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June 2018 – Vol.38 No.5

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Queensland solicitors

A committed and empathetic profession



Queensland's solicitors are professional, empathetic, high-achieving and committed.

We see this each and every day through your practice, your community work and pro bono service, your interactions with the courts and each other, and your commitment to ongoing professional development and career progression.

It is timely, however, to remember that we work in a profession with varied areas of practice which lead to the requirement for varying levels of sympathy and care. In particular, I would like to focus on family law this month.

As you are no doubt aware, family law is a very emotional and complex area of law with not only the emotions of adults often at the forefront, but those of children. We must always remember that when children are involved, we must take extra care to protect them where we can from the often harsh realities of legal proceedings. It is our responsibility as trusted solicitors to take into account the great obligations upon us and resist actions such as the passing on of inflammatory letters to the other side.

Family law is not like personal litigation; it involves many more emotions and individual concerns. In many cases it involves the breaking down of a family unit, with the children vastly impacted in one or more ways. I commend the exceptional family lawyers that we have in Queensland, and I recognise the work you undertake and the personal touch you utilise in often difficult circumstances.

Our advocacy team and QLS Family Law Committee are in the process of drafting our submission in response to the Australian Law Reform Commission's Review of the Family Law System's issues paper, as part of the Law Council's Family Law Section submission. The issues paper poses 47 questions about the family law system and we have taken on board a lot of feedback from our members. I look forward to updating you as this progresses.

Our judiciary

I have previously mentioned some new appointments to the bench in Queensland, but I would also like to mention the retirements from the bench of Judge Brian Harrison from Cairns and Judge Stuart Durward SC from Townsville in March, as well as Judge John Robertson from Brisbane in May. Deputy president Bill Potts and I have been able to thank them personally at their valedictory ceremonies, but I would like to once again congratulate them on their prestigious careers, and wish them the best of luck in their future endeavours.

We have been fortunate that the Queensland Government have quickly filled the gap left by these key judicial members with the instalment of Judge Tracy Fantin to replace Judge Harrison and Judge John Coker to replace Judge Durward. The Federal Government has also now moved to effect the transfer of Judge Middleton from Newcastle to Townsville to fill the space left by Judge Coker of the Federal Circuit Court. I congratulate the new appointments and look forward to working with them in the future.

Steer clear of claim farming

I'm sure you are all aware that claim farming is unethical and very much frowned upon. We have been hearing reports of consultancy organisations offering potential clients gift cards when they complete a survey and authorise their details to be passed on.

In light of this, it is timely to remind you that claim farming can take many forms, and it is imperative that we as solicitors steer clear of any practice such as this. Section 68 of the *Personal Injuries Proceedings Act 2002* relating to personal injuries states that "a person must not pay, or seek payment of, a fee for the soliciting or inducing of a potential claimant to make a claim".¹

As solicitors, it is our role to remain ethical and above reproach. I encourage all practitioners to avoid utilising any type of ploy or outside organisation to find clients,

regardless of how innocuous it may seem. We should always be conscious of protecting the reputation of the profession, especially in the methods of attracting new clients, either directly or through any third party.

Rule 5 of the Australian Solicitors Conduct Rules, which deals with dishonest and disreputable conduct, is also relevant here.

We must always remember that compliance with the law and our paramount duty to the administration of justice is critical to our responsibilities to our clients. Actions such as claims farming diminish public confidence and compromise the profession's integrity.

Should you have any concerns about your current practices, please phone our QLS Ethics Centre and speak to one of our experienced advisers.

Reminder – practising certificates

One last reminder about renewing your practising certificates (PC) and QLS membership. Renewals closed on 31 May 2018, however, you can still renew your PC and membership until the end of this month. There will be a late fee for the renewal of the Certificate, but it is important that you not practise without a PC. Current certificates expire on 30 June. If, after 1 July 2018, you require a practising certificate but have not renewed, you will have to apply for a grant of PC which cannot be backdated. To practise without a PC is a breach of s24 the *Legal Profession Act 2007*. You can contact our records and member services team on 1300 367 757 or records@qls.com.au for more information.

Ken Taylor

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Notes

¹ *Personal Injuries Proceedings Act 2002*, section 68.

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An example for us all

You can combine practice and community service



This month it is my pleasure to introduce Robert Reed OAM.

Rob, a special counsel at MinterEllison, was awarded an Order of Australia Medal earlier this year for “service to social welfare programs, and to the law”, a very fitting award. I haven’t met anyone as accomplished in combining a successful legal career with an incredible amount of service in pro bono and social welfare.

Rob won the Queensland Law Society Individual Pro Bono Award in 2009 and was a finalist in the law category of the 2013 Human Rights Awards. He was president of the QPILCH (now LawRight) Management Committee and chair of the QLS Access to Justice and Pro Bono Law Committee.

He is a founder of the Darkness to Daylight run, an annual 110-kilometre challenge with each kilometre representing a person in the yearly toll of deaths brought about by domestic violence in Australia.

I have taken the opportunity to chat with him in this month’s interview (see *page six*) as I believe that his story is an inspiration for others; there is ample opportunity to combine legal practice with community service in a way that benefits both the practitioner and the broader community.

Advocacy highlights

This month *Proctor* features our regular report on the efforts of our hard-working policy committees and advocacy team.

This month’s advocacy column, on page 12, goes into the detail of some of our recent submissions on legislation such as the Local Government Electoral (Implementing

Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 and the Heavy Vehicle National Law and Other Legislation Amendment Bill 2018. We note that the parliamentary Transport and Public Works Committee made more than 30 references to our submission in its report on the latter Bill.

Last month’s highlights

Last month we celebrated Law Week with a range of activities across Queensland, including the Queensland Legal Walk in Brisbane, Toowoomba, Mackay, Townsville, Cairns, and on the Gold and Sunshine Coasts in support of LawRight. In Brisbane it was another beautiful Queensland morning, if a little on the cool side! Several hundred walkers were led by Attorney-General and Minister for Justice Yvette D’Ath and Court of Appeal President Justice Walter Sofronoff.

QLS open day on 16 May was, as usual, very well attended with all seats booked by members eager to attend their choice of sessions from the eight complimentary professional development topics.

Our annual ball wrapped up Law Week, with a contingent of mainly early career lawyers taking to the Brisbane River on 18 May aboard Seadeck.

Another highlight in May was Di Fingleton’s address at the second event in the 2018 Modern Advocate Lecture Series. The audience was inspired to hear how her faith in the law was a critical factor in enabling her to return to judicial practice.

Gold Coast Symposium

As usual, there’s a busy professional development program again this month, led by the 11th annual Gold Coast Symposium on 8 June at the Surfers Paradise Marriott Resort & Spa.

There are several excellent sessions, including District Court Judge McGill SC providing insights from the applications jurisdiction and Judge Turner of the Federal Circuit Court of Australia with practical advice on evidence law.

I’ll be chairing a session with Mind Gardener’s Susan Pearse, who will be explaining how we can develop our resilience and focus to improve workplace performance and productivity. Did you know, for example, that the average person spends some 60% of their work time doing one thing but thinking about something else?

I look forward to catching up with many of our Gold Coast members at this event.

Renewals

Finally, my thanks go to all of those who have renewed their practising certificate and QLS membership over the past month. The official renewals period has closed and any further applications for practising certificate renewal this month will attract a late fee.

Rolf Moses

Queensland Law Society CEO

In the long run, you can make a difference

Robert Reed and the pro bono challenge

You can't help but feel inspired when you talk to Robert Reed OAM.

Rob, a special counsel at MinterEllison, has focused his career on not just commercial law but also on pro bono work and community service.

This has included his roles as president of the QPILCH (now LawRight) Management Committee and chair of the QLS Access to Justice and Pro Bono Law Committee, and his pivotal role in founding the Darkness to Daylight run.

I recently spoke with Rob about how he was able to make such a significant difference from within a large law firm, and I think you will find his comments most interesting.

You have managed to combine a career as a commercial lawyer in a large firm with a significant focus on pro bono and community investment. When did you decide to develop a community and pro bono focus, and how has the platform of a large commercial law firm assisted you?

It was always in the back of my mind. Like many others, I went into law to help people and make a difference to them – that's what lawyers do for all clients after all: help them solve problems. I brought a passion to play some part in making a positive difference in the community with me when I commenced my articles and I was looking for ways to build that ethos into my work life.

In my late 20s I left the firm to try and find a way to do this kind of work full time – thinking that I would need to leave large private practice to make it a reality.

It took a life-changing event in another country for me to realise that I could make it a reality right back where I came from. I was in Japan, turning 29, and I was completing the Sacred Run (a relay from the top of Japan to the bottom including, for some like me, a 100-kilometre individual leg). The run was organised by the American Indian Movement and started by Dennis Banks to spread the message of harmony via the traditional means of communicating messages over long distances – on foot.



During this run, which lasted a little over two months, I came to understand how a group of people when aligned and working together in an organised way can make a difference and accomplish amazing things. Dennis Banks helped me to reflect that running on my own (or running away) was not the best way to make a difference. The challenge and the opportunity was to make the difference from the platform I already had in place as a lawyer in Brisbane in a major firm.

While I didn't return to the firm specifically to make that change, the inspiration and insight which I gained from the Sacred Run was always with me and that eventually manifested in me taking a major role in developing a coordinated community investment program in the Brisbane office. I have been fortunate to have had the opportunity to run that locally (now part of a firm-wide program) pretty much full time for more than 15 years.

How did you go about building this practice at the outset, when structured and organised community engagement programs were only in their early days of existence? How did you get people to take your plans and ideas seriously?

I was fortunate that I had significant internal support from others, including partners who were thinking along these lines. Like many

others, our firm was already doing pro bono work and supporting charities, but these activities were not run in a coordinated way.

We thought there was an opportunity here. It made sense that we should undertake our community initiatives with the highest level of coordination, sophistication and professionalism, just like we do in the rest of our work. By approaching our community work in that way we would know better what we were doing as a firm and we would be more likely to make a positive difference in the community and provide effective opportunities for our staff.

In the circumstances, getting people to take this seriously wasn't hard – it just required confirming why this was a good thing to do. I encountered no philosophical obstacles to it at all – in many ways the conditions were right to start to take this forward.

How have you observed pro bono and community work improving the morale and engagement of solicitors at work?

In my observation, people get so much out of participating in a coordinated community engagement program. At an early stage of our national program we asked our staff what social issues they were passionate about addressing and then we formed relationships

by Queensland Law Society CEO Rolf Moses



with organisations on the ground dealing with those issues.

That meant we could create informed and effective opportunities that resonated with our people. I think it's fair to say that our staff have derived immense satisfaction from being part of something that they know will and does make a difference to others. It seems to me also that spending time on pro bono matters or volunteering helps develop a well-rounded professional experience and personal growth.

More broadly, previously having been part of the QPILCH (now LawRight) management committee, the QLS Access to Justice Committee and the Australian Pro Bono Centre Board, and still meeting with community legal centres and pro bono coordinators locally and nationally, has brought home to me how many lawyers are passionate about pro bono and social justice and doing something about it. We work together and draw inspiration from each other constantly – it is like that community of runners in Japan all those years ago coming together to cover big distances and make big changes.

What has been your biggest achievement – or the achievement you are most proud of?

Every win, every time we help someone, it is an accomplishment – no matter how minor. And whatever it is, I always see it as a group accomplishment – there are always so many people involved in any achievement.

If I had to choose any one particular achievement, it would be the Darkness to Daylight Challenge. This 110-kilometre overnight run symbolises for each kilometre the number of lives lost to domestic and family violence (DFV) in Australia every year and people can participate in a number of different ways. Together, we're literally bringing the issue of DFV out of darkness and into the daylight.

The initial inspiration for this event came to me as a result of my Sacred Run experience in Japan all those decades ago. I took this inspiration to our long-standing community partner, Australia's CEO Challenge (on whose board I sit), and they embraced it.

I am proud of how the vision became a reality so quickly – from a single runner with a handful of people joining for the last 10km in the 2012 pilot to over 2000 participants last year and even more registered runners for this year's event. This is because of the effort, contributions and commitment of many, in particular Australia's CEO Challenge, and I have been extremely proud to see our other community partner, Glenala State High School, take part in the event in such a big way over the last few years.

You determined as an early career lawyer to contribute to the community sector. What suggestions or advice would give others who are looking to make a contribution to, or to build a career in this field?

To make your interests known – if you are passionate about an issue or if you want to engage generally in social justice causes, let people know. Explore where you work right now and get involved with their programs. If you perceive there is a gap, then work out ways to fill it and make that known. The more I put it out there that I was passionate about making a difference, the more I found others willing to provide advice, support and ideas, and the more opportunities opened up.

The key to getting involved is networking with others internally and externally, getting informed and finding a support base, and making yourself known, demonstrating your passions and interests.

You have worked hard and achieved much, which has been recognised with an OAM – what support have you had along the way? What or who has inspired you?

The award is a tremendous honour. But I have never for one moment thought that it is just about me. I am the first to say that in everything I have done I have had support internally in the firm and from outside. So many people have offered inspiration, ideas, got involved and made things happen.

My inspiration and wisdom comes from working with others. Just like the Sacred Run, community effort is required to make a real difference and we can all do our bit.

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Courts highlight need for more resources

Queensland's courts have released their 2016-17 annual reports, highlighting key issues such as increased workloads and lodgements with fewer judiciary.

The reports highlight the need for more resources for the Queensland justice system, with the Chief Justice and Chief Judge calling for more judicial appointments and court officers.

Supreme Court

The Supreme Court of Queensland noted a clearance rate in criminal cases of 86.8%, with 2362 new lodgements and 1022 outstanding at the conclusion of the financial year.

For the criminal cases, there was a significant increase of 38% in criminal lodgements. On the civil side, there was an exceptional clearance rate of 93.5%, with 2983 new lodgements and 2567 outstanding at the end of the year.

Chief Justice Catherine Holmes said the court's criminal work load had almost tripled over four years, but the number of judges sitting in the trial division was one fewer than in 2012-13 (two judges being allocated to the Queensland Civil and Administrative Tribunal).

Her Honour said that "the ratio of staff numbers (a figure in which the Productivity Commission includes judges, support staff, registry staff and security officers) to finalisations of matters in both the civil and criminal jurisdictions was lower in Queensland than in any other State or Territory".

Her concern is that there is not only a financial cost to the judiciary – Queensland Courts is spending less than the average cost per finalised criminal and civil matter – but also the personal costs of stress and fatigue to judges and staff.

"There are larger adverse consequences, with economic implications: the inevitable decrease in clearance rates, the holding of prisoners on remand for longer periods with attendant human and financial costs, and, on the civil side, the inability to deal with matters and deliver judgments in that jurisdiction expeditiously," her Honour said.

"It hardly needs to be said that the Court needs a significant addition to the number of judges. At the same time, the increase in both the size and complexity of the registry's workload necessitates not only an increase in the number of registry staff, but a greater number of positions of higher classification to promote both staff retention and greater professionalisation."

District Court

Queensland's District Court listed criminal clearance rates of 96.8% with 6531 new lodgements and 2327 outstanding at the end of the year, an 11.1% increase in criminal lodgements (5.9% in 2015-16), and a civil side clearance of 99.7% with 4868 new lodgements and 4681 outstanding at the end of the year.

The Chief Judge noted that the "increasing volume, length and complexity of the work dealt with by the court has placed its judicial resources under considerable strain".

In the previous year's report, the Chief Judge had identified the need for an additional judge to the District Court, which he noted had not yet occurred even with the continued growth of criminal work in the court. His Honour also emphasised the "lack of meaningful discussion" between the Crown and defence between committal and indictment presentation, noting that this issue continued

to "cause significant delays in listing matters for trial or sentence, and the result can be an inefficient use of court time".

Magistrates Court

The Chief Magistrate noted a heavy workload with a decrease in lodgements across most of the major jurisdictions of the court, as well as some increases in others. The criminal jurisdiction saw a decrease of 6.92% of defendants dealt with overall, which included a 7.78% decrease in adult defendants and a 9.12% increase in child and young offenders. Domestic violence applications decreased by 0.46%, child protection applications rose by 6.94% and civil claims rose by 13.35%.

The clearance rates for child protection applications dropped from 98.3% in 2015-16 to 91.9% in 2016-17 as lodgements had increased. Chief Magistrate Ray Rinaudo AM noted a large number of appointments and retirements during the reporting period. He also made note of significant court reforms, including the permanency of the Southport domestic and family violence court, the reinstatement of Murri Court and the reinstatement of drug and alcohol specialist courts.

The Chief Magistrate also remarked that the Coroners Court of Queensland continued to "perform well, again in an environment of increased workloads".

The three key annual reports, available from courts.qld.gov.au, all appear to highlight an ongoing issue with sufficient resources to deal with increasing workloads. This issue has been raised in the past by Queensland Law Society, the courts themselves, the State Government and other stakeholders.

QLS to extend legal advice panel

Queensland Law Society is extending the reach of its Free Legal Advice Panel to the Sunshine Coast, Toowoomba, Rockhampton, Townsville and Cairns.

When a member is the subject of a complaint to the Legal Services Commissioner or an adverse trust account investigation report, the Society provides them with six hours of free legal advice.

The Society has a panel of solicitors to provide this service on its behalf at an hourly rate. Lexon Insurance provides further assistance over and above the six hours of free advice

and the members of the Free Legal Advice Panel form Lexon's panel for that.

The Society wishes to appoint solicitors in the Sunshine Coast, Toowoomba, Rockhampton, Townsville and Cairns to the panel. Such a solicitor must:

- have an unblemished record of professional conduct
- have practised as a solicitor or barrister for at least 15 years
- have practised as a sole practitioner, partner, legal practitioner director or senior associate of a law practice for at least five years

- have substantial experience in litigation, criminal law or professional conduct disciplinary proceedings.
- be a member of the Society.

Interested solicitors are invited to submit applications to the Society by 20 June 2018. Members will be appointed to the panel by the Council of the Queensland Law Society.

Enquiries should be referred to Professional Leadership general manager Craig Smiley, c.smiley@qls.com.au.

Sciacca legacy lives on in award



Sciaccas Lawyers has announced an annual memorial award to honour the legacy of the late Con Sciacca.

The award, which will recognise an individual who epitomises devotion to the union movement, was launched in Brisbane on 10 May.

Potential recipients include union officials or members, or law students/lawyers working in the field of workers' rights, labour law and industrial relations.

Sciaccas Lawyers special counsel Jason McAulay said: "Con was a Labor politician and in his role as a solicitor and as an advocate, he acted for Australian unions and their members. This award honours his memory."

Above: Sciaccas Lawyers special counsel Jason McAulay and Queensland Premier and Trade Minister Annastacia Palaszczuk with Zina Sciacca, daughter of the late Con Sciacca, at the award launch.

McR names new managing partner

McCullough Robertson has announced the appointment of senior corporate and commercial lawyer Kristen Podagiel as managing partner.



Kristen started with the firm in 2001 as a graduate and has been a partner since 2007. She has recently returned from maternity leave and takes up the post from 1 June. Brad McCosker is continuing in his role as CEO until 1 June and assisting in the transition.

"Kristen is an excellent lawyer and natural leader, which makes her the perfect candidate for the role of managing partner," chairman of partners Dominic McGann said. "Her career success is built on a personal commitment to client relationships and sets an outstanding example for the whole of the firm."

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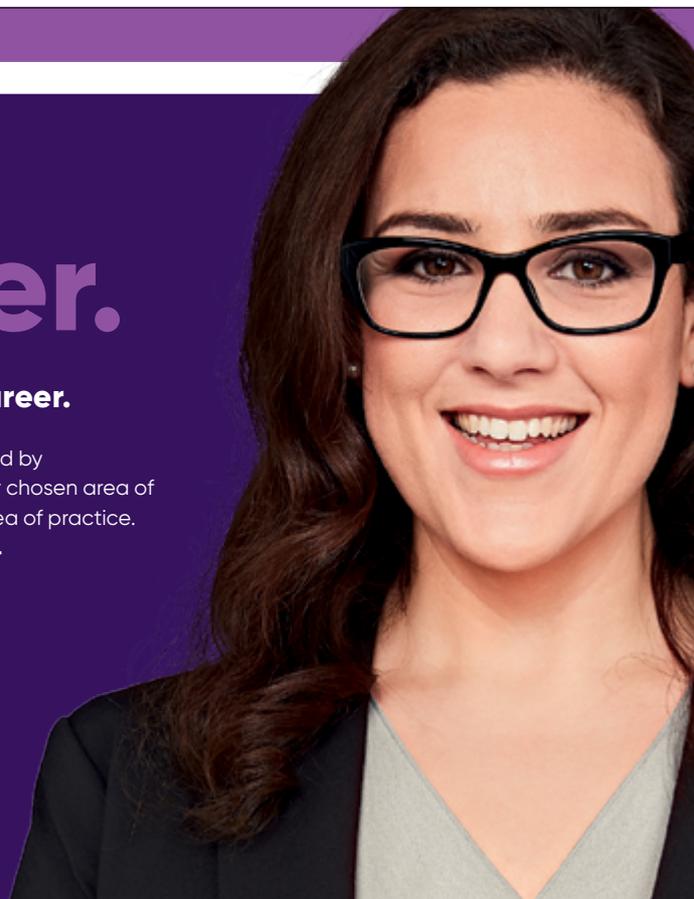
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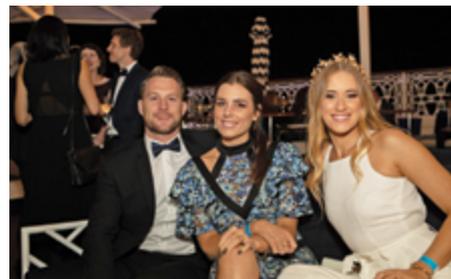


A Law Week for everyone

From the cool morning Legal Walk (above) through Queensland centres to the QLS Ball celebrated on the Brisbane River (right), it was a Law Week that had something for everyone.

