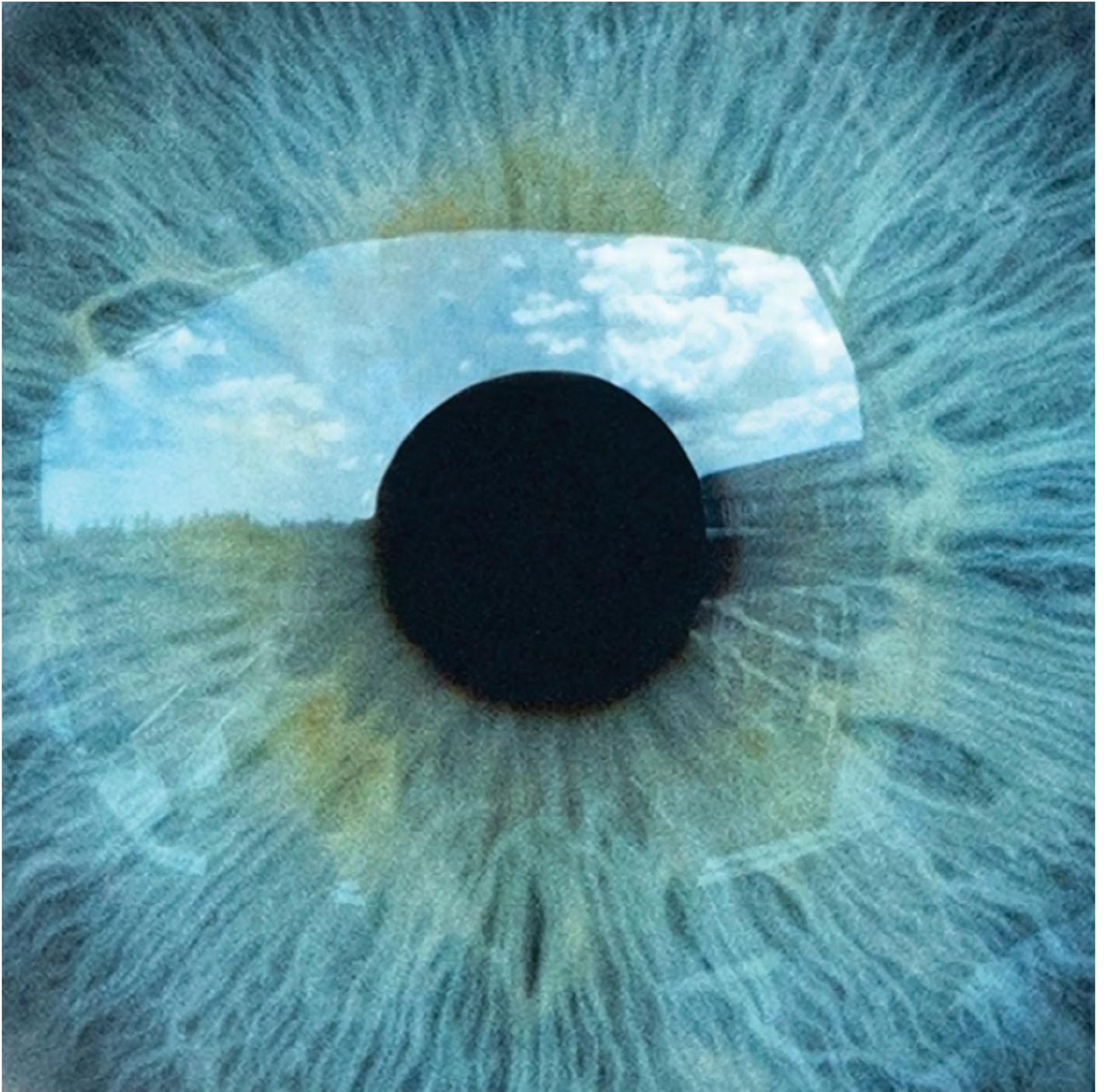


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Queensland
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June 2016 – Vol.36 No.5

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Before you vote

How do the parties stand on key legal issues?

On 2 July, Queensland Law Society members have a choice.

As a Society, we have never suggested – and never will suggest – how members should vote in any election. Our members hold views across all shades of the political spectrum, and the only course your Society follows is firmly nonpartisan.

What we do ask of members is that, when they consider the choices that they will make in an election, they take into account the policies or attitudes of their preferred party on the issues that concern us as members of the legal profession.

Members who feel strongly about these issues are encouraged to raise them with their local candidate or sitting member, to discuss them with their clients and join in this important public debate.

For next month's federal election, as in previous election campaigns, we have engaged in a consultative process with our members and committees, and formulated a document which lists the legal issues of concern to our profession and the broader community.

We have sent our Call to Parties document (see qls.com.au/federalelection2016) to the major political parties and asked for their responses. If and when received, these will be made available to members.

The first key issue raised in our Call to Parties is making justice more accessible, including restoring \$5 million in funding to Legal Aid Queensland, not proceeding with planned reductions in funding for community legal centres, and investigating the potential allocation of money seized from proceeds of crime actions as an ongoing funding source for legal assistance.

The second is the resolution of family law disputes in a timely way, including the implementation of a protocol to fill judicial vacancies within a month of a judge's retirement and relieving delays in family law disputes by the appointment of more judges.

The third concerns assistance to Queensland businesses, including law firms, through a number of measures such as no reduction in the entry threshold for the federal workers' compensation scheme and other suggestions.

Other key points in the Call to Parties concern the development of our region and our profession, ensuring equal treatment before the law (particularly in the treatment of 17-year-old offenders accused of federal offences in Queensland) and a suggestion for a single national fundraising regulation framework for the charity and not-for-profit sector.

I urge all members to consider these issues and the views held by their preferred political representatives when formulating their voting intentions. And feel free to take these topics directly to the candidates for direct discussion.

A future funding model?

The ongoing debate on funding for our entire legal system has seen a number of interesting ideas come to light.

One of them was hinted at by High Court Chief Justice Robert French AC in an address on 29 April on the state of the Australian judiciary.

In reminding us of the tripartite nature of government – the judicial, legislative and executive branches – it prompted the thought that, as the legislative and executive branches are in effect separately funded, why should not the judicial branch be treated likewise?

Perhaps the judicial branch of government – encompassing the courts and our entire judicial system – should not be just another government 'service', or cost centre within a government department or Attorney-General's portfolio.

As lawyers, we understand that courts are not just a 'workplace' and that access to justice is not just a three-word slogan, but the glue by which our society is held together.

Perhaps we should start a conversation based on the fact that the judicial branch is as significant a piece of democratic machinery as that of the legislative branch, Parliament, itself. Therefore it would be appropriate to fund our judicial system, including the provision of legal aid and community legal centres, through a similar specific funding regime.

This could be one way to ensure that this fundamental cornerstone of democracy achieves its purpose, and enables the most vulnerable in our society to access the judicial services and resources that they need.

As I said, it's an interesting idea, and maybe it has come up before, but I'd certainly welcome the thoughts of our members on this.

Bill Potts

Queensland Law Society president

president@qls.com.au

Twitter: @QLSPresident

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

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Practices made perfect

More practical support tools for you

A major priority for Queensland Law Society is to enhance and extend the practical support services that we provide to members.

In line with that objective, I am pleased to make several significant announcements.

The first is the arrival, this month, of our new practice support service to help practitioners to practise practically, efficiently and ethically.

This service takes the form of an in-firm consultation by a solicitor from the QLS Ethics Centre, initially to attendees of the QLS Practice Management Course who have either started a new practice or become a principal in an existing sole to small practice.

This month we begin with consultations at five Brisbane firms, where the aim will be to identify the existing practice arrangements and, as necessary, provide guidance on best practice arrangements and identify potential sources of complaints.

Facets of practice to be covered include:

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

Follow-up strategies will include telephone and email guidance as required, and provision of QLS resources such as checklists, fact sheets and guidelines, and sample client agreements.

Following feedback and review, we will run a second series of consultations with Sunshine Coast and Gold Coast firms in July/August and launch this program statewide from October.

Your survival guide

The second announcement is that we are developing a disaster readiness and recovery guide for members.

The guide will provide practical tools and suggestions to improve members' ability to be ready and withstand a multitude of disasters. It will help you to prepare your practices for disasters and will include assessing local risks, as well as last-minute and immediate actions during disasters. It will include several checklists as well as templates.

The guide will be available to members soon and I look forward to announcing its release.

Warrant guidelines planned

Another initiative sees the Society working together with Queensland Police Service on a series of guidelines to be followed whenever police execute a warrant on a solicitor's premises.

The guidelines will aim to cover every step of that process, including applications to the court on privilege, the examination of computer records and the solicitor's ethical duty of disclosure to all clients in regard to the execution of the warrant.

A consultant has been engaged to research and write these guidelines, beginning next month.

And there's more

In line with our commitment to enhancing our engagement and connection with our membership community, we have prepared an IT roadmap covering our technological innovation over the next 18 months.

This guide has been endorsed by our Audit and Investment Committee, and will be presented to Council this month for its consideration.

Also under way is the annual review of our comprehensive learning and professional development program, a key element in planning the conferences, seminars and other events for you in 2017.

This includes seeking input from you on our current program, examining the financial viability of past events and reviewing all member feedback. This will be followed by consultation and discussion on the trends emerging in the changing face of the law and the profession itself, so that we can present you with the best possible professional development options next year.

Please make an effort to think about your further professional development needs and your business support needs in the face of future disruption to our profession. Email me your thoughts via the address below, pick up the phone or grab me to chat at any of our upcoming events.

Another project in development is a study of ways in which we could involve law students within QLS through internship or work experience programs. For example, enabling students to participate in our extensive advocacy work would be of significant benefit in developing their understanding of the workings of the legal system

Amelia Hodge
Queensland Law Society CEO

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Will graduate oversupply assist regional Australia?

A new research project will look at whether the oversupply of legal graduates is having an impact on the provision of legal services in regional, rural and remote areas.

Dr Francesca Bartlett, from the University of Queensland's TC Beirne School of Law, working in collaboration with Dr Caroline Hart and Dr Jennifer Nielsen, said the project team was seeking feedback from practitioners to determine whether graduate and junior lawyers were going to regional and rural areas looking for practice opportunities.

"In particular, we hope to find out whether these new lawyers are establishing their own practices in these regions and what sorts of new issues might emerge from this trend," she said.

"We want to know whether lawyers, and the communities in which they practise, need targeted education and additional support. And is this trend

assisting regional/rural communities to receive more access to appropriate legal services?"

Practitioners who may be able to contribute to this research will be asked to complete a confidential questionnaire, and possibly agree to be interviewed.

District law associations are invited to contribute to the study through their members, and it is anticipated that an article on the outcome of this project will appear in a future edition of *Proctor*.

To assist with this research or obtain more information, please contact Dr Francesca Bartlett (f.bartlett@law.uq.edu.au), Dr Jennifer Nielsen at the School of Law and Justice at Southern Cross University (Jennifer.nielsen@scu.edu.au), or Dr Caroline Hart (Caroline.Hart@usq.edu.au), who is also a director of the National Rural Law & Justice Alliance and member of the Institute for Resilient Regions.

Joint attack on legal aid funding crisis

Queensland Law Society has joined with the Bar Association of Queensland to bring public attention to the crisis in the state's legal aid system.

In a joint media release, the organisations said the lack of federal funding meant justice was being denied to thousands of people each year.

Society president Bill Potts said successive federal governments had ripped hundreds of millions of dollars from legal aid, crippling a vital justice safety net.

Bar Association president Christopher Hughes QC said the legal aid system was at present in a state of crisis and justice was being denied to thousands of people each year.

"It is a fundamental component of the rule of law that access to justice be available to all," he said.

"Nevertheless, the funding of legal aid has been neglected by successive governments of all political persuasions for far too long now. The legal aid system is in crisis."

Mr Potts said Commonwealth funding for Legal Aid Queensland was reduced by

\$1.5 million this financial year following a \$3 million cut last year.

"The lack of sustainable and increasing funding for legal aid is one of the most significant problems facing the Queensland and federal justice system," Mr Potts said.

"The system is now at a point where most Queenslanders who can't afford a lawyer simply won't get one – in many cases even if they are living below the poverty line. This crisis is ruining lives."

Mr Hughes QC said access to justice was a right that should be enjoyed by all citizens and not merely those who can afford it.

"I have been deeply concerned about the legal aid funding crisis for some time now," he said.

"Whichever party wins the July election, it is time for the government to accept that legal aid funding is now a critically urgent priority. It can no longer be treated as a luxury that governments can choose to let fall into disrepair – it is far too important."

Australians could get involved and tell their local MP that legal aid matters by visiting the campaign website, legallaidmatters.org.au.

Lawyers come out punching

Sparring in the courtroom isn't unusual, but a group of Brisbane lawyers are taking it to the next level with weekly boxing sessions at a Brisbane gym.

Criminal lawyers Daniel Hannay and Adam Magill are members of the group, which meets for training on Wednesday nights at Dundee's Gym in inner suburban West End.

"The law can be highly stressful and highly taxing on the body and mind," Daniel, from Hannay Lawyers, said. "Boxing is a great stress relief. It has really helped with my focus and memory.

"It really increases your confidence and has helped me when I'm appearing in court and advocating for my clients. Somehow, it has helped when putting on my armour for court."

Adam, a former rugby player who has always been active, enjoys boxing as a fitness regime and makes sure he finds the time to spar.

"Boxing is learning another discipline," he said. "It's technically based so you are not exercising randomly and it's fun to do some sparring so you can utilise the technique and even get to spar at the end of the session with a mate.

"Going down to Dundee's a few times a week has had some very positive reinforcement in my life. It really has had a ripple effect – I want to train harder, so I eat better, and I don't drink the night before because I have training in the morning. So it all is very positive.



"It is so easy when you have had a hard day at work to have a drink with other legal professionals and download. It is an accepted form of stress relief. Going down to the boxing gym is just a much better alternative for all generations."

Dundee Kim, a two-time amateur boxing champion in South Korea and owner of the gym, has a 16-week training program suited to his legal clients.

"Basically the lawyers sit down all day and fight using their brains – boxing helps improve posture and is also a great stress relief," he said. "They love punching the bag and sparring each other, literally.

"We also look at the long-term goals for the lawyers. Often they get burnt out, so we focus on their professional endurance. Most of the lawyers that come in to the gym are overweight and often suffer from poor blood pressure. We need to get them moving and doing something they enjoy."



He said boxing was a dynamic sport, compared to bike riding and running.

"Boxing is more exciting," he said. "It is more focused and at my gym we teach proper boxing techniques with personal interaction."

Top: Daniel Hannay spars with trainer Dundee Kim.

Above: Gym owner Dundee Kim, second from left, with lawyers Scott Lynch, Angus Edwards, Daniel Hannay and Ashkan Tai.

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New DLA covers Logan and Scenic Rim

Queensland's newest district law association, the Logan and Scenic Rim Law Association, will hold a social launch event this month.

Founding president Michele Davis said the association had already attracted around 30 members and covered a 'black hole' bordered by the DLAs for Ipswich, the Gold Coast and Brisbane South. It included centres such as Springwood, Beenleigh, Beaudesert, Boonah and Jimboomba.

She said her experience with DLAs in Ipswich and Hervey Bay had underlined the benefits of collegiate networking for practitioners working in geographic regions, and the new DLA would aim to provide networking opportunities for the many practitioners in the area.

Jocelyne Berry is secretary of the new DLA and Ben Wilcock is treasurer. More information is available at lsrla.wordpress.com or via [facebook.com/LSRLA](https://www.facebook.com/LSRLA).

Bond University elects new chancellor

Recently retired Federal Court judge Dr Annabelle Bennett AO SC has been elected as Bond University's eighth chancellor.

Dr Bennett, who initially obtained an honours degree in science and then completed a PhD in cell biology, later studied law and practised as a barrister, becoming Senior Counsel in New South Wales in 1994.

She has also served as president of the Copyright Tribunal of Australia, an arbitrator of the Court of Arbitration for Sport, presidential member of the Administrative Appeals Tribunal and an additional judge of the Supreme Court of the ACT. She is recognised globally for her expertise in intellectual property law.

The 19 April meeting of the University Council also elected new councillors Lisa Paul AO PSM and Dr Manny Pohl.



Dr Annabelle Bennett

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Time to take the Push Up Tour!

For Gold Coast solicitor Matt Windle, a fitness challenge has become a consuming passion that brings benefits to community charities.

The Push Up Tour encourages individuals or teams to “get off the couch” and match push ups with the kilometres ridden at *that* famous French bike race in July each year.

“Initially, before setting up this initiative, three friends and I completed the push ups as a bit of a fitness challenge in 2014,” he said. “However, given the support and encouragement we were receiving from family and friends, we decided to turn it into a charity-based event to raise money for local/Australian charities of our choice.

“We have a Facebook page, along with a mycause.com.au page for the registration of participants and, of course, the all-important fundraising.

“In the first year (2014), we raised a little over \$3000 for the Starlight Children’s Foundation. Last year with 99 participants we raised over \$31,900 and split those funds between Starlight and the Cure Brain Cancer Foundation. This year, off the back of last



year’s amazing results, we are seeking 300 participants to register and looking at raising more than \$100,000 for charity.”

As well as completing a push up for every kilometre ridden on each day of the bike race, participants will need to rally family, friends, work colleagues or others to sponsor their efforts. From the 2 July start date, they will receive a daily email over each of the 21 days of the race noting the number of push ups required that day.

Push Up Tour organisers Stacy Mitchell, second from right, and Sam Dalzell, right, presented the Starlight Children’s Foundation with a cheque for more than \$13,900 last year.

Matt, a partner at MBA Lawyers, said that this year the charities supported would again be the Starlight Children’s Foundation and the Cure Brain Cancer Foundation.

For free registration and more information, see mycause.com.au/events/thepushuptour.

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QLS backs mandatory reporting in child care sector

The Child Protection (Mandatory Reporting – Mason’s Law) Amendment Bill 2016 was introduced into the Queensland Parliament on 17 March 2016 by the Shadow Minister for Communities, Child Safety and Disability Services, Tracy Davis MP.

The primary objective of the Bill, as outlined in its explanatory notes, is to “ensure that mandatory reporting obligations apply to early childhood education and care [ECEC] sector individuals in accordance with the QLRC [Queensland Law Reform Commission] report, ‘Review of Child Protection Mandatory Reporting Laws for the Early Childhood Education and Care Sector’”.

In 2011 it was reported that 16-month-old Mason Parker was allegedly killed by his mother’s partner. Mason’s grandfather campaigned to have the law changed so

that day care centres have a duty to report incidences of abuse.

In our submissions we noted that Queensland Law Society is a strong advocate for evidenced-based policy and that the Bill had been introduced following the referral and report from the QLRC. We said the Society supported the general principles underpinning the Bill, noting that the QLRC recommended that the Act be amended to expand mandatory reporting to the ECEC sector in its December 2015 report.

We also observed that the increase in families utilising the ECEC sector strengthened the argument that it should not be excluded from mandatory reporting if there was a reportable suspicion about a child or if it was considered that a child was likely to become a child in need of protection.

We then agreed with the QLRC recommendations that “any potential adverse

consequences of expanding mandatory reporting to the ECEC sector can be addressed through appropriate training and education”.

We also raised the recent case of Sanaya Sahib, and asked for consideration of whether paramedics in Queensland should also be included in the classes of persons from whom mandatory reporting is required. We ultimately recommended that there be an inbuilt mechanism in the Act for a two-year review of the classes of persons required to undertake mandatory reporting, with the view to possibly expanding these classes to paramedics following relevant research and consultation.

The parliamentary Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee is due to report on the Bill to Parliament by 8 June.

Louise Pennisi is a QLS policy solicitor.



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Human rights submission takes broad view

Queensland Law Society has made a submission to State Parliament's Human Rights Inquiry following Council consideration of a draft prepared by the Society's Human Rights Working Group.

We submitted views which accord both with opponents and proponents of legislating for human rights in Queensland. The submission reflects the views both of the working group constituency and the broader membership, and accords with the Society's role as an independent, *all-partisan* broker representing the full gamut of its members' interests.

The parliamentary Legal Affairs and Community Safety Committee is due to report by 30 June.

Julia Connelly is a QLS policy solicitor.

Existing regulation sufficient for building and construction

Queensland Law Society, with the input of its Construction and Infrastructure Law Committee, has made a submission to the Department of Housing and Public Works on its Security of Payments discussion paper.

The discussion paper, released last December, outlined the possibility of introducing project bank accounts following the collapse of Walton Constructions in 2013.

We submitted that, prior to imposing another layer of compliance on an already significantly regulated industry, there should be an assessment of the present figures in relation to such corporate collapses.

In our view, the circumstances leading to the Walton's collapse are not evident generally in the construction industry, and imposing additional

costs of compliance on medium and small contractors may not necessarily be warranted.

The submission emphasised that, properly enforced, existing regulations would address the issues raised in the paper. Specifically, these regulations are:

- Section 67U of the *Queensland Building and Construction Commission Act 1991*, and
- the Minimum Financial Requirements Policy for licensing.

We proposed that the issues raised in the paper would be adequately addressed by the amendment of the financial monitoring requirements, by requiring companies to report quarterly, with those reports being no older than 14 days prior to submission and a maximum age of one month old.

Annmaree Verderosa is a QLS policy solicitor.



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Pro bono best practice guide released

The Australian Pro Bono Centre has released a new guide to best practice in the provision of pro bono legal services by large and mid-size law firms in Australia.

Centre chair Phillip Cornwell, a partner at Allens said structured pro bono legal practice in large and mid-size firms had become more complex, sophisticated and diverse in recent years, and was still evolving.

“The centre decided to review these different approaches and to try to articulate what is best practice so as to share the knowledge nationally and internationally,” he said. “The resulting best practice guide draws on the experience of leading Australian practitioners and will be a useful tool for law firms to help them develop, and better manage, their pro bono programs and practice.”

According to the guide, the 10 key elements for best practice are:

1. a strong social justice and pro bono culture supported by management
2. a dedicated pro bono leader
3. broad awareness of the pro bono program within the firm
4. broad engagement of staff and appropriate training
5. a pro bono policy and strategic plan
6. performance of pro bono legal work to the same standard as commercial work
7. adequate crediting and recognition of pro bono legal work within the firm
8. setting a firm-wide pro bono target and budget
9. strong and deep relationships with community partners
10. a strategic risk management plan including accurate record keeping and a regular evaluation process.

The guide is supported by examples of best practice from individual firms and quantitative data to provide benchmarks and to illustrate the Australian context.

Copies of the guide are available at probonocentre.org.au.

Vale Esther Lardent 1948-2016

One of the most noble and fulfilling activities regularly undertaken by lawyers is giving their time, effort and expertise to various good causes for no other reward than the satisfaction of a doing a good deed – what we collectively refer to as pro bono legal work.

Such work has become so commonplace that most lawyers see it as simply part of their regular duties, and the fact that pro bono has become ‘part of the furniture’ at pretty much all firms owes a lot to the efforts of Esther Lardent, who passed away on 4 April 2016.

Esther Lardent was a strong advocate of pro bono legal work and one of the early proponents of making the business case for pro bono. In her monograph on why pro bono is good for business, she outlined many of the factors as to why law firms should embrace pro bono, such as staff retention, greater training and development, and enhanced firm morale.

Esther coined the phrase, ‘pro bono is the glue that holds the firm together’, which is often used in the Australian context, most recently in evidence given before the Productivity Commission’s Inquiry into Access to Justice Arrangements.

An important contribution Esther made to the pro bono movement in the United States was her work on positional law firm conflicts. Writing in 1998 in the *Fordham Law Review*, she highlighted the serious consequences of law firms relying on broad claims of positional conflicts in order to refuse requests for pro bono assistance.

Law firms that claim blanket positional conflicts (or what we in Australia more frequently refer to as a commercial conflict – as opposed to a traditional client conflict)



Esther Lardent - Photo courtesy of the Australian Pro Bono Centre

reduce the available pool of pro bono resources for legal matters in the public interest. Esther wrote:

“Current law firm practice... too often consists of an unexamined and *ad hoc* approach to such conflicts that turns more on anxiety about client reactions than on a careful examination of legal, ethical and policy considerations that admit market realities but tempers those concerns with an affirmative commitment to access to justice.”

Her point remains relevant today.

Queensland Law society, and in particular the Society’s Access to Justice and Pro Bono committee, who were inspired by Esther, recognise the tremendous contribution she made and the enduring influence of her work on legal professions globally.

Monica Taylor
Director, UQ Pro Bono Centre

Did you know Justice Hope?

Historian Dr Peter Edwards AM is seeking information from anyone who has correspondence, photographs or recollections relating to the life and career of Robert Marsden Hope (1919-1999) AC CMG LIB LID (Hon), a former Justice of the Supreme Court of New South Wales and Royal Commissioner on intelligence and security organisations.

Dr Edwards is preparing a biography and can be contacted at: PO Box 1063, Fitzroy North, Vic. 3038; t: 0438 230 892; e: edwardspg@bigpond.com.

Got something to say?

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

McInnes Wilson moves into three states

McInnes Wilson has expanded its operations with the opening of new offices in Canberra, Adelaide and Melbourne last month.

"Regardless of the challenges that are facing the industry, McInnes Wilson recognises that the law is about service and value, and our firm has grown its client base over 40 consecutive years, with no dips or downturns because we offer our clients value," McInnes Wilson chair Paul Tully said.

"The opening of new offices across three capital cities is not only an important step towards achieving a national presence, it also enables the firm to grow its capabilities and provide better value services to meet our clients' needs and expectations.

"Value is simply a matter of quality over price, and while others are focusing on price, our clients are looking for value regardless.

"While our roots lie in insurance law, McInnes Wilson is a full-service firm and the Canberra, Adelaide and Melbourne teams will maintain the firm's well-known insurance expertise while also focusing on other areas of practice.

"We have identified many opportunities in these cities, particularly in property, government, insolvency, litigation, corporate and commercial and education."

McInnes Wilson has offices in Brisbane, Maroochydore and the Gold Coast, and opened offices in Sydney and Parramatta in New South Wales in 2013.

New appointments welcomed

The Law Council of Australia has applauded the appointment of the new Commonwealth Director of Public Prosecutions (DPP) as well as the new Disability Commissioner, Age Discrimination Commissioner and Human Rights Commissioner.

The appointments were all announced by the federal Attorney-General on 5 May.

Law Council president Stuart Clark AM said the appointment of Sarah McNaughton SC as the new Commonwealth DPP was an outstanding choice.

"With almost three decades experience as a legal practitioner, and a respected member of

the New South Wales Bar, Ms McNaughton is extremely well placed to serve as the nation's lead criminal prosecutor," Mr Clark said.

Mr Clark also welcomed the appointment of Alastair McEwin, a former manager of the Australian Centre for Disability Law, as Disability Discrimination Commissioner and that of Dr Kay Patterson as Age Discrimination Commissioner. Dr Patterson is the current Commissioner of the National Mental Health Commission and a former Cabinet Minister for Health and Ageing.

Also welcomed was the choice of Edward Santow, a legal academic and director of the Australian Pro Bono Centre, as Human Rights Commissioner.

Queensland judicial changes

Queensland Attorney-General Yvette D'Ath last month announced the appointment of a District Court judge, a new Public Guardian and three magistrates.

Barrister Craig Chowdhury was welcomed to the bench of the District Court in a ceremony in the Banco Court on 19 May. Mr Chowdhury is a criminal lawyer who worked as a federal and state prosecutor before serving as Deputy Public Defender at Legal Aid Queensland.

Natalie Siegel-Brown, who was appointed as Public Guardian, has led government

organisations working in child protection, Indigenous affairs, disability, family violence, mental health and crime prevention. She will commence her appointment on 25 July for a three-year term.

Queensland's three new magistrates are James Blanch of Blanch Towers Lawyers at Deception Bay, Legal Aid Queensland Deputy Public Defender David Shepherd, and Belinda Merrin, a consultant Crown Prosecutor at the Office of the Director of Public Prosecutions.

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- * Sale or succession planning
- * Incorporation and Stamp Duty

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- * Sale or succession planning
- * Partnership Buy Out or Buy In
- * Mergers or Acquisitions
- * Incorporation and Stamp Duty

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A Law Week to remember

From the glorious morning that greeted Brisbane participants in the Queensland Legal Walk until the last dance at the QLS Ball, it was a Law Week to remember.

The week began early on Tuesday 17 May with walkers in Brisbane and regional centres assembling for the annual walk to fundraise for the Queensland Public Interest Law Clearing House (QPILCH) and celebrate the legal profession's commitment to ensuring all Queenslanders have access to the legal system when they most need it.

Law week continued on Wednesday 18 May with a complimentary breakfast session on Mindfulness for Lawyers, which presented attendees with a positive way to strengthen resilience and help prevent mental health and other issues arising.

The QLS Open Day on Thursday 19 May included eight complimentary professional

development sessions and an enjoyable opportunity for members to network with their colleagues and QLS staff.

For many, the highlight of the week came on Friday 20 May when the QLS Annual Ball was held at Cloudland's Rainbow Room in the heart of the Fortitude Valley precinct.

For many, it was a night to remember that capped an unforgettable week.

More photographic highlights from Law Week can be found on the QLS Facebook page.



1. Greer Davies, chair, Early Career Lawyers Committee
2. QLS councillor Kara Thomson, QLS deputy president Christine Smyth
3. My Family Lawyers + Moray & Agnew
4. Joshua Creamer, QLS vice president Kara Cook
5. Tucker & Cowen Solicitors
6. O'Sullivan's Law Firm
7. Go To Court Lawyers





8



11



9

8, 9. Queensland Law Society Open Day
10. Mindfulness for Lawyers breakfast
11, 13-14. Queensland Legal Walk, Brisbane
12. Attorney-General Yvette D'Ath and Chief Justice Catherine Holmes lead participants in the Queensland Legal Walk.

 View more images at facebook.com/qldlawsociety



13



10



12



14

Awards for champions of equity and diversity



A highlight of QLS Open Day was the presentation of the Equity & Diversity Awards which acknowledge firms that develop new and innovative approaches to law firm life. The awards, managed by the Equalising Opportunities in the Law Committee, are awarded in three categories.

President Bill Potts, *left*, presented the awards, with the Large Legal Practice Award going to Clayton Utz. It was accepted by Brisbane partner in charge Alan Maguire, *right*. Miller Harris Lawyers won the Small Legal Practice Award, which was accepted by partner Melissa Nielsen, and the Small Legal Practice Initiative Award was won by Harrington Family Lawyers, accepted by partner Stephen Page.

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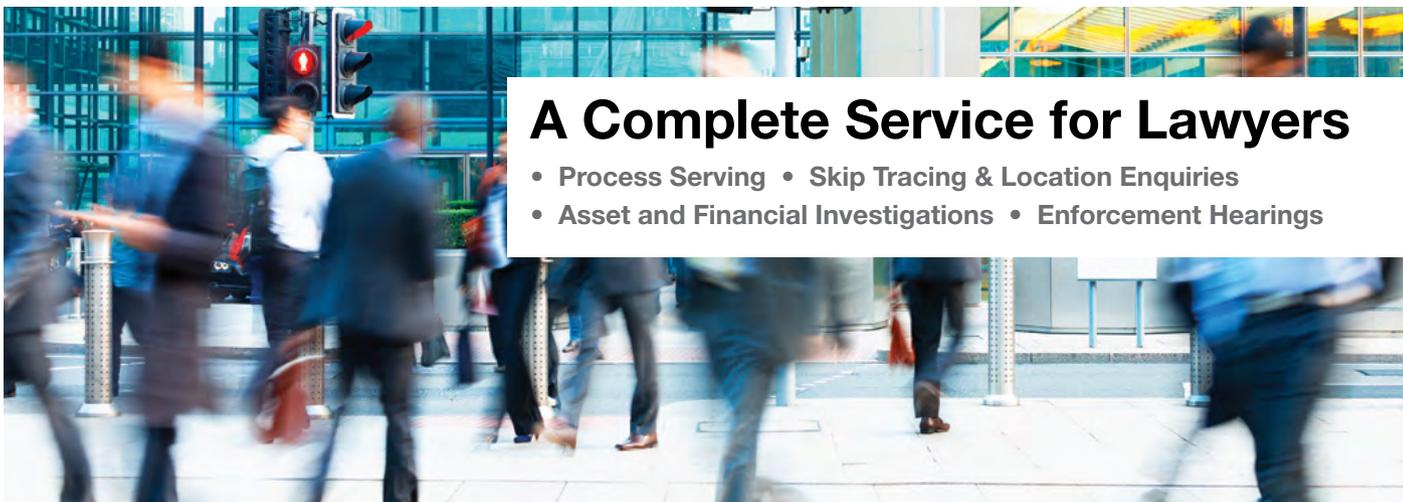
Fine footy fun

One of the fun events of the year was the Queensland Law Society Touch Football Tournament, held on 7 May at JF O’Grady Park, Fairfield.

With 20 teams in a six-a-side mixed competition, it was a big day with plenty of excitement and some thrilling football.

Maloney MacCallum Lawyers (pictured right) came out on top, closely followed by Clayton Utz, with last year’s winners, K&L Gates, in third place.

A guest team, Sweet Az, took out the lunchtime relay event, while Holly Browne, of Mills Oakley, scored a luxury BMW for a weekend, courtesy of sponsor Brisbane BMW.

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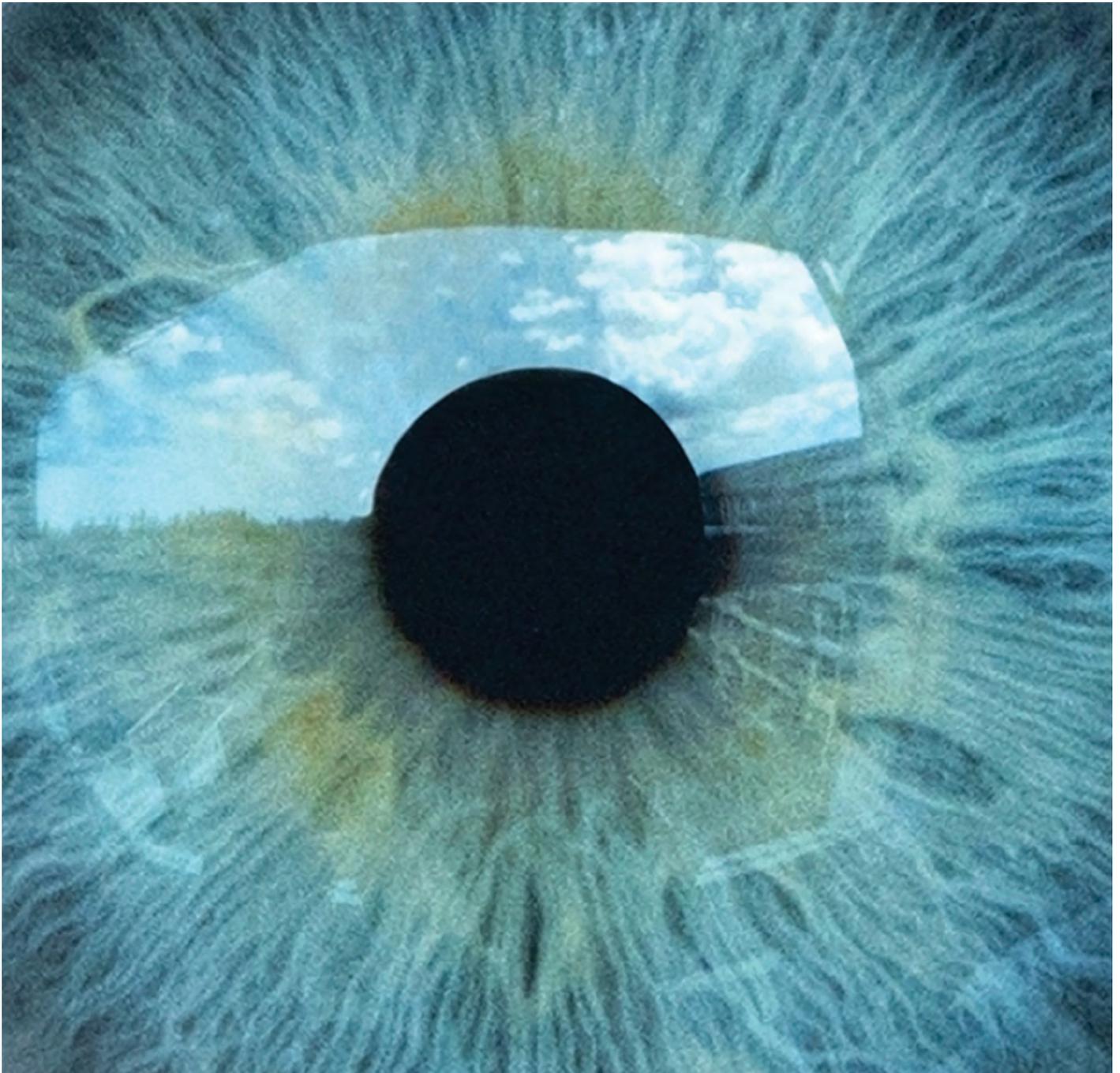
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The new CGT withholding regime: More than meets the eye

Both residents and non-residents should prepare



Sally Newman outlines some of the implications for transactions under the new 10% foreign resident capital gains tax (CGT) withholding regime.



In February 2016, the Federal Government passed new legislation introducing a 10% foreign resident capital gains tax withholding regime,¹ which is intended to capture CGT payable on capital gains made by foreign residents.²

However, the withholding obligation applies more broadly than many will have anticipated – both vendors and purchasers, whether Australian residents or not, will need to consider whether or not their transactions are affected.

From 1 July 2016, purchasers of direct (and some indirect) interests in Australian land (including options to acquire such interests), will have to pay to the Australian Taxation Office (ATO) an amount equal to 10% of the first element of the purchaser's cost base in the relevant asset (which will generally be the purchase price in an arm's length transaction) on or before completion of the transaction.

The withholding applies unless there is sufficient proof of the vendor's Australian tax residency, or the transaction is otherwise exempted. Note that this essentially creates a reverse onus – that is, vendors are assumed to be non-residents unless proven otherwise.

What are the main implications?

1. If the vendor has not demonstrated that it is not a foreign resident, the purchaser must withhold from the purchase price and pay to the ATO the withholding amount. If the purchaser does not do so, it will be penalised by the ATO in the amount that should have been withheld and paid plus, potentially, punitive interest costs.

2. Parties will likely require additional time in affected transactions to establish residency, complete the compliance steps and apply to vary the withholding amount (if necessary). Parties should be alive to this and start to factor these requirements into settlement timeframes. This should be started now, as transactions currently contemplated may be executed or formed after 30 June 2016.
3. Transaction documentation should include appropriate clauses to address the withholding obligations and the timing of any compliance steps (for example, obtaining a clearance certificate or withholding variation from the ATO).
4. This is not a final withholding tax, but the vendor will receive a credit for the withholding amount when it lodges its tax return (although this may not occur until well after the transaction settles).

What transactions are affected?

The scope of the legislation is broad. Unless an exclusion applies, the following transactions will be caught by the regime:

- acquisitions of Australian land (including certain leases, and mining, quarrying and prospecting rights)
- grants of leases for a premium
- acquisitions of interests in some Australian companies, partnerships and trusts, when the vendor owns 10% or more of the entity and the entity is 'land rich' (that is, the value of the entity's Australian land interests is more than the value of the entity's assets which are not Australian land interests)
- grants of options to acquire any of the above interests.

What are the exclusions?

No withholding or payment to the ATO is required to be made if an exception applies to the transaction, regardless of whether or not the vendor is a foreign resident.

If an exception does not apply, most significantly, no withholding or payment to the ATO is required for these transactions if there is sufficient 'proof' of the vendor's Australian tax residency. However, as discussed below, this is not simply a matter of applying your intuition as to a party's residency – the required proof is prescribed by the legislation.

Agreements formed prior to 1 July 2016 will not be affected. If a contract is executed before 1 July 2016 but is not formed until after, because there are conditions precedent to formation, they will be subject to the regime, as will options granted prior to 1 July 2016 but which are exercised after 1 July 2016.

Acquisitions of land, leases or company title interests worth less than \$2 million, or grants of leases with a premium of less than \$2 million are also excluded from the regime. However, there is no *de minimis* threshold for acquisitions of interests in land-rich entities, or for grants of options/rights (that is, the regime will apply to these transactions even where consideration is \$1).

Depending on the form of your transaction, you may want to consider the availability of other exclusions, including for:

- transactions involving vendors who are in administration or subject to bankruptcy proceedings in Australia
- transactions conducted through an approved stock exchange or a broker-operated crossing system
- certain securities lending arrangements
- transactions for which another withholding tax applies (for example, withholding from fund payments made by managed investment trusts to foreign resident taxpayers).

What 'proof' is required of the vendor's Australian tax residency?

Direct land transactions

For direct land transactions (other than grants of rights or options) and for transfers of company title interests, no withholding is required if the vendor obtains and provides to the purchaser a 'clearance certificate' issued by the ATO.

Clearance certificates are valid for 12 months, once issued. The ATO has advised that the form to apply for a clearance certificate will be available online on 27 June 2016. As at the time of publishing, we are expecting more information regarding clearance certificate applications, as well as the processes around the regime, generally. Current indications are that the timeframes for issuing clearance certificates will be one to 14 days if the information on the application conforms with that already on ATO systems, 14 to 28 days if any information needs to be checked, and over 28 days for 'high risk' or 'unusual' transactions.

If no clearance certificate is provided to the purchaser, the purchaser must withhold the withholding amount, irrespective of whether or not the vendor is, in fact, an Australian resident. This makes providing a clearance certificate to the purchaser an essential step in a transaction for every Australian vendor of Australian land, mineral rights or company title interests.

If a transaction involves multiple vendors, then *all* vendors must provide a clearance certificate to the purchaser. If any one vendor fails to do so (even if that vendor, in fact, is an Australian resident), then the obligation on the purchaser to withhold remains (although note that in such a situation it may be possible to vary the withholding amount down from 10%).

Interests in land rich entities and grants of options or rights

For transactions involving sales of interests in landholding entities or grants of options or rights, vendors may make a declaration that they are Australian residents for tax purposes. Purchasers may rely on the vendor declaration, unless the purchaser *actually* knows the declaration to be false (even if a purchaser may have reasonable grounds to doubt the accuracy of a declaration, that does not, of itself, prevent the purchaser from relying on the declaration). Vendors can make a standing declaration that can be relied on by a purchaser for six months from the time they are made.

If no vendor declaration is given, or one is given but the purchaser has specific knowledge that it is false, the purchaser must apply the 'knowledge condition' test. Where this test applies, the purchaser must make the 10% withholding if the purchaser knows or has reasonable grounds to believe that at least one grantor is a foreign resident, or if the purchaser has a foreign address for a grantor, or has been asked to make a payment to a place outside Australia in respect of a grantor and has no reasonable grounds to believe that grantor is an Australian resident.

How is the withholding amount calculated?

The withholding amount is 10% of the first element of the purchaser's CGT cost base, which is usually the total purchase price (including any instalments and any consideration given 'in kind') reduced by any option fees paid to acquire the asset. GST is excluded from total consideration provided the purchaser is registered for GST.

If there are multiple purchasers, the purchasers will 'split' the total withholding amount based on the respective interest in the asset acquired by each of the purchasers.

Can you apply to vary the withholding amount?

A party with an interest in the transaction may apply to vary the withholding amount. Variations are given at the Commissioner of Taxation's discretion. Situations in which parties might apply for variations include when there are multiple vendors, only one of which is a foreign resident; when the transaction would not otherwise give rise to any income tax liability (for example, the vendors have tax or capital losses); or when the sale price is less than a debt owed to a secured creditor. Note that a secured creditor may be able to apply for a variation, not just the vendors and purchasers.

In the majority of cases (where the ATO has all the required information), the variation will be provided within 28 days. If you have any concerns about the variation being obtained in time, then you should apply more than four weeks before settlement.

When must the purchaser pay the withholding amount to the ATO?

The purchaser must pay the amount on or before the day on which the purchaser becomes the owner of the property (usually settlement). The payment must be made to the ATO based on the total amount payable for the property (less any option fee), even if payments are to be paid by instalments post-settlement.

Before paying, the purchaser must notify the ATO about the payment. Note that the purchaser may pay the amount to the ATO on the day of or prior to settlement, but the vendor has until settlement to provide the clearance certificate. Clear communication between vendor and purchaser must be a priority, so as to avoid the situation where an amount is paid to the ATO by the purchaser but the vendor subsequently provides a clearance certificate to the purchaser.

The penalty for failing to pay the withholding amount to the ATO is equal to the amount that was required to be paid to the ATO. The ATO can seek recovery of the penalty plus interest from the purchaser.

Things to consider in advance of the regime's commencement

It is important that parties communicate with one another about these new requirements. Parties should:

- Consider whether or not the transaction will be subject to the regime, to avoid surprises at settlement.
- Consider including tailored clauses in the sale agreements, including warranties, and clauses dealing with timing for the provision of clearance certificates, vendor declarations and any withholding variations.
- If they are an Australian resident vendor, obtain a clearance certificate as soon as possible.
- Factor in time for compliance, including purchaser PAYG tax registration if required, when determining settlement timeframes.

Sally Newman is a special counsel (tax) at MinterEllison. The assistance of Daniel Jones, a graduate at MinterEllison, is gratefully acknowledged.

Note

¹ The new requirements are inserted into Schedule 1 to the *Taxation Administration Act 1953* (Cth) (See Div 14).

² Explanatory Memorandum, Tax and Superannuation Laws Amendment (2015 Measures No.6) Bill 2015.

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Property transactions and overseas clients

Obligations and means to verify identity

Article by Elizabeth Dann, Registrar of Titles.

With current trends in the property market it is a commercial reality that most legal practitioners conducting conveyancing will at some stage act for clients who are temporarily or permanently outside Australia.

In the past, witnesses, legal practitioners, financial institutions and transacting parties have expressed concerns about the lack of a clear, uniform process for all instruments or documents executed and witnessed outside Australia.

Consequently the Queensland Titles Registry has worked with the Commonwealth Department of Foreign Affairs and Trade and other Australian jurisdictions' registries to develop a consistent and standard process for verification of identity and witnessing for overseas clients and other parties.

Obligations to verify identity

As practitioners should be aware, both the *Land Title Act 1994* (for paper transactions) and the Queensland Participation Rules (for electronic conveyancing) impose obligations for prescribed parties to take steps to verify the identity of persons who are executing instruments and documents outside Australia.

In brief these obligations are:

1. For paper transactions: There are obligations under section 162 of the *Land Title Act 1994* for a person who witnesses an instrument executed by an individual to take reasonable steps to ensure that the individual is entitled to sign the instrument, and additional requirements outlined in the *Land Title Practice Manual*.

2. For electronic conveyancing transactions: There are obligations under the Queensland Participation Rules for electronic conveyancing for a subscriber (for example, an Australian legal practitioner or mortgagee) to take reasonable steps to verify the identity of persons, including their clients or client agents or mortgagors, when the subscriber is a mortgagee or represents a mortgagee.

Process from 1 May 2016

From 1 May 2016, in Queensland, substantially the same process is available for all parties outside Australia, irrespective of whether the instrument or document for the conveyancing transaction is intended to be lodged in paper or electronically.

The process is outlined in paragraph [60-0390] of the *Land Title Practice Manual* and paragraph 5.2 and the appendix to the Australian Registrars' National Electronic Conveyancing Council Model Participation Rules Guidance Note 2: Verification of Identity (the ARNECC Guidance Note). When the practitioner is verifying the identity of their client, the process requires a practitioner to take preliminary steps before an instrument or document is witnessed, including:

1. Reviewing with the client what identification documents they have available and determining the highest document category in the Verification of Identity Standard the client can satisfy (paragraph [60-2000] of the *Land Title Practice Manual* or schedule 8 of the Queensland Participation Rules).
2. Taking reasonable steps to determine the client's right to deal as a particular party to the conveyancing transaction, that is, their entitlement to mortgage, transfer or otherwise deal with the relevant property.
3. Preparing the instrument or document and providing it to the client along with:
 - a. a witness certification in the form prescribed in paragraph [60-0390] of the *Land Title Practice Manual* or the appendix of the ARNECC Guidance Note, and

- b. written instructions advising the client of the process and what original and current identification documents are to be produced to the intended witness in accordance with the Verification of Identity Standard (passport, driver's licence, etc.).

The witness will then witness the execution of the instrument or document and complete the applicable certification in accordance with the process.

For instruments or documents lodged in paper, from 1 August 2016 the applicable certification completed by the witness will need to be deposited when the instrument or document is lodged for registration. Instruments or documents executed before 1 August 2016 may comply with either the new process or the requirements that were previously outlined in paragraph [60-0390] of the *Land Title Practice Manual* and applied prior to 1 May 2016.

More information

For a comprehensive understanding of the obligations and process, including minor differences between electronic and paper conveyancing, practitioners should refer to:

1. The *Land Title Practice Manual*, particularly part 60, paragraph [60-0390] available online at dnrm.qld.gov.au/__data/assets/pdf_file/0006/97134/land-title-practice-manual.pdf.
2. The Queensland Participation Rules, particularly rule 6.5 and schedule 8 available online at business.qld.gov.au/industry/titles-property-construction/titles-property/electronic-lodgement-conveyancing/national.
3. The Australian Registrars' National Electronic Conveyancing Council Model Participation Rules Guidance Note 2: Verification of Identity available online at arnecc.gov.au/__data/assets/pdf_file/0017/208313/MPR_Guidance_Note_2_-_Verification_of_Identity_Updated.pdf.



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These outcomes deliver both tangible and intangible benefits. Foremost amongst these is the ability for QLS Council to deliver in 2016/17 a base levy rate reduction of up to 20% for insured practices. This follows on from the 10% delivered in 2015/16 and reinforces Lexon's role in working with QLS to provide your insurance at the most affordable cost.

The intangible benefits are also important and should not be overlooked – a lower level of claims improves consumer confidence in the profession and also reduces the overall emotional toll on practitioners resulting from claim events.

In addition to lower rates, in 2016/17 Lexon and QLS are offering 'top-up' insurance for QLS members who would like 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. If you are interested in these options, please contact the Lexon team.

Coverage for 2016/17

Lexon prides itself on the expansive coverage it provides to the profession. Some key benefits for 2016/17 include:

- Coverage for the costs of representation in Legal Services Commission complaints and prosecutions (subject to specified limits). This cover follows on from the existing free legal service provided to members by QLS and comes at no extra charge. It also attracts a reduced excess.

- The expansion of our innocent party coverage to a full \$2 million each and every claim, and the removal of the online legal services exclusion.
- Free run-off cover for former insureds. This is an important benefit as it is possible for a claim to arise well after practice has ceased. In commercial insurances, run-off cover often comes at a significant unexpected additional cost when a professional practice is being wound down.

The full terms and conditions of cover are available on our website.

The profession continues to grow

Despite the challenging economic conditions, it is pleasing to see the insured cohort continue to grow. Lexon-insured practices now collectively generate annual revenues exceeding \$1.9 billion with year-on-year growth exceeding 3%.

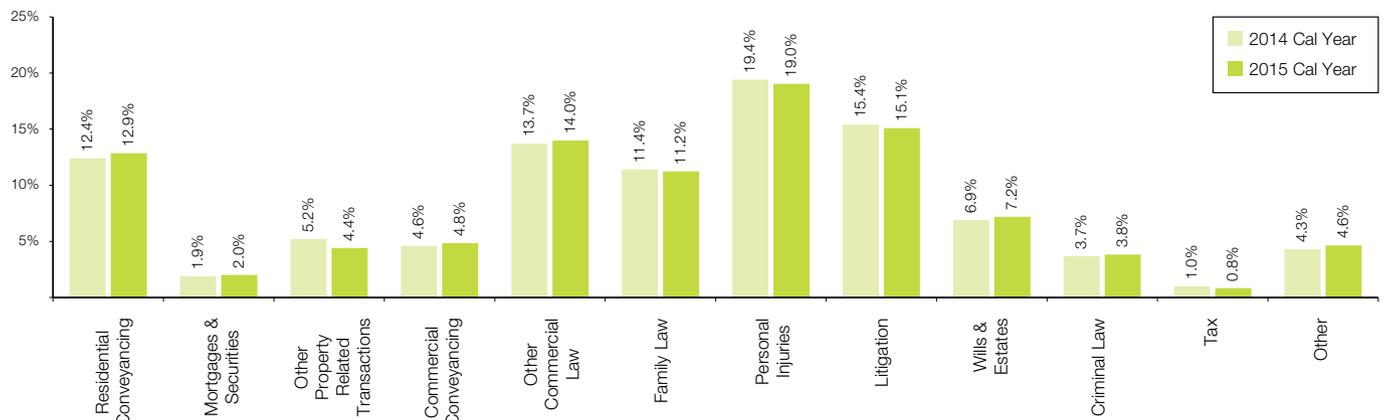
The graphic below depicts the comparative size of practice areas in 2014 and 2015. Personal injuries work remains a key area of activity, albeit one which may have been impacted in relative terms by the introduction of WorkCover impairment thresholds. With those thresholds now removed, it will be interesting to see how this area performs next year.

Family law, litigation, commercial law and residential conveyancing each contribute more than 10% towards the overall fee income.

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 in 2014 and 2015.



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Getting ready for the end of year – practice changes

The end of the financial year is the most active time for practice changes.

These include 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 Buying & Selling and Acquisition Endorsement information sheets available on the Lexon website.



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A constructive view of criticism

It's really about self-education

Justine Gerrey explains how to handle criticism without tears and apply it to benefit your career.



You have toiled tirelessly to craft a masterpiece of legal prose, or practised your court appearance in the mirror a hundred times.

After all that hard work it can be difficult to accept that you could have done better.

It can be easy to become defensive of your efforts, to the point of failing to truly appreciate the value in the feedback you receive. Having struggled myself with receiving constructive criticism graciously, I thought I would share some of the tips I have picked up to help me get the most out of the experience.

It isn't personal

Most people assume receiving criticism is, by definition, a negative experience; that you are being condemned, denounced as somehow lacking. 'Constructive' criticism is not about reproof, it is an appraisal of the merits of the legal work with commentary on how to make it better. In other words, it is your work that is being evaluated, not you as a person. We lawyers, particularly early career lawyers who often feel they have 'something to prove', can forget that we are not our work.

Also, consider the source and their motivation. An upset litigant on the other side is likely to have a very different view of your performance than, say your principal solicitor. This does not mean that both do not have something to offer if you are able to realistically analyse the criticism for any aspects that might help you improve for your own sake.

Sometimes the issue which is the subject of criticism is not about you at all; it could be a procedural issue that you could help improve so the entire firm benefits.

That said, criticism that does not contain some form of development advice, may not be 'constructive'. This should not be taken to heart either, but should also not be taken as an accurate reflection on your work.

Be proactive

We are human beings, and we cannot possibly know everything perfectly all the time. Most lawyers have, at some point, had a moment or two when they knew that what they had was not quite right yet, but early career lawyers can sometimes be afraid to admit they could use some help. Don't be. Being able to identify your own weaknesses is an invaluable tool.

I quite often take work to another solicitor and honestly say "something's not right here, can you please review this?" I find my colleagues are usually open and frank in their assessment of my work, and often the insight and fresh perspective they provide helps me to refine my own practices and to build better internal procedures to assist me with future work.

Ask questions

Whether you have sought the feedback or not, it can be just as uncomfortable to give constructive criticism as to receive it, leaving some people dodging the central issue, trying to be polite. If you are going to be criticised, make the most of it. Ask questions, request specifics and make sure you are clear in your own mind as to what exactly the criticism is about.

The questions you ask should not just be 'what you did wrong', but also whether the other person has any ideas on how to do it better. This step can also help you separate constructive criticism from personal attacks – constructive criticism should include some sort of 'take-away' for you to work with.

Follow up

It is called constructive criticism for a reason – to help you 'construct' methodologies to be bigger, better, brighter next time the situation arises. This is often easier said than done, and figuring out how to apply the constructive criticism you just received can sometimes be harder than actually receiving the criticism itself.

I always make a plan of what I intend to change to better my approach to the criticised issues. This helps me to make sure I truly understand what is being criticised and how I can improve it. It also helps me consolidate all the points above, to try to separate myself from the work or action being criticised and view it more objectively.

Quite often I also share my plan with my criticiser. This shows I have taken their criticism seriously, and also helps me confirm I have truly understood their criticism. Sometimes, I am able to get further feedback on my action plan as well.

Summary

Ultimately, I try to view constructive criticism as a process of self-education. Yes, it may sting a little, but using the above strategies I aim to turn any 'weaknesses' to my advantage, to learn from them, and to use them to become a better lawyer not only for my clients, but for myself.

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee's Proctor working group is chaired by Greer Oliver (GXO@cbp.com.au) and Hayley Schindler (h.schindler@hopgoodganim.com.au). Justine Gerrey is a lawyer at Bottoms English Lawyers in Cairns.

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Pleading a reply

A guide for state and federal courts

The usual course of pleadings is the filing and service of a statement of claim by the plaintiff, then defence by the defendant and then, if necessary, a reply by the plaintiff.

In relation to a counter-claim (in the state courts) or cross-claim (if the *Federal Court Rules* (FCR) apply), the course of pleadings is filing and service of the counterclaim or cross-claim by the defendant or respondent against the plaintiff or applicant, then defence by the plaintiff¹ or applicant, then the defendant's or respondent's reply to that defence.

Purpose of reply

A reply has two primary purposes.

First, it enables the party serving the reply to admit any allegations of fact made in the defence. This serves to reduce the factual issues which are before the court and narrows the dispute.

Secondly, it enables the party serving the reply to raise new facts and matters not pleaded in the statement of claim in response to the allegations of fact made in the defence. This ensures that the party pleading the defence is not taken by surprise at trial.

If your client does not wish to do either of these things, then it may not be necessary for your client to file and serve a reply.

Timing of reply

Generally, a party must file and serve its reply within 14 days of being served with the defence.²

Consequences of no reply

Pursuant to rule 16.11(1) FCR, if no reply to a defence is filed, a joinder of issue is implied in relation to any allegation of fact in the defence and each allegation of fact is taken to be denied.

This is to be contrasted with the position in the state courts. Under the *Uniform Civil Procedure Rules 1999*, every allegation of fact in a defence to which no reply is filed in response is taken to be the subject of a non-admission, and the party who fails to file a reply may not give or call evidence in relation to the fact which is not admitted, unless it relates to some other part of its pleaded case.³

Requirements for a reply under the FCR

As a general rule,⁴ a reply filed under the FCR must:

1. Either specifically admit or deny every allegation of fact in the defence or state that the party does not know and therefore cannot admit a fact in the defence (in which case the allegation of fact will be taken as denied).⁵
2. Identify the issues that the party wants the court to resolve.⁶
3. State the material facts on which the party relies that are necessary to give the opposing party fair notice of the case to be made against that party at trial.⁷
4. State the provisions of any statute relied on.⁸
5. Plead a fact if it is necessary to plead it to meet an express denial of the fact pleaded by another party.⁹
6. Plead a fact which, if not pleaded, may take another party by surprise.¹⁰
7. Pleads the words contained in a document or spoken words if the words are material to the reply.¹¹
8. Plead that a condition precedent has not been satisfied, if that is part of its case.¹²
9. Plead a fact or point of law that raises an issue not arising out of the earlier pleading.¹³
10. Plead a fact or point of law that if not expressly pleaded, might take another party by surprise if later pleaded.¹⁴
11. Plead a fact or point of law that the party alleges makes the defence not maintainable.¹⁵
12. Comply with rule 16.02 FCR in relation to issues of form.

A reply filed under the FCR must *not*:

1. Plead the evidence by which the pleaded material facts are to be proved.¹⁶
2. Fall foul of rule 16.02(2) FCR including, in particular, it must not be evasive or ambiguous.
3. Contain allegations which are inconsistent with what is pleaded in the statement of claim, unless they are pleaded in the alternative.¹⁷

Requirements for a reply under the UCPR

As a general rule,¹⁸ a reply filed under the UCPR must:

1. Expressly admit, deny or not admit an allegation of fact made in the defence. The denial or non-admission must be accompanied by a direct explanation for the party's belief that the allegation is untrue or cannot be admitted.¹⁹
2. State all of the material facts on which the party relies.²⁰
3. Plead a fact which, if not pleaded, may take another party by surprise.²¹
4. Plead anything required by rule 150(1) UCPR to be specifically pleaded such as estoppel. That is, if the plaintiff wishes to claim that a defendant is estopped from raising a defence, the plea of estoppel would usually appear in the reply rather than the statement of claim.
5. Plead a matter that the party alleges make the defence not maintainable²² or shows a transaction is void or voidable.²³
6. Plead a matter that raises a question of fact not arising out of a previous pleading.²⁴
7. Plead the words contained in a document or spoken words if the words are material to the reply.²⁵
8. Plead that a condition precedent has not been satisfied, if that is part of its case.²⁶
9. Comply with rule 146 UCPR in relation to issues of form.



by Kylie Downes QC

A reply filed under the UCPR must *not*:

1. Plead the same facts again which are pleaded in the statement of claim. This is explained further below.
2. Plead the evidence by which the pleaded material facts are to be proved.²⁷
3. Contain allegations which are inconsistent with what is pleaded in the statement of claim, unless they are pleaded in the alternative.²⁸

A common problem for those drafting a reply in the state courts is the assessment of what needs to be pleaded to comply with rule 166, particularly when the defence has pleaded a fact which the party pleading the reply wishes to deny but the explanation for the denial is already pleaded in the statement of claim.

The answer is that the UCPR does not require a plaintiff to deny allegations of fact in the defence and to plead again facts already pleaded in the statement of claim as the explanation for the denial. This would result in a circular and repetitive pleading which adds nothing in terms of narrowing the issues in dispute.

In *Melco Engineering Pty Ltd v Eriez Magnetics Pty Ltd* [2007] QSC 198 at [17]–[18], Dutney J observed that:

“I am not persuaded that r 150 (4) of the UCPR requires a party to re-plead facts it has asserted in an earlier pleading. The purpose of the Defence as a document is to set out the

basis on which the plaintiff’s claim is not maintainable. Having set that out there is no obligation on the plaintiff to reassert the original facts in its statement of claim. A reply is necessary only where the defence raises new matters by reason of which the claim of the other party is said to be not maintainable or where facts are alleged which otherwise fall within sub r 151 (4). In any case, the plaintiff has incorporated the SOC into the RAA as part of its general reply to the defence and answer to the counterclaim. Where something has already been pleaded, I can see no reason why it cannot be adopted into a subsequent pleading by reference.

“By way of example, where, by way of defence to a claim in contract, the defendant pleaded illegality, duress or fraud, it would often be necessary for the plaintiff to respond to the facts in a reply because the defence raised would be a new issue. Where one party merely pleads that the contract is ‘X’ and the other says that it is ‘Y’ there is no need to go further.”

Notwithstanding this, it appears to be common (and accepted) practice for a reply to conclude with a paragraph such as, “Subject to the matters pleaded in the reply, the plaintiff denies the allegations in the defence and repeats and relies on the matters pleaded in the statement of claim as its explanation for this denial”.

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

Notes

- ¹ Which is called an answer to the counterclaim under the *Uniform Civil Procedure Rules*: see rule 164 UCPR.
- ² Rule 16.33 *Federal Court Rules*; rule 164(2) UCPR.
- ³ Rule 168(1) UCPR.
- ⁴ There are exceptions such as rule 16.03(2) which does not require a party to plead a fact if the burden of proving that fact does not lie on that party.
- ⁵ Rule 16.07 FCR.
- ⁶ Rule 16.02(1)(c) FCR.
- ⁷ Rule 16.02(1)(d) FCR.
- ⁸ Rule 16.02(1)(e) FCR.
- ⁹ Rule 16.03(1)(a) FCR.
- ¹⁰ Rule 16.03(1)(b) FCR.
- ¹¹ Rule 16.04(2) FCR.
- ¹² Rule 16.05(2) FCR.
- ¹³ Rule 16.08(a) FCR.
- ¹⁴ Rule 16.08(b) FCR.
- ¹⁵ Rule 16.08(c) FCR.
- ¹⁶ Rule 16.02(1)(d) FCR.
- ¹⁷ Rule 16.06 FCR.
- ¹⁸ There are exceptions such as rule 151 UCPR.
- ¹⁹ Rule 166(1) and 166(4) UCPR.
- ²⁰ Rule 149(1)(b) UCPR.
- ²¹ Rule 149(1)(c) UCPR, 150(4)(c) UCPR.
- ²² Rule 150(4)(a) UCPR.
- ²³ Rule 150(4)(b) UCPR.
- ²⁴ Rule 150(4)(d) UCPR.
- ²⁵ Rule 152 UCPR.
- ²⁶ Rule 153 UCPR.
- ²⁷ Rule 149(1)(b) UCPR.
- ²⁸ Rule 154 UCPR.

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Proprietary estoppel and the burial licence

‘The best way to keep one’s word is not to give it.’¹

The decision of *Yu & Anor v Chief Executive, Dept of Justice & AttorneyGeneral* [2016] QCA 54 potently demonstrated the impact death has on a family in the context of making funeral arrangements.

Increasingly, families are making plans in advance in the expectation that it will reduce the trauma experienced on the loss of a loved one. To that end, the matter of *Vosnakis v Arfaras* [2015] NSWSC 625, *Vosnakis v Arfaras* [2016] NSWCA 65 (*Vosnakis*) shows that even when plans are made in advance, the law associated with a right of burial is complex and often involves resort to common law and equitable remedies for resolution.

Vosnakis involved the propounding of contract law and proprietary estoppel principles, where the parties disputed the right to hold a certain burial licence. The reading of *Vosnakis* is assisted by some background to the law of burial rights.

There is no ownership in a dead body – “The right to possession of a dead body exists only for the purpose of its proper disposal.”² If a person has named an executor in his or her will and that person is ready, willing and able to arrange for the burial of the deceased’s body, the person named as executor has the right to do so.³ The personal representative is either an executor appointed in a valid and binding will,⁴ or an administrator appointed by the Supreme Court.

A right of burial is a mere licence to inter a deceased’s remains in a particular plot. It is irrevocable once the remains have been interred in that licensed plot.⁵ Accordingly, once the remains have been interred in the plot the holder of the right of burial has no further rights.

It is not a proprietary right in land.⁶ It is a contractual right granted by the cemetery body to the holder of the right, for the holder to nominate who may be interred in that particular plot.

A right of burial is a chose in action, and as such can be the subject of transactions. However, once the right of burial has been exercised, then the right to control the interment site passes to the legal personal representative of the original deceased (buried in the plot),

not the legal personal representative of the person who is the holder of the right of burial.⁷

In *Vosnakis*, the deceased was the wife of Mr Vosnakis. Her mother, Mrs Arfaras, held a burial licence to a double plot at the Eastern Suburbs Memorial Park (ESMP), Matraville, NSW. There was a further licence to an adjacent double plot, in which Mr Arfaras’ mother was buried. Mrs Arfaras offered Mr Vosnakis the burial licence to the empty double plot, on the basis that he would bury his wife (her daughter) in that plot and that he could later be buried in the plot with his wife. Mrs Arfaras stated she would have her body interred in the plot with her mother.

It was later revealed that Mrs Arfaras’s mother owned the burial licence to the plot in which she was interred and it would be necessary for a grant of probate to issue to Mrs Arfaras to give effect to that arrangement. Various discussions took place over several days, in front of witnesses, to this effect.

Mrs Arfaras, however, did not sign the transfer of the licence for the empty plot to Mr Vosnakis. The parties attended upon the funeral arranger and ESMP to arrange for Mrs Vosnakis to be buried in the disputed plot. After the burial, Mrs Arfaras wavered in her commitment to transfer the licence to Mr Vosnakis.

Mr Vosnakis instructed his solicitor to commence the process of Mrs Arfaras obtaining a grant of probate of her mother’s will. It was at this point that Mrs Arfaras reneged on the arrangement, refusing to proceed with the grant process. Consequentially, Mr Vosnakis commenced proceedings to have the burial licence transferred to him, pleading two grounds, one based in contract law, the other in estoppel.

The court at first instance found the particular facts did not give rise to a contractual relationship (at [147]), in so far as the facts did not give rise to an intention to create a legally binding arrangement, nor was there any consideration (at [149]). However, the court did find that Mrs Arfaras induced Mr Vosnakis into burying his wife in the plot (at [153]) and by doing so he effectively relinquished his right to bury his wife elsewhere.

Mrs Arfaras took the matter to appeal, with Mr Vosnakis filing a cross appeal on the contract claim. The Court of Appeal concurred with the court of original decision.

Of note, the appeal court explores the precision with which the estoppel was formulated in the primary judgment, in particular whether it was a proprietary or promissory estoppel.

The primary decision provides an analysis of the law related to burial rights. The appeal decision provides a detailed analysis of the application of estoppel, especially the difficulty in extrapolating the different types of estoppel. In doing so, it analyses (at [82]-[114]) the six essential elements of equitable estoppel articulated in *Waltons Stores v Maher*⁸ in the context of the facts of this matter, concluding that the court in the first instance did not err.

Probate practice update – Brisbane Registry

Queensland Law Society has commenced regular consultation with the Brisbane Probate Registry,⁹ expanding the meetings to include the probate registrars for Rockhampton, Townsville and Cairns, with the objective of achieving greater engagement between the profession and the courts.

We thank each of the court probate registrars for their insight and assistance. This month we are pleased to advise that the Brisbane Registry has approved for publication the following protocol for processing court-approved statutory wills.

Statutory wills protocol – Brisbane Registry

This protocol is intended to set out the administrative process for obtaining an order for a statutory will on the day of the court application in the Brisbane Registry. It is not intended to be an exhaustive list:

- The solicitor emails the draft order in Word to the associate and judge.
- The s21 application is heard in court.
- The court makes an order pursuant to s21, *Succession Act 1981* (Qld).
- If there are any revisions to the draft order during the application, the solicitor makes revisions and emails the draft order in Word to the associate and judge.
- The associate returns the order and the file to level 1 – Records Management, Courts.
- The associate contacts the probate registrar to advise of the order.



with Christine Smyth

- The solicitor calls the will maker and the probate registrar speaks to the will maker or the will maker's carer to confirm that the will maker is alive.
- The will is signed and it is entered into the Register of Statutory Wills by the probate registrar

As to the correct attestation clause for a statutory will, the Supreme Court Registrar of Probate (Brisbane Registry), Leanne McDonnell, has approved the following:

"Signed for and on behalf of [will maker's name] as his/her last Will by [Registrar's name] a Registrar of the Supreme Court of Queensland at Brisbane and sealed

with the Seal of the Court as required by section 26(1)(b) of the Succession Act 1981 pursuant to an Order of the (Hon) Justice [Judge's name] under section 21 (1) of the Act made on [date] in processing number [court number] of [year].

Dated [date]

*Registrar of Probates,
Supreme Court of Queensland*

A Word template for the attestation clause of a statutory will may be downloaded at qls.com.au > Knowledge centre > Areas of law > Succession law.

Christine Smyth is deputy president of the Queensland Law Society, a Queensland Law Society accredited specialist (succession law) and partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, the Proctor editorial committee, STEP, and associate member of the Tax Institute.

Notes

- ¹ Napoleon Bonaparte.
- ² *Calma v Sesar & Ors* (1992) 2 NTLR 37;106 FLR 446; *Robinson v. Pinegrove Memorial Park Ltd & Anor* (1986); *Beard v Baukham Hills Shire Council* (1986) 7 NSWLR 273; *AB v CD* [2007] NSWSC 1474.
- ³ *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 694, Young J.
- ⁴ *Ibid*; see *Succession Act* requirements for a will.
- ⁵ See 15 points enunciated in *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 694, Young J.
- ⁶ *Beard v Baukham Hills Shire Council* (1986) 7 NSWLR 273.
- ⁷ As above.
- ⁸ [1988] HCA 7; (1988) 164 CLR 387.
- ⁹ The meetings are an initiative of the QLS Succession Law Committee, led by its chair, Gary Lanham, and assisted by policy solicitor Louise Pennisi.

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Trusts – construction of trusts – trustees’ powers

In *Fisher v Nemeske* [2016] HCA 11 (6 April 2016) the High Court was asked to construe a clause in a trust deed that conferred on the trustees power to “advance or raise any part or parts of the whole of the capital or income of the Trust Funds and to pay or to apply the same as the Trustee shall think fit...” (at [5]). The trust assets were comprised of shares in another company. In 1994, the trustee resolved to distribute an amount equal to the value of the shares to the two beneficiaries of the trust. The distribution was recorded in the trust accounts, along with a record of the same amount returned to the trust funds as beneficiary loans. A further deed was created in 1995 purporting to charge the shares in the favour of the beneficiaries, with an obligation on the trustee to repay the principal on the demand of the beneficiaries. The key question for the court was whether the distribution was a valid exercise of the trustee’s power under the deed. The majority held that the creation of a debt to be satisfied out of the property of the trust fell within the powers to “advance” and “apply” the capital or income of the trust fund. A creditor/debtor relationship had been created between the trustee and the beneficiaries. The actions of the trustee were valid and a debt was owed to the beneficiaries. French CJ and Bell J jointly, Gageler J concurring; Kiefel and Gordon JJ dissenting separately. Appeal from the Court of Appeal (NSW) dismissed.

Criminal law – criminal liability – intent to cause specific result

In *Zaburoni v The Queen* [2016] HCA 12 (6 April 2016) the appellant was convicted of unlawfully transmitting a serious disease (HIV) to another with intent to do so. In the alternative he was charged with occasioning grievous bodily harm which did not require intent in the circumstances. He was convicted of the primary charge. The only issue was the appellant’s intent. The High Court held that, under the Queensland Criminal Code, proof of intention to produce a result requires evidence that the accused meant to produce that result. Foresight or probability was not sufficient. The court further held that the evidence was insufficient to establish that the accused had the purpose of transmitting the disease, and he should instead be found guilty of the alternative offence. Kiefel, Bell and Keane JJ jointly; Gageler and Nettle JJ concurring separately. Appeal from the Court of Appeal (Qld) allowed.

Federal jurisdiction – criminal law – application of state laws

In *Mok v Director of Public Prosecutions (NSW)* [2016] HCA 13 (6 April 2016) the High Court dealt with the application of s89(4) of the *Service and Execution of Process Act 1992* (Cth) to the appellant, who had been charged with attempting to escape lawful custody at an airport in Victoria, while being taken to NSW to face charges there. He was charged under s310D of the *Crimes Act 1900* (NSW), which applied by application of s89(4). The question for the court was whether s89(4) applied s310D in precisely its terms (that is, unaltered), which would then impose a requirement for the appellant to be an “inmate” as defined (noting that the magistrate at first instance had found that the appellant was not an “inmate”). The court held that s89(4) did not operate to pick up and apply state laws unaltered, but had to be read in the context of their application, which in turn meant that adjustments to the state laws were necessary. In the circumstances, the appellant could be convicted without being an “inmate” as defined. French CJ and Bell J; Kiefel and Keane JJ jointly concurring; Gordon J separately concurring. Appeal from the Court of Appeal (NSW) dismissed.

Criminal law – evidence – admissibility – relevance – tendency and complaint evidence

In *IMM v The Queen* [2016] HCA 14 (14 April 2016) a majority of the High Court held that a judge assessing the probative value of tendency or complaint evidence should do so assuming that the jury would accept the evidence. The appellant was convicted of sexual offences based in large part on tendency and complaint evidence. The trial judge ruled the evidence to be admissible, considering the probative value of the evidence on the basis that the jury would accept the evidence. The appellant argued that the judge erred, as an assessment of probative value is a different exercise to the assessment of relevance, and the reliability of the evidence is an essential part of assessing its probative value. By not having regard to the credibility of the witness, the assessment of probative value was flawed. Arguments were also put as to the admissibility of the particular evidence in the case. French CJ, Kiefel, Bell and Keane JJ held that the enquiry as to the probative value of evidence must be approached in the same way as for considering relevance, on the assumption that the jury will accept the evidence. Gageler J, and Nettle and Gordon JJ separately, dissented on this point,

holding that an assessment of probative value necessarily involves considerations of reliability. However, the court also held that, on any view, the tendency evidence did not have sufficient probative value and should have been excluded. A new trial was ordered. French CJ, Kiefel, Bell and Keane JJ; Gageler J, and Nettle and Gordon JJ jointly, concurring in the orders for different reasons. Appeal from the Court of Appeal (NT) allowed.

Statutory construction – land valuation – statutory construction

In *Coverdale v West Coast Council* [2016] HCA 15 (14 April 2016) the High Court was asked to rule on the appropriate construction of the words “Crown land” in the *Valuation of Land Act 2001* (Tas) (VLA). The council sought to levy rates on marine farming leases over parts of seabed and waters and sought a valuation of the area. The Valuer-General declined on the basis that the areas were not “lands” or “Crown lands” within the meaning of the VLA. The question for the court was whether “land” in the VLA should be construed in accordance with its ordinary meaning, not to include seabed and waters above the land, or in accordance with the definition of “land” in the *Crown Lands Act 1976* (Tas) (CLA), which specifically included land covered by the sea or other waters. The court held that, having regard to the legislative history of the VLA and antecedent circumstances, the scope and purpose of the VLA required that the definition of “land” in the VLA follow the definition in the CLA. The areas at issue therefore fell within the meaning of “land”. French CJ, Kiefel, Keane, Nettle and Gordon JJ jointly. Appeal from the Full Court of the Supreme Court (Tas) dismissed.

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

Federal Court

Administrative law – Migration law – jurisdictional error – failure to take into account a relevant consideration – indefinite detention

In *Cotterill v Minister for Immigration and Border Protection* [2016] FCAFC 61 (14 April 2016) the Full Court allowed the appellant’s appeal and set aside the orders of the primary judge.

The appellant was born in England in 1943 and migrated to Australia with his parents

with Andrew Yuile and Dan Star



when he was seven years old. Under the *Migration Act 1958* (Cth) (the Act), the appellant was taken to have been granted an “absorbed person” visa which allowed him to stay in Australia indefinitely. The visa was subject to the provisions of the Act including the discretion of the Minister to cancel a visa on character grounds under s501. In 2012 the appellant pleaded guilty to certain sexual offences and was sentenced to 12 months’ imprisonment. In 2015, the Minister cancelled the appellant’s absorbed person visa pursuant to s501(2) of the Act. The primary judge dismissed the appellant’s application for judicial review.

The Full Court (North, Kenny and Perry JJ) held that the Minister’s decision involved jurisdictional error because the Minister had failed to take into account the relevant consideration that a possible consequence of that decision was that the appellant would face prolonged and possibly indefinite detention because of his ill-health.

There was consideration and discussion of the Full Court’s judgment in *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 which concerned s501(1) of the Act. Justices Kenny and Perry said the *NBMZ* is authority for the proposition that, in exercising power under s501(1) or (2), the Minister must take into account the legal consequences of a decision under the Act. Kenny and Perry JJ further explained at [133]: “There is also another difference between this case and *NBMZ*, but again it does not alter the Minister’s obligation to take into account that indefinite detention is in prospect as a legal consequence of his proposed decision. This difference lies in the fact that in *NBMZ* it was virtually certain on the facts of that case that, if the Minister refused to grant a visa under s501(1), it would not be reasonably practicable to remove the visa applicant from Australia in the immediate future and that, by operation of the Act, he would be kept in detention for an indefinite time. In the present case, the material before the Minister did not show that it was virtually certain that it would not be reasonably practicable to remove the appellant if his visa were cancelled. Rather, this material indicated that there was a real possibility that the appellant’s removal would not be reasonably practicable on account of his ill-health and that, if this were the case, the appellant would face indefinite detention (by operation of ss189,

196 and 198). Again, this difference did not affect the Minister’s obligation to take into account the legal consequences of his proposed decision (although it might affect his decision-making in other ways). The Minister was obliged in this case as in *NBMZ* to take into account that the material before him disclosed that the appellant’s indefinite detention was in prospect if he cancelled the appellant’s visa, as a consequence of ss189, 196 and 198 of the *Migration Act*.”

In addition to allowing the appeal on the above ground, North J also held that the Minister’s decision was vitiated by a number of other jurisdictional errors.

Representative proceedings – refusal by the court to approve the settlement of a class action

In *Kelly v Willmott Forests Ltd (in liquidation) (No.4)* [2016] FCA 323 (5 April 2016) the court refused the applications for approval of settlement in four related proceedings.

The proceedings arose out of a failed managed investment scheme in forest plantations. The investors made claims against the responsible entities of the schemes, certain directors and officers of the responsible entities, and the financial institutions that provided loans to some of the investors for the acquisition of their interest in the schemes (lenders). Many class members retained the solicitors for the applicants, Macpherson and Kelley (M+K) (client class members) but the great majority did not (non-client class members).

In summary, the reasons of the court (Murphy J) for not approving the class action settlement were as follows:

The settlement included binding admissions by the applicants on behalf of class members that the class members’ loan agreement with the lenders are valid and enforceable. The court regarded that as constituting a significant detriment for some class members. Further, large numbers of class members (being those who did not “register” in the class member registration process) were not permitted to obtain the benefit of the proposed settlements. For these class members, the detriment of the admissions under the settlement is not balanced by any benefit (at [6]-[7] and [126]).

There were substantial difficulties in funding the proceedings which resulted in significant gaps in the preparation of the cases. M+K did

not inform class members of these difficulties. Further, the settlement did not allow class members to opt out at this point (at [8] and [301]-[314]).

Having regard to the terms of settlement, several potential conflicts of interest arose (at [9]). These included a conflict between class members, as well as a conflict between M+K to its client class members and the interests of non-client class members. These conflicts were not recognised or properly addressed in the materials before the court (at [10] and [315]-[323]).

There was not material to satisfy the court as to the reasonableness of M+K’s costs (at [11] and [324]-[348]).

Having regard to gaps in case preparation and some shortcomings in the confidential opinion of the applicant’s counsel, the court was not satisfied that the applicants’ lawyers were in a position to properly inform the court as to prospects of success (at [12] and [285]-[300]).

To assist the court in the hearing and determination of the application, a contradictor was appointed by the court to represent the interests of non-client class members (at [4]).

The relevant principles to be applied by the court in a settlement approval application under s33V of the *Federal Court of Australia Act 1976* were summarised by Murphy J at [62]-[77].

NOTE: The Federal Court has published on its website a consultation draft dated 13 January 2016 for a new practice note for class actions. If and when adopted, it will replace Practice Note CM 17 (Representative proceedings commenced under Part IVA of the *Federal Court of Australia Act 1976* (Cth)).

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

Can I keep information from my client for their own good?

by Stafford Shepherd



On occasions we may receive a request from another professional (such as psychologist or doctor) not to disclose to our client the contents of their report or opinion.

This request is normally made when the professional is concerned that the disclosure of the information may be traumatic, cause the client anxiety or affect their health or mental wellbeing.

Such a request needs to be treated with caution as it could easily create a tension between our duty to disclose material facts to our client and any assurance made to such a professional not to disclose.

Our duty is to act in the best interests of a client.¹ This ethical responsibility is derived from the fiduciary obligations which came from the solicitor-client relationship. This relationship is one of utmost trust and confidence. The fiduciary obligation is to disclose to the client all material facts so that a client can make informed choices.²

In *McKaskell v Benseman*,³ Jeffries J said:

“A primary obligation of the fiduciary is to reveal all material information that comes into his possession concerned with his client’s affairs.”

His Honour said the disclosure related to material or essential information rather than trifling and insignificant detail.

When we instruct professionals to provide reports or opinions, we should tell them that the report or opinion will be made available to the client. It may be necessary to say that we are under an obligation to reveal fully all information that might affect our client’s decision to do or not to do something, notwithstanding any perceived detrimental consequences that the information may cause.

If a professional insists that the report or opinion be kept confidential to us as the solicitor, then no assurances should be given to the professional until the informed consent of the client is given.

The client may be prepared to consent to less than full disclosure but the client must be able to appreciate the consequences (including not being able to fully instruct on the issues raised by the report or opinion).

No undertaking or assurance should be given to the provider of the report as to non-disclosure unless our client has agreed to this. A client could subsequently revoke this instruction so any undertaking or assurance to the provider of the report should be subject to the consent not being countermanded by the client. We are under a duty to consult with our client on all questions of doubt which do not fall within the express or implied discretion left to us and to keep our client informed to such an extent as may be reasonably necessary.

Notwithstanding the request to not disclose, we may be able to suggest to the professional to review the manner in which his/her opinions are expressed but not to change the substance of their opinions. We should always take great care in how we communicate with our clients. We should also call on the assistance of others if circumstances warrant.

Hurtful, traumatic or offensive comments ought to be disclosed. As Jeffries J said:

“...as part of [our] practice, [we] have to convey not infrequently to clients unwelcome, bad and even at times, devastating information. The greatest care should always be taken on the occasion of such communication, but, nevertheless, it must be done.”

The American Bar Association Model Rules of Professional Conduct (the model rules) contain a rule as to communications between a lawyer and their client. The *Australian Solicitors Conduct Rules 2012* (ASCR) has no equivalent. A comparative rule is rule 7.1 ASCR, which provides that we must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken.

In a comment on the communications rule, the American Bar Association (ABA) has opined that there may be some circumstances that justify a lawyer in delaying telling a client information when the client “would be likely to react imprudently” to an immediate communication (Comment 7 to rule 1.4 of the model rules). The example given is the withholding of a psychiatric diagnosis of a client when the examining psychiatrist believes disclosure would harm the client.

In such circumstances the client should be urged to discuss that matter directly with the psychiatrist and if necessary with a support person present. Notwithstanding the above comment by the ABA, it is important for us to remember that competent and diligent delivery of legal services (rule 4.1.3 ASCR) will require the client to have all necessary information so that the client can make informed choices (see rule 7.1 ASCR).

It will only be in circumstances where substantial harm could be caused to the client or a third party that disclosure might be deferred until appropriate arrangements can be made.

Stafford Shepherd is the director of the Queensland Law Society Ethics Centre. An earlier version of this article appeared in the November 2013 edition of *Proctor*.

Notes

¹ ASCR, Rule 4.1.1.

² *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 per Thankerton LJ; ASCR, Rule 7.1.

³ [1989] 3 NZLR 75, 87.

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Time for change at 7-Eleven

Wage fraud exposure a lesson in corporate liability

by Laura Regan



The wage fraud issue involving 7-Eleven Australia has been highly-publicised, with the spotlight turning to the culpability of 7-Eleven's head office.

The issue has highlighted that the upper management of corporations may face serious legal consequences when there has been a failure to adequately regulate the safety and/or employment procedures in operation at their franchisee or subsidiary workplace.

Timeline

- **2008** – The Workplace Ombudsman investigates dozens of convenience stores, including 7-Eleven, recovering \$162,000 for 168 staff.
- **June 2014** – The Fair Work Ombudsman (FWO) starts an inquiry into 7-Eleven as a result of numerous complaints made by staff.
- **1 August 2015** – Fairfax Media and the ABC's *Four Corners* program jointly report on systemic wage fraud and falsification of employee records in numerous 7-Eleven Australia franchises.
- **18 September 2015** – 7-Eleven announces it will conduct an internal investigation into wage fraud allegations, hiring an independent auditor.
- **30 September 2015** – Russ Withers, the Australian founder and chairman of 7-Eleven stores, and chief executive Warren Wilmot resign.
- **5 February 2016** – 7-Eleven's internal wage fairness panel, led by former Australian Competition and Consumer Commission chair Allan Fels, reports to the Senate Employment Committee.
- **April 2016** – The FWO releases a report with a series of recommendations that 7-Eleven ought to adopt.

What has 7-Eleven been accused of?

The complaints centred on wage underpayment. The allegations included employees being intimidated and coerced into working excessively long hours at less than half of the standard minimum wage. Many of the employees had to pay thousands of dollars to gain working visas and when payment discrepancies were raised with management, threats of either dismissal or a complaint to the Department of Immigration were threatened, implying the worker could face deportation for contravening the permissible maximum working hours of their visas.

The catalyst

A point of issue was whether 7-Eleven's head office was complicit in the wrongdoing. Whistle-blowers reported franchisors selected "experienced franchisees" to mentor new owners in wage manipulation and record falsification. Investigators from Fairfax and ABC reported on an endemic culture in which franchisor employers promoted ways to "get around" the award wage system.

Mr Fels came to the conclusion that much of the issue lay with the 7-Eleven franchisee agreement, stipulating a strict 57/43 gross profit-sharing model. His conclusion was that, in most cases, a franchisee could only remain solvent by underpaying its workers and engaging in fraudulent behaviours. There were concerns franchisors either had knowledge of systemic failures or were wilfully blind to franchisees' practices.

FWO inquiry report on 7-Eleven

The April 2016 report by the FWO into 'Identifying and addressing the drivers of non-compliance in the 7-Eleven network' issued the following key recommendations to 7-Eleven:

- that it enter into a compliance partnership with the FWO in which 7-Eleven would publicly accept it had a moral and ethical responsibility to require standards of conduct from all franchisees and individuals involved in its enterprise

- that it implemented effective governance arrangements that ensure compliance with all relevant Commonwealth laws, and
- that it review its operating model.

The report findings placed an emphasis on the need to tackle systemic problems apparent within the 7-Eleven business model. By encouraging the implementation of a biometric time-recording system for all employees and franchisees, the report highlighted that the starting point for prudent holistic management of any organisation begins with sound policies, procedures and practices.

Furthermore, through the recommendation for regular self-auditing to be adopted, the report reinforced that good corporate governance must incorporate proactive oversight to ensure these sound policies, procedures and practices are in practical operation.

Lessons learnt

When addressing concerns of corporate accessorial liability in employment and safety sectors, the best defence is a good offence. A good offence in this scenario is the improvement and implementation of proactive management strategies.

A sound corporate governance shell must include:

- an adequate internal information-sharing system for communicating employment and/or safety issues that reaches all company employees
- an internal, up-to-date knowledge gathering system to recognise the constant developments across both employment and safety sectors, and
- regular internal auditory processes, ensuring policy and procedure methods are in practical operation.

Laura Regan is a senior associate at Sparke Helmore Lawyers. The assistance of Mason Fettel and Edwina Sully in the preparation of this article is gratefully acknowledged.

Rare insights in Feez diaries

with Supreme Court Librarian David Bratchford



sclqld.org.au

The diaries of Arthur Feez KC, right, span his life from age 18 until his death in 1935.

They are a remarkable source, not just revealing the life and character of the author, but offering rare insights into the Queensland legal system and courts of the time.

Feez wrote about the cases he was working on, his social life, his contemporaries, sporting events, and home life with his wife and daughter in Indooroopilly.

Thanks to generous donor Liz Wessels, Arthur Feez's 58 diaries are now part of the Supreme Court Library's collection.

Arthur Feez KC was a leading Queensland barrister in the early 20th Century. After studying law at the University of Sydney, he was admitted to the Queensland Bar in 1881, took silk in 1909, and was involved in many major cases of the time.

Library curators carefully selected for display pages from the diaries that record notable events and career highlights, providing an insight into the professional life of the man, while also illuminating aspects of Queensland's legal history.

This display is open from 8.30am to 4.30pm Monday to Friday, excluding public holidays,



level 12, Queen Elizabeth II Courts of Law, 415 George Street, Brisbane.

Current exhibition and displays

Michael Cook

Looking at contemporary Australia through a colonial lens, Brisbane-based photographer Michael Cook examines the position of Aboriginal people in Australia. View the artwork on display in the library, courtesy of Andrew Baker Art Dealer, from Monday to Friday 8.30am to 4.30pm, level 12, Queen Elizabeth II Courts of Law.

Selden Society

Formed in 1887 by English jurist and historian Frederic William Maitland, the Selden Society was named in honour of John Selden, a jurist, parliamentarian, scholar, writer and polymath. The Australian chapter of the society is administered by the Supreme Court Library Queensland.

In our 2016 Selden Society Lecture Series we explore six new themes, each chosen for their broad appeal to contemporary Australian audiences. A large display cabinet in the library on level 12 showcases unique items reflecting themes from the lecture series.

In Freedom's Cause: the Queensland Legal Profession and the Great War

In Freedom's Cause exhibition is open from 8.30am to 4.30pm Monday to Friday, Sir Harry Gibbs Legal Heritage Centre, Queen Elizabeth II Courts of Law, ground floor, 415 George Street, Brisbane.

View biographies of Lachlan Wilson and Joseph McWhinney, courtesy of Wilson Ryan and Grose, from 8.30am to 4.30pm Monday to Friday at the Townsville Courthouse, 31 Walker Street, Townsville.

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'Care and conduct' costs component considered

Turner v Macrossan & Amiet Pty Ltd [2016] QCAT 5

Application to set aside costs agreement – entitlement under costs agreement to general care and conduct component at rate up to 50% – whether QCAT has jurisdiction to make declaration as to validity of costs agreement – whether costs agreement sufficiently certain – whether costs agreement unfair or unreasonable – onus of proof

In *Turner v Macrossan & Amiet Pty Ltd* [2016] QCAT 5 the Queensland Civil and Administrative Tribunal, constituted by Carmody J, considered an application to set aside a costs agreement which entitled the law firm to charge a general care and conduct rate of “up to 50%”. It was argued that this costs agreement was unfair or unreasonable, or insufficiently certain.

Facts

The applicant engaged the respondent incorporated law firm to represent him in relation to two matters. The respondent rendered various invoices for legal services relating to each matter. The amounts invoiced were based on a costs agreement entered into between the parties on 27 September 2011. A clause in the costs agreement provided that:

“In addition to the item charges the firm is entitled to charge a general care and conduct component at the rate up to 50% based on the total itemised professional costs taking into account the following matters...”

The clause then itemised 10 circumstances which could determine the rate of the general care and conduct charge to be imposed.

The applicant applied to the tribunal to set aside the costs agreement on the grounds that it was unfair or unreasonable, or that it was insufficiently certain.

The application was determined on the papers under s32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (the QCAT Act).

Legislation

The original jurisdiction of the tribunal conferred by sections 9 and 10 of the QCAT Act includes jurisdiction to deal with any matter in respect of which jurisdiction is conferred on the tribunal under an “enabling Act”. An enabling Act is defined in s6(2) of the QCAT Act so as to include an Act that confers original, review or appeal jurisdiction on the tribunal. Section 6 of the QCAT Act also regulates the relationship between the QCAT Act and enabling Acts generally.

Section 60(1) of the QCAT Act empowers the tribunal to make a declaration about a matter in a proceeding instead of making an order it could make about the matter, or in addition to an order it could make about the matter.

The tribunal's power to set aside costs agreements is conferred by s328 of the *Legal Profession Act 2007* (Qld) (LPA). That section provides, in key respects:

On application by a client, the Supreme Court or the tribunal may order that a costs agreement be set aside if satisfied the agreement is not fair or reasonable (s328(1)), and the Supreme Court or tribunal may decide whether or not a costs agreement exists (s328(8)).

Jurisdiction

By way of preliminary objection the respondent argued that the tribunal lacked the jurisdiction to declare the costs agreement invalid for uncertainty.

The tribunal considered the provisions of the QCAT Act conferring the tribunal with jurisdiction, including the power under s60 of that Act to make a declaration. It found nothing to suggest that this power was unavailable to the tribunal in determining the validity of legal costs agreements under s328 of the LPA.

The tribunal also found that the jurisdiction conferred under s328(8) could not be construed as a mere reiteration of the jurisdiction conferred in s328(1). It said that a costs agreement under the LPA is a standard contract or agreement that is subject to special regulation and formalities under the LPA, and that if the tribunal has jurisdiction to consider the existence of a contract it must possess jurisdiction to examine the necessary preconditions for the formation of a contract. Accordingly, it must have jurisdiction to determine whether a contract is void for lacking sufficient certainty.

It was concluded that there was no jurisdictional impediment to issuing a declaration of validity in respect of the legal costs agreement; nor to the setting aside of the costs agreement for uncertainty.

Existence of costs agreement

Onus of proof

As sufficient certainty of the essential terms of a contract is an integral element of a contract, including a costs agreement, the tribunal found it to follow that the onus resides with the party asserting the existence of the contract. It noted that the applicant appeared to be alleging uncertainty, but explained this as merely putting the respondent to proof regarding the existence of the costs agreement.

Certainty of terms

The applicant submitted that the consideration payable in exchange for professional legal services in a costs agreement was an essential term of the contract, and that here the description of general care and conduct charge made the contract void for uncertainty. It was submitted in particular that the rate of general care and conduct was uncertain because the costs agreement stated that the charge was “up to 50%”, and also that it was unclear whether the general care and conduct charge applied to the professional fee component of the costs schedule, or all itemised professional costs.

The Queensland Civil and Administrative Tribunal has scrutinised the care and conduct component of a costs agreement in a case which also indicates that the tribunal takes a broad view of its powers over these agreements. Report by **Sheryl Jackson**.



The tribunal rejected both arguments. In relation to the rate of the general care and conduct charge, the tribunal said (at [98]):

“The rate of the general care and conduct charge is clear – it is up to 50%. The precise amount will depend on the circumstances of the case, which are not *a priori* ascertainable.”

The tribunal also stated that it could not be said that the general care and conduct was entirely at the discretion of the respondent, since it was subject to the constraint implied by s328 of the LPA that it must be fair and reasonable.

The subject matter of the general care and conduct charge was also found to be sufficiently clear. The tribunal found that under the agreement the respondent was able to charge for general care and conduct in respect of all matters specified in appendix A to the agreement, though it could elect to exclude certain items, such as photocopying and marking up exhibits.

The tribunal concluded accordingly that the costs agreement possessed sufficient certainty in respect of the essential terms.

Was the agreement fair or reasonable?

Onus of proof

The tribunal considered that the balance of authority on the question as to the location of the persuasive onus of proof under s328(1) of the LPA appeared to weigh strongly in favour of the respondent bearing the onus to establish that the costs agreement was fair and reasonable.

However the tribunal then referred to the wording of s328(1) of the LPA. It regarded the natural meaning of this subsection to be that the tribunal may only set aside the costs agreement *if satisfied* that the agreement is *not* fair or reasonable, a construction which assigns the onus of proof to the applicant. The tribunal noted, however, that in *McNamara Business & Property Law v Kasmeridis (No.2)* (2007) 97 SASR 129 the Court of Appeal of South Australia had followed the established precedent in other jurisdictions when construing s42(7) of the *Legal Practitioners Act 1981* (SA), the terms of which significantly resembled s328(1) of the LPA.

Further, after an examination of the rationale for the established approach, and of its jurisprudential foundations, the tribunal concluded that the precedent in favour of placing the onus of proof on the respondent “has unstable jurisprudential foundations and relies on unjustifiable assumptions relating to the nature of the practitioner-client relations.”

Nevertheless, the tribunal found that it should follow the precedent. Though “with some trepidation” it concluded:

“... the applicant bears an evidential onus to show that the costs agreement may not be fair and reasonable. If the evidential onus is discharged the persuasive onus rests with the respondent to establish that the costs agreement is fair and reasonable. The tribunal may set aside the costs agreement under s328 of the LPA if the respondent fails to discharge that onus.”

Unfairness

Addressing the submissions for the applicant as to the bases on which the costs agreement was unfair, the tribunal found:

The inclusion of general care and conduct charges, subject to a clear contractual threshold, “appears to be consistent with existing industry standards and practices within the legal industry, and the applicable Supreme Court Scale of Costs” and there was nothing inherently unfair in conferring a discretion on

the law firm to determine the rate of general care and conduct charge. The tribunal noted the discretion provided the firm with commercial flexibility when the relative difficulty associated with a particular matter was more or less than that which was anticipated, and also that the discretion was not unrestricted, as the contract prescribed the circumstances which would influence the rate of the general care and conduct charge to be applied.

The evidence established that the respondent had sufficiently explained to the applicant that the costs agreement would result in the imposition of costs in excess of the applicable Supreme Court scale.

The fact that the costs agreement may, *ex facie*, permit but not require the general care and conduct component to be determined by reference to an aggregated amount, which may include items not requiring special skill, care or responsibility, did not mean the costs agreement was unfair.

It was concluded that the costs agreement before the tribunal was fair.

Unreasonableness

In the context of charging practices, the tribunal said that requirements of reasonableness include that the professional fees must not be plainly excessive when compared with relevant industry standards, and also that any discretion conferred by a costs agreement must not be so broad as to allow a legal practitioner to determine a basic term entirely without constraint.

In relation to the specific grounds on which the applicant submitted the agreement was unreasonable, the tribunal found:

The respondent provided adequate disclosure of the costs agreement to the applicant. Although the respondent occupied a position of advantage relative to the applicant, there was no evidence that the respondent had abused, or otherwise exploited, that position of advantage.

The respondent did not have an improper discretion to establish the rates at which its legal services were charged. The general care and conduct component employed in both matters was consistent with the court scale of costs and standard industry practices. The discretion conferred in relation to this component was not so extravagant as to warrant intervention by the tribunal. There was a clear limit or threshold on the amount which could be charged under the contract, and the contract provided indicia which guided the rate for this component. There was an implied term in the costs agreement that the respondent would exercise its rights, and perform its obligations, reasonably.

It was not necessary for every item within the costs agreement to distinguish between the amounts charged for services performed by legal practitioners with different levels of seniority. Here a number of items in the costs agreement clearly did make this distinction.

It was concluded that the costs agreement before the tribunal was reasonable.

The tribunal said that if the exercise of discretion in establishing the general care and conduct rate, or the failure to distinguish between certain categories of work performed by legal practitioners of different seniority, resulted in the imposition of unreasonable

or unfair legal costs, the appropriate course of action was to file an application for a costs assessment under s335 of the LPA. This was on the basis that it was the performance of the costs agreement, not the agreement *per se*, which was unfair or unreasonable.

Orders

The tribunal dismissed the application to set aside the costs agreement, and reserved its decision in relation to the costs of the application for further directions of the tribunal after submissions from the parties.

Comment

The tribunal's analysis in the course of reaching its conclusion that the law practice bears the persuasive of establishing that the costs agreement is fair and reasonable invites further judicial consideration of the issue. As it acknowledged, the natural meaning of s328(1) is certainly suggestive of a client bearing the onus to persuade the tribunal that the agreement should be set aside.

However, the decision does provide some comfort for law firms whose costs agreement include provision for the charging of care and conduct, particularly in light of its finding that a rate of "up to 50%" is not of itself unusual

or extraordinary, and that it does not render the costs agreement unfair or unreasonable.

The conclusions that the jurisdiction conferred by s328(8) of the LPA extends to determining if a costs agreement is void for uncertainty, and that the power under s60 of the QCAT Act to make declaration extends to the making of a declaration as to the validity of a legal costs agreement, are unsurprising.

It may be noted, however, that in the course of its judgment the tribunal made a number of observations which suggest that it takes a very broad view of its powers. Despite these views, it is always important to bear in mind that the tribunal does not have jurisdiction over general common law or equitable claims, and to ensure both that the matter before the tribunal is within its jurisdiction, and that the tribunal has the power to grant the relief sought.

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

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New words on deeds

by Matthew Dunn

Title: *Seddon on Deeds*
 Author: Nicholas Seddon
 Publisher: The Federation Press 2015
 ISBN: 9781760020194
 Format: Hardback/272pp
 RRP: \$145

The preface to Nick Seddon's little golden legal text on deeds starts with the words "Get a life".

Evidently this was the degree of welcome shown by his friends and perhaps even the response of the occasional legal text consumer for a new work on the arcane legal topic of deeds.

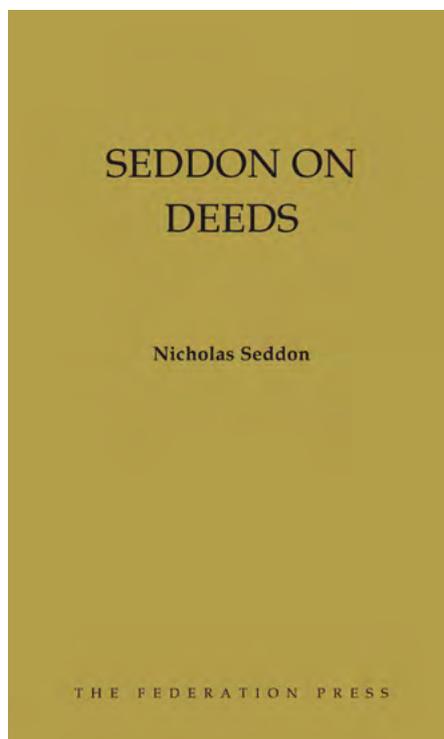
But the casual contempt shown by Mr Seddon's associates is not well placed and this is indeed an important little book.

Any commercial solicitor is likely to use deeds on an all-too-frequent basis and perhaps mostly just to bind without proper consideration. Seddon's analysis of the arcane chicanery of the formation and execution of deeds boils down to some very practical advice – there are many ways deeds can go wrong; they should not be used unless it is unavoidable.

Seddon's analysis on the use and abuse of deeds, including the structures of deeds inter partes and poll as well as statutory pseudo-deeds, describes easily and accessibly the peril awaiting the unwary solicitor.

For example, why are duplicates of indentures cut with wavy lines but a deed poll is cut straight? Why is the old assumption that a deed imports consideration not safe when a party may ultimately need to rely upon an equitable remedy for enforcement? Why is the risk of improper formation taken in a deed of settlement when a contract will do the job more safely? Why must a deed still be written on paper or parchment in Australia?

Seddon makes a fulsome, scholarly and detailed dive into a topic which at first blush might seem otiose in today's world. But this is an important work, important for the questions it should raise for commercial lawyers and more important for the answers it provides.



To top it all off, this little golden book is the only dedicated text Australian lawyers can have on the subject, replacing the standard UK reference, *Norton on Deeds*, last published in second edition in 1928. Time has marched on and the landscape has changed markedly in Australia, but lawyers' love of deeds remains blind and unabated. Seddon aptly asks us why?

Matthew Dunn is Queensland Law Society government relations principal advisor.

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'Polygamous' marriage declared valid

with Robert Glade-Wright



Divorce – validity of foreign marriage under Part VA *Marriage Act*

In *Ghazel and Anor* [2016] FamCAFC 31 (4 March 2016) the Full Court (Finn, May & Austin JJ) heard the wife's appeal against Hogan J's dismissal of her application under s88D of the *Marriage Act 1961* (Cth) (MA) for a declaration of validity of the parties' marriage which was valid under the law of Iran. The wife (who was born in England) married the husband in Iran in 1981. Hogan J said that the law of that country "permitted a husband subject to certain conditions to take up to three additional wives. Thus, the marriage of the parties in Iran can be described ... as a 'potentially polygamous marriage'" ([2]). Hogan J had held that the definition of marriage in s5(1) MA as a union "to the exclusion of all others voluntarily entered into for life" meant that under Part VA (s88B(4) MA) a marriage solemnised in a foreign country "must be monogamous for it to be recognised in Australia" ([10]).

The Full Court disagreed, saying (at [23]-[26]) that under s88D MA a foreign marriage recognised as valid under the relevant foreign law shall be recognised in Australia as valid except when at the time of the marriage a party was married to another person, was not of marriageable age or was within a prohibited relationship, or the consent of either party was not real.

The Full Court observed that "[a] potentially polygamous marriage is not expressly included in the exceptions to the ... rule of recognition ... in s 88D(1)" and noted the explanation of the Solicitor-General (the intervener) that the exception as to a party at the time of the marriage being married to another person "was 'a first in time rule' [which] would only preclude recognition of a second marriage not of a first potentially polygamous marriage" ([36]).

The appeal was allowed and a declaration made that the marriage was valid.

Property – stay of wife's property case under *Trans-Tasman Proceedings Act 2010* (Cth) – 'the more appropriate court' in NZ – connecting factors

In *Nevill* [2016] FamCAFC 41 (17 March 2016) the Full Court (May, Ryan & Murphy JJ) upheld an order made by Kent J staying the wife's property proceedings brought

initially in the Federal Circuit Court. Kent J did so after holding that the High Court of New Zealand was "the more appropriate court" within the meaning of s19 of the *Trans-Tasman Proceedings Act 2010* (Cth) (the TTP Act). The husband had applied for the stay under s17 on the ground that a New Zealand court was the more appropriate court to determine the matters in issue. The Full Court said (at [5]):

"... the Australian court is given a discretion that is constrained by two matters. First, the court must take into account a number of matters prescribed in s 19(2). Secondly, the court must not take into account 'the fact that the proceeding was commenced in Australia'. Otherwise, the discretion is at large. (...)"

The Full Court said (at [30]):

"Stripped to its bare essentials, the submission ... is that there was a juridical disadvantage for the wife in proceeding in New Zealand which his Honour did not take into account in considering s 19(2) (e) ... [and which] is said to derive from the different system in New Zealand by which settlements of property ... are decided, which ... the wife contends might result in her receiving less ... than ... she might receive from an Australian court."

Kent J had rejected the wife's claimed juridical disadvantage ([32]), saying that s19(2) expressly excludes any juridical advantage from proceedings being instituted first in Australia. His Honour added ([33]) that "the 'clearly inappropriate forum test' established ... in *Voth v Manildra Flour Mills Pty Ltd* [[1990] HCA 55] ... is fundamentally different to the 'more appropriate forum test' ... to be applied under the TTP Act" and ([38]) that "the ... question should be answered not by reference to juridical advantage ... but to the connecting factors with the law of New Zealand as compared to the law of Australia".

In dismissing the wife's appeal with costs, the Full Court ([38]-[41]) agreed with Kent J who held that "connecting factors" overwhelmingly favoured the law of NZ, those factors being that the parties were both NZ nationals who lived for most of their married life there; most of their substantial property was acquired there; and their respective trusts were NZ trusts.

Property – \$90,000 withdrawn by wife from her superannuation to invest in a business that failed not added back

In *Martin & Wilson* [2016] FCCA 235 (11 February 2016) Ms Wilson withdrew \$90,000 of her superannuation at separation to establish a business but lost it when the venture failed. After citing *Miller* [2009] FamCAFC 121 (in which the Full Court followed *AJO & GRO (Omacini)* [2005] FamCA 195 (FC)) Judge Phipps said (at [23]):

"The evidence does not show that the expenditure ... was reckless, negligent or wanton. The respondent may have been naive in thinking that she could successfully conduct a (business omitted), but the evidence does not show that the success of the venture was impossible or even improbable. It may have been successful in which case the applicant would have benefited."

The court added (at [25]):

"Another consideration is the small value of the ... pool. If the \$90,000 was added back ... the respondent's share of the property available for distribution would be very small if not completely eliminated unless there was a contribution assessment and adjustment very much in her favour. (...)"

No adjustment was made in her favour under s90SF(3) despite uncertainty about her employment, the court ([35]) "taking into account the loss of her superannuation as a circumstance which the justice of the case requires to be taken into account [under s90SF(3)(f)]" and adding ([36]):

"If the respondent had remained in her employment she would still have that income and would have \$90,000 superannuation ... [and] no adjustment would be appropriate. (...) The applicant had no part in the respondent's decision to use her superannuation ... He did not know of [the business] and had no opportunity to assess the risks and influence the use of the money. The respondent took the risk."

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

Court of Appeal judgments

1-30 April 2016

with Bruce Godfrey



Civil appeals

Harrison v President of the Industrial Court of Queensland & Ors [2016] QCA 89, 12 April 2016

Case Stated – where complaints were made to prosecute offences under the *Mining and Quarrying Safety and Health Act 1999* (Qld) – where the Industrial Magistrate dismissed the complaints because they were duplex and so deficient as to the required legal and factual ingredients that they did not disclose an offence known to law – where the Industrial Magistrate refused to allow any amendment – where the Industrial Court held that the complaints did not identify the legal ingredients of the charge or the factual basis of the charge, and were nullities – where the Industrial Court held that the complaints did not comply with s43 of the *Justices Act 1886* (Qld) and were incapable of amendment under s48 – whether the complaints were nullities and incapable of amendment – where the Industrial Magistrate erroneously decided the complaints were incapable of amendment – where the Industrial Court on appeal made an error of law in determining that the Industrial Magistrate had no jurisdiction to proceed because the complaints were nullities – where the applicant applied for orders in the nature of certiorari to quash the orders of the Industrial Court – whether there was an error within jurisdiction or a constructive refusal or failure to exercise the jurisdiction of the Industrial Court amounting to jurisdictional error – where the question is whether if the same error or a similar error was made by the Industrial Court on appeal from the orders of the Industrial Magistrate, there is a constructive refusal or failure to exercise the jurisdiction of the Industrial Court on appeal or merely an error within jurisdiction – where a critical consideration is that the Industrial Court exercising appellate jurisdiction is not exercising the original jurisdiction of the Industrial Magistrate – where at no point would the Industrial Court have exercised the original jurisdiction of the Industrial Magistrate – where if the decision of the Industrial Court involved an error of law that the Industrial Magistrate had no jurisdiction to proceed because the complaints were nullities, it should be held that the error amounts to jurisdictional error – where the long reach of the power of amendment under s48 is apparent from its terms – it extends to a defect in substance or in form – where the Industrial Magistrate, having decided that the complaint did not comply with s43, should have put the complainant to his election as to the offence on which he proposed to proceed, before dismissing the complaints for non-compliance

– where the question in the present case must now be decided having regard to the effect of s48 and the other sections of the *Justices Act 1886* (Qld) – where the Industrial Court's finding in the present case that the complaints were nullities and incapable of amendment should be seen as a conclusion that they were nullities because the complaints were noncompliant with the requirements for a valid complaint in a way that the power to amend cannot reach – where in other words, characterisation as a nullity is a conclusion that does not inform the scope of the power of amendment – where so viewed, the true question is what is the scope of the power of amendment under s48 of the *Justices Act 1886* (Qld) in relation to the particular defects to be found in the complaints – where the present case presents an extreme example of a pleading that informs the reader of the substance of the matter but at the same time manages, almost artfully, to avoid setting out a clear statement of the relevant obligation or its contravention – where analysis of the application of the power of amendment in the present case should proceed from what is reasonably disclosed as to the offence sought to be charged on the face of the complaint including the particulars – where it should be accepted that if the facts alleged in the particulars included the required essential elements of a properly pleaded charge, the complaint was one capable of amendment even though the limitation period may have expired after the particulars were provided – where the complaint was not so defective that it did not even engage the jurisdiction of the Industrial Magistrate or that it was beyond the reach of the power of amendment under s48 – where no doubt, the surgery required was major, but there was enough in the complaint to repel the conclusion that it was foredoomed from the beginning.

The questions posed by the case stated should be answered as follows: (a) Was it a jurisdictional error for the Industrial Court to find that each complaint was a nullity or incapable of amendment under s48 of the *Justices Act 1886* (Qld)? Answer: Yes. (b) If 'yes' to (a), and in the absence of any discretionary reasons for declining the orders, should orders in the nature of certiorari be made quashing the orders of the Industrial Court and directing that court to proceed according to law? Answer: Yes. Set aside the orders of the first respondent dismissing the applicant's appeal from the Industrial Magistrate's decision in each proceeding before the Industrial Court. Remit the matter to the first respondent for hearing and determination according to law. Parties have leave to make submissions on costs. (Brief)

Davan Developments Pty Ltd v HLB Mann Judd (SE Qld) Pty Ltd [2016] QCA 90, 12 April 2016

General Civil Appeal – where the appellant company retained the services of the respondent to prepare and lodge the appellant's tax statements and returns – where the appellant acquired two adjoining lots in East Brisbane in 2005 with an intention to amalgamate and subdivide the property into three lots – where three investors of the appellant were the intended transferees of the subdivided lots – where the investors verbally agreed to contribute equally to development costs and held a right of first refusal over each lot – where in August and November 2007 the appellant sold two of the lots and, based on tax returns prepared by the respondent, the appellant paid GST on those sales – where the appellant claimed it was not liable to pay any tax on the transactions because the appellant held the land on trust and the respondent was aware or ought to have been aware of that arrangement – where the appellant alternatively claimed that the sales were not taxable supplies for GST purposes – whether the respondent was negligent in discharging its professional services – where according to the parties' original agreement, they did intend that the land would be developed, not for the appellant's benefit, but for the benefit of the investors – where the intention of each investor was to obtain a home site at a cost which included no component of a profit for the appellant company – where the agreed term for a right of first refusal, at least absent further terms by which the proceeds of sale of the lot to another party would be held by the appellant for the benefit of the relevant investor, is inconsistent with the existence of a trust – where further, because any trust would have its basis in the agreement between the investors made in 2004, it would have been susceptible to extinguishment or variation of that agreement – where by s7-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), GST is payable on a taxable supply – where the question was whether this sale was made in the course of an activity in the form of an adventure or concern in the nature of trade – where the difficulty for the appellant in contending that there was no enterprise in the course of which this sale was made was that the argument depended upon the effect of an agreement between the investors which was no longer in place – where the agreement was not in place at least from late 2006 – where in essence the appellant's complaint is that the documents which were prepared and lodged with the Australian Tax Office were inconsistent with the agreement between the investors – where there was evidence

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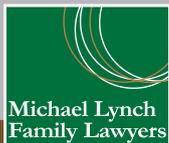


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from Mr and Mrs Pearse that they had explained the agreement to the respondent's Mr Henderson at their meeting with him and another employee of the respondent in July 2005 – where his Honour rejected the evidence of the Pearses, more particularly the relatively detailed evidence of Mrs Pearse – where it is of some concern that his Honour concluded that her evidence was improbable without there explaining why that was so – where if the evidence of Mr and Mrs Pearse was not accepted, there was no factual basis for imposing a duty on the accountants to inquire as to whether this particular development of the appellant was different because it was not to be conducted for its benefit – where the nature of the venture, according to the investors' agreement, was unusual indeed and the accountants were not required to make inquiries in case it existed.

Appeal dismissed. Costs.

Seeto Kui (Holdings) Limited v Chow [2016] QCA 112, 22 April 2016

General Civil Appeal – where the appellant sought registration of a foreign judgment in Australia – where the respondent satisfied judgment debts before the application was heard – where the appellant sought its costs of the application – where the appellant required leave to apply for its costs, as more than two years had passed since a step had been taken in the proceeding – where the primary judge declined to grant the appellant leave to proceed – whether the primary judge's decision was affected by an error of law – whether the appellant should be granted leave to proceed – whether the appellant should be granted its costs of the application for registration and application for leave to proceed – where after amalgamation, the register of companies recorded both Mainland and Ardrossan as amalgamated – where the registrar did not, as required by s238(c) of the *Companies Act 1997* (PNG) (the Act), remove Mainland and Ardrossan from the register, however the failure to do so did not have the effect of Mainland and Ardrossan continuing as separate legal entities – where the amalgamation is effective, pursuant to s238 of the Act, whether or not such removal has taken place – where the consequence of this conclusion is that while the respondent was supplied goods under the names of Mainland and Ardrossan, those goods were provided by the appellant as the amalgamated company – where as the provider of those goods, the appellant was entitled to recover the price of those goods – where the appellant was a judgment creditor within the meaning of s3 of the Act and was a person in whom the rights under the judgment were otherwise vested – where at the time of the application before the primary judge, the only remaining issue on the originating application was the costs of that proceeding – where costs remained a relevant issue, even if the underlying judgment had been paid in full after the filing of the originating application – where the consideration of all the circumstances favours a conclusion that the appellant, having properly brought an application for registration

of judgment debts which ultimately could not be pursued because of payment of those judgment debts a substantial time after the bringing of the application, is entitled to recover the costs of that application.

Appeal allowed. Orders set aside. Application for leave to proceed is allowed. Respondent to pay the appellant's costs of the appeal on the standard basis. Respondent pay the appellant's costs of the originating application and of the application for costs on the standard basis. Appellant pay the respondent's costs of the application for leave to proceed to be assessed on the standard basis. (Brief)

Criminal appeals

R v Graham [2016] QCA 73, 1 April 2016

Appeal against Conviction – where, after a trial by jury, the appellant was convicted of one count of burglary with the aggravating circumstances of being in company and using actual violence and one count of extortion and acquitted on one count of assault occasioning bodily harm and one count of common assault – where the appellant contends there is an irreconcilable inconsistency between his convictions for burglary using actual violence and extortion where he was acquitted on the assault charges – where at trial, the prosecution particularised its case, and the trial judge so directed, that the aggravating circumstance of actual violence could be proved either by proof of the appellant's violence or proof of violence by the appellant's co-offender which the appellant assisted or aided by virtue of s7(1)(c) *Criminal Code* – where the trial judge further directed that, upon proof of the appellant's offence of robbery under s419(1) *Criminal Code*, the jury could be satisfied of the appellant's use of actual violence by the operation of either s7(1)(a) or s7(1)(c) *Criminal Code* – where the jury apparently reasoned according to s7(1)(c) and concluded that the appellant used actual violence because he aided his co-offender to use actual violence in the commission of an offence of burglary – where the appellant contends that s7(1)(c) could not be used in such a way – whether the verdicts were inconsistent and irreconcilable – where by s7(1)(c) a person who aids another person in committing the offence is deemed to have taken part in committing the offence – where the operation of s7(1)(c) requires the proof of the offence by the perpetrator (including the proof of any requisite state of mind of that person) – where, importantly, the effect of s7(1)(b), (c) or (d) (according to the reasoning in *R v Barlow* (1997) 188 CLR 1), is to impose a criminal responsibility by deeming a person to have done the act (or made the omission) by which the perpetrator committed the offence and not to "deem the secondary party to be liable to the same extent as the principal offender" – where there is authority to support the interpretation so as to make a s7(1)(c) offender liable to a punishment as if he or she had done an act which for that offence is a circumstance of aggravation: *R v Phillips and Lawrence* [1967] Qd R 237 –

where the Chief Justice did not discuss the present question but instead assumed that s7 could be employed to expose an aider to punishment according to the circumstances of aggravation – where the reasoning of Hanger J and Hart J, in this case the circumstance of actual violence would be an element of the offence of burglary – where this reasoning is not easily reconciled with that in *Barlow* – where, however, this court was not asked to disagree with the judgments in *Phillips and Lawrence* and indeed, counsel for the appellant conceded that, in general, an aggravating circumstance of burglary could be proved by the operation of s7(1)(c) – where it is preferable for this question to be determined in a case where it is fully contested – where the appellant was tried with two other defendants, namely Williams and Brooker – where the first count on the indictment charged each defendant with entering the complainant's dwelling with intent to commit an indictable offence and with three circumstances of aggravation: the first being that each used actual violence, the second that each was armed with an offensive weapon and the third that each was in company of the others – where at the commencement of the trial, Williams and Brooker each pleaded guilty to that count with the exception of the circumstance that he was armed with an offensive weapon – where the appellant was convicted of the offence and with the aggravating circumstances as alleged, save that he was found not to have been armed – where

importantly for the appellant's present argument, the aggravating circumstance of the use of actual violence was found to be proved against him – where the appellant was not charged with committing the offence of burglary which was committed by Williams – where had that been the prosecution case, it would have required proof, *as against the appellant*, that Williams committed his offence – where there was an error then in the way in which this part of the case was put to the jury, in that it failed to distinguish between the distinct offences of burglary which were alleged against the appellant and Williams – where absent any violence on the part of the appellant, any assistance which the appellant had provided to Williams in the commission by Williams of his offence was irrelevant to the proof of violence as a circumstance of aggravation of the appellant's offence – where the appellant contends that it was not open on the evidence for the jury to conclude that he went to the complainant's house intending to do or threaten violence – where it was clear from the evidence that the appellant went to the complainant's premises to reclaim property and take the complainant's car – where the evidence further established that the appellant had entered the complainant's house in a group without invitation, made demands upon the complainant and that one member of the appellant's group assaulted the complainant – whether the jury's finding that the appellant intended to do or threaten violence was unreasonable or insupportable on the evidence

– where the appellant and his group were there in an exercise of self help, with a tow truck and an angry resolve to obtain what the appellant thought should be in his hands – where in these circumstances it was open to the jury to find that he went there intending to threaten violence and did so.

Jury's finding of a circumstance of aggravation of the appellant's offence of burglary, being that he used violence be set aside. The appeal against convictions be otherwise dismissed. Set aside the sentence imposed for the offence of burglary. Remit the matter to the District Court of Queensland for the appellant to be resentedenced on the conviction of burglary.

R v Crouch; R v Carlisle [2016] QCA 81, 5 April 2016

Sentence Applications – where the applicants each pleaded guilty to committing fraud to the value of more than \$30,000 – where the applicants were each sentenced to 10 years' imprisonment with parole eligibility after four years – where the applicants were not the architects of the fraud – where the applicants contended the judge did not set parole eligibility after one third of the sentence because they did not disclose to authorities the identity of the architect of the fraud – where there is no requirement for a sentencing judge who does not set a parole date, parole eligibility or suspension after one third of the head sentence to give reasons for not doing so – where the judge failed to give proper



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weight to the fact that that without the applicants' admissions a fraud of only \$1.8 million, instead of \$5.6 million, could have been established – where their co-operation with the authorities, although not such as to invoke s13A, was extensive – where it seems that his Honour overlooked this in his understandable disappointment at the applicants' failure to disclose to the authorities the identity of the person or persons who masterminded this serious fraud which hurt so many – where this error requires this court to consider what sentence it would impose if resentencing the applicants, so as to determine whether leave to appeal should be granted.

Applications for leave to appeal granted. Appeals against sentence allowed. Sentences imposed at first instance are varied by setting aside the parole eligibility date of 30 July 2019 and substituting the parole eligibility date of 30 November 2018. Sentences imposed at first instance are otherwise confirmed.

R v LAH [2016] QCA 82, Orders delivered ex tempore 10 March 2016; Reasons delivered 5 April 2016

Appeal against Conviction – where the appellant was charged on a 10-count indictment with maintaining a sexual relationship with a child (count 1), indecent treatment of a child under 12 (count 2), five counts of rape (counts 3, 5, 7, 9 and 10), two counts of attempted rape (counts 4 and 6) and indecent treatment of a child under 16 (count 8) – where the

appellant contended that it was not open to the jury to accept the complainant's evidence beyond reasonable doubt because of its many weaknesses – where the complainant did not give evidence of instances of abuse about which she complained to police – where there were inconsistencies between the complainant's evidence and the evidence of other witnesses whom she had told about the abuse – where the jury were entitled to reject the appellant's evidence – whether it was open to the jury to accept the reliability of the complainant's evidence beyond reasonable doubt on each count – where the appellant contended that the judge failed to adequately give a direction in terms of *Robinson v The Queen* (1999) 197 CLR 162 – where the appellant highlighted the inconsistencies between the complainant's evidence and that of preliminary complaint witnesses – where the judge directed the jury that they should consider that the complainant told a number of people different things about her complaint – where the judge directed that if the jury had a reasonable doubt concerning the truthfulness or the reliability of the complainant's evidence in relation to one or more count they must take that into account when assessing her truthfulness or reliability generally – where the judge warned the jury of the difficulties arising from the long delay between the alleged offending occurring and the complainant's police complaint – where the judge's directions sufficiently drew to the jury's attention the principal matters which may undermine the

reliability and truthfulness of the complainant's evidence – where the directions, when considered in context, were sufficient to warn the jury of the dangers arising in this case of a miscarriage of justice from too readily accepting the complainant's evidence and complied with *Robinson* – where the complainant was aged between seven and 16 years at the time of the alleged offending – where the judge directed the jury that for counts of rape, where the complainant was over 12 but under 16, she could not give consent – where the judge erred in his direction as to consent under s349 *Criminal Code* – where neither counsel brought the error to the judge's attention – whether there was a substantial miscarriage of justice – where the directions as to consent were extraordinarily concerning – where it is not and has never been the law in Queensland that consent is not an element of the offence of rape where the complainant is between the ages of 12 and 16 – where consensual sexual contact with children under 16 is unlawful, but it is not rape under s349 – where the completely unsatisfactory nature of the directions as to consent and the shortcomings as to the evidence as to when counts 9 and 10 occurred required that the appeal against conviction insofar as it concerned counts 5, 6, 9 and 10 be allowed, with retrials ordered – where there is an especially disappointing aspect of this appeal – where it is the duty of counsel in criminal trials to listen carefully to the judge's directions to the jury and to bring to the judge's attention any

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errors or shortcomings – where trial counsel in this case failed in that duty, both on the judge's directions as to consent and as to the s29(2) *Criminal Code* point – where had they assisted the court as they should, it is likely that the errors would not have been made and this appeal against conviction would have failed.

Appeal against conviction in so far as it concerned count 2 (indecent treatment of a child under 12); count 5 (rape); count 6 (attempted rape); count 9 (the alternative verdict of attempted rape to the charged count of rape) and count 10 (rape) is allowed. Verdicts of guilty on those counts are set aside and retrials are ordered. The appeal against conviction in so far as it relates to count 3 (rape) and count 4 (attempted rape) is dismissed.

R v Shambayati [2016] QCA 100, 19 April 2016

Appeal against Conviction & Sentence – where the appellant was found guilty of assault occasioning bodily harm following a trial by a jury – where during the empanelling of the jury the appellant allegedly called out 'challenge' but the juror was subsequently empanelled – where the appellant alleged that the jury had not been empanelled according to law – where the recording of the empanelment of the relevant potential juror was played – where in that recording the word 'challenge' is heard as a whisper – where defence counsel heard this and subsequently spoke with the appellant – where the trial judge did not hear the appellant – whether the word 'challenge'

was audible to the court – whether the jury was empanelled according to law – where the absence of any reference to a challenge by the appellant in the transcript or the court order sheet confirms that what the appellant said was not audible to the judge or the judge's associate – where the appellant did not make an effective challenge to the juror – where the evidence of the appellant was supported by independent witnesses and the evidence of the alleged co-offender – where the complainant's evidence derived support from the evidence of other independent witnesses – whether the verdict was unreasonable or insupportable having regard to the evidence – where the jury had the advantage, denied to this court, of seeing and hearing that evidence as it was given – where it was reasonably open to the jury to find that the Crown had proved the offence alleged against the appellant beyond reasonable doubt – where the appellant was sentenced to eight months' imprisonment with a parole date fixed on 3 October 2015 – where the appellant was sentenced on the basis that there was no provocation, that it was not a premeditated assault and that it was a protracted assault – where the appellant had a relevant criminal history – whether the sentence was manifestly excessive – where having regard to the circumstances identified by the sentencing judge, and to the further circumstance that there was no evidence of remorse or insight into the offending by the appellant, it could not be said that the short term of actual imprisonment

imposed upon the appellant, a mature adult who had committed an offence which involved the protracted infliction of bodily harm, was manifestly excessive.

Appeal against conviction dismissed. Application for leave to appeal against sentence refused.

R v SCL; R v SCL; Ex parte Attorney-General (Qld) [2016] QCA 107, 26 April 2016

Appeal against Conviction; Sentence Appeal by Attorney-General (Qld) – where the appellant was convicted by a jury of one count of rape of a seven-year-old girl – where, at the time of the alleged rape, the appellant was in a relationship with the complainant's mother – where, in his police interview, the appellant claimed that he had punched a man, P, because the complainant's mother had told him P had touched the complainant – where the appellant also stated that the complainant's mother had told him that, when he began his relationship with her, she was involved in court proceedings in relation to another man, W, who had also touched the complainant – where the appellant, when asked by police, denied that he had ever been alone with the complainant's mother's children nor slept in the same bed as the complainant – where, at trial, the complainant's mother gave evidence that she had once found the appellant asleep in the complainant's bed in the bedroom that she shared with her sister, S – where she also gave evidence that there had never been contact between the complainant

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and W and that there had been no touching of the complainant by P – where the prosecution adduced police evidence that no complaint had been made against W and P – where the prosecution alleged the inconsistencies between the appellant’s evidence and the evidence of the complainant’s mother and police records were suggestive of three lies told by the appellant indicative of his consciousness of guilt – where, in summing up, the trial judge identified four lies and directed the jury that they must be satisfied that an alleged lie revealed a knowledge of the offence in order to be probative of guilt, but suggested a line of reasoning not specifically explained by the prosecutor – where, after objection from defence counsel, the trial judge redirected the jury as to the third lie – where the appellant contends the trial judge erred in giving the direction on the alleged lies and that the direction was otherwise deficient – whether the misdirection and characterisation of the lies caused a miscarriage of justice – where the first question here, in relation to each of the suggested lies, is whether it was open to the jury to find that the lie could be used as evidence of the appellant’s guilt, rather than as evidence only affecting his credibility – where a lie of the first kind could be established only by the jury being persuaded of several things – where importantly, the jury’s reasoning had proceeded by reference to a lie which had been “precisely identified”, as the majority said in *Edwards v The Queen* (1993) 178 CLR 193 – where the identification of the lies in this case

lacked precision, at least because the alleged lies about W and P were defined differently by the prosecutor and the trial judge – where in summary, none of the alleged lies should have been left for the jury to consider as *Edwards* lies – where there was thereby a miscarriage of justice – where indeed, if any of them was incapable of being considered an *Edwards* lie, there was a miscarriage of justice because of a real possibility that the jury’s use of the lie in that way deprived the appellant of an acquittal.

Allow the appeal against conviction. Quash the conviction. Order that the appellant be retried. Dismiss the appeal against sentence by the Attorney-General.

R v KAN [2016] QCA 108, 26 April 2016

Appeal against Conviction – where the appellant was found guilty of one count of maintaining a sexual relationship with a child under 16 and two counts of rape – where the complainant led evidence of uncharged, unlawful sexual acts which she agreed to a suggestion put by police began when she was about five years old – where she said the acts occurred nearly every night – where, based her on evidence, other evidence and admissions at trial, the alleged uncharged acts would have occurred when the complainant was two years old – where the primary judge directed the jury that these acts were only relevant to “background” – where the judge failed to direct the jury that they must be persuaded beyond reasonable doubt that some or all of those uncharged acts occurred before

they could be used as proof of the appellant’s sexual interest in the complainant – where defence counsel failed to request such a direction at trial – where the trial judge should have given such a direction as failure to do so may have affected the jury verdict – where defence counsel’s failure to request the direction was an oversight and not a tactical, forensic decision – where it is clear the judge endeavoured to give the jury a balanced summation of the issues at trial – where his Honour should have separately identified for the jury the complainant’s evidence about the initial alleged rape in South Australia and the subsequent rapes which she said then occurred nearly every night, up until 30 April 2003 (the commencement of the maintaining charge, count 1) – where his Honour should have explained that at this time the complainant was aged between two and five years old and invited them to consider whether she could give reliable evidence about events occurring when she was as young as two – where it follows that the inadequacies in the directions to the jury identified in this ground of appeal may well have affected the verdict.

Appeal against conviction allowed. Verdicts of guilty set aside. A retrial is ordered.

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



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TOURNAMENT



Brian Patrick McCafferty

23 August 1932 – 19 December 2015

Brian McCafferty's pre-eminence as a commercial lawyer and company director was eclipsed only by his devotion to his family and friends.

Those priorities were undoubtedly forged in his upbringing. Brian was the third child of Dr Sydney and Mrs Kathleen McCafferty. His father practised for many years from a surgery attached to the sprawling family home on Logan Road, Greenslopes. It was a busy household, and ever more so as the family grew in number. But it was a 'busyness' founded in mutual support and a simple commitment to their Catholic faith.

Brian was educated at St Joseph's College, Nudgee, and Downlands College, Toowoomba, before spending some years studying with the Missionaries of the Sacred Heart at Douglas Park, outside Sydney.

He returned to Brisbane to study arts and law at The University of Queensland. Brian's life as a student was, however, not limited to the books. He participated fully in the social life of a law student, and in his final year was president of the University of Queensland Law Society. His contemporaries still speak in whispers about Brian's capacity to navigate his motor scooter across south-east Queensland in search of parties.

Brian was initially admitted as a barrister after his graduation in December 1957. With a view to gaining experience, he commenced working as a law clerk at Morris Fletcher and Cross, then a prominent and well-respected firm of solicitors in Brisbane. His talent as a transactional lawyer was such, however, that a career at the Bar was not to follow. Admitted as a solicitor on 16 February 1960, he was immediately made a partner in the firm. In 1994, he retired as that firm's senior partner.

In the course of his career, Brian's acumen as a commercial and corporate lawyer achieved legendary status within the business community in Queensland and further afield. Apart from his own practice, he contributed widely to the profession's engagement in commercial law matters, and served as chair of the Queensland Commercial Law Association for five years from 1977. Queensland Law Society appointed him as one of its Senior Counsellors, and for many years a multitude of legal practitioners benefited from his wise and practical advice. Brian also served on many Society committees.

In addition to dealing adroitly with a vast range of commercial circumstances,



Brian earned a well-deserved reputation as a tax specialist. In 1981-1982 he was president of the Taxation Institute of Australia, the first Queensland member to hold the position.

Brian's ascendancy as a leading corporate lawyer coincided with enormous growth in the sophistication of the Queensland corporate sector. Local, national and international clients all benefited from his calm and sure advice. That led naturally to his being enlisted to corporate governance positions. Over a period of some 25 years from the mid-1970s, Brian was a director of, and in some cases chaired, many leading companies, including Incitec Ltd, AP Eagers Ltd, Bridge Oil Ltd, Pioneer Sugar Mills Ltd, Australian Interstate Pipeline Company Limited, the Iwasaki Foundation Ltd, ICL Australia Pty Ltd and Walter Reid & Co Ltd. Even after retirement from practice, his corporate life continued with his directorship of Hamilton Island Ltd.

Such was the esteem in which Brian was held within the corporate sector that in the 1970s, when a number of smaller building societies were set to fail, he was called in by the Government to assist in merging them into a larger, more stable unit under the aegis of the State Government Insurance Office. This became the SGIO Building Society, later the Suncorp Building Society, of which Brian was deputy chairman for some 16 years from 1976.

This was also a period during which the RACQ enjoyed tremendous growth and transition, due in no small part to Brian's service as a member of the RACQ Management Council

from 1968-1984, including a term as president in the mid-1970s.

Brian became the senior partner of Morris Fletcher and Cross on the retirement of Sir John Nosworthy in the early 1980s. With the quiet but firm dignity for which he was renowned, Brian led the firm through an unprecedented period of growth and expansion during the 1980s and early 1990s. This culminated in Brian guiding the firm through the national merger which created Minter Ellison Morris Fletcher. After his retirement in 1994, the firm changed to its present name, Minter Ellison.

In addition to his wide-ranging professional engagements, Brian made major contributions to charitable endeavours. These included his membership of the Council of St. John Ambulance Australia from 1977 (chair in 1995) and appointment as a Commander of the Order. He was a member of the Queensland Institute of Medical Research ethics committee, and also served for many years with the Knights of the Southern Cross.

Brian was noted for his avuncular geniality. Several generations of lawyers have lasting memories of attending on Brian in his expansive office, where they would find the senior partner leaning back in a giant leather chair behind an intimidatingly large timber desk, on which he would place his feet while he puffed contentedly on his pipe. In a voice so soft that he could barely be heard, and with the attitude of a kindly Irish uncle, Brian would issue instructions for them to undertake tasks which would stretch their professional limits but teach them valuable lessons for their future careers.

Retirement from the firm allowed Brian to pursue other interests. He enrolled at Bond University to study mediation, graduating with a Master of Laws. He pursued a number of personal advisory interests. He attended to his garden. He supplemented his hat collection. He took up golf – a sport which, one suspects, he pursued largely for its social dimension.

Most importantly, he spent time with his family and friends. And it was in this aspect of his life that Brian really excelled. Because, for all of his success in the corporate sphere, Brian was happiest at home with his family and in the company of his lifelong friends. Despite his health fading over the last several years, Brian never lost his humour, his good grace, and his concern for those close to him.

Brian Patrick McCafferty passed away on 19 December 2015. He is survived by sons Alexander and Christopher, and by wife Carol and their son, Patrick.

This month ...



Webinar: Protecting Client Information from Cyber Attacks

Online | 12.30-1.30pm

Cybercrime in Australia is unrelenting and cyber attacks continue to grow year on year. This webinar will assist you in safeguarding your firm and your clients' information from cyber attacks by offering practical advice on how to protect yourself, your business and clients.



1 CPD POINT

WED
1
JUN

Webinar: Interpreting Key Clauses in Construction Contracts

Online | 12.30-1.30pm

This webinar will provide a refresher on key principles of contractual interpretation and demonstrate the impact that choice of words can have on issues that are frequently dealt with in building contracts such as extension of time, liquidated damages, back charges and claim notices. QLS is a QBCC Adjudication Registry Approved Provider.



1 CPD POINT

WED
15
JUN

Practice Management Course – Sole Practitioner and Small Practice Focus

Law Society House, Brisbane | 8.30am-4.45pm

As the professional path to practice success, the Queensland Law Society Practice Management Course (PMC) equips aspiring principals with the skills and knowledge required to be successful principals.

Our PMC features: practical learning with experts, tailored workshops, leadership profiling and superior support.



10 CPD POINTS

THU-SAT
2
TO
4
JUN

Practice Management Course – Information Evening

Law Society House, Brisbane | 5.30-7pm

Are you interested in obtaining a principal practising certificate in the future? Come along to our information evening to find out about all aspects of the Practice Management Course including course, study requirements, assessment and more.

WED
15
JUN

Introduction to Wills and Estates

Law Society House, Brisbane | 8.30am-5pm

Aimed at legal support staff with less than three years' experience, this introductory course provides:

- an overview of succession law
- practical guidance on estate planning including preparing wills, general and enduring powers of attorney and deceased estate documentation
- tips on estate administration and litigation.

The course is based on the nationally accredited diploma level unit 'BSBLEG515 Apply legal principles in wills and probate matters'.



6 CPD POINTS

TUE
21
JUN

Gold Coast Symposium 2016

Surfers Paradise Marriott Resort & Spa
8.30am-5.30pm

Gold Coast Symposium is a unique opportunity for practitioners to explore the issues and pressures relevant to the local legal profession. The 2016 Gold Coast Symposium:

- helps you understand what the Commonwealth Games will mean to you
- gives you the opportunity to hear about the progress of the unique domestic violence court at Southport
- provides you with the tools to communicate with influence and motivate internal stakeholders
- brings you up to speed with the latest compliance issues in the world of self-managed superannuation funds
- provides valuable guidance on how to charge effectively for your time.



7 CPD POINTS

FRI
10
JUN

Save the date

Early Career Lawyers Conference	15 July
QLS and FLPA Family Law Residential	21-23 July
Government Lawyers Conference	26 August
Property Law Conference	8-9 September
Criminal Law Conference	16 September
Personal Injuries Conference	21 October
Succession and Elder Law Residential	4-5 November
Conveyancing Conference	25 November

Earlybird prices and registration available at
qls.com.au/events



Katherine Marshall



Catherine Chiang



Rebecca Castley



Melissa Demarco



Julian Lane



Tom Adames



Kayleigh Whittaker



Andrew Shields

Career moves

Best Wilson Buckley Family Law

Katherine Marshall has been appointed as a solicitor at Best Wilson Buckley Family Law's Toowoomba office. Katherine was admitted in 2011 and has returned to family law after practising in commercial litigation, building and construction law, and estate planning, with a brief period in corporate law and personal injury law.

Broadley Rees Hogan

Broadley Rees Hogan has welcomed **Catherine Chiang** as a lawyer in its commercial litigation and dispute resolution services team. Catherine has recently moved from a boutique CBD firm where she was working in commercial and cross-jurisdictional litigation. Her practice at Broadley Rees Hogan focuses on commercial litigation, insolvency, building and construction law, planning and environment disputes and corporate advisory. She will continue to service Asian investors and litigants with her fluent Chinese language skills.

Colin Biggers & Paisley

Rebecca Castley has joined the property team as a partner in the Brisbane office. Rebecca has extensive experience in the acquisition and sale of commercial, industrial, retail and residential property, due diligence, joint ventures and leasing. She also advises on commercial and retail greenfield developments and refurbishments, strata titling and flat-land subdivisions, as well as body corporate matters, including general advice, management rights and disputes.

Creevey Russell Lawyers

Melissa Demarco has joined Creevey Russell Lawyers as a special counsel. Melissa has extensive experience in workplace relations, and workplace health and safety. She advises large employers in highly unionised industries and is a registered migration agent. With a primary focus on assisting employers to manage their industrial relations and work health and safety compliance, Melissa also has experience in commercial litigation and dispute resolution, most recently with a top-tier national firm.

McInnes Wilson

McInnes Wilson has expanded its property and construction division with the appointment of two new principals to lead the construction and projects team in Brisbane.

Julian Lane has been promoted to the role of principal of construction and projects while **Tom Adames** has joined the firm, also as principal of construction and projects.

Julian joined the division as special counsel in mid-2014 and is an expert in construction contracts, risk identification, dispute resolution, energy and resources, and security of payment.

Tom has extensive experience in all areas of building and construction law, with an excellent understanding of commercial and domestic building disputes, building and construction contracts, commercial litigation and building regulations and licensing.

NB Lawyers

Kayleigh Whittaker has been appointed as a lawyer at NB Lawyers with the property and commercial law teams. Kayleigh brings experience from working with a local council and will focus on property and commercial transactions.

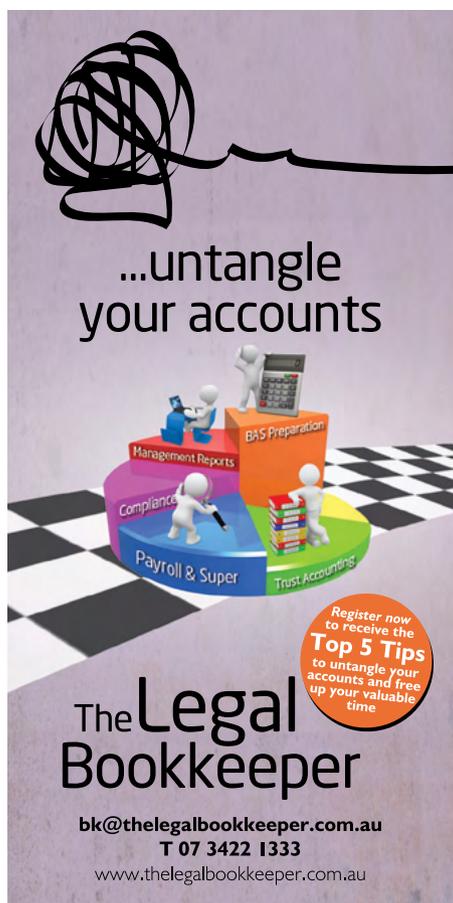
Nyst Legal

Senior tourism and financial services lawyer **Andrew Shields** has joined the Nyst Legal team as a special counsel focusing on the tourism sector, particularly all areas of legal compliance including financial services, privacy, telemarketing and other marketing initiatives, and dealing with government regulators and ombudsmen. Andrew was previously a director of Shields Legal, and prior to that senior counsel to Wyndham Vacation Resorts Asia Pacific.

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.

New QLS members

Queensland Law Society welcomes the following new members, who joined between 8 April and 9 May 2016.



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Shalini Nandan-Singh, Singh Law
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Simone Gray, Simonidis Steel Lawyers Brisbane Pty Ltd
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Starting this way can powerfully inform the viability of your business model...

The profession currently demonstrates a monumental spread of capabilities in online presence and activity... from the utterly incompetent *one page set and forget* through to the very active and easy to access (including transactional and assisted transactional) sites.

We can say unconditionally that the vast majority of legal websites are poor. They are unremarkable, internally focused, provide no competitive advantage for their firms, and few (if any) client benefits that can cut through... viz, About us, Our people, Our Areas of Practice, Contact us. Moreover, based on the evolving Google search rules, they are unlikely to feature on the first couple of normal keyword search pages – which means in practical terms, they don't feature at all. Many remain non-mobile compatible.

Over the last year, we have taken an approach to business planning that significantly elevates the website in the process, as opposed to the traditional one of settling strategy (of sorts) and then creating the site after the fact.

In the spirit of *simple is good*, we encourage the model shown *far right*.

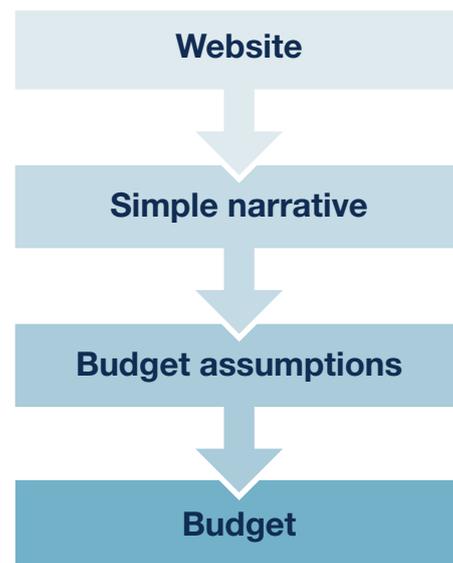
Obviously the usual internal and external scanning needs to happen. But focusing on the website in the first instance encourages the key questions of: How are we going to compete? Who is our target market? What things do they value? (For example, outcomes, process certainty, easy to work with, listeners, we come to you, pricing certainty, payment options, bail-out options, the references from other clients, do we provide services online, face to face, or a combination?)

You *must* deal with all these questions on your site – either directly or indirectly. Marketing 101 says clients are motivated by benefits – that is, what's in it for me? So this is what you need to focus on. Large corporations and mum and dads will have different needs, but the principles are the same.

In our own case, we even devote quite a bit of effort to explaining what we *don't/won't* do – which is beneficial as a filter for ourselves and our clients.

So the process is this:

- Look at your competitors, your target market, and your own capabilities and define the *very specific* benefits you are going to offer so as to compete.
- Work out how you can succinctly explain these as value propositions – both verbally and visually – get some external help so that Google will elevate you.
- Stand in your clients' shoes first and your own shoes second.
- Think clearly through your service delivery formula... yes – online is cheaper once it's running, but often the setup costs are high.
- For each value proposition, for your own internal benefit, prepare a *simple narrative* explaining *why* it is important and *how* you will execute it.
- Then you need to get more detailed and work through the *budget assumptions* supporting each proposition – that is, what business levels, what people, what IT investments do we need to build into the draft P&L to support our plan? Remember, if your website is a central plank of how you will compete, then you need to build in a realistic ongoing cost of maintaining it and providing new information.
- Convert all these into a draft budget... and be honest/try to analyse your revenue as clients rather than just \$\$\$s per month.
- There's a good chance that your ideas will cost you way more than you thought (or alternatively you are being a bit soft with your analysis) and so you'll have to go back to the beginning and ask what is essential to your business idea and what is optional...



By proceeding this way you ought to end up with a clear strategy that is consistent across your website *and* your actual firm, together with a budget that properly reflects the true costs of your service delivery. Give it a go...

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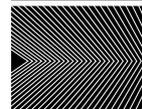
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Would any person or firm holding or knowing the whereabouts of any original Will of **Thomas Anthony (Tony) Silles** formally of 4/57 Cracknell Road, Annerley, Brisbane in the State of Queensland and late of Ballinclogher West, Lixnaw, Co. Kerry, Ireland, who died on the 18th February 2016, please contact Thomas J. O' Halloran Solicitor of Thomas J. O' Halloran Solicitors, Ashe Street, Tralee, Co. Kerry, Ireland by email to info@tohalloransolicitors.com within 14 days of this notice.

Would any person or firm holding or knowing the whereabouts of a Will or other document purporting to embody the testamentary intentions of **William Lindsay Lonergan** late of Townsville Hospital, Douglas in the State of Queensland who died on 13 September 2015 please contact Dan O'Connor of Bell Legal Group, 91 Upton Street, Bundall QLD 4217
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Along the Bordeaux line

with Matthew Dunn



Bordeaux created the taste for quality wine of deep colour and flavour known to many as claret.

The estates of Bordeaux virtually kicked off the wine trade as we know it today, and it is renowned as the main game for the international wine set.

Nowhere else makes more top quality wine or is more sought after and expensive – yet offers so few good options for the average punter.

The city of Bordeaux has always been a port, though it lies almost 100 kilometres from the sea up the mighty Gironde, not far from where two mighty rivers join – the Garonne and the Dordogne.

Its country is gravelly and well-watered. Wine has been made here since Roman times, falling into disrepair when the Visigoths moved in and being repatriated when good King Clovis came to bring back order. The medieval wine of the time was a rambling mixture of red and white grapes, fermented for a short time to give a pinkish hue; it was called 'claret'.

When Gascony became English in 1152 by the marriage of Henry Plantagenet and Eleanor of Aquitaine, things started to heat up in the wine trade. England proved

a wealthy and thirsty market for the claret. King John granted Bordeaux a tax holiday to import wine to England, bringing a cheer from the locals, and a very happy marriage of eager French wine producers and thirsty English nobility was forever sealed.

Skipping forward to the second half of the 17th Century and something miraculous happened in Bordeaux that would change the face of wine forever. Discerning consumers were no longer content to simply buy red Bordeaux mixed together in barrels; the estates started to market themselves as unique, quality proprietors, better than their local competitors (Chateau Haut-Brion features heavily as one of the first of the 'new' estates).

Also, a new style of wine emerged when these estates paid attention to what was in their vineyards (bodies built of cabernet sauvignon and clothing of merlot). They took care; they tried new ways to vinify and tried to outdo their competitors, and the resultant wines were higher in quality, deeper in colour and more concentrated in flavour. In England these came to be known as 'New French Clarets' and were highly sought after – the greater the social standing, the better the claret.

To put Gallic order into the new chaos of a free market of names, the great classification

of 1855 was decreed. It put the major names of the day into five classes, with the First Growths being the unquestioned best chateaus: Lafite-Rothschild, Margaux, Latour and Haut-Brion. In the 1970s Chateau Mouton-Rothschild was added to this magic circle. These five represent the most expensive, long-lived and most sought-after trophy wines that can be found. To get a sense of it, 2010 was a very fine year in Bordeaux and the Haut-Brion is going for around \$2000 a bottle.

Today Bordeaux is an enigma for the average wine drinker. The very economic examples are quaffable enough, but to get a wine of structure, quality and style is an invitation to do GBH to the credit card. Many inferior, unripe or poorly made wines can be and are sold off using the reflected shine of the First Growths and the innate desire for claret.

Some say there is better buying at home in the Margaret River or Coonawarra. For the Australian palate, the wines of Pauillac present the best buying and most familiar territory. Good appellations to check for include Haut-Medoc or Graves.

There are so many options, many good, some poor, but there is much adventure to be had in sifting the wheat from the chaff.

The tasting Three accessible examples of Bordeaux red wines were examined.



The first was the **Calvert Grande Reserve Bordeaux Superieur 2013** which announced that it was 'élevé en fût de chêne' or 'raised in oak casks'. The colour was light ruby red and the nose was blackcurrants growing in a mossy glade overlooked by wet washing. The palate was very light and soft, with a little tannin to make its fleshy fruit approachable and the distinct hint of capsicum revealing cabernet sauvignon from a hard ripening year.



The second was the **Chateau Haut-Madrac Haut Medoc 2012** (the second label of fifth growth Pauillac estate Chateau Lynch-Moussas) and was damson plum red. The nose spoke of blackberries and sweet red fruits on an old oak tray. The palate was initially rich blackcurrants warmed with spice that grew on the mid palate to peppery notes laced with tannin drying firmness. As air intruded a nutty velvety oak came out to play and showed hints of its older sister wine.



The third was the **Chateau Chantemerle Cru Bourgeois 2012 Medoc** which was dark red brick colour. The nose was a basket of herbaceous leaves, summer flowers and strawberries. The palate was rounded and smooth, dry yet velvety and an intriguing mix of green leaf and tart red fruits.

Verdict: The popular choice was the Chateau Haut-Madrac, which had a strength and body to win popular approval.

Matthew Dunn is Queensland Law Society government relations principal advisor.

At home with the law

Legal contributions to Brisbane's heritage



Queensland's cultural heritage has benefited from the continuing contribution of Brisbane lawyers as both creators and custodians.

Practitioners have made culture, championed it and have acted as patrons.

Queensland literature has benefited from the works of lawyer/authors such as Tammy Williams, the Honourable Ian Callinan and Chris Nyst. The stage has been honoured with performances from Justice Ros Atkinson, among others.

Gadens has an extensive art collection. Judge Brian Devereaux was a member of '80s pop group Looking for Humphrey. Solicitor Elizabeth Jameson is the deputy chair of the Queensland Theatre Company.

In the late 1980s, many senior practitioners put their pens aside and picked up paint brushes, producing small canvasses sold for charity. Walter Sofronoff QC's piece, *Carnival Night*, hangs on my wall.

This commitment to cultural heritage is also evident in wood and stone. Brisbane lawyers have commissioned several remarkable houses, and various suburbs and streets bear the names of these homes and their owners. We can travel through Kedron on Lutwyche Road towards Merthyr Road. Some houses have survived and continue to be cared for by practitioners.

Whytecliffe

In 1876, Robert Little built Whytecliffe on the white cliffs of Albion. The original 22-room house was designed by architect Francis Stanley.

Little was born in Londonderry in 1822 and as a young man emigrated from Ireland, arriving in Australia in 1846. In December of that year he arrived in Brisbane and was the city's first solicitor.

With the establishment of the Moreton Bay Supreme Court in 1857, Little was appointed as Crown Solicitor. His official duties were not onerous and Little retained his private practice until 1885. In 1873, he became the first president of the first Queensland Law Society.¹

In September 1930, FE Lord wrote:

"Whytecliffe is built of brick with stone foundations, is of two stories with a wing at the back and has a balcony and veranda on three sides. The roof was originally of shingles but these have now been replaced by corrugated iron. The double doors in front of the house lead into a spacious vestibule, with high plaster ceiling, and lighted by a skylight in the roof above the winding cedar staircase that takes one to the upper rooms."²

After Robert Little's death in 1890, Whytecliffe passed through several hands. It served as a boarding school for the Brisbane High School for Girls (later Somerville House). From the 1920s, it was Albion's social hub, being Miss Rosendorff's guest house. In 1959 it was purchased by the Christian Brothers to form part of St Columban's College. After extensive

restoration, Whytecliffe is again a social hub, hosting community activities at the Forest Place Clayfield Retirement Village.

Astolat

In 1890, a two-acre, 20-perch block in Yeronga was transferred to Albrecht Feez. On this land Adolph Frederick Milford Feez built Astolat. It burnt down shortly after its completion and was rebuilt immediately.³

Adolph Feez was born in Brisbane in 1858 but spent his childhood in Rockhampton. Originally, he was a surveyor. He was admitted as a solicitor of the Supreme Court of Queensland on 1 December 1885, with his admission moved by his brother, Arthur.

Feez was a foundation partner of Feez Ruthning & Co. He died on 31 December 1942, but his name stayed with the firm until its merger with Allen Allen & Hemsley in 1996.

The house is thought to have been designed by renowned Brisbane architect GHM Addison. Its name comes from Elaine of Astolat, the innocent maiden who dies of unrequited love for Sir Lancelot. The legend had great resonance for Feez, whose first child was named Elaine.

Astolat is listed on the Queensland Heritage Register with this description:

"Astolat is a picturesque single-storey timber residence, with corrugated iron roof and timber verandahs...

"The house has an L-shaped plan, with a hipped primary roof encircled by a raked

Margaret Ridley spotlights three Brisbane homes with historic legal connections.



verandah roof. It has verandahs to the north and the west, and a projecting hexagonal bay at the north west corner. A wide set of timber stairs extends out to the north east from the hexagonal bay."⁴

The house has been lovingly restored by its present owners, one of whom is a senior Brisbane solicitor.

Kedron Lodge

Kedron Lodge was designed by Christopher Porter in the style of an English manor house. It was commissioned by the first judge of the Supreme Court of Queensland, Alfred James Lutwyche.

In 1853, Lutwyche left the Bar in England to come to the colonies because of ill health. He had secured a position as a correspondent for the *Morning Chronicle* in Sydney, but relinquished the position on arrival and practised at the Bar.

After serving on the New South Wales Legislative Council and as Solicitor-General and Attorney-General, Lutwyche was appointed Supreme Court judge at Moreton Bay. Upon separation, Lutwyche became the state's first Supreme Court judge. Never far from controversy due to his outspoken commitment to liberalism, he remained in this position until his death in 1880.⁵

Kedron Lodge is built of sandstone hewn from John Petrie's Albion quarry. The two-storey Gothic-style house has 20 rooms, pitched gable roofs and five chimneys.⁶ The house

Far left: Astolat

Left: Kedron Lodge (photo courtesy of Queensland Heritage Register)

Above: Whytecliffe (photo courtesy of the foto fanatic)

has passed through several hands, including the Catholic Church. Despite being renovated, its recent owners have respected its heritage significance. Like Astolat, Kedron Lodge's current custodians are local solicitors.

While Queensland lawyers have stood as champions of cultural heritage, much has been lost. Sir Samuel Griffith's magnificent New Farm house, Merthyr, was demolished in the 1930s. However, we can be pleased that practitioners continue to write, perform, patronise, collect and build.

Margaret Ridley is a former legal academic working for QUT in Equity Services and holds a master's degree in cultural heritage.

Notes

- ¹ *Australian Dictionary of Biography* and Helen Gregory, *The Queensland Law Society Inc 1928-1988*.
- ² FE Lord, 'Brisbane Historic Homes XXIX – Whytecliffe', *The Queenslander*, 11 September 1930, 7.
- ³ MWD White and Pieter Wessels, 'The Australian Fez Family: Its Contribution to the Law', Clem Lack Oration, 24 September 1998.
- ⁴ Queensland Heritage Register, Place ID 601473.
- ⁵ *Australian Dictionary of Biography*.
- ⁶ Queensland Heritage Register Place ID 600238.



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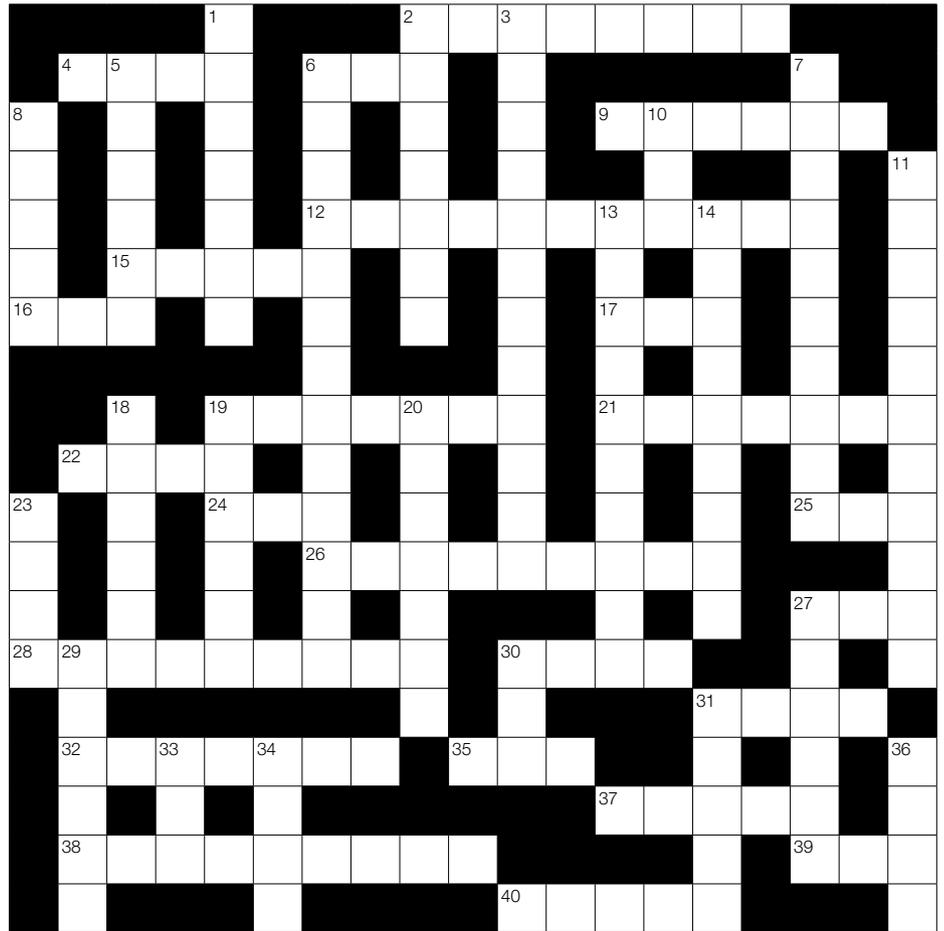
Mould's maze

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



Across

- 2 Case summary within a law report. (8)
- 4 Defence to breach of copyright when copying for criticism or parody, use. (4)
- 6 Queensland statute abolishing quasi-entails. (abbr.) (3)
- 9 System of hearing matters before the same judge. (6)
- 12 An injunction that is not mandatory. (11)
- 15 Defamation tort in South Africa, iniuriarum. (Latin) (5)
- 16 Sum paid to a landlord as an inducement to rent the property to a prospective tenant, ... money. (3)
- 17 Federal subsidy of medicines. (abbr.) (3)
- 19 Fictional barrier erected within a firm to prevent exchanges or communication that could lead to conflicts of interest wall. (7)
- 21 Doctrine by which a statute of limitations is paused or delayed. (7)
- 22 Oldest (87) judge to sit on the High Court, renowned for his brevity of judgment, Sir George KCMG KC PC. (4)
- 24 Christian name of solicitors Watson, Somers, Gummow and Meakins, and Supreme Court Justice Lyons. (3)
- 25 Phrase used in case citations to designate that a case has a different name before the court than it did before a previous court, sub (Latin) (3)
- 26 A natural gradual increase in land. (9)
- 27 Discretionary power of a court to dismiss a case when another court is better suited to hear the case, forum ... conveniens. (Latin) (3)
- 28 An event which must occur before performance of a contract is due, condition (9)
- 30 A hearing before a Full Court, en (French) (4)
- 31 In a case involving competing security interests, the first lender will seek to a subsequent advance to its first loan in order to defeat the interest of another lender. (4)
- 32 No person should be judged without being given the opportunity to respond to the evidence against them, audi partem. (Latin) (7)
- 35 Doctrine that makes a defendant liable for the unforeseeable and uncommon reactions to the defendant's tortious or criminal conduct, ...skull shell. (3)
- 37 Wesley Hohfeld's relations comprise right, duty, privilege, no-right, power, disability, immunity and liability. (5)
- 38 Punitive award aimed at deterring the defendant and others from engaging in similar conduct, damages (9)
- 39 Phrase describing the risk of litigation, literally 'the die is cast', alea jacta (Latin) (3)
- 40 An enforceable agreement requires a pre-contractual meeting of (5)



Down

- 1 of estate is the legal relationship that two parties bear when their estates constitute one estate in law, for example, landlord and tenant. (7)
- 2 Provision of a statute that specifies that certain conduct will not be deemed to violate a general rule, safe (7)
- 3 Defence to a breach of contract raised where a plaintiff knowingly stands by without raising any objection to the infringement of their rights. (12)
- 5 Alarming fighting in public. (6)
- 6 Provocation requires the offending force used to be to the provocative conduct. (13)
- 7 The right of a mortgagor to recover their property once the debt secured has been discharged, equity of (10)
- 8 Well established legal rules that are no longer subject to reasonable dispute, letter law. (5)
- 10 A defective pleading will often be struck (3)
- 11 Surrendering custody of goods while retaining ownership until sold. (11)
- 13 Defamatory accusation. (10)
- 14 Unable to pay debts owed. (9)
- 18 Pre-trial application to determine admissibility of evidence, motion in (US) (6)
- 19 To book. (6)
- 20 Complete, sign or carry out according to its terms. (7)
- 23 Offender. (jargon) (4)
- 27 Christian name of OJ Simpson's wife. (6)
- 29 Trainee barrister. (6)
- 30 Agreement in connection with a private sale of securities not to sue over non-disclosure of material inside information, ... Boy Letter. (3)
- 31 Scope of a commission of inquiry, of reference. (5)
- 33 Frequently a soccer result, but never a result in litigation. (3)
- 34 Process of reclaiming possession of a chattel. (jargon) (4)
- 36 Emeritus Professor and author of seminal texts on land law, Peter (4)

Solution on page 64

And the secret of DIY is...

DDI – Don't Do It (unless there's beer involved)

by Shane Budden



Recently – which is a word I use with less and less confidence as I grow older and my memory begins to make your average goldfish look like Barry Jones – I agreed to help a friend do some painting.

Of course, this was on the same basis upon which we all agree to help friends with unpleasant tasks – I didn't really think he would actually get around to it.

We see such requests like we see the horizon, conceivable but never realised. This allows us to feel like good friends who can be counted on, until the task comes due and we realise that we are good friends who can be counted on to do things that do not involve physical effort, like drink beer and watch football.

This willingness to help our friends as long as we never have to do anything is pretty much universal and has been with us a long time. The leaning tower of Pisa, for example, is clearly the result of a bunch of mates agreeing, a year or so before construction, to help build a tower. When the time came to do it, only half of them turned up and they did a botch job (and now that the tower is a famous tourist attraction, they would all claim that they did it on purpose).

I remember reading an SRA card back in primary school about the Colossus of Rhodes, a wonder of the ancient world, which was a giant statute that was destroyed and all that was left were the feet. I strongly suspect that again a group of friends agreed to build a statue and got as far as the feet before giving up and making up a story about an earthquake (either that or the Rhodes Must Fall movement has been around way longer than we thought).

If you have ever moved house, you will have witnessed this phenomenon. About two weeks before you are to move, every friend you have – even those on LinkedIn – agrees to help. If they all actually turned up you could move GOMA to the Gold Coast in about three hours, unless someone gets a flat tyre on the M1, causing all of south-east Queensland to grind to a halt.

Of course, they do not all turn up; you will be lucky to get three people to show up, and if you do get that many at least one will

be hungover and another will have been unaware of the move, having just popped over to borrow your lawnmower.

Painting, of course, is one of those things we all do ourselves because we all think we can do it. Why, we ask ourselves, do people bother with apprenticeships and training when any fool can paint a wall? Then we go about answering that ourselves by spending two hours with rollers and brushes, speaking authoritatively about 'cut-ins' and 'surface prep', before stepping back and marvelling at a wall that looks as if it were painted by six-year-old children hyped up on red cordial and wearing blindfolds.

I suspect my friend will have to spend much of the money he saved paying a real painter to fix up the work, but on the plus side I held up my end of the bargain, and he will feel obligated to help me next time.

Actually, the painting turned out OK, with my friend's wife complimenting us on the mint undertone we had achieved, no doubt not realising we had achieved it by putting insufficient white paint on an already green wall. Lest you feel inspired by our success and decide to tackle such a task yourself, I should point out that my friend and I are highly qualified (although not, truth be told, in painting) and we undertook this work under controlled conditions, namely that our spouses were not present and we had access to beer; if you do not think you can replicate our standards of safety and professionalism, you should probably pay a professional. I would recommend a painting professional, but you need not feel constrained by that.

Naturally, not all tasks are suited to the do-it-yourself regime; notably, anything which involves electricity and is more complex than plugging in a toaster is well beyond the ability of most home handypersons. Other subjects which do not commend themselves to the do-it-yourself method are firearm repair, gas stove installation and tiling which, my experience with the building regulator tells me, has not been successfully done by anyone, ever.

Sadly, car maintenance is something often attempted at home, usually – and I do not wish to be sexist here, but I will anyway – by men. This is because all men possess a gene (known by top geneticists as the 'stupid' gene) which causes them to believe

that they can fix most mechanical problems despite the fact that they would not know a distributor from a head gasket (I'm assuming they are not the same thing).

Another friend once had a flatmate who, when she was not cooking inedible meals that gave off smells which would fell a woolly mammoth at 30 feet, was busy pitting her astonishingly poor driving skills against the quality of the engineering of the Honda Corporation by abusing her car in ways the good men and women of Honda could not have imagined.

For example, she would not – under any circumstances and regardless of how fast she was driving – change into any gear higher than third; her obstinacy in this regard was such that it seemed she did not believe the higher gears existed, making her the world's first and only top gear atheist (although Jeremy Clarkson's old bosses at the BBC may have recently converted). Her car responded to this treatment by letting out that high-pitched whine that cars in the wild use to signal to the rest of the herd that they are in distress.

Unfortunately, the herd never showed up to help the car, but a friend of the flatmate did. He was of course male, and would regularly throw himself into the act of car repair, stupid gene fully in control, exuding the sort of confidence a man can only display when the car he is working on is not his.

He would happily pull parts of the car apart, examining them with the same look of wonder and befuddlement that you would expect from a chimp who had been presented with a piece of the international space station. The fact that the car always remained capable of some sort of movement (albeit sometimes only backwards) when he was finished inspired in my friend and I both a deep sense of wonder and an abiding conviction to never, ever accept a lift home in his flatmate's car, even if society had collapsed and the entire cast of *Mad Max 2* was chasing us.

So there you have it – my complete guide to DIY or mechanical repair, I'm not sure which. And if you need some painting done give me a call, because for some reason my friend has a lot of white paint left over.

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

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Crossword solution from page 62

Across: 2 Headnote, 4 Fair, 6 Pla, 9 Docket, 12 Prohibitive, 15 Actio, 16 Key, 17 Pbs, 19 Chinese, 21 Tolling, 22 Rich, 24 Ann, 25 Nom, 26 Accretion, 27 Non, 28 Precedent, 30 Banc, 31 Tack, 32 Alteram, 35 Egg, 37 Jural, 38 Exemplary, 39 Est, 40 Minds.

Down: 1 Privity, 2 Harbour, 3 Acquiescence, 5 Affray, 6 Proportionate, 7 Redemption, 8 Black, 10 Out, 11 Consignment, 13 Imputation, 14 Insolvent, 18 Limine, 19 Charge, 20 Execute, 23 Perp, 27 Nicole, 29 Reader, 30 Big, 31 Terms, 33 Tie, 34 Repo, 36 Butt.

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Rate	Effective	Rate %
Standard default contract rate	3 May 2016	9.60
Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year	1 January 2016 to 30 June 2016	8.00
Federal Court – Interest on judgment debt for half year	1 January 2016 to 30 June 2016	8.00
Supreme, District and Magistrates Courts – Interest on default judgments before a registrar	1 January 2016 to 30 June 2016	6.00
Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion)	1 January 2016 to 30 June 2016	8.00
Court suitors rate for quarter year	To 1 July 2016	1.28
Cash rate target	from 4 May 2016	1.75
Unpaid legal costs – maximum prescribed interest rate	from 1 Jan 2016	8.00

Historical standard default contract rate %

May 2015	Jun 2015	Jul 2015	Aug 2015	Sep 2015	Oct 2015	Nov 2015	Dec 2015	Feb 2016	Mar 2016	Apr 2016	May 2016
9.7	9.7	9.55	9.45	9.45	9.45	9.45	9.45	9.45	9.45	9.55	9.60

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

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

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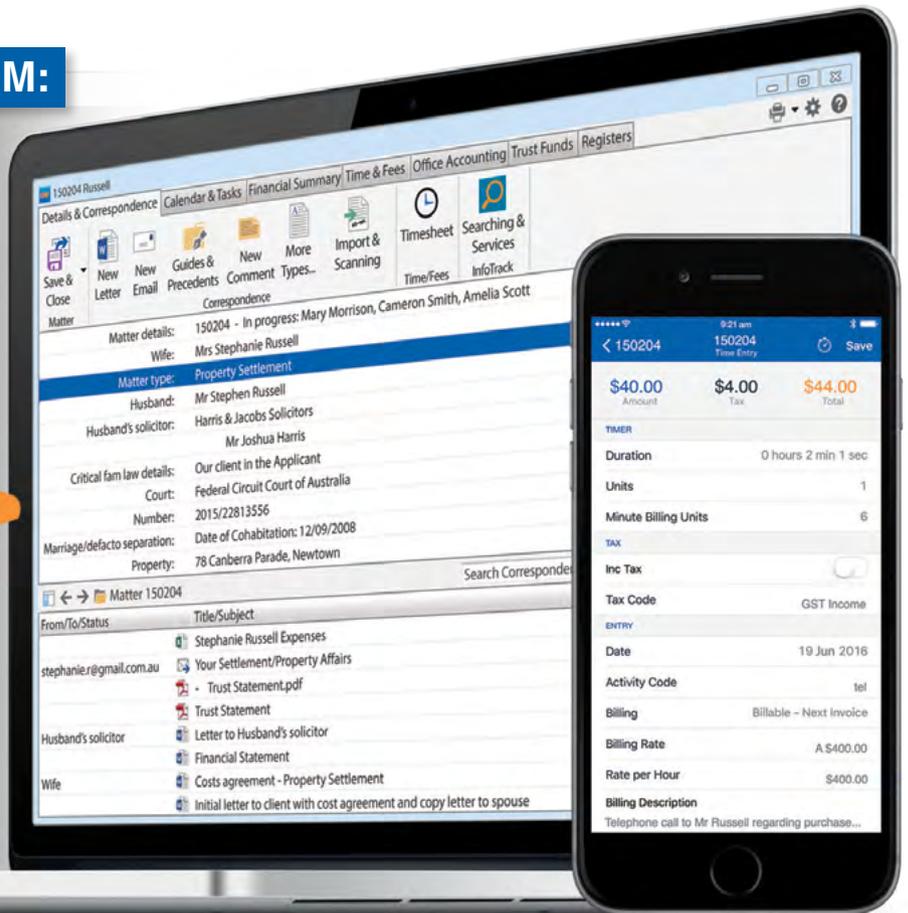




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