

# PROCTOR



Queensland  
Law Society

May 2017 – Vol.37 No.4

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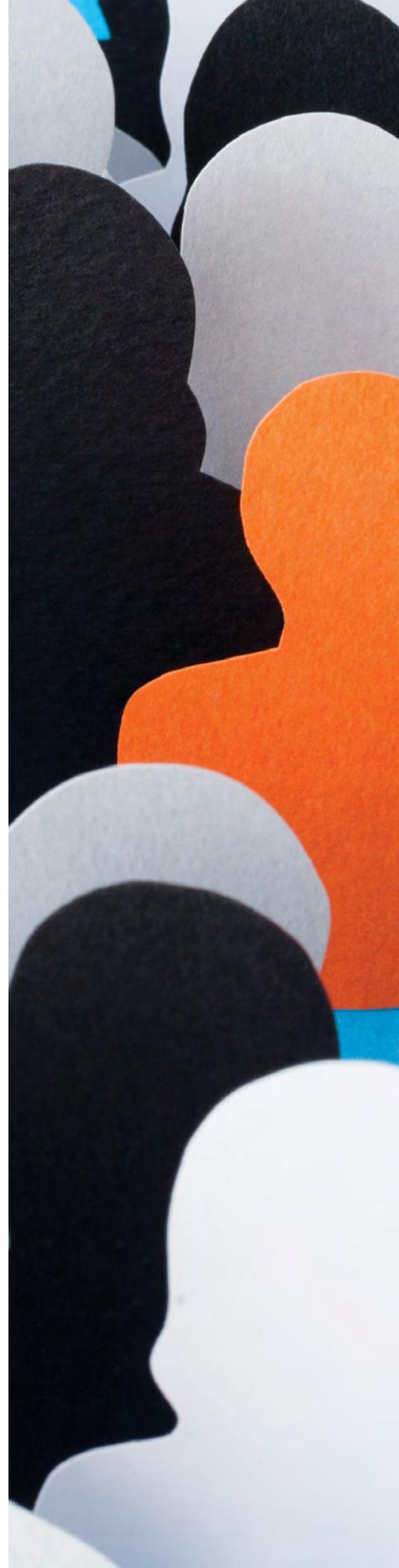


**LAW IN ORDER**

# PROCTOR

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# Reversal of funding cuts welcomed

But there's still a long way to go

On Monday 24 April, federal Attorney-General Senator George Brandis QC announced that the Government would reverse its proposed funding cuts for community legal centres.

While we warmly welcome this reversal, as a victory it is bittersweet. The threat of reduced funding had already forced CLCs to review their offerings, staffing and volunteer placements. This is not easily reversed, especially when the State Government has already announced its funding allocations for CLCs.

The restored funding comes with caveats and many CLCs will not benefit from this restoration, as it is to be allocated to CLCs which provide much needed services in family law, domestic violence and Aboriginal and Torres Strait Islander legal services.

Senator Brandis's announcement said that the \$39 million allocation for community legal centres would prioritise frontline family law and family violence services. Another \$16.7 million would be for Aboriginal and Torres Strait Islander legal services.

While it is essential that these segments receive this funding, it remains very concerning that CLCs which provide generalist legal advice remain severely under threat.

The CLCs are the gatekeepers of the revolving door of justice, providing advice on a broad range of matters to the vulnerable and disadvantaged in our community. These areas include housing, employment, minor civil breaches such as fines and, importantly, assisting people in their interaction with government agencies, whose power and resources greatly outweigh most in the community.

Closer to my practice area, there are concerns on whether funding for family law and domestic violence matters includes elder abuse in all its forms. In 2015, the report of the Special Taskforce on Domestic and Family Violence in Queensland, 'Not Now, Not Ever: Putting an end to domestic and family violence in Queensland', identified elder abuse as a subset of domestic violence, but the funding does not appear to capture this.

With more than six million people in Australia over the age of 55, it is crucial that we as a society ensure that legal services are available to this cohort.

Rebecca Gee is a QLS member who also provides her services pro bono in her own time.

"Each time I attend my local CLC to provide advice, there is an incredible number of clients," she says. "All the volunteers try their very best to assist as many clients as we can, however, without these CLCs those clients would not have the opportunity to obtain the advice they need.

"This then renders them without the ability to make an informed decision on the next stage of their legal matters and can flow on through the court system, causing many other issues for them.

"Oftentimes our clients have to rely on lifts from others to get to the CLC, or even organise for their child/children to be taken care of so that they can attend. It is a real disappointment for them if they are turned away as they genuinely require advice on very stressful situations such as child protection or domestic violence. Turning them away really should not be an option."

She's right; it should not be an option.

Only realistic funding levels will overcome the access to justice gap that sees an estimated 160,000 people turned away from CLCs each year.



The Productivity Commission, in its Access to Justice Arrangements report of 2014, estimated that additional funding of around \$200 million a year was needed to maintain existing frontline services with a demonstrated benefit to the community.

The reinstatement of a mere \$55 million falls well short of this target. And so our advocacy for access to justice will continue.

## Causes to celebrate

There are some causes to celebrate. This month we have National Reconciliation Week from 27 May to 3 June, a celebration of the rich culture and history of the first Australians.

It is also an opportunity to reflect on achievements so far and the things which must still be done to achieve reconciliation.

At QLS, we will soon announce the official launch of our Reconciliation Action Plan (RAP). We will also host an appropriate staff event on Mabo Day (2 June).

I would also like to note the State Government's appointment of barrister Gregory Lynham to the District Court in Townsville and that of three magistrates, with Andrew Sinclair and Mark Howden appointed to the bench of Southport Magistrates Court, and Toowoomba-based barrister Robbie Davies appointed to the bench of the Dalby Magistrates Court.

I congratulate our new appointees and call on the State Government to continue to support our justice services with further judicial appointments aimed at overcoming the bottlenecks in our courts.

**Christine Smyth**  
Queensland Law Society president

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# Acting for the benefit of members

## Law Foundation-Queensland and the Limitation of Liability Scheme

It is very rare to find a chief executive officer's column written by an acting, acting CEO, particularly for a body such as Queensland Law Society.

However, with acting CEO Matt Dunn on a long-planned holiday, I have found myself in this position and so have prepared this month's executive report.

Ordinarily I am the Society's general manager of Professional Leadership, which means I am responsible for our regulatory responsibilities. I could use this space to preach about how valuable regulation is to our profession; to discuss the niceties of the advertising rules at Rule 36 of the *Australian Solicitors Conduct Rules*, or to advise of forthcoming amendments to the *Legal Profession Act 2007* which make it a show cause event for an incorporated legal practitioner director if their incorporated legal practice is placed in liquidation.

However, I have chosen to write about two lesser-known benefits of Queensland Law Society membership – the assistance available from the Law Foundation-Queensland and eligibility under the Limitation of Liability Scheme.

### Law Foundation-Queensland

The foundation is a trust fund of which each member of the Society is a beneficiary.

It provides three programs to assist members:

- **Solicitor Hotline.** Two experienced solicitors, each with more than 30 years' experience in practice, are available to provide confidential advice to members on any matter of practice.
- **Solicitor Helping Hand.** The foundation has established a panel of professionals to provide confidential assistance in specialised areas. They can attend the office of the member practitioner and work through any problem in their practice – management difficulties, accounting problems in connection with the practice, difficulty with particular files or dealing with workload because of illness or other cause.

Locum services can be provided if required. The foundation can also provide assistance with personal problems such as alcohol and drug dependency or gambling. The assistance is confidential and free.

- **Benevolent Fund.** The foundation can provide financial assistance to a member, their family and dependents who may be experiencing difficulty. That difficulty may arise from any cause and need not be practice or work-related.

See [qlf.com.au](http://qlf.com.au).

### Limitation of Liability Scheme

This scheme, established under the *Professional Standards Act 2004*, provides a cap on the damages that can be awarded against a practice or practitioner. While professional indemnity insurance pays any damages awarded, the scheme caps the amount of damages that can be awarded so that, in effect, the total of damages plus costs should be covered by the insurance. The scheme will not prevent the subsequent application of excesses or penalties in the event of a claim.

To participate in the scheme you must be a full member of Queensland Law Society, hold a current Australian practising certificate and be covered by professional indemnity insurance in accordance with *Legal Profession Act 2007*. At present, the scheme does not cover corporate entities.

To gain the full benefit of a cap, all solicitors within the traditional law firm should be members of both the Society and the scheme. Clearly, it is to the benefit of individual solicitors employed by an ILP to have this cap. It is likely that incorporated legal practices per se will soon be able to participate in the scheme. The scheme cost for the 17/18 year is \$122.85 per practitioner.

The caps it provides are as follows:

- \$1.5 million to participating members of a law practice consisting of up to and including 20 principals where the law practice generates income for the financial year up to and including \$10 million.

- \$10 million for participating members who are in a law practice consisting of greater than 20 principals or a law practice that generates an income for the financial year greater than \$10 million.

QLS can approve higher caps, either in all cases or any specified class or case. Requirements for that approval are generally proof of an insurance cover over and above the liability limitation sought.

Given that a benefit of the cap is to ensure that the defence costs are met within the professional indemnity insurance, it may be necessary to consider top-up insurance.

The scheme does not apply to all matters. It does not apply to personal injury claims or to matters which arise because of fraud, dishonesty or breach of trust by a practitioner. It does not apply to matters that fall within the ambit of claims under the Queensland State Government Fidelity Fund for title fraud (Part 9, Division 2, subdivision C of the *Land Titles Act 1994*).

### Practising certificates and membership renewals

Finally, I need to mention that it is the time of year for practising certificate and QLS membership renewal. The processes for paying fees and the rules around late fees have changed this year, so please visit [qls.com.au/renewals](http://qls.com.au/renewals) and read the information to understand how these changes may affect you.

All renewals must be successfully lodged before 31 May to avoid a late fee. Practising certificate fees paid after the due date will also attract a late fee.

All law practices must also ensure their professional indemnity insurance is renewed and that it accurately reflects their circumstances. Thank you to those who have updated their details in preparation.

#### Craig Smiley

Acting Acting Queensland Law Society CEO

# Legal Analytics 101 – Big data and the art of value spotting

by Daniel Owen,  
The Legal Forecast



The reality of modern life is that everything we do leaves a digital footprint.

Consequentially, the uptake of data analytics is empowering progressive thinkers by revealing patterns and trends in legal data that were previously imperceptible. This article discusses how Australian legal analytics start-up Jurimetrics and US-based platform Premonition have the potential to disrupt the legal profession.

Legal analytics identifies patterns in ‘big data’ (compilations of data so large that they are unable to be utilised by traditional processing methods) so that lawyers can better understand the operation of the legal system and the risks associated with legal and commercial decisions.<sup>1</sup>

Legal analytics are applicable to firms and clients of all sizes and can be used to identify trends in regulatory and legal decisions, evaluate firm or counsel performance, and even critique a company’s internal corporate governance policies.

However, it is not just lawyers who benefit. The ability to analyse legal data empowers clients to engage a lawyer based on measurable data such as previous successful outcomes and relevant litigation experience.<sup>2</sup>

The big question is the application of this technology within the legal profession. The Legal Forecast recently met with Jurimetrics’ managing director Conrad Karageorge to discuss exactly this question.<sup>3</sup>

Karageorge and his team came together to found Perth-based Jurimetrics after recognising that the legal industry is formidably slow to adopt new technology. It offered them the opportunity to establish the ‘Bloomberg terminal for law’<sup>4</sup> – a hub providing up-to-date data on concerns ranging from industry-specific regulatory risk to the decision-making patterns of tribunals to better inform the legal advice lawyers provide.

In Karageorge’s opinion, ‘data scraping’ is akin to actual mining: “The documents are the tenements and the information is the resource you need to extract from them. Basically it means teaching a computer how to read.”<sup>5</sup>

In this context, sophisticated data analytics has the potential to recognise the *meaning*

of words contained within a document rather than mere arrangement. However, Karageorge believes this technology is still a few years off.<sup>6</sup> He warns that “judges don’t talk like humans”, which means that data analytics typically struggle. “It’s really more art than science when it gets down to that level,” he said.

In the context of legal information, the recognition of patterns of meaning is exponentially more complex than the recognition of sentences and phrases.

## Replacing traditional metrics

Although the potential applications of data analytics are endless, the central purpose of legal analytics is to uncover more effective systems and standards of measuring what is valuable to the user. In this regard, legal analytics may make traditional value indicators, such as firm branding, reputation, size and pre-existing relationships redundant and replace them with more ‘accurate’ indicators based on empirical data.<sup>7</sup>

This has created the current situation in which legal analytics start-ups (such as Jurimetrics and Premonition) are capitalising on the new ‘client-empowered’ approach. This has created a disruptive force which has resulted in traditional legal data giants LexisNexis and Westlaw also moving to adopt new analytics services.<sup>8</sup>

## Choosing representation – merely a numbers game?

An example of the value of data in an industry based on complex relationships is the idea that the client-lawyer relationship could be reduced to a series of statistics. In this regard, it is possible that new means of interpreting data could result in novel ways to qualify old relationships. Specifically, legal analytics has the real potential to offer the ability to make informed decisions on a client’s legal counsel based on a combination of highly specific analysis of past experience coupled with demonstrable success.<sup>9</sup>

Toby Unwin is the co-founder and chief innovation officer of American-based legal analytics service Premonition. Unwin seeks to prove that the correlation between the cost and outcome is weak.<sup>10</sup> He says that, by “crunching the numbers”, the true value

of legal advisors is revealed. Unwin is confident that Premonition will disrupt the balance of power in an industry traditionally dominated by the better-resourced party.<sup>11</sup>

## The way forward

The application of legal analytics arguably presents an ethical double-edged sword. On one hand, it can heighten and promote transparency in the legal profession and empower clients to act more objectively. On the other, it has the potential to reduce the value and role of legal practitioners to a mere number.

Despite ethical concerns relating to fair evaluation metrics, the real intrigue is on what Karageorge calls “the story behind the data”. For those willing to listen to that story, legal analytics offers tremendous opportunities for innovative lawyers and law firms with the will to adapt to new ideas and approach the law with a tech-informed methodology.

Daniel Owen is a Student Executive Committee member of The Legal Forecast. Special thanks to Milan Gandhi, Angus Murray and Chloe Bennett (The Legal Forecast) as well as Julian Barclay (Ramsden Lawyers) for technical advice and editing. Thanks to Conrad Karageorge of Jurimetrics ([jurimetrics.com.au](http://jurimetrics.com.au)) and Toby Unwin of Premonition ([premonition.ai](http://premonition.ai)) for their valued insights and contributions. The Legal Forecast ([thelegalforecast.com](http://thelegalforecast.com)) aims to advance legal practice through technology and innovation. TLF is a not-for-profit run by early career professionals passionate about disruptive thinking and access to justice.

### Notes

- <sup>1</sup> See: Corien Prins, ‘Legal Analytics – Law & data science is much more than privacy alone’ (March 2016) [2016] Tilburg University Blog, [tilburguniversity.edu/topic/big-data/show/data-science-blog-corien-prins/](http://tilburguniversity.edu/topic/big-data/show/data-science-blog-corien-prins/).
- <sup>2</sup> The Legal Forecast, ‘Interview (Part 1): Chief Innovation Officer of Premonition, Toby Unwin’ (February 2017) [thelegalforecast.com/interview-part-1-chief-innovation-officer-of-premonition-toby-unwin/](http://thelegalforecast.com/interview-part-1-chief-innovation-officer-of-premonition-toby-unwin/).
- <sup>3</sup> See above n.2.
- <sup>4</sup> See above n.4.
- <sup>5</sup> *Ibid.*
- <sup>6</sup> Joe Dysart, ‘How lawyers are mining the information mother lode for pricing, practice tips and predictions’ [2013], *ABA Journal*; above n.2.
- <sup>7</sup> See above n.2.
- <sup>8</sup> Bernard Marr ‘How Big Data Is Disrupting Law Firms And The Legal Profession’ [2016], *Forbes Magazine*.
- <sup>9</sup> Above n.8.
- <sup>10</sup> See above n.2.
- <sup>11</sup> *Ibid.*

## Amendments to external examinations of trust records

On 30 March 2017 amendments were made to the *Legal Profession Regulation 2007* (LPR) pertaining to the external examinations of trust records.

The amendments were made to Section 62 of the LPR. The previous section was replaced in its entirety and replaced with 'Exemption from requirement on a law practice to have its trust records externally examined'.

This section now lists the two criteria for an exemption from lodging an external examiner's report.

The exemption applies to law practices that have only received or held trust money during the financial period in the form of transit money or money received into or held in a PEXA source account.

Definitions that are relevant to electronic conveyancing and a PEXA source account have been included.

The amendment took effect from 31 March 2017.

Please contact the QLS trust account investigation team on 07 3842 5908 or via email to [managertai@qls.com.au](mailto:managertai@qls.com.au) if you have any questions on this.



## Linking Indigenous students to the law

Indigenous law students from universities across south-east Queensland attended the first Lawlink event of 2017, hosted by Clayton Utz on 28 March.

The event provided students with an inside look at the work undertaken in a top-tier law firm and included a tour of Clayton Utz before a networking session with legal professionals and fellow students. Clayton Utz lawyers also gave an overview of the recruitment process and their personal experiences as both graduates and senior lawyers at the firm.

QLS president Christine Smyth and immediate past president Bill Potts were proud to attend and support the event, along with QLS Equalising Opportunities in the Law

(EOL) Committee chair Ann-Maree David and other committee members.

QLS thanks Clayton Utz for hosting this successful event and for generously giving time to the Lawlink program.

Lawlink is an ongoing Indigenous student liaison program, established by the EOL Committee in 2003, with the aim of connecting Indigenous students with those in the legal profession. Through the program, students are given opportunities to better understand the practice of law and grow their professional network. It also aims to bridge the cultural divide between Indigenous law students and the legal profession.

The next Lawlink event will be held on 22 August.

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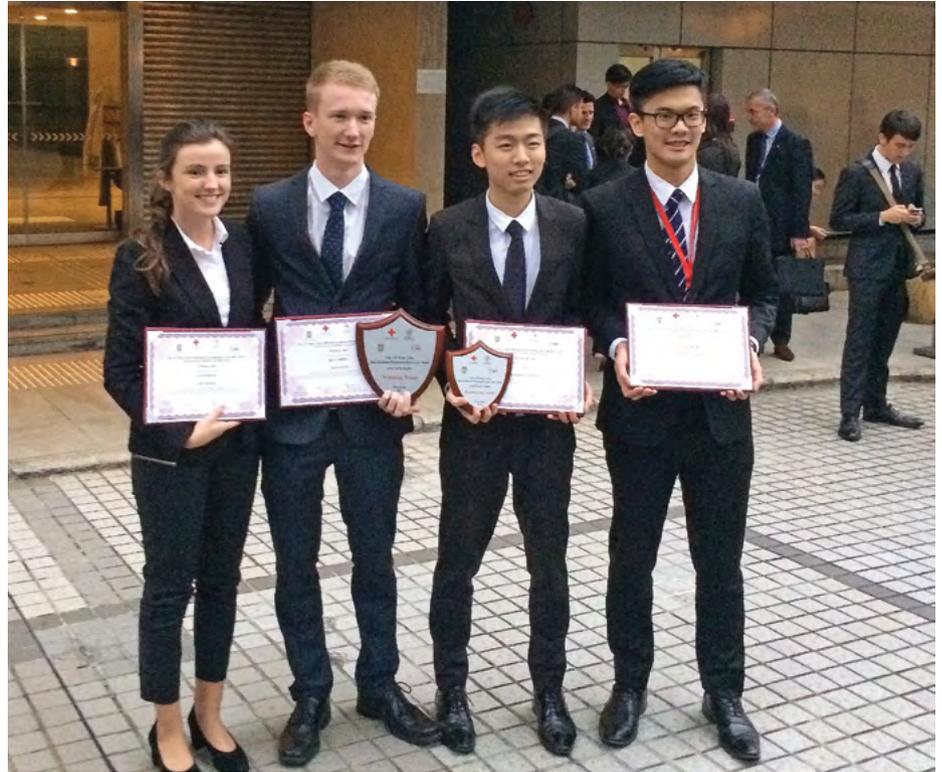


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# Bond students win Red Cross moot



Lara Sveinsson and Marty Campbell with the runners-up from the University of Hong Kong.

Two Bond University law students have won the 15th Red Cross International Humanitarian Law (IHL) Moot in Hong Kong, out-arguing more than 24 teams from the Asia-Pacific region.

Lara Sveinsson and Marty Campbell qualified for the international competition after winning the national moot run by the Australian Red Cross and the Australian Law Students' Association. It was the first time that a Bond University team has competed in the IHL moot.

The pair faced university teams from countries that included Iran, New Zealand, Mongolia, China and Nepal, and argued their

case in front of International Red Cross legal advisors, barristers and judges from around the world.

The final round of the four-day competition was held in Hong Kong's High Court, before a bench of five judges that included judges from the Hong Kong Court of Final Appeal and a former judge of the International Court of Justice.

Lara and Marty have been awarded a joint scholarship which they will use to travel to Geneva to undertake an IHL-related program at the International Committee of the Red Cross headquarters.

## Return of the Law Revue

The Law Revue will return this month for a two-night run.

Presented by Queensland Young Lawyers, the revue will be held on 18 and 19 May at the Brisbane Multicultural Arts Centre on level one of the Queensland Multicultural Centre, 102 Main Street, Kangaroo Point.

See [qyl.com.au](http://qyl.com.au).

## Past and President

At right, recently retired Queensland Court of Appeal President the Honourable Margaret McMurdo AC appears to have a quiet word to her successor, Walter Sofronoff QC, following a ceremony welcoming him to the position last month.

His Honour was sworn in as a justice of the Supreme Court to sit as president of the Court of Appeal at a private ceremony on Monday 3 April and welcomed to the position at a public ceremony in the Banco Court on Thursday 6 April.

His Honour was first called to the Bar in 1977 and took silk in 1988. He served as Queensland's Solicitor-General from 2005-2014 and was Commissioner for the Grantham Floods Commission of Inquiry. He recently led a review of Queensland's parole system.

Attorney-General Yvette D'Ath, Bar Association of Queensland president Christopher Hughes QC and QLS president Christine Smyth were among those who welcomed his Honour's appointment at the



ceremony, which was presided over by Chief Justice Catherine Holmes.

Ms Smyth noted that an unwavering commitment to justice had characterised his Honour's legal career, and this had much to do with the resounding approbation his appointment had received.

"Your Honour is of course highly regarded for your skill as an advocate, and even more so because you have remained a genuine 'all-rounder' in that your practice has never been limited to one area of the law, having excelled in a broad range of jurisdictions," she said.

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# Mining for good law

## The QLS Mining and Resources Law Committee



This is not a drill ... the QLS Mining and Resources Law Committee at work.

**An important function of the Queensland Law Society advocacy team is to advocate for good law, respond to law reform proposals and identify issues of concern for the profession.**

It could not do so without the ongoing support and wealth of knowledge provided by the members of its policy committees, one of the most active being the Mining and Resources Law Committee.

The main objectives of this committee include reviewing the effectiveness of legislation, advancing practitioner knowledge on how laws and procedures will affect their practice and collaborating with key stakeholders in the development and improvement of legislation and judicial process.

The committee works with various stakeholders, including the Department of Natural Resources and Mines (DNRM), the Department of Environment and Heritage Protection, the courts and industry groups.

Its diverse membership includes practitioners with a wide range of experience across private practice, government and in-house roles. Members are based in both cities and regional centres, and service clients across Queensland and nationwide.

The Queensland mining and resources industry has seen numerous developments

in the last financial year driven by key reforms affecting the development of the Queensland resources sector.

### **Key areas of engagement**

The Government Gas Fields Commission Review Report (released in July 2016) recommended that the *Petroleum and Gas (Production and Safety) Act 2004* and the *Water Act 2000* be amended to provide that, if parties could not agree on an ADR process or practitioner, the president of the Queensland Law Society or similar office could decide on the ADR process to be undertaken by the parties and select an appropriate practitioner from the ADR panel.

In September 2016, the committee prepared submissions for the Society to submit to DNRM regarding opt-out agreements and related information sheets. The Society highlighted the importance of the forms being properly drafted, in order to effectively prescribe the relevant process and inform parties of their legal rights and responsibilities. The Society also advocated for greater emphasis on certain clauses in the information sheet, including the need to obtain legal advice before signing.

In August 2016, the committee commented on the Land Access Code 2016. The Society commended DNRM's resources policy and projects team for making the draft amendments to the Land Access Code available for review well in advance of the

commencement of the *Mineral and Energy Resources (Common Provisions) Act 2014*.

The Society, through the committee, also worked with DNRM to develop a 'Land Access Hub' which is now live on the QLS website. The hub is a resource for landholders (owners or occupiers) who are approached by resource tenement holders to find experienced practitioners able to assist them during land access and compensation negotiations.

In November 2016, the committee liaised with a consultant engaged by the Land Court to review its procedures for hearing objections to mining leases and associated authorities. The committee provided valuable feedback on its members' experiences in the court regarding processes, practice directions and jurisdictional issues.

In late 2016, the committee was asked to comment on the *Land Court (Transitional) Regulation 2016*. Overall, the Society supported the proposed regulation, and in particular its clarification of important procedural provisions and powers of the court.

The committee also assisted the Society in making a submission to the parliamentary Infrastructure, Planning and Natural Resources Committee (the parliamentary committee) on the Strong and Sustainable Resources Communities Bill 2016 (the SSRC Bill). The submission made clear the Society's strong concerns with aspects of the SSRC Bill, including inherent difficulties in its interpretation and application by government

and industry, as well as aspects which deviated from fundamental principles of legislative drafting.

QLS was invited to appear before the parliamentary committee at the public hearing on the SSRC Bill where it highlighted its concerns including amendments to the *Anti-Discrimination Act 1991*, warned of the unreliability caused by retrospective legislation, and advised of the potential negative impact investment opportunities in Queensland by giving the Coordinator-General overly broad powers to state conditions. Several aspects of the submission and discussion at the public hearing were later quoted in the parliamentary committee's report.

The committee was also given the opportunity to comment on Land Court draft practice directions, in collaboration with the QLS Litigation Rules and Alternative Dispute Resolution Committees. The Society noted its support of a proposed practice direction that

provided guidelines for the use of concurrent evidence as a step in the right direction for the efficient and cost-effective conduct of proceedings. The Society did, however, recommend that the court reconsider the parameters of the proposal for members to act as mediators. The Society was pleased that its feedback and suggestions were then taken into account when the final practice directions were made.

The committee provided the Senate Legal and Constitutional Affairs Legislation Committee with a detailed submission on the Native Title (Indigenous Land Use Agreements) Bill 2017. The committee endorsed the Federal Government's swift attention to addressing the issues raised by the Federal Court's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10.

The committee is also reviewing the overlapping tenure framework with a view to reform.

The number of submissions the committee has made in the last few months is a reflection of its members' wholehearted dedication to contributing to the profession and engaging with the industry.

QLS commends retiring committee chair Martin Klapper and deputy chair Gavin Scott, who have worked tirelessly in representing their fellow practitioners, and given countless hours of, and expertise in, their ongoing commitment to advocating for good law.

QLS welcomes James Plumb and James Minchinton as recently appointed chair and deputy chair. We look forward to the committee continuing its valuable work under their leadership.

Article prepared by QLS policy solicitor Vanessa Krulin and paralegal Hayley Grossberg.

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# The ~~vibe~~ gist of the triviality defence

... and other lessons from the Dennis Denuto case

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A recent Queensland case that scrutinised the triviality defence in defamation proceedings has implications in all Australian jurisdictions. Report by **Doug Fox**.

## The majority in *Smith v Lucht* [2016] QCA 267 (the Denuto case) have resolved ongoing uncertainty regarding the breadth of the triviality defence contained in the *Defamation Act 2005 (Qld)* (the Act).

The decision is significant given the triviality defence is replicated in all Australian states.<sup>1</sup>

### Background

The defamatory publications in the Denuto case are summarised in *McMurdo P's* judgment:

- [2] “The applicant, Mr Brett Smith, a respected Ipswich solicitor, brought a claim for damages in defamation against the respondent, Mr Kenneth Lucht, the former husband of Mr Smith’s daughter-in-law. The primary judge found that Mr Lucht made defamatory imputations concerning Mr Smith on three occasions.
- [3] The first was in an email from Mr Lucht to Mr Smith’s daughter-in-law concerning access arrangements for one of their children in which he wrote:
- ‘...everything was fine until your pathetic email of 21 December and the barrage I received from Dennis Denuto from Ipswich about stupid things....’
- [4] The second was ... outside a restaurant in the course of access arrangements concerning their children. Mr Lucht called out, referring to Ms Smith’s husband as ‘Dennis Junior’, and said words to the effect, ‘Say hello to Dennis Denuto and Jenny.’ The third was later that day ... During an argument between Mr Lucht and Ms Smith’s husband, Mr Lucht said, more than once, words to the effect, ‘Just get Dennis Denuto to sort it out, Dennis Junior.’
- ...

- [6] The trial judge found that, although Mr Lucht made the defamatory imputations, he established that the circumstances of their publication were such that Mr Smith was unlikely to sustain any harm so that he had a defence of triviality under s33 *Defamation Act 2005 (Qld)*.<sup>2</sup> [footnotes omitted]

For those unfamiliar, the trial judge described ‘Dennis Denuto’ as follows:<sup>2</sup>

“Dennis Denuto is a central character in the popular Australian film *The Castle* ... He is portrayed as likeable and well-intentioned, but inexperienced in matters of constitutional law and not qualified to appear in person in litigation of that nature. His appearance in the Federal Court portrayed him as unprepared, lacking in knowledge and judgment, incompetent and unprofessional. His submission concerning ‘the vibe’ is a well-known line from the film.”

### The triviality defence generally

Section 33 of the Act provides:

“It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.”

The following principles concerning the construction of s33 (and its predecessor)<sup>3</sup> can be distilled from case law:

- The defence is intended to discourage actions for trivial defamation.<sup>4</sup>
- The question of whether a plaintiff was unlikely to sustain any harm is directed entirely to the moment of publication, and is a prospective inquiry.<sup>5</sup> The propensity for harm in the circumstances of the publication is relevant; whether harm was actually suffered is irrelevant (or of very limited relevance).<sup>6</sup>
- The phrase ‘unlikely to sustain any harm’ refers to the absence of a real chance or possibility of harm.<sup>7</sup> It is not sufficient to merely establish that it was more likely than not that the plaintiff would suffer no harm.

- The major circumstances relevant to the inquiry are the content of the publication, the extent of the publication, and the nature of the recipients and their relationship with the plaintiff.<sup>8</sup>
- Malice on the part of the publisher will not negate the triviality defence.<sup>9</sup>
- The defendant bears the burden of proving the defence and, while that is a heavy burden,<sup>10</sup> it can be done on the plaintiff’s evidence.<sup>11</sup>
- The ‘grapevine’ effect is irrelevant. Because the defence focuses on the moment of publication, any subsequent republication is irrelevant.<sup>12</sup> However, the likelihood of republication is a relevant circumstance of the publication.<sup>13</sup>

The trial judge<sup>14</sup> and the Court of Appeal<sup>15</sup> considered the triviality defence was made out because:

- The statements were confined to two members of the plaintiff’s family, with whom the defendant was in dispute.
- Those two recipients of the publications were able to make their own assessment of the imputations carried by the publications.
- The publications did not convey any breach of duty, illegal acts or dishonesty.
- The statements were not in a form that was intended or likely to be republished.

In seeking leave to appeal, the applicant focused on two main issues:

- Whether, as a matter of statutory construction, the word “harm” in s33 encompassed hurt feelings as well as harm to reputation.
- Whether the trial judge failed to apply s33 prospectively.

The majority granted leave to appeal in relation to the statutory construction issue, but dismissed the appeal. Unconvinced on the statutory construction issue, *McMurdo P* would have refused leave to appeal in any event, considering that the defence of triviality was made out on either view of the statutory construction issue.

## The triviality defence and the meaning of ‘harm’

The majority concluded that “harm” in s33 of the Act is limited to reputational harm. A defendant can therefore establish the triviality defence without having to prove the absence of a real chance of harm to the plaintiff’s feelings.

The issue of whether “harm” in s33 might include hurt feelings was raised twice in obiter by Kaye JA of the Victorian Court of Appeal,<sup>16</sup> where his Honour noted the difficulties in the construction given the inconsistent use of the undefined term “harm” in the legislation.

The majority in the Denuto case arrived at their decision in light of:

- the underlying purpose of the Act and general law of defamation being directed to protection from reputational harm, with the corollary that “if a person’s reputation is not harmed (or is not likely to be harmed) no remedy should be available”<sup>17</sup>
- the legislative history of the defence and the lack of any extrinsic material to suggest parliament intended a radical change to the way the predecessor to s33 had been applied<sup>18</sup>
- the prospect that the provision would be virtually unworkable if the word “harm” included harm to hurt feelings.<sup>19</sup>

## The triviality defence and post-publication conduct

The applicant also contended that the trial judge applied the wrong test by looking at whether the plaintiff in fact suffered any harm. Such an approach is impermissible because the defence is only concerned with the propensity of reputational harm at the moment of publication.<sup>20</sup>

The majority found that a fair reading of the trial judge’s reasons did not reveal such an error. More significantly from a precedential perspective, the majority confirmed the approach that, while the tribunal of fact must base its conclusion on the circumstances existing at the time of publication, it is permissible to look at conduct occurring after the publication to fortify such a conclusion.<sup>21</sup>

## The triviality defence at work

The application of the triviality defence can be counterintuitive. In the Denuto case, the plaintiff alleged serious harm to his reputation. By the time the trial was heard, such harm had undoubtedly ensued – the pre-trial media attention to the proceedings was alleged to be, and was, significant. If the defendant was unsuccessful in establishing a defence, the trial judge would have been required to

consider that subsequent media attention in assessing the damages necessary to vindicate the plaintiff’s reputation.<sup>22</sup>

That consideration of the media attention (brought about by the self-publication involved in commencing defamation proceedings in open court) would have been necessary despite the ‘grapevine effect’ of the publication being limited in that republication was not a natural or probable result of the publications – or, in the words of the trial judge, “[i]t was the plaintiff who, by making the claim, called in an airstrike on his own position”.<sup>23</sup>

Further, if the triviality defence failed, the plaintiff would have been entitled to aggravated damages arising from the defendant’s pleading, which was described by the trial judge as “improper” and by McMurdo P as “offensive”. While the author and the defendant’s counsel (who both ‘inherited’ the proceeding), sought and received instructions to substantially amend the defendant’s pleading prior to trial, the content of the initial defence would have entitled the plaintiff to aggravated damages because it increased injury suffered to the plaintiff’s feelings.<sup>24</sup> That initial pleading:

- defined the plaintiff by reference to his initials, “BS”, and subsequently referred to his law practice as the “BS Practice” and its website as the “BS Website”
- claimed there could be a “favourable comparison” between the plaintiff’s practice and that of Dennis Denuto, citing, among other things, that Dennis Denuto was skilled in administrative tasks such as “giving and taking dictation, typing and troubleshooting photocopiers”, and that his submissions regarding “a blatant violation of the *Constitution*” were later vindicated by the Full Court of the High Court of Australia, and
- alleged that it could be inferred (from the nature of the plaintiff’s practice and his substantial family law and criminal law experience) that the plaintiff had been called or accused of being “unprofessional, inexperienced, unethical, unable or incapable of discharging properly his role as a solicitor, incompetent or foolish”.

Fortunately for the defendant in the Denuto case, the focus of the triviality defence is firmly on the moment of publication; the subsequent conduct and media attention referred to above is irrelevant to its application.

## Opportunity for law reform

The first instance proceeding in the Denuto case was filed in June 2013; the judgment was handed down in November 2015. The trial occupied 3½ days, followed by a one-day hearing in the Court of Appeal.

The trial judge considered that, if he were wrong about the application of the triviality defence, the plaintiff’s damages should be assessed at \$10,000 including interest.

In New South Wales, single-judge decisions of the NSW Supreme Court<sup>25</sup> have followed the approach of the English Court of Appeal<sup>26</sup> in finding that, when the time and costs necessary to bring a matter to its judicial conclusion are out of all proportion to the interest at stake, the disproportionality can be regarded as an abuse of process leading to a permanent stay of the proceeding. The NSW Court of Appeal, in obiter, has considered that approach may be appropriate (albeit only rarely), but declined to express a concluded view on the issue.<sup>27</sup> A single judge of the ACT Supreme Court has also accepted the principle could be applied in appropriate cases.<sup>28</sup>

In Queensland, the proportionality approach was rejected by McGill SC DCJ in an interlocutory application in the Denuto case.<sup>29</sup> The availability of the summary judgment procedure does little to address the issue – in the context of pleaded triviality defence, a defendant would need to hurdle both the high standard applied in summary judgment applications and the high standard in making out the triviality defence.

Beyond the proportionality principle, the British parliament has enacted legislation providing that “[a] statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant”.<sup>30</sup> Prior to that legislation, there is a suggestion that the courts were recognising a similar “threshold of seriousness” in the common law definition of the tort.<sup>31</sup>

It seems inevitable, in the context of ever-increasing numbers of defamation claims and recent reports regarding the stretching of judicial resources, that either the legislature or the courts will respond to these issues.

Doug Fox is an associate director at Hewlett Legal, and had the conduct of the trial and appeal in *Smith v Lucht* [2015] QDC 289 and *Smith v Lucht* [2016] QCA 267. Image credit: ©iStock.com/bowie15

## Notes

- <sup>1</sup> *Defamation Act 2005* (NSW) s33; *Defamation Act 2005* (Vic.) s33; *Defamation Act 2005* (SA) s31; *Defamation Act 2005* (WA) s33; *Defamation Act 2005* (Tas.) s33.
- <sup>2</sup> *Smith v Lucht* [2015] QDC 289 at [17].
- <sup>3</sup> Section 33 is largely modelled on s13 of the now repealed *Defamation Act 1974* (NSW). The decisions regarding the construction of s13 continue to be useful in the analysis of s33 (see *Barrow v Bolt* [2014] VSC 599 at [61]).
- <sup>4</sup> *Chappell v Mirror Newspapers Ltd* (1984) *Australian Torts Reports* ¶180-961 at 68,947.
- <sup>5</sup> *Chappell* at 68,947; *Jones v Sutton* (2004) 61 NSWLR 614 at [12]; *Barrow v Bolt* [2015] VSCA 107 at [34].
- <sup>6</sup> Actual harm, of course, remains relevant to the assessment of damages.
- <sup>7</sup> *Jones v Sutton* at [45] and [49] per Beazley JA.
- <sup>8</sup> *Jones v Sutton* at [15] per Beazley JA and *Barrow v Bolt* at 69,695 per Kaye JA.
- <sup>9</sup> *Lang v Willis* (1934) 52 CLR 637 at 683; *Rana v Google Australia Pty Ltd* [2013] FCA 60 at [74].
- <sup>10</sup> *Jones v Sutton* at [38] and [39] per Beazley JA.
- <sup>11</sup> *Doelle v Bedey* [2007] QCA 395 at [11] per Keane JA.
- <sup>12</sup> *Jones v Sutton* at [54] per Beazley JA.
- <sup>13</sup> *Barrow v Bolt* at [40].
- <sup>14</sup> *Smith v Lucht* [2015] QDC 289 at [42].
- <sup>15</sup> *Smith v Lucht* [2016] QCA 267 at [46] – [53] per Flanagan J and at [12] per McMurdo P (her Honour's decision considered the first two points).
- <sup>16</sup> *Szanto v Melville* [2011] VSC 574 at [161] and *Barrow v Bolt & Anor* (2015) *Australian Torts Reports* 82-248. It was not necessary for Kaye JA to decide the point in either of those cases.
- <sup>17</sup> *Smith v Lucht* [2016] QCA 267 at [61] per Flanagan J.
- <sup>18</sup> *Smith v Lucht* [2016] QCA 267 at [91] and [92] per Flanagan J.
- <sup>19</sup> *Smith v Lucht* [2016] QCA 267 at [97] and [99] per Flanagan J.
- <sup>20</sup> *Enders v Erbas and Associates Pty Ltd* [2014] NSWCA 70.
- <sup>21</sup> See observations to a similar effect in *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 799 and *Barrow v Bolt* (2015) *Australian Torts Reports* 82-248 at 69,702.
- <sup>22</sup> See *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33 at [35] per Applegarth J, with whom McMurdo P and Gotterson JA agreed. There are at least two inferior court interstate decisions which have followed or cited with apparent approval this aspect of *Cerutti* (see *Allen v Lloyd-Jones (No.6)* [2014] NSWDC 40 [124] and *Rothe v Scott (No.4)* [2016] NSWDC 160 at [132]). Without doubting the correctness of Applegarth J's conclusion (his Honour's judicial and pre-judicial experience in this field is vast), it is noted that no authority is cited for the observation at paragraph 35 of his Honour's judgment, and that interstate superior courts are yet to consider that aspect of his Honour's reasons. An entire article could be devoted to paragraph 35 of the judgment in *Cerutti*. For now, the author suspects that principle expounded therein is ripe for further judicial consideration.
- <sup>23</sup> *Smith v Lucht* [2015] QDC 289 at [52].
- <sup>24</sup> *Smith v Lucht* [2015] QDC 289 at [57]. While hurt feelings are irrelevant to the application of the triviality defence, they are relevant to damages.
- <sup>25</sup> See *Bleyer v Google Inc* (2014) 88 NSWLR 670 and *YZ v Amazon (No.7)* [2016] NSWSC 637.
- <sup>26</sup> *Jameel v Dow Jones & Co Inc* [2005] QB 946.
- <sup>27</sup> *Ghosh v Ninemsn Pty Ltd* (2015) 90 NSWLR 595 at 602.
- <sup>28</sup> *Lazarus v Azize* [2015] ACTSC 344 at [22].
- <sup>29</sup> *Smith v Lucht* [2014] QDC 302.
- <sup>30</sup> *Defamation Act 2013* (UK), s1.
- <sup>31</sup> *Thornton v Telegraph Media Group Ltd (No.2)* [2010] EWHC 1414 (QB) at [50] – [95].



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# Queensland's *Industrial Relations Act 2016*

Is there really anything new?

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The short answer is 'yes'. In particular, discrimination and bullying fall under a broader jurisdiction, as **Ken Watson** explains.

### On 1 March 2017 the *Industrial Relations Act 2016 (Qld)* (the IR Act) came into force in Queensland.

The IR Act is a response to a report delivered in December 2015 to the Queensland Government by the Industrial Relations Legislative Reform Reference Group.<sup>1</sup>

Queensland has a long history of reports on industrial relations in the state preceding new Acts, such as the Hanger report which led to the *Industrial Relations Act 1990*, the Professor Gardner report which led to the 1999 Act, and now this one.

The reference group was faced with the reality that there had already been a wholesale takeover of the regulation of industrial relations in Australia by the Commonwealth Parliament. This had been achieved by the use of the corporations power – s51(xx) of the Constitution – and the referral by most states, including Queensland, of the power to regulate industrial relations in the private sector for those employers who are not constitutional corporations.

So, since 1 January 2010 the Queensland Parliament has essentially been left to industrially regulate the Queensland public service and local governments.

As might be expected, this has meant a significant decrease in work for the Queensland Industrial Relations Commission, and to partly offset that, the commission was given jurisdiction to hear matters under the *Workers' Compensation and Rehabilitation Act 2003*. The IR Act does not seek to disturb that, but rather expands the jurisdiction of the commission in two important respects, which are discussed in this article.

### Discrimination matters

Practitioners would be familiar with matters involving alleged contraventions of the provisions of the *Anti-Discrimination Act 1991 (Qld)* (Anti-Discrimination Act) which are not resolved at the conciliation stage being referred to the Queensland Civil

and Administrative Tribunal (QCAT) for hearing under the *Queensland Civil and Administrative Tribunal Act 2009*.

Now contraventions of the Anti-Discrimination Act which involve or include a matter that is a work-related matter must be dealt with in the commission unless the commission makes an order under s193A of the Anti-Discrimination Act and refers the matter to QCAT. This will most likely occur when the connection to work or the workplace is tangential or peripheral.

This also raises the question of what is meant by a "work-related matter". This is defined in the dictionary for the Anti-Discrimination Act as meaning "a complaint or other matter relating to, or including, work or the work-related area".

Although there is no definition of "work-related area" in the dictionary, there is a definition of "work" which on even a cursory glance demonstrates that it covers more than simply the traditional employer/employee relationship.

In a decision on an earlier definition, Stephen Keim (sitting as a member of the Queensland Anti-Discrimination Tribunal) came to the conclusion that work done by prisoners inside a prison was work for the purposes of the Anti-Discrimination Act.<sup>2</sup>

Perhaps of more immediate interest to practitioners is that discrimination within partnerships in which there are six or more partners in contravention of the Anti-Discrimination Act is within the part of the Act (Division 2 of Chapter 2) headed 'Work and work-related areas'. Given that (by s35C of the *Acts Interpretation Act 1954 (Qld)*) headings form part of a provision, it is certainly arguable that alleged contraventions of the Anti-Discrimination Act involving partners and partnerships in which there are six or more partners should be heard in the Queensland Industrial Relations Commission.

The other matter of note with respect to alleged contraventions of the provisions of the Anti-Discrimination Act is that the commission's jurisdiction is not confined to Queensland public servants or employees of local governments. This is because the

combined effect of s26 and s27 of the *Fair Work Act 2009 (Cth)* (Fair Work Act) means that that Act does not exclude the operation of the Anti-Discrimination Act and it is that Act which confers jurisdiction upon the Queensland Industrial Relations Commission. This means that Queensland employers in the private sector can find themselves before that commission on an alleged breach of the Anti-Discrimination Act.

### Workplace bullying

Sections 272 to 277 of the IR Act (Chapter 7) deal with workplace bullying. These sections are almost identical to similar provisions in the Fair Work Act (see ss789FB to 789FH).

The definition of an employee being bullied in the workplace is contained in s272, which lays down the following elements:

- a. The employee has to be at work.
- b. The employee has to be subjected to repeated unreasonable behaviour either by another individual or a group of individuals.
- c. The behaviour has to create a risk to the health and safety of the employee who is being bullied.

As one would expect, there has been case law built up in the Fair Work Commission dealing with the federal provisions and one case in particular deserves attention. In *Bowker v DP World Melbourne Ltd*,<sup>3</sup> a full bench of the commission analysed what is meant by the phrase "at work" as used in the federal legislation. The same phrase is used in the Queensland Act.

The full bench concluded that the bullied employee did not have to be actually at the workplace or doing work when the unreasonable behaviour occurred but could, for example, be on an authorised break. However, the words are not broad enough to encompass any substantial connection to work because the phrase is "at work" not "with work", although the words can cover the situation in which an employee may be at home outside the usual working hours when they receive a phone call from their supervisor to discuss work-related matters.

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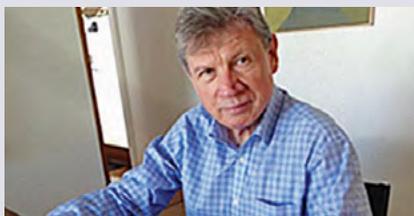
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For the purposes of the workplace bullying provisions, the definition of employee in the IR Act excludes those employees who have access to the same provisions in the Fair Work Act. The Commonwealth provisions in the most part cover those who are workers in businesses operated by constitutional corporations. This means that employees of individuals and partnerships would have access to the Queensland provisions.<sup>4</sup> The meaning of the word “employee” in the IR Act borrows the definition of worker in the *Work Health and Safety Act 2011* (Qld), which covers many more categories than the stereotypical employer/employee relationship.

The other matter that practitioners need to consider if advising or bringing an application for an order to stop workplace bullying is that, under the IR Act, there is no capacity for the commission to order monetary compensation.<sup>5</sup>

### Legal representation

As would be expected, the IR Act deals with the question of legal representation in the various courts and tribunals that have jurisdiction under it. Mostly legal representation is by consent of the parties or by leave. It is the criteria for granting leave which have changed. The criteria in the IR Act<sup>6</sup> have been modelled on the provisions of the Fair Work Act.<sup>7</sup> They are:

- a. that it would enable the proceedings to be dealt with more efficiently, having regard to the complexity of the matter, or
- b. it would be unfair not to allow the party or person to be represented because the party or person is unable to represent itself, himself or herself, or
- c. it would be unfair not to allow the party or person to be represented having regard to fairness between the party or person, and other parties or persons in the proceedings.

The Commonwealth provisions were the subject of some comment by Flick J in the Federal Court in *Warrell v Walton*.<sup>8</sup> His Honour held that the discretionary power to grant permission (or leave in the case of the Queensland Act) was far from a mere formal act to be acceded to upon the mere making of a request. One or other of the matters set out in the subsection needed to be satisfied, and even if satisfaction was present, there was still a discretion that needed to be exercised, while an exercise of the discretion without reference to those criteria would amount to an error of law.

Finally, the costs provisions in the IR Act<sup>9</sup> appear to draw their wording from the similar provisions in the Fair Work Act (see s611 of that Act). Thus they mark a departure from the costs provisions in the repealed *Industrial Relations Act 1999* in that:

- a. Firstly, the provisions apply to vexatious conduct or conduct without reasonable cause which is engaged in by either the applicant or the respondent (under the repealed 1999 Act it was only the applicant who was really at risk) or secondly, that it should have been reasonably apparent to a party that their application or response had no reasonable prospect of success.
- b. A representative of a party (which would include the party's lawyer) can be ordered to pay costs incurred by another party if the court or commission is satisfied the costs have been incurred because the representative encouraged the represented party to start, continue or respond to the proceeding and it should have been reasonably apparent to the representative that the person had no reasonable prospect of success in the proceeding, or because of an unreasonable act or omission of the representative in connection with the conduct or continuation of the proceeding. These provisions need to be noted because there was no such provision under the repealed 1999 Act. One could therefore expect that the conduct of practitioners in matters before the commission or court may come under closer scrutiny by either the court or commission, or opponents, than has hitherto been the case.

An exception to what has been said about the cost provisions applies to proceedings in the commission under the Anti-Discrimination Act where costs are governed by schedule 2 of the IR Act (see s548 of that Act), which parallels the costs regime applicable in QCAT proceedings.

Ken Watson is a Brisbane barrister.  
Image credit: ©iStock.com/FotografiaBasica

#### Notes

<sup>1</sup> Queensland Law Society was represented on the reference group by Rob Stevenson from Australian Workplace Lawyers.

<sup>2</sup> See *NC v Queensland Corrective Services Commission* [1997] QADT 22.

<sup>3</sup> (2014) 246 IR 138.

<sup>4</sup> This was not the preferred option of the Industrial Relations Legislative Reform Reference Group which in recommendation 33 recommended that the Minister for Industrial Relations negotiate with her federal counterpart for a further referral which would enable employees of unincorporated bodies and other entities which are not constitutional corporations to be covered by the federal jurisdiction.

<sup>5</sup> See s275 (2) of the IR Act.

<sup>6</sup> See s530 (4).

<sup>7</sup> See s596 of that Act.

<sup>8</sup> (2013) 233 IR 335 at 342.

<sup>9</sup> These are contained in s545.

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# QCAT – a different experience

## A guide for early career lawyers

Early career lawyers venturing into or advising on matters in the Queensland Civil and Administrative Tribunal (QCAT) will find significant differences in practice and procedure to Queensland courts. Report by **Frances Stewart**.



### For early career lawyers (ECLs), appearing in the courts is daunting.

Most of us are quite nervous, despite all that we learn at university and PLT about pleadings, appearing and the *Uniform Civil Procedure Rules* (UCPR).

So what happens when you have a client whose matter is one that the Queensland Civil and Administrative Tribunal (QCAT) has jurisdiction over?

For many of us, QCAT's many and varied jurisdictions are not something we learnt much (or anything) about in our training to become lawyers. Unfortunately, some young lawyers fall into the trap of applying all that they know about proceedings through the courts to matters in QCAT.

While there are many similarities between the two, there are also a number of important differences that ECLs should be aware of. This article provides a brief overview of some of these.

Before going further, it is helpful to provide a little background on QCAT to illustrate exactly why ECLs need to develop an understanding of its practices and procedures.

QCAT was established in December 2009 under the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) and was an amalgamation of 18 individual tribunals. It is, in essence, a super-tribunal, or one stop shop, for many very common jurisdictions.

The 2014-15 QCAT Annual Report shows that, during 2014-15, it received close to 30,000 applications. Its objectives and functions are detailed in sections 3 and 4 of the QCAT Act and, in short, are to act with as little formality and technicality as possible and to resolve disputes in a way that is fair, just, accessible, quick and inexpensive.

The types of matters determined by QCAT are extensive and are broadly grouped into three main jurisdictions – civil disputes, administrative and disciplinary, and human rights. Some examples of matters in these jurisdictions are:

- a. **Civil disputes** – debt disputes up to \$25,000, consumer and trader disputes, residential tenancy matters, disputes about dividing fences and trees, building disputes, retail shop leases, manufactured homes and some body corporate matters including complex contractual disputes, lot entitlement disputes and appeals of BCCM adjudicator orders.
- b. **Administrative and disciplinary** – review of decisions by government entities including in relation to weapons licensing, blue cards, Queensland Building and Construction Commission decisions, property occupations, Office of State Revenue decisions, and decisions of local councils including those regarding dogs and cats. QCAT also decides disciplinary matters for various occupational groups, such as lawyers, doctors, nurses, teachers, engineers, builders and valuers.
- c. **Human rights** – guardianship and administration for adults, end-of-life decisions, validity of powers of attorney, authorisation of conflict transactions, child protection and anti-discrimination matters.

QCAT has a wide-ranging jurisdiction and there is a very strong chance that as an ECL you will have a client whose dispute involves a proceeding before the tribunal. It is not hard to see why ECLs need to have an understanding of QCAT or, at the very least, the knowledge of where to look to find information on practice and procedure in the tribunal.

### The UCPR does not apply in QCAT

As stated above, legal education (at least when I was studying) does not give QCAT the attention it deserves. Accordingly, many lawyers go into practice assuming that, if they have a matter before the tribunal, the UCPR will apply. It does not.

ECLs need not scan the Supreme Court Library website for long to find statements from tribunal members to the effect that *the UCPR does not apply in QCAT*. In this regard, it is also important to point out that rule 3 of the UCPR actually lists that those rules apply to proceedings in the Supreme, District and Magistrates courts. There is no mention of QCAT in rule 3.

Accordingly, ECLs should look to the QCAT Act, *Queensland Civil and Administrative Tribunal Rules 2009* (QCAT Rules), QCAT's practice directions, decisions and the enabling legislation relevant to their particular matter. Knowledge and awareness of the provisions of the enabling legislation relevant to your matter is crucial because, pursuant to section 7 of the QCAT Act, if enabling legislation modifies the tribunal's functions, the modifying provision prevails over the provisions of the QCAT Act to the extent of any inconsistency between them.

### Legal representation is not as of right

QCAT aims to resolve disputes in a way that is accessible and inexpensive. To assist in achieving these objectives, parties are not automatically entitled to be legally represented in proceedings before the tribunal. In this regard, section 43(1) of the QCAT Act relevantly states: "The main purpose of this section is to have parties represent themselves unless the interests of justice require otherwise."

To be legally represented in proceedings before QCAT, parties must generally obtain the leave of the tribunal. I say 'generally' because, while leave is required in most cases, relevant enabling legislation may entitle parties to be represented without requiring permission. For example, section 72 of the *Tax Administration Act 2001* (which applies to cases involving review of decisions of the Office of State Revenue) states that parties may be represented by a lawyer.

In deciding whether to give a party leave to be represented in a proceeding, section 43(3) of the QCAT Act provides that the tribunal may consider the following as circumstances supporting the giving of leave:

- a. if the party is a state agency
- b. if the proceeding is likely to involve complex questions of fact or law
- c. if another party to the proceeding is represented in the proceeding
- d. if all of the parties have agreed to the party being represented in the proceeding.

Accordingly, when making an application for leave to be represented, the tribunal needs to be satisfied that legal representation is *in the interests of justice*. It is not as simple as just filing the application and assuming, based on the automatic entitlement to legal representation in the courts, that leave will be granted.

## Costs don't always follow the cause

An important way in which QCAT differs from the courts is in regard to legal costs. Section 100 of the QCAT Act relevantly provides:

"Other than as provided under this Act or an enabling Act, each party to a proceeding must bear the party's own costs for the proceeding."

The effect of section 100 is that, as a starting point, parties to proceedings in QCAT are expected to bear their own costs, regardless of the outcome. There are, as the section suggests, exceptions to this.

A particular piece of enabling legislation may change the position in relation to costs. For example, for proceedings under the *Queensland Building and Construction Commission Act 1991*, section 77 of that Act gives QCAT the power to award costs.

The QCAT Act itself contains exceptions to the general position in section 100. For example, there is a power to award costs when an offer is made and rejected and the rejecting party does not receive a more favourable outcome at the hearing of the matter.

Also, (and perhaps most importantly) section 102 of the QCAT Act enables the tribunal to award costs if it is *in the interests of justice* to make a costs order. In considering whether to make such an order, the tribunal may have regard to:

- a. whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding
- b. the nature and complexity of the dispute the subject of the proceeding
- c. the relevant strengths of the claims made by each of the parties to the proceeding
- d. for a proceeding for the review of a reviewable decision:
  - i. whether the applicant was afforded natural justice by the decision-maker for the decision, and
  - ii. whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits
- e. the financial circumstances of the parties to the proceeding
- f. anything else the tribunal the considers relevant.

In *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No.2)* [2010] QCAT 412, former QCAT President Justice Wilson provided a useful discussion on costs in QCAT and the circumstances in which it will be in the *interests of justice* to make a costs order.

It is important to note that while the starting position is that parties bear their own costs in proceedings before the tribunal, costs orders *are not* a rarity in QCAT and ECLs should not make the mistake of advising their clients that there are no cost implications in tribunal proceedings.

## Evidence before QCAT

Section 28 of the QCAT Act details how the tribunal is to conduct proceedings generally. In contrast to the position in the courts, this section provides that the tribunal:

"Is not bound by the rules of evidence, or any practices or procedures applying to courts of record, other than to the extent the tribunal adopts the rules, practices or procedure."

This section also states that the tribunal may "inform itself in any way it considers appropriate".

A trap for ECLs is to form the (mistaken) view that, because the tribunal is not bound by the rules of evidence, applications can be made with little or insufficient evidence demonstrating the applicant's entitlement to the relief sought. While the tribunal is not bound by the strict and technical rules

of evidence that apply in the courts, it is nonetheless required to make decisions based on the best evidence.

This of course accords with the tribunal's duty in section 28 to "act fairly and according to the substantial merits of the case" and to "observe the rules of natural justice". Accordingly, if a client comes to you on a particular matter that could be brought in the Magistrates Court or in QCAT, do not assume that the prospects of success are automatically greater simply because of the wording of section 28. If the evidence available in your client's case is such that you wouldn't commence proceedings in the Magistrates Court for fear of an adverse cost order, it really shouldn't be brought in QCAT either.

## Compulsory conferences are... compulsory

Section 4 of the QCAT Act lists how the tribunal is to achieve those objectives in section 3. These functions include (but are not limited to) requirements to:

"Encourage the early and economical resolution of disputes before the Tribunal, including, if appropriate, through alternative dispute resolution processes.

"Ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick and is consistent with achieving justice."

QCAT places a strong emphasis on alternative dispute resolution (ADR). Prior to a matter proceeding to a hearing, parties will generally be required to participate in a compulsory conference (or a mediation in the context of the minor civil dispute jurisdiction) in which a tribunal member assists the parties in resolving their dispute.

It is not the purpose of this article to explain the benefits of ADR and the role it plays in resolving disputes early and minimising parties' costs; it suffices to say that these attributes assist QCAT in achieving its objectives.

Compulsory conferences are, as the name suggests, compulsory. To many this will no doubt sound glaringly obvious, however, I have had clients advise that they would like to elect to *not* participate in the process. If a party does not attend, the conference may proceed in that party's absence and the tribunal may make a decision adverse to the absent party, including orders on costs.

In circumstances in which a party has been granted legal representation, the tribunal will still expect that the party attends the conference. If your client cannot attend the conference in person, an application must be made to the tribunal for permission to attend by remote conferencing (that is, telephone).

QCAT's 2014-15 Annual Report highlights a settlement rate of about 50% for mediation of minor civil disputes and compulsory conferences which occur across a range of matters. Accordingly, ECLs should encourage their clients to meaningfully participate in compulsory conferences and mediations because there is a strong likelihood that the dispute will resolve earlier than anticipated and without the expense and angst that comes with preparing for a hearing.

### Withdrawal of applications

QCAT also differs from the courts on withdrawal of applications. As we know, under the UCPR a proceeding can only be withdrawn without the consent of the other party if a defence has not been filed.

However, under the QCAT Act, an applicant may (generally) withdraw their application without leave before the matter is heard and decided by the tribunal. I say

'generally' because leave is required for certain applications or referrals made under particular Acts detailed in section 46 of the QCAT Act.<sup>1</sup> This article focuses on those matters for which leave to withdraw is not a requirement. If an applicant withdraws an application, they cannot make a further application relating to the same facts and circumstances without leave of the tribunal.

An application can be withdrawn in the way specified in the QCAT Rules. Section 57A of the rules states that if leave is not required, an applicant may withdraw their application by filing a notice in the approved form and giving a copy of same to each other party in the proceeding, each other person who was given a copy of the application under section 37 of the QCAT Act, and any other person directed by the tribunal to be given the notice of withdrawal.

The QCAT Act does not require an applicant to obtain consent of the other party to the withdrawal prior to filing the notice. Accordingly, if leave is not required, you need only file a Form 58 – Notice of withdrawal of application or referral and follow the steps set out in the Act and rules with respect to service of that notice on other parties.

The filing of a Form 58 in the tribunal will not affect any counter-applications made against the applicant in the proceeding

and the applicant will therefore still be required to respond to any counter-application.

Again, the point to bring home here is that practitioners must read the QCAT Act and rules.

### Conclusion

ECLs cannot assume that everything learned at university or PLT will apply in proceedings before QCAT. It is different to the courts with its own Act, rules and practice directions. Before embarking on a matter in QCAT, take the time to review the relevant legislation, rules, practice directions and decisions.

This article is brought to you by the Queensland Law Society Early Career Lawyers Committee. The committee's Proctor working group is chaired by Frances Stewart (Frances.Stewart@hyneslegal.com.au) and William Prizeman (william.prizeman@legalaid.qld.gov.au). Frances Stewart is a lawyer at Hynes Legal. *Image credit: ©Stock.com/SIphotography*

#### Note

<sup>1</sup> Leave will be required if the applicant wishes to withdraw an application or referral made under the *Child Protection Act 1999*, *Disability Services Act 2006* (section 178(9)), *Guardianship and Administration Act 2000* and *Powers of Attorney Act 1998*.

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# The reality of AML for solicitors

‘A fundamental attack on the civil rights of clients’

Anti-money laundering (AML) regulation may soon become a reality for Australian solicitors, with a strong call for its implementation following the 2013 report of the Financial Action Task Force.

The implications of this proposal are of grave concern to Queensland Law Society, as it will attack the heart of the solicitor-client relationship. While this is not breaking news for the profession and has been in the pipeline for many years, it is closer to implementation.

## A brief history

Nearly 30 years ago the *Financial Tractions Reports Act 1988* (Cth) was introduced to monitor the flow of money in Australia. The year after this legislation was introduced, the task force was formed by several nations to further address this issue in the illicit drug trade. Australia is now one of 34 members of the task force.

It was not until 2003 that the task force included lawyers within the scope of its ‘non-financial business and professions’ ambit, and it was recommended that this group undertake measures such as due diligence and record keeping.

Three years later, in 2006, the *Anti-Money Laundering/Counter-Terrorism Financing Act 2006* was passed by the Australian Government to ensure that the nation aligned with the task force’s requirements. This Act established a reporting regime that originally targeted the financial and gambling sectors, and bullion dealers.

It was also anticipated that lawyers would be brought into the regime after the initial legislation was introduced, however this did not occur. One possible reason for the delay may have been the 2007 federal election, which saw a change of government.

Most recently, the task force released the 2013 report which referred to the “vulnerabilities of legal professionals to money laundering and terrorism financing”. This brought the focus back to Australian solicitors and there is now a strong call for legal practitioners to be brought into the AML/CTF regime.

The Society holds portentous concerns about the effects of this proposal. Citizens have a right to the protection of their confidences – particularly when it comes to legal professional privilege. These changes will undermine the integrity of the solicitor-client relationship if implemented as currently proposed.

## Current obligations for solicitors

It is important to note that the legal profession in Australia is already heavily regulated when it comes to ethical and professional obligations concerning a client’s criminal activity. The *Australian Solicitors Conduct Rules 2012* contain a number of fundamental duties.

These include the first and paramount duty to the administration of justice, avoiding compromise to integrity or professional independence, following a client’s lawful proper and competent instructions, and the right to terminate the engagement for just cause and on reasonable notice. Breaching any of these rules may constitute “unsatisfactory professional conduct” or “professional misconduct”.

A solicitor can – in certain circumstances – terminate the client engagement for just cause on reasonable notice.

Legal practitioners are required to treat client money as trust money across all Australian jurisdictions. The receipt and use of trust money is also heavily regulated in this country and there are already obligations in place to report irregularity within lawyers’ trust accounts, which are held by banking institutions, who are subject to this scheme.

Under the current arrangements, when a legal services commissioner or similar authority learns that a practitioner has committed a breach, they must report the person to the relevant law enforcement or prosecution authority.

There are also obligations set out for reporting under the Property Exchange Australia.

It is important to recognise that lawyers are already aware – and there are substantial professional obligations in place – that they must manage the risk of being an instrument to a client achieving an illegal or improper purpose.

Although it is obvious, it is also important to note that lawyers as individuals are subject to Division 400 of the *Criminal Code Act 1995*

(Cth). The offences under this division apply to a lawyer who inadvertently or unwittingly allows an act of money laundering to occur as a result of failing to make proper enquiries.

## Obligations under AML/CTF

It is vital that Australian legal practitioners understand what will be required of them under the AML/CTF regime ahead of the potential changes. There are significant offences, sanctions and risks for “reporting entities” who fail to meet their obligations. General obligations include:

- **identification and verification** – Reporting entities must identify and verify a customer’s identity before providing the customer with a designated service and also must carry out ongoing due diligence on clients.
- **reporting** – Reporting entities must register and report to AUSTRAC suspicious matters, certain transactions above a threshold amount, and international funds transfer instructions. AUSTRAC is, in turn, authorised in certain circumstances to provide that information to domestic regulatory, national security and law enforcement agencies and certain international counterparts.
- **developing and maintaining an AML/CTF program** – Reporting entities must introduce into their businesses, and comply with, AML/CTF programs which are designed to identify, mitigate and manage money laundering, terrorist financing and other risks that the reporting entity might reasonably face in its business.
- **record keeping** – Reporting entities must make and retain certain records, and retain certain documents given to them by customers, for seven years.

The *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (No. 1) provides further clarification on specific AML/CTF program requirements that reporting entities should have.

In particular, the reporting regime will place solicitors in an untenable position in which they are no longer able to protect the client’s entitlement to open and reasoned advice. This system creates an inherent and intolerable conflict for a practitioner to represent the client without the intrusion of the state into that relationship.

Queensland Law Society president **Christine Smyth** says the proposed inclusion of Australian solicitors in the reporting regime for the *Anti-Money Laundering/Counter-Terrorism Financing Act 2006* (AML/CTF) will likely lead to higher costs, loss of business and, most importantly, challenge legal professional privilege and the sanctity of solicitor-client confidentiality.



These proposed changes to AML/CTF regime will mean that solicitors cannot discharge a fundamental ethical obligation to serve their clients loyally and to protect their confidences, as the changes to the legislation will mean that solicitors become an agent of the state rather than an agent of the client.

### The potential costs

Queensland Law Society members and staff worked with the Law Council of Australia (LCA) and other state law societies to draft the LCA's 'Response to Consultation Paper: Legal practitioners and conveyancers: a model for regulation under Australia's anti-money laundering and counter-terrorism financing regime'.

Provided to the Commonwealth Attorney-General's Department on 7 February 2017,

the response included the results of a survey conducted by Queensland Law Society. The survey was run in December 2016 and January 2017, and asked law firms to assess the likely implementation costs of an AML/CTF regime akin to the existing Australian scheme.

Key highlights from the survey results indicated that establishment and annual compliance costs for the AML/CTF regime for legal practices extraordinarily high. For larger firms, figures look to be around \$748,000 a year; for medium-sized firms around \$523,000, and for smaller firms around \$119,000. In addition to the cost implication, lawyers in the United Kingdom, under the same scheme, report turning down work and losing significant business. Queensland Law Society is concerned that the establishment, maintenance and loss of business costs could significantly affect solicitors in Queensland and the nation.

The Society is opposed to the AML/CTF applying to legal practitioners in Australia for four main reasons:

- strain on the principles of confidentiality and client legal privilege
- erosion of the client-lawyer relationship and the independence of the legal profession
- imposition of additional onerous regulatory burdens that will likely impact on the ability of Australian law practices to remain viable in the international legal market
- addition of an unnecessary additional cost burden for regulatory compliance, which is likely to significantly increase the cost of legal services and make access to legal services less affordable for Australians.

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In addition to the Society's opposition, it is important to recognise that the inclusion of lawyers in the UK's AML/CTF scheme has made no significant difference in the prevention of money laundering and terrorism financing. The only impact thus far has been a negative one in terms of costs to the legal profession. There is little to no data proving that countries meeting the set targets are seeing reduced crime rates. The Society has called for the provision of evidence that this scheme effectively leads to a reduction in crime.

### Concerns

One of the most significant concerns of lawyers being brought into the AML/CTF scheme is the requirement that they report suspicious transactions. This obligation would undoubtedly affect the client-lawyer relationship, along with client confidentiality and client legal privilege.

Under Section 41 of the Act, suspicious transaction reporting obligations would arise when a reporting entity provides, offers to provide, or is requested to provide a designated service. When a lawyer, firm or director has reasonable grounds for suspicion, they must formally contact AUSTRAC within 24 hours for terrorist financing matters or three days for all other matters.

What must be reported:

- a person who is not who they claim to be
- information likely to be of relevance to an investigation or prosecution of a person for an evasion, or an attempted evasion, of Commonwealth, state or territory taxation law – for example, an executor of a deceased estate where the deceased engaged in tax evasion.
- information likely to be of relevance to an investigation or prosecution of a person for an offence against a Commonwealth, state or territory law
- information that may be of assistance in the enforcement of the *Proceeds of Crime Act 2002* (Cth), or a state or territory equivalent.

The person must not disclose to anyone – including his or her client – that a suspicious matter report has been made or that the suspicion has been formed. They must also ensure they do not provide any information that could assist the person to infer that a suspicion has been formed.

If a legal professional is found to have participated in any of the above, they contravene the AML/CTF provisions against 'tipping off', which is a criminal offence and can attract a penalty of two years' imprisonment or 120 penalty units or both (Section 123 of the Act).

Legal professional privilege is a fundamental client right, and the legal advisor must protect the privilege for the client's benefit. Privilege can only be waived by the client and not the legal advisor. It is attached to

communications and what falls within that privilege is a question of fact.

Gleeson CJ, Gaudron and Gummow JJ in *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67 said:

"The [legal professional] privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers."

In this case it was noted that legal professional privilege:

1. exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers, and
2. a person should be entitled to seek and obtain legal advice for the purposes of the conduct of actual or anticipated litigation, without the apprehension of being prejudiced by subsequent disclosure of the communication.

While section 242 of the Act states that the law relating to legal professional privilege is not affected by the Act, if legal practitioners become "report entities" then this principle is clearly in danger.

The concern is that legal profession privilege is eroded by the reporting obligations under Section 41. As stated, it is not for the legal practitioner to waive this privilege. He or she has no discretion. The requirement to report based on a "reasonable suspicion" is far too low a test to break privilege. Further, Section 41 is wide and does not extend solely to existing clients. It appears that leaving a message on a law firm's voicemail or sending an email to a law firm enquiring about fees for service would suffice in engaging Section 41.

To quote the LCA in its recent submission: "Client legal privilege cannot be used to cloak illegality and impropriety and does not apply when advice is sought to further or facilitate fraud, a crime or unlawful purpose."

The requirement of a legal practitioner to keep information received from a client confidential is also critical. This obligation assists in the promotion of clients making full and frank disclosure to their solicitor or barrister. It is based on a secure knowledge that their legal representative will not disclose to a third party discussions or documents. It is similar to the fundamental characteristics of legal professional privilege with the distinct difference being that the duty of confidentiality applies to all communications regardless of whether it is for the purpose of legal advice or advice in anticipation, or in the course of, litigation.

It is also important to note that Section 242 referred to above relates to legal professional privilege but does not express a protection for matters that are to be kept confidential.

Further, and as noted in the LCA's submission, the fact that a legal practitioner

cannot reveal that a report has been made to the client upon pain of criminal sanction strikes directly at the heart of the fiduciary relationship between solicitor and client and undermines the integrity and independence of the legal profession by making the solicitor the agent of the executive government against the interests of the client.

Ultimately, if a legal practitioner fails to report, there may be penalties under the Act. However, if they report under Section 41 but the communication is subject to client legal privilege, then they may be exposed to disciplinary processes through their respective professional associations. This can occur if they have made a wrong judgment and reported a matter that was later determined to be privileged.

These proposed changes will jeopardise the openness of communications between the client and their chosen legal representation.

### Where to from here?

A Government report in April 2016 followed a statutory review of the AML/CTF regime. It made a number of recommendations, including recommendation 4.6 which said that the Attorney-General's Department and AUSTRAC, in consultation with industry, should:

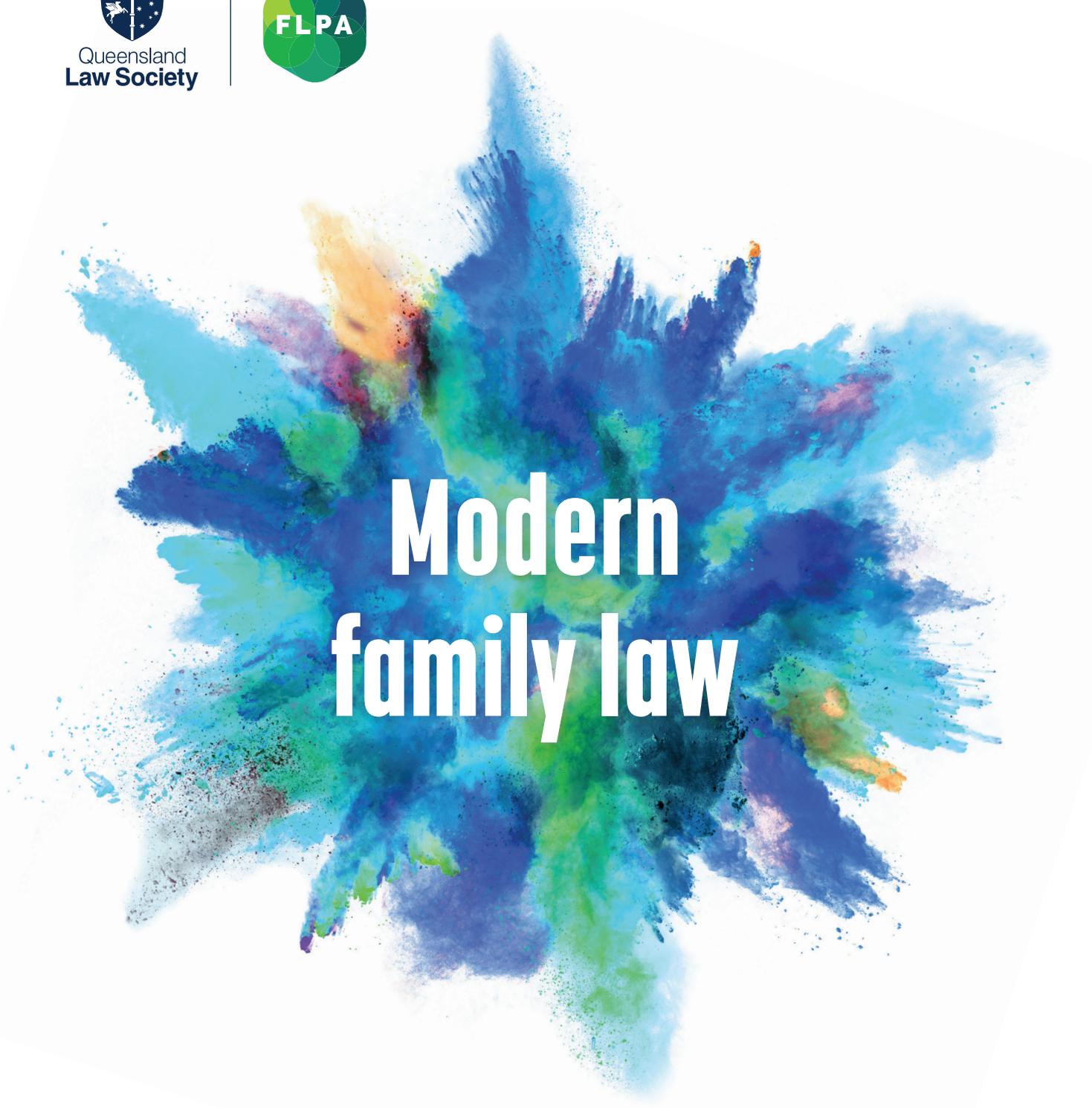
- a. develop options for regulating lawyers, conveyancers, accountants, high-value dealers, real estate agents and trust and company service providers under the AML/CTF Act, and
- b. conduct a cost-benefit analysis of the regulatory options for regulating lawyers, accountants, high-value dealers, real estate agents and trust and company service providers under the AML/CTF Act.

The A-G's Department and AUSTRAC have not conducted step (a), but have announced the engagement of KPMG to produce a questionnaire designed to extract the costs for the industry of each component of the current AML/CTF obligations. This survey will form part of a cost-benefit analysis undertaken by KPMG. The Society has put forward members who have volunteered to participate in this survey.

It is in the interests of members that the Society assists where possible to demonstrate the true costs and demands of this regime, and will continue to inform members about developments in this space.

The Society forbodes that the inclusion of Australian lawyers in the scheme may be inevitable, but will continue to oppose this.

A useful resource for lawyers interested in reading more about AML/CTF and the implementation for the profession is the LCA's 'Anti-money laundering guide for legal practitioners', updated in January 2016.



# Modern family law

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# Queensland's new class action regime

## From commencement to settlement or judgment

### Queensland now has a regime for representative proceedings, or class actions.

Amendments to the *Civil Proceedings Act 2011* (CPA) and *Uniform Civil Procedure Rules 1999* (UCPR) create a framework for conducting class actions in the Supreme Court of Queensland<sup>1</sup> and are supplemented by Practice Direction 2 of 2017<sup>2</sup> and four new forms.<sup>3</sup>

### Commencing proceedings

Section 103B of the CPA sets out the criteria of a representative proceeding, which is one that is commenced by claim (using form 2B) in the Supreme Court by and on behalf of seven or more claimants against the same person in respect of, or arising from, the same, similar or related circumstances that give rise to a substantial common issue of law or fact.

Pursuant to s103F of the CPA, the claim, or a document filed in support of the claim, must:

- a. describe or otherwise identify the group members to whom the proceeding relates (although it is not necessary to name or state the number of the group members)
- b. state the nature of the claims made and relief sought on behalf of the group members, and
- c. state the questions of law or fact common to the claims of the group members.

The consent of a person to be a group member is not required, subject to some exceptions with respect to public bodies and government officers listed in s103D of the CPA. Under s103E, a person under a legal incapacity may be a member of a group without a litigation guardian, but requires a litigation guardian to take a step or conduct part of the proceeding.

Sub-groups may be established if particular issues to be determined are common to a group of members.

Group members may opt out of the proceeding by giving written notice under s103G of the CPA. The date by which an opt-out notice may be given must be fixed by the court, which will be done at a case conference

following the initial case conference. If at any stage of the proceeding it appears that there fewer than seven group members, s103I of the CPA provides that the court may order that the proceeding either be continued or no longer continue under the regime.

Once a representative proceeding has been commenced, a particular Supreme Court judge (the presiding judge) will be assigned to manage the proceeding. The presiding judge will determine all interlocutory applications, conduct the trial of any common questions that may arise and give directions for determining remaining questions.

The proceedings will be managed by case conferences, which will be a more informal procedure than a directions hearing. This is designed to promote discussion between the parties and the judge with a view to exploring the best method of bring the case to a hearing.<sup>4</sup> The case conferences will be at times determined by the presiding judge in consultation with the parties.<sup>5</sup>

When a proceeding is started, the plaintiff must email a copy of the claim and the parties' known contact details to the Civil List Manager. The proceeding will then be made returnable for an initial case conference before the presiding judge.<sup>6</sup>

### Conduct of proceedings

At or prior to the initial case conference, each party is expected to disclose any litigation funding agreement (which may be redacted to conceal tactical information). At the initial case conference the parties should be in a position to deal with the following matters:

- a. whether there is any dispute that the proceedings are representative proceedings for the purpose of part 13A of the CPA
- b. any issue concerning the description of group members
- c. any issue concerning the identification of the common questions of fact or law in the originating process
- d. any other issues concerning the adequacy of the originating process
- e. a timetable for the service of defences, cross-claims and further pleadings

- f. disclosure and document management
- g. whether any security for costs will be sought and if so the amount, manner and timing of the provision of such security
- h. whether the matter should be referred for alternative dispute resolution, and
- i. any protocol for communication with unrepresented group members.<sup>7</sup>

Parties are encouraged to file a joint position paper in advance of each case conference listing the major points the parties anticipate raising and outlining their respective positions on each issue in one to three sentences.<sup>8</sup>

The following additional matters will be dealt with at subsequent case conferences:<sup>9</sup>

- a. the date before which a group member may opt out of the proceeding (s 103G(1) of the CPA)
- b. the form and content of the notice to group members advising of the commencement of the proceeding and their right to opt out of the proceeding before a specified date (s103T(1)(a) of the CPA) (the opt-out notice)
- c. the manner of publication and dispatch of the opt-out notice
- d. the extent of disclosure
- e. the steps necessary for the determination of the representative party's claim and the common questions including:
  - i. the provision of witness statements, and
  - ii. the provision of expert evidence and the manner that such evidence will be taken.
- f. such further directions as may be necessary, and
- g. the date of the hearing.

At the appropriate time, the proceedings will be referred to mediation by an order pursuant to rule 323 of the UCPR.<sup>10</sup>

In any proceeding conducted under the regime, the court may, on its own initiative or on application by a party or group member, make any order the court considers appropriate or necessary to ensure justice is done.

**Kylie Downes QC** and **Hamish Clift** provide practitioners with a brief overview of Queensland's new class actions regime, from commencing proceedings to settlement or judgment.



## Settlement

Representative proceedings may not be settled or discontinued without the approval of the court and in giving approval, pursuant to s103R of the CPA, it may make any orders it considers just for the distribution of money paid under a settlement or paid into the court.

## Judgment

In deciding a matter in a representative proceeding, s103V of the CPA provides that the court may do any one or more of the following:<sup>14</sup>

- decide an issue of law
- decide an issue of fact
- make a declaration of liability
- grant equitable relief
- make an award of damages for group members, sub-group members or individual group members, consisting of stated amounts or amounts worked out in a stated way
- award damages in an aggregate amount without stating amounts awarded in respect of individual group members

- make any other order the court considers just.

The court may also make an order under s103W of the CPA to constitute and administer a fund that consists of monies to be distributed, if it is necessary to do so as a result of an award of damages. If an award of damages is made, a representative party may apply for costs under s103ZC of the CPA and if those costs are likely to exceed the costs recoverable from the defendant, the court may order some or all of the excess to be paid out of the damages awarded.

Finally, s103Y provides that an appeal of a representative proceeding judgment may also be brought as a representative proceeding. If a representative party does not start an appeal within the time limit, another member of the group may do so on behalf of the group members within a further 21 days.

## Conclusion

Flexibility and justice are key aspects of the new regime. The court has broad powers to manage representative proceedings and judges are empowered with a broad

discretion in many circumstances to make the orders considered necessary, in many cases on the court's own initiative, to ensure justice is done.

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

### Notes

- <sup>1</sup> The *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* amends the *Civil Proceedings Act 2011* to create Part 13A and the *Uniform Civil Procedure (Representative Proceedings) Amendment Rule 2017* amends the *Uniform Civil Procedure Rules 1999* to create Chapter 3, Part 1, Division 5.
- <sup>2</sup> Available at [courts.qld.gov.au/courts/supreme-court/practice-directions](http://courts.qld.gov.au/courts/supreme-court/practice-directions).
- <sup>3</sup> Forms 2B, 134, 135 and 136, all of which are available at [courts.qld.gov.au/about/forms?root=84820](http://courts.qld.gov.au/about/forms?root=84820).
- <sup>4</sup> Practice Direction 2 of 2017 paragraph 1.
- <sup>5</sup> Practice Direction 2 of 2017 paragraph 7.
- <sup>6</sup> Practice Direction 2 of 2017 paragraph 6.
- <sup>7</sup> Practice Direction 2 of 2017 paragraph 8.
- <sup>8</sup> Practice Direction 2 of 2017 paragraph 7.3.
- <sup>9</sup> Practice Direction 2 of 2017 paragraph 9.
- <sup>10</sup> Practice Direction 2 of 2017 paragraph 11.

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# Two good to be true?

## How a second job can land you in hot water

### Running a digital application (app) side-business or working a second job, in addition to working a nine-to-five job, is becoming increasingly common.

However, workers holding down a second job can in some circumstances impact a primary employer's business, especially if the worker is fatigued and unable to work safely, or if the job directly competes with the employer's business.

In such situations, workers may find themselves in hot water, with employers potentially having the right to exercise performance management or terminate employment. This article looks at the rights of employers and workers, and the actions that can be taken when a second job may be negatively impacting the primary employment, with reference to important cases handed down by the Fair Work Commission (FWC).

### Fitness for work – *Jacob v WAN*

In 2016, the FWC held that West Australian Newspapers Ltd (WAN) did not unfairly dismiss Mr Jacob, a night-shift press foreman, who worked a second job as an Uber driver.<sup>1</sup>

Mr Jacob's employment contract with WAN included an express term that he was not to engage in other work without WAN's permission, but that such permission would not be unreasonably withheld.<sup>2</sup> WAN also had a fitness-for-work procedure in place, which required that employees attending work not be adversely affected for any reason, including fatigue.<sup>3</sup>

After hearing rumours that Mr Jacob may have had a second job, WAN became concerned that this was affecting his fitness for work on night shifts and was a cause behind performance issues and increased personal leave days.

WAN started an investigation and requested Mr Jacob to submit a formal request to hold a second job (noting the hours he expected to work as a driver), so WAN could determine if it was reasonable and safe. Mr Jacob failed to submit the request and repeatedly denied he was working as an Uber driver. Following a show-cause process, Mr Jacob was dismissed with pay in lieu of notice.

The FWC held that WAN had a valid reason for dismissing Mr Jacob as it had undertaken an investigation and given repeated warnings that he had to be open and honest about his Uber driving, and had been provided repeated opportunities to respond. The dismissal was held not to be harsh, unjust or unreasonable in the circumstances.

### What are the risks?

A worker with two jobs is not necessarily a cause for concern. Many workers, known or unbeknownst to their primary employer, successfully engage in additional work.

However, a second job can give rise to genuine problems or risks for businesses and workers, when:

- safety is affected because a worker performing safety-critical work is fatigued or distracted
- through fatigue or distraction there is a decline in performance or production and/or an increase in absenteeism or tardiness, or
- conflicts of interest, breaches of confidentiality and the misuse of physical and intellectual property occur.

### Can employers 'control' workers' external activities?

Courts, commissions and tribunals have historically been reluctant to allow an employer to unnecessarily intrude into a worker's private life outside of work hours.

In *Hivac v Park Royal Scientific Instruments Ltd* [1946] CH 169<sup>4</sup> Lord Green MR said that the law would not look to impose an obligation on workers that would prevent them from making more income during their spare time.

With that said, there are some actions that a business can reasonably and legally take in circumstances in which a second job is creating a genuine safety risk or performance issues.

### Health and safety

In circumstances such as those in *Jacobs v WAN*, when an employer becomes concerned about a worker's ability to perform their work safely, they have an obligation under work health and safety laws to manage this risk.

Under the *Work Health and Safety Act 2011* (Qld) (WHS Act) a person conducting a business or undertaking (PCBU) has a duty to ensure, so far as reasonably practicable, that workers and other persons are not exposed to health and safety risks arising from the business or undertaking.<sup>5</sup>

Safe Work Australia advises that:

"The duty on the person conducting the business or undertaking is not removed by a worker's ... willingness to work extra hours or to come to work when fatigued. The person conducting the business or undertaking should adopt risk management strategies to manage the risks of fatigue in these circumstances".<sup>6</sup>

While a PCBU cannot necessarily or reasonably be expected to control what a worker does in their own time, when at work a PCBU cannot ignore the safety risk a fatigued or distracted worker may pose. The PCBU has an obligation to develop strategies, including policies and procedures, to identify risks and put in place controls to eliminate or minimise the likelihood of harm.

Workers also have a duty under the WHS Act to take reasonable care of their own health and safety, and not adversely affect the health and safety of others.<sup>7</sup> This includes:

- taking responsibility for their own fitness for work and, when affected, advising their employer and not undertaking safety-critical tasks
- complying and cooperating with any reasonable instruction, policy or procedure, including those relating to fitness for work.

In practice, this means any business concerned about the risks arising from a worker undertaking two jobs can and should:

- Implement strategies, such as fitness-for-duty policies and procedures, aimed at identifying and controlling the risk arising from a worker who is fatigued or unfit for work. In circumstances in which fatigue is a likely hazard, such as night-shift work, these policies should include a direct requirement to disclose and/or seek approval to perform other work.
- Consult, investigate and take disciplinary action if a worker fails to follow these policies or procedures and/or attends work fatigued or unfit to perform their job.

Laura Regan looks at the rights of workers to have a second job and what primary employers can do when second jobs have ramifications for their business.



## Performance

If a second job does not present a safety risk, fatigue or distraction may still affect a worker's performance or productivity.

If an employer suspects that performance is suffering as a result of a second job, the best course of action is to develop and implement performance management processes that include allowing the worker an opportunity to respond to allegations and improve, before taking disciplinary action or proceeding to termination.

## Conflict of interest

In circumstances in which a worker's second job is for a direct competitor or within the same industry, it would be reasonable for an employer to be concerned about a conflict of interest.

However, if an employer wishes to address this issue through direction or termination, generally it must either establish a breach of an express clause of the employment agreement or a breach of an implied duty to act in good faith.

## Implied duty

Whether or not a duty of good faith can be implied in an employment contract will depend on the specific facts and circumstances of each case.<sup>9</sup> In considering whether having a second job breaches a worker's implied duty of good faith, it is not sufficient to merely establish that a worker is engaged in employment by a competitor.

The worker must be "guilty of some conduct in itself incompatible with his duty and the confidential relation between himself and his employer",<sup>9</sup> and "an actual repugnance between his acts and his relationship must be found".<sup>10</sup>

In *Bril v Rex Australia Ltd* [2015] FWC 884,<sup>11</sup> transport driver Mr Bril was forced to resign after his employer discovered he was working as a driver for another transport company during his annual leave. The FWC noted there was no actual conflict of interest arising from Mr Bril's work with a competitor, finding his dismissal was harsh, unjust and unreasonable. It said:

"Undertaking secondary employment which does not encroach on the primary employer's field of business does not contravene the implied contractual term of fidelity and good faith. Nor does the implied term impose any duty upon the employee to disclose secondary employment of this nature."

## Express restraint clauses

A well-drafted non-compete clause in an employment agreement can be an effective way to prevent a worker from undertaking other work in direct competition with the employer's business.

In *Pedley v IPMS Pty Ltd* [2013] FWC 4282,<sup>12</sup> Mr Pedley's contract of employment contained several express restraint clauses, including clauses preventing him from undertaking work, or providing advice or services to anybody that resulted in him competing with his primary employer (PVH). With the knowledge and consent of PVH, Mr Pedley was running his own business on the side, undertaking very similar work but on smaller projects (and not within the scope of PVH's business).

As part of advertising the expansion of his business to a full-time practice working on larger projects, he sent an email to a list of contacts, including some clients of PVH. Mr Pedley was immediately dismissed as a result of the email.

He subsequently commenced unfair dismissal proceedings in the FWC. The FWC upheld Mr Pedley's dismissal, stating he had breached the express terms of his employment contract, resulting in PVH losing confidence that he would promote their interests above his own.

## It's about balance and communication

One of the best ways to balance business interests with the rights of workers is to ensure that everyone understands "if and when" a second job is acceptable. The most effective way to do this is through express contractual terms, policies and procedures tailored to the specific business and risk, and through ongoing consultation and disclosure between the worker and the business.

Strictly prohibiting secondary work is not always necessary and in some cases unlawful, so it is important to have risk management strategies in place that are appropriate to the business and its potential risks. Failure to identify and control risks that arise from fatigue or distraction (caused by a second job) can have catastrophic safety ramifications in high-risk workplaces. Strategies that encourage a worker to disclose when they are not fit for work – and provide controls, like rest areas – can be key in managing such consequences.

Laura Regan is a senior associate at Sparke Helmore Lawyers.

### Notes

<sup>1</sup> *Jacob v West Australian Newspapers Ltd* [2016] FWC 5382 (8 August 2016).

<sup>2</sup> *Ibid* at [8].

<sup>3</sup> *Ibid* at [11].

<sup>4</sup> *Hivac Limited v Park Royal Scientific Instruments limited* [1946] CH 169 as cited by the Full Bench of the Fair Work Commission in *Adidem Pty Ltd T/A The Body Shop v Nicole Suckling* [2014] FWC 3611.

<sup>5</sup> WHS Act s19.

<sup>6</sup> Safe Work Australia, *Guide for managing the risk of fatigue at work*, page 3.

<sup>7</sup> WHS Act s28.

<sup>8</sup> The question of whether a duty of good faith is generally implied by law into employment contracts is yet to be resolved. See *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [42]. See also *Gramotnev v Queensland University of Technology* [2015] QCA 127 and *State of New South Wales v Shaw* [2015] NSWCA 97 at [128-130].

<sup>9</sup> *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 Starke and Evatt JJ at 74, as cited by the Full Bench of the Fair Work Commission in *Adidem Pty Ltd T/A The Body Shop v Nicole Suckling* [2014] FWC 3611 at [44].

<sup>10</sup> *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 Dixon and McTiernan JJ at 81-82, as cited by the Full Bench of the Fair Work Commission in *Adidem Pty Ltd T/A The Body Shop v Nicole Suckling* [2014] FWC 3611 at [44].

<sup>11</sup> *Jim Bril v Rex Australia Limited t/a K&K Glass* [2015] FWC 884 at [56].

<sup>12</sup> *Bradford Pedley v IPMS Pty Ltd T/A Peckvonhartel* [2013] FWC 4282.

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# Youth justice

## A brief overview

James Benjamin offers a brief overview of the Queensland youth justice regime in the second of a series of articles highlighting recent improvements.



In 1992 the Queensland Parliament passed two Acts to introduce a modern system for dealing with children charged with criminal offences – the *Juvenile Justice Act 1992* and the *Childrens Court Act 1992* (CC Act)

Both have been amended over the ensuing decades and the *Juvenile Justice Act* is now known as the *Youth Justice Act 1992* (YJ Act).

The CC Act established the Childrens Court as a court of record.<sup>1</sup> The court is constituted by either a Childrens Court judge or a Childrens Court magistrate. Judges of the District Court and any magistrate may be appointed to the Childrens Court by the Governor in Council acting on the recommendation of the Attorney-General.<sup>2</sup>

The court is led by a president who has the power to issue directions about court procedure.<sup>3</sup> If a Childrens Court judge or magistrate is unavailable, any District Court judge or magistrate may constitute the court.<sup>4</sup> If no other magistrate is available, the court may be constituted by two justices of the peace.<sup>5</sup>

The court has the jurisdiction conferred by any Act.<sup>6</sup> In practice, the principle jurisdictions which the court exercises are criminal matters under the YJ Act, child protection applications under the *Child Protection Act 1999*, and adoption orders under the *Adoption Act 2009* (Qld). This article is restricted to the court's criminal jurisdiction.

When the court is constituted by a magistrate, there are restrictions on who may be present in court while it is sitting.<sup>7</sup> Those present are usually confined to the child, a parent or other adult family member, legal representatives and a representative of the chief executive of Youth Justice Services.

In addition to being present, the chief executive is entitled to be heard by the court in relation to certain matters such as adjournments, bail and custody matters, and sentence orders, as well as any other matter the court considers appropriate except for decisions about allowing publication of a child's identifying information.<sup>8</sup>

The YJ Act is a code for dealing with children in the criminal justice system, including regulating the detention of child offenders.<sup>9</sup> The Act presently applies to children who have not yet turned 17.

Practitioners should be aware, however, that the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* received royal assent on 11 November 2016. This Act will commence by proclamation, which is expected to occur within 12 months of its passing. It amends the YJ Act to include 17-year-olds in the youth justice system, bringing Queensland into line with all other Australian states. It also includes transitional provisions applying to those 17-years-olds already before the court.

Schedule 1 to the YJ Act contains a charter of youth justice principles which underlie the operation of the Act.<sup>10</sup> The charter sets out 20 principles that apply to how courts are to deal with children. The principles are not set out in any order of priority and the weight

given to any particular principles will depend on the circumstances of the case.<sup>11</sup>

The YJ Act is divided into 11 parts which govern aspects of the system including:

- special provisions about policing and children
- restorative justice processes
- bail and custody of children
- jurisdiction and proceedings
- sentencing
- detention administration
- confidentiality.

Because the YJ Act is a code for dealing with children, many aspects of criminal law – such as summary elections for indictable offences, decisions about bail and sentencing options – are entirely different from those applying to adults. These aspects of the system will be discussed in future articles.

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

Image credit: ©iStock.com/kaisersosa67

### Notes

<sup>1</sup> S4 CC Act.

<sup>2</sup> Ss11 & 14 CC Act.

<sup>3</sup> S8 CC Act.

<sup>4</sup> Subss5(2)(b) & (3)(b) CC Act.

<sup>5</sup> Subss5(3)(c) CC Act.

<sup>6</sup> S6 CC Act.

<sup>7</sup> S20 CC Act.

<sup>8</sup> S74 YJ Act.

<sup>9</sup> S2(6) YJ Act.

<sup>10</sup> S3 YJ Act.

<sup>11</sup> *R v EI* [2009] QCA 278.

# Pre-reconciliation order finally quashed

with Robert Glade-Wright



## Property – reconciliation after final order – wife appeals dismissal of her s79A application – husband’s failure to disclose

In *Waterman* [2017] FamCAFC 23 (8 February 2017) the Full Court (Bryant CJ, Murphy and Kent JJ) allowed the wife’s appeal against Judge Newbrun’s dismissal of her s79A application for the setting aside of a final property order made before the parties – who had two children – reconciled. The order required the sale of their home and an equal division of proceeds. The wife argued miscarriage of justice due to the husband’s failure to disclose his financial circumstances and that the parties had impliedly consented to the order being set aside.

Murphy J (with whom Bryant CJ and Kent J agreed) at [(34)] cited *Morrison* [1994] FamCA 153 in which the Full Court said that “[o]rdinarily, a failure to comply with th[e] duty [of disclosure] will amount to a miscarriage of justice”, continuing at [61]:

“Taken together ... the wife’s lack of literacy; the husband’s failure to disclose; ... the wife’s self-representation ... [when] the husband’s solicitor ‘told’ the wife of the proposed orders; ... [that] that occurred at the husband’s solicitor’s office; the fact that the orders were read to her only once ... ; and ... that she was not advised as to entitlements, all, in my view, amount to a miscarriage of justice ... ”

Murphy J said [(66)] that “[r]econciliation is not, of itself, sufficient for a finding that the parties had impliedly consented to the setting aside of a s79 consent order ... Rather, any such finding is made by reference to the ... circumstances ... [of] the parties’ relationship by which the ... intention is to be inferred”; and that [(77)] “[n]otably absent ... from the ultimate findings made by his Honour ... is any mention of ... the parties’ respective contributions”; and concluded [(88)]:

“I am unable to see ... how it was reasonably open to his Honour to conclude in 2016 that the parties did intend to bring an end to their financial relationships by the 1998 orders.”

## Children – mother ‘orchestrated’ father’s exclusion from child’s life – trial judge gave insufficient weight to mother’s neglect and exposure of child to violence

In *Bangi & Belov* [2017] FamCAFC 5 (3 February 2017) the Full Court (Ainslie-Wallace, Murphy & Cronin JJ) allowed the father’s appeal against Hannam J’s parenting order for a 10-year-old child after a nine-day trial. The mother only attended the first five days, telling the court that if the orders made did not accord with her wishes she would not obey them [(107)], and did not attend the appeal. The father had sought orders that the child live with him, arguing “that the child was at risk of harm in the mother’s care” [(2)].

The trial judge ordered that the child live with the mother and spend five nights a fortnight and half of holidays with the father. He argued on appeal that the order was based on inconsistent findings as to the mother’s parenting capacity and that the family consultant’s findings as to the mother being the child’s primary attachment figure was in ignorance of other evidence, such as violence in the mother’s household.

The Full Court said [(6)-[19)] that for two years after separation “the father had been excluded from the child’s life”; “the mother orchestrated that exclusion”; the mother did not co-operate with an order that the mother take the child to a psychologist for therapy; the trial judge rejected the mother’s claim that the father had been violent or abusive; that the mother “lacked credibility and ... had been violent to both the father and the child” and had “exposed [the child] to ... drunkenness ... [by] the mother’s partner ... and ... violence between the mother and her partner”.

The trial judge [(22)] said that “removal of the child from the mother would be traumatic for him” and found that the mother’s attitude had “changed”, a finding that “did not sit comfortably with other findings made by her Honour” [(104)]. All “charges against the father were dismissed as were the domestic violence orders” [(41)]. The Full Court referred [(102)] to “cogent evidence, accepted by her Honour, from a person unconnected with the proceedings (Mr JJ) of a significant lack of parental care ... and ... exposure to regular family violence ... That evidence was entirely supportive of the father’s evidence”.

The family consultant said [(109)] that removal of the child was “an option if her Honour found the mother had significant deficits in her ... parenting”. The trial judge’s findings were “based upon the evidence of the family consultant” [(112)] who was not made aware of the evidence of Mr JJ, the Full Court saying [(114)] that “[t]he failure to have the family consultant express opinions postulated upon the trial judge’s acceptance of Mr JJ’s evidence (and the father’s evidence seen in its light) is in our view a significant omission”.

## Interim costs – wife’s application dismissed – parties’ wealth not controlled by husband, wife’s big spending, \$27,000 owed by her friend

In *Millhouse & Mullens* [2017] FamCA 37 (27 January 2017) Hogan J dismissed the wife’s application for an order for payment of \$150,000 for her legal costs. Hogan J concluded [(41)-[42)]:

“ ... I am not persuaded that it is just and equitable ... [to] mak[e] ... [the] order [sought] ... because:

I ... doubt that ... ‘the wealth of the parties’ ... is controlled by one of them; rather, it seems uncontroversial that it involved each party contributing their own ‘wealth’, controlling the same and making their own ... decision/s about its ... disposition; and

the Applicant’s financial circumstances following her expenditure ... are such that I am not persuaded it will be possible to take into account ... at trial ... any sum paid to the Applicant by the Respondent; and

the diminution in the Applicant’s financial circumstances appears ... to have arisen as a consequence of a combination of the post-separation decision to sell her H Resort property ( ... where it seems its value had ... halved) and her expenditure of the ... proceeds ... knowing of the existence of this litigation; and

the Applicant appears to retain some financial resources, such as the \$27,000 owed to her by a friend ... from which she may be able to meet at least some of her likely legal fees.”

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](http://thefamilylawbook.com.au)). He is assisted by Queensland lawyer Craig Nicol, who is a QLS accredited specialist (family law).

# High Court and Federal Court casenotes

## High Court

### Family law – parenting orders – best interests of children – views of the children

In *Bondelmonte v Bondelmonte* [2017] HCA 8 (1 March 2017) the High Court considered the requirements of the *Family Law Act 1975* (Cth) with respect to the consideration of the views of children and interim parenting orders. The parties to the appeal were the father and mother of three children. The two eldest (aged almost 17 and 15) had been taken to New York by the father for a holiday. The father decided not to return, keeping the children with him, in breach of parenting orders that provided for equal parental responsibility, required the children to engage in a child responsive program and provided for parental interviews. The mother applied for the children to be returned to Australia. The father did not indicate what he would do if orders were made for the children's return. The children had expressed a desire to remain with the father. In making orders, the Family Court was required to consider, relevantly, the best interests of the children and any views they had expressed. The primary judge made interim orders for the children's return, considering their views but giving them limited weight because of the father's influence over the children. The children were ordered to return to live with the mother or, if the children preferred, identified parents or friends. The father appealed, arguing that the children's views had not been properly considered and that there was no power to order custody in favour of the friends' parents. The High Court held that the primary judge was entitled to take account of the father's influence in giving weight to the children's views. The judge was also not required to ascertain the children's view on the alternative living arrangements – only to consider views that had been expressed. Lastly, the High Court held that there was power to make parenting orders in favour of a parent of a child "or some other person", which included the friends' parents. Kiefel, Bell, Keane, Nettle and Gordon JJ jointly. Appeal from the Family Court dismissed.

### Migration law – migration – statutory interpretation – deeming under *Acts Interpretation Act*

In *Minister for Immigration and Border Protection v Kumar* [2017] HCA 11 (8 March 2017) one of the criteria for a visa applied for by the respondent was that, at the time of application, the visa applicant was the holder of a visa of a specified class. The respondent held a visa that would have satisfied the criterion, which expired on a Sunday. However, the new visa application was made on the Monday after the old visa expired. The new visa was refused because the applicant did not meet the criterion. The respondent argued that s36(2) of the *Acts Interpretation Act 1901* (Cth) applied. That section provides that if an Act requires or allows

a thing to be done, and the last day for doing the thing is a weekend or public holiday, then the thing can be done on the next working day. The respondent argued that s36(2) operated to allow the new visa to be applied for and for the criterion to be satisfied on the Monday because the existing visa expired on the Sunday. That was rejected by the Federal Circuit Court but upheld by the Federal Court. The High Court held that the *Migration Act 1958* and *Migration Regulations 1994* did not, in this case, impose a time limit or require a thing to be done by a particular date, expressly or impliedly. It was common ground that the visa application was validly made on the Monday. However, the visa applicant did not meet the criterion on that day. Section 36(2) did not apply to alter the rights or obligations in that scenario. Bell, Keane and Gordon JJ jointly; Gageler J separately concurring; Nettle J dissenting. Appeal from the Federal Court allowed.

### Criminal law – directions to juries – application of the 'proviso' – approach to questions for appellate courts

In *Perara-Cathcart v The Queen* [2017] HCA 9 (1 March 2017) the High Court held that jury directions as to discreditable conduct evidence were sufficient, and also commented on the application of the "proviso" (which allows for criminal appeals to be dismissed when there has been an error but if there has been no substantial miscarriage of justice) and the questions for an appellate court. The appellant was convicted of rape and threatening to kill. The trial judge admitted evidence that a small amount of cannabis had been found in the appellant's home when it was searched. The trial judge gave directions as to how the evidence could be used. On appeal, the appellant argued that the evidence should not have been admitted and that the directions were insufficient. The Court of Appeal unanimously held the evidence was admissible. Two members of the court held that the direction was inadequate; of those, one would have allowed the appeal, but the other applied the proviso to dismiss it. Ultimately, the appeal was dismissed. The appellant argued that the Full Court should have allowed the appeal because a majority had not held that the proviso should apply. In the High Court, a majority (Nettle J dissenting) dismissed the appeal on the basis of a notice of contention, finding that the direction to the jury was sufficient. However, the court divided on other aspects of the case. Kiefel, Bell and Keane JJ, Nettle J concurring on this issue, held that the application of the proviso presented two questions: whether there had been an error; and whether the proviso should apply. The legislation required a majority for both questions. The notice of contention aside, the members of the joint judgment would have upheld the appeal for that reason. Gageler J and Gordon J held that there was but one

question, whether the appeal should be allowed or dismissed. Absent the notice of contention, their Honours would have dismissed the appeal, because a majority of the court below had not decided that the appeal should be allowed. Kiefel, Bell and Keane JJ jointly; Gageler J and Gordon J separately concurring; Nettle J dissenting. Appeal from the Court of Appeal (SA) dismissed.

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

## Federal Court

### Administrative law – whether s33 of the *Acts Interpretation Act 1901* (Cth) authorised revocation of administrative decision – whether the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) evinced a contrary intention preventing revocation of a decision

*Minister for Indigenous Affairs v MJD Foundation Limited* [2017] FCAFC 37 (3 March 2017) concerned the interaction between s33 of the *Acts Interpretation Act 1901* (Cth) (the *Acts Interpretation Act*) and s64(4) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the *Land Rights Act*). Section 33(1) of the *Acts Interpretation Act* provides that: "Where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires."

There were two core issues before the Full Court (Perram, Mortimer J and Perry JJ). The first was whether s33(1) of the *Acts Interpretation Act* empowered the incoming Minister to revoke the earlier decision of a former Minister under s64(4) of the *Land Rights Act*. The second issue was whether the scheme provided by the *Land Rights Act* evinced a "contrary intention" for the purposes of s2(2) of the *Acts Interpretation Act* to displace any powers of revocation that may be conferred by s33(1).

Justice Mortimer (with whom Perry J agreed) held that there was a contrary intention evinced by the scheme of the *Land Rights Act* as a whole (and Pt VI of the Act, in which s64(4) is contained, in particular), so that s33(1) of the *Acts Interpretation Act* was not applicable. That was a sufficient basis on which to determine the appeal. However, had her Honour not been satisfied of the existence of a contrary intention, in Mortimer J's opinion, the scope of s33(1) of the *Acts Interpretation Act* did not extend to a general implication of an additional power to reverse or undo an exercise of power, whether by revoking a decision made in the exercise of a power or otherwise (at [110]).



with Andrew Yuile and Dan Star SC

Justice Perram dissented and held s33(1) did authorise the incoming Minister to revoke the former Minister's direction, and the scheme of the Land Rights Act did not evince a contrary intention for the purposes of s2(2) of the Acts Interpretation Act (at [5]).

**Industrial law – intention to coerce under ss343 and 348 of the Fair Work Act 2009 (Cth) – tort of intentionally procuring a breach of contract – meaning of illegitimate for conduct that is unlawful, unconscionable or illegitimate**

In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (CFMEU) [2017] FCA 157 (24 February 2017) the court (Reeves J) found the Construction, Forestry, Mining and Energy Union (the CFMEU) to have breached ss343 and 348 of the *Fair Work Act 2009* (Cth) (the FW Act).

The case concerned a series of twice-daily, two-hour CFMEU meetings at the construction site for the Carrara Sports and Recreation Centre on the Gold Coast in Queensland between 9 May 2016 and 1 June 2016. The applicant's case was that the CFMEU and two of its officials arranged the meetings in order to coerce the managing contractor to enter into an enterprise agreement with it.

The CFMEU and its relevant union official did not give evidence (at [43]). The effect of the reverse onus presumption in s361 of the FW Act was in issue. In accordance with previous authority, Reeves J agreed that s361 applied equally to the expression "intention to coerce" in ss348 and 343 of the FW Act (at [43]). Further, Reeves J rejected the CFMEU's argument that the presumption in s361 only applied to the "intention" element but that the applicant was still required to prove the other element (namely that its conduct in organising, or taking the action of calling and conducting, the union meeting was unlawful, illegitimate or unconscionable) (at [51]). The practical consequences of this conclusion included that "while s361 does not relieve the Commissioner from proving on the balance of probabilities each of the three elements of the contravention of s343 ... the allegations in the amended statement of claim ... will stand as sufficient proof of those matters unless the CFMEU proves otherwise" (at [52]). Therefore, in this case it was the CFMEU that needed to establish that its conduct was not unlawful, unconscionable or illegitimate (at [104]).

The court did not find the CFMEU to have acted unconscionably (at [105]).

The applicant argued that the CFMEU's conduct was unlawful in various respects but the court accepted this submission on one basis only (at [106]). Justice Reeves found that the CFMEU had intentionally procured a breach of contract since the meetings diverted the subcontractor's

employees, ultimately preventing them from fulfilling their obligations to the managing contractor (at [121]-[126]). It followed that its conduct was unlawful and, having regard to s361, the CFMEU failed to establish that its conduct was not unlawful (at [127]). The court concluded that the CFMEU took action against the managing contractor with intent to coerce it to exercise a workplace right and to engage in industrial activity in contravention of ss343 and 348 of the FW Act.

Although not strictly necessary, the court also considered the question of whether the CFMEU's conduct was illegitimate (at [128]). The court considered a number of single judge and one Full Court decision (from [129]). Accepting that the court was bound by authority that illegitimate conduct was one of three kinds of conduct that met the second element of coercion under ss343 and 348 of the FW Act, Reeves J said "the critical question then is to identify the legal standard that is to be applied in the field of industrial relations to determine when the threat, or application, of lawful pressure is illegitimate" (at [145]).

At [152], Reeves J held that "disproportionality between a lawful threat of action, or the lawful action itself, and the legitimate interest in the demand the threat, or action, supports is the appropriate legal standard to be applied to determine whether the threat of action, or actual action, is illegitimate". Applying this principle, the court held that CFMEU's conduct was illegitimate (at [153]-[154]).

**Practice and procedure – costs – costs where compromise offer is greater than consent order for damages – the discretion to make an order inconsistent with the rules under r1.35 of the Federal Court Rules 2011 (Cth)**

In *Sydney Equine Coaches Pty Ltd v Gorst* [2017] FCAFC 34 (2 March 2017) the Full Court dismissed an appeal on costs.

At first instance the proceeding was settled on the second day of the trial by the court entering judgment, by consent, for the applicant in the sum of \$36,000. This was less than the respondent's offer of compromise under Pt 25 of the *Federal Court Rules 2011* (Cth) (the rules). The respondent sought payment of its costs (from the relevant date) on an indemnity basis pursuant to r25.14(1)(b) of the rules. This rule provides that, if a respondent makes a compromise offer that is of a greater quantum than the order for damages, the applicant shall pay the costs the respondent incurred after the offer was served on an indemnity basis. The primary judge declined to make an order for indemnity costs in accordance with r24.14(1)(b) and made a different costs order. The respondent appealed from the order as to costs.

The Full Court (Rares, Flick and Bromwich JJ) considered r1.35 of the rules in relation to the

costs consequence under r25.14. Rule 1.35 provides: "The Court may make an order that is inconsistent with these Rules and in that event the order will prevail." The Full Court said at [19]: "The provisions of r1.35 are remedial in character. They, like r1.34, enable the Court to make an order that is inconsistent with the Rules. The purpose of the broad power in a provision such as r1.35 is to relieve against injustice: *FAI [General Insurance Co Ltd v Southern Cross Exploration NL]* (1988) 165 CLR 268] at 283. Parties can expect that r25.14(1) provides for the costs consequences that in the ordinary course of litigation will flow from the nonacceptance of an offer of compromise made under Pt 25 of the Rules where the offeree obtains a less favourable result than the one made in the offer. Nonetheless, the purpose of r1.35 is to allow the Court to make an order that is inconsistent with what r25.14 prescribes would otherwise occur, so as both to meet the justice of the case or to prevent injustice and to give effect to the Court's broad discretion to make orders for costs conferred in s 43(2) of the *Federal Court Act*."

The Full Court referred to authorities which appeared to qualify the court's discretion under r1.35 through the use of phrases such as "proper reasons" and "exceptional circumstances" (at [21]-[22]). The Full Court said that such phrases should be understood as "simply conveying the notion that a reason or reasons must be shown for departing from the prima facie position set forth in r25.14".

There was no *House v King* (1936) 55 CLR 499 error with the primary judge's exercise of discretion and the appeal was dismissed.

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

# Court of Appeal judgments

1-31 March 2017

with Bruce Godfrey



## Civil appeals

*Electro Industry Group Queensland Ltd v O'Donnell Griffin Pty Ltd* [2017] QCA 24, 3 March 2017

General Civil Appeal – where a claim was brought against the appellant (EIG) in May 2009 by an employee for personal injury arising from the appellant's negligence – where the appellant commenced third party proceedings against the respondent (ODG) in November 2009 – where between 2010 and 2016, there were significant delays between steps taken in the third party proceeding – where the appellant took steps without first delivering a Notice of Intention to Proceed or obtaining an order of the court in accordance with *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) r389 – where the appellant sought leave nunc pro tunc pursuant to UCPR r389 to take the irregular steps and proceed with the claim – where the primary judge refused leave and struck out the third party proceeding for want of prosecution – where the primary judge misapprehended the true facts due to unsatisfactory evidence – where, in exercising his discretion, the primary judge attached "heavy" weight to the inability of the respondent to locate a particular witness – where evidence adduced on appeal demonstrated the relevant witness is available to testify – whether the misapprehension of fact infected the exercise of the discretion in a material way – whether the respondent was materially prejudiced by the delay – where on appeal, leave was granted, without objection, to the filing of three affidavits, all concerning the availability of ODG's site foreman, Mr Kirk, to testify – where Mr Kirk is in a position to give evidence with respect to the entries to which his Honour specifically referred – where the misapprehension as to fact was one to which his Honour was led by the unsatisfactory state of the evidence before him, and it was not a misapprehension of his own making – where nevertheless, it has infected the exercise of the discretion in a material way – where consistently with basic principle, as formulated in *House v The King* (1936) 55 CLR 499 and affirmed in *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621, this court must, on that account, set aside the exercise of the discretion by the primary judge and the orders his Honour made to give effect to it – where all delay in prosecuting the third party proceeding has not been satisfactorily explained by those representing EIG – where despite that, there is no evidence that dilatoriness on the part of EIG itself has been responsible for the delay – where the factors that do weigh in favour of a continuation of the third party proceedings are the readiness of the principal proceeding for a trial, the readiness of the third party proceeding for trial,

the availability of Mr Kirk to give evidence in it, and the absence of significant prejudice to ODG in the prosecution of its defence to the third party claim, attributable to delay on the part of EIG.

Appeal allowed. Set aside the orders made on 18 July 2016. Order that the originating application filed on 6 May 2016 be dismissed. Order that the defendant have leave pursuant to r389(2) UCPR to take a new step in the third party proceeding on the condition that the third party claim is to be litigated on the basis of the statement of claim of the defendant against the third party filed on 11 November 2009. No order as to costs in respect of each of the appeal and of the originating application at first instance.

*Kitchen v Vision Eye Institute Ltd & Anor* [2017] QCA 32, 14 March 2017

General Civil Appeal – Further Order – where the respondents obtained judgment in an action for damages by which, amongst other orders, the appellant was ordered to pay the respondents the sum of \$10,845,476 – where by a subsequent order the appellant and Mrs Kitchen were ordered to pay 95% of the respondents' costs of the proceedings assessed on the indemnity basis – where the appellant brought an appeal against the primary judgment – where the appellant's appeal ultimately turned upon the proper construction of a contractual provision – where the court dismissed the appeal and gave the parties leave to make submissions about costs – where the appellant raised numerous grounds of appeal that ultimately were abandoned – where the appellant unreasonably refused two *Calderbank* offers (*Calderbank v Calderbank* [1975] 3 WLR 586) of compromise the respondents made before the hearing of the appeal – where the first offer was made by email on 8 February 2016 and was stated to remain open until 5pm on 12 February 2016 – where there were terms of the offer that upon receipt of the appellants' acceptance of the offer, the present appellant would do all things necessary to have the notice of appeal dismissed with no orders to costs, the respondents would do all things necessary to have a bankruptcy notice served upon the present appellant set aside with no orders to costs, and in the event that the appellants defaulted in any of the specified payments the respondents had the right immediately to enter judgment against the appellant by consent for the outstanding amount of the payment sum at the relevant time – where the respondents' second offer was made by email dated 14 February 2016 which was headed "without prejudice" with that offer remaining open for acceptance until 9am on the following morning, 15 February 2016, when the appeal was listed for hearing and was in fact heard – where the two *Calderbank* offers were both substantially more favourable to the appellant

than the order of the trial judge – where the parties agree the appellant should be ordered to pay the respondents' costs of the appeal – whether those costs should be assessed on the standard basis or on the indemnity basis – where the first offer was substantially more favourable to the appellant than the result in the Trial Division; even if the proper amount of the costs and disbursements recoverable by the respondents under the costs order in the Trial Division was not as high as \$3,577,143 (excluding GST), as the respondents stated in their first offer, the recoverable amount must have been very substantial; that offer abandoned that substantial amount together with some \$1,846,000 of the judgment amount; and it also included the substantial compromise that the appellants would assume liability to pay the settlement sum over four years, instead of immediately as in the case of the existing judgment in the respondents' favour – where the first offer was capable of immediate acceptance and involved no material ambiguity – where the first offer was made a week before the first of the two days listed for the hearing of the appeal – where the appellant then should have been readily able to make an informed decision about his prospects of success in the appeal – where the appellant has not identified a reason for not accepting the respondents' first offer.

The appellant pay the respondents' costs of and incidental to the appeal, those costs to be assessed on the indemnity basis in respect only of costs incurred by the respondents after 5pm on 12 February 2016, and otherwise to be assessed on the standard basis.

*Medical Board of Australia v Wong* [2017] QCA 42, 17 March 2017

Application for Leave *Queensland Civil and Administrative Tribunal Act*; Appeal *Queensland Civil and Administrative Tribunal Act* – where QCAT departed from the default position in s100 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) that each party bear its own costs – where the tribunal failed to make a finding as to whether the moving party was required by statute to refer the matter to the tribunal – where the tribunal accepted expert evidence as conclusive of an ultimate question – where the tribunal concluded that a party's position was not "wholly unreasonable" but failed to identify any unreasonableness justifying departure from the default position – whether the court should extend time for applying for leave to appeal – whether the court should grant leave to appeal – whether the primary judge erred in law by not recognising the mandatory nature of a statute requiring a party to bring proceedings in the tribunal – whether the primary judge erred in law by accepting expert evidence as conclusive rather than making a value judgment based on that evidence – whether a

tribunal may depart from the default position that each party bears its own costs absent a specific finding of unreasonableness – where her Honour made no finding as to whether the board, when referring the matter to QCAT, held a reasonable belief that Dr Wong’s sexual misconduct had constituted professional misconduct – where absent a finding that the board had commenced the proceeding without such a belief, there could be no such criticism of the board’s doing so – where, moreover, if the board held that reasonable belief, it was bound to bring the proceeding – where her Honour erred in law by not recognising the importance of that mandatory nature of the then s193 to the question of whether this proceeding had been properly brought – where if it was to be determined that the board should pay costs because it had unnecessarily commenced the proceeding, a necessary consideration was whether the board had been bound to do so – where as to the board’s conduct after the 2015 decision, her Honour found that the position taken by the board was not “wholly unreasonable” – where there was no respect in which the board’s position was identified as unreasonable, in pressing for the conditions which it proposed – where absent any finding of unreasonableness, there could not have been a basis for departing from the default position, according to s100, that each party bear its own costs – where absent a finding, which this court was not asked to make, that the board’s characterisation of Dr Wong’s conduct as professional misconduct was unreasonable, there can be no proper criticism of the board for bringing and prosecuting this proceeding as it did – where no finding was sought here that the board acted in bad faith – where it must be kept in mind that the board has a statutory responsibility for the protection of the public in this context and the fact that the outcome was not that which was sought should not of itself burden the board with an order for costs, especially in a proceeding in QCAT where the starting position is that prescribed by s100 – where the board’s concern for the protection of the public in the present case was clearly reasonable from Dr Wong’s very serious misconduct in 2012.

Extend the time for making the application for leave to appeal. Grant leave to appeal. Allow the appeal. Set aside the order for costs made by the tribunal. Order that there be no order for costs in the proceeding in the tribunal. Order the respondent pay the applicant’s costs of the proceeding in this court.

**AAI Limited & Anor v Marinkovic** [2017] QCA 54, 31 March 2017

General Civil Appeal – where the respondent was injured in a motor vehicle accident caused by the second appellant – where the respondent had pre-existing injuries in a prior accident and suffered multiple injuries – where the appellants challenged the award of damages on a number of grounds, contending that the award was erroneously too high – where a number of injuries had to be assigned an ISV value under the *Civil Liability Regulation 2014* (Qld) – where the appellant contended that the trial judge erred in determining which was the dominant injury for the purpose of the *Civil Liability Regulation 2014* (Qld) – where

the appellant contended that this error was due to a lack of medical evidence – where the trial judge adopted an uplift of 25% – where the uplift was awarded so that a psychiatric injury, which was not assessable under the ISV scales, was accounted for – where the appellant contended there were no proper reasons for adopting an uplift – whether the trial judge correctly applied the ISV tables in the *Civil Liability Regulation 2014* (Qld) – whether the amount award was the proper quantum of damages – where the inability to separately assess an ISV for the psychiatric injury meant that there was a real risk of the award not properly reflecting the true extent of the injuries – where such a separate assessment would likely have produced an ISV of 30 or more – where instead the application of the scheme meant that the dominant injury (the shoulder) attracted an ISV of 15, which was “quite inadequate” and an uplift of only 25% still produced an inadequate assessment – where therefore the uplift was higher and produced an ISV of 25 – where the contention that appropriate reasoning was absent, or less than sufficient, cannot be sustained – where the respondent claimed to have suffered psychologically and physically – where the respondent claimed he was no longer capable of working – where the respondent refused a number of job offers – where the appellant challenged the respondent’s contention that he would have worked until he was 70 – where the trial judge made various findings as to the respondent’s credibility and reliability, including that the respondent had tendered false tax returns as part of his evidence of lost earning capacity – where the trial judge found that there was nonetheless a reduced earning capacity – where the appellants contended that the inconsistencies in the respondent’s evidence should have resulted in a finding that the respondent was unreliable – where the focus of the grounds of appeal was whether the findings made by the trial judge were against the evidence – whether sufficient evidence was available to form a judgment on the issue of lost earning capacity – whether the trial judge’s findings are supported by the evidence – where the challenge to the trial judge’s assessment of this aspect of the damages cannot be shown to be in error – where his Honour has accepted particular evidence as to what could have been earned, based on an acceptance of the evidence of particular witnesses including Mr Marinkovic, and then applied an orthodox analysis, applying a number of discounting factors to take into account the varying probabilities for and against the continuity of the loss – where contrary to the appellants’ submissions, the evidence as accepted by his Honour was cogent and reliable – where the respondent did not include loss of superannuation in the pleadings or the statement of loss and damage – where loss of superannuation was pleaded at trial – where the total award made by the trial judge was more than that in the pleadings or in the statement of loss and damage – whether the trial judge was correct to award damages for loss of superannuation – whether the trial judge erred in calculating the final award – where the case was litigated on the basis that such a claim was made, as it was included expressly in the written submissions on behalf of Mr Marinkovic, and addressed in the appellants’

written submissions below – where this is sufficient to dispose of this ground – where a minor mathematical error was made in the assessment of damages – where the trial judge failed to make deductions for Centrelink payments received by the respondent – whether the impact of that error is such that the award should be changed – where the parties agreed that the trial judge failed to take into account the receipt of Centrelink benefits when assessing the interest on past economic loss, and that an adjustment should be made – where the resultant amendment that is called for is by deducting the agreed sum (\$21,375) from the award (\$240,000), and then applying the agreed interest rate (1.265%) over six years and one month – where over six years and one month, that is \$16,824.19.

Allow the appeal to the extent of awarding \$16,824.10 for interest on past economic loss instead of \$19,545. Set aside the judgment entered on 3 June 2016 and substitute judgment for \$458,528.10. Otherwise dismiss the appeal. The appellants are to pay the respondent’s costs, of and incidental to the appeal, to be assessed on the standard basis.

## Criminal appeals

**R v Manning** [2017] QCA 23, 3 March 2017

Appeal against Conviction – where the appellant was convicted of 20 counts of child sexual offences – where the appellant appeals the conviction on the ground that the prosecution’s failure to call two witnesses resulted in a miscarriage of justice – where the appellant was tried on the same charges at two previous trials – where at each of the first and second trials the applicant’s wife, Mrs Manning, and his brother, Mr Phillips, gave evidence although in the defence case, but not the trial which is subject to the appeal – where the respondent’s case depended largely on the credibility and reliability of the complainant – where the respondent contended that the evidence of the witnesses was not material or would be unreliable – where the appellant submitted that the evidence was capable of affecting the jury’s view of the complainant’s evidence – whether the evidence of the two witnesses was material – where the Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness in the Crown case and a trial judge may not direct the prosecutor to call a particular witness – where the decision of the prosecutor not to call a person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice – where the prosecutor when asked by his Honour to explain why Mrs Manning was not to be called the prosecutor referred to these factors: (i) she had refused to give police a statement in the initial investigation; (ii) she had been a defence witness at the two previous trials; (iii) the jury evidently rejected her evidence by convicting at the first trial; (iv) she was quick to say that there were limited opportunities for the complainant to stay over; and (v) her evidence had developed in favour of the appellant on the issue of how many times the complainant had

stayed over, from three to four at the first trial, to two in cross-examination – where several of the factors identified by the prosecutor about Mrs Manning were in the nature of an apprehension that she would not be an impartial witness – where that apprehension was not unreasonable: Mrs Manning was married to the appellant and had an obvious interest in the outcome of the trial – where, however, that was not to say her evidence was bound to be unreliable – where many witnesses, including those who are themselves parties to criminal or civil litigation, are interested in the outcome, but that interest does not, by definition, make them unreliable – where the suggestion that the evidence would be unreliable, because the jury in the first trial must have rejected it, cannot be accepted – where her evidence was clearly material and was not made immaterial by an apprehension that it could be unreliable because there were not identifiable circumstances which clearly established such an unreliability – where as to the evidence of Mr Phillips, it may again be noted that the prosecutor’s justification for refusing to call him was that his evidence would be unreliable rather than irrelevant – where his evidence was relevant and admissible – where, again, an apprehended interest of this witness, as the appellant’s brother, in the outcome of the trial did not clearly establish that his evidence would be unreliable – where he was able to give material and not demonstrably unreliable evidence – where once it is seen that the evidence was material and not unreliable, the prosecution was obliged to lead that evidence because “a basic requirement of the adversary system of criminal justice is that the prosecution, representing the State, must act ‘with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused’s trial is a fair one’.” (*Dyers v The Queen* (2002) 210 CLR 285) – where fairness requires the prosecution to

produce all of the material evidence which is available to it before putting the defendant to his election as to whether to give or call evidence – where, therefore, the fact that the defence was able to call the witness as a defence witness does not overcome the miscarriage of justice which occurs as a result of the Crown’s refusal to call a material witness – where Mrs Manning’s evidence, if accepted, made the complainant’s version less likely to be true – where, further, the impact of her evidence upon the credibility or reliability of the complainant’s evidence on these counts may have had an effect upon the complainant’s evidence more generally – where the prosecution case on each count was dependent upon the complainant’s testimony – where it follows that there was a miscarriage of justice caused by the refusal by the prosecution to call Mrs Manning – where the evidence of Mr Phillips was relevant because it had some potential to affect the jury’s assessment of the likelihood of offences being committed at the appellant’s business premises as the complainant had testified – where it may be said that evidence of Mr Phillips was less likely than the evidence of Mrs Manning to affect the jury’s assessment of the complainant’s testimony – where, nevertheless, at least considered with Mrs Manning’s testimony, it had a potential to influence the jury’s reasoning.

Appeal against conviction allowed. Conviction set aside. Retrial ordered.

*R v Juckes; Blomeley; Hutchins; Ex parte Attorney-General* (Qld) [2017] QCA 33, 15 March 2017

Reference under s668A *Criminal Code* – where the respondents were committed for trial to the District Court of Cairns on one charge of assault occasioning bodily harm whilst in company with a circumstance of aggravation under the *Vicious Lawless Association Disestablishment Act 2013* (Qld) (VLADA) – where pursuant to s339(3) of the *Criminal Code* (Qld) and s7(1) VLADA, the maximum

penalty for the offences charged against the respondents Juckes and Blomeley was 25 years’ imprisonment, and the maximum penalty for the offence charged against the respondent Hutchins was 35 years’ imprisonment – where the District Court therefore lacked jurisdiction to hear the cases against any of the respondents; see *District Court of Queensland Act 1967* (Qld), sections 60 and 61 – where for that reason, the Crown applied under s590AA of the *Criminal Code* for an order that the District Court transfer the matter to the Supreme Court for trial – where a judge of the District Court refused that application – where the judge reasoned that because the expression “the court” was defined for the purposes of the *Justices Act 1886* (Qld) as the Magistrates Court, the District Court lacked power to transfer a matter before it in which it did not have jurisdiction to the Supreme Court – where s4 of the *Justices Act* defines “court” as meaning a Magistrates Court – where, as the Attorney-General pointed out, s32A of the *Acts Interpretation Act 1954* (Qld) makes definitions in any Act applicable, except so far as the context or subject matter otherwise indicates or requires – where, thus, it is and always has been the case that the definition of “court” applies unless the context otherwise indicates or requires – where the context in which the term “court” is used in s129 requires that the definition be regarded as inapplicable – where the word “court” in the first clause is necessarily a reference to the court to which the defendant has been committed for trial or sentence – where that, in itself, reveals that the definition of “court” as Magistrates Court is inapplicable in the first clause of s129 – where it seems clear that the word “court” in s129 must comprehend a court to which a defendant has been committed or might have been committed for trial or sentence – where thus it comprehends the District Court, the Childrens Court, and the Supreme Court.

## Do your clients need Immigration advice or assistance?



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Question: “Does the District Court of Queensland have the power pursuant to s129 of the *Justices Act 1886* to remand a defendant to take his or her trial or for sentence before another and proper court and to, in a proper case, grant or enlarge bail?”  
Answer: “Yes”.

*R v Pham, Tran & Dang; Ex parte Director of Public Prosecutions (Cth)* [2017] QCA 46, 23 March 2017

Sentence Appeals by Director of Public Prosecutions (Cth) – where the first and second respondents were convicted after trial of attempting to possess a commercial quantity of a border-controlled drug – where the third respondent pleaded guilty to attempting to possess a commercial quantity of a border-controlled drug on the day before trial – where the first respondent was sentenced to 12 years’ imprisonment with a non-parole period of seven years – where the second respondent was sentenced to 10 years’ imprisonment with a non-parole period of six years – where the third respondent was sentenced to 10 years’ imprisonment with a non-parole period of 5½ years – where 33 kilograms of pure heroin was hidden inside wooden altars that formed part of a consignment of furniture inside a shipping container from Ho Chi Minh City – where the border-controlled drug was intercepted and replaced by the Australian Federal Police with an inert substance – where the sentencing judge found that all respondents were willing participants in removing the substance from the wooden altars – where the third respondent had the additional task of transporting a quantity of heroin in a vehicle – where the sentencing judge found that all respondents knew of the presence of the border-controlled drug and that they were facilitating the distribution of illegal drugs – where the respondents did not have precise knowledge of the quantity of the border-controlled drug – where the first

respondent was 35 years old and had previously committed drug offences – where the second respondent was 32 years old and had no criminal history – where the third respondent was 51 years old and had a prior conviction for receiving stolen property – where the nature of the involvement of the respondents was considered – where the quantity of drugs is a relevant and significant factor but the weight to be given to the quantity of the drug involved varies with the circumstances of each case – where the approach of the sentencing judge in this particular case accorded with the statement of principle in *Wong v The Queen* (2001) 207 CLR 584, in that this was a case where it was open to the sentencing judge to be “concerned to identify the level of the offender’s criminality by looking to the state of the offender’s knowledge about the importation in which he or she was involved” – where counsel for the respondents submitted, to characterise the respondents as comparable to “couriers” did not provide a particularly meaningful comparison bearing in mind their respective states of mind – where there was no error in the sentencing judge’s approach of having regard to the extent of their involvement – where the sentence imposed on Pham of 12 years’ imprisonment with a non-parole period of seven years took into account: the gravity of his offending in attempting to possess a very large quantity of unlawfully imported drugs; that he was not aware of the quantity; and the nature of the role he played – where the sentencing judge was required to moderate the sentence to take into account that, in his case, he had made significant factual admissions during the trial – where the appellant has not demonstrated any error in the sentencing judge’s process, nor has it been shown that the sentence imposed is so out of step with any of the comparatives so as to demonstrate a misapplication of principle – where in imposing sentence on Tran, her Honour remarked that there was no evidence

that Tran would have taken possession of the heroin other than fleetingly and her Honour was correct in assessing his involvement as at a low level – where the imposition of a sentence of 10 years’ imprisonment with a non-parole period of six years adequately reflected the criminality and culpability attached to the respondent’s offending – where far from being inadequate, the sentence was, given the confinements of the respondent’s culpability, a condign punishment of an offender with no criminal history who had made significant efforts towards rehabilitation – where unlike Pham and Tran, her Honour remarked in relation to Dang, that he was aware that “at least some” of the heroin was to be removed for further distribution and his involvement was of a more serious nature – where bearing in mind the gravity of his offending and the need to ameliorate the sentence to accommodate the plea, it is not considered that the sentence of 10 years’ imprisonment with a non-parole period fixed at 5½ years must have involved some misapplication of principle – where no *House v The King* (1936) 55 CLR 499 error has been demonstrated.

Appeals dismissed.

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 [scljld.org.au/caselaw/QCA](http://scljld.org.au/caselaw/QCA). For detailed information, please consult the reasons for judgment.

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# One marshmallow, or two?

## How to overcome workplace distractions

We are all used to our work being interrupted, but many of us will be unaware of how great an impact this actually has on our productivity. **Petris Lapis** reveals the true cost of interruptions, and suggests a simple solution.



### Can you relate to this?

You arrive at work and start checking emails. Half-way through writing a reply, you decide a coffee is in order. On the way to the coffee machine, a colleague asks if you could help review a report.

The phone is ringing as you walk back to your desk. While you are on the phone to the client, you are alerted to three more emails. An hour later you see your still empty cup at the coffee machine, realise your client's file is on your colleague's desk, you have no idea where the report is, and you still haven't sent the email you started drafting because of the interruptions.

If you feel that distractions make it more difficult for you to do and enjoy your job, you are right. Researchers have found that even tiny interruptions derail your thinking and increase mistakes.

In one study, people performed a sequence-based procedure on a computer. Erik Altman<sup>1</sup> and his team found that interruptions of only three seconds doubled the error rate. Other researchers found that distractions can increase the time it takes you to do a task by between 20% and 40%.<sup>2</sup>

The impact of interruptions in the office is now so great that we have interruptions researchers. Gloria Marks is one of these and her team spent three days studying a group of office workers and timing everything they did. They found:<sup>3</sup>

- The average time people spent on a task before being interrupted or switching was about three minutes.
- People interrupted themselves about 44% of the time; the rest of the interruptions came from external sources.
- On average it took 23 minutes and 15 seconds to return to interrupted tasks and most people did two intervening tasks before returning to the original task.

Not only do the interruptions mean it takes longer for us to do the task; we are also not as clever as we do them. Alessandro Acquisti<sup>4</sup> examined how much brain power was lost if you are interrupted by a phone call

or email. Participants were asked to read a short passage and answer questions about it. The participants who were interrupted performed an incredible 20% worse than those who were not.

When you work in law, an inability to concentrate while doing legal research can lead you to miss a case, statute or piece of evidence which may assist your client. Constant distractions can lower the quality of advice you provide, the quality of preparation you do for a court appearance, and your enjoyment of the job. They can also make it difficult for you to find the mental space necessary for complex legal issues which may require detailed structuring advice.

### How marshmallows can help

Given how many interruptions there are in a modern legal workplace, is there anything you can do? It is possible to train yourself not to give in to distractions in the same way that some of the children in the famous Stanford marshmallow experiment did with their desire to eat a marshmallow.

In the experiment, young children were seated at a table in front of a marshmallow and told they could eat it now or, if they could wait until the researcher came back into the room, they would get a second marshmallow. A few ate the marshmallow straight away. The rest tried to wait for the researcher to return so they would get a second marshmallow.

Of those who tried to wait, only one-third were successful and received a second marshmallow. Later in life, the children who waited became the most successful. They had better education, higher paying jobs, a lower BMI, better relationships, and tended not to have addictions or criminal records.

Researchers from another study done in Dunedin, New Zealand,<sup>5</sup> were shocked to find that a child's level of self-control was just as important for predicting their financial success and health later in life as social class, wealth, family of origin or IQ.

### Are you a one or two-marshmallow person at work?

When you hear an email alert, your phone tells you a text has arrived or you overhear a conversation in a nearby office, it is easy to want to immediately gratify yourself and find out what is going on.

If you stop focusing on the report you are writing and immediately check the email, you would be displaying the traits of a 'one-marshmallow person'. If you could hold the desire to find out what is in the email until you have finished the report, you would be displaying the traits of a 'two-marshmallow person'. You would finish the report sooner and make fewer mistakes.

Dealing with distractions in a work environment might just be as simple as reminding yourself to be a 'two-marshmallow person'. This small act of personal discipline will pay dividends.

Petris Lapis holds commerce and law degrees from the University of Queensland and a Master of Laws from the Queensland University of Technology. She is also trained as a Master Results Coach, Master Performance Consultant and a Master of Ericsonian Hypnosis. See [petrislapis.com](http://petrislapis.com).

#### Notes

<sup>1</sup> Erik Altman, an associate professor of psychology at Michigan State University in 2013.

<sup>2</sup> An American study reported in the *Journal of Experimental Psychology* found that it took students far longer to solve complicated maths problems when they had to switch to other tasks. They were up to 40% slower.

<sup>3</sup> 'Too Many Interruptions At Work', *Gallup Business Journal*, Gloria Mark, associate professor at the Donald Bren School of Information and Computer Sciences at the University of California, Irvine, and a leading expert on work.

<sup>4</sup> A professor of information technology and psychologist Eyal Peer at Carnegie Mellon.

<sup>5</sup> Terrie E. Moffitt et al, 'A Gradient of Childhood Self-Control Predicts Health, Wealth and Public Safety', *Proceedings of the National Academy of Sciences* 108, no.7 (February 15, 2011): 2693-98, [pnas.org/cgi/doi/10.1073/pnas.1010076108](https://doi.org/10.1073/pnas.1010076108).

# Career moves



Michele Davis



Diem-My Hoang-Le



Jacinta Norris



Cady Simpson



Malcolm McBratney



Daniel Wignall



Andrew Clark



Nick Humzy-Hancock

## Bennett & Philp Lawyers

Michele Davis and Diem-My Hoang-Le have joined Bennett & Philp Lawyers in Brisbane, Michele as an associate with the wills and estates team and Diem as a commercial lawyer with the business and commercial team.

Michele's expertise traverses all areas of wills and estates, succession and elder law. She has worked in a variety of small to large legal firms in Queensland, developing extensive experience in estate administration, estate planning for individuals and succession planning for businesses, trust establishment and administration, retirement villages and accommodation, and guardianship.

Diem has worked across a variety of disciplines, including commercial, property and immigration law in Brisbane. She advises in areas such as business start-ups, commercial structures, partnerships, trusts and corporations, and is experienced in drafting documents such as business licence agreements, business contracts, partnership agreements and joint venture agreements.

## Creevey Russell Lawyers

Creevey Russell Lawyers has appointed Jacinta Norris as a senior associate in its family law section.

Jacinta has focused on family law for the past seven years and is trained in collaborative law. She has extensive experience with complex family law matters, and has also worked in commercial and estate planning law.

## CRH Law

Cady Simpson has joined CRH Law's elder law team. She is a nationally accredited mediator and accredited family dispute resolution practitioner with a passion for resolving disputes through mediation. Cady was previously a principal investigator with the Queensland Ombudsman.

## Macpherson Kelley

Macpherson Kelley has announced the appointment of Malcolm McBratney as a commercial principal in its Brisbane office, along with that of Daniel Wignall as a principal in litigation and dispute resolution.

Malcolm, a recognised expert in commercial and intellectual property law, will lead the corporate and commercial practice in Brisbane. His experience covers the digital economy, manufacturing, life sciences and fast-moving consumer goods (FMCG), and working with organisations ranging from digital and life sciences start-ups through to ASX-listed and multinational corporations.

Daniel has extensive experience across corporate restructuring and insolvency, body corporate, planning and environment, and finance.

## Moulis Legal

Moulis Legal is pleased to announce the appointment of Andrew Clark as a partner in the firm's Brisbane office.

Andrew has practised in complex corporate law, mergers and acquisitions, and transactional matters in international markets and joins the firm from the London office of Reed Smith LLP, where he was a partner representing some of the world's best-known companies in their corporate affairs across Europe, Asia, the United States and Australia.

He has advised clients in industries as diverse as resources and energy, internet applications and software, and real estate. This has included large and medium-sized cross-border and domestic mergers and acquisitions, joint ventures, and commercial negotiations.

## Results Legal

Results Legal has appointed Nick Humzy-Hancock as a senior associate. Nick is an experienced litigator with more than 10 years' experience in commercial disputes, insolvency and financial services. He has established successful ongoing relationships with some of Australia's largest banks and credit unions.

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

## 11 Core: Cybersecurity and Minimising Data Breaches

12.30-2pm | 1.5 CPD

Law Society House, Brisbane

Law firms and lawyers hold sensitive client business information and intellectual property, and therefore are prime targets for cybercriminals. Do you have the right office processes and procedures in place to minimise the risk of, and also deal with, a cyberattack and a data breach? Have you also considered your ethical obligations as a lawyer? Join us for a panel discussion to understand what the current cyber threats are in Australia, and learn practical steps to prepare for a cyberattack and minimise a data breach.



## 11 Modern Advocate Lecture Series 2017, Lecture two

6-7.30pm | 0.5 CPD

Law Society House, Brisbane

Successful legal careers are founded on strong professional networks, which offer collegiality and support. The Modern Advocate Lecture Series features presentations from senior practitioners within the legal profession or members of the judiciary dealing with practical advocacy relevant to early career practitioners. Networking drinks will be served after the presentation.

Lecture two of 2017 will be delivered by the Honourable Margaret McMurdo AC, former President, Court of Appeal, Supreme Court of Queensland.



## 12 Webinar: Conveyancing Settlements and Natural Disasters

12.30-1.30pm | 1 CPD

Online

Natural disasters, such as the recent Cyclone Debbie, can have a significant impact on people and property and can create difficulties for properties under contract of sale. Hear from the QLS Ethics Centre regarding conveyancing settlement obligations and what issues you need to consider to ensure you protect your client.



## 17 QLS Open Day 2017: Award-Winning Law

12-4.15pm | 3.5 CPD

Law Society House, Brisbane

We are delighted to invite you to a complimentary half-day professional development event at Law Society House. Hear from award-winning lawyers on a range of important legal and business issues, and take away practical tips and strategies that will support your professional development and develop your practice.



## 17 Equity & Diversity Awards

4.15-5.15pm

Law Society House, Brisbane

The Equity & Diversity Awards 2017 recognise Queensland legal practices which promote equity in the profession, engage in inclusive and equitable workplace practices, and embrace workplace diversity in a meaningful way. Join us in celebrating and acknowledging practices leading the way in this space. Networking drinks and canapés will be served after the awards ceremony.

## 18 In Focus: Leading Wellbeing in the Legal Profession

7.30-8.40am | 1 CPD

Law Society House, Brisbane

Targeted at experienced practitioners and partners this complimentary breakfast will provide you with the opportunity to hear from our expert presenters about how you can develop your workplace leadership. Learn how to support and promote wellbeing, and create a workplace where your team will not only flourish but also wish to remain and grow. This session is an initiative of the QLS Wellbeing Working Group.



## 24 Introduction to Wills and Estates

8.30am-5pm | 6 CPD

Law Society House, Brisbane

Designed for junior legal staff with less than three years' experience, this introductory course develops delegates' knowledge and skills, offering an overview of succession law and providing practical guidance on estate planning, including preparing wills, general and enduring powers of attorney and deceased estate documentation.



## 25 Webinar: Search Warrant Guidelines

12.30-2pm | 1.5 CPD

Online

QLS and Queensland Police Service launched the Search Warrant Guidelines on 28 February 2017. The new guidelines, developed in consultation with Queensland Courts, seek to address the rapid advancement in digital technology used in solicitors' offices on a daily basis. They provide a comprehensive set of protocols and practitioner obligations when an application for a search warrant on a solicitor's premises is made. Join us to hear from the experts who will bring you up to speed on the updates and the ethical obligations of both practitioners and police.



## 26 QLS Annual Ball

7pm-late

Brisbane Convention & Exhibition Centre, Brisbane

Join us for a night of brilliance at the QLS Annual Ball. Shine bright in your best threads, gather your friends and colleagues and head to the radiant Boulevard Room at the Brisbane Convention & Exhibition Centre. Be treated to a scrumptious three-course dinner and premium drinks package, and let your hair down on the dancefloor. Secure your tickets now for the social event of the year!

Earlybird prices and registration available at

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

## 30 Webinar: Small Practice Legal Project Management

12.30-1.30pm | 1 CPD

Online

Designed for sole practitioners and micro to small firms, learn about how to apply legal project management methodologies to help you achieve better client satisfaction, fewer cost disputes and higher return rates.



## 31 Masterclass: Taxation Law

8.30am-12pm | 3 CPD

Law Society House, Brisbane

Designed for lawyers with five years+ PAE who want to apply and extend their advanced skills and knowledge, this masterclass explores various aspects of tax law. It will include a detailed examination of complex fact scenarios, with a focus on income tax, capital gains tax, goods and services tax, and transfer duty.



## Save the date

1-3 June Practice Management Course – Sole Practitioner and Small Practice Focus

9 June Gold Coast Symposium 2017

14 June Essentials: Law Hack! General Practice

14 June Practice Management Course Information Evening

15 June Webinar: Introduction to Drafting Titles Office Documents

16 June Masterclass: The Golden Rules of Negotiation

19-20 June Introduction to Family Law

22 June Webinar: In-House Counsel – Demonstrating Value

# New QLS members

Queensland Law Society welcomes the following new members who joined between 9 March and 10 April 2017.

Aimo Aho, Autorial Legal Service  
 Emma Alexander, Toll Holdings  
 Tristan Appleby, Ellem Warren Lawyers  
 Hyeoksu Bae, non-practising firm  
 Eden Bird, Karydas Law  
 Camille Boileau, King & Wood Mallesons  
 Joel Borgeaud, Pro-Ma Systems  
 Belinda Bray, Firth Lawyers  
 Annabel Burton, Gary S. Rolfe Solicitors  
 Patrick Byrne, HWL Ebsworth  
 Silvia Canetti, Golding Contractors Pty Ltd  
 Kyara Catheray, Non Practising Firm  
 Fiona Caulley, Phillips Family Law  
 Benjamin Chapman, Condon Charles Lawyers  
 Ton Chau, non-practising firm  
 Alice Chirila, Harding Richards Lawyers  
 Vicki Clarkson, Bank of Queensland Limited  
 Elise Clowes, Harrington Family Lawyers  
 Oliver Cook, Herbert Smith Freehills  
 Sarah Cox, LawRight Inc  
 Luke Cudmore, Cudmore Legal  
 Corey Cullen, Lawler Magill  
 Matthew Daniel, Santos Limited  
 Billie Davis, Whitsunday Regional Council  
 Kimberley De Looze, Ashurst Lawyers  
 Jodie Diefenbach, Fox Taylor Mildwaters  
 Darin Draper, Turbo Legal  
 Alison Fleming, Thompson McNichol  
 Ella Furlong, Ellem Warren Lawyers  
 Alexandra-Lydia Ganis, Piper Alderman  
 Charlotte Glab, Milner Lawyers  
 Krishneil Gosai, Gosai Development Pte Ltd  
 Theresa Grahame, Able Legal Pty Ltd  
 Edward Green, Mason & Green Solicitors  
 Alan Griffiths, ASPECT Business, Taxation & Insolvency Law

Sarah-Jane Hampson, Morgan Conley Solicitors  
 Brett Hartley, Hartley Healy  
 Michael Hine, Woolworths Limited - Legal Division  
 Sunny Hou, Australasian Legal Consultants Pty Ltd  
 Edward Howard, Speakman Lawyers  
 Mya Hunt, Department of Defence - RAAF  
 Fleur Irvine, non-practising firm  
 Kirby Jukes, McCullough Robertson  
 Edwina Kelly, Ashurst Australia  
 Rowan King, RK Law  
 Douglas Kinley, Australian Federal Police  
 Heather Kirkup, King & Wood Mallesons  
 Karla Kramer, Gilbert & Tobin  
 Chyrse Lambridis, non-practising firm  
 Keenan Lee, DCL & Associates Pty Ltd  
 Cheng-En Wayne Lee, Norton Rose LLP  
 Murray Lehmann, Murray Tutt Legal  
 Miles Leslie, Hefford Price Law  
 Hollie Lester, Elliott May Lawyers  
 Rachel Liang, Simmonds Crowley Galvin Lawyers  
 Skye MacKenzie, Legal Aid Queensland  
 John Massey, Arrow Energy Pty Ltd  
 Mercedes Mather, LawLab Pty Limited  
 Penelope McCreery, Suthers George  
 Jennifer McDermott, LinhLaw  
 Natasha McGrow, Heart Legal Pty Ltd  
 Everett McIvor, Australian Business Lawyers & Advisors Pty Ltd  
 Simone McMahan, non-practising firm  
 Ella McNamara, Bell Legal Group  
 Claire Mernberg, non-practising firm  
 Tariq Menzies, Roberts & Kane Solicitors Pty Ltd  
 Sarah Meyer, Mobbs & Marr Legal  
 Kayla Milana, McCullough Robertson  
 Riki Millard, Scenic Rim Conveyancing

Julie Myers, Corrs Chambers Westgarth  
 Matthew O'Connor, Beckhaus Legal  
 Sian Ogge, Small Myers Hughes  
 Kerry Olsen, Watt & Severin  
 Robert O'Neil, ROC Legal  
 Rebecca O'Toole, Shine Lawyers  
 Alexander Pasquale, Cleary Hoare Solicitors  
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 Lisa Taylor, Go To Court  
 Thomas Trembath, Halliday & Trembath  
 Lisa Turner, Arrow Energy Pty Ltd  
 Frederik van Reede, Ligeti Partners  
 Michaela Vaughn, Comey & Lind  
 Yolande Wiltshire, The Creche and Kindergarten Association of QLD  
 Samuel Wintergreen-Arthur, Allens  
 Lauren Wrafter, K&L Gates  
 Amer Zaib, Chand Lawyers

# Practical, personal guidance for members

## The QLS Senior Counsellor experience

QLS Senior Counsellors provide confidential guidance to practitioners on professional or ethical issues.

The service has been operating for more than 40 years and today there are 50 highly experienced practitioners across Queensland who can assist with professional or ethical issues and career advice.

This month, we profile three QLS Senior Counsellors who practise in Brisbane – Suzanne Cleary, Wendy Miller and Bill Loughnan



### Suzanne Cleary

#### What motivated you to become a QLS Senior Counsellor?

I wanted to give something back to the profession. Many senior lawyers have supported and mentored me throughout my career. I am glad to be in a position now to do the same. One of the best parts about being a QLS Senior Counsellor is the interaction with my fellow practitioners.

#### What do you like to do during your time off?

Watch *Game of Thrones*. I came to it late but I am hooked. I am part way through series five, so I can't wait to find out if Jon Snow avenges Ned Stark's death.

#### What is your favourite area of practice?

I don't have a favourite. Litigation can be fun (and at times no fun at all).

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

Make yourself indispensable. You want your bosses and clients to trust you to handle any given task. You may not always know the answer, but you need to be willing and proactive. Make sure you understand the task. Clients want commercial, practical advice – not a regurgitation of the law. Learn to write well and succinctly. Never underestimate the power of Google.



### Wendy Miller

#### What motivated you to become a QLS Senior Counsellor?

I chose to be a QLS Senior Counsellor to help other practitioners. The experience has been very rewarding and I like the fact that practitioners can feel 'safe' in contacting a QLS Senior Counsellor. I am also one of the many volunteers at Women's Legal Service as a very small contribution to the community.

#### What is your favourite area of practice?

I am an accredited specialist and practice only in family law. I find this area of law very interesting and challenging as it requires knowledge across many areas of law such as commercial, estate, equity and tax. Family law also has an ever-growing international aspect in both parenting and financial matters. In short, the work is never boring.

#### What do you like to do during your time off?

I like old historic pubs and particularly country pubs; I find stories, pictures and drawings of Brisbane in the early days say, before 1900, fascinating.

#### What do you like about your region?

I really like the (warm) weather in South-East Queensland. We who live in South-East Queensland are very fortunate in that there are so many wonderful places to visit in the region that are within two to three hours' driving distance from Brisbane. And then there is the wonderful Moreton Bay and Brisbane River.



### Bill Loughnan

#### What motivated you to become a QLS Senior Counsellor?

I consider myself very fortunate to have great mentors, not only during my two-year articles at Cannan & Peterson, but also later in my career. Becoming a QLS Senior Counsellor is one way I can repay part of the debt I owe to others who have gone before me. I suspect lawyers in today's environment face greater challenges in any number of respects than previous generations, such as the increased pressure on professionals, rapidly increasing rate of change, increased competition, work/life balance, etc.

**What is your favourite area of practice?**

I came from western Queensland and went to university in the 1970s during the beef recession. My heart has always been in the bush and it was an easy decision to seek articles at Cannan & Peterson and specialise in agribusiness law. My team has a strong belief in face-to-face contact and meeting the clients where they are. My old firm pioneered 'fly-in fly-out' legal services to regional centres (almost 40 years ago), a practice which our agribusiness group at Thynne + Macartney continues to this day.

**What do you like to do during your time off?**

My wife Stephanie and I ran grazing operations in south-west Queensland for the first 30 years of my legal career. My wife says she was a single parent to our three children and when, many years ago, she brought my daughter (aged three) into my office, my daughter said, "Dad, this is where you live!"

**What do you like about your region?**

It's the people that make it special. There are any number of families in the bush who were clients of our group before I became a lawyer and who all, going to plan, will continue to be clients when I am long since retired. People in the bush are the 'salt of the earth' – great clients to have – and they become personal friends in many cases.

Our group has numerous intergenerational clients. One family comes to mind where I've acted for four generations. The sense of personal satisfaction from such relationships surpasses any monetary rewards and makes this part of Australia, for me, the best place to live and work.

To learn more about QLS Senior Counsellors, see [qls.com.au](http://qls.com.au) > QLS Ethics Centre > QLS Senior Counsellors. Contact details for QLS Senior Counsellors are listed at the back of each edition of Proctor.

## SOLICITORSHELPINGHAND

## When a phone call is not enough – we can lend a hand

Looking for in-depth specialist advice?  
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# Managing expectations via the agreement schedule

A practice idea that might make a big difference



Most firms now divide their client agreements into a set of general conditions which are common for all clients, and a schedule which sets out the essential facts and details of the matter.

This works well because (a) each schedule item aligns with the associated field in the practice system, (b) essential information is in a compact space which clients are more likely to read, and (c) it enables reliable matter setup so that the chances of quirky variations are very low.

With that in mind, we can structure the schedule so as to reduce risk inter alia in scope and price.

I advise my clients to set up their general conditions to say that, if any item in the schedule does not apply, then the words 'THIS DOES NOT APPLY' be inserted as mandatory text in the schedule item. In other words, nothing is left silent. This can apply to monies in trust, outlays, and any component of price.

For the scope, I recommend a minimum of two schedule variables... Work Specifically INCLUDED, and Work Specifically EXCLUDED. The benefit is that the practitioner is forced to give some reasonable consideration to the details and write them down (and preferably explain them). It is very challenging to insert 'THIS DOES NOT APPLY' in Work Specifically EXCLUDED. In terms of risk management, it is simply not acceptable to rely on the short matter description (the two or three-word RE:) to set out the scope of work. You might understand what is normal, but your inexperienced clients won't.

For pricing, I recommend a minimum of two different variables: Fixed Price, and Estimated Price. Each provides a track in your schedule which can be followed through. If you are going down the estimate track, I strongly recommend using a range. It gives all parties more breathing space. It also avoids unintended interpretation of a single figure as a quote.

But – even if you do use a single-figure estimate, having the other schedule variable showing 'Fixed Price – THIS DOES NOT APPLY' should save you if a misunderstanding occurs.

Remember also that scope and price travel together. This is critical where you have activated a fixed price – so your schedule variable should have standardised text showing 'This Price applies to the Work Specifically INCLUDED in Item xx'.

Using your schedule to manage risk and expectations will speed up your matter opening and reduce misunderstandings. Many firms don't do it as well as they could because of the initial effort to set up a few additional system fields.

But overall, the approach is simple, effective, and ties in perfectly with paper-light offices. If your current approach is to have essential matter data lost in the bowels of six pages of general conditions, you should consider giving the schedule approach a go.

It should also go without saying that the suggestions above are not a substitute for understanding the rules on pricing and disclosure in Division 3 of the *Legal Profession Act 2007*.

**Dr Peter Lynch**  
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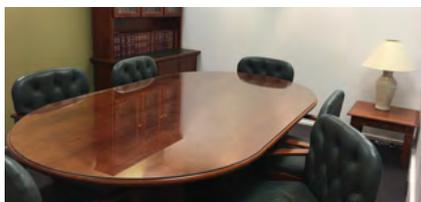
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# Guideposts on the path to partnership

by William Prizeman



**Title:** *Junior to Partner in under 5 years*  
**Author:** Bradley Postma  
**Publisher:** Major Street Publishing Pty Ltd 2016  
**ISBN:** 9780994542496  
**Format:** paperback/211pp  
**RRP:** \$19.95

*Junior to Partner in under 5 years* – it sounds too good to be true.

However, as we're often reminded, we should judge a book by its cover and this recent publication by Cullens principal Dr Bradley Postma explains how it can be achieved.

The assistance offered is specifically skewed towards early career lawyers, and designed to give the reading professional a guide on the path to partnership.

Dr Postma provides substantial and practical advice towards becoming an equity partner in your chosen profession.

While many junior practitioners are motivated to progress to partner, university does not necessarily teach students how to achieve this goal. This guide fills that information gap and, importantly, the insights and anecdotes are grounded in the experience of an author who has personally succeeded in the same process.

The content from Dr Postma is engaging, as you might expect from a book with an index featuring Darwinian Theory, social media and the Fonz. Chapters cover issues that fall into the category of 'essential to know but rarely discussed', such as personal marketing and building your personal practice.

These essentials are revealed as part of an overall framework to make yourself as desirable a candidate for partnership as possible, while also delivering high-quality service to your clients.

Standing to gain the most benefit from this book are law students and first-year post-admission lawyers. Subtracting from the overall value of this early career guide is some content that will be all too familiar



to professionals with only short periods of experience. These beginner topics include effective communication, dealing with difficult clients, and the perils of billing targets. Given much less attention is the recognised need for a work-life balance to support the mental health of professionals.

The most important lesson conveyed by *Junior to Partner* is that hard work and a strategic approach are essential to becoming a partner. While partnership is regularly presented as the pinnacle of success, the prerequisites are rarely outlined to emerging lawyers, who are generally expected to learn by trial and error.

Encouraging those lawyers to consider the stepping stones outlined by this book helps to illuminate a clear path to partnership.

William Prizeman is a lawyer with Legal Aid Queensland and co-chair of the Queensland Law Society Early Career Lawyers Committee *Proctor* working group.

# Bubbles, some mothers do 'ave 'em

with Matthew Dunn



May is a month when we usually think of the most important women in our life, our wives and mothers.

With Mother's Day just around the corner, and with the knowledge that many mums are fond of a great bottle of something bubbly, perhaps we should skip the fluffy slippers, nightgowns and soppy music CDs this year.

By May, the weather has cooled in Queensland and with it the festivity associated with Mother's Day champagne breakfasts or high teas presents a golden opportunity to break out the bubbles.

While not all mothers have a penchant for good bubbles, it is safe choice and a marked step-up from buying them domestic appliances, or worse.

And if we delve into the origins of Mother's Day, we may find that celebratory bubbles are more in keeping with its noble heritage.

Started by proclamation in the United States by President Woodrow Wilson in 1914, it commemorated the work of peace activist and Civil War nurse Ann Jarvis. Ann's daughter, Anna Jarvis, had campaigned for the recognition of her mother and her

contribution to those around her since her mother's death in 1905.

The International Mother's Day Shrine still exists at the St Andrews Methodist Episcopal Church, Main Street, in downtown Grafton in Taylor County, West Virginia, where Anna Jarvis had her first memorial service to her mother's memory in 1908. Anna subsequently went on to become a campaigner against the commercialism of the day occasioned by greeting-card and candy companies in the US.

In Australia the US date also became celebrated and the tradition of gift-giving to mothers was started by Sydney resident Janet Heyden in 1924 when she sought donated gifts from schools and businesses to cheer up the lonely and forgotten mothers at the Newington State Home for Women. This altruistic tradition grew, but commercialism followed closely thereafter.

Today the day has lost some of its lustre and merely an echo of its noble beginnings, but, and this is a big but, at its core it is still about honouring mothers and the profound effect they have on our lives.

If you ask the most important ladies in your life, they will give you a frank answer "I don't need anything dear..." but actually they do – everyone needs more good cheer. Don't skimp – go for the best you can reach for, take it chilled and hope that she generously offers to open it immediately.

We are all fond of good bubbles and they're a fine way to mark any special occasion. I suggest that, if there is something that is a family favourite, purchase a case; if there isn't, go for a good bottle of quality Australian sparkling wine or a Champagne and then either on the day, or as soon as is reasonably practicable, share a bottle with your mother and loved ones.

While wine is for gifting, its purpose is one of shared pleasure, so always take a spare, as apparently there are only seven small glasses in a bottle!

I was once counselled in one of the French Champagne houses that Champagne is not designed to be cellared, it is presented to market for immediate consumption. If you are still sitting on something from one of those not-so-recent landmark birthdays, I suggest you try it out now, with mum.

**The tasting** Three examples of bubbles were examined to see if they were fit for mum.



The first was the **Moutard Brut Grande Cuvee Champagne non-vintage**, which was pale straw in colour and had a medium bubbly bead. The nose was quiet and the palate was pleasingly mouth-filling and quite dry. It had flavours of green apple and some pinot berry notes. While more straightforward for a Champagne, it was a crowd pleaser.



The second was the **Henri Laurent Brut Champagne Charly-sur-Marne non-vintage**, which was almost pinky in hue and had a hard fizzy bead which slowed to a more stately pace quickly. The nose was toast with mushrooms. The palate was a spritzy attack followed by Vegemite and yeasty creaminess on the mid-palate with some good body and weight cut back by grapefruit citrus as it lengthened.



The last was a dark horse, the **Fleur de la Valee Blanquette de Limoux 2013**, which was medium in bead and a little greener in colour. The palate was much lighter and more crisp green apple acid than the heavier Champagnes. A different beast, from the real home of sparkling wine, it was frisky and zingy with ripe fruit and a brace of acid to match.

**Verdict:** The favourite for mum, and of mum's tasting, was the Henri Laurent Brut, giving both some complexity and good balance of flavours.

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

# Mould's maze

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

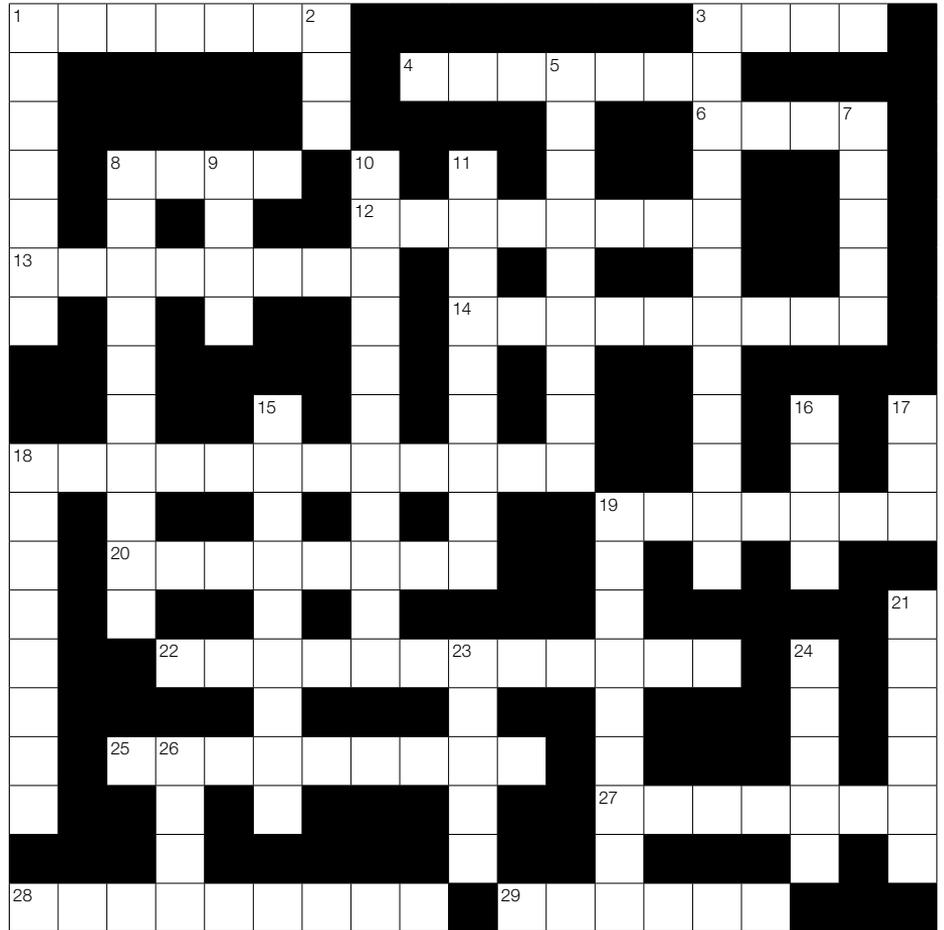


**Across**

- 1 Leasehold interest, ..... real. (7)
- 3 It is mandatory now in parenting matters to file a notice of ..... (4)
- 4 The degree of annexation often dictates whether an item of personal property is characterised as a ..... (7)
- 6 Arrests. (Jargon) (4)
- 8 Counsel are required to .... for trials and criminal sentences. (4)
- 12 Costs assessment. (8)
- 13 A solicitor may disclose confidential client information for the purpose of preventing ..... serious physical harm to the client or another person. (8)
- 14 Involved in a criminal offence. (9)
- 18 A joint tortfeasor may be held liable for ..... negligence. (12)
- 19 Behavioural integrity, honesty and sincerity. (7)
- 20 Interim order commonly sought against a corporate plaintiff, ..... for costs. (8)
- 22 Arguably an element of all property. (12)
- 25 The addition of value to property through labour or new materials, for example, silt on a river delta. (9)
- 27 Formal document self-regulating future health care which operates in the event of incapacity ..... Health Directive. (7)
- 28 If goods are joined together, ..... will occur if it is impractical to separate them again; process by which sovereign states become parties to an international treaty. (9)
- 29 Give as security on a loan. (6)

**Down**

- 1 The ..... defence is used by the media to traverse allegations of agency in respect to misleading and deceptive conduct. (7)
- 2 Bachelor of Laws. (Abbr.) (3)
- 3 Abandonment of a legal right. (12)
- 5 Evidence to which perjury applies. (9)
- 7 A contractual condition referring a dispute to arbitration, ..... v Avery clause (5)
- 8 Principle of limiting damages as articulated in *Hadley v Baxendale*. (10)
- 9 Goods without any apparent owner, .... vacantia. (Latin) (4)
- 10 Statement of a copyright holder's identity and the fundamental requirement of any copyright licence. (11)



- 11 A gift under a will which has not been distributed to the beneficiary, ..... bequest. (9)
- 15 A company director owes a ..... duty to its shareholders. (9)
- 16 The illegal practice of using a headline price to attract potential buyers which is misleading because it is not the final total price, .... pricing. (4)
- 17 Transaction involving the vesting of a contingent interest in goods by the payment of a deposit, ...-by. (3)
- 18 Code adopted by the *Fair Trading Act* (Qld), the Australian ..... Law. (8)
- 19 Traineeship period of junior barristers. (9)
- 21 Reference to legal advice in court documents will often amount to a ..... of legal professional privilege. (6)
- 23 A gavel is used on a sound ..... (5)
- 24 Gaol. (Jargon) (5)
- 26 Mandatory negotiation between prosecution and defence in the Magistrates Court, .... conference. (4)

Solution on page 56

# Honours by degrees

As long as everyone gets a ribbon

by Shane Budden



**As you will recall, my last column was about the rampant use and misuse of technology, unless of course you have an Arts degree, in which case it was an existential lament about the soulless banality of urban destitution and social angst in the face of a nihilistic and uncaring world.**

As you can see, with my ability to string together uncommon and unrelated words in meaningless and overly long sentences, I would have got an honours degree had I done Arts.

Actually, these days I would have an honours degree in law as well, since the decision has been taken that all law degrees will now be honours degrees. That makes uni. much the same as school sports days, when in the interests of self-esteem and not exposing children to anything remotely resembling the real world until they are 35, even the kids who run the wrong way and knock themselves unconscious on the wall of the library get a ribbon (this means that these days I would have both a law degree AND a ribbon from sports day).

I cannot wait for this system to be implemented at the Olympics so that our track and field team – which, in a development probably not unrelated to the ‘everybody gets a ribbon’ policy on school sports days, could not win an Olympic race if the other teams’ bus was an hour late to the stadium – might actually pick up something other than plane ‘flu (I warned you my sentences were long).

I am not saying that I should have received an honours degree back then – indeed, I suspect my degree was awarded to settle a *Trading Places*-style bet between a couple of lecturers as to whether or not someone with a GPA which could double as a probability calculation could actually forge a successful career as a lawyer.

The lecturers who made the bet probably now ring me for ethics advice, so I will leave it to the reader to decide who won. (Note for younger readers: *Trading Places* is a

comedic movie from back when the humour in movies arose via cleverly written dialogue delivered by talented actors and actresses, as opposed to casting four intellectually unremarkable, Yoko Ono-level talentless males who go on a road trip for some reason – the humour arising from the fact that there are people in the world stupid enough to pay money to see it. Also, the ‘probability calculation’ line is funny because the answer is always between zero and one; who’s the Arts graduate now?).

My point is that giving everyone an honours degree takes something away from the concept of honours, in much the same way as your favourite beer would taste worse if you found out Kyle Sandilands liked it as well.

Also, it will be harder for those of us with a plain degree to get employed when everyone else has an honours degree. In the interests of fairness, I note that I am not including myself in that group; 20 years of this column has given me the same overall employment prospects as Clive Mensink.

In any event, as I was saying, last time I spoke of the fact that we are faced with the many problems related to disruptive technology – one of which, at least in my case, is working out how to turn it on (this is literally true – my wife and I recently bought a new computer, and were unable to make it start again after shutting it down. I was ready to take it back to the shop when our daughter located a small, non-traditionally placed power switch; should I ever meet the designer responsible for this feature, I will place the entire computer in a non-traditional place, if you get my drift). I note that a lot of people cannot handle this pressure, and reject the technology to seek a more alternative lifestyle.

I always find this curious – an alternative lifestyle would seem to indicate something alternative to life, which could really only mean death (this may explain why so many vegans, diligently pursuing an alternative lifestyle, look like Gollum).

Alternative lifestyles often involve a commitment to ‘organic’ food, the implication apparently being that the rest of us are eating concrete. Many respected earth-child loons believe that organic food is of higher nutritional value, which may well be true as organic farmers do not use

pesticides, meaning that most organic produce is riddled with various worms and bug larvae; you would think they have a decent protein content.

Such lifestyles also involve adopting whatever the latest alternative medicine is, presumably because people in these lifestyles prefer staying sick to getting better. The latest trend at the time of writing is ingestion of large amounts of turmeric which apparently can cure cancer, acne, haemorrhoids and reality TV addiction. I have trouble accepting this, partly because the scientific studies say turmeric has no measurable benefits for the most part, but mostly because my friends and I were deeply into Indian food back in the day, and we consumed so much turmeric that heroin addicts were regularly telling us that the first step to recovery was admitting we had a problem.

If turmeric was even half as powerful as claimed, we would have all sprouted wings and started glowing by now. I suppose it is possible that the turmeric was busy fighting the effects of us consuming our body weight in chillies, but to be sure we’d need to do the experiment, and my friends and I have (surprisingly) matured enough to no longer define our masculinity by chilli consumption contests. I don’t want to go into this in detail, but suffice to say if my mate Mal is making you a curry, and he says “pick a number”, do NOT say 12.

I realise that there may be some alternative lifestyle devotees – which is a bit like being a flat earth devotee – who take issue with this, but I am not worried because due to their severe protein deficiencies, few of them have the upper-body strength needed to type angry letters to the editor.

If it makes them feel any better, though, I can assure them that Kyle Sandilands agrees, and you are all going to get a ribbon.

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### Lexon

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### Room bookings

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## Crossword solution from page 54

**Across:** 1 Chattel, 3 Risk, 4 Fixture, 6 Nabs, 8 Robe, 12 Taxation, 13 Imminent, 14 Complicit, 18 Contributory, 19 Probity, 20 Security, 22 Alienability, 25 Accretion, 27 Advance, 28 Accession, 29 Pledge.

**Down:** 1 Conduit, 2 Lib, 3 Renunciation, 5 Testimony, 7 Scott, 8 Remoteness, 9 Bona, 10 Attribution, 11 Executory, 15 Fiduciary, 16 Drip, 17 Lay, 18 Consumer, 19 Pupillage, 21 Waiver, 23 Block, 24 Clink, 26 Case.

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For up-to-date information and more historical rates see the QLS website [qls.com.au](http://qls.com.au) under 'For the Profession' and 'Resources for Practitioners'

| Rate  | Effective                      | Rate % |
|---|--------------------------------|--------|
| Standard default contract rate  | 3 October 2016                 | 9.25   |
| Family Court – Interest on money ordered to be paid other than maintenance of a periodic sum for half year                      | 1 January 2017 to 30 June 2017 | 7.50   |
| Federal Court – Interest on judgment debt for half year   | 1 January 2017 to 30 June 2017 | 7.50   |
| Supreme, District and Magistrates Courts – Interest on default judgments before a registrar                                     | 1 January 2017 to 30 June 2017 | 5.50   |
| Supreme, District and Magistrates Courts – Interest on money order (rate for debts prior to judgment at the court's discretion) | 1 January 2017 to 30 June 2017 | 7.50   |
| Court Suits Rate for quarter year   | 1 April 2017 to 30 June 2017   | 0.80   |
| Cash rate target  | from 2 November 2016           | 1.50   |
| Unpaid legal costs – maximum prescribed interest rate   | from 1 Jan 2017                | 7.50   |

## Historical standard default contract rate %

| May 2016  | June 2016 | July 2016 | Aug 2016 | Sep 2016 | Oct 2016 | Nov 2016 | Dec 2016 | Jan 2017 | Feb 2017 | Mar 2017 | Apr 2017 |
|-----------|-----------|-----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|
| 9.55/9.60 | 9.60      | 9.35      | 9.35     | 9.35     | 9.25     | 9.25     | 9.25     | 9.25     | 9.25     | 9.25     | 9.25     |

**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](http://qls.com.au) > Knowledge centre > Practising resources > Interest rates any changes in rates since publication. See the Reserve Bank website – [www.rba.gov.au](http://www.rba.gov.au) – for historical rates.

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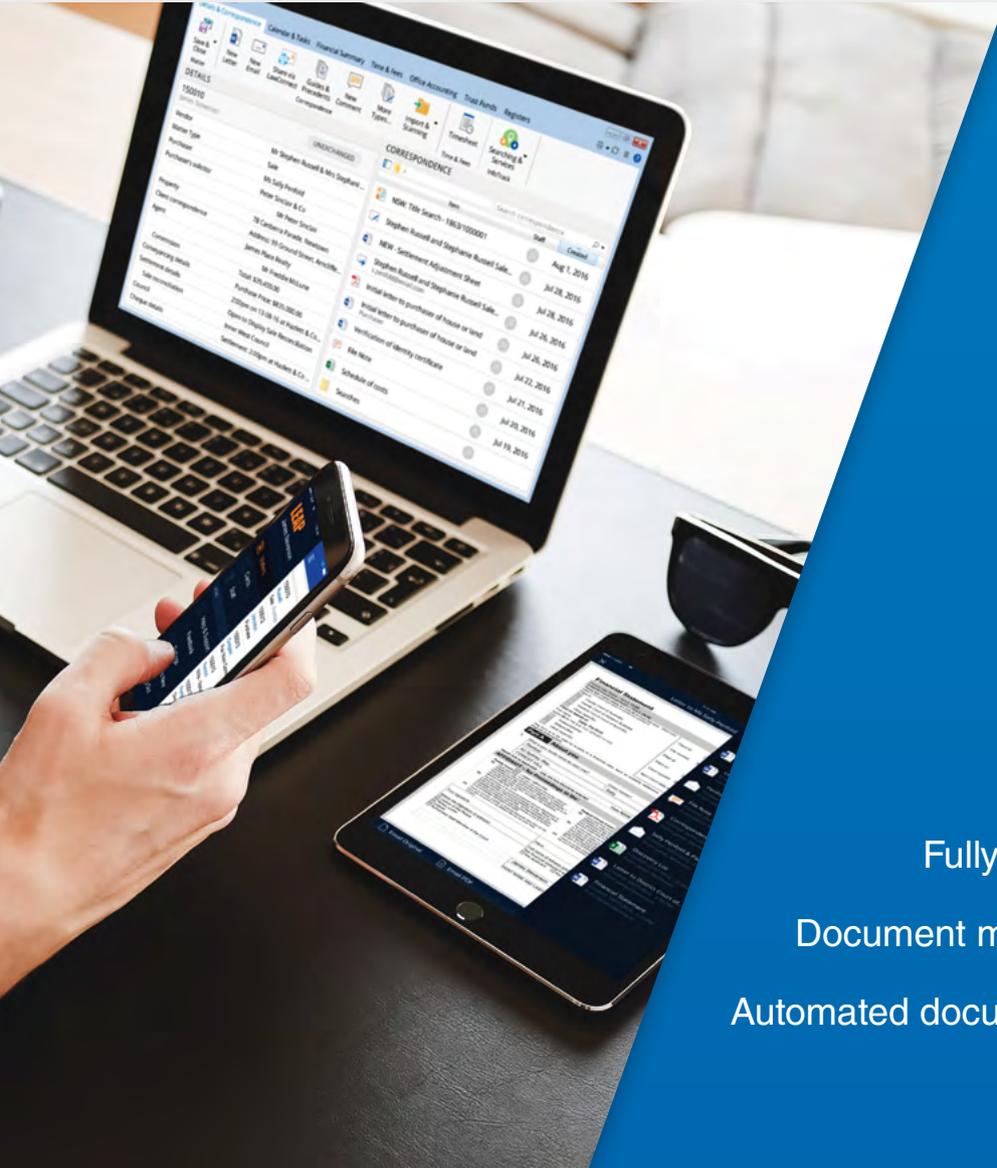
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