Popular events included the QLS Open Day (below), with a 'full house' for all eight complimentary professional development sessions, and the 'Leading wellbeing in the legal profession breakfast' with its vigorous panel discussion on key mental health issues.





Legislative consultation a key role for QLS

prepared by the QLS Advocacy team

During the 2017-18 financial year, Queensland Law Society's advocacy team has prepared submissions in response to more than 150 calls for stakeholder consultation on legislative reform and other relevant legal issues.

And on another 22 occasions it has initiated submissions to government and other stakeholders on critical legal issues.

The submissions are prepared by the advocacy team with the expertise of members of the Society's 25 policy committees. Following public consultation periods on proposed legislation, parliamentary committees regularly consider and refer to these submissions in their reports to government.

Significantly, the parliamentary Transport and Public Works Committee, in its report on the Heavy Vehicle National Law and Other Legislation Amendment Bill 2018, referred to the submission by the Society more than 30 times. We made several arguments opposing provisions in the Bill, including the proposal to increase penalties and mandatory licence disqualification for drivers involved in crashes resulting in death or grievous bodily harm.

The committee noted these concerns, but did not pass on the recommendations for reform in its final report, instead suggesting the provisions would have a deterrent effect on drivers. The Society was pleased to note, however, that the committee did not recommend mandatory jail sentences be imposed, as was suggested by a number of other stakeholders.

The Society's submission on the Local Government Electoral (Implementing Stage 1 of Belcarra) and Other Legislation Amendment Bill 2018 outlined significant concerns in regard to the retrospective nature of a number of proposed provisions. In response to the issue of retrospectivity, the department advised that it was "a matter of policy for government" and did not respond to the issue.

During the public hearing, the Society also commented on vague definitions in the Bill, suggesting that the lack of clarification imposed far-reaching power on the Electoral Commission Queensland (ECQ) to determine and enforce the parliamentary intention of the legislation. The parliamentary Economics and Governance Committee, in its report, considered that it would be beneficial for further definitions and examples to be given to provide guidance on the entities the legislation is intended to cover.

As suggested by the Society, the committee made the recommendation that examples be developed to define the terms 'property developer', 'close associate' and what constitutes 'regularly' in the context of making relevant planning applications, to assist the ECQ and courts in determining the application of the legislation.

The abrogation of the protection against self-incrimination has become increasingly common in proposed legislation. The Land, Explosives and Other Legislation Bill 2018 requires a person to answer questions from an inspector in relation to an explosives incident unless there is a reasonable excuse.

It also proposes to omit the section which provides that it is a reasonable excuse for an individual to not answer the question, if answering the question might tend to incriminate the individual or make the individual liable to a penalty. The answer to a question (and other material directly or indirectly derived from evidence) would not be admissible as evidence against the person in civil or criminal proceedings. The Society considered this to be an insufficient justification for abrogating the right against self-incrimination and voiced the significant concern about the trend of legislation purporting to revoke this right.

The committee agreed that legislation should provide protection against self-incrimination as a fundamental legal principle and recommended that the Minister, in his second reading speech, respond to this issue. It remains to be seen whether this recommendation is accepted by the Minister and if subsequent amendments will be tabled.

The removal of the right to claim privilege against self-incrimination was also raised by the Society in its submission on the Plumbing and Drainage Bill 2018. The parliamentary Transport and Public Works Committee reviewed these comments in its report, but considered that the public policy grounds provided by the Department of Housing and Public Works were significant justification and did not propose any changes to these clauses.

The committee also noted the Society's comments on the transitional regulation-making power proposed within the Bill, which would allow the legislature to bypass parliamentary processes and the disproportionality of the maximum sentences imposed within the Bill, but did not make recommendations for review.

The views of the Society's policy committees have been referred to in a number of other parliamentary committee reports in 2018, including the Nature Conservation (Special Wildlife Reserves) and Other Legislation Amendment Bill 2018, the Local Government (Councillor Complaints) and Other Legislation Amendment Bill 2018, the Vegetation Management and Other Legislation Amendment Bill 2018 and the Mineral, Water and Other Legislation Amendment Bill 2018.

QLS submissions to parliamentary committees are available at the committees' inquiry pages at parliament.qld.gov.au/work-of-committees/committees.

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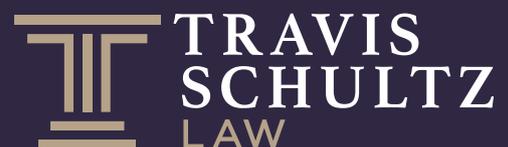
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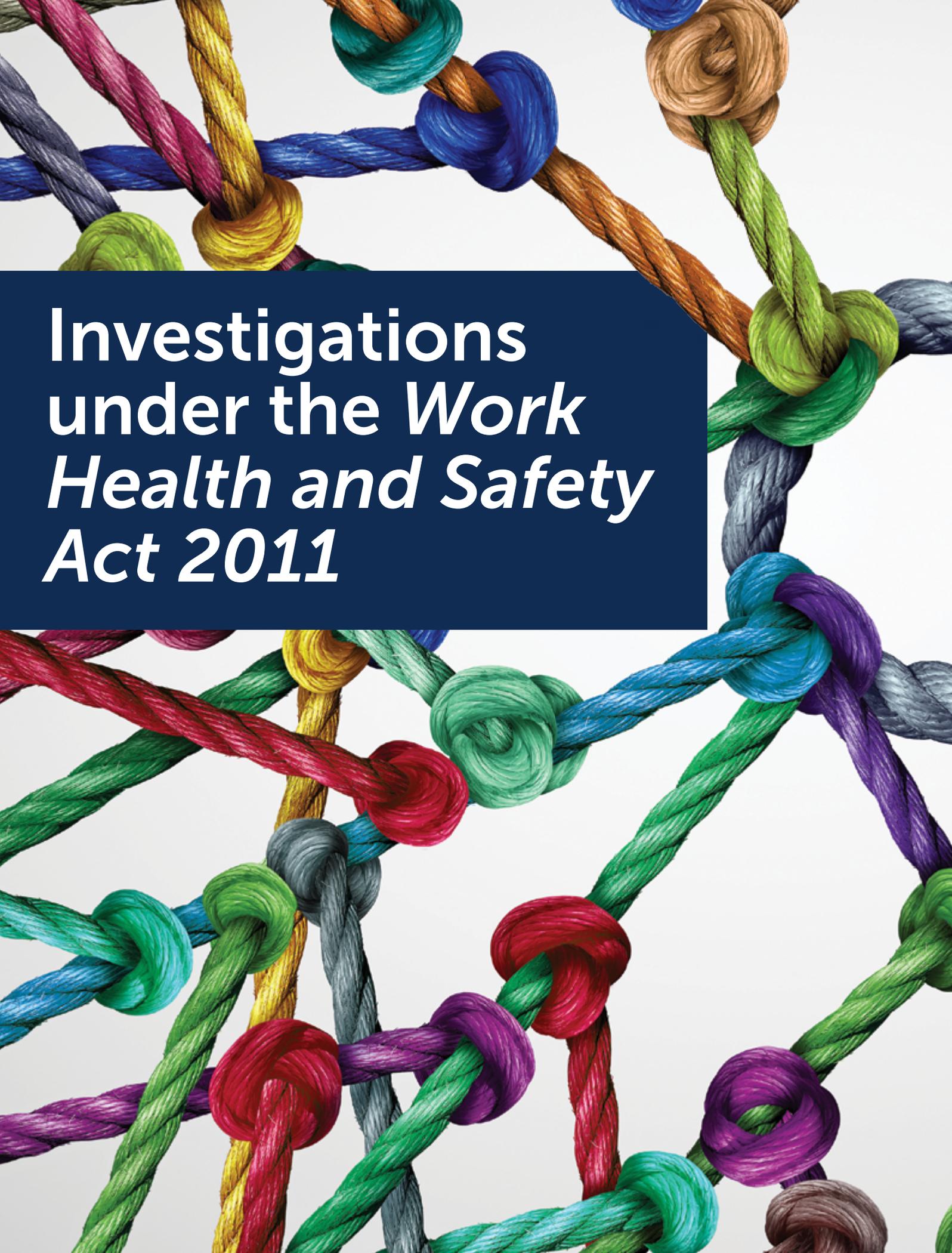
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The background of the entire page is a complex network of thick, braided ropes in various colors including red, green, blue, purple, yellow, and grey. Each rope is tied into a knot, and these knots are interconnected, creating a web-like structure that fills the entire frame. The ropes are set against a plain white background.

Investigations under the *Work Health and Safety Act 2011*



When it comes to investigations of workplace incidents, practitioners representing more than one client can suddenly find themselves in an untenable position. In a two-part article, **Stephen Keim SC** reveals the risks of multiple representation in work health and safety law matters.



Solicitors do not, generally, go looking for situations of conflict. More often than not, the solicitor finds the conflict situation foisted upon him or her.

Just act for all of us, the refrain goes, the money won't stretch to employ another lawyer. What's the point, anyway?

Conflicts of duty can arise in many different transactions. Conveyances involving family members or friends are a common source of conflict situations. So, too, are estates. Criminal investigations do not spring to mind, quite as easily, as sources of conflict. However, for lawyers who act in the work health and safety field, the investigation process can raise matters of great difficulty and concern.

When an accident occurs and a person is injured or killed in a work environment, the tentacles of the criminal law stretch out and have the potential to make a number of people criminally responsible for the circumstances that led to that injury or death.

The structure of offences under the Act

The *Work Health and Safety Act 2011* (Qld) (the Act) imposes duties on different actors in order to protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.¹

These duties are placed upon any person conducting a business or undertaking,² officers of the person conducting the business or undertaking,³ workers,⁴ and other persons at the workplace.⁵ The duties are called 'health and safety duties'.⁶

The duties imposed upon a person conducting a business or undertaking include a duty to ensure, so far as is reasonably practicable, the health and safety of workers engaged or caused to be engaged by the person and workers whose activities in carrying out work are influenced or directed by the person while the workers are at work in the business or undertaking.⁷

In circumstances where a person conducting a business or undertaking has a duty

or obligation under the Act, there is an obligation on each officer of the person to exercise due diligence to ensure that the person complies with their duty or obligation under the Act.⁸

The duties on a worker include a duty to take reasonable care for his or her own health and safety⁹ and to take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons.¹⁰ Other persons at the workplace are under duties similar to those imposed on workers.¹¹

A failure to comply with a health and safety duty is capable of amounting to a criminal offence.¹² Category 1 offences carry a maximum penalty of 30,000 penalty units for a body corporate,¹³ and five years' imprisonment and 3000 penalty units for a person who is neither the person conducting the business or undertaking, nor an officer¹⁴ of the business or undertaking.¹⁵ The maximum is five years' imprisonment and 5000 penalty units if the person is either the person conducting the business or undertaking, or an officer of the business or undertaking.¹⁶

The elements of a category 1 offence focus on the presence of reckless conduct. The offence is committed when a person has a health and safety duty;¹⁷ the person, without reasonable excuse, engages in conduct which exposes an individual to whom that duty is owed to a risk of death or serious injury;¹⁸ and the person is reckless as to the risk to an individual of death or serious injury.¹⁹

Categories 2 and 3 offences are less serious. Category 2 retains the exposure to a serious risk of injury or death²⁰ but removes both the excusing element of 'without reasonable excuse'²¹ and the aggravating element of recklessness.²² Category 3 offences involve just the existence of a duty and a failure to comply with it.²³

A scenario: Conflicts in action

The existence of conflicts may be very obvious by the time litigation originating from a work health and safety breach reaches the litigation stage. Imagine an incident in which the cable of a crane has unwound in an uncontrolled manner, causing the heavy load to crash to the ground, in turn causing the death or serious injury of a worker waiting to attach or detach the crane hook to or from the next load.

The mechanism of the failure may have been identified. The company conducting the business, the crane driver and the on-site foreperson may all be charged with offences alleging breaches of health and safety duties.

In such circumstances, the interests of the three defendants are likely to be far apart. The company may be seeking to establish that the safeguards, both procedural and physical, that it had in place were sufficient so that there was no breach of duty or, at least, no recklessness on its part. It may be asserting that the crane driver, recklessly, overrode the controls that provided the physical safeguard against an accident of this kind.

The crane driver may be asserting that the physical safeguard was clunky, highly inefficient to use and that it also made other aspects of the work of a crane driver inefficient and unwieldy. Indeed, the crane driver may assert that these elements were so well known that the foreperson and other forepersons, on other occasions, had instructed the driver to ignore and override the particular safeguard.

The foreperson may not acknowledge having given any such instruction but may, nonetheless, adduce evidence that it was a common practice of other forepersons, encouraged by senior management, to instruct crane drivers to operate the crane without the physical safeguard being operative.

In such circumstances, the conflicts between the positions of the different defendants are clear and it would be rare for a firm of solicitors or an advocate to seek to act for more than one defendant in such a case.

A reminder from the Court of Appeal

In March 2017, the President of the Court of Appeal considered circumstances in which conflicts of interest may arise in a criminal trial.²⁴ In *Pham*, the President pointed out that it is fraught with danger for one legal firm (or legal practitioner) to act for co-defendants in a criminal proceeding.²⁵

The President pointed out that both trials and sentence hearings are very unpredictable. Conflicts of interest between co-defendants can arise, without warning, through unanticipated evidence or submissions.²⁶

Her Honour also explored reasons why risk of conflict situations is inherent in acting for co-defendants. One or more of the firm's clients may be more culpable than other defendants. A more dominant client may manipulate others to give instructions to their own detriment and to the benefit of the dominant person.

The duty to advise your client of the benefits of pleading guilty and cooperating with police can give rise to conflicts of interest because a decision by one client to plead guilty and give evidence is likely to be against the interests of the others, especially if those others are desirous of going to a contested trial.²⁷

The President summarised the general position by saying that the practice of one firm acting for more than one defendant in a criminal proceeding is apt to undermine public confidence in the legal profession and should be discouraged. Defendants should have separate legal representation unless there is no possibility of any conflict arising. Her Honour said that these points applied equally as between barristers and solicitors.²⁸ Her Honour said that, if legal practitioners persisted in acting for co-defendants, they must be assiduous in meeting their ethical responsibilities.²⁹

In the scenario discussed above, a practitioner does not have to depend on the cautionary advice from the President in *Pham*. The conflicts in the trial in *Pham* are fully developed and obvious. It would be a rare legal practitioner who would need reminding to avoid acting for more than one defendant in those circumstances.

The significance of the reminder in *Pham* is that conflict situations can arise unexpectedly. Whereas one's present instructions may not indicate the presence of any conflict and your clients may each consent to your acting for the others, that may rapidly change.³⁰

When it does, the difficulty of one's position may be expensive both for the clients and the justice system as a whole.

Australian Solicitors Conduct Rules

The Australian Solicitors Conduct Rules (ASCR), made pursuant to s225 of the *Legal Profession Act 2007* (LP Act), took effect from 1 June 2012.³¹

The LP Act provides that legal profession rules (including solicitors' rules)³² are binding on Australian legal practitioners (including government legal officers) to whom they apply.³³

The purpose of the ASCR is to assist solicitors to act ethically and in accordance with the principles of the professional conduct established by the common law and the ASCR.³⁴

The ASCR provide that a solicitor must act in the best interests of their client in any matter in which the solicitor represents the client.³⁵

The ASCR place confidentiality obligations on a solicitor.³⁶

While rule 10 ASCR provides that solicitors and law practices must avoid conflicts between duties owed to current and former clients,³⁷ the more acute issues are likely to arise in current criminal proceedings (where all clients are current clients) as discussed, above, in respect of the scenario.

Conflict of duties concerning current clients is dealt with by rule 11 ASCR. The rule starts with a prohibition subject to exceptions spelled out later in the rule.³⁸ The exceptions depend on disclosure of the potential conflict situation and informed consent from the affected clients.³⁹ However, when an actual conflict arises between the duties owed to two or more clients, it becomes impermissible to keep on acting for the clients between or among whom the actual conflicts exist.⁴⁰

It should be remembered that the ASCR apply to all forms of solicitors' conduct. Informed consent to acting for both the vendor and purchaser in a family conveyancing transaction may raise quite different considerations to obtaining and acting on informed consent to act for two or more defendants in a serious criminal trial.⁴¹

It is also important to note that rule 11 ASCR imposes the ability of the solicitor to discharge their duty to act in the best interests of their client as a separate and additional requirement to the client's knowledge and consent. The reality of many criminal proceedings, as the scenario example indicates, is that the additional requirement is impossible to satisfy.⁴²

Moving backwards in time – the investigation stage

By the time a work health and safety investigation has ripened into a criminal prosecution with multiple defendants, most of the conflict of interest difficulties should have been addressed and resolved.

The problem of potential conflicts tends to present itself to businesses and the lawyers who advise them at a much earlier stage in the investigation, when the whole picture of what happened and who was responsible for what remains unclear.

The client's instructions may be that an unfortunate accident happened; that the inspectors want to interview everyone at the worksite; and it was just one of those unfortunate accidents. When you raise the subject of potential conflicts between management and workers, the client may say, along with soothing words, that the business is happy to cover the cost of looking after the employees but there is just no way we can pay for a separate firm of solicitors for 20 people.

As lawyers, we always want to help, especially, in difficult situations. And it feels a lot like one is being a Grinch⁴³ to say that, nonetheless, I cannot act for everybody.

Notes

¹ Act, s3(1) (object).

² Act, ss19-26: the person conducting the business or undertaking may be a natural person or a corporation (including a body politic) (*Acts Interpretation Act 1954* (the AI Act), s36 or a partnership or unincorporated association (Act, s5(2)).

³ Act, s27(1): 'officer' is defined in different ways for different circumstances which are collected in the definition in schedule 5 to the Act.

⁴ Act, s28: 'worker' is defined in s7 of the Act to cover many eventualities in Act.

⁵ Act, s29: other persons at the workplace.

⁶ Act, s30.

⁷ Act, s19(1).

⁸ Act, s27(1).

⁹ Act, s28(a).

¹⁰ Act, s28(b).

¹¹ Act, s29(a) and (b).

¹² Act, ss31-33.

¹³ Act, s31: paragraph (c) of the penalty provision.

¹⁴ The definition of 'officer' in Schedule 5 to the Act makes use of the definition of an 'officer' in s9 *Corporations Act 2001* (Cth). The definition includes a director or secretary of a corporation but also has a functional element that extends to a person whose decision-making involvement affects a substantial part of the business of the corporation.

¹⁵ Act, s31: paragraph (a) of the penalty provision.

¹⁶ Act, s31: paragraph (c) of the penalty provision.

¹⁷ Act, s31(a).

¹⁸ Act, s31(b).

¹⁹ Act, s31(c).

²⁰ Act, s32.

²¹ See Act, s32(b).

²² Act, s32(c).

²³ Act, s33(a) and (b).

²⁴ *R v Pham* [2017] QCA 43 (*Pham*).

²⁵ [2017] QCA 43, [58].

²⁶ [2017] QCA 43, [59].

²⁷ *Ibid.*

²⁸ The practice seen most often is where a legal firm acts for more than one defendant but briefs individual barristers for each client.

²⁹ [2017] QCA 43, [60]. The President's comment is probably directed more to responding appropriately if and when an actual conflict of duty arises than making sure that the correct structures and consents are in place at the beginning of the process, but is capable of referring to both.

³⁰ When consent to acting for multiple parties is being considered, it is salutary to remember the President's comment in *Pham* that one party may be dominant over others from whom consent is being requested.

³¹ *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012*, s2.

³² See LP Act, s219(1) for the Law Society's power to make legal profession rules about legal practice engaged in by solicitors.

³³ LP Act, s227(1).

³⁴ ASCR, rule 2.1.

³⁵ ASCR, rule 4.1.1.

³⁶ ASCR, rule 9.

³⁷ ASCR, rule 10.1.

³⁸ ASCR, rule 11.1.

³⁹ ASCR, rules 11.3 and 11.4.

⁴⁰ ASCR, rule 11.5.

⁴¹ These matters, including examples, are discussed in the commentary to the ASCR published by the Law Council of Australia (the commentary). The commentary, after discussing examples of non-contentious matters states that acting for multiple criminal defendants can be particularly challenging ethically because of the potential for conflicts to arise. See lawcouncil.asn.au/files/web-pdf/SolicitorsConductRulesHandbook_Ver3.pdf (accessed 16 April 2017).

⁴² See *Farrington v Rowe, McBride and Partners* (1985) 1 NZLR 83, 90.

⁴³ en.wikipedia.org/wiki/Grinch (accessed 22 February 2018).

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The importance of Mabo Day

and the *Native Title Act 1993*

Many Australians mistakenly think that native title began with the historic High Court of Australia decision in *Mabo and others v Queensland (No.2)*¹ (the Mabo decision).

However, native title is the recognition of the long-held traditional laws and customs of Australia's Aboriginal peoples and Torres Strait Islanders. These traditional laws and customs have existed and been practised since time immemorial.

All native title cases post-Mabo have been about the recognition of pre-existing and ongoing native title rights and interests by traditional owner groups in different parts of Australia.

British Empire's assertion of sovereignty

At the time sovereignty was asserted by the British Empire it was not uncommon for the colonial power to acquire sovereignty over territories with existing populations, laws and property rights. The rules for determining which rights would be recognised under the new sovereign were a matter for British Imperial law. In part, the rules depended on the distinction between settled and conquered (ceded) colonies.²

In a 'settled' or 'desert and uninhabited' colony, the laws of England, if not inconsistent with local circumstances, were imported on acquisition of sovereignty. The doctrine of continuity was thought not to pertain to settled colonies; logically, if there were no local laws then there were no rights of property to respect.³

Aboriginal peoples and Torres Strait Islanders were understood factually to have been present at sovereignty in Australia, but their social systems and governance were not recognised by British law—it was, in this sense only, *terra nullius* 'desert and uninhabited'. By the 1860s, it was increasingly accepted that Aboriginal peoples and Torres Strait Islanders were to be treated as British subjects. Thereafter, only common law would apply to govern Aboriginal peoples and Torres Strait Islanders within Australia.⁴

By the 1980s more than 200 years of anthropology and historical study of Aboriginal peoples and Torres Strait Islanders had clearly demonstrated that, far from lacking a system of laws and customs, the Aboriginal peoples and Torres Strait Islanders of Australia had, over tens of thousands of years, developed complex forms of social organisation, including laws relating to ownership and management of land. However, because of the ethnocentric view of the British Empire in 1788, they wrongly believed that the Aboriginal peoples and Torres Strait Islanders did not have a system of land law deserving recognition by the common law. Up until 1992 that remained the law.⁵

The significance of the Mabo Decision

Legal proceedings for the Mabo case began in 1982, when a group of Meriam people, Eddie Koiki Mabo, Reverend David Passi, Celuia Mapoo Salee, Sam Passi and James Rice (who are all now deceased), brought an action against the State of Queensland and the Commonwealth of Australia, in the High Court, claiming 'native title' to the Murray Islands.

When the High Court handed down its judgment on the matter in 1992, the judges acknowledged that, in the face of the historical facts and modern attitudes to

human rights, the common law of Australia, in good conscience, could no longer refuse to recognise the native title of the Aboriginal peoples and Torres Strait Islanders of Australia. In effect, the judges said that, knowing what we know now, it would be unjust for the common law of Australia to maintain the fiction that Australia in 1788 was *terra nullius*.⁶

3 June marks the anniversary of the decision which declared that the "Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands".⁷ The decision did not give benefits to the Aboriginal peoples and Torres Strait Islanders in the form of rights that they did not have before; rather it belatedly recognised rights to ownership of land which the Aboriginal peoples and Torres Strait Islanders had possessed for thousands of years before 1788.⁸

What is 'native title'?

According to the Mabo decision, the rights and interests that constitute native title have their origins in those rights and interests acknowledged under traditional laws and customs which pre-existed the assertion of British sovereignty. Native title, though recognised by the common law, is not an institution of the common law.⁹

Native title acknowledges that Aboriginal peoples and Torres Strait Islanders have a direct and continuing connection to the land since time immemorial. In addition to this, native title is the legal recognition that they have access to their land and seas to carry out their traditional practices and customs.

Mabo Day, held on 3 June, celebrates the High Court decision which gave legal substance to native title.

Report by **Leah Cameron** and **Cassie Lang**.



The laws and customs of Aboriginal peoples and Torres Strait Islanders differ between groups. Just like laws differ between the states of Australia or between countries. Also, as with the laws and customs of all living communities, the laws and customs of Aboriginal peoples and Torres Strait Islanders are not static. They change over time to meet the challenges of the day. Given the significant impact of European contact, it is not surprising that the laws and customs of Aboriginal peoples and Torres Strait Islanders have undergone substantial change over the years.¹⁰

Native title can be recognised in different ways. Aboriginal peoples and Torres Strait Islanders may be determined to have the right to live on the land; access the area for traditional purposes; visit and protect important places and sites; hunt, fish or gather traditional food or resources on the land or sea and trade them; and teach Aboriginal and Torres Strait Islander laws and customs on the land or sea. In some cases, native title can include the right to own and occupy an area of land or water to the exclusion of all others.

Native Title Act 1993 (Cth)

In response to the High Court's decision, the Commonwealth Government introduced the *Native Title Act 1993 (Cth)* (NTA), which provides a framework for Aboriginal peoples and Torres Strait Islanders to seek recognition over their traditional country. At the time of its introduction to Parliament, the NTA was said to reflect the need to balance Aboriginal peoples and Torres Strait Islanders' interests, the proposals for significant state involvement in the processes under the NTA, and industry concerns for 'certainty' – all within the overarching Commonwealth framework. The NTA was seen as an opportunity "to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management".¹¹

In summary, the NTA:

- prescribes that native title cannot be extinguished except in the manner set out in the NTA
- provides a mechanism regulating activities which affect native title rights and interests
- provides a mechanism by which native title rights and interests can be established and compensation determined
- validates past acts which may be invalid because of the existence of native title rights and interests.

Why is Mabo Day important to Aboriginal peoples and Torres Strait Islanders?

The Mabo decision was a turning point for the recognition of Aboriginal and Torres Strait Islander peoples' rights, because it acknowledged their longstanding and unique connection with the land for the last 65,000 to 80,000 years. It also led to the Australian Parliament passing the *Native Title Act* in 1993.

Mabo Day symbolises the long struggle of Aboriginal peoples and Torres Strait Islanders for recognition as custodians, protectors and knowledge holders of their culture. It also recognises that Aboriginal peoples and Torres Strait Islanders had been dispossessed of their lands piece by piece as the colony grew and that very dispossession underwrote the development of Australia as a nation. This recognition is set out in the NTA preamble.

The Mabo decision has been an inspiration for Indigenous peoples around the world and a platform to secure native title rights and interests over land and seas. Native title and the Mabo decision have encouraged more and more members of the Australian community to pay their respects and acknowledge the traditional owners on the land they stand, work and live.

Although the recognition of native title has brought great gains, there are still many challenges which remain.

Leah Cameron is the principal and Cassie Lang is a senior solicitor at Marawah Law, Cairns and Brisbane, a Supply Nation certified Indigenous legal practice. This year Leah won the inaugural QLS Queensland First Nations Lawyer of the Year award. Both are members of the QLS Reconciliation and First Nations Advancement Committee.

Notes

- ¹ [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).
- ² Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No.126 (2015).
- ³ *Ibid.*
- ⁴ *Ibid.*
- ⁵ Jeff Kildea, *Native Title: A Simple Guide – A Paper for those who wish to understand Mabo, the Native Title Act, Wik and the Ten Point Plan* (July 1998) Human Rights Council of Australia.
- ⁶ *Ibid.*
- ⁷ At [129].
- ⁸ Above n5.
- ⁹ Above n2.
- ¹⁰ Above n5.
- ¹¹ Above n2.



The government grants process

Recent trends and key issues

Government agencies manage a wide variety of grant funding programs that play an important role in achieving their priorities and objectives.

The subject matter and scope of the programs vary significantly, but the common goal is to secure benefits for Queenslanders through targeted and purposeful funding of non-government organisations.

Legislative and policy frameworks

Commonwealth government agencies are bound to comply with the grants policy framework that is made under the *Public*

Governance, Performance and Accountability Act 2013 (Cth). The framework has recently been updated with the release of the *Commonwealth Grants Rules and Guidelines 2017*, which took effect on 29 August 2017.¹ The framework and guidelines explain the key legislative and policy requirements for Commonwealth agencies in administering funding grants and also highlight best practice principles.

For Queensland Government agencies, section 6 of the *Financial Accountability Handbook* sets out provisions relevant for agencies and statutory bodies when they are developing and administering funding programs.² Queensland Government accountable officers and statutory bodies are required to have regard to the handbook

as part of their responsibility for financial administration under the *Financial and Accountability Act 2009*.

Within these parameters, government agencies are free to develop their own grant funding programs to support government policy objectives, which will have their own rules and eligibility criteria.

There are also Acts that contain specific requirements for some types of grant funding – such as the *Community Services Act 2007* (Qld) and the *Housing Act 2003* (Qld). These Acts may include specific eligibility requirements for non-government organisations, obligations about use of the funding and reporting, as well as enforcement or recovery procedures that



by Catherine Jackson

must be followed if a funding arrangement is to be suspended or terminated.

When funding is provided under a legislative scheme, care needs to be taken to ensure that any funding agreement complies with the relevant legislation. It is also important to note that some legislation automatically applies to certain types of funding and cannot be excluded by a funding agreement.

Distinction between procurement and funding

In recent years, more focus has been placed on establishing competitive processes for organisations to apply for funding. Although grant programs can be differentiated from government procurement of goods and

services, there are significant benefits in requiring an element of competition in administering grants. By assessing applications against set criteria, an agency can determine which applicant will deliver the most benefit using the grant monies.

The adoption of a competitive process can sometimes lead to confusion about whether the government is providing grant funding or undertaking a procurement. Provision of funding to an organisation to provide services, either to the government or the community, could potentially be characterised as a procurement.

Careful consideration needs to be given to the arrangement at the outset as its classification will determine what form of

agreement should be used to document the arrangement. The nature of the arrangement will also be important for determining whether the Queensland Procurement Policy 2017 applies.

Unfortunately, the distinction between funding and procurement can sometimes be difficult to make. As a general rule, if the arrangement primarily involves provision of services for payment of funds by the government, it is more likely to be procurement. On the other hand, if the arrangement is designed to support or contribute towards the provision of services by an organisation then it is more likely to be funding.

Recent trends and key issues for funding agreements

In recent years, the focus has started to shift from task-based funding arrangements to more purpose or output-based arrangements. This has seen a change in approach to drafting funding agreements and a move away from detailed task-based obligations. Instead, agencies may adopt a more flexible approach by providing funding to organisations for them to use in their discretion to achieve a specified objective or output.

The benefit in this approach is that the funded organisation has greater autonomy to deliver a specified outcome. In many cases, the organisation is better placed to determine how the funds can be used to maximise the benefit to the community.

However, this approach also carries specific risks that need to be addressed in the funding agreement and through the management processes adopted by agencies. In particular, agencies need to take a proactive role in monitoring the effectiveness of the funded organisation in using the grant monies and funding agreements need to include appropriate mechanisms to allow the agency to take action when it does not believe the funds are being used appropriately.

There are a number of key matters that should be considered when drafting and managing funding agreements, including:

1. Payment of funding

The tendency to adopt more flexible and purposive approaches to funding lends itself to a model under which funding is provided progressively. It is increasingly uncommon for funding to be provided in a lump sum.

More often, agencies stagger the provision of funding at different stages, which can be a useful management and monitoring tool. However, if this approach is adopted, it is important that the funding agreement clearly set out the applicable payment schedule and any relevant payment milestones.

Where funding is staged to allow an agency to assess progress, this must be balanced against an organisation's need for certainty in relation to funding in order to develop and implement its programs. Organisations may have particular cash-flow requirements that are particularly important when government funding is their primary source of income or when a specific project is dependent on government funding.

Another factor relevant to payment of funds is risk allocation. When funds are payable in large lump sums on an upfront basis, the agency will bear the majority of risk in relation to delivery of the funded activities. That risk can be better allocated by progressive payment of the funding. Large up-front payments should only be made where they are truly required to establish programs or if there is a demonstrable benefit.

2. Protecting funding

It is important that agencies ensure that funding agreements contain appropriate mechanisms to protect public funds. In high-risk or high-value funding arrangements, it may be appropriate to require security for performance of obligations, for example, by a registered security interest or a performance guarantee.

All funding agreements need to contain appropriate provisions that give agencies power to oversee and monitor the progress of funding programs. These mechanisms can include:

- yearly or more frequent reporting
- a right of access to information or records for the purpose of conducting audits
- a requirement to keep funding separate from other money and to account for it separately in relevant records and financial statements.

However, any contractual mechanisms alone are meaningless if they are not followed. Agencies and organisations must ensure that they properly engage in the reporting, auditing and monitoring procedures that are established under a funding agreement. It is only in this way that the performance of the program can be properly assessed and decisions made as to whether to continue funding.

Delays in providing reports or delivery of objectives should not be ignored. A failure to appropriately manage delays by a funded organisation compromises the effectiveness of both the funding program and the individual funding agreement.

3. Suspension and termination

If things go wrong, agencies may need to rely on their right of suspension or termination under the funding agreements. To terminate or suspend, the agency will need to point to a specific provision that the organisation has failed to satisfy. If the organisation's responsibilities are not clearly defined, then any notice of suspension or termination may be disputed.

Consideration should be given to the treatment of funding that is not spent at the end of the funding program or upon termination of the funding agreement. The funding agreement should clearly provide

for surplus funds to be returned to the agency or otherwise dealt with by the organisation in a manner consistent with the funding objectives.

4. GST

Government funding is not automatically exempt from GST and specific consideration needs to be given to individual funding agreements to determine whether a taxable supply is made. Australian Taxation Office GST ruling 2012/2 provides guidance on GST obligations in relation to funding agreements.

When a funding agreement is framed so as to place an obligation on the grantee to do something or to refrain from doing something in consideration for receiving the grant monies, then there may be a taxable supply for which GST must be remitted. Of course, the other requirements for a 'taxable supply' will also need to be satisfied. If there is a taxable supply the agreement would usually require the agency to pay a GST amount to the grantee in addition to the amount of the funding, which is usually specified exclusive of GST. It is likely that the agency could claim an input tax credit for amounts paid on account of GST to the grantee.

If the agreement is framed in a way that money is provided to the grantee with no positive obligation on it to do something in return, then there may not be a taxable supply. An example of where there may not be a taxable supply is when an agreement only requires funding to be spent on a certain project and, if it is not, requires it to be repaid to the government agency.

Although it may be possible to avoid GST by framing the grantee's obligations in this way, there are other considerations to take into account and it may be more important to specifically require the grantee to perform certain tasks.

The appropriate structure of a funding agreement depends on the funding amount involved and how it will be used. In some cases, it may be appropriate to draft an agreement so that a taxable supply is not made, but that can be at the expense of certainty in the grantee's obligations under the funding agreement.

This article appears courtesy of the Queensland Law Society Government Lawyers Committee. Catherine Jackson is a senior principal lawyer at Crown Law.

Notes

- ¹ finance.gov.au/resource-management/grants.
- ² Section 15(2) of the *Financial and Performance Management Standard 2009* (Qld).

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Base levy GFI rates for 2018/19 remain at all-time lows

On 26 April 2018 Queensland Law Society Council approved a levy model for 2018/19 which will retain the all-time low gross fee income (GFI) rates introduced last year.

With rates at their lowest levels since the current levy model commenced in 2007/8, this should help all insured practices contain the cost of doing business in the current volatile economic environment.

The long-term exceptional claims performance in the criminal law area will again be recognised in 2018/19, with a 20% base levy discount applying to any insured practice which derives at least 90% of its GFI from that area.

Whilst we have seen a somewhat increased level of claims and an uncertain investment climate this financial year, the strong capital position of the scheme means the benefit of these low rates can again be afforded to all insured practices.

Lexon remains committed to providing tangible benefits to the profession by delivering an exceptional insurance product at the best possible price. This could not be achieved without the profession actively embracing Lexon's risk management message, nor without the continuing support of the QLS Council.

I am pleased to report Lexon and QLS are again offering QLS members the additional comfort of professional indemnity cover beyond the existing \$2 million per claim provided to all insured practitioners. This option is available at very competitive rates with practitioners having the choice of increasing cover to either \$5 million or \$10 million per claim. Pricing was provided in your renewal pack sent by QLS. If you are interested in either of these options, please contact the Lexon team.

Areas of law practised in Queensland

The graphic below depicts the comparative size of the areas of law (by GFI) practised by Lexon insureds over the period from 2014 to 2017.

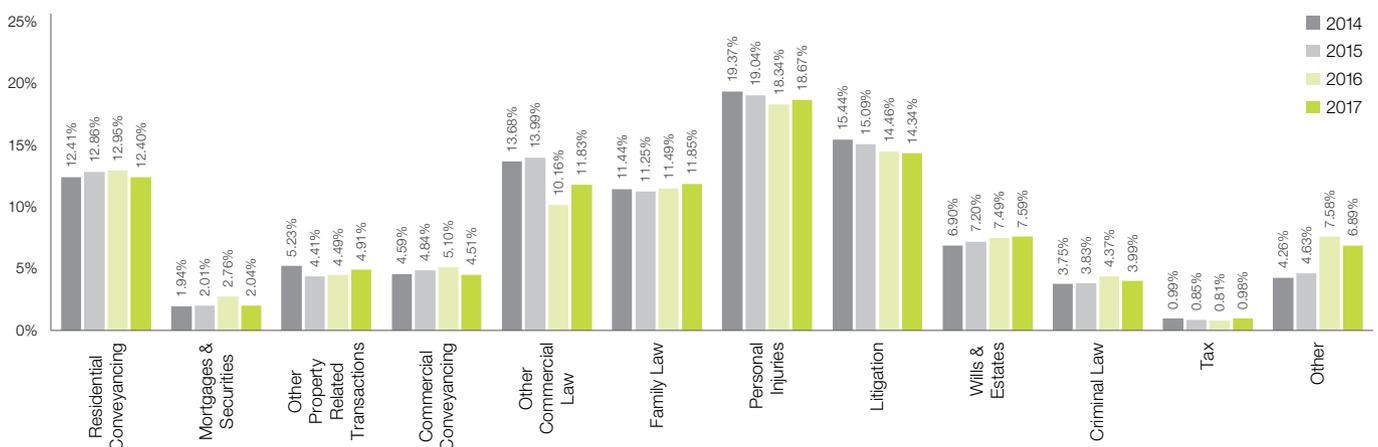
Personal injuries work remains the largest area of activity – consistently at or about 19%. Some interesting trends are starting to emerge in other areas, with wills & estates and family law continuing to grow – a trend we do not expect to change in the medium term. The proportionate decline in litigation since 2014 perhaps reflects the current sedate business environment.

Lexon-insured practices now generate in excess of \$2.1 billion of annual GFI, having grown over 3.5% year on year. This is in line with the average growth rate we have seen since 2010 and suggests that the profession remains in a relatively healthy state.

I am always interested in receiving feedback, so if you have any issues or concerns, please feel free to drop me a line at michael.young@lexoninsurance.com.au.

Michael Young
CEO

The comparative size of practice areas from 2014 to 2017



Top-up insurance now available!

QLS Council has arranged with Lexon to again make top-up insurance available to QLS members who would like the additional comfort of professional indemnity cover beyond the existing \$2 million per claim provided to all insured practitioners.

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- you deal with Lexon – the Queensland profession's insurer
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Getting ready for the end of year – practice changes (mergers, acquisitions, splits and dissolutions)

The end of the financial year is the most active time for practice changes, including purchases, mergers, amalgamations, takeovers, transfers, splits of partnership, entity transitions (for example, firm to ILP), principals (or former principals) leaving or joining, dissolutions or the recommencement of a former practice.

Given this, it is an opportune time to remind practitioners that, as part of their due diligence prior to undertaking such changes, they should consider the potential impact of the prior law practice (PLP) rule which ensures a practice (and its relevant successor) retains responsibility for the insurance consequences of a claim made against it.

There are potentially significant financial consequences (in terms of levies and excesses) which should be borne in mind when considering such changes. Law practices are strongly encouraged to understand the options available to manage these consequences. Details can be found in the Buying & Selling and Acquisition Endorsement information sheets available on the Lexon website.



Did you know?

- If you are a sole principal practice and would like to access Lexon's free HelpNow program in the event of an emergency, please make sure you have in place an enduring power of attorney with a financial power or, if an ILP, an attorney for the entity. Otherwise, if a sole principal loses capacity (say in a car accident) Lexon is unable to deploy its HelpNow program unless and until a receiver is first appointed to the practice.
- Since its inception in late 2013, Lexon's System Test (previously known as Stress Test) has expanded from transactional property work to now include binding financial agreements (BFAs), wills & estates and personal injury claims. The free program involves (where applicable) the review of sample documentation followed by a practical 'hands-on' round-table discussion with authors working in relevant areas. The program seeks to highlight the top possible failure points and allows Lexon to play devil's advocate to help practices identify and manage any gaps. This initiative represents another partnership Lexon has formed with the profession and it has been extremely well received. Indeed, the feedback has been such that we now have two risk solicitors working full time on this program – Robert Mackay and Emma-Jane McNicol.

Please contact Robert Mackay at robert.mackay@lexoninsurance.com.au if you are interested in being involved.



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Litigation privilege and witnesses

What protection applies to third-party communications?

A question can arise in proceedings as to whether communications between one party and a potential witness are, in fact, protected by legal professional privilege and if so, in what circumstances.¹

Entitlement to interview a witness

It is common for circumstances to arise in litigation where:

1. A party (Party A) interviews a potential witness for the purposes of proceedings which are either on foot or reasonably contemplated.
2. Another party to the same case (Party B) identifies the witness as being a potential witness and also approaches them for the purposes of asking the witness questions relevant to the issues in the case.

There is no restriction on different parties identifying and asking questions of a witness, and the answers which the witness gives to those questions (that is, the information itself) is not privileged information.²

If you are involved in a case which is proceeding to trial, and the parties are directed to exchange lists of witnesses to be called at trial, you should approach the witnesses on the other side's witness list and interview them about the facts in issue in the case.

If the witness has taken photographs, or recorded diary notes, or prepared a statement of their recollections in their own words, there is no restriction on the witness providing these documents to one party, even if another party to the proceeding has already been given these documents.

In *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 1)* (1999) 1 Qd R 141 at 145, Pincus JA observed that:

"If an eyewitness to a motor accident makes a statement using notes, diagrams, photographs or other documents assembled for the purpose of making the statement, the fact that the witness has first been approached by one side rather than the other should not, at first sight, give the former a superior right in respect of the documents to which I have referred. They are the witness' documents and the witness could ordinarily,

without anyone's permission, show them to the other side, produce them in court pursuant to subpoena or indeed publish them in a newspaper."

Entitlement to witness statement prepared by other party's lawyers

Litigation privilege only applies to documents or communications if they are made or prepared:

- a. in anticipation of litigation (or during pending litigation), and
- b. for the purposes of the litigation (for example, with a view to obtaining evidence for use in the litigation).³

Litigation privilege exists on the basis that, in the adversarial system, the legal representatives and their clients generally control and decide for themselves which evidence they will adduce at trial, without any obligation to make disclosure to the opposing party of the material acquired in preparation of the case.

The questions asked of a potential witness, and the answers given to those questions, and any witness statement prepared by the party's lawyer as a result of those answers being provided, will be regarded as being a communication made between a legal representative and a witness for the purposes of actual or pending litigation.⁴

Such communications are likely to be privileged, at least in the hands of the party. The policy behind extending the privilege to such communications is that, as observed by McLure JA in *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd*,⁵ with whom the court agreed:

"Disclosure of those communications would at best enable the other side to identify possible prior inconsistent statements made by the witness (much court time is often spent by counsel on such issues for little if any forensic reward) and any breach by the opposing lawyer of his or her duties in relation to the proofing of witnesses. ...It would also provide the other side with access to and the benefit of the opposing lawyer's work product. The lawyer is not a passive recipient of information volunteered by a witness. In all but the simplest litigation, the preparation of a quality witness statement requires the proofing lawyer to have a good grasp of the relevant law, understand all the relevant issues (which in this jurisdiction are not often apparent from the pleadings) and

be familiar with the discovered documents. Many insights into an opponent's case can be gleaned from access to communications between the lawyer and a witness, including from successive drafts of witness statements."

However, if the witness statement is provided to the witness by a party's lawyer, for example, and there is no restriction placed on the witness as to what they may do with that statement, the issue of whether the witness statement is privileged *in the hands of the witness* is less easy to answer, at least by reference to the common law.

That is because the authorities are divided as to whether litigation privilege attaches to communications (or documents summarising communications) between a third party, such as an independent witness, and a lawyer when they are not confidential and the relevant communication is found in the hands of the witness, rather than in the hands of the lawyer.⁶

In *Ritz Hotel Ltd v Charles of the Ritz Limited (No.22)*, McLelland J said:⁷

"Now, whether in the case of communications between a party or its representative on the one hand and a potential witness on the other, those communications can be said to be confidential so far as the potential witness is concerned, may be a nice question in many circumstances. In the case of an independent witness to some event who is interviewed by a party or his solicitor or representative with a view to his making an affidavit or giving evidence in anticipated or pending proceedings, the details of that interview would not in my view be confidential so far as the potential witness is concerned in the absence of special circumstances, because the potential witness in that situation is not a person owing any duty of confidentiality to the party or to the party's solicitor or representative. And in a situation of that kind, the question whether a claim for protection from disclosure of the communications on the basis of legal professional privilege should be upheld would in my opinion depend on whether the disclosure sought is, on the one hand, from the party or his solicitor or representative, in which case the claim should succeed, or, on the other hand, from the independent witness, in which case the claim should fail."

by Kylie Downes QC and Brent Reading



In *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd*,⁸ McLure JA (with whom the court agreed) appeared to take the same approach by stating that, “I have reservations as to the correctness of the proposition that litigation privilege protects non-confidential communications. Why should communications between a lawyer and a proposed witness in the presence of relevantly disinterested parties be protected?”

By contrast, in *Commonwealth Bank of Australia v Cooke*,⁹ Williams J (as his Honour then was) refused to make an order requiring a witness to produce for inspection a copy of an affidavit which the witness had sworn in the proceeding and which had been provided to the witness (but not filed or served). This was so even though the applicant had submitted that, “the authorities [disallow] a claim for privilege made in respect of a copy of a witness statement in the hands of the witness, absent some particular circumstances under which the witness would be obliged to keep the documents confidential”.¹⁰

In the Federal Court, the position is more straightforward because section 119 of the *Evidence Act 1995* (Cth) makes plain that the relevant communication or document must be confidential. Section 119 provides that:

“Evidence is not to be adduced if, on objection by a client, the court finds that

adducing the evidence would result in disclosure of:

- a. a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- b. the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an [existing or anticipated or pending legal proceeding] in which the client is or may be, or was or might have been, a party.”

Section 117 of the Act defines a confidential communication as being a communication which was made in such circumstances that, when it was made, the person who made it or the person who received it was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

Conclusion

There is no property in an independent third party witness. Such a witness can be interviewed by any party to a case and is free to provide their own documents to all parties. If, following an interview, a witness is provided with a document such as a

witness statement by a party, and the witness is not under any obligation to keep the document confidential, then there is a real risk that litigation privilege will not attach to the document under the general law (or that section 119 *Evidence Act 1995* (Cth) may not apply in the Federal Court).

Kylie Downes QC is a Brisbane barrister and member of the Proctor Editorial Committee. Brent Reading is a Brisbane barrister.

Notes

- ¹ This article does not consider whether, if privilege does attach, it is waived by, for example, providing a copy of a witness statement to a witness.
- ² *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No.1)* (1999) 1 Qd R 141 at 145; see also *Commonwealth Bank of Australia v Cooke* (2000) 1 Qd R 7 at 12-13 [27]-[28].
- ³ *Cadbury Schweppes Pty Ltd v Amcor Ltd* (2008) 246 ALR 137; [2008] FCA 88 (Gordon J).
- ⁴ *Commonwealth Bank of Australia v Cooke* (2000) 1 Qd R 7 at 13 [29].
- ⁵ (2007) 34 WAR 279 at [32].
- ⁶ *State of New South Wales v Jackson* [2007] NSWCA 279 at [37]; *ACCC v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547 at [34].
- ⁷ (1988) 14 NSWLR 132 at 133-134.
- ⁸ (2007) 34 WAR 279 at [33]; see also *ACCC v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547 at [34]-[37].
- ⁹ (2000) 1 Qd R 7.
- ¹⁰ (2000) 1 Qd R 7 at 12 [26].

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The truth about lying

by Stafford
Shepherd



I have learned that my client has lied when giving evidence before a court. What are my duties?

We are ethically obliged to deliver legal services competently and diligently and not to disclose any information which is confidential to a client and acquired by us during the client's engagement, unless permitted by the conduct rules.¹

We are also officers of the court. We have not only a legal duty but an ethical obligation to the administration of justice – this duty and ethical obligation is paramount and prevails to the extent of consistency with any other duty.² As officers of the court we cannot assist our client in perpetrating a fraud on a tribunal.

Rule 20.1 Australian Solicitors Conduct Rules (ASCR) requires that if we, as a result of information provided by the client or a witness called on behalf of the client, learn during a hearing or after judgment or the decision is reserved and while it remains pending, that the client or a witness called on behalf of the client:

- has lied in a material particular to the court or has procured another person to lie to the court
- has falsified or procured another person to falsify in any way a document which has been tendered, or
- has suppressed or procured another to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court

We must:

- advise the client that the court should be informed of the lie, falsification, or suppression and request authority so to inform the court, and
- refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie, falsification, or suppression. We must promptly inform the court of the lie, falsification, or suppression upon the client authorising us to do so, but otherwise we may not inform the court of the lie, falsification, or suppression.

What rules 20.1.4 and 20.1.5 require of us are:

- to inform the client that the court must be told of the client's or witness's perjury, and that we must seek the client's instructions to inform the court of the perjury, and
- if our client refuses, or just fails to give instructions to permit us to inform the court of the perjury, we must terminate our retainer with the client and withdraw from representing the client before the court. We are, in those circumstances, not permitted to inform the court of the lie, falsification, or suppression when withdrawing.³

Atkinson J in *Perpetual Trustee Ltd v Cowley*⁴ observed that we have a duty to robustly represent our clients, but we are "not merely a passionate and gullible mouthpiece".⁵ The other party and the court may have their suspicions as to why we withdraw, but such withdrawal without more is not a breach of the confidential information we have of our client's or the client's witness' perjury.

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

Notes

¹ Rules 4.1.3 and 9, Australian Solicitors Conduct Rules 2012 (ASCR).

² The legal duty is referred to in *Giannarelli v Wraith* (1988) 165 CLR 543 at 555-6 (Mason CJ) and at 572 (Wilson J). The ethical obligation is Rule 3.1 ASCR.

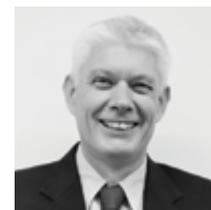
³ *Perpetual Trustee Co Ltd v Cowley* [2010] QSC 65 at para [130]. It should be noted that this case also dealt with the issue of when a solicitor is under a duty to correct a misleading or false statement made by a solicitor to a court. In that context see para [132].

⁴ *Ibid.*

⁵ *Ibid.*

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Copyright and piracy

Why legislators and the law fail in the digital age

While watching the questioning of Mark Zuckerberg in the aftermath of the Facebook data leak, I couldn't help but notice the lack of knowledge amongst the politicians (evidenced by the questions they were asking) with respect to the internet and its *legal* regulation.

I cringed watching senior members of the United States Congress struggle to even read the questions on the papers before them, stuttering through as though they were reading a different language. Are these the same political representatives who will determine whether certain laws will be effective in regulating the internet and 'big data'?

Unfortunately yes, and regrettably, this disconnect between disciplines is not exclusive to America.

Recent and frequent legislative reforms reflect the dedication of Parliament to address and eradicate online copyright infringement in Australia. However, despite these efforts, Australia still maintains one of the highest piracy rates in the world.¹ This suggests that Australian copyright laws remain *ineffective* in preventing piracy and brings into question whether the reason for this ineffectiveness is a deficiency in the law, its implementation, or another, perhaps external, factor.

In order to assess the effectiveness of a law, it must be measured against the purpose for which it was created. Does the law do what legislators intended it to do? Has it solved the problem it was created to solve? Are there other factors affecting or preventing the proper functioning of the law?

The series of failed attempts and legislative reforms indicate that a unilateral approach which ignores the intersection of the telecommunications and entertainment sectors is, and will continue to be, ineffective in preventing piracy.

Copyright itself is limited in its scope. Copyright protects the *form* of expression of ideas.² It does not expand to the protection of ideas, information, styles or techniques.³ It is limited in its application to expressions in *material* form. The Australian *Copyright Act 1968* (Cth) recognises these forms in literary, artistic, dramatic or musical works⁴ and in subject matter other than works⁵ as set out in the Act.

However, copyright should not be confused as providing a general right of ownership. Copyright protects distinct rights; the right to reproduce the work in material form,⁶ the right to publish the work,⁷ the right to perform⁸ and communicate⁹ the work to the public; and the right to make an adaptation of the work.¹⁰

Copyright creates an intangible property in the form of expression and the way in which the idea is expressed.¹¹ Once a work is expressed in material form, protection applies immediately, automatically, and at no cost to the creator.¹² This provides content creators with an incentive to create new works and a legal framework for the control and protection of their creations.¹³

An *infringement* is a violation. Deductive reasoning suggests that *copyright infringement* is the violation of a *copyright*. Therefore, the relationship between copyright and copyright infringement is unambiguous; the former represents the right, while the latter represents a violation of said right.

The relationship between *piracy* and *copyright infringement* is not as simple. The early contemporary English *Treatise on the Laws of Literary Property*¹⁴ saw the term 'piracy' being used simply as a word meaning 'infringement'. This would mean that, in terms of copyright, the term 'piracy' is merely a synonym for copyright infringement.¹⁵ However, this is not the case. While piracy has been widely used to describe 'infringement' generally,¹⁶ it has also been distinguished from copyright infringement as the "act of selling unauthorised copies for profit" (as opposed to individual copying).¹⁷

Notwithstanding the importance of an internal, doctrinal analysis of the law, a socio-legal approach allows for the consideration of external factors in assessing the effectiveness of a law. In particular,

socio-legal methodology seeks to study the law in practice¹⁸ and considers how legal institutions work in society.¹⁹ This is in contrast to the strict study of "legal rules in a social, economic, and political vacuum",²⁰ a common criticism of doctrinal analysis.

Piracy by its very nature demands the attention of the respective regulatory and enforcement sectors of content creators and entertainment industries. Online copyright infringement demands the attention of an additional sector – telecommunications and its service providers. In order to address such a multi-faceted issue, interdisciplinary considerations *and communication* become paramount.

According to a 2015 report commissioned by the Australian Copyright Council,²¹ "the internet has dramatically disrupted the creation, distribution and consumption models for copyright material".²² On one hand, the digital era has enabled content creators to reach new and larger audience groups. On the other, it has challenged the boundaries of copyright.

The report identified the 'fundamental' ways in which copyright has been challenged by the internet. Firstly, it proposes that digital consumption has changed the relationship between audience and creator.²³ Secondly, it claims Australians are prolific consumers of 'pirated' content,²⁴ regularly citing the lack of accessibility, time delays and high cost of new legal creative content.²⁵

Consumer convenience: 'Fast and free'

The proposition that (high) costs are a contributing factor to pirating content is consistent with the findings of the Intellectual Property Awareness Foundation (IPAF); an Australian organisation committed to educating people about the value of screen content.²⁶ It seeks to inform Australian consumers of the choices they can make to contribute to the future of the nation's film and television community.²⁷ In its annual research summary into "the online behaviour and attitudes of Australians in relation to movie and TV piracy",²⁸ the foundation identified the 'primary motivator' for illegally downloading movies and TV shows in 2013 was that it was *free* of cost.²⁹

Is legislation really the answer to online piracy and copyright infringement?

Report by **Sheetal Deo**.

While the IPAF is silent on the subject of accessibility as a motivating factor, statistics from the popular file-sharing websites speaks volumes. According to Torrentfreak, Australians broke records with the series finale of *Breaking Bad*. Despite the fact that the finale was scheduled to air in Australia on the Foxtel cable network less than seven hours after the US premiere, Australia held the highest number of illegal downloads of the file.³⁰

Australian consumers want content; and whenever possible, they want it for free. The readily available, easily accessible and free content has bred a growing sense of entitlement amongst illegal downloaders. As consumers, they have developed an expectation that content creators should provide their work for free and across as many platforms as there are available. When this expectation is not met by content creators, consumers resort to pirated content.

Changing dynamics: Consumers as content creators

The change of relationship between audience and creator is evidenced by consumer use and consumption of creative content. The digital era has facilitated a shift from a passive enjoyment of creative content to an active participation in its distribution and modification. Online social platforms such as YouTube, Instagram and Facebook have enabled audiences to edit, upload, 'like' and 'share' their favourite songs, movies, or TV shows.

This represents a shift in the onus to determine copyright status from the *original* content creator to the user and puts the original content creator in a disadvantaged position, forcing them to compete with the consumer to distribute their own content faster, cheaper and across a wider number of platforms. Inevitably, it is the original content creator who is at a loss because the consumer (not having to incur any loss) is often willing to distribute the content for free. It is nearly impossible then for the original content creator, having invested their time and money into the creation of their work, to compete with the consumer without serious detriment to themselves, their content and the industry.

All of the above identifies the lack of regulation and enforcement as the *legal* issue. Legislators are unaware as to whose responsibility it is to monitor the upload, distribution and download of copyrighted content and content holders are left to suffer in silence without any legal recourse. Internet users continue to download illegal content, often remaining 'anonymous' to content creators³¹ and internet service providers (ISPs) cannot disclose personal information that can be used to identify a consumer.³²

Equally concerning, however, is the increasing sense of entitlement amongst consumers. This highlights an additional, *social* issue: consumer lack of awareness and education. Illegal downloaders are either unaware of the ramifications of online copyright infringement, or under-educated as to its long-term effects on content creators and their respective industries.

Despite several attempts by the Australian Government to redress the damage with legal reports and legislation, Australian piracy and copyright issues remain at large, which begs the question whether the inadequacy is not in the legislation, but in the use of legislation as a solution.

Whilst character count restrictions prevent an in-depth doctrinal analysis of the development of copyright law as it pertains the piracy prevention, the question at hand is whether a legislative response is even appropriate to begin with.

In truth, albeit conscious of the multidimensionality of the piracy problem, legislators have repeatedly ignored the relevant sectors; including the content creators and the telecommunications sector. This seems absurd given that the telecommunications sector is the provider of the medium through which *online* copyright infringement takes place.

It appears that it is not the legislation that is unable to keep up with the digital era of copyright, but the legislators who are unable to comprehend the digital era. In the absence of a more *collective* approach which gives deference to the rightful sectors, it is unlikely that any laws will be effective in preventing piracy in Australia.

This article appears courtesy of the Queensland Law Society Early Career Lawyers Committee Proctor working group, chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and Adam Moschella (amoschella@awbale.com.au). Sheetal Deo is a lawyer at Anthony Delaney Lawyers.

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Magic money – estate litigation and cost orders

“But don’t you just take your costs out of the estate?” demands the righteous caller, scoping for a solicitor to take on their estate litigation.

There is a belief amongst lay people and some lawyers, albeit mistaken, that a deceased estate bears the burden of the costs of litigation.

This belief likely finds its origins in the seminal family provision decision of *Singer v Berghouse* in which her Honour Gaudron J noted that “family provision cases stand apart from cases in which costs follow the event. Costs in such a case depend on the overall justice of the case.”² The premise for this is that family provision applications are a unique creature of statute which exist to right the actions of a testator who was not “wise and just”.³ Accordingly, it is usual that the estate of the testator shoulders much of the costs burden in a family provision claim.

However, this approach in family provision matters has always been tempered by the concept of ‘proportionality’ in litigation. Referencing the New South Wales’ court rules on costs, Palmer J has stated that rules as to costs “were designed to put into the Court’s hands a brake on intemperate and disproportionately expensive conduct of proceedings”.⁴

It is trite law, but nevertheless noteworthy, that litigation is conducted according to the rules of the court⁵ and those rules generally dictate that the unsuccessful party pays the successful party’s costs of the litigation.⁶ The amount of a costs order will depend upon a complex intersection of the court rules and the conduct of the litigation, with the court retaining “a wide discretion on the issue of costs and each case depends on its own facts”.⁷



People should know when they’re conquered.”

– Quintus, *Gladiator*¹

In recent years, there has been a shift towards a more restrictive approach to costs orders in family provision claims. In *Carroll v Cowburn*,⁸ while acknowledging that “practically speaking the court has little control over costs in family provision matters”, Young J cautioned that as a general guideline an applicant would not receive an order for costs any larger than the award from the estate. So, for example, “if the estate is \$700,000, the plaintiff’s costs \$200,000, and the plaintiff receives of legacy of \$50,000, the plaintiff’s costs would be capped at \$50,000”.⁹

Fifteen years has passed since Young J advanced the warning that costs capping is a risk to litigants in family provision matters, “particularly for those claimants who are not particularly concerned about how much they get out of the estate as long as they ruin it for everybody else”.¹⁰ Since then family provision litigation has significantly increased, with reports of increases in Victoria of 73% in the last 13 years, in New South Wales of 52% in the last seven years.¹¹ In response, the courts have applied cost-capping orders to applicants¹² and respondent personal representatives¹³ alike.

However, it should be noted that estate litigation is not merely confined to claims for further provision. Estates can be the subject of all manner of litigation that traverse a variety of causes of action. Most recently the Victorian Supreme Court demonstrated the grave risks relentless litigants take in pursuing court proceedings in a gladiatorial way.

In the matter of *Molnar v Butas (No.4)* [2018] VSC 165, McMillan J ordered a plaintiff to personally pay costs on an indemnity basis for pursuing a hopeless case. “On 22 November 2017, the Court dismissed the plaintiff’s application for the removal of the defendant as the executor of the estate of the deceased. The Court determined that the plaintiff’s grounds for the removal of the defendant as the executor of the estate were contrived, without substance and there was no proper basis for the removal of the defendant.”¹⁴

Relying on a number of decisions¹⁵ in concluding that a special order as to costs was appropriate, McMillan J cautioned that:

“Where an action has been commenced or pursued in circumstances where an applicant, properly advised, should have known he had no chance of success it may be presumed to have been commenced or continued for some ulterior motive or in wilful disregard of the known facts or established law. It is not a prerequisite to the power to award special costs that a collateral purpose or a species of fraud be established. The discretion is enlivened when, for whatever reason, a litigant persists in, what on proper consideration should be seen to be, a hopeless case.”¹⁶

This caution was not confined to litigants but also their legal representatives. At paragraph 13, McMillan J went on to warn:

“Practitioners and litigants must also have regard to the overarching obligations contained in the *Civil Procedure Act 2010* and the overarching purpose of the Act to ‘facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute’. These obligations include not making a claim that does not have a proper basis.”



with Christine Smyth

These decisions demonstrate a trend – when litigants do not self-regulate, the court will do so via costs orders. If this does not temper the eagerness of estate litigants to pursue their grievances, then it will be but a matter of time before Parliament steps in.

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- ⁵ *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) – made under the *Supreme Court of Queensland Act 1991* – as at 24 November 2017 – Reg.111 of 1999 (UCPR); *Uniform Civil Procedure Rules 2005* (NSW) – made under the *Civil Procedure Act 2005* (NSW) – As at 7 April 2017 – Reg.418 of 2005; *Supreme Court (General Civil Procedure) Rules 2015* (Vic.) – made under section 25 of the *Supreme Court Act 1986* (Vic.); *Supreme Court Civil Rules 2006* (SA); *Rules of the Supreme Court 1971* (WA); *Supreme Court Rules 2000* (Tas.); *Supreme Court Rules* (NT); *Court Procedures Rules 2006* (ACT).
- ⁶ For Queensland the applicable rule is r681(1) UCPR.
- ⁷ *Cerneaz v Cerneaz & Anor (No.2)* [2015] QDC 73 at [50].
- ⁸ [2003] NSWSC 248.
- ⁹ At [36].
- ¹⁰ *Ibid.*
- ¹¹ theaustralian.com.au/news/inquirer/its-a-battle-of-wills-when-estates-are-contested/news-story/87ccb8b42cb74f683b5376ebf0fb61c.
- ¹² *Gill v Smith* [2007] NSWSC 832; *Underwood v Underwood* [2009] QSC 107; *Jones v Jones* [2012] QSC 342.
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Eyes in the sky, and all around

Computer vision threatens current notions of privacy

Traditional notions of privacy are being challenged with advancements in technology, particularly computer vision.

In recent years this technology has grown in popularity, with improved accuracy and performance to the point where computer vision surpasses human performance in some instances.¹ Computer vision improves on facial recognition technology as it combines feature, image and pattern recognition with position, orientation, motion detection and gaze tracking. This new computer vision technology has been widely applied in government security, such as in passport security and border control, immigration and crime control.

More interestingly, computer vision technology has also been increasingly applied in the commercial sector. The technology is being developed by some of the world's largest technology companies before regulators have had an opportunity to consider the ramifications.² The issues with these rapid advancements are that the extent of private sector development and the ability to deploy this technology are unknown and require a more thorough understanding to regulate effectively.

Privacy in Australia

Computer vision allows companies to identify and track users' movements and social activities. Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR). Article 17 of the ICCPR provides for a right to privacy. Otherwise, Australia does not have a constitutional right to privacy, and the common law protections of privacy are generally limited to what is encompassed by tort law.³

The *Privacy Act 1988* (Cth) (Privacy Act) was introduced as Australia's response to its international obligations under the ICCPR. It regulates the use of personal information by Commonwealth Government agencies and certain private organisations, and enshrines the Australian Privacy Principles (APPs).

The Privacy Act only applies to private organisations with a turnover of more than \$3 million, meaning there is a 'small business' exemption. This creates a concerning gap within the framework, as 94% of businesses do not meet this threshold.⁴ The predominant issue with the current framework is that, while it imposes a 'transparency' framework and a consent requirement for the collection of sensitive information, computer vision challenges these concepts as it innovates the way that data can be collected and allows data to be collected seamlessly without requiring consent. Computer vision also challenges the notion of notification.

Commercial uses of computer vision

Computer vision is currently being used in a number of commercial applications, but the full extent of its current application is not yet known. Companies developing facial recognition software cite four types of functions that can currently benefit from this technology:⁵

- marketing and customer service
- safety and security
- photograph identification and organisation
- secure access and authentication.

Computer vision can now be used to track a customer walking past a store by identifying them on camera. This can then allow a company to send a notification to that person's phone about potential sales in the shopping centre.⁶ From a business perspective, this capability is an invaluable marketing tool that can enhance customer engagement.

Computer vision also has applications in billboard customisation, whereby the technology can identify a customer's gender, age and other specific factors and can use this information to create personalised advertisements in real time. A further use of this technology is within the home via smart TVs. With the use of 'gaze tracking', businesses can analyse precisely who is viewing advertisements, as well as their response.⁷

Going beyond the APPs

It is likely that additional privacy principles are required to safeguard against emerging technologies.⁸ The three most prominent and necessary additional principles are transparency, dynamic consent and privacy by design.⁹

1. Transparency

There are two important ways that companies can facilitate transparency. These are by developing and publishing privacy policies, and providing notice that computer vision is being used.¹⁰ The principle of transparency also requires that any information addressed to the public should be easy to understand and easily accessible.¹¹ Further, companies should be candid about their business models and what sort of results data mining is expected to produce.¹²

Most social media businesses trade personal information for an array of free services. While sophisticated internet users may understand searching online is funded through the monetisation of their personal information, most online services are opaque with their privacy policies and disclosure to customers. This is an example of a lack of transparency.

2. Dynamic consent

The large quantity of personal information collected by vision sensors challenges existing concepts of consent and notification in surveillance and privacy. It is difficult to gain consent when individuals are identified or profiled against other datasets.¹³

To gain dynamic consent, businesses should try to disclose all conceivable future uses of the data and, when new ways to use the data arise, businesses should seek permission to use the data in this way.¹⁴ The challenges raised by this proposition mean artful user interface design is required to come close to achieving dynamic consent.¹⁵

3. Privacy by design

Privacy by design means building in reasonable privacy and security controls at all stages of product development. It includes promoting consumer privacy and data security throughout one's organisation.

Conclusion

The tension between technological advancements and the right to privacy is a constant battle in law. It is evident that, while Australia maintains a conservative privacy framework, computer vision and other emerging technologies have the ability to undermine the protections that it attempts to afford.



by Rachel Treasure, The Legal Forecast

This technology demonstrates that, as personal information can now be seamlessly and unknowingly obtained from individuals, amendments to the privacy framework are required in order to provide adequate protection. Australia, as an innovation nation, plans to be at the forefront of advancements in technologies. It is critical that outdated laws do not hinder this ambitious goal.

Rachel Treasure 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.

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Recklessness leads to landmark WHS prosecution

\$900K fine for NSW category one offence

A landmark decision under the *Work Health and Safety Act 2011* (NSW) proves costly for a quarry operator with a reckless attitude to workplace health and safety.

Report by **Andrew Ross**.



New South Wales company Cudal Lime Products Pty Ltd (Cudal Lime) has been prosecuted and fined \$900,000 following the fatal electrocution of a woman in her home in 2014.

The case, *Orr v Cudal Lime Products Pty Ltd; Orr v Shannon* [2018] NSWDC 27, was brought by the NSW Resources Regulator to the NSW District Court.

The woman lived with her partner, who worked for Cudal Lime, in a home owned by the company and located 200m from its limestone quarry near Orange in central NSW. The quarry and its production operator had failed to meet many standard Australian health and safety regulations. This included having a history of damaged and badly worn electrical equipment, ineffective automatic disconnection of the electricity supply, and a lack of important safety mechanisms within the quarry's switchboard.

The operation of heavy processing machinery on the quarry's hazardous power supply sparked an electrical current, which surged to the woman's home, charging its metallic fixtures. The woman was in the shower at the time and suffered a fatal shock.

Cudal Lime's failure to adhere to NSW's *Work Health and Safety Act 2011* saw it charged under s31 with a category one offence – the highest category in NSW, carrying a maximum penalty of \$3,000,000 for corporations. This category accounts for reckless conduct, which exposes an individual to the possibility of death, serious injury or serious illness.

The production operator had been instructed to undertake electrical work on the quarry, despite having no electrical qualifications. The court found that Cudal Lime's decision was driven by a desire to cut costs and was devoid of social utility.¹ The court also found there were a number of reasonably practicable steps that could have been easily taken by Cudal Lime to eliminate or minimise the WHS risk.

It further considered that the quarry's history of electrical issues aggravated Cudal Lime's recklessness.² This distinguished them from category two and three offences because they were reckless as to the risk, meaning they held an indifference to the health and safety of others. This state of mind has a higher threshold of proof than the lower categories, so generally carries higher penalties.

As this is the first successful prosecution, it is further evidence of the prosecution's heavy evidential burden. The quarry's breaches of the health and safety regulations showed such a wilful disregard for lives that it pleaded guilty to the category one offence.

Additionally, the production operator was also charged with a category two offence because he failed to maintain a safe work environment and did not take reasonable steps to eliminate the electrical risks. He also pleaded guilty and had his fine reduced to \$48,000, significantly less than the maximum \$150,000 for an individual.

Queensland comparison

In Queensland, there is an additional tier to the offences under the state's *Work Health and Safety Act 2011*. Above the category one charge is the industrial manslaughter provision under Part 2A of the Queensland Act. If a similar set of facts occurred at a Queensland workplace³ after the commencement date of 23 October 2017, Cudal Lime may have been charged with industrial manslaughter.

This is more severe than a category one offence because there must be a resultant death, however the threshold test of category one's 'reckless' and industrial manslaughter's 'negligent' are analogous. It is unlikely the woman would qualify as a 'worker' to meet the requirements for industrial manslaughter.

The greater severity is also shown by the charge's maximum penalty – 20 years' imprisonment for an individual or \$12,615,000 for a corporation. The industrial manslaughter laws were introduced in Queensland after the tragic deaths at Dreamworld and Eagle Farm revealed a gap in the law between the

potential seriousness of an offence and the relatively small penalty.

"These harsher penalties serve as a deterrent to employers who might be tempted to cut corners when it comes to safety in the workplace," Industrial Relations Minister Grace Grace said in a statement last year.

Workplace fatalities may also bring about charges of criminal manslaughter, when a person has been unlawfully killed without the intention of causing death or grievous bodily harm. This carries the maximum penalty of life imprisonment.

An industrial case with an application of criminal manslaughter will be awkward to prove compared with industrial manslaughter, particularly if the negligence flowed from a business decision, policy or deliberation that could not be attributed to a person. The extreme penalty associated with criminal manslaughter would only suit exceptional cases.⁴

Conclusion

The emerging laws have seen a trend of increasing severity, from the category one offences to Queensland's currently unique industrial manslaughter laws.

What this means for companies is that greater importance must be placed on the health and safety regulations that ensure the wellbeing of their workers and all those they could potentially affect.

Andrew Ross is a senior associate at Sparke Helmore Lawyers. The author gratefully acknowledges the assistance of Lachlan Thomas in the preparation of this article.

Notes

¹ [136], citing *Aubrey v R* [2017] HCA 18, [49].

² 2018] NSWDC 27 at [137].

³ The Queensland *Mining and Quarrying Safety and Health Act 1999* applies to most quarries in Queensland. It does not have an industrial manslaughter provision at this stage.

⁴ Claudio D'Alessandro, the builder in charge of a site at Eagle Farm Racecourse, was charged in 2016 with criminal manslaughter following the death of two construction workers.

Son gains access to parents' 1977 court file

with Robert
Glade-Wright



Procedure – Full Court grants adult son access to his parents' 1977 court file pursuant to FLR 24.13

In *Carter* [2018] FamCAFC 45 (6 March 2018) the Full Court (Ainslie-Wallace, Murphy and Aldridge JJ) allowed the appeal of a 53-year-old son against Johns J's dismissal of his application for access to his parents' 1977 court file. After their separation in 1976 he lived with his mother and three siblings until he was 15 when he began living with his father. When 17 he boarded with another family.

His wish was to search the court record in the hope of "mak[ing] some sense of" why his family became "dysfunctional" and to better understand why he was separated from his siblings ([17]-[20]). Johns J limited the son's access under FLR 24.13 to his parents' consent parenting orders, refusing leave to search the rest of the file.

Ainslie-Wallace J (with whom Murphy and Aldridge JJ agreed) said (at [22]-[23]):

"The primary judge found that the appellant had a proper interest in the proceedings to make the application (r24.13(1)).

However, she refused the appellant access... because...she was concerned as to what benefit he might obtain from inspecting the file...Her Honour said...that she was not persuaded 'that the pursuit of such information is reasonable'."

Ainslie-Wallace J concluded (at [36]-[38]):

"Her Honour was obliged to consider whether the appellant's request to access the file was reasonable in light of his stated purpose...This purpose was that he wanted to look at the file to see whether there was anything in it which might make sense of his living arrangements after his parents' separation and to undertake an 'autopsy' on his family history..."

Her Honour determined that the access sought was not reasonable in light of that purpose, not by reference to the dictates of the rule but by reference to...whether to inspect it would provide him with answers.

In my view, her Honour erred by having regard to irrelevant matters when determining the question of reasonableness of the request for access and the matters to which she referred were unsupported by evidence before her."

Property – competing approaches to valuation of 'rural lifestyle property'

In *Granger* [2018] FCCA 51 (12 January 2018) a 'rural lifestyle property' was valued by single

expert 'Mr L' at \$595,000 but by the wife's valuer 'Mr J' at \$800,000. The valuers agreed ([35]) that the property was not commercially viable and that there were a limited number of comparable sales. Judge Terry preferred Mr L's valuation, saying (from [39]):

"There are problems with Mr J's approach. First, he used the carrying capacity of the property to arrive at a figure which represented the bottom of his range but he conceded... that the property was not...commercially viable...and that this was not an appropriate method...to value this property. (...)

[43] ...Mr J determined the values of the various components of the land (wooded, improved pasture, cleared) by extracting rates from other sales which he said were not comparable.

[44] ...[T]here was a dispute about whether Mr J had correctly identified the amount of improved pasture... (...)

[46] I cannot...be satisfied...that the property has the higher proportion of cleared land...[[f] the carrying capacity method is discounted as a proper valuation method Mr J's only method of valuing it was the component method. He had no regard to sales material (...)

[50] Mr J was firm...that there were no comparable sales...but there is some sales data and Mr J...did not make any attempt to cross-check his component approach with any of [it]."

Nullity – wife remarried before determination of her divorce proceedings – visa considerations

In *Kirvan & Tomaras* [2018] FamCA 171 (21 March 2018) the wife married 'Mr D' overseas in 2015 but moved to Australia on a student visa in 2016. She declared her marriage in her visa application but a month later advised the Department of Immigration that she and Mr D had separated. She then filed divorce proceedings, but due to service difficulties a divorce was not granted until late 2017. In the meantime the wife began living with the respondent, marrying him in mid-2017.

Berman J said (from [18]):

"The parties were concerned as to the cultural integrity of their cohabitation... [being] not married. They decided to marry notwithstanding that each of them knew that the wife's marriage to Mr D was not yet formally dissolved. The wife contends...that the parties felt that the 'marriage was not valid any longer'.

(...)

[21] The wife seeks a decree of nullity on the basis that at the time of her marriage...she was still married to Mr D. (...)

[26] The submissions of the wife's solicitor were unconvincing. It was also apparent that the wife's solicitor's experience is predominantly in migration law and his involvement with the parties seemed to be concerned with an application for the parties to secure a visa... (...)

[28] I was left with the distinct impression that the application for a decree of nullity was ancillary to other applications...pending pursuant to the *Migration Act*... (...)

[30] The...[marriage] certificate reflects that each of the parties were 'Never Validly Married'.

[31] Whilst it may have accurately described the husband's marital status, it did not apply to the wife. (...)"

The court declared her latest marriage a nullity on the ground that she was lawfully married to another person. In referring the parties to the Commonwealth Director of Public Prosecutions, the court concluded (from [58]):

"It is difficult to view the wife's conduct and perhaps that of the husband as anything less than a wilful disregard of the requirement that she make full and frank disclosure in relation to her marital status.

[59] The evidence...strongly supports the proposition that the wife and by implication the husband, were prepared to...misrepresent...that at the time of the marriage ceremony the wife...[was not] married to Mr D.

[60] Whilst the Court has the discretion as to whether the papers should be referred, I consider...th[is] conduct...to be blatant in order to undergo a marriage ceremony... where they knew that it was not permissible to do so.

[61] It is a matter for the relevant authorities as to whether the parties or either of them will be the subject of prosecution [for bigamy]."

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High Court and Federal Court casenotes

High Court

Equity – power of a court to set aside a perfected judgment – fraud

Clone Pty Ltd v Players Pty Ltd (In liquidation) (Receivers and Managers Appointed) [2018] HCA 12 (21 March 2018) concerned the scope of the equitable power of the Supreme Court of a state to set aside its own perfected judgment. The proceedings concerned a dispute about the interpretation of a lease executed between the parties and, in particular, whether the lease provided for a transfer of lease premises and licences for “NIL” consideration. That dispute turned on whether the respondent had struck through the word NIL when the lease was executed. No original of the lease was found and copies of the lease produced to the court by the parties were inconclusive, but tended to suggest the word was not struck through. However, unbeknown to the respondent, junior counsel for the appellant had been told by an employee of the Liquor and Gambling Commissioner (commissioner) about another copy of the lease (the ‘third copy’) that showed the strikethrough more clearly. The employee was instructed not to copy the lease, to avoid its discovery, and later subpoenas were directed at files held by the commissioner that did not contain the additional copy of the lease, meaning that the third copy was never produced to the respondent. A fourth copy was, however, produced to the court as part of a further file, but was never called on. At first instance, the South Australian Supreme Court found for the appellant, largely because of a finding that the word NIL was not struck through. The respondent later found out about the third and fourth copies and brought proceedings to set aside the judgment and to get a new trial. The respondent alleged malpractice on the part of the appellant and argued that the judgment could therefore be set aside. The primary judge and the Court of Appeal accepted those arguments. The High Court held that the equitable power to set aside was limited to actual fraud, though there were other grounds for setting aside not relevant in this case. Malpractice was not sufficient. Fraud had to be clearly pleaded and proved, which had not occurred. The proper application was a new proceeding seeking to rescind the perfected orders, not an application in the original proceedings. Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ jointly. Appeal from the Full Court of the Supreme Court (SA) allowed.

Criminal law – murder and manslaughter – appeal on conviction – acting on incorrect advice – miscarriage of justice

In *Craig v The Queen* [2018] HCA 13 (21 March 2018) the High Court considered whether there had been a miscarriage of justice as a result of incorrect advice given by counsel. The appellant was convicted of murdering his partner. He claimed that they had been drinking and had an argument, and his partner picked up a knife. The appellant disarmed her, but accidentally cut her neck. He admitted the act, but argued that the requisite intent was not present. The appellant did not give evidence at the trial. He was advised by his counsel that if he gave evidence, it was likely he would be cross-examined on his criminal history, which included a conviction for a fatal stabbing; and on inconsistencies between his evidence and his statement to police. The second part of the advice was correct, but the first part was not. The appellant appealed his conviction arguing that the trial miscarried because his decision not to give evidence was based on the incorrect advice. The Court of Appeal rejected that argument, holding that there was a sound forensic reason not to give evidence. The High Court held that to find that a trial was not fair requires satisfaction that the accused wished to give evidence and the incorrect advice effectively deprived the accused of the chance to do so. That finding does not depend on an assessment of whether an objectively rational justification for the original decision can be discerned. Instead, the appellate court looks to the nature and effect of the incorrect advice on the accused’s decision. In this case, the Court of Appeal’s conclusion was correct, as the evidence did not show that the appellant’s trial would have been conducted differently had the incorrect advice not been given. Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ jointly. Appeal from the Court of Appeal (Qld) dismissed.

Administrative law – appeal from Supreme Court of Nauru – migration

In *WET044 v The Republic of Nauru* [2018] HCA 14 (11 April 2018) the High Court dismissed an appeal from a decision of the Nauru Supreme Court, rejecting an application for asylum. The appellant arrived by boat to Australia and was transferred to Nauru, where he lodged an application to be recognised as a refugee. The application was rejected by the Secretary of the Department of Justice and Border Control of Nauru. On review before the Refugee Status Tribunal (RST), the appellant submitted additional material, including ‘country information’ (generalised information

about a country) in support of his claims. The RST affirmed the Secretary’s decision. The Supreme Court affirmed the RST’s decision on review. Before the High Court, the appellant argued that the RST had failed to consider the country information and had failed to afford him procedural fairness by failing to put to him other country information that it relied on. The High Court rejected both grounds. On the appellant’s country information, the court held it should not be inferred that the RST would ignore the information, having read and referred to the submissions to which the information was attached. In any event, the information was not such as to require comment from the RST: most of it was before the Secretary in other forms and did not contradict the Secretary’s opinions. The court identified several pieces of information that were not expressly mentioned by the RST, but which the court found were covered by other material or contained only general information. On the RST’s country information, the court held that it was information already known to the appellant. Procedural fairness did not require that it be brought to his attention. Kiefel CJ, Gageler and Keane JJ jointly. Appeal from the Supreme Court (Nauru) dismissed.

Constitutional law – Chapter III – jurisdiction of state tribunals not ‘courts of a State’ – federal jurisdiction – inconsistency

State of New South Wales v Garry Burns [2018] HCA 15 (18 April 2018) concerned the scope of state parliaments to confer on a state tribunal jurisdiction to deal with matters within ss75 and 76 of the Constitution. Mr Burns made complaints to the Anti-Discrimination Board of New South Wales under the *Anti-Discrimination Act 1977* (NSW) regarding statements made about him by a Ms Corbett and a Mr Gaynor. Mr Burns was at all times a resident of NSW, Ms Corbett was a resident of Victoria and Mr Gaynor was a resident of Queensland. Each case came before the Administrative Decisions Tribunal (ADT) or its successor, the Civil and Administrative Tribunal of New South Wales (NCAT). The issue before the High Court was whether NCAT had jurisdiction to deal with the matters. That question arose because s75(iv) of the Constitution confers original jurisdiction on the High Court in matters between residents of different states. It was common ground that although NCAT was exercising the judicial power of the state, it was not a “court of a State” within the meaning of Ch III of the Constitution. The question was whether a state parliament could confer on such a body jurisdiction to deal with a matter within ss75 or 76 of the Constitution. Two arguments were put. First, by implication from the Constitution, a state law cannot confer



with Andrew Yuile
and Dan Star QC

adjudicative authority to deal with a matter in ss75 or 76 on a state body other than a court of a state within the meaning of Ch III ('implication argument'). Second, any such conferral would be inconsistent with s39(2) of the *Judiciary Act 1903* (Cth), by which the Commonwealth has conferred federal jurisdiction on courts of the states, and therefore invalid under s109 of the Constitution ('inconsistency argument'). The court unanimously held that NCAT could not be conferred jurisdiction to deal with matters falling within ss75 or 76. Kiefel CJ, Bell and Keane JJ jointly upheld the implication argument and did not deal with the inconsistency argument. Gageler J, writing separately, also upheld the implication argument, but rejected the inconsistency argument. Nettle J, Gordon J and Edelman J, each writing separately, upheld the inconsistency argument but rejected the implication argument. Appeal from the Court of Appeal (NSW) dismissed.

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Federal Court

Constitutional law – freedom of information – what is a 'matter'?

In *Australian Information Commissioner v Elstone Pty Ltd* [2018] FCA 463 (9 April 2018) the court was considering a referral of two questions of law by the Australian Information Commissioner under s55H of the *Freedom of Information Act 1982* (Cth) (FOI Act).

A company (Sydney HeliTours) made a freedom of information request (FOI request) to the Civil Aviation Safety Authority (CASA) for access to a copy of a complaint made to CASA against it. CASA decided that the relevant document was exempt in full and Sydney HeliTours sought a review by the Information Commissioner under s54L of the FOI Act of CASA's decision (IC review). Before the IC review was complete, CASA decided to vary its decision by providing Sydney HeliTours with access to some material in the document but redacting parts of the document. Sydney HeliTours pressed for access to the document in full in the IC review. CASA's view was that the IC review now related to its varied or revised decision. However, there was a construction of the applicable provisions of the FOI Act in decisions of the Administrative Appeal Tribunal (AAT) to the effect that an agency cannot vary its original decision under s55G by giving the FOI applicant access to more information that is not the entire document or the entire material requested (at [12]). The

Information Commissioner had taken a different view in other decisions made by him (at [13]). This provided the foundation for the questions of law which were referred to the court by the Information Commissioner on his own initiative. In summary, those questions were at [14]:

1. Was CASA's decision to give Sydney HeliTours access to further parts of the document under review a "revised decision" within the meaning of s55G of the FOI Act?
2. Was that decision by CASA the decision under review pursuant to s55G(2)(b) of the FOI Act?

The court dismissed the Information Commissioner's originating application on the basis that there was no 'matter' for the purposes of Chapter III of the Constitution (at [48]). Griffiths J referred at [31]-[32] to the meaning of 'matter' in the authorities and in particular the principles discussed in *CGU Insurance Limited v Blakeley* (2016) 259 CLR 339 at [26], [27] and [29] per French CJ, Kiefel, Bell and Keane JJ. There was no 'matter' in the proceeding because two referred questions of law did not involve any dispute or controversy between the parties (at [39]).

Griffiths J explained at [37]: "...The referred questions reflect the existence of a difference of opinion between the Information Commissioner and the AAT as to the proper construction of s55G, but they do not involve a controversy or dispute between the Information Commissioner and either of the respondents in relation to the subject matter of those questions. Without doubt, there is a controversy or dispute between the first and second respondents. That controversy relates to the extent to which CASA is obliged to provide Sydney HeliTours with access to the entirety of the two page document. But that is **not** the controversy which is the subject of the two referred questions."

The court observed that its decision turned on the particular circumstances of the case and that nothing said should be regarded as casting any doubt on the constitutional validity of s55H of the FOI Act or the availability of that procedure in an appropriate case where there is a 'matter' (at [47]).

Administrative law – migration law – jurisdictional error – unreasonableness and irrationality in the sense of *Li* (2013) 249 CLR 332

In *CPJ16 v Minister for Immigration and Border Protection* [2018] FCA 450 (5 April 2018) the court set aside the decision of the Administrative Appeals Tribunal (AAT) to affirm the decision of the delegate of the Minister not to grant the

applicant a bridging E (Class WE) visa and remitted the relevant merits decision back to the AAT to decide in accordance with law.

The applicant, a New Zealand citizen who had been living in Australia since in 2009, had a lengthy criminal history in both New Zealand and Australia. Those convictions, along with other facts and circumstances found by the AAT, led to the conclusion that the applicant did not pass the character test because of her past and present criminal and general conduct, and because of a risk that, if she were allowed to enter or remain in Australia, she would engage in criminal conduct here (see ss501(6)(c) and (6)(d) of the *Migration Act 1958* (Cth)). The circumstances relied on by the AAT in making the adverse character findings included (relevantly) orders made by the Children's Court of New South Wales allocating parental responsibility for her Australian child (B) to B's father, including undertakings he gave to provide limited supervised contact between the applicant and B.

While various grounds of judicial review failed, Bromwich J held that the AAT fell into jurisdictional error by finding that Children's Court orders reflected adversely on the applicant's character (at [39]-[56]) regarding ground 4. The AAT's conclusion was legally unreasonable or irrational in the sense explained by the High Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [72] and [76]. There was no foundation for the AAT's finding that the making of the Children's Court orders, including the undertakings given by B's father, without more, adversely reflected on the applicant's conduct towards B (at [51]).

Bromwich J explained at [55]: "All of the available evidence points inexorably to the conclusion that the Children's Court orders were made in the due application of the precautionary principle, which not only makes it clear that no such finding had to be made, but that no such finding should be made in the absence of sufficient proof. It was legally unreasonable or irrational to conclude, as the Tribunal did, that the making of the orders by the Children's Court, even being conditional upon the severe restrictions reflected in the undertaking given by B's father, constituted any basis for reflecting adversely on the applicant's conduct towards B in the sense of establishing that such conduct had, in fact, taken place ..."

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Court of Appeal judgments

1 to 30 April 2018

with Bruce Godfrey



Civil appeals

Re Benchmam [2018] QCA 65, 9 April 2018

Application for Admission – where the Legal Practitioners Admissions Board opposed the applicant’s application for admission as a legal practitioner – where the applicant had received an overpayment from Centrelink and had lodged income tax returns late – whether the applicant is a fit and proper person for admission to the legal profession – where the board’s role upon such an application is by force of s39 of the *Legal Profession Act 2007* (Qld) (LPA) is to make a recommendation to the court as to various issues including: firstly, whether the applicant is eligible for admission in the sense that the applicant has or has not complied with necessary requirements and secondly whether the applicant is a fit and proper person for admission – where the applicant has complied with all required study and training and she has complied with all formal requirements of an application for admission – where the board submits that the applicant is not of good fame and character and not a fit and proper person to be admitted as a legal practitioner for a total of seven reasons which in one way or another concern the following: firstly, the applicant’s dealings with Centrelink; secondly, the applicant’s late lodgement of income tax returns; thirdly, the applicant’s dealings with the board – where in particular, so submits the board, the applicant failed to make full and frank disclosure of suitability matters which in context here is an alleged failure to disclose to the board in a timely way her dealings with Centrelink and the late lodgement of the income tax returns – where in the board’s written submissions the board says amongst other things: “She –”, which is clearly a reference to the applicant: “...has been seriously careless at best in discharging her suitability matters to the board and to the Supreme Court.” – where the reference to “careless at best” is troubling – where it suggests that the board holds the view that some inference worse than carelessness is open and the obvious worse position for the applicant is a finding of dishonesty – where if the board considers that a finding of dishonesty is open, then it should have said so forthrightly and explained with full particularity why that is so – where it is well established that if a party alleges dishonesty, then it should do so expressly and with full particularity – where that was held to be necessary, for instance, by this court in disciplinary proceedings under the Act in *Legal Services Commissioner v Madden* [2009] 1 Qd R 149 and that principle applies to reports to the court made by the board under s39 of the LPA – where conversely, if no inference of dishonesty is open, the board should say so – where oblique hints at dishonesty are

not appropriate – where the board was unable to explain the submission and had to be pressed before ultimately abandoning any suggestion of dishonesty – where there is no doubt that the applicant has failed to comply with all of her obligations to Centrelink in a timely way – where however, she was very young when this default occurred – where importantly, there is no suggestion that Centrelink regarded the default as dishonest – where the applicant explains that she did not file the income tax returns because she was not sure about her obligations and certainly no money was owing by her to the Australian Taxation Office when the returns were lodged – where the failure to lodge tax returns, in some circumstances, can be a very serious matter – where however, this is an example of a young person on a limited income misunderstanding her obligations – when the income tax returns were lodged, the applicant, in fact, received a refund, and the Australian Taxation Office did not impose any penalties – where the applicant’s conduct is categorised as careless but not dishonest – where the applicant is shown on the material to be a person of good fame and character and a person who is fit and proper to be admitted as a legal practitioner – where if the board is going to oppose an application, then it’s not good enough to put in a written submission and leave it for the court to do the rest – where it would be expected that the basis for the opposition be stated with absolute precision upon a basis that can be wholly supported and that somebody will be briefed who is in a position to defend that position to the extent that it can be defended.

Applicant be admitted as a legal practitioner.

Attorney-General of the State of Queensland v Legal Services Commissioner & Anor; Legal Services Commissioner v Shand [2018] QCA 66, 13 April 2018

General Civil Appeal – where the solicitor respondent has been admitted to practise as a solicitor in Queensland since 1975 – where he became the chief executive officer of a company called Jellinbah Resources Pty Ltd – where it was in that capacity that, in 2002, he committed an offence against s442BA of the *Criminal Code* (Qld) of making a corrupt payment to a Minister of the Crown – where the respondent was convicted of that offence in 2011 and sentenced to a period of imprisonment – where the Legal Services Commissioner applied to the Queensland Civil and Administrative Tribunal for a disciplinary order against the respondent – where the tribunal recorded a finding that the respondent had engaged in professional misconduct and ordered that a local practising certificate not be granted to him before the expiry of five years from the date of the order – where

the appellants contend that the tribunal erred in not recommending that the respondent’s name be removed from the Roll – whether the probability is that the respondent is permanently unfit to practice so that his name should be removed from the Roll – where under s419(1) (b) *Legal Profession Act 2007* (Qld) (LPA), the conduct must be so serious as to justify a certain finding, namely that the practitioner is not a fit and proper person to engage in legal practice – where in *The Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145, it was held that an equivalent provision to s419 LPA required an assessment of whether, at the time at which the conduct occurred, it could have justified a finding that the practitioner was not a fit and proper person to engage in legal practice – where the relevant inquiry, in order to determine whether certain conduct constituted professional misconduct, was not to ask whether the conduct could justify a finding that a practitioner was not a fit and proper person at the time at which that determination by a tribunal or court was to be made – where here, the Member appeared to regard the question of whether there had been professional misconduct as one which called for an assessment, as at the date of the tribunal’s decision, of whether the respondent was then a fit and proper person to engage in legal practice – where the discretion conferred by s456 LPA is a broad one and, as noted by the tribunal, not subject to any express constraint – where it is to be exercised for the purposes which are established by the authorities and it is well established that the purpose is not to punish the respondent, but to protect the public – where protection of the public is a purpose also served by an order which affects an existing or future practising certificate – where by an order affecting a practising certificate, the public is immediately protected from the risks to which those who would encounter an unfit person would be exposed – where the community needs to have confidence that only fit and proper persons are able to practise as lawyers and if that standing, and thereby that confidence, is diminished, the effectiveness of the legal profession, in the service of clients, the courts, and the public is prejudiced – where the court’s Roll of practitioners is an endorsement of the fitness of those who are enrolled – where the tribunal erred in not considering all of the purposes which are to be served by orders made under s456 LPA – where it was necessary to have regard to the wider purposes for these powers, namely the preservation of the good standing of the legal profession and of the Roll as the court’s endorsement of the fitness of those enrolled – where this was a very serious offence, the nature of which undermined the integrity of executive government at a Ministerial level – where it is

difficult to imagine that a mature person, having studied and practised the law, could have failed to underestimate the seriousness of an offence of corruption involving a Minister of the Crown – where it was an isolated offence, but nevertheless an unfitness to practise law was plainly demonstrated by this offence, when it was committed in 2002 – where the character of the respondent was also revealed by the offence, and that there had to be some persuasive evidence which showed that the position was now different – where having regard to the purposes to be served by orders for striking off or suspension, the respondent, having been shown not to be a fit and proper person to be a legal practitioner of this court, should have his name removed from the Roll – where the commissioner originally sought an order for costs fixed in the amount of \$2500, but ultimately sought that the respondent pay costs to be assessed on the standard basis – where the tribunal ordered that the respondent pay the commissioner's costs fixed in the sum of \$2500, on the basis that the matter ostensibly involved light preparation, minimal investigation and no undue complication – whether the tribunal erred in the exercise of the relevant discretion by failing to consider relevant matters – where there was no error in the commissioner's reasoning as to costs – where there is the fact that the commissioner was influenced by what he saw as the light preparation and minimal investigation which was involved in the commissioner's case – where the Member was well placed to make that assessment.

Appeal allowed. Order 2 of the decision of the Queensland Civil and Administrative Tribunal dated 12 May 2017 be set aside. The name of the respondent solicitor be removed from the Roll of Solicitors in Queensland. In Appeal No.5760 of 2017 (*Legal Services Commissioner v Harold Warner Shand*), the respondent pay the costs of the appellant of this appeal to be assessed.

***Board of Trustees of the State Public Sector Superannuation Scheme v Gomez* [2018] QCA 67, 13 April 2018**

General Civil Appeal – where the respondent/cross-appellant (Gomez) injured his shoulder when working as a registered nurse in the intensive care unit of the Princess Alexandra Hospital – where Gomez claimed a total and permanent disablement (TPD) benefit under the superannuation scheme administered by the appellant/cross-respondent – where the claim for a TPD benefit under the superannuation scheme was rejected on the basis the claim did not satisfy the definition of TPD – where the trial judge was correct in declining to interfere with the board's second decision – where the information before the board was in the circumstances sufficient for the board to give properly informed consideration to whether Mr Gomez would ever be able to and whether he was reasonably qualified to work as a health promotion officer, telephone triage nurse and pathology collector – where it was reasonably open to the board to conclude, as it did, that he is so qualified – where the trial judge ordered

a reconsideration of the board's decision to decline payment in relation to the third decision – whether the decisions made by the board and the board's delegate were open on the evidence – whether the trustee's duty to give properly informed consideration was met – where the obvious difficulty with the board's appeal is that the nature of the additional material contained in Ms Hague's (occupational therapist) further report included material information, on topics clearly relevant to Mr Gomez's capacity to work in the posited jobs, which had not hitherto been before the board – where it is unfortunate, and perhaps frustrating from the perspective of the board or its delegate, that the important relevant information provided in Ms Hague's supplementary report was not provided prior to the second decision – where nonetheless the additional information in respect of two of the posited jobs went to important relevant topics bearing upon Mr Gomez's suitability for those jobs about which the earlier materials before the board had been silent – where in respect of the third of the posited jobs, Ms Hague provided contradictory information of a kind which meant that, in truth, there had not yet been properly informed consideration of Mr Gomez's suitability for that job – where none of this is to suggest that as a result of the additional information the board ought ultimately arrive at a different conclusion but it obviously indicates there was a reasonable possibility of a different result than the board's second decision – where it was information of such objective importance that

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the board had a duty to consider it in fulfilling its duty to give properly informed consideration to Mr Gomez's application – where the probability is that had the board properly considered it, it would have made further enquiry – where it follows the trial judge was correct in concluding that the board should be ordered to properly consider Mr Gomez's request for reconsideration of his application – whether the delegation to the board's delegate was effective – where the board has been unsuccessful in its appeal against the trial judge's decision to set aside the third decision and order Mr Gomez's application for reconsideration of the second decision be remitted to the board to be considered according to law – where it is therefore unnecessary for this ground of Mr Gomez's cross-appeal to be determined, however, because there appears to be substance to the point raised by Mr Gomez in respect of this ground and because of the board's ongoing role in this matter, it is at least prudent to identify the nature and force of the point raised – where the point of substance to which the present ground therefore gives rise is whether the power to pay a TPD insurance benefit includes the power to determine an entitlement to a TPD insurance benefit – where if it does, then it does not matter that the CEO purported to delegate the power to pay by also specifically delegating the power to determine – where if it does not, then the CEO's sub-delegation of the power to determine was invalid and Ms Brennan (acting manager, Claims Operations) was not lawfully empowered to make the third decision (assuming that decision was a purported 'determination').

The board's appeal is dismissed. Mr Gomez's cross-appeal is dismissed. Procedural orders on costs.

Fraser Coast Regional Council v Linville Holdings Pty Ltd [2018] QCA 71, 18 April 2018

General Civil Appeal – where last November, a judge in the Trial Division declared that for each of the last three financial years, the appellant had failed to validly make and levy rates and charges, because it did not decide, by resolution at its budget meeting for that year, what rates and charges were to be levied as required by s94(2) of the *Local Government Act 2009* (Qld) – where after this appeal was filed, the Parliament amended the relevant legislation with the effect of overriding the decision under appeal, by declaring that a rate or charge levied by a local government is valid notwithstanding that there was no decision, by resolution, to levy that rate or charge at its budget meeting – where consequently, the declaration made by the primary judge cannot stand, regardless of whether it was correct on the law as it was at the time at which it was made – where the parties have asked this court to make orders by consent for the disposition of the appeal – where it should be noted that these orders do not represent any view of the court about the merits of the appeal prior to the amendment to the relevant legislation – where the respondent seeks an indemnity certificate under s15 of the *Appeal Costs Fund Act 1973* (Qld) – where the parties are agreed that between them

there should be no order for costs – where the indemnity certificate is sought to indemnify the respondent against its costs of the appeal – where although this court has not had to consider the merits of the appeal, as they were before the legislative amendment, it may be accepted that the respondent's case before the primary judge was fairly arguable – where there is some difference in the authorities as to whether an indemnity certificate can be granted when the appeal has been allowed by consent without any determination of the merits – where in this case, the merits are now with the appellant, according to the legislation in its present terms – where because the appeal is by way of a re-hearing, it is the present law which is to be applied.

Appeal allowed. Declaration made by the primary judge be set aside. The originating application filed in the Trial Division be dismissed. An indemnity certificate pursuant to s15 of the *Appeal Costs Fund Act 1975* (Qld) be granted to the respondent.

Boral Resources (Qld) Pty Limited v Gold Coast City Council [2018] QCA 75, 20 April 2018

Application for Leave *Sustainable Planning Act* – where the respondent refused to grant the applicant a permit for a material change of use of land – where the proposal was for the development of a large hard rock quarry in the Gold Coast hinterland – where the applicant submitted that the primary judge did not give a practical, common-sense meaning to s3.5.5.1(10) of CityPlan 2016 – where the applicant submitted the words 'appropriately' or 'to an acceptable level' ought to have been interpolated into s3.5.5.1(10) – whether the primary judge erred in law in interpreting s3.5.5.1(10) – where consistency with the decision in *Lockyer Valley Regional Council* (2011) 185 LGERA 63 does not require the interpolation of the words suggested by Boral in order for s3.5.5.1(10) to operate sensibly and practically – where that is sufficiently achieved by the not too strict manner in which the primary judge considered it should be construed and applied – where moreover, to interpolate those words would unjustifiably displace recognition of the different standards that the express language of s3.5.5.1(8) and s3.5.5.1(10) respectively indicate are to be applied to extractive resource committed areas on the one hand, and to the Reedy Creek extractive resource non-committed areas on the other – where the applicant submitted the primary judge mischaracterised the koala habitat that exists on the land as a matter of environmental significance – where the applicant submitted it is the koala that is a matter of environmental significance, not its habitat – where there were 23,000 non-juvenile koala habitat trees on the subject land – whether the primary judge erred in characterising the whole of the quarry footprint as a matter of environmental significance for the purposes of s3.5.5.1(10)(b) – where the primary judge cited the description in Part 8.2.6.1 of CP 2016 of 'koala habitat areas' as a matter of state environmental significance – where it is accepted that it is questionable whether the description in Part 8.2.6.1 to which

has been referred, would, of itself, justify the characterisation of any koala habitat as a matter of state environmental significance – where his Honour may have erred in doing so – where, however, if an error was made, it was not one that impaired his finding that the clearing of the 65 hectares of koala habitat could not sensibly be reconciled with the object of conserving, protecting and enhancing matters of environmental significance – where that holds true even if the koala is taken to be the relevant matter of environmental significance – where it cannot seriously be disputed that to destroy its habitat is to fail to conserve and protect it as a listed threatened species – where the primary judge observed that if the applicant's proposal does not succeed under CityPlan 2016, its prospects of success under the Gold Coast Planning Scheme 2003 are even more unlikely – whether the primary judge failed to apply s25 and s36 of the *Sustainable Planning Act 2009* (Qld) (SPA) with respect to State Planning Policy 2013 and the South East Queensland Regional Plan respectively – where a perusal of the reasons under the heading 'CP 2003' reveals that the primary judge was conscious of s25 and s36, as well as s314(1)(d) of the SPA – where his Honour's reasons illustrate that he did have regard for the application of s25 and s36 of the SPA – where he could not justifiably have reasoned that once those provisions were applied, CP 2003 was consigned to irrelevancy or that there was no, or minimal, conflict with it – where the respondent refused to grant the applicant a permit for a material change of use of land – where the proposal was for the development of a large hard rock quarry in the Gold Coast hinterland – where CityPlan 2016 was a relevant instrument – where the applicant submitted that the primary judge failed to give adequate reasons for his decision – where his Honour explained how he construed s3.5.5.1(10) and gave reasons for rejecting the opposed constructions of it proposed by Boral and by the council and also explained how he proposed to apply the provision – where the learned primary judge did identify the matters of environmental significance that he considered relevant to the case – where they included waterways, vegetation, habitat for native flora and habitat for native fauna, including the koala and he stated his findings with respect to them and the reasons for the findings.

Application for leave to appeal refused.
Costs. (Brief)

Criminal appeals

R v Ostrowski; Ex parte Attorney-General (Cth) [2018] QCA 62, 6 April 2018

Sentence Appeal by Director of Public Prosecutions (Cth) – where the respondent was sentenced to eight years' imprisonment with a non-parole period of two years and six months for the offence of importing a commercial quantity of a border-controlled drug – where the respondent pleaded guilty – where a package containing 3,148.1 grams pure methamphetamine was sent to the respondent on a friend's behalf – where the respondent provided his name and an

address for the package to be delivered – where the respondent thought the package was to contain cocaine – where the respondent had a minor criminal history and was driven by his drug addiction – where the respondent showed favourable prospects of rehabilitation – where the appellant contended the non-parole period did not adequately reflect the objective seriousness of the offending – whether the sentence was manifestly inadequate – where s16A(1) of the *Crimes Act 1914* (Cth) requires that in determining a sentence for a federal offence, the sentencing court must impose a sentence that is of a severity appropriate in all of the circumstances of the offence – where in a case, such as this, where it is necessary that considerations of deterrence and punishment be reflected in the sentence, “the necessary deterrent and punitive effects of sentences ... must be reflected both in the head sentence and also in any provision for earlier release from custody”: *Hili v The Queen* (2010) 242 CLR 520 – where the non-parole period is to be the sentencing judge’s estimation of “the period before the expiration of which release of that offender would ... be in violation of justice according to law, notwithstanding the mitigation of punishment which mercy to the offender and benefit to the public may justify”: *Bugmy v The Queen* (1990) 169 CLR 525 – where the maximum sentence for the importation of a commercial quantity (750 grams or more) of the border-controlled drug methamphetamine is life imprisonment – where, as the sentencing judge observed, by any objective measure

the importation of more than three kilograms of pure methamphetamine is a very large importation and the respondent’s conduct in facilitating the importation of that very large importation of methamphetamine was bad by any objective standard – where it was clearly within the discretion of the sentencing judge to impose a materially less severe sentence upon the respondent than the sentences imposed in *Webber v The Queen* [2014] NSWCCA 111 and *R v Onyebuchi; Ex parte Director Public Prosecutions (Cth)* [2016] QCA 143 – where nevertheless the non-parole period of two years and six months in the respondent’s sentence appears excessively lenient when regard is had to the non-parole periods in *Webber* and *Onyebuchi*, and notwithstanding the respondent’s more favourable circumstances, and the facts and circumstances and the overall sentences in each case – where for offending of this nature and seriousness, the necessary deterrent and punitive effects of the sentence are not sufficiently reflected in a term of imprisonment of eight years when it is coupled with a non-parole period as short as two years and six months – where no error can be discerned in the sentencing remarks but the sentence itself reveals that there must have been an error of principle – where the shortness of the non-parole period renders the sentence imposed by the sentencing judge manifestly inadequate – where the favourable findings by the sentencing judge about the respondent’s progress towards and prospects of rehabilitation, his relative youthfulness, his plea of

guilty, and his other personal circumstances may be taken into account in imposing what otherwise might be regarded as a lenient term of eight years and an unusually short non-parole period, but the non-parole period in all of the circumstances of this case should not be less than four years.

Allow the appeal. Set aside so much of the order made in the Supreme Court Trial Division on 3 February 2017 fixing a non-parole period of two years and six months. Substitute a non-parole period of four years.

R v Douglas [2018] QCA 69, 17 April 2018

Appeal against Conviction – where the appellant was charged with three sexual offences against the same child complainant – where the appellant was convicted by a jury of maintaining an unlawful sexual relationship with the complainant (count one) and one count of unlawfully and indecently dealing with the complainant (count three) – where the jury was unable to reach a verdict on one count of rape (count two) – where the prosecution effectively relied upon evidence of uncharged acts as evidence of the appellant’s sexual interest in the complainant – where the jury was not directed as to the use they could make of that evidence nor the applicable standard of proof – whether the trial judge’s failure to direct the jury caused a miscarriage of justice so that a re-trial should be ordered in relation to both counts one and three – where in his first police interview, the complainant said that when he was aged about eight or nine, the appellant “made me a painting” as a present – where in his pre-recorded evidence



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in chief, the complainant identified the picture, and it was then tendered by the prosecutor without objection – where during the evidence in chief of the complainant’s mother, she described an incident at a social occasion in 2011 at the house of the appellant’s mother – where she testified that when she was inside the house with others preparing some food, someone told her that the appellant was outside sitting on top of the complainant – where this was correct: it was depicted within a short video recording which was played to the jury – where this was not said to have been an act of sexual misconduct – where the act was described by the prosecutor, not inaccurately, as wrestling – where the prosecutor tendered the video recording without objection – where in the present case, there was no objection to the admission of the evidence constituted by these two exhibits – where nor is it argued in this court that the evidence was wrongly admitted – where the unambiguous effect of the prosecutor’s address to the jury was to suggest that they should treat these exhibits of proof of a sexual interest in the complainant at any relevant time – where the jury needed instruction from the trial judge about the relevance of a sexual interest, if that was demonstrated by evidence other than the complainant’s evidence of the conduct which was the subject of the charges – where they required instruction as to what evidence it was that they were to consider, in deciding whether there was a demonstrated sexual interest – where they required instruction that they were not to find that the appellant had a sexual

interest in the complainant unless they were satisfied of that fact beyond reasonable doubt – where regrettably, none of those instructions was given – where the jury was effectively asked by the prosecutor to treat these exhibits as proof, independently of the evidence of the conduct which was charged, of a sexual interest – where there was a real risk that that argument would be accepted, and that the fact of that sexual interest would be used as a step in the jury’s reasoning towards a verdict of guilty – where the jury was instructed that this evidence was not to be used “to conclude that the defendant is a person with a tendency to commit the type of offences charged”. – where that direction was insufficient as it did not explain the true effect of the prosecutor’s argument to the jury, the relevance of a demonstrated sexual interest in the complainant or the standard of proof to be applied – where it must be acknowledged here that this direction was the result of unhelpful submissions from counsel when the judge was seeking their assistance in his preparation of the summing up – where the proof of the offence of maintaining an unlawful sexual relationship with a child (count one) required the proof of more than one unlawful sexual act over the relevant period – where the prosecution case was based on any combination of several sexual acts described in the complainant’s evidence – where the prosecution case in relation to count one did not exclude the act of rape constituting count two – where the jury was unable to reach a verdict in relation to count two – whether some of the

jury concluded the appellant’s guilt in relation to count one by a course of reasoning that was not open to them by reason of them not being satisfied of the appellant’s guilt of count two, resulting in a miscarriage of justice warranting a re-trial on count one – where because of the verdict on count three, it is known that the jury was persuaded of the occurrence of that act – what must then be considered was whether there was a possibility that some of the jury were persuaded about the commission of the rape of the complainant, but of no other act – where the jury could not have been left unpersuaded about the complainant’s testimony that there were many sexual acts, if they accepted his testimony about count three – where as their failure to agree on count two demonstrates, the prosecution case on count two was relatively weaker than on the other counts – where it was open to the jury to convict upon the charge of rape and that, in any case, there is no real prospect that if a juror was persuaded that the alleged rape occurred, that could have been material for the verdict on count one.

Appeal allowed. Convictions on counts one and three on the indictment be set aside. The appellant be re-tried on those counts.

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. For detailed information, please consult the reasons for judgment.

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6 Introduction to family law

6-7 | Day one: 8.30am-4.30pm

Day two: 8.30am-4.15pm | 10 CPD

Law Society House, Brisbane

Aimed at junior legal staff with less than three years' experience, this introductory course develops delegates' knowledge and skills, offering an overview of family law and practical guidance on the most common processes and tasks associated with handling family law matters.

PLE  PS  SL 

8 Gold Coast Symposium

8.30am-5.35pm | 7 CPD

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Registration closes 5 June.

PLE  PM&BS  PS  SL 

12 Insolvency law developments – what's new?

12.30-2pm | 1.5 CPD

Law Society House, Brisbane

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SL 

13 Core PMBS & PS: Client service and branding essentials

8.25am-12pm | 3 CPD

Law Society House, Brisbane

Understanding the fundamentals of client service, personal branding, and business development techniques is essential to growing a successful practice, contributing to your firm, and attracting opportunities within your career. This practical workshop will equip you with these crucial skills, including how to identify and communicate your value to your clients and firm, and identifying and capitalising on work opportunities.

PM&BS 

14 Family law drafting masterclass

8.30am-12pm | 3 CPD

Law Society House, Brisbane

Designed for family lawyers with 5 years+ PAE who want to apply and extend their advanced skills and knowledge, this masterclass drills down into two advanced and core aspects of family law practice. Join our expert presenters for practical sessions that examine technical drafting of orders, agreements and affidavits.

PS  SL 

15 Navigating leases essentials

8.30am-12.30pm | 3.5 CPD

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This interactive half-day workshop is ideal for those looking to enhance their skillset or seeking a refresher on the fundamental issues of leasing. Relevant to both the lessor and the lessee, the program guides you logically through the leasing process and identifies crucial steps along the way. Scenarios will be used throughout the program to help you absorb the wealth of information covered.

PS  SL 

19 First Nations & cognitive impairment: Intervention economics

12.30-1.30pm | 1 CPD

Livecast

Is it fair to incarcerate a cognitively impaired person – when the court, prosecution and even defence are unaware of that impairment? First Nations youth who present with cognitive impairment are a particularly vulnerable sector of our community. Sadly, they are also one of the most overrepresented groups of people in the corrective system. Join us for an enlightening presentation by two expert presenters and improve your client management skills and advocacy for this vulnerable sector of the community.

Registration is complimentary for members.

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20 New GST remittance rules affecting property settlements

12.30-2pm | 1.5 CPD

Livecast

Tune in and hear about the new GST regime effective 1 July 2018, which affects purchases of newly constructed residential properties or new subdivisions. Join us to hear from the Australian Taxation Office about what these changes mean for purchasers and property developers, and gain practical hints and tips to ensure your clients comply with the new regime.

PS  SL 

22 How can early career lawyers thrive in the legal profession?

8-9.10am | 1 CPD

Law Society House, Brisbane

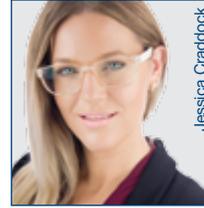
QLS is hosting a complimentary member breakfast for our early career lawyers to increase awareness around mental health issues in the legal profession. Join our panel, comprising members of the QLS Wellbeing Working Group, to hear stories and practical hints and tips about how early career lawyers can build resilience and thrive in the legal profession.

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 qls.com.au/events

Career moves



Brisbane Family Law Centre

Brisbane Family Law Centre has announced the appointment of two solicitors.

Alison Allen, who has practised in family law since admission in 2009, holds a commerce/law degree and a particular interest in complex property settlements. She also has considerable experience in parenting, child protection and domestic violence issues, and has spent a significant period practising in regional Queensland.

Janelle Osborne has practised in family law exclusively since 2007 and has an extensive background in complex parenting issues, including various court appointments as a best interest advocate for children. Janelle also has significant experience mediating complex family law disputes as a nationally accredited mediator and family dispute resolution practitioner.

Both Alison and Janelle are also qualified collaborative law practitioners.

BTLawyers

BTLawyers has announced the appointment of **Samantha Abbott** and **George Williams** as senior associates.

Samantha joined the firm in March 2017 and has managed workers' compensation claims for her clients in various industries including processing, manufacturing, wholesaling and construction.

George joined in April 2015, bringing experience with health and not-for-profit aged care clients, as well as industry clients in retail, ports and stevedoring, and meat-processing sectors.

Carter Newell

Carter Newell has welcomed **Katherine Hayes** and **Kelly Alcorn** to partnership.

Katherine, a member of the insurance team since 2013, is widely experienced in cyber-risk, directors' and officers' claims, and professional indemnity, while Kelly, who was previously a partner at a national firm, has joined Carter Newell's planning and environment team. Her experience in this area compliments the firm's established commercial property, energy and resources, and construction and engineering practices.

Hynes Legal

Hynes Legal has announced the appointment of commercial lawyer **Helen Kay** as an associate director in its aged care and retirement living team. Helen has 15 years' commercial legal experience within top-tier law firms, as well as running her own practice. This experience includes business sales and acquisitions, commercial property, franchising, leasing and general corporate/commercial advice.

Ian W Bartels & Associates

Trisch Partridge has returned to practice at Ian W Bartels & Associates after a year working for the QUT Commercial and Property Law Research Centre. Trisch is a general practitioner with a particular interest in property and contract law.

Nyst Legal

Jonathan Nyst has been appointed as an associate with Nyst Legal. Admitted as a solicitor in 2015, Jonathan has worked closely with principal Chris Nyst and has experience in the conduct of criminal and traffic prosecutions, and civil dispute resolution. He has practised extensively in all Queensland courts, as well as representing clients in the Local and District Courts of New South Wales.

Pullos Lawyers

Myles Walker and **Jessica Craddock** have joined Gold Coast family law firm Pullos Lawyers.

Myles is a QLS accredited specialist in family law with more than 10 years' experience at family law firms in Canberra and Brisbane. Myles brings extensive experience in complex family law matters and is an advocate for alternate dispute resolution techniques, including collaborative law, mediation and arbitration.

Jessica, who was admitted in 2012, has experience with a Brisbane family law firm, particularly in matters involving domestic violence, property and binding financial agreements.

Robertson O'Gorman Solicitors

Hannah McAlister has joined Robertson O'Gorman Solicitors. Hannah recently spent almost two years as associate to Justice Ann Lyons SJA at the Brisbane Supreme Court and previously worked in employment law, administrative law and insolvency. She will now focus on criminal defence, including corporate crime, and work health and safety matters.



George Williams



Katherine Hayes



Kelly Alcorn



Helen Kay



Trisch Partridge



Jonathan Nyst



Daniel Birch



Chelsey Grbcic



Reece Ramsden



Rebekah Lamb



Zion Saint



Sean Webb

Stone Group Lawyers

Stone Group Lawyers has announced two appointments and three elevations.

Daniel Birch, who has been appointed a senior associate and section leader of the corporate and commercial division, has a strong track record in large corporate and commercial transactions with a focus on property, agriculture and technology.

Chelsey Grbcic has been appointed as a litigation lawyer while Reece Ramsden and Rebekah Lamb have been promoted to family law associates and Zion Saint promoted to a litigation associate.

WGC Lawyers

WGC has appointed Sean Webb as an associate. Sean joined the firm last year and practises in commercial and civil litigation,

covering building and construction, BCIPA disputes, body corporate matters, debt recovery and consumer disputes.

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

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What to know before you employ someone

by Robert Stevenson



So you've opened your own firm and decided to employ someone.

Before you do so, it's important to understand the basics of the employment law landscape. Yes, you will need to organise a tax file declaration, superannuation and workers' compensation, and work out the right tax to deduct from wages.

But there is more. Employment law is an amalgam of overlapping statutory and common law requirements. Perhaps the most important obligation exists under workplace health and safety legislation. Employers have a duty to ensure the health and safety of their workers while at work, so far as is reasonably practicable.

Without being exhaustive, employers also have statutory obligations under employment, discrimination, consumer protection and privacy legislation. Actions towards employees may also have professional conduct implications. These statutory requirements will generally prevail over any contractual agreement.

There is a hierarchy of basic employment law instruments. The foundations are the National Employment Standards under the Fair Work Act 2009 (Cth), which apply to all employees. These standards include the right to annual leave, personal/carer's leave, parental leave and minimum notice of termination and redundancy pay.

The Fair Work Act also contains a host of other obligations such as the requirement to keep particular employment records and provisions about unfair dismissal, workplace bullying, breaches of general protections and sham contracting.

It is then necessary to consider whether there is an applicable industrial award that applies to an employee. Industrial awards are given force by legislation and contain more detailed provisions relating to particular industries or occupations. It is not generally possible to simply opt in or out of an industrial award. In the area of private legal services, the Legal Services Award 2010 applies to most support staff and graduates.

It is possible to enter into a legislatively recognised enterprise agreement with a group of employees (but not an individual), which takes the place of an industrial award. However, this is subject to approval by the Fair Work Commission and subject to employees being better off overall than under the applicable award. The reality is that there is little to be gained at the moment for most employers and employees through the enterprise bargaining process.

Next we have the common law contract of employment. Whilst provisions which are inconsistent with legislation will usually be of no effect, it is still an important document, particularly from an employer's point of view. Confidentiality and post-employment restraint provisions are particularly relevant.

It is trite to say that an employment contract should always be in writing, saving the uncertainty of ascertaining any verbal terms. In the absence of specific contractual agreement, the common law implies certain terms into the employment relationship, such as the need to give reasonable notice on termination.

Lastly, employer policies are an important tool for formalising employer directions about operational matters. Policies may, or may not, form part of the employment agreement depending on their content and contractual status.

Understanding this hierarchy is the starting point for any successful employment relationship.

Rob Stevenson is the principal of Australian Workplace Lawyers, rob.stevenson@workplace-lawyers.com.au.

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Winter? There is a choice!



with Matthew Dunn

When the long Queensland summer has finally slipped away and the hounds of winter bay at the door, our thoughts usually turn to our favourite red wines.

However, this brass monkey season perhaps it is time to consider some alternative red varieties to warm the cockles.

This winter, why not leave our old friends – like shiraz, cabernet sauvignon and GMS blends – in the wine cupboard to mature for another season, and try some of the alternatives? Adventure may be only a cork away!

While there is always a certain safety in reaching for Barossa or McLaren Vale shiraz, or Coonawarra or Margaret River cabernets, some of your other options might include:

Malbec – This variety comes from Bordeaux region and makes the magical ‘black wine’ of Cahors. However, away from Europe a new malbec has found a spiritual apogee in Argentina, particularly from the high valleys of Mendoza. Expect a full-bodied wine with violets and vanilla on the palate. The Granite Belt makes a fine malbec too and golden child Golden Grove is a reference.

Syrah – OK, so we call it shiraz, but the French name usually describes a very different beast from the same grape. French syrah from Côte-Rôtie, Crozes-Hermitage, Hermitage and St Joseph is nothing like our shiraz, with its stronger structure and less sweet fruit. Across the pond they often label their wines syrah (presumably to avoid disappointment for Australian consumers to whom the lighter style would come as a shock). At home, some of our producers deliberately label a syrah to signal a different, usually lighter, style.

Durif – Sometimes called ‘petite sirah’, this is a very different beast to its parent, syrah. Durif wines are often bold, fighting wines with tannin, body and bounce to please the heartiest McLaren Vale shiraz lover. In Australia, the hot fields of Rutherglen make excellent, titanic durif that can live longer than its bottle.

Tannat – This is another great cassoulet wine from south-west France and most accessible in a wine called madiran. The grapes have very thick skins which permit a great deal of extract in the wine. This tannic monster is all substance and, with a few years of mellowing, quite some style. At home, Boirean – from our beloved Granite Belt – makes some for those lucky enough to score a bottle.

Nebbiolo – Here’s an Italian variety with a big personality. In its native lands it makes the weighty and long-lived wines of Barolo. Sometimes described as tar and roses, with some time for the tannin to soften, complexity emerges and it sings. In Australia we have seen many of the new Italian-styled wineries from the King Valley in Victoria and other places jump on board, and so should you. Also worth a try is nebbiolo’s little brother, barbera (see the tasting notes below).

Amarone or, more properly, amarone della valpolicella – This is an Italian powerhouse of flavour and depth. Made near Verona, it is a red wine made from partially dried grapes, thereby increasing the skin-to-pulp ratio, permitting greater tannin extract and reducing the amount of water involved, increasing sugars and therefore alcohol. While a little determined in price from the manual labour involved in desiccating grapes before winemaking, good amarone stands right beside any Australian big reds. Don’t leave a bottle lonely on a shelf in Australia, it is quite a find.

The tasting A few interesting big red offerings were examined for the comfort of the cooler season.



The first was the **McWilliams Canberra Appellation 2015 Shiraz**, which was the familiar purple red hue of shiraz. The nose was not typical shiraz but cherries and violets. The palate was quite a revelation, with violets, vanilla and plum giving way to a little white pepper on the mid palate and a rousing savoury spice tinge as it trailed on. Very different to have the flavour grow rather than the usual shiraz fruity attack and decline.



The second was the **Fontanabianca Barbera D’Alba DOC 2015**, which was red black with a line of orange. The nose was blueberries, mountain ceps, forest floor and dusty tannins. The palate was sweet fruit drive which gave way to a tannic dry burst somewhere in the middle and then went on to become overgrown by earthy forest.



The last was the home favourite of the **Golden Grove Granite Belt Malbec 2016**, which was a space-truckin’ deep purple. The nose was a heavenly sweet floral bouquet of violets and spice. The palate was a mix of savoury spice sitting on a pyramid of structural tannin filled with violet flowers and Madagascar vanilla. Easily the equal of anything Mendoza has produced and much more affordable.

Verdict: The surprise packet was the syrah but the sentimental favourite took it for the sheer quality, structure and goodness of the Golden Grove. In the words of the man in the hat, do yourself a favour...

Matt Dunn is Queensland Law Society government relations principal advisor.

Mould's maze

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

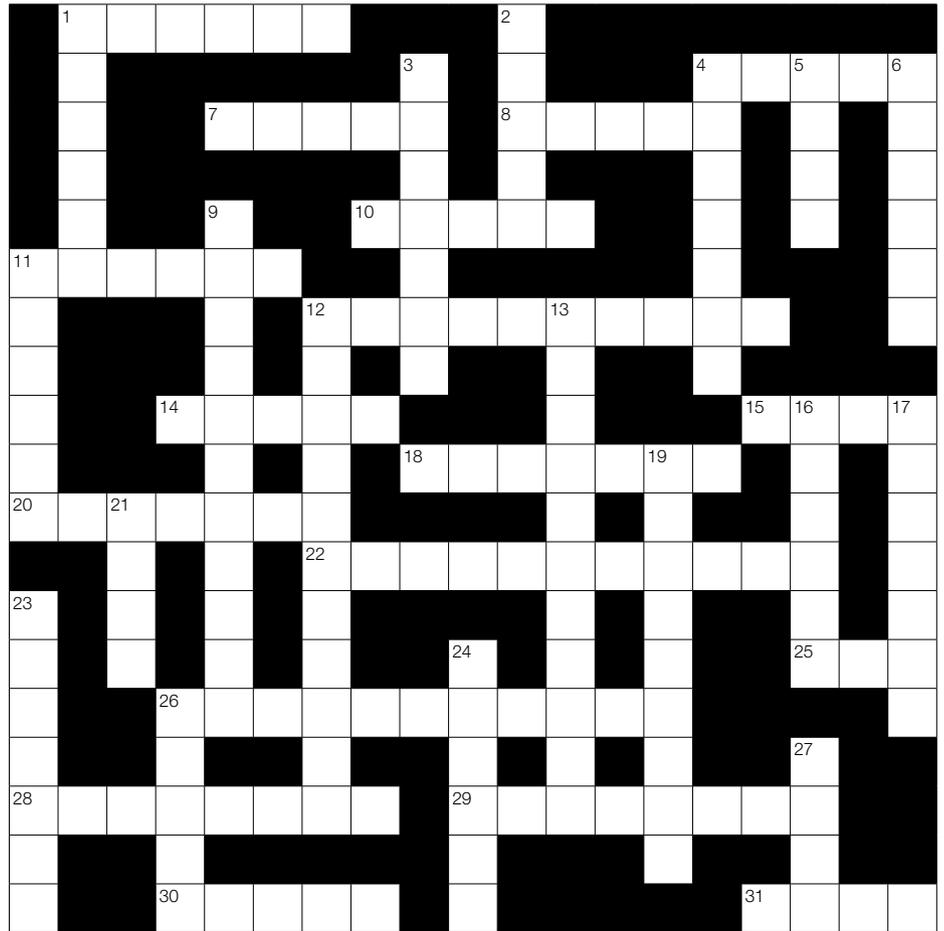


Across

- 1 The actor who played a lawyer who could only tell the truth in *Liar Liar*, Jim (6)
- 4 Youngest ever justice of the High Court, nicknamed 'Doc'. (5)
- 7 Acknowledgment of responsibility, *mea* (Latin) (5)
- 8 Antonym of testamentary, *inter* (Latin) (5)
- 10 Cartoon boss on *The Simpsons* who had an army of lawyers, Mr (5)
- 11 An account established by a broker for holding funds on behalf of the broker's principal until the completion of the subject transaction. (6)
- 12 Equitable. (10)
- 14 *The Hurricane* was a film about a boxer wrongly convicted of murder, Carter. (5)
- 15 The rule in *v Harbottle* provides that, in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. (4)
- 18 An area next to the bench where lawyers can talk confidentially to the judge. (US) (7)
- 20 Value of a motor vehicle that is uneconomical to repair. (7)
- 22 New process implemented upon the dismissal of a complaint under the *Youth Justice Act*, justice. (11)
- 25 Number of High Court justices with the first name 'Susan'. (3)
- 26 Failure to account for trust funds. (11)
- 28 A permissible conflict of interest requires at least the consent of the parties. (8)
- 29 True or false, it can nonetheless render a defendant liable in defamation. (8)
- 30 Obsolete form of order which did not end a marriage but allowed the parties to reside separately, *divorce a mensa et* (Latin) (5)
- 31 An accused will not receive if they are an unacceptable risk of failing to surrender into custody again or interfering with witnesses. (4)

Down

- 1 Doctrine used to give a gift to a similar beneficiary when the true beneficiary no longer exists. (6)
- 2 Number of amendments to the Commonwealth Constitution. (5)
- 3 Maliciously misrepresenting another's words or acts or falsely charging another with a crime (7)
- 4 Forfeiture of all property to the state when an intestate person dies without heirs or descendants. (7)



- 5 Danish band that Mattel sued after releasing a single which made sexual references to Barbie. (4)
- 6 The rule against perpetuities forbids a person from creating future interests in property that would vest at a date beyond that of the lifetimes of those then living plus-one years. (6)
- 9 A will that is oral. (11)
- 11 Deborah Winger, Robert Redford and Daryl Hannah starred in this film about a US district attorney, *Legal* (6)
- 12 Precedent form. (11)
- 13 A provision which states that the subject a contract represents the full and final agreement of the parties, clause. (11)
- 16 To be valid, a trust must show certainty of intention, subject and (6)
- 17 A person who creates an express trust by declaration. (7)
- 19 A statute that declares a specific person guilty of a crime, Bill of (9)
- 21 Local law, *lex* (Latin) (4)
- 23 Legal fiction that any living person is capable of having a child in estate planning whose sibling could defeat the intentions of the person leaving property to others, the-octogenarian rule. (7)
- 24 Leading case concerning the admissibility of expert evidence, (*Australia Pty Ltd v Sprowles*). (6)
- 26 A customary right belonging to the Crown, including flotsam, jetsam, ligan, treasure, deodand and derelict, a of admiralty. (UK) (5)
- 27 Property that has no owner, *vacantia*. (Latin) (4)

Solution on page 56

Angst in space

So, where are the aliens?

by Shane Budden



One or two columns ago – I cannot be certain, because as we all know lawyers cannot do maths – I was talking about space, and Elon Musk flinging a car into it.

I consider this to be very wasteful of him, not so much because he was adding to all the space junk out there but because the car was largely empty. I can think of any number of politicians who could better serve their constituents from the cold, distant and – most importantly – lifeless depths of space, but I digress.

When you think about space, one of the things that comes to mind – or at least it does if you are deep and thoughtful, like me – is that contact from alien races is well and truly overdue. Back in the '70s (to be clear, the 1970s), we were all led to believe that the nearby bits of our galaxy were heavily populated by very advanced races who nevertheless needed to encounter us to learn about the important things in life, such as morality, friendship and the virtues of shooting any aliens who didn't agree with your point of view. Apparently, foreign policy in the future will be pretty much the same as it is now.

The point is that whether you watched *Star Trek*, *Space: 1999* or *Lost in Space* (I watched all of them), the message was that space was chock-full of very human-looking aliens, the females of whom were all attractive, given to wearing very revealing outfits and not at all hung up about having a romantic liaison with an earthling. It should go without saying that my male friends and I considered 'space explorer' as an exceptionally appealing career.

Indeed, space exploration seemed to be great fun to us, especially given what occurred on *Lost in Space*. Will Robinson – who was about our age – did no homework and was able to wander off and do pretty much what he wanted – we weren't even allowed to ride our bikes to the shop.

In fact, Will's parents, no doubt influenced by Dr Spock (note to young readers: that isn't Mr Spock from *Star Trek* – although I am sure he would have a doctorate or two – but a controversial figure who advocated raising children by letting them do whatever the hell they wanted, apparently because he had



never met any; I suspect Mark Zuckerberg's parents were fans) were perhaps the first free-range parents.

For example, not long after landing on an alien planet, Will was either sent to fetch water or allowed to explore, as long as he didn't go 'too far'. This would happen even if the crew had just survived an attack from a stunt-man in a cheap rubber alien costume, and continued to happen despite the fact that Will never once failed to encounter a dangerous alien on these trips (nor did he ever bring back any water, for that matter). I suspect the real reason Will's father never managed to find a way back to Earth was that he knew the child safety authorities would be waiting for him.

So by now, we should have encountered aliens by the bucket-load, and be reaping the benefits of their amazing technology (all aliens, going by '70s TV shows, have superior technology to ours) like flying cars and pop-up toasters that work. We haven't, of course, unless President Trump proves to be from another planet, which, let's face it, would explain a lot.

I think I know why, though (why we haven't met aliens, I mean, not why people voted for Trump). You see, since we invented television, we have been pumping shows out into the atmosphere, some of which escape, due to climate change (hey, it's responsible for everything else, so why not?).

These shows propagate through the cosmos at the speed of light, which is really fast –

faster than Usain Bolt and nearly as fast as a Bill Shorten backflip. This means that aliens have been watching our TV for years, and I have to say not all of our TV is good, like *Star Trek*; some it is just the opposite (bad).

Think of the aliens sitting out there, receiving our TV – *Neighbours*, *Home and Away*, reality shows, Ben Stiller movies – I suspect our solar system has the interspace equivalent of detour signs all around it, and on space maps it simply says 'Here be morons' instead of 'Earth'.

So, clearly we will have to go to them, and it would seem that Elon Musk wants to make the very long journey by car, which tells me that he does not have children. As any veteran parent can tell you, any car trip longer than about 20 minutes causes children in the back seat to develop superpowers, such as the ability to calculate the exact middle of the back seat, and then detect if the other child crosses that boundary by distances of as much as a nanometre (or indeed if any molecule of CO₂ expelled by the other child crosses into the first child's airspace).

At this point, both children will erupt with a level of fire and fury that would make Donald Trump and Kim Jong-un wet their big boy-pants and hug each other for comfort. It will be at this precise moment that the car will run out of petrol or suffer a puncture.

If Elon Musk does attempt to have a crew make the long and dangerous trip to Mars in search of aliens who don't watch TV, I predict news reports along these lines:

"Breaking news: The planned expedition to Mars by Space-X has been a failure, with Commander Jane Smith returning the rocket to Earth today.

"I told them if they didn't stop screwing around back there I'd turn the ship around," she said. Sources report that trouble started when geophysicist Ben Choo kept looking out engineer Kym Palmer's window. Co-pilot Aaron Stevens had also threatened to hold his breath until they stopped for McDonalds, but this reportedly had no bearing on Smith's decision."

Actually, I am beginning to see why Will Robinson's dad kept sending him out to get water...

© Shane Budden 2018. Shane Budden is a Queensland Law Society ethics solicitor.

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LawCare

1800 177 743

Lexon

07 3007 1266

Room bookings

07 3842 5962

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Solicitors who are interested in providing pro bono evening assistance should contact them on 0401 730 821 or email either tstedman@bigpond.net.au or admin@countrytocoastlawyers.com.au.



Crossword solution

From page 54

Across: 1 Carrey, 4 Evatt, 7 Culpa, 8 Vivos, 10 Burns, 11 Escrow, 12 Beneficial, 14 Rubin, 15 Foss, 18 Sidebar, 20 Salvage, 22 Restorative, 25 Two, 26 Defalcation, 28 Informed, 29 Innuendo, 30 Thoro, 31 Bail.

Down: 1 Cypres, 2 Seven, 3 Calumny, 4 Escheat, 5 Aqua, 6 Twenty, 9 Noncupative, 11 Eagles, 12 Boilerplate, 13 Integration, 16 Object, 17 Settlor, 19 Attainder, 21 Loci, 23 Fertile, 24 Makita, 26 Droit, 27 Bona.

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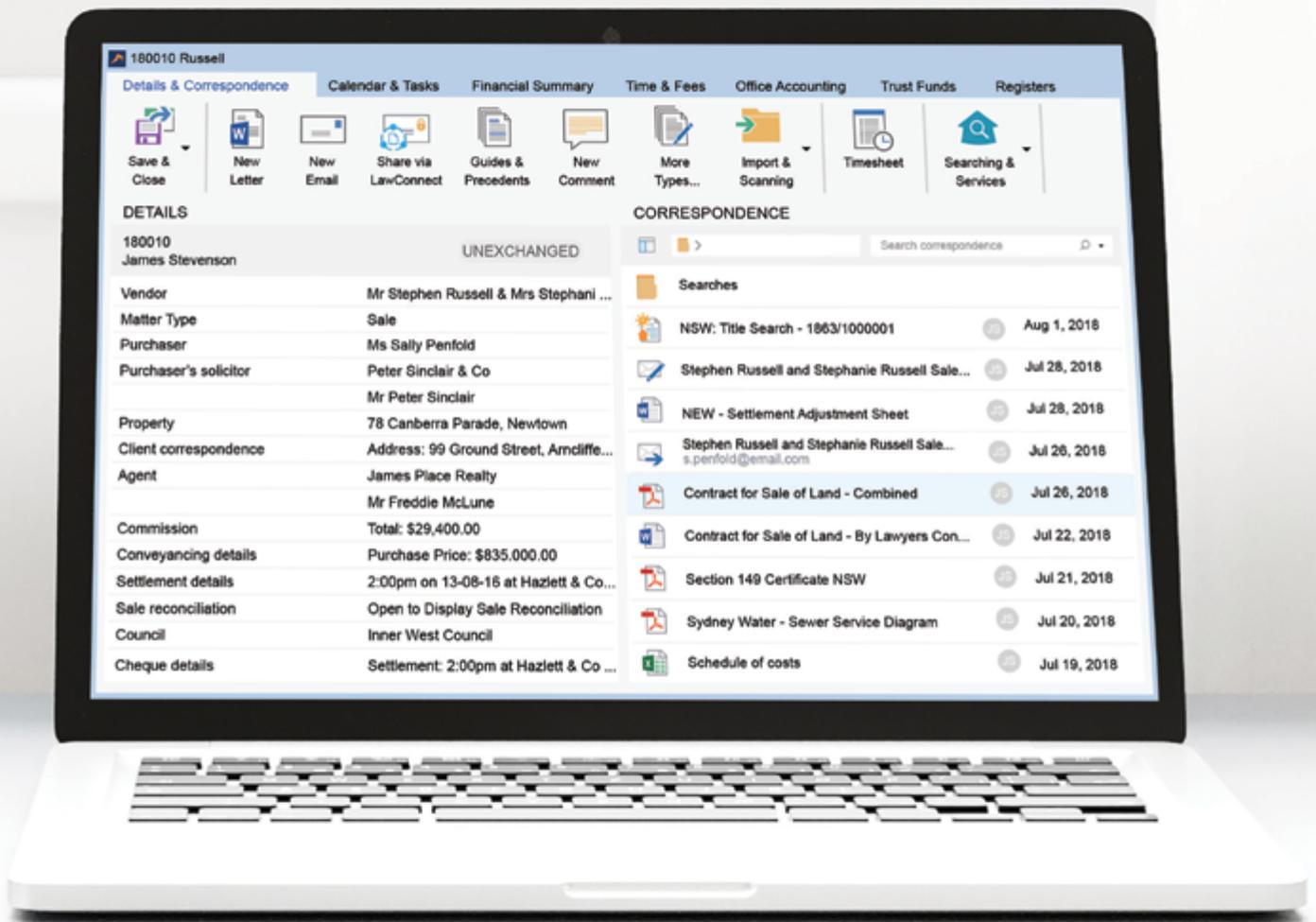
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