antonin Scalia and the right to bear arms



with Supreme Court  
Librarian David Bratchford

Please join us for the first lecture in the 2018 Selden Society lecture series, presented by Justice Glenn Martin AM.

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Antonin (Nino) Scalia was, for many years, the best known member of the Supreme Court of the United States. He was charming, mercurial, polarising and stubborn. Scalia was a member of the court for nearly 30 years until his unexpected death in 2016 at the age of 79.

Justice Scalia collected numerous awards and achievements on his way to the Bench.

At Harvard he graduated magna cum laude and became a Sheldon Fellow. His legal career began in 1961 in a respected firm in Cleveland, Ohio, but because he wanted to teach he took up a post as professor of law at the University of Virginia in 1967. Four years later he entered public service in the Nixon administration, becoming an Assistant Attorney-General in 1974. It was in that role that he argued his only case before the Supreme Court, *Alfred Dunhill of London v Republic of Cuba*.

His judicial career began in 1982 when President Reagan appointed him to the United States Court of Appeals for the District of Columbia Circuit. Four years later he was unanimously confirmed by the Senate as an Associate Justice of the Supreme Court.

Many commentators suggested that Scalia would unite the conservative justices on the court, but they were wrong. Scalia was more concerned with being true, as he saw it, to the principles of textualism and originalism than with forming coalitions of like-minded judges. He wanted to win each argument, and his frustration with the reasoning of other members of the court would often lead him to engage in ferocious and destructive dissents.

He was, as Bruce Murphy observed in *Scalia – A Court of One*, “driven to be right rather than influential”.

But he was influential in other ways. His dissents helped promote ‘originalism’ as a means of interpreting the US Constitution. In one of the most influential decisions of the last 25 years, Scalia wrote the majority opinion in *District of Columbia v Heller*. It was the first extensive decision on the Second Amendment and the right to bear arms. In it he engaged in a lengthy historical exposition and a grammatical analysis of the amendment. This decision changed the previously accepted understanding of the amendment and it is often mistakenly thought to support the abolition of all restrictions on gun ownership.

## About the speaker

Justice Glenn Martin AM was in practice as a barrister from 1979 until his appointment as a judge of the Supreme Court in 2007. In 2013 he received additional appointments as president of the Industrial Court of Queensland and the Queensland Industrial Relations Commission.

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# Court accepts after-hours application preceding husband's death

with Robert Glade-Wright



**Property – wife's application filed electronically after 4.30pm accepted (despite FLR 24.05(2)) as filed before husband's death hours later**

In *Whooten & Frost (Deceased)* [2017] FamCA 975 (29 November 2017) the wife filed a property application when she learned that the husband (from whom she had been separated for two years) had been placed on life support after a farming accident. Her application – for an order that she be excused from particularising her final orders until the husband had made full and frank disclosure – was electronically filed at 7.40pm. The husband died at 11pm.

His estate relied on *Family Law Rules 2004* (FLR) rule 24.05(2) (an electronic filing “after 4.30 pm according to legal time in the [ACT] is taken to have been received ... on the next day when the ... registry is open”) to argue that the wife could not apply after the husband's death (22) and that her application needed amendment to claim some relief if it was to invoke jurisdiction ([44]). Cronin J disagreed (at [45]):

“... The jurisdiction ... is enlivened by a party filing an application seeking a matrimonial cause. Did the wife's application seek that the court exercise its jurisdiction in relation to ‘proceedings between the parties to a marriage with respect to the[ir] property ... ’? Clumsily though the words may have been expressed, I accept that the wife invoked the jurisdiction seeking orders with respect to property. (...)”

The wife sought an order under FLR 1.14 to extend time under the rules; the estate sought a decision that the rule “should not be applied because the rules cannot create a substantive right” ([47]). Cronin J, however (at [49]–[51]), cited the judgment of McHugh J in *Gallo v Dawson* [1990] HCA 30 who said that rules of court “cannot become instruments of injustice”. Applying Rules 1.14 and 1.09 (“if a doubt exists in relation to ... practice a court may make such order as it considers necessary”) it was held that the wife's application should be treated as having been filed when it was filed electronically.

**Property – when heads of agreement at a mediation involving a third party take effect is a question of fact**

In *Thatcher & Thatcher & Ors* [2017] FCCA 3008 (6 December 2017) heads of agreement at a mediation between the husband, wife and their two sons related to the property case between husband and wife and a case by the sons against their parents in the Supreme Court of Victoria where they claimed an interest in a farming company. The sons

agreed to pay the husband \$800,000 and interest of 3.5% pa, the husband agreeing to transfer properties to the wife. After orders were made the husband refused to settle, arguing that he was entitled to interest since the mediation.

Judge Riethmuller said (from [8]):

“( ... ) As the High Court ... [said] in *Masters v Cameron* [1954] HCA 72 ... [as to] heads of agreement ... :

- a) The parties may intend to be bound immediately, although desiring to draw up their agreement in a more formal document at a later stage; or
- b) They intend to be bound immediately, but do not intend to have ... [it] take effect until ... a more formal agreement; or
- c) They may intend to postpone ... contractual relations until a formal contract is ... executed ( ... *Cheshire & Fifoot Law of Contract* ... 10th ed, 2012, 5.24).

[9] ... The fact that ... [an] agreement is informal ... does not preclude it from being immediately binding. ( ... ) Ultimately ... it is a matter for the Court to determine the parties' intention ... objective[ly] ... having regard to the language used and their conduct. ( ... )

[15] ... [T]he heads of agreement could [not] be considered a binding financial agreement ( ... )

[17] The land ... was held in part by the wife, yet the payment was entirely to the husband. Without finalisation of the ... [case] the wife was potentially required to transfer her interest ... for the husband to receive \$800,000 ... without any certainty that the[ir] agreement ... would become binding.

[18] In these circumstances, I am not persuaded that the heads of agreement were ... binding ... until ... the ... orders were made ...

[29] ... I am satisfied that the sons were ready, willing, and able to settle ... and that ... settlement did not proceed ... because the husband sought ... interest ... prior to ... the ... orders ... [thus] it is not appropriate that he be permitted to insist on interest ... .”

**Property – parties not in a de facto relationship despite their lengthy sexual relationship and two children – *Elias* principle**

In *Weldon & Levitt* [2017] FCCA 3072 (11 December 2017) Judge Riley dismissed Mr Weldon's property application, granting Ms Levitt a declaration that the parties did not have a de facto relationship and accepting her evidence that they were “boyfriend and girlfriend” ([3]) and that while they did have two children together

they lived in the same house for less than one of the 16 years they had known each other.

The court said (from [33]):

“The respondent was unemployed and in receipt of ... [benefits] from 2001 until the present ... She did not ... tell Centrelink that she was in a de facto relationship. ( ... )

[68] The applicant acknowledged ... that the respondent alone bought Property B, Property C and Property A. ...

[73] The applicant exhibited ... an application for an intervention order ... by a police officer ... [in] 2014 on behalf of [the] respondent ... [which] said that ... the ... [parties] were in a de facto relationship for about 12 ... years ( ... )

[115] In ... *Elias* ... (1977) FLC 90-267 Goldstein J held that the parties were bound by their statements to governmental authorities. ( ... )

[116] More recently, however, the *Elias* principle has fallen into disfavour. ( ... )

[117] In *Sinclair & Whittaker* [[2013] FamCAFC 129 at [65]] the primary judge found that a de facto relationship existed, notwithstanding the applicant's statements to governmental authorities and lenders that she was single. That finding was not disturbed on appeal. ( ... )

[120] The respondent's child support application was ... based on her claim that the ... [parties] were not in a de facto relationship. ( ... )

[126] ... [T]he respondent's statement in an intervention order application ... that the applicant was her former intimate partner tends to go the other way ... it supports the proposition that the applicant was merely her boyfriend.

[127] The net effect ... is that the court is required to look at all of the evidence, including statements to governmental authorities ... and assess whether, in all the circumstances, the parties were a couple living together on a genuine domestic basis. ( ... )”

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

# Abandonment clauses abandoned

## FWC updates six modern awards

A recent decision by the Fair Work Commission (FWC) has determined that provisions concerning abandonment of employment should be removed from the six modern awards where such provisions still exist.<sup>1</sup>

The decision was handed down as part of the four-yearly review of modern awards, with FWC president Iain Ross (in February 2017) referring the task of reviewing abandonment clauses to the same Full Bench which decided the case of *Bienias v Iplex Pipelines Australia Pty Limited* [2017] FWCFB 38 (*Iplex*) one month earlier.<sup>2</sup>

The Full Bench in *Iplex* held that the entirety of cl.21 (Abandonment of Employment) of the *Manufacturing and Associated Industries and Occupations Award 2010* (the award) was not a term that was either permitted or required to be in a modern award and consequently had no effect under the *Fair Work Act 2009* (Cth) (FW Act).

In its review, the Full Bench concluded that the relevant provisions of each of the six awards should be deleted, however, that this would not happen until a standard replacement provision was determined. To this end, interested parties were invited to file proposals for a replacement provision, having regard to the reasons for the decision.

### Background

An employee is said to have abandoned their employment when it is reasonable for the employer to conclude that the employee no longer wishes to return to work. This may arise when an employee fails to turn up to work for an extended period without providing a valid excuse.

The FW Act does not expressly deal with abandonment of employment and confusion generally arises when an employer seeks to claim that an employment contract is automatically terminated in such instances.

While it may be said that an employee who abandons their employment has effectively repudiated the employment contract, at common law termination will

not occur without the employer accepting the repudiation by electing to terminate the employment contract.

### The facts of *Iplex*

Although abandonment is a form of termination by agreement, it was previously thought that modern awards containing an abandonment provision operated such that, when the employee failed to attend work for a specified period, the employment was ended without the employer having to act.

Indeed, senior deputy president O'Callaghan came to this conclusion at first instance in *Iplex*.<sup>3</sup> In this case the employee, Mr Bienias, had been employed by Iplex for more than 20 years and was covered by the award. In May 2016, Mr Bienias failed to show up to work for two weeks and failed to provide his employer with the reason for his absence.

Mr Bienias received a letter from Iplex stating "...we have determined that you have abandoned your employment with Iplex Pipelines and, consequently, your employment with the company is terminated with effect on 13 May 2016, being the last shift you worked for the company". Mr Bienias subsequently filed an unfair dismissal claim against Iplex.

The first issue to be considered by the FWC was whether the employee had been dismissed within the meaning of s386(1)(a) of the FW Act – that is, whether the employee's employment had been terminated at the initiative of the employer. To determine this, the senior deputy president found it necessary to consider the specific provisions of cl.21 of the award and its effect. The senior deputy president found that:<sup>4</sup>

"Clause 21.1 of the Award must be read on the basis that an absence, without the consent of the employer and without notification to the employer, for a continuous period exceeding three working days, creates a presumption that the employee has abandoned his or her employment..."

Further, concerning cl.21.2 of the award, it was held that:<sup>5</sup>

"...this provision must be read in the context that it specifies that a failure to notify the employer, or obtain the employer's consent to an absence within 14 days of the employee's last attendance at work means that the employee is regarded or judged as

having abandoned their employment. That abandonment must be regarded as an employment termination on the basis that it ends the employment relationship."

The senior deputy president concluded – despite having reservations about the potential ramifications created by such a strict interpretation of the provision, such as in instances in which an individual is incapacitated and unable to communicate with the employer for more than 14 days – that he was unable to apply the clause in any other manner.

Mr Bienias appealed the decision on three grounds. Firstly, he contended that the senior deputy president misconstrued or misapplied cl.21 of the award by concluding that the clause operated to automatically terminate the employment. Apart from this construction point, Mr Bienias advanced two further grounds of appeal:

- cl.21 of the award is neither a permitted nor required term of a modern award and that by reason of s137 of the FW Act, the term has no effect, and
- cl.21 of the award is an objectionable term because it has the effect of requiring or permitting a dismissal in contravention of the general protections provisions, specifically s352 of the FW Act, which prohibits an employer from dismissing an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the *Fair Work Regulations 2009* (Cth).

### The abandonment clause

The Full Bench upheld the first ground of appeal, finding that textual and contextual considerations inferred the award did not have the effect of automatically terminating the employment.

On cl.21.1 of the award, the Full Bench considered that the provision did not refer to termination of employment, only that there was evidence of abandonment when a worker had been absent for a continuous period exceeding three working days. Clause 21.2 was found to be no more than a deeming provision that the employee had abandoned their employment.

Importantly, it was determined that the employer must take the positive step of terminating the employment and a failure

**Andrew Ross** looks at the Fair Work Commission's decision to remove remaining provisions on abandonment of employment in modern awards, in the context of *Bienias v Iplex Pipelines Australia Pty Limited*.



to do so will mean the employment continues. The Full Bench considered it would be "extraordinary" for the clause to operate such that the wishes of the employer were not taken into account.

Therefore, it was held the abandonment clause did not automatically terminate the employment, but rather the onus was on Iplex to terminate the employment on their own initiative. The Full Bench noted that the conduct of Iplex, in its correspondence to Mr Bienias and the payment to him of five weeks' pay in lieu of notice, was consistent with this conclusion.

The Full Bench found that the entirety of the abandonment clause was not a term that may be included in modern awards under the FW Act. In particular, the clause could not be said to be about any of the subject matters

identified in s139(1). Further, the clause was not a term that must be included in modern awards as per s136 of the Act.

### Conclusion

There is often confusion for employers surrounding abandonment of employment and the various factors that must be considered before action should be taken.

Given the significant legal risks surrounding this form of termination, including potential unfair dismissal or general protections claims, it is no surprise the Full Bench considered that it would be helpful to include a provision identifying procedures to be followed in the event an employee is absent from duty for an unexplained extended period.

While a standard provision to replace the current abandonment provisions is yet to be determined, it is likely that such a provision will primarily concern the steps employers might take to consult with employees before taking action.

Andrew Ross is a senior associate at Sparke Helmore Lawyers. The author gratefully acknowledges the assistance of Kate Archibald and Mason Fettell in the preparation of this article.

#### Notes

- <sup>1</sup> *Abandonment of Employment* [2018] FWCFB 139.
- <sup>2</sup> *4 yearly review of modern awards – Abandonment of employment* [2017] FWC 669.
- <sup>3</sup> *Bienias v Iplex Pipelines Australia Pty Limited T/A Iplex Pipelines Australia* [2016] FWC 6624.
- <sup>4</sup> *Ibid* [73].
- <sup>5</sup> *Ibid* [74].

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# High Court and Federal Court casenotes

## High Court

### **Proceeds of crime – statutory interpretation – *Proceeds of Crime Act 2002* (Cth) – recovery of forfeited property**

*Commissioner of the Australian Federal Police v Hart; Commonwealth v Yak 3 Investments Pty Ltd; Commonwealth v Flying Fighters Pty Ltd* [2018] HCA 1 (7 February 2017) concerned the proper construction of s102 of the *Proceeds of Crime Act 2002* (Cth) (POCA), which allows for a person to recover property forfeited to the Commonwealth in certain circumstances. Steven Hart was an accountant who was convicted of nine counts of defrauding the Commonwealth. Under s92 of the POCA, property of Mr Hart and companies with which he was associated was automatically forfeited to the Commonwealth. Companies with interests in the property applied to the Queensland District Court to recover their interests under s102. That section, as it stood at the relevant time, required the applicants to show that “the property was not used in, or in connection with, any unlawful activity”, “the property ... was not derived or realised, directly or indirectly, by any person from any unlawful activity” and “the applicant acquired the property lawfully”. The Commonwealth Director of Public Prosecutions (CDPP) also applied to the District Court under s141 of the POCA for a declaration that any property recovered by the companies was available to satisfy any pecuniary penalty order made against Mr Hart. The court could only make such a declaration if satisfied that the relevant property was subject to the effective control of Mr Hart. The District Court made the recovery orders but not the declaration. Both parties appealed. The Court of Appeal upheld the recovery order, accepting that property would only be “derived” in the necessary sense if it was “wholly derived” from unlawful activity. The CDPP’s appeal was dismissed on the basis that s141 was to be assessed as at the date of the application, and at that time it could not be shown that Mr Hart had the requisite control. The Commonwealth appealed. The High Court allowed the appeal in respect of the recovery order but dismissed the appeal regarding s141. On recovery, the court held that it was enough for the property to have been partly derived from unlawful activity. The degree of derivation had to be more than trivial, but did not need to be substantial. The court also held that whether property had been used in, or in connection with, unlawful activity did not require a causal link between the property or the offence, nor did the property need to have been necessary for the commission of the offence or have made a unique contribution to the offence. The degree of use did not need to be proportionate to the forfeiture. Last, the court held that the applicant had to show that each step in the process by which it acquired the property was lawful, and

that all of the consideration for the acquisition was lawfully acquired. In this case, on the facts, the requirements of s102 could not be made out. On s141, the court held that effective control of property was to be assessed at the date of the determination of an application under that provision. Kiefel CJ, Bell, Gageler and Edelman JJ jointly, concurring with the separate reasons of Gordon J. Appeal from the Court of Appeal (Qld) allowed in part and dismissed in part.

### **Constitutional law – Chapter III judicial power – migration detention – visa cancellation**

In *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2 (7 February 2018) the High Court held that a power conferred by the *Migration Act 1958* (Cth) on the Minister for Immigration and Border Protection requiring the Minister to cancel visas in certain situations did not confer judicial power. The appellant had lived in Australia since 1956. In 2008, he was convicted of trafficking a large commercial quantity of cannabis and sentenced to 11 years’ imprisonment. Just before the end of his non-parole period, a delegate of the Minister cancelled the appellant’s visas under s501(3A) of the Act. That section provides that the Minister must cancel a person’s visa if the Minister is satisfied that the person does not pass the character test because they have a substantial criminal record, and the person is currently serving a sentence of imprisonment on a full-time basis. A substantial criminal record includes where a person has been sentenced to 12 months or more in prison. The result was that the appellant became an unlawful non-citizen, was taken into immigration detention and became liable to deportation. The appellant argued that s501(3A) conferred judicial power on the Minister, because the legal operation and effect of the provision was to punish the appellant by requiring his continued detention, and such punishment could only be imposed in the exercise of judicial power. The court unanimously held that s501(3A) did not authorise or require the appellant’s detention. That section only required the cancellation of his visa as part of a statutory scheme to regulate the presence of non-citizens in Australia and to remove non-citizens not permitted to stay here. The detention was imposed for the purpose of facilitating his removal from Australia. The cancellation of the visa therefore did not involve punishment and did not involve an exercise of judicial power. Kiefel CJ, Bell, Keane, and Edelman JJ jointly; Gageler and Gordon JJ jointly concurring; Nettle J separately concurring. Application in the original jurisdiction dismissed.

### **Industrial law – pecuniary penalties – power to make orders preventing indemnification**

*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3 (14 February 2018) concerned the power of a judge to make

orders under the *Fair Work Act 2009* (Cth) (FWA) to prevent a person, the subject of a pecuniary penalty order, from being indemnified in respect of that penalty. Mr Joseph Myles, the second respondent, organised and participated in a blockade of a site of a large construction project. The appellant brought proceedings in the Federal Court in which it was accepted by the respondents that Mr Myles’ actions contravened the FWA. The only issue before the court was penalty. The primary judge ordered Mr Myles to pay a pecuniary penalty of \$18,000 pursuant to s546(1) of the FWA, which confers power to order a person to pay a pecuniary penalty if the court is satisfied that the person has contravened a civil penalty provision. The judge also made an order, purportedly under s545 of the FWA, that the CFMEU “not directly or indirectly indemnify” Mr Myles in respect of that penalty (the “non-indemnification order”). Section 545(1) provides that the Federal Court “may make any order the court considers appropriate” if satisfied that a person has contravened a civil penalty provision. The Full Federal Court held that ss545 and 546 of the FWA, and s23 of the *Federal Court of Australia Act 1975* (Cth) (FCA Act), did not provide power to make the additional order. The High Court unanimously upheld those findings. However, by majority, the court also held that s546 of the FWA carried with it an implied power to do everything necessary for the effective exercise of the power to impose a pecuniary penalty, including making orders reasonably required for the accomplishment of the deterrent effect of the penalty. Section 546 therefore granted power “to make an order that a contravener pay a pecuniary penalty personally and not seek or accept indemnity from a co-contravener” (a “personal payment order”). The matter was sent back to the Full Court for the imposition of penalties. Keane, Nettle and Gordon JJ jointly; Kiefel CJ separately concurring; Gageler J separately concurring on the issue of the non-indemnification order and dissenting on the issue of the personal penalty order. Appeal from the Full Federal Court allowed.

### **Administrative law – judicial review – availability of quashing orders – security of payments legislation**

In *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5 (14 February 2018) the High Court followed its findings in *Probuild Constructions* (above) in respect of the SA Supreme Court and the *Building and Construction Industry Security of Payment Act 2009* (SA) (SOP Act). The court also considered s12 of the SOP Act and “pay when paid” provisions. Maxcon and Mr Vadasz were parties to a construction subcontract. The subcontract required Mr Vadasz to provide an amount of money as security (the “retention provisions”). Mr Vadasz made a payment claim. Maxcon responded that it was entitled to deduct



with Andrew Yuile  
and Dan Star QC

the retention sum and administrative charges from the payment claim. Mr Vadasz sought an adjudication. The adjudicator found that the retention provisions were “pay when paid” provisions within the meaning of the SOP Act and Maxcon was not entitled to deduct them. Under s12 of the SOP Act, a “pay when paid” provision cannot be taken into account in relation to payment for construction work carried out under a construction contract. “Pay when paid” provisions include provisions making the liability to pay money owing contingent or dependent on the operation of another contract. Maxcon sought judicial review of the adjudicator’s decision. In the Supreme Court, the primary judge held that the adjudicator had erred, but that the error was not jurisdictional. The Full Court allowed the appeal. It held that the adjudicator erred in finding that the retention provisions were “pay when paid” provisions, but that the error was not jurisdictional. It also decided to follow the NSW Court of Appeal decision in *Probuild Constructions* to find that its jurisdiction to issue certiorari for non-jurisdictional error was ousted. The High Court held that the adjudicator did not err in finding that the retention provisions were “pay when paid” provisions. That followed because the retention sum was to be released only after a certificate of occupancy had been provided, which required completion of the head contract. The court also concluded, consistent with its decision in *Probuild Constructions*, that the SOP Act ousted the jurisdiction of the Supreme Court to make an order in the nature of certiorari quashing the adjudicator’s determination for non-jurisdictional error of law on the face of the record. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ jointly; Gageler J and Edelman J separately concurring. Appeal from the Full Court of the Supreme Court (SA) dismissed.

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

## Federal Court

### Administrative law – the penalty privilege – whether available in AAT proceedings

In *Migration Agents Registration Authority v Frugtniet* [2018] FCAFC 5 (30 January 2018), the Full Court considered whether the privilege against exposure to a penalty (penalty privilege) was available to a respondent in his Administrative Appeals Tribunal (AAT) proceedings.

In an AAT review, the conference registrar made procedural directions including that Mr Frugtniet give the AAT and the Migration Agents Registration Authority (MARA) witness statements, documents and a statement of facts, issues and contentions. A deputy president rejected Mr Frugtniet’s objection to these orders on the basis of the penalty privilege. The deputy president also

affirmed the decision of the MARA to cancel Mr Frugtniet’s registration as a migration agent.

Mr Frugtniet successfully appealed to the Federal Court (see [2017] FCA 537). The primary judge (Kenny J) overturned the deputy president’s final decision on the basis that the penalty privilege was available to Mr Frugtniet in the AAT. The primary judge also found that the possibility of a different outcome, had the penalty privilege claim been upheld, could not be excluded.

The MARA’s appeal to the Full Court was successful. Justices Siopis, Roberston and Bromwich held that the primary judge erred in concluding that the penalty privilege applied to Mr Frugtniet’s AAT proceedings.

The outcome of the appeal turned on the interpretation of High Court authority (relevantly, *Sorby v Commonwealth* (1983) 152 CLR 281, *Pyneboard Pty Ltd v TPC* (1983) 152 CLR 328, *Police Service Board v Morris* (1985) 156 CLR 397, *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 and *Rich v ASIC* (2004) 220 CLR 129): at [6]-[44]. Having reconciled those authorities, the Full Court concluded (at [53]) the “penalty privilege is not even a substantive rule of law of a kind that must be found not to apply or be abrogated in a non-curial setting, but, rather, a protection that must have a foundation for applying in the first place as a matter of statutory construction. In this case, that requires consideration of the relevant provisions of the *Migration Act 1958* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act).”

The Full Court explained the distinction between the privilege against self-incrimination and the penalty privilege at [77]: “Following *Sorby*, the starting point for the privilege against self-incrimination is that it exists and applies unless abrogated. However, that is not the starting point for penalty privilege, which is not, following *Daniels* and *Rich*, a substantive rule of law, let alone an important and fundamental common law immunity, having, as it does, a very different origin and history. In each setting where penalty privilege is claimed, the opening question is whether that privilege applies in the first place, not whether it has been abrogated ...” The Full Court held there was nothing in the relevant provisions of the *Migration Act* or the *AAT Act* to support the conclusion that the penalty privilege applied to Mr Frugtniet’s proceedings before the AAT (at [82]).

The Full Court emphasised that its decision was limited to the application of the penalty privilege to the AAT proceedings and excluded consideration of non-federal intermediate appeal courts decisions that dealt with the issue in the context of non-federal tribunals, which it said had a very different legislative and constitutional context (at [7], also [74]).

**Note:** Mr Frugtniet has sought special leave to appeal to the High Court of Australia.

### Industrial law – the right of entry regime – the ‘act in an improper manner’ test in s500 of the Fair Work Act 2009 (Cth)

In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Castlemaine Police Station Case)* [2018] FCAFC 15 (12 February 2018) the court allowed the regulator’s appeal which principally concerned the meaning of the requirement in s500 of the *Fair Work Act 2009* (Cth) (FW Act) that a permit holder not “act in an improper manner”.

Mr Tadic, an organiser of the union who held a entry permit under Part 3-4 of the FW Act, inspected a construction site with a colleague (also a permit holder), the site manager and a WorkSafe Victoria inspector appointed under the *Occupational Health and Safety Act 2004* (Vic.). The proceedings concerned whether Mr Tadic had acted in an improper manner by his conduct during the inspection to the WorkSafe inspector.

The Full Court overturned the primary judge’s decision and made a declaration that Mr Tadic had acted in an “improper manner” within the meaning of s500 of the FW Act by his conduct with the WorkSafe inspector. The Full Court addressed at [38]-[41] the key principles for determining the assessment of propriety (in particular, the established test from *R v Byrnes & Hopwood* (1995) 183 CLR 501 at 514-515).

Justices Dowsett, Tracey and Charlesworth rejected an argument by the respondents that a permit holder would only contravene the “improper manner” limb of s500 if the impugned act had a practical and adverse impact on the performance of the inspector’s statutory duties (at [31] and [48]). The Full Court explained (at [49]) “... The determination of whether somebody has acted in an improper manner by making statements of the kind which Mr Tadic did cannot depend on the reaction of the person or persons to whom the action is directed. Possible reactions would range from complete capitulation to overbearing conduct on the one hand, to unconcern and dismissiveness on the other.”

The Full Court dismissed other grounds of appeal to the effect that the trial judge denied procedural fairness to the commissioner by certain adverse findings in the judgment about the commissioner’s conduct in the course of a compulsory examination of the WorkSafe inspector (see [35]-[36] and [57]-[85]).

The proceeding was nonetheless remitted to a different single judge to determine the question of penalty following the declared contravention of s500 of the FW Act.

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

# Court of Appeal judgments

1 to 28 February 2018

with Bruce Godfrey



## Civil appeals

*The Thistle Company of Australia Pty Ltd v Bretz & Anor* [2018] QCA 6, 9 February 2018

Application for Leave s118 DCA (Civil) – where the first respondent sustained injuries at a petrol station owned and operated by the applicant – where the first respondent had filled his car with petrol and tripped over the plinth of a petrol bowser as he was walking to the pay stations – where the plinth of the bowser was constructed at right angles and was painted the same colour black as the surrounding tarmac – where the trial judge made findings that management had identified that the camouflaged plinth was an obvious tripping hazard – where the trial judge held that the risk was not an obvious one – whether the trial judge’s findings as to whether the risk was obvious were inconsistent – when regard is had to the entirety of the paragraphs, it is evident that, contrary to the applicant’s contention, there is no inconsistency in the trial judge’s reasoning – whether the trial judge erred in introducing an impermissibly subjective test as to whether the risk was obvious to a person in the position of the first respondent – whether the plinth was a risk that would have been obvious to a reasonable person in the first respondent’s position such that there was no duty on the part to warn the first respondent of the risk – where the relevant inquiry was whether the risk “in the circumstances, would have been obvious to a reasonable person”, being the test in s13 of the *Civil Liability Act 2003* (Qld) (the Act) – where her Honour’s finding that the risk was not “obvious” to a reasonable person in the position of Mr Bretz was made in the context of findings as to the shallow nature of the plinth’s protrusion (some 37 to 39mm) which extended beyond the body of the bowser, that it was an unusual feature of the site and that it had been painted black from its original colour of yellow, the same colour as the adjacent tarmac, resulting in a “colour homogeneity of the stepped levels” – where her Honour concluded that, in those circumstances, the repainting “camouflaged” the plinth and, given Mr Bretz’s limited experience of the site, the plinth was not an obvious risk “for him” – where the use of the words “for him” read in context does not indicate the introduction of an impermissible element of subjectivity into the test under s13 of the Act – where the

trial judge found that the risk of tripping on the petrol bowser plinth when it was painted black was not insignificant on the basis of inferences that other patrons had stumbled or tripped on it – where there was a lack of incident reports detailing prior tripping incidents – where there were observable marks caused to the plinth and pedestrians were likely to inadvertently interact with the plinth when it was painted black – where the occupier had knowledge of the situation and considered that there was a need to report and discuss it – where the applicant submitted that the trial judge erred by failing to consider that the nature of the risk prospectively rather than with the benefit of hindsight – whether the risk of tripping was not insignificant such that there was a breach of the applicant’s duty – where although not determinative, an occupier’s knowledge of a situation sufficiently risky to warrant a need to report and discuss it is a persuasive factor in concluding that the risk was not insignificant – where the trial judge’s inferential finding that, once the plinth was painted black, other patrons had stumbled or tripped on it, was open on the evidence that was considered by her Honour – where the applicant contended that the first respondent was contributorily negligent in failing to watch where he was walking when he tripped on the plinth – where the first respondent stated in cross-examination that he was not watching where he was walking – whether the trial judge erred in finding that the first respondent had not been negligent – whether the conduct of the first respondent amounted to mere inadvertence, inattention or misjudgement or to negligence on his part – where the trial judge referred to the evidence of Mr Bretz of looking at his feet as he moved towards the shop and, as observed in *Astley v Austrust Ltd* (1999) 197 CLR 1, the question for the trial judge was whether Mr Bretz did not, in his own interest, take reasonable care of himself and contributed, by his want of care, to his own injury – where that involved a consideration of whether his conduct “amounted to mere inadvertence, inattention or misjudgment, or to negligence rendering him responsible in part for the damage”: *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 – where the trial judge’s finding that Mr Bretz’s inattention fell into the former category was entirely open on her Honour’s consideration of the evidence, which included the location of the bowser,

hoses and vehicle and the necessary navigation of those elements and the plinth – where the primary judge awarded the first respondent general damages, special damages and an additional sum for past and future gratuitous care – where the special damages and damages for past and future gratuitous care related to the first respondent’s shoulder surgery – where the first respondent had suffered from a degenerative shoulder injury but had previously decided not to undergo surgery because of the attendant risks – where the applicant submitted that the trial judge erred in finding that the first respondent’s decision to undergo the surgery was causally related to his fall at the applicant’s petrol station – whether the first respondent would have pursued the surgery but for the fall – whether the first respondent was entitled to special damages or damages for past and future gratuitous care in relation to his shoulder surgery – where the uncontested medical records, together with the evidence of Mr Bretz and Dr Shaw, were capable of supporting the trial judge’s finding that there was a worsening of the state of Mr Bretz’s shoulder after his fall that was causally linked to Mr Bretz’s decision to undergo the surgery – where in particular, there was evidence that, while Mr Bretz chose not to have surgery before the accident given the attendant associated risk, the increased pain experienced after the incident meant, as the trial judge found, that the risk was worth taking to alleviate the pain – where the trial judge was entitled to consider that the test for causation set out in s11(1)(a) of the Act had been met – where at first instance the applicant made a third party claim against the second respondent – where the second respondent had provided design, engineering and construction supervision to the applicant during the renovation – where each of the contracts between the applicant and the second respondent contained an exclusion clause that stated that the second respondent would be discharged from liability after the expiration of one year from the date of the final invoice – where the applicant contended that the exclusion clause was inapplicable as there was no evidence that a final invoice had been issued – where the invoice of 31 January 2010 referred to “final” certificates being held pending finalisation and completion of outstanding accounts, provided abundant evidence for her Honour’s

finding that the invoice of 31 January 2010 was the invoice in respect of the final amount claimed – where there is no basis for the impeaching of the trial judge’s process of reasoning in inferring that the final invoice was issued “some years ago” – where the applicant contended that the contractual exemption of liability did not occur because the work required to be performed was carried out other than under the contract – whether the trial judge was correct to dismiss the third party claim against the second respondent on the basis that the exclusion clause was effective in excluding liability – where there is no substance in this argument – where in the present case, whether framed as a breach of contract or as tortious negligence, the applicant’s complaint was clearly “in respect of the services” that had been contracted.

Application for leave to appeal refused with costs.

***Amos v Brisbane City Council* [2018] QCA 11, 20 February 2018**

General Civil Appeal – where the respondent brought an action to recover overdue rates and charges – where the rates and charges were a charge on the land – whether the primary judge erred in holding that the 12-year limitation in s26(1) *Limitation of Actions Act 1974* (Qld) (LAA) applied to the exclusion of the six year limitation period in s10(1)(d) and s26(5) – where s10 of the LAA provides that neither actions founded on simple contract, nor actions to recover sums recoverable by virtue of an enactment, may be brought after the expiration of six years from the date on which the cause of action arose – where then at s26(1) of the Queensland limitation statute, it is provided that an action to recover “a principal sum of money secured by a mortgage or other charge on property” shall not be brought after the expiration of 12 years from the date on which the right to receive the money accrued – where reg.66(1) of the *City of Brisbane (Finance, Plans and Reporting) Regulation 2010* provides that the respondent council may recover overdue rates or charges by court proceedings for debt – where the council’s proceeding against Mr Amos clearly fell within this description, and also within the description at s10(1)(d) of the LAA, that is, the proceeding was to recover sums (rates, charges and interest) recoverable by virtue of enactment – where no case has been found deciding the question of whether it is s10 or s26 (or their analogues in other jurisdictions) which applies when action is taken to recover a sum owing by virtue of a statute in circumstances where that sum is secured by a charge on real property – where there are however several cases and a well-established position in the textbooks dealing with the closely analogous situation of

an action for monies secured by a mortgage – where such an action is based on the mortgagor’s promise to repay – where this promise is contained in a deed, it is unlikely that any limitation question will arise, for the limitation period for actions based on a deed is usually the same as the limitation period for actions brought to recover a principal sum of money secured by mortgage or charge – where there are cases where the promise to pay is not made by deed – where all the case authority, and all the textbooks that have been able to be found on this point, are to the effect that the limitation period is six years – the action is one treated as founded on simple contract or quasi-contract within an analogue to s10(1)(a) of the LAA – where the point at issue is to be resolved by looking to the purpose of the limitation provisions in issue – where the provisions do not permit action within a certain time limit; they prohibit the bringing of an action after a certain time has passed – where at a point six years after the right to recover the statutory sum accrued, s10(1)(d) gave the appellant a good defence to any action which the council then began – where the service was provided to a structure – where the primary judge found the appellant implicitly asked for the service to be provided – whether the primary judge erred in finding the appellant liable for utility charges levied by the respondent on rateable land owned by the appellant – where the appellant has not established any basis for overturning the primary judge’s finding of fact that the appellant implicitly asked the council to supply the relevant services – where no reason appears to construe s59(1)(b) *City of Brisbane (Finance, Plans and Reporting) Regulation 2010* as requiring a formal or express request to the exclusion of an implicit request.

Allow the appeal. Set aside the orders made in the Queensland Supreme Court on 20 June 2016. Judgment for the respondent in accordance with minutes of judgment produced by the parties to the Registrar. The respondent is to pay the appellant’s costs of the appeal.

***Morphett v Rivergate Marina & Shipyard Pty Ltd* [2018] QCA 15, Date of Orders: 20 October 2017; Date of Publication of Reasons: 23 February 2018**

Application for Leave s118 DCA (Civil) – where the respondent operates a marina and shipyard on the Brisbane River – where in late 2010, a wooden hulled motor cabin cruiser, the *C Princess* (the boat) came into the shipyard and work was done on it by various subcontractors for the respondent to perform work that was done by the respondent for the applicant under a written agreement – where not all of the work was paid for – where from September 2011, the respondent refused to release the boat from

the marina until the unpaid amounts were paid – where the boat sank on 18 January 2014 – where the applicant was ordered by the District Court to pay the expenses of salvaging the applicant’s boat while bailed to respondent – where the contract between the applicant and the respondent provided that the applicant would indemnify the respondent against all expenses arising from the acts, omissions or negligence of the applicant that resulted in any economic loss to the respondent – where clause 10.1 provided under the heading ‘owner’s obligations’ that “the owner must... ensure that the vessel is kept in a clean, sound, seaworthy and watertight condition, and free of any vermin, pests and insects” – where the applicant’s contention that the terms of the contract did not alter the content of the respondent’s obligation as bailee to take all reasonable care of the boat in the circumstances was unsustainable as a proposition of law, with no authority referred to or identified in support of it – where his Honour found that the duties of a bailee are subject to the terms of the contract and the duty to exercise reasonable care was modified in this case by the express terms of the contract, in clause 10.1, so that the obligation to maintain and keep the boat seaworthy was the applicant’s obligation, not the respondent’s obligation, including during the period of exercise of the lien for non-payment.

Application dismissed. Applicant to pay the respondent’s costs of the application.

## Criminal appeals

***R v Livingstone* [2018] QCA 3, 6 February 2018**

Appeal against Conviction – where the appellant was convicted of one count of murder, having been found to hold a specific intention to kill or cause grievous bodily harm to the deceased – where the appellant submits that the verdict is unreasonable having regard to the evidence in relation to causation – where an appeal of this kind requires the appellate court to conduct an examination of the evidence – where the exact cause and time of death was unknown – where the evidence from witnesses and the appellant was varied, including statements from the appellant that he did not intend to kill the deceased, wanted to “roll” the deceased for money, and eye witness accounts that he “lost it” and said “die” when attacking the deceased – where the jury was required to find that the appellant intended to kill the deceased or cause him grievous bodily harm from the beginning to the end of the assault – where the appellant submitted that the variations in the evidence meant such a conclusion could not be reached beyond reasonable doubt – where the respondent submitted that the inconsistencies were

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capable of being resolved and directions to the jury made clear that they had to be satisfied that the appellant held the requisite intention for the entirety of assault – where the jury had the advantage of seeing and hearing the witnesses give evidence – whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's intention to cause grievous bodily harm (or death) to the deceased from the start to the end of the assault – where ultimately, the prosecution case against the appellant was unusual due to the evidence from the forensic pathologists who were not able to identify the cause of death from the possible causes that could have been operative during the appellant's assault on Mr Quayle – where the statements of the appellant made soon after the assault as to his rage and anger, and his description of his initial assault as a "king hit" and that he "bashed him" in conjunction with his actions before and during the first phase of the altercation, evidenced a level of aggression that supported the inference beyond reasonable doubt that he intended to do grievous bodily harm to Mr Quayle – where it was not a question of whether the appellant thought it was likely he would cause permanent damage to Mr Quayle, but whether, at the time he commenced the assault, he meant to cause him grievous bodily harm (whether he did so or not) – where once the conclusion is reached that there was evidence on which it was open to the jury to be satisfied beyond reasonable doubt that the appellant meant to cause Mr Quayle grievous bodily harm, that displaced any other competing inference of an intent to cause less serious harm or no intent – where once satisfied that the appellant held that intent, the fact that he might also, at the same time, have had the lesser intent to rob, does not displace the conclusion that he held the requisite intent for the offence of murder – where the jury had the undoubted advantage over this court of seeing and hearing the witnesses at the trial, and in particular Ms French and Mr Hansen who witnessed the event itself – where this court must be careful not to substitute trial by appellate court for trial by jury: *R v Baden-Clay* (2016) 258 CLR 308 – where the appellant submitted that a miscarriage of justice was occasioned by the admission into evidence at trial that the appellant had been in jail and was on parole when the deceased was killed – where that evidence was a recording of a telephone conversation between the appellant and a friend who was in prison – where the prejudicial aspect of the evidence was the fact that the appellant was previously in jail and on parole when the offence occurred – where the appellant's trial counsel brought a pre-trial application to have the recording excluded from evidence – where the application was refused and

trial counsel chose to use the evidence to the effect that it was distasteful boasting by a callow youth – where the appellant's counsel on appeal submitted that it was not suggested at the trial that the impugned statements themselves had probative value and the recording should have been edited or reduced to an admission – where the respondent submitted that the prejudicial effect was outweighed by the recording's probative value and editing would deprive the evidence of its proper context – where directions were given to the jury as to how to deal with the evidence in a non-prejudicial way – whether the trial judge was correct to refuse the application to exclude the evidence – whether the decision to present the recording as evidence of the appellant's immaturity was a tactical, forensic decision reasonably made by counsel – where there is no doubt that ordinarily it is prejudicial to have a jury know that the accused had just been released from jail, or on parole when the particular offence was committed – where the trial judge recognised as much – where defence counsel took a particular tactical step based on his assessment that those references could not be severed from the rest without causing the particular context to be lost – where he wished to exploit that context before the jury, to portray whatever was said to be the distasteful boasting of an immature youth, egged on to do so by the prison atmosphere – where that mattered because at the time felony murder was still on foot as an alternative basis for murder and the admissible part of the phone call admitted a central element of that offence – where it also mattered because of the effect the appellant's laughter would likely have on the jury – where in terms of the language used in *TKWJ v The Queen* (2002) 212 CLR 124, an informed and deliberate decision was made to pursue or not to pursue a particular course at the trial, and the course taken is explicable on the basis that it could have resulted in a forensic advantage – where further, the trial judge, conscious of the risk of prejudice that would normally flow, considered that properly crafted directions could overcome that risk – where that was necessary because the unobjectionable part of the phone call was, in his Honour's assessment, highly probative – when the phone call was played to the jury the trial judge gave an immediate direction, instructing that those prejudicial references could play no part in the jury's analysis – where that direction was reiterated at the start of the summing up – where *R v Hasler; Ex parte Attorney-General* [1987] 1 Qd R 239 supports the decision to include the evidence but give appropriate directions – where the evidence that was probative was not of trifling weight and the interests of justice called for its admission – where it could not, in the view of defence counsel and the trial judge,

be severed from the prejudicial part without distorting the remaining evidence – where it has not been demonstrated that the inclusion of those references in the phone call had the effect that the trial miscarried.

Appeal dismissed.

#### *R v CBZ* [2018] QCA 16, 27 February 2018

Appeal against Conviction – where the appellant was convicted by a jury of one count of sexual assault – where the appellant was married to the complainant’s daughter in 2004, and separated in 2013 – where in about 2004 the complainant, the appellant, an office administrator (BM), and the appellant’s brother were at the warehouse – where the complainant was walking in the warehouse towards a door leading to outside, the appellant came up beside her, pulled the top of her dress down to expose her breasts, and said, “Great tits” – where both parties formally admitted that the complainant first complained to police about any of the charges in the indictment on 30 March 2014 – where a new witness (BR) claimed the complainant had deliberately sought the new witness to give perjured evidence – where BR had known the complainant since about 2005 to 2006 when he started an apprenticeship as a hairdresser for her company – where he knew the appellant in the same period because the appellant worked for the company in a managerial role – where after BR heard in 2014 that the appellant had been charged with a number of criminal offences the complainant contacted him – where BR deposed that the complainant said to him, “When you write your statement, make sure you over-exaggerate it” – where the complainant told BR that he had witnessed various things, including: the appellant grabbing the complainant by the wrist and dragging her out of the salon; the appellant pushing the complainant’s daughter against a cupboard and slamming the door; the appellant slapping the complainant on the arse when they left the salon to get a coffee; BR saw bruising on the complainant’s daughter’s body and a scar on her head; and the scar was caused by the appellant throwing a chair at the complainant’s daughter – where BR told the complainant that he had not witnessed those things – where so that the conversation would finish he agreed to sign a statement that the complainant told him she would email to him – where he did not intend to sign a false statement – where about 20 minutes after the conversation BR sent a text message to the complainant with words to the effect that he did not want to be involved – where it is not suggested BR witnessed any act relevant to the charges against the appellant and there is also no suggestion that he was mentioned in any of the police statements –

where BR’s affidavit should be regarded as “fresh evidence”, being evidence which could not with reasonable diligence have been discovered at the time of the trial – where if a jury accepted BR’s evidence, the jury reasonably could conclude that, knowing that BM did not have any personal knowledge of the events discreditable to the appellant which the complainant suggested BR had witnessed, the complainant both sought to persuade BR to sign a statement testifying that he witnessed those events and asked him to “over-exaggerate” his statement against the interests of the appellant – where if a jury did accept that evidence, the jury reasonably could conclude that the complainant quite deliberately sought to persuade BR to give perjured evidence adverse to the appellant – where of course the evidence has not been tested and it would be a matter for the jury to decide whether it should be accepted – where the transcript of the complainant’s evidence at the trial makes it clear that she wasted few opportunities to make her strong dislike of the appellant clear – where if the jury accepted the fresh evidence and concluded that the complainant quite deliberately sought to persuade BR to give perjured evidence adverse to the appellant, the jury would be required to assess the credibility of the complainant and the reliability of her evidence in a very different context – where the jury then might much more readily discount the complainant’s evidence of the offence of which the appellant was convicted – where the fresh evidence might well have been enough for the jury to conclude that the prosecution had not excluded a reasonable doubt that the appellant was guilty of the offence of which he was convicted – where the fresh evidence satisfies the “significant possibility” test: *Van Beelen v The Queen* (2017) 91 ALJR 1244 – where particularly the nature and strength of the bias suggested by the fresh evidence and the fact that it is the complainant who is said to be biased justify the conclusion that the fresh evidence, when understood in the context of the evidence at the trial, reveals that there has been a miscarriage of justice such as to require that the conviction be set aside and a new trial ordered.

Application for leave to adduce fresh evidence granted. Appeal allowed. Conviction on count 1 set aside and sentence on that count quashed. New trial 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 [sclqld.org.au/caselaw/QCA](http://sclqld.org.au/caselaw/QCA). For detailed information, please consult the reasons for judgment.

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# The rule of law: From abstract to essential?

Introducing the inaugural Protecting  
Legal Rights Conference

by Dr Rachel Baird  
and Sarah-Elke Kraal



*...most of the content of the rule of law can be summed up in two points:*

- (1) that the people (including, one should add, the government) should be ruled by the law and obey it and*
- (2) that the law should be such that people will be able (and, one should add, willing) to be guided by it.”<sup>1</sup>*

At QLS Symposium 2018, a number of eminent presenters urged practitioners throughout Queensland to take up the mantle of protecting the rule of law.

On day one, Emeritus Professor Gillian Triggs guided delegates through numerous examples of incursions upon civil liberties and the separation of powers at both the Commonwealth and state level; and referenced a number of recent Queensland Bills which illuminated numerous issues requiring the immediate attention of the profession.

Professor Triggs' keynote address (*above*) also highlighted the executive's slow but dangerous encroachment on recognised common law rights, freedoms and privileges

(the subject of an Australian Law Reform Commission (ALRC) 2016 report).

In the Attorney-General's address on day two, Cameron Dick MP emphasised the role of the rule of law on lawmakers, echoing his comments in the toast to the legal profession at the Legal Profession Dinner Awards the night before.

The 'rule of law' is a grand statement, and a concept that generates lively debate and opinion. At best, it is a shield against the abuse of power by the executive; at worst, it is misappropriated as propaganda. But it also speaks to the issue of access to justice – a key issue highlighted by 2018 QLS president Ken Taylor in his agenda for the year.

While our profession's approach to the rule of law may differ, access to justice issues such as the impact of location, culture and

socio-economic status on a person's ability to access justice (and thus protect their own legal rights) can surely be agreed upon as an issue for all Australians.

So when all is said and done, what does the rule of law really mean to modern Australian legal practice?

As the peak body for Queensland's legal profession, Queensland Law Society is delighted to host a meeting of minds on this very issue at the inaugural Protecting Legal Rights Conference on 29 May 2018. Keynote addresses by Justice Edelman and Professor Peter Greste will challenge our thinking and understanding on the relevance of the rule of law in the protection of legal rights – and promise insight into contemporary legal reasoning and relevance.

We will further explore the compelling analysis of the QLS advocacy team as featured in this edition of *Proctor*; and (with no pun intended – and no judgment on US foreign policy) answer the question: "When does community security or administrative convenience 'trump' human rights?"

The president of the Australian Council for Civil Liberties, Terry O'Gorman, will also review the ALRC findings on the Commonwealth lawmaking – which will complement discussions on national security and immigration throughout the day.

We will be front and centre on the 29th to celebrate the double-edged sword that is the rule of law; and to better understand our rights and obligations as practitioners to protect it. We hope you will join us.

Dr Rachel Baird is QLS learning and professional development manager. Sarah-Elke Kraal is a QLS legal professional development executive and solicitor.

#### Note

<sup>1</sup> Geoffrey de Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy*, (1st ed., Melbourne University Press, 1988).

# In April ...

● Brisbane ● Livecast ● Regional

Practical Legal Ethics ✓

Practice Management & Business Skills ✓

Professional Skills ✓

Substantive Law ✓

## 16 Introduction to conveyancing

16-17 | Day one: 8.30am-5pm

Day two: 8.30am-3.10pm | 10 CPD

Law Society House, Brisbane

Aimed at junior legal staff, this interactive and engaging introductory course provides delegates with the key skills to:

- understand key concepts and important aspects of the conveyancing process, including ethical dilemmas
- develop an applied understanding of the sale and purchase of residential land and houses, and lots in a community titles scheme
- get ahead of the game with insight into conveyancing in practice.

PLE ✓ PS ✓ SL ✓

## 18 Allocation of risk: Indemnities, warranties and exclusions

12.30-1.30pm | 1 CPD

Livecast

This practical livecast will give you the skills and knowledge needed to negotiate and draft robust indemnity, warranty and exclusion clauses in contracts. Putting a spotlight on these common clauses, this session explores recent trends and best practice, provides the knowledge to negotiate terms to protect your client's interests (without threatening the deal), and finishes with practical drafting tips.

PS ✓ SL ✓

## 19 Personal injuries masterclass

12-1.30pm | 1.5 CPD

Law Society House, Brisbane

Designed for experienced personal injuries solicitors who want to build on their expert knowledge, this masterclass explores various aspects of personal injuries law. Join QLS Council member Travis Schultz, principal of Travis Schultz Law and a QLS accredited specialist (personal injuries), and Quinlan Miller & Treston Lawyers partner Rachael Miller, also a QLS accredited specialist (personal injuries), for a detailed examination of a complex fact scenario.

SL ✓

## 20 Solicitor Advocate Course

20-21 | Day one: 5-7pm | Day two: 9am-5pm | 9 CPD

Brisbane Magistrates Court, Brisbane

To enhance your ability to deliver personalised and effective advocacy and give you the edge in court, the QLS Ethics Centre has partnered with the Australian Advocacy Institute to offer an intensive full-day advocacy workshop conducted at the courts. Disciplines covered include presenting applications and injunctions, development of case theory, and preparing and delivering effective examination and cross-examination.

PLE ✓ PS ✓ SL ✓

## 24 Core PM&BS: Trust accounting essentials

12.30-1.30pm | 1 CPD

Livecast

Aimed at legal staff or practitioners wanting to improve their fundamental knowledge of trust accounting regulation, this livecast will give you access to the Society's in-house trust accounting experts and is your essential guide to trust accounting.

PM&BS ✓



## 8 JUNE Gold Coast Symposium 2018

8.30am-5.35pm | 7 CPD

Surfers Paradise Marriott Resort and Spa

Join local experts at this unique opportunity to explore the issues, challenges, and pressures relevant to the Gold Coast legal profession. Gain insight into a range of areas relevant to your practice, hear the latest on topical issues, and connect with your local professional network.

**Program out now!**

Earlybird prices and registration available at

[qls.com.au/events](https://qls.com.au/events)



# Career moves

## Carroll Fairon Solicitors

Carroll Fairon Solicitors has welcomed senior associate **Nicole Turnbull** to lead the firm's Sunshine Coast team at its Maroochydore office. Nicole has almost 10 years' experience in family law and wills and estates, and is also an independent children's lawyer.

## Carter Newell

Carter Newell has announced five elevations and five appointments.

**Laura Horvat**, **Elisha Goosem** and **Milton Latta** have been appointed special counsel, while **Jillian Commins** has been promoted to senior associate and **Liana Isaac** to associate.

Laura specialises in back-end construction matters, advising clients on construction industry-related insurance claims, acting for insurers in relation to subrogated actions for recovery, and conducting litigation.

Elisha provides advice in construction and engineering on disputes and insurance claims both for principals and contractors. She also advises insurers with respect to professional indemnity claims, and on claims and indemnity issues under various insurance policies.

Milton acts for insurers and corporate clients in the defence of personal injury and property damage claims, as well as in pursuing recovery actions. His experience extends from trip-and-fall claims to more complex property damage claims.

Jillian specialises in personal injuries claims under the PIPA and common law. She has advised insurers and corporate insureds on indemnity and liability issues as well as detailed quantum issues. She focuses on claims involving personal injuries arising from hotelier claims, the mining industry and workplace injuries where the insured is the host employer.

Liana's experience extends to property and injury liability matters, advising a variety of leading Australian insurers with respect to indemnity, liability and quantum issues.

Carter Newell has also announced the appointment of **Andrew Shields** as a special counsel and **Tarin Olsen** as an associate on the construction and engineering team in

Brisbane. Recent interstate appointments to the firm's insurance team include **Elizabeth Beech** as a senior associate in Melbourne, and **Wendy Bure** as a senior associate and **Stephanie Bird** as an associate in Sydney.

## Creevey Russell Lawyers

**Andrew Spinks** has joined the Toowoomba office of Creevey Russell Lawyers as a lawyer in its family law and criminal law section. Andrew, who was admitted in 2016, has extensive experience in family law, wills and estates, and in litigation.

## Kennedy Spanner Lawyers

Kennedy Spanner Lawyers has announced the appointment of **Rachel Duckworth** as a solicitor in its Brisbane office. Rachel has some two years' experience in a national law firm, working mainly in criminal law, and will be working on criminal law, wills and deceased estates matters.

## Macpherson Kelley

Macpherson Kelley has announced the appointment of **Mark Metzeling** and **Olivia Christensen** as special counsel in its Brisbane commercial practice and **Danny O'Brien** as a special counsel on the property and construction team.

Mark holds a Master of Intellectual Property Laws, a Master of Laws and a Bachelor of Applied Science (Biochemistry), and has extensive experience providing strategic

## New members

Queensland Law Society regularly welcomes its new members. The list of new members at [qls.com.au/newmembers](http://qls.com.au/newmembers) is updated monthly.



Elisha Goosem



Milton Latta



Jillian Commins



Liana Isaac



Andrew Shields



Tarin Olsen



Rachel Duckworth



Mark Metzeling



Olivia Christensen



Danny O'Brien



Justine Cirocco



Danielle Watt



David Callaghan



Brendan Ezzy



Michael Burrows



Jasmine Evans

IP litigation advice, winning a number of awards. He is ranked as a leading lawyer by the World Trademark Review 2018.

Olivia is a corporate transaction lawyer with expertise in corporate finance and mergers and acquisitions for clients predominately in the resources and technology sector. Her experience extends to company structuring, equity raisings, acquisitions, sales, backdoor listings, IPOs, schemes of arrangement and takeover plays.

Danny was admitted to practice in 2002 and focuses on government, regulatory and environment law across a number of industry sectors including major projects (mining, power and infrastructure), property development and local government. He regularly advises clients on issues including regulatory approvals, land access and resumption, contracting and compliance.

### MBA Lawyers

MBA Lawyers has announced the appointment of **Justine Cirocco** as a senior associate family lawyer. Justine was the recipient of the Moncrieff Community Services Award for her service to the Gold Coast Community Legal Advice Centre and is the current principal solicitor (volunteer) at the Robina Community Legal Centre.

MBA Lawyers has also announced the appointment of **Danielle Watt** as a senior associate in its personal injury department.

### Mullins Lawyers

Mullins Lawyers has announced the promotion of corporate lawyer **David Callaghan** to partner.

David is experienced in corporate and business advisory, corporate governance, crowdfunding and commercial advice to businesses operating in a range of industries. Joining Mullins Lawyers in 2011, he has developed particular expertise in mergers and acquisitions in private enterprise and start-ups, and has been involved in a number of large transactions for sellers and buyers.

### MurphySchmidt Solicitors

**Brendan Ezzy** has been promoted to senior associate at MurphySchmidt Solicitors. Brendan has been with the firm for more than 10 years and practises exclusively in accident compensation.

### Nyst Legal

Nyst Legal has appointed **Michael Burrows** to its criminal, traffic and corporate regulatory team. Michael is a former partner in a Northern Territory criminal defence firm and has appeared regularly in all original and appellate courts of the Northern Territory. He has also practised extensively in Queensland, New South Wales, South Australia and Western Australia, and has conducted a number of complex criminal cases in South-East Asia.

### Pullos Lawyers

**Jasmine Evans** has joined Gold Coast firm Pullos Lawyers.

Jasmine recently spent a year as a legal associate in the Sydney Registry of the Family Court of Australia, assisting Justices Stevenson and McClelland. She previously worked at a Brisbane law firm, gaining expertise in family law as well as in commercial law, civil litigation, property law, and wills and estates.

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

# Justice John Daniel Murray Muir

27 December 1944 – 10 February 2018

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As John would surely appreciate, I will begin with a dry recital of some dates and times.

John was appointed as a judge of the Supreme Court on 3 April 1997. Ten years later, he was appointed to the Court of Appeal. In the meantime, he served on the Land Appeal Court for three years; he served as a Commercial List Judge for five years after 2002; he was chair of the Queensland Law Reform Commission for three years; and he was chair of the Bar Practice Centre for two years and was actively involved in its mentoring of new barristers for many more. For nine years, he shouldered the heavy, but distinctly unexciting, burden of membership of the Rules Committee, a dull but vital job responsible for ensuring that the machinery by which the courts operate is kept in good repair.

After his appointment to the Court of Appeal, he served for seven years, until statutory retirement on 15 December 2014.

Afterwards, his public service continued in work as an arbitrator and as the head of inquiries into important aspects of the life of the community including the Byzantine mysteries of the Queensland racing industry.

Ordinarily, when one recites the bare facts of a judicial career, the recital can seem rather spare – appointed on such and such a date and retired some time later – but even the bare recital of the simple facts of John's judicial career suggests the reality of a life rich in public service and personal achievement.

Before undertaking his judicial career, John had spent more than 20 years at the Bar. He took silk in November 1986 after a little more than 10 years as a junior. He had, of course, worked for five years as a solicitor here and in London. It may well have been at that time that he developed his sensitivity for the realities of commerce that gave him an instinctive feel for the dynamics of commercial disputes, and made him, it seemed, a natural as a commercial lawyer and judge.



When he was at the Bar, many of us here today appeared with and against him. Some of us had the joy and privilege of sharing chambers with him. He was riotously good fun in chambers. There can be a lot of pressure and anxiety in barristers' chambers before court. Dropping in for a chat with John, whether to ask for his advice on a difficult point, or just to chew the fat, was a sovereign cure for pre-trial nerves.

Even as an opponent in court, his dry sense of humour always ensured that no contest was ever more unpleasant than the conflict between the parties required it to be.

As an advocate he was, from his earliest days at the Bar, in demand for the heaviest cases. For many years before his appointment to the Bench, he was constantly engaged in the hardest fought commercial litigation in the state. As a silk, he went from trial to trial – in cases that were often many weeks long – back to back for months on end without any break between trials except for the weekends that he spent in preparation. He did this for years. The rest of us stood in awe as he went from case to case without a break.

by Justice Patrick Keane AC

His energy and his efficiency were prodigious. He was living proof of the adage that if you want a difficult job done well, give it to a busy person.

He worked so hard that none of the rest of us was even jealous of his success. Among lawyers that is a remarkable thing. But no one else wanted to work that hard. No one else could imagine trying to match his workload.

No doubt this strenuous regime he maintained at the Bar helped to make him the efficient judge he became.

That John was able to maintain his balance and joie de vivre under a workload that would have crushed others was entirely a tribute to Sandra and Jane and Emma, the lights of his life. There is, of course, a great danger that people who are successful at the Bar become so immersed in the work that there is nothing else. Sandra and the girls ensured that this did not happen to John. On the other hand, they had to deal with his restless energy.

On their regular, and famous, family holidays, when John would recharge his batteries, the girls (and I include Sandra in that description) would be marched around interesting parts of the globe, literally, from dawn to dusk. The exhaustion they endured while John indulged his endless curiosity was a small price to pay for the joy of his company and his obvious joy in theirs.

As a judge, and as the commercial list judge, in particular, he was a model of efficiency, fairness, forensic skill and clarity of judgment. The fame of his court spread beyond Queensland and Australia to jurisdictions overseas. And rightly so.

The quality of justice he dispensed was very high. He ran a briskly efficient court. He was always fair and courteous, and his dry wit kept everyone's feet on the ground. He showed impatience only when counsel appeared to be drifting off into irrelevance, and then the flash of the rapier wit, so deft that it barely drew blood, would bring the case back to the true path.

The Court of Appeal on which John served had a fair claim to be regarded as the most efficient and effective in the nation.

Within the Australian legal system, the workload of the Courts of Appeal of the states is brutal and unrelenting. Jim Spigelman aptly described the job as trying to drink out of a fire hose: it is not something that it is possible to do elegantly. It was an education and a pleasure to work with John on the Court of Appeal. Due in large part to John's mastery of his craft, we always had a sense of calm and confident assurance that we could cope with the worst that the fire hose could do to us.

John was the most open-handed and open-hearted of men. He was always generous with his time with new lawyers as his long and intense involvement with the Bar Practice Centre attests. He gave up his time at night and on weekends to give lectures and run seminars for the benefit of aspiring barristers.

In everything he said, he abhorred flamboyance and showy behaviour of any kind. In the purest tradition of the laconic Australian, he avoided displays of enthusiasm. When Hamish was born I dropped into his chambers to congratulate him. He was obviously very, very happy at the arrival of his grandson, and so, sensing a moment of weakness, and expecting an enthusiastic response, I asked him what Hamish was like. John immediately got a grip on himself and replied: "Well, he has no obvious vices."

Whether as a barrister or a judge, he shunned publicity. He entered the political fray only once, and then in response to the extraordinary attack on the Supreme Court by the former State Government as a result of its ill-advised belief that its judges were an ivory-towered elite distant from their fellow citizens. John refused to stand silent while the institution he served was wrongly besmirched by people who plainly should have known better.

His intervention was very courageous. It was also very effective. Voltaire prayed that God would make his enemies look ridiculous. John gave God a little help.

The great irony of that unfortunate saga in Queensland's public life was that if any of those bizarrely fixated upon attacking the courts as a playground of a self-interested elite had troubled to actually meet some judges, like John Muir, they would have found that no one could sensibly imagine that these people, almost all, like John, from modest backgrounds, often members of the first generation of their families to attend university, were members of an elite remote from the concerns of their fellow citizens.

It is impossible to believe that anyone who knew John at all would not have perceived his abiding commitment as the arch enemy of judicial rudeness and unnecessary expense and delay in litigation. John was deeply committed to ensuring that every litigant who came before the courts was treated with courtesy, and given a fair, sensible and well-reasoned judgment as promptly as humanly possible. He was acutely conscious of the rights and dignity of his fellow citizens; and he was deeply committed to the belief that it was the function of the legal system to ensure that the powerful should not dominate the less advantaged.

Given John's mighty contribution to the public life of his state and his nation, it is appropriate that the legal profession should be here today, in such numbers, to do appropriate honour a distinguished judge and a great Australian. It is entirely right and fitting.

But, in sober truth, that is not why all of us are here today. We are here because John was our friend, and we loved him. We loved him for his wit and wisdom and his shining decency. His wit delighted us. His wisdom undoubtedly improved us. And his decency inspired us.

We will cherish his memory.

Eulogy delivered by Justice Patrick Keane AC,  
High Court of Australia, 16 February 2018

# Justin Francis O'Sullivan AM

5 May 1928 – 6 February 2018

Former Queensland Law Society president Justin Francis O'Sullivan, who died at the age of 89, left an extraordinary legacy of service to the law and community.

That Justin was well loved and respected was evident from the large attendance by members of his extended family, friends and colleagues, and by the many compliments paid to him, at his funeral at Little Flower Church, Kedron, on 12 February.

A founding student of Marist Brothers, Ashgrove, Justin's first QLS *Proctor* presidential page in 1994 noted that, from the age of 10, he "knew that more than anything else, he wanted to be a lawyer". The source of Justin's inspiration was his father, respected Brisbane Lawyer Francis O'Sullivan, a pioneering defender of the trade unions during the heady 1930s and '40s.

His father's dedication to the legal profession, his sense of responsibility to the wider community together with a relentless work ethic – which probably contributed to his early death at the age of 52 – greatly influenced him.

Justin was admitted as a solicitor in February 1951 after completing his articles at Timbury and Taylor in Roma and then being employed as the managing clerk of the Cairns firm of MacDonnell, Harris & Bell. These firms provided the foundation for his sterling legal career.

Health issues then led him to the drier climate of Dalby, where he built a successful practice from scratch and began the pattern of community service which characterised his life. This included taking on the positions of secretary of the Dalby Show Society and a foundation member of the Dalby Apex Club. He served on Dalby Council for a number of years, including as deputy mayor.



Justin's first receptionist was his lifelong soulmate and confidante, his wife Rita, whom he had met in Roma and married before his admission. This partnership continued to flourish to the day Justin died. Between them, they had five girls, two boys, 15 grandchildren and seven great grandchildren.

Justin will also always be remembered for his moustache. Its origin goes back to the advice of the principal of the well-known Brisbane firm, Macrossan, Byrne and Co., who told a youthful-looking Justin that a moustache would give him gravitas and the look of experience.

Justin's firm became O'Sullivan and Edgar in 1969 when his articled clerk, John Edgar, became a partner and then Justin's son, Frank, joined the partnership in 1985.

In 1999, Justin had retired, but then Frank's ill-health and untimely death at 52, (the same age as his grandfather) was the catalyst for his return to legal practice.

In the words of Frank's son, Aidan: "Supporting family was always a given with Granddad, and this selflessness was unmistakable in a sad time in our lives when Dad got sick. Granddad never faulted, he came out of retirement to look after Dad's business (Laherty & O'Sullivan in Toowoomba), to support the family and most of all to support Dad. I think about the times that Dad and Granddad got to spend together, and we will be forever grateful for his compassion, concern, support and love."

Justin was a man who always set the bar high. In the words of his son-in-law, Peter Varghese: "People underestimated Justin at their peril. He had the unstated and laconic style of his generation but behind that, he was a man of steely determination. He was also a restless soul who wanted to live a larger life than a provincial solicitor."

To that end, Justin held various positions in the national and international administration of Apex, including being elected as treasurer and member of the International Officers' Board of the World Council of Young Men's Service Clubs in his 30s.

"I've always believed that if you were born with the capacity to do more for the community, then you have a responsibility to do so," he said.

Justin's involvement with QLS had commenced in 1986 when, as an active member of the Queensland National Party, he was the Attorney-General's appointee to the QLS Council.

By Raoul Giudes

Elected as QLS president by his peers in 1994, Justin was never one to take a back seat. At various times, he was a member of several QLS committees and was also the inaugural chair of the Queensland Government Grants Committee.

"Whenever I saw an opportunity to make a difference, I took it," he said.

Even more significant than his work with QLS was Justin's seminal contribution to the Queensland Law Foundation (QLF) (the beneficial arm of QLS and its practitioner members). He was its inaugural chairman, serving in that role until he retired in 2001 due to ill health but continuing as a director and emeritus chairman for some time. Justin

could rightly be seen as one of the architects of the QLF, and all the work that it does for the solicitors in Queensland.

At all times, Justin was active in his faith in the Dalby Catholic Church, holding various administrative positions such as chair of the Finance Committee for 12 years. According to Peter Varghese: "Justin did not wear his faith on his sleeve, but it was essential to his life. Justin grew up in a sectarian age and while he was never a 'sectarian warrior', there were strong traces of his Irish Catholic tribalism in his outlook. It was an integral pride he took in his ancestry."

Justin's dedication to the law and community service was recognised in his appointment as a Member of the Order of Australia in 2008.

But he will also be remembered for his life outside the law; namely, love of his family, service to his community and his faith. These were, as noted at his funeral, "the three large threads which wove their way through Justin's life outside the law".

Vale Justin Francis O'Sullivan AM.  
May he rest in peace.

Raoul Giudes is a Queensland Law Society past president. He would like to thank the extended O'Sullivan family for its assistance in compiling this article.



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# Gordon Raymond Brown

2 November 1941 – 12 February 2018

By Anthony Smith

A legal institution in the Sandgate community after 48 years of legal practice, Ray Brown, as he was known to his friends and colleagues, passed away after a short illness on 12 February 2018. He was 76.

Unashamedly, Ray was old school. He served several generations of clients. An ever-genial, humble, pragmatic and understanding suburban practitioner and Notary Public, he later became a Fellow of the Australian and New Zealand College of Notaries.

His working life began in the 1950s when Ray joined the public service at 15. These were venerable days in legal educative history where, largely self-taught, he learned the law and passed the relevant Solicitors' Board examinations.

But in order to qualify for admission, he had to undertake the requisite 10 years of practical training. Townsville's then Court of Petty Sessions sufficed as a base for that lengthy 'apprenticeship'.

Among many other roles in that registry, he was a depositions clerk, Mining Registrar, land agent, Deputy Coroner, secretary of two hospital boards, a marriage celebrant, the District Officer for Aborigines, an industrial inspector and a mediator settling a sugar cane price-cutting dispute. As a justice of the peace, he also sat on the Bench with another to constitute the court if a magistrate was unavailable. Through all these undertakings, he gained a profound knowledge of practice, procedure and the law.

Not long after gaining admission, Ray commenced a partnership at Sandgate in July 1969. Ten years later, he went out solely as, 'G.R. Brown solicitor'. That name persisted until his retirement in November 2017, and became synonymous with honesty, integrity, goodwill and professionalism.

Our first meeting was unforgettable. A square generous hand locked onto mine like an iron clamp. Muted gratitude followed its release.



Ray had been a state champion high jumper at 18 and was a formidable tennis player. He kept fit throughout his life.

Excelling in probate, Ray was a consummate all-rounder undertaking prosecutions for the Redcliffe City Council. Apart from commercial work, he also accepted instructions on a wide range of complex cases including passing off, stopping a major development in the Planning Court, the controversial surveying of Russell Island, criminal, medical malpractice, customs fraud, industrial, personal injuries, defamation and even a High Court appeal in family law.

Ray became one of my most loyal briefing solicitors for over 25 years. Ray's files were immaculate. Everything had a place and if a document was called for, he unearthed it with alacrity. He never drowned in paper.

In the early days we did a large number of criminal trials and went on to other jurisdictions as I gained experience. A defamation action stood out. The defendant successfully sued the complainant after an acquittal, a first in Queensland. All the resources of the state were arrayed against

the cause. The matter settled prior to the appeal. Ray worked tirelessly in that case.

Ray's ethics were beyond reproach, not merely as between himself and the client but also in his relations with both branches of the profession. He regarded paying counsel upon an account being rendered as his ethical duty, even if that meant drawing from his own funds.

Somehow, Ray found time outside of the law for the local community, and was also a proud Rotarian over many years. Rotary for him was serving good causes, local and international. He discovered the Atkin Monument behind the rectory of Sandgate's Anglican Church had fallen into disrepair. Robert Atkin was a distinguished Queenslander and the father of the great jurist, Lord Atkin. Ray made representations to successive QLS presidents about this and when Justice Applegarth became aware of its parlous state, action prevailed and the monument has now resumed its pre-eminent status.

In later years Ray and his wife, Wendy, ventured on many legal conferences to destinations all over the world. His tales of various stays in exotic locations were always lively and informative. An oft-repeated one entailed a subterranean sojourn involving dinner within the limestone caves in France where the Verve Cliquot was cellared *en masse* and no refrigeration was necessary. The famous Champagne was liberally bestowed!

Last year while attending a conference in Italy, Ray had an ugly fall. It carved a terrible gash in his forearm. Sadly this was the harbinger of motor neurone disease. He bore that rampant and terrible affliction stoically even as it gained mastery over him.

Ray Brown was a consummate professional, a loyal friend and a true gentleman. Most of all, he was a committed and loving father and wonderful husband. He will always be remembered by those who were touched by him.

Ray is survived by his wife, Wendy, four children and seven grandchildren.

Anthony Smith was a practising barrister between 1983 and 2013

# Are you protecting your confidential information?

by Robert Stevenson



Your firm relies on the confidentiality of sensitive information from both professional and business standpoints.

However, there can be inadvertent leaks and employees (and contractors) leaving for new pastures can be tempted to take confidential information with them. There are a number of steps that can be taken to reduce this risk:

1. **Work out what information is important to the firm, where it is stored and who has access to it.** Prepare a list of the most important types and locations of confidential information and who has access to it. This will include client personal and financial details, client files, firm financials and pricing, marketing information and strategic plans as well as employee details.
2. **Make sure employment agreements include a suitable confidential information clause.** This will contractually protect the status of confidential information both during and after the employment. This provision should be drawn to a new employee's attention before they commence work. This provision can work in conjunction with a restraint provision to

help protect your firm from having its clients poached by departing employees.

3. **Establish and implement a confidential information policy.** A policy should be simple and direct. Important aspects to address include talking about client and firm matters outside work, taking files and documents out of the office, and downloading information to private devices or the cloud. A training session should be provided to employees along with yearly refreshers and employees should be required to acknowledge having received the policy and training. Policies should also be reviewed annually.
4. **Be vigilant.** It is important to have tools to monitor data access, including establishing alerts for activity at odd hours or the transfer of unusual amounts of data or large attachments being sent to personal email addresses.
5. **Prepare to respond when an employee resigns or their employment is terminated.** Consider the implications for your business:
  - What is the risk if the employee serves out their notice period? Is it possible the employee could sabotage the employer's systems and databases?

- How likely are they to copy confidential documents or download information?
- Should the employee be placed on 'gardening leave' pending the end of their employment?
- Should the employee's access to databases and emails be suspended or monitored during their notice period?
- Should an audit of the employee's computer/phone records be conducted to ensure there has been no breach of obligation by the employee?
- Consider asking the employee to confirm in writing that they do not hold any documents of a confidential nature and have not downloaded or copied any confidential information.
- Remind an outgoing employee of their ongoing obligations of confidentiality, notwithstanding the end of their employment.

The unfortunate reality is that it is usually too late once confidential information has left the building and it can be difficult to undo damage.

Rob Stevenson is the principal of Australian Workplace Lawyers, [rob.stevenson@workplace-lawyers.com.au](mailto:rob.stevenson@workplace-lawyers.com.au).

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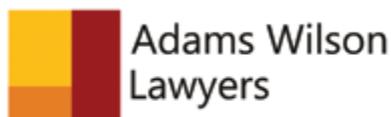
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### EDWARD CHARLES MORRIS (Died 5/2/18).

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## Missing wills continued

**Roslyn Joan Rye** (Died 20.02.2018). Would any person or firm knowing of the existence or whereabouts of a will for **ROSSLYN JOAN RYE** (late of 11 Cremorne Road, Kedron) contact Marie Sambanis of Sambanis Family Law on (07)3171 2229 or email: [office@sambanisfamilylaw.com.au](mailto:office@sambanisfamilylaw.com.au)

Would any person or firm holding or knowing the whereabouts of a will of the late **MAXWELL STANLEY REID** of Broadbeach Waters, Gold Coast, Qld, born on 28 July 1953 and died on 27 February 2018, please contact Pamela Roberts of Woods Hatcher Solicitors on 07 5617 8000 or [advice@goodlaw.com.au](mailto:advice@goodlaw.com.au).

Anybody holding or knowing the whereabouts of a will of **DOROTHY NANCY BYRNE** late of Oz Care Malanda QLD formerly of New South Wales who died on 8th July 2007 please contact Roger Wilkinson Solicitor, PO Box 51, South West Rocks, NSW, 2431 or at [roger.wilko@bigpond.com](mailto:roger.wilko@bigpond.com).

### ERICA SMITH

Would any person or firm holding or knowing the whereabouts of any original or copies of any Will or Codicil of **ERICA SMITH** late of

7 Mallee Street, Condon, Queensland and formerly of 13 Florence Court, Kirwan, Queensland who died on 24 June 2015, please contact Anna Bratti of the Official Solicitor to the Public Trustee of Queensland, GPO Box 1449, Brisbane Qld 4001, Ph: (07) 3213 9174, E: [Anna.Bratti@pt.qld.gov.au](mailto:Anna.Bratti@pt.qld.gov.au), within thirty (30) days of this notice.

## Missing wills continued

Would any person holding a will of the late **Robert Henry Tough** of 7 Hill St, Bongaree, Bribie Island (DOB 26/12/1939), please contact his daughter, Kym Smith on 0414588243 or email [cherub60@gmail.com](mailto:cherub60@gmail.com).

## Office relocation

**THE DEPARTMENT OF TRANSPORT AND MAIN ROADS (Qld) Legal Services Unit** has relocated to Floor 8, 61 Mary Street, Brisbane QLD 4001. The Department's telephone (3066 7014) and facsimile (3066 7022) details remain unchanged. Please note the effect of the Crown Proceedings Act 1980 (Qld) remains unchanged with respect to documents required to be served on the Crown for the purposes of or in connection with a proceeding by or against the Crown.



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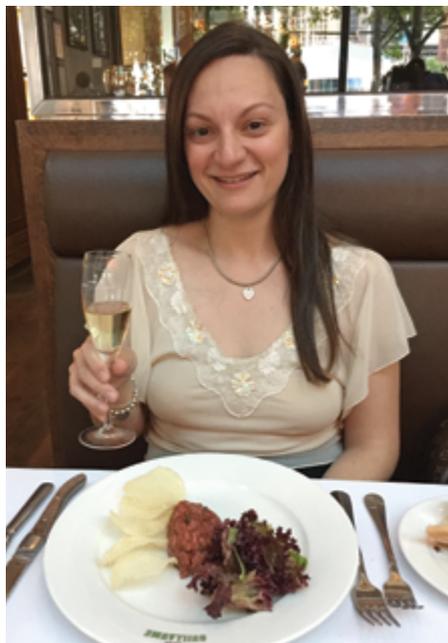
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# A hint of Paris in Melbourne

by Dominique Mayo



**Bistro Guillaume, at Melbourne's Crown Casino, is filled with natural light and features French oak timber panelling and mouldings, and an extensive outdoor terrace (a must-have for any Parisian-style bistro).**

As I enter I see two things quite out of the ordinary – a bright grass-green coloured entrance and zinc-topped bar area, and Bistro Guillaume's signature chefs' hats pendant lights.

I begin my dining experience with an aperitif, a Lillet Blanc neat, on ice with a twist of orange, and, shortly thereafter, I progress to a coupe de champagne, as any good Frenchwoman does.

As I sit in my traditional bistro-style booth seat overlooking the Yarra River, sipping on a glass of Moët et Chandon, I recall that it was around 2006 that the Paris-born chef, who earned his cooking credentials at (French) household names including Aux Charpentiers, La Tour d'Argent and Joel Robuchon's Jamin, graced our televisions with his wonderfully thick French accent in the SBS production of *French Food Safari*. Suffice to say, I have

maintained a keen interest in Guillaume's culinary endeavours since then.

Now, for the entrée. I select the steak tartare avec pommes gaufrettes. I discover, however, following a discussion with my French waiter, that this dish is pre-prepared by the kitchen and so it is not possible to have it prepared at the table, being my usual preference for steak tartare, so that I might control its ingredients and, therefore, its taste.

I find that every mouthful of the finely diced meat produces a slightly tangy taste, and the pommes gaufrettes – otherwise known as lattice chips – are underwhelming as they taste of oil and little else. As a result, I gladly welcome the petite salade with vinaigrette to alternate with mouthfuls of the steak tartare.

For my next course, I select the chateaubriand, pommes frites and sauce au poivre. The chateaubriand is cooked 'à point' which, in French kitchens, is the terminology used for any food that is *perfectly cooked*, and which you can expect to be rare to medium rare with the accent on the rare. The chateaubriand has a tasty garlic and parsley outer rim, and simply melts in the mouth. I am in heaven. The frites are presented in a cute copper bucket and disappear as quickly as the absolutely delectable meat on my plate.

While the sauce used in a dish is often overlooked, the mastery of a staple sauce such as a sauce au poivre, when exceptional, as here, is deserving of a special mention – the sauce is especially delicate and well balanced, and the best I have ever tasted! Bravo.

As my Bistro Guillaume experience draws to a close, I opt for a childhood favourite for dessert – madeleines, elegant cakes shaped like scallop shells. The hot little buttery parcels of goodness, which are perfectly baked, provide a wonderful sweet finish.

The service is wonderfully authentic with an all French-speaking wait staff, and I find myself drawing comparisons to some of my dining experiences in France's most popular neighbourhood bistros. As I depart, an exchange of 'à la prochaine' occurs – I'll be back, for sure.

Dominique Mayo is a senior lawyer at Clayton Utz

# A fine view of the Hilltops

with Matthew Dunn



**A long time ago in a new colony not so far away, enterprising pioneers started crafting the land known as New South Wales into John Bull's vineyard.**

Given the regularity of blockades with France in times of war, the British Colonial Office dreamed of the Australasian colonies providing a steady stream of wine to quench the thirst of a parched mother country.

Viticulture in NSW grew on mixed use farming properties, along with sheep, wheat and fruits. The vine penetrated the Hunter Valley and the Sydney environs, but not much further due to water shortages. Mostly, the climate of the new wide brown land was too challenging, though in time the new colonies in Victoria, South Australia and Tasmania proved kinder.

The Hilltops region of NSW could have been a star of the new colony if a more concentrated effort had been made to overcome the dual tyrannies of distance and rainfall. Today, these restrictions are more manageable, and Hilltops has gained fame as one of the 'new' wine regions in NSW along the western edge of the Great Dividing Range (Gundagai, Young, Orange and Mudgee).

The region itself is at a high altitude (starting at 450m ASL), sitting around the towns of Young, Borowa and Harden. This is stonefruit country (not unlike our Granite Belt, which is also on the western edge of the Great Dividing Range) and famous for cherries and fruits.

Originally settled in the 1830s, the region took off in the 1860s when New South Wales' richest goldfields were discovered there. Winemaking seems to have come at about that time, when Croatian pioneer Nichole Jasprizza established a vineyard and sold cherries and wine to the goldminers.

By 1880 he had recruited three of his nephews from the old country to help, and in the early days of the 1900s had reportedly won medals at the Sydney wine show and expanded to 240 hectares of vines. Like many colonial vineyard areas (Roma, for example), the business dried up in the hard years of depression and port-fancying.

Rebirth came to the Hilltops in 1969, when farmer Peter Robinson planted vines at his property, Barwang, near Young. This reputedly preceded the birth of the nearby powerhouse Canberra district by two years.

The Barwang label has continued to this day, after being bought by the McWilliams family in 1989, but not without its hairy

moments. Wine writer Chris Shanahan tells of a contest of ideas within McWilliams about whether Barwang fruit should have been for blending or a regional wine.<sup>1</sup> He describes powerful forces inviting wine journalists to Barwang to tour the vineyard, taste their vines and support blending or the creation of a Hilltops identity.

Fortunately for us, everyone sided for the creation of a new wine region and Barwang has spearheaded the growth of the region. Other great vineyards like Moppity and Grove Estate have championed the cause, and McWilliams (heavily invested in the region) has created a number of appellation and reserve wines to showcase the area.

But if you were looking for an endorsement of the potential of the Hilltops region, it is telling that Canberra district leviathan, Clonakilla, has created a Hilltops Shiraz to provide an entry wine for its mighty Shiraz Viognier. The Clonakilla Hilltops Shiraz has been gaining some fame itself, no less I hear, for its involvement in a party at Parliament House in Canberra one night which resulted in a broken marble table...

#### Note

<sup>1</sup> [chrisshanahan.com/articles/2010/hilltops-files-solo](http://chrisshanahan.com/articles/2010/hilltops-files-solo).

**The tasting** Three Hilltops wines were tasted for the betterment of society.



The first was the **Barwang Hilltops 2014 Cabernet Sauvignon**, which was purple red in colour. The nose was spicy with white pepper and a little capsicum. The palate had oak to the fore with a dense currant and briar flavour, with some menthol and capsicum flavour hiding in the background looking on from a safe distance.



The second was the **McW Reserve 660 Hilltops Shiraz 2015**, which had deep purple hues and a touch of smoke on the water. The nose was savoury with notes of leather and fresh earth turned in the region's canola fields. The palate had a core of red currants, leather and ripe savoury spice with rising oak on the mid palate weight. Perhaps some more time will bring it all together.



The last was the mighty **Clonakilla 2016 Hilltops Shiraz**, which was plum red with dark brooding clouds of extracted colour. The nose was very approachable cherry and spice. The palate was rising action on the attack with black pepper, mushroom, leather and ripe red fruits with a tannin backbone to see it through at least the next five years.

**Verdict:** The favourite was the Clonakilla, which had power and a dose of class.

Matt Dunn is Queensland Law Society government relations advisor.

# Mould's maze

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

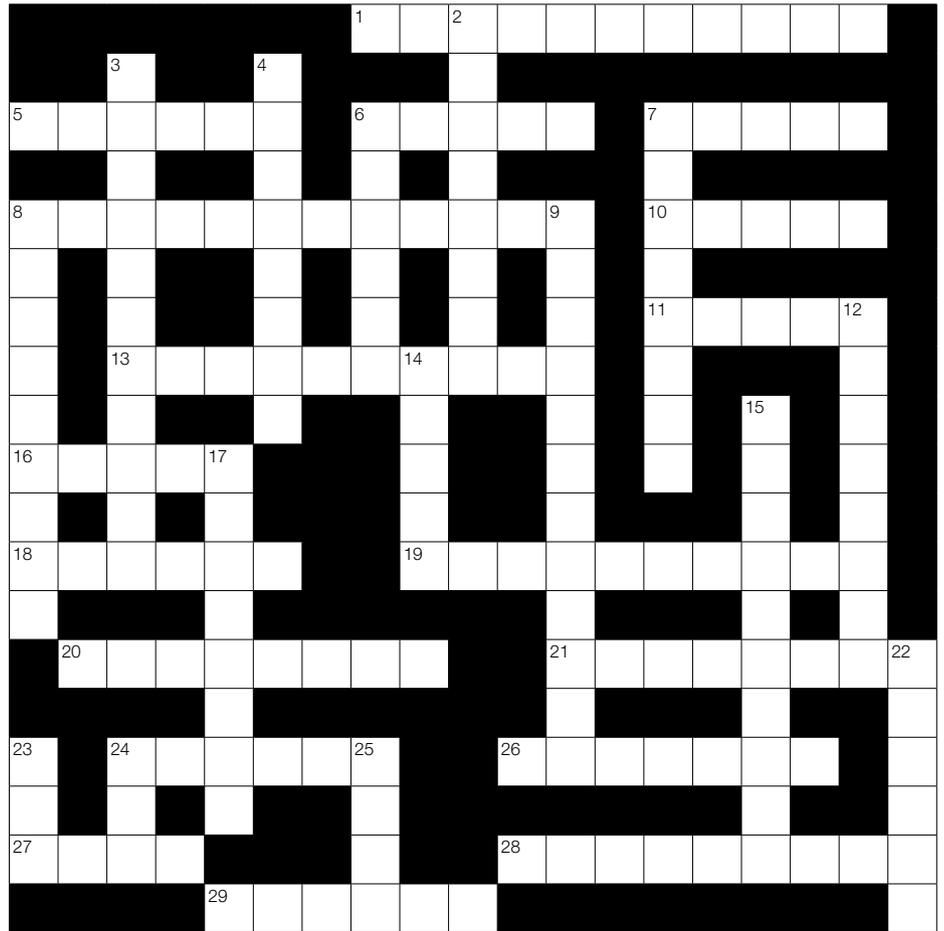


**Across**

- 1 Pledge as security for a loan without surrendering possession. (11)
- 3
- 4
- 5 'And wife' (Latin), often appearing in older deeds and documents to indicate the property was owned by a married couple. (6)
- 6 Court of original jurisdiction, nisi ..... (Latin) (5)
- 7 The black flap on the back of a barrister's gown, ..... bag. (5)
- 8 The right to sole ownership of an asset upon the death of all joint tenants. (12)
- 10 Formally pleaded response to a defence. (5)
- 11 This country has 15 judges for every million people. (5)
- 13 Overdue child support. (10)
- 16 In the movie *My Cousin Vinny*, a witness' credibility was destroyed by his unbelievably quick time to cook this food. (5)
- 18 Right to occupy property; length of time a person has held a position. (6)
- 19 Language in a legal document that is irrelevant or has no legal effect. (10)
- 20 South Australian town in which multiple murder victims were found in barrels in a disused bank vault. (8)
- 21 Attempting or abetting are examples of ..... offences. (8)
- 24 Orders sought from the court in a statement of claim, ..... for relief. (6)
- 26 Unique, sui ..... (Latin) (7)
- 27 An issue with no practical or relevant value, .... point. (4)
- 28 Statute. (9)
- 29 Adjourn. (6)

**Down**

- 2 Internet fraud involving creating a fake website or email to resemble a legitimate one in order to steal valuable information. (8)
- 3 An insurer's right to step into the shoes of an insured. (11)
- 4 The essential element of a suit. (8)
- 6 Australia's Attorney-General, Christian ..... (6)
- 7 Bigamy is illegal under the ..... Act 1961 (Cth). (8)



- 8 A person acting on behalf of another, including a woman who gives birth to a baby of another. (9)
- 9 A right to use property, acquired by open and obvious use, without the owner's authority, ..... easement. (12)
- 12 Ostensible authority is also known as ..... authority. (8)
- 14 Shares a common boundary with. (5)
- 15 A period of suspension of enforcement of a law; an authorised period of delay in paying a debt. (10)
- 17 A fallacious argument intended to distract; a person to whom property is transferred for the sole purpose of concealing the true owner. (8)
- 22 The right to trial by jury is contained within this section of the Australian Constitution. (6)
- 23 A suit brought by a citizen but brought for the government as well, qui ... action. (US) (3)
- 24 To cause an order to apply retrospectively, nunc ... tunc. (Latin) (3)
- 25 Australia's first female judicial appointment on 23 September 1965, .... Mitchell. (4)

Solution on page 60

# The space race can wait

## Can't we build a waterproof bus?



by Shane Budden

You may be keen to keep up with events on the 'humanity going into space front' – as I am (I am keen to keep up on it, I mean, not that I am going into space).

If so, you will have noticed that, not so long ago, Elon Musk sent his Tesla roadster into heliocentric orbit ('heliocentric' is the word scientists use to describe things that orbit the sun; they don't simply say 'things that orbit the sun' for very important scientific reasons – they enjoy making laypeople feel stupid. Scientists don't get out much).

Many people have been critical of this move, partly because it adds to the amount of space junk out there, partly because it turns out Elon left all his tax records for the past 15 years in the glovebox, but mostly because a mannequin known as 'Starman' was placed in the driver's seat, despite Musk's motives remain unclear, although he has begun pointing out that his car has now travelled several million kilometres without having to recharge.

Of course, going into space by luxury car is certainly better than the current option, which involves hitching a ride on the Soyuz rockets. Keep in mind that these were built by engineers from the country that lost the Cold War to Ronald Reagan, despite the fact that when questioned at the Contra enquiry, Reagan identified Russia as "a kind of mammal".

In fact, going into space by car is probably too cramped – I prefer the *Star Trek* style of space travel, where your spacecraft is larger than many European countries, you are allowed to hang out in your pyjamas all day, and avoiding death is simply a matter of not wearing a red shirt when leaving the ship.

It certainly beats my most frequent method of transport these days, which is by bus. It isn't that I don't like the bus per se, because that would involve knowing what 'per se' means, but it doesn't make for an ideal experience in the same sense that George Christensen doesn't make for an ideal personal trainer. To be fair, the ideal personal trainer would be one that was in the boot of Musk's Tesla, because if there is one thing the world doesn't need any more of – apart from sushi bars – it is personal trainers; but I digress.

A big part of the problem is the bus shelter itself, which is about as effective as the NSW defensive line while being far more likely to harm you. Indeed, I am conflicted about calling it a shelter, similar to the way I would be conflicted about calling Tom Cruise well-adjusted. This is because the shelter was apparently designed by engineers that the Russians considered too stupid to be involved in the Cold War.

For example, the shelter doesn't have a roof so much as a primitive 'proto-roof', such as might have been constructed by our ancestors on the African savannah, assuming they were particularly stupid examples of our ancestors and had been hitting the fermented Mastodon blood pretty hard the night before. The consequence of this is that during rainy periods, the roof does a sterling job of keeping the upper half of the rear wall of the shelter dry, while leaving the rest of the shelter (and anyone in it) as wet as Prince Charles taking a shower in a submarine.

That wouldn't be so bad if, at the time of writing, the weather gods hadn't dumped enough rain on Brisbane to float Clive Palmer's *Titanic 2* and maybe even Palmer himself at a pinch. You might think that the arrival of the bus itself would provide some relief, but it turns out the buses were put together by the same crew responsible for the shelters, meaning that they are about as waterproof as fairy floss. Had any of the passengers managed to stay dry before getting on the bus, they would have been pretty peeved – so I guess it is possible that the shelters are deliberately ineffective in order to lower expectations and reduce complaints.

On the plus side, when I do get on the bus I get the chance to feel exactly the way John Wayne did when he walked through the swinging doors to a saloon in one of his westerns (assuming he had just taken a shower in his clothes). There is a hushed silence, and fearful whispers among youngsters.

Young person number 1: "Look! It's the dude with the thing!"

Young person number 2: "I looked it up, it's called a ... a ... book!"

Young person number 1 (crying): "I want my mum!"

Yes, that is the kind of fear and respect you can inspire by being the only person on the bus reading an actual book, rather than using a smart device to post pictures of your breakfast on Snapchat, Facebook or Instagram (I am assuming here that these are not all the same thing).

The only time I have experienced such awe previously was back in my student days, on those occasions in lectures when the lecturers expressed their open admiration for my achievements ("Shane! You turned up! Did you find the room all by yourself?").

The upshot is that I think Elon Musk should stop mucking about in space and focus on more useful priorities, such as creating a driverless waterproof bus powered by fermented mastodon blood, which gives off zero carbon emissions and is free for people who actually read books. Also, I point out that 'Fermented Mastodon Blood' would be a great name for one of those energy drinks parents feed their kids to exact revenge on teachers; if anyone wants the rights I'll swap them for a Tesla, presuming Elon doesn't fling them all into space.

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## Crossword solution

### From page 60

**Across:** 1 Hypothecate, 5 Etuxor, 6 Prius, 7 Money, 8 Survivorship, 10 Reply, 11 India, 13 Arrearages, 16 Grits, 18 Tenure, 19 Surplusage, 20 Snowtown, 21 Inchoate, 24 Prayer, 26 Generis, 27 Moot, 28 Enactment, 29 Remand.

**Down:** 2 Phishing, 3 Subrogation, 4 Gravamen, 6 Porter, 7 Marriage, 8 Surrogate, 9 Prescriptive, 12 Apparent, 14 Abuts, 15 Moratorium, 17 Strawman, 22 Eighty, 23 Tam, 24 Pro, 25 Roma.

### Erratum

In last month's crossword solution, the answer to 30 across should have been 'agist', not 'ears' as published. We apologise for this error.

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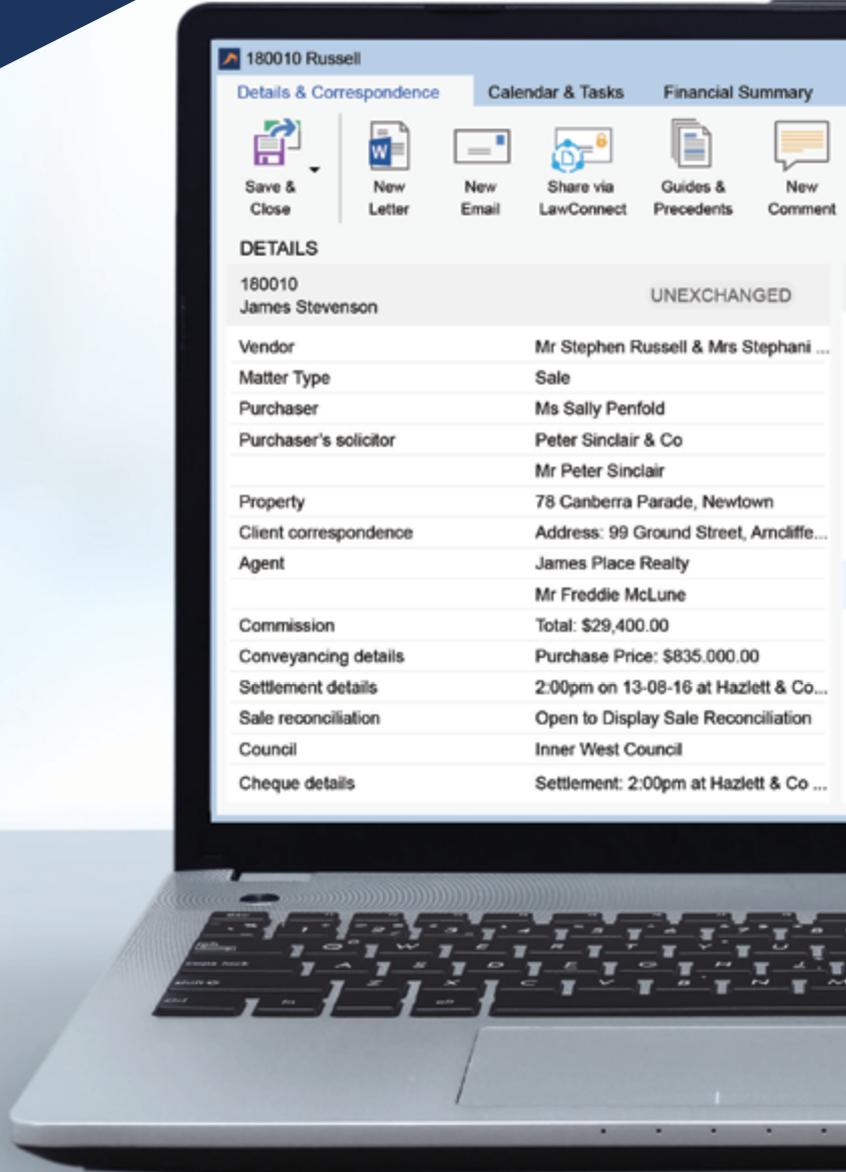
